UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
SUMMIT UNITED SERVICE, LLC	:	BANKRUPTCY CASE NO. 03-67061-WHD
Debtor.	:	
_____	:	
SUMMIT UNITED SERVICE, LLC,	:	
Plaintiff,	:	ADVERSARY PROCEEDING NO. 03-6247
v.	:	
MEIJER, INC., MEIJER STORES, LP, MEIJER DISTRIBUTION, INC.,	:	IN PROCEEDINGS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE
Defendants.	:	

O R D E R

Before the Court is the Motion for Partial Summary Judgment filed by the defendants, Meijer, Inc., Meijer Stores LP, and Meijer Distribution, Inc. (hereinafter "Meijer"), against the plaintiff, Summit United Service, LLP, in its capacity as debtor-in-possession (hereinafter "Summit"). This motion arises from a complaint filed by Summit in which Summit has alleged, among other things, that Meijer owes Summit certain sums arising from Summit's sale of merchandise to Meijer and that Meijer is holding personal property of Summit's bankruptcy estate. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 157(b)(2)(E); (O).

FINDINGS OF FACT

1. Summit was formed on January 13, 1999. Meijer's Statement of Undisputed Facts, ¶ 1; Summit's Response to Meijer's Statement of Undisputed Facts, ¶ 1; Meijer's Reply to Summit's Response to Meijer's Statement of Undisputed Facts, ¶ I. William Castle was a member of Summit and acted as the General Manager of Summit. Meijer's Statement of Undisputed Facts, ¶¶ 16-17.

2. Meijer was Summit's largest customer. Meijer's Statement of Undisputed Facts, ¶ 3; Summit's Response to Meijer's Statement of Undisputed Facts, ¶ 3.

3. On May 3, 2001, Meijer and William Castle, purporting to act on behalf of Summit, entered a Scan-Based Trading Agreement (hereinafter the "SBTA"). Meijer's Statement of Undisputed Facts, ¶ 23. The SBTA contained an integration clause, which provides as follows:

> Entire Agreement; Amendment. This Agreement contains the entire agreement between the parties with respect to the matters set forth herein, and any and all prior or contemporaneous oral or written agreements made by either party shall have no force or effect. This Agreement may only be amended or modified by Buyer in the form of written notice of the modifications to Seller.

Meijer's Statement of Undisputed Facts, ¶ 25.

4. On August 21, 2001, William Castle signed a Vendor Agreement, which incorporated by reference the Meijer Purchase Order Terms and Conditions (hereinafter the "POTC"). Meijer's Statement of Undisputed Facts, ¶ 26.

5. Summit provided merchandise to approximately one-half of Meijer's stores. Meijer's

Statement of Undisputed Facts, ¶ 5; Summit's Response to Meijer's Statement of Undisputed Facts, ¶ 5.

6. Summit also provided certain fixtures, racks, and signage to Meijer for the purpose of displaying merchandise. Meijer's Statement of Undisputed Facts, ¶ 4.

7. The POTC provides as follows:

> Ownership of Fixtures. If SELLER provides BUYER with any materials, equipment or fixtures to in any way assist in the resale of any goods purchased from Seller, then unless otherwise agreed in writing, BUYER shall be deemed sole owner of such materials, equipment or fixtures, without charge, free and clear of any interest, whatsoever, of SELLER. This provision shall apply regardless of whether such materials, equipment or fixtures are shown on this order.

Meijer's Statement of Undisputed Facts, ¶ 8.

8. The SBTA provides:

> Ownership of Fixtures. If Seller provides Buyer with any materials, equipment or fixtures to in any way assist in the resale of the Goods purchased from Seller, then unless otherwise agreed in writing, Buyer shall be deemed sole owner of such materials, equipment or fixtures, without charge, free and clear of any interest, whatsoever, of Seller.

Meijer's Statement of Undisputed Facts, ¶ 24.

9. The POTC provides the following:

> Commencement of Payment Terms; Controlling Terms; Invoicing. Terms of payment for the goods ordered shall, at BUYER'S option, commence either on the date the goods are received at BUYER'S designated location or the date stated on SELLER'S invoice to BUYER for the goods. Payment, freight and FOB terms on this order shall control over any such different terms stated in any other agreement between the parties, unless the terms in such other agreement are more favorable to BUYER. SELLER shall invoice BUYER for the goods no later than one (1) year after the goods have been received by

> BUYER; if SELLER fails to do so, SELLER shall be deemed to have waived any right to BUYER's payment for the goods.

