SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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FEDERAL MOGUL CORPORATION and WESTPOINT HOMES, INC.,

Index No.: 601271/2010

DECISION & ORDER

Plaintiffs,

-against-

UTI, UNITED STATES, INC.,

Defendant.

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SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

Defendant UTi, United States, Inc. (UTi) moves, pursuant to CPLR 3212, for partial summary judgment against plaintiffs Federal-Mogul Corporation (FM) and WestPoint Homes, Inc. (WPH).[1] Seq. 003. Plaintiffs oppose and move, pursuant to CPLR 3025(b), for leave to file a proposed second amended complaint (the PSAC). Seq. 004. Defendant's motion is granted in part and denied in part, and plaintiffs' motion is denied for the reasons that follow.

I. Procedural History & Factual Background

Unless otherwise indicated, the following facts are undisputed.

A. The Parties

FM is an automotive parts manufacturer. WPH is a textile manufacturer. FM and WPH, which are controlled (in complex ways not pertinent to this action) by non-party Carl Icahn, do business across the globe and, therefore, use shipping companies to transport their goods. UTi is a "non-asset-based supply chain services company that provides freight transportation through a global network of freight forwarding offices," or as described by plaintiffs, UTi is a travel agent

[1] According to plaintiffs, WPH is now known as "WestPoint Home LLC." Plaintiffs are directed to amend the caption accordingly.

for freight cargo.[2] Companies contract with UTi to ship their goods, and UTi, in turn, arranges for shipping companies to handle the shipments. UTi pays the shipping invoice at rates governed by contracts between the shipping companies and UTi. UTi's clients pay it a fee based on separate contracts between UTi and the clients. Hence, for UTi to make money, it must charge its clients more per shipment than it pays the shipping companies. This spread effectively functions as a commission, similar to those charged by brokers in other industries.

B. The Contracts

In the spring of 2009, Icahn invited UTi to participate in a bid auction for the opportunity to win plaintiffs' shipping business. In August 2009, Icahn notified UTi that it won the bid. FM and WPH each entered into substantially similar contracts with UTi (the Contracts).[3] The Contracts had initial 2 year terms. *See* Dkt. 51 at 6. Section 8, titled "Non-Exclusivity," provides:

> It is understood and agreed between the Parties that this is a non-exclusive agreement, and not a requirements contract. [UTi] is free to arrange transportation and related services for other clients and [plaintiffs are] free to utilize the services of other forwarders and carriers. [Plaintiffs are] also free to expand, diminish, or suspend [their] use of [UTi] for the Work, in its sole discretion and at any time during the initial and any renewal term of [the Contracts]. The provisions of [the Contracts], however, will be effective for all shipments that [plaintiffs tender] to [UTi] during the initial term or any renewal term.

See Dkt. 51 at 9.

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[2] UTi claims to be a "non-vessel operating common carrier" (NVOCC). The regulatory significance of UTi's status as an NVOCC, which is disputed by the parties, is not material to the instant motions because, as explained later, the court does not reach the parties' arguments under federal and international maritime law.

[3] FM's Contract was executed on September 4, 2009. *See* Dkt. 51. WPH's Contract was executed on October 1, 2009. *See* Dkt. 52. The Contracts are governed by New York law and provides that any litigation must be brought in the United States District Court for the Southern District of New York. *See* Dkt. 51 at 33. At the May 18, 2010 hearing, the court noted that there did not appear to be diversity jurisdiction with respect to WPH. *See* Dkt. 25 (5/18/10 Tr. at 3). Federal question jurisdiction was never addressed.

Section 10, titled "Amendment Procedures," states that "[t]he parties intend [the Contracts to] be [living documents]," but that amendments must be writing. *See id.* at 10. The Contracts extensively set forth the framework for UTi's services. The adequacy of the actual services provided by UTi is not at issue.

Section 30 requires UTi to indemnify plaintiffs for various forms of third-party liability, but does not, nor does any other section of the Contracts, contain an attorneys' fees or prevailing party clause. *See* Dkt. 51 at 26. Section 31 provides that neither party may recover consequential damages absent fraud, willful misconduct, or reckless engenderment of life or property. *See id.* at 27.

The parties dispute the fees charged by UTi, which are governed by section 36:

> In addition to making reimbursements as provided in section 35 above, [plaintiffs] shall compensate [UTi] for the Work, in accordance with the rates and charges set forth in Appendix E[4] as executed by both Parties, attached hereto and made a part hereof. Only those fixed fees of [UTi] which are specified in Appendix E and agreed to in writing by [plaintiffs] shall apply to any shipment within the scope of [the Contacts]. Other than such fixed fees, which are intended to compensate [UTi] for all of its underlying costs, and other than the reimbursements specified in section 35, [plaintiffs] and Work will not be subject to any additional fees or payments to [UTi] or its agents or subcontractors, including, without limitation, [examples omitted] ... or miscellaneous expenses of any type. Under no circumstances shall freight rates, surcharges, accessorial charges or other fees set forth in [UTi's] published tariffs or service guides apply to the Work unless those amounts are specifically set forth in Appendix E.

