IT IS ORDERED as set forth below:

Date: September 07, 2007

W. H. Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	**CASE NUMBERS**
ANDERSEN 2000, INC.,	04-14155-WHD
Debtor.	
ANDERSEN 2000, INC,	
Plaintiff,	ADVERSARY PROCEEDING NO. 05-1161
v.	
GEORGIA GULF CORPORATION,	
Defendant.	
GEORGIA GULF CORPORATION,	
Counter-Claimant,	

v.	:	
	:	
ANDERSEN 2000, INC.,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 11 OF THE
Counter-Defendant.	:	BANKRUPTCY CODE

O R D E R

Before the Court are cross Motions for Summary Judgment, filed by Andersen 2000, Inc. (hereinafter the "Debtor") and Georgia Gulf Corporation (hereinafter the "Defendant"). The Motions arise in connection with the Debtor's complaint to disallow the Defendant's claim, for turnover of estate property, and for breach of contract. To the extent that the complaint seeks disallowance of the Defendant's claim, which was filed in this Court without a reservation of rights, this matter constitutes a core proceeding. *See* 28 U.S.C. § 157(b)(2)(B); *In re G.I. Indus., Inc*., 204 F.3d 1276 (9th Cir. 2000) (holding that the filing of a proof of claim transforms a non-core breach of contract action into a core proceeding); *In re Northwestern Corp*., 319 B.R. 68 (D. Del. 2005). To the extent that the complaint seeks turnover of the retainage allegedly owed to the Debtor by the Defendant, this matter is a non-core proceeding. *See In re Electric Machinery Enterprises, Inc.*, 479 F.3d 791 (11th Cir. 2007).

FINDINGS OF FACT

In 1990, the Defendant desired to increase its production of methanol, which required an increase in the Defendant's requirements for "superheated

steam." Defendant's Statement of Undisputed Facts, ¶ 1. To accomplish this, the Defendant required a "natural gas and hazardous liquid waste fired boiler" (hereinafter the "Boiler"). Defendant's Statement of Undisputed Facts, ¶ 2.

On November 9, 1990, the Debtor into entered a contract with the Defendant (hereinafter the "Contract") under which the Debtor agreed to manufacture and install the Boiler for the Defendant's chemical manufacturing complex in Louisiana. Debtor's Statement of Undisputed Facts, ¶¶ 1-2; Defendant's Statement of Undisputed Facts, ¶ 3. Mr. Schmitt signed the Contract on behalf of the Defendant. Debtor's Statement of Undisputed Facts, ¶ 3. The Contract provided that the specifications of the Boiler would be in accordance with "Georgia Gulf Plaquemine Division Engineering Standards." Debtor's Statement of Undisputed Facts, ¶ 7; Defendant's Statement of Undisputed Facts, ¶¶ 3; 15. The process requirements for the Boiler included: 1) the ability to burn up to 180 MM Btu/hr of waste liquid fuel, including phenol heavy ends, phenol light ends, fusel/waste oil and natural gas to produce 920 psig superheated steam at 850 degrees and 120,000 lb/hr; 2) the ability to pump 11,400 lb/hr of heavy oils to the boiler site, burn 7600 lb/hr, and recycle 3800 lb/hr back to the unit; and 3) the ability to operate a minimum of 8400 hours per year (roughly 350 days per year). Defendant's Statement of Undisputed Facts, ¶¶ 6-8.

With the Defendant's approval, the Debtor subcontracted this work to Nebraska Boiler Company (hereinafter "NBC"). Defendant's Statement of Undisputed Facts, ¶ 18. NBC agreed to do the work according to the

specifications discussed by the Debtor, the Defendant, and NBC. Debtor's Statement of Undisputed Facts, ¶ 10.

After delivery and installation, the Boiler was first fired on January 19, 1992. Debtor's Statement of Undisputed Facts, ¶ 12; Defendant's Statement of Undisputed Facts, ¶ 24. The Defendant used the Boiler through mid-1993, but it experienced problems throughout that period. Debtor's Statement of Undisputed Facts, ¶ 13. Specifically, leaks were discovered in the tube connections to the mud drum of the unit on February 14, 1992. Debtor's Statement of Undisputed Facts, ¶ 48. The Boiler's defects resulted in multiple shut-downs and in the Defendant's inability to reach the desired increase in methanol production. Defendant's Statement of Undisputed Facts, ¶¶ 27; 30; 43. The Debtor and NBC worked to try to resolve the problems with the Boiler. Debtor's Statement of Undisputed Facts, ¶ 14. Although the Defendant continued operating the Boiler, by the middle of 1993, the Defendant began to question whether the Boiler could ever be made to comply with the performance specifications. Defendant's Statement of Undisputed Facts, ¶ 34. The Boiler never met the Contract specifications. Defendant's Statement of Undisputed Facts, ¶ 22.

In August 1993, the Defendant owed the Debtor a retainage equal to $352,177 out of the total contract price of $4,320,000. Debtor's Statement of Undisputed Facts, ¶ 15. At that time, the Defendant agreed to permit the Debtor to retain a consultant to work on the Boiler. Debtor's Statement of Undisputed Facts, ¶ 16. The Debtor retained and paid RJM Corporation (hereinafter "RJM")

to review and assess the boiler. Debtor's Statement of Undisputed Facts, ¶ 17. RJM issued a report in October 1993. *Id*. ¶ 18. The Debtor fabricated the required replacement parts. *Id*. The Defendant never adopted or implemented any of the recommendations in RJM's report. Debtor's Statement of Undisputed Facts, ¶ 18.

