IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re ESSAR STEEL MINNESOTA LLC and ESML HOLDINGS INC.,[1] Debtors.	Chapter 11 Case No. 16-11626 (BLS) (Jointly Administered) **Related to Docket No. 789, 869, 871 and 872**

GREAT LAKES GAS TRANSMISSION LIMITED PARTNERSHIP'S RESPONSE TO OBJECTIONS TO DEBTORS' RULE 9019 MOTION FILED BY THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND U.S. BANK NATIONAL ASSOCIATION

Creditor Great Lakes Gas Transmission Limited Partnership ("**Great Lakes**") hereby files this Response to Objections to Debtors' Rule 9019 Motion Filed by the Official Committee of Unsecured Creditors ("**the Committee**") and U.S. Bank National Association ("**U.S. Bank**"). In support, Great Lakes respectfully represents as follows:

I. PRELIMINARY STATEMENT

In October 2009, Great Lakes filed suit for breach and repudiation of a natural gas transportation contract and tariff against Debtor Essar Steel Minnesota LLC n/k/a Mesabi Metallics Company LLC's ("**ESML**") and its affiliates, Essar Steel Limited f/k/a Essar Steel Holdings, Ltd.; Essar Steel India Limited f/k/a Essar Steel Limited; and Essar Global Fund Ltd. f/k/a Essar Global Limited (collectively, "**the Essar Co-Defendants**") in the United States District Court for the District of Minnesota. Over the course of the next several years, the district court, as a matter of law, rejected each of ESML's and the Essar Co-Defendants' counterclaims, determined that ESML breached and repudiated the contract, and held that each and every one of

[1] The last four digits of Essar Steel Minnesota LLC's federal taxpayer identification number are 8770. The last four digits of ESML Holdings Inc.'s federal taxpayer identification number are 8071.

ESML's defenses were factually and legally meritless. After conducting extensive discovery and numerous depositions, the Essar Co-Defendants made an offer of judgment to be liable for any amounts assessed against ESML. Finally, in August 2015, a jury awarded Great Lakes approximately $32.9 million for its claims.

Although the Eighth Circuit Court of Appeals recently determined the district court lacked subject-matter jurisdiction, Great Lakes has a virtually identical lawsuit pending in state court in Minnesota against the same defendants for the same claims. Indeed, having had the benefit of a six-year "dry run" culminating in a jury verdict, ESML wisely agreed to the full amount of Great Lakes' claim. In exchange, Great Lakes agreed to withdraw its objection to release of the supersedeas bond posted in ESML's favor before the appeal process is complete so that approximately $22 million would be immediately available to the estate.[2] Bankruptcy courts favor such settlements because they minimize litigation and expedite the administration of the bankruptcy estate for the benefit of all creditors.

Great Lakes' and ESML's agreement is memorialized in the certificates of counsel filed on March 11, 2017 (Dkt Nos. 785, 786), as well as Debtors' First Amended Disclosure Statement filed on March 16, 2017 (Dkt No. 808 at 25). Neither the Committee nor U.S. Bank objected. On March 20, 2017, pursuant to Great Lakes' and ESML's agreement, the district court ordered release of the supersedeas bond to the estate.

Now, only after the estate has received the benefit of the $22 million collateral securing the bond, the Committee and U.S. Bank object to ESML's Rule 9019 motion based on nothing more than on the purported strength of ESML's counterclaims and defenses to Great Lakes' claim, which already have been rejected by a federal court. Tellingly, even the Debtors do not

[2] Because Great Lakes still has time to pursue certiorari in the United States Supreme Court, the appeal process is incomplete.

dispute that a United States District Court rejected, as a matter of law, each and every one of ESML's and the Essar Co-Defendants' claims and defenses over the course of six years of litigation. That litigation was protracted and costly for both sides. In fact, ESML and the Essar Co-Defendants employed five law firms, including Fried Frank, Paul Hastings, the second-largest firm in Minnesota—Fredrikson & Byron, and a prominent local trial firm that was retained to handle the three-day trial in Duluth. Despite being ably and tenaciously represented, ESML and the Essar Co-Defendants lost at each and every turn because their claims and defenses simply had no merit.

The Committee's and U.S. Bank's objections to the Rule 9019 motion are particularly confounding, since re-litigation of Great Lakes' claim potentially will cost the estate millions it does not have. The estate has approximately $2 billion in unsecured claims, and there will be no distributions to unsecured creditors unless the estate wins additional funds through adversary litigation. There simply is no reason to spend money to fund another round of costly litigation against Great Lakes that will once again reach the same result. The Debtors already recognize this, and have agreed to Great Lakes' claim. The Committee and U.S. Bank, however, cannot explain why fighting this claim will do anything but further diminish the estate's already non-existent resources.

The judgment will allow Great Lakes to proceed with its claim in the state court in Minnesota, where its claims against the non-debtor Essar Co-Defendants remain pending. U.S. Bank characterizes this agreement as an attempt to do "mischief," but its argument is without merit. Great Lakes is seeking recovery against three non-debtors, which recovery will not impede the bankruptcy process or diminish the estate in any way. Although ESML has filed an adversary proceeding against one of those non-debtors—Essar Global Fund Ltd. f/k/a Essar

Global Limited ("**Essar Global**")—the claims asserted in the adversary proceeding are not mutually exclusive of Great Lakes' pending claims in Minnesota. Great Lakes' claims against the Essar Co-Defendants, including Essar Global, are personal to Great Lakes and could not have been brought by ESML both because they are not claims belonging to the estate and because they would have been time-barred as of the commencement of the bankruptcy. Accordingly, Great Lakes has standing to pursue its claims, and entry of a judgment in Great Lakes' favor in order to aid its pursuit of the non-debtors in Minnesota will not be detrimental to the estate.

For all of these reasons and as discussed further herein, the Court should approve ESML's Rule 9019 motion and reject the Committee's and U.S. Bank's objections.

II. RELEVANT BACKGROUND

A. The underlying dispute between Great Lakes and ESML.

On November 30, 2006, Great Lakes and ESML's predecessor Minnesota Steel Industries, LLC ("**MSI**") entered into a Transportation Services Agreement (Contract Identification FT6496) ("**the TSA**"), whereby Great Lakes agreed to reserve capacity on its pipeline for transportation of up to 55,000 dekatherms of natural gas per day from July 1, 2009 to March 31, 2024 between certain receipt and delivery points. In consideration for this "firm capacity," MSI agreed to pay the monthly reservation rate approved by the Federal Energy Regulatory Commission ("**FERC**") and contained in Great Lakes' Tariff beginning in August 2009.

In October 2007, MSI's assets and obligations, including the TSA, were purchased and MSI's name was changed to ESML. ESML's first monthly payment under the TSA was due on August 17, 2009. ESML has never made a single payment and refused to provide Great Lakes with assurances that it intended to perform its obligations under the TSA. As a result of ESML's breach and repudiation of its obligations under the TSA and the Tariff, Great Lakes filed suit in October 2009 in the United States District Court for the District of Minnesota against ESML and the Essar Co-Defendants.

B. Litigation in the district court in Minnesota.

In a series of lengthy, well-reasoned opinions, the district court rejected each of ESML's claims and defenses as a matter of law. First, after two years of jurisdictional disputes, which ESML and the Essar Co-Defendants ultimately conceded, the district court granted Great Lakes' motion to dismiss ESML's counterclaims for failure to state a claim. (Exhibit 1). The district court rejected ESML's counterclaims for declaratory judgment that *force majeure* and temporary commercial impracticability/impossibility excused its performance, reasoning that the great weight of authority from around the country has rejected similar attempts to excuse performance based on the 2008 financial crisis. (*Id.* at 12–24). "It was completely foreseeable that ESML might not secure the necessary financing for the Nashwauk facility. Given that possibility, MSI/ESML could have conditioned its performance on obtaining such financing. It failed to do so." (*Id.* at 23). The district court also rejected ESML's counterclaim for conversion because that claim was premised entirely on ESML's unavailing argument that performance was excused. (*Id.* at 24–26).

Then, one year later, the district court considered the parties' cross-motions for summary judgment in a 48-page opinion. (Exhibit 2). The district court granted Great Lakes' motion for summary judgment on ESML's affirmative defenses of *force majeure* and commercial impracticability/impossibility, citing its prior opinion on Great Lakes' motion to dismiss ESML's counterclaims. (*Id.* at 30–33). The district court also determined, as a matter of law, that ESML anticipatorily repudiated the TSA and failed to marshal any evidence refuting that claim. (*Id.* at

33–44). Rejecting ESML's argument that it merely requested renegotiation, the district court held "the evidence shows that [ESML] sought to re-write the Contract, rather than to comply with its terms," and that ESML unreasonably refused to perform unless Great Lakes agreed to re-negotiate material terms, including price, volume, term, and commencement date. (*Id.* at 42). The district court also determined, after extensive analysis, that the limitation of liability clause in Great Lakes' Tariff does not limit Great Lakes' ability to recover damages for ESML's breach:

> The Limitations of Liability clause here can only be reasonably interpreted consistent with the contractual language as a whole to preclude liability for tort damages except for the enumerated acts. . . . In light of this permissible and reasonable construction, Defendants' proposed construction is simply not justified.

(*Id.* at 22). In fact, the district court noted that even if the contract language were ambiguous, the parol evidence in the record would lead the Court to "reach the same conclusion." (*Id.* at n.3).

Shortly thereafter, after several months of exchanging extensive paper discovery and numerous depositions related to Great Lakes' veil piercing claims, the Essar Co-Defendants made an offer of judgment, which Great Lakes accepted. (Exhibit 3). The Essar Co-Defendants agreed to "pay all damages determined by the Court to be recoverable by [Great Lakes] as a result of any judgment entered against [ESML] **in this case** for breach and anticipatory repudiation of the [contract] . . . ." (Doc. 639 at 1 (emphasis added)). As the Committee notes, it is Great Lakes' position that "this case" encompasses its ongoing dispute with ESML regarding its breach and repudiation of the TSA, and the Essar Co-Defendants remain bound by their offer of judgment.

In March 2014, the district court granted Great Lakes' second motion for summary judgment on ESML's defense based on mitigation. (Exhibit 4). The district court determined

Great Lakes established it had no reasonable options available to mitigate its damages and rejected as a matter of law ESML's argument that Great Lakes was required to renegotiate the TSA in order to mitigate. (*Id.* at 11–28). The district court explained:

> [T]here is no fact issue here because [ESML's] offer of "renegotiation" was an offer to possibly perform at some unknown time in the future, under different terms. The law does not require a plaintiff to accept such a speculative, radically different offer in mitigation of its damages under these circumstances. Requiring a plaintiff to do so, under these facts, would distort the law of contracts by permitting a breaching party to unilaterally dictate the terms of a significantly different, renegotiated contract.

(*Id.* at 28).

The parties retained experts to calculate the discount rate for Great Lakes' future damages pursuant to the district court's extensive analysis of the proper parameters for doing so. In a sealed opinion, the district court struck ESML's expert Laura Stamm's opinion that the discount rate should be an astonishingly high 20% because ESML's counsel failed to provide—and Ms. Stamm—failed to consider highly relevant data points. In a second sealed opinion, the district court declined ESML's request to reconsider its decision based on Ms. Stamm's after-the-fact affidavit, which flatly contradicted her deposition testimony. The district court once again explained at length its rationale for striking Ms. Stamm's legally insufficient testimony.[3]

In August 2015, the sole remaining issue of fact—the discount rate—was tried to a jury over three days. The jury returned a unanimous verdict in Great Lakes' favor, resulting in an award of $32,902,183.

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[3] U.S. Bank argues the district court erroneously struck ESML's expert and that ESML potentially could introduce new expert testimony in state court, where the standards for qualifying experts may be different. U.S. Bank's argument is perplexing, since if this case were re-litigated, it would be done in this Court, where the same standards for admissibility of expert testimony apply. As discussed, a federal district court already determined Ms. Stamm's testimony fell far short of those standards.

III. RESPONSE TO OBJECTIONS

A. The *Martin* factors weigh strongly in favor of approving the Rule 9019 settlement.

Compromises are favored in bankruptcy in order to minimize litigation and expedite the administration of the bankruptcy estate. *Myers v. Martin (In re Martin)*, 91 F.3d 389, 393 (3d Cir. 1996) (quoting 9 *Collier on Bankruptcy* ¶ 9019.03[1] (15th ed. 1993)). The bankruptcy court has discretion to approve a compromise after assessing and balancing the value of the claim to be settled against the value to the estate of settlement. *Id.* The four factors the court should consider are (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity, expense, inconvenience, and delay of litigation; and (4) the paramount interest of the creditors. *Id.* Here, the *Martin* factors weigh heavily in favor of accepting the Rule 9019 settlement, despite the Committee's tortured attempt to demonstrate to the contrary.

i. <u>ESML's likelihood of success in litigation is virtually zero.</u>

First, and most importantly, ESML's likelihood of success in re-litigating the dispute with Great Lakes is virtually zero. Although the Eighth Circuit ultimately determined the district court lacked subject matter jurisdiction to resolve the dispute, the court of appeals did not cast doubt upon the correctness of any of the district court's substantive determinations. As discussed in greater depth above, the district court issued a series of lengthy, well-reasoned opinions rejecting each and every one of ESML's (and the Essar Co-Defendants') counterclaims and defenses, and determining as a matter of law that ESML breached and repudiated the TSA without justification.

The Committee's and U.S. Bank's after-the-fact confidence in the merits of ESML's claims and defenses is simply unfounded, particularly in light of the fact that a United States

District Judge devoted six years and hundreds of pages of analysis to determine ESML's positions had no merit whatsoever. Even though the Eighth Circuit ultimately determined the district court lacked subject-matter jurisdiction, nothing has changed with respect to the merits of the underlying dispute, and the Essar Co-Defendants have stipulated to personal jurisdiction in state court in Minnesota. No new law or facts support a different outcome if this case is re-tried in this Court or in Minnesota state court.

In addition, the Committee erroneously argues ESML has a right to $1.2 million in costs. Eighth Circuit authority is clear: without an order from the court of appeals expressly awarding supersedeas bond premiums as costs under FED. R. APP. P. 39(a)(4) and (e), they are not available. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 497 F.3d 805, 808 (8th Cir. 2007). In this case, ESML did not seek taxation of supersedeas bond premiums, and the Eighth Circuit did not expressly award them. Accordingly, they are not recoverable.

ii. The likely difficulties of collection factor is inapposite here.

At this time, ESML has no pending claims against Great Lakes, so the likelihood of ESML's ability to collect against Great Lakes is not at issue. In the case the Committee relies upon—*In re Martin*—the court of appeals was tasked with assessing the likelihood that the **debtor** could collect damages **from the non-debtor defendant**. Because the debtor already had secured a judgment against a solvent non-debtor defendant at the time the trustee sought to settle the claim for a walk-away, the panel determined the proposed settlement was not in the best interests of the estate. *In re Martin*, 91 F.3d at 393.

Here, in contrast and for the reasons stated above, Great Lakes is almost certain to prevail, yet again, on its claim against ESML, which will entitle Great Lakes to a share of the recovery for unsecured creditors. Thus, to the extent unsecured creditors recover anything in this bankruptcy, Great Lakes' likelihood of recovery is high.

iii. As it was the first time, litigation will be complex, expensive, inconvenient, and lengthy.

