IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2743

POLYCHEM INTERNATIONAL CABLE COMPANY, INC.,

Plaintiff-Third Party Defendant-Appellant,

v.

HITACHI CABLE AMERICA, INC., ET AL.,

Defendants-Third Party Plaintiffs-Appellees,

v.

ROBERT E. LEE and CHARLES E. WINES,

Third Party Defendants, Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA H 85-597)

(August 12, 1994)

Before KING and SMITH, Circuit Judges, and KENT,[*] District Judge.

PER CURIAM:[**]

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[*]District Judge of the Southern District of Texas, sitting by designation.

[**]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Polychem International Cable Company, Inc. brought suit against Hitachi Cable America, Inc., Hitachi Cable, Ltd., and Paul Kutcher under multiple theories of liability. The case proceeded to trial; at the close of Polychem's case, the district court granted judgment as a matter of law for the defendants on most of Polychem's claims. The jury returned a verdict for Polychem on the remaining claims; however, the district court granted judgment notwithstanding the verdict on those claims. The district court also entered judgment against Wines and Lee, individually. Polychem, Wines, and Lee appeal. We affirm in part and reverse in part the judgment of the district court.

I. FACTS AND PROCEDURAL HISTORY

Hitachi Cable, Ltd. (HCL) is a Japanese corporation which manufactures wire, cable, and heat shrinkable tubing. Hitachi Cable America, Inc. (HCA) is a subsidiary of HCL and was attempting to develop a market in the United States for HCL's heat shrinkable tubing products. HCA had two employees principally involved in developing a market in the United States for HCL's heat shrinkable tubing: Paul Kutcher, administrator of sales and marketing, and Yasuo Sato, general manager.

In 1983, Robert E. Lee and Charles A. Wines were working for Radiation Dynamics, Inc. (RDI). During 1983, Kutcher contacted Wines about the possibility of RDI's purchasing HCA's heat shrinkable tubing. At this time, HCA sold its heat shrinkable tubing through its house accounts or through one of its two distributors, Freedom Electronics (Freedom) and Manhattan

Electric Cable Company (Manhattan). Wines told Kutcher that RDI was not interested in purchasing any heat shrinkable tubing from HCA.

Following this initial contact with Kutcher, Wines told Lee about HCA's attempts to make inroads into the United States' market for heat shrinkable tubing. Because Wines and Lee were "disillusioned" with RDI and were looking for other opportunities, they decided that developing a market for HCA's heat shrinkable tubing in the United States could be a golden opportunity. Thereafter, Wines and Lee contacted Kutcher and arranged a meeting in Denver to discuss the possibility of developing a business relationship with HCA.

During the Denver meeting, which occurred in January of 1984, Lee introduced Kutcher to his company, Polychem International Corporation. Polychem International Corporation was dormant at this time. However, Lee described the company to Kutcher as a Houston-based chemical marketing and transportation service firm with six experienced executives. Lee and Wines communicated to Kutcher that they would be interested in marketing HCA products if HCA would grant them exclusive rights to market and sell those products. Soon thereafter, Lee and Wines set up Polychem International Cable Corporation (Polychem) in order to market HCA's heat shrinkable tubing.

From this point forward, both sides attempted to negotiate an "exclusive" agreement in which Polychem would distribute HCA's heat shrinkable tubing in the United States. In April of 1984,

representatives of both HCA and Polychem met in New York to discuss a distributorship agreement. Wines and Lee testified that at the end of the meeting, the parties had agreed to "go into business together."

Wines and Lee informed Kutcher that they needed a letter establishing their relationship with HCA in order to obtain a line of credit from their bank. In response to this request, Kutcher sent them a letter dated April 11. The letter stated:

> Dear Bob,
>
> This letter will confirm our discussions of 4-10, concerning an agency/master distributor agreement. Hitachi Cable America agrees in principle to your proposal concerning, wire prodcuts [sic] and shrinkable tubing.
>
> Hitachi Cable America is authorizing Polychem to solict [sic] business for Electrical wire And Cable, Electronic wire and Cable and Shrinkable Tubing products using the Hitachi Cable name and logo. In addition Hitachi Cable America will allow your company to offer our technology toward the development of new industry and products.
>
> The actual agreement is subject to final negotiations and review by all parties but from this date you and your agents may start to develop new business under our joint venture agreement.
>
> If you have any questions please contact me at your convenience. I look forward to seeing you in three weeks to finish our negotiations.

Because the letter of April 11 was not "strong" enough, Wines and Lee requested Kutcher to send another letter. Kutcher responded by sending Polychem a second letter outlining the parties' relationship; it is this letter which Wines and Lee argue establishes an exclusive distributorship agreement between Polychem and HCA.

On April 23, 1984, Polychem placed its first order with HCA. Polychem also began developing a sales network for HCA's shrinkable tubing. Between April and December of 1984, Polychem and HCA continued to negotiate in an attempt to finalize the terms of a master distributorship agreement. The parties exchanged several drafts of an "exclusive" distributorship agreement; however, the parties were never able to reach a final agreement, and eventually negotiations broke down.

