IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2007-CA-00341-COA

PEAVEY ELECTRONICS CORPORATION — APPELLANT

V.

BAAN U.S.A., INC. — APPELLEE

ON APPEAL FROM THE CIRCUIT COURT OF
LAUDERDALE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANT PEAVEY ELECTRONICS CORPORATION

ORAL ARGUMENT REQUESTED

Vincent J. Hess
Texas State Bar No. [redacted]
LOCKE LORD BISSELL & LIDDELL LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
(214) 740-8000 (Telephone)
(214) 740-8800 (Facsimile)
Admitted Pro Hac Vice

Jerry K. Clements
Texas State Bar No. [redacted]
Barbara Ellis
Texas State Bar No [redacted]
Susan A. Kidwell
Texas State Bar No. [redacted]
LOCKE LORD BISSELL & LIDDELL LLP
100 Congress Avenue, Suite 300
Austin, Texas 78701
(512) 305-4700 (Telephone)
(512) 305-4800 (Facsimile)
Admitted Pro Hac Vice

James P. Streetman, III
Mississippi State Bar N[redacted]
David Lee Gladden, Jr.
Mississippi State Bar No. [redacted]
SCOTT, SULLIVAN, STREETMAN & FOX, P.C.
725 Avignon Drive
Jackson, Mississippi 39236-3847
(601) 607-4800 (Telephone)
(601) 607-4801 (Facsimile)

Ronnie L. Walton
Mississippi State Bar No[redacted]
GLOVER, YOUNG, WALTON & SIMMONS, PLLC
P.O. Box 5514
Meridian, Mississippi 39302-5514
(601) 693-1301 (Telephone)
(601) 693-1363 (Facsimile)

ATTORNEYS FOR APPELLANT
PEAVEY ELECTRONICS CORPORATION

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2007-CA-00341-COA

PEAVEY ELECTRONICS CORPORATION **APPELLANT**

V.

BAAN U.S.A., INC. **APPELLEE**

STATEMENT CONCERNING ORAL ARGUMENT

Appellant Peavey Electronics Corporation has requested oral argument and believes it would assist the decisional process in this appeal for two reasons. First, this appeal challenges orders dismissing without benefit of a trial all claims in a complex, multi-million dollar computer software dispute, and related orders refusing to allow relevant discovery that could have affected the decision on whether summary judgment should be granted. The subject matter of this dispute is technical, the record is voluminous, and the facts are hotly contested. Oral argument would aid the Court by allowing it to resolve any confusion about the record facts and their relationship to the legal arguments presented by both parties. Second, although this appeal involves numerous legal issues, the Court only needs to decide several of these issues to resolve the case. Oral argument would allow the Court to focus on the dispositive issues and resolve any questions about how recent authorities should be applied to the unique facts in the case at bar. Accordingly, Appellant Peavey Electronics Corporation respectfully requests that the Court allow each side 30 minutes for oral argument.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

(Continued)

Page

TABLE OF AUTHORITIES

CASES

STATUTES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2007-CA-00341-COA

PEAVEY ELECTRONICS CORPORATION **APPELLANT**

V.

BAAN U.S.A., INC. **APPELLEE**

TO THE HONORABLE COURT OF APPEALS OF THE STATE OF MISSISSIPPI:

Although this appeal involves numerous issues, extensive briefing, and a voluminous record, it boils down to one crucial – but simple – question:

> *For each and every one of Peavey's claims, did Baan meet its burden to prove that it was entitled to judgment as a matter of law?*

According to the record and the briefing before this Court, the answer to this question is "no." Nevertheless, Baan managed to convince the trial court to misapply the summary judgment standard in three ways: (i) Baan mischaracterized Peavey's claims; (ii) Baan shifted the burden to Peavey to prove facts it would not have been required to prove unless the case was submitted to a jury; and (iii) in convincing the trial court to accept its view of the evidence, Baan led the court to ignore evidence favorable to Peavey.

Now Baan urges this Court to affirm the trial court's judgment by committing the same errors. Because Baan did not meet its summary judgment burden, the trial court's judgment must be reversed and Peavey must be allowed to present its claims to a jury.

ARGUMENT IN REPLY

1. Baan's attempt to uphold summary judgment on Peavey's tort claims is a gross misapplication of the standard of review.

