

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**ROBINSON MANUFACTURING** )  
**COMPANY, et. al.,** )  
 )  
**Plaintiffs** )  
 )  
**v.** ) **Civil No. 02-42-P-H**  
 )  
**BANC OF AMERICA** )  
**COMMERCIAL, LLC,** )  
 )  
**Defendant** )

**MEMORANDUM DECISION ON DEFENDANT’S MOTION TO STRIKE  
AND RECOMMENDED DECISION ON DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT**

Defendant Banc of America Commercial, LLC (“Bank”) moves for summary judgment as to all claims against it in this action arising from a factoring relationship between a predecessor bank and plaintiff woolen mills Robinson Manufacturing Company (“Robinson Co.”) and L.W. Packard & Company, Inc. (“Packard Co.”) (together, “Mills”). See Defendant’s Motion for Summary Judgment (“S/J Motion”) (Docket No. 21) at 1-3; First Amended Complaint, etc. (“Complaint”) (Docket No. 17). The Bank also moves to strike portions of affidavits submitted by the Mills in opposition to summary judgment. See generally Banc of America Commercial, LLC’s Motion To Strike (“Motion To Strike”) (Docket No. 33). For the reasons that follow, I grant in part and deny in part the Bank’s motion to strike and recommend that its summary judgment motion be granted.

**I. Summary Judgment Standards**

Summary judgment is appropriate only if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ.

P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.’” *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must “produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue.” *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). “As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party.” *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

## **II. Factual Context**

### **A. Motion To Strike**

I rule as follows with respect to the Motion To Strike:

1. Paragraph 6 of Affidavit of Steven Minolfo (“Minolfo Aff.”), Tab 6 to Robinson Manufacturing Company and L.W. Packard & Company, Inc.’s Appendix in Support of Opposition to Defendant’s Motion for Summary Judgment (“Plaintiffs’ Appendix”), filed with Plaintiffs’ Opposition

to Defendant's Motion for Summary Judgment, etc. ("S/J Opposition") (Docket No. 29); *see also* Exh. A to Motion To Strike: Overruled. While the phrase "the full purchase price" is redundant, it is not inaccurate, and there is no other evident lack of foundation for the statement. The word "unearned," contained in a footnote, likewise accurately describes as a factual matter a discount for which a customer has not qualified by virtue of failure to pay within the requisite number of days. It is thus an acceptable shorthand reference for such discounts.

2. Paragraph 7 of Minolfo Aff.: Sustained as to the word "improperly," which is conclusory. *See, e.g., Shorette v. Rite Aid of Me., Inc.*, 155 F.3d 8, 12 (1st Cir. 1998) (non-movant may not rely on "conclusory allegations, improbable inferences, and unsupported speculation" to defeat motion for summary judgment) (citation and internal quotation marks omitted). Overruled as to the word "unearned."

3. Paragraph 8 of Minolfo Aff.: Sustained to the extent the statement of the anonymous Bank employee is offered for the truth of the matter asserted (no showing having been made pursuant to Federal Rule of Evidence 801(d)(2)(C) or (D) that the employee was authorized to make the statement or that it concerned a matter within the scope of his or her employment); overruled to the extent offered to explain the reason why the Mills believed the funds in issue ultimately would be credited back to them and, hence, why they did not object to the initial deduction, *see* Plaintiffs' Opposition to Banc of America Commercial, LLC's Motion To Strike ("Strike Opposition") (Docket No. 37) at 6-7. Also overruled as to the word "unearned."

4. Paragraphs 9-13 of Minolfo Aff.: Sustained as to the word "improperly"; overruled as to the word "unearned."

5. Paragraph 5 of Affidavit of Peter Warshaw (“Warshaw Aff.”), Tab 7 to Plaintiffs’ Appendix; *see also* Exh. B to Motion To Strike: Sustained. The statement is essentially a legal argument, not a fact.

6. Paragraph 6 of Warshaw Aff.: Overruled. With respect to the second sentence, the affiant makes clear the basis for his personal knowledge of the Mills’ intentions – he was their selling agent and was involved in negotiations regarding the agreements in issue. The final clause of the third sentence is neither speculative, lacking in foundation nor reflective of confusion regarding the difference between the commission and the purchase price of factored receivables. It qualifies, pursuant to Federal Rule of Evidence 701, as a lay witness’ opinion or inference “rationally based on the perception of the witness” and “helpful to a clear understanding of the witness’ testimony.”

7. Paragraph 4 of Affidavit of James McEwen (“McEwen Aff.”), Tab 8 to Plaintiffs’ Appendix; *see also* Exh. C to Motion To Strike: Overruled.

