IN THE SUPREME COURT OF MISSISSIPPI COPY

No. 2007-CA-00341

PEAVEY ELECTRONICS CORPORATION APPELLANT

v.

BAAN U.S.A., INC. APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Peavey Electronics Corporation, Appellant;

2. Jerry K. Clements, Vincent J. Hess, April R. Terry, Barbara Ellis, Susan A. Kidwell, LOCKE LORD BISSELL & LIDDELL LLP; James P. Streetman III, David Lee Gladden, Jr., SCOTT, SULLIVAN, STREETMAN & FOX, P.C.; Ronnie L. Walton, GLOVER, YOUNG, WALTON & SIMMONS, PLLC; attorneys for Appellant Peavey Electronics Corporation;

3. Baan U.SA., Inc., Appellee;

4. William C. Hammack, Lee Thaggard, BORDEAUX AND JONES LLP; Daniel D. Zegura, Robert B. Remar, Christopher M. Golden, Kerri A. Gildow, ROGERS & HARDIN LLP; attorneys for Appellee Baan U.S.A., Inc.;

5. Honorable Lester F. Williamson, Jr., Circuit Court Judge;

6. Honorable Larry E. Roberts, Judge, Mississippi Court of Appeals and former Circuit Court Judge.

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CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties to this action with a copy of the **CERTIFICATE OF INTERESTED PERSONS** via overnight delivery to:

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The Honorable Lester Williamson, Jr.
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This 12th day of June, 2008.

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5. Honorable Lester F. Williamson, Jr., Circuit Court Judge;
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STATEMENT REGARDING ORAL ARGUMENT

Appellant Peavey Electronics Corporation ("Peavey") has requested oral argument. The facts of this case and the applicable Mississippi law are not unduly complex. Although the record is voluminous, this case is primarily a straightforward statute of limitations case where Peavey waited years past the limitations period to assert its claims.

Appellee Baan U.S.A., Inc. ("Baan") joins in this request should the Court determine that it would benefit from counsel's clarification of any issue or concern regarding the undisputed material facts and application of settled law.

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STATEMENT OF ISSUES

1. Whether the trial court correctly decided that Peavey's tort claims are barred by the three-year Mississippi statute of limitations when it is undisputed that: (a) Peavey's business operations were massively disrupted due to computer system problems in July 1999; (b) Peavey's IT personnel knew the causes of Peavey's computer system problems within a few days; (c) all Baan personnel left Peavey's facilities by the end of 1999; (d) Peavey filed this action on February 27, 2004; and (e) Peavey offered no evidence of any wrongful conduct by Baan that occurred after February 27, 2001 (i.e., within three years of filing suit)? (See Section II infra.)

2. Whether the trial court correctly determined that Peavey's claims based on alleged deficiencies in Baan's consulting services under the parties' Professional Services Agreement are barred by the three-year Mississippi statute of limitations governing services claims and when it is undisputed that Baan did not provide Peavey with services after 1999? (See Section III infra.)

3. Whether the trial court correctly decided that Peavey's claims under the Software License and Support Agreement ("Software License") fail as a matter of law because Peavey waived its right to any remedy by failing to timely assert its rights or revoke acceptance as required under the Software License and the Uniform Commercial Code prior to filing this lawsuit on February 27, 2004? (See Section IV infra.)

4. Whether Peavey's contract claims fail as a matter of law because Peavey did not assert a warranty claim while the software was under warranty and Peavey offered no evidence that Baan breached any warranty? (See Section V infra.)

5. Whether the trial court abused its discretion in denying Peavey's discovery demands for any and all documents pertaining to research and development of all of Baan's

software and regarding each and every complaint by other Baan customers, including those related to software products Peavey never used or even attempted to use? (See Section VI infra.)

STATEMENT OF THE CASE

This is a statute of limitations case in which the two trial court judges properly dismissed stale, long-time-barred claims on summary judgment. Peavey waited to file this action until February 27, 2004, claiming that Baan was responsible for a disastrous 1999 Go-Live on a new computer software system. Yet, throughout this litigation Peavey's own senior officers and key Information Technology ("IT") personnel consistently testified that they **knew** of Peavey's problems and the causes of those problems **in 1999**. Peavey's senior officers and key IT personnel also consistently testified that Baan did nothing to hide the problems and the causes of those problems from Peavey. The two trial judges' decisions to dismiss such stale claims were based on settled principles of law and raise no novel questions on appeal.

Peavey contracted with Baan in 1997 to license Baan IV enterprise resource planning ("ERP") computer software to be implemented as part of a larger IT project, involving several software vendors—a project which Peavey called its Enterprise Systems Project (the "ESP Project"). Peavey also entered into a second contract with Baan under which it hired Baan consultants, among many other third-party consultants to provide services assisting Peavey with Peavey's implementation of the various ESP Project software programs. Peavey experienced serious problems with the Go-Live in July 1999 during Phase One of the ESP Project. Peavey stopped work on the remainder of the ESP Project (Phase Two) in October 1999 due to its own internal business needs—unrelated to Baan—and sent away all the Baan consultants from Peavey's premises.

Peavey's IT personnel and ESP Project team members were well aware of the causes of the July 1999 failures within a matter of days and reported those causes to Peavey's senior officers. In addition, after the problematic July 1999 Go-Live, Peavey hired a new Director of Information Systems ("IS Director"), Ken Kantor, who, once system stability was restored, conducted a comprehensive six-month investigation into the causes of Peavey's computer failure. In June 2000 Mr. Kantor authored a final report (the "Kantor Report") to Peavey's senior officers, concluding: "**These problems are [of] our own making: They are not inherent in Baan.**" (8/15/05 Opinion (App. C)[1] at 4766 (quoting from the 6/12/00 Kantor Report (App. AA) at 5202) (emphasis in original document).)

On occasion over the years that followed, Peavey considered purchasing additional or upgraded software products or services from a number of vendors, including Baan. On February 27, 2004, without giving prior notice or sending a single demand letter over the intervening four and a half years, Peavey filed a lawsuit alleging breach of contract, breach of warranty and a variety of tort claims stemming from the parties' 1997 contracts and the July 1999 business interruptions. Baan filed a motion under MRCP 12(b)(6) seeking dismissal of Peavey's purported fraud and other tort claims on the grounds they were barred by the three-year statute of limitations. (1 CR 82.)

After hearing oral argument, the trial court declined to dismiss the action under MRCP 12(b)(6), but ordered Peavey to re-plead its alleged fraud and misrepresentation allegations which failed to meet the particularity requirement of MRCP 9. (1 RR 45-46, 51, 54.) Peavey filed a First Amended Complaint and Baan renewed its motion to dismiss as Peavey continued to rely on allegations outside the limitations period. (2 CR 169.)

Discovery proceeded and Peavey filed a motion to compel discovery of, among other things, each and every research and development document about every Baan software program,

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[1] For the Court's convenience, documents referenced by "App. [tab]" can be found in either Appellant or Appellee's Record Excerpts. The Clerk's Record is cited as "[volume] CR [page]" and the Reporter's Record is cited as "[volume] RR [page]."

without demonstrating that Peavey ever used a given program or that the program caused Peavey any difficulty whatsoever. Peavey also demanded any and all complaints from other Baan customers, without regard to Peavey's own extensive customizations to Baan's software or whether the other customers even used the same programs on the same operating systems or computers as Peavey. (3 CR 358.) The trial court conducted a lengthy omnibus hearing on Peavey's discovery motions after receiving detailed briefs. (App. F at 1758.)[2] On April 18, 2005, the Court denied Peavey's motion to compel, except as to matters to which Baan had already agreed and did not oppose. (App. F.) The trial court properly held that Peavey sought discovery without showing that the discovery related to Peavey's situation, but rather compared "apples to oranges." (App. F at 1760.) Peavey immediately moved for reconsideration of the discovery order, which the trial court denied. (App. G.) Peavey then filed a petition for interlocutory review which this Court also denied. (18 CR 2761.)

During this time, Baan filed a motion for partial summary judgment seeking dismissal of Peavey's time-barred tort claims. (7 CR 961.) After extensive briefing and a hearing on the merits, the Honorable Judge Larry Roberts granted Baan's motion for partial summary judgment. (8/15/05 Opinion (App C).) Judge Roberts correctly found that Peavey had offered no evidence of tortious conduct by Baan within the limitations period and that Peavey had no justification for waiting to assert its claims. (Id. at 4775-81.)

After the Court dismissed Peavey's tort claims, Peavey filed a motion to compel discovery of any and all internal Baan documents pertaining to certain software modules collectively referred to as "SCS," software which Peavey had never used in 1999—nor since.

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[2] Peavey did not request a court reporter for this discovery hearing so there is no transcript of the parties' arguments and presentations to the trial court from which Peavey now assigns error.

(41 CR 6225.) The Honorable Judge Lester Williamson[3] denied the motion, finding that Peavey was not entitled to every research and development document and every customer complaint relating to software that Peavey had not even used. (9/28/06 Order (App. H) at 8545.) The trial court correctly noted that SCS has no relevance as it is undisputed that Peavey stopped the ESP Project in October 1999—for its own internal business reasons unrelated to Baan—before ever needing or using SCS. (See id.)

Several months later, the trial court took up Baan's final motion for summary judgment seeking dismissal of Peavey's remaining breach of contract and breach of warranty claims. (32 CR 4820.) The trial court, again after extensive briefing and oral argument, granted Baan's motion and entered final judgment dismissing Peavey's remaining claims. (App. E.)

STATEMENT OF FACTS

The two Lauderdale County trial court judges presiding over this case had before them a large record, developed over three years of litigation and multiple hearings. Yet, the dispositive issues are not complicated and the material facts were never disputed—instead these facts were consistently affirmed by Peavey's own senior officers as well as the key members of Peavey's IT department and, most importantly, Peavey's own ESP Project Manager.[4]

A. Peavey's ESP Project and Peavey's Due Diligence.

1. By 1997, Peavey formed an evaluation committee to define its future software and business needs. (Second Amend. Compl. (App. Y) at 2616, ¶ 10; Harshbarger Dep., 89 CR

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[3] Judge Roberts was appointed to the Mississippi Court of Appeals during the pendency of the case.

[4] In the trial court, and as required by the court rules, Baan submitted detailed Statements of Undisputed Facts with record citations for each undisputed fact. (9 CR 1305; 32 CR 4823.) Tellingly, in Peavey's responses, it did not (as it could not) actually **deny** any of the facts recited by Baan, thereby causing those facts to be deemed admitted. (See URCCC 4.03(2); 9 CR 1315; 58 CR 8667.)

13348-49; 8 CR 1131.) Peavey's committee was headed up by its experienced IT professionals who had years of prior experience in manufacturing software, from the customer and vendor side, and intimate knowledge of Peavey's business practices, Peavey's operational needs, and prior ERP implementations. (See, e.g., 79 CR 11868; 79 CR 11835; Word Bio, 102 CR 15444 at (2) CD containing: Letter to Judge Williamson pp. 2, 6; 33 CR 5008-10; 8 CR 1131.)

2. Over the next year, Peavey conducted due diligence evaluating software packages from many vendors and considered the services of computer industry consultants such as Deloitte & Touche, CapGemini, SE Technologies, Andersen Consulting, IBM Consulting and KPMG. (34 CR 5099-106; Reid Dep., 9 CR 1213; Finan Aff. (App. DD) at 4607, ¶ 10; 8 CR 1131.) After receiving data and advice from each of these outside firms, Peavey made its own decision to license the Baan IV ERP software, along with several software applications from other vendors, for Peavey's overall ESP Project. (8/15/05 Opinion (App. C) at 4764-65; Finan Aff. (App. DD) at 4607-08, ¶¶ 9-15; 34 CR 5099-106; Reid Dep., 34 CR 5178, 5179, 6 CR 887.)

B. The Parties Negotiated And Executed Written Contracts.

3. Peavey, with the assistance of counsel, then negotiated and executed detailed contracts that set out the parties' respective duties for the license and use of Baan's software (the "Software License" or "SLSA") and the respective duties of the parties for Baan's separate consulting services (the "Professional Services Agreement") to assist Peavey with the implementation of its ESP Project. (SLSA (App. I); Professional Services Agmt. (App. K).) In each of these two contracts, the parties defined their obligations governing the distinct subject matters of the two agreements, allocated the relative risks between the parties, and agreed upon the exclusive remedies in the event of later disappointment. (Finan Aff. (App. DD) at 4608-10, ¶¶ 17, 20-24.)

4. Peavey also negotiated with Baan to extend the typical warranty period covering Baan's software in the Software License to two years beginning on January 1, 1998. Baan's software was therefore warranted through January 1, 2000, to "perform in substantial accordance with the [software's] Documentation"—the on-line help files and written instruction manuals for the software. (SLSA (App. I) at 8943, 8947, §§ 1.4, 7.1, as modified by Addendum Number One (App. J) at 8956, § 7.) Further, Peavey expressly agreed that Baan would have the contractual right to repair or replace any software alleged to be in breach of warranty. In the event Peavey made a timely warranty claim and Baan could not repair or replace the software, Peavey would then be entitled to a refund for amounts paid for software that remained non-conforming. (Finan Aff. (App. DD) at 4609-10, ¶ 22; SLSA (App. I) at 8947, § 7.1, as modified by Addendum Number One (App. J.) at 8956, § 7.)

5. In executing the contracts with Baan, Peavey's Chief Financial Officer testified:

> I understood that Peavey, by executing these agreements, was limiting its remedies and it was Peavey's informed intention to do so. Similarly, Baan USA was disclaiming certain warranties, and by signing the agreements Peavey agreed that such warranties were not available.
>
> The provisions of the agreements allocated risks between Peavey and Baan USA and the pricing for the software and services which Peavey received was negotiated in light of the various provisions included in the agreements. If Peavey desired different contractual language concerning the limitation of warranties or liability than it ultimately agreed upon, Peavey would likely have been required to pay Baan USA a higher fee than it paid under the contracts as signed.
>
> . . . . .
>
> I understood that the only legally effective representations made by Baan USA were contained in the parties' written agreements and, by reference, the software Documentation.

(Finan Aff. (App. DD) at 4609-10, ¶¶ 20-21, 23.)

6. The Peavey ESP Project was not a packaged or "turn-key" software system. Instead, Peavey selected software systems from several software vendors—including Baan—and, after obtaining the software from the various vendors, Peavey needed to map its business processes into the various software components, i.e., Peavey needed to "implement" the various software applications. (See, e.g., 8 CR 1131-37, 1165-67, 1117-23, 33 CR 5014-15 ("[Peavey] viewed the implementation services separate from the software itself.").)

7. While Peavey paid an up-front fee for the software licenses, in sharp and significant contrast, Peavey did not negotiate a set price ("flat fee" or "fixed price") for the consulting services in assisting Peavey's implementation. Instead, Peavey hired consultants on an hourly basis from many vendors, including Baan, to provide services assisting Peavey on the ESP Project. (Professional Services Agmt. (App. K) at 8960, § 4.1; Reid Dep., 79 CR 11849; Word Dep., 79 CR 11903.)[5]

8. Thus, Peavey negotiated for and agreed to pay for Baan's professional services pursuant to the separate Professional Services Agreement on a time-and-materials basis. Baan billed for its services on a periodic basis throughout the project as services were delivered. (Professional Services Agmt. (App. K) at 8960, § 4.1.) Peavey paid Baan's consulting invoices

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[5] By the express terms of the Professional Services Agreement, **Peavey's ESP project was run by and was the responsibility of Peavey:**

> Tasks. **Responsibility for the proper implementation of the Software is with Customer**; Baan's role is to **assist** Customer with such implementation. Tasks that are primarily the responsibility of Customer's personnel will remain Customer's responsibility and will **remain under Customer's supervision, management and control, even if Baan assists Customer** in performing such tasks.