Although, on its face, this dispute is rather straightforward, ESML and the Essar Co-Defendants raised every counterclaim and defense conceivable to defeat Great Lakes' claim. As a result, the litigation dragged on for six years and cost each side millions of dollars. As noted, ESML and the Essar Co-Defendants retained five law firms over the course of the litigation, including several of the most prominent firms in New York City and the Midwest. Ultimately, a United States District Court determined as a matter of law that ESML and the Essar Co-Defendants have no valid claims or defenses.

The Committee argues this factor weighs against Great Lakes because the costs of further litigation will burden Great Lakes. Whether litigation will burden Great Lakes, however, is immaterial to the Court's analysis of whether litigation will burden **the estate**. Great Lakes intends to seek recovery of the approximately $32.9 million it is owed by ESML and the Essar Co-Defendants and will re-litigate its claim in this Court if it is required to do so. The cost of that litigation will be borne by the estate, to the detriment of the unsecured creditors and the Debtor. There should be no dispute or any doubt that avoiding the cost and time needed to litigate this dispute any further is in the best interests of the estate.

iv. Settlement is in the best interest of all creditors.

As explained above, the Rule 9019 settlement will conserve estate resources by avoiding costly, lengthy litigation, which ultimately will benefit all creditors. The Committee's arguments to the contrary are not convincing. For instance, the Committee's statement that the settlement amount is "beyond the range of reasonableness" is without merit because there is no dispute that

Great Lakes' damages are limited to value of the contract discounted to net present value. Unlike a speculative personal injury claim, for instance, where the creditor-plaintiff is seeking a potentially broad range of damages, Great Lakes' damages already have been established. Also, as discussed, there is no merit to the argument that the settlement purports to forego any likelihood that ESML will recover $1.2 million in supersedeas bond premiums in the district court.

In addition, as discussed further below, Great Lakes is not seeking to "jump the line" of creditors of the Essar Co-Defendants. Rather, because Great Lakes has standing to pursue its pending claims against the Essar Co-Defendants in Minnesota state court, a judgment entered in this Court will facilitate resolution of that dispute and will not harm the estate in any way.

For all of these reasons, the *Martin* factors weigh strongly in favor of approving the Rule 9019 settlement in this case.

B. The Court should approve entry of a judgment in favor of Great Lakes.

i. Entry of a judgment in Great Lakes' favor will not harm the estate or the other creditors.

The Rule 9019 settlement envisions that the Court will enter a judgment in favor of Great Lakes against ESML in the full amount of the unsecured claim. The Committee claims it is unaware of any basis for entry of such a judgment but fails to cite any authority that would prohibit it. Indeed, a judgment will not harm the estate, since Great Lakes' unsecured claim would be allowed in full regardless of whether it also receives a judgment. Nor will a judgment favor Great Lakes to the detriment of other creditors, since it will do nothing to advance Great Lakes' claim to the front of the line. Great Lakes certainly does not contend, as the Committee suggests, that entry of a judgment will elevate its claim to secured status.

Rather, the value of a judgment is personal to Great Lakes and will not harm the estate or the other unsecured creditors in any way. Great Lakes seeks a judgment it can enter in state court in Minnesota in order to pursue the Essar Co-Defendants there, not ESML. The Essar Co-Defendants stipulated to personal jurisdiction in Minnesota and agreed to be liable for any **judgment** entered against ESML arising out of the dispute with Great Lakes. It is Great Lakes' position that the Essar Co-Defendants are jointly and severally liable for that judgment. Importantly, if Great Lakes prevails and recovers against the Essar Co-Defendants (none of which are debtors), there will be no need for Great Lakes to take a share of the unsecured creditors' recovery against ESML, increasing the value of the pot available to all other creditors. In other words, if Great Lakes is successful in state court, it may actually benefit the estate.

The Committee's argument that Great Lakes is seeking to jump the line to collect against Essar Global before the estate is simply not accurate. Great Lakes has been locked in litigation against Essar Global (and ESML and the other Essar Co-Defendants) since October 2009. Great Lakes has devoted over seven years and millions of dollars in its attempt to recover the approximately $32.9 million it lost as a consequence of ESML's breach and repudiation of the TSA. ESML waited until the eve of the first trial setting in October 2014 to assert, for the first time, that the district court lacked subject-matter jurisdiction to resolve the dispute, despite stipulating to the contrary years earlier. Jurisdiction was only raised because ESML and the Essar Co-Defendants had lost each and every claim and defense over the course of five years of litigation. Great Lakes is not seeking an advantage over other creditors but merely seeking to conclude litigation with the non-debtor Essar Co-Defendants that has dragged on for over seven years at great expense.

ii. <u>Great Lakes has standing to pursue its claims against the Essar Co-Defendants.</u>

The Committee erroneously argues Great Lakes' claims against the Essar Co-Defendants belong to the estate, not Great Lakes. Those claims are: (1) piercing the corporate veil and/or liability based on alter ego/mere instrumentality; (2) joint enterprise/joint venture liability; and (3) agency liability. (Exhibit 5 at ¶¶ 62–70). The fundamental question is whether the debtor, pursuant to state law, could have raised these claims as of the commencement of the bankruptcy. *Highland Capital Mgmt. LP v. Chesapeake Energy Corp. (In re Seven Seas Petroleum, Inc.)*, 522 F.3d 575, 584 (5th Cir. 2008). If a claim alleges only indirect harm to a creditor derived from direct harm to the debtor, then the debtor owns the claim. *Id.* If a claim does not alleged harm to the debtor, then the cause of action could not have been asserted by the debtor and is not property of the estate. *Id.*

The Committee argues Great Lakes' claims belong to the estate because ESML already has asserted veil piercing claims against Essar Global and other affiliated entities in an adversary proceeding ("**the Adversary**"). ESML has not asserted any claims against two of the three Essar Co-Defendants in Great Lakes' suit. And, even if it had, "it is entirely possible for a bankruptcy estate and a creditor to own separate claims against a third party arising out of the same general series of events and broad course of conduct." *Seven Seas*, 522 F.3d at 585. What is critical is not the type of claim, but rather the nature of the injury alleged. *See id.* Even alter ego/veil piercing claims, which often belong to the estate, cannot be asserted by the debtor if the injury alleged is unique to a specific creditor, as it is here. *See Lumpkin v. Envirodyne Indus., Inc.*, 933 F.2d 449, 463 (7th Cir. 1991) (alter ego claims could not be asserted in bankruptcy because they were not claims of creditors generally, but rather unique to former employees); *Segner v. Sinclair Oil & Gas Co.*, No. 3:11-cv-03606, 2012 WL 12885055, at *6 (N.D. Tex. June 4, 2012) (claims for partnership and joint enterprise, among others, did not belong to estate because they alleged direct injury to the plaintiff-creditors themselves, not the estate generally).

In this case, Great Lakes' claims are specific to Great Lakes' particular injury. Great Lakes asserts veil piercing claims against the Essar Co-Defendants for their role in causing ESML to breach and repudiate the TSA. Great Lakes has a lawsuit pending in state court, filed within the statute of limitations, and the Essar Co-Defendants have made an offer of judgment. If Great Lakes prevails in state court, the Essar Co-Defendants will be liable only for the amount of any damages arising out of that breach and repudiation. In contrast, the Adversary asserts much broader claims against Essar Global and others related to an alleged scheme to divert over $1.1 billion from ESML to Essar affiliates belongs to the estate. The Adversary alleges direct harm to the Debtor, whereas Great Lakes' claims allege harm to Great Lakes only. Thus, Great Lakes' claims do not belong to the estate.

Further, ESML could not have raised Great Lakes' claims as of the commencement of the bankruptcy on July 8, 2016 because the applicable statute of limitations would have barred it from doing so. The TSA contains a choice of law provision designating Michigan law to apply to any controversy between Great Lakes and ESML. The Michigan statute of limitations for breach of contract is six years from the date the claim accrued. MICH. COMP. LAWS § 600.5807(8). In this case, Great Lakes' claim accrued in August 2009, which means it must have been brought by no later than August 2015. Accordingly, even if the claim belonged to the estate (it did not), it would have been time-barred as of the commencement of the bankruptcy and could not have been brought by the estate.

V. CONCLUSION

WHEREFORE, Great Lakes respectfully requests entry of an order (i) approving the Rule 9019 Motion, and (ii) granting Great Lakes such other and further relief as the Court deems just and proper.

Dated: April 21, 2017

Respectfully submitted,

/s/ Tobey M. Daluz

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EXHIBIT 1

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Great Lakes Gas Transmission Limited Partnership,

Plaintiff,

v.

Essar Steel Minnesota, LLC; Essar Steel Holdings, Ltd.; Essar Steel Limited; and Essar Global Limited, a/k/a Essar Group,

Defendants.

Essar Steel Minnesota, LLC,

Counterclaimant,

v.

Great Lakes Gas Transmission Limited Partnership,

Counterclaim Defendant.

Civil No. 09-CV-3037 (SRN/LIB)

MEMORANDUM OPINION AND ORDER

Barbara L. Wohlrabe, Susan D. Nassar, and David W. Elrod, Elrod PLLC, 500 North Akard Suite 3000 Dallas, Texas 75201; David T. Schultz and Julian C. Zebot, Maslon, Edelman, Borman & Brand, LLP, 90 South Seventh Street Suite 3300, Minneapolis, Minnesota, 55402, for Plaintiff and Counterclaim Defendant

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SUSAN RICHARD NELSON, United States District Court Judge

This matter is before the Court on Plaintiff's Motion to Dismiss for Failure to State a

Exhibit 1

Claim and to Strike Defendant's Pleading [Doc. No. 364]. For the reasons that follow, Plaintiff's motion is granted.

I. BACKGROUND

In October 2009, Plaintiff Great Lakes Gas Transmission Limited Partnership ("Great Lakes") filed a breach of contract action against Defendant Essar Steel Minnesota, LLC ("ESML"), and its affiliated entities, Essar Steel Holdings, Ltd., Essar Steel Limited, and Essar Global Limited, a/k/a Essar Group (collectively, the "Essar Entities"). ESML subsequently filed a counterclaim against Great Lakes and filed third-party claims against nine entities related to Great Lakes: TC GL Intermediate Limited Partnership, TC Pipelines, LP, TC Pipelines GP, Inc., TransCan Northern, Ltd., TransCanada Pipeline USA, Ltd., TransCanada Pipelines Ltd., TransCanada Corporation, Great Lakes Gas Transmission Co., and TransCanada GL, Inc. (the "TransCanada Entities").[1] Pursuant to a stipulation of the parties, on March 1, 2012, the Court dismissed the third-party claims against the nine TransCanada Entities. (Order of 3/1/12 [Doc. No. 396].) Accordingly, portions of Plaintiff's instant motion regarding the TransCanada Entities are now moot. The Court therefore confines its discussion to arguments related to Great Lakes and ESML.

In its Amended Complaint, Great Lakes alleges that it owns and operates a natural gas pipeline, which transports over 2.2 billion cubic feet of natural gas per day through 2,100 miles of pipeline. (Am. Complaint ¶ 12 [Doc. No. 35].) The pipeline extends from the Minnesota-Manitoba border at Emerson, Manitoba, to the Michigan-Ontario border at St. Clair, Ontario, and

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[1] While the Essar Defendants filed a joint answer to the Amended Complaint, the Counterclaim is asserted solely by Defendant ESML. (Counterclaim [Doc. No. 80].)

Exhibit 1

"serves as a link between western Canada's natural gas basin and major industrial and market centers in Minnesota, Wisconsin, Michigan, and eastern Canada." (Id.) Great Lakes alleges that it offers the use of its pipeline to shippers of natural gas for a rate that is regulated by the Federal Energy Regulatory Commission ("FERC"). (Id. ¶ 13.)

Defendant ESML is a Minnesota company affiliated with the other Essar entities, which are engaged in manufacturing and the provision of services in various industries, including the steel industry. (Am. Compl. ¶ 15 [Doc. No. 35].) In 2007, Essar Steel Holdings, the sole member of ESML, acquired the membership units of a company known as Minnesota Steel Industries ("MSI"), which was renamed Essar Steel Minnesota, LLC. (Counterclaim ¶ 3-4 [Doc. No. 80].) The Essar Entities purchased MSI for the purpose of constructing a steel plant in Nashwauk, Minnesota. (Id.) As alleged in ESML's Counterclaim, for several years, MSI had been developing plans to construct a fully-integrated steel making facility, which, when operational, would require natural gas as an energy source. (Id. ¶ 20.)

The parties' claims in this action arise from a September 6, 2006 contract between Great Lakes and MSI (the "Contract"). (Am. Compl. ¶ 17 [Doc. No. 35]; Contract, Ex. 1 to Aff. of Barbara Wohlrabe [Doc. No. 347-1].) There appears to be no dispute that ESML acquired the membership interests of MSI, and that the terms of the Contract are binding on ESML. Under the general terms of the Contract, which is also referred to by the parties as the Transportation Services Agreement, or "TSA," Great Lakes agreed to transport up to 55,000 dekatherms of natural gas per day on MSI's behalf, from its Emerson receipt point to its Carlton delivery point, or to "a new location near Mile Post 228." (Contract, App. A, Ex. 1 to Wohlrabe Aff. [Doc. No. 347-1].) Defendant ESML alleges that the "new location" is a yet-to-be constructed delivery point on the Great Lakes pipe system, which would connect Great Lakes' pipeline with a yet-to-be constructed pipeline to transport gas to the steel facility in Nashwauk. (Counterclaim ¶ 3 [Doc. No. 80].) The Contract term began running on July 1, 2009 and continues through March 31, 2024. (Contract, Ex. 1 to Aff. of Barbara Wohlrabe [Doc. No. 347-1].) ESML alleges that the parties intended for performance of the Contract to coincide with the commencement of operations at the contemplated new steel facility in Nashwauk, Minnesota. (Counterclaim ¶ 28 [Doc. No. 80].)

As consideration for the transportation services, Plaintiff alleges that MSI agreed to pay the rates indicated in the Contract, which included the rate schedule reflected in Great Lakes' FERC Gas Tariff (the "Tariff"). (Am. Compl. ¶ 17 [Doc. No. 35].) However, ESML contends that during contract negotiations, Great Lakes misrepresented the cost of its service to transport gas. (Counterclaim ¶ 25 [Doc. No. 80].) ESML further contends that Great Lakes has misrepresented its costs to other customers, leading FERC to commence regulatory proceedings against Great Lakes. (Id. ¶ 26.) Plaintiff alleges that under the Contract, the reservation fee for the agreed-upon transportation was to be paid monthly. (Am. Compl. ¶ 20 [Doc. No. 35].) Great Lakes contends that Defendants failed to make the first payment of $190,190, due on August 17, 2009, and have consistently failed and refused to make payments. (Id.)

The Contract incorporates the rates found in the Tariff, as well as the general terms and conditions set forth in the Tariff. (Contract ¶ 12, Ex. 1 to Wohlrabe Aff. [Doc. No. 347-1].) One such general term or condition is the Tariff's *force majeure* clause. The clause enumerates various types of circumstances excusing the parties' liability to each other in damages. Among other things, the clause enumerates acts of God, strikes, natural disasters and labor strikes and

Exhibit 1

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further provides that liability may be excused for:

> any other cause, whether the kind herein enumerated or otherwise, and whether caused or occasioned by or happening on account of the act or omission of one of the parties hereto or some person or concern not a party hereto, not within the control of the party claiming suspension and which by the exercise of due diligence such a party is unable to prevent or overcome.

(Tariff ¶ 10.1, Ex. B to Counterclaim [Doc. No. 80-2 at 48].) (emphasis added).