Baan's argument to uphold the summary judgment dismissing Peavey's tort claims is based on three erroneous contentions: (1) Peavey had the "burden" to show that limitations was tolled; (2) because Peavey's "injury" was the July 1999 business disruption, it is "undisputed" that Peavey's tort claims accrued in July 1999; and (3) there is "no evidence" that Baan committed a tort or engaged in any inequitable or fraudulent conduct within the limitations period. (*See* Baan Br. at 19-28.) As demonstrated below, Baan's argument misapplies the summary judgment standard by mischaracterizing Peavey's claims and misrepresenting the evidence.

a. Peavey had no "burden" to prove that the statute of limitations was tolled.

Although Baan sought summary judgment on Peavey's tort claims based on the three-year statute of limitations (*see* 7 CR 961), Peavey alleged that limitations was tolled by the continuing tort doctrine, equitable estoppel, the fraudulent concealment doctrine, and the discovery rule (*see* 10 CR 1359-67). In this procedural posture, it was incumbent upon *Baan*, as the summary judgment movant, to prove that no material issues of fact existed on any of these tolling doctrines and that it was entitled to judgment as a matter of law. *See* MISS. R. CIV. P. 56(c); *Robinson v. Cobb*, 763 So. 2d 883, 886 (Miss. 2000).

Unable to meet that burden, Baan has chosen another option. It has attempted to shift its burden to Peavey, as the following statements from Baan's brief demonstrate:

- "*Peavey offered no evidence* of tortious acts by Baan after February 27, 2001." (Baan Br. at 19 (italics added);

- "*Peavey cannot meet its burden* to toll the statute of limitations based on unsupported allegations relating to SCS . . . ." (*Id.* at 26 (emphasis added));

- "*In order to meet its burden* of [establishing] equitable estoppel, Peavey must establish by competent evidence on-going '**inequitable or fraudulent conduct.**'" (*Id.* at 27 (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.'" (*Id.* (emphasis added)).

The only question before this Court relating to Peavey's tort claims is whether *Baan* met its burden to show that, for each and every one of Peavey's tort claims, it was entitled to judgment as a matter of law. *See* MISS. R. CIV. P. 56(c); *Robinson*, 763 So. 2d at 886. To do so, Baan had to conclusively establish that Peavey's claims accrued more than three years before suit was filed and demonstrate that there were no genuine issues of material fact about whether the statute of limitations was tolled as Peavey has alleged. Because Baan failed to meet its burden, the summary judgment on Peavey's tort claims must be reversed.

b. Baan cannot meet its summary judgment burden by mischaracterizing Peavey's "injury."

According to Baan's version of events, the injury giving rise to Peavey's claims was the business disruption that occurred in July 1999 when Peavey attempted to "go live" on the "Sales and Distribution" component of the software package sold by Baan. (*See* Baan Br. at 21.) Because Peavey's "injury" (as defined by Baan) was "neither hidden nor latent," Baan argues that Peavey's tort claims are not saved by the discovery rule. (*Id.* at 22-24.)

This argument provides no basis for affirming the summary judgment for one simple reason: contrary to Baan's repeated assertions, the July 1999 business disruption is not

Peavey's true "injury." Peavey's injury, as defined by Peavey's pleadings, is significantly different.

Peavey's tort claims arose from the fact that the extensive software package Baan sold to Peavey could not be fully implemented and, therefore, could not provide the substantial business benefits that Baan promised. (*See* 18 CR 2615-20.) It is, therefore, irrelevant that Peavey knew about the July 1999 business disruption more than three years before filing suit. (*See* Baan Br. at 21.) And it is equally irrelevant that Peavey did not specifically raise "SCS issues" before August 2005. (*See id.* at 24-26.) The only question is whether Baan conclusively established that Peavey knew the software package it purchased from Baan could never be fully implemented – and, thus, could never provide the promised benefits – more than three years before Peavey filed suit.

When the question is properly framed, it is readily apparent that summary judgment on Peavey's tort claims was improper. As fully explained in Peavey's brief, material fact questions about when Peavey discovered its true injury require that the summary judgment on Peavey's tort claims be reversed. (*See* PEC Br. at 28-30.) Baan cannot meet its summary judgment burden by mischaracterizing Peavey's injury.

c. Baan cannot meet its summary judgment burden by ignoring evidence favorable to Peavey.