At trial, Polychem attempted to demonstrate that as early as June 1, 1984, HCA developed a new company policy by which it would no longer grant exclusive agreements to any of its distributors. Polychem asserted that HCA continued to negotiate with it as if such an agreement could be reached because HCA wanted Polychem to use its expertise in setting up a sales and distribution network for HCA's products which HCA would take over once Polychem was out of the way. Polychem further asserted that because exclusivity was an "an absolutely critical" part of the deal for Polychem, it would not have expended any further time, energy, or resources if it had been informed of HCA's new policy.

In September of 1984, HCA became aware, through Freedom, one of HCA's original distributors, of a potentially large order of tubing for General Motors. Polychem asserted at trial that Freedom and HCA should have told Polychem about the General Motors order, because, pursuant to the April 23 letter, Polychem was HCA's master distributor. However, Polychem was never told of the potential order. In fact, HCA had decided that Freedom

would be the sole distributor for the General Motors order. Further, HCA informed Polychem, in November 1984, that it was reclaiming the Freedom account, which had been turned over earlier to Polychem.

In December of 1984, HCA apprised Polychem that it was no longer considering granting Polychem an exclusive agreement to market its tubing. An HCA official testified that Polychem was not being considered for an exclusive agreement anymore because Polychem was delinquent in paying for inventory purchased from HCA. Following the complete breakdown of the relationship between HCA and Polychem, Polychem brought suit against HCA, HCL, and Kutcher under multiple theories of liability including breach of contract, fraud, negligent misrepresentation, and promissory estoppel. HCA asserted counterclaims against Polychem for fraud, negligent misrepresentation, RICO violations, and the non-payment of outstanding invoices, and it brought various claims against Wines and Lee as third-party defendants.

After the close of Polychem's case, the defendants moved for judgment as a matter of law on all of Polychem's claims. The district court granted the defendants' motion as to most of Polychem's claims, including its claim for breach of contract, and its request for lost profits.[1] The district court, however, allowed Polychem's claims against Kutcher and HCA for promissory

[1] The district court granted judgment as a matter of law on all of Polychem's claims against HCL. Because Polychem does not appeal any of the district court's rulings as to HCL, we will not address any of those claims in this appeal.

estoppel, fraud, and negligent misrepresentation to go the jury. The jury returned a verdict in favor of Polychem on those claims, and it determined that Polychem had suffered actual damages of $150,000. Further, based on a finding that Kutcher and HCA had acted with malice towards Polychem, the jury awarded twenty million dollars in punitive damages for Polychem against HCA and two million dollars in punitive damages for Polychem against Kutcher. The jury also found against HCA on its claims against Polychem. The last aspect of the jury's findings concerned the fair market value of goods which HCA had delivered to Polychem but that Polychem had never paid for. Before trial, the district court had determined that Polychem was liable to HCA for the goods. Therefore, the only question submitted to the jury concerning the goods were their fair market value. In response to the jury's finding concerning the fair market value of the goods, the district court entered judgment against Polychem as well as against Wines and Lee for $161,593.35.

On appeal, Polychem attacks the district court's entry of judgment as a matter of law as to its claim for breach of contract and its request for lost profits. Polychem does not attack the district court's entry of judgment as a matter of law on any of its other claims. Polychem also appeals the district court's granting of judgment notwithstanding the verdict (JNOV) as to its claims for promissory estoppel, fraud, and negligent misrepresentation. Wines and Lee appeal the district court's

entry of judgment against them personally for the unpaid goods in the amount of $161,593.35.[2]

II. STANDARD OF REVIEW

In reviewing a district court's entry of JNOV or judgment as a matter of law, formerly referred to as a directed verdict, we apply the same legal standard as did the trial court. Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). We view the entire trial record--not just that evidence which supports the non-mover's case--in the light most favorable to the non-movant and draw all inferences in its favor. Id. If the evidence at trial points so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach a contrary conclusion, this court will conclude that the motion should have been granted. See FED. R. CIV. P. 50(a). The "decision to grant a directed verdict or a judgment notwithstanding the verdict is not a matter of discretion, but a conclusion of law based upon a finding that there is insufficient evidence to create a fact question for the jury." Drake v. Letterman Transaction Servs. (In re Letterman Bros. Energy Sec. Litig.), 799 F.2d 967, 972 (5th Cir. 1986), cert. denied, 480 U.S. 918 (1987).

III. ANALYSIS

A. BREACH OF CONTRACT

Polychem asserts that the district court erred in granting HCA's motion for judgment as a matter of law as to its claim for

[2] Polychem does not appeal the district court's entry of judgment against it for $161,593.35.

breach of contract because a fact issue existed as to whether the parties intended to be bound by the agreement expressed in the April 23 letter from Kutcher to Polychem. In granting HCA's motion for judgment as a matter of law, the district court determined that the April 23 letter and the parties' actions subsequent to the letter conclusively demonstrated that the parties did not intend for the April 23, 1984, letter to be their actual distributor agreement. The district court also determined that because the letter lacked all of the essential terms necessary to set forth the rights and obligations of both parties, the April 23, 1984, letter was not a contract as a matter of law. Specifically, the district court noted that the letter lacked "specific terms such as minimum purchase requirements, terms of sale, freight terms, manufacturing specifications, performance reviews, renewal, and credit terms."