8. Paragraph 5 of McEwen Aff.: Sustained as to the last sentence on the basis that, although the Mills assert in their brief that the affiant was involved in the negotiations and was aware of what terms were acceptable to Packard Co., *see* Strike Opposition at 10, this is not clear from the affidavit. Overruled as to the word “unearned” and the phrase “the full amount of.”

9. Paragraph 6 of McEwen Aff.: Sustained as to the words “wrongfully” and “improperly” and as to the last sentence to the extent that sentence is offered for the truth of the matter asserted. Overruled as to the last sentence to the extent offered to explain the reason why the Mills believed the funds in issue ultimately would be credited back to them and, hence, why they did not object to the initial deduction. Also overruled as to the word “unearned.”

10. Paragraph 7 of McEwen Aff.: Sustained as to the word “wrongfully.” Overruled as to the word “unearned” and as to the last sentence, which is more in the nature of a fact than a legal conclusion.

11. Paragraph 9 of McEwen Aff.: Sustained as to the word “improperly”; overruled as to the word “unearned.”

12. Paragraph 5 of Affidavit of Joseph Robinson, II (“Robinson Aff.”), Tab 9 to Plaintiffs’ Appendix; *see also* Exh. D to Motion To Strike: Overruled.

13. Paragraph 6 of Robinson Aff.: Sustained as to the words “improperly” and “owed us”; overruled as to the phrase “we learned for the first time,” which is more in the nature of a fact than a legal conclusion.

14. Paragraph 7 of Robinson Aff.: Sustained as to the word “improper” and the phrases, “never had a right to retain those funds” and “now Robinson seeks recovery of the money it is owed”; overruled as to the phrase “never notified us of the . . . retention.”

### **B. Factual Background**

Taking into account the above disposition of the Motion To Strike, the parties’ statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56 and viewed in the light most favorable to the Mills as the non-moving parties, reveal the following relevant to this recommended decision:

Robinson Co. is a Maine corporation with its principal place of business in Oxford, Maine. Banc of America’s Statement of Material Facts (“Defendant’s SMF”) (Docket No. 22) ¶ 1; Plaintiffs’ Responsive Statement of Material Facts in Dispute and Plaintiffs’ Statement of Additional Facts in Opposition to Defendant’s Motion for Summary Judgment (“Plaintiffs’ Opposing SMF”) (Docket No. 30) ¶ 1. Packard Co. is a New Hampshire corporation with its principal place of business in Ashland,

New Hampshire. *Id.* ¶ 2. The Bank is a Georgia limited liability company with a principal place of business in Atlanta, Georgia, and is the successor-in-interest to Banc of America Commercial Corporation (also, “Bank”), which converted to a limited liability company and was renamed Banc of America Commercial, LLC in April 2001. *Id.* ¶ 3. Prior to August 1999 the Bank operated under the name NationsBanc Commercial Corporation (also, “Bank”). *Id.*

The Mills operate manufacturing facilities in Maine and New Hampshire that produce wool and blended-wool cloth used to make garments, such as coats and suit jackets, blankets and other products. *Id.* ¶ 5. Warshaw Woolen Associates, Inc. (“Agency”), a New York corporation with its principal place of business in New York City, acts as the exclusive sales agent for the Mills. *Id.* ¶ 6.

Due to the seasonality of the Mills’ business, the vast majority of invoices for goods sold between January and June were due sixty days from July 1, *i.e.*, September 1. *Id.* ¶ 7. For invoices rendered after June the terms were simply sixty days from July 1, *i.e.*, September 1. *Id.* These extended terms effectively advanced credit to the Mills’ customers for up to nine months. *Id.*

From December 1992 through December 2000 the Mills offered their customers a one percent prompt-payment discount off the invoice amounts if the customer made payment of an invoice in full within ten days of the invoice date. Plaintiffs’ Opposing SMF ¶ 27; Defendant’s Response to Plaintiffs’ Statement of Additional Facts (“Defendant’s Reply SMF/Additional”) (Docket No. 36) ¶ 27. The Mills’ customers rarely paid invoices within ten days, and thus rarely qualified for the one percent discount, inasmuch as they could have the benefit of the use of funds representing the purchase price for an additional two to nine months depending on when they purchased the goods. *Id.* ¶ 28.