Meijer's Statement of Undisputed Facts, ¶ 21.

10. The POTC provides as follows:

> Charge Backs; Waiver; Claim Submission; Administrative Fee. All amounts payable to SELLER shall be subject to all claims and defenses of BUYER, whether arising from this order or any other transaction. BUYER may set off and deduct against any such amounts all present and future indebtedness of BUYER to SELLER. BUYER shall provide SELLER with a debit memo or vendor charge back stating the amount of such setoff(s). SELLER shall be deemed to have accepted each debit memo or vendor charge back within ninety (90) days following receipt of same, unless SELLER notifies BUYER in writing during such period as to why the deduction should not be made and provides documentation of the reason(s) given. Such written notice and all other claims of SELLER against BUYER shall be submitted to SELLER on BUYER's Claim Form available on BUYER's VendorNet located on the Web at www.meijervendor.com. Seller agrees to pay an administrative fee of US $75.00 to BUYER for each claim submitted to BUYER in any manner other than on BUYER's Claim Form.

Meijer's Statement of Undisputed Facts, ¶ 22.

CONCLUSIONS OF LAW

I. The Summary Judgment Standard.

In accordance with Federal Rule of Bankruptcy Procedure 7056, which incorporates Federal Rule of Civil Procedure 56, this Court will grant a motion for summary judgment only in the absence of any material issue of fact so as to make the movant entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). The

movant has the burden of establishing that no such factual issue exists. *Id.* at 324. The Court will read the opposing party's pleadings liberally. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). As a drastic remedy, summary judgment only will be granted when there is no room for controversy. *United States v. Earhart (In re Earhart*), 68 B.R. 14, 15 (Bankr. N.D. Iowa 1986); *Sell v. Heath (In re Heath*), 60 B.R. 338, 339 (Bankr. D. Colo.1986). Finally, the Court will examine the record to determine whether the movant's motion and supporting pleadings provide a sufficient legal basis that would entitle the movant to judgment. *Dunlap v. Transamerica Occidental Life Ins. Co.,* 858 F.2d 629, 632 (11th Cir.1988). If the movant has set forth a sufficient legal basis, judgment is proper. *Id.*

II. Summit's Contentions

In its complaint, Summit alleges that it sold goods to Meijer and installed certain fixtures in Meijer stores, and that Meijer owes Summit payment for these goods and should turn over the fixtures as property of the bankruptcy estate. In response, Meijer contends that, pursuant to the contractual agreements between the parties, the fixtures became property of Meijer as soon as the fixtures were installed in Meijer's stores and Summit has waived its right to collect payment for the some of the amounts that Summit alleges remain unpaid. Meijer asserts that these conclusions can be reached by the Court without the necessity of holding a trial because the facts necessary to support the conclusions are either undisputed or any dispute Summit may raise with regard to these facts is unsupported by any evidence.

A. *Ownership of Fixtures*

Summit contends that the operative agreement between the parties took the form of an offer, which was made via a letter written by Sylvan Gross on December 15, 1998 on behalf of Summit (hereinafter the "Offer Letter"), and was accepted by a letter written by Richard Crawford on behalf of Meijer (the "Acceptance Letter"). Pursuant to the terms of the Offer Letter, Summit argues, the fixtures at issue would have remained property of Summit. Meijer disputes that the Offer Letter and the Acceptance Letter constitute a binding contract between Summit and Meijer because: 1) Summit is not named in either the Offer Letter or the Acceptance Letter; 2) Sylvan Gross did not purport to be acting on behalf of Summit; and 3) Summit did not exist as a legal entity at the time the Offer Letter and the Acceptance Letter were executed. Further, Meijer submits that, even if the Court finds that Summit and Meijer were party to a binding agreement, the later agreements entered by the parties, specifically the Vendor Agreement, which incorporates by reference the POTC, and the SBTA, superseded any previous agreement that the parties may have been operating under. In response, Summit contends that Summit never authorized any alteration to the original agreement between the parties and that the Vendor Agreement and the SBTA do not control the parties' relationship because, although Castle signed these documents, the agreements had not been approved by the other three members of Summit and Castle had no authority to bind Summit.