In November 1993, the Debtor provided the Defendant with detailed information the Debtor believed would address the Boiler's problems and asked the Defendant for help in getting NBC to assist in correcting the Boiler's deficiencies. Debtor's Statement of Undisputed Facts, ¶ 19. On October 4, 1995, Mr. Schmitt, acting as the Defendant's Vice President of Operations for the Defendant's Commodity Chemicals Group, wrote to Jack Brady, an employee of the Debtor, and stated that the Defendant would not shut down the Boiler to implement the recommendations of RJM. Debtor's Statement of Undisputed Facts, ¶ 28. Instead of instituting the recommendations, the Defendant chose to "modify the fuel stream in such a manner as to reduce those properties that resulted in the boiler's operational problems." Debtor's Statement of Undisputed Facts, ¶ 31; Defendant's Statement of Undisputed Facts, ¶ 33. The Defendant also built a salt-removal system at a cost of $550,000 in order to limit the amount of cleaning down-time that were necessitated by the "fouling" of the Boiler. Defendant's Statement of Undisputed Facts, ¶ 45.

The Defendant communicated to the Debtor that it was "surprised" that the Debtor was awaiting a resolution of the matter and that the Defendant had "decided to end [its] relationship on this project." Debtor's Statement of

Undisputed Facts, ¶ 22. The Defendant stated its intention to keep the retainage and wished the Debtor "good luck" in pursuing NBC for the amount owed on the Boiler. Debtor's Statement of Undisputed Facts, ¶ 23. The Defendant never signed any agreement with the Debtor resolving the issue of the retainage. Defendant's Statement of Undisputed Facts, ¶ 46.

The relevant provisions of the Contract are reproduced below:

1. The Work and the Contract Price.

a. Contractor, in consideration of the sum of four million three hundred twenty thousand and no/100 dollars ($4,320,000.00) . . . agrees to do all the work specified or indicated herein for the completion of a project generally described as follows . . . : Supply and install one (1) Natural Gas and Hazardous Liquid Fired Boiler as per Georgia Gulf Specification #4027 dated 5/29/90 (Exhibit A) and Andersen 2000, Inc. proposal #I-5592-S Items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, & 16 (Exhibit B), Andersen 2000, Inc. proposal #I-5592-S Rev. B dated 10/2/90 (Exhibit C), Andersen 2000, Inc. proposal #I-5592-S Rev. B dated 10/15/90 (Exhibit D), Andersen 2000, Inc. proposal #I-5592-S Rev. B dated 10/24/90 (Exhibit E), Andersen 2000, Inc. proposal #I-5592-S Rev. B dated 11/6/90 (Exhibit F) – all to the satisfaction of GG and in accordance with the plans and specifications and performance guarantees attached hereto and incorporated as Exhibits A, B, C, D, E, & F.

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c. Contractor agrees to furnish and pay for all labor, materials, services, tools, and equipment necessary to perform the Work, except the following which shall be furnished by GG. Construction site.

d. It is the intention of the parties that this Agreement includes everything necessary for the proper execution of the Work. It is understood that, notwithstanding any plans, specifications, or other expressed descriptions of the Work, GG is relying on Contractor's skill and judgment to accomplish the Work in a manner satisfactory to GG.

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2. Time of Completion. The Work shall be started by November 9, 1990, and completed by August 12, 1991. Time of completion of the Work is of the essence of this Agreement.

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3. Payments.

a. Payment of the Contract Price shall be made for Work completed in a workmanlike manner, in accordance with this Agreement, free from defects, satisfactory to GG, and free and clear of all liens and claims of any kind. Such payment shall be made provided Contractor is not then in default under any terms of this Agreement and shall be made in the following manner: 10% with order; 10% Net thirty (30) days after completion of engineering; 14% Net thirty (30) days for five (5) monthly progress billings (total 70%); 10% Net thirty (30) days after acceptance of performance testing by GG.

b. In addition to the retainage, if any, provided for in Paragraph 3.a. of this Agreement, GG may withhold payments to such extent as it deems necessary to protect GG from loss due to: (i) defective work not remedied; (ii) claims filed or reasonable evidence indicating probable filing of claims; (iii) failure of Contractor to make payments properly to subcontractors; (iv) persistent failure by Contractor to prosecute the Work in accordance with this Agreement.

4. Acceptance, Final Payment, and Liens

a. Upon receipt of written notice that the Work is ready for final inspection, GG shall make an inspection and, if the Work is acceptable to GG, GG shall promptly accept the Work. In the event GG determines that the Work is not acceptable, Contractor shall be advised in what respect the Work is not acceptable. When Contractor has corrected any such deficiency, the above procedure shall be repeated until GG accepts the Work. Final payment of the Contract Price, including the retainage, if any, provided for in Paragraph 3.a. of this Agreement, less sums, if any, GG shall have spent to cure Contractor's default or pursuant to Paragraph 3.b. of this Agreement, shall be due ninety-one (91) days after GG

accepts the Work.

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c. No payment made to Contractor, nor partial or entire use of the Work by GG shall be acceptance of the Work or any portion thereof which is not in accordance with this Agreement.

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6. Title to Work and Guarantees.

a. Contractor guarantees to GG:

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(iii) that the Work will be of good quality, free from faults or defects, fit for the purpose intended and will meet the specifications and performance guarantees set forth herein.

b. In addition to Contractor's guarantees, Contractor shall secure for the benefit of GG best available guarantees of third party vendors, subcontractors and suppliers with respect to portions of the Work supplied by them, and Contractor shall use its best efforts to enforce such guarantees and to cooperate with GG in GG's enforcement of such guarantees.

c. In addition to any other warranty or remedies available to GG at law or in equity, Contractor warrants the Work against defects of any kind, including defects in design, workmanship and material for a period of one year from the date of acceptance and Contractor shall during such one (1) year period at Contractor's sole expense repair or replace defective Work or any defective portions thereof, ordinary and fair wear and tear by GG excepted. Any repair or replacement of the Work or portions thereof shall be additionally and automatically warranted against defects and shall be subject to the same repair and replacement remedy by Contractor for a period of one (1) year after such repair and replacement. All warranties shall survive any inspection, acceptance and payment.

