Q Semiconductor Inc. v GlobalFoundries U.S. 2 LLC
2019 NY Slip Op 30603(U)
March 12, 2019
Supreme Court, New York County
Docket Number: 652342/2018
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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Q SEMICONDUCTOR INC.,

Plaintiff,

-against-

GLOBALFOUNDRIES U.S. 2 LLC and GLOBALFOUNDRIES SINGAPORE PTE. LTD.,

Defendants.

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DECISION AND ORDER
Index No.: 652342/2018

Motion Sequence No.: 002

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, the facts are taken from the Complaint (Complaint, NYSCEF Doc. No. 1).

Plaintiff Q Semiconductor (Q) designed a semiconductor chip which, it believed, could be manufactured in a more cost-effective process than those then in use. Simulations indicated the chip could be fabricated and perform as expected. Q sought a manufacturer to make the chip. Once Q proved the chip could be fabricated, it anticipated receiving offers for the purchase of the company.

Defendant GlobalFoundries US 2 LLC (GF2) is a chip fabricator. Q and GF2 communicated about manufacturing Q's chips. GF2 represented it had a "qualified" "130 nm RF SOI EDMOS" manufacturing process on 300mm wafers which was already in use for other large customers (the EDMOS Process, Complaint, ¶ 4). GF2 also represented itself as dedicated to quality, that the EDMOS Process was a mature process in full production, and that GF2 was capable of meeting Q's manufacturing needs in the specified time frame (*id.*, ¶ 44). GF2 did not reveal the complaints it had received from other customers about the EDMOS Process.

Q entered into an October 31, 2016, agreement with GF2 for the manufacture of Q's chips (Agreement, attached to Complaint as Exhibit A, NYSCEF Doc. No. 2), which was amended on November 15, 2016 (the Amendment, attached to Complaint as Exhibit A, NYSCEF Doc. No 2). The EDMOS Process was not qualified and GF2 had major problems manufacturing the chips. GF2 continued tweaking its experimental process while it manufactured Q's chips using Q as its guinea pig and attempted to create a new manufacturing process, which it failed to disclose to Q

and which was prohibited by the contract. Q placed an order and sent payment to defendant GlobalFoundries Singapore PTE LTD (GFS), which was going to do the actual manufacturing (Complaint, ¶ 63). All along, defendants indicated the EDMOS Process was qualified and tested. It was not. The chips were shipped by GF2 on March 30, 2017. Q could not test them immediately because the chips had to be sent out to be cut before they could be tested, (*id.* at ¶68). None of the chips worked. On April 9, 2017, GF2 admitted it learned the chips did not work. Plaintiff contends GF2 knew earlier. GF2 finally informed Q the chips would not work on April 26, 2017, admitting it had skipped a step in the testing process which would have revealed the problem (*id.* at ¶74).

In September 2017, GF2 announced a new manufacturing process. The announcement indicated the EDMOS Process used for the Q chips had not been qualified, and brought Q to believe GF2 used the Q job to improve its new process, so it could get bigger jobs from Q's competitors (*id.*, ¶ 83-84).

As a result of the failure of the manufacturing process, Q missed the window to sell itself for millions, instead having to have a fire sale of its Intellectual Property. As Q was unable to fill its orders with the non-working chips, it was unable to close a pending M&A deal or obtain more investment funding (*id.*, ¶ 81).

Q asserts the following causes of action:

1) **Fraud against GF2** for representing it was using a fully qualified process which had already produced tens of millions of items for multiple customers and that it was capable of manufacturing the chips required by Q, and for concealing customer complaints about the process;
2) **Breach of contract against both defendants**. GF2 breached the Agreement by changing the process without leave or informing plaintiff; GFS and GF2 breached the purchase order, as defendants provided defective chips; and GF2 misrepresented its principal place of business as Santa Clara, CA (Silicon Valley), when it is actually Hopewell Junction, New York.
3) **Breach of express warranty against GF2**. The Agreement states, in §6.1, that GF2 "warrants that the Products will conform to the Specifications and be free from defects in material and workmanship during the warranty period". GF2 breached the warranty by providing defective goods.