Immediately following the *force majeure* clause, the remedy section of the Tariff provides that such circumstances or contingencies affecting the parties' respective performance do not relieve it from liability "in the event of concurring negligence," nor do such circumstances relieve it "from its obligation to make payments of amounts then due thereunder. . . ." (Tariff ¶ 10.2, Ex. B to Counterclaim [Doc. No. 80-2 at 48].)

Pursuant to the Contract, MSI obtained a letter of credit ("Letter of Credit") in the amount of $580,000, for which Great Lakes is the beneficiary, MSI is the borrower and American Bank of the North is the lender. (Counterclaim ¶ 37 [Doc. No. 80]; Letter of Credit, Ex. C to Counterclaim [Doc. No. 80-3].) Under the terms of the Letter of Credit, if MSI fails to make payment consistent with the Contract, Great Lakes may draw upon the Letter of Credit for reimbursement. (Letter of Credit, Ex. C to Counterclaim [Doc. No. 80-3].)

ESML contends that while it intended to secure funding for construction of the steel facility in Nashwauk, the intervening 2008 global financial crisis made it difficult to do so. (Counterclaim ¶¶ 39-58 [Doc. No. 80].) Specifically, ESML alleges that global demand for steel plummeted in 2008 and 2009, forcing steel prices to a six-year low. (Id. ¶¶ 49-51.) ESML contends that the "credit freeze, the world-wide economic problems, and the depression of steel prices have inhibited ESML from obtaining financing for the [Nashwauk] Facility." (Id. ¶ 55.)

Consequently, ESML alleges that until it secures financing, it cannot commence construction of the steel plant in Nashwauk. (Id. ¶ 56.) Alleging that its inability to secure financing was outside its control, and that it could not otherwise obtain financing, ESML has invoked the *force majeure* clause of the Tariff, alleging that "the slump in steel prices constitutes an event that permits ESML to delay its performance . . . ." (Id. ¶ 58.)

In the first count of its three-count Counterclaim, ESML seeks a declaratory judgment that its duty to perform pursuant to the Contract is excused in light of its inability to obtain financing for the Nashwauk facility. (Id., Count I.) In the alternative, in its second count, ESML seeks a declaratory judgment that its performance is excused under the doctrine of temporary commercial impracticability/impossibility. (Id., Count II.)

ESML contends that Great Lakes rebuffed its efforts to resolve the contractual dispute and instead, on November 20, 2009, drew upon the Letter of Credit. (Id. ¶ 69.) This action forms the basis for ESML's count of conversion in its Counterclaim. (Id., Count III.) In this count, ESML alleges that Great Lakes had no basis for drawing upon the Letter of Credit, as ESML's non-performance under the Contract was excused by the *force majeure* clause. (Id.)

ESML pled three additional counts in its Counterclaim in which it sought to establish derivative liability against former Third-Party Defendants, the TransCanada entities, based on theories of piercing the corporate veil, alter ego/mere instrumentality, joint enterprise/joint venture and agency liability. (Id., Counts IV-VI.) Because Defendants voluntarily dismissed the TransCanada entities from the case, these derivative counterclaims against the TransCanada entities are now moot and are therefore dismissed. Plaintiff answered the Counterclaim [Pl's Reply to ESML's Counterclaim, Doc. No. 91], and now moves to dismiss pursuant to Fed. R. Civ.

Exhibit 1

P. 12(b)(6). In addition, Plaintiff moves to strike Counts I and II of the Counterclaim, pursuant to Fed. R. Civ. P. 12(f).

In moving to strike Counts I and II of ESML's Counterclaim, Plaintiff argues that these counts for declarative relief are redundant and repetitious of ESML's affirmative defenses. In support of its Motion to Dismiss, Great Lakes contends that the Contract requiring ESML to make monthly payments to Great Lakes is separate and independent from ESML's plans to construct a steel facility in Nashwauk, Minnesota. The Contract, Great Lakes asserts, is unambiguous and is clear that ESML's obligations are not contingent upon constructing the steel facility or obtaining financing. (See Pl's Mem. Supp. Mot. Dismiss at 2 [Doc. No. 364].) Rather, Plaintiff argues, the Contract simply requires Great Lakes to transport natural gas, and for ESML to take the gas and pay for it. Great Lakes asserts that, regardless of whether ESML intends to use the gas or operate the steel facility, it is ESML's obligation to have a lateral pipeline constructed. Accordingly, Plaintiff argues that ESML's decision to delay construction of the steel facility and the lateral pipeline and its alleged inability to obtain financing are not excused by virtue of the *force majeure* clause or by the doctrines of impracticability/impossibility. (Id. at 3.)

In response, ESML argues that Plaintiff brings this motion under the incorrect procedural rule – Rule 12(b)(6) as opposed to Rule 12(c) – and the Court should therefore deny the motion as procedurally improper.[2] (ESML's Opp'n Mem. at 19 [Doc. No. 374].) On the merits, ESML

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[2] Because Third-Party Defendants were in the case at the time that ESML filed its response memorandum, ESML also argued that consideration under Rule 12(c) of Plaintiff's and Third-Party Defendants' Motions to Dismiss was also improper. Because Rule 12(c) motions may only be brought when the pleadings have closed, and because Third-Party Defendants had not answered the Third-Party Complaint, ESML argued that the motions to dismiss should be denied as premature. Because Third-Party Defendants have since been dismissed from the case and because Plaintiff has filed its Answer to ESML's Counterclaim, the Rule 12(c) requirement

contends that the broad language of the Contract's *force majeure* clause excuses its non-performance under the Contract and that it has stated a plausible claim for a declaratory judgment to that effect. (Id. at 22-27.) Likewise, ESML argues that it has pled a plausible claim for relief as to its alternative count for a declaratory judgment based on the doctrines of impossibility/impracticability. (Id. at 27-32.) Specifically, ESML contends that its performance should be excused in light of the unforeseeable worldwide financial crisis and its effect on ESML's ability to obtain financing. (Id.) Finally, ESML contends that it has presented a plausible claim that Great Lakes wrongfully converted the Letter of Credit funds that ESML posted as security. (Id. at 32-33.)

II. DISCUSSION

A. Standard of Review

Plaintiff purports to bring a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). ESML argues, however, that Great Lakes filed this motion after filing its answer to ESML's counterclaims and therefore, Plaintiff's motion is procedurally improper.[3] (See Pl's Reply to ESML's Counterclaims [Doc. No. 91].) Although the TransCanada Entities are no longer in this case, they were represented by the same counsel as Great Lakes, and, on the same

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of closed pleadings is met, and ESML's argument with respect to Rule 12(c) is moot.

[3] On July 2, 2010, Plaintiff filed its Reply to ESML's Counterclaim [Doc. No. 91] and also filed a motion to dismiss pursuant to Rule 12(b)(6) [Doc. No. 93]. In October 2010, the Court stayed the parties' Rule 12 motions while the parties conducted jurisdictional discovery [Doc. 190], and in January 2011, the Court ordered the parties to withdraw the pending Rule 12 motions without prejudice [Doc. No. 265]. In March 2011, pursuant to the Amended Pretrial Scheduling Order [Doc. No. 272], the Court ordered the parties to file all dispositive motions by September 1, 2011. On September 1, 2011, Plaintiff filed the instant motion in accordance with the scheduling order.

Exhibit 1

day that Plaintiff's instant motion was filed, the TransCanada Entities filed a motion to dismiss pursuant to Rule 12(c). Although that motion is no longer before the Court, ESML had argued that the TransCanada Entities' motion should have been styled as a Rule 12(b)(6) motion, since the TransCanada Entities had not yet filed their answer.

By its terms, Rule 12(b) provides that a party asserting a defense by motion, including a motion for failure to state a claim upon which relief can be granted, must assert such a defense before pleading, if a responsive pleading is allowed. Fed. R. Civ. P. 12(b) (emphasis added). Technically, therefore, a Rule 12(b)(6) motion cannot be filed after an answer has been submitted. Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir.1990).

> As a leading treatise observes, "A strict interpretation of [this] language leads to the conclusion that the district judge must deny any Rule 12(b) motion made after a responsive pleading is interposed as being too late." 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1361 (3d ed. 2004). But as that treatise also observes, as long as the defense of failure to state a claim has been asserted in the answer, federal courts routinely consider defendants' post-answer motions raising the defense "although technically they are no longer Rule 12(b) motions." Id.

Ali v. Frazier, 575 F. Supp.2d 1084, 1089 (D. Minn. 2008).

In Ali, this Court treated the moving party's Rule 12(b)(6) motion to dismiss for failure to state a claim as a Rule 12(c) motion asserting the same argument. Id. at 1089-90 (citing Westcott, 901 F.2d at 1488. A motion for judgment on the pleadings brought pursuant to Rule 12(c) may be brought "after the pleadings are closed - but early enough not to delay trial. . . ." Fed. R. Civ. P. 12(c). "As the Eighth Circuit held in Westcott, because motions to dismiss for failure to state a claim are subject to the same legal standard whether brought under Rule 12(b)(6) or Rule 12(c), the distinction is "purely formal . . . ." Ali, 575 F. Supp.2d at 1089 (citing Westcott, 901 F.2d at 1488.)

While ESML argues that Great Lakes did not assert a Rule 12(b)(6) defense in its Reply to ESML's Counterclaim, Great Lakes did invoke Rule 12 in its Answer, albeit the provisions of Rule 12 pertaining to a motion for a definite statement and a motion to strike. (Pl's Answer at 2 [Doc. No. 91].) Given the procedural history of this case, the refusal to consider Plaintiff's motion because it was styled as a Rule 12(b)(6) motion rather than a Rule 12(c) motion would be unfair. An examination of the docket reveals that Plaintiff filed its original Motion to Dismiss (i.e., the predecessor to the instant motion) on the same day that it filed its Reply to ESML's Counterclaim. (See Doc. Nos. 91 & 93.) Assuming for the sake of argument that Great Lakes had simply filed these documents in reverse order, i.e., the Motion to Dismiss first, as Docket No. 91, and Plaintiff's Answer second, as Docket No. 93, there would be no procedural infirmity.

In light of all of these factors – the specific procedural circumstances of this case, the identical standard of review applicable under the two rules, and the Eighth Circuit's recognition of a "purely formal" distinction between the rules – the Court will consider Plaintiff's motion under Rule 12(c), on the merits. This approach is consistent with rulings made, albeit in passing, by this Court, see E.E.O.C. v. Northwest Airlines, 216 F. Supp.2d 935, 937 (D. Minn. 2002), and by other district courts within the Eighth Circuit, see, e.g., Egziabher v. Parks, No. 11-CV-5088, 2012 WL 912933, *1-2 (W.D. Ark. Mar. 16, 2012); Janis v. Nelson, No. 09-CR-5019-KES, 2009 WL 5216902, *2, n.2 (D. S.D. Dec. 30, 2009); Woods v. St. Louis Justice Center, No. 4:06-CV-233 CAVES, 2006 WL 2990240, *1 (E.D. Mo. Oct. 18, 2006).

When evaluating a motion to dismiss, the Court assumes as true the factual allegations in the complaint (or counterclaim) and construes all reasonable inferences from those facts in the light most favorable to the non-moving party. Schaaf v. Residential Funding Corp., 517 F.3d

544, 549 (8th Cir. 2008). However, the Court need not accept as true wholly conclusory allegations, Hanten v. Sch. Dist. of Riverview Gardens, 183 F.3d 799, 805 (8th Cir. 1999), or legal conclusions that the pleader draws from the facts pled. Westcott v. City of Omaha, 901 F.2d 1486, 1488 (8th Cir. 1990).

To survive a motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 545 (2007). Although a complaint need not contain "detailed factual allegations," it must contain facts with enough specificity "to raise a right to relief above the speculative level." Id. at 555. As the United States Supreme Court recently reiterated, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not pass muster under Twombly. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Twombly, 550 U.S. at 555). In sum, this standard "calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of [the claim]." Twombly, 550 U.S. at 556.

When considering a motion for judgment on the pleadings (or a motion to dismiss under Fed. R. Civ. P. 12(b)(6)), the court generally must ignore materials outside the pleadings, but it may consider 'some materials that are part of the public record or do not contradict the complaint,' Missouri ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1107 (8th Cir. 1999), cert. denied, 527 U.S. 1039 (1999), as well as materials that are "necessarily embraced by the pleadings." Piper Jaffray Cos. v. National Union Fire Ins. Co., 967 F. Supp. 1148, 1152 (D. Minn. 1997). See also 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d § 1357, at 199 (1990) (court may consider 'matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint'). The Court

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here considers the Contract, Tariff and the Letter of Credit as materials necessarily embraced by the pleadings. The terms of these documents are referenced in ESML's Counterclaim, to which all three documents are attached as exhibits (Contract and Tariff, Ex. B to Counterclaim [Doc. No. 80-2]; Letter of Credit, Ex. C to Counterclaim [Doc. No. 803]), and in the Amended Complaint. Any other substantive affidavits and declarations of the parties will not be considered.

B. ESML's Claim for a Declaratory Judgment Based on the *Force Majeure* Clause

As noted, the Contract incorporates the general terms and conditions set forth in the Tariff. (Contract ¶ 12, Ex. 1 to Wohlrabe Aff. [Doc. No. 347-1].) One such "general term or condition" is the Tariff's *force majeure* clause, which provides, in full:

> Neither Shipper nor Transporter shall be liable in damages to the other for any act, omission or circumstances occasioned by or in consequence of: any acts of God, strikes, lockouts, acts of the public enemy, wars, blockages, insurrections, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, arrests and restraints of rulers and peoples, civil disturbances, explosions, breakage or accident to machinery or lines of pipe, line freezeups, decline in the Btu level of Gas received by Transporter at any point below the level at which the MDQs of Service Agreements are based, as specifically stated in Section 8.1 of the General Terms and Conditions, to the effect that Transporter can not Transport Shippers Scheduled Daily Delivery, or the binding order of any court or governmental authority which has been resisted in good faith by all reasonable legal means, and <u>any other cause, whether the kind herein enumerated or otherwise, and whether caused or occasioned by or happening on account of the act or omission of one of the parties hereto or some person or concern not a party hereto, not within the control of the party claiming suspension and which by the exercise of due diligence such a party is unable to prevent or overcome</u>.

(Tariff ¶ 10.1, Ex. B to Counterclaim [Doc. No. 80-2 at 48].) (emphasis added). ESML argues that it has stated a plausible claim for a declaratory judgment and that the underscored language above, in the *force majeure* clause, excuses its non-performance under the Contract. Specifically, ESML contends that it was unable, "through no fault of its own, to obtain financing for the Nashwauk facility due to the unprecedented credit freeze, economic meltdown and dive in steel demand resulting from the Great Recession." (Counterclaim, Count I [Doc. No. 80].)