1. *Because the Validity of the SBTA Has Been Established, Meijer Clearly Owns the Fixtures in the Eight SBTA Stores*

In its complaint, Summit stated that "[Summit] and [Meijer] are parties to a scan-based trading agreement (hereinafter the "SBT Agreement") pursuant to which [Summit] delivers goods described as recorded CDS, cassettes, accessories and other key 74 items for sale to eight specific locations of [Meijer] in the Grand Rapids, Michigan and Chicago, Illinois areas." Summit's Complaint, ¶ 5. Further, Summit alleged that the SBTA was an executory contract, which Summit had not yet determined whether to assume or reject, and Summit sought payment of amounts due by Meijer pursuant to the terms of the SBTA. *Id.* ¶¶ 6-8. Meijer submits that these statements constitute a judicial admission that precludes Summit from arguing that Summit did not enter the SBTA.

"In general, judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them" and "may not be controverted at trial or on appeal." *Lambert v. Credit Lyonnais (Suisse) N.A.*, 2001 WL 357316 at *1 (S.D.N.Y. Apr. 10, 2001). Judicial admissions are not considered evidence, "but rather have the effect of withdrawing a fact from contention." *Id.* "Judicial admissions are conclusive" unless the court allows the party to withdraw the admission or "the pleading is amended or withdrawn." *Id.*; *see also Official Committee of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147 (2d Cir. 2003) ("[T]he allegations in the Second Amended Complaint are 'judicial admission[s]' by which [plaintiff] was 'bound throughout the course of the proceeding.'"); *Weyerhaeuser Co. v.*

Israel Discount Bank of New York, 895 F. Supp. 636 (S.D.N.Y. 1995) (factual admissions in a pleading are ordinarily considered binding judicial admissions).

The Court must agree with Meijer that Summit has made a judicial admission as to the binding nature of the SBTA. Although the validity of a contract is not a fact, but rather a legal conclusion, by relying upon the validity of the SBTA to support its recovery against Meijer, Summit has necessarily assumed and admitted the facts necessary to reach the conclusion that Summit and Meijer were legally bound by the SBTA. Additionally, by stating that the SBTA constituted an executory contract, which Summit could choose to assume or reject, Summit must have assumed that Summit and Meijer were parties to a valid and enforceable contract with continuing obligations due by both parties. Summit has never amended its complaint to correct these statements, and this Court has not allowed Summit to withdraw the admission. Accordingly, Summit cannot now argue that it was not bound by the terms of the SBTA.

Meijer has argued that the terms of the SBTA clearly provide that fixtures placed in Meijer stores become the sole property of Meijer. *See* SBTA, ¶ 16 ("If Seller provides Buyer with any materials, equipment or fixtures to in any way assist in the resale of the Goods purchased from Seller, then unless otherwise agreed in writing, Buyer shall be deemed sole owner of such materials, equipment or fixtures, without charge, free and clear of any interest, whatsoever, of Seller."). Accordingly, Meijer seeks entry of summary judgment as to Summit's claim that the fixtures installed by Summit in the eight SBTA stores are property of Summit's bankruptcy estate and subject to turnover. In response,

Summit argues that the so-called "Gross Agreement" is an agreement in writing between Meijer and Summit that provided that the fixtures would remain the property of Summit.

Having reviewed the SBTA, the Court concludes that, even if the Court were to assume that the "Gross Agreement" constituted a valid and binding contract between Meijer and Summit, the SBTA contains an integration clause that specifically provides that the SBTA supersedes all previous oral and written agreements between the parties. *See* SBTA, ¶ 20. ("This Agreement contains the entire agreement between the parties with respect to the matters set forth herein, and any and all prior or contemporaneous oral or written agreements made by either party shall have no force or effect."). Under Michigan law, "[a]n integration clause in a subsequent agreement nullifies all antecedent agreements between the parties."[1] *Munson v. Montie*, 2004 WL 1393773, at *2 (Mich. App. June 22, 2004); *Wummel v. First Nat. Bank of America*, 2004 WL 842439, at *2 (Mich. App. Apr. 20, 2004) ("Where a binding agreement is integrated, it supersedes inconsistent terms of prior agreements and previous negotiations to the extent that it is inconsistent with them."). Additionally, parol evidence of any prior agreements, written or verbal, is not admissible to contradict the "unambiguous and integrated written agreement." *Wummel*, 2004 WL 842439 at *3.

Here, the SBTA is an integrated written agreement between Summit and Meijer.[2]

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[1] Michigan law applies to the interpretation of the SBTA. *See* SBTA, ¶ 15.

[2] As discussed above, the issue of whether the SBTA was a binding agreement between Summit and Meijer has been removed from contention by Summit's judicial admission of the existence and enforceability of the SBTA.

