STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

AURIA FREMONT, LLC,	Case No. 2022-196895-CB
Plaintiff,	Hon. Victoria A. Valentine
v.	**Business Court Docket**
LYONDELLBASELL ADVANCED POLYMERS, INC.,	
Defendant.	

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OPINION AND ORDER REGARDING PLAINTIFF'S MOTION FOR PRELIMINRY INJUNCTION

At a session of said Court held on the
14th day of August 2023 in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court in relation to Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction. The parties appeared before the Court on August 3, 2023, at which time the Court took the matter under advisement.

Prior to the August 3, 2023, hearing, the parties were operating under a May 4, 2023, Third Stipulated Interim Order that included Defendant's continuing supply of material and Plaintiff's

waiver of claims concerning the quality of performance of the material supplied. This Interim Order expired, which expired on August 3, 2023, was extended by the Court until the Court rules on Plaintiff's motion for a preliminary injunction, For the reasons set forth below, Plaintiff's Motion is DENIED.

FACTUAL BACKGROUND

Plaintiff is a Tier One automotive supplier that supplies interior products and systems for OEMs. Defendant is a plastics company that supplies a chemical compound pellet product for Plaintiff that is then utilized as backing for Plaintiff's acoustic systems, panels, inserts, liners, etc. Plaintiff operates under the "just-in-time" delivery model, requiring an uninterrupted flow of products from Defendant before those products are required for Tier One production.

The parties have been operating under three Purchase Orders, namely FRE005865, FRE005866, and FRE005867 dated 3/29/2021, all of which incorporate by reference Plaintiff's Purchase Order Terms and Conditions. (See Exhibits 3-5 of Plaintiff's Motion).

In March 2022, Plaintiff purported that there were quality issues with Defendant's product. On August 23, 2022, and October 4, 2022, Plaintiff issued two Quality Notices to Defendant, alerting them of this alleged quality issue and putting them on notice that Defendant was potentially responsible for $682,364.29 in claimed costs because the product did not satisfy its warranties. On October 20, 2022, Defendant corresponded with Plaintiff, stating that they would suspend production of the product unless Plaintiff withdrew the Quality Notices, abandoned its claims, and accepted Defendant's Terms and Conditions. When the parties were unable to agree to a resolution, Plaintiff initiated this lawsuit against Defendant on October 26, 2022, seeking breach of contract claims as well as a request for a temporary restraining order and preliminary injunctive relief.

Plaintiff's Arguments:

Plaintiff argues it is entitled to a TRO and preliminary injunction compelling Defendant to continue producing and delivering product to Plaintiff. Plaintiff defers to Defendant's October 20, 2022, correspondence to assert that Defendant is demanding that Plaintiff forfeit its contractual rights under a contract that will remain intact until 2030 in order to continue receiving product. Plaintiff relies heavily on a 2006 Oakland County Circuit Court opinion by former Circuit Court Judge Mark Goldsmith, to argue that an ultimatum such as Defendant's constitutes irreparable injury. (In Judge Goldsmith's case, he determined that the surrender of a setoff right, which was the contract right at issue, is not easily measurable in monetary terms and so it constituted irreparable harm).

In this case, Plaintiff contends that Defendant is demanding that Plaintiff waive all its contractual rights, including its setoff right. Plaintiff alleges that the following damages will occur if Defendant does not supply Plaintiff with the product: (1) potential loss of millions of dollars of revenue; (2) potential shutdown of Plaintiff's OEM plants and OEM's other suppliers; (3) layoff of employees at these facilities; (4) disruption of supply chain; (5) damage to Plaintiff's relationship with OEMs; (6) loss of goodwill and customer trust; and (7) possible claims by third parties due to Plaintiff's inability to meet its supply obligations.

Plaintiff maintains that injury to a company's goodwill constitutes irreparable injury since those losses are difficult to compute or quantify.

Next, Plaintiff argues that it will likely succeed on the merits of its claims. Plaintiff relies upon the three Blanket Purchase Orders that require Defendant to supply product through December 31, 2030. On the face of the three Blanket Purchase Orders is language that expressly states that the Purchase Order incorporates by reference Plaintiff's Purchase Order Terms and

Conditions. Under Section 1(B) of the Purchase Order Terms and Conditions, "[a] contract is formed when Seller accepts the offer of Purchaser. Each Order shall be deemed accepted upon the terms and conditions of such Order by Seller by shipment of goods, performance of services, [etc.]" Accordingly, Plaintiff argues that Defendant's performance under the Purchase Orders without objection to the terms constituted Defendant's acceptance of the Terms. (See Exhibit 6 of Plaintiff's Motion).

