IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
(Gadola, P.J., and Jansen and O'Brien, JJ.)

MSSC, Inc.,	MSC No. 163523
Plaintiff-Appellee,	COA No. 354533
v.	Trial Ct. No. 2020-179620-CB Oakland County Circuit Court
AirBoss Flexible Products Co.,	**Filed under AO 2019-6**
Defendant-Appellant.	

Amicus Curiae Brief of Aisin World Corp. of America, Inc.; American Axle & Manufacturing, Inc.; Bollhoff, Inc.; Dayco Products LLC; E&E Manufacturing Company, Inc.; Fisher & Company, Inc.; MacLean-Fogg Component Solutions, L.L.C.; Martinrea International US Inc.; North American Stamping Group Holdings, LLC; Purem Novi Inc.; Safety Socket LLC; Semblex Corporation; Trelleborg Corporation; and Visteon Corporation

Jason D. Killips (P67883)
Brooks Wilkins Sharkey & Turco PLLC
401 S. Old Woodward Avenue, Suite 400
Birmingham, Michigan 48009
248.971.1800 / killips@bwst-law.com

Counsel for the Supplier Amici

Contents

AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

RULES

Question Presented

A contract for the sale of goods is "not enforceable . . . beyond the quantity of goods shown in the writing." MCL 440.2201(1). The quantity may be a fixed number or may be measured "by the output of the seller or the requirements of the buyer." MCL 440.2306(1). Is the inclusion of the word "blanket" in the contract, without more, enough to state a quantity measured by the requirements of the buyer?

The trial court answered:	"Yes."
The Court of Appeals answered:	"Yes."
Appellant AirBoss answers:	"No."
Appellee MSSC answers:	"Yes."
The Supplier Amici[1] answer:	"No."

[1] Under MCR 7.312(H)(5), the Supplier Amici, as defined below, confirm that no counsel for any party authored this brief in whole or in part and that no party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the Supplier Amici made any such monetary contribution.

Introduction and Summary of the Argument

"How many parts did you buy?"

Contracts for the sale of goods are enforceable only as far as they answer this question by stating a quantity. Some contracts answer the question completely and unambiguously, such as with "10 parts" or "all I needed." Others state incomplete answers, like "all" or "100%," which provide an amount but need more detail to be a complete answer. ("All of what?" is a logical follow-up.) Yet others do not state any amount and so aren't enforceable until the buyer later places an order for a fixed quantity of goods; the contract is then enforceable for that fixed quantity.

This last contract structure, in which the parties agree on contract provisions that will govern a series of transactions, is often called a "blanket" or "framework" contract. This is consistent with the definition of "blanket order" in *Black's Law Dictionary* (10th ed): "an order negotiated by a customer with a supplier for multiple purchases and deliveries of specified goods over a stated period, as an alternative to placing a separate order for each transaction." Such a structure is often called a "blanket" or "framework" because it covers or supports a series of purchases. According to the courts below, the term "blanket" also creates an enforceable requirements contract. That conclusion is profoundly flawed.

A contract for the sale of goods is enforceable only up to the quantity stated in the writing. MCL 440.2201(1). And a requirements contract is one for the sale of goods that, under § 2-306 of the Uniform Commercial Code, "measures the quantity by . . . the requirements of the buyer." MCL 440.2306(1). So if a contract states that the quantity is "100% of buyer's requirements for the parts," it is an enforceable requirements contract under which the buyer must order all the parts it needs from the seller and the seller must deliver all the parts so ordered. Buyers then typically use regularly issued documents called releases to tell sellers what specific quantities are needed on specific days.

But if a contract is a "blanket" contract without any quantity term, then the contract documents (usually a purchase order and an incorporated set of terms and conditions) form a blanket or framework that will cover any transactions between the parties if and when they decide to engage in any. A buyer that wants parts would then issue a release to order a specific quantity of parts from the seller, and if the seller accepts the release, a contract is formed for that specific quantity

of parts. That contract includes the detailed provisions in the blanket contract documents without the parties having to negotiate them each time. Regardless of the buyer's requirements, it is free to issue the releases to the seller or to another supplier, and the seller is free to accept or reject each offered release.

In this case, the seller believes that the contract is enforceable on only a release-by-release basis, and so it stopped accepting new releases offered by the buyer. The buyer wants to force the seller to continue deliveries, so it argues that the contract is one for its requirements. If the buyer is right, the seller cannot reject releases but must deliver all the parts the buyer needs. Neither the purchase order nor the terms contain any explicit quantity term, so the buyer argues that the purchase order's use of the words "PO Type: BLANKET" and "blanket order" are enough to create an enforceable requirements contract. The courts below both agreed with the buyer's position. But that position is wrong, and the Supplier Amici urge this Court to reverse.

The Supplier Amici care very much about how contracts for the sale of goods are structured, interpreted, and enforced. They are all suppliers in the automotive supply chain or similar manufacturing industries and so are parties to many contracts governed by Michigan's Uniform Commercial Code. They routinely evaluate contracts, weighing their risks and benefits, to make decisions that will affect their businesses for years to come.

The Supplier Amici seek the reversal of the decision below, as well as two earlier Court of Appeals cases that the decision below relies on—*Cadillac Rubber* and *Great Northern Packaging*. In *Cadillac Rubber*, the Court of Appeals held that a provision requiring the buyer to "purchase no less than one piece or unit of each of the Supplies and no more than one hundred percent (100%) of Buyer's requirements for the Supplies" obligated the seller to deliver the buyer's requirements even though, by the plain meaning of that language, the buyer had to buy no more than one unit. And in *Great Northern Packaging*, the Court of Appeals held that "blanket" is a quantity akin to "all," even though "blanket" does nothing to explain how many goods a buyer must buy and a seller must sell.