As a consequence of the substantial credit risk entailed by the extended terms offered, the Mills traditionally factored their receivables. Defendant’s SMF ¶ 7; Plaintiffs’ Opposing SMF ¶ 7.<sup>1</sup>

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<sup>1</sup> “Factoring” is defined as “[s]ale of accounts receivable of a firm to a factor at a discounted price.” *Black’s Law Dictionary* 592 (continued on next page)

The factor assumed the risk of a customer's inability to pay, although not the risk of a dispute as to the quality or quantity of goods, for which the Mills remained responsible. *Id.* In December 1992 the Mills entered into separate and in all material respects identical factoring agreements ("Factoring Agreements"). *Id.* ¶ 8. The Factoring Agreements were the product of significant negotiation between the parties. *Id.* The Mills were represented by the same law firm and assisted by their exclusive selling agent, the Agency. *Id.* The resulting agreements combined a standard-form factoring agreement (used originally by Citizens & Southern, a predecessor of the Bank) and various amendments, riders and side letters. *Id.* The Factoring Agreements provided, *inter alia*:

#### SECTION 1. DEFINITIONS

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1.6 "Net Amount" of Receivables shall mean the gross amount of Receivables, less discounts, less returns, less credits or allowances of any nature at any time issued, owing, granted or outstanding, and less also your commission as set forth herein.

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1.9 "Payment Date" shall mean (i) for each credit-approved Receivable for which you [Bank] retain the Credit Risk, the earlier of date of collection plus three Banking Days (3) for collection and clearance of checks or one hundred twenty (120) days after the Receivable becomes past due; and (ii) for each Receivable for which you do not bear the Credit Risk, the date of collection plus three Banking Days (3) for collection and clearance of checks.

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#### SECTION 2. SALE AND APPROVAL; PURCHASE PRICE; COMMISSION; ADVANCES; RESERVE

2.1 We [Mills] hereby assign and sell to you as absolute owner, without recourse, except as hereinafter set forth, our entire interest in all of our present and future Receivables.

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(6th ed. 1990).

2.5 The purchase price of Receivables is to be the Net Amount thereof, which, less any debits and reserves, will be due and payable on Payment Date. We shall pay you a commission in an amount equal to 95/100 of one percent (.95%) of the gross amount of such Receivables less applicable discounts. You may retain from sums payable to us a reserve, which reserve may be revised from time to time at your discretion, in order to provide for Customer Disputes, possible credit losses on unapproved Receivables, sums owing to you for goods/services purchased by us from any other firm factored or otherwise financed by you, and the Obligations. A discount, credit, or allowance after issuance or granting may not be claimed by us, but may be claimed solely by the Customer provided, however, that at our request and if approved by you, you will credit to us any Customer credits which have not been applied to specific invoices, and simultaneously you will charge back to us any Receivable relating thereto. We will indemnify, defend and hold you harmless from and against any and all claims which may thereafter be asserted against you for a refund or recovery of such monies credited our account or otherwise paid to us or our order.

We shall issue credits only for the full amount of invoices and if approved by you, you will credit to our account the commission applicable to such credits. No third-party beneficiary rights are created hereby. At the end of each day you are to credit to our account the Net Amount of Receivables received by you during such day.

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#### SECTION 10. APPLICABLE LAW

This Agreement shall be governed by, construed and enforced according to the laws of the State of New York.

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#### SECTION 12. EXPENSES, ATTORNEY'S FEES; NO WAIVER; SEVERABILITY; HEADINGS

. . . No delay or failure on your part in exercising any right, privilege, or option hereunder shall operate as a waiver of such or of any other right, privilege, or option, and no waiver, amendment, or modification of any provision of this Agreement shall be valid, unless in writing signed by you and then only to the extent therein stated.

Factoring Agreements, Tabs 1-2 to Plaintiffs' Appendix, §§ 1.6, 1.9, 2.1, 2.5, 10 & 12.<sup>2</sup>

The printed language found in section 1.6 was not changed by any rider, side letter or other written agreement of the parties, either in December 1992 or at any time thereafter. Defendant's SMF

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<sup>2</sup> The Mills and the Bank fail to set forth material provisions of the Factoring Agreements in their statements of material facts, as required by Local Rule 56. However, inasmuch as the parties supply copies of the agreements, the authenticity of which is not disputed, and discuss relevant provisions in their briefs, I have set forth sections referenced in the briefs in this recitation.