The provision regarding the ownership of fixtures is unambiguous. Accordingly, the Court cannot consider parole evidence with regard to any earlier agreement that may have existed between the parties that would contradict the terms of the SBTA. This being the case, the Court must conclude that Meijer became the sole owner of any fixtures or signage installed by Summit in the eight SBTA stores. Because Count V of Summit's complaint for turnover of the fixtures and signage is premised on the allegation that Summit continued to own said property, the Court must grant summary judgment to Meijer as to this count, as to any fixtures or signage provided by Summit to the SBTA stores.

2. *Questions of Fact Remain as to the Applicable Agreement as to Fixtures in the Non-SBTA Stores*

With regard to the remaining stores, which were not covered by the SBTA, Meijer argues that the Vendor Agreement, which incorporates the POTC, controls the issue of fixture ownership. The Vendor Agreement states that the agreement supplements the POTC and that "[v]endor's shipment of all or any part of any order of goods to Meijer shall be deemed Vendor's consent to such Terms and Conditions as if they were fully set herein." Vendor Agreement for 2001. Additionally, the Vendor Agreement provides that the terms of the Vendor Agreement are triggered each time Meijer issues a purchase order to the vendor, and, the business terms of the purchase order will also apply to that order. *Id.* As to the issue of fixtures, the POTC provides that "[i]f SELLER provides BUYER with any materials, equipment or fixtures to in any way assist in the resale of any goods purchased

from Seller, then unless otherwise agreed in writing, BUYER shall be deemed sole owner of such materials, equipment or fixtures, without charge, free and clear of any interest, whatsoever, of SELLER." POTC, ¶ 17.

Summit again contends that the "Gross Agreement" is the operative agreement between the parties and that its provision with regard to ownership of fixtures constitutes a "written agreement" that alters the standard provision as to fixtures. Additionally, Summit argues that the Vendor Agreement is not a valid agreement between Summit and Meijer because Castle, who signed the Vendor Agreement, lacked the authority to bind Summit and the other three members of Summit never authorized Summit to enter the Vendor Agreement or to otherwise modify the original terms of the "Gross Agreement."

Assuming the Court determines that Summit was legally bound by Castle's execution of the Vendor Agreement, the Court could, nonetheless, determine that the "Gross Agreement" was also a valid, enforceable agreement between the parties and that it constituted a written agreement intended to modify the standard terms of the POTC.[3] The proposal attached to the "Offer Letter" specifies that all fixtures would remain the property of the seller unless purchased by the buyer. The Court is not prepared to hold at this time that the "Gross Agreement" is not a valid, enforceable agreement between the parties. Sufficient evidence has been submitted to create material questions of fact as to that issue.

Summit has produced the affidavit of Sylvan Gross, which supports its position that Gross, on behalf of Summit, made a proposal to Crawford, on behalf of Meijer, for Summit

[3] Unlike the SBTA, the Vendor Agreement does not contain an integration clause.

to supply Meijer with music and video. *See* Affidavit of Sylvan Gross, ¶¶ 4-5; 8.[4] The Gross Affidavit also states that Gross received the attached "Acceptance Letter" from Crawford. *Id*. at 8. This testimony has not been directly controverted by Meijer. Meijer submitted the testimony of John Smilde, a Meijer employee who appears to have no knowledge of the early relationship between Meijer and Summit. Smilde stated in his deposition that he worked from September 1997 until September 2003 as the manager of the merchandise payables area. Although Smilde stated that he would have worked with Dick Crawford during his time at Meijer, he had never reviewed either the "Offer Letter" or the "Acceptance Letter," and he stated that he was not involved with negotiating vendor contracts. Deposition of John Smilde, at 74-75. Meijer also submitted the testimony of Mary Devon, who also stated that she had never seen the "Offer Letter" or the "Acceptance Letter," that these letters were dated prior to the time that she became the merchandise manager for music and movies, and that she never spoke with her predecessor about the agreements between Summit and Meijer. Deposition of Mary Devon, at 31-33.