See Dkt. 51 at 30 (underline in original). Section 36.1 then provides:

> Rates are fixed for the first year of [the Contracts]. At the end of the initial term of [the Contracts] under section 2 hereof, the Parties will discuss whether any rate adjustments (either increases or decreases) are appropriate and will negotiate in good faith as to any appropriate adjustment. [UTi] will implement any adjustment only if mutually agreed, and only after giving [plaintiffs] at least [30] calendar days' prior written notice. Any exceptions to the fixing of rates for a full year as

[4] *See* Dkt. 51 at 94-95; *see also* Dkt. 52 at 50-82.

> stated above, such as holiday peak surcharges, must be mutually agreed to in writing and must be listed in Appendix E.

See id. (underline in original). Additionally, and most relevant to this case, section 36.2 provides:

> [Plaintiffs recognize] that TSPs [defined to mean "Transportation Service Provides", i.e., a shipping company] utilized by [UTi] in the Work may assess fuel surcharges. If [UTi] is unable to negotiate an exception to a fuel surcharge, [UTi] may request that [plaintiffs] accept all or a portion of the increase. The Parties will negotiate in good faith as to appropriate treatment of such increases on a case by case basis. [UTi] will implement any such fuel-related increase only as mutually agreed, and only after giving Customer at least [30] calendar days' prior written notice in the form of an addendum or amendment to Appendix E.

See id. (underline in original).

Thus, under section 36, plaintiffs were entitled to avail themselves of the fixed rates set forth in Appendix E during the first year of the Contracts.[5] Hence, even if (as plaintiffs allege and the documentary evidence indicates)[6] the first year rates were not profitable for UTi, UTi had no right to renegotiate until the end of the first year. The only exception, set forth in section 36.2, is that UTi was entitled to negotiate additional fuel surcharges.

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[5] For FM, the first year ended on September 3, 2010. For WPH, the first year ended on September 30, 2010.

[6] UTi suggests, somewhat plausibly, that it may well be rational to negotiate first year rates at which it would realize a marginal loss on each shipment. For instance, UTi's ability to negotiate rates with its shippers is supposedly impacted by its total volume, so luring business with lower, but unprofitable rates may be worth it if such losses can be made up, in the long run, by gaining market share to be used as leverage to negotiate lower shipping rates. UTi might also have sought to impress new clients, such as plaintiffs, with its services, and hope to keep them even after raising rates. Regardless, such rationales are legally irrelevant. The sole determinative factor of whether UTi's conduct was permitted under the Contracts is the express language of sections 36, 36.1, and 36.2.

C. The Rate Disputes

During the first nine months of the Contracts (that is, between September 2009 and May 2010), UTi's rates were low. It therefore sought to renegotiate to avoid incurring further losses. In early 2010, UTi attempted to procure plaintiffs' consent to raise rates and add fuel surcharges. UTi, however, did not provide any evidence to plaintiffs that its own fuel surcharges had increased. Plaintiffs refused to agree to a rate increase or pay fuel surcharges. The parties' relationship deteriorated, and this litigation resulted after UTi sent plaintiffs the following letter dated May 13, 2010 (the May 13 Letter):[7]

> Dear Mr. Gary,
>
> On behalf of UTi, I am writing you to advise the Icahn companies of the current volatile transportation market conditions and the impact of this volatility to our relationship. The fact is air and ocean carrier capacity has failed to keep pace with market demand resulting in higher shipping costs in order to ensure shipment movement. We have had many discussions over the past 3 months about these conditions with Icahn, [FM] and [WPH]. Because of the current conditions, UTi is unable to secure sufficient capacity to meet the needs of all your companies at the current rates. As you are aware, this problem has been exacerbated by the fact that Icahn has been unwilling to discuss price increases with UTi to mitigate the substantial losses that UTi has been incurring over the last several months. The carrier market rate increases have been well documented in the press and benchmarking is available from companies such as Drewry.
>
> UTi wants to continue providing services to Icahn, [FM] and [WPH]. However, UTi cannot do so under the current pricing and service structure. UTi has spent considerable time analyzing the impact of current carrier ocean pricing on the various Icahn programs and, in an attempt to reach a compromise position with Icahn, UTi is prepared to accept bookings under an "open book" agreement, with Icahn paying an agreed margin over cost. This structure will allow for a partnered approach to the management of the carriers and proper capacity forecasting.
>
> In addition to the above pricing proposal, we will require immediate relief for the continuous fuel increases that have occurred and are expected to occur throughout

[7] The letter was written by Chris Dale, the then president of freight forwarding at UTi, and addressed to Hunter C. Gary, Icahn's employee, who appears to have been UTi's primary contact person with respect to the Contracts

[* 6]

the remainder of this year. UTi has incurred these increases since they were first imposed by the ocean carriers, and UTi cannot continue to bear these costs. The rates that would be applied globally to any bookings on or after May 17, 2010, would be USD 700.00 for all 20' containers and USD 900.00 for all 40' containers.

On June 15, 2010, the carriers will also implement a Peak Season charge per container. This fee will also need to be billed to all Icahn companies on a global basis as soon as such fee is implemented by the ocean carriers.