(Professional Services Agmt. (App. K) at 8960, § 2.3 (emphasis added).) While Peavey was responsible for the overall implementation, Baan of course retained the right to control its consultants in order to maintain their independent contractor status. (Id. at 8960, § 1.2.)

throughout the project as agreed and without any objection or reservation of rights. (Harshbarger Dep., 33 CR 4998 ("[Peavey] didn't refuse to pay a bill because of quality.").)

C. Peavey's Implementation Of The ESP Project And The Disastrous July 1999 Go-Live.

9. Peavey conceded that it accepted Baan's software when tendered in 1998 and 1999. (Plaintiff's Brief in Opp. To Baan's Second Mot. for Summary Judgment, 59 CR 8808, 8817, 8824.)

10. Peavey then decided to split the ESP Project into two phases. Along with some non-Baan software, Phase One consisted of the Sales and Distribution portions of Baan IV along with Peavey's own customizations and interfaces to its legacy (i.e., existing) systems. (8/15/05 Opinion (App. C) at 4765; Second Amend. Compl. (App. Y) at 2618, ¶ 19; Harshbarger Aff. (App. EE) at 5319, ¶ 8.)

11. Peavey went live on the Phase One software on July 6, 1999. Within a matter of days, Peavey experienced problems fulfilling orders entered into the ESP system as customer orders were not passing through the Peavey-developed interface to Peavey's legacy warehouse systems. (8/15/05 Opinion (App. C) at 4765; see also Finan Aff. (App. DD) at 4610-11, ¶¶ 27-29.) By the end of the week, Peavey had disconnected the new system and sent personnel to Peavey's warehouses to fill orders and ship product by hand. (8/15/05 Opinion (App. C) at 4765-66; Second Amend. Compl. (App. Y) at 2618, ¶ 20.) As Peavey's ESP Project Manager succinctly put it, anyone "breathing" at Peavey knew that Peavey's business was essentially shut down for a time in July 1999. (Harshbarger Dep., 18 CR 2697; see also Finan Aff. (App. DD) at 4610, ¶ 28.)

12. Peavey and its IT personnel knew within a matter of days which parts of the Phase One software caused Peavey's problems. (Harshbarger Dep., 79 CR 11876; Word Dep., 8

CR 1047.) And Peavey and its personnel knew within a matter of weeks that Peavey's problems in Phase One resulted not from Baan, but from Peavey's own customizations and interfaces Peavey had developed connecting the Phase One software to Peavey's legacy systems. (8/15/05 Opinion (App. C) at 4765; Word Dep., 8 CR 1047; Lagrone Aff. (App. HH) at 6511, ¶¶ 17-19.)

13. Peavey and its IT staff knew at the time in 1999 that Peavey—not Baan—was responsible for the failed software customizations and interfaces which Peavey's IT staff and Peavey third-party consultants had designed, developed and tested. (Supp. Harshbarger Aff. (App. FF) at 8213-14, ¶¶ 13-15.) Indeed, Peavey's own Project Manager for the ESP project testified that Baan did not have any responsibility—contractual or otherwise—for Peavey's Phase One customizations or interfaces to Peavey's legacy systems. (79 CR 11868; Supp. Harshbarger Aff. (App. FF) at 8213-14, ¶15 ("At no time while I was the Peavey ESP project manager did I believe that Baan or Baan consultants were responsible for the interfaces and source code modifications made by Peavey. Those aspects of the project were handled by Peavey through Peavey's IT development team and the third-party consultants hired by, and under the direction of, Peavey.").) Further, Peavey had agreed that Baan was not responsible for any customizations Peavey made to Baan's software and Peavey had further agreed that Baan had no liability for such customizations. (Source Code Agmt. (App. L) at 8979-80, §§ 3.3 & 5.)

14. In July 1999 and the months following, Peavey's IT and ESP Project personnel reported to Peavey's management on the ESP project Steering Committee the causes of the system failures. (Word Dep., 8 CR 1049, 79 CR 11910-11.) Peavey's Chief Operating Officer, its Chief Financial Officer, and Peavey's ESP Project Manager all testified that Peavey knew of the injury to Peavey's business and the causes for those injuries no later than the late summer or fall of 1999. (Lutz Aff. (App. BB) at 4560, ¶ 16; Finan Aff. (App. DD) at 4611, ¶ 36.) Those same senior Peavey officers and key project personnel testified that Baan did nothing to conceal

the facts from Peavey or to dissuade Peavey from exercising its rights. (Lutz Aff. (App. BB) at 4560-61, ¶¶ 21-22; Finan Aff. (App. DD) at 4611, ¶¶ 34-35.)

15. As Peavey's Chief Operating Officer testified:

> By the late summer or fall of 1999, Peavey was well aware of the particular software elements around which Peavey's post-go-live problems centered.
>
> As of July 1999, Peavey's management knew the identities of the various consultants and programmers who worked on the E.S.P. Project, including those employed by Baan USA.
>
> I had sufficient notice of the problems experienced by Peavey in July 1999 and thereafter to warrant investigating the source.
>
> Peavey had full access to all of the software in place at Peavey and was able to analyze the software code or provide access to the software code to consultants for analysis to help determine the source of problems Peavey experienced.
>
> There was nothing in particular which acted to prevent or hinder Peavey from locating and identifying the cause of the problems with the E.S.P. Project within a few weeks or months of experiencing the problems.
>
> Baan USA did not hinder Peavey in determining the sources of the problems caused by the computer system during and after July 1999.
>
> During my time as COO at Peavey, Baan USA never attempted to conceal the cause or to confuse me as to the cause of the problems experienced at Peavey during the E.S.P. Project.

(Lutz Aff. (App. BB) at 4560-61, ¶¶ 16-22.)

16. Once Peavey restored system stability, Peavey senior management tasked its new IS Director, Ken Kantor, to conduct an investigation into the causes of the failures in the ESP Project which lasted half a year. (79 CR 11853; 8/15/05 Opinion (App. C) at 4766.) Mr. Kantor presented the final version of the Kantor Report to Peavey's senior management in June 2000

concluding that Baan was not responsible for Peavey's problems and Peavey's senior officers and IT personnel accepted the findings. (6/12/00 Kantor Report (App. AA) at 5202; see also Lutz Aff. (App. BB) at 4562-64, ¶ 32-33; Finan Aff. (App. DD) at 4613-14, ¶¶ 44-45.)

D. Peavey Decides To Stop Its Project In October 1999.

17. In October 1999, Peavey stopped all work on Phase Two of the Peavey ESP Project (including, among other things, the core Baan IV Manufacturing software and the "SCS" modules) for Peavey's own, internal, business reasons—reasons that had nothing to do with any alleged deficiency in Baan's software or Baan's consulting services. (8/15/05 Opinion (App. C) at 4766; Supp. Lutz Aff. (App. CC) at 6522-23, ¶¶ 4-11; Harshbarger Aff. (App. EE) at 5320, ¶ 10.) At that time, Peavey chose to allocate its internal IT resources to other projects while it considered making fundamental changes to its manufacturing methods. (Lutz Aff. (App. BB) at 4561, ¶¶ 26-27; Supp. Lutz Aff. (App. CC) at 6522, ¶¶ 4-8.) Those changes would, if acted upon, essentially moot Phase Two of the ESP Project. (Id. at 6522, ¶ 7; Kantor Dep., 80 CR 12018.) Peavey had all Baan consulting personnel stop work and leave Peavey in 1999. (8/15/05 Opinion (App. C) at 4766.)

18. Prior to Peavey's decision to stop the project, Baan submitted periodic invoices for its consulting services under the Professional Services Agreement. Peavey paid Baan's invoices for its consulting work from 1997 throughout the end of the project in October of 1999 without objection or reservation of rights. (Supp. Harshbarger Aff. (App. FF) at 8217, ¶ 25; Diamond Dep., 80 CR 12076, 82 CR 12373.) Peavey did so because Peavey's ESP Project

Manager overseeing Baan's work knew Baan's services were satisfactory and complied with the Professional Services Agreement. (Supp. Harshbarger Aff. (App. FF) at 8217, ¶ 25.)[6]

E. Peavey Never Gave Notice To, Or Made A Warranty Claim Against, Baan.

19. Peavey never moved forward or completed Phase Two of the ESP project. Nor did Peavey ever demand that Baan return to fix any alleged deficiency in Baan's software or services. (Id. at 8215, ¶¶ 19-20.)

20. Peavey had agreed to provide Baan with written notice to Baan's corporate offices of any matter required to be reported under either the Software License or the Professional Services Agreement or for which notice is required by law. (SLSA (App. I) at 8949, § 12; Professional Services Agmt. (App. K) at 8962, § 7.) The parties further expressly agreed to the form and manner of any required notice:

> **Any notice required or permitted under the terms of this Agreement or required by law must** be **in writing** and **must** be (a) delivered in person, (b) sent by first class mail, registered mail, or air mail, as appropriate, (c) sent by overnight air courier, or (d) by facsimile, **in each case** properly **posted to the appropriate address set forth below.**

(SLSA (App. I) at 8949, § 12 (emphasis added).) The Software License specified that Peavey must provide such written notice to Baan's corporate office in Reston, Virginia. (Id. at 8951.)

21. Although contractually and legally required, Peavey never gave Baan written notice of any non-conformity of Baan's software or services. Peavey never once demanded that Baan remedy any aspect of the Baan software or services before Peavey filed this lawsuit in February 2004. (Supp. Harshbarger Aff. (App. FF) at 8215, ¶ 19.)

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[6] "[I]f I had believed Baan's consulting services were deficient or breached Baan's Consulting Services Agreement with Peavey, I would have refused to pay Baan's consulting invoices relating to any deficient services. I never did so because the situation did not occur . . ." Id.

22. Although contractually and legally required, Peavey did not give Baan written notice in the days and weeks after Peavey's problematic Phase One Go-Live in July 1999. Peavey did not give Baan written notice prior to Peavey management's October 1999 decision to stop work on Phase Two of the Peavey ESP Project—again, due to Peavey's internal reasons, unrelated to any alleged deficiency in Baan's software or services. (Id. at 8216-17, ¶¶ 23-25.)

23. Peavey did not give Baan written notice before the expiration of the parties' negotiated 24-month warranty period on January 1, 2000.[7] Peavey did not give Baan written notice during or after Peavey's comprehensive internal audit of the causes of Peavey's problems with the ESP Project, or when Peavey's IS Director formally reported the results on June 14, 2000 to Peavey's Chief Operating Officer that Peavey's "**problems are of our own making. They are not inherent in Baan.**" (Kantor Report (App. AA) at 5202 (emphasis added).)[8] Peavey did not give any required notice in 2001, 2002, or 2003. (Supp. Harshbarger Aff. (App. FF) at 8215, 8216-17, ¶¶ 19, 23-25; see also 8/15/05 Opinion (App. C) at 4776-77.)

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[7] "As project manager for Peavey's ESP project, if I believed the Baan software did not perform as warranted and agreed under the Software License Agreement between Peavey and Baan, I would have notified Baan and demanded that Baan repair or replace the software. If Baan could not repair or replace the software, I would have again notified Baan and requested that Baan refund the license fee related to the defective software. I never did so because such a situation never occurred." (Supp. Harshbarger Aff. (App. FF) at 8216-17, ¶ 24.)

[8] Peavey's Chief Operating Officer (Walter Lutz) and Chief Financial Officer (Daniel Finan) instead testified that they, as then-Peavey senior officers, **accepted and agreed** with the Kantor Report's conclusions regarding the causes of Peavey's problems. (Lutz Aff. (App. BB) at 4564, ¶ 33 ("At the time I received Mr. Kantor's report, I agreed with his conclusions. Today, I still agree with his conclusions."); Finan Aff. (App. DD) at 4614, ¶ 45 ("I agree with Mr. Kantor's conclusions."). Peavey's ESP Project Manager likewise agreed with Mr. Kantor's conclusions. (Harshbarger Dep., 33 CR 5000-01; see also Lagrone Aff. (App. HH) at 6512, ¶ 23.)

F. In 2003 Baan Negotiated With Peavey In Good Faith To Amend And Restate The Software License And Peavey Continued To Use Baan's Software Every Day.

24. In the summer of 2003, Peavey negotiated with Baan a reduction in the number of licensed users who could access the system in order to reduce the amounts Peavey would pay Baan going forward for access to Baan's help-desk. (Supp. Harshbarger Aff. (App. FF) at 8215-16, ¶¶ 20-22.) In these negotiations, Peavey never notified Baan that any of Baan's software was defective or that the Baan software failed to perform as warranted. (Id. at 8215, ¶ 19.) Peavey did not ask Baan to extend the warranty on Baan's software which had expired three and half years earlier in January of 2000. Peavey did not ask Baan to redress any issue relating to Baan's software or services whatsoever. (Id.) Peavey instead continued to use Baan's software, without any reservation of rights, and agreed on June 20, 2003 that the Software License, as amended by the parties, "shall remain in full force and effect" and Peavey chose not to make any claim or provide Baan with any notice of alleged deficiency with Baan's software. (Id.; Addendum Number Two to SLSA (App. Z) at 4862.)

25. Peavey continued to use Baan's software every business day from July 1999 through February 27, 2004 when Peavey filed this lawsuit. (8/15/05 Opinion (App. C) at 4766 ("Peavey has been utilizing portions of the Baan IV software in its daily business operations since July 1999.") Indeed, Peavey continued to use Baan's software each day during the years of litigation below. (Id.)

26. Peavey filed this lawsuit in February 2004. By that time almost all of Peavey's personnel with knowledge of Peavey's ESP Project were no longer employed by Peavey. (See 8/15/05 Opinion (App. C) at 4768-70; Boydstun Aff. (App. GG) at 5756, ¶ 1; Lagrone Aff. (App. HH) at 6508, ¶ 1.) Peavey's ESP Project Manager resigned in February 2004. (Supp. Harshbarger Aff. (App. FF) at 8216, ¶ 23.)

SUMMARY OF THE ARGUMENT

Because Baan's consultants left Peavey in 1999, Peavey cannot establish any tortious acts by Baan that occurred since 1999, let alone after February 27, 2001 (within the three-year limitations period governing tort claims). Likewise, Peavey cannot toll the limitations period in the face of the undisputed testimony of senior Peavey officers and senior IT and ESP Project personnel that everyone at Peavey who was "breathing" knew about Peavey's problems in July 1999 and those on the ESP Project reported the precise causes of those problems to Peavey senior management shortly thereafter. As both trial judges below correctly held, Peavey's own senior officers admitted that Baan took no action to deter Peavey from making a timely claim or to dissuade Peavey from exercising its rights.

Peavey's claims of deficient consulting services are likewise barred by the three-year statute of limitations governing services claims as it is undisputed that Baan left Peavey in 1999 and did not provide any services to Peavey within three years of this lawsuit. Further, Peavey never complained about Baan's services prior to filing suit. Rather, Peavey paid Baan's consulting invoices years ago as agreed, without any protest or reservation of rights.

It is also undisputed that Peavey accepted Baan's software in 1998 and 1999. Once Peavey accepted Baan's software, under the parties' contracts and by law, Peavey was required to give written notice of breach and revoke its acceptance within a commercially reasonable time or be barred from remedy. Peavey is a sophisticated multi-national corporation. Peavey had every opportunity to write a simple demand letter and timely revoke its acceptance of Baan's software. Peavey did not do so.