As an initial matter, the Contract provides that any disputes arising under the agreement shall be determined in accordance with Michigan law. (Contract ¶ 13, Ex. 1 to Aff. of Barbara Wohlrabe [Doc. No. 347-1].) Under Michigan law, while the main goal of contract interpretation is to enforce the parties' intent, "when the language of a document is clear and unambiguous, interpretation is limited to the actual words used, and parol evidence is inadmissible to prove a different intent." Burkhardt v. Bailey, 680 N.W.2d 453, 464 (Mich. App. 2004).[4]

Michigan courts have recognized that a *force majeure* clause relieves a party from termination of the agreement "due to circumstances beyond its control that would make performance untenable or impossible." Erickson v. Dart Oil, 474 N.W.2d 150, 156 (1992) (citing Edington v. Creek Oil Co, 690 P.2d 970, 973 (Mont. 1984)). However, a *force majeure* clause may not be invoked to excuse performance where the delaying condition was caused by the party invoking it or could have been prevented by the exercise of prudence, diligence, and care. Id. at 155. A party's "failure to explore or utilize available options to overcome the delaying condition can constitute lack of due diligence." Id. (citing Woods v. Ratliff, 407 So.2d 1375, 1378-1379 (La. App. 1981)). The Michigan Court of Appeals has also observed that "*force majeure*" is a term that is "virtually unknown" in Michigan common law, prompting

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[4] ESML argues that "reliance" on Burkhardt v. Bailey is inapposite because that decision addressed contract interpretation in an assignment clause. In addition, ESML argues that it does not ask this Court to re-write the Contract. (ESML's Opp'n Mem. at 23, n.12.) The Court cites Burkhardt for the general proposition that clear and unambiguous contractual language is interpreted in accordance with the written terms of the contract.

Exhibit 1

Michigan courts to turn to other jurisdictions for guidance in cases in which such clauses are invoked. Cordoba v. City of Detroit, No. 221391, 2001 WL 1009308, *3 (Mich. Ct. App. 2001) (Mich. Ct. App. 2001) (citing Erickson, 474 N.W.2d at 150). Accordingly, where Michigan law is undeveloped or silent, the Court will consider persuasive authority from other jurisdictions.

At least one Michigan decision has addressed the 2008 financial crisis in the context of a *force majeure* clause. In Flathead-Michigan I, LLC v. Peninsula Devl., LLC, No. 09-14042, 2011 WL 940048, *4 (E.D. Mich. 2011), defendants argued that the economic downturn of 2008 prevented them from complying with the terms of their loans and guarantees. Based on this argument, the defendants sought leave to amend their pleadings to add affirmative defenses that included commercial impracticability, impossibility and invocation of *force majeure*. While most of the opinion addressed the doctrines of impracticability and impossibility, the United States District Court for the Eastern District of Michigan also rejected the defendants' *force majeure* argument, without elaboration, finding, "[t]he defense of *force majeure*, inapplicable to financial hardships, is also unavailable."[5] Id. at *5 (emphasis added).

Courts in other jurisdictions have considered whether the 2008 financial crisis constitutes a *force majeure*, with mixed results. See, e.g., In re Old Carco LLC, 452 B.R. 100, 119 (S.D.N.Y. 2011) (invoking *force majeure* clause was proper); but see, Elavon, Inc. v. Wachovia Bank, et al., __ F. Supp.2d __, No. 1:09-CV-139-ODE, 2011 WL 7071066, *8 (N.D. Ga. May 23, 2011) (finding that no external *force majeure* prevented the defendant from continuing to perform under the agreement in question); Route 6 Outparcels, LLC v. Ruby Tuesday, Inc., No. 2413-09, 2010 WL 1945738, *3-4 (N.Y. Sup. Ct. May 12, 2010) (finding that the defendant failed to

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[5] The court also noted that the loan agreements did not contain a *force majeure* clause. 2011 WL 940048 at *5, n.1.

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demonstrate that it was prevented from complying with its contractual obligations due to events entirely outside of its control).

The bankruptcy court in Old Carco, which found that the *force majeure* clause was properly invoked, first noted that financial difficulties do not generally excuse a defaulting party's performance. 452 B.R at 119. However, the court found it significant that the *force majeure* clause at issue specifically included "change to economic conditions" as an enumerated event that could excuse a default:

> The requirement that the event must be expressly identified in the *force majeure* clause in order to excuse performance is "especially true where the event relied upon to avoid performance is a market fluctuation." United States v. Panhandle E. Corp., 693 F. Supp. 88, 96 (D. Del. 1988). Therefore, while courts will not presume that a change in economic conditions constitutes an excuse for nonperformance, this does not preclude the parties from negotiating for such an excuse.

Id. at 119-20.

The court then went on to consider whether the event in question – a plant closing – was caused by both a change in economic conditions, and was outside of Old Carco's control. Id. at 119-25. The court found in the affirmative as to both points, and further found that Old Carco had "exerted reasonable efforts to remain a viable business, perform its obligations, and retain the plant." Id. at 125.

Faced with essentially the opposite facts, the court in Route 6, 2010 WL 1945738 at *3-4, reached a different conclusion in a case involving the alleged breach of a commercial lease agreement for a Ruby Tuesday restaurant. The operative *force majeure* clause excused performance based on events beyond the parties' control, including, "without limitation, all labor disputes, governmental regulations or controls, fire or other casualty, inability to obtain any material, services, acts of God, or any other cause, whether similar or dissimilar to the foregoing, not within the control [of the parties]." Id. at *2. A change in financial circumstances was not included among the enumerated list of triggering events, unlike Old Carco.

The court found that while the "worldwide economic meltdown" was an event beyond Ruby Tuesday's control, the critical inquiry was whether Ruby Tuesday was actually prevented from constructing a restaurant due to events entirely outside its control and through no fault of its own. Id. at *4. Construing the plain language of the *force majeure* clause, the court observed that courts are generally reluctant to excuse contractual non-performance based on claims of economic hardship and changing economic circumstances.

While noting that "it is a well established rule of contract law that *force majeure* clauses must be narrowly construed," the court held that

> even assuming for purposes of this motion that a severe economic downturn is a triggering event that falls within the broad "catchall" language of the *force majeure* clause, the Court concludes that Ruby Tuesday has failed to demonstrate that it was prevented from complying with its obligations under the Lease due to events entirely outside of its control.

Id. at *4. Rather, the court found that "all defendant has shown is that changing economic conditions have made it burdensome or more difficult to perform its contractual obligations." Id. at *5. In particular, the court noted that Ruby Tuesday failed to identify the steps it took to perform its obligations under the lease, despite its financial difficulties. Id.

In Elavon, __ F. Supp.2d __, 2011 WL 7071066 at *8, the court rejected the defendants' argument that the 2008 economic crisis constituted a *force majeure* which excused the defendants' obligations under the contract in question. Like the Route 6 case, the *force majeure* clause in Elavon did not include "financial crises" in the enumerated instances of *force majeure*.

2011 WL 7071066 at *6. However, the agreement stated that the enumerated instances of *force majeure* were not exclusive but instead "without limitation as to other events beyond the control of the part[ies]." Id. Nonetheless, the court found that co-defendant Wells Fargo Bank chose to sign a contract when it knew that a merger with Wachovia was pending and knew of Wachovia's contract with Elavon. Id. at *6. Even if the financial market could be considered a *force majeure*, the court again noted that the contract's *force majeure* clause did not include financial crises in the list of enumerated events. Id. Ultimately, regardless of whether the financial crisis of 2008 constituted a *force majeure*, the court concluded that no external *force majeure* prevented Wachovia from continuing to perform under the agreement in question. Id

In Seitz v. Mark-O-Lite Sign Contractors, Inc., 510 A.2d 319, 321 (N.J. Super. Ct. Law Div. 1986), a *force majeure* decision that did not involve the 2008 financial crisis, the court considered whether a broad, or "catch-all," *force majeure* clause could be construed to apply to circumstances or events different from those otherwise specifically enumerated in the clause. The allegedly breaching party sought to invoke the *force majeure* clause due to the physical disability of a key worker. Id. The *force majeure* clause provided:

> The Company shall not be liable for any failure in the performance of its obligations under this agreement which may result from strikes or acts of labor union [sic], fires, floods, earthquakes, or acts of God, War or other conditions or contingencies beyond its control.

Id. In construing the clause, the court relied on the rule of *ejusdem generis*, and narrowly interpreted the catch-all language of the clause such that "only events or things of the same general nature or class as those specifically enumerated" fell within the clause to excuse a party's non-performance. Id. The court specifically found that the employee's disability did not fall into the same class as that of labor strikes, fires, floods, earthquakes, war or acts of God. Id. Rather, it was a progressive aggravation of an underlying health problem. Id.

In this case, while the *force majeure* clause includes a laundry list of hardships that may suspend a party's obligations under the Contract, it does not include financial crises or changes in financial conditions. Moreover, the remedies section, immediately following the *force majeure* clause, provides:

> Such causes or contingencies affecting the performance of the Agreement by either party, however, shall not relieve it of liability in the event of its concurring negligence or in the event of its failure to use due diligence to remedy the situation and remove the cause in an adequate manner and with all reasonable dispatch, nor shall such causes or contingencies affecting the performance of this Agreement relieve either party from its obligation to make payments of amounts then due thereunder. . . .

(Tariff ¶ 10.2, Ex. B to Counterclaim [Doc. No. 80-2 at 48]) (emphasis added). Reading the contract as a whole, it would make little sense for the *force majeure* clause to excuse ESML's obligation to make payments when the immediately succeeding remedies clause explicitly provides that neither party is excused from its obligation to make payments of amounts due under the Contract.

However, what is most determinative is the plain language of the Contract. The Contract is for the transportation of natural gas. Great Lakes' obligation under the contract is to provide the transportation, and ESML's obligation is to pay a fee for that service. The parties' obligations are not conditioned on ESML's ability to obtain financing, the status of the Nashwauk facility, or the status of the construction of any lateral pipelines necessary to transport natural gas to that facility. ESML's claim that the parties intended for the Contract to commence with the simultaneous commencement of operations at the Nashwauk facility (Counterclaim ¶ 28 [Doc. No. 80]) is belied by the face of the Contract, which provides for a term from July 1, 2009 to

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March 31, 2024. Similarly, while ESML contends that the City of Nashwauk was responsible for building a lateral connecting pipeline, and failed to do so (id. ¶ 31), again, the Contract, between ESML's predecessor and Great Lakes contains no such provisions or conditions.

The fact that ESML might not be able to obtain financing for the construction of the steel facility, even absent a global financial crisis, was a foreseeable event. Had MSI/ESML wanted to avoid its obligations under the Contract due to this possibility, it could have included a provision in the Contract conditioning its performance on the events which, ESML now contends, make its performance impossible or impracticable. ESML fails to connect its invocation of the *force majeure* clause directly with the terms of the Contract. It focuses on the financing needed for construction of the Nashwauk steel facility, but the Contract simply and plainly obligates ESML to make its monthly payments.

Finally, accepting ESML's factual allegations as true, which this Court must under the Rule 12 standard, ESML fails to sufficiently allege facts demonstrating that it made reasonable efforts to sell its pipeline capacity on the secondary market, or took sufficient, specific measures in mitigation. For all of these reasons, the Court finds that ESML has failed to state a plausible claim for a declaratory judgment that, based on the *force majeure* clause, its duty to perform pursuant to the Contract is excused, without consequence, until the Nashwauk facility is in a position to require the delivery of natural gas.

C. ESML's Claim for a Declaratory Judgment Based on Temporary Commercial Impracticability/Impossibility

The Court's analysis of ESML's alternative count based on the doctrines of commercial impracticability and impossibility is similar to its analysis regarding the *force majeure* clause. See Flathead-Michigan, 2011 WL 940048 at *4 (describing commercial impracticability, impossibility and *force majeure* as "overlapping defenses"); Steel Indus., Inc. v. Interlink Metals & Chems., Inc., 969 F. Supp. 1046, 1052, n.17 (E.D. Mich. 1997) (simultaneously relying on cases involving the doctrines of contract construction, *force majeure* and impracticability and finding them to dictate the same result).

In cases involving the defense of impracticability, courts applying Michigan law have cited to the Restatement Second of Contracts § 261 (1981), which provides that if "after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate to the contrary." Karl Wendt Farm Equipment Co., Inc. v. Int'l Harvester Co., 931 F.2d 1112, 1116 (6th Cir. 1991); Flathead-Michigan, 2011 WL 940048 at *4.

Other courts have specifically considered whether a fluctuating financial market permits a party to a contract to rely on the doctrine of impracticability. Citing comment b of the same section of the Restatement, the court in Seaboard Lumber Co. v. United States, 41 Fed. Cl. 401, 416 (Fed. Cl. 1998), noted that "'the continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumptions, so that mere market shifts or financial ability do not usually effect discharge under the rule stated in this section.'" Rejecting the defense of impracticability, the court reasoned that "[i]f contracts were found to be breachable under such circumstances, there would be few contract breaches which could not be defended against based on such a claim. The state of the market is one of the things on which the parties are gambling when the contract . . . is made." Id. at 416–417. Applying similar reasoning, the court in Chainworks, Inc. v. Webco Industries, Inc., No. 1:05-CV-135, 2006 WL 461251, *5 (W.D. Mich. Feb. 24, 2006), likewise rejected a financial impracticability defense. The court found that "[the defendant] cannot, after the fact, alter the contract based on impracticability simply because it may have misread the market and entered into a contract which became a greater financial burden than originally expected." Id.

Similar to the doctrine of impracticability, "[t]he doctrine of impossibility may extinguish a party's liability under a contract if performance of the party's promise becomes objectively impossible." Oakwood of Cambridge, L.L.C. v. Kapsa, No. 289590, 2010 WL 2016294, *4 (Mich. Ct. App. May 20, 2010) (citing Roberts v. Farmers Ins. Exch., 737 N.W.2d 332 (2007)). While the unforseeability of a supervening event

> may produce an impossibility sufficient to extinguish liability, Vergote v. K Mart Corp., 404 N.W.2d 711 (1987), under Michigan law '[s]ubsequent events which in the nature of things do not render performance impossible, but only render it more difficult, burdensome, or expensive, will not operate to relieve [a party of its contractual obligations.]' Chase v. Clinton Co., 217 N.W. 565 (1928).

Id.

Michigan decisions on the impossibility doctrine have held that "'unexpected financial difficulty, expense or hardship does not excuse a contractual promissor from performing his undertaking when the contract does not provide otherwise.'" Flathead-Michigan, 2011 WL 940048 at *4 (quoting Covenant Medical Management, Inc. v. Knepper, 2006 WL 3333021, *5 (E.D. Tenn. 2006) (other citations omitted). The Flathead court, addressing the same economic crisis which ESML argues excuses its performance, found that "[b]ecause the economic fluctuations of the past three years were not "unforeseeable," and Defendants have not supplied reasons other than the economic downturn for the loan default, this defense is unavailable." Id. at *5. The Court in Elavon, 2011 WL 7071066 at *8 emphasized that the "impossibility" invoked by the party seeking an excuse for non-performance, must render impossible the party's "performance of their obligations under the [agreement at issue]." The Elavon court found that the defendants, who argued that the 2008 financial crisis made their performance impossible, failed to identify evidence supporting their impossibility argument. Id.

In Ner Tamid Congregation of North Town v. Krivoruchko, 638 F. Supp.2d 913, 928, 933 (N.D. Ill. 2009), the court held that the potential inability to obtain commercial financing is generally considered a foreseeable risk that can be readily guarded against by including financing contingency provisions in the contract. In Ner Tamid, the defendant/purchaser in a real estate transaction argued that the doctrines of impossibility and impracticability excused his performance under the contract. The defendant based his defense in this breach of contract suit on his inability to obtain the precise financing that he wanted, which, he argued, was a result of the real estate recession that began in 2007. Id. at 916.

> But let us assume that the situation in the summer of 2007 was an acute event; Mr. Krivoruchko's argument is nonetheless analytically incorrect. The question is not whether the "depth of the recession" was foreseeable, but rather, it is whether it was foreseeable that a lender might not provide him with financing in connection with the purchase of the Ner Tamid property. The foreseeability of that event is beyond debate.