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9. Termination.

a. If Contractor, in the opinion of GG, fails at any time to perform work in a good and workmanlike manner, or fails to prosecute the Work efficiently or diligently, or if it should fail to make prompt payment to subcontractors or for materials and labor, or persistently disregard law, ordinances, or the instructions of GG, or otherwise should breach any provision of this Agreement; . . . then GG shall have the right (without prejudice to any other right or remedy) to terminate the employment of Contractor and to take possession and control of any or all materials, subcontracts, tools and appliances, or Work then in progress and finish the Work by whatever method GG may deem expedient. Thereupon, Contractor shall not be entitled to receive any further payment until the Work is finished. If after completion the unpaid balance of the Contract Price shall exceed the expense of finishing the Work, including compensation for additional managerial or administrative work, such excess shall be paid to Contractor. If such expense shall exceed the unpaid balance of the Contract Price, Contractor shall pay the difference to GG.

b. In addition to its right to terminate as set forth in Paragraph 9.a. of this Agreement, GG shall have the right to terminate this Agreement whenever and for whatever reason it chooses. Such termination shall be effective immediately after written notice is given to Contractor or at the time specified in such termination notice. In the event of such termination, Contractor shall have ten (10) days to move itself and all equipment, supplies and materials used in the performance of the Work from GG's premises. In the event of such termination, Contractor shall be paid for that portion of the Work satisfactorily completed in accordance with the Agreement up to the time of termination.

10. Subcontractors. Contractor shall not subcontract any portion of the Work without GG's written consent as to the identity of each subcontractor and the extent of work each is to perform. Contractor shall assure that each subcontractor shall agree with Contractor to be bound to Contractor by the terms of this Agreement relevant to the portion of the Work to be performed by such subcontractor and to assume toward Contractor such obligations and responsibilities that will insure that no arrangement or agreement with any subcontractor is inconsistent with this Agreement or adversely affects GG's exercise of its rights hereunder. Contractor agrees that it is fully responsible to

GG for the acts and omissions of its subcontractors and of persons directly or indirectly employed by them. Nothing contained herein shall create any contractual relation between GG and any subcontractor.

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12. Controlling Law. This Agreement shall be construed and interpreted under, and all respective rights and duties of the parties shall be governed by, the laws of the state in which the Jobsite is located.

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19. Entire Agreement. The terms and provisions of this Agreement constitute the entire agreement between the parties and supersede all previous communications, negotiations, proposals, representations, conditions, warranties or agreements, either oral or written, between the parties hereto with respect to the subject matter hereof. This Agreement may not be enlarged, modified, or altered except in writing signed by duly authorized officers or representatives of the parties. Any proposal by Contractor referred to in this Agreement is solely referenced as a matter of convenience to Contractor and any terms and conditions of such proposal are expressly prohibited from becoming part of this Agreement.

On or about May 23, 1996, the Debtor filed an amended complaint against NBC in the United States District Court for the Middle District of Louisiana. Defendant's Statement of Undisputed Facts, ¶ 40. On October 11, 1996, the Defendant filed a complaint against the Debtor in state court in Louisiana. In its complaint, the Defendant sought damages from the Debtor for breach of warranty and breach of contract and asserted that the Debtor's work on the Boiler was defective as to design, workmanship, and/or materials. Although the Debtor filed an answer to the complaint, the lawsuit was not resolved prior to the filing of the Debtor's bankruptcy petition and was, therefore, stayed.

The Debtor filed a voluntary petition under Chapter 11 of the Bankruptcy Code on December 20, 2004. On April 1, 2005, the Defendant filed a proof of claim evidencing an unsecured claim in the amount of $7,205,679. The proof of claim states that the claim arises from a breach of warranty and a breach of contract by the Debtor.

CONCLUSIONS OF LAW

The Debtor's complaint seeks the disallowance of the Defendant's claim and an order directing the Defendant to turnover to the Debtor the amount held by the Defendant as retainage. The Defendant contends that its claim should be allowed as filed and that it does not owe the Debtor the retainage. Both the Debtor and the Defendant submit that there are no genuine issues of material fact and both parties seek summary judgment.

A. *Summary Judgment Standard*

In accordance with Bankruptcy Rule 7056, the Court will grant summary judgment only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Gray v. Manklow* (*In re Optical Techs., Inc.*), 246 F.3d 1332, 1334 (11th Cir.2001). "Material facts" are those which might affect the outcome of a proceeding under the governing substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Furthermore, a dispute of fact is genuine "if the evidence is such that a reasonable jury could

return a verdict for the nonmoving party." *Id.* The moving party has the burden of establishing the right to summary judgment. *Clark v. Coats, Inc.,* 929 F.2d 604, 608 (11th Cir.1991); *Clark v. Union Mut. Life Ins. Co.,* 692 F.2d 1370, 1372 (11th Cir.1982).

In determining whether a genuine issue of material fact exists, the Court must view the evidence in the light most favorable to the nonmoving party. *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 157 (1970); *Rosen v. Biscayne Yacht & Country Club, Inc.,* 766 F.2d 482, 484 (11th Cir.1985). The moving party has the burden to establish the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-24 (1986); *see also* Fed. R. Civ. P. 56(e). Once the movant has made a *prima facie* showing of its right to judgment as a matter of law, the nonmoving party must go beyond the pleadings and demonstrate that there is a material issue of fact which precludes summary judgment. *Celotex,* 477 U.S. at 324; *Martin v. Commercial Union Ins. Co.,* 935 F.2d 235, 238 (11th Cir.1991).