Lastly, UTi and Icahn must address the routings of the current program. During the RFQ process, we proposed pricing utilizing All Water, Port to Port routings as the bidding template instructed us to do. It was reviewed and **agreed that** this was the intent of the bid and the pricing for the first year. Since the program started, both the operations team of [FM] and [WPH] have requested routing changes that moved the service to Mini Land Bridge, MLB. This change in routing has caused significant inland and delivery costs to UTi that were not agreed to in the original pricing. We will need your commitment to revert routings back to all water movement or, alternatively, have Icahn companies pay for the additional inland costs being incurred through a MLB routing. A good example of this is the case where [FM] designated their trucking company for the inbound Asia lanes for the delivery of the material to Smyrna TN. This designation and the lack of flexibility in routings have caused UTi to incur significant losses per container.

We are open to discussion and negotiation. However, as a result of the current market conditions and our inability to gain agreement for immediate changes to the current program pricing, **effective May 17, 2010, UTi will no longer accept bookings for [FM] and [WPH] cargo unless we have reached resolution on the pricing proposals described above.** This action is necessary to avoid the risk of further penalties and contingency costs to correct shipment backlogs.

UTi values its relationship with Icahn, [FM] and [WPH]. Unfortunately, unprecedented volatility in the global transportation market has made it impossible for us to continue our relationship under the current pricing and service structure. We are hopeful that we can work together to find an immediate solution to our collective challenge. We remain available to discuss at our previously arranged face-to-face meeting on May 25/26th or on any earlier date, but we must implement our proposal or a renegotiated proposal by May 17.

See Dkt. 53 (emphasis added).

FM and WPH responded with virtually identical letters, respectively dated May 15 and May 17, 2010. *See* Dkt. 54 & 55. Plaintiffs took the position that the proposed unilateral rate

increases and threat to stop providing services to plaintiffs would constitute breaches of the Contracts. *See id.*

D. The Initial Litigation & BAF Amendments

Plaintiffs commenced this action on May 18, 2010. Their original complaint asserted a single cause of action for breach of contract, based upon UTi's threats in its May 13 Letter. *See* Dkt. 1. Plaintiffs alleged that, as threatened, UTi discontinued providing services on May 17. *See id.* at 7. Additionally, plaintiffs moved by order to show cause for an injunction requiring UTi to continue providing services under the Contracts at the originally agreed-upon rates. *See* Dkt. 3. After a hearing on May 18, 2010, the parties reached an agreement, whereby UTi would resume providing shipping services to plaintiffs, and plaintiffs would be entitled to challenge any fees charged by UTi in excess of those permitted under the Contracts. As a result, the existence of a repudiation and threat of irreparable harm, which existed for a mere six days (between May 13 and May 18), abated.

The parties further agreed to immediately meet and negotiate a resolution to UTi's demands. The parties met and, during the summer of 2010, negotiated an amendment to the Contracts that would require plaintiffs to pay the subject fuel surcharges, known as a "bunker adjustment factor" (BAF). The starting point, again, was plaintiffs' demand that UTi provide it with clear documentary proof that it was indeed paying higher BAF to the shipping companies. There is no question of fact that UTi did not provide plaintiffs with adequate assurances that it was doing so. Consequently, plaintiffs began their own investigation into BAF and contracted for clawback rights if the BAF charged exceeded the amount paid by UTi.[8] On July 27, 2010 and August 6, 2010, WPH and FM respectively entered into amendments to section 36.2 of the

[8] This decision is reflected in the parties' email correspondence. *See* Dkt. 193.

Contracts. *See* Dkt. 306 (FM amendment) & Dkt. 289 (WPH amendment) (collectively, the BAF Amendments).

The BAF Amendments provide that plaintiffs will pay a fuel surcharge, calculated as the "lower of (i) the applicable published index BAF rate minus a specified discount (if any) on a region-by-region basis; or (ii) the lowest rate that UTi is paying or has negotiated directly with the relevant steamship line." *See* Dkt. 306 at 2. The BAF Amendments further specify that:

> For the avoidance of any doubt, with respect to (ii) above, the BAF rate that UTi pays to the relevant steamship lines, if any, on a particular shipment is the maximum allowable rate that can be imposed on [plaintiffs] and such rate, if applicable, **will not contain any profit margin, whatsoever, in favor of UTi.**

See id. (emphasis added).

In other words, plaintiffs agreed to pay UTi's BAF surcharges as a pass-through expense. Plaintiffs, however, ensured with this provision that UTi could not use artificially inflated BAF charges to effectively cover its losses and generate a spread on an otherwise unprofitable shipment. Plaintiffs further negotiated for audit rights to allow them to confirm that the BAF charged was indeed in conformance with the BAF Amendments. The parties' understanding and the scope of plaintiffs' audit rights are set forth in the BAF Amendments:

> According to UTi, discounts off published indices do not always reflect the rates actually paid by freight forwarders. In the past, UTi has been able to negotiate substantially discounted BAF rates or even eliminate them entirely. Therefore, in an effort to provide an "open book" approach to BAF surcharges, UTi will provide [plaintiffs] with access (to the extent UTi has any such information) to any such financial records and supporting documentation as may be necessary to verify both the accuracy of the BAF rate as well as the fact that **the BAF is billed not to exceed a "pass-through" without any markup on the part of UTi.**

See id. (emphasis added). The BAF Amendments provide that the BAF surcharges only apply to shipments booked with UTi after May 19, 2010. *See id.* at 3. Shortly after the BAF Amendments were executed, plaintiffs withdrew their injunction motion. *See* Dkt. 5.