Throughout its brief, Baan asserts that the evidence conclusively establishes Baan's right to judgment as a matter of law – either because there is "no evidence" that raises a fact

issue on Peavey's claims or because crucial facts are "undisputed."[1] When these assertions are compared to the record, it becomes apparent that Baan is attempting to uphold summary judgment by ignoring evidence favorable to Peavey.

i. The evidence raises a fact issue about whether Baan made continuing misrepresentations into the limitations period.

Although Baan alleges that "Peavey offered no evidence of tortious acts by Baan after February 27, 2001 (within the three-year limitations period)," Baan makes no effort to explain how the evidence of wrongful conduct cited in Peavey's brief constitutes "no evidence." (Baan Br. at 19.) As Peavey explained, Baan made repeated representations that the software package it sold Peavey could be fully implemented to provide substantial business benefits to Peavey. (*See* PEC Br. at 18-20.) Indeed, the evidence demonstrates that:

- Peavey chose Baan's software package based on the purported strength of Baan's SCS product, which, according to Baan, was supposed to make Peavey's marketing system much more efficient and, over five years, improve Peavey's cash flow by nearly $13.5 million (*see* App. M at 15051; App. W at 9119, ¶ 12;);
- Although Baan told Peavey that SCS was not compatible with the version of software that Peavey licensed – version IVb – Baan said it would notify Peavey when version IVc2 – the version with which SCS "would be compatible" – would be available (App. X at 8885);
- After installing version IVc2 knowing it was not compatible with the full suite of SCS products, Baan advised Peavey that full SCS functionality would become available later (App. V at 9111, ¶ 10; App. W at 9123, ¶ 28);
- In September 2002, Peavey and Baan were engaged in discussions about possible financial "concessions" Baan would make to compensate Peavey for the fact that

[1] Although Baan generally asserts that "the material facts were never disputed" because Peavey failed to challenge Baan's statements of undisputed facts filed in support of each motion for summary judgment (*see* Baan Br. at 5 n.4), the record establishes that the opposite is true. (*See* 9 CR 1315; 58 CR 8667.)

Peavey purchased a software package with products for which "integration was not available" (*see* App. R); and

- As late as January 2003, Baan was still offering to "complete implementation" with Peavey's existing software (App. T at 14791, 14793).

This evidence, viewed – as it must be – in a light favorable to Peavey, shows that Baan's misrepresentations that the software package it sold to Peavey could be fully implemented continued into 2003. The evidence thus raises a fact issue about whether Baan made continuing misrepresentations into the limitations period.

ii. The evidence raises a fact question about whether Baan engaged in inequitable or fraudulent conduct.

Although Baan argues that Peavey failed to present evidence of "inequitable or fraudulent conduct," that argument is based on Baan's erroneous assertion that "the trial court *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." (Baan Br. at 27-28 (emphasis added).) Baan's argument is yet another perversion of the summary judgment standard.

As a threshold matter, the trial court could not "correctly" make *any* findings on summary judgment – and certainly not findings based on evidence construed *against* the non-movant. *See Wilner v. White*, 929 So. 2d 315, 318-19 (Miss. 2006). Peavey was entitled to have the summary judgment evidence construed in a light favorable to it, and the trial court erred in not giving Peavey "the benefit of every reasonable doubt." *See Robinson*, 763 So. 2d at 886. When a trial court weighs the evidence, makes credibility determinations, or adopts the moving party's version of events as true and dismisses the non-moving party's

version entirely, summary judgment must be reversed. *See Douglas Parker Elec., Inc. v. Miss. Design & Dev. Corp.*, 949 So. 2d 874, 877-78 (Miss. Ct. App. 2007).

Urging this Court to accept its version of events, Baan – like the trial court – ignores Peavey's evidence raising at least a fact issue about whether Baan engaged in "inequitable or fraudulent conduct." (*See* PEC Br. at 23-24.) For instance, an internal Baan email from February 1999 saying that Baan was on "VERY thin ice" because it was building Peavey a model for software that "may not exist" is evidence that Baan was concealing the fact that it sold Peavey a software package that could never be fully implemented. (App. O.) So is evidence that, in October 2002 – long after Baan knew that that "the full suite of BaanSCS products [would] not operate under the Baan IV c2 product" (*see* App. Q) – Peavey was "working with BAAN to determine IF [Peavey] should proceed with [its] implementation" and if so, whether "implementation should be completed on [Peavey's] current version of BAAN IV[c2 software] or a newer version BAAN V C." (*See* App. S.)