The April 23 letter provides:

> Dear bob [sic],
>
> This letter will confirm our discussions of today(4-23-84). Hitachi Cable America is only interested in a long term arrangment [sic] for our hear [sic] shrinkable tubing product line, a minimum 3 year, with a 2 year guarantee renewal for a total first contact [sic] committment [sic] of 5 years. This is an exclusive agreement for you to develop a sales and customer network under the Hitachi name and logo.
>
> In addition we offer your agency access to all product [sic] other than our flat cable line which is already represented. We will include a clause in your agency agreement to reopen discussions for rights to any product lines you feel capable of developing.
>
> The actual agreement is subject to further negotiation and final approval by all parties concerned but from this date

> you and your agents may start to develop a protected account base under our joint venture agreement.
>
> If you have any questions please hold them until our next meeting 5-1.

According to Polychem, the April 23 letter is a memorialization of an agreement that the parties had already reached during their meeting in New York. Polychem asserts that the April 23, 1984, letter sets forth the terms of the agreement of greatest interest to the parties: the length of the agreement (5 years), the nature of the agreement (exclusive), and the products covered by the agreement (heat shrinkable tubing, with a reservation of rights to reopen discussion for other product lines).

Because the letter contemplates further negotiations and a more detailed formal contract, Polychem asserts that the question of whether the letter is a binding agreement is a factual inquiry governed by a determination of what the parties intended. Polychem further asserts that the instant case is controlled by two Texas Supreme Court cases: Foreca v. GRD Development Co., 758 S.W.2d 744 (Tex. 1988), and Scott v. Ingle Bros. Pacific, Inc., 489 S.W.2d 554 (Tex. 1972).

In Scott v. Ingle Bros. Pacific, Inc., the court was presented with the issue of whether the parties had entered into a binding employment contract. 489 S.W.2d 554, 554 (Tex. 1972). In Scott, the parties had entered into a purchase agreement which also provided that "[a]n Employment Agreement has been prepared wherein H. L. Scott will manage the business for a minimum of five years at an annual salary of $15,000, payable monthly, with

a $3,000 increase after the 1st year, provided annual gross sales exceed $200,000." Id. at 555. However, no separate employment agreement was ever executed by the parties. Id.

Scott was fired; he brought suit alleging that his termination was a breach of his employment contract. Id. The court stated that "[w]hether the execution of a separate employment agreement was, and is, essential to a mutuality of assent is a question of the intention of the parties." Id. The Texas Supreme Court determined that the trial court erred in not submitting an issue to the jury concerning whether the "parties intended for there to be a contract of employment under the basic terms set in the 'purchase agreement.'" Id. at 557.

Likewise, in Foreca v. GRD Development Co., the issue before the Texas Supreme Court was whether a "contemplated formal document [was] a condition precedent to the formation of a contract or merely a memorial of an already enforceable contract[.]" 758 S.W.2d 744, 745 (Tex. 1988) (emphasis added). In Foreca, the parties had been attempting to arrange an agreement involving the purchase of several amusement park rides. Id. at 744. After negotiating the terms of such an agreement, one of the parties prepared a document which both parties initialed and which contained the cost, terms of payment, delivery and warranty information, and a provision stating "SUBJECT TO LEGAL DOCUMENTATION CONTRACT TO BE DRAFTED BY MR. DUNLAP." Id. at 744-45.

The court concluded that when the parties clearly contemplate the execution of another document memorializing their agreement, whether the parties are bound before the completion of the formal agreement is decided by determining the parties' intent. Id. at 746. Therefore, the court concluded that the facts created a question for a jury to decide. Id.

Based on Foreca and Scott, Polychem asserts that there is a fact question as to whether the parties intended to be bound by the April 23, 1984, letter. However, in order for Polychem's assertion--that the question of whether the April 23, 1984, letter is enforceable is a fact question--to be accurate the letter must contain all the essential terms of the parties' agreement. See T.O. Stanley Boot Co., v. Bank of El Paso, 847 S.W.2d 218, 221 (Tex. 1992) ("The material terms of the contract must be agreed upon before a court can enforce the contract."); see also Neeley v. Bankers Trust Co., 757 F.2d 621, 628 (5th Cir. 1985) ("Texas law provides that the omission or failure of an essential element of a contract vitiates the whole."). When an essential term of a contract is left open for future negotiations, there is no binding contract. McCulley Fine Arts Gallery, Inc. v. "X" Partners, 860 S.W.2d 473, 477 (Tex. App.--El Paso 1993, no writ); Gerdes v. Mustang Exploration, 666 S.W.2d 640, 644 (Tex. App.--Corpus Christi 1984, no writ) ("Where any essential term of a contract is open for future negotiations there is no binding contract."); Mooney v. Ingram, 547 S.W.2d 314, 317 (Tex. Civ. App.--Dallas 1977, writ ref'd n.r.e.) (noting