Id. at 928.

The court noted that financing can be denied for any number of reasons and, moreover that "financing was not an assumption underlying the contract at all, let alone a basic assumption." Id. at 928-29. In rejecting the defendant's impossibility/impracticability defense, the court further found that the defendant failed to demonstrate that he had tried all practical, available alternatives that would have permitted his performance of the contract. Id. at 933.

Citing Ner Tamid, the court in YPI 180 N. LaSalle Owner, LLC v. 180 N. LaSalle II, LLC, 933 N.E.2d 860, 865-66 (Ill. App. Ct. 2010), held that the 2008 financial crisis did not excuse the plaintiff's contractual obligations based on its alleged inability to obtain financing:

> Even if the global credit crisis made it difficult, to nearly impossible, to procure the sought-after commercial financing, this is not the relevant issue. The primary issue is whether it was foreseeable that a commercial lender might not provide Younan and YPI with the financing they sought. See Ner Tamid Congregation of North Town v. Krivoruchko, 638 F. Supp.2d 913, 928 (N.D. Ill. 2009). Even without the global credit crisis of 2008, it was foreseeable that a commercial lender might not provide Younan and YPI with the financing they sought. See Ner Tamid Congregation of North Town, 638 F. Supp.2d at 928.

Id.

ESML alleges that the 2008 financial crisis affected its ability to obtain the financing necessary for the Nashwauk facility. For the same reasons identified by the Court herein as to ESML's *force majeure* allegations, the Court finds that the doctrines of impracticability and impossibility are inapplicable and, therefore, do not excuse or delay ESML's performance under the Contract. It was completely foreseeable that ESML might not secure the necessary financing for the Nashwauk facility. Given that possibility, MSI/ESML could have conditioned its performance on obtaining such financing. It failed to do so.

In addition, ESML's allegations with respect to mitigation are scant. It simply alleges that it "diligently sought financing for the [Nashwauk] Facility." (Counterclaim ¶ 54 [Doc. No. 80].) ESML fails to sufficiently allege that it sought all reasonable alternatives in order to perform its obligations under the Contract. While ESML argues in its opposition memorandum, citing

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Paragraph 54 of the Counterclaim quoted above, that "it has alleged that it could not obtain any financing whatsoever" (ESML's Opp'n Mem. at 31 [Doc. No. 374]), the allegation does not support such a sweeping statement. More importantly, ESML simply fails to allege facts sufficient to support its efforts at mitigation.

Moreover, this is not a case where the terms of the Contract are inconsistent or ambiguous. As noted herein, any reference to the parties' subjective intent is unnecessary, as their "intent" is expressed in the plain language of the Contract.

Finally, ESML's reliance on the decision of the Minnesota Court of Appeals in Burgi v. Eckes, 354 N.W.2d 514 (Minn. Ct. App. 1984) is inapposite. In Burgi, a landlord's duty to make major or structural repairs was suspended by reason of economic impossibility where the tenant's filing of bankruptcy resulted in a drastic reduction in the tenant's monetary obligations to the landlord. Id. at 518. The case does not apply Michigan law, nor does it involve the inability to obtain financing, or a national economic downturn. At most, it provides a general statement of Minnesota law as to the doctrines of impossibility or impracticability of performance.

The Court finds that ESML has failed to state a plausible claim for a declaratory judgment that, based on the doctrines of impossibility/impracticability, its duty to perform pursuant to the Contract is excused until the Nashwauk facility is in a position to require the delivery of natural gas. Accordingly, ESML's count for a declaratory judgment based on the doctrines of impossibility and impracticability is dismissed.

D. ESML's Claim for Conversion

As to ESML's claim for conversion, the underlying basis for this claim is predicated on the authority by which Great Lakes could draw upon the Letter of Credit. ESML alleges that

Plaintiff's actions in drawing upon the Letter of Credit were without justification, because ESML's performance under the Contract was excused by the *"force majeure* clause and the non-existence of the Nashwauk facility," which the Court construes as the doctrines of impracticability/impossibility. (Counterclaim, Count III [Doc. No. 80].) In addition, ESML alleges that Plaintiff's legal right to draw upon the Letter of Credit is "unclear" because "FERC has issued an Order stating that it appears that Great Lakes' rates are unreasonable and unlawful." (Id.) ESML alleges that Great Lakes should not have taken any action with respect to the Letter of Credit until FERC "has resolved its inquiry." (Id. ¶ 71.) Therefore, ESML argues that it has stated a plausible claim for conversion and dismissal is inappropriate.

Because the Court has concluded that ESML cannot state a claim based on those theories, it cannot state a claim for conversion, in any event. However, as to ESML's allegation that the Letter of Credit was unlawfully drawn upon during the pendency of a rate inquiry, and therefore was unlawfully converted, ESML also fails to state a claim. First, the terms of the Contract provide that ESML would be charged based on Great Lakes' "maximum rates and charges plus all applicable surcharges in effect from time to time under the applicable Rate Schedule on file with the [FERC] unless otherwise agreed to by the parties in writing." (Contract ¶ 9, Ex. B to Counterclaim [Doc. No. 80-2].) The rates at issue are on file with a federal regulatory commission and there is nothing ambiguous or unclear about the rates, as they appear in the Contract.

Second, if the rates in the Contract were found to be unreasonable, 15 U.S.C. 717d(a) provides that FERC will decrease the rates to a reasonable level – it does not provide that FERC is authorized to find the Contract invalid. Under the terms of the Letter of Credit, if ESML fails

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to make payments consistent with the Contract, Great Lakes may draw upon the Letter of Credit for reimbursement. (Letter of Credit, Ex. C to Counterclaim [Doc. No. 80-3].) ESML does not appear to dispute the fact that it failed to make any payments under the Contract. A plain reading of the Letter of Credit and the Contract supports Great Lakes' right to draw upon the Letter of Credit. Accordingly, for all of these reasons, ESML's count of conversion fails to state a plausible claim for relief.

E. Allegations Regarding Misrepresentation

Although ESML asserts three counts for relief, i.e., conversion and two counts for a declaratory judgment, factual allegations in ESML's Counterclaim contend that Great Lakes misrepresented its cost of service to transport natural gas, thereby overcharging MSI/ESML. (Counterclaim ¶¶ 25-26 [Doc. No. 80].) In its Opposition Memorandum, ESML contends that Great Lakes and former Third-Party Defendants, the TransCanada Entities, "were active participants" in a "scheme" to misrepresent the cost of Great Lakes' service. (ESML's Opp'n Mem. at 37 [Doc. No. 374].)

To the extent that ESML intends to plead a count of fraud or misrepresentation, it has not included a separate count to that effect in the Counterclaim. Moreover, the bare factual allegations of misrepresentation in the Counterclaim fail to state such a claim. Federal Rule of Civil Procedure 9(b) requires particularized pleading as to the "circumstances" constituting fraud allegations. Such "circumstances" include the "time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." Bennett v. Berg, 685 F.2d 1053, 1062 (8th Cir. 1982); Stark v. Monson, 07-CV-4374 (MJD/AJB), 2008 WL 189959, *8 (D. Minn. Jan. 22, 2008). Conclusory allegations of fraud are insufficient to satisfy Rule 9(b). See Commercial Prop. Invs., Inc. v. Quality Inns, Int'l, Inc., 61 F.3d 639, 644 (8th Cir. 1995). The requirements of Rule 9(b) apply not only to fraud claims, but to any allegations of negligent or intentional misrepresentation. McGregor v. Uponor, Inc., 09-CV-1136 (ADM/JJK), 2010 WL 55985, *3 (D. Minn. Jan. 4, 2010) (citing Conwed Corp. v. Employers Reinsurance Corp., 816 F. Supp. 1360, 1363 (D. Minn. 1993)).

The factual allegations in the Complaint as to Great Lakes' misrepresentations are simply conclusory allegations, entirely lacking in specificity as to the "who, what, where, when and how" necessary to support a claim under Rule 9(b). See Drobnak v. Andersen Corp., 561 F.3d 778, 783 (8th Cir. 2009). Accordingly, to the extent that ESML alleges a misrepresentation claim against Great Lakes, it fails as a matter of law.

F. Role of FERC

The Court is unpersuaded by ESML's argument that additional discovery is needed, or that the resolution of complaints lodged with FERC about Great Lake's charged rates makes dismissal inappropriate.

Pursuant to the National Gas Act, FERC is given rate authority over companies that engage in either the sale or the transportation of natural gas. Section 4 of the Act requires natural gas companies to file all rates and contracts with FERC. See 15 U.S.C. § 717(c) (2005). Section 5(a) authorizes FERC to determine whether any rate or charge, or contract affecting such a rate or charge, is unjust and unreasonable, and provides that FERC may determine a just and reasonable rate. 15 U.S.C. § 717d(a) (2012).

". . . [I]t is long established that FERC views pure questions of the interpretation of FERC-approved contracts as falling within the jurisdiction of the district courts. Portland General

Elec. Co. v. City of Glendale, Civil No. 05-1321-PK, 2007 WL 1655545, *5 (D. Or. June 1, 2007) (citing Doswell Ltd. P'ship v. Va. Elec. & Power Co., 61 F.E.R.C. ¶ 61,196 at 61,731 (1992)). In a case for declaratory relief involving the sale and purchase of electric energy, the court in Portland General noted that interpretation of the contract would not, in itself, usurp any FERC function in determining fair rates or jurisdictionally infringe upon FERC's authority:

> To provide the declaratory relief that [the plaintiff] requests, this court will not be required to make any determination of reasonableness. Instead, this court will be called upon to interpret specified contractual provisions of the parties' Agreement, without looking beyond the four corners of the document. Because this court's declaration will neither modify the terms of the Agreement nor evaluate its formulary rates against any standard of fairness, reason, or justice, the interpretation of the contract will not, in itself, constitute an usurpation of any FERC function.

Id.

The Court finds that FERC's inquiry or ruling – the Counterclaim uses both terms – does not affect whether this Court may rule on Plaintiff's Motion to Dismiss. In deciding this motion, the Court is concerned with the terms of the Contract and the interpretation of those terms, without regard to the reasonableness of the rates charged. Any determination of reasonableness of rates is within the jurisdiction of FERC. What is before the Court and what is before FERC are entirely distinct issues. The Court has full authority to rule on Plaintiff's motion, and, in doing so, the Court does not impinge upon FERC's authority.

G. Leave to Amend

In the portion of its opposition argument concerning the now-dismissed Third Party Defendants, ESML argues that if the Court finds that it has not alleged facts sufficient to show an injustice occurred so that it may pierce the corporate veil, it should be given leave to amend the Counterclaim. (ESML's Opp'n Mem. at 36-38 [Doc. No. 374].) In its memorandum, ESML includes the following proposed allegations:

1. The TransCanada Entities and Great Lakes misrepresented facts to MSI about the quantity of capacity that MSI would need when the [Nashwauk] Facility was fully operational, and the TransCanada Entities and Great Lakes collectively induced MSI to enter into a 25-year contract at the highest Tariff rate.

2. TransCanada Pipelines Limited has entered into dozens of TSAs with Great Lakes and now owns the largest stake of transmission capacity in the Western zone of Great Lakes' pipeline (running from Emerson to the Central zone), or approximately 49% of the total capacity of the pipeline.

3. As a result of these TSAs, and due to a known lack of demand in the market for capacity in the Western zone of Great Lakes' pipeline, TransCanada Pipelines Limited and Great Lakes have made it impossible for ESML - Great Lakes' largest non-affiliated customer - to fairly remarket its capacity to third-parties.

4. TransCanada Pipelines Limited, on the other hand has a distinct advantage over ESML because of the favorable rates that TransCanada Pipelines Limited has obtained in its TSAs with Great Lakes. For example, if a third-party has an option to purchase gas from ESML (which has excess capacity due to greater efficiencies in its [Nashwauk] Facility plans and the advancement of technology) or TransCanada Pipelines Limited - TransCanada Pipelines Limited will always win because it can underbid ESML.

(Id. at 37-38 [Doc. No. 374].)

Courts will grant leave to amend only if the proposed amendment would not be futile. Where the proposed amendment would not withstand a Rule 12(b)(6) motion, denial of leave to amend is appropriate. In re Senior Cottages of America, LLC, 482 F.3d 997, 1001 (8th Cir. 2007). Some of the proposed amended language that concerns the former Third-Party Defendants, the TransCanada Entities, is now moot, as they have been dismissed from the case. To the extent that the proposed amendments concern Great Lakes, the Court finds that the proposed amendments cannot salvage any of the counts in ESML's Counterclaim.

For the reasons identified above, the language in Paragraph 1 fails to include the specific information necessary to support a claim for misrepresentation. In addition, while the language proposed in Paragraphs 2-4 alleges mitigating circumstances that might be applicable to ESML's declaratory judgment counts, they are wholly conclusory. They do not allege facts showing a duty on Great Lakes' part to determine the quantity of capacity needed by ESML.

Moreover, in some ways, these mitigation allegations undercut ESML's position. For example, in Paragraph 3, ESML alleges a "known lack of demand in the market for capacity in the Western zone of Great Lakes' pipeline." Presumably, MSI was aware of this "known lack of demand" at the time it entered into the Contract. Moreover, the hypothetical situation in Paragraph 4 alleges a non-existing situation, referring to ESML's "excess capacity due to greater efficiencies in the [Nashwauk] Facility plans." As the Nashwauk facility is not even operational, an allegation that hypothesizes about its existence provides no basis for ESML's claim and is futile. For all of these reasons, the Court denies ESML's request for leave to amend its Counterclaim, as the proposed amendments would be futile.

H. Rule 12(f) Motion to Strike as Redundant

Finally, Great Lakes also moves the Court for an order striking ESML's declaratory judgment claims (Counts I & II) as redundant. Although the Court has found that the claims should be dismissed on the merits, it also finds that Counts I and II should be dismissed or stricken as redundant. This Court has held that where a "proposed counterclaim and the plaintiffs' claim raise identical factual and legal issues[, the] proposed counterclaim is redundant and will be moot upon disposition of the plaintiffs' claims. A redundant declaratory judgment claim is not a proper declaratory judgment claim and should be dismissed." Mille Lacs Band of Chippewa

Exhibit 1

Indians v. State of Minn., 152 F.R.D. 580, 582 (D. Minn.1993) (citing Aldens, Inc. v. Packel, 524 F.2d 38, 51–51 (3d Cir. 1975)).

"When deciding whether to dismiss a counterclaim as redundant, courts consider whether the declaratory judgment serves a useful purpose." Gratke v. Andersen Windows, Inc., 10-CV-963 (PJS/LIB), 2010 WL 5439763, *3 (D. Minn. Dec. 8, 2010) (citations omitted). Such an analysis "requires consideration of whether resolution of plaintiff's claim, along with the affirmative defenses asserted by defendants, would resolve all questions raised by the counterclaim." Id. (citing Daily v. Federal Ins. Co., 2005 WL 14734 at *6 (N.D. Cal. Jan.3, 2005)). In this case, resolution of Plaintiff's claims, including Defendants' affirmative defenses, would resolve the questions presented by ESML's claims seeking a declaratory judgment based on the *force majeure* clause, or, alternatively, the doctrines of impossibility/impracticability. Accordingly, the Court finds that, even if it had not found that ESML's claims should be dismissed under Rule 12, Counts I and II should be stricken, or dismissed, as redundant.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion to Dismiss for Failure to State a Claim and to Strike Defendant's Pleading [Doc. No. 364] is **GRANTED;** and

2. ESML's Counterclaim (Counts I-III) is **DISMISSED.**

Dated: May 15, 2012

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Court Judge

Exhibit 1

EXHIBIT 2

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Great Lakes Gas Transmission Limited Partnership,

Plaintiff,

v.