Baan cannot justify the trial court's decision to take Peavey's tort claims away from a jury by baldly asserting that it did not hide SCS issues. (*See* Baan Br. at 25.) The evidence in the record raises at least a fact question about whether Baan did in fact hide SCS issues. That question should not have been decided by a trial court on summary judgment; it must be decided by a jury after a trial on the merits.

iii. The evidence raises a fact question about whether Peavey had "issues" with SCS.

Baan attempts to dismiss Peavey's arguments relating to the lack of integration for the SCS component of the software package by asserting that Peavey stopped the software

implementation "[p]roject in October 1999 – for its own internal business reasons unrelated to Baan – before ever needing or using SCS." (*See* Baan Br. at 5.) Indeed, Baan goes so far as to emphatically assert that "there **was, in fact, no issue with SCS**." (*See* Baan Br. at 26 (emphasis in original).)

These assertions are contradicted by evidence favorable to Peavey, which, again, Baan conveniently ignores. Under the proper standard of review, this Court must consider evidence that:

- Peavey decided to purchase the Baan software package based on the purported strength of SCS (App. W at 9119, ¶ 12);
- Peavey estimated that it would save $13.5 million over five years based on increased efficiencies from using SCS (App. M at 15051);
- Peavey planned to implement three SCS software applications (Planner, Scheduler, and Execution) in Phase II of the installation process (App. V at 9111, ¶ 8);
- Peavey was led to believe that SCS would work with Baan IVc2 (App. W at 9120, ¶ 16);
- Peavey stopped implementation of Phase II in the fall of 1999 because the Baan software installed in Phase I had not "reached stability" and required further modification before Phase II could proceed (App. Q);
- Phase II was never completed due to incompatibility issues between Baan IVc2 and SCS (App. U at 9554, ¶ 22);
- Baan kept promising Peavey that SCS functionality would become available (App. W at 9123, ¶ 28; App. X at 8885);
- SCS was never installed "because that functionality did not exist for and was not compatible with the update of the Baan IV software that Peavey implemented in its production environment, Baan IVc2" (App. U at 9551, ¶ 10); and
- Because Peavey was never able to use SCS, it was unable to realize $13.5 million in savings from increased efficiency due to SCS (App. T at 14792).

Although it is undisputed that Peavey never used SCS, its inability to do so (and to realize the benefits of the full software package Baan sold Peavey) is what gave rise to Peavey's tort claims. As the record and briefing demonstrate, Peavey's issues with SCS were significant. That Baan cites the trial court's opinion to suggest that the contrary is true only confirms that the trial court erred in weighing the evidence and accepting the version of events presented by Baan. *See Douglas Parker*, 949 So. 2d at 878.

To sum up – in urging this Court to affirm the summary judgment dismissing Peavey's tort claims, Baan, like the trial court, forgets that "summary judgment is not a substitute for the trial of disputed facts." *See Robinson*, 763 So. 2d at 889. The trial court's judgment as to Peavey's tort claims cannot be affirmed by misapplying the standard of review and ignoring genuine issues of material fact raised by evidence favorable to Peavey. *See id.* The summary judgment on Peavey's tort claims must therefore be reversed, and Peavey's claims must be decided by a jury.

2. Baan offers no response to key arguments that require the summary judgment on Peavey's contract claims to be reversed.

The trial court's order dismissing all of Peavey's contract claims was based on two erroneous conclusions: (1) Peavey waived its claims arising out of the Software Agreement by entering into a contract addendum in June 2003; and (2) Peavey's claims arising out of the Services Agreement are barred by limitations. (*See* App. E at 14471.) Accordingly, Peavey's opening brief focused on explaining why summary judgment cannot be sustained based on the trial court's stated grounds. (*See* PEC Br. at 31-39.) Peavey also explained

why the summary judgment cannot be sustained on any other ground raised by Baan. (*See id.* at 39-45.)

