UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-20430

ANDERSON GREENWOOD & COMPANY,

Plaintiff-Appellee
Cross-Appellant,

versus

J.F. GASKILL CO., INC.,

Defendant-Appellant
Cross-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(H 92 CV 1542)

August 22, 1995

Before POLITZ, Chief Judge, and EMILIO M. GARZA, and STEWART, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:[*]

J.F. Gaskill Co., Inc. ("Gaskill") appeals from the district court's entry of judgment as a matter of law on its fraud counterclaim against Anderson Greenwood & Co. ("AGCO"). Gaskill also appeals from the district court's amendment of its final judgment to include a declaratory judgment that AGCO had requested

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[*] Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

in its amended complaint. AGCO cross-appeals, raising two evidentiary issues and challenging the sufficiency of the evidence to support Gaskill's entitlement to punitive damages. We affirm.

I

Gaskill is a Birmingham-based corporation that has been an independent sales representative for industrial valve manufacturers for over thirty years. An independent sales representative contracts with a manufacturer to represent it, usually exclusively, in a designated territory. The representative can earn income selling a manufacturer's products in two ways: it can sell products directly from the factory and earn a commission on those sales, or it can purchase products from the manufacturer and resell them from its inventory at a profit.

AGCO manufactures valves primarily for applications in the oil and gas, chemical, and petrochemical industries. AGCO is a subsidiary of Keystone International, a holding company for several valve manufacturers. AGCO markets its products through a system of independent sales representatives and corporate-owned sales companies. At the time Gaskill became an AGCO representative in 1989, AGCO owned two sales companies, The Rutherford Co. and LuMac, Inc.[1]

As owner of the sales companies, AGCO exercised a greater degree of control over Rutherford and LuMac than it did over its

[1] AGCO acquired Rutherford and LuMac, both of which had been independent AGCO representatives, in 1981.

independent representatives. In dealing with its independent representatives, AGCO could only establish yearly targets and hope that the representatives would meet those targets. If they did not, AGCO's ultimate sanction was to terminate the representative and appoint another. Like independent representatives, however, AGCO's corporate-owned sales companies sell products of other manufacturers in addition to AGCO's.[2]

As of the beginning of 1989, AGCO had divided Alabama into two territories. An independent representative, The Blythe Co., covered northern Alabama. Blythe also covered North and South Carolina, Georgia, and eastern Tennessee. LuMac, one of AGCO's two corporate-owned sales companies, covered the southern portion of Alabama. LuMac also covered southern Louisiana, southern Mississippi, and part of the Florida panhandle.

In early 1989, AGCO decided to terminate Blythe's coverage of northern Alabama and Georgia. Consequently, it began looking for another representative to take Blythe's place. It approached Gaskill, which expressed a keen interest in becoming an AGCO representative.[3] After Ross and Bachmann decided that Gaskill was

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[2] Unlike some manufacturers, including other Keystone subsidiaries, AGCO did not sell "direct" in the sense that it did not have a sales force consisting of its own employees.

[3] For twenty-five years, Gaskill had been the Alabama representative for Fisher Controls International, Inc., and sales of Fisher Controls products accounted for 95% of Gaskill's profits. Fisher Controls terminated Gaskill in 1986, resulting in a severe drop in Gaskill's income and causing Gaskill to incur steep operating losses for the next three years. Gaskill hoped that AGCO would replace Fisher as its anchor account.

the best available candidate, they began negotiations with Joe and Jef Gaskill regarding Gaskill's appointment to the northern Alabama territory.

During the negotiations, Bachmann and Ross made a number of representations relevant to this appeal. First, when Joe Gaskill asked that a sixty-day termination clause be deleted from the proposed agreements,[4] Ross and Bachmann assured him that AGCO was interested in a long term relationship and that as long as Gaskill did its job, it would have a long term relationship. According to Jef Gaskill, Bachmann and Ross further stated that "the 60 day cancellation was nothing to worry about, that it was there for a moral escape clause."

Joe Gaskill also testified that when he asked Ross and Bachmann why AGCO did not simply appoint LuMac, AGCO's corporate-owned sales company responsible for southern Alabama, to the northern Alabama territory, Bachmann and Ross responded that LuMac was an "oil patch outfit," referring to LuMac's concentration in the oil and gas industry in southern Alabama and Louisiana. According to Joe Gaskill, he then asked if AGCO had any plans to "go direct," and Ross and Bachmann assured him they did not.

Bachmann and Ross also assured the Gaskills (1) that AGCO's parent, Keystone International, would not interfere in Gaskill's

[4] AGCO's standard representation agreement contains a sixty-day termination clause, exercisable by either party for any reason. Gaskill had operated under similar clauses before, and it had even terminated agreements with other manufacturers by exercising its rights under such clauses.

relationship with AGCO; (2) that the business in the northern Alabama territory was worth between $300,000 and $400,000; and (3) that Gaskill would be considered for the Georgia territory if AGCO decided to terminate Blythe's representation of Georgia.

