

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION**

3W POWER USA, INC. f/k/a
AEG POWER SOLUTIONS USA, INC.,

Plaintiff,

v.

POWER MAX CO., LTD.,

Defendant.

§
§
§
§
§
§
§
§
§
§

Case No. 4:15-CV-677

**CORRECTED MEMORANDUM OPINION AND ORDER
GRANTING IN PART PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT AND DENYING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

The following are pending before the court:

1. Plaintiff's motion for summary judgment and brief in support (docket entry #16);
2. Power Max's opposition to motion for summary judgment (docket entry #21); and
3. Plaintiff's reply in support of motion for summary judgment (docket entry #23).

-
1. Power Max's motion for partial summary judgment (docket entry #17);
 2. Notice of errata to Power Max's motion for partial summary judgment (docket entry #18);
 3. Plaintiff's corrected response to Defendant's motion for partial summary judgment and brief in support (docket entry #22);
 4. Power Max's reply in support of motion for partial summary judgment (docket entry #24); and
 5. Plaintiff's sur-reply to Defendant's motion for partial summary judgment and brief in support (docket entry #25).

Having considered the pending motions and the responsive briefing thereto, the court finds that the Plaintiff's motion for summary judgment should be granted in part and the Defendant's motion for partial summary judgment should be denied.

FACTUAL BACKGROUND and PROCEDURAL HISTORY

The stipulated facts, as set forth in the parties' Joint Final Pretrial Order (docket entry #31) beginning at page 17, are as follows:

1. Simon Britter ("Britter") is an employee of AEG Power Solutions Sdn Bhd, a subsidiary of the Singapore division of AEG Power Solutions BV;
2. Sean Huang ("Huang") was the Chief Commercial Officer for ZNShine and, subsequently, for Power Max¹;
3. Power Max Co., Ltd. ("Power Max") is in the business of, among things, developing and selling to investors solar electric power plants in Japan;
4. Power Max is an affiliate of ZNShine Solar aka ZNShine PV-Tech Co. Ltd. ("ZNShine"), a Chinese manufacturer of photovoltaic panels, which convert sunlight into electricity;
5. During 2012, Britter began interfacing with representatives of ZNShine in Japan regarding the possibility that AEG might provide inverters for ZNShine's solar projects in Japan;
6. In early 2013, AEG proposed the use of the 45 kW MPV inverter systems for projects generating up to 50 kW of electricity;
7. Britter made several trips to Fukuoka, Japan during 2013 and 2014 to meet with representatives from ZN Shine and Power Max;
8. The 45 kW MPV inverter referenced above is a modular unit consisting of a 75 kW inverter cabinet and three 15 kW modules;
9. The cabinet is referred to as a 75 kW cabinet because it is capable of housing up to five (5) 15 kW modules [for] a total capacity of 75 kW;

¹Although this fact was not included in the parties' stipulated facts, it appears to be undisputed.

10. The inverter units being discussed only included three (3) 15 kW modules for a total capacity of 45 kW. These modular units, consisting of a 75 kW Cabinet and three (3) 15 kW modules, will be referred to hereinafter as the 45 kW MPV Inverters;
11. Britter traveled to Fukuoka, Japan between June 3 and June 14, 2013, to meet with representatives from ZNShine;
12. On June 27, 2013, Britter sent Huang an email attaching the specifications for a transformer that he represented could be used with the 45 kW MPV Inverters along with a quote from one potential supplier;
13. On July 13, 2013, Huang, as “Director” of Power Max, issued a purchase order (the “Purchase Order”) to “AEG Power Solutions”;
14. The first page of the Purchase Order specifies a quantity of 500 “sets” of one (1) 75 kW MPV cabinet and three (3) 15 kW MPV inverters, at a price per set of \$12,000, for a total price of \$6,000,000;
15. The second page of the Purchase Order identifies a delivery schedule that adds up to only 200 Inverters;
16. On July 29, 2013, Britter sent Power Max’s CEO an email requesting him to make the initial 20% payment on the first 80 45 kW MPV Inverters;
17. The unit price for each 45 kW MPV Inverter was \$12,000;
18. The total cost for the first 80 units was, therefore, \$960,000, 20% of which is \$192,000;
19. Britter also requested that Power Max make arrangements for the letter of credit for the 80% balance of \$768,000;
20. Power Max did not make the initial 20% deposit on the first eighty (80) units;
21. Sixteen (16) units at \$12,000 per unit totals \$192,000, 20% of which is \$38,400;
22. On or about October 28, 2013, Power Max paid AEG Power Solutions USA, Inc. (“AEG USA”) \$38,400;
23. AEG USA shipped sixteen (16) 45 kW MPV Inverters to Power Max in November, 2013 which arrived in Japan in December, 2013;
24. Power Max made a 60% payment to AEG USA, in the amount of \$115,200, in