Cadillac Rubber, *Great Northern Packaging*, and the decision below all thwart the parties' intentions by imposing requirements contracts when the plain language of the contracts binds the parties on only a release-by-release basis. This contract reformation has dramatic consequences for manufacturers that, like the Supplier Amici, often form contracts for programs that last for years, even

decades. If the parties chose to form a contract on a release-by-release basis, with all the risks and benefits of such a structure, reforming it years later into a requirements contract upends that risk–benefit analysis and leaves the parties with obligations they never intended to take on. The risk of such reformation destroys the predictability the Supplier Amici and similar companies depend on to run their businesses.

The Supplier Amici thus urge this Court to:

a. hold that the only types of quantities enforceable under the UCC are those stated as a number or measured by the buyer's requirements or the seller's output;

b. hold that "blanket" is not an enforceable quantity for purposes of the UCC, and that neither is any similar word or phrase that does not refer to the buyer's requirements or the seller's output; and

c. at least partially reverse the decision below and partially overrule the Court of Appeals' decisions in *Cadillac Rubber* and *Great Northern Packaging* because they conflict with these principles.

STATEMENT OF INTEREST OF AMICI CURIAE

The Supplier Amici—Aisin World Corp. of America, Inc.; American Axle & Manufacturing, Inc.; Bollhoff, Inc.; Dayco Products LLC; E&E Manufacturing Company, Inc.; Fisher & Company, Inc.; MacLean-Fogg Component Solutions, L.L.C.; Martinrea International US Inc.; North American Stamping Group Holdings, LLC; Purem Novi Inc.; Safety Socket LLC; Semblex Corporation; Trelleborg Corporation; and Visteon Corporation—are all manufacturers in the automotive or aerospace supply chains. None of them are vehicle manufacturers (known in the industry as original equipment manufacturers or OEMs) or end customers. Instead, they are suppliers in the middle of the supply chain, which refers to the process through which raw materials are transformed into finished automobiles.

The automotive supply chain consists of hundreds, if not thousands, of companies throughout the world. To efficiently manage the supply chain, automotive companies have established a tiered system of supply. It generally works like this: A raw-material supplier (tier-3) ships raw material, such as steel, to

an automotive part supplier (tier 2), which transforms the raw material into an automotive part. The tier-2 supplier then ships the part to a tier-1 supplier that integrates the part, along with parts from other tier-2 suppliers, into an automotive assembly or system. The tier-1 supplier then ships finished assemblies or systems to the OEMs (Ford Motor Company, Stellantis, General Motors, etc.). Because of their place in the middle of this tiered structure, the Supplier Amici are both buyers (from lower-tiered suppliers) and sellers (to higher-tiered suppliers or OEMs) under contracts for the sale of goods.

This case involves whether, and how far, contracts for the sale of goods are enforceable in Michigan. At issue is what words state a quantity that is measured by the requirements of the buyer, thus forming a requirements contract enforceable under §§ 2-201(1) and 2-306(1) of Michigan's Uniform Commercial Code, codified at MCL 440.2201(1) and MCL 440.2306(1). The Supplier Amici are parties to thousands of such contracts. And they are regularly evaluating new contracts that, if formed, will affect their businesses for years to come. The Supplier Amici must thus be able to trust that the contract terms they evaluate and base business decisions on today will be interpreted in the same way in a few years when a dispute breaks out.

The decisions below—and the Court of Appeals' similar decisions in *Cadillac Rubber* and *Great Northern Packaging*—undermine that trust by enforcing as requirements contracts terms that say nothing about measuring the quantity by the buyer's requirements. In effect, these decisions reform flexible short-term contracts into inflexible long-term contracts, upending the risks and benefits the parties evaluated when they formed the contracts. These decisions are wrong and harm the Supplier Amici's ability to evaluate potential commercial agreements, so the Supplier Amici urge this Court to overturn them.

Background

1. Contracting in the automotive supply chain and similar industries.

The automotive supply chain runs on contracts for the sale of goods. And because so much of that supply chain runs through Michigan, most of those contracts are governed by Michigan's Uniform Commercial Code. Manufacturing industries like the automotive supply chain are heavily affected by the Michigan UCC, either because the contracts are governed by Michigan law or because the

courts of other states so often look to Michigan decisions interpreting the UCC for persuasive guidance.

Contracts in the automotive supply chain often involve three primary types of documents. The first is a *purchase order*. (Each of these documents is sometimes called something else; the terms used here are simply the most common.) The purchase order here is typical. PO (App'x 42a–48a). The purchase order is identified by a specific number, lists the date it was issued, and often notes whether the document is the original purchase order or one that has been revised. *Id.*, p 1 (App'x 42a). It then identifies the buyer, seller, and delivery location. *Id.* And it often states the payment terms and delivery term. *Id.* The purchase order then identifies the specific part or parts being ordered with pricing for each. *Id.*, pp 4–7 (App'x 45a–48a). The purchase order also usually incorporates the buyer's terms and conditions of purchase. *Id.*, p 7 (App'x 48a) ("Acceptance of the offer represented by this order is expressly limited to MSSC Terms and Conditions.").

The second type of document often involved in automotive contracts is the *terms and conditions*. Such terms vary widely, but at a high level, the terms involved here are also typical. Terms (App'x 55a–62a). Terms usually address topics like contract formation, warranty, quality, price changes, indemnification, and termination. Most terms are not intended to form a binding contract on their own (because, for example, they don't identify any specific goods to be purchased), but are incorporated by reference in each purchase order so that the resulting contracts may be thorough while the purchase orders remain relatively short documents. See PO, p 7 (App'x 48a); Terms, p 1 (App'x 55a).