In July, 1989, Gaskill entered into two representation agreements with AGCO ("the Agreements"), both of which contained sixty-day, no-cause termination clauses. Gaskill's performance, measured in net bookings,[5] surpassed its annual targets during 1989 and 1990, but its performance for 1991 fell substantially below its target for the year. In addition, beginning with its first payment and continuing intermittently throughout its relationship with AGCO, Gaskill experienced credit problems and was frequently delinquent on its credit line payments.[6]

Beginning in November, 1990, Gaskill's credit problems, among other concerns,[7] caused AGCO's sales managers to question Gaskill's future as its representative for the northern Alabama territory. Bachmann mentioned these concerns to Juan Gomez, AGCO's Vice President of Finance & Marketing Subsidiaries, in January, 1991.

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[5] "Net bookings" refers to the dollar value of a representative's sales, less commissions or resale profit. Gaskill earned a commission of 20% on factory orders and its profit on inventoried products averaged 20% in a typical year. Thus, Gaskill's gross sales figure exceeded its net bookings by approximately 20%.

[6] AGCO provided Gaskill with a $25,000 credit line when Gaskill first started representing AGCO. Gaskill used its credit line primarily to finance purchases from AGCO's factory.

[7] Gaskill represented Flowseal, CCI, and Centerline, three competitors of Yarway, one of Keystone's other subsidiaries. Bachmann had become concerned that AGCO was not competing favorably with these other accounts for the time and efforts of Gaskill's salesmen.

Gomez oversaw AGCO's corporate-owned sales representatives, LuMac and Rutherford. This prompted an interest by LuMac in the territory, and in March, 1991, Bachmann solicited a proposal from LuMac for such an expansion.

On February 26, 1992, AGCO exercised its right to terminate the Agreements and gave Gaskill sixty-days notice of its cancellation of the Agreements. It is undisputed that AGCO never informed Gaskill prior to February 26, 1992, that it was considering terminating the Agreements or that it was considering appointing LuMac as its representative for northern Alabama.

On April 28, 1992, AGCO appointed LuMac, which it had renamed A-G Safety Sales, Inc., as its representative in the northern Alabama territory. In 1993, AGCO purchased Total Valve Systems of Alabama, combined it with A-G Safety Sales, Inc.'s Alabama branch office, and renamed the firm A-G Safety Sales of Alabama.[8] In the fall of 1993, AGCO terminated Southern Industrial Sales, its independent representative in Georgia, and formed A-G Safety Sales of Georgia.

Following its termination, Gaskill sent letters to AGCO's management regarding what it perceived to be the unfairness of AGCO's unilateral action. Gaskill also threatened legal action, prompting AGCO to file a complaint for declaratory relief, *see* 28

[8] AGCO had also renamed Rutherford, which had operated in the southern two-thirds of Texas, A-G Safety Sales of Texas. In 1992 or 1993, AGCO also founded A-G Safety Sales & Service of Florida and A-G Safety Sales & Service of New Jersey. A-G Safety Sales & Service of Florida replaced LuMac's coverage of northwest Florida.

U.S.C. § 2201, in federal district court in Houston in May, 1992. AGCO alleged that Gaskill had threatened to sue over its termination and had taken the position that AGCO had not properly terminated the Agreements and was required "to deal with . . . Gaskill for the next one or two years." In its complaint, AGCO sought a declaration that it had properly and effectively terminated the Agreements. AGCO's complaint was referred by consent of the parties to United States Magistrate Judge Frances Stacy.

Gaskill unsuccessfully moved to dismiss AGCO's complaint. AGCO then successfully moved for leave to amend its complaint to add a request for a declaration that "AGCO has no obligations or liabilities to Gaskill arising under the Agreements or pursuant to any federal or state statutory or common law." Gaskill filed a motion for summary judgment, which the magistrate judge denied.

Six months later, and one month before trial, Gaskill obtained new counsel and filed a "Motion to Stay Proceedings and in the Alternative, to Transfer Proceedings or in the Alternative, to Limit Plaintiff's Claim for Declaratory Relief, or in the Alternative to Allow Defendant Leave to Amend its Counterclaims." Gaskill's new counsel had filed suit in a federal district court in Alabama, simultaneously seeking orders in the Alabama and Houston district courts staying the Houston litigation and transferring it to Alabama. The magistrate judge denied Gaskill's motion to stay, transfer, etc., but it granted Gaskill's motion for leave to amend

its answer to assert its compulsory counterclaims.

Gaskill then amended its answer to include three counterclaims. In Count One, it alleged that AGCO had committed fraud in the inducement by misrepresenting:

> that the Agreements . . . would be a long term arrangement; that the Agreements which would be signed were merely "Boiler Plate" agreements and that the signing of the Agreements was merely a formality; that the territory to be serviced by Gaskill was then producing $300,000 to $400,000 of business per year; that the amount of territory would be increased if Gaskill performed well; and that AGCO would operate autonomously from its parent company, Keystone International, Inc., and specifically without the influence of Keystone's Vice President, Arthur L. French, who also wrongfully terminated Gaskill's association with Fisher Controls International, Inc.; [and that] AGCO made representations that they were not going to eliminate the distributorship arrangement and sell direct in Gaskill's territory.