On April 1, 2011, UTi filed an answer to plaintiffs' original complaint, which contains a breach of contract counterclaim based on plaintiffs' alleged failure to pay all of UTi's invoices. *See* Dkt. 6. On April 22, 2011, plaintiffs filed their first amended complaint (the FAC). The FAC's breach of contract claim was expanded to include myriad other alleged breaches of the Contracts, such as problems with respect to plaintiffs' shipments. *See id.* at 13-15. The FAC also added two causes of action for tortious interference with business relations and defamation. *See id.* at 15-16. On October 18, 2011, UTi filed an answer to the FAC, which continued to assert its original breach of contract counterclaim. *See* Dkt. 9.

E. Discovery[9]

A preliminary conference was held on June 19, 2012, at which a discovery schedule was set, including a Note of Issue deadline of January 9, 2013. *See* Dkt. 11. At the first compliance conference on September 18, 2012, the parties agreed to mediate privately and, therefore, the discovery deadlines were extended. *See* Dkt. 12. At the following status conference on November 27, 2012, the parties, who had not yet mediated, expressed their commitment to mediation and agreed to stay discovery. *See* Dkt. 13. The parties did not settle, and discovery resumed.

The parties entered into an ESI stipulation on June 17, 2013. *See* Dkt. 14. At a status conference the following day, on June 18, 2013, the parties stipulated to a new discovery schedule, which provided, *inter alia*, that the Note of Issue deadline was December 24, 2013.

[9] The history of the discovery conferences is provided to explain why discovery has not yet been completed in this 2010 action.

See Dkt. 15. At the next compliance conference, on September 24, 2013, the discovery deadlines were extended, a major reason being plaintiffs' failure to provide defendants and the court with any clarity about the nature of its damages (e.g., which shipments were allegedly problematic). The Note of Issue deadline was again extended, this time to **March 21, 2014**. *See* Dkt. 21.

In the order issued after the next conference, on November 7, 2013, the court noted that plaintiffs had not complied with the prior discovery order because they failed to "identify the shipments forming the basis of their claims." *See* Dkt. 22. Plaintiffs were ordered to do so by December 9, 2013. *See id.* Then, on December 19, 2013, the parties were ordered to meet and confer regarding depositions. Further delays[10] required yet another Note of Issue deadline extension to July 25, 2014. *See* Dkt. 23.

In an order dated April 28, 2014, the court noted that its December 19, 2013 order was not complied with because the parties failed to complete depositions. *See* Dkt. 26. The court extended all of the discovery deadlines by another 60 days. *See id.* After further delay, the court so-ordered the parties' stipulation dated July 1, 2014, which extended the Note of Issue deadline to December 23, 2014. *See* Dkt. 35. This delay appears to have been caused by motion practice over the issuance of a commission, which was not resolved until the court ruled on the motion in an order dated July 9, 2014. *See* Dkt. 36. Further delay was caused by another deposition dispute, raised at a conference on August 14, 2014. *See* Dkt. 37.

Discovery finally appears to have gotten back on track after a compliance conference on September 30, 2014. At that conference, the court finally induced plaintiffs to thoroughly explain their case and defendants to explain their refusal to comply with long standing discovery

[10] These delays may have been caused by a change in counsel. Plaintiffs' attorneys at Winston & Strawn LLP are not the same as those that appear to have been involved back in 2010. Additionally, at the end of 2013, UTi's original counsel at Paul Hastings LLP withdrew and was later replaced by UTi's current counsel at Venturini & Associates.

demands, which they were required to respond to as set forth in the court's discovery order. *See* Dkt. 39. The court stressed that discovery needed to conclude and that all other outstanding disputes would need to be addressed at the next conference. *See id.*

That conference was held on October 30, 2014, and resulted in an order resolving a multitude of disputes, including extensive ESI matters. *See* Dkt. 42. Plaintiffs now claim that the production they received as a result of that order is the basis for their motion to amend. At the following conference, on December 9, 2014, the court turned its attention to the completion of depositions and the parties' post-deposition demands. The Note of Issue deadline was extended to June 12, 2015, before which both fact and expert discovery was to be completed. *See* Dkt. 43.

On a December 23, 2014 telephone conference, after it appeared that substantial progress had been made, the parties proposed filing the instant motions. UTi sought to file a partial summary judgment motion on its arguments under federal law and on the scope of plaintiffs' damages. Plaintiffs sought to file a motion for leave to amend to add a fraudulent inducement claim. A briefing schedule was set [*see* Dkt. 44], and the instant motion practice followed.

In the interim, the parties continued taking depositions. After the motions were briefed, but before oral argument, the parties were given leave to supplement the record with transcripts from recently completed depositions. *See* Dkt. 334. Oral argument on the motions was held on May 21, 2015. *See* Dkt. 346 (5/21/15 Tr.)