By failing to give Baan timely notice of Peavey's contentions, Baan was necessarily deprived of its contractual right to fix any legitimate problems with Baan's software or services **in 1999**, while the software was still under warranty and remedial action was still possible.

Instead of revoking acceptance or giving notice of breach, Peavey continued to use Baan's software every day, without complaint. Indeed, three years later, in June 2003, Peavey negotiated with Baan and entered into **another** agreement amending and restating the parties' prior agreements and thereby waived any breach of contract claim for earlier events.

Even if Peavey's claims were not barred as a matter of law for the reasons stated above, Baan is also entitled to summary judgment because Peavey failed to put forth evidence that Baan's software or services breached any of the warranties in the Software License or Professional Services Agreement. Instead, every person with personal knowledge—Peavey's ESP Project Manager with overall project responsibility, Peavey's Chief Financial Officer who executed the contracts on behalf of Peavey, Peavey's Chief Operating Officer who oversaw the project, Peavey's IS Director, Peavey's IS Manager and other members of its ESP Project team—consistently testified that the problems Peavey encountered, and for which it now sues, **were not caused by Baan.**

Finally, the trial court judges did not abuse their discretion in denying Peavey's motions to compel discovery regarding matters wholly unrelated to the claims in this case and regarding software modules that Peavey never used and which never caused Peavey any injury.

ARGUMENT

I. STANDARD OF REVIEW.

In this case, the two trial judges considered numerous pleadings and voluminous exhibits and held many hearings over the course of three years of litigation. Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." M.R.C.P. 56(c). When reviewing a summary judgment decision, the appeals court examines the same materials as the trial court.

Miranda v. Wesley Health Sys., LLC, 949 So. 2d 63, 65 (Miss. Ct. App. 2006). The trial judges' grant of summary judgment is reviewed de novo. Jenkins v. Ohio Cas. Ins. Co., 794 So. 2d 228, 232 (Miss. 2001); Sarris v. Smith, 782 So. 2d 721, 723 (Miss. 2001) ("[A]pplication of a statute of limitation is a question of law to which a de novo standard also applies.").

Speculative arguments and assertions, however, do not create issues of material fact. "The non-moving party may not rest upon mere allegations or denials in the pleadings but must set forth specific facts showing that there are genuine issues for trial." Albert v. Scott's Truck Plaza, Inc., 978 So. 2d 1264, 1266 (Miss. 2008) (internal quotation marks omitted). The Court must also be convinced that "the factual issue is a material one, one that matters in an outcome determinative sense . . . the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact." Leffler v. Sharp, 891 So. 2d 152, 156 (Miss. 2004) (internal quotation marks omitted). "[A] complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." Evan Johnson & Sons Constr., Inc. v. State, 877 So. 2d 360, 365 (Miss. 2004) (internal quotation marks omitted); see also Albert, 978 So. 2d at 1266 ("Summary judgment is mandated where the non-movant fails to establish the existence of an essential element of that party's claim."). Likewise, the alleged factual dispute must be raised by competent evidence in the record, not by hindsight arguments and criticisms by the parties' advocates, years after the fact.[9]

[9] For example, both in the trial court and now on appeal, Peavey relies heavily on the "facts" recited in the report of Peavey's retained expert witness. (App. X.) Peavey's retained expert, of course, has no personal knowledge of the facts of the case and his hearsay report is no more evidence than the parties' briefs. See, e.g., Flowers v. State, 842 So. 2d 531, 559-60 (Miss. 2003) (finding that trial court erroneously allowed expert to testify as to hearsay); Richardson v. Derouen, 920 So. 2d 1044, 1049 (Miss. Ct. App. 2006) ("Experts may rely on inadmissible hearsay in reaching their opinions; however, the hearsay evidence does not become admissible

Finally, the two trial judges' discovery rulings are all reviewed under an abuse of discretion standard. Fair v. Town of Friars Point, 930 So. 2d 467, 469 (Miss. Ct. App. 2006). "Trial courts have broad discretion regarding discovery issues." Id.

II. PEAVEY'S TORT CLAIMS ARE BARRED BY THE THREE-YEAR STATUTE OF LIMITATIONS.

Peavey filed suit: (1) over 6 years after it contracted with Baan; (2) over 4½ years after the failed July 1999 Go-Live and the contemporaneous knowledge of Peavey's senior officers and IT personnel of the causes of Peavey's system failures and the impact on Peavey's business; (3) more than 4 years after Peavey decided—for its own internal business reasons unrelated to Baan—to stop the ESP Project and send Baan's consultants away; and (4) over 3½ years after Peavey's IS Director reported to Peavey senior management in June 2000 the results from Peavey's own investigation into the causes of the failed July 1999 Go-Live; namely that Peavey's **"problems were of [its] own making,"** not Baan's. Both trial judges correctly held that Peavey's tort claims for alleged fraud, fraudulent and negligent misrepresentation, money had and received, and breach of the duty of good faith and fair dealing are all time-barred as Peavey offered no evidence of tortious acts by Baan after February 27, 2001 (within the three-year limitations period).[10]

Statutes of limitation have an important role in a system of justice. They are "founded upon the general experience of society that **valid** claims will be promptly pursued and not allowed to remain neglected." Williams v. Clay County, 861 So. 2d 953, 961 (Miss. 2003)

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simply because the expert relied upon it."); see also Def. Baan U.S.A.'s Objs. & Mot. to Strike the Report of R. Diamond (App. MM).

[10] Likewise, the three-year statute of limitations period for claims based on services bars Peavey's claims regarding consulting services under the Professional Services Agreement. It is undisputed that all Baan consultants left Peavey in 1999 and Baan provided no consulting services thereafter, let alone within three years of Peavey's lawsuit. See, infra at Section III.

(emphasis supplied) (quoting Miss. Dep't of Pub. Safety v. Stringer, 748 So. 2d 662, 665 (Miss. 1991)). The statutes of limitation set forth the Legislature's designation of a reasonable time for asserting a cause of action. They are "designed to suppress assertion of false and stale claims, when evidence has been lost, memories have faded, witnesses are unavailable, or facts are incapable of production because of the lapse of time." Id. [11]

The statutes of limitations are particularly critical in the present case. Due to the passage of time, almost all of the Peavey senior officers and IT managers with personal knowledge of the ESP Project are no longer employed by Peavey. (See, e.g., 8/15/05 Opinion (App. C) at 4768-70; Boydstun Aff. (App. GG) at 5756, ¶ 1; Lagrone Aff. (App. HH) at 6508, ¶ 1) Indeed, Baan no longer employs **anyone** involved with the project. (Resp. to Peavey's Mot. to Enforce Court Order and Motion to Compel, 38 CR 5732.) By the time Peavey filed suit, Baan had few documents still in its possession even pertaining to Peavey. (4 CR 569.)

Further, as argued in more detail below, a sophisticated multi-national corporation is not allowed to lay in wait for years on a commercial claim when the vendor has a contractual and legal right to remedy legitimate problems **at the time** and **when such cure is still possible**. In accord with the very purpose of limitations periods, Peavey's failure to timely assert its rights bars its claims. See, infra at Sections IV(A) & (B).

A. Peavey's Tort Claims Accrued In July 1999.

Peavey does not dispute that a three-year statute of limitations applies to all its tort claims. Miss. Code Ann. § 15-1-49. Peavey also does not dispute that, through the knowledge

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[11] While the parties agreed that California law controls the interpretation and construction of the Software License and the Professional Services Agreement, (SLSA (App. I) at 8950, § 13.11; Addendum Number One to SLSA (App. J) at 8957, § 13.11; Professional Services Agreement (Ex. K) at 8962, § 7), Mississippi law, as the procedural law of the forum, applies to determine the applicable statute of limitations for all of Peavey's belated claims. See Ford v. State Farm Ins. Co., 625 So. 2d 792, 793 (Miss. 1993).

of its senior officers and its key IT managers, it knew of both the causes of the failed Go-Live in July 1999 and the resulting injuries and disruptions to Peavey's business at the time. (Peavey's Br. at 19 (". . . Peavey knew about the problems implementing Phase I of the Software package in July 1999 . . ."), 26-27 (". . . initial problems that were manifest in July 1999. . ."); see also 8/15/05 Opinion (App. C) at 4765.)

This case does not present a close call about whether a party should have heeded "storm warnings" sufficient to require an investigation and thereby trigger the statute of limitations. This is a case of undisputed actual knowledge of: (1) the event; (2) the injury giving rise to the claim; and (3) the causes of that injury. This is a case where Peavey's Chief Operating Officer, Chief Financial Officer, three of its senior IT officers, ESP Project Manager and several key Peavey project team members all testified that they and Peavey knew the sources and causes of the disruptions to Peavey's business **in July 1999**. (8/15/05 Opinion (App. C) at 4768 ("Baan has produced deposition testimony and affidavits from ex-employees of Peavey which reflect that Peavey knew very soon after the 'go-live' that there were problems with the implementation of the Baan IV software."), 4770 ("Peavey acknowledges that absent tolling the statute of limitations has run on its tort claims.").)

There is no legal doctrine to save time-barred claims on this record. The two trial judges below both heard and correctly rejected Peavey's assertion that the statutes of limitations were tolled either through a purported lack of knowledge on Peavey's part, or by some alleged inequitable conduct by Baan.

B. No Tolling Doctrine Applies In The Face Of Peavey's Undisputed And Actual Contemporaneous Knowledge.

1. The Discovery Rule Does Not Apply.

By statute in Mississippi, the discovery rule "can have no effect with regard to injuries which are not latent." Chamberlin v. City of Hernando, 716 So. 2d 596, 601 (Miss. 1998); Miss.

Code Ann. § 15-1-49(2). Latent injury "is defined as one where the plaintiff will be precluded from discovering harm or injury because of the secretive or inherently undiscoverable nature of the wrongdoing in question . . . [or] when it is unrealistic to expect a layman to perceive the injury at the time of the wrongful act." PPG Architectural Finishes, Inc. v. Lowery, 909 So. 2d 47, 50 (Miss. 2005) (internal quotation marks omitted).

For example, in Wayne Gen. Hosp. v. Hayes, the Court stated that a plaintiff "knew or reasonably should have known that some negligent conduct had occurred, **even if they did not know with certainty that the conduct was negligent as a matter of law**." 868 So. 2d 997, 1000 (Miss. 2004) (emphasis added). The proper focus is on the time that a plaintiff "discovers, or should have discovered by the exercise of reasonable diligence, that he **probably** has an actionable injury." Wright v. Quesnel, 876 So. 2d 362, 366 (Miss. 2004) (internal quotation marks omitted) (emphasis added); see also First Trust Nat'l Ass'n v. First Nat'l Bank, 220 F.3d 331, 336-37 (5th Cir. 2000) ("The would-be plaintiff need not have become absolutely certain that he had a cause of action; he need merely be on notice—or **should** be—that he should carefully investigate the materials that suggest that a cause probably or potentially exists.") (emphasis in original).

Peavey's injury was neither hidden nor latent. As the trial court observed, the record evidence is undisputed that during the July 1999 Go-Live "Peavey experienced problems in the disruption of its business operations and the 'go-live' was unsuccessful. As characterized by some Peavey employees, it was 'a disaster.' Peavey's operations, including shipping and invoicing, were disrupted." (8/15/05 Opinion (App. C) at 4765; see also Second Amend. Compl. (App. Y) at 2618, ¶ 20 ("[S]hipping operations were disrupted for weeks, forcing Peavey to spend months 'cleaning up' the problems caused by the Baan software.")

Furthermore, "by the fall of 1999, Peavey's project team was aware of the particular software elements around which Peavey's post go-live problems centered." (8/15/05 Opinion (App. C) at 4770; see also Finan Aff. (App. DD) at 4610-11, ¶¶ 27-31; Word Dep., 8 CR 1047.) In light of these undisputed facts, the trial court correctly concluded that "the alleged injury to Peavey was not latent in that it was known that there was a problem." (8/15/05 Opinion (App. C) at 4779.)

Moreover, Peavey did in fact conduct its own extensive investigation regarding the causes of its injury **in both 1999 and 2000**, when the events were recent and memories were fresh. Peavey's IT staff immediately investigated the causes of the problems in July 1999 and reported those causes to Peavey's senior officers. (Word Dep., 8 CR 1047; 23 CR 3421.) Peavey then directed its new IS Director, Ken Kantor, to conduct a follow-up investigation after which he drafted a comprehensive report to Peavey's senior management. (8/15/05 Opinion (App. C) at 4766; Lutz Aff. (App. BB) at 4561-62, ¶¶ 28-30; 79 CR 11853; Kantor Report (App. AA).) At the time Peavey possessed all the information it needed to fully analyze its situation and learn the nature of the injuries it now claims.[12] (Lutz Aff. (App. BB) at 4560, ¶ 19; Finan

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[12] Peavey relies on a distinguishable case, Sarris v. Smith, 782 So. 2d 721 (Miss. 2001). (Peavey Br. at 28.) In Sarris, the plaintiff did not know the name or conduct of a negligent doctor until years after her husband's death. Id. at 725. Once the plaintiff obtained her husband's medical records and learned the identity of the doctor at fault, she filed suit—within two years of obtaining the records but not within two years of her husband's death. Id. at 722-23. The Court held that the **only way** the plaintiff could have learned of the allegedly tortious conduct was by reviewing the medical records which showed that a consulting doctor had failed to inform her deceased husband of the need for follow-up treatment. Id. at 724.

In stark contrast, Peavey's senior officers testified that Peavey's injury and its causes were not hidden. Peavey knew the identity of the consultants, including Baan's, working at Peavey and their various responsibilities. Peavey had available to it the software itself and everything it needed to determine the causes of its problems. (Finan Aff. (App. DD) at 4611, ¶ 32 ("Peavey had full access to all of the software in place at Peavey and was able to analyze the software code or provide access to the software code to consultants for analysis to help determine the source of the problems Peavey experienced.").)

Aff. (App. DD) at 4611, ¶ 32). Peavey can not argue Baan withheld documents critical to discovering its injury; instead Peavey maintained a vast project library containing all relevant information regarding the ESP project. (Word Dep., 11 CR 1616-A.) The Baan software has been in Peavey's hands **since 1999,** along with many of the e-mails on which it relies. Thus, the trial court correctly found that Peavey "made a thorough investigation of the cause of the problems Peavey experienced during the 'go-live' with the Baan IV software . . ." (8/15/05 Opinion (App. C) at 4766.)

After completing the comprehensive audit, Mr. Kantor reported to senior Peavey management: he and Peavey's IT staff analyzed all of the issues and problems Peavey had experienced in 1999 and reported to Peavey's senior management: "**These problems are [of] our own making. They are not inherent in Baan.**" (Kantor Report (App. AA) at 5202-03 (emphasis in original); 8/15/05 Opinion (App. C) at 4766; 79 CR 11853.) Peavey's senior officers accepted those findings in 2000. (Lutz Aff. (App. BB) at 4562-64, ¶¶ 31-33; Finan Aff. (App. DD) at 4612-14, ¶¶ 42-45.) As the trial court succinctly pointed out, these admissions by Peavey's IS Director go "straight to the meat of the coconut[.]" (1 RR 33.)

Peavey's injury and potential cause of action cannot be "latent" as Peavey was quickly able to determine the causes of its problems in 1999 and confirm those causes again in June 2000. Thus, even under the discovery rule, Peavey's tort claims filed in February 2004 are time-barred.