Record on Appeal, vol. 11, at 696-97.[9]

The parties proceeded to trial, which lasted ten days. The main theory of Gaskill's fraud in the inducement claim was that AGCO, after having adopted a plan to shift to a direct sales force, terminated Blythe and appointed Gaskill to the northern Alabama territory to penetrate that market so that it could then terminate Gaskill and appoint LuMac, its corporate-owned sales company, to the territory. Thus, Gaskill contended that at the time Gaskill entered into the Agreements, AGCO planned to use Gaskill on only a temporary basis until it reassigned the territory to LuMac.

The jury found that AGCO had defrauded Gaskill and awarded

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[9] The magistrate judge dismissed Counts Two and Three of Gaskill's counterclaims on grounds that Gaskill does not challenge on appeal.

Gaskill $200,000 in actual damages and $1,000,000 in punitive damages. The proof at trial, the court's instructions to the jury, and the jury's verdict, were all limited to Gaskill's fraud in the inducement counterclaim. Gaskill moved for judgment on the jury's verdict, and AGCO renewed its motion for judgment as a matter of law, arguing that the evidence in the record was insufficient to support a verdict in Gaskill's favor on its fraud counterclaim. The magistrate judge granted AGCO's motion on the grounds that insufficient evidence existed to support a finding that AGCO's alleged misrepresentations injured Gaskill.

Following the court's entry of judgment in AGCO's favor on Gaskill's fraud counterclaim, AGCO filed a motion to amend the judgment to include a ruling on its request for declaratory relief. Without a ruling on AGCO's declaratory judgment claim, AGCO contended, the magistrate judge's earlier judgment was not final. Based on Gaskill's admissions, the parties' stipulations, and the magistrate judge's rulings on Gaskill's counterclaims, AGCO requested the magistrate judge to amend its judgment to include a declaration "that AGCO has no obligations or liabilities to Gaskill Co. under the Agreements or pursuant to any federal or state statutory or common law." In the alternative, AGCO requested the magistrate judge to certify the earlier judgment under Rule 54(b) of the Federal Rules of Civil Procedure.[10] Over Gaskill's

[10] Rule 54(b) provides in pertinent part:
When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim,

objection, the magistrate judge granted AGCO's motion to amend the judgment to include AGCO's requested declaration.

Gaskill now appeals, contending that the magistrate judge (1) erroneously excluded its proof of lost profits; (2) erroneously held that insufficient proof supported a finding that Gaskill suffered an injury as a result of AGCO's alleged misrepresentations; (3) erroneously applied federal law in ruling on AGCO's motion for judgment as a matter of law; and (4) erroneously granted AGCO's request for a declaratory judgment. AGCO, which urges affirmance not only on the grounds that the magistrate judge properly held that Gaskill had not proved any injury but also on the grounds that insufficient evidence supported the other elements of Gaskill's fraud claim, cross-appeals. AGCO raises two evidentiary issues and contends that insufficient evidence supported the jury's award of punitive damages.

II

A

Gaskill argues that the magistrate judge erroneously held that there was insufficient evidence in the record to support a finding that Gaskill had suffered an injury as a result of AGCO's alleged misrepresentations. In response, AGCO argues that the magistrate judge correctly held Gaskill's proof of injury insufficient and

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> or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Fed. R. Civ. P. 54(b).

further that Gaskill's proof of the remaining elements of its fraud counterclaim was insufficient to support a verdict in its favor.

We review a judgment as a matter of law, formerly referred to as a judgment notwithstanding the verdict, de novo, applying the same standard as the district court. *Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 950 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1110, 130 L. Ed. 2d 1075 (1995). Under the well-established standard of *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969) (en banc):

> [T]he court should consider all of the evidence))not just that evidence which supports the non-mover's case))but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable [jurors] could not arrive at a contrary verdict, granting of the [judgment as a matter of law] is proper. On the other hand, if there is substantial evidence opposed to the motion[], that is, evidence of such quality and weight that reasonable and fair-minded [jurors] in the exercise of impartial judgment might reach different conclusions, the motion[] should be denied . . . . A mere scintilla of evidence is insufficient to present a question for the jury.

Id. at 374.[11] In addition, we may affirm the magistrate judge's

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[11] Gaskill argues at length in its brief on appeal, without citing any Fifth Circuit authority, that the magistrate judge erred in applying the federal standard for ruling on a motion for judgment as a matter of law. Gaskill argues that the district court should have applied the more lenient Texas "no evidence" standard, *see Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 275-76 (Tex. 1995), because the standard for measuring the sufficiency of evidence to support a jury's verdict is substantive for purposes of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 2d 1188 (1938).