II. UTi's Motion for Partial Summary Judgment

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving

party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

A. Cover Damages

After UTi sent plaintiffs the May 13, 2010 Letter, plaintiffs, concerned that UTi would follow through with its threat to cease accepting plaintiffs' shipments on May 17, made arrangements to ships their goods with two other companies, non-parties Hellman Worldwide Logistics (Hellman)[11] and Kuehne and Nagel (collectively, the Other Shipping Companies). After UTi agreed to resume accepting plaintiffs' shipments at the May 18 hearing, plaintiffs continued using the Other Shipping Companies' services during the summer of 2010, while the parties were negotiating the BAF Amendments. During this time, plaintiffs provided some of

[11] Plaintiffs used Hellman's services prior to contracting with UTi.

their shipping business to UTi, but kept much of their business with the Other Shipping Companies, even though UTi's rates were significantly cheaper than the Other Shipping Companies' rates.

To be sure, as UTi readily admits, the Contracts do not require plaintiffs to ship exclusively with UTi. However, even after UTi conceded that it was not entitled to unilaterally raise plaintiffs' rates and agreed to resume accepting plaintiffs' shipments, plaintiffs continued to use the more expensive services of the Other Shipping Companies. Plaintiffs now contend that UTi is obligated to reimburse them for the difference between the rates they paid the Other Shipping Companies and the rates under the Contracts. Plaintiffs contend these are recoverable mitigation damages. They cite this court's decision in *VFS Financing, Inc. v Ins. Servs. Corp.*, 2014 WL 234340 (Sup Ct, NY County 2014), where the court explained that "[t]he law imposes upon a party subjected to injury from breach of contract[] the duty of making reasonable exertions to minimize the injury." *Id.* at *3, quoting *Holy Props. Ltd. v Kenneth Cole Prods., Inc.*, 87 NY2d 130, 133 (1995), citing *Wilmot v State*, 32 NY2d 164, 168 (1973) ("the party seeking damages is under the duty to make a 'reasonable effort' to avoid consequences of the act complained of"); *see also Mack Cali Realty, L.P. v Everfoam Insulation Sys., Inc.*, 110 AD3d 680, 682 (2d Dept 2013) ("the duty to mitigate damages arising from a breach of contract is a duty that arises from common law and, therefore, need not be expressly bargained for in a contract").

The parties characterize plaintiffs' mitigation damages as "cover damages," which are recoverable when a non-breaching party mitigates in the face of repudiation. *See Marjam Supply Co. v All Craft Fabricators, Inc.*, 94 AD3d 954 (2d Dept 2012) ("plaintiff repudiated its

agreement to supply [defendant] with certain ceiling tiles, thus forcing [defendant] to purchase the tiles from another supplier at a higher price, and warranting an award of cover damages"), citing *Fertico Belgium S.A. v Phosphate Chemicals Export Ass'n*, 70 NY2d 76, 81-82 (1987) ("the nonbreaching party [has] the alternative of either seeking the partial self-help of cover along with recovery of damages, or of recovering damages only for the differential between the market price and the contract price, together with incidental and consequential damages less expenses saved") (citation omitted), *Walck Bros. Ag. Serv., Inc. v Hillock*, 5 AD3d 1058, 1060 (4th Dept 2004) ("Where a seller breaches the contract, the buyer may cover by making a substitute purchase of goods from another seller, provided that such purchase is made **in good faith** and without unreasonable delay") (emphasis added), and *Toto We're Home, LLC v Beaverhome.Com, Inc.*, 301 AD2d 643, 644 (2d Dept 2003) ("The plaintiffs established the seller's breach, which necessitated the reasonable and prompt purchase of replacement goods from another seller at increased cost. The plaintiffs thus demonstrated their entitlement to recover their cover costs").[12]

UTi does not contend that a repudiation of the Contracts cannot give rise to cover damages. Rather, it argues that if UTi had not agreed to resume providing services after the May 18 hearing and, instead, refused to resume services until plaintiffs agreed to pay a higher rate, plaintiffs would have been entitled (if not forced) to mitigate by using another company. In that event, plaintiffs would be entitled to cover damages from UTi. That being said, UTi argues that the cover damages sought by plaintiffs were not caused by UTi's breach or repudiation. *See Pesa v Yoma Dev. Group, Inc.*, 18 NY3d 527, 532 (2012) ("It is axiomatic that damages for

[12] These cases involve the UCC. Plaintiffs aver, and UTi does not dispute, that the same principles apply to computing mitigation damages for a services contract not governed by the UCC.

breach of contract are not recoverable where they were not actually caused by the breach"). Specifically, UTi avers that even if the May 13 Letter was a repudiation, it retracted that repudiation at the May 18 hearing by agreeing to perform. UTi, therefore, maintains that plaintiffs may not seek cover damages arising after May 18, 2010. UTi is correct.