B. *The Parties' Contentions*

In the complaint, the Debtor asserts that the Defendant's claim should be disallowed because: 1) the Defendant did not sustain any damages that can be proven at trial; 2) the Defendant's claim for damages is barred by the doctrines of accord and satisfaction and waiver and release; 3) the Defendant's damages should be disallowed because of the Defendant's failure to mitigate its damages; 4) any

damages that may have accrued were caused by NCB's conduct, and the Debtor is not liable for any damages under the Contract; and 5) the Defendant's claim for damages is barred by the statute of limitations and laches. The Debtor acknowledges that, if the Court finds that the Defendant is not entitled to any further funds from the Debtor under an accord and satisfaction theory, the Defendant would be entitled to keep the retainage and that the Debtor's suit for turnover of that amount should be dismissed.

The Defendant submits that it is entitled to summary judgment on its claim for $7 million in damages under the Contract because the Debtor expressly warranted that the Boiler would be free from defects and that it would be designed and manufactured in accordance with the performance specifications, and it is undisputed that the boiler never performed in accordance with those specifications. The Defendant asserts that its claim for damages should be allowed in full because there is no dispute that the Boiler did not work properly, which cause frequent failure of the Boiler parts and reduced plant productivity due to burdensome cleaning requirements and the failure of the Boiler to perform to more than two-thirds of the capacity at which it was intended to perform. In the Defendant's view, it is undisputed that these problems resulted in numerous shut downs and the need for the Defendant to install a salt removal system at a cost of $550,000. The Defendant asserts that it is entitled to summary judgment on the Debtor's objection to its claim because the Debtor has admitted to liability for breach of contract, and, under the contract, the Debtor remained liable for the acts

of its subcontractor.

As to the Debtor's argument that the Debtor and the Defendant entered an accord and satisfaction, the Defendant states that no agreement was ever reached. According to the Defendant, the Defendant demanded that the Debtor fix the problems with the Boiler, but the Debtor could not and did not do so. As to the Debtor's assertion that the Defendant failed to mitigate its damages, the Defendant defends its decision not to adopt and implement the RJM recommendations by noting that the Debtor never provided the Defendant with any proof that the recommendations would correct the deficiencies. The Defendant contends that it gave the Debtor a reasonable opportunity to solve the problems with the Boiler.

Finally, the Defendant seeks summary judgment on the Debtor's motion for turnover of the retainage on the basis that: 1) the Contract provided that the retainage would not be owed unless and until the Defendant accepted the work; and 2) the Defendant never accepted the work.

C. *Whether the Defendant's Claim Should Be Disallowed*

Under section 502, "[a] claim or interest, proof of which is filed under section 501. . . is deemed allowed, unless a party in interest . . . objects." 11 U.S.C. § 502(a). "[I]f such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim . . . and shall allow such claim in such amount, except to the extent that . . . such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for

a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1). The parties agree that Louisiana law applies to the Contract.[1]

1. *Whether the Defendant's Damages Claim has Prescribed*

A claim that is barred by the applicable statute of limitations is not allowable under section 502(b)(1). *See Wilferth v. Faulkner*, 2006 WL 2913456 (N.D. Tex. Oct. 11, 2006). Under Louisiana law, "[t]he applicable prescriptive period is determined by the character of the action disclosed in the pleadings." *Johnson v. Ledeoux*, 2007 WL 1427525 (La. App. 2d Cir. May 16, 2007); *see also Morris & Dickson Co., Inc. v. Jones Bros. Co., Inc*., 691 So.2d 882, 888 (La. App. 2d Cir. 1997). If the applicable prescription period has not expired, the claim cannot otherwise be barred under any equitable doctrine, such as laches or estoppel. *See Fishbein v. State ex. rel. Louisiana State University Health Science Center*, 898 So.2d 1260 (La. 2005) ("Because the doctrine of laches is in conflict with this state's civil laws of prescription, the statements contained in [earlier] civil opinions that suggest the doctrine of laches may be applicable under certain circumstances are hereby repudiated.").

The Debtor asserts that, under Louisiana Civil Code Article 2534,[2] the applicable prescriptive period is four years from the date the Boiler was delivered to the Defendant or one year from the date the Defendant discovered the defect in

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[1] *See* Section 12 of the Contract.

[2] Hereinafter references to Article are references to the Louisiana Civil Code.

the Boiler, whichever period is longer. Article 2534 provides the prescriptive period for an action for redhibition. *See* La. Civ. Code Art. 2534; *Cunard Line, Ltd. v. Datrex, Inc*., 926 So.2d 109 (La. App. 3rd Cir. 2006) ("[A]n action for redhibition against a seller prescribes in one year from the day the defect was discovered by the buyer, unless the seller did not know of the existence of a defect in the thing sold, in which case the action prescribes in four years from the day delivery of the thing was made to the buyer or one year from the day the defect was discovered by the buyer, whichever occurs first."). Under Article 2520, "a seller warrants the buyer against redhibitory defects, or vices, in the thing sold." La. Civ. Code Art. 2520. The existence of a redhibitory defect "gives a buyer the right to obtain rescission of the sale" or, if the defect does not render the item totally useless, "a reduction of the price." *Id*. "[R]edhibition applies only to contracts of sale and not to contracts to build." *Hebert v. McDaniel*, 479 So.2d 1029 (La. App. 3d Cir. 1985).