II. ARGUMENTS

A. Defendants' Arguments

Defendants move to dismiss the Complaint pursuant to CPLR 3211(a)(1) and (7).

Defendants contend that they replaced the defective set of chips delivered on March 30, 2017, with a set which worked, by June 1, 2017 (Memo at 1). Plaintiff was informed the replacements were being manufactured on April 12, 2017, three days after GF2 discovered the chips did not work. Neither of the written agreements stated that time is of the essence in providing the chips. The terms and conditions on the price quote provided by GFS stated that "delivery dates . . . are approximate, and Foundry is not responsible for any losses or damages resulting from late deliveries. . . . In the event of any significant delay in delivery or failure to deliver for any reason whatsoever, Customer's sole remedy is to cancel the affected portion of the applicable order" (Complaint, Exhibit C, §5.2). The Agreement provides that if a product does not comply with the warranty in the agreement, the customer may return the product for repair, replacement, or refund (Complaint, Exhibit A, § 6.2). Plaintiff received replacement chips. This is exactly what plaintiff bargained for.

1. Fraud Claim

The Agreement has a merger clause (§ 12.10 "This Agreement, including the NDA embodies the entire understanding between the Parties and supersedes all previous verbal or written agreements and undertakings with respect to the subject matter of this Agreement and any conflicting, additional terms contained on Customer's purchase order and other documents issued by Customer. This Agreement may only be amended by a writing signed by the authorized representatives of both Parties.").

Plaintiff has failed to allege fraudulent statements which are not barred by the merger clause. Further, such allegations must be made with specificity, pursuant to CPLR 3016(b), and plaintiff has not alleged who made what statements, to whom or when. Nor can statements made after plaintiff entered into the agreements be deemed to have induced them to enter into those agreements. The allegations of post-agreement conduct include promises of quality and failure to disclose changes to the EDMOS Process, which are in the Agreement, and are not independent of the breach of contract claim. Such allegations should not be considered (Memo at 17).

2. Breach of Contract

As far as plaintiff alleges GF2 breached the Agreement by changing the EDMOS Process, the claim is contradicted by the terms of the Agreement. Plaintiff claims there were two instances of changing the process. The first in November 2016, required no approval. As far as plaintiff mentions a failure to use the Process Request Form Procedure, that procedure (according to the Agreement, § 5.1) only applies to changes requested by the customer, which is not the circumstances here. As far as plaintiff alleges GF2 failed to follow the Change Request Procedures, those procedures are outlined in Exhibit A to the McLaughlin Affidavit (NYSCEF Doc. No. 34). Notice is required only for some of the eventualities listed in those procedures, and plaintiff has not alleged facts which suggest one of those eventualities applies (Memo at 20). As to the April 14, 2017, changes alleged to have been made by GF2, no notice or approval was required (*id.* at 21). Further, it is not alleged that the changes would have caused the chips to be outside specifications. To the extent the changes made were of the type alleged by plaintiff, and plaintiff could have objected to those changes, plaintiff was made aware of the changes to the process no later than April 26, 2017. Plaintiff does not allege it objected before May 26, within the 30 day period for such objections (Memo at 22).

Even if plaintiff had a claim for breach of section 5.1 of the Agreement, regarding changes to the procedure, it does not have claims for non-delivery, cover, or revocation of acceptance. The only available damages would be for breach of warranty. The cost of the order was $70,000. Therefore, the maximum amount of damage should be $70,000. The Agreement limits the parties' liability and damages (Memo at 23, citing Agreement§ 10). Parties' liability is capped at 20% of the total payments for the goods at issue, and there can be no damages for indirect, incidental, consequential, or punitive . . . damages. Accordingly, plaintiff's recovery is capped at $14,000. The Purchase Order also limits GFS's liability for late products, excludes liability for losses due to late delivery, and states that the customer's sole remedy for delay or failure to deliver is to cancel the order and get a refund (Purchase Order, § 5.2). Plaintiff never cancelled the order.