The final type of document relevant here is the *release*. Buyers issue releases regularly—often weekly, and sometimes daily—to communicate specific quantities and delivery dates to the seller. A typical release will provide firm quantities for the near term (say, on specific days for the next two weeks) and nonbinding forecasts for the longer term (often as weekly or monthly estimates).

The parties can shape how the purchase order, terms, and releases work together and what sort of contract they form based on the context of each specific purchase. If the parties are dealing with a fixed volume of parts—common for prototype parts or tools—they will often state the quantity in the purchase order itself and not use releases. Such contracts are commonly called *spot buys*.

For production parts, volumes fluctuate as the OEMs respond to market conditions, so the parties often negotiate *requirements contracts* under § 2-306(1) of the UCC. MCL 440.2306(1) (a requirements contract "measures the quantity by . . . the requirements of the buyer"). Purchase orders for such contracts often list the quantity as "100% of buyers requirements" or something similar and use releases to communicate the buyer's requirements to the seller as they become known. The Court of Appeals has described a requirements contract as one "in which the seller promises to supply all the specific goods or services which the buyer may need during a certain period at an agreed price in exchange for the promise of the buyer to obtain his required goods or services exclusively from the seller." *Acemco, Inc v Olympic Steel Lafayette, Inc*, 2005 WL 2810716, at *8 (Mich App, 2005) (quoting *Propane Industrial, Inc v General Motors Corp*, 429 F Supp 214, 218 (WD Mo, 1977)). In the automotive supply chain, it is common for requirements contracts to last for the life of the vehicle program for which the parts are used.

Finally, automotive suppliers and other manufacturers sometimes contract on a release-by-release basis. This happens when the parties want to use purchase orders and terms to provide the detailed "blanket" or "framework" contract covering any orders they place, but want to issue and accept orders as they see fit. See, generally, *Advanced Plastics Corp v White Consol Indus, Inc*, 47 F3d 1167, 1995 WL 19379, at *2 (CA 6, 1995) ("the parties intended for White Consolidated to purchase quantities of parts only according to its releases, and not according to its requirements"). In these contracts, neither the purchase order nor the terms state any quantity; a quantity is first stated in writing when the buyer issues a release, which forms a contract for the stated quantity if the seller accepts it. These release-by-release contracts trade the certainty of requirements contracts for flexibility; the buyer may order from the seller or anyone else, and the seller is free to not accept any given release. In fact, release-by-release contracts share much in common with spot buys, except that parties to release-by-release contracts may issue and accept releases for years because it benefits them to do so.

2. The contract provisions here.

This case presents a common question in supply-chain disputes: Is the contract here enforceable as a requirements contract or on only a release-by-release basis?

The purchase order does not contain an explicit quantity term. PO (App'x 42a–48a). It identifies the "PO Type:" as "BLANKET." *Id.*, p 1 (App'x 42a). And it goes on to explain that it means "blanket" to refer to the contract's duration:

> If this Purchase Order is identified as a "blanket" order, this order is valid and binding on seller for the lifetime of the program or until terminated pursuant to MSSC's Terms and Conditions. A "blanket" order may be re-issued annually, but that does not change its binding effect for the lifetime of the program or until terminated. Annual volume is an estimate based on the forecasts of MSSC's customers and cannot be guaranteed. [*Id.*, p 2 (App'x 43a).]

The purchase order also incorporates the buyer's terms. *Id.*, p 7 (App'x 48a). The terms explain how, in a blanket order, the buyer will communicate quantities to the seller:

> 2. BLANKET ORDERS: If this order is identified as a "blanket order", Buyer shall issue a "Vendor Release and Shipping Schedule" to Seller for specific part revisions, quantities and delivery dates for Products. Buyer shall have the right to cancel, adjust or reschedule the quantities of Products shown in such "Vendor Release and Shipping Schedule," except that it may not cancel, adjust or reschedule the Products shown as "Firm Obligations" on such "Vendor Release and Shipping Schedule." [Terms § 2 (App'x 55a).]

The trial court and the Court of Appeals both held that this use of "blanket" stated a quantity. Ruling on summary disposition, the trial court found "that the documents, when considered together establish the existence of an enforceable life of the program requirements contract as a matter of law." Trial Ct Op, p 10 (App'x 19a). Similarly, the Court of Appeals wrote: "Taken together, these provisions demonstrate that 'blanket' was intended to be a quantity term or a requirements contract." MCOA Op, p 5 (App'x 5a). This Court then granted the seller's application for leave to appeal, ordering the parties to "include among the issues to be briefed whether the purchase order between the parties, together with the relevant written terms and conditions, satisfied the requirements of the Uniform Commercial Code's statute of frauds, MCL 440.2201(1)." MSC Or, Jan 26, 2022.

Legal Standard

This Court reviews summary-disposition rulings, as well as questions of contract and statutory interpretation, de novo. *DeRuiter v Twp of Byron*, 505 Mich 130, 139 (2020); *Badeen v PAR, Inc*, 496 Mich 75, 81 (2014); *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463 (2003).

Argument

1. The contract here is not a requirements contract; instead, it is enforceable on only a release-by-release basis.

a. Contracts for the sale of goods must state a quantity to be enforceable under the Uniform Commercial Code, and are enforceable for only that written quantity.