¶ 8; Plaintiffs’ Opposing SMF ¶ 8. In February 1993, the Bank entered into substantially identical factoring agreements for export receivables with the Mills (“Export Factoring Agreements”). *Id.*

As part of the negotiations leading to execution of the Factoring Agreements, the Bank provided each of the Mills a separate letter dated December 1, 1992 setting forth its normal practices with respect to certain issues, including the collection of late-payment interest. *Id.* ¶ 16. The letter stated in relevant part, “We bill Customers for interest on late payments and will credit your account for any amounts actually collected.” *Id.* Following execution of the Factoring Agreements, and in conformance with this representation, the Bank credited to the accounts of the respective Mills all amounts collected as late-payment interest. *Id.* ¶ 17. The sums collected for late payment interest were reported to the Mills in the report of receivables credits (“Daily” or “Dailies”) sent to each of the Mills and to the Agency. *Id.* The amounts credited to the Mills also were included in monthly statements of account (“Monthly” or “Monthlies”). *Id.*

At the inception of the relationship between the Bank and the Mills, James McEwen and Steven Minolfo<sup>3</sup> noticed that the account sales summary of the Monthlies showed a deduction about equal to one percent of unearned customer discounts when calculating the amount of net sales. Plaintiffs’ Opposing SMF ¶ 33; McEwen Aff. ¶ 6; Minolfo Aff. ¶ 7. They called the Bank to determine why it was making that deduction. *Id.* The Bank employee with whom they spoke explained that the Bank’s practice was to initially record the one percent deduction for its own accounting purposes but that the Mills should not worry, because when the money was actually collected from their customers their accounts would be credited for the entire amount collected, including the one percent unearned customer discount. Plaintiffs’ Opposing SMF ¶ 34; McEwen Aff. ¶ 6; Minolfo Aff. ¶ 8.

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<sup>3</sup> McEwen was at all relevant times controller for Packard Co., while Minolfo was at all relevant times controller for the Agency. *See (continued on next page)*

The Bank continued the practice of remitting one hundred percent of late-payment interest collected to the Mills until September 1995. Defendant's SMF ¶ 18; Plaintiffs' Opposing SMF ¶ 18. At a meeting on August 2, 1995 between Peter Warshaw, president of the Agency, and Harvey Gross, then the wholesale credit manager in the New York City office of the Bank, Gross stated that the Bank's policy would thenceforth be to retain fifty percent of collected late-payment interest. *Id.* ¶¶ 4, 18. However, Gross agreed to implement this policy on a graduated basis for the Agency, which was one of the Bank's largest factoring clients. *Id.* ¶ 18. Accordingly, Gross stated that the Bank would retain only twenty-five percent of late-payment interest until August 1996, after which it would retain fifty percent. *Id.*

The Bank began retaining twenty-five percent of collected late-payment interest charges in September 1995. *Id.* ¶ 19. However, it did not change the retention amount in its accounting system to fifty percent until February 27, 1997. *Id.* The Dailies show that the Bank credited seventy-five percent of late-payment interest to the Mills between September 1995 and February 26, 1997 and fifty percent thereafter, reflecting a retention by the Bank of twenty-five percent and fifty percent, respectively. *Id.* The late-payment interest agreement was intended to affect late-payment interest only, not discounts. Plaintiffs' Opposing SMF ¶ 36; Deposition of Harvey Gross, filed with S/J Motion, at 180-81.

In order to render Monthlies and otherwise provide factoring services to its clients, the Bank maintained a computerized accounting system that tracked details on the specifics of each client contract and applied those details to the receivables factored under those agreements. Defendant's SMF ¶ 15; Plaintiffs' Opposing SMF ¶ 15. This system combined the treatment of late-payment interest collections and "collected" discount into a single data field. *Id.* This data field, titled "%

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Defendant's SMF ¶ 4; Plaintiffs' Opposing SMF ¶ 4.

INT/DISC RETAINED,” set the percentage of collected past-due interest and unearned discounts to be retained by the Bank. *Id.* The portion to be refunded to the client was to appear on the Dailies. *Id.* Because late-payment interest and unearned discounts were combined into a single data field, the percentage retained by either category of revenue automatically applied to the other. *Id.*

The Bank’s retention of unearned discounts tracks precisely the history of the retention of late-payment interest. *Id.* ¶ 20. In conformance with the representations in the December 1, 1992 side letter regarding late-payment interest, the initial client data sheets completed by the Bank showed “000” in the “% Int/Disc Retained” data field. *Id.* The Dailies showed that one hundred percent of both unearned discounts and late-payment interest was included in the amounts to be credited to the Mills’ accounts. *Id.* From 1992 until September 1995, the unearned discounts were designated as I/D<sup>4</sup> in the Monthlies and entered into the debit/credit column in that report. Plaintiffs’ Opposing SMF ¶ 35; Defendant’s Reply SMF/Additional ¶ 35.