Baan's response does not address the fatal flaws in the trial court's decision that were pointed out by Peavey. Although Baan argues that claims arising from the Services Agreement are governed by the three-year statute of limitations, it has no answer to Peavey's argument that material fact questions about whether Baan was equitably estopped from asserting a limitations defense must be decided by a jury. (*See* Baan Br. at 29-34.) Nor does Baan explain how the trial court "correctly" granted summary judgment based on waiver when this ground was not raised in Baan's motion. (*See id.* at 34-37.) The gaps in Baan's brief further confirm that the summary judgment dismissing all of Peavey's contract-based claims must be reversed.

a. ***Baan makes no effort to justify the trial court's decision to grant summary judgment* sua sponte *on a ground not raised in Baan's motion.***

Baan offers absolutely no response to Peavey's argument that summary judgment on Peavey's claims arising from the Software Agreement must be reversed because it was erroneously granted based on waiver, a ground not raised in Baan's motion. (*See* PEC Br. at 32; App. E at 14471.) There is simply no way to support the trial court's decision to ignore Rule 56(c)'s procedural safeguards and grant summary judgment on an unasserted ground. *See John Deere Co. v. Am. Nat'l Bank, Stafford*, 809 F.2d 1190, 1192 (5th Cir. 1987). So instead, Baan argues that the trial court's ruling should be upheld simply because it is "correct." (*See* Baan Br. at 35-37.)

However, Baan's attempt to justify the trial court's waiver ruling is premised on the erroneous assertion that Peavey entered into the 2003 addendum with "full knowledge" of the July 1999 business disruption and, therefore, with full knowledge of the "injury" that allegedly gave rise to Peavey's claims. (*See id.*) As previously explained, Peavey's actual injury was, of course, something entirely different. (*See* 18 CR 2615-20.) Again, summary judgment cannot be justified by mischaracterizing Peavey's claims.[2]

Baan's response (or, rather, lack of response) to Peavey's waiver arguments thus confirms why the summary judgment on Peavey's claims arising from the Software Agreement cannot be affirmed based on waiver. The trial court's *sua sponte* ruling on an unraised ground was neither permissible nor "correct."

b. Baan ignores fact issues relating to equitable estoppel.

Baan devotes five pages of its brief responding to Peavey's argument that, because the services at issue relate to implementing the software package, which clearly involves a sale of goods, Peavey's claims arising from the Services Agreement are governed by the six-year statute of limitations in the UCC. (*See* Baan Br. at 37-41.) But Baan offers no response to Peavey's argument that, even if the three-year statute of limitations applies, fact questions about whether Baan is equitably estopped from asserting a limitations defense require that the summary judgment be reversed. (*See* PEC Br. at 38-39.)

---

[2] The trial court's ruling on waiver constitutes reversible error for additional reasons set forth in Peavey's brief. (*See* PEC Br. at 33-34.)

Again, Baan's silence is telling. Because the evidence raises fact issues on estoppel (*see* PEC Br. at 20-24), Peavey is entitled to reach a jury on its claims arising out of the Services Agreement.

3. Baan's UCC arguments demonstrate fundamental confusion over the statutory requirements.

Baan also attempts to explain why the trial court's summary judgment is "entirely consistent with and, indeed, required by the UCC." (Baan Br. at 37.) But Baan's UCC arguments are premised on the unsupportable assumption that Peavey was required to revoke its acceptance of the software to be entitled to a remedy – something entirely inconsistent with the UCC's plain language. (*See id.* at 37-41.) And Baan tries to avoid obvious fact questions about the adequacy and timeliness of Peavey's notice by claiming that it is "undisputed that Peavey never gave written notice that it claimed breach." (*See id.* at 39.) Although Baan's UCC arguments offer no basis for affirming the trial court's judgment, they do confirm Baan's confusion about the statutory requirements.

a. Peavey was not required to revoke its acceptance.

Peavey explained why the UCC does not require revocation of acceptance. (*See* PEC Br. at 40 (citing MISS. CODE §§ 75-2-607 & 75-2-714).) Instead of challenging Peavey's analysis, Baan reiterates its belief that Peavey had a "legal and contractual obligation to revoke its acceptance of Baan's software" before filing suit. (*See* Baan Br. at 41.) But nothing in "§ [75-]2-607 requires clear and effective revocation of acceptance," as Baan

inexplicably maintains.[3] (*See* Baan Br. at 41.)