In Michigan, contracts for the sale of goods are governed by the Uniform Commercial Code. MCL 440.2102. Section 2-201 of the UCC contains the statute of frauds and other formal requirements, and provides in relevant part:

> Except as otherwise provided in this section, a contract for the sale of goods for the price of $1,000.00 or more is not enforceable by way of action or defense unless there is a writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his or her authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in the writing. [MCL 440.2201(1).]

This section does two things. In the first sentence, it mandates what a writing must show for a court to conclude that a contract exists. *Id.* In the second sentence, § 2-201(1) limits how far a court may enforce the contract—not "beyond the quantity of goods shown in the writing." *Id.* A writing thus satisfies § 2-201(1) if it shows that a contract for the sale of goods has been made and specifies a quantity. *Lorenz Supply Co v American Standard, Inc*, 419 Mich 610, 614 (1984).

The comments to § 2-201 reinforce that the quantity is the only essential term in a contract for the sale of goods: "The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated." MCL 440.2201 cmt 1; see also *In re Estate of Frost*, 130 Mich App 556, 559 (1983) ("The only term which must appear in the agreement is the quantity term."). The lack of a quantity term "does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract." MCL 440.2201 cmt 4. So, for example, a contract might still serve as a defense to an action for trespass even if a court cannot enforce it to compel a seller to deliver goods. *Id.*

b. Courts apply traditional rules of interpretation when construing quantities in contracts for the sale of goods.

To determine whether a written contract states a quantity, courts follow the same rules as when interpreting contracts generally. Unless the contract is ambiguous or internally inconsistent, its "interpretation begins and ends with the actual words" written. *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496 (2001). The main purpose of contract interpretation "is to give effect to the parties' intention at the time they entered into the contract." *Miller–Davis Co v Ahrens Const, Inc*, 495 Mich 161, 174 (2014). This is done by examining "the language of the contract according to its plain and ordinary meaning." *Id.* Unambiguous contract language must be interpreted and enforced as written. *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507 (2016).

A contract is not ambiguous simply because it doesn't define the word in question. *Henderson v State Farm Fire and Cas Co*, 460 Mich 348, 354 (1999). Nor is it ambiguous just because the parties disagree about its interpretation. *Farm Bureau Mut Ins Co of Mich v Nikkel*, 460 Mich 558, 567 (1999). Instead, a contract is ambiguous only when its provisions are capable of conflicting interpretations. *Id.* at 567.

In sum, a court's duty when interpreting a contract—and here, a contractual quantity—is to determine what the parties meant *when they wrote the contract*, not what they would like the contract to mean years later when circumstances have changed. This meaning is determined based on the plain and ordinary meaning of the terms used. A contract is ambiguous only if its plain and ordinary meaning lends itself to conflicting interpretations. And if the contract is unambiguous, it must be enforced according to is plain and ordinary meaning.

c. Enforceable contracts for the sale of goods may state quantities only as numbers or as measured by the seller's output or the buyer's requirements; nothing else satisfies § 2-201 of the UCC.

The two sentences of § 2-201(1) of the UCC mean that a court might find that a contract exists (under the first sentence) but is enforceable on only a limited basis or even not at all (under the second sentence). MCL 440.2201(1); see also MCL 440.2201 cmt 4 ("Failure to satisfy the requirements of this section does not render the contract void for all purposes, but merely prevents it from being judicially enforced in favor of a party to the contract."). How must a contract state a quantity, not just to show that a contract exists, but to be judicially enforceable?

A quantity is "the amount of something measurable; the ascertainable number of countable things." *Black's Law Dictionary* (10th ed). There are three ways of stating a quantity in a contract for the sale of goods. The simplest way is with a number—"10 parts." Or a contract may use a term that measures the quantity "by the output of the seller or the requirements of the buyer . . . ." MCL 440.2306(1). An output contract might state the quantity as "all wood sawable," while a requirements contract might say that "the quantity is for Purchaser's requirements." *Frost Estate*, 130 Mich App 556, 558 (1983) (output example); *Dayco Prod, LLC v Thistle Molded Grp, LLC*, 2019 WL 423523, at *1 (ED Mich, 2019) (requirements example).

If a contract doesn't state a quantity, parol evidence may not be admitted to add one. *Frost Estate*, 130 Mich App at 559. But if a quantity is stated, parol evidence is admissible to explain or supplement that quantity. *Id.* at 560. The Court of Appeals' decision in *Frost Estate* provides a good example of this. A contract stated that it was for "all wood sawable." *Id.* at 558. This quantity was ambiguous because it didn't identify the parcel of land from which "all wood sawable" would be taken. *Id.* at 561. The Court of Appeals thus held that "all" "referred to a quantity and was sufficient to meet the requirements of" § 2-201, and that parol evidence should be considered to determine the relevant parcel of land. *Id.* at 565.

Frost Estate relied on the reasoning in *Port City Construction Co, Inc v Henderson*, 48 Ala App 639 (1972), which provides another good example of an ambiguous yet enforceable quantity term. *Frost Estate*, 130 Mich App at 560. *Port City* involved a quantity of "all concrete for slab." 48 Ala App at 641. The *Port City* court held that this statement of quantity satisfied § 2-201 because, through parol

evidence, "[t]he slab referred to was capable of being identified with reasonable certainty as was the location and dimensions." *Id.* at 644.

In contrast, a quantity is not enforceable when it is determined only by the whim of a party. This is perhaps best demonstrated in the oft-cited case *Advanced Plastics Corp v White Consol Indus, Inc*, 828 F Supp 484 (ED Mich, 1993), aff'd, 47 F3d 1167, 1995 WL 19379 (CA 6, 1995). The case involved "blanket purchase orders" that were explained in the contract as follows:

> Seller agrees to furnish Buyer's requirements for the goods or services covered by this Purchase Order to the extent of and in accordance with the delivery schedule set forth therein, or, if no such schedule is set forth, then pursuant to Buyer's written instructions . . . . [*Advanced Plastics (ED Mich)*, 828 F Supp at 486.]