Plaintiff also fails to allege GFS's breach caused the damages alleged, *i.e.* lost credibility and investment money.

As far as plaintiff alleges GF2 misrepresented its principal place of business, that is not a breach of contract. GF2 makes no promises about where it is located or that it had a major presence in Silicon Valley (Memo at 24).

3. Breach of Express Warranty

Section 6.1 of the Agreement warrants that the chips provided will conform to the specifications and be free of defects. Plaintiff alleges it paid for the chips, but defendants provided non-conforming chips. Plaintiff does not allege the chip design ever worked, only that it worked in simulation. Plaintiff does not allege precisely what the warranty was that was breached, or how it was breached (*id.* at 27). Further, the warranty period is limited, and liability is limited to returns and refunds (*id.* at 28-29).

B. Plaintiff's Opposition

1. Fraud Claim

Plaintiff alleges that the defendants, represented by Paul Freud Jr., and Armond Mehrabian, misrepresented that the chips would be manufactured using the fully qualified EDMOS Process and that they would be delivered on time. These allegations are sufficiently specific (see Opp at 13-14).

The merger clauses do not bar the fraud claim (see *id.* at 15-16, citing *Danann Realty Corp. v Harris*, 5 NY2d 317, 320 [1959] ["where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud -- either in the inducement or in the execution -- despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made"]). Further plaintiff argues that there were ongoing representations about the EDMOS Process, as each process to be used to manufacture the chips was to be qualified (Opp at 16, citing Purchase Order Terms and Conditions § 3.0). As far as the defendants argue the agreements state they cannot be held liable for delays, they cannot disclaim liability for their own fraud, willful or grossly negligent actions (Opp at 17). Plaintiff argues that, had defendants used the qualified process, functioning chips would have been made (*id.*). Further, while the Agreement states that the defendants will qualify each manufacturing process, that is different from the representations made by the defendants that the EDMOS Process was qualified and had been used to manufacture millions of parts (*id.* at 18). This claim is extraneous to the contract, even though it is connected to it, and so should survive as a claim (*id.*, citing *Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY 2d 382, 389-90 [1987]).

2. Breach of Contract Claim

The Complaint makes sufficient allegations that defendants breached the contracts by changing the fabrication process without approval by Q. Discovery is needed to determine the

intention of the parties regarding the notification clause in the Agreement (Opp at 19). As far as defendants point to the Change Request Procedures to argue that no notification was needed about the changes to the EDMOS Process, that is extrinsic to the Agreement, and questions remain as to the parties' meaning. Defendants claim that no notice or approval was needed in November 2016, but the Agreement required GF2 to not change processes, except in accordance with the Change Request Procedures (*id.* at 20, citing Agreement, sxn 5.1). The Change Request Procedures cover changes that may affect the quality and reliability of the product (Opp at 20). The parties then dispute which procedures apply. Discovery must be conducted to determine whether these were the kinds of changes which would require notification.

As to the question of damages, plaintiff argues that the question of its entitlement to specific damages is outside the scope of a motion to dismiss, and that as long as it has asserted a proper claim, the claim should survive. Further, the Uniform Commercial Code ("UCC") entitles the recipient of defective goods to direct, incidental, and consequential damages (Opp at 23, citing UCC 2-714-15). As far as the contracts exclude consequential damages, the demarcation between direct and consequential damages is a question of fact (Opp at 24). The question of damages is an issue of fact.

GF2 made a representation in the Agreement that its principal place of business was in Santa Clara, CA. It knew plaintiff would not have signed with GF2 if Q knew GF2 was not located in Silicon Valley. That is sufficient for a breach of contract claim.

3. Breach of Warranty

The breach of warranty claim is pled in the alternative. Section 10.1 of the Agreement contemplates claims based on the Agreement sounding in other than breach of contract (Opp at 26). Thus, regarding sections 10.1 and 6.1 of the Agreement together, plaintiff's remedy for nonconforming goods is not solely for breach of warranty.