that there is no enforceable contract when a material term is left for future determination). Moreover, a "contract . . . must define its essential terms with sufficient precision to enable the court to determine the obligations of the parties." Cotten v. Deasey, 766 S.W.2d 874, 877 (Tex. App.--Dallas 1989, writ denied). In determining whether the April 23, 1984, letter sufficiently indicates the legal obligations undertaken by the parties to enable a court to enforce them is a question of law because "we need look no further than the terms of the agreement in deciding it." Neeley v. Bankers Trust Co., 757 F.2d 621, 626 (5th Cir. 1985); see also Success Motivation Inst. v. Jamieson Film Co., 473 S.W.2d 275, 280 (Tex. Civ. App.--Waco 1971, no writ) (stating that whether a written instrument constitutes a contract requires a construction of the instrument and is therefore addressed to the court).

We believe that the district court did not err in determining that the April 23, 1984, letter is not a contract, i.e., not an agreement that the law will enforce. We cannot agree with Polychem that the letter sufficiently indicates the legal obligations undertaken by the parties in order for this court to enforce it. The letter itself, by stating that HCA "is interested" in a long-term arrangement with Polychem, contemplates that the essential terms of the agreement have not been agreed to and will be negotiated in the future. Further, the letter provides that the "agreement is subject to further negotiation and final approval by all parties." See University

Nat'l Bank v. Ernst & Whinney, 773 S.W.2d 707, 710 (Tex. App.--San Antonio 1989, no writ) ("A lack of definiteness in an agreement may concern the time of performance, the price to be paid, the work to be done, the service to be rendered or the property to be transferred."). We believe that letter is too indefinite as to the respective legal obligations of Polychem and HCA to be enforceable as a master distributorship agreement. Thus, we uphold the district court's granting of judgment as a matter of law as to Polychem's claim for breach of contract.

B. PROMISSORY ESTOPPEL

Polychem also asserts that the district court erred in granting a JNOV on its claim for promissory estoppel. The district court determined that the jury's findings concerning promissory estoppel were inconsistent with its entry of judgment as a matter of law on the issue of whether the April 23 letter was an enforceable agreement between the parties because "[i]mplicit in the directed verdict on the contract issue is a finding that the parties did not inten[d] to be bound until the actual contract was further negotiated and finally approved by all parties concerned."

Texas has adopted the doctrine of promissory estoppel as set forth by the RESTATEMENT OF CONTRACTS § 90. Wheeler v. White, 398 S.W.2d 93, 96 (Tex. 1965). Section 90 provides:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Thus, the elements of promissory estoppel require proof of (1) a promise, (2) foreseeability that the promisee would rely on the promise, and (3) substantial reliance by the promisee to his detriment. Adams v. Petrade Int'l, Inc., 754 S.W.2d 696, 707 (Tex. App.--Houston [1st Dist.] 1988, writ denied). The function of promissory estoppel is defensive in that it estops a promisor from denying the enforceability of a promise. "Moore" Burger, Inc. v. Phillips Petroleum, Co., 492 S.W.2d 934, 936 (Tex. 1972). However, the doctrine of promissory estoppel does not create a contract when no contract existed before. Gillum v. Republic Health Corp., 778 S.W.2d 558, 570 (Tex. App.--Dallas 1989, no writ).

At trial, Polychem attempted to prove that HCA "promised to give Polychem an exclusive 5-year distributorship contract and promised to reduce the contract to writing." In its brief before this court, Polychem asserts that "[a]ll of the evidence necessary to support the jury's finding in this regard [the promissory estoppel claim] is provided by the letter of April 23, 1984" (emphasis added). Polychem's argument hinges on two sentences in the April 23 letter. Polychem asserts that the promise from HCA to Polychem is that "[t]his is an exclusive agreement for you to develop a sales and customer network under the Hitachi name and logo." Next, according to Polychem, the expression in the letter which is expected to induce action on Polychem's part is " . . . from this date you and your agents may

start to develop a protected account base under our joint venture agreement."

As we have already stated, in order to establish a claim for promissory estoppel under Texas law, the promisee must establish that his reliance on the promisor's promise was reasonably foreseeable. In this case, we believe, as a matter of law, that Polychem could not have reasonably relied to its detriment on the April 23 letter as a promise that HCA would grant Polychem "an exclusive 5-year distributorship contract." We believe that, reading the letter as a whole, it is clear that HCA was interested in developing an exclusive agreement with Polychem, but that both parties understood that such an agreement or relationship between the parties would only be born after further negotiations.