When the percentage of late-payment interest retained changed from zero percent to twenty-five percent in September 1995 and then to fifty percent in February 1997, the Bank retained the same percentage of amounts collected as unearned discount. Defendant’s SMF ¶ 21; Plaintiffs’ Opposing SMF ¶ 21. The Dailies, which were sent to the Mills, contained the amount of discounts. *Id.* For example, the Daily dated December 28, 1995, sent to the Agency and Packard Co., stated: “As of 01-02-96 your account will be credited with \$35,200.37 which includes \$161.69 discount, \$1385.20 interest, at 075% and \$.00 anticipation.” Defendant’s SMF ¶ 21; Tab 99 to Banc of America’s

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<sup>4</sup> The “I/D” column identified amounts of interest and unearned discount the Bank was remitting to the Mills. *See* Plaintiffs’ Opposing SMF ¶ 11; Bank of America’s Reply to Plaintiff’s Responses to Defendant’s Statements of Fact 1 Though [sic] 26 (Docket No. 35) ¶ 11.

Appendix in Support of Motion for Summary Judgment (“Defendant’s Appendix”), filed with S/J Motion, at RPW1176.<sup>5</sup>

On January 1, 1997, Robert Higgins, then the Bank’s Northeast portfolio manager, signed a master-file change form that included a change in the amount of the Mills’ interest/discount retained to .50. Plaintiffs’ Opposing SMF ¶¶ 37-38; Deposition of Robert Higgins (“Higgins Dep.”), filed with S/J Motion, at 8-9, 58-59; Tab 54 to Defendant’s Appendix at BAC001001. In his capacity as Northeast portfolio manager, Higgins was responsible for overseeing all of the Bank’s accounts in the Northeast region, including those of the Mills. Plaintiffs’ Opposing SMF ¶ 37; Higgins Dep. at 8-9. When Higgins filled out the change form, he believed that it would affect only customer past-due interest, not discounts. Plaintiffs’ Opposing SMF ¶ 39; Higgins Dep. at 60. He believes that when the Bank was changing the system to address a change in how it handled customer past-due interest, discounts also were unintentionally affected. Plaintiffs’ Opposing SMF ¶ 40; Higgins Dep. at 57-58.<sup>6</sup>

The Bank did not notify the Mills when it changed the percentage of the unearned customer discounts it was retaining from zero percent to twenty-five percent or from twenty-five percent to fifty percent. Plaintiffs’ Opposing SMF ¶ 53; McEwen Aff. ¶ 7; Robinson Aff. ¶¶ 4-6.<sup>7</sup> When it began retaining a portion of unearned customer discounts, the Bank merely deducted the percentage it was retaining from the amount, which ultimately would be recorded as an I/D entry in the credit/debit

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<sup>5</sup> The Bank further asserts that the \$161.69 in discount credited to the Packard Co. account was exactly seventy-five percent of \$262.50, the total amount of collected discount shown immediately above the summary line quoted. *See* Defendant’s SMF ¶ 21. As the Mills point out, the total amount of collected discount shown is \$262.95, not \$262.50. *See* Plaintiffs’ Opposing SMF ¶ 21; Tab 99 to Defendant’s Appendix at RPW1176; *see also* Plaintiffs’ Opposing SMF ¶ 50. As the Mills further note, *see* Plaintiffs’ Opposing SMF ¶ 21, \$161.69 is not seventy-five percent of either figure but rather is approximately sixty-one percent of \$262.95. The Bank explains that the collected discount credited to the Mills, \$161.69, is seventy-five percent of \$215.60 (with rounding), which number results from subtracting \$47.35 shown as a discount offered on a “credit to reserve” item. *See* Defendant’s Reply SMF/Additional ¶ 50.

<sup>6</sup> The Bank qualifies this statement, noting among other things that Higgins testified that (i) he recalled no discussion about retaining interest or discount that differed from the contracts and (ii) he recalled no discussion regarding discounts either in the context of contract negotiations or communications with the Agency. *See* Defendant’s Reply SMF/Additional ¶ 40; Higgins Dep. at 15, 89.

<sup>7</sup> The Bank disputes this, arguing that the Monthlies and Dailies gave notice of these changes. *See* Defendant’s Reply SMF/Additional (continued on next page)

column. Plaintiffs' Opposing SMF ¶ 54; Minolfo Aff. ¶ 12. It did not add a new column or entry to the Monthlies to account for the amount of collected discount it retained. *Id.*<sup>8</sup> During the course of their relationship with the Bank, the Mills were unaware that it had begun retaining a portion of unearned customer discounts and that the I/D entries no longer represented one hundred percent of those discounts. Plaintiffs' Opposing SMF ¶ 55; Minolfo Aff. ¶ 11; McEwen Aff. ¶ 7; Robinson Aff. ¶ 6.