Gaskill's argument is frivolous. *Boeing* itself was a diversity case, *see id*. at 367, and we have applied the *Boeing* standard consistently in diversity cases, *see, e.g.*, *United States Fire Ins. Co. v. Confederate Air Force*, 16 F.3d 88, 91 (5th Cir. 1994); *Turner v. Purina Mills, Inc.*, 989 F.2d 1419, 1421 (5th Cir. 1993); *Entente Mineral Co. v. Parker*, 956 F.2d 524, 526 (5th Cir. 1992); *Pagan v. Shoney's, Inc.*, 931 F.2d 334, 337 (5th Cir. 1991); *First State Bank v. Maryland Casualty Co.*, 918 F.2d 38, 42 (5th Cir. 1990); *Jones v. Wal-Mart Stores,*

judgment as a matter of law on any ground supported in the record, not just the ground on which the magistrate judge granted AGCO's motion. *Weingart v. Allen & O'Hara, Inc.*, 654 F.2d 1096, 1106 (5th Cir. Unit B 1981) (noting that "an appellee may rely upon any basis in the record in support of the judgment"); *Bickford v. International Speedway Corp.*, 654 F.2d 1028, 1031 (5th Cir. 1981) ("[R]eversal [of a directed verdict] is inappropriate if the ruling of the district court can be affirmed on any grounds, regardless of whether those grounds were used by the district court."); *see also Brewer v. Wilkinson*, 3 F.3d 816, 820 (5th Cir. 1993) (holding that Court of Appeals is not bound to grounds articulated by district court for granting summary judgment but may affirm judgment on other appropriate grounds), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1081, 127 L. Ed. 2d 397 (1994).

Consistent with Texas law, the magistrate judge instructed the jury on the elements of fraud as follows:

> The essential elements of this claim are:
> (A) A party makes a material misrepresentation.
> (1) A misrepresentation is a false statement made by one who knows the statement is false.
> (2) A misrepresentation is material if it caused Gaskill to enter into the Agreements.
> (B) The misrepresentation is made with knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion.
> (C) The misrepresentation is made with the intention that it should be acted on by the other party. A party acts intentionally when it acts deliberately with the desire to bring about the consequences of its acts or with the knowledge that those consequences were

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Inc., 870 F.2d 982, 986-87 (5th Cir. 1989); *Whatley v. Armstrong World Indus., Inc.*, 861 F.2d 837, 839 (5th Cir. 1988).

> substantially certain to follow from its acts.
> (D) The other party acts in reliance on the misrepresentation and thereby suffers injury.

Record on Appeal, vol. 5, at 2311; *see Boggan v. Data Sys. Network Corp.*, 969 F.2d 149, 151-52 (5th Cir. 1992); *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 723 (Tex. 1990).

We do not reach the issue of Gaskill's proof of injury; instead, we affirm the magistrate judge's judgment as a matter of law on the alternative ground that insufficient evidence exists in the record to support a finding that AGCO knowingly or recklessly misrepresented any material facts. Because "evidence of a single misrepresentation of material fact will suffice to sustain the verdict," *Boggan*, 969 F.2d at 153, we address each alleged misrepresentation in turn.

1

AGCO argues that there is insufficient evidence to support a finding that it knowingly misrepresented the fact that it did not have a plan to "go direct" in the northern Alabama territory. Ross and Bachmann's representations that AGCO did not have a plan to go direct were statements of fact that must have been false when made in order to constitute actionable fraud. *See DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688-89 (Tex. 1990), *cert. denied*, 498 U.S. 1048, 111 S. Ct. 755, 112 L. Ed. 2d 775 (1991). In addition, Ross and Bachmann must have known the statements were false when they made them. *See id.*

Gaskill points to two places in the record to support a

finding that Ross and Bachmann falsely represented that AGCO did not have a plan in 1989 to "go direct" in the Alabama territory. First, it points to the fact that AGCO expanded the territories of its corporate-owned sales companies in the Southeast Region in 1992 and 1993. Ross testified that in 1993 the successors of LuMac and Rutherford had expanded their territories in the Southeast Region. While many territories stayed in the hands of independent representatives, in and around the Gulf Coast area, the independent representatives' share of the territories was substantially reduced.

Viewing the reasonable inferences from this evidence in the light most favorable to the jury's verdict, this evidence could suggest the existence of a trend toward expanding the territories of AGCO's corporate-owned sales companies and away from relying on independent sales representatives, at least in the Gulf Coast states. A reasonable juror might also infer that this trend reflects a plan beginning in 1993, or even in 1992, when AGCO terminated Gaskill and expanded LuMac's AGCO territory to include northern Alabama.[12]

Even assuming the evidence was sufficient to support a finding that such a plan existed in 1992, however, Gaskill was required to prove that Ross and Bachmann's representations were false when made, *see DeSantis*, 793 S.W.2d at 689, that is, that AGCO had

[12] Ross testified that nationwide, AGCO dealt with 23 independent representatives as of April, 1989, and 24 as of April, 1992.

adopted such a plan before July, 1989. To support a finding that AGCO's "plan" existed in 1989, Gaskill points to a memorandum written by Lou Sprecher dated November 4, 1988, titled "Power Industry Products 5 Year Plan." Sprecher was a mid-level manager at AGCO responsible for the power industry products line, a line that represented five percent of AGCO's overall business. Sprecher's memorandum includes an analysis of domestic and international bookings for his product line, projections for future bookings, a description of product features, a list of objectives, an overview of major competitors, a description of the industry outlook and a list of seven proposed "Strategy Alternatives," including "b. Implement a direct sales force to meet growth objectives." At trial, Gaskill seized on this proposal and argued to the jury that it proved AGCO had adopted a plan to "go direct"[13] in the Northern Alabama territory before appointing Gaskill.