Nor does Baan explain how Peavey could have been required to revoke acceptance when § 75-2-714 expressly provides that:

> [w]here the buyer has *accepted goods and given notification* (subsection (3) of Section 2-607) he may recover as damages for any nonconformity of tender the loss resulting in the ordinary course of events from the seller's breach as determined in any manner which is reasonable.

MISS. CODE § 75-2-714(1) (emphasis added). According to the official comment, § 75-2-714 "deals with the remedies available to the buyer after the goods have been accepted *and the time for revocation of acceptance has gone by.*" *Id.*, cmt. 1 (emphasis added). Contrary to Baan's unsupported assertions, revocation of acceptance is not required to recover damages for accepted goods.

b. Whether Peavey gave adequate and timely notice is a fact question for a jury.

Because revocation of acceptance was not required, the summary judgment cannot be affirmed on UCC grounds unless the record conclusively establishes that Peavey's notice was (i) *inadequate* and (ii) not given within a *reasonable* time after discovering Baan's alleged breach. *See* MISS. CODE § 75-2-607(3)(a). Not surprisingly, whether a party has satisfied the notice requirements in the Mississippi UCC "'is a question which is particularly within the province of the jury.'" *Miss. Chem. Corp. v. Dresser-Rand Co.*, 287 F.3d 359,

---

[3] Section 75-2-607 provides that:

> (3) Where a tender has been accepted
>
> (a) 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 . . . .

MISS. CODE § 75-2-607(3).

368 (5th Cir. 2002) (quoting *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 973 (5th Cir. 1976)).

The parties agree that Peavey's obligation to notify Baan about its alleged breaches of contract is governed by § 75-2-607(3)(a), and that the official comment to that section fleshes out the standard for determining whether notice was adequate and timely. (*Compare* PEC Br. at 40-42, *with* Baan Br. at 37-41.) However, they sharply disagree about whether Baan met its summary judgment burden to establish, as a matter of law, that Peavey's notice was inadequate and not given within a reasonable time after Peavey discovered that the software package could never be fully implemented. (*Id.*)

Peavey has pointed to evidence showing that it had put Baan on notice of its dissatisfaction with the lack of integration for the SCS components in the software package and, therefore, with Peavey's inability to realize the benefit of its contractual bargain. (*See* PEC Br. at 41-42.) This evidence reveals that:

- Peavey sent Baan a written complaint about "issues" with the software implementation project (69 CR 10380);
- Baan was on notice of what those issues were – the Baan "SCS module never worked so [Peavey was] not able to realize [the $13.5 million] savings" from using SCS (*see* App. T at 14792); and
- Peavey's written notice includes a demand for at least $3.9 million in "concessions" (69 CR at 10380).

This evidence raises at least a fact issue on whether Peavey gave Baan adequate notice that the business transaction was "still troublesome" and that Peavey believed that Baan had not met its contractual obligations and, therefore, was in breach. *See* MISS. CODE

§ 75-2-607(3)(a), cmt. 4. Baan, therefore, did not conclusively establish that Peavey's notice was inadequate.[4]

Nor did Baan conclusively establish that Peavey's notice was untimely. Indeed, because Baan was still promising to achieve full implementation in early 2003 (*see* App. T at 14793), the evidence raises a fact question about whether Peavey gave notice within a reasonable time after discovering that SCS could never be fully implemented and, therefore, that Baan would not be able to meet its contractual obligations.

Instead of responding to Peavey's arguments, Baan resorts to a familiar tactic: it simply asserts – without citing any authority – that "[i]t is *undisputed* that Peavey never gave written notice that it claimed breach." (*See* Baan Br. at 39 (emphasis added).) The trial court's judgment cannot be sustained on Baan's unsupported assertions. Whether Peavey gave adequate and timely notice is a fact question that must be decided by a jury. *See Miss. Chem.*, 287 F.3d at 368.