2. Belated Allegations Related To SCS Provide No Basis For Tolling.

Peavey did not even mention the "SCS modules" for over 1½ years of litigation or in any of the three versions of its complaint below. Peavey never complained about SCS modules at all from July 1999 until the lead-up to the partial summary judgment hearing in August 2005.

Around that time, Peavey apparently re-discovered a single February 1999 e-mail (App. O)—an e-mail **Peavey** itself had produced, Bates labeled as PEC 040242, from its own ESP Project library. (Word Dep., 11 CR 1616-A.)[13] It is not surprising that Peavey brought no claims, nor raised any issues about SCS before August 2005. Peavey had never used the product as it was not part of the software implemented in Phase One or the resulting July 1999 failed Go-Live. (Order Denying Motion to Compel (App. H) at 8545.) Peavey then stopped the project in October 1999 before using or needing SCS. (Boydstun Aff. (App. GG) at 5758, ¶¶ 13-14.) Moreover, the Peavey personnel with project responsibility for SCS all testified there **was, in fact, no issue with SCS**. (See, e.g., Harshbarger Aff. (App. EE) at 5320, ¶¶ 11-15; Boydstun Aff. (App. GG) at 5757-58, ¶ 9, 14.)[14]

Peavey now contends—a decade after the fact—that Baan somehow hid issues with SCS from Peavey. Peavey ignores the undisputed testimony of its own ESP Project Manager to the contrary: that Baan kept Peavey "informed of the progress of the development of the various Baan products, including progress of the integration of Baan IV ERP and Baan [SCS]. [Baan] included me in conference calls and meetings with development personnel from Baan USA concerning development and availability of those integrations." (Harshbarger Aff. (App. EE) at 5319, ¶¶ 6, 7.) Indeed, Peavey admits in its own brief that Baan was providing Peavey with documents regarding the status of the SCS products and their compatibility with the various

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[13] Peavey apparently claims that, nearly a decade later in litigation, it has learned new information about how Baan breached the parties' contracts **in 1998 and 1999**. Under such a theory the statute of limitations is tolled forever. Baan need not prove that every Peavey employee had complete knowledge of every aspect of Peavey's revisionist arguments (made a decade later in litigation) for the limitations period to begin to run back in 1999. The un-rebutted testimony from Peavey's senior officers and key ESP project personnel is more than sufficient.

[14] Beth Boydstun was the Peavey employee handling the SCS part of the project. She testified that Baan, in fact, **delivered SCS** and that Peavey had **successfully tested SCS at three different Peavey facilities without any issues** prior to Peavey stopping Phase Two of the ESP project. (Boydstun Aff. (App. GG) at 5757, ¶¶ 8-9.)

versions of the Baan IV ERP software **from project inception in January 1998.** (Peavey Br. 7-8) Peavey cannot meet its burden to toll the statute of limitations based on unsupported allegations regarding SCS a decade after the fact in the face of the testimony of Peavey's own ESP Project Manager that she was fully informed on the status of SCS in **1998 and 1999**.

Moreover, Peavey never needed or used SCS. SCS was to be implemented as part of Phase Two of the ESP Project. (Harshbarger Aff. (App. EE) at 5319-20, ¶¶ 8-9.) Yet, Peavey's Chief Operating Officer testified that he stopped Phase Two in October 1999 for reasons having nothing to do with SCS. (Supp. Lutz Aff. (App. CC) at 8523, ¶ 10 ("My reasons for pausing the implementation in no way, shape, or form included any consideration of [SCS].").) Since then, Peavey never moved forward with Phase Two and Peavey has never used any of the Phase Two software, including SCS.

Both trial judges correctly rejected Peavey's inventive argument that the statute of limitations for a "disastrous" software implementation in July 1999 does not begin to run until mid-2005 when Peavey re-discovers an e-mail which had been in its possession since 1999. Likewise, Peavey's entirely speculative conjecture that had Peavey, in fact, used SCS it **might** have caused problems is not a basis to toll the statute of limitations. Were such a basis valid, Peavey could extend the statute of limitations indefinitely.

3. Peavey Has Failed To Put Forth Evidence Of Any Inequitable Conduct By Baan To Toll The Statute of Limitations.

Peavey's senior officers and key ESP Project personnel also testified—without contradiction—that Baan did nothing to conceal from Peavey either its injury or the causes thereof, or to hinder Peavey from filing its action. (Finan Aff. (App. DD) at 4611, ¶¶ 34-35; Lutz Aff. (App. BB) at 4560-61, ¶¶ 21-22.) In the face of this testimony, Baan did not "fraudulently conceal" Peavey's cause of action, engage in a "continuing tort," or act inequitably. None of these doctrines apply as Peavey already knew of its injury and the causes and Baan did nothing to conceal those matters from Peavey. Each of these tolling doctrines requires that Peavey show that Baan deterred Peavey from acting by inequitable, fraudulent or wrongful conduct during the intervening years since the July 1999 Go-Live and continuing for years **after all Baan personnel had left Peavey's premises**. The two trial judges below correctly rejected Peavey's contentions of "continuing fraud."

In order to meet its burden of equitable estoppel, Peavey must establish by competent evidence on-going "**inequitable or fraudulent conduct**." Mitchell v. Progressive Ins. Co., 965 So. 2d 679, 685 (Miss. 2007) (emphasis added) (declining to apply equitable estoppel where plaintiff had notice of the claim and "[n]o evidence was submitted . . . that [defendant] engaged in inequitable or fraudulent conduct"). Thus, Peavey must prove that "it was induced by the conduct of [the defendant] **to not file its complaint sooner**" and that the defendant "knew or had reason to know that such consequences would follow." Harrison Enters., Inc. v. Trilogy Comm'ns, Inc., 818 So. 2d 1088, 1095 (Miss. 2002) (emphasis added).

Similarly, in order to establish fraudulent concealment, Peavey must demonstrate "some act or conduct of an affirmative nature designed to prevent and which does prevent discovery of the claim." Stephens v. Equitable Life Assurance Soc'y, 850 So. 2d 78, 83 (Miss. 2003) (internal quotation marks omitted); see also Miss. Code Ann § 15-1-67. Peavey must show that "despite investigating with due diligence, [it] was unable to discover the claim." Nygaard v. Getty Oil Co., 918 So. 2d 1237, 1242 (Miss. 2005). Likewise, a "continuing tort" is one in which the defendant commits "repeated acts of wrongful conduct." Smith v. Franklin Custodian Funds, Inc., 726 So. 2d 144, 149 (Miss. 1998). A continuing tort is "one inflicted over a period of time; it involves wrongful conduct that is repeated until desisted, and each day creates a separate cause of action." Id. at 148 (quoting Stevens v. Lake, 615 So. 2d 1177, 1183 (Miss. 1999)).

Despite the oft- repeated rhetoric in Peavey's brief, Peavey offered **not a single witness** who testified that Baan did anything to discourage Peavey from taking action or that Peavey did, in fact, rely upon Baan's conduct in failing to assert its rights. Peavey instead contends that the two trial judges overlooked some vague assurances by Baan that Peavey could "fully implement" the software. The two trial judges did not overlook anything. Rather, after exhaustive briefing and a full hearing of all Peavey's contentions, both trial court judges correctly found that all of the communications Peavey wishes to now construe as "continuing torts" or inequitable conduct were nothing more than sales pitches by Baan in an effort to sell new software and services. (8/15/05 Opinion (App. C) at 4776-77 ("[T]he Court can discern no representation in these communications which could be construed to have induced Peavey, a sophisticated multinational corporation, to refrain from filing suit against Baan. These are large multinational corporations which are sophisticated business entities that communicated regarding the support and sale of software.")[15]

The trial judges' holdings that Peavey's claims are time-barred necessarily follow from the sworn testimony from Peavey's own senior officers and key project personnel that Baan did nothing to discourage Peavey from asserting its rights coupled with Peavey's complete failure to contradict the sworn testimony of its senior officers and IT personnel. (Lutz Aff. (App. BB) at 4560-61, ¶¶ 21-22; Finan Aff. (App. DD) at 4611, ¶¶ 34-35.) There is no basis on this undisputed record to revisit the decisions of the two trial judges that the statutes of limitations were not tolled.

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[15] Indeed, the Court further noted that despite having ample opportunity to re-plead, "the Plaintiff has yet to plead with particularity, naming the who, what, and when, of the alleged fraud, fraudulent misrepresentation, and negligent misrepresentation committed by Baan." (8/15/05 Opinion (App. C) at 4780.)

III. PEAVEY'S CLAIMS AGAINST BAAN FOR DEFICIENT SERVICES ARE ALSO TIME-BARRED.

A. Peavey's Breach Of Contract Claims Based On The Professional Services Agreement Are Also Barred By The Three-Year Statute Of Limitations.

Peavey sued Baan on two distinct contract claims: (1) for allegedly defective **software** under the Software License; and (2) for breaches related to Baan's professional consulting **services** under the parties' Professional Services Agreement. (Second Amend. Compl. (App. Y) at 2617, 2620-21.) The latter claims for allegedly deficient services are covered by the three-year limitations period set forth in Miss. Code Ann. § 15-1-49 and the trial court correctly found them time-barred. 1/24/07 Opinion (App. E) at 14471; U.S. Fidelity & Guar. Co. v. Conservatorship of Melson, 809 So. 2d 647, 652 (Miss. 2002) (three-year limitation period in § 15-1-49 applies to claim on written contracts); In re Estate of Stewart, 732 So. 2d 255, 258 (Miss. 1999) (applying § 15-1-49 to the provision of professional services).

Peavey put forth no evidence of any breach of the Professional Services Agreement that occurred less than three years before Peavey filed suit (i.e., after February 27, 2001) for the obvious reason that Peavey elected to stop all work on the Peavey ESP Project in October 1999 and sent the Baan personnel off Peavey's premises at that time. (1/24/07 Opinion (App. E) at 14471; Harshbarger Aff. (App. EE) at 5320, ¶¶ 10-11; Finan Aff. (App. DD) at 4612, ¶¶ 37-38.) The trial court correctly ruled therefore that Peavey's claims relating to Baan's consulting and professional services under the Professional Services Agreement are time-barred.

B. The Statute Of Limitations For Claims Under The Professional Services Agreement Is Not Governed By The Uniform Commercial Code.

Lacking evidence of any services performed within three years of filing suit, but in an effort to avoid the three-year statute, Peavey asserts that Baan's consulting services are actually "goods" subject to the six-year statute of limitations for claims governed by the Mississippi Uniform Commercial Code ("UCC") for the sales of goods. The Professional Services

Agreement is, however, a contract for services, not for the sale of goods. See Miss. Code Ann. §§ 75-2-102 ("[T]his chapter applies to transactions in goods ...."), 75-2-105(1) ("'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale ....").

Baan's consultants are human beings, not chattel. The judge below correctly held that the Professional Services Agreement dealt with the provisions of services. (1/24/07 Opinion (App. E) at 14471.)

Additionally, Peavey's argument that services claims are governed by the UCC fails because under Mississippi law, even in so-called hybrid contracts (i.e., transactions involving both goods and services), **the nature of a given claim** dictates the body of law applicable to that claim. In J.O. Hooker & Sons, Inc. v. Roberts Cabinet Co., 683 So. 2d 396, 399-400 (Miss. 1996) the Mississippi Supreme Court specifically addressed the issue of whether Article 2 of the UCC governs **all** aspects of a mixed contract, i.e. a **single** contract for **both** goods and services. The contract at issue in J.O. Hooker & Sons provided for the sale of cabinetry and the parties disputed which party had the duty to dispose of the old cabinets. 683 So. 2d at 400.

The Court found that the contract was a "mixed transaction of goods and services" but held that the UCC did **not** apply to the claim that was asserted. Id. The Court reasoned that "whether or not the contract should be interpreted under the UCC or . . . general contract law should depend upon the nature of the contract and also upon whether the ***dispute*** in question primarily concerns the goods furnished or the services rendered under the contract." Id. at 400 (emphasis in original). As the dispute concerned the cabinet removal **services**, not the quality of the cabinets, the Court explained, "[t]he fact that goods were furnished in the present contract has no bearing on the legal analysis involved, **given that the dispute in this case clearly concerns the service aspect of this mixed transaction**." Id. (emphasis added).

The Court recently applied J.O. Hooker & Sons' mixed-transactions test in Upchurch Plumbing, Inc. v. Greenwood Utilities Comm'n, 964 So. 2d 1100, 1110-11 (Miss. 2007). The contract at issue there was for the upgrade of a control system for a combustion turbine. Id. at 1102-03. The Court once again held that the UCC did **not** apply because "[u]sing this Court's mixed-transactions test, the dispute . . . clearly concerns testing of the system, which is a service." Id. at 1111.[16]

The case **against** applying the UCC to Peavey's services claims is even more clear in the present case. Unlike the Hooker and Upchurch cases involving a **single** contract which contained "mixed" purposes, here the parties entered into **two** written contracts, one that defined and clearly delineated which aspects of this transaction related to the sale of **goods** (the Software License) and the other relating to the provision of **professional consulting services** (the Professional Services Agreement).[17] Indeed, Peavey separately alleged in each of the three

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[16] Peavey's reliance upon the Indiana Court of Appeals decision in Dexter Axle Co. v. Baan USA, Inc., 833 N.E.2d 43 (Ind. Ct. App. 2005) is a red herring. In Dexter, the Indiana courts determined that under Indiana law an exclusive venue selection provision in one but not all of the parties' contracts required the plaintiff to sue in the venue the parties agreed to. This decision under Indiana law, of course, has no bearing on the appropriate statute of limitations for a services claim under Mississippi law. This case is controlled by J.O. Hooker & Sons and Upchurch Plumbing.

[17] Peavey argues that the two contracts should be treated as a "single" contract. Peavey's reliance on Sullivan v. Mounger, 882 So. 2d 129 (Miss. 2004) for this argument is also misplaced. (Peavey Br. at 35.) In Sullivan, the parties first executed a summary term sheet which contained the principal terms of their agreement regarding the settlement and termination of the plaintiff's ownership interest, and employment by, a business. Id. at 130-31. The parties then executed several more detailed documents collectively referred to throughout the documents as the "Transaction Documents." Id. The issue before the Court was whether the plaintiff's dispute was within the scope of an **arbitration provision** found in some, but not all, of the "Transaction Documents." Id. In finding that the arbitration provision applied, the Court concluded that the various contracts should "be **construed** together." Id. at 135 (emphasis added) (internal quotation marks omitted).

The rules of contract construction of the two contracts at issue in the present case does **not** control what statute of limitations applies to each of Peavey's contract claims, some made for versions of its Complaint breaches of the Software License for alleged deficiencies in the Baan software, all the while also separately alleging breaches of the Professional Services Agreement regarding Baan's consultants and their services.[18]

Peavey then relies upon non-Mississippi cases in which courts have held that services that are provided "ancillary" to the purchase of a computer system are considered "goods." Unlike all of the transactions in those cases, however, Peavey in this case **did not** buy a single "turn-key" computer system for a single "fixed price." Instead, under the Software License, Peavey only licensed the software itself from Baan for a flat fee (and entered into several other licenses with other software vendors too). Regarding outside consulting services, those services were **not** provided as part of the Software License. Indeed, Peavey was **not** obligated to obtain **any** consulting services from Baan, or to purchase such services from **any** outside source at all.

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allegedly defective software under the Software License and others for allegedly deficient services under the Professional Services Agreement.