First, the sentence which Polychem asserts is HCA's promise to Polychem must be read in context. The letter's first paragraph bears repeating:

> This letter will confirm our discussions of today(4-23-84). Hitachi Cable America is only interested in a long term arrangment [sic] for our hear [sic] shrinkable tubing product line, a minimum 3 year, with a 2 year guarantee renewal for a total first contact [sic] committment [sic] of 5 years. This is an exclusive agreement for you to develop a sales and customer network under the Hitachi name and logo.

The sentence preceding HCA's "promise" states that HCA is interested in a long term arrangement. The next sentence, the "promise," then further defines what type of long term arrangement HCA is interested in developing, i.e., an exclusive long term arrangement. We do not believe that Polychem could

reasonably rely on the first paragraph of the letter to determine that HCA had "promised" it an exclusive distributorship. Moreover, the letter further provides that "[t]he actual agreement is subject to further negotiation and final approval by all parties concerned but from this date you and your agents may start to develop a protected account base under our joint venture agreement." While this sentence is slightly ambiguous, we do not believe that it raises a fact question as to whether Polychem reasonably relied on a promise by HCA that it would grant Polychem an exclusive distributorship. We conclude that the only reasonable construction of the letter is that HCA desired to enter into an exclusive distributorship arrangement with Polychem, but that both parties understood that no such relationship existed or was promised at that time.

Moreover, Texas cases have held that the same indefiniteness which makes a promise too vague to enforce as a contract prevents that party from prevailing on a promissory estoppel theory. Neeley v. Bankers Trust Co. of Texas, 757 F.2d 621, 630 n.7 (5th Cir. 1985) ("The same indefiniteness that makes the putative contract unenforceable prevents [the plaintiff] from prevailing on a promissory estoppel theory."); Gillum, D.O. v. Republic Health Corp., 778 S.W.2d 558, 569-570 (Tex. App.--Dallas 1989, no writ) ("Because we have previously concluded that no express or implied contract existed, in that the promises made were too vague and indefinite, we hold that the trial court did not err in granting [the defendant's] summary judgement with regard to [the

plaintiff's] cause of action for promissory estoppel."); see also Weitzman v. Steinberg, 638 S.W.2d 171, 176 (Tex. App.--Dallas 1982, no writ) ("Since the agreement was only an agreement to agree, Weitzman cannot establish an enforceable contract by promissory estoppel where no enforceable contract existed."). Likewise, in this case, because the promise in the letter is too vague and indefinite to be enforced as a contract, Polychem is prevented from asserting a claim for promissory estoppel.

C. Fraud and Negligent Misrepresentation

Polychem also asserts that the district court erred in granting a JNOV on its claims for fraud and negligent misrepresentation. Polychem's claims for fraud and negligent misrepresentation were premised on the theory that HCA and/or Kutcher deceived Polychem by making affirmative representations after June 1, 1984, that it was possible to negotiate an exclusive agreement when HCA's company policy at that time did not allow it to grant exclusive agreements to its distributors. Polychem further attempted to prove that HCA made these misrepresentations to induce Polychem to set up a distribution sales network which HCA would be able to take over once Polychem was out of the picture. Polychem also attempted to prove that, in reliance on these misrepresentations by Kutcher and/or HCA, it expended money in an attempt to develop a distribution network for HCA's heat shrinkable tubing.

To establish a claim for fraud under Texas law, the plaintiff must establish that (1) a material representation was

made, (2) the representation was false, (3) when the representation was made the speaker knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion, (4) the speaker made the representation with the intent that it should be acted upon by the party, (5) the party acted in reliance upon the representation, (6) the party thereby suffered injury. Eagle Properties, Ltd. v. Scharbauer, 807 S.W.2d 714, 723 (Tex. 1990). A promise to do an act in the future is actionable fraud when made with intention and purpose of deceiving, and with no intention of performing the act. Id. However, failure to perform, standing alone, is no evidence of the promisor's intent not to perform when the promise was made. Id. In order to establish negligent misrepresentation, the plaintiff must establish that (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest, (2) the representation is false, (3) the defendant did not exercise reasonable care in obtaining or communicating the information, and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. Federal Land Bank Assoc. v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991).

The question before us on appeal is whether there was sufficient evidence for a reasonable juror to find that HCA either through fraud or negligence falsely represented to Polychem that it was possible to negotiate an exclusive agreement at a time when it was not possible. Further, as part of the

instructions regarding whether Kutcher and/or HCA had committed fraud, Polychem was required to prove that "Kutcher and/or HCA made the representation for the purpose of inducing Polychem to continue setting up a distributor net work for Hitachi's benefit." We conclude that, as a matter of law, Polychem did not present enough evidence to support the jury's verdict. Thus, we uphold the district court's grant of JNOV.