4. Baan's arguments relating to Peavey's warranty claims further subvert the summary judgment standard.

Baan raised only one summary judgment ground that was specific to Peavey's warranty claims – that Peavey's implied warranty claims "fail as a matter of law because they were properly disclaimed." (*See* 32 CR 4820.) Although the trial court did not base its ruling on that ground, Peavey has nevertheless explained that the purported disclaimers are

[4] Contrary to Baan's contentions, it is irrelevant that Peavey used portions of the software that had been installed without asserting a "reservation of rights." (*See* Baan Br. at 41.) That is because the UCC does not require a buyer to make "'a specific claim for damages or an assertion of legal rights'" to satisfy the notice requirement. *See Miss. Chem.*, 287 F.3d at 368 (quoting *E. Air Lines*, 532 F.2d at 976).

invalid. (*See* PEC Br. at 42-44.) Consequently, the trial court's decision to dismiss Peavey's warranty claims cannot be sustained on Baan's "warranty disclaimer" ground.

Instead of responding to Peavey's argument, Baan refers the Court to its briefing in the trial court. (*See* Baan Br. at 44 n. 30.) This apparent attempt to circumvent the page limits for appellate briefs allows Baan to focus its appellate briefing on a different contention – that Peavey failed to produce evidence to support its *express* warranty claims. (*See id.* at 44.) That contention fails for three reasons.

First, it assumes that the only warranty Baan made was the express promise that the software "would 'perform in substantial accordance with' the software's defined 'Documentation.'" (*Id.* at 42.) But Baan ignores that it also promised to correct or replace any software that failed to perform as warranted. (*See* App. I at 8947.) A promise to "repair or replace" a defective product is distinct from a promise that the product is "free from defects." *Miss. Chem.*, 287 F.3d at 366.

Second, it ignores evidence showing that Baan was never able to provide Peavey with a functional SCS module. (*See* App. Q; App. T at 14792.) Evidence that the "SCS module never worked" raises fact issues about whether Baan breached the express warranties in the Software Agreement that the software would "perform" properly and that Baan would "correct or replace" software that did not perform properly by selling Peavey software that could not be implemented and failing to correct the software problems or provide Peavey with an SCS module that worked. (*See id.*) The same evidence also raises a fact question on Peavey's claims that Baan breached the implied warranties of merchantability and fitness for

a particular purpose – warranties that were not effectively disclaimed. (*See id.*; *see also* PEC Br. at 42-44.)

And third, it assumes that evidence favorable to Baan – largely opinions presented as "facts" in affidavits Baan obtained from former Peavey employees – establishes Baan's right to prevail on the merits as a matter of law. According to Baan, summary judgment was proper because: (i) "Peavey's problems were not even caused by Baan"; (ii) "[t]he Baan software was not deficient in any way," (iii) "Peavey's software problems were '**not inherent in Baan,**'" (iv) "Baan's professional services were also satisfactory," and (v) Peavey's contentions in this lawsuit are "bull." (*See* Baan Br. at 44-46.)

Not surprisingly, the "facts" according to Baan are contradicted by evidence favorable to Peavey showing that:

- SCS never worked (App. T at 14792);
- SCS "functionality did not exist for and was not compatible with the update of the Baan IV software that Peavey implemented in its production environment, Baan IVc2" (App. U at 9551, ¶ 10; *see also* App. W at 9120, ¶ 14);
- Peavey's software problems were caused, in part, by the unavailability of SCS software (App. U at 9554, ¶ 22);
- Baan did not adequately warn Peavey that customizing the software would impair Peavey's ability to implement the full software package (*see* 61 CR 9231, ¶ 8; 62 CR 9280, ¶ 6; 62 CR 9311, ¶¶ 6-8); and
- Baan billed Peavey for consultants who were "helping to build a model for software that may not exist" and "go[ing] on time wasting wild goose chases" (App. O).

The trial court was not free to ignore this controverting evidence. That some of Peavey's former employees provided affidavits stating that they were unaware of these problems does not mean that Baan established its right to judgment as a matter of law. To

the contrary, "if one party swears to one version of events and the another (sic) party swears to a different version, summary judgment should be denied." *Robinson*, 763 So. 2d at 886. Because the affidavits in support of Baan's motion were contradicted by affidavits in opposition to the motion,[5] summary judgment should have been denied. *See id.*

Instead of denying summary judgment as it should have, the trial court weighed the evidence, made credibility determinations, and adopted Baan's version of the facts as true. *See Douglas Parker*, 949 So. 2d at 877-78. In so doing, it usurped the jury's role and improperly resolved fact issues by summary judgment. This Court should therefore reverse the trial court's judgment and require those fact issues to be resolved by a jury.