The Bank sold its factoring business assets to GMAC Commercial Credit, LLC ("GMAC") on December 31, 2000. Defendant's SMF ¶ 24; Plaintiffs' Opposing SMF ¶ 24. As part of this transaction, it assigned the Factoring Agreements and the Export Factoring Agreements to GMAC. *Id.* GMAC accounted for the discounts differently than the Bank had. Plaintiffs' Opposing SMF ¶ 56; Minolfo Dep. at 55-56. It took one percent of the invoices and charged that amount to the Mills' loan account up front. *Id.*<sup>9</sup> Minolfo contacted GMAC, which informed him that the Bank also had collected unearned customer discounts but had accounted for them differently. Plaintiffs' Opposing SMF ¶ 57; Minolfo Dep. at 55-56. Subsequently, Minolfo and McEwen engaged in a considerable amount of research, analyzed former Monthlies and Dailies and ultimately learned that the Bank had indeed retained unearned discounts. Plaintiffs' Opposing SMF ¶ 58; Minolfo Dep. at 56-58.<sup>10</sup>

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¶ 53.

<sup>8</sup> The Bank qualifies this statement with (i) the argument that it had no obligation to report its own revenue and expenses, inasmuch as the Factoring Agreements called for the non-recourse purchase of receivables and (ii) the observation that inasmuch as the Dailies specifically described the amount and percentage remitted to the Mills, it was apparent that the balance was retained by the factor. *See* Defendant's Reply SMF/Additional ¶ 54; Deposition of Steven Minolfo ("Minolfo Dep."), filed with S/J Motion, at 63.

<sup>9</sup> The Bank qualifies this statement, noting that GMAC used the Bank's accounting system until May 2001, when it transferred data to its own computer system, and that Minolfo first questioned the retention of collected discounts by GMAC when he reviewed the new GMAC monthly statement in May 2001. Defendant's Reply SMF/Additional ¶ 56; Minolfo Dep. at 71-73.

<sup>10</sup> The Bank qualifies this statement, asserting that Minolfo's testimony made clear that once he understood the reports provided by the Bank, he had no difficulty connecting the entries in the Monthlies with the detail in the Dailies, even demonstrating from specific documents that he understood how the Bank had credited the Mills' accounts for only fifty percent of collected discount. *See* Defendant's Reply SMF/Additional ¶ 58; Minolfo Dep. at 57-64.

In or about May 2001 the Mills demanded that GMAC remit all amounts retained by it as discounts that were not claimed by the Mills' customers. Defendant's SMF ¶ 25; Plaintiffs' Opposing SMF ¶ 25. Inasmuch as it was having tremendous operating problems with the computerized accounting system that it had installed for its factoring business and was receiving many complaints, GMAC determined that for client relations reasons it would not dispute the claims made by the Mills and agreed to remit to them all sums claimed by them to be improperly retained discounts. Defendant's SMF ¶ 26; Higgins Dep. at 45-46. At least part of GMAC's reasoning for rebating the deposits was that it appeared that when the Bank made the computer changes concerning retention of late payment interest, it also unintentionally affected the retention of discounts. Plaintiffs' Opposing SMF ¶ 42; Higgins Dep. at 53-58.<sup>11</sup>

When the Mills entered into the Factoring Agreements, Robinson Co. and the Mills' representatives understood that the Bank would credit the Mills for the full amount of the unearned customer discounts that the Mills had conditionally offered their customers but for which the customers had not qualified, having failed to pay the full amount of the invoices within ten days. Plaintiffs' Opposing SMF ¶ 32; Warshaw Aff. ¶ 6; Robinson Aff. ¶ 5. Peter Warshaw would not have advised the Mills to sign the Factoring Agreements, and Robinson Co. would not have signed it, if Warshaw or Robinson understood them to allow the Bank to retain unearned discounts. *Id.*

The Bank has admitted, through its Rule 30(b)(6) designee L. Ransom Burts, that the phrase "issued, owing, granted or outstanding" in section 1.6 of the Factoring Agreements could apply to both discounts and credits. Plaintiffs' Opposing SMF ¶ 30; Rule 30(b)(6) Deposition of Bank through its designee, L. Ransom Burts, filed with S/J Motion, at 5-6, 112-13, 115-16.