The district court determined that there was no rational basis for the jury's verdict and that the evidence relied upon by Polychem to support its claim--a letter from Kutcher to Manhattan along with Kutcher's and an HCL official's notes concerning a meeting held in December 1984--only supported the jury's verdict if the evidence was taken out of context. To support its assertion that the letter and two extracts were "taken out of context," the district court noted that (1) the parties never agreed on what the term "exclusive" meant, (2) HCA's president testified that exclusivity was available to any company that was properly performing and that Kutcher's letter to Manhattan applied only to Manhattan, and (3) there was evidence that Kutcher and Sato were still discussing the possibility of granting Polychem an exclusive agreement as late as November 12, 1984. The district court further stated that even assuming that HCA and/or Kutcher were keeping secrets from Polychem, Polychem had presented no evidence of a motive for HCA to misrepresent to Polychem the possibility of negotiating an exclusive contract and no evidence that once Polychem was out of the picture HCA moved

in and took over the network. Thus, the district court concluded that it "was simply irrational for the jury to infer from this evidence that after June 1, 1984 negotiations for an exclusive relationship between the parties were not only meaningless, but outright deceptions undertaken by HCA to induce Polychem to build a network which HCA would then be able to take over and use for itself." Finally, the district court determined that Polychem had presented no evidence that Polychem relied on any misrepresentation to its detriment.

Polychem's assertion that HCA's company policy did not allow it to grant exclusive agreements after June 1, 1984, is premised, in part, on several pieces of documentary evidence. One such piece of documentary evidence is a letter sent by Paul Kutcher to Manhattan. The letter provided:

> Dear mr. [sic] Harvey,
>
> It is my duty to inform your company that as a corporate decision and marketing policy Hitachi Cable america [sic] has decided to end exclusive agreements for round wire and cables, plus shrinkable tubing products.
>
> You will continue as a house account with the status of distributor. All previous correspondence concerning Rights to product or markets are now voided; as are all verbal or written agreements [sic].

According to Polychem, this letter demonstrates that HCA's company policy, after June 1, 1984, was that HCA would not grant exclusive agreements to any of its distributors. Polychem further supports its claims for fraud and negligent misrepresentation by pointing to two extracts from notes taken concerning a meeting in December of 1984, in which Wines and Lee

met with officials of HCA. The first extract is from Kutcher's notes in which Kutcher states that "Mr. Wines continued pressure on HCA to grant special exclusive rights to shrinkable tube but based on our new policy HCA will not grant anymore exclusive contracts unless total capacity given to the U.S.A. can be purchased by one customer, every month. Since Polychem cannot meet the condition HCA will not grant exclusive rights." The second extract is from an HCL official's notes which provide that "granting the exclusivity for shrinkable tubes was repeatedly requested, but we insisted that it cannot be granted as a company policy." Polychem also relies on an HCL official's notes from a meeting with Manhattan, held on December 13, 1984, in which the official states that Manhattan was told it would not be able to obtain an exclusive agreement because of company policy. Next, Polychem asserts that two faxes, dated November 30, 1984, from Kutcher to Polychem, support the jury's verdict on fraud and negligent misrepresentation. One fax states that "I have received your requests for a change in our policy concerning an exclusive agreement and must reject the requested changes. I admit, that in May I was more receptive to an exclusive deal but as things happen the corporation has the right to change policy." The other fax states that "I was able to have a discussion with Mr. Sato today. He is in agreement with my position concerning your contract and its major provisions. HCA as a general policy has decided to allow protected but non-exclusive rights in this and all contracts."

In addition to the documentary evidence, Polychem offered testamentary evidence from Wines and Lee. Wines testified that he was told at the December 1984 meeting that "there were no more exclusive agreements that were going to be given by Hitachi to anyone." Further, Lee testified that at the December 1984 meeting Mr. Tominaga, an HCL official whose notes Polychem relies on, stated "we don't -- we no longer give exclusive agreements, or something to that effect."[3]

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[3] In its brief, Polychem asserts that Kutcher also testified that at the December 1984 meeting Polychem was informed of HCA's company policy of not granting exclusive agreements to anyone. However, Kutcher's testimony, referenced by Polychem in its brief, does not support Polychem's position. Specifically, Kutcher's testimony is as follows:

> Question: Were there any discussions at the December meeting that Hitachi was no longer willing to grant an exclusive of even tubing?
>
> Answer: I believe that's what was said, yes.
>
> Why was that said?
>
> Answer: I have no idea. Mr. Tominaga and Mr. Mitsuda discussed things in Japanese and then Mr. Tominaga, because I assume his English was a little better than Mr. Mitsuda's at the time, said a statement they weren't offering an exclusive agreement but he could continue to buy from Hitachi Cable America and be a master distributor for heat shrinkable tubing products.
>
> Then, as of the meeting in December when Mr. Tominaga or Mr. Mitsuda said that Hitachi was no longer willing to offer an exclusive, that came as a surprise to you?
>
> I wouldn't say it was a surprise, but I was -- I didn't expect it to be, you know, said at, you know, at the meeting as it was said. I expected that there would be maybe some discussion after the meeting, after Mr. Lee and Mr. Wines had stated their case before Mr. Mitsuda and Mr. Tominaga.