The Defendant counters that the Contract was not a contract for the sale of an item, but rather a contract to build or to work by the job. *See* La. Civ. Code Art. 2756 ("To build by a plot, or to work by the job, is to undertake a building or a work for a certain stipulated price."). The Defendant submits that the applicable prescription period for its claims under the Contract is found in Article 2762, which provides that a claim for "a building, which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, the architect or undertaker shall

bear the loss if the building falls to ruin in the course of ten years, if it be a stone or brick building, and of five years if it be built in wood or with frames filled with bricks." La. Civ. Code Art. 2762.

Alternatively, Article 3499 provides a prescription period of ten years for general personal actions. This period has been applied to claims for breach of a contract to work by the job. *See Morris & Dickson Co., Inc.*, 691 So.2d at 888 ("Actions for damages caused by the breach or negligent execution of construction or installation contracts, in which the principal obligation is one to do or not to do, prescribe in ten years. La. C.C. art. 3499."). Regardless of whether the proper prescriptive period for a contract to work by the job is the five-year prescriptive period found in Article 2762 or the ten-year period found in Article 3499, if the Court finds that the Contract is one to work by the job rather than one for the sale of the Boiler, the Defendant's claims have not prescribed.

A sales contract is "an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing built." La. Civ. Code Art. 2439. "To build by a plot, or to work by the job, is to undertake a building or a work for a certain stipulated price." La. Civ. Code Art. 2756. "Classifications of contracts have occasioned the courts some difficulty where the contract includes aspects of the obligation both to do and to give" and, [w]here they are inseparable, generally one of the obligations must be determined as fundamental and the rules thereunder will control." *Conmaco, Inc. v. Southern Ocean Corp.*, 581 So.2d 365, 369 (La. App. 4th Cir. 1991), *writ denied*, 586 So.2d

534 (La. 1991).

In determining whether the Contract is a contract to build, as opposed to a contract for the sale of goods, Louisiana courts generally consider "three major factors": 1) whether the "buyer" has some control over the specifications; 2) whether the negotiations over the terms of the contract take place prior to the time the item is built; and 3) whether the "seller" will provide the materials and furnish the skill and labor to build the item. *Conmaco*, 581 So.2d at 369 (La. App. 4th Cir. 1991) (citing *Duhon v. Three Friends Homebuilders Corp*., 396 So.2d 559 (La. App. 3d Cir. 1981); *see also Smith v. Arcadian Corp*., 657 So.2d 464 (La. App. 3d Cir. 1995). Additionally, courts apply a "value" test, which considers whether the cost of the materials or the cost for the labor and skills for the manufacture of the item "constitute 'the principal value of the contract.'" *Smith v. Arcadian Corp.*, 657 So.2d 464, 468 (La. App. 3d Cir. 1995); *Austin's of Monroe, Inc. v. Brown*, 691 So.2d 882 (La. App. 2d Cir. 1997) (contract was one for sale of computer equipment because cost of installation and training only accounted for 1/5 of the total contract price); *Morris & Dickson Co., Inc.*, 691 So.2d at 890 (holding that a contract was a contract to build because the object of the contract was not just the purchase of equipment, but was to have the equipment properly outfitted and situated in the proper environment; the contractor undertook the supervision of the installation of the equipment).

Under an analysis of the three *Duhon* factors, the Contract is a contract to build or work by the job. The undisputed facts show that the Defendant provided

the specifications for the Boiler to the Debtor, the Boiler did not exist at the time the Defendant and the Debtor negotiated the Contract, and the Debtor was obligated to provide the materials and to furnish the skill and labor to build the Boiler. The Contract provided that the Defendant relied on the Debtor's skill and judgment to ensure that the project was completed properly. The Defendant did not simply bargain to purchase a boiler, but relied on the Debtor's skill and judgment to ensure that the entire boiler system would perform in accordance with the Defendant's requirements. Having reviewed the evidence submitted by the parties, the Court is also persuaded that, under the "value test," the principal value of the Contract was the overall project of providing a boiler system, which incorporated design, engineering, procurement, installation, and testing services, rather than simply the purchase of the boiler itself.[3] For this reason, the Court concludes that the Defendant's claim had not prescribed prior to the time the Defendant filed its original complaint.

2. *Whether the Defendant's Claim for Damages is Foreclosed by Accord and Satisfaction*

The Debtor argues that the Defendant waived, through accord and

[3] In this regard, this case is distinguishable from *Conmaco, Inc. v. Southern Ocean Corp.*, 581 So.2d 365, 369 (La. App. 4th Cir. 1991), *writ denied*, 586 So.2d 534 (La. 1991), in which the court held that the contract was a sales contract because the seller purchased a piece of equipment from a third party and simply provided the equipment to the buyer. In *Conmaco*, unlike the Debtor, the seller apparently had no involvement with the project and acted solely as a distributor for the equipment manufacturer.

satisfaction, any claims under the Contract that it could have been asserted against the Debtor when it ended the relationship between the Defendant and the Debtor. The Defendant counters that no accord and satisfaction occurred because the parties have not satisfied Article 3071, which requires that a valid compromise be reduced into writing or recited in open court.[4]

Louisiana law recognizes that contractual damage claims may be compromised in accordance with the statutory requirements of Article 3071, and that such claims may be waived as a result of the common law doctrine of accord and satisfaction. *See Decuir v. Sam Broussard, Inc.*, 459 So.2d 1375 (La. App. 3d Cir. 1984) (holding that one party's agreement to accept new engine was neither compromise nor accord and satisfaction of that party's claims for breach of duty to repair). Under Article 3071, a compromise is "an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing." La. Civ. Code Art. 3071. Such an agreement must be "either reduced

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[4] *See* La. Civ. Code Art. 3071 ("A *transaction* or *compromise* is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent, in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing. This contract must be either reduced into writing or recited in open court and capable of being transcribed from the record of the proceeding. The agreement recited in open court confers upon each of them the right of judicially enforcing its performance, although its substance may thereafter be written in a more convenient form."), amended by 2007 La. Sess. Act 138 (H.B. 73) (June 25, 2007).

into writing or recited in open court and capable of being transcribed from the record of the proceeding." *Id*. The Debtor acknowledges that no compromise has occurred, as there is no agreement reduced to writing to reflect that the Defendant's claims have been settled. Instead, the Debtor argues that the course of conduct between the Defendant and the Debtor constitutes an accord and satisfaction.