"Under New York law, a repudiation is 'a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach.'" *Vision Entm't Worldwide, LLC v Mary Jane Prods., Inc.*, 2014 WL 5369776, at *3 (SDNY 2014), quoting *Norcon Power Partners, L.P. v Niagara Mohawk Power Corp.*, 92 NY2d 458, 463 (1998); *see Children of Am. (Cortlandt Manor), LLC v Pike Plaza Assocs., LLC*, 113 AD3d 583, 584 (2d Dept 2014) ("Under the doctrine of anticipatory repudiation, when a party repudiates contractual duties prior to the time designated for performance and before all of the consideration has been fulfilled, the repudiation entitles the nonrepudiating party to claim damages for total breach"); *see generally Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266-67 (1st Dept 1995). "The repudiation must be unequivocal, definite, and final." *Children of Am.*, 113 AD3d at 584; *see Tenavision, Inc. v Neuman*, 45 NY2d 145, 150 (1978) ("the announcement of an intention not to perform [must be] positive and unequivocal").

If a repudiation occurs, "[t]he non-repudiating party may refuse, for a time, to acquiesce in the repudiation, and, without waiving any rights, urge the repudiator to perform." *Vision Entm't*, 2014 WL 5369776, at *5, citing *S. D. Hicks & Son Co. v J. T. Baker Chemical Co.*, 307 F2d 750, 752 (2d Cir 1962). However, "[i]n a situation where the non-repudiating party continues to insist on performance, the repudiating party is given 'an opportunity to repent and to

resume the contract' during this period of insistence." *Vision Entm't*, 2014 WL 5369776, at *5, quoting *De Forest Radio Tel. & Tel. Co. v Triangle Radio Supply Co.*, 243 NY 283, 293 (1926).[13] "The repudiator may retract his repudiation until the other party has elected to terminate the contract or has materially changed his position in reliance on the repudiation." *In re Randall's Island Family Golf Centers, Inc.*, 261 BR 96, 102 (Bankr SDNY 2001) (applying New York law; collecting cases). "If the repudiating party retracts its repudiation, the non-repudiating party once again becomes obligated to perform its obligations under the contract." *Argonaut Partnership v Sidek*, 1996 WL 617335, at *6 (SDNY 1996), citing *De Forest*, 243 NY at 292. "[I]n order for a retraction to negate a prior repudiation, the retraction must take the form of a statement by the repudiating party that it will perform." *Id.*

UTi correctly avers that the cover damages sought by plaintiffs that were incurred after May 18, 2010 were not caused by UTi's breach. Assuming, *arguendo*, that the May 13 Letter was a repudiation,[14] plaintiffs would be entitled to mitigate and seek cover damages from UTi. However, at most, the time period during which plaintiffs could have understood there to be a genuine threat of UTi not accepting their shipments absent rate increases was six days. By the end of the May 18 hearing, plaintiffs could not have reasonably feared that UTi would not accept its shipments without insisting on higher rates. On the contrary, at the May 18 hearing, UTi agreed to accept plaintiffs' shipments and further agreed not to charge plaintiffs more than the rates permitted by the Contracts. Plaintiffs, moreover, reserved their rights to seek further court intervention to claw back any charges invoiced in excess of the amounts permitted under the

[13] *See Pesa*, 18 NY3d at 532 (*De Forest* is still good law).

[14] Contrary to the way UTi portrays the May 13 Letter, UTi was not merely seeking to negotiate fuel surcharges. As the May 13 Letter makes clear, UTi was attempting to renegotiate the entire fee structure.

Contracts.[15] Nonetheless, during the summer of 2010, plaintiffs divided their shipping business between UTi and the Other Shipping Companies. To the extent plaintiffs argue that they did so for reasons unrelated to UTi's fee demands,[16] such as UTi's alleged mishandling of shipments, plaintiffs have rightfully abandoned such claims.[17] Consequently, plaintiffs cannot rely on anything other than the May 13 Letter as a predicate for cover damages.[18]

Under these circumstances, plaintiffs are not entitled to cover damages. Cover damages are recoverable only when such costs arose from a breach and were incurred as part of reasonable mitigation efforts. That is not the case with plaintiffs' use of the Other Shipping

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[15] It is unclear if plaintiffs are indeed asserting a breach of contract claim for overcharges under the Contracts and BAF Amendments. To the extent plaintiffs are either asserting such a claim or wish to do so, they should confer with UTi's counsel and raise the matter on the next telephone conference.

[16] It should be noted that plaintiffs did not seek court intervention at any time between the May 18 hearing and the execution of the BAF Amendments. To the extent plaintiffs are claiming that they needed to mitigate because, during the summer of 2010, UTi was again making threats tantamount to those set forth in the May 13 Letter, there is no evidence to support such a claim. A review of the parties' correspondence in the summer of 2010 reveals robust negotiations between sophisticated commercial counterparties, not threats that could legally be considered a repudiation giving rise to cover damages. If plaintiffs felt otherwise, they should have renewed their injunction motion.

[17] Damages for such claims, as UTi explains and plaintiffs do not refute, are strictly capped by the federal and international regulatory structure discussed in UTi's briefs. The Contracts, moreover, limit the damages recoverable for mishandled shipments. *See* Dkt. 51 at 24-25. It also should be noted that plaintiffs have abandoned their tortious interference and defamation claims.