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<sup>11</sup> The Bank's objection to this statement on the ground that it is speculative, conclusory and lacks foundation in the record, *see* Defendant's Reply SMF/Additional ¶ 42, is overruled. The statement is factual and concrete in nature, and the Bank provides no insight into the deponent's asserted lack of foundation to qualify.

### III. Analysis

#### A. Counts I-IV: Breach of Contract

In Counts I through IV of their complaint, the Mills allege that the Bank breached the Factoring Agreements and the Export Agreements by retaining funds in excess of those allowed pursuant to those contracts, failing to disclose the improper retention and failing to account properly for the funds. Complaint ¶¶ 34-49.<sup>12</sup> The Bank seeks summary judgment as to all four counts on the bases that (i) the Factoring Agreements unambiguously permit the Bank's retention of all unearned discount amounts – an interpretation consistent with industry practice – and (ii) the Mills' claims are in any event barred by their failure to exercise reasonable diligence in examining the statements of account transmitted by the Bank. *See* S/J Motion at 1-21. I agree with the first proposition and thus need not address the second.

The Factoring Agreements are governed by New York law, *see* Factoring Agreements § 10, pursuant to which:

the question of whether a writing is ambiguous is a question of law for the Court, while the meaning of an ambiguous contract is a question of fact for the factfinder. A contract is ambiguous where its terms suggest more than one meaning when viewed objectively by a reasonably knowledgeable person who has examined the context of the entire integrated agreement. If the Court finds that a contract is ambiguous, it then looks at any available extrinsic evidence to ascertain the meaning intended by the parties during the formation of the contract.

*Al Sayegh Bros. Trading (LLC) v. Doral Trading & Export, Inc.*, 219 F. Supp.2d 285, 291 (E.D.N.Y. 2002) (citations and internal quotation marks omitted) (applying New York law); *see also, e.g., Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996) (contract terms are ambiguous if they are “capable of more than one meaning when viewed objectively by a reasonably

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<sup>12</sup> The parties acknowledge that the Export Agreements are identical in all relevant respects to the Factoring Agreements. *See* S/J Motion at 6 n.3; S/J Opposition at 2 n.2. Although, for ease of reference, I employ the term “Factoring Agreements,” my analysis pertains to both the Factoring and Export agreements.

intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business.”) (citation and internal quotation marks omitted) (applying New York law).

The Factoring Agreements provide that the Bank, as factor, will pay the Mills, as sellers of receivables, a purchase price equal to the “net amount” of the receivables, “which, less any debits and reserves, will be due and payable on Payment Date.” Factoring Agreements § 2.5. The phrase “‘Net Amount’ of Receivables,” in turn, is defined to mean “the gross amount of Receivables, less discounts, less returns, less credits or allowances of any nature at any time issued, owing, granted or outstanding, and less also your commission as set forth herein.” *Id.* § 1.6.

The Bank contends that the phrase “at any time issued, owing, granted or outstanding” unambiguously modifies only the words “credits or allowances”; the Mills argue that the phrase reasonably can be construed to modify the word “discounts” as well. *Compare S/J Motion at 7-8 with S/J Opposition at 4-7.* The Bank is right. The use of the word “less,” preceded by a comma, to separate each phrase clearly signals that each is a self-contained description.<sup>13</sup>

Additional language in section 2.5 that the Mills suggest helps them, *see S/J Opposition at 6-8*, actually cuts against them: “A discount, credit, or allowance after issuance or granting may not be claimed by us [Mills], but may be claimed solely by the Customer provided, however, that at our request and if approved by you [Bank], you will credit to us any Customer credits which have not been applied to specific invoices, and simultaneously you will charge back to us any Receivable relating

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<sup>13</sup> The Mills argue, alternatively, without citation to authority, that the Bank should be estopped from arguing its construction of section 1.6 because of an admission by its Rule 30(b)(6) deponent, L. Ransom Burts, that the words “issued, owing, granted or outstanding” in that section could modify the word “discounts.” *See S/J Opposition at 5.* This assertion is troubling both because the admission itself is equivocal and because I find some authority for the proposition that, even in the face of such an admission, the interpretation of a contract remains the province of the court. *See, e.g., Sysco Food Servs. of Atlanta, Inc. v. Chupp*, 484 S.E.2d 323, 326 n. 5 (Ga. Ct. App. 1997) (even assuming *arguendo* that employer’s counsel’s statements constituted an “admission” that non-compete covenant was overbroad, “a mere statement of opinion as to the legal effect of a document is not a binding admission, because interpretation of a (continued on next page)

thereto.” Factoring Agreements § 2.5. The Mills argue that (i) no discounts ever were issued or granted to the vast majority of customers who did not pay within ten days of the invoice date and (ii) by the time payment for receivables was due from the Bank to the Mills (long after the ten days lapsed) there literally was no discount for the Bank to subtract from the gross amount of receivables. *See* S/J Opposition at 7-8. These are ingenious but ultimately unpersuasive arguments.