Plaintiff also points to Section 16 of its Purchase Order Terms and Conditions, which provides, in pertinent part, that Defendant acknowledges and agrees that money damages would not be a sufficient remedy for any actual, anticipatory, or threatened breach of any Order by Defendant with respect to its delivery of goods to Plaintiff. Additionally, Plaintiff shall be entitled to injunctive relief as a remedy for any such breach. Since damages is not an adequate remedy, in Plaintiff's view, Plaintiff is seeking specific performance under the contract.

Plaintiff also argues that the balance of hardships weighs greatly in its favor since Defendant will not be harmed if it is ordered to simply continue to perform in accordance with the contract.

In terms of the public interest, Plaintiff asserts that public policy would strongly favor the issuance of injunctive relief in this case. Without injunctive relief, Plaintiff, its customers, its employees, and the communities that depend upon them could suffer grave consequences.

Defendant's Argument:

In response, Defendant argues that Plaintiff cannot establish a significant chance of success on the merits because Defendant has fulfilled its supply obligations set forth in the September 13, 2022, Blanket Purchase Orders. Alternatively, Defendant asserts that the controlling contract

between the parties is Defendant's May 26, 2022, Price Communication under a "battle of the forms" analysis.

With respect to irreparable harm, Defendant argues that Plaintiff cannot prove irreparable harm outside of an injury for which a money award is adequate compensation. Additionally, Defendant argues that it would suffer more harm should the injunctive relief be granted because it would be forced to supply an allegedly defective product that will increase Plaintiff's claimed damages. Defendant questions why Plaintiff would want an order forcing Defendant to continue to supply purported, defective product. Additionally, Defendant argues that Plaintiff has not proven that it has been unable to secure the product from other sources. The product is manufactured with Plaintiff's formula and so Plaintiff can easily take this formula to another supplier.

Defendant notes that Plaintiff indicated that it could find a replacement supplier in 9-12 months. However, Plaintiff has had at least 9 months during the pendency of this action to find a replacement supplier and has failed to do so.

In terms of balancing the harms, Defendant argues that a preliminary injunction would force Defendant to continue to supply allegedly defective product and as a result, it would increase Plaintiff's alleged damages.

LEGAL ANALYSIS

In accordance with MCR 3.310(A), the Court has the authority to grant a preliminary injunction. However, "injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. The purpose of a preliminary injunction is to preserve the status quo pending a final hearing regarding the parties' rights." *Johnson v Michigan Minority Purchasing Council,* 341

Mich App 1, 8–9, 988 NW2d 800, 807 (2022). (Citations omitted). "The party seeking injunctive relief has the burden of establishing that a preliminary injunction should be issued." MCR 3.310(A)(4).

To determine whether a preliminary injunction should issue, the Court conducts the following four-factor analysis:

> (1) The strength of the applicant's demonstration that the applicant is likely to prevail on the merits;
> (2) Demonstration that the applicant will suffer irreparable injury if a preliminary injunction is not granted;
> (3) Whether harm to the applicant in the absence of a stay outweighs the harm to the opposing party if a stay is granted; and
> (4) Harm to the public interest if an injunction issues.

State Emps. Ass'n v. Dep't of Mental Health, 421 Mich 152, 157–58, 365 NW2d 93, 96 (1984). See also *Detroit Fire Fighters Ass'n, IAFF Loc. 344 v City of Detroit*, 482 Mich 18, 34–35, 753 NW2d 579, 587–88 (2008).

"Importantly, the four factors governing consideration of injunctive relief are meant to simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." *Johnson*, 341 Mich App at 25. The Court should also consider "whether an adequate legal remedy is available to the applicant." *State Emps. Ass'n*, 421 Mich at 158. "A preliminary injunction should not be issued if an adequate legal remedy is available. Economic injuries generally are not sufficient to demonstrate irreparable injury because such injuries typically can be remedied by damages at law. In addition, the mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Sandstone Creek Solar, LLC v. Twp. of Benton,* 335 Mich App 683, 706, 967 NW2d 890, 903, *appeal denied*, 508 Mich 947, 964 NW2d 572 (2021). (Citations omitted).