Defendants also failed to give Q an opportunity to return the chips before they began fabrication of replacement chips. After the defendants unilaterally began making replacements, plaintiff could not be expected to go through the return procedure (*id.* at 28). As far as the Agreement limits the available remedies, plaintiff claims that the limitations should not be enforced, as it fails its essential purpose, and would leave Q with no effective remedy (*id.* at 29). Here, part of the benefit of Q's bargain is that it would be able to sell its Intellectual Property, which benefit was thwarted by the defective chips.

C. Reply

1. Fraud

Plaintiff has admitted that the fraud alleged is fraud in the inducement and is not based on misrepresentations made after they entered into the Agreement (Reply at 2). In any event, plaintiff still fails to allege facts supporting the claim with the necessary specificity (*id.* at 3). Plaintiff does not include a particular date, time or place, or who made the statement.

The Agreement bars fraud claims for statements made before the Agreement was signed (*id.* at 5). Neither agreement makes time of the essence, and the Purchase Order specifically disclaims damages for delay. As far as plaintiff claims that disclaimer is unenforceable, the case relied upon by plaintiffs relates to construction delays, and does not apply to the sale of goods (*id.* at 6). The UCC permits limitations on damages for delay unless it is unconscionable, which is not alleged here.

2. Breach of Contract

The Change Request Procedures are not extrinsic evidence. Nor are they ambiguous. Defendants explain that the changes to EDMOS Process were made in November 2016, well before the chips started production after January 2017 (*id.* at 9). Further, the changes to the process made in April 2017 were not changes requiring notice and permission, as they could not be changes that could adversely affect the quality of the product. They were intended to bring the chips within specifications, and there is no allegation that the second set of chips did not meet specifications.

As far as plaintiffs claim the damage limitation clause is the Agreement should be ignored, this is not a proper case to disregard such a clause. Section 10 of the Agreement is not unconscionable, so that it should not be enforced (*id.* at 10). Nor were the lost profits what was bargained for in the Agreement, and so they should not be granted as damages here.

3. Breach of Warranty

Plaintiff must overcome the Agreement warranty clause making repair or replace the express exclusive remedy and it fails to do so. To avoid this limitation plaintiff must show that the warranty would act to deprive plaintiff of the benefit of its bargain, and that has not been alleged. The warranty required defendants to repair or replace the chips with working ones, and they did.

III. DICUSSION

A. Standards

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY 2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY 2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY 3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY 2d 268, 275 [1977]; *Sokol v Leader*, 74 AD 3d 1180 [2d Dept 2010]).

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY 2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD 3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v Jersey Partners, Inc.,* 60 AD 3d 562, 562 [1st Dept 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez*, 84 NY 2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn*, 85 Ad 3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 Ad 3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically, that means

"judicial records, as well as document reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,'" (*id.* at 84-85). Here, the documentary evidence is the Agreement, the Purchase Order, and the Change Request Procedures. Those documents are of undisputed authenticity and are appropriate documentary evidence for the purpose of this motion.

B. Fraud

Plaintiff has clarified that the fraud alleged occurred in August 2016, when Q approached GF2 about manufacturing the chips and the parties discussed the process that would be used to do so, with GF2 misrepresenting the maturity of the EDMOS Process (Opp at 14). This was before the parties entered into any agreements.

"In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to the imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7AD 3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD 3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). Representations of opinion, even as to matters of fact, are not representations and are not actionable unless guaranteed (*see Lanzi v Brooks*, 54 Ad 2d 1057 [1976], affd 43 Ny 2d 778 [1977]; *Mun. Metallic Bed Mfg. Corp. v Dobbs*, 253 NY 313 [1930]).

CPLR 3016 provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." Plaintiff states only generally that the representations about the maturity of the manufacturing process were made in August of 2016 by GF2. While plaintiff names two individuals with whom it had discussions about the process to be used for manufacturing, it does not claim either of those individuals made representations as to the EDMOS Process's maturity.