Gaskill argues that a jury could infer from the fact that Sprecher proposed the implementation of a direct sales force for power industry products in November of 1988 that AGCO had adopted a plan to expand LuMac's territory to include northern Alabama by the time it offered the territory to Gaskill. However, there is no evidence in the record demonstrating (1) that Sprecher's suggestion was adopted for the power industry products line, let alone other

[13] As noted above, AGCO's use of corporate-owned sales companies was not selling "direct" in the true sense as those terms, i.e., selling through its own employees. *See supra* note 1. Before joining AGCO earlier in 1988, Sprecher had worked for Yarway Corp., one of Keystone's subsidiaries that uses a direct sales force to market its power industry products.

product lines (2) by someone with authority to implement such a shift in selling methods (3) before Gaskill's negotiations with AGCO in the spring and summer of 1989.

Indeed, Gaskill's own trial exhibits, which include a multitude of planning documents generated at various levels of AGCO's management during the years 1989 through 1992, belie the suggestion that AGCO had adopted a plan to implement a direct sales force or replace its independent representatives with corporate-owned sales companies. None of the planning documents prepared at the highest level of AGCO's management refer to a change in the structure of AGCO's marketing system.[14] Similarly, planning documents prepared by AGCO's Vice President for Sales and Marketing, Ed Jones, who was responsible for AGCO's domestic and international sales efforts, also contradict the existence of a plan to "go direct."[15] At the regional level, Bachmann's yearly

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[14] AGCO's Five Year Business Plan, dated November 11, 1988, is a corporate-wide planning document prepared by AGCO's President Richard Mattie for Malcolm Clark, the President of Keystone International, AGCO's parent. It makes no mention of a plan to implement a direct sales force or replace its independent representatives with corporate-owned sales companies. In Mattie's Three Year Business Plan for 1991-93, he refers to efforts to improve interaction among its sales representatives without any mention of a plan to change its mix of independent and corporate-owned sales representatives.

[15] For example, in a memo to Mattie dated February 23, 1989, Jones writes:

> Our Sales Plan, in a broad sense, is to continue monitoring individual Rep results monthly, keep pressure on the Reps for performance, and take whatever corrective action we can which is appropriate to the situation. Our ultimate action, of course, is to replace a Rep or reduce his territory. These are "last resort" actions and certainly do not guarantee a short-term benefit to AGCO.
>
> If we pull the trigger too quickly, we'll have a real mess on our hands with the remaining Reps. We must all recognize that our Reps' business does not come in to AGCO in equal monthly increments. I think we must accept the fact that there will be cyclical fluctuations in a Reps' sales and we must do a good job of analyzing

Southeast Region Sales Plans make no reference to a plan to replace AGCO's independent representatives with corporate-owned sales companies or any plan to "go direct" in the Southeast Region. The planning documents make references to improving independent representatives' performance generally, and they refer to concerns about individual representatives' net bookings, but they contain no mention of a shift in the mix of independent and corporate-owned sales representatives.

Gaskill's exhibits also lay a paper trail of its own termination, beginning with its credit problems and culminating in concerns about Gaskill's dedication to selling AGCO products. Gaskill's exhibits clearly show that its representation had become problematic for AGCO and that AGCO considered terminating Gaskill beginning in November, 1990. The documents also show that AGCO began considering LuMac as a replacement for Gaskill beginning December of 1990.

To support its theory of the "Sprecher Memorandum," Gaskill points to Jef Gaskill's testimony that in his opinion most of the alternatives in the Sprecher Memorandum had been adopted, including the direct sales force proposal. However, Jef Gaskill did not

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> each situation before we conclude that a Rep is not performing.
>
> As you know, managing Reps is a tricky business. We've got to be careful that we don't "shoot ourselves in the foot" while at the same time getting the best possible performance from the Reps.

Defendant's Exhibit 827. While Jones' memorandum clearly reflects concerns regarding the performance of some of AGCO's independent representatives, it contradicts any inference that AGCO had already adopted a plan to replace its independent representatives with a direct sales force or corporate-owned sales companies.

testify regarding any facts suggesting that the alternatives had been implemented but rather that in his opinion most of the alternatives had been implemented.[16]

Considering the overwhelming direct evidence that AGCO had not adopted a plan to implement a direct sales force with respect to any of its product lines or with respect to the Northern Alabama territory, the Southeast region, or any other territory or region, in July of 1989, we conclude that the Sprecher Memo, even in conjunction with Jef Gaskill's interpretation of the memo, amounts to no more than a scintilla of evidence supporting the jury's verdict. *See Boeing*, 411 F.2d at 374; *Crossthwait Equip. Co. v. John Deere Co.*, 992 F.2d 525, 529 (5th Cir. 1993) (holding that plaintiff's evidence, a notation by defendant's employee in an inter-office memo, was insufficient under *Boeing* standard to show bad faith), *cert. denied*, ___ U.S. ___, 114 S. Ct. 549, 126 L. Ed. 2d 451 (1993); *Lloyd v. John Deere Co.*, 922 F.2d 1192, 1196 (5th Cir. 1991) (holding in a products liability case that plaintiff's expert's testimony amounted to no more than a scintilla of evidence supporting finding that product was unreasonably dangerous); *see also Enlow v. Tishomingo County, Miss.*, 45 F.3d 885, 889 (5th Cir. 1995) (applying *Boeing* standard and holding that while "circumstantial evidence *may* be enough to avoid a directed verdict, we cannot overlook the strength of the defendants' direct evidence

[16] AGCO's president, Richard Mattie, testified that none of the alternatives had been implemented.

to the contrary").

Any possible inference from the Sprecher Memorandum that AGCO had adopted a plan to "go direct" in any form, with respect to any products, or with respect to northern Alabama is simply too tenuous to support a jury verdict in Gaskill's favor. As we stated in *Love v. King*, 784 F.2d 708 (5th Cir. 1986):

> While we are required to draw inferences favorable to [the nonmovant], such inferences must be `within the range of reasonable probability.' When the necessary inference is so tenuous that it rests merely upon speculation and conjecture, it is the duty of the court to withdraw the case from the jury.

Id. at 711 (quoting *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 887 (2d Cir. 1972)); *see also Stroik v. Ponseti*, 35 F.3d 155, 157 (5th Cir. 1994) ("[A] verdict may not rest on speculation and conjecture."), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1692, 131 L. Ed. 2d 556 (1995). In *Love*, a civil conspiracy case, we held that in light of the defendant's direct testimony disavowing an agreement "and in view of the complete lack of any other direct evidence of a conspiracy, it is simply too speculative to draw an inference of conspiracy from the facts in this case." *Id.* at 711. Similarly, in the absence of any direct evidence that AGCO actually adopted Sprecher's proposed strategy alternative, and in light of the direct evidence suggesting that AGCO had not adopted a plan to "go direct" at the time Gaskill became an AGCO representative, it is purely speculative whether AGCO adopted the plan before July of 1989.

In sum, the direct evidence and reasonable inferences from it

point so strongly in the direction of a finding that as of July, 1989, AGCO had not adopted a plan to "go direct" in northern Alabama that we conclude that reasonable jurors could not arrive at a contrary conclusion. *See Boeing*, 411 F.2d at 374 ("If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable [jurors] could not arrive at a contrary verdict, granting of the motion[] is proper.") Consequently, because the record contains insufficient evidence that Ross and Bachmann's representations that AGCO did not have a plan to "go direct" in the northern Alabama territory were false when made and that Ross and Bachmann knew the representations to be false when made, Gaskill's fraud claim necessarily fails with respect to the first alleged misrepresentation. *See DeSantis*, 793 S.W.2d at 689 (holding that fraud counterclaim failed as a matter of law because counter-plaintiff failed to prove each element of fraud claim, including that statements were false when made and that defendant knew statements were false).

2

Gaskill's proof that Ross and Bachmann falsely promised that Gaskill would not be terminated in the short term provided it "did its job" fails for similar reasons. Because AGCO's alleged misrepresentations involved a promise not to perform an act in the future, Gaskill was required to prove that AGCO had no intention of keeping its promise at the time it made the representations. *See T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 222 (Tex.

1992) ("Because the representation in this case involves a promise to do an act in the future, Petitioners also had to prove that at the time the [counter-defendant's] representative made the promise, the [counter-defendant] had no intention of performing the act."); *see also In re Haber Oil Co.*, 12 F.3d 426, 437 (5th Cir. 1994) (noting that under Texas law "a promise of future performance does not constitute actionable fraud unless the promisor did not intend to perform at the moment he made his promise").

Gaskill argues that Ross and Bachmann could not have intended to keep their promise that Gaskill would not be terminated as long as it performed well because AGCO had already adopted a plan to replace its independent representative in northern Alabama with a corporate-owned sales company. For the reasons stated in part II.A.1, we hold that the evidence in the record is insufficient to support a finding that Ross and Bachmann intended to terminate Gaskill in the short term pursuant to a plan to "go direct" at the time they negotiated the Agreements. Because Gaskill's proof of AGCO's intent not to perform was insufficient, its fraud claim based on Ross and Bachmann's promise not to terminate Gaskill in the short term as long as it performed well fails as a matter of law. *See T.O. Stanley Boot Co.*, 847 S.W.2d at 222 (holding that fraud claim based on false promise failed in the absence of proof of intent not to perform).[17]

[17] With respect to Jef Gaskill's version of Ross and Bachmann's assurances, that is, that Ross and Bachmann stated that the 60-day termination clause was simply a "moral escape clause," we note that under Texas law, a

AGCO further argues that Gaskill produced insufficient evidence to support a finding that AGCO knowingly misrepresented that "there was between $300-400,000 in existing business in the northern Alabama territory." Whether Gaskill supported its fraud claim with respect to AGCO's estimate of the value of the northern Alabama territory depends on whether Gaskill proffered sufficient evidence that Ross and Bachmann knew their representations were false when made. *See Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995) ("A statement of value is actionable if the speaker knows it is false.").

The Gaskills testified that Ross and Bachmann told them during their negotiations over the Agreements that Blythe's Alabama territory had "between $300,000 and $400,000 worth of existing business." Ross and Bachmann confirmed that they had indeed represented AGCO's sales in the territory to be worth $300,000-$400,000. Ross and Bachmann testified that they had relied on Blythe's estimates of the value of the business in the northern Alabama territory because the only figures AGCO could compile were Blythe's total net bookings for his territory, which included Georgia, the Carolinas, and eastern Tennessee.

Jef Gaskill testified that he recognized at the time that the

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"representation as to the legal effect of a document is regarded as a statement of opinion rather than of fact and will not ordinarily support an action for fraud." *Fina Supply, Inc. v. Abilene Nat'l Bank*, 726 S.W.2d 537, 540 (Tex. 1987); *accord Eagle Properties, Ltd. v. Sharbauer*, 807 S.W.2d 714, 723 (Tex. 1990).

estimate was an "educated approximation," and he testified that while he knew at the time of trial where the estimates had come from, he had no way of knowing whether Ross and Bachmann actually relied on Blythe's estimates. In addition, he testified that he had not seen any numbers contradicting AGCO's estimate.[18]

Moreover, it is undisputed that Gaskill's sales actually were consistent with Ross and Bachmann's estimate. Gaskill's net bookings for the period from July 11, 1989, the date Gaskill signed the Agreements, through the end of July, 1990, totalled $313,295. Gaskill's net bookings for calendar years 1990 and 1991, the only two full calendar years it sold AGCO products, totalled $572,051 and $346,744, respectively.

Because there is no evidence in the record to support a finding that Ross or Bachmann falsely represented the value of the northern Alabama territory, or that they knew their estimate of the value of the territory was false, Gaskill's fraud claim with respect to this alleged misrepresentation fails as a matter of law. *See Faircloth*, 898 S.W.2d at 276-77 (holding that fraud claim failed as a matter of law because no evidence existed that statement of value was false or that defendant's agent knew

[18] The only documentary evidence in the record regarding the volume of Blythe's business in the Alabama territory is Defendant's Exhibit 802, a list of outstanding quotes that Blythe provided AGCO in July, 1989, which total approximately $500,000, and Defendant's Exhibit 801, a letter from Blythe to AGCO in which he forecasts sales for his three major Alabama accounts, not the entire territory, to be $225,000.

statement of value was false when made).[19]

4

AGCO also argues that there is insufficient evidence in the record to support a finding that AGCO misrepresented its intent to allow Gaskill to expand into the Georgia territory. It is undisputed that Bachmann and Ross told the Gaskills that if AGCO terminated Blythe's representation of the Georgia territory, Gaskill would be considered as a replacement. However, Gaskill points to no evidence other than the evidence supporting its secret plan theory to support a finding that Ross and Bachmann misrepresented AGCO's intent to consider Gaskill for the Georgia territory.

Furthermore, overwhelming direct evidence shows that AGCO *did* consider Gaskill for the Georgia territory. Consequently, we hold that the evidence was insufficient to support a finding that AGCO misrepresented its intent to consider Gaskill for the territory. *See Boeing*, 411 F.2d at 374 ("If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable [jurors] could not arrive at a contrary verdict, granting of the motion[] is proper."). Because Gaskill's

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[19] The Gaskills did testify that Ross had told them that most of the business in the northern Alabama territory would come from SONAT, and that SONAT could be expected to produce $300,000 of the $300-400,000 worth of business in the territory. SONAT actually produced much less than $300,000 in 1990, and consequently, Ross' estimate with respect to SONAT did turn out to be wrong. However, there is no evidence in the record that the Gaskills relied on how the aggregate estimate of $300,000 to $400,000 was apportioned between major accounts in deciding whether to enter into the Agreements. Under Texas law, a party must have acted in reliance on an alleged misrepresentation for the representation to support a claim for fraud. *See Eagle Properties*, 807 S.W.2d at 723.

proof was insufficient to sustain a finding that Ross and Bachmann falsely promised to consider Gaskill for the Georgia territory, Gaskill's fraud claim based on these alleged representations fails as a matter of law. *See T.O. Stanley Boot Co.*, 847 S.W.2d at 222 (holding that fraud claim failed in the absence of proof of intent not to perform).

5

Gaskill similarly failed to prove that Ross and Bachmann falsely assured Gaskill that Keystone would not influence AGCO's relationship with Gaskill. During the contract negotiations, Joe Gaskill raised his concerns that Art French, an employee of Keystone, might interfere with AGCO's relationship with Gaskill. French had formerly worked for Fisher Controls, and bad feelings persisted between Gaskill and French stemming from Fisher Controls' termination of Gaskill.

Again, however, Gaskill presented no evidence that Ross and Bachmann's representations were false, as is required to support a fraud claim. *See T.O. Stanley Boot Co.*, 847 S.W.2d at 220; *DeSantis*, 793 S.W.2d at 698. In fact, the magistrate judge precluded Gaskill from doing so when she granted AGCO's motion in limine to exclude "any evidence, mention, reference or inference, that A.L. French or his employer, Keystone International ("Keystone") had or `must have had' some involvement in AGCO's decision to terminate the Agreements in question since Gaskill's claims in this regard are mere speculation." Record on Appeal,

vol. 8, at 1446 (motion); Record on Appeal, vol. 15, at 106 (magistrate judge's ruling). Gaskill does not challenge this ruling on appeal, and it has pointed to no evidence in the record that would support a finding that Ross and Bachmann falsely represented that Art French and Keystone would not interfere with AGCO's relationship with Gaskill. Consequently, because there is insufficient evidence to support an inference that Ross and Bachmann's reassurances were false, Gaskill's fraud claim fails as a matter of law. *See DeSantis*, 793 S.W.2d at 698.

In summary, we conclude that the record contains insufficient evidence to support a jury's finding that AGCO made misrepresentations knowing them to be false when made. Consequently, we affirm, on these alternative grounds, the magistrate judge's entry of judgment as a matter of law on Gaskill's fraud counterclaim.

B

Gaskill also appeals from the magistrate judge's amendment of the final judgment to include a declaration that AGCO "properly exercised its contractual right to terminate the Agreements between AGCO and [Gaskill] and that AGCO has no liability to [Gaskill] under such Agreements or pursuant to any state or federal statutory or common law." Gaskill argues that AGCO waived its right to obtain such a declaration by failing to move for judgment as a matter of law, or directed verdict, on the issues underlying the declaratory judgment. AGCO argues that because its entitlement to

a declaration of nonliability depended solely on questions of law, that is, the effect of Gaskill's admissions, the parties' stipulations, and the magistrate judge's rulings on Gaskill's counterclaims, there was no need to challenge the sufficiency of the evidence supporting its claim before the case was submitted to the jury.[20] In its reply brief, Gaskill argues that the "or pursuant to any state or federal statutory or common law" language of the declaratory judgment encompasses Gaskill's permissive counterclaims, i.e., its claims "not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim," Fed. R. Civ. P. 13(b), as to which AGCO offered no evidence and made no other showing of entitlement.[21]

The thrust of Gaskill's argument on this issue is unclear. Gaskill cites no relevant authority for its argument, and we have found none. However, reading Gaskill's brief and reply brief together, it is clear that its complaint is limited to that part of the declaration that could be read to have adjudicated its permissive counterclaims, counterclaims concerning which there were

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[20] *See Hiltgen v. Sumrall*, 47 F.3d 695, 699 (5th Cir. 1995) ("A motion for a judgment as a matter of law (previously, motion for directed verdict or J.N.O.V.) in an action tried by jury is a challenge to the legal sufficiency of the evidence supporting the jury's verdict."). The two basic purposes of a motion for judgment as a matter of law are "to enable the trial court to re-examine the sufficiency of the evidence as a matter of law if, after verdict, the court must address a motion for judgment as a matter of law, and to alert the opposing party to the insufficiency of his case before being submitted to the jury." *MacArthur v. University of Tex. Health Center*, 45 F.3d 890, 897 (5th Cir. 1995).

[21] Gaskill does not argue that the district court erred by granting a declaration of nonliability with respect to its compulsory counterclaims. *See Park Club, Inc. v. Resolution Trust Corp.*, 967 F.2d 1053, 1058 (5th Cir. 1992) (stating test for determining whether counterclaim is compulsory).

no facts presented at trial, no questions submitted to the jury, and no motions for judgment as a matter of law. AGCO, on the other hand, does not appear to have ever requested a declaration of nonliability with respect to Gaskill's permissive counterclaims.

Gaskill has not argued that it has permissive counterclaims that it fears will be barred by the amended final judgment, and we do not address the issue whether a given counterclaim would have been permissive or compulsory. Rather, (1) because the parties' dispute appears to be largely a function of the ambiguously overbroad language in the amended final judgment, "or pursuant to any state or federal statutory or common law," (2) because AGCO clearly intended the declaratory judgment to encompass only Gaskill's compulsory counterclaims, and (3) because AGCO made no showing to support any broader declaration, we interpret the declaratory judgment to be limited to a declaration that AGCO has no liability to Gaskill Co. under the Agreements or pursuant to any state or federal statutory or common law, except to the extent that Gaskill may assert claims that would not have been compulsory counterclaims within the meaning of Rule 13 of the Federal Rules of Civil Procedure.

III

For the foregoing reasons, we **AFFIRM**.