CONCLUSION AND PRAYER

Nothing in Baan's response casts any doubt on Peavey's argument that the trial court erred in dismissing all of Peavey's claims on summary judgment. If anything, Baan's efforts to encourage this Court to misapply the summary judgment standard further confirm that Peavey should have been able to present its claims to a jury.

For the reasons stated above and in its opening brief, Appellant Peavey Electronics Corporation prays that the Court will reverse the summary judgment and discovery orders under review and remand this case to the trial court for further proceedings consistent with the Court's opinion. Peavey also prays for all such further relief to which it may be justly entitled.

---

[5] *Compare* statements by Peavey's senior officers and IT staff referenced in Baan's Brief at 44-46, *with* controverting statements in App. U at 9552, ¶¶ 11, 17, 21; App. W at 9120, ¶¶ 16-24, 29, 37; 61 CR 9231, ¶ 8; 62 CR 9280, ¶ 6; 62 CR 9311, ¶¶ 6-8.

Respectfully submitted,

PEAVEY ELECTRONICS CORPORATION

By: Vincent J. Hess by SAK with permission
VINCENT J. HESS, ONE OF
COUNSEL OF RECORD FOR
SAID APPELLANT

Vincent J. Hess
Texas State Bar No. [redacted]
LOCKE LORD BISSELL & LIDDELL LLP
2200 Ross Avenue, Suite 2200
Dallas, Texas 75201-6776
(214) 740-8000 (Telephone)
(214) 740-8800 (Facsimile)
Admitted Pro Hac Vice

Jerry K. Clements
Texas State Bar No. [redacted]
Barbara Ellis
Texas State Bar No. [redacted]
Susan A. Kidwell
Texas State Bar No. [redacted]
LOCKE LORD BISSELL & LIDDELL LLP
100 Congress Avenue, Suite 300
Austin, Texas 78701
(512) 305-4700 (Telephone)
(512) 305-4800 (Facsimile)
Admitted Pro Hac Vice

James P. Streetman, III
Mississippi State Bar No. [redacted]
David Lee Gladden, Jr.
Mississippi State Bar No. [redacted]
SCOTT, SULLIVAN, STREETMAN
& FOX, P.C.
725 Avignon Drive
Jackson, Mississippi 39236-3847
(601) 607-4800 (Telephone)
(601) 607-4801 (Facsimile)

Ronnie L. Walton
Mississippi State Bar [redacted]
GLOVER, YOUNG, WALTON &
SIMMONS, PLLC
P.O. Box 5514
Meridian, Mississippi 39302-5514
(601) 693-1301 (Telephone)
(601) 693-1363 (Facsimile)

CERTIFICATE OF FILING

I, Susan A. Kidwell, one of the counsel of record for Appellant **Peavey Electronics Corporation**, do hereby certify that I have this the 23rd day of July 2008, caused to be delivered via United States Mail postage prepaid an original and three copies of the foregoing Reply Brief to the Clerk of the Court of Appeals for the State of Mississippi at the following address:

Betty W. Sephton, Clerk
Court of Appeals of the State of Mississippi
450 High Street
Jackson, Mississippi 39201-1082

Susan A. Kidwell

CERTIFICATE OF SERVICE

I, Susan A. Kidwell, one of the counsel of record for Appellant **Peavey Electronics Corporation**, do hereby certify that I have this the 23rd day of July 2008, caused to be delivered via United States Mail postage prepaid a true and correct copy of the above and foregoing Reply Brief to the following:

William C. Hammack
Lee Thaggard
BOURDEAUX AND JONES
P.O. Box 2009
Meridian, Mississippi 39302-2009

The Honorable Lester F. Williamson, Jr.
Lauderdale County Circuit Court
P.O. Box 86
Meridian, Mississippi 39302

Daniel D. Zegura
Christopher M. Golden
ROGERS & HARDIN
2700 International Tower
Peachtree Center
229 Peachtree Street, N.E.
Atlanta, Georgia 30303-1601

Susan A. Kidwell