Accord and satisfaction is a common law doctrine that affords an affirmative defense applicable "when there is an unliquidated or disputed claim between the debtor and creditor, a tender by the debtor for less than the sum claimed, and acceptance of the tender by negotiation of the check." *Precision Dry Wall and Painting, Inc. v. Woodrow Wilson Constr. Co., Inc*., 843 So.2d 1286, 1288 (La. App. 3d Cir. 2003); *see also Fischbach and Moore, Inc. v. Cajun Elec. Power Co-op, Inc*., 799 F.2d 194 (5th Cir. 1986) ("The common law doctrine of accord and satisfaction embraces the discharge of an obligation by a debtor rendering, and a creditor accepting, performance different from that the creditor claims due."). An accord and satisfaction is itself a contract and is subject to the rules governing contracts. *See Fischbach and Moore, Inc.,* 799 F.2d at 197. To find that an accord and satisfaction has occurred, the Court must find the existence of mutual consent to enter the contract. *See Fireman's Fund Insurance Co. v. Goodman*, 2006 WL 3234288, *4 (E.D. La. Nov. 1, 2006); *Precision Dry Wall and Painting, Inc.,* 843 So.2d at 1289; *United States v. Bloom*, 112 F.3d 200, 206 (5th Cir. 1997). The words and actions of the parties must be scrutinized to

"ascertain whether there was sufficient offer and acceptance." *Fischbach and Moore, Inc.,* 799 F.2d at 197; *Castay, Inc. v. Monsanto Co*., 2000 WL 341030 (E.D. La. Mar. 30, 2000). A party cannot be found to have accepted an offer of accord and satisfaction unless the party was "fully aware" that tender is offered as a "final settlement." *Spalitta v. Hartford Fire Ins. Co.*, 428 So.2d 824 (La. App. 5th Cir. 1983). The burden of establishing the required elements is on the party seeking to establish the existence of an accord and satisfaction. *See Sallie Mae, Inc. v. James A. Harry, Inc.*, 2006 WL 220052 (E.D. La. Jan. 30, 2006).

The Debtor asserts that all three elements of accord and satisfaction are present: 1) the Defendant and the Debtor had a dispute over the performance of the Contract; 2) the Debtor tendered the Defendant's right to keep the retainage; and 3) Mr. Schmitt, on behalf of the Defendant, agreed to accept the retainage in full satisfaction of its claims for breach of contract and consequential damages. However, in the Court's view, the evidence does not appear to support the Debtor's argument that the Defendant's breach of contract claim has been foreclosed by accord and satisfaction.

The Debtor asserts that the conclusively established facts support a finding that the Defendant agreed to end the contractual relationship between it and the Debtor and that it kept the retainage in exchange for waiving its right to sue the Debtor for breach of contract. The Court disagrees. The fact that the Defendant chose to end the contractual relationship does not automatically require a finding that the Defendant intended to enter an accord and satisfaction.

Under the Contract, the Defendant had the right to terminate the Contract if the Debtor, in the Defendant's opinion, fail[ed] at any time to perform work in a good and workmanlike manner, or fail[ed] to prosecute the [Boiler] efficiently or diligently . . . or otherwise . . . breach[ed] any provision" of the Contract. In that event, the Defendant had the right "(without prejudice to any other right or remedy) to terminate the employment of [the Debtor] and to take possession and control of any or all materials, subcontracts, tools and appliances, or Work then in progress and finish the Work by whatever method [the Defendant] may deem expedient." The Contract specified that the Debtor would not be entitled to receive any further payment until the Boiler was finished and that, if after completion of the Boiler, the retainage amount exceeded the cost of finishing the Boiler, the Defendant would pay the excess to the Debtor, but, it also specified that, if the cost of completion exceeded the retainage, the Debtor would pay the difference to the Defendant.

The Defendant's actions in this case are consistent with its exercise of the termination provision of the Contract. It is undisputed that the Boiler never met the specifications required by the Contract. The deposition testimony of Schmitt indicates that the Defendant determined, in its opinion, after having its engineers review the Debtor's proposal for repairs, that the Debtor had failed to produce a boiler system that met the specifications. Deposition of Edward Schmitt, April 3, 2001 at 44. Assuming the Defendant exercised its right to terminate the Contract, the termination provision specifically preserved the Defendant's right to any other

remedies, such as a suit for breach of contract and damages arising from that breach.

It is not clear that the Defendant had any intent to waive its right to sue the Debtor for breach of contract. Schmitt testified that, although he did not think future litigation against the Debtor was "on [his] mind" at the time he wrote the letter to the Debtor in October 1995, he could not recall whether he intended to sue the Debtor. Deposition of Edward Schmitt, April 3, 2001 at 45-46. The fact that Schmitt was not actively planning to sue the Debtor does not necessitate a finding that he intended to waive the Defendant's right to do so at a later time. Schmitt testified that he was not the individual who would have made the decision to initiate a law suit against the Debtor. *Id*. This fact would explain why Schmitt may not have had a present intent to sue the Debtor at the time he terminated the parties' relationship.