Essar Steel Minnesota, LLC; Essar Steel Holdings, Ltd.; Essar Steel Limited; and Essar Global Limited, a/k/a Essar Group,

Defendants.

Civil No. 09-CV-3037 (SRN/LIB)

MEMORANDUM OPINION AND ORDER
[FILED UNDER SEAL]

Barbara L. Wohlrabe, Susan D. Nassar, and David W. Elrod, Elrod PLLC, 500 North Akard Suite 3000 Dallas, Texas 75201; David T. Schultz and Julian C. Zebot, Maslon, Edelman, Borman & Brand, LLP, 90 South Seventh Street Suite 3300, Minneapolis, Minnesota, 55402, for Plaintiff

Stephanie J. Goldstein, Fried, Frank, Harris, Shriver & Jacobson, LLP, One New York Plaza, New York, New York 10004; Thomas S. Fraser and Nicole Moen, Fredrikson & Byron, PA, 200 South Sixth Street, Suite 4000, Minneapolis, Minnesota 55402, for Defendants

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SUSAN RICHARD NELSON, United States District Court Judge

This matter is before the Court on Plaintiff's Motion for Partial Summary Judgment [Doc. No. 416]; Defendants' Motion for Summary Judgment [Doc. No. 421]; Plaintiff's Motion for Leave to Amend the Complaint [Doc. No. 440]; and Defendants' Motion for Leave to Amend the Answer [Doc. No. 447]. For the reasons that follow, Plaintiff's Motion for Partial Summary Judgment is granted in part, denied in part, and denied

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without prejudice in part; Defendants' Motion for Summary Judgment is denied in part, and denied without prejudice in part; Plaintiff's Motion for Leave to Amend the Complaint is granted in part, and denied as moot in part; and Defendants' Motion for Leave to Amend the Answer is denied.

I. BACKGROUND

A. Factual Background

In October 2009, Plaintiff Great Lakes Gas Transmission Limited Partnership ("Great Lakes") filed this breach of contract action against Defendant Essar Steel Minnesota, LLC ("ESML"), and affiliated foreign entities, Essar Steel Holdings, Ltd., Essar Steel Limited, and Essar Global Limited, a/k/a Essar Group (collectively, the "Foreign Essar Defendants"). Great Lakes owns and operates a natural gas pipeline, which transports over 2.2 billion cubic feet of natural gas per day through 2,100 miles of pipeline. (Am. Complaint ¶ 12 [Doc. No. 35].) The pipeline extends from the Minnesota-Manitoba border at Emerson, Manitoba, to the Michigan-Ontario border at St. Clair, Ontario, and "serves as a link between western Canada's natural gas basin and major industrial and market centers in Minnesota, Wisconsin, Michigan, and eastern Canada." (Id.) Great Lakes alleges that it offers the use of its pipeline to shippers of natural gas for a rate that is regulated by the Federal Energy Regulatory Commission ("FERC"). (Id. ¶ 13.)

The claims in this action arise from a September 6, 2006 contract (the "Contract") between Great Lakes and Minnesota Steel Industries ("MSI"). (Am. Compl. ¶ 17 [Doc.

No. 35]; Contract, Ex. B to First Am. Answer at 1-3 [Doc. No. 80-2].) As alleged in ESML's Counterclaim, for several years MSI had been developing plans to construct a fully-integrated steel making facility, which, when operational, would require natural gas as an energy source. (Countercl. ¶¶ 20-24 [Doc. No. 314].) In 2007, Defendant ESML acquired the membership interests of MSI, such that ESML is the "new name for MSI" and is its successor in interest. (First Am. Answer ¶ 19 [Doc. No. 314].) ESML admits that its obligations under the Contract are the same as those originally applicable to MSI. (Id. ¶ 50.) ESML is a Minnesota company affiliated with the Foreign Essar Defendants and is engaged in manufacturing and the provision of services in various industries, including the steel industry. (Am. Compl. ¶ 15 [Doc. No. 35].) Plaintiff contends that ESML is an alter ego or instrumentality of the Foreign Essar Defendants, such that ESML acted as the agent of the Foreign Essar Defendants in acquiring the assets of MSI. (Am. Compl. ¶ 47 [Doc. No. 35].) Defendants deny this allegation. (First. Am. Answer ¶ 47 [Doc. No. 314].)

Under the general terms of the Contract, which is also referred to by the parties as the Transportation Services Agreement, or "TSA," Great Lakes agreed to transport up to 55,000 dekatherms of natural gas per day on MSI's behalf, from its Emerson receipt point to its Carlton delivery point, or to "a new location near Mile Post 228." (Contract, App. A, Ex. 1 to Aff. of Barbara Wohlrabe [Doc. No. 347-1].) Defendant ESML contends that the "new location" was a not-yet constructed delivery point on the Great Lakes pipe system, which would connect Great Lakes' pipeline with a yet-to-be constructed pipeline to

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transport gas to a steel facility in Nashwauk, Minnesota. (Countercl. ¶ 30 [Doc. No. 314].) Great Lakes asserts that under the Contract, it was required to reserve 55,000 dekatherms of gas transportation capacity for MSI regardless of whether MSI actually utilized the Great Lakes system to transport natural gas. (Am. Compl. ¶ 18 [Doc. No. 35].)

The Contract term began running on July 1, 2009 and continues through March 31, 2024. (Contract, Ex. 1 to Wohlrabe Aff. [Doc. No. 347-1].) ESML contends, however, that the parties intended for performance of the Contract to coincide with the commencement of operations at the contemplated steel facility in Nashwauk. (Countercl. ¶ 28 [Doc. No. 314].)

As consideration for the transportation services, MSI agreed to pay the rates indicated in the Contract, which included the rate schedule reflected in Great Lakes' FERC Gas Tariff (the "Tariff"). (Contract ¶ 9, Ex. 1 to Wohlrabe Aff. [Doc. No. 347-1].) Plaintiff alleges that under the Contract, the reservation fee for the agreed-upon transportation was to be paid monthly. (Am. Compl. ¶ 20 [Doc. No. 35].) Also pursuant to the Contract, MSI obtained a letter of credit ("Letter of Credit") in the amount of $580,000. (Countercl. ¶ 37 [Doc. No. 80]; Letter of Credit, Ex. C to Countercl. [Doc. No. 80-3].) Under the terms of the Letter of Credit, if MSI failed to make payments consistent with the Contract, Great Lakes could draw upon the Letter of Credit. (Letter of Credit, Ex. C to Countercl. [Doc. No. 80-3].)

Great Lakes asserts that Defendants failed to make the first payment of $190,190, due on August 17, 2009, and consistently failed and refused to make payments thereafter.

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(Am. Compl. ¶ 20 [Doc. No. 35].) Due to the 2008 global financial crisis, credit freeze, and consequent decline in steel prices, ESML contends that it was unable to obtain the financing necessary to commence construction of the Nashwauk steel facility. (Countercl. ¶¶ 52-57 [Doc. No. 314].) Consequently, ESML asserts that it has no use for the pipeline space reserved under the Contract until the Nashwauk facility is completed. (Id. ¶ 61.) In addition, ESML admits that it has no sales or revenue and will not have sales or revenue until the Nashwauk facility becomes operational. (First Am. Answer ¶ 33 [Doc. No. 314].) ESML contends that it provided notice to Great Lakes that it had invoked the Tariff's *force majeure* clause and endeavored to "fashion a solution in which the parties could keep the mutually beneficial [Contract] in place, but with a delayed performance." (Countercl. ¶¶ 65-66 [Doc. No. 314].) In a February 27, 2009 letter from ESML's Commercial and Project Finance Manager, Mahendra Mishra, to Thomas Kasunic of Great Lakes, Mishra stated, "While the present crisis may provide a legally justifiable reason for MSI to terminate the Contract, we believe, and hope, that an alternative, amicable solution is possible." (Letter of 2/27/09 from M. Mishra to T. Kasunic at 2, Ex. 5 to Goldstein Decl. [Doc. No. 424-4].)

In September 2009, Great Lakes sent letters to ESML regarding the past-due amounts under the Contract. (Letter of 9/3/09 from D. Elrod to M. Mishra & S. Hicks, Ex. 2 to Wohlrabe Aff. [Doc. No. 419-2], and Letter of 9/29/09 from D. Elrod to M. Mishra, Ex. 3 to Wohlrabe Aff. [Doc. No. 419-3].) Specifically, Great Lakes informed ESML that it considered the missed payments "consistent with the prior statements by [ESML] that it

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does not intend to fulfill its obligations under the Contract," a "clear repudiation of the Contract." (Id.) Great Lakes asked that ESML "provide adequate assurances that it intends to perform its obligations under the Contract, including payment in full," or Great Lakes would pursue legal remedies. (Id.) Great Lakes contends that ESML failed to provide the requested assurances of performance and failed to make the required payments. (First Am. Compl. ¶ 53 [Doc. No. 35]; First Am. Answer ¶¶ 20, 49-51 [Doc. No. 314].) In November 2009, shortly after filing this suit, Great Lakes drew upon the $580,000 Letter of Credit. (Countercl. ¶ 69 [Doc. No. 314].)

B. Relevant Terms

The Contract incorporates the rates found in the Tariff, as well as the general terms and conditions set forth in the Tariff. (Contract ¶ 12, Ex. 1 to Wohlrabe Aff. [Doc. No. 347-1].) The provisions most relevant to the instant motions are the Tariff's *force majeure* and limitations of liability clauses. Under the Contract, any disputes arising under the agreement are to be determined in accordance with Michigan law. (Contract ¶ 13, Ex. 1 to Wohlrabe Aff. [Doc. No. 347-1].)

The *force majeure* clause enumerates various circumstances excusing the parties' damages liability to each other. Among other things, the clause enumerates acts of God, strikes, natural disasters, and labor strikes. (Tariff § 10.1, Ex. B to Countercl. [Doc. No. 80-2 at 48].) It further provides that liability may be excused for:

> any other cause, whether the kind herein enumerated or otherwise, and whether caused or occasioned by or happening on account of the act or omission of one of the parties hereto or some person or concern not a party

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> hereto, not within the control of the party claiming suspension and which by the exercise of due diligence such a party is unable to prevent or overcome.

(Id.) (emphasis added).

Immediately following the *force majeure* clause, the remedy section of the Tariff provides that such circumstances or contingencies affecting the parties' respective performance do not relieve it from liability "in the event of concurring negligence," nor do such circumstances relieve it "from its obligation to make payments of amounts then due thereunder. . . ." (Tariff § 10.2, Ex. B to Countercl. [Doc. No. 80-2 at 48].)

The Limitations of Liability Clause provides:

> Except as otherwise provided herein, neither Transporter nor Shipper shall be liable in damages, whether direct, indirect, consequential or otherwise, other than for acts of gross negligence, undue discrimination or willful misconduct and then only to the extent that Force Majeure does not apply, provided that nothing herein shall limit Transporter's or Shipper's liability, if any, for direct damages resulting from its own negligence.

(Tariff § 6.13.8, Ex. 4 to Decl. of Stephanie J. Goldstein [Doc. No. 425].)

C. Procedural Background

In this breach of contract suit, Great Lakes alleges that ESML is directly liable for its failure to make payments due under the Contract and for the anticipatory repudiation of its future obligations. In addition, Great Lakes asserts derivative liability against the Foreign Essar Defendants based on the following theories: (1) piercing the corporate veil or alter ego/mere instrumentality; (2) joint enterprise/joint venture liability; and (3) agency. (Am. Compl. ¶¶ 55-63 [Doc. No. 35].)

In their Answer, Defendants deny that ESML repudiated the Contract and assert several affirmative defenses. (First Am. Answer at 18-20 [Doc. No. 314].) The defenses most pertinent to the instant motions are that: (1) the Complaint fails to state a claim upon which relief may be granted; (2) the *force majeure* clause excuses ESML from performance due to “the unprecedented credit freeze, economic meltdown and precipitous decrease in steel demand and steel prices resulting from the Great Recession;” and (3) ESML’s performance is excused under the doctrine of temporary commercial impracticability until the Nashwauk facility is in a position to require natural gas delivery. (Id. at 19.)

In connection with their Answer, ESML also filed a Counterclaim against Great Lakes.[1] (Answer & Countercl. [Doc. No. 80].) Two of the causes of action asserted in the Counterclaim mirror two of Defendants’ affirmative defenses: ESML sought a declaratory judgment that its performance under the Contract was excused based on the *force majeure* clause (Count I), or, in the alternative, based on the doctrine of commercial impracticability/impossibility (Count II). (First Am. Answer & Countercl. at 38-39 [Doc. No. 314].) ESML also asserted a third claim against Great Lakes for conversion, based on Great Lakes’ actions in drawing on the Letter of Credit. (Id. at 39-40.) Finally, in the

[1] In addition, ESML asserted third-party claims against various entities allegedly related to Great Lakes, generally referred to as “the TransCanada Entities.” (Answer & Countercl. [Doc. No. 80].) In February 2012, Defendants obtained new legal counsel and stipulated to the dismissal without prejudice of ESML’s third-party claims. (Stipulation [Doc. No. 392] & Order of Voluntary Dismissal [Doc. No. 396].) Accordingly, the TransCanada Entities were dismissed without prejudice and the claims asserted against them in ESML’s Counterclaim and Third-Party Complaint were dismissed as moot. (Order of May 15, 2012 at 6-7 [Doc. No. 397].)

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general factual allegations of the Counterclaim, Defendants alleged that they endeavored to sustain the parties' agreement. (Countercl. ¶¶ 59-72 [Doc. No. 314].)

Plaintiff previously moved for dismissal of ESML's Counterclaim pursuant to Fed. R. Civ. P. 12(b)(6). (Pl.'s Mot. to Dismiss [Doc. No. 364].) At issue were ESML's three claims against Great Lakes for a declaratory judgment based on the *force majeure* clause and the doctrine of commercial impossibility/impracticability, and ESML's claim for conversion. In this Court's Order of May 15, 2012, the Court granted Great Lakes' motion, dismissing ESML's three claims against Great Lakes, and dismissing as moot its claims against the dismissed third-party defendants. (Order of 5/15/02 at 6; 31 [Doc. No. 397].)

Presently before the Court are the parties' cross-motions for summary judgment. In Defendants' motion, Defendants seek summary judgment, arguing that pursuant to the filed rate doctrine and the limitation of liability provision in the Tariff, Great Lakes is prohibited from seeking damages other than as provided in the Tariff. (Defs.' Mem. Supp. Mot. for Summ. J. at 10 [Doc. No. 423].) Defendants contend that because no provisions in the Tariff provide for any recovery – beyond possibly the Letter of Credit, which Great Lakes has already drawn upon – summary judgment should be entered for Defendants. Defendants also argue that because the Tariff precludes Great Lakes' claim against the Foreign Essar Defendants, summary judgment should be entered in their favor as well. (Id. at 20.)

In its motion for partial summary judgment, Plaintiff seeks judgment as to

Exhibit 2

Defendants' affirmative defenses based on the *force majeure* clause and the doctrine of commerical impossibility/impracticability, as well as the defense of no anticipatory repudiation of the Contract. (Pls.' Mem. Supp. Mot. for Summ. J. at 2 [Doc. No. 418].)