connection with the shipment;

25. On January 14 and February 17, 2014, Michael Julian, general counsel for AEG Power Solutions BV, sent Huang “Notice Letters” on behalf of AEG USA demanding that Power Max complete the purchase of the remaining 484 45kW MPV Inverters;
26. On March 26, 2014, Britter sent Huang an email reminding him that the 20% balance on the delivery of the first sixteen (16) 45 kW MPV Inverters was due;
27. The 45 kW MPV Inverters were manufactured for AEG USA by Creation Technologies, Inc.;
28. Sixteen (16) 45 kW MPV Inverters were delivered to Power Max in Japan, together with 6 spare 15 kW modules for which Power Max was not charged;
29. The total purchase price for these sixteen (16) units was \$192,000, of which Power Max paid \$153,600;
30. AEG USA contracted to sell the 45 kW MPV Inverters to Power Max at a loss of approximately \$1,450 per unit; and
31. Had AEG USA delivered five hundred (500) 45 kW MPV Inverters to Power Max and had Power Max paid \$6,000,000 for all 500 inverters, AEG USA would have lost approximately \$725,000.

On June 16, 2015, the Plaintiff filed its original petition in the 296th Judicial District Court of Collin County, Texas. In its petition, the Plaintiff alleged that the July 13, 2013 purchase order constituted an enforceable contract between the parties and the Defendant breached the contract. The Plaintiff sued for damages for the alleged breach of contract. The Plaintiff also seeks to recover its reasonable and necessary attorneys’ fees. On September 29, 2015, the Defendant filed its original answer in state court, asserting the following affirmative defenses: statute of frauds; the contract was illusory, invalid, or unenforceable; the Plaintiff failed to satisfy all conditions precedent; waiver; ratification; estoppel; the economic loss rule; unclean hands; *in pari delicto*; statute of limitations; and comparative responsibility. Also on September 29, 2015, the Defendant filed counterclaims in

state court, alleging breach of the implied warranty of fitness for a particular purpose and breach of contract, seeking damages as well as its reasonable and necessary attorneys' fees. Thereafter, the Defendant removed this case to this court on October 2, 2015. On October 19, 2015, the Plaintiff filed its answer to the Defendant's counterclaims, asserting that the Defendant's claims are barred by the following affirmative defenses: prior breach; statute of frauds; the damage limitation contained in the agreement between the parties; statute of limitations; and the doctrines of waiver and/or estoppel.

On August 24, 2016, the Plaintiff moved for summary judgment, arguing that it is entitled to judgment as a matter of law on its own breach of contract claim as well as on both of the Defendant's counterclaims. Also on August 24, 2016, the Defendant moved for partial summary judgment, arguing that it is entitled to judgment as a matter of law on the issue of damages with respect to the remaining 484 45kW MPV Inverters. The court will address each motion in turn.

SUMMARY JUDGMENT STANDARD

The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). A dispute about a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The trial court must resolve all reasonable doubts in favor of the party opposing the motion for summary judgment. *Casey Enterprises, Inc. v. American Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981) (citations omitted). The substantive law identifies which facts are material. *See id.* at 248.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.