"The grant or denial of a preliminary injunction is within the sound discretion of the trial

court." *Bratton v Detroit Auto. Inter-Ins. Exch.*

Whether Plaintiff is likely to prevail on the merits

With respect to this first factor of whether Plaintiff is likely to prevail on the merits, the Court must consider whether the September 13, 2022, Purchase Order superseded the June 7, 2022, Blanket Purchase Orders and whether the June 7, 2022, Blanket Purchase Orders or the Defendant's May 26, 2022, Price Communication controls this matter.

Defendant argues that Plaintiff's September 13, 2022, Blanket Purchase Orders superseded the prior June 7, 2022, Blanket Orders under Section 49 of Plaintiff's Purchase Order Terms and Conditions. (See Exhibit 6 of Plaintiff's Motion). According to Defendant, because the September 13, 2022, Blanket Purchase Orders are specific orders with exact quantities, prices, and dates of delivery, they do not qualify as requirements contracts, nor do they mandate supply through 2030. (See Exhibit 8 of Defendant's Response). Defendant argues that once it satisfied the September 13, 2022, Blanket Purchase Orders, it had fulfilled its contractual obligation to Plaintiff.

Upon review of the September 13, 2022, Blanket Purchase Orders, the Court observes that these Orders were not limited to specific fixed quantities as argued by Defendant. Rather, such additional information was included to report sales and/or production for a particular time frame, similar to a Release. Likewise, the August 25, 2021, and January 5, 2022, Blanket Purchase Orders (Exhibit 4 of Defendant's Response) also included additional information regarding certain due dates, received quantity, etc. Additionally, these Blanket Purchase Orders still contain the Blanket Order time frame of 3/23/2021 – 12/31/2030. The Court does not view these subsequent Blanket Purchase Orders as modified orders that would supersede the June 7, 2022, Blanket Purchase Orders.

With regard to Defendant's "battle of the forms" argument under MCL 440.2207, the Court

notes that on May 26, 2022, Defendant emailed Plaintiff regarding a pricing adjustment to which Defendant attached its May 25, 2022, Price Communication that included a price quotation for a certain pricing period. On the third page of the Price Communication, under Section 5 of the Specific Terms and Conditions, the language states that this Price Communication and sales of products are subject to Defendant's Commercial Terms and Conditions and General Terms and Conditions, both of which are incorporated into the parties' agreement relating to the sale of the product. Thereafter, on June 7, 2022, Plaintiff sent Defendant the three Blanket Purchase Orders that were revised to reflect the June price increase as stated in Defendant's Price Communication. Other than the price increase, however, the verbiage in the Blanket Purchase Orders remained unchanged.[1] Defendant, therefore, argues that Plaintiff's issuance of its June Blanket Purchase Orders constitutes an acceptance of Defendant's May 26, 2022, Price Communication, which is now the operative contract.

At times, Courts are "faced with the task of determining whether the forms exchanged by the parties created a contract and, if so, what the terms of that contract are. In resolving the threshold question, it is necessary to consider M.C.L. § 440.2207; M.S.A. § 19.2207, Michigan's statutory adaptation of the Uniform Commercial Code 'Battle of the Forms' provision. MCL 440.2207(1) provides:

> A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

[1] At some point, the Blanket Order time frame was extended to 12/31/2030, however, it is unclear when this occurred. It may have been in these June 2022 Blanket Purchase Orders.

"Thus, to determine whether a contract has been formed, it is necessary to determine which of the forms constituted the 'offer' and which form constituted the 'acceptance.'…Courts must often look beyond the words employed in favor of a test which examines the totality of the circumstances." *Challenge Mach. Co. v Mattison Mach. Works*, 138 Mich App 15, 20–21, 359 NW2d 232, 235 (1984). (Citations omitted).

Here, on May 26, 2022, Defendant corresponded with Plaintiff regarding pricing for products to be shipped on or after June 1, 2022. The Price Communication included a pricing period as well as a Quote Expiration Date of August 31, 2021 [sic]. (See Exhibit 5 of Defendant's Response).