[18] See, e.g., Second Amend. Compl. (App. Y) at 2620-21:

> 33. Peavey paid Baan more than $4 million **under the Software Agreement** for the use, support, and installation of the Baan software. Baan, however, has failed to provide the **software as contemplated under the Software Agreement** and has failed to provide the support and installation services required under the contract. Peavey has been deprived of the benefits that it reasonably anticipated receiving **from the Software Agreement.** This is a complete failure of performance **under the Software Agreement** and a material breach of that Agreement.
>
> 34. Baan **also** contracted to **provide professional consulting services** for the implementation of the Baan software at Peavey. Baan's involvement with the implementation was so exceedingly deficient that it amounted to a complete failure of the performance contracted **for in the Service Agreement** and **therefore is a material breach of that Agreement.** Peavey consequently was deprived of the benefits that it reasonably anticipated receiving **from the Service Agreement.**

(emphasis added).

(See Reid Dep., 35 CR 5183; Word Dep., 33 CR 5014-15 ("[W]e viewed the implementation services separate from the software itself.").)[19]

Also, in contrast to the Software License fee, Peavey agreed to pay for Baan's consulting services on a time and materials basis, in accordance with an hourly fee schedule and not linked in any way to payment under the Software License. (Professional Services Agmt. (App. K) at 8963-64.)[20] In fact, Baan issued invoices on a periodic basis as the consulting services were performed and Peavey paid those invoices throughout the project without objection or reservation of rights. (Id. at 8960, § 4.1.)

Peavey's claims for alleged breach of the Professional Services Agreement **by definition** involve a dispute about Baan's professional consulting **services**. The very nature of the Professional Services Agreement and the separate Software License, as evidenced by each contract's plain terms, is that each agreement governed a different and distinct subject matter—

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[19] Computer consulting services are not deemed per se "ancillary" to a related software license for goods. Rather, the courts look to the nature of the services, the payment terms for those services (up front or as services are delivered), whether the services are part of a single "fixed price" contract for a finished computer system or are provided on a time and materials basis, and whether the nature of the alleged breach is related to the core software or the services related to that software. See e.g. Page v. Hotchkiss, No. CV020067814, 2003 WL 22962151, *6 (Conn. Super. Ct. Dec. 2, 2003) (holding that contract was "for the provision of a service as an independent contractor, not the sale of a good") (copy attached at Addendum 1); Pearl Invs. LLC v. Standard I/O, Inc., LLC, 257 F. Supp. 2d 326, 353 (D. Me. 2003) (distinguishing cases involving parties who "were paid in a manner primarily reflecting sale of goods", as compared with payment on "a time and materials basis").

[20] Peavey's argument that "the contractual dispute in question involves Baan's obligation to deliver and implement the software package Peavey purchased" is untenable. The agreements show on their face that Peavey did not license a turn-key software system. Rather, Peavey licensed certain modules of the Baan IV software for a fixed sum as specified in the Software License. Peavey decided also to contract separately on an hourly basis for professional consulting services from Baan and others to **assist** Peavey's internal IT staff in the implementation. (See, e.g., Professional Services Agmt. (App. K) at 8960, § 2.3 ("Tasks. Responsibility for the proper implementation of the Software is with Customer; Baan's role is to assist Customer with such implementation." (emphasis in original).)

one consulting services and the other software goods. Under both J.O. Hooker and Upchurch, the trial court correctly applied settled Mississippi law and held that Peavey's claims based on allegations of deficient professional services are all subject to the three statute of limitations governing service contracts and are time-barred. (1/24/07 Opinion (App. E) at 14471.)

IV. PEAVEY'S CLAIMS BASED ON THE SOFTWARE LICENSE AGREEMENT FAIL AS A MATTER OF LAW.

The trial court correctly observed that "Peavey has been utilizing portions of the Baan IV software in its daily business operations since July 1999." (8/15/05 Opinion (App. C) at 4766.) Indeed, until it filed this lawsuit, almost five years after the failed July 1999 Go-Live, Peavey never notified Baan of any purported deficiency in Baan's software or services. In the intervening years, Peavey and Baan instead had periodic contact with regard to new software products. As Peavey's ESP Project Manager testified:

> During these discussions with Baan, I never told Baan or any of its representatives that any of Baan's software was defective . . . [or] that the Baan software was defective . . . [or] that the Baan software failed to work as warranted. I never made a warranty claim or complaint to Baan about Baan's software or services, nor did I ever request that Baan take action to redress a breach of any warranty relating to Baan's software or services. I was instead trying to negotiate for Peavey a better price from Baan for future software and services.

(Supp. Harshbarger Aff. (App. FF) at 8215, ¶ 19.)

The trial court correctly held that since Peavey: (1) used Baan's software for years, without objection or making a single demand; and (2) then voluntarily negotiated with Baan to enter into a contract amendment some four years later, the parties' contract amendment in June 2003 marked the absolute outside legal time limit for Peavey to have asserted its rights. Under both common law and the UCC, Peavey waived and relinquished its right to any remedy through its years of inaction while continuing to use Baan's software and subsequent new agreement with Baan.

A. The Trial Court Correctly Held That Peavey Waived Its Right To Any Remedy Under The Software License Agreement.

Like any party to a contract, Peavey can relinquish its rights through its actions and conduct. Sanderson Farms, Inc. v. Gatlin, 848 So. 2d 828, 837 (Miss. 2003) (quoting Brent Towing, Inc. v. Scott Petroleum Corp., 735 So. 2d 355, 359 (Miss. 1999)). "To determine the point at which any waiver occurs, the Court should look to the actions of the relevant party after that party has sufficient information to be on notice of the alleged deviation from the contractual duty." Upchurch, 964 So. 2d at 1112.

Peavey's inaction after the disastrous July 1999 Go-Live and its continued use of Baan's software for years thereafter constitutes such a waiver. "If, after acquiring knowledge of the deviation from a known right articulated in the contract, a party fails to insist on its contractual rights, or acts inconsistently with such rights, then that party waives the right to require such performance." Id.; see also Vice v. Leigh, 670 So. 2d 6, 10 (Miss. 1995) ("Although he may not have been pleased, [plaintiff] made no attempt to enforce his rights under the lease. Consequently, [plaintiff] waived [his] right to object to [defendant's] conduct.").[21]

Here, the undisputed testimony from Peavey's senior officers and its ESP Project Manager and personnel is that Peavey knew of the disastrous effects of the failed July 1999 Go-Live, yet Peavey continued to use Baan's software for years. Peavey did so without once demanding that Baan to fix any alleged deficiency in the software or its services, or revoking its acceptance of Baan's software and services from 1999 or in the many years afterward. (Supp.

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[21] Notwithstanding the parties' agreement that the contracts would be "interpreted and construed in accordance with the laws of the State of California . . .", (Addendum Number One to SLSA (App. J) at 8957, § 13.11), Peavey contends that California law does not apply. (82 CR 12302.) Baan notes that under California law, waiver may also result from conduct that is inconsistent with the intent to enforce the right in question. See Rubin v. Los Angeles Fed. Sav. & Loan Ass'n, 159 Cal. App. 3d 292, 298-99 (Cal. Ct. App. 1984). Whether the Court applies Mississippi law or California law, the result is the same, Peavey failed to give prompt contractually and legally required notice.

Harshbarger Aff. (App. FF) at 8216-17, ¶¶ 23-24.) Peavey thereby relinquished any right to belatedly sue Baan for breach.

For example, Peavey and Baan had periodic contact from 2000 through 2003 with regard to the possibility of Peavey contracting with Baan to come back and perform additional consulting services or to purchase new software products. (Id. at 8214, ¶ 17.) Yet, as Peavey's ESP Project Manager testified, Peavey never notified Baan of any alleged deficiency in Baan's software or services during those negotiations. (Id. at 8215, ¶ 19.)

Furthermore, in 2003, Peavey had more discussions with Baan about reducing the number of Peavey users authorized to use the Baan software from 500 to 175 -- the number of Peavey users actually using the system because Peavey had chosen not to go forward with Phase Two of the ESP Project. (Id. at 8215-16, ¶¶ 20-22.) Once again, Peavey never once during these negotiations notified Baan of any issue under the prior agreements. (Id. at 8216-17, ¶¶ 23-24.) Nor did Peavey request an extension of the warranty period for Baan's software which had ended back in January 2000.

Rather, Peavey kept the Baan software and kept using it, while at the same time negotiating from Baan a reduction in the number of licensed users. Baan accommodated the request and reduced Peavey's yearly help-desk fee. Peavey memorialized this agreement with Baan in an addendum to the Software License. The parties further agreed the Software License "as amended by this Addendum shall remain in full force and effect." (App. Z at 4862.) Peavey thereby voluntarily renewed its contract with Baan without making a claim or reserving its rights under the old agreement.

On such a record, the trial court correctly held that Peavey, as a matter of law, had to assert its rights prior to causing Baan to enter into the June 2003 Addendum, or those rights were thereafter waived. Peavey, with full knowledge of the failed July 1999 Go-Live and the causes of those problems, had by then continued to use Baan's software for almost four years without notifying Baan of any purported defect or deficiency. (See 8/15/05 Opinion (App. C) at 4766.) Peavey then executed the June 2003 Addendum that ratified the parties existing contract, without making a claim or reserving its rights, and Peavey thereafter continued to pay Baan under the new terms. (Supp. Harshbarger Aff. (App. FF) at 8216, ¶ 22; App. Z; 1/4/07 Opinion (App. E) at 14470.)

As a result of Peavey's failure to insist on its contractual rights for years, or to even notify Baan of any purported breach, and due to Peavey's actions inconsistent with such rights (including never tendering back Baan's software and continuing to use the software while negotiating and executing amendments to the Software License with Baan), the trial court correctly held that Peavey waived its right to sue Baan for breach. See Upchurch, 964 So. 2d at 1112.

B. Peavey's Software License Claims Are Also Barred Under the UCC.

The trial court's ruling is also entirely consistent with and, indeed, required by the UCC. Peavey does not dispute that it accepted Baan's software when tendered in 1998 and 1999. (59 CR 8808.) Peavey never revoked its acceptance and continued to use Baan's software throughout the litigation below. Therefore, UCC § 2-607(3)(a) applies: "Where a tender has been accepted . . . the buyer **must within a reasonable time** after he discovers or should have discovered any breach **notify the seller of breach** or **be barred from any remedy** . . . ." (emphasis added). Peavey never gave legally and contractually required notice of alleged breach. And since Peavey never gave any notice at all, by definition Peavey also failed to give notice within a commercially reasonable time. Miss. Code Ann. § 75-2-607 cmt. 4 ("[T]he rule of requiring notification is designed to defeat commercial bad faith . . ."); see also Cal. Com. Code § 2607 cmt. 4 (same).[22]

One of the goals of the UCC is "to encourage compromise and promote good faith in commercial relations." C.R. Daniels, Inc. v. Yazoo Mfg. Co., 641 F. Supp. 205, 211 n.12 (S.D. Miss. 1986). To that end, comment 4 to Miss. Code Ann. § 75-2-607 requires that the buyer give notice "such as informs the seller that the transaction **is claimed to involve a breach**, and thus opens the way for normal settlement through negotiation." (emphasis added); see also C.R. Daniels, Inc., 641 F. Supp. at 211 (citing Eastern Airlines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 976 (5th Cir. 1976)); K&M Joint Venture v. Smith Int'l, Inc., 669 F.2d 1106, 1114-15 (6th Cir. 1982) (applying California law).[23]

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[22] This Court may consider on appeal the relevant UCC provisions that require the same result reached by the trial court. See, e.g., Brocato v. Miss. Publishers Corp., 503 So. 2d 241, 244 (Miss. 1987) (where defendants moved for summary judgment on several alternative bases, defendants on appeal are "entitled to raise any alternative ground based on the pleadings in the court below which would support the judgment here"). Moreover, it is a "long-standing rule" that this Court "will not reverse a lower court's decision where that court reaches the right conclusion although for the wrong reason." Briggs v. Benjamin, 467 So. 2d 932, 934 (Miss. 1985).

[23] In K&M Joint Venture, the parties contracted for the sale of a tunnel boring machine. Id. at 1108. The disappointed buyer, K&M, experienced problems with the machine immediately after it was positioned in an excavation. Id. at 1114. The problems with the machine continued and required various repairs. Id. During this time, the disappointed buyer remained in frequent contact with the seller, complaining of the various problems and seeking advice on how to best resolve them. Id. Like Peavey in the present case, the disappointed buyer, however, never made any demand to receive repair or replacements free of charge and never made any claim for breach of warranty. Id. The Sixth Circuit held that notification under California law (U.C.C. § 2607) requires more than an indication from the buyer that it is experiencing difficulties with the goods, **it requires the buyer to inform the seller that the transaction is claimed to involve a breach**. Id. at 1114-15. K&M did not notify that it considered the transaction to involve breach until it filed suit seventeen months after its first problem was experienced. Id. at 1114. In addition, the court found that the fact that K&M "continued to order repair and replacement parts from [the seller] and to pay for them as billed without protest throughout the period when problems were being experienced is inconsistent with the claim that K&M considered [the seller] liable." Id. Finally, the Sixth Circuit concluded "[t]his was a transaction between two large enterprises, not one in which an individual consumer dealt in a single transaction with a large

US CA law ?

Here the parties also agreed to the manner and method of any required notice of breach, specifically that:

> **Any notice required** or permitted under **the terms of [either agreement] or required by law** must be **in writing** and must be (a) delivered in person, (b) sent by first class registered mail, or air mail, as appropriate, (c) sent by overnight air courier, or (d) by facsimile, in each case properly **posted to [Baan's corporate office in Reston, Virginia]**.

(SLSA (App. I) at 8949, § 12; Professional Services Agmt. (App. K) at 8962, § 7 (incorporating § 12 of the SLSA by reference) (emphasis added).).[24] Peavey further agreed that it must "**promptly** report all detected errors or malfunctions of the Software to Baan" so that Baan could perform its contractual duty to correct or replace the alleged non-conforming software. Software License (App. I) at 8946, § 6.8(c) (emphasis supplied); see also Mercury Marine v. Clear River Constr. Co., 839 So. 2d 508, 511 (Miss. 2003) (buyer's claim barred due to failure to give seller reasonable opportunity to repair according to the warranty thereby depriving seller of right to notice and cure).

It is undisputed that Peavey never gave written notice that it claimed breach. Peavey did not give Baan any notice of breach in the days and weeks after the problematic Phase One Go-Live in July 1999, nor did it give Baan notice of breach prior to Peavey's decision to stop work

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manufacturer or seller of goods...[u]nder these circumstances, there is no inequity in requiring it to bear the consequences of its decision." Id. at 1115-16.

[24] See, e.g., Copenhagen Reinsurance Co. v. Champion Home Builders Co., 872 So. 2d 848, 855 (Ala. Civ App. 2003) ("If a company wishes to require a specific mode of notice as a prerequisite to warranty coverage, it may do so"; affirming summary judgment against buyer who merely gave telephone notice where the agreement specified written notice); Hitachi Elec. Devices (USA), Inc. v. Platinum Techs., Inc., 621 S.E.2d 38, 40 (S.C. 2005) (parties may specify whether notice is required and manner of effective notice).

on Phase Two of the Peavey ESP Project in October 1999.[25] Peavey did not give notice of breach before the expiration of the negotiated warranty period on the Baan software on January 1, 2000, at any point during or after Peavey's six month internal audit of the causes of Peavey's problems, or when Peavey's IS Director formally reported on June 14, 2000 the results of Peavey's investigation. Nor did Peavey provide notice of any breach in 2001, 2002 or 2003. (Supp. Harshbarger Aff. (App. FF) at 8216-17, ¶¶ 23-25.)[26]

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[25] Lacking a single demand letter (and in the face of the consistent testimony from Peavey's senior officers, Peavey's ESP Project Manager, and even Peavey's own retained expert (Diamond Dep., 80 CR 12073) that Peavey did not give Baan notice), Peavey is left to creatively re-interpret a few of Peavey's own documents from 1999 without any corroborating testimony and which, in any event, do not comply with the procedures the parties agreed to for legally required and effective notice. (SLSA (App. I) at 8949, § 12.)