Finally, even the deposition of Bill Castle could be considered to be consistent with a finding that Summit and Meijer negotiated the terms of their relationship in late 1998, early 1999. Castle stated that Summit was formed in January 1999 and that he believes Sylvan Gross and Harold Lipsius prepared the paperwork. Deposition of Williams Castle,

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[4] Meijer has objected to the Court's consideration of the Gross Affidavit on the basis that the affidavit contains improper legal conclusions about the effect of the "Offer" and "Acceptance" letters. The Court will consider the affidavit only for the purpose of establishing that a question of fact remains as to whether the letters were sent and as to whether Gross sent the "Offer Letter" on behalf of Summit.

at 24, 156. He stated that Gross put together the other investors and made the initial contact with Meijer through a written proposal that was presented to Crawford and Bob Vanderark. *Id.* at 43; 45, 48-49. Additionally, Castle stated that, within a month or so after Gross' initial presentation, Summit had been chosen to replace Northeast One Stop to service approximately 50 of Meijer's stores. *Id.* at 55-56. The fact that Gross was directly involved in forming Summit and obtaining the business of Meijer and negotiating the terms of that business supports Summit's contention that the parties agreed to the terms defined in the Offer and Acceptance letters. Also, the fact that Summit, rather than one of Gross' other business entities became Meijer's vendor shortly after the letters were exchanged tends to support the conclusion that Gross was acting on behalf of Summit, rather than another of his business entities.

Meijer contends that, as a matter of law, the "Offer" and "Acceptance Letters" could not have formed a binding contract between Summit and Meijer because the letters do not identify Summit as a party. Meijer cites the case of *Kojaian v. Ernst*, 177 Mich. App. 727 (1989), for the proposition that, under Michigan law, to be enforceable, a contract must identify the parties. The *Kojaian* case does not address the necessary elements of a contract, but rather the necessary elements of a writing that must satisfy the statute of frauds. In *Kojaian*, the issue was whether a set of documents executed by the parties with regard to the sale of real property satisfied the statute of frauds. As an alternative argument, one party contended that the other party had admitted the facts necessary to find that a contract existed and therefore waived the statute of frauds defense. The court held that the parties had failed

to agree on the terms of payment, and, because the sale was designed as a credit transaction, such payment terms were necessary to create a binding oral agreement. Meijer also cites *Zurcher v. Herveat*, 238 Mich. App. 267 (1999). Likewise, in *Zurcher*, the issue was whether a contract for the sale of real property satisfied the statute of frauds. Meijer has cited no authority for the proposition that the identity of the parties is critical to a contract that need not satisfy the statute of frauds.

Meijer also contends that Summit and Meijer could not have formed a binding agreement by exchanging these letters because Summit had not been legally formed at the time the "Offer" and "Acceptance" letters were exchanged. In response, Summit argues that Gross, as the "incorporator" of Summit, had authority to enter into a contract on behalf of Summit prior to the time Summit became a legal entity. Neither party has suggested which state law would apply to this issue, but, for purposes of this analysis, the Court will assume that Michigan law applies.

Under Michigan law, "[a] corporation will be held liable for preincorporation contracts made by the promoters or incorporators if the corporation subsequently ratifies or adopts the contracts, and the promoters will not be held liable." *Medco Health Services, Inc. v. Bragg*, 1996 WL 33364162 at *1 (Mich. App. May 28, 1996) (citing *Henderson v. Sprout Bros, Inc.*, 176 Mich. App. 661, 673; 440 N.W.2d 629 (1989); *Campbell v. Rukamp*, 260 Mich. 43, 46-47; 244 N.W. 222 (1932)). Here, assuming that the Offer and Acceptance Letters formed a contract between Meijer and Gross, the available facts suggest that, subsequent to its creation, Summit may have adopted and ratified that contract by

performing the obligations therein. The Court recognizes that, in this case, it is not the putative business entity that is attempting to raise the failure to incorporate as a defense, but rather the other party to the contract. However, since the parties have not thoroughly briefed this issue, the Court is not prepared to conclude that the fact that Summit did not exist as a legal entity is a *per se* bar to a finding that Meijer and Summit were parties to a binding contract. That being said, the Court finds that questions of fact remain as to whether the "Gross Agreement" constitutes a valid, binding contract between Summit and Meijer, and, if so, whether the "Gross Agreement" controls the issue of fixture ownership in the non-SBTA stores. Accordingly, the Court cannot grant summary judgment to Meijer as to Summit's claim for turnover of the fixtures installed in the non-SBTA stores.

B. *Questions of Fact Remain as to Summit's Claims for Amounts Due For Product*

In its complaint, Summit alleges that: 1) pursuant to the terms of the SBTA, Meijer owes Summit $344,313.72, as well as $150,000 arising from loss of Summit's products (Complaint, ¶¶ 7-8); and 2) in addition to the amounts owed under the SBTA, Meijer owes Summit $1,201,733.79 for the sale of Summit's products (Complaint, ¶ 45). Meijer seeks summary judgment as to these claims on the basis that the Vendor Agreement, which incorporates the POTC, precludes Summit from collecting the amounts it alleges are due.