Kutcher's testimony does not support Polychem's assertion that he testified that there was a new company policy against granting

As we have already stated, we need not decide whether the evidence which Polychem refers us to is sufficient as a matter of law to create a fact question as to fraud and negligent misrepresentation; rather, we must decide whether there was sufficient evidence to create a fact question for the jury after reviewing the entire trial record. Initially, we note that the extract from Kutcher's notes concerning the December 1984 meeting does not support a claim that HCA would not grant an exclusive agreement to any distributor. Kutcher's notes do not state that HCA will not grant an exclusive agreement to any distributor; rather, the note states that HCA will not grant an exclusive agreement because Polychem cannot satisfy the condition of "total capacity given to the U.S.A. can be purchased by one customer, every month." Further, while Mr. Tominaga's notes do state that Polychem would not be given an exclusive agreement because of company policy, the notes do not state what that company policy is. Also, while Mr. Tominaga's notes concerning a meeting with Manhattan in December 1984 state that as a company policy Manhattan could not be given an exclusive agreement, his notes further provide that Manhattan had not paid for past deliveries of goods and would not be given any more deliveries of goods without payment. Further, in reference to the two faxes sent by Kutcher to Polychem, we note that on November 27, 1984, Wines sent a memo to Kutcher and Sato concerning HCA's latest "Master Distributor Draft Agreement." In the memo, Wines stated that "in

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exclusive agreements to anyone.

the first paragraph of SECTION III, you grant an exclusive distribution agreement to Polychem and then proceed to outline how 'House Accounts' and 'Private Labels Accounts' can be added at your discretion. This is not an exclusive agreement. This paragraph should be open for discussion at our meeting." Therefore, the faxes from Kutcher to Polychem appear to be aspects of the ongoing negotiations between Polychem and HCA concerning the term "exclusive" rather then admissions by HCA that it never intended to grant Polychem an exclusive agreement.

In addition to the evidence referred to by Polychem, HCA's president repeatedly testified at trial that HCA would grant an exclusive contract to a company which was performing well; he also testified that Polychem was ultimately not granted an exclusive contract because Polychem was delinquent in paying its bills. HCA's president further testified that another distributor, Xport, did have its exclusive contract altered; however, its exclusive agreement was not terminated after June 1, 1984. Moreover, in an internal memorandum from Kutcher to Sato, dated November 12, 1984, Kutcher sets forth HCA's position on granting Polychem an exclusive contract. The memo states that "HCA gives Polychem the exclusive right for tubing only except for Freedom." The memo also outlines other important provisions for an exclusive distributorship agreement such as minimum order requirements and performance reviews. It would certainly appear odd that Kutcher and Sato would still be discussing granting Polychem an exclusive agreement on November 12, 1984, if company

policy had negated such a position by at least June of that year. We also note that Polychem has not pointed us to any evidence in the record to support its assertion that HCA dangled the exclusivity carrot in front of Polychem so that Polychem would develop a sales network which HCA would then be able to take over. Rather, Polychem's only support for this aspect of its claim appears to be proof that after HCA terminated its relationship with Polychem, HCA made arrangements to use warehouse facilities which Polychem had utilized in its distribution network. Polychem further asserts that HCA contacted Polychem's sales representatives and asked them to work for HCA.[4]

In sum, we conclude that the evidence taken as a whole and in the light most favorable to Polychem is insufficient, as a matter of law, to support the jury's verdict that HCA fraudulently or negligently misrepresented to Polychem that it was possible to negotiate an exclusive agreement after June 1,

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[4] The only portion of the record which Polychem cites in support of this proposition is the written deposition of R. Wayne Waller, Polychem's banker. In his deposition, Waller testifies that

> Q. Was there anything else that Mr. Lee or Mr. Wines told you prior to the lawsuit being filed about any of their discussions with anyone from Hitachi?
>
> A. Well, they had indicated prior to that February time, which, again, dates back to my call period, that they were having a lot of trouble that Hitachi was violating their agreement, that they were selling direct to customers in the United States. At some point at or near that time that Kutcher had directly contacted all of their manufacturer's reps that they were selling to and, in effect, I think they succeeded in getting a lot of them to buy direct, is what I was told.

1984; rather, the evidence demonstrates that the parties attempted to negotiate such a deal, but it ultimately proved futile. Thus, we uphold the district court's granting of JNOV on Polychem's claims for fraud and negligent misrepresentation.[5]

D. JUDGMENT AGAINST WINES AND LEE

Finally, Wines and Lee assert that the district court erred in entering judgment against them, individually, in the amount of $161,593.35 for unpaid goods delivered to Polychem by HCA. Wines and Lee argue that the district court's judgment is erroneous because there are no pleadings or evidence to support the entry of judgment against them in their individual capacities.

The only question which the district court submitted concerning the unpaid goods asked the jury to "[f]ind from a preponderance of the evidence the fair market value of the goods delivered by HCA to Polychem, but not paid for by Polychem" (emphasis added). The jury found the fair market value of the goods to be $161,593.35. The district court then entered a final judgment against Polychem and additionally against Wines and Lee, in their individual capacities for this amount.