For example, despite Peavey's contentions to the contrary, Peavey failed to elicit supporting testimony from the ESP Project member who authored the 1999 internal "issues log" which Peavey now relies upon as "notice" to Baan of alleged breach. (App. P.) Instead, the author contradicted Peavey's contention and admitted that the problems experienced were with Peavey's customizations and interfaces, not the Baan software. (Word Dep., 33 CR 5024.)

While everyone on the ESP Project knew that Peavey faced problems in 1999, that does not change the fact that Peavey never notified Baan that it believed those problems **were caused by Baan** or were Baan's legal responsibility. <u>See</u> <u>C.R. Daniels, Inc. v. Yazoo Mfg. Co.</u>, 641 F. Supp. 205, 211 (S.D. Miss. 1986) (finding that "several vague references to problems with the product," the return of some of the product and a minor warranty claim, while also telling the seller that he anticipated taking delivery in the future when problems related to the economy and government regulations were resolved, did not constitute notice of breach under § 2-607).

[26] In addition, Peavey's lawsuit years after-the-fact does is **not** notice under the UCC either. The entire purpose of the contemporaneous notice requirement is to encourage dispute resolution, to allow the seller to cure problems and avoid litigation. <u>Gast v. Rogers-Dingus Chevrolet</u>, 585 So. 2d 725, 729 (Miss. 1991) (holding that "notice by initiation of legal proceedings does not satisfy the statutory mandate" to revoke acceptance); <u>C.R. Daniels, Inc.</u>, 641 F. Supp. at 211 n.12 (explaining that one of the goals of the UCC "and particularly of the notice provision of § 2-607, is to encourage compromise and promote good faith in commercial relations"); <u>Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith</u>, 523 So. 2d 324, 328 & n.1 (Miss. 1998) (explaining that the seller's opportunity to cure is a legal "requisite of [the buyer's] right of recovery"). This doctrine bars claims both on express **and** implied warranties. Miss. Code Ann. § 75-2-607(3)(a) ("[T]he buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach **or be barred from any remedy**.") (emphasis added).

authority?

Under the UCC, notice of revocation of accepted goods between sophisticated businesses must be given within a **commercially reasonable time**. Miss. Code Ann. § 75-2-607 cmt. 4; see also Cal. Com. Code § 2607 cmt. 4. Peavey cites no case for the proposition that it can sue Baan for all monies it paid to Baan (and tens of millions of dollars in alleged consequential damages) while at the same time **continuing to use Baan's software** for almost a decade. There is no such authority.

Instead, §2-607 requires clear and effective revocation of acceptance on a prompt and timely basis. See, e.g., Dan J. Sheehan Co. v. Ceramic Technics, Ltd., 605 S.E.2d 375, 377 (Ga. Ct. App. 2004) (affirming summary judgment in favor of seller and finding that notice of breach **less than four months** after delivery was not reasonable and seasonable under § 2-607;); Pace v. Sagebrush Sales Co., 560 P.2d 789, 792 (Ariz. 1977) (granting summary judgment to seller holding that notice **four months** after buyer's receipt of the goods was not seasonable as a matter of law); Hapag-Lloyd, A.G. v. Marine Indem. Ins. Co. of Am., 576 So. 2d 1330, 1330 (Fla. Dist. Ct. App. 1991) (reversing jury verdict in favor of buyer holding that buyer's notice of breach after **using** defective top loader **for four weeks** and after damages occurred was not within a reasonable time "as a matter of law").

Peavey never exercised its legal and contractual obligation to revoke its acceptance of Baan's software, let alone within a commercially reasonable time. The trial court's determination that Peavey had necessarily waived its right to revoke its acceptance at least by the June 2003 Addendum is correct—the law governing commercial transactions of accepted goods required Peavey not to sleep on its rights, but to act years earlier. Using Baan's software for over four and a half years before bringing suit, without prior objection or reservation of rights, and then continuing to use the product for the better part of a decade is not commercially reasonable as a matter of law.

V. PEAVEY HAS FAILED TO PUT FORTH EVIDENCE OF ANY BREACH OF WARRANTY.

Finally, Peavey's contract claims all fail on the merits as Peavey never identified any breach of the actual warranties and duties that the parties agreed to in 1997. To properly analyze Peavey's contract claims, one must start with the warranty language the parties agreed would define the parties' obligations, what software would be provided and what that software would do. (SLSA (App. I) at 8947-48, § 7.) It is no accident that Peavey does not cite **any** of the parties' **actual** warranty provisions in its brief.

In the Software License, the parties agreed that Baan's software was warranted for two years, ending January 1, 2000. (Addendum Number One to SLSA (App. J) at 8956.) During that warranty period, Baan warranted that the specific software modules in the Software License would "perform in substantial accordance with" the software's defined "Documentation." (SLSA (App. I) at 8947, § 7.1.)

Baan did **not** warrant that its software fit Peavey's particular needs or that the software would work exactly as Peavey wished. Instead, Baan only warranted that the software would work as described in Baan's user manuals and on-line help files—i.e. the software's Documentation. (Finan Aff. (App. DD) at 4609-10, ¶ 22.)[27] Indeed, the parties agreed that once

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[27] Rather than relying on the actual warranty language, Peavey invents out of whole cloth "warranties" that were never discussed, given, or agreed to. For example, Peavey argues without citation, that it was Baan's "obligation[]" to "provide Peavey with a fully integrated software package as promised." (Peavey's Br. at 23.) There was no such promise. Peavey's sole post-litigation software criticism apparently relates to the mechanisms by which data passes (the "interface" or "integration") between the SCS modules and the core Baan IV Manufacturing application. Putting aside that both SCS and Baan Manufacturing were part of Phase Two of the ESP project and, therefore, never used by Peavey, Peavey's own retained expert had to admit that the software mechanism Baan supplied with SCS (a "flat file" interface) was **exactly** what was specified and described in the Baan software Documentation and thus was **exactly** as warranted. (Diamond Dep., 80 CR 12083; SLSA (App. I) at 8947, § 7.1; see also Muirhead Dep., 77 CR 11596 ("Q: So you understood that the interface between Baan IVc2 and [SCS] was a flat file interface, correct? A: I understood that that's what the documentation said.").)

Peavey customized Baan's software, the software was no longer under any warranty and Baan had no responsibility at all with regard to Peavey's own customizations to the software. (Supp. Harshbarger Aff. (App. FF) at 8213-14, ¶ 15; Source Code Agmt. (App. L) at 8979, §§ 3.1, 3.3; see Easley v. Day Motors, Inc., 796 So. 2d 236, 240 (Miss. Ct. App. 2001.)

Likewise, in the Professional Services Agreement, Peavey agreed that it—not Baan—was responsible for the overall ESP Project implementation. (App. K) at 8960, § 2.3 ("Responsibility for the proper implementation of the Software is with Customer[.]").)[28] Peavey agreed the Baan's role was merely "to assist Customer with such implementation." (Professional Services Agreement (App. K) at 8960, § 2.3.) Peavey further agreed that Baan was **not** responsible for implementation tasks performed by Peavey's own personnel; instead such tasks "remain Customer's responsibility and will remain under Customer's supervision, management and control, even if Baan assists Customer in performing such tasks." (Id.)[29] The Peavey officer who executed these contracts testified that Peavey understood and agreed to these limited warranties and that Peavey did not negotiate or receive any other warranties other than those set out in the parties' contracts. (Finan Aff. (App. DD) at 4609-10, ¶¶ 21-22.)[30]

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[28] Thus, Peavey's contention that Baan was unable to achieve the "full implementation of the software package that Peavey purchased" (Peavey's Br. at 22) is not only factually untrue (because it was Peavey that decided to stop the project for its own business reasons (Lutz Aff. (App. BB) at 4561, ¶ 26.), it is legally irrelevant. **Peavey**—not Baan—had the contractual and legal responsibility for the ESP project implementation.

[29] Peavey's own project personnel testified that the primary causes of Peavey's disastrous July 1999 Go-Live were Peavey's customizations and Peavey's interfaces between the core Baan ERP software and Peavey's legacy systems. (Harshbarger Dep., 33 CR 5000-01.) It is undisputed that Peavey (and not Baan) controlled the customization and interface development and did all the work on those aspects of the project. (Supp. Harshbarger Aff. (App. FF) at 8213-14, ¶¶ 14-15.) Baan therefore has no liability for such problems under the terms of the Professional Services Agreement.

[30] As implied warranties cannot conflict with express warranties, the testimony of Peavey's senior officers and project personnel disposes of both Peavey's express and implied warranty

Peavey does not just fail to produce evidence to support its claims, Peavey's IT staff and senior officers actually repeatedly **disavowed** Peavey's revisionist allegations relating to both Baan's software and services. Rather than offering evidence that Baan's software or services breached any contractual obligations, Peavey's own senior officers and ESP Project personnel instead, consistently testified that Peavey's problems were not even caused by Baan. (See, e.g., Kantor Report (App. AA); supra at Stmt. of Facts (C).)

As for Baan's software, Peavey's senior officers and IT staff repeatedly admitted that the Baan software was not deficient in any way. (Reid Dep., 34 CR 5179; Word Dep., 33 CR 5024, 5027; Kantor Dep., 18 CR 2707; Lutz Aff. (App. BB) at 4564, ¶ 34; Finan Aff. (App. DD) at 4615, ¶ 48.) For example, Peavey's own project manager admitted that the primary causes of Peavey's disastrous July 1999 Go-Live were the interfaces that **Peavey** developed between the core Baan ERP software and Peavey's legacy systems—not anything in the Baan software. (Harshbarger Dep., 33 CR 5000-01; see also Lagrone Aff. (App. (HH) at 6511, ¶ 17 ("The problems after go-live were absolutely caused by the customizations and interfaces created by Peavey, not the Baan software itself.").)

Peavey's IS Manager leading up to the failed July 1999 Go-Live testified that Peavey's allegation in its Complaint that Baan "failed to provide the software as contemplated under the Software Agreement and has failed to provide support and installation services required under the contract" is **"absolutely not"** true. (Reid Dep., 33 CR 5768, 5765 ("I think Baan was the

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claims. (See Miss. Code Ann. § 75-2-317 and Cal. Comm. Code § 2317 ("Warranties whether express or implied shall be construed as consistent with each other . . ."); Finan Aff. (App. DD) at 4609-10, ¶¶ 18-22.) In addition, as testified by Peavey's Chief Financial Officer, in order to get a better price from Baan, Peavey knowingly disclaimed all implied warranties. Under the Mississippi Computer Law provisions of the UCC, Peavey (a sophisticated multi-national corporation with a professional and experienced IT staff) may agree to disclaim implied warranties and to exclusive remedies in transactions involving computer systems. Miss. Code Ann. § 75-2-314(5). Baan will not restate those arguments here but relies on its briefing on this issue in the trial court. (See 77 CR 11648-664.)

best choice."); see also Harshbarger Dep., 33 CR 5005-06; Word Dep., 33 CR 5025; Kantor Dep., 35 CR 5199.) Peavey's IS Director who evaluated the IT situation at Peavey after the failed Go-Live wrote (and later confirmed at deposition) that Baan has "proven to be a solid, strong, and well-maintained system. We have had very little problems with the basic functionality." (77 CR 11577.) In short, even Peavey witnesses agree that Peavey's software problems were "**not inherent in Baan.**" (Kantor Report (App. AA) at 5202.)[31]

Likewise, Peavey's senior officers and ESP Project managers all admitted that Baan's professional services were also satisfactory. The head of Peavey's IT department during the implementation testified that he was "quite impressed with the caliber and qualifications of the Baan provided personnel." (Reid Dep., 12 CR 1729.) Peavey's ESP Project Manager admitted that Baan's consultants performed the services that Peavey paid for and that she had no concerns regarding the quality of the consultants provided by Baan. (Harshbarger Dep., 33 CR 4998-99; see also, Word Dep., 33 CR 5024 ("Q. Are you aware of any criticism or deficiencies in the skill of the consulting services provided by Baan USA with regard to this project? A. **No.**"); 33 CR

[31] Improvidently, Peavey did offer two affidavits from two of its employees who speculated that SCS somehow prevented Peavey from moving forward with Phase Two of the ESP project. (40 CR 6000-09; 40 CR 6010-17.) In court ordered depositions, however, both admitted that they actually had no knowledge about the reasons Peavey stopped Phase Two, that they had no knowledge about, or project responsibility for, SCS, and that they would have to defer to the testimony of Peavey's Chief Operating Officer, Peavey's ESP Project Manager and the Peavey employee that handled SCS, all of whom had actual personal knowledge on the subjects (and who all testified favorably to Baan). (Muirhead Dep., 77 CR 11593, 56 CR 8351; Johnson Dep., 45 CR 6734; Miss. R. Civ. P. 56(e) ("[A]ffidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein."); App. KK; App. LL; 40 CR 6029; 55 CR 8334; see also Rod v. Home Depot USA, Inc., 931 So. 2d 692, 696 (Miss. Ct. App. 2006) ("It is well established that a nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony.").) Peavey also relies upon an affidavit from a former Baan employee for the same issue, but that employee gave a second affidavit clarifying his testimony and negating all the arguments that Peavey inferred from the first incomplete affidavit Peavey drafted for the witness. (Supp. Sharman Aff. (App. JJ).)

5026 ("Q. But are you aware of any deficiency in the work that [Baan] provided Peavey? A. **No. None whatsoever.**"); Lutz Aff. (App. BB), at 4564, ¶ 35 ("I am unaware of any particular deficiencies in the services provided by Baan USA.").) Peavey's ESP Project Manager also testified that Peavey would have refused to pay any invoice from Baan for less than satisfactory service. (Supp. Harshbarger Aff. (App. FF) at 8217, ¶ 25 ("As project manager for the Peavey ESP project, if I had believed Baan's consulting services were deficient or breached Baan's Consulting Services Agreement with Peavey, I would have refused to pay Baan's consulting invoices relating to any deficient services. I never did so because that situation did not occur . . . ").)

Thus, this case poses the unusual circumstance where Peavey's own key personnel **disavowed Peavey's contentions in this lawsuit on the strongest terms** upon reading Peavey's Complaint at their depositions.[32] For instance, with respect to Peavey's allegation in its Complaint that "Baan's implementation work was so exceedingly deficient that it amounted to a complete failure of the performance contracted for " Peavey's IT Director testified (somewhat colorfully): "**No. That's bull. No, it's not [true].**" (Reid Dep., 35 CR 5182; see also Harshbarger Dep., 33 CR 5005-06; Word Dep., 33 CR 5026; Finan Aff. (App. DD) at 4615, ¶ 48; Lutz Aff. (App. BB) at 4564, ¶ 35.)[33]

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[32] Likewise, when presented with numerous requests to admit which had been denied by Peavey, Peavey senior officers and project personnel on deposition repeatedly contradicted Peavey's responses and readily admitted matters that Peavey had denied in its responses. (See, e.g., Kantor Dep., 9 CR 1232-33; Reid Dep., 9 CR 1212-13, 35 CR 5184, 79 CR 11849.)