That being said, Schmitt's testimony could be interpreted to support the Debtor's assertion that the Defendant intended an accord and satisfaction. Schmitt testified that the intent of his October 1995 letter was that the parties' relationship would end, the Defendant would keep the retainage, and the Defendant would have no further involvement with the Debtor, and the Debtor would have no further involvement with the Defendant. *Id*. at 44.

The evidence is also not clear as to whether the Debtor had even made an offer to the Defendant to settle the matter through accord and satisfaction. According to Brady's deposition testimony, in April 1995, Brady drafted a letter

from the Defendant to the Debtor and mailed it to Bill Washington, an employee of the Defendant. It appears that Brady's intention was that Schmitt would finalize the letter and send it to the Debtor as an offer to settle the relationship between the parties. The letter, if Schmitt had finalized and sent it, would have proposed that the matter could be resolved by either allowing the Debtor to implement the proposed modifications to the Boiler or by the Defendant possibly accepting the Boiler "as is" and keeping the retainage "as compensation for the reduced performance." Deposition of Jack Brady, February 17, 1999 at 204-08. It does not appear that the draft letter was a specific offer of a settlement made either by the Debtor or by the Defendant.

Finally, as the Defendant points out, the retainage, which the Debtor asserts was the consideration offered by the Debtor in exchange for the accord and satisfaction, was never the property of the Debtor to give. Under the Contract, the Debtor had not yet earned the retainage. It is undisputed that the Defendant never received written notice that the Boiler was ready for final inspection, that the Defendant never made a final inspection, that the Boiler was never acceptable to the Defendant, and the Defendant never accepted the Boiler. During his deposition, Schmitt testified that, at the time he wrote the letter to Brady, he did not believe that the Defendant owed the Debtor any money. If the Defendant believed that the retainage had not been earned, the Defendant could not have seen its failure to pay the funds as accepting anything in exchange from the Debtor, as the Debtor, in the Defendant's mind, had nothing to give up.

The testimony of Schmitt and Brady suggests that neither the Debtor nor the Defendant had any intent to enter an accord and satisfaction. To the contrary, the evidence is more consistent with the conclusion that the Defendant was simply exercising its right to terminate the Contract and intended to preserve its right to pursue any remedies to which it would have been entitled. Accordingly, the Debtor has not demonstrated the existence of mutual consent or that the Defendant was "fully aware" that the Debtor was tendering anything as a "final settlement." Accordingly, the Court cannot conclude that the Defendant waived its right to proceed on its breach of contract claim. Nonetheless, because there is some evidence to support the Debtor's position, the Court will reserve final ruling as to this defense.

3. *Whether the Debtor is Liable Under the Contract For the Defendant's Damages*

The Debtor asserts that, assuming the Defendant can prove that it suffered damages arising from the Boiler's failure to perform as intended, under the Contract, the Defendant is not liable for those damages because they arose from the conduct of NBC, rather than the Debtor. The Debtor points to language in the Debtor's Terms and Conditions, which states that the Debtor is not providing any warranty and is, essentially, not liable for the work of its subcontractor. In response, the Defendant looks to the terms of the Contract, which, in Section 6, provides that the Debtor guaranteed that the "Work will be of good quality, free

from faults or defects, fit for the purpose intended and will meet the specifications and performance guarantees set forth herein." The Contract also provided that, in addition to "any other warranty or remedies available . . . at law or in equity," the Debtor warrants the "Work against defects of any kind, including defects in design, workmanship and material for a period of one year from the date of acceptance." Additionally, the Defendant relies on Section 10 of the Contract, in which the Debtor agreed to be "fully responsible to [the Defendant] for the acts and omissions of its subcontractors and of persons directly or indirectly employed by them."

Under Louisiana law, "for a determination of whether such damages are due we are bound by the fundamental rules of contract interpretation embodied in [Articles 2045 through 2057]." *Magnolia Const. Co., LLC v. Parish of St. Charles*, 947 So.2d 747 (La. App. 5th Cir. 2006). "Those rules require the court to determine the common intent of the parties." *Id.* (citing La. Civ. Code Art. 2045). If the words of the contract are "clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent." *Id*. (citing La. Civ. Code. Art. 2046). "Courts may not disregard a clear and explicit clause of a contract." *Industrial Roofing & Sheet Metal Works, Inc. v. J.C. Dellinger*, 751 So.2d 928 (La. App. 2d Cir. 1999) (citing *Amend v. McCabe,* 664 So.2d 1183, 1187 (La.1995); *Maloney v. Oak Builders, Inc.,* 256 La. 85, 235 So.2d 386 (1970)). "[W]hen there is any doubt about the meaning of an agreement, the court must ascertain the common intention of the parties, rather

than adhering to the literal sense of the terms," and, "[i]f this intent cannot be adequately discerned from the contract itself, the court may then consider evidence as to the facts and circumstances surrounding the parties at the time the contract was made." *Id*. If the contract is ambiguous, it should be " viewed and interpreted as a whole, and all ambiguities construed against the party who prepared it." *Id*.

The Contract is not ambiguous as to the issues raised by the Debtor, and the Defendant's interpretation of the Contract would not lead to an absurd consequence. Section 6 of the Contract provides that the Debtor is liable to the Defendant for the actions of its subcontractor. Although the Debtor's standard terms and conditions of sale, which appear in the proposals submitted by the Debtor, provide that the Debtor is not responsible for the actions of any subcontractor, Section 19 of the Contract states that "[t]he terms and provisions of this Agreement constitute the entire agreement between the parties and supersede all previous communications, negotiations, proposals, representations, conditions, warranties or agreements, either oral or written, between the parties hereto with respect to the subject matter hereof." That section further provides that "[a]ny proposal by Contractor referred to in this Agreement is solely referenced as a matter of convenience to Contractor and any terms and conditions of such proposal are expressly prohibited from becoming part of this Agreement." Although the Contract incorporates the Debtor's proposals for the purpose of outlining the specifications for the project, the express terms of the Contract, to the extent that they conflict with the terms in the proposal, represent the intent of

the parties and those provisions control over the terms included in the proposal.