In addition, based on the Court's rulings with regard to the summary judgment motions, the parties seek leave to amend their pleadings if the Court finds any deficiencies in the pleadings. (Pl.'s Mot. for Leave to Am. the Compl. [Doc. No. 440]; Defs.' Mot. for Leave to Am. the Answer [Doc. No. 447].)

Following the hearing on these motions, Plaintiff sought leave to supplement the record with three exhibits related to Defendants' argument under the filed rate doctrine. (Pls.' Mot. for Leave Supp. Record [Doc. No. 502].) The Court granted Plaintiff's requested leave and permitted both parties to submit memoranda regarding the supplemental exhibits. (Order of 2/4/14 at 2 [Doc. No. 511].)

II. DISCUSSION

A. Summary Judgment Standard of Review

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. Enter. Bank v. Magna Bank of Missouri, 92 F.3d 743, 747 (8th Cir. 1996). However, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Id. at 323; Enter. Bank, 92 F.3d at 747. A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials, but must set forth specific facts in the record showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

B. Defendants' Motion for Summary Judgment

1. Filed Rate Doctrine and Limitation of Liability Defense

As noted, based on the filed rate doctrine, Defendants contend that the Limitation of Liability provision, found in Section 6.13.8 of the Tariff, proscribes the extent of Great Lakes' recovery. (Defs.' Mem. Supp. Mot. Summ. J. at 9-11 [Doc. No. 423].) In addition, Defendants point to the Billing and Failure to Pay provisions in Section 6.9.1, arguing that the Tariff only permits Great Lakes to bill and collect on a monthly basis for any amount owed for the preceding month. (Id. at 11.) Defendants further argue that under Section 6.9.4, the Tariff allows Great Lakes to suspend or terminate service in the event of non-payment. (Id. at 12.) Viewing the Tariff as a whole, Defendants contend that Plaintiff has no monetary remedy against them, even assuming liability, other than the ability to draw down on the Letter of Credit. (Id. at 13.) In response, Great Lakes contends that nothing in the Tariff, FERC opinions, or any applicable law prohibits it from recovering the full

Exhibit 2

measure of damages it seeks. (Pl.'s Opp'n Mem. at 2 [Doc. No. 429].) Moreover, Plaintiff argues that Defendants have waived this argument, as it is an affirmative defense which Defendants failed to plead. (Id. at 2.) If the Court permits Defendants to pursue this defense at this late date, Plaintiff further requests leave to recover its attorney's fees incurred defending against Defendants' previously-asserted jurisdictional defenses. (Id. at 41.)

The basis for Defendants' summary judgment motion is their new limitation of liability defense – a defense that Defendants recently raised, for the first time, after the parties spent over two years on jurisdictional discovery. Defendants contend that in their Answer they reserved all affirmative defenses and averred that the Complaint failed to state a claim upon which relief could be granted. (Defs.' Mem. Supp. Mot. for Summ. J. at 17, n.11 [Doc. No. 423].) However, Plaintiff asserts that none of these averments apprised Great Lakes of Defendants' Tariff-based damages limitations defense. (Pl.'s Opp'n Mem. at 39 [Doc. No. 429].) Defendants argue that this damages limitation theory is not an affirmative defense that must be pleaded at risk of waiver, like a statutory defense, or any of the affirmative defenses enumerated in Rule 8(c). Plaintiff, however, argues that because this defense comes from a federal tariff, which is construed like a federal statute, it must be affirmatively pleaded. Great Lakes contends that a majority of jurisdictions hold that a statutory limitation of damages defense is an affirmative defense that must be pleaded, or is waived. (Pl.'s Opp'n Mem. at 37 [Doc. No. 429]) (citations omitted). Further, Great Lakes argues that the defense falls within Rule 8(c)'s residuary

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clause, which requires the affirmative pleading of "any avoidance or affirmative defense," and contends that it will suffer unfair surprise or undue prejudice if the Court permits the inclusion of this defense. (Id. at 39.)

In general, the "failure to plead an affirmative defense results in the waiver of that defense." First Union Nat'l Bank v. Pictet Overseas Trust Corp., Ltd., 477 F.3d 616, 622 (8th Cir. 2007) (citing Fed. R. Civ. P. 8(c)). However, when an affirmative defense "'is raised in the trial court in a manner that does not result in unfair surprise, . . . technical failure to comply with Rule 8(c) is not fatal.'" Id. (quoting Fin. Timing Publ'ns, Inc. v. Compugraphic Corp., 893 F.2d 936, 944, n.9 (8th Cir. 1990)). Notably, Defendants do not assert a limitation of liability defense in their Answer, in which they specifically assert defenses related to jurisdiction, the *force majeure* clause, and the doctrine of commercial impracticability/impossibility. (See First Am. Answer ¶¶ 20, 50-51; Affirmative Defenses at 18-19 [Doc. No. 314].)

There appears to be no authority in this jurisdiction regarding whether a limitation of liability defense is an affirmative defense under Rule 8(c). The Court acknowledges that Defendants changed legal counsel in 2012, which may explain why this specific defense was recently asserted. However, this defense was asserted following more than two years of discovery and related motions practice on Defendants' other defenses – namely, jurisdictional defenses, the invocation of the *force majeure* clause, and the doctrine of commercial impracticability/impossibility. In this vein, the newly-asserted limitations of liability defense would appear to run counter to Defendants' earlier asserted defenses. If, as Defendants contend, Plaintiff is not entitled to damages pursuant to Section 6.13.8, then Defendants' previous positions with respect to jurisdiction, the *force majeure* clause, and the doctrine of commercial impracticability/impossibility make little sense. However, because courts have found no unfair surprise in permitting affirmative defenses to be raised prior to trial, see Pictet, 477 F.3d at 623, and because the Court prefers to determine disputed issues on the merits, the Court considers Defendants' limitation of liability defense on the legal merits.

Pursuant to the National Gas Act, FERC is given rate authority over companies that engage in either the sale or the transportation of natural gas. Section 4 of the Act requires natural gas companies to file all rates and contracts with FERC. See 15 U.S.C. § 717(c) (2005). Section 5(a) authorizes FERC to determine whether any rate or charge, or contract affecting such a rate or charge, is unjust and unreasonable, and provides that FERC may determine a just and reasonable rate. 15 U.S.C. § 717d(a) (2012); Entergy Louisiana, Inc. v. Louisiana Public Serv. Com'n, 539 U.S. 39, 49 (2003) (observing that FERC is charged with ensuring "just and reasonable" wholesale rates). "The filed rate doctrine requires 'that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.'" Id. at 47 (quoting Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 962 (1986)). In addition, the filed rate doctrine prohibits a regulated entity from charging rates for its services different than those filed with the applicable federal regulatory authority. Bd. of Pub. Works, City of Blue Earth, Minn. v. Wisc. Power & Light Co., 613 F. Supp.2d 1122, 1129 (D. Minn.

2009).

> The purpose of the filed rate doctrine is to: (1) preserve the regulating agency's authority to determine the reasonableness of rates; and (2) insure that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require. . . .

Id. (quoting H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 488 (8th Cir. 1992)).

By extension, "[t]he filed rate doctrine prohibits a party from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue." Blue Earth, 613 F. Supp.2d at 1129. For instance, in Arkansas Louisiana Gas. Co. v. Hall, 453 U.S. 571, 573 (1981), the Supreme Court considered whether the filed rate doctrine bars a state court from calculating damages in a breach of contract action based on the assumption that had a higher rate been filed, FERC would have approved it. The Supreme Court held that such actions are prohibited, noting that "[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively." Id. at 578.

The filed rate doctrine also applies to the terms and conditions of federal tariffs, in addition to the actual rates set forth in the tariffs. Nantahala, 476 U.S. at 966-67. In AT&T Co. v. Central Office Tel. Inc., 524 U.S. 214, 227 (1998), the Supreme Court held that the plaintiff's state law claims were prohibited by the filed rate doctrine when the customer sought privileges or services not included in the tariff.

In contrast, where a regulated party seeks to pursue common law contract remedies,

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courts have held that the filed rate doctrine does not bar such claims. See, e.g., Central Iowa Power Coop. v. Midwest Transmission Sys. Operator, Inc., 561 F.3d 904, 906-07 (8th Cir. 2009). In Blue Earth, this Court also held that the filed rate doctrine did not impinge on its jurisdiction where the plaintiff merely sought to enforce its contract: "Here, Blue Earth does not seek to change WPL's tariff or the contract rates or terms. It only seeks to enforce the contract as it exists. In this case, the filed rate doctrine has no impact on this Court's jurisdiction to interpret contracts. . . ." 613 F. Supp. 2d at 1129-30. Similarly, here, the filed rate doctrine has no impact on this dispute. Great Lakes is not challenging the rates in the Contract or Tariff, nor is it seeking to impose terms that are not found in these two documents. As in Blue Earth, Great Lakes merely seeks to enforce the contract as it exists, attesting that it is "only seeking to recover damages for breach of contract based on its Tariff rate, which is the reservations charges due under the [Contract]." (Pl.'s Opp'n Mem. at 12 [Doc. No. 429].) The filed rate doctrine is therefore not applicable.

Not only is the doctrine inapplicable to these facts, the specific contract provisions for which Defendants seek to invoke the filed rate doctrine do not reasonably support Defendants' argument that Great Lakes is prohibited from recovering damages. Defendants first point to Section 6.9.1 of the Tariff, arguing that it only permits Plaintiff to bill and collect on a monthly basis. (Defs.' Mem. Supp. Mot. for Summ. J. at 11 [Doc. No. 423].) This section of the Tariff, however, merely deals with billing arrangements and does not in any way limit Plaintiff's right to common law damages. Defendants further contend that Sections 6.9.4 and 6.26.2(E), providing for the transporter's options if the shipper fails to pay, set forth the exclusive remedies available to the transporter. (Id. at 12.) These provisions allow a transporter to terminate or suspend service. (Tariff §§ 6.9.4 & 6.26.2(E), Ex. 4 to Goldstein Decl. [Doc. No. 425-5].) Defendants contend that Great Lakes treated the Contract as terminated and therefore Great Lakes has no further recourse. (Defs.' Mem. Supp. Mot. for Summ. J. at 12 [Doc. No. 423].) But counsel for Great Lakes represents that Great Lakes has not filed a termination notice with FERC and cannot do so as long as Defendants assert defenses that permit them to claim entitlement to Great Lake's pipeline capacity. (Transcript of 10/4/12 at 79 [Doc. No. 470].) While Great Lakes has not terminated or suspended service under the Contract, even if it did, these tariff provisions do not preclude Great Lakes from recovering common law breach of contract damages.

Defendants base their claim that Great Lakes is not entitled to damages on the Tariff's Limitations of Liability provision, which states:

> Except as otherwise provided herein, neither Transporter nor Shipper shall be liable in damages, whether direct, indirect, consequential or otherwise, other than for acts of gross negligence, undue discrimination or willful misconduct and then only to the extent that Force Majeure does not apply, provided that nothing herein shall limit Transporter's or Shipper's liability, if any, for direct damages resulting from its own negligence.

(Tariff § 6.13.8, Ex. 4 to Goldstein Decl. [Doc. No. 425-5].) Defendants argue that by placing this language in the FERC-approved Tariff, Great Lakes limited its recovery to the express rights and remedies set forth in the agreement and waived the right to pursue

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remedies under common law. (Defs.' Mem. Supp. Mot. for Summ. J. at 10 [Doc. No. 423].)

The Court disagrees. The language in Section 6.13.8 contains no such waiver and does not limit liability for state law breach of contract claims. (Tariff § 6.13.8, Ex. 4 to Goldstein Decl. [Doc. No. 425-5].) First, the provision makes no reference to claims sounding in contract, nor uses terms or language associated with common law breach of contract actions. In contrast, it provides for tort-specific liability as to gross negligence, which suggests that the liability limitations apply to general torts. In addition, the term "undue discrimination" is a term of art applicable to tariffs, and does not in any way pertain to state law breach of contract claims.[2] Finally, the concept of "willful misconduct" is typically associated with tort claims. To the extent that willful misconduct applies in a breach of contract claim, Plaintiff's allegations generally describe such conduct, as discussed *infra* in connection with Plaintiff's Motion for Partial Summary Judgment as to Defendants' defense disclaiming anticipatory repudiation.

Most importantly, this Court must construe the Limitation of Liability provision in the context of the entire Tariff. "Numerous Michigan courts have held that contracts must be read as a whole. A court must consider the entirety of the contractual text whenever

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[2] Under the Federal Power Act, it is unlawful for public utilities, with respect to any regulated sales or transmissions, to unduly prejudice or disadvantage any persons, or to charge any unreasonable difference in rates as between localities or types of service. 16 U.S.C. § 824d(a)-(b). FERC is empowered to order a decrease in existing rates where they are "unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates." 15 U.S.C. § 717d(a).

construing any portion of a contract." Reardon v. Kelly Services, Inc., 210 Fed. App'x 456, 459-460 (6th Cir. 2006) (citing Wilkie v. Auto-Owners Ins. Co., 664 N.W.2d 776, 781, n.11 (2003)). "An interpretation derived from a reading of the contract as a whole is preferred to an interpretation taken from a reading of a single provision in isolation." Id. (citations omitted).

As Great Lakes asserts, "[i]f a shipper has no liability except for gross negligence, undue discrimination or willful misconduct, Great Lakes simply cannot enforce any of the other provisions of the Tariff. Such a reading of the Tariff renders meaningless all other provisions which impose obligations on a shipper 'to pay.'" (Pl.'s Opp'n Mem. at 25 [Doc. No. 429].) The Limitations of Liability provision specifically provides, "Except as otherwise provided herein. . . ." (Tariff § 6.13.8, Ex. 4 to Goldstein Decl. [Doc. No. 425-5].) Were the Tariff construed to limit all damages, whether in tort or contract, direct or indirect, there would be no need for the many provisions in the Contract and Tariff concerning remedies (Section 10.2), as well as numerous other provisions concerning monthly payments (Section 5.1.4), reservation fees (Section 5.1.4.1), payment of the rate on file with FERC (Section 5.1.4.3), imposition of financial penalties for imbalances in quantities (Section 6.3.5), and accrual of interest on portions of unpaid bills (Section 6.9.4). The remedies provision (Section 10.2) would likewise be unnecessary. As noted, the remedies provision, which follows the *force majeure* clause in the Tariff, provides:

> Such causes or contingencies affecting the performance of the Agreement by either party, however, shall not relieve it of liability in the event of its concurring negligence or in the event of its failure to use due diligence to

> remedy the situation and remove the cause in an adequate manner and with all reasonable dispatch, nor shall such causes or contingencies affecting the performance of this Agreement relieve either party from its obligation to make payments of amounts then due thereunder. . . .

(Tariff § 10.2, Ex. B to Countercl. [Doc. No. 80-2 at 48]) (emphasis added). This provision contemplates that various contingencies affecting performance under the Tariff will not relieve either party from its obligations, including the obligation to make payments. (Id.)

Under Michigan law, when determining contractual obligations and claims, the Court seeks to enforce the parties' intent. Networktwo Communications Group, Inc. v. Spring Valley Marketing Group and Communityisp, Inc., No. 99-72913, 2003 WL 1119763, *8 (E.D. Mich. 2003). "When the words of a written contract are clear, unambiguous and have a definite meaning, the Court has no right to look to extrinsic evidence to determine the parties' intent." Id. (citing DeVries v. Brydges, 225 N.W.2d 195, 198 (Mich. Ct. App. 1974). Thus, where the language is clear and unambiguous, the language "must be held to express the intentions of the parties." Id.