[33] Peavey's IS Manager was also asked:

"Q. In this lawsuit, Peavey Electronics has claimed that it was damaged as a result of some deficient services provided by [Baan's Project Manager] and the other Baan U.S.A. employees. Would you agree with that allegation?

In the face of the testimony of Peavey's own senior officers and ESP Project managers—with contemporaneous knowledge of the facts—that Baan did not breach any obligations owed, Peavey cannot avoid summary judgment through inventive arguments nearly a decade after-the-fact. Peavey instead must show genuine issues of material fact based on competent evidence for each and every element of its claims, which Peavey cannot do. Lacking evidence of any breach of any specific term of the parties' contracts, Baan was and is entitled to summary judgment even if Peavey's claims were not already time-barred.

VI. THE TRIAL COURT AFFORDED PEAVEY APPROPRIATE DISCOVERY UNDER THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

A litigant does not have a right to unlimited discovery. "Parties may obtain discovery regarding any matter, not privileged, which is **relevant** to the issues raised by the claims or defenses of any party." MRCP 26(b)(1). As the comments to the rule explain, discovery is "**limited to the specific practices or acts that are in issue.**" Id. (emphasis added). Furthermore, "[d]iscovery is left to the discretion of the trial court, and a ruling may only be reversed if there has been an abuse of discretion." Cole v. Buckner, 819 So. 2d 527, 530 (Miss. 2002).

In 2005, Peavey petitioned the trial court for letters rogatory to subpoena records related to a lawsuit filed in a New Mexico federal court, Summit Electric Supply Co. v. Baan U.S.A., Inc., No. CIV 00-1511 ("Summit Litigation") (N.M.D.C. 2001). (3 CR 309-31.) Peavey also filed a motion to compel seeking an order compelling Baan to produce a corporate representative for deposition on dozens of separate topics under Rule 30(b)(6) and compelling Baan to produce all of its research and development records related to Baan's software and records of all

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A. **Not at all."**

(Reid Dep., 12 CR 1729 (emphasis added).)

customer complaints about any and all aspects of all of Baan's software, as well as testing and engineering reports and e-mails and memoranda about the readiness and marketing of all of Baan's software. (3 CR 358.) As written, Peavey's requests would encompass virtually every single document or record possessed by Baan.

Faced with Peavey's breathtakingly broad requests—Peavey did not even specify a specific discovery request upon which it moved to compel—the trial court correctly concluded that Peavey's requests for each and every research and development record and customer complaint, were overbroad and sought information that was not relevant to the issues in this case.[34] (4/18/05 Order (App. F) at 1758-59; see also Yoste v. Wal-Mart Stores, Inc., 822 So. 2d 935, 936 (Miss. 2002) (upholding exclusion of two prior accidents where the plaintiff failed to submit enough evidence of the cause of his own injury). Peavey had in fact **heavily customized** the software and made no effort to demonstrate how other Baan customers who had not make such customizations would be relevant to Peavey's situation.

In addition, the trial court denied Peavey's request for letters rogatory, finding that the issues in the Summit litigation differed materially from the issues in this case. (4/18/05 Order (App. F) at 1760.) On the undisputed record before the trial court, Summit involved different versions of Baan's software on different operating systems and without Peavey's numerous Peavey-specific customizations. (See Barr Aff. (App. II) at 645-46.) As Peavey's own IT Manager testified, Peavey's request compares "apples and oranges." (4/18/05 Order (App. F.) at 1760 (quoting Reid Dep., 12 CR 1728).) The trial court correctly held that the software at issue was "too dissimilar for the documents requested to be of any relevance in this litigation." Id. at 1760; see also Hageney v. Jackson Furniture of Danville, Inc., 746 So. 2d 912, 922 (Miss. Ct.

[34] Peavey did not request a transcript of the omnibus and lengthy hearing on these discovery motions. Thus, there is no record on appeal for this Court of the parties' arguments considered by the trial court and on which Peavey now assigns error.

App. 1999) (upholding exclusion of testimony involving prior incident and stating that "evidence must show that the similar accidents occurred under substantially similar circumstances"). Peavey offered no evidence to the contrary in multiple briefs or at hearing. The trial court was well within its discretion to prevent this case from evolving into the proverbial fishing expedition.

In 2006, Peavey filed a second motion to compel. (41 CR 6225.) Having before it only Peavey's remaining breach of contract and breach of warranty claims, the second trial court judge correctly denied Peavey's motion, concluding that the requested documents pertaining to SCS were "not relevant to the remaining issues before the Court." (9/28/06 Order (App. H.) at 8545-46.) Specifically, the court correctly found that "the SCS software was never installed at Peavey. Peavey never even attempted to install the SCS software. It was not contained in the portion of the software that was customized in Phase I of the 'go live' and that the parties did not even bring up SCS until over a year after the suit filed." (Id. at 8545.) The court was well within its discretion, and the Mississippi Rules of Civil Procedure, to appropriately limited discovery "to the specific practices or acts that are in issue," (MRCP 26 Cmt.), both trial judges' exercise of that discretion should not be disturbed on appeal.

CONCLUSION

Peavey argued below and argues now speculation, not facts, on a record it wishes it had. But there is no dispute about the dispositive facts actually in the record governing Baan's motions for summary judgments. For all the foregoing reasons, the trial courts' dismissal of Peavey's claims on summary judgment should be affirmed and this litigation should be brought to an end.

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Page v. Hotchkiss
Conn.Super.,2003.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut,Judicial District of Windham.
David B. PAGE
v.
R. William HOTCHKISS.
No. CV020067814.

Dec. 2, 2003.

John McGrath, Jr., Willimantic, for David Page.
R.W. Hotchkiss, Northfield, pro se.
COSGROVE, J.
*1 The plaintiff, David Page, has filed a five-count complaint against the defendant William Hotchkiss based upon a business relationship between the parties that commenced in 1996 and terminated in 1999. The plaintiff's complaint, in five counts, alleges that the defendant has damaged him by: (1) breach of the Uniform Commercial Code (UCC) warranty of merchantability; (2) breach of an express warranty; (3) breach of oral contract; (4) conversion; and (5) engaging in deceptive and unfair trade practices. In essence, the plaintiff claims that the defendant was engaged in the sale of computer software goods, and therefore the transactions between the parties are governed by the UCC. The defendant claims that he was a consultant hired by the plaintiff to provide services which included computer programming and therefore the UCC does not apply. He further claims that since this lawsuit was commenced more than three years after the termination of the relationship between the parties, the action is barred by the statute of limitations and or the statute of frauds.

The threshold issue presented to the court is to determine the nature of the relationship between the parties-was there a contractual relationship regarding the delivery of a product or was there an independent contractor relationship between the parties regarding the providing of computer services. If the relationship is the former, then the court will examine the plaintiff's claims pursuant to the UCC. If the relationship is the later, then the court will determine the terms of the oral contract between the parties and whether there was a breach of contract. The nature of the relationship between the plaintiff and the defendant will also implicate whether there is liability under the Connecticut Unfair Trade Practices Act (CUTPA) and the efficacy of the defendant's special defenses.

At trial, the plaintiff presented the testimony from his office employee, a computer programmer and himself. The defendant then testified on his own behalf. The parties thereafter submitted posttrial memoranda. A review of the testimony reveals the following salient facts.

The plaintiff, David Page, at all times relevant to this case has been a marshal for the State of Connecticut. In 1995, he wanted to computerize his office operations. After a number of ineffective attempts by himself to accomplish this goal, Mr. Page placed advertisements at local universities to obtain computer programming assistance. In response to the advertisement, the defendant William Hotchkiss, a former student at Eastern Connecticut University, met with Mr. Page. They discussed the problems Mr. Page had in accessing the times and dates of when he had served papers. Mr. Page also had difficulties with billing software. The parties reached an agreement which was reduced to writing. Although not introduced as an exhibit at trial, both parties testified that the written contract called for Mr. Hotchkiss to produce a computer program to track wage executions, that the defendant was authorized to work 15-20 hours on the project and that the defendant would be paid an hourly wage. By all accounts the work undertaken pursuant to this written agreement was done successfully and to the satisfaction of both parties. It was also the last time that the parties reduced an agreement to writing.

*2 After this first programming project was successfully completed, the plaintiff and defendant discussed further computer programming assistance that the plaintiff needed. The defendant agreed to work at developing additional programs or applications that the plaintiff could use in his office. The defendant was paid by the plaintiff on an hourly basis. The defendant worked in the plaintiff's office as well as at his own house.

As the parties continued to work together, the plaintiff conceived of the idea that the software programming that the defendant was working on could be the basis of a prototype of a software application that could be sold to other marshals in the State of Connecticut. Thus, the work the defendant was performing had a dual purpose-it computerized Mr. Page's office and it was a prototype for a software package that Mr. Page wished to market to other marshals.

The plaintiff used the defendant's software programs to run his office. As bugs were discovered in the programs, the defendant debugged the program or got it back online. The defendant also set up operating systems and backup systems for the plaintiff's office. The defendant further worked on enhancements to the programs. The plaintiff discussed with the defendant a plan to market the software program. The parties, however, never reached an agreement as to a blueprint for the entire program, a timetable for the development or a cost for the development of the program. There were, however, continual problems with the program that seemed to be related to the indexing functions. Eventually the plaintiff became dissatisfied with the pace and quality of the defendant's work. He felt he was being billed for work that was not being done. The defendant disputed the assertions of the plaintiff.

The parties had a falling out. In November 1998, the defendant wrote to the plaintiff describing, from his point of view, the current state of their relationship. Mr. Hotchkiss described the process as a "learning experience" and stated "I am not a professional developer, nor have I ever claimed to be."He offered to continue working for the plaintiff but not for free. He also provided the plaintiff with names of other consultants with whom he might work. The working relationship between the parties did not improve. On March 9, 1999 the defendant wrote again to the plaintiff "I am no longer interested or willing to work for you ... With this letter I intend to terminate our business relations."The defendant failed to provide the plaintiff with the password to get onto the server computer at the time the defendant terminated his relationship with the plaintiff. The plaintiff through his attorney wrote to the defendant in June and July of 2000 demanding that the defendant complete the project. The defendant never responded to those letters.

Eventually the plaintiff retained a new consultant, Paul Schofield, to work with him on the project. There was no written agreement between the plaintiff and his new consultant. Mr. Schofield testified that he could have quit working on the plaintiff's project at any time.

*3 As a result of the conduct of the defendant, the plaintiff claims he has suffered monetary damage in that he has had to pay a new software consultant almost twenty thousand ($20,000.00) dollars to complete the program. The plaintiff claims that he was not provided the password for his server computer and spent hours trying to get back onto his system. The plaintiff attributes approximately seven thousand ($7,000.00) dollars of Schofield's billings to repair the work done by the defendant. The plaintiff also claims that he spent five hundred and eighty ($580) dollars for some computer equipment, runtime modules, that he purchased at the suggestion of the defendant. The plaintiff further claimed that because of the problems with the defendant's programming, he had to pay his office staff additional salaries. No bills were produced for any of the damages claimed. The plaintiff commenced this litigation by a complaint dated March 20, 2002 and served on March 24, 2002. Throughout the decision, other findings of fact are presented as necessary.

The initial issue presented is whether the "software" that Hotchkiss developed for Page was a "good," as that term is used in article two of the UCC,[FN1] or was it programming that the defendant provided as a service.[FN2]The UCC is to be "liberally construed and applied to promote its underlying purposes and policies."General Statutes § 42a-1-102(1). Article two defines goods as "all things, including specially manufactured goods, which are moveable at the time of identification to the contract for sale ..."

FN1. Article two is incorporated in the General Statutes at § 42a-2-101 et seq.

FN2. Note that "the National Conference of Commissioners on Uniform State Laws has promulgated the Uniform Computer Information Transactions Act ("UCITA"), a code resembling UCC Article 2 in many respects but drafted to reflect emergent practices in the sale and licensing of computer information. UCITA, prefatory note (rev. ed. Aug.23, 2001) (available at www.ucitaonline.com/ucita.html). UCITA-originally intended as a new Article 2B to supplement Articles 2 and 2A of the UCC but later proposed as an independent code-has been adopted by [only] two states, Maryland and Virginia. See Md.Code Ann. Com. Law §§ 22-101 et seq.; Va.Code Ann. §§ 59.1-501.1 et seq."*Specht v. Netscape Communications Corp.*, 306 F.3d 17, 29 n. 13 (2nd Cir.2002).

A number of courts have addressed the question of whether 'software' is a good or a service. These courts have come to differing conclusions depending upon the facts of each case. A significant factor for the courts was the degree of development and customization or programming that was required by the buyer."At one end of the spectrum is a consumer who walks into the local electronics store, pulls a shrink-wrapped word processing program from the shelf, pays the cashier and goes home with it. Such a sale is very clearly one for a good. At the other end of the spectrum is a programmer that invents and develops new software [from scratch] for a particular customer. In that case, the contract is more like a services contract."*Smart Online, Inc. v. Opensite Technologies, Inc.*, Superior Court of North Carolina, Wake County, Business Court, Docket No. 01 CVS 09604, 2003 NCBC 5 (June 17, 2003)(51 U.C.C. Rep. Serv.2d47).[FN3] In the middle of the spectrum is the situation "[w]here programmers are selling preexisting software albeit with custom modifications or upgrades to adapt it to the user's needs or equipment."*Id.* Where, as here, the facts of a case place the issue in the middle of the spectrum, the courts have explicitly or implicitly relied upon a predominate element test. D. Toedt, *The Law and Business of Computer Software* (Release # 12 10/2001) § 13.02, p. 13-3,FN4 and a primary factor in this analysis has been whether the programmer was "paid in a manner primarily reflecting [the] sale of goods ..."[FN5]*Pearl Investments v. Standard I/O, Inc.*, 257 F.Sup.2d 326, 353 (D.Me.2003).

FN3. See *Saga Solutions v. Sherwin-Williams Co.*, Superior Court, judicial district of Ansonia/Milford at Milford, Docket No. CV 01 0073513 (May 8, 2002, Cutsumpas, J.), for an example of a case involving shrink-wrapped software. (At issue was whether the defendant properly rejected the purchase of a software program known as "Goldmine.") See *Novacore Technologies, Inc. v. GST Communication Corp.*, 20 F.Sup.2d 169 (D.Mass.1998), aff'd, 229 F.3d 1133 (1st Cir.1999) for an example of customized, made from scratch, software. See also *Pearl Investments v. Standard I/ O, Inc.*, 257 F.Sup.2d 326 (D.Me.2003) holding that "development of a software system from scratch primarily constitutes a service."*Pearl Investments v. Standard I/O, Inc.*, 257 F.Sup.2d 326, 353 (D.Me.2003).

FN4. Note that *The Law and Business of Computer Software* cites to numerous cases that employed the predominate element test. D. Toedt, *The Law and Business of Computer Software* (Release # 12 10/2001) § 13.02, p. 13-3 n. 4 and 13-4 n. 6. The facts and results of each of those cases is distinguishable since they either involved custom, from scratch, software development or situations where the programmer(s) were paid in a manner reflecting the sale of goods. Nevertheless, the point is that courts across the nation have adopted the predominate element test to distinguish between the different forms of software.

FN5."Paid in a manner primarily reflecting [the] sale of goods" means for example that the programmer was paid an up-front software licensing fee. See *Pearl Investments v. Standard I/O, Inc.*, 257 F.Sup.2d 326, 353 (D.Me.2003). This term can also be applied where the purchaser buys a good from a merchant and additionally has that merchant customize the good to the purchaser's needs. See *Micro Data Base Systems, Inc. v. Dharma Systems, Inc.*, 148 F.3d 649, 655 (7th Cir.1998).