In *Eastman Kodak Co. v Roopak Enterprises, Ltd*, the First Department noted that "[d]ismissal [was] required for failure to plead the fraud allegations with sufficient particularity [because t]he defendant alleged neither the time not the place of the purported misrepresentations nor which employee of the plaintiff purportedly made them" (202 Ad 2d 220, 222 [1st Dept 1994]).

Here, the allegations of the fraudulent representation are similarly vague. The person making the representation, where, how, and when are not alleged, only that GF2 made representations about the maturity of the Process. It is not specifically alleged that the representations were made in August of 2016, but instead that Q approached GF2 and began discussions at about that time. The fact that Q does business in California does not make an allegation that the representation was made in any particular place, and the fact that the Agreement was signed in Laguna Hills, CA, is irrelevant to the details of when and how the misrepresentations were made (*see* Opp at 14). Accordingly, this claim shall be dismissed for failure to state a claim with sufficient specificity, as required by CPLR 3016.

2. *Breach of Contract*

To sustain a breach of contract, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD 2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp v CRP/Extell Riverside LP*, 60 AD 3d 61 66 [1st Dept 2008], affd 13 NY 3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 Ad 3d 272 [1st Dept 2007]).

Defendants argue that, even if this claim survives, plaintiff's damages should be limited to the damages permitted by the Agreement in section 10, which limits liability under the Agreement to 20% of the total payments on the purchase order and excludes indirect, incidental, special, consequential, punitive, exemplary damages, and lost profits, regardless of the basis of the claim made. While the UCC may allow a variety of damages, the damages sought by plaintiff here, related to loss of a prospect sale of the company or the reduction of the value of its Intellectual Property is excluded by the Agreement. Plaintiff's claim survives but recovery is restricted by the Agreement to direct damages, and capped at 20% of the payment on the Purchase Order.

3. Breach of Warranty

Section 6.1 of the Agreement states that GF2 "warrants that the Products will conform to the Specifications and be free from defects in material and workmanship during the warranty period" with certain exclusions. It is undisputed that the first set of chips did not conform to the specifications.

Defendants point to the rest of section 6 of the Agreement, which states that "[i]f Customer believes a Product does not comply with the warranty . . . Customer should notify its customer service representative to initiate a Returned Materials Authorization" (Agreement section 6.2). GF2, upon inspection of the product, may, at its discretion, repair or replace the product or refund the customer's money (*id.*).

The UCC provides an "agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair and replacement of non-conforming goods or parts" (Uniform Commercial Code Law § 2-719 [1] [a]). However, "[w]here circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Act" (Uniform Commercial Code Law § 2-719 [2]).

Plaintiff claims it was not given the opportunity to request the Returned Materials Authorization before defendants began refabricating. However, as the choice of remedy (repair, refabrication, or refund) is at the discretion of the defendants, and it is not disputed that they refabricated the entire order, plaintiff received the maximum remedy available under section 6 of the Agreement, and was not damaged by that omission.

As far as plaintiff argues that limitation of the warranty to replacement fails its essential purpose, and that the question of whether it fails its essential purpose is a question of fact, plaintiff bases this argument on its position that the ability to sell its business or Intellectual Property was a benefit of its bargain with the defendants, which entitles plaintiff to a remedy outside those contemplated in the Agreement.

"The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent

may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD 3d 61, 66 [1st Dept 2008], affd 13 NY 3d 398 [2009]). This Agreement is for the manufacture of chips, and plaintiff received those chips, albeit later than anticipated. The purpose of the Agreement is clear on its face, and does not include plaintiff's sale of the company or Intellectual Property. Accordingly, this claim should also fail.

Accordingly, it is hereby

ORDERED that the motion to dismiss (motion sequence number 002) is GRANTED to the extent that the First (Fraud) and Third (Breach of Warranty) Causes of Action are DISMISSED and the Second Cause of Action (Breach of Contract) is limited to direct damages and capped at the contractual 20% of the amount paid by plaintiff; and it is further

ORDERED that defendant shall answer the complaint within 20 days of service of this Decision and Order with notice of entry.

This constitutes the decision and order of the court.

DATED: March 12, 2019

E N T E R,

O. PETER SHERWOOD J.S.C.