The contracts thus said that they were for "Buyer's requirements," but then limited that "to the extent of and in accordance with" releases. *Id.* The parties operated under these blanket purchase orders for years until the buyer decided to change suppliers. *Id.* at 487. The buyer then stopped issuing releases to the seller, ordering the parts it required from its new supplier instead. *Id.*

The seller sued, arguing that the buyer had breached the blanket purchase orders by not buying all the parts it required from the seller. The district court held that, once the buyer stopped issuing releases, "the contractual relationship between [the parties] simply ceased." *Id.* Under the plain language of the contracts, "whenever defendant no longer desired to order line 1 or line 5 parts from plaintiff, it could simply cease issuing releases against the blanket orders and the obligation of defendant to purchase parts would end." *Id.*

The Sixth Circuit affirmed, rejecting the seller's argument that "the contract did not expire because it was a requirements contract and Michigan law requires a buyer subject to a requirements contract to purchase its actual good faith requirements." *Advanced Plastics (CA 6)*, 1995 WL 19379, at *2. The court recognized that the contract used the word "requirements," but emphasized that these were limited "*to the extent of and in accordance with*" the releases. *Id.* (emphasis in original). "The language of this document clearly demonstrates that the parties intended for [the buyer] to purchase quantities of parts only according to its releases, and not according to its requirements." *Id.* The Sixth Circuit explained that, to prove an enforceable requirements contract, the contract would

have to say that the buyer agreed "to purchase a portion of its requirements from the seller and the contract must set forth a specific amount of goods." *Id.* at *3. Because that wasn't the case, the Sixth Circuit held that the contract was enforceable "only according to its releases." *Id.* at *2.

The UCC and these cases thus show that an enforceable quantity is one that answers the question "How much?" or "How many?" A response to these questions of "10 parts" or "100% of buyer's requirements for the parts" is clear and unambiguous; it answers the question without the need for any more information.[2] Responses such as "all wood sawable" or "100%," by their plain meaning, state an amount, but they are ambiguous because they require additional information to become definite answers. These are still enforceable quantities because parol evidence can supplement or explain them to make them definite. But if the contract is silent about quantity or leaves it to a party's whim, it is not enforceable except on a release-by-release basis.

d. Parties wanting blanket-type contracts can choose between requirements contracts and release-by-release contracts based on the balance of certainty and flexibility that comes with each choice.

Many contracting parties want blanket-type contracts so that they need not negotiate the details of warranty, delivery, indemnification, termination, and the like each time they want parts. In that context, parties forming such blanket-type contracts can choose between forming release-by-release contracts or requirements contracts. These two contract types balance risks and benefits in opposite ways.

The balance turns on the scope of the parties' obligations to one another. In a release-by-release contract, the seller cannot be obligated to accept future releases offered by the buyer. "A contract to make a subsequent contract is not per se unenforceable; in fact, it may be just as valid as any other contract." *Opdyke Inv Co*

---

[2] All the examples of requirements contracts in this brief are of all or 100% of the buyer's requirements. This is because it is what the caselaw discusses most often. But there is no reason that a requirements contract could not be for any share of the buyer's requirements—say "one third" or "60%"—so long as the contract explicitly said so. Such a contract would obligate the buyer to purchase that specific share of its requirements exclusively from the seller, and obligate the seller to deliver that specific share of the buyer's requirements.

v Norris Grain Co, 413 Mich 354, 359 (1982). But an agreement to agree will fail for indefiniteness if any essential terms are left to be agreed upon. *Id.* In the sale-of-goods context, the quantity is essential. MCL 440.2201 cmt 1; *Frost Estate*, 130 Mich App at 559. So a seller cannot be contractually obligated to accept a future release unless the agreement containing that obligation also states the quantity. In other words, a seller can be bound to "accept a release *for 10 parts* that the buyer will issue next week," but cannot be bound to "accept a release that the buyer will issue next week, with a quantity yet to be determined." The first is an enforceable agreement to agree because it contains the essential quantity term; the second is not enforceable. *Opdyke*, 413 Mich at 359 (1982).

It is this principle that creates the key difference between release-by-release contracts and requirements contracts. A requirements contract is enforceable for the stated duration, even though it will be followed by releases with quantities yet to be determined, because the purchase order or terms already state the essential quantity term—"100% of buyer's requirements." In a release-by-release contract, on the other hand, the purchase order and terms are silent as to quantity. The first document in which a quantity appears is the release, so each release is an offer that the seller is free to accept or reject. The requirements contract offers the certainty of continuing sales but restricts the buyer's ability to buy parts elsewhere and the seller's ability to exit the business. The release-by-release contract flips those features, giving the buyer the ability to shop around and the seller the right to reject offers, but providing neither with the certainty of ongoing sales. Both types of contract structures are enforceable (to different degrees) under the UCC. It is the written quantity that determines what type a particular contract is.

So parties that, at the time of contracting, opt for the flexibility of a release-by-release contract form one by omitting any quantity in the purchase order and terms. And parties that want a requirements contract say so by stating a quantity measured by the buyer's requirements. The written quantity, or its absence, thus shows what the parties intended.

e. The contract here is not one for the buyer's requirements.