The essential flaw in the Mills’ logic, and its undoing, lies in their construction of the word “issuance.” In common parlance, “issuance” means, among other things, “the act of officially putting forth or getting out or printing (as new currency or postage stamps) or making available or distributing (as supplies or material) or giving out or granting (as licenses) or proclaiming or promulgating (as a written order or directive).” *Webster’s Third New International Dictionary of the English Language Unabridged* 1201 (1983). The phrases “putting forth,” “getting out” and “making available,” in turn, are tantamount to “offering.”

This definition comports with factoring-industry practice of deducting any offered discounts “off the top,” regardless of whether such offers ever ultimately were accepted. *See, e.g.*, Peter H. Weil, *Asset-Based Financing* § 27.02[7][a] (1993), Tab 110 to Banc of America’s Supplemental Appendix in Support of Summary Judgment, filed with Banc of America’s Reply to Plaintiffs’ Opposition to Summary Judgment (“S/J Reply”) (Docket No. 34) (“The computation of the amount of the purchase price is probably the one constant in this area. It is almost universally established, in one form or another, as the face amount of the receivable less: (1) all discounts and allowances to which the customer would be entitled if it paid on the most expeditious basis; and (2) all returns and credits.”); Carroll G. Moore, *Factoring – A Unique and Important Form of Financing and Service*, *Bus. Law.* 703, 713 (Apr. 1959), Tab A to S/J Motion (“[T]he factor actually credits the client with

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contract is a question of law for the court.”). In any event, even assuming *arguendo* that the Bank were estopped from urging its  
(continued on next page)

the full amount of the accounts receivable after deducting only the trade discounts which the customers are entitled to take, the factor's commission, and the discounting to be applied to compensate for the time gap which will exist between the disbursement of funds to the client and the factor's collection of the accounts receivable.”).<sup>14</sup>

A discount accordingly was “issued” when offered, regardless of whether ultimately accepted via payment within the requisite number of days.

While the Bank's conduct throughout the course of the parties' dealings was inconsistent with its contractual rights, with the Bank remitting varying percentages of unearned discount to the Mills, the Mills do not argue that this conduct was tantamount to a waiver of those rights. *See S/J Opposition* at 1-17. They would be hard-pressed to do so, inasmuch as the Factoring Agreements contain express no-waiver provisions. *See Factoring Agreements* § 12.

The Bank accordingly is entitled to summary judgment as to Counts I-IV of its complaint.

### **B. Remaining Counts (Counts V-X)**

The Bank moves for summary judgment as to the Mills' remaining claims (for money had and received, unjust enrichment and conversion) on the ground that under New York law those claims are subsumed in the Mills' action for breach of contract and thus subject to dismissal. *See S/J Motion* at 21-22; *Complaint* ¶¶ 50-79.

As the Mills acknowledge, *see S/J Opposition* at 29, under New York law “[i]t is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of

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preferred construction of section 1.6, for reasons that follow, the outcome would be the same.

<sup>14</sup> The Mills suggest that the Moore article, while in their view irrelevant, supports their position inasmuch as their customers were not “entitled” to take a discount unless they paid within ten days. *See S/J Opposition* at 14-15. I agree with the Bank, *see S/J Reply* at 2, that this is a strained reading of the Moore text, which speaks to a customer's right (upon receipt of invoice) to take advantage of the discount upon prompt payment.

which clearly covers the dispute between the parties,” *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (N.Y. 1987). Moreover, “[i]t is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated.” *Id.* The Mills do not articulate, and I cannot perceive, how their three remaining causes of action diverge from the scope of the subject matter of the contract, or how any legal duty independent of the contract itself has been violated. See S/J Opposition at 30.

The Bank accordingly is entitled to summary judgment as to the remaining counts (Counts V-X) of the Mills’ complaint.

#### IV. Conclusion

For the foregoing reasons, I **GRANT** in part and **DENY** in part the Bank’s motion to strike and recommend that its motion for summary judgment be **GRANTED**.

#### NOTICE

*A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.*

Dated this 15th day of April, 2003.

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David M. Cohen  
United States Magistrate Judge

**Plaintiff**

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