> Typically, a price quotation is considered an invitation for an offer, rather than an offer to form a binding contract. Instead, a buyer's purchase agreement submitted in response to a price quotation is usually deemed the offer. However, a price quotation may suffice for an offer if it is sufficiently detailed and it reasonably appear[s] from the price quotation that assent to that quotation is all that is needed to ripen the offer into a contract. While the inclusion of a description of the product, price, quantity, and terms of payment may indicate that the price quotation is an offer rather than a mere invitation to negotiate, the determination of the issue depends primarily upon the intention of the person communicating the quotation as demonstrated by all of the surrounding facts and circumstances. Thus, to constitute an offer, a price quotation must be made under circumstances evidencing the express or implied intent of the offeror that its acceptance shall constitute a binding contract.

Dyno Const. Co. v McWane, Inc., 198 F3d 567, 572 (6th Cir. 1999). (Citations omitted).

The Court finds that based upon the May 26, 2022, correspondence and the language included in the Price Communication, Defendant's Price Communication was not an offer to form a binding contract, but rather a communication or an invitation for an offer. The language in the Price Communication is telling as it provides that "Seller is *offering* to sell the Product (as defined herein) in the quantities and during the term set forth in this pricing communication." Stated otherwise, this language denotes an invitation for an offer to sell products at a higher price.

The Price Communication also included an expiration date for the quoted pricing. None of this language demonstrates that this price quotation is an offer to form a binding contract. And, the Price Communication does not evidence an express or implied intent by Defendant that Plaintiff's acceptance shall constitute a binding contract.

Additionally, Defendant sent a letter, dated October 20, 2022, to Plaintiff, stating that Defendant has decided to suspend production of the product unless Plaintiff agrees, among other things, that any sale of the product is subject to Defendant's General Terms and Conditions for the Sale of Products. (See Exhibit 7 of Plaintiff's Motion). Had Defendant believed that its May 26, 2022, Price Communication was the controlling contract, it would not have asked Plaintiff to agree to be bound by Defendant's General Terms and Conditions as they would have already been in place had the Price Communication been controlling.

In response to Defendant's Price Communication, on June 7, 2022, Plaintiff sent Defendant the three Blanket Purchase Orders, namely FRE005865, FRE005866, and FRE005867 dated 3/29/2021, with the revised June price increase. (See Exhibit 7 of Defendant's Response). These Blanket Purchase Orders, submitted in response to Defendant's Price Communication, became the "offer" in this matter.

Thereafter, the parties continued to conduct business under the Blanket Purchase Orders, which notably incorporate by reference Plaintiff's Purchase Order Terms and Conditions. And, Defendant commenced performance under the June 7, 2022, Blanket Purchase Orders.

Pursuant to Section 1(B) of Plaintiff's Purchase Order Terms and Conditions, the Order is deemed accepted upon the Terms and Conditions of the Order through Defendant's performance of services. (See Exhibit 6 of Plaintiff's Motion).

Based upon the foregoing analysis, the Court finds that the September 13, 2022, Purchase

Order did not supersede the June 7, 2022, Blanket Purchase Orders, which is the controlling contract. Accordingly, Plaintiff has demonstrated that it is likely to prevail on the merits.

Whether Plaintiff will suffer irreparable injury if a preliminary injunction is not granted

With respect to the irreparable harm factor, Plaintiff asserts that Defendant is demanding that Plaintiff forfeit its contractual rights under a contract that will remain intact until 2030 in order to continue receiving product. Plaintiff contends that it will suffer irreparable harm in the absence of a preliminary injunction as it will suffer monetary damages, potential shutdowns, disruption of the supply chain, and loss of goodwill and customer trust.

"[A] particularized showing of irreparable harm is an indispensable requirement to obtain a preliminary injunction." Further, "a preliminary injunction should not issue where an adequate legal remedy is available." *Pontiac Fire Fighters Union Local 376*, 482 Mich 1, 9, 753 NW2d 595 (2008); *Johnson v. Michigan Minority Purchasing Council*, 341 Mich App at 9, 21.

Economic injuries generally are not sufficient to demonstrate irreparable injury because such injuries typically can be remedied by damages at law. *Sandstone Creek Solar,* 335 Mich App at 706. The damages listed by Plaintiff are quantifiable and can be compensated monetarily. Notably, Plaintiff's Quality Notices state that Defendant is responsible for the specific, calculated amount of $682,364.29 in potential liability on account of its allegedly defective product.