In this case, it is clear that the buyer wants a requirements contract *now*, because it finds itself needing parts that only one supplier has to offer. But the written contract language shows that, *when the contract was formed*, the buyer intended to maintain its flexibility to obtain parts elsewhere. In short, the contract here is enforceable on only a release-by-release basis.

The purchase order is labeled a "blanket," which it explains means that "this order is valid and binding on seller for the lifetime of the program . . . ." PO, pp 1 & 2 (App'x 42a & 43a). The terms provide that, for such a "blanket order," the buyer must issue releases "for specific part revisions, quantities and delivery dates for Products." Terms § 2 (App'x 55a). The buyer may "cancel, adjust or reschedule" the quantities shown in a release except for those identified as "Firm Obligations." *Id.*

By this plain language, then, "blanket" as defined by the contract is a duration term—"for the lifetime of the program." PO, p 2 (App'x 43a). Neither the word "blanket" nor its contractual definition contain any obligation on the part of the buyer to buy all the parts it needs from the seller. Instead, according to the contract, quantities will be stated in releases. And nothing in the contract documents ties the quantities stated in releases to the buyer's requirements. If one were to ask, "How many parts must the buyer purchase," the only answer offered by the contract here is: "the quantity (if any) identified as a firm obligation in the release." So each release, once accepted, may be enforceable as a fixed-quantity contract, but the buyer is not obligated to sell and the seller is not obligated to deliver any other quantity of parts.

The definition of "blanket order" from *Black's Legal Dictionary* (10th ed) reinforces the conclusion that this is not a requirements contract. *Black's* defines a "blanket order" as "an order negotiated by a customer with a supplier for multiple purchases and deliveries of specified goods over a stated period, as an alternative to placing a separate order for each transaction." That definition of a type of contract structure contains nothing tying the buyer's obligation to buy to its requirements for the parts. See *Advanced Plastics (CA 6)*, 1995 WL 19379, at *2 ("The language of this document clearly demonstrates that the parties intended for [the buyer] to purchase quantities of parts only according to its releases, and not according to its requirements."). In fact, the *Black's* definition doesn't refer to quantity at all.

On their face—and even adopting the *Black's* definition of "blanket order"—the purchase order and terms do not state any quantity, while the releases do as fixed numbers. So the contract made up of these documents includes unambiguous quantities in each release, and are enforceable on that basis alone.

The only way to interpret this contract as one for the buyer's requirements is to consider parol evidence. But the contract already states quantities in the

releases and those are unambiguous, so parol evidence is inadmissible to change them. *UAW-GM Hum Res Ctr v KSL Recreation Corp*, 228 Mich App 486, 492 (1998). Nor can parol evidence be used to add a requirements term not stated in the writing. *Frost Estate*, 130 Mich App at 559. So there is no proper way to use parol evidence to convert an unambiguous release-by-release contract into one for the buyer's requirements.

♦ ♦ ♦

Following the principles outlined above, this contract is unambiguous. It states quantities only in each release as they are issued, and so is enforceable only to the extent of each accepted release. The use of "blanket" doesn't change that, because neither any plain and ordinary meaning of "blanket" nor the specialized meaning of "blanket order" in *Black's* adds a quantity—let alone a requirements term—to the contract. Parol evidence cannot be considered either to change the plain meaning of the fixed quantities in the releases or to add a new requirements quantity term. The Court is left with the plain meaning of the words of this contract, which may be enforced under § 2-201 on only a release-by-release basis.

2. To clarify Michigan law, this Court should partially overturn three decisions of the Court of Appeals.

The principles outlined above and their application to this case conflict with three decisions by the Court of Appeals. While the most recent—the decision below—is directly implicated in this appeal, the others form part of the foundation for the decision below and, if left standing, will clash with the holdings that the Supplier Amici seek here. To clarify Michigan law in this important area, this Court should partially overturn each of those decisions, which are addressed from oldest to most recent because they build on one another.

a. This Court should partially overrule *Great Northern Packaging*.

First, this Court should overrule *Great Northern Packaging, Inc v General Tire and Rubber Co*, 154 Mich App 777 (1986), at least in part. (The opinion also addressed damages and other issues not implicated here.) In *Great Northern Packaging*, the buyer issued the seller a purchase order for 50 units, but quickly changed the order to a "Blanket Order" (stating no other quantity) with a fixed duration. *Id.* at 780. During the term of the blanket order, the buyer began buying some goods it needed from another seller while still purchasing some of its

requirements from the original seller. *Id.* Within a few months, circumstances changed and the buyer no longer required any more goods; through that point, it had ordered about 25% of its requirements from the blanket-order seller and 75% from the new supplier. *Id.* The banket-order seller sued the buyer for breach of contract and prevailed at trial. *Id.* at 780–81.

On appeal, the buyer argued that its contract was a "blanket" order that stated no quantity in writing, so it was not enforceable. *Id.* at 786. The Court of Appeals opined that a "blanket" term was "analogous" to the "all wood sawable" quantity in *Frost Estate*. *Id.* at 786–87. After summarizing *Frost Estate* without explaining how it was analogous, the court concluded "that the term 'blanket order' expresses a quantity term, albeit an imprecise one." *Id.* at 787. The court held that the jury was thus right to consider parol evidence to determine that "blanket" indicated a requirements contract. *Id.*

The *Great Northern Packaging* court was wrong when it concluded that "blanket" was analogous to "all wood sawable." "All wood sawable" states how much sawable wood is being sold—all of it—and requires only some clarification (about the relevant parcel of land) before it can be precisely known. "Blanket" isn't like that at all because nothing in the contract suggests that "blanket" is intended to state an amount. Contrary to the *Great Northern Packaging* court's holding, "all wood sawable" and "blanket" are not analogous contract terms.

Great Northern Packaging's holding that "blanket" states a quantity contradicts the plain language of the contract (which says nothing indicating that "blanket" is a quantity), the definition in *Black's* (which says nothing about quantity), and the other principles discussed above. This Court should therefore overrule *Great Northern Packaging* to the extent it holds that "blanket" states a quantity in a contract for the sale of goods.

b. This Court should partially overrule *Cadillac Rubber*.

If *Great Northern Packaging*'s determination that "blanket" is a quantity reflects an unstated—and unwarranted—assumption that these sorts of contracts must be enforceable over the long term, then the Court of Appeals' decision in *Cadillac Rubber & Plastics, Inc v Tubular Metal Systems, LLC*, 331 Mich App 416 (2020), takes that assumption to the extreme, and so should also be partially overruled.

Cadillac Rubber also involved a "blanket order." *Id.* at 419. The buyer's incorporated terms explained that, if the contract is a blanket order, the seller grants to the buyer "an irrevocable option . . . to purchase Supplies in such quantities as determined by Buyer and identified as firm orders in" releases. *Id.* The option was conditioned, however, in that the buyer had to "purchase no less than one piece or unit of each of the Supplies and no more than one hundred percent (100%) of Buyer's requirements for the Supplies." *Id.* at 420. In the resulting lawsuit, the seller argued that this language "create[d] a series of spot-buy (also called fixed-quantity) contracts, not a requirements contract." *Id.* So, the seller argued, it was free to accept or reject each release offered by the buyer. *Id.* The trial court rejected that argument and ruled for the buyer. *Id.* at 421.

On appeal, a divided panel of the Court of Appeals held that this options structure was "indisputably" a requirements contract. *Id.* at 429. This holding was based on three main arguments, none of which align with the principles discussed above.

First, the majority noted that the purchase orders stated that the "material requirement will be released weekly," and that the buyer's terms provided that the buyer "was obligated to purchase from [the seller] a quantity between one part and 100% of [the buyer's] requirements." *Id.* at 430 (text is all-caps in original). But nothing in that language links the quantity the buyer had to order to the buyer's requirements. Even if the reference to "material requirement" could be interpreted as obligating the buyer to buy all the parts it needs from the seller—and that's quite the stretch—that interpretation contradicts the plain language that allows the buyer to choose to buy no more than one part.

Second, the majority relied on the Eastern District of Michigan's decision in *Johnson Controls, Inc v TRW Vehicle Systems, Inc*, 491 F Supp 2d 707 (ED Mich, 2007). *Id.* at 427. That case featured an option term nearly identical to that in *Cadillac Rubber*. *Johnson Controls*, 491 F Supp 2d at 710. The *Johnson Controls* court didn't hold that it created a requirements contract, though. Instead, it held that the option provision satisfied the statute of frauds but was "ambiguous." *Id.* at 718. The court held that summary judgment for the seller was inappropriate because "[v]iewing the evidence in the light most favorable to [the buyer], questions of fact remain as to whether the parties intended a requirements contract." *Id.* at 719. So *Johnson Controls* doesn't support the *Cadillac Rubber* majority's conclusion that this option provision clearly creates a requirements

contract. (This was one of Judge Shapiro's main points in dissent. *Cadillac Rubber*, 331 Mich App at 432–33.)

Johnson Controls should be disregarded because of its dependence on *Great Northern Packaging*. The *Johnson Controls* court relied on *Great Northern Packaging*'s conclusion that "a term with no apparent reference to a specific quantity could satisfy the statute of frauds" under Michigan law. *Johnson Controls*, 491 F Supp 2d at 714. The *Johnson Controls* court was persuaded by *Great Northern Packaging* in reaching its conclusion that the options provision stated a quantity term, and that "this may have been a requirements contract . . . ." *Id.* at 716 & 718. But as explained above, *Great Northern Packaging* is wrong and should be overruled on this point. *Johnson Controls*' reasoning based on *Great Northern Packaging* is thus similarly wrong.

Third, the *Cadillac Rubber* majority relied on the parties' course of performance. *Id.* at 430–31. The majority agreed with the trial court's findings that "[the buyer] has regularly issued material authorization releases setting forth the quantity of parts needed as well as a reasonable forecast of future requirements, and [the seller] has fulfilled those releases by providing the required parts." *Id.* It held that this course of performance helped "establish[] the existence of a requirements contract as a matter of law." *Id.* at 431. But the course of performance described here, while arguably consistent with a requirements contract, is just as consistent with a series of release-by-release contracts. So this evidence is ambiguous at best.

If the *Cadillac Rubber* majority's reliance on the course of performance in this way remains good law, it creates a perverse incentive for a seller operating under a release-by-release contract to reject the occasional release to avoid converting the contract into a long-term requirements contract. This incentive exists even if buyer needs all the parts listed on each release and the seller can and wants to deliver them all. Courts should avoid creating such incentives.

In addition to the three flawed arguments described above, *Cadillac Rubber* is also wrong because it places Michigan alone among the states interpreting § 2-201 of the UCC. As Judge Shapiro noted in dissent, the *Cadillac Rubber* majority "does not cite any case holding that a promise to buy between 1 unit and 100% of requirements is sufficient to create a requirements contract." *Cadillac Rubber*, 311 Mich App at 434. The Supplier Amici couldn't find support elsewhere, either.

Instead, the few other courts to have considered the question[3] have followed Seventh Circuit Judge Richard Posner's analysis in the classic case *Empire Gas Corp v American Bakeries Co*, 840 F2d 1333, 1339 (CA 7, 1988), which held that "a requirements contract was more than a buyer's option." "[A] requirements contract is not just an option to buy." *Agfa-Gevaert, AG v AB Dick Co*, 879 F2d 1518, 1522–23 (CA 7, 1989). So Michigan appears to now stand alone in holding that an option to buy can be a requirements contract.

Moreover, *Cadillac Rubber* reflects harmful policy that is contrary to that shown by the Legislature's enactment of the UCC. As explained above, the UCC provides for three ways to state a quantity: as a number, as measured by the seller's output, or as measured by the buyer's requirements. MCL 440.2201(1); MCL 440.2306(1). But under *Cadillac Rubber*, almost any contract language can be interpreted to be an enforceable requirements contract. The contract in *Cadillac Rubber* refers to 100% of the buyer's requirements only as a *cap* on the buyer's obligations to purchase, yet the court held that it was also the *amount* of the seller's obligation to deliver. Most likely, the *Cadillac Rubber* court would have enforced as a requirements contract even the language in *Advanced Plastics* because it mentioned "Buyer's requirements," no matter that the contract explicitly gave the buyer to discretion to choose whether to issue releases and for what quantities. *Advanced Plastics (CA 6)*, 1995 WL 19379, at *2. In effect, *Cadillac Rubber* creates a presumption that a contract for the sale of goods is a requirements contract, despite there being no support for any such presumption in the UCC.

Because of these flaws, the *Cadillac Rubber* majority shouldn't have held that the option provision established a requirements contract as a matter of law. Instead, it should have held that the parties had a release-by-release contract under which the buyer had to order, and the seller had to deliver, only a single part. The unambiguous language of the contract says that the buyer had to "purchase no less than one piece or unit of each of the Supplies and no more than one hundred percent (100%) of Buyer's requirements for the Supplies." *Id.* at 420. Must the buyer purchase one part from the seller? Yes, it must "purchase no less than one piece." Must the buyer purchase two pieces? Nothing in this language says so. The

[3] See, e.g., *Merritt-Campbell, Inc v RxP Products, Inc*, 164 F3d 957, 963–64 (CA 5, 1999); *Technical Assistance Intern, Inc v US*, 150 F3d 1369, 1372 (CA Fed, 1998); *BRC Rubber & Plastics, Inc v Continental Carbon Co*, 876 F Supp 2d 1042, 1051 (ND Ind, 2012).

Court of Appeals' majority was wrong to conclude otherwise, so this Court should overrule *Cadillac Rubber* on that point.

c. This Court should at least partially reverse the decision below.

Finally, this Court should at least partially reverse the decision below. That opinion rests heavily on *Great Northern Packaging*, *Johnson Controls* (which in turn relied on *Great Northern Packaging*), and *Cadillac Rubber*, each of which is flawed for the reasons explained above. For those reasons, and for the reasons stated throughout this brief, this Court should hold that the contract here is not one for the buyer's requirements and that it is enforceable, if at all, on a release-by-release basis. This Court should therefore reverse the decision below to the extent it conflicts with this holding.

Conclusion and Relief Requested

Parties that opt to contract for the sale of goods on a release-by-release basis do so by omitting a quantity term in the purchase order and terms. Buyers do this when they want the freedom to buy parts elsewhere, or even to make the parts themselves. Sellers do this when they want the freedom to reject offered orders. Both parties obtain these benefits by giving up the certainty that can come with a long-term contract.

Parties that opt for requirements contracts, on the other hand, prefer that certainty in exchange for flexibility. Buyers must order all the parts they require from the seller, and the seller must deliver all the parts ordered. If parties want to make this choice, they need only say so by including in the written contract a quantity measured by the buyer's requirements.

This Court should not allow one party to change its mind and flip the risks and benefits agreed to when the contract was formed. But that is what the decision below—and the Court of Appeals' decisions in *Cadillac Rubber* and *Great Northern Packaging*—permits. Under those decisions, a party to a release-by-release contract who finds itself in trouble—a buyer who needs parts to fill orders, or a seller with idle workers and equipment—can enforce as a requirements contract a set of contract documents that make no mention of quantity outside the releases. This is wrong and contrary to the Uniform Commercial Code, so this outcome and those cases should be overturned.

For all the reasons stated above, the Supplier Amici urge this Court to:

a. hold that the only types of quantities enforceable under the UCC are those stated as a number or measured by the buyer's requirements or the seller's output;

b. hold that "blanket" is not an enforceable quantity for purposes of the UCC, and that neither is any similar word or phrase that does not mention the buyer's requirements or the seller's output; and

c. at least partially reverse the decision below and partially overrule the Court of Appeals' decisions in *Cadillac Rubber* and *Great Northern Packaging* because they conflict with these principles.

Respectfully submitted,

August 4, 2022

BROOKS WILKINS SHARKEY & TURCO

/s/ Jason D. Killips
Jason D. Killips (P67883)
Counsel of Record
BROOKS WILKINS SHARKEY & TURCO
401 S. Old Woodward Avenue, Suite 400
Birmingham, Michigan 48009
248.971.1800 / killips@bwst-law.com

Counsel for the Supplier Amici

Certificate of Compliance

I hereby certify that this document complies with the formatting rules in Administrative Order No. 2019-6. I certify that this document contains 8,294 countable words. The document is set in Equity, and most of the text is in 12-point type with 17-point line spacing and 12 points of spacing between paragraphs. Some headings are set with larger type.

/s/ Jason D. Killips (P31680)
Brooks Wilkins Sharkey & Turco
401 S. Old Woodward Ave., Ste. 400
Birmingham, Michigan 48009
248.971.1800 / killips@bwst-law.com