[18] More plausible is the notion, proffered by UTi and supported by the record, that plaintiffs' were using both UTi's and the Other Shipping Companies' services as pricing leverage. Even though plaintiffs' rates with UTi could not be increased in the first year, the rates were subject to increase in the second year, which was scheduled to begin at the end of the summer of 2010. By splitting their business, plaintiffs put pressure on UTi and the Other Shipping Companies to lower their rates. Continuing to provide some business to UTi made plaintiffs appear to be willing to use UTi instead of the Other Shipping Companies if prices were not lowered.

Companies' services after May 18, 2010. While there are questions of fact as to plaintiffs' motives, there is no question of fact that plaintiffs' decision to send their post-May 18 shipments to the Other Shipping Companies was not a byproduct of a breach or repudiation of the Contracts. The only breach was the May 13 Letter, but that breach was cured after the May 18 hearing. Plaintiffs were not entitled to mitigate after May 18 because UTi unequivocally expressed its willingness to perform. To the extent plaintiffs provided UTi with shipments during the summer of 2010, UTi performed. No reasonable finder of fact could conclude that plaintiffs' could not avail themselves of the Contracts after May 18, 2010. They simply chose not to. Consequently, the only cover damages recoverable by plaintiffs are those incurred between May 13, 2010 and May 18, 2010.[19]

B. UTi's Invoices

The parties do not present definitive evidence on the issue of whether plaintiffs were charged fees for shipments in excess of those permitted by the Contracts and the BAF Amendments. Nor is there sufficient evidence to determine if there is merit to UTi's counterclaim that plaintiffs failed to pay all of its invoices, or if the invoiced amounts were proper. Likewise, as noted earlier, it is unclear if plaintiffs are actually asserting a claim for overcharges, and, if so, whether they timely objected. Summary judgment, therefore, is denied on these claims.

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[19] Plaintiffs' argument based on the ramp-up time associated with a change in shippers is not compelling. While logistical arrangements may have had to be made weeks in advance, plaintiffs were in a position to resume using UTi's services on May 18. Even if plaintiffs had made arrangements, for instance, between May 13 and May 18, to move much of its business to Hellman during the summer, just because such talks occurred during the short repudiation period does not mean that cover damages for all Hellman shipments are recoverable. If actual orders were placed during that week, but not shipped until June, those shipments may be eligible for cover damages. But if orders were not placed until June, and could have been serviced by UTi instead, no cover damages may be recovered.

That being said, plaintiffs' punitive damages and attorneys' fees demands are stricken. "[I]n order for punitive damages to be awarded, the plaintiff must demonstrate that the defendant's conduct is intentional and deliberate, has fraudulent or evil motive, and has the character of outrage frequently associated with crime." *Morsette v "The Final Call"*, 309 AD2d 249, 254 (1st Dept 2003), citing *Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 479 (1993). No such conduct occurred here. This is simply a commercial contract dispute between highly sophisticated parties. Moreover, in the absence of express contractual agreements (or applicable statute), plaintiffs cannot recover their attorneys' fees. *See Gotham Partners, L.P. v High River Ltd. Partnership*, 76 AD3d 203, 206 (1st Dept 2010), accord *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487 (1989). The indemnity clause discussed earlier "falls short of satisfying the exacting standard of [*Hooper*] that for an indemnification clause to cover claims between the contracting parties rather than third-party claims, its language must unequivocally reflect that intent." *Id.* Section 30 does not do so.

III. Plaintiffs' Motion to Amend

"Leave to amend pleadings under CPLR 3025(b) should be freely given, and denied only if there is **prejudice or surprise resulting directly from the delay**, or if **the proposed amendment is palpably improper or insufficient as a matter of law**." *McGhee v Odell*, 96 AD3d 449, 450 (1st Dept 2012) (citations and quotation marks omitted; emphasis added).

The PSAC clarifies that plaintiffs are only seeking to assert breach of contract and fraud claims. *See* Dkt. 171 at 29-32 (redline, confirming that plaintiffs are no longer asserting tortious interference and defamation claims). Plaintiffs may maintain their breach of contract claim to

the extent set forth above. However, plaintiffs may not amend to assert a claim for fraudulent inducement of the BAF Amendments.

"The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009). Plaintiffs claim that UTi lied about its own BAF expenses and that such lies fraudulently induced plaintiffs to enter into the BAF Amendments. However, even if plaintiffs' allegations are true and even if plaintiffs were invoiced for BAF surcharges in excess of the BAF surcharges actually paid by UTi, the fraudulent inducement claim set forth in the PSAC is not viable.

To explain, if UTi did indeed charge plaintiffs BAF surcharges that UTi was not paying,[20] such surcharges are recoverable by plaintiffs under the BAF Amendments. Plaintiffs negotiated for this very right, rendering the fraud claim duplicative. *See Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 423 (1st Dept 2014) (fraud claim duplicative of breach of contract where "it seeks the same damages as the breach of contract claim"). As the First Department explained:

> Causes of action for breach of contract and fraud based on the breach of a duty separate from the breach of the contract are designed to provide remedies for different species of damages: the damages recoverable for a breach of contract are meant to place the nonbreaching party in as good a position as it would have been

[20] To be clear, in reviewing UTi's internal emails from September 2009 through June 2010, there seems to be little doubt that UTi could not precisely compute the marginal BAF it was paying for each shipping lane but needed to come up with a figure that would be large enough to make a marginal profit on plaintiffs' shipments (i.e., the kerfuffle over the $700/$900 numbers). UTi's dishonesty seems to have stemmed from its own disorganization. Icahn, however, understood this. He made a savvy attempt to use the chaos at UTi as a means to negotiate lower shipping costs with all of the companies he contracted with. It was a strategic decision, but one the court sees as legally untenable. While Icahn would love to recoup the higher fees charged by the Other Shipping Companies (fees plaintiffs, at the time, appear to have underestimated), by the time Icahn was engaging in his attempt at legal/business arbitrage, the legal grounds for cover damages (repudiation) had abated.