*4 When applying the predominant element test "the question becomes whether the dominant factor or essence of the transaction is the sale of the materials or the services."(Internal quotation marks omitted.) *Incomm, Inc. v. Thermo-Spa, Inc.*, 41 Conn.Sup. 566, 570, 595 A.2d 954, 3 Conn. L. Rptr. 346 (1991)."[I]t is clear that where the contract is basically one for the rendition of services, and the materials are only incidental to the main purpose of the agreement, the contract is not one for the sale of goods under the UCC."(Internal quotation marks omitted.) *Martisek v. Showron*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. CV 98 0354780 (July 9, 2003, Doherty, J.).

"In determining whether a contract is one of sale [of goods] or to provide services, the court looks to the essence of the agreement to see whether service predominates over any sale aspect, such as supply of materials by the principal to the service entity ... Whether a contract is one for the sale of goods, or for work and labor to be rendered may depend on whether the primary intent is merely to provide for the delivery of goods, or whether the essential consideration is work and labor to be performed at the employer's instance and for his use rather than for the producer's benefit ... It is of no moment that the materials to be processed [were] transferred from the defendant's possession to the plaintiffs: where service predominates, and the transfer of personal property is only incidental to the transaction, it is a contract for work, labor and materials and not a sale."(Internal quotation marks omitted.) *Id.*

In this case the defendant advised the plaintiff to purchase an off-the-shelf database software program that could be customized. Once the database software was purchased by the plaintiff, the defendant commenced his programming work. Throughout the relationship between the parties, the defendant was paid for the number of hours that he put in on any project. At the time the defendant first started to work with the plaintiff, he was not in the software development business. He was a student. Even when the defendant started to work on putting the software into a form that could be sold by the plaintiff to other state marshals, he was paid by the hour. There never was any agreement that the defendant would be paid a user licensing fee or a project fee. Therefore, the line of cases that find that the "software" was paid for in a manner reflecting the sale of goods are factually distinguishable from the present case.FN6

FN6. For example, the result in cases such as *Micro Data Base Systems, Inc. v.*

Dharma Systems, Inc., 148 F.3d 649 (7th Cir.1998); *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670 (3rd Cir.1991); *RRX Industries, Inc. v. Lab-Con, Inc.*, 772 F.2d 543 (9th Cir.1985); *EPresence, Inc. v. Evolve Software, Inc.*, 190 F.Sup.2d 159 (2002) and *Smart Online, Inc. v. Opensite Technologies, Inc., supra,* 2003 NCBC 5 (June 17, 2003) are not applicable to the present case.

The court finds that the essence of this transaction was a service. Page purchased Hotchkiss' work and labor. Page supplied Hotchkiss with the material, a software program, he wanted customized, and the essential consideration of the transaction was Hotchkiss' hourly labor. All Page received as a function of the transaction was modified computer code loaded on a computer hard drive. The goods, therefore, that Page received were incidental to the transaction.

*5 In addition to the software spectrum of cases, the court finds support for its findings from other chapters of the General Statutes. First, General Statutes § 42a-9-101 et seq., which incorporates article nine of the UCC, defines "Goods" as "all things that are movable when a security interest attaches ... The term also includes a computer program embedded in goods and any supporting information provided in connection with a transaction relating to the program if (i) the program is associated with the goods in such a manner that it customarily is considered a part of the goods, or (ii) by becoming the owner of the goods, a person acquires a right to use the program in connection with the goods. *The term does not include a computer program embedded in goods that consist solely of the medium in which the program is embedded.*" (Emphasis added .) General Statutes § 42a-9-102(44). Applying the article nine definition to the present case would again yield a finding that what Hotchkiss provided was not goods since what was provided was a modified computer program embedded in a convenient medium for Page to access. The real object of Page's purchase was the intellectual property which had been loaded and stored on a transferable medium.

Additionally, support is found in the tax code. The tax code defines "Services" in part as: "Computer and data processing services, including, but not limited to, time, programming, code writing, *modification of existing programs,* feasibility studies and installation and implementation of software program and systems even where such services are rendered in connection with the development, creation or production of canned or custom software ..." (Emphasis added.) General Statutes § 12-407(37)(A). The Supreme Court recently explained this term in *Anderson Consulting, LLP v. Gavin,* 255 Conn. 498, 767 A.2d 692 (2001). The trial court in *Anderson Consulting, LLP v. Gavin* found that Anderson provided goods to the gas and electric companies saying: Anderson "developed software programs which in and of themselves would provide [the gas company] and [the electric company] with the informational systems to allow them to operate efficiently and cost-effectively now and into the immediate future ... [T]he object of the underlying transaction in this case was the creation of informational systems for both [the gas company] and [the electric company], not the creation of various elements necessary to reach the final product."[FN7](Internal quotation marks omitted.) *Anderson Consulting, LLP v. Gavin,* 255 Conn. 498, 524, 767 A.2d 692 (2001). The Supreme Court accepted these findings however it conversely held that "[t]hese findings bring the services rendered by Anderson within the clarified, expansive definition of computer and data processing services."(Internal quotation marks omitted.) *Id.* Thus, since the object of the Page-Hotchkiss transaction was the modification of an existing computer program, the transaction would fall within the "expansive definition of computer and data processing services" of the tax code and would not be taxed as the transfer of goods.

FN7. The "software" that Anderson Consulting provided to the gas company was a modified version of its "Customer 1" software. *Anderson Consulting, LLP v. Gavin,* 255 Conn. 498, 507, 767 A.2d 692 (2001). Therefore, *Anderson Consulting, LLP* provides a fact pattern with "software" comparable to the 'software' in the present case.

*6 In light of the foregoing, the court finds that the nature of the relationship between the plaintiff and the defendant was for the provision of a service as an independent contractor, not the sale of a good. The UCC does not apply. This purchaser contracted for a service to be performed and he carried away a tangible result of that service.[FN8]

FN8. If this "software" is subsequently transferred to a third party then it should be recognized as a good since what is now being purchased is essentially off-the-shelf software.

The court now turns to the issue of what were the terms of the parties' agreement for the provision of computer services. The court finds that the parties had an agreement that the plaintiff would pay the defendant twenty ($20) dollars per hour while performing computer consulting work. The tasks or problems would be identified by the plaintiff. While the goals of the defendant's consulting services were agreed upon, no promises were made with regard to whether or when the programs could be developed or integrated. There was no agreement as to the duration of the relationship between the parties. The plaintiff was the owner of the computer hardware and the customized software that the defendant developed. The defendant agreed that while he was working for the plaintiff that he would apply himself in a diligent manner. Both the plaintiff and the defendant could have terminated their relationship at any time.

The court now turns to theories of recovery plead by the plaintiff. In the first count, the plaintiff claims that the defendant breached a statutory UCC warranty of merchantability. This theory must fail based upon the determination that the nature of the relationship between the parties was for the provision of services rather than the sale of goods.

In the second count of his complaint, the plaintiff claims that the defendant violated express warranties. Generally, "in order to sustain an action for breach of express or implied warranty there has to be evidence of a contract between the parties ..."*Hamon v. Digliani,* 148 Conn. 710, 712, 174 A.2d 294 (1961)."Absent a statutory warranty or definitive contract language, the determination of what the parties intended to encompass in their contractual commitments is a question of the intention of the parties, and an inference of fact."*Torosyan v. Boehringer Ingelheim Pharmaceuticals,* Inc., 234 Conn. 1, 15, 662 A.2d 89 (1995); see also *Bead Chain Mfg. Co. v. Saxton Products, Inc.,* 183 Conn. 266, 274-75, 439 A.2d 314 (1981).

"An express warranty has been defined as a positive representation of fact which induces a bargain."(Internal quotation marks omitted.) *Albrecht v. Rubinstein,* 135 Conn. 243, 246, 63 A.2d 158 (1948). The court finds that the plaintiff did not provide any evidence that the defendant made express warranties. The defendant was a former student at a local university who responded to an ad to provide computer consulting. He was not in the business of software development or computer consulting.

The third count of the complaint asserts liability based upon a claim of a breach of contract. "The existence of a contract is a question of fact to be determined by the trier on the basis of all of the evidence."(Internal quotation marks omitted.) *Senco, Inc. v. Fox-Rich Textiles, Inc.,* 75 Conn.App. 442, 445, 816 A.2d 654,cert. denied, 263 Conn. 916, 821 A.2d 770 (2003). Contracts can be either express or implied. "An express agreement may be either written or oral."*New York Bakery, Inc. v. Downtown Bakery Inc.,* 19 Conn.Sup. 388, 390, 115 A.2d 467 (1955). The court has previously described the terms of the oral agreement between the parties. "It is an implied condition of every service contract that the service will be performed in a workmanlike manner."*Ferrigno v. Pep Boys-Manny, Joe & Jack of Delaware, Inc.*, 47 Conn.Sup. 580, 582, 818 A.2d 903 (2003). The words workmanlike manner "implicate negligence principles in that the defendant had a duty to the plaintiff and allegedly failed to perform its duties under the proper standard of care."*Bonan v. Goldring Home Inspections, Inc.*, 68 Conn.App. 862, 871, 794 A.2d 997 (2002). Furthermore, it has been held that "professional services are best measured by a negligence standard rater than an implied warranty theory."(Internal quotation marks omitted.) *Lavy v. W & M Construction Corp.*, Superior Court complex litigation docket at Stamford-Norwalk at Stamford, Docket No. X08 CV 01 0187185 (June 10, 2003, Adams, J.)(34 Conn. L. Rptr. 721)."Negligence occurs where one under a duty to exercise a certain degree of care to avoid injury to others fails to do so ... The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury."(Citation omitted; internal quotation marks omitted.) *Stokes v. Lyddy*, 75 Conn.App. 252, 257, 815 A.2d 263 (2003).

*7 The duties that Hotchkiss owed Page were defined in their agreement, principally, Hotchkiss was to set up the plaintiff's office computer system and was to work on developing a software program that performed certain specified functions and he was implicitly to use the skill and knowledge possessed by those ordinarily employed in the trade. As to whether Hotchkiss breached his duties to Page, the court finds that since the Page-Hotchkiss contract was terminable at-will, Hotchkiss did not have a duty to finish the project. Rather, he had a duty to work on the project with the skill and competence and diligence until such time that either party elected to terminate the relationship. Once Hotchkiss elected to terminate the relationship he had a duty to turn over information such as the server password, to allow the plaintiff continued access to his computer system. The sole area where the court finds that Mr. Hotchkiss failed to act in accordance with his contractual obligations is his failure to provide the plaintiff with the password for the server computer. As a result of the defendant's failure the plaintiff was damaged in that he had to spend a substantial period of time to gain access to the server computer. The court finds that the plaintiff has been damaged by the defendant's conduct in the amount of $1000.

The plaintiff has withdrawn his claim for relief under a theory of conversion as pleaded in the fourth count of the complaint.

The plaintiff's claim under the Connecticut Unfair Trade Practices Act (CUTPA) is barred by the statute of limitations. "Where ... a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter ... In such cases, the time limitation is not to be treated as an ordinary statute of limitation, but rather is a limitation on the liability itself, and not the remedy alone ... [U]nder such circumstances, the time limitation is a substantive and jurisdictional prerequisite, which may be raised [by the court] at any time, even by the court sua sponte, and may not be waived."(Internal quotation marks omitted.) *Williams v. Commission on Human Rights & Opportunities*, 257 Conn. 258, 294, 777 A.2d 645 (2001). Actions brought under the CUTPA are created by statute, General Statutes § 42-110a et seq., therefore the statute of limitations established in CUTPA is a limitation on both the liability and remedy for such actions.

"Since CUTPA violations are defined in General Statutes § 42-110b to include deceptive acts or practices in the conduct of any trade or commerce, it is evident that the legislature intended that the perpetrators of such fraudulent practices, as well as other CUTPA violators, should be permitted to avail themselves of the statute of limitations defense provided by § 42-110g(f)." (Internal quotation marks omitted.) *Willow Springs Condominium Assn., Inc. v. Seventh BRT Development Corp.*, 245 Conn. 1, 45-46, 717 A.2d 77 (1998). Furthermore, "[d]espite the existence in other states of statutes of limitation applicable to unfair trade practices establishing a limitation period for bringing an action that begins after discovery of the violation, our legislature has failed to create such an option for victims of CUTPA violations in this state ... Therefore, if the deceptive acts that the [trier of fact] reasonably could have found form the basis of the CUTPA claim occurred more than three years prior to the commencement of the action, that claim is time barred."(Citation omitted; internal quotation marks omitted.) *Id.,* 45-46.In Connecticut an action is brought once the writ, summons and complaint have been served upon a defendant. See General Statutes § 52-45a; Practice Book § 8-1; *Hillman v. Greenwich,* 217 Conn. 520, 527, 587 A.2d 99 (1991). In the present case the action was served on March 24, 2002. The last act initiated by Hotchkiss was his letter of March 9, 1999 terminating his contract with Page. Because Page did not bring his action until three years and two weeks after Hotchkiss' last act, the CUTPA claim is barred by the statute of limitations.

*8 Finally, the last issue to be addressed is whether the plaintiff's recovery under the third count is barred by the applicable statute of limitations or the statute of frauds. The defendant will not prevail by asserting a statute of limitations defense under § 52-581. First, "[§]52-581 is confined to express oral agreements. It does not reach implied contracts which are governed by [a six-year statute of limitations under] § 52-576."*Abou-Saif v. Cedarcrest Condominium Association,* Superior Court, judicial district of New Haven at New Haven, Docket No. CV 95 0375338S (November 1, 2000, Licari, J.). Second, "[o]ur Supreme Court has distinguished the statutes ... by construing § 52-581, the three year statute of limitations, as applying only to executory contracts [and § 52-576 to executed contracts] ... A contract is *executory* when neither party has fully performed its contractual obligations and is *executed* when one party has fully performed its contractual obligations."(Citations omitted; internal quotation marks omitted.) *John H. Kolb & Sons, Inc. v. G and L Excavating Inc.,* 76 Conn.App. 599, 610, 821 A.2d 774 (2003). Since the court has already found that Page and Hotchkiss had entered into and performed a contract for hourly services, § 52-576 establishes the applicable limitation period. The statute of limitations is therefore six years; the claim was not barred by the statute.

The statute of frauds, General Statutes § 52-550, is inapplicable to the present case. The court has found that there was no agreement between the parties that created a contract for future performance.

Accordingly, judgment may enter in favor of the plaintiff in the amount of $1000, plus costs.

Conn.Super.,2003.
Page v. Hotchkiss
Not Reported in A.2d, 2003 WL 22962151 (Conn.Super.), 52 UCC Rep.Serv.2d 365, 36 Conn. L. Rptr. 193

END OF DOCUMENT

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for all parties to this action with a copy of the **BRIEF OF APPELLEE BAAN U.S.A., INC.** and **APPELLEE BAAN U.S.A., INC.'S APPENDIX OF RECORD EXCERPTS** via electronic mail and overnight delivery to:

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The Honorable Lester Williamson, Jr.
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This 6th day of June, 2008.

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AMENDED CERTIFICATE OF SERVICE

COPY

This is to certify that on the 6th day of June, 2008, I served counsel for all parties to this action with a copy of the **BRIEF OF APPELLEE BAAN U.S.A., INC.** and **APPELLEE BAAN U.S.A., INC.'S APPENDIX OF RECORD EXCERPTS** via overnight delivery to:

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