The POTC provides that the seller must invoice the buyer for goods no later than one (1) year after the goods have been received by buyer and, if seller "fails to do so, SELLER shall be deemed to have waived any right to BUYER's payment for the goods." POTC, ¶

15. Further, the POTC states that amounts owed to the seller are subject to claims and defenses of the buyer. *Id*. ¶ 2. The buyer is entitled to set off against the amount payable, but is required to provide the seller with a debit memo or vendor charge back with the amount of the setoff. If the seller fails to challenge the debit memo or charge back in writing within 90 days after receipt of the memo or charge back, the seller will be deemed to accept the debit or charge back. The seller is required to submit the challenge to the debit or charge back on the buyer's claim form and attach documentation to support the challenge. *Id*.

Meijer has asked the Court to determine that the terms of the POTC, which pertain to the time frame in which Summit must challenge charge backs and other expenses, prevent Summit from recovering amounts it claims are owed by Meijer for product if Summit failed to challenge those debits within the stated time frame. In doing so, Meijer does not ask the Court to determine which challenges were submitted within the stated time frame or the total amount of credits claimed validly by Summit. In response, Summit argues that: 1) the time limits contained within the Vendor Agreement were not enforceable against Summit because Castle, who signed the agreement, purportedly on behalf of Summit, had no authority to bind Summit, and the requisite number of Summit's members did not authorize Summit to enter the Vendor Agreement; 2) assuming the time limits within the Vendor Agreement did apply, Summit submitted its invoices and charge back and debit challenges in a timely manner; and 3) assuming the time limits applied to Summit and Summit failed to submit its challenges within the time limits, pursuant to the doctrines of waiver and

mutual departure, Meijer may not enforce the time limits against Summit. In response to Summit's first argument, Meijer submits that Summit ratified the terms of the POTC each and every time it shipped goods to Meijer stores. Pursuant to section 2-206 of the Uniform Commercial Code, Meijer argues, a signed contract between parties is not necessary to form a contract for the sale of goods. Instead, the seller accepts a buyer's offer when the seller ships the goods called for by the purchase order. In response, Summit argues that the UCC does not control as to this issue because Meijer never provided purchase orders to Summit for the goods at issue.

Having reviewed the evidence presented thus far and having considered the oral arguments made by the parties, the Court is inclined to find that the Vendor Agreement is a binding contract between Summit and Meijer and, therefore, the POTC would apply to the subsequent shipment of goods from Summit to Meijer. However, even if the Court were to make this finding on the basis of the information currently available, the Court finds that there is sufficient evidence to create a question of fact as to whether the course of conduct between Meijer and Summit could have resulted in a waiver of any time limits that would otherwise have applied under the POTC. For example, William Zimelis' affidavit states that over the course of Summit's relationship with Meijer, the average time period to resolve disputed vendor charge-backs was over 180 days, with some disputes taking as long as a year to resolve. Affidavit of William Zimelis, at ¶11. Similarly, Zimelis stated that, over the course of Summit's relationship with Meijer, the average time period to resolve disputed debit issues was over 195 days, with some disputes taking as long as 2 years to resolve. *Id*.

at ¶ 12. Finally, Zimelis states that, because of Meijer's failure to get authorization for charge-backs and debits, disputes over charge-backs and debits were regularly raised and resolved more than 90 days after the initial debit was issued by Meijer. *Id*. at ¶ 21.

Because the Court must hear testimony and consider the evidence in order to determine whether Meijer may have waived its right to enforce the deadlines with regard to charge-backs and advertising expenses contained within the POTC, the Court will also reserve its final consideration of whether the terms of the POTC apply. The parties will have a further opportunity to present relevant evidence and argument as to this point at trial.

CONCLUSION

Having carefully considered the Plaintiff's motion and brief, the Court concludes that summary judgment would not be appropriate at this time, other than as to the issue of whether the terms of the SBTA apply with regard to the eight SBTA stores, as discussed above. Accordingly, Meijer's motion for summary judgment is hereby **GRANTED** in part and **DENIED** in part.

IT IS SO ORDERED.

At Atlanta, Georgia, this _____ day of September, 2005.

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W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE