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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MURPHY OIL USA, INC.,) 3:18-CV-1345-X
Plaintiff,)

VS.)

LOVE'S TRAVEL STOPS & COUNTRY) DALLAS, TEXAS
STORES, INC., GEMINI MOTOR)
TRANSPORT, L.P., MUSKET)
CORP., STANLEY BOWERS, LARRY)
JONES, MICHAEL WOOD, ROY)
TAYLOR, MATT TUGMAN, EDWARD)
WASHINGTON, and ALAN SVAJDA,)
Defendants.) November 12, 2019

TRANSCRIPT OF MOTION FOR SUMMARY JUDGMENT HEARING
BEFORE THE HONORABLE BRANTLEY STARR
UNITED STATES DISTRICT JUDGE

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1 SUMMARY JUDGMENT HEARING - NOVEMBER 12, 2019

2 P R O C E E D I N G S

3 COURT: All right. We are on the record in Murphy
4 Oil USA, Inc., versus Love's Travel Stops & Country stores,
5 3:18-CV-1345.

6 Let's go ahead and do appearances, starting with
7 Murphy.

8 MR. OATES: Good morning, Your Honor. Brian Oates
9 along with my colleagues Mark Josephs and Will Montgomery on
10 behalf of Murphy Oil USA. Also here is Murphy's general
11 counsel, John Moore.

12 THE COURT: Thank you for being here.

13 And Love's, Defendants?

14 MR. CIARLONE: Good morning, Your Honor. I'm Thomas
15 Ciarlone from Kane Russell Coleman & Logan on behalf of all
16 Defendants. With me is my colleague, Demetri Economou.

17 Also present is Morris Collie, in-house counsel for
18 the Love's family of companies.

19 THE COURT: Thank you for being here.

20 When I say Love's, I'll try to just collectively
21 refer to the Defendants. And if I target any specific
22 defendant, I'll try to be specific.

23 MR. CIARLONE: Thank you, Your Honor. We appreciate
24 that.

25 THE COURT: Thank you for being here.

1 So we called a hearing -- you may be seated. We
2 called a hearing on all pending motions. As of the ruling on
3 Friday, the only pending motion is yours, the motion for
4 summary judgment. Is that understanding correct?

5 MR. CIARLONE: Yes, Your Honor.

6 MR. OATES: Yes, Your Honor.

7 THE COURT: I understand that we have PowerPoints
8 from both sides. It's your motion, Mr. Ciarlone, so the floor
9 is yours if you want it, and I'll let you have the final word
10 as well. Since that's how we do it in written form, I'll let
11 you do that in oral form as well.

12 MR. CIARLONE: Thank you, Your Honor.

13 Your Honor, let's begin with just a little bit of
14 background. If you want me to skip through any of this because
15 it's already on your radar screen, let me know and I'll fast-
16 forward, but I do want to make sure that you are comfortable
17 with the cast of characters.

18 We have the corporate Defendants, which are all
19 members of the Love's family of companies. So we have Love's,
20 we have Gemini, and we have Musket. Now what does each one do?

21 Love's is -- you've probably seen them on the side of
22 the highway. They are the gas stations and convenience stores.
23 So they are where the product is sold.

24 Then we have Gemini, which is a trucking company that
25 gets the fuel to the stores where it's going to be sold.

1 Musket is a commodities trader. So, in effect,
2 Musket buys the fuel, Gemini picks up and transports the fuel,
3 and it's sold at Love's stores.

4 we then have the individual Defendants. In this
5 case, Your Honor, all of the individual Defendants are truck
6 drivers for Gemini. So it's folks like these. And if Murphy
7 is to be believed, it was gentlemen like this and women like
8 this who developed a sort of vast conspiracy to steal diesel
9 from Murphy when they had absolutely nothing to gain personally
10 from doing that.

11 The Plaintiff is, of course, Murphy USA. They are
12 mostly a company that operates retail gasoline and diesel
13 establishments with small footprint convenience stores.
14 Additionally, they wholesale fuel, including to the Love's
15 family of companies.

16 Now, one thing I want to make sure that is abundantly
17 clear to the Court, Your Honor, is that the parties here are
18 not strangers to each other. These events occurred in August
19 and September of 2017, during Hurricane Harvey; but in the
20 trailing years before that, Love's has purchased tens if not
21 hundreds of millions of dollars of fuel from Murphy.

22 So we have two commercial partners who have dealt
23 with each other for many, many years. This is not a situation
24 where there is an accused theft and there was no prior
25 relationship between Murphy on the one hand and Love's on the

1 other.

2 So when did everything happen? well, as we see from
3 the pictures, Your Honor, this all happened during a very fluid
4 and chaotic and unpredictable time, one of the greatest natural
5 disasters in the history of our state.

6 And so on August 30th, August 31, and September 1st
7 of 2017, what happened?

8 Gemini, the trucking company that we saw before, went
9 to a terminal, the Frost terminal. And this is a terminal
10 where all of our drivers are carded. This is not an unfamiliar
11 place for us. We're authorized to be there. It's a place
12 where we purchased and picked up fuel from Murphy in the past.

13 Again, we are a commercial partner of Murphy. This
14 is nothing new. And we have used a loading code for all of
15 these loads that we have historically used to load fuel not for
16 delivery to Murphy's stores but for delivery to Love's stores.
17 And all this is happening during the greater context of
18 Hurricane Harvey.

19 Now, what does Murphy say was wrong with what we did?

20 well, although all diesel is stored in one large
21 tank, there are internal allocations that a wholesaler like
22 Murphy will make. They will say that some fuel is branded and
23 some fuel is unbranded.

24 The branded fuel, in Murphy's opinion, is destined or
25 appropriately destined for Murphy's stores. what they say is

1 the fuel we picked up was branded fuel rather than unbranded;
2 thus, they say we stole from them.

3 So what happened after we ostensibly stole this fuel?

4 And we'll get into the detail timeline and
5 communications in just a minute. But after Murphy knew
6 everything that happened, they understood that we took fuel
7 that they thought was branded. They didn't sort of raise a
8 ruckus. They didn't accuse us of theft. They didn't raise a
9 stink. They took about a week to think about it, and knowing
10 what we did, they decided to bill us. And they billed us at a
11 special high price. Those are words that they've used, a
12 special price, a high price. They billed us at, like you see,
13 a high price, and we paid them in full.

14 There's no dispute about that in the record, and
15 there's no dispute that they understood at the time they sent
16 the bill and at the time we paid it that we had taken this fuel
17 to Love's stores.

18 So all of the salient facts that they are complaining
19 about were completely on their radar screen, according to the
20 documents, at the time they billed us at this high special
21 price which we then paid.

22 What does that, therefore, mean as a matter of law?

23 We'll get into this in detail, but as far as we're
24 concerned, the course of conduct that I just described, Your
25 Honor, leads to two inevitable conclusions. Number one, we had

1 a contract, which under the economic loss rule would preclude
2 Murphy from proceeding under any theory of tort. Additionally,
3 the same course of conduct would operate as a waiver to Murphy
4 bringing any of these tort-based causes of action.

5 THE COURT: Can you walk through with me the
6 invoicing and the paying process? How did that work
7 specifically? And let me tell you the background of why I'm
8 asking.

9 MR. CIARLONE: Sure.

10 THE COURT: It seems to me that either there was a
11 meeting of the minds or there wasn't in the invoicing phase.

12 If there wasn't a meeting of the minds, you
13 unilaterally took their fuel in their view and then they
14 unilaterally charged you a price that you paid, those two
15 unilateral things in my mind can still result in a waiver.
16 Perhaps there is not a meeting of the minds, but if they
17 debited your account for whatever they wanted to, then they
18 were done. That's a waiver, and they're done. Or there was a
19 meeting of the minds. There was a communication and a process
20 in that invoicing and billing in which case there was a
21 contract and the economic loss rule bars the tort claims.

22 I can't figure out which one it is. I know your
23 argument is that under either result you win, but I don't
24 understand the process as thoroughly as I would hope to from
25 the summary judgment briefing as to what happens with the

1 invoicing and the billing.

2 Did the invoice happen because they actually debited
3 the account that they already had on file because of the
4 business relationship; or was there an invoice sent to Gemini,
5 Gemini said, "That's fine. Debit our account"?

6 MR. CIARLONE: Sure.

7 THE COURT: Which one was it, and what evidence in
8 the record is there that I could rely on for that understanding
9 of a meeting of the minds principle?

10 MR. CIARLONE: Sure.

11 well, first of all, there are communications, emails
12 between Murphy and between Love's talking about what the price
13 would be charged for this fuel. There are then directives
14 internally at Murphy that we see in the emails where top
15 executives at the diesel organization inform accounting and
16 say, "This is what you should invoice Love's."

17 And I will go through all of you those with you in
18 the slide deck, Your Honor. You will then see communications
19 from Murphy to Love's where they say, "This is what we're going
20 to invoice you." And sure enough, the next day the invoices
21 come in, and no one disputes that those invoices were paid.

22 I think the iterative communications alone, the
23 emails between the parties that I will put up on the screen for
24 you show that there was a back-and-forth about what the price
25 would be, that it was a special price, that that's what they

1 would bill us. And, again, there's no dispute that we then
2 paid those amounts.

3 In terms of how it actually happens, Your Honor, my
4 understanding is that an invoice is electronically issued from
5 Murphy to Love's. Assuming the prices match up to what they
6 should be on our end, that invoice will be approved and then
7 paid.

8 I could get into those communications so you could
9 sort of see it specifically. I think that will help.

10 THE COURT: Sure.

11 MR. CIARLONE: Okay. I do want to make one point
12 before we move on. In terms of what is not at issue today --
13 because I think we're going to hear from Murphy that we weren't
14 authorized to take this fuel, that we used a loading code that
15 we shouldn't have used.

16 None of our theories that are the grounds for our
17 summary judgment motion, whether it's waiver, whether it's the
18 economic loss rule, whether it's the lack of any damages in the
19 record, whether it's the lack of demand and refusal as is
20 required for their conversion claim, whether we were
21 authorized, whether we used a loading code that was appropriate
22 or inappropriate, that doesn't affect our defensive theories.
23 And I just want to make sure that that is emphasized at the
24 onset. All of those things, Your Honor, are red herrings.

25 So let's talk about waiver. I think Your Honor knows

1 what it is, but that's the bright line rule. And the central
2 element is intent. We have to see something from Murphy that
3 shows, yeah, we wanted to just send you an invoice and get paid
4 and consider it the end of the day.

5 And I think we have -- we don't have to look any
6 further than Murphy's own briefing, Your Honor. This is coming
7 from their brief.

8 And what do they say? They say a couple of very
9 important things. And I've tried to emphasize the salient
10 language.

11 Most importantly, they say, "Look, after we
12 discovered Defendants' theft, here's what we did." So we have
13 to realize that they are now operating in an environment where
14 they are aware of all of the facts that they have now put into
15 their complaint in this case to say the Love's family of
16 companies engaged in theft.

17 So they're in a state of full information. Now, in
18 that state what do they do? Well, they take cognizance of the
19 environment in which they're in. They say, "Look, this diesel
20 was not for sale." That's another way of saying, "They took
21 branded fuel rather than unbranded fuel."

22 So they know that we've ostensibly engaged in theft,
23 they say, "We're going to adjust the price based on two things.
24 Number one, you took branded fuel and you should have only
25 taken unbranded." And this was occurring in an environment of

1 Hurricane Harvey when there was a shortage. So what do they
2 then do? They come up with a high price in the documents that
3 are exchanged internally at Murphy's accounting department.
4 And you'll see this on one of the upcoming slides. They call
5 this a special price.

6 So they know it's going on. They take cognizance of
7 the fact this is branded rather than unbranded fuel. They take
8 cognizance of the fact that there's a fuel shortage. And what
9 do they do? They specifically decide to charge us a special
10 high price.

11 Now, what does Murphy want to do here? And here's
12 where we're going to see the communications. They want to say
13 they can sort of unring the bell, that waiver can be undone
14 after the fact.

15 I would submit to the Court that if that's how it
16 worked, if you could always just sort of take it back, we would
17 not have a defense of waiver.

18 It would not exist, because it could always be cured,
19 it could be undone, it could be taken back.

20 So let's go through the timeline, because what they
21 are going to try to tell you is they reserved all of their
22 rights. The problem is they reserved all of their rights long
23 after the waiver and the contract already occurred.

24 So August 30th, Your Honor, is the first day that we
25 took a load from Frost. It happened again August 30, August

1 31, and September 1. And this email is in the summary judgment
2 record. And Matt Elliott is a buyer at Love's, at Musket, and
3 he's putting this right on the table. You know, to the extent
4 we're thieves, it's sort of odd the first thing we do on the
5 day of the ostensible theft is reach out to Murphy and say,
6 "Hey, we're loading fuel at Frost," right? So that's what
7 happens.

8 The next day -- David Wright is basically Matt
9 Elliott's counterpart at Murphy -- sort of figures out what
10 happens. He says, "Oh, yeah, you're taking fuel from us, but
11 as far as we're concerned, that's branded fuel, not unbranded
12 fuel."

13 So what was Murphy's reaction? And I think this is
14 just as applicable to the contract formation argument as it is
15 to the waiver argument, Your Honor. So you will see that some
16 time goes by. We have gone from August 31st to September 5th.

17 So Murphy has now had about a week to think about
18 what are they going to do. And so the first person we hear
19 from is Kim Poff. And she is the central billing coordinator
20 at Murphy. And she reaches out to Kent Rice. And this email
21 is again in the summary judgment evidence. And she says to
22 Mr. Rice, "Any news on how to invoice these yet?"

23 Mr. Rice gets right back to her and says, "Pat
24 Kennedy and I are working on this." And Pat Kennedy, again, is
25 a ranking executive at Murphy. He's the director of diesel

1 operations. "I'm working with Pat, and we should have
2 something for you later today."

3 An hour later, Mr. Rice instructs Ms. Poff to do
4 what? Invoice Love's. "Issue the invoice for \$2.1018 per
5 gallon."

6 Importantly, Your Honor, in this email Mr. Rice
7 confirms that at this point he understands that the diesel did
8 not go to Murphy but went to Love's stores.

9 Same day, Mr. Rice then turns around after emailing
10 internal accounting about the invoicing, then reaches out to my
11 client and says to Jacob Gutierrez, "About those loads at
12 Frost, we know they didn't do it at Murphy's stores. We
13 presume they went to Love's stores. We are going to charge you
14 \$2.1018 per gallon."

15 At the same time, Ms. Poff, after getting the
16 directive from Mr. Rice, writes to all of her internal
17 accounting counterparts and says, "Per Kent Rice I will be
18 invoicing all the loads pulled out of Frost by Love's at again
19 this," quote, unquote, "special price."

20 The next day, the invoices are issued. September
21 6th. This is a high price, a special price, again, using
22 Murphy's language. And there is no dispute on Murphy's part
23 that those invoices were then immediately paid by Love's.

24 So what happens two weeks later? This is when Murphy
25 says that they, in fact, reserved their rights. That's when we

1 get a demand letter that accuses us of theft, that accuses us
2 of reputational harm. That's a theory that they now abandoned.
3 But, regardless, it's too late, Your Honor.

4 Again, if you could undo waiver, there would be no
5 such thing as a defense of waiver. They've not cited a single
6 case -- we are not aware of a single case that says you can
7 take back waiver. What we are aware of are cases like these:
8 You can't retract waiver. Waiver can't be undone. Waiver
9 can't be cured.

10 Murphy made its bed, Your Honor. They should have to
11 sleep in it.

12 Economic loss rule. The language on contract
13 formation, I think, is important, because we had a sale of
14 goods here. And our UCC and the Texas Business and Commercial
15 Code is very clear that we can make a contract in any way that
16 shows agreement. In implied contracts, the common law that
17 sort of undergirds the UCC, is that implied contracts will be
18 inferred from acts and conduct like those acts and conduct here
19 when the facts and circumstances show an intent to contract.

20 And what is the sort of keystone of the offer and
21 acceptance process?

22 Well, there has to be something that communicates to
23 Love's that if we accept that we've got a deal. And I think
24 we've got exactly that here, Your Honor. You saw the
25 communications. You saw the emails. Murphy made an

1 unequivocal statement to Love's. The diesel price is going to
2 be \$2.1018 per gallon. Murphy extended this offer purposefully
3 after it knew all of the facts, knew that we took branded fuel,
4 knew that we took it to Love's stores. They extended this
5 offer only after internal deliberations among executives at the
6 highest level of their diesel organization. They then billed
7 us. We then approved those invoices, and we then paid them.
8 That is a tailor-made example of offer and acceptance.

9 Now, if we've got a contract, what does that mean for
10 their tort claims? Because that's all they have in this case
11 are tort claims.

12 well, what the economic rule loss says is, if you
13 have a contract that covers the subject matter of the dispute,
14 then the common-law tort theories are not going to govern. The
15 contract is going to govern the case, and you cannot sue in
16 tort.

17 Now, Murphy says that we're wrong about that. And
18 what they say is, even if a contract covers the same subject
19 matter, they say if there is a -- if there is an independent
20 duty sounding in tort, that they can still sue under that. And
21 the duty they cite is this quote, unquote duty to refrain from
22 unlawfully or wrongfully appropriating the property of another.

23 The problem with their theory, Your Honor, is that
24 the Texas Supreme Court has told us that it doesn't work this
25 way. And so we've got this case, DeWitt County v. Parks. And

1 here's the language: A person who enters a neighbor's property
2 and cuts down trees with no contractual right, well, they can
3 be sued in tort. But if you've got a contract that says here's
4 what you can and cannot do with those trees, then the contract
5 is going to -- is going to govern and not the law of the common
6 law of tort.

7 Your Honor, it's no different here whether we're
8 talking about diesel or whether we are talking about trees.
9 The parties had an agreement to buy and sell diesel at \$2.1018
10 per gallon. And that's what governs whether and under what
11 terms Love's could load that fuel. And so the common law of
12 tort does not apply.

13 Now, Professor Wren and Professor Brabb at Baylor,
14 they write an article every year for the State Bar on the
15 economic loss rule. And they've really done a good job of sort
16 of encapsulating the Parks case. And here's what they said:
17 When the tort duty has been addressed and modified by the
18 contract, then the source of the duty is no longer one that
19 exists outside of and independent of the contract; the source
20 of the duty now arises from the contract.

21 So to the extent Murphy wants to pretend that there
22 is an independent tort duty, it simply doesn't exist once this
23 contract was made. That's what Parks says. That's what the
24 commentators interpreting Parks have to say year after year.

25 what else do Professors Wren and Brabb say? I think

1 they say something important so that we don't get caught up in
2 the weeds here. They say it's important that you don't
3 adjudicate the economic loss rule in a mechanical way. You
4 need to look at the policies that underlie the rule.

5 So what have courts here in the Northern District and
6 what does the Texas Supreme Court said about, hey, what really
7 sort of animates the economic loss rule? Why do we have this
8 doctrine?

9 And they say, look, the policies underlying the rule
10 that supports its application, that give it teeth, teeth that
11 are present here, is let's defer to what the parties bargained
12 for. If you look at the Texas Supreme Court case, it says it
13 makes sense to let the parties bargain rather than impose a
14 legal solution. And that's what we should do here, Your Honor.

15 Conversion. Murphy will say that a showing of demand
16 and refusal is unnecessary when the demand would be useless.
17 We agree with that statement of the law, Your Honor. What we
18 don't agree with is that a demand would have been useless in
19 this case.

20 And there is absolutely no dispute, Murphy admits
21 that they never made a demand. But there is nothing in the
22 record to show that the demand would have been useless. And
23 that's their burden. They have to put in evidence of that
24 factor.

25 Now, critically, Murphy has itself characterized in

1 its briefing diesel as a commodity. So we all agree that
2 diesel is a commodity. Six of one, Your Honor, is the same as
3 half a dozen of another. We are not talking about a Honus
4 Wagner rookie card. We're not talking about the Mona Lisa. We
5 are talking about something that is fungible and replaceable.

6 Now, we cite to the Koch decision. And Murphy tries
7 to distinguish the case by saying that it, quote, stands for
8 the -- they call it unremarkable proposition that upon demand
9 for stolen oil, the exact oil need not be returned.

10 That's exactly the point, Your Honor. The exact oil
11 does not have to be returned. The exact diesel does not have
12 to be returned, because diesel is a fungible good like cement
13 or oil or glucose.

14 When you put that, Your Honor, against the background
15 of the fact that the Fifth Circuit has specifically said you
16 only -- you only can excuse the demand and refusal element
17 under extraordinary circumstances, I do not know what
18 extraordinary circumstances they have pointed to where they
19 could not have asked Love's, literally one of the largest
20 traders of diesel in the United States, to provide Murphy or to
21 provide them with replacement gallons had they simply asked.

22 So, Your Honor, we have a situation here where the
23 law imposes the duty on them to speak. They have to ask for it
24 back and we have to refuse. They now want to be rewarded for
25 their silence. The law of conversion does not allow that.

1 THE COURT: Out of curiosity, have the courts imposed
2 any time parameters on demand and refusal? Because the
3 hurricane was a wrinkle here. Let's say that they demanded and
4 you didn't refuse and you said, "we'll give you 220,000 gallons
5 of Love's diesel in two weeks."

6 Is that enough, or have the courts really not
7 addressed the time parameters of demand and refusal?

8 MR. CIARLONE: Your Honor, I don't know the answer to
9 that question. I will say that the onus was certainly on
10 Murphy in the first place to make the demand. And whether it
11 happened within two weeks or whether's it now been 18 months,
12 there's never been a demand.

13 THE COURT: Sure.

14 MR. CIARLONE: I think the elephant in the room, Your
15 Honor, is damages. And what we will see is -- you could spend
16 the next week going through the record. You are not going to
17 be able to find an iota of evidence showing what their damages
18 are in this case.

19 Now, what they have told you is there's four ways
20 that maybe they could show damages. We're going to go through
21 each of them. But it's all "we could have. We might do it in
22 the future. But, hey, it's not here in the summary judgment
23 record." And that's where it has to be.

24 So what is the first thing they say? They say,
25 "well, we retained a really experienced damages expert."

1 well, that's all fine if they had actually submitted
2 a report, but what happened -- and this is in their briefing --
3 they say, "We hired this guy, but what he told us is that our
4 damages are really, really kind of small, and so we're not
5 going to put in an expert report at all."

6 So I'm not really sure why they're even citing this
7 as evidence of damages since they didn't put in an expert
8 report.

9 So ground number one which they might show damages,
10 that's just completely off the table.

11 Number two, it says they produced its financial
12 information months ago.

13 Your Honor, several hundred thousands pages of
14 documents have been produced in this case, thousands of pages
15 of spreadsheets of profit and loss statements, quarterly
16 reports, annual reports. Nothing is in the summary judgment
17 record.

18 They haven't told you what information they're
19 talking about. They haven't given you a calculation. They're
20 saying there is some pile of paper out there in my office that
21 they haven't put before you, and somewhere in there, in this
22 unidentified mass, you can find damages. Clearly, that doesn't
23 cut it.

24 Then it says, "Well, we can have our witnesses
25 testify. Our witnesses can tell you what our damages are, and

1 that's enough on summary judgment."

2 well, again, the problem is, they've put in three
3 sworn declarations from their top executives, Your Honor. None
4 of them tell you anything about damages. So it's great that
5 they think they can do this, but on the summary judgment
6 record, despite putting in these affidavits, they haven't told
7 you anything about damages.

8 The last thing is that they can prove damages they
9 say through Defendants' witnesses, through my clients. The
10 problem with that is they've now given up their theory on
11 unjust enrichment. The only thing that Love's could possibly
12 testify about is how much money we made on these disputed
13 gallons.

14 So to the extent they have now abandoned their unjust
15 enrichment claim, there is nothing that our witnesses can
16 possibly do to prove up Murphy's damages.

17 THE COURT: Was that evidence ever addressed in
18 depositions of how much money Love's made off of the 220,000
19 gallons of diesel?

20 MR. CIARLONE: We actually took a loss on those
21 gallons. None of that testimony is in the summary judgment
22 record, but we did not make money on the gallons.

23 THE COURT: Did the depositions ever address the
24 in-store profits that were tied to those 220,000 gallons of
25 diesel?

1 MR. CIARLONE: The in-store profits at Love's?

2 THE COURT: Correct.

3 MR. CIARLONE: I do not know whether the depositions
4 covered that. I don't think so.

5 So what does all this mean as a matter of law, Your
6 Honor? Because Chief Judge Lynn has talked about what we do in
7 this situation. What happens when a non-movant says, "Well, we
8 could prove something. We would prove something," but they
9 don't, and it's not in the summary judgment record?

10 Judge Lynn says, look, the promise of future
11 evidence, that doesn't cut it. If a non-movant doesn't come
12 forward with anything, then, look, the motion has got to be
13 granted. And that's what we've got here.

14 I challenge Murphy and I challenge the Court to try
15 to find a shred of evidence of damages in the summary judgment
16 record. It is simply not there. That is fatal to all other
17 claims.

18 I have that up there to just sort of remind the Court
19 that it's really not your job to look into a crystal ball and
20 figure out what their evidence will be in the future. We all
21 know about the hundreds if not thousands of cases that say it's
22 not your job to sort of parse through the record and try to
23 figure out what their damages are. Here it's even worse,
24 because even if you are inclined, Your Honor, the evidence
25 simply is not there. It's not in the record. You couldn't do

1 it even if you were inclined to. It was their job to get that
2 evidence into the record, and that never happened.

3 Conspiracy. There's really not much to say here.
4 That's a predicate tort. If you accept our arguments on these
5 other theories, the conspiracy claim falls as a natural result.

6 And, finally, unjust enrichment. They have given
7 up -- I think counsel is going to represent to you that they
8 have given up -- their corporate 30(b)(6) witness has testified
9 that they have abandoned their unjust enrichment theory. And
10 Murphy has filed amended Rule 26 disclosures that do not
11 include unjust enrichment as a theory of recovery. I assume
12 that's off the table and that they will tell you as much.

13 That's all I have, Your Honor. If you have any other
14 questions, obviously I'll do my best to address them.

15 THE COURT: I don't think I have any at this time
16 relating to the MSJ that you haven't answered already. But can
17 I ask just status-wise in the case, at the end of December the
18 parties are set for another mediation, and then trial is set
19 for January 27th?

20 MR. CIARLONE: That's my understanding of the
21 schedule, yes, Your Honor. Thank you.

22 THE COURT: Thank you.

23 Mr. Oates, the floors is yours.

24 MR. OATES: Thank you, Your Honor.

25 Good morning, Your Honor.

1 THE COURT: Good morning.

2 MR. OATES: Defendants' summary judgment is rather
3 unique in that there is nothing in the way of sworn testimony
4 whatsoever in the summary judgment evidence that Defendants
5 cite. There's no affidavits. There's no deposition testimony.
6 It's completely devoid of any sworn testimony. It's just a
7 string of documents that they have put together to support
8 their summary judgment. And a lot of that has to do with the
9 timing of the summary judgment. The Defendants and the parties
10 had not engaged in depositions at the time that this motion was
11 filed.

12 THE COURT: What is the standard for summary judgment
13 evidence? Does it have to be authenticated, or does it have to
14 be capable of authentication?

15 MR. OATES: Your Honor, I believe the rules require
16 it to be authenticated, which was not done in this case.

17 THE COURT: My understanding is that it has to be
18 capable of authentication. So the question would be, do the
19 witnesses who testified, could they authenticate emails?

20 MR. OATES: Yes, Your Honor. They -- likely the
21 witnesses who were later deposed likely could authenticate a
22 number of the emails that were in Defendants' summary judgment
23 record.

24 THE COURT: So is there anything in the summary
25 judgment record that is not capable of authentication in

1 Murphy's view?

2 MR. OATES: No, Your Honor, not that I'm aware of at
3 this moment.

4 Now, I know that the Defendants went through a little
5 bit of the background facts, but I think it's important from a
6 high level of review to understand why are we here. And
7 certainly this case revolves around facts that occurred during
8 Hurricane Harvey, after it made landfall, and specifically
9 relates to what's called the Frost terminal. It's the Magellan
10 Midstream Partners terminal. It's about an hour south of
11 Dallas where Murphy stores its fuel and Defendants accessed and
12 loaded 27 truckloads of Murphy's fuel for delivery to Love's
13 stores during the midst of Hurricane Harvey.

14 And certainly Defendants made reference to the fact
15 that both Murphy and Love's are large retail fuel operations
16 and at times have had a relationship in terms of wholesale
17 transactions whereby Murphy has sold fuel to Love's. And
18 specifically at the Frost terminal, during 2017, there were 14
19 legitimate wholesale transactions between the parties. But in
20 this case, in this situation, those 27 loads were not -- were
21 much different than those previous 14 wholesale transactions
22 that had occurred earlier during that year.

23 And certainly Murphy does not dispute the fact that
24 it charged Love's account for the wholesale cost of the diesel.
25 But that's important, wholesale cost. I will get to that in a

1 little bit.

2 Defendants appropriately described what their --
3 Love's family of companies is. You've got Gemini as the fuel
4 hauler to Love's stores. Love's is the retail operation. And
5 Musket finds the fuel, prices the fuel, and purchases the fuel
6 for Gemini to load and to deliver to Love's stores.

7 Now, Defendants have, as they just went through,
8 essentially four bases for summary judgment. And the first is
9 the economic loss doctrine bars Murphy's tort claims, and
10 specifically theft claims.

11 And I think a deeper understanding of what
12 specifically occurred in this case demonstrates that these are
13 purely tort claims. You did not hear at any point -- you did
14 not see a contract. You didn't hear what the offer and
15 acceptance were in this case. And so I think it's important to
16 understand what is the actual conduct that occurred to see that
17 this is purely theft. This is not arising between a contract
18 between the parties. And because of that, the theft remedies
19 that Murphy is asserting here today do not arise from contract.
20 They arise from statutory and common law.

21 And the fact that Murphy post-theft, after the theft
22 occurred, approximately 10 to 12 days later charged Defendants'
23 account, that did not create a contract. There was no
24 agreement on the material terms of -- between the parties.

25 As Your Honor appropriately stated, Defendants

1 unilaterally took the fuel without authorization. Murphy
2 unilaterally invoiced a price. There was no meeting of the
3 minds at any point.

4 THE COURT: But couldn't that give rise to waiver?

5 MR. OATES: No, Your Honor, and I'll explain why. I
6 will get to it in a little bit. But waiver boils down to
7 intent, is did the party who is being accused or asserted of
8 having waived its claim, did it intend to waive those claims.

9 And intent, as Your Honor knows, is certainly a
10 question for a jury. It's more appropriately left to the
11 province of the jury. But I think the facts of this case, as
12 Defendants state -- admitted, Murphy subsequently, after it
13 invoiced for -- charged Defendants' account for the fuel, it
14 sent additional demand letters. At no point --

15 THE COURT: And not at the time. It was two weeks
16 later, right?

17 MR. OATES: It was within -- within a week. Within
18 one to two weeks.

19 THE COURT: So September 22nd was the reservation of
20 rights. What date did the invoices occur and did the drafting
21 of the account occur?

22 MR. OATES: September -- I believe September 8th to
23 the 12th, Your Honor.

24 THE COURT: Okay.

25 MR. OATES: So it followed -- the demand letters did

1 follow, but, again, there was no intent. There is nothing that
2 can be pointed to by the Defendants whereby Murphy intended to
3 waive its claims. They are pointing to the fact that just the
4 fact that Murphy charged for the wholesale cost of the diesel
5 did not -- for, one, it did not recoup all of Murphy's losses.
6 That's why we're here today, is to recoup the remaining cost,
7 remaining losses.

8 The only thing that Murphy was able to recover was
9 purely the cost of the diesel taken. And as was discussed
10 earlier, that's because of the previous relationship between
11 the parties. There's an automated system whereby Murphy can
12 generate invoices and automatically cue the drafting of the
13 Defendants' account.

14 There was -- at no point in time was it did Murphy
15 say, "Defendants, we will sell you this diesel for this price."
16 The fuel was already gone. The fuel had already been taken,
17 unauthorized. And so Murphy simply said, "We've got to do
18 something to recoup our damages as quickly as possible while
19 we're still figuring out the widespread impact of those
20 damages."

21 This is in the midst of a hurricane. So Murphy knew
22 that it could draft the Defendants' account to recoup at least
23 the cost of the diesel while they were figuring out what are
24 those remaining additional lost profits and damages that Murphy
25 suffered.

1 THE COURT: But there is no indication of that with
2 the invoices? There's no reservation with the invoices? If
3 it's purely unilateral, then why couldn't they have charged
4 \$3.00 or \$4.00 a gallon to cover all of their losses?

5 MR. OATES: Because, Your Honor, they were looking at
6 what was their actual cost. This was not a mechanism to which
7 they -- Murphy was intending to recoup all of its damages that
8 it could possibly recover. It was trying to actually calculate
9 what was the cost of the -- Murphy's cost in this diesel,
10 recover that immediately, and then here's a letter to
11 Defendants saying, "We've been damaged. We've recovered the
12 costs, but we still have consequential and other damages, lost
13 profits associated with this had we been able to sell that
14 diesel in our stores."

15 THE COURT: So if the invoices are limited to cost of
16 the diesel, why was there not a communication contemporaneous
17 with the invoices or in the invoices of a reservation of rights
18 for access costs?

19 MR. OATES: Your Honor, these invoices are sent
20 essentially through -- it's called DTN. It is a proprietary
21 system in the oil and gas industry.

22 There is no communications between the parties during
23 that process. It is just an automatic -- Murphy can cue it on
24 its end, and it automatically sets to be charged to Musket, one
25 of the Defendants' account, because of their relationship.

1 THE COURT: So that's why it couldn't be in the
2 invoice, but there is no explanation why it couldn't be
3 contemporaneous with the invoice. Kim Poff sent the email on
4 2-20-18, being the special price. Why could that not have
5 said, "This covers the cost of the diesel, but we're reserving
6 our rights for other damages as well"?

7 MR. OATES: Yes, Your Honor. Murphy at the time was
8 still trying to -- I know Defendants represented that Murphy
9 was fully aware of exactly what happened. Murphy at this
10 time -- this is in the middle of a hurricane. You have
11 approximately 35 Murphy stores that are out of diesel in DFW
12 due to the widespread fuel shortages. Murphy was just trying
13 to, in this instance, recapture some amount of its -- of the
14 wholesale cost of the diesel. And then as soon as it was able
15 to kind of calculate and understand what exactly had occurred,
16 that's when the letters followed.

17 THE COURT: Okay.

18 MR. OATES: And going back to the economic loss
19 doctrine, Your Honor, to understand the facts of exactly what
20 occurred I think demonstrates why there is no contract that
21 bars Murphy's tort claims.

22 This is some pictures of the actual Frost terminal,
23 Magellan Midstream Partners, who is a pipeline and terminal
24 operator. This is the actual terminal where the events took
25 place. The Frost terminal is a place that Murphy stores its

1 fuel for its stores, as well as is able to sell to the
2 wholesale market at Frost as well.

3 There is four steps in which a driver, a truck can
4 access fuel at the Frost terminal. I know this may seem
5 granular, but this is the details of why it shows that
6 Defendants stole the fuel and there was no contract for the
7 sale of this diesel at the time it was taken.

8 The first step for a driver, for a truck to load at
9 the Frost terminal is to actually position the truck, pull into
10 this bay, and the driver gets out and attaches the loading
11 arms. And that's what you see here, is the driver. You have
12 got the yellow loading arms with ULSD. That's ultra-low-
13 sulfur diesel attached to the truck.

14 Once that occurs is the most important of the process
15 and really what this case boils down to. It's the use of
16 what's called loading codes. And the driver has to enter the
17 loading code for the supplier he or she is loading from and the
18 destination or the customer of where that fuel is going to go.
19 And that's all done on a touchscreen computer at the terminal.
20 And so here you see the driver performing that very feat. And
21 so in order for a driver to access fuel, he or she has to know
22 who are they trying to load from.

23 And so here you see -- this is a Murphy Oil USA
24 supplier code on the left. You see it says 334. And on the
25 right you've got the Petroex loading number being entered,

1 597677.

2 And then on the bottom of the touchscreen it shows
3 the destination for that fuel, which in this case is Store
4 Number 7677, Hudson Oaks, Texas. This is just in this
5 situation, not the case here. This was watching a driver load
6 a few weeks ago.

7 After the loading codes are entered, the driver
8 selects the product that he or she wants to load the fuel with
9 and then initiates the load. And the final process is to
10 collect the bill of lading, which is done by simply pushing the
11 button at the Frost terminal. They are able to walk -- it
12 prints about 50 yards away in a separate house. The bill of
13 lading is the legally operative document that the drivers are
14 required to have when he or she is hauling fuel. It lists who
15 the supplier is, what the product is, the amount of fuel, and
16 the destination for the fuel.

17 And you heard Defendants' counsel refer to the
18 distinction between unbranded and branded in this case. And
19 that is the distinction between whether or not fuel is for sale
20 unbranded, for sale to third parties, or is it branded fuel,
21 meaning Murphy has designated that fuel to go to its stores for
22 sale to its customer. And unbranded may be allocated to third
23 parties. And I say may be. Murphy is able to determine how
24 much, how many gallons for sale of fuel does it want to have at
25 a specific terminal.

1 During the events in question, that allocation was
2 zero. There was no unbranded fuel. All of Murphy's fuel
3 across terminal was branded only. Branded only means for
4 delivery to Murphy's stores only.

5 Again, there is a difference in the loading codes
6 between branded and unbranded fuel.

7 So for unbranded loading codes, the supplier number
8 is 802. That's the Murphy supplier number. And then the
9 loading code for a client of Murphy, in this case Musket would
10 have been a client during the -- during proper wholesale
11 transactions, would have been 591542.

12 So Musket goes to the Frost terminal whenever Murphy
13 posts an allocation if there's diesel available here for sale.
14 802-591542 are the loading numbers that that driver would enter
15 into in the touchscreen in order to access the fuel.

16 On the other side, for branded, that is a completely
17 different supplier and loading number. Supplier is 334,
18 totally different than 802. And the loading code is 59 plus
19 the Murphy store number, because that loading number is
20 specifically tied to the Murphy store that that fuel is
21 destined for.

22 So branded loading codes can only properly be used by
23 Murphy's own designated fuel carrier, its own fleet. And
24 Gemini Defendants were not at this time a designated fuel
25 carrier for Murphy.

1 Those loading codes that are entered into at the
2 Frost terminal, that is what generates, helps generates the
3 information on the bills of lading.

4 And here you've got just the two distinctions between
5 an unbranded bill of lading versus a branded bill of lading.

6 On the left you have August 16, 2017. This is pre-
7 Hurricane Harvey. See the supplier code is 802. And the
8 Petroex loading code is 591542. The consignee is Musket Corp.
9 The destination is "Various, Texas."

10 That is a proper use where -- of Murphy's unbranded
11 loading code by Defendants during a wholesale transaction.

12 On the right you have a branded bill of lading
13 which -- where it's during August 31, 2017. This is in the
14 middle of Hurricane Harvey. This is one of the loads at issue
15 in this case.

16 And, again, in this situation, the supplier code is
17 334, and the Petroex loading coding is 597101. So that ties
18 back to -- that is the branded loading code for Murphy.

19 And you see the destination says Murphy USA Store
20 Number 1701, Bowie, Texas. That is a specific Murphy store in
21 Bowie, Texas, which is --

22 THE COURT: Who enters that information?

23 MR. OATES: The driver does at the terminal.

24 THE COURT: And is there evidence from the depositions of
25 the drivers as to why they entered that store?

1 MR. OATES: Yes, Your Honor, there is. I have a
2 slide in just a second that talks about that, but --

3 THE COURT: It's not on summary judgment record. I'm
4 aware of that, given the temporal aspect of this case.

5 MR. OATES: Yes, Your Honor.

6 THE COURT: But just curious.

7 MR. OATES: Essentially, the driver was told --
8 during Hurricane Harvey, fuel was in short supply, and so
9 drivers were going to many different terminals trying to find
10 anywhere -- any suppliers that had fuel.

11 And this driver, the first driver who first accessed
12 a load of Murphy's fuel at the Frost terminal was told by
13 Gemini back in Oklahoma City, the headquarters, to go to Frost
14 and try every supplier code that you can to see if anybody has
15 fuel.

16 And so he went to Frost, and he just started entering
17 codes at random. And he got to a Murphy code that was on a
18 sheet of paper in his truck, and he entered it, and it gave
19 him -- he saw that Murphy had, and he entered a branded code.

20 After he entered that code, he called and notified
21 headquarters, "Hey, I just got loaded off Murphy at Frost."

22 And they said, "Great. We'll send you a new order
23 to -- once you drop that load, come back, get another load of
24 it," because the fact that they had found fuel was surprising
25 since there was very little available in the DFW area.

1 And he saw -- the orders get sent from headquarters
2 in Oklahoma City directly to the computers in their truck, and
3 he noticed when he got that order in his truck that the loading
4 code that's entered into on the computer was different, because
5 it was Murphy's unbranded code. The code that Murphy had used
6 14 times previously in 2017 without question or without a
7 problem when Murphy actually had diesel fuel for sale, properly
8 wholesale fuel. And he notified headquarters that, "Hey, the
9 numbers I used are different than the unbranded numbers in the
10 system."

11 And they said, "Give me numbers that you used. We'll
12 circulate them. You keep loading off the number that worked."

13 And so that's how this whole thing -- and then you've
14 got -- you know, 26 loads later and a quarter-million gallons
15 later, Murphy's fuel was completely exhausted at Frost.

16 And so this -- this is just to make a showing that
17 pre-Hurricane Harvey, there was no issue between the parties in
18 terms of using the proper versus improper loading codes.
19 Fourteen times proper loading codes, wholesale, unbranded
20 loading codes were used.

21 You have Hurricane Harvey, which I think the Court is
22 well aware of, and Defendants certainly covered, was a
23 catastrophic hurricane that led to seriously impacting the oil
24 and gas industry, including many refineries and pipelines being
25 shut down.

1 It also exacerbated the problem that was during --
2 right around Labor Day weekend. So a lot of motorists, you
3 know, had plans of getting on the highway and driving for the
4 holiday weekend. They were worried about fuel shortages, so
5 everybody ran to the gas stations to fill up with gas and
6 diesel, which further created widespread fuel shortages,
7 including a number of stores being out of fuel.

8 And then after Hurricane Harvey hits, you have 27
9 instances in three days of the improper use of branded loading
10 codes, Murphy's branded loading code.

11 So pre-Harvey there was no issue 14 times. Post-
12 Harvey, when fuel was unavailable, 27 times in three days.

13 This is the intentional conduct. This is the
14 testimony that I cited to you earlier about how they -- how the
15 driver -- when the driver first went to the Frost terminal,
16 which was trying all the suppliers that they could, found that
17 Murphy had some supply available and then notified corporate
18 that Murphy worked but then notified that, "The numbers in the
19 system are different than the numbers I used. What should we
20 do?"

21 And they said, "Give me the numbers. We'll circulate
22 them. You keep using."

23 This is what we believe shows it was intentional, it
24 was theft.

25 In addition, if that wasn't enough, each of these

1 bills of lading, the legally operative document that they have
2 to have, the drivers have to have in their trucks with them,
3 show that the destination on each of these 27 bills of lading
4 was a Murphy store in Bowie, Texas, yet none of the 27 loads
5 went to a Murphy store in Bowie, Texas. They all went to these
6 six Love's stores that are shown there on the right.

7 And then just to kind of compare and contrast, 14
8 proper wholesale transactions in eight-plus months, a little
9 less than two loads, two wholesale transactions in a month,
10 versus 27 loads in three days, showing that, you know, if you
11 take that out for a full month, that's more than 250 loads a
12 month, clearly a serious change in the party's behavior, which
13 doesn't -- which implicates the fact that it was theft and not,
14 you know, a sale of fuel pursuant to some contract as the
15 Defendants are trying to posit.

16 And, again, this is just a summary of the Defendants'
17 theft over a three-day period, eight drivers, 27 truckloads,
18 220,000 gallons of Murphy's branded diesel, all delivered to
19 Love's, completely exhausting Murphy's diesel supply at Frost
20 during the hurricane.

21 Now, getting back to the economic loss doctrine, that
22 is what occurred in this case. All of that theft -- there is
23 no contract where Murphy said to Defendants, "We have fuel
24 available at Frost. You're free to go there to load at this
25 set price of \$2.10." That did not occur.

1 what occurred is, Defendants went to the Frost
2 terminal as we just went through, they took all the diesel,
3 Murphy uncovered it, and simply charged their account.

4 There was no communications, no meeting of the minds.
5 There was no agreement. There was no agreement on -- really on
6 any material terms of the contract.

7 And there is no testimony in the record, no evidence
8 in the record of what that agreement is. It's just simply the
9 mere fact that Murphy charged Defendants' account.

10 Further, there is no rights and obligations set forth
11 that -- you know, evidence of what the parties had agreed to.
12 There is no agreement on future relationship, how the parties
13 would be governed. It was simply a charging of an account.

14 And because there's no contract that governed the
15 parties' rights and obligations, it can't be barred by economic
16 loss doctrine. The typical economic loss doctrine occurs when
17 parties enter into a contract and they agree on certain rights,
18 obligations, and duties between the parties, and then events
19 and conduct occur after the fact, after the agreement has been
20 entered, and one of the parties tries to sue the other party
21 based in tort when really the underlying dispute all stems out
22 of that contract. That's not what happened here.

23 Theft occurred. Murphy charged their account for a
24 portion of the damages and filed suit to recover the
25 remaining -- the remaining damages. That's -- that is not the

1 economic loss doctrine. Murphy's tort claims are not barred.

2 The next argument that Defendants make is this waiver
3 argument, which you and I have previously discussed.

4 Express waiver -- there is two types of waivers that
5 are typically asserted, either express waiver or implied
6 waiver. An express waiver is not asserted here. There is no
7 evidence in the record or no argument that Murphy said,
8 "Defendant Love's, hey, if you pay us, if you pay us this
9 wholesale price, we're done. we'll agree not to pursue our
10 claims. we'll waive our right to move forward." That's not
11 what's being argued here.

12 what's being argued here is implied waiver, right?
13 It's somehow Murphy's conduct in invoicing, charging
14 Defendants' account, somehow impliedly waived its rights to
15 continue with the case. And, again, implied waiver is the
16 central element.

17 So what was Murphy's intent?

18 There is no evidence in the record that Murphy
19 intended to waive its claims. There is no testimony that
20 Murphy was considering, you know, not pursuing its claims.
21 Instead, again, as Your Honor is well aware, within two weeks
22 after drafting the account, Murphy sent the first demand letter
23 saying, "we intend to pursue this case, and we have been
24 damaged." And then follow up the subsequent letter in October
25 that still said, "we're currently in the process of determining

1 the company's consequential losses, which include lost
2 opportunities, lost operating revenue, and damage to its
3 reputation," among other things.

4 At no time was there -- is there any evidence that
5 Murphy intended to waive its right to bring the claims that
6 it's bringing here today.

7 THE COURT: Do you have any other cases that talk
8 about a delay along the lines of two weeks from a unilateral
9 invoicing to a reservation of rights?

10 MR. OATES: Not currently, Your Honor. I'm happy to
11 provide some supplement briefing if that would help the Court.

12 THE COURT: Okay.

13 MR. OATES: And because we believe that Murphy's
14 conduct clearly shows that it never intended to waive its
15 claims, we do not believe that it impliedly waived its right to
16 pursue this case.

17 The next argument that Defendants make is that Murphy
18 was somehow -- was somehow required to demand return of the
19 quarter-million gallons of diesel that Defendants took.

20 Courts in this district, among others, have clearly
21 stated that a showing of demand and refusal is unnecessary when
22 the possessor of the property shows a clear repudiation of the
23 Plaintiff's rights.

24 This case, there is no clearer repudiation than what
25 occurred here. The Defendants came to a third-party terminal,

1 improperly accessed Murphy's diesel that was not for sale and
2 should not have been taken anywhere but a Murphy's store. It
3 took -- Gemini took that fuel to a Love's store, dropped it in
4 Love's fuel tanks, and immediately began selling it to Love's
5 customers.

6 In fact, by the time that Murphy uncovered and
7 realized what had happened here, that all its fuel had been
8 taken, all of the fuel that had been dropped in Love's tanks
9 was already being sold to Love's customers. That's as clear as
10 a repudiation of Murphy's rights to the diesel as there can be.

11 And the intention of demand and refusal is not for
12 situations like this where a party knew what they were doing
13 and, you know, intentionally went somewhere looking for
14 somebody's fuel supply, found it, and took it. This is a
15 situation where courts want to make sure that a party who
16 inadvertently or didn't know they took somebody's property and
17 still has possession of that property has an opportunity to
18 make it right and give that property back. That's not what
19 happened here.

20 They took the property. They knew what they were
21 doing. They immediately began selling it. And during
22 Hurricane Harvey time period, there was no more fuel to --
23 everyone was looking for as much fuel as possible. And so to
24 think that Murphy could have simply said, "Love's, would you
25 mind returning that quarter-million gallons of diesel so we can

1 sell it to our customers?" that's -- that's just simply -- I
2 mean, it just defies logic that that would even occur, nor how
3 would that happen? It doesn't make sense.

4 In this case, because of Defendants' conduct, they
5 repudiated Murphy's rights in the diesel. Murphy didn't have
6 to. They were excused of demanding return of the
7 quarter-million gallons.

8 THE COURT: Do you have any evidence that Love's
9 could not comply with a return demand, or are you simply
10 hanging your hat on the argument that refusal is not -- demand
11 and refusal is not needed because of the clear repudiation?

12 MR. OATES: That demand and refusal was not needed
13 because of the clear repudiation.

14 THE COURT: Okay.

15 MR. OATES: And, finally, the argument that
16 Defendants posit is that Murphy has no damages in this case.

17 Damages have been pled from the complaint, through
18 the initial disclosures, throughout the entire case. It's
19 quite simple and easy to understand. Defendants took 220,000
20 gallons of diesel fuel that was destined and intended for
21 Murphy's stores to be sold to Murphy's customers. They took
22 that diesel to Love's stores to sell to their customers.

23 Murphy was deprived of the opportunity to make
24 profits on the sale of the diesel to Murphy customers. And
25 when Murphy customers filled up their vehicles with Murphy's

1 diesel, they walked inside, they made secondary sales, such as
2 merchandise. There's lost profits on both components of that.
3 That is straightforward and clear. The damages show that.
4 Murphy --

5 THE COURT: The allegations, but where is the
6 evidence, right?

7 So once we shift -- and there's an MSJ on file that
8 says there is no evidence of damages, then it shifts from an
9 allegation case to an evidence case. And you have a duty at
10 that point to do one of two things, either put on your evidence
11 of damages in your response to MSJ or to ask the Court for more
12 time because you haven't gotten your evidence yet. And I don't
13 understand Murphy to have done either. I understand Murphy to
14 have said, "we will get there eventually."

15 MR. OATES: Your Honor --

16 THE COURT: But that's -- that's not one of the
17 permissible options. So we are here much later than where we
18 were. Where is the evidence of damages?

19 MR. OATES: Well, Your Honor, Murphy's corporate
20 representative testified that his damages were \$42,911. That
21 did happen subsequent to the motion for summary judgment
22 briefing. I think that that just further illustrates that
23 Murphy did suffer damages. In fact, Defendants even calculated
24 in the record in previous filings what Murphy's damages are.
25 There's really not a dispute, Your Honor, that Murphy has

1 damages.

2 If the question is, is \$42,911 in the summary
3 judgment briefing, no, Your Honor, because that testimony and
4 calculation didn't exist at that time. Murphy did put into its
5 briefing that it had the types of damages that it had suffered,
6 it's sworn testimony via its affidavits of some of its vice
7 presidents that Murphy was unable to sell the diesel and
8 therefore lost profits on the diesel, which is evidence of
9 damages.

10 And so the distinction might be, Your Honor, is there
11 a calculable dollar figure within the summary judgment
12 briefing? No, Your Honor, because it didn't exist at the time.
13 But there is certainly evidence that Murphy suffered damages as
14 shown by the sworn testimony, which I will note, Your Honor, is
15 the only sworn testimony in the summary judgment briefing, has
16 not been controverted in any way.

17 THE COURT: Sure. But there was no request for more
18 time of the filing of a response. That's what I'm struggling
19 with.

20 MR. OATES: Sure.

21 THE COURT: Ordinarily what happens in private
22 practice is when there's an MSJ response due and you don't yet
23 have the evidence, you ask the Court to defer considering the
24 motion for summary judgment until the evidence is adduced at
25 the deposition. I have had that happen many times when I was

1 practicing, and that didn't happen here.

2 Now, it wasn't on my watch also, which is another
3 complicating factor. But that request for more time didn't
4 occur. It said, "Don't worry. We'll get to it," but that's
5 not a proper request in my mind.

6 So that's what I'm wrestling with. We now have a
7 dollar amount. I understand that. That dollar amount is also
8 not triggering the court's jurisdictional threshold. So what's
9 your response to it being less than \$75,000?

10 MR. OATES: Yes, Your Honor. And I know counsel --
11 Defendants' counsel used the word "elephant in the room."

12 This is the reason why Murphy tried to dismiss this
13 case, that as it approaches expert deadline and had worked for
14 months trying to figure out exactly what its calculable damages
15 were, this is the -- this is the number, the ballpark number
16 that Murphy understood that that was going to be its damages
17 that it could prove in this case. That's why it made the
18 business decision to try to dismiss the case and didn't believe
19 it made sense from a business perspective to move forward to
20 take -- I think we have taken 18 depositions since Murphy tried
21 to dismiss the case, or move forward to trial.

22 Murphy's position is that this Court certainly has
23 the discretion to dismiss this case due to lack of subject
24 matter jurisdiction. We do not believe that the threshold --
25 that the threshold amount is met based on Murphy's damages,

1 because they are \$42,911.

2 THE COURT: You can proceed.

3 MR. OATES: Okay. And, Your Honor, if -- if the
4 Court would like Murphy to -- since calculable damages numbers
5 are now in the record and available, we're happy to supplement
6 our appendix to reflect, to get these damages dollars into
7 specific damages amounts into the record.

8 THE COURT: Okay.

9 MR. OATES: And for those reasons, we believe that
10 all of the Defendants' summary judgment arguments are
11 unpersuasive, that they should be denied, and that this case
12 should not be dismissed pursuant to Defendants' summary
13 judgment.

14 THE COURT: Thank you.

15 Mr. Ciarlone, the last word.

16 MR. CIARLONE: I'll be very brief in response, Your
17 Honor.

18 Let's address damages first. Mr. Oates brought up
19 the prior motion to dismiss. We agree that this case should
20 have gone away. This case began with Murphy presenting these
21 massive damage claims, you know, millions and millions of
22 dollars, people will never buy from Murphy ever again. And
23 then after 18 months of litigation and my clients being put to,
24 you know, astronomical legal fees, they said suddenly, "We want
25 out, but we want to dismiss it without prejudice. We want to

1 be able to sue you again if we decide that's appropriate."

2 And we briefed this in front of Judge Lynn. And
3 Judge Lynn made a very careful analysis of the situation and
4 gave Murphy a choice. They said, "Look, if you want to get
5 out, that's fine. You can get out with prejudice, and then
6 we'll have a hearing on attorneys' fees," because we do have a
7 mandatory "loser pays" statute here. Or Judge Lynn said, "You
8 can keep litigating." They chose to keep litigating.

9 So the reason we're here today is because they were
10 given a choice, and this is what they chose.

11 Now, on the damages figure, Your Honor has made a
12 number of, I think, apt observations. Number one, they could
13 have asked for more time, but they didn't. They could have
14 asked to supplement the record. They didn't. This \$42,000
15 figure is not in the record, and it should be if they wanted to
16 make an allegation that they do have damages.

17 But more importantly, Your Honor, back at the motion
18 to dismiss stage when Judge Lynn decided that these guys can't
19 just cut and run, their response was, "we hired an expert. The
20 expert calculated our damages. The damages are small;
21 therefore, we're not going to designate an expert."

22 This was before we even filed our motion for summary
23 judgment and certainly long before their opposition was due.

24 So they knew what this number was. They just chose
25 not to put it in the record. They could have designated an

1 expert. They say in their briefing that they have the number,
2 it was just small.

3 So the idea that this number came about only
4 recently, I just think that's demonstrably false based on the
5 positions they have taken in front of this court and in front
6 of Judge Lynn.

7 Now, let me just deal with a few other points. And
8 by the way, if we do get into the \$42,000 worth of damages, the
9 other thing that their 30(b)(6) witness testified is that there
10 is absolutely no offset on that \$42,000 for the profit that
11 they made on the gallons that they sold Love's.

12 So, in other words, they want a double recovery.
13 They want to keep the profits they made by selling the gallons
14 to Love's, and then they want to keep the profits that they
15 would have sold on selling those gallons to the public.

16 Now, as a theory of damages, you can't have it both
17 ways. You have to pick. So, number one, it's a double
18 recovery.

19 Number two, if we're going to get into supplemental
20 briefing, we have an expert witness who has looked at what
21 their cost basis is on these gallons, and they made more money
22 selling to us than they would have made selling at retail.

23 So if you accept their \$42,000 figure and you offset
24 it by the profit that they made selling to us, they're going to
25 have negative damages.

1 we shouldn't be talking about any of this, because
2 it's not in the record. It was their responsibility to put it
3 there. They could have put it there. But if that's where we
4 go, that's where this is going to end up, just to give you some
5 background.

6 On the dates, I do want to be sure that we're clear.
7 Mr. Oates said something about, oh, September 10th, September
8 12th. Let's be clear. It's in the briefing. But the emails
9 were all September 5th. That's when we had internal emails at
10 Murphy, saying, "what are we going to charge these guys?"
11 "we're going to charge them \$2.10."

12 That's coming from the director of diesel operations
13 to the accounting people at Murphy. The accounting people at
14 Murphy are then disseminating that information internally,
15 saying, "This is what we charge. This is the special price
16 that Kent Rice gave us."

17 Murphy is then reaching out to their counterparts at
18 Love's, saying, "This is what we're going to charge you." This
19 is September 5th.

20 And the very next day, the invoices are issued. They
21 were approved on our end, and they are paid.

22 It's two weeks and two days later that there is this
23 ostensible reservation of rights.

24 I think Your Honor has pointed out, "well, hey, even
25 if the invoicing was electronic, why couldn't you have included

1 a reservation of rights in an email," for example?

2 And the reality is, there were those emails. We have
3 the emails both within Murphy and between Murphy and Love's,
4 and there's nothing in there about a reservation of rights.