The Contract clearly and unambiguously states that the Debtor guaranteed that the work performed on this project would meet the Defendant's performance requirements and that the Debtor agreed to be liable to the Defendant for the work performed by its subcontractors. The Contract also clearly provides that terms of the Debtor's proposal would not be incorporated into the Contract. This is supported by the statement in Section 6 of the Contract that the Defendant retained all legal and equitable remedies available. Accordingly, the Court rejects the Debtor's argument that the language contained in the Debtor's standard terms and conditions absolves the Debtor from liability for the failure of the Boiler to meet the required specifications.

4. *Whether the Defendant Failed to Mitigate Its Damages*

The Debtor contends that the Defendant is not entitled to damages arising from the Boiler's failure to perform because the Defendant failed to mitigate those damages by adopting and implementing the Debtor's recommendations for repairing the Boiler. The Defendant submits that it gave the Debtor a more than reasonable opportunity to repair the Boiler and to bring it into conformity with the specifications. Accordingly, the Defendant argues that it did all that it was obligated to do under the Contract and was entitled to end the contractual relationship with the Debtor and undertake its own attempts to make the Boiler fit its needs.

The duty to mitigate damages exists in both contract and tort law. *See Merlin v. Fuselier Const., Inc*., 789 So.2d 710 (La. App. 5th Cir. 2001). "In mitigating damages, an injured party should exercise the degree of care such as would be taken by an ordinarily prudent individual under the same or similar circumstances." *Id*. at 716. The "plaintiff only has a duty to take reasonable steps to mitigate damages." *Kostmayer Constr., Inc. v. Sewerage & Water Board of New Orleans*, 943 So.2d 1240 (La. App. 4th Cir. 2006) (citing *Aisole v. Dean*, 574 So.2d 1248 (La. 1991)); *Hebert v. McDaniel*, 479 So.2d 1029 (La. App. 3d Cir. 1985) (homeowner took reasonable steps to mitigate damages by repeatedly asking contractor to repair roof whenever it rained and was justified in refusing to allow the contractor to replace the roof or to apply a sealer).

The parties disagree over whether the adoption of the Debtor's recommendations for repairing the Boiler was a reasonable step that the Defendant should have taken in order to mitigate its damages. The Debtor asserts that the Defendant did not give the Debtor a reasonable opportunity to repair the Boiler and that, if the Defendant had implemented the recommendations of the Debtor's boiler expert, the Boiler would have performed as intended. The deposition testimony of Mr. Brady supports the conclusion that the Debtor was ready, willing, and able, with all parts required having previously been fabricated, to implement the recommendations of its boiler expert and that these solutions would have fixed the problems. The Defendant submits that it gave the Debtor numerous chances to fix the problems and, because it did not believe the Debtor's

recommendations would completely cure the problem, properly determined that the most economical way to proceed was to alter the fuel stream.

According to Schmitt's deposition testimony, the Defendant opted not to implement the recommendations because it did not believe that they would cure the defect that was most important to the Defendant – the Boiler not being able to handle all of the waste that the Defendant wanted burned. Deposition of Edward Schmitt, April 3, 2001 at 37-38. The deposition testimony also demonstrates a conflict in the evidence as to why the Defendant refused to try the recommendations. Schmitt stated that one of the Defendant's reasons for not adopting the Debtor's suggestions was that their implementation would have required the Defendant to shut down the Boiler. Deposition of Edward Schmitt, April 3, 2001 at 41. The testimony of Brady and Graves, however, indicates that the Defendant could have permitted the Debtor to make its repairs during planned down time, but that it never notified the Debtor of the planned down time and never gave the Debtor an opportunity to install the fabricated parts. *See* Deposition of Jack Brady, February 17, 1999 at 101-02; 105-06; 197-98; Deposition of Ken Graves, February 17, 1999 at 170-72.

The Court is inclined to agree with the Defendant that the Debtor was afforded substantial opportunities to make repairs to the Boiler and that the Defendant was justified in deciding to terminate its relationship with the Debtor after nearly five years. However, the Court cannot determine from the evidence before it whether the Defendant's decision not to implement the Debtor's

recommendations was reasonable. Relevant to this determination is whether the Defendant had legitimate reasons for believing that the costs, including plant down-time, associated with implementing the Debtor's regulations would outweigh the benefits of doing so. The parties have presented conflicting evidence on these points and, at the summary judgment stage, the Court is not permitted to weigh that evidence, as would be required for the Court to determine the likelihood of success of the recommendations and whether the failure to implement the recommendations was reasonable. Accordingly, the Court must conclude that the Debtor has identified a genuine issue of material fact, which the Court must resolve before it can conclude that the Debtor cannot maintain a defense of failure to mitigate damages.[5] Summary judgment in favor of the Debtor, is not warranted on any of the grounds advocated by the Debtor.

CONCLUSION

For the reasons stated above, the Cross Motions for Summary Judgment, filed by the Debtor and the Defendant, are hereby **DENIED**.

[5] The Court will also resolve at trial the issue of whether the Debtor is entitled to any damages for breach of the Contract arising from the Defendant's failure to permit the Debtor a further opportunity to cure the defects.