With respect to Plaintiff's claim of loss of good will and customer trust, Plaintiff cites to various cases, which stand for the proposition that injury to a company's goodwill can constitute irreparable injury because the damages are difficult to estimate or calculate. "Loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute." *Slis v State*, 332 Mich App 312, 362, 956 NW2d 569, 597 (2020).

Plaintiff subsequently makes the following statements in its Motion: "[i]f an injunction is

not issued, Auria's relationship with the OEMs *may* be irreparably harmed. Auria *could* suffer the loss of goodwill and customer trust if its ability to support the OEM's production is disrupted." (See p. 12 of Plaintiff's Motion).

The Court finds this argument to be speculative. Moreover, "the mere apprehension of future injury or damage cannot be the basis for injunctive relief." *Johnson*, 341 Mich App at 9. "The injury must be both certain and great, and it must be actual rather than theoretical." *Thermatool Corp. v Borzym*, 227 Mich App 366, 377, 575 NW2d 334, 338–39 (1998).

In the case of *Johnson v Michigan Minority Purchasing Council*, 341 Mich App 1, 22, 988 NW2d 800, 813–14 (2022), the Court recognized that the loss of goodwill can constitute irreparable harm relevant to a preliminary injunction proceeding. In that case, the MBE (Minority Business Enterprise) certification of the Piston Companies was at issue and relevant to the goodwill argument. Damages relative to the Piston Companies losing their MBE certification could be difficult to estimate or calculate. In this matter, Plaintiff is arguing for the potential loss of customer goodwill due to a breach of a general manufacturing supplier contract. Damages relating to a breach of contract action can be calculated and compensated monetarily.

Plaintiff also relies upon Section 16 of its Purchase Order Terms and Conditions to argue that it shall be entitled to injunctive relief as a remedy for any such breach. Yet, a contractual provision that entitles a party to injunctive relief is not sufficient to alter a court's obligation to analyze whether the party seeking an injunction has proven irreparable harm. *Nexteer Auto. Corp. v Korea Delphi Auto. Sys. Corp.,* unreported curiam opinion of the US District Court, ED Mich, Southern Division, decided February 13, 2014 (Docket No. 13-CV-15189).[2]

[2] Unpublished decisions are not binding, MCR 7.215(C)(1), but they can be "instructive or persuasive," *Paris Meadows, LLC v. City of Kentwood*, 287 Mich.App. 136 n 3, 783 N.W.2d 133 (2010). "

The Court finds that even though Plaintiff may prevail on the merits of its claim, Plaintiff has failed to meet its burden of demonstrating irreparable harm. As stated previously, a showing of irreparable harm is an indispensable requirement to obtain a preliminary injunction.

Balancing the Harm

In balancing the harm, the Court must evaluate whether the harm suffered by Defendant, if injunctive relief was granted, will outweigh the harm suffered by Plaintiff, in the absence of an injunction. While Plaintiff argues that it would suffer harm if its request for injunctive relief is denied, Defendant contends that it will suffer harm if it is forced to continue to supply potentially defective product, which would increase Plaintiff's damages against Defendant.

Since the commencement of this lawsuit on October 26, 2022, Defendant has continued to supply product to Plaintiff without interruption. Plaintiff has now had almost 10 months to secure an alternative supplier and yet it has not done so. Any harm to Plaintiff could have been mitigated had it worked to secure an alternate supplier during this interim period.

The Court finds that neither party has demonstrated that the relative harm it might suffer would outweigh the relative harm the other might suffer. As such, the balancing of harms does not favor injunctive relief.

Public Harm

In relation to any harm to the public interest, courts have found "that the public interest lies in preserving the enforceability of contracts." *Neveux v Webcraft Techs., Inc.,* 921 F Supp 1568, 1573 (ED Mich 1996). It can also be said that Michigan public policy and case law prohibit the issuance of injunctive relief unless there is a risk of irreparable harm. Since Plaintiff's claims can be compensated monetarily, there is no risk of irreparable harm in this matter and so the public interest would favor denying injunctive relief.

CONCLUSION

In light of the foregoing analysis, injunctive relief is not warranted, and Plaintiff's Motion is DENIED.

IT IS SO ORDERED

THIS IS NOT A FINAL ORDER AND DOES NOT CLOSE OUT THE CASE.

/s/Victoria A. Valentine