5 They also say that when they invoiced us that all
6 they were trying to do was recover their costs. That's not
7 true. They, in fact -- and this is in their 30(b)(6) witness's
8 testimony -- if we need to supplement the record, we can.
9 Their 30(b)(6) witness has specifically testified that they
10 don't know what their cost basis is.

11 what they did do, as is reflected in the summary
12 judgment evidence, is pick a high price. They went to the
13 market and they said, "what is everybody charging? well, let's
14 pick a price at the high end of the spectrum." That became
15 their special price, and that's what their 30(b)(6) witness
16 said.

17 So this wasn't about recovering cost and then we'll
18 figure everything else out later. Their 30(b)(6) witness said
19 something entirely different, and the documents show that this
20 was simply a high price that they plucked from the spectrum of
21 prices that wholesalers were using at the time. It was, in
22 fact, a penalty price. And this only further reinforces the
23 fact that this was a contract or, alternatively, there was a
24 waiver.

25 Lastly, Your Honor, we heard -- actually, I have two

1 more points. Counsel spent most of their time arguing against
2 the summary judgment motion that this court did not allow us to
3 bring, were we authorized. And we heard all about the loading
4 code, was it the right loading code, how many times have we
5 used it. I would love to brief that, because I think we come
6 out on top. But the reality is, if we accept everything that
7 Mr. Oates said as gospel, it doesn't address waiver. It
8 doesn't address contract formation. It doesn't address the
9 lack of damages. It doesn't address demand and refusal. It's
10 an opposition to the motion that we were not allowed to bring.

11 what I will tell you, you know, if you want to just
12 satisfy your curiosity, yes, this was a fluid time. The
13 drivers are, you know, salt of the earth guys. They have notes
14 just like we have notes. They scratch down on a sheet of paper
15 all the numbers that they use, because when they go into these
16 little booths where they type in the numbers, they can't bring
17 their cell phones. They can't bring computers. If they can't
18 remember the numbers, they've got notes. This number that
19 they're talking about is one we have historically used. And
20 we've used it, and it has yielded a Love's destination.

21 So he tried -- Mr. Oates tried to say, "well, look,
22 on the one hand we've got these branded codes, and we have the
23 unbranded codes, and they are different codes." If we were to
24 go into that summary judgment motion that we didn't bring, you
25 would see that the very same code that they're talking about in

1 this case is one that we have used in the past. The 597101344
2 number, we have typed in that code. We have used it. It's
3 yielded a Love's destination. They billed us, and we paid.

4 So they want to pretend that we were never
5 authorized. We were. And when we asked their witnesses, "How
6 do you explain this? How do you explain that historically
7 we've used this code and it's yielded a Love's destination?"
8 they say, "It's a big mystery."

9 well, we don't program the codes, Your Honor. We
10 can't change the codes. Those are -- those are Murphy's codes.

11 And so at some point something happened. Maybe
12 Magellan made a mistake. Maybe Murphy forgot to update their
13 codes. I don't know. But the reality is, that's a code we've
14 used.

15 They produced at a deposition a form called a P61,
16 which is the very document that authorizes us to load fuel in
17 the first place. And as they produced it to us, annexed to the
18 back of it were all of these bills of lading in which we used
19 this very code to deliver to Love's stores, and that's what the
20 bills of lading say.

21 But, again, all of this has nothing to do with the
22 motion that we're actually here for today. But I do want to
23 respond to it since so much time was spent on it and it sort of
24 casts us in a bad light, and I do want you to have the entire
25 story. This is a code we've used in the past, and there hasn't

1 been an issue.

2 Finally, demand and refusal. I think Your Honor
3 keyed into the proper sort of questions here. You asked, "Hey,
4 are you just hanging your hat on clear repudiation, or do you
5 actually have evidence that Love's would not have been able to
6 satisfy a demand for the return of the diesel?"

7 The reality is, there is no evidence in the record.
8 It's their burden to show that they made a demand. It's their
9 burden to show that we would not have been able to satisfy it.

10 And we're talking about a commodity here, Your Honor,
11 and that's what they're trying to avoid. They say, "Oh, you
12 know, the diesel, you know, went to the Love's tanks, went to
13 the stores, it went into customers' cars. You know, if we ask
14 for it back, we can't go siphon it out of these people's
15 vehicles." That misses the point, and that's why we cite cases
16 like Koch, which say you don't have to return the exact oil.

17 Again, we're not talking about the Mona Lisa. We're
18 not talking about a Babe Ruth rookie card. If that's what it
19 was, you know, we took the Babe Ruth rookie card and we ripped
20 it up, would that be clear repudiation? Sure. But in a case
21 of a commodity and the nation's largest -- one of the largest
22 resellers and traders of diesel, when the law imposes a duty on
23 them to not even ask and just assume we couldn't do it -- he
24 say says it defies common sense. I think it's perfectly
25 sensible that you would have asked a company like Love's, "Can

1 you please get us the gallons back?" That's what the cases
2 require. They simply did not do it.

3 I have nothing further, Your Honor, unless you have
4 any additional questions.

5 THE COURT: I don't. Thank you, Mr. Ciarlone.

6 MR. CIARLONE: Thank you, Your Honor. I appreciate
7 your time.

8 THE COURT: Well, I can give you a quick snippet of
9 what I'm thinking on the summary judgment, and then I'd like to
10 talk just for a minute about docket management and the
11 deadlines coming up.

12 On the summary judgment, I'm troubled that Murphy
13 didn't include evidence of damages in its response or ask for
14 more time. I recognize that was not on my watch. What I'm
15 going to do is require Murphy to supplement the summary
16 judgment record by Friday at 5:00 p.m. for this evidence of
17 damages.

18 Mr. Ciarlone, I'll give you 14 days, the 14 days I
19 think you should have had, from the time of their MSJ response
20 to the time of your MSJ reply, to reply in whatever fashion you
21 want to, including your own evidence if you choose to file
22 evidence.

23 I will file a written order later on today, so I
24 don't intend for my verbal presentation to convey an order, but
25 I'm giving you a preview given that it's a tight deadline that

1 I expect you to comply with. I want to give you as much notice
2 as I possibly could of what that deadline would be.

3 On the deadlines in the case, I intend to rule on the
4 summary judgment motion as soon as I possibly can. All of the
5 judges are under a new era, now that we have a full bench in
6 Dallas, and we are doing all that we can to get up to speed on
7 our dockets by the end of March, which is the next Civil
8 Justice Reform Act deadline, The Slowpoke List.

9 And so I inherited about 209 civil cases. I'm up to
10 about 300 now total, civil and criminal. And we've got about
11 200 motions that will put us on the late list at the end of
12 March, and then we have several cases that will turn three
13 years old before the end of March that will also put us on the
14 list. So my goal is to knock out as many of these motions, and
15 I think the MSJ in this case is one of them, before the end of
16 March.

17 what I don't want to do is try all of my 2018 cases
18 before I finish that blitz. And so I intend to give you an
19 extra month on your mediation deadline and then set a trial
20 date probably in April or May when we will come back and try
21 this case, assuming there is something left after the MSJ
22 ruling.

23 So I will do not only an order on supplemental
24 briefing but also an amended scheduling order that addresses
25 those deadlines between now and when a new trial date would be.

1 Are there any other deadlines other than a mediation
2 deadline, pretrial filings, pretrial conference, and a trial
3 date that I need to adjust that you are aware of in this case?

4 MR. CIARLONE: None that I'm aware of, Your Honor.

5 MR. OATES: I don't think so.

6 THE COURT: Okay. Any further questions of the Court
7 at this hearing?

8 MR. CIARLONE: No. Thank you, Your Honor.

9 MR. OATES: Thank you, Your Honor.

10 THE COURT: Thank you.

11 Thank you for being here today. Thank you for your
12 presentations. They were very helpful. But I also appreciate
13 that they weren't a crutch. You were able to stop and answer
14 the questions. And I have seen them all too often be a crutch
15 to the lawyers. You both did a fine job.

16 Thank you to your clients for being here, and thank
17 you for lawyering this case very well. The Court appreciates
18 it.

19 MR. OATES: Thank you, Your Honor.

20 MR. JOSEPHS: Thank you, Your Honor.

21 THE COURT: All rise.

22 (Hearing adjourned)

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1 I, TODD ANDERSON, United States Court Reporter for the
2 United States District Court in and for the Northern District
3 of Texas, Dallas Division, hereby certify that the above and
4 foregoing contains a true and correct transcription of the
5 proceedings in the above entitled and numbered cause.

6 WITNESS MY HAND on this 16th day of January, 2020.

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