> had the contract been performed; the damages recoverable for being fraudulently induced to enter a contract are meant to indemnify for **the loss suffered through that inducement**.

Manas v VMS Assocs., LLC, 53 AD3d 451, 454 (1st Dept 2008) (citations and quotation marks omitted).

Plaintiffs could not have suffered any losses though fraudulent inducement that are any different than those suffered by virtue of UTi's alleged breach of the BAF Amendments. The losses arising from the alleged fraud – those arising from being lied to about UTi's supposed BAF expenses – are the same losses plaintiffs incurred by virtue of UTi's alleged breach of the BAF Amendments. In both instances, plaintiffs' losses are the BAF charges it paid to UTi that UTi allegedly did not pay to the shipping companies. The question of whether the BAF that UTi charged to plaintiffs was indeed a pass-through expense or a profit markup[21] is the very subject of the breach of contract claim. The fraud claim, therefore, is not collateral to the breach of contract claim. *See MMCT, LLC v JTR College Point, LLC*, 122 AD3d 497, 499 (1st Dept 2014) ("the fraudulent inducement claim duplicates the breach of contract claim because plaintiff has not alleged any representation that is collateral to the contract"). It is the gravamen of the contract claim.

Similarly, plaintiffs' insistence on the inclusion of audit and clawback rights in the BAF Amendments demonstrate that whether UTi was actually paying BAF surcharges was not material to plaintiffs' decision to execute the BAF Amendments. Plaintiffs' lack of trust in UTi's honesty about the BAF surcharges is evidenced by the audit clause, which permits plaintiffs to demand substantiation from UTi that its BAF surcharges are real. If UTi does not

[21] A question of fact not amenable to resolution on this motion.

prove that they are, plaintiffs are entitled to a refund of the BAF paid to UTi. UTi's pre-contractual representations about its own BAF expenses were clearly not relied on by plaintiffs. Under these circumstances, no reasonable finder of fact could conclude that plaintiffs relied on UTi's BAF representations. Indeed, the audit and clawback clauses are the very sort of prophylactic provisions the Court of Appeals believes sophisticated commercial parties should be inserting into contracts. *See ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 (2015) (when a plaintiff knows "that defendants ha[ve] not supplied them with the financial information to which they were entitled, [a heightened degree of diligence is triggered]") (quotation marks omitted), citing *Pappas v Tzolis*, 20 NY3d 228, 232-33 (2012), quoting *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 279 (2011).

It should also be noted that adding a fraud claim to this case would, yet again, require discovery deadlines to be extended to include the broad and expensive factual inquiries into scienter, reliance, and causation. The extra ESI and deposition costs would be extraordinary and would almost certainly exceed the amount in controversy. The history of discovery in this action, extensively recounted herein, and "proportionality" militate against such a result.

Finally, in light of the rulings set forth above, it is unnecessary to address the myriad other arguments made by the parties. Of particular note is the parties' dispute over the possible effect of federal and international maritime law on the Contracts. The parties proffer widely different interpretations of the applicable federal statutes and regulations, for which there appears to be little federal court precedent.

UTi argues that its own failure to file the Contracts with the Federal Maritime Commission somehow vitiates the enforceability of the Contracts. Neither party cites any case

that specifically addresses this issue under the modern regulatory regime. To wit, UTi relies, by way of analogy, on case law concerning FCC regulations because no on-point case exists for the applicable maritime regulations. Given the remaining amount in controversy and the inadequate briefing on the issue, this court will not rule on the apparent federal questions of first impression raised by UTi. Accordingly, it is

ORDERED that the motion by defendant UTi, United States, Inc. for partial summary judgment against plaintiffs Federal-Mogul Corporation and WestPoint Homes, Inc. is granted in part to the extent that plaintiffs' cover damages claim is limited, as set forth herein, to damages incurred between May 13, 2010 and May 18, 2010, plaintiffs' punitive damages and attorneys' fees claims are stricken, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' motion to amend is denied; and it is further

ORDERED that within 7 days of the entry of this order on the NYSCEF system, the parties shall call the court (646-386-3363), between 4:00 and 5:30 p.m., at which time the status of this case will be discussed.

Dated: July 1, 2015

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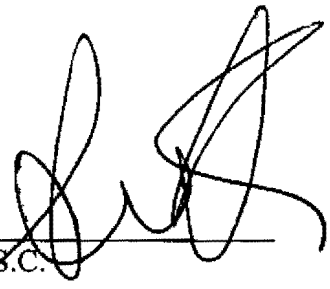

J.S.C.