HCA asserts that the district court's judgment is proper because from its first amended answer through the pretrial order, it had asserted that Lee and Wines were individually liable for

[5] Because we uphold the district court's rulings as to all of Polychem's claims which it appeals, we need not discuss whether the district court erred in granting judgment as a matter of law on Polychem's damage claims for lost profits. Likewise, we need not address the district court's entry of JNOV on the jury's finding that Polychem was entitled to punitive damages.

Polychem's failure to pay for the goods. HCA argues that the district court's entry of judgment against Wines and Lee should be upheld because "[n]either party submitted the issue to the jury and the court accordingly ruled on the claim and entered judgment against Lee and Wines pursuant to Fed. R. Civ. P. 49(a)." HCA further asserts that there is ample evidence in the record "for disregarding the corporate veil and holding Lee and Wines personally responsible for the debt to HCA." Accordingly, HCA asserts that Wines and Lee cannot now complain about the district court's finding that they are individually liable for Polychem's failure to pay for goods sold and delivered to Polychem from HCA; rather, Wines and Lee waived their right to a jury trial concerning their individual liability under a theory of piercing the corporate veil.

Implicit in this argument is a finding that HCA sufficiently pled the issue of Wines' and Lee's individual liability under the corporate veil theory such that Wines' and Lee's failure to object when the district court did not submit a question to the jury concerning their individual liability constituted a waiver of a jury trial on that issue. While we recognize that the federal rules require only notice pleading, we do not agree that Wines and Lee were given the requisite notice that HCA was attempting to recover against them in their individual capacities by piercing the corporate veil.

We note initially that HCA has not directed us to--nor have we found--any reference in either the joint pretrial order or in

HCA's second amended answer[6] averring that Wines and Lee should be held individually liable for the unpaid goods under the corporate veil theory. In fact, in its brief to this court, HCA cites only generally the pretrial order and its second amended answer in support of its assertion that its pleadings support the district court's judgment without citation to specific pages or paragraphs setting forth this allegation. We further note that in its second amended answer, HCA lists its counterclaims and claims in five separate counts. Count one seeks damages for fraud, count two seeks damages for "goods sold and delivered," count three seeks damages for an "account stated," count four seeks damages under the Racketeer Influenced and Corrupt Organization Act, and count five seeks damages for conversion. In respect to counts two and three, HCA never alleged that Wines and Lee should be held individually liable for Polychem's failure to pay for the goods. Rather, in count two, HCA alleges that "Polychem International Corporation owes Hitachi Cable America $161,827.78 for goods sold and delivered in 1984 and 1985" (emphasis added). Further, in count three, HCA alleges that "Hitachi Cable America provided Polychem with $161,827.78 worth of goods sold and delivered on open account for which Polychem has not paid Hitachi Cable America" (emphasis added). No reference is made to Wines and Lee whom HCA now seeks to hold liable. We find this omission to be telling because the other

[6] HCA's second amended answer was fully incorporated by reference into the pretrial order.

counts make it clear that liability was sought to be imposed against Wines and Lee individually.

While we recognize that HCA's prayer for relieve requests that "Hitachi Cable America recover from Polychem Cable, Lee, and Wines, jointly and generally, $161,827.78" on its second and third counterclaims, we believe that this averment was insufficient to apprise Wines and Lee that HCA was seeking to hold them individually liable under a theory of piercing the corporate veil for Polychem's corporate debts.[7] We also note that HCA makes a vague allegation that "Lee, Wines, the Polychem entities and the Lee companies transferred and funnelled monies and assets to each other, through each other. They also shared expenses and accounts and otherwise functioned as an ongoing, continuous and evolving unit for at least the past fourteen years" in its second amended answer; however, this statement is never tied to any claim or assertion that Polychem's owners were not entitled to a corporate shield. In fact, the statement is contained in the portion of the answer entitled "The Parties and Other Significant Entities" and not in any section concerning any of Polychem's claims or counterclaims. In sum, and after reading HCA's pleadings in this case as a whole, we hold that Wines and Lee were never adequately notified of the potential of individual liability for Polychem's failure to pay its debts under the

[7] Moreover, although the prayer refers to HCA's "counterclaims," we observe that Wines and Lee are third-party defendants, not plaintiffs against whom a "counterclaim" could be brought.

corporate veil theory. Thus, we reverse the district court's judgment against Wines and Lee in their individual capacities for $161,593.35 and render a take nothing judgment in their favor.

IV.

For the foregoing reasons, we AFFIRM the district court's granting of judgment as a matter of law on Polychem's claim for breach of contract, AFFIRM the district court's granting of judgment notwithstanding the verdict on Polychem's claims for promissory estoppel, fraud, and negligent misrepresentation, REVERSE the district court's entry of judgment against Wines and Lee in their individual capacities for $161,593.35, and RENDER a take nothing judgment in favor of Wines and Lee. Costs shall be borne by Polychem.