The Court finds that the contract language here is clear and unambiguous. As noted, the Limitations of Liability provision must be read in the context of the Tariff as a whole. It would make no sense for the Tariff to drastically limit the parties' contractual liability, particularly for direct, contract-based damages, when other provisions of the Tariff directly address the transporter's rights in the event of non-payment. (See, e.g., Tariff § 10.2, Ex. B to Countercl. [Doc. No. 80-2 at 48]; Tariff § 6.9.4, Ex. 4 to Goldstein

Decl. [Doc. No. 425-5].) While Defendants cite three decisions in which courts have enforced limitations of liability provisions in claims sounding in contract (Defs.' Mem. Supp. Mot. for Summ. J. at 10), the particular contractual provisions in these cases are distinguishable because the liability limitations concerned indirect, consequential damages, or special damages – not direct damages, as is the case here. See NetworkTwo, 372 F.3d at 845; Beirut Traders Co. v. The Neiman Marcus Group, Inc., No. 2:09-CV-11176, 2009 WL 3460674, *12 (E.D. Mich. Oct. 22, 2009); Trans-Union Interstate Pipeline, L.P., 104 FERC ¶ 61,315, at ¶ 10 (2003). Moreover, the provision in Trans-Union specifically applied the liability limitation to claims for "breach of contract, negligence, strict liability or otherwise," which is not the case here. 104 FERC ¶ 61,315, at ¶ 10. Jaye v. House Arrest Servs., Inc., No. 282015, 2009 WL 81839, *1 (Mich. Ct. App. Jan. 13, 2009), cited by Defendants in their reply memorandum, is inapposite. While the court in Jaye enforced a limitation of liability provision barring claims for direct as well as indirect damages, the plaintiff's claim sounded in negligence. Id.

Defendants' interpretation of Section 6.13.8 is simply inconsistent with the Tariff. In a reverse hypothetical scenario, under Defendants' reading of the Tariff, if Great Lakes breached the Contract with ESML and entered into a contract with another shipper for the same reservation of pipeline capacity, even if Defendants had expended millions of dollars in building the Nashwauk facility, Defendants would have no damages. In either the real or imagined scenario, Defendants' strict interpretation of Section 6.13.8 requires it to be read in isolation, contrary to the principles of contract construction, Reardon, 210 Fed.

Appx. at 459-460, and, moreover, leads to an unfair and absurd result. See Penn Central Co. v. General Mills, Inc., 439 F.2d 1338, 1341 (8th Cir. 1971) (stating, "published rules relating to tariffs must have a reasonable construction and should be interpreted in such a way as to avoid unfair, unusual, absurd or improbable results.").

The Limitations of Liability clause here can only be reasonably interpreted consistent with the contractual language as a whole to preclude liability for tort damages except for the enumerated acts. This interpretation of Section 6.13.8 is reasonable and enforces the parties' intent by maintaining the viability of the other provisions of the Tariff. In light of this permissible and reasonable construction, Defendants' proposed construction is simply not justified.[3] See id. ("[A] strict construction of a tariff against a

[3] While the Court finds that the language of the Tariff is clear and unambiguous, even if the Court were to find some ambiguity and consider parol evidence, the Court would reach the same conclusion. Plaintiff's supplemental exhibits demonstrate that liability was not limited to the $580,000 posted in the Letter of Credit, nor that liability existed only for tortious acts of gross negligence, willful misconduct, or undue discrimination. Rather, Defendants were provided with a legal opinion specifically opining that their liability for breach of contract was not limited to the amount of the Letter of Credit, but could potentially reach "the millions of dollars." (Letter of 3/2/09 from A. Gordon to W. Klein at 2, Ex. 1 to Wohlrabe Aff. [Doc. No. 508-1].) Moreover, in Great Lakes' 2006 correspondence with FERC to revise the limitations of liability language in the Tariff, it is clear that the liability limitations concern tort claims. (Letter of 5/31/06 from J. Willett to M. Salas at 2, Ex. 2 to Wohlrabe Aff. [Doc. No. 508-2]) (proposing to add clarifying and conforming language to the Tariff's provision on liability, including limitations for when damages are attributable to Great Lakes' simple negligence, imposing liability only for gross negligence, willful misconduct or bad faith); Letter of 6/30/06 from M. McLaughlin to J. Willett at 1 [Doc. No. 508-3]) (restating same). Again, the Court does not rely upon the supplemental exhibits in reaching its findings, because it is unnecessary to this determination. The Court simply notes this alternative basis on which this ruling could be made.

carrier is not justified where such a construction ignores a permissible and reasonable construction which conforms to the intentions of the framers of the tariff, avoids possible violations of the law, and accords with the practical application given by shippers and carriers alike.") Accordingly, Defendants' motion for summary judgment based on the limitation of liability defense is denied.

2. Creditworthiness Standards

Defendants further argue that because FERC has held that "a three-month cushion" for non-creditworthy customers is sufficient to provide full protection for pipelines, Great Lakes has no monetary remedy against ESML beyond the draw down on the Letter of Credit. (Defs.' Mem. Supp. Mot. for Summ. J. at 12 [Doc. No. 429].)

Under the Tariff, FERC's creditworthiness standards are met by a shipper providing an unconditional, irrevocable guaranty, a revolving irrevocable standby letter of credit, or other form of credit enhancement acceptable to Great Lakes, calculated for three months of service. (Tariff § 6.26.2(A), Ex. 4 to Goldstein Decl. [Doc. No. 425-8].) Defendants contend that the Tariff, which required MSI to post three months' estimated charges as collateral, entitles Great Lakes to nothing more. (Defs.' Mem. Supp. Mot. for Summ. J. at 13 [Doc. No. 429]; Tariff § 6.26.2(A), Ex. 4 to Goldstein Decl. [Doc. No. 425-8].) In response, Plaintiff contends that the creditworthiness provision has no impact on its ability to recover damages for breach of contract. Rather, Great Lakes argues, a three-month

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security provision is the industry standard because typically, a pipeline transporter is able to determine whether it will be able to remarket its capacity in a three-month window. (Pl.'s Opp'n Mem. at 14 [Doc. No. 429].)

In Trailblazer Pipeline Co., Order on Rehearing and Compliance Filing, 108 FERC ¶ 61,049 (2004), FERC observed that it had originally adopted the three-month collateral requirement because that period "protects the pipeline against revenue loss while it completes the termination process and is in a position to remarket the capacity." Such a statement about FERC's general creditworthiness requirements does not, however, limit a party from recovering damages in the event of a breach of contract. Defendants point to no statement or opinion from FERC that suggests that the purpose of three-month's worth of security collateral is to eliminate or restrict state law claims for breach of contract. Morever, as Great Lakes observes, numerous courts have allowed "aggrieved pipelines to recover from defaulting shippers damages which are considerably in excess of the collateral provided by the shipper." (Pl.'s Opp'n Mem. at 14-20 [Doc. No. 429]) (citing, e.g., In re USGen New England, Inc., No. 03-30465 PM, 2007 WL 1074055, *3 (Bankr. D. Md. Jan. 23, 2007) (acknowledging that a shipper can be sued for state law breach of contract damages); In re Mirant Corp., 332 B.R. 139, 159 (Bankr. N.D. Tex. 2005) (awarding damages based on the breach of a long-term transportation agreement)). Defendants' argument based on the creditworthiness provision therefore fails.

Finally, Defendants also argue that the Tariff prohibits Great Lakes from recovering future damages occurring as a result of repudiation. No provisions of the Tariff contain

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such a limitation and Michigan law permits the recovery of all damages, including future damages due under an agreement, upon a party's breach and repudiation of the agreement. Carpenter v. J.D. Smith, 383 N.W.2d 248, 250 (Mich. 1986). Defendants' argument in this regard is therefore unavailing.

For all of the reasons noted above, Defendants' summary judgment motion based on Great Lakes alleged lack of damages is denied.

3. Derivative Liability of Foreign Essar Defendants

In support of their motion for summary judgment as to the Foreign Essar Defendants, Defendants advance an argument similar to that addressed above, namely, that "[t]he filed rate doctrine requires that Great Lakes abide by the actual terms of its Tariff, and [Great Lakes] does not identify a single term entitling it to hold the Foreign Essar Defendants secondarily liable for damages, if any, owed by ESML." (Defs.' Reply Mem. at 17 [Doc. No. 464]) (emphasis in original). Defendants further argue that Great Lakes has failed to adequately allege the elements of injustice or fundamental unfairness necessary to pierce the corporate veil and disregard the corporate formalities. (Defs.' Mem. Supp. Mot. for Summ. J. at 23-24 [Doc. No. 423].) In addition, Defendants argue that they are entitled to summary judgment based on Plaintiff's allegations that had Great Lakes contracted directly with ESML, Great Lakes would have required guaranties, co-signatories, or other collateral. (Id. at 22) (citing First Am. Compl. ¶ 57 [Doc. No. 35].) Defendants contend that the Tariff does not provide for such consent rights or guarantees beyond the three-month security. (Id.)

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In response, Great Lakes argues that the filed rate doctrine does not preclude its claims against the Foreign Essar Defendants, for the reasons previously advanced with respect to its claims against ESML. (Pl.'s Opp'n Mem. at 30 [Doc. No. 429].) In addition, Great Lakes contends that it has adequately pleaded its claims against the Foreign Essar Defendants. (Id. at 31.) Great Lakes alleges the following in support of its veil piercing claim: (1) ESML was insufficiently capitalized for purposes of the corporate undertaking of building the Nashwauk Facility; (2) ESML was insolvent and lacked revenue when it acquired MSI; (3) ESML and the Foreign Essar Defendants have overlapping officers and directors and do not observe regular corporate formalities; and (4) ESML is a mere shell or facade of the Foreign Essar Defendants. (Id. at 31-32) (citing First. Am. Compl. ¶¶ 33-45 [Doc. No. 35].) Further, Great Lakes asserts that this summary judgment motion is premature, as merits discovery has only been undertaken as of July 18, 2012, in light of the earlier focus on jurisdictional discovery. (Id. at 33 [Doc. No. 429].) Finally, as to the allegations in Paragraph 57 of the First Amended Complaint in which Great Lakes asserts that it would have requested additional security or guarantees had it contracted directly with ESML, Plaintiff concedes that this is in error. (Id. at 34.) Accordingly, Plaintiff requests leave to amend this allegation, consistent with the Tariff. (Id.)

Under Michigan law, parent and subsidiary corporations are generally presumed to be separate and distinct legal entities. Novo Nordisk A/S v. Caraco Pharm. Labs., Ltd., 450 F. Supp.2d 757, 760 (E.D. Mich. 2006) (citing Seasword v. Hilti, Inc., 537 N.W.2d 221, 224 (1995)). This presumption, or "the corporate veil," may be pierced due to the

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interests of justice or overriding public policy. Id. The corporate veil may be pierced when (1) the corporate entity is a mere instrumentality of another entity or individual; (2) the corporate entity is used to commit a fraud or wrong; and (3) the plaintiff suffers an unjust loss or injury. Grand Rapids Assocs. Ltd. P'ship v. Coop Props., LLC, Nos. 10-2560 & 10-2613, 2012 WL 3553488, *2 (6th Cir. 2012) (citing Foodland Distrib. v. Al–Naimi, 559 N.W.2d 379, 381 (Mich. Ct. App. 1996)). No single rule determines when the corporate veil should be pierced, "and the facts are to be assessed in light of a corporation's economic justification to determine if the corporate form has been abused." Id. (quoting Rymal v. Baergen, 686 N.W.2d 241, 252 (Mich. Ct. App. 2004)). Because the question of piercing the corporate veil depends on the equities of the situation, "the inquiry tends to be intensively fact-driven." Servo Kinetics, Inc. v. Tokyo Precision Instruments Co. Ltd., 475 F.3d 783, 798 (6th Cir. 2007) (citing Kline v. Kline, 305 N.W.2d 297, 299 (Mich. 1981)). As to the element of a fraud or wrong, the Sixth Circuit, applying Michigan law, has held that a breach of contract may form the basis of the fraud or wrong necessary to establish veil-piercing liability. Id. at 799-800 (citing Herman v. Mobile Homes Corp., 26 N.W.2d 757, 763 (Mich. 1947)).

The Court finds that Plaintiff has adequately alleged a claim for piercing the corporate veil against the Foreign Essar Defendants. As noted, Great Lakes contends that ESML was undercapitalized, that Essar Holdings purchased the assets and liabilities of MSI and placed them in ESML at a time when ESML had no sales or sources of revenue, that ESML was unable to make its payments to Great Lakes under the Contract as a result of this undercapitalization, that the Foreign Essar Defendants controlled ESML, and that Great Lakes suffered injury as a result of these actions. (First Am. Compl. ¶¶ 21-45 [Doc. No. 35].)

Viewing the facts in the light most favorable to Plaintiff, it has submitted evidence demonstrating that ESML "relies heavily on [Essar Steel Holding Ltd.] for funding." (Unaudited Financial Statements of ESML through 9/30/09 at 6, Ex. 9 to Wohlrabe Aff. [Doc. No. 430-9].) In addition, in the First Amended Answer, ESML admits that it has no sales or revenue and will not have sales or revenue until the Nashwauk facility becomes operational. (First Am. Answer ¶ 33 [Doc. No. 314].) An August 2008 Essar Steel document entitled "MSI Project Updates" refers to the effective date of July 2009 on the gas line capacity contract with Great Lakes, and deadlines of December 2010 for the completion of ESML's crusher and concentrator, September 2010 for its slurry pipeline, and October 2010 for its pellet plant. (MSI Project Updates, Ex. 10 to Wohlrabe Aff. at 15, 21 [Doc. No. 430-9].) A November 2008 email from Mahendra Mishra, ESML's Commercial and Project Finance Manager, to TransCanada's Thomas Kasunic, responded to TransCanada's inquiry about the status of the lateral pipeline and indicated no anticipated delays. (Email of 11/24/08 from T. Kasunic to M. Mishra [Doc. No. 430-10].) Such evidence supports Plaintiff's veil-piercing allegations and summary judgment is inappropriate. Defendants' motion for summary judgment is therefore denied based on its theory under the filed rate doctrine and the adequacy of Plaintiff's pleading of the claim.

However, as further discussed in connection with Plaintiff's cross motion on this claim, summary judgment is also premature because the parties have engaged in little discovery specifically directed at the veil-piercing issue. At the hearing on these motions, Plaintiff's counsel indicated that Great Lakes would seek to depose several persons on this issue, including Mr. Mishra and Mr. Vuppuluri. (Tr. at 31 [Doc. No. 470].) Assuming that document production concerns could be resolved, Plaintiff's counsel estimated that if the deponents would appear for deposition in the United States, discovery could be completed within approximately two months. (Id. at 32.) The Court grants Plaintiff's request to commence such discovery and orders that it be completed no later than June 15, 2013. Accordingly, should the parties' discovery necessitate the filing of summary judgment motions on the derivative liability claim, Defendants' motion is therefore also denied without prejudice.

Lastly, Plaintiff seeks permission to amend the First Amended Complaint to remove language in Paragraph 57 in which it currently alleges that had Great Lakes contracted directly with ESML, it would have required guaranties, co-signatories, or other collateral. (Pl.'s Opp'n Mem. at 34 [Doc. No. 429].) Plaintiff also seeks leave to more specifically allege injustice or fundamental unfairness with respect to this claim, in light of facts and information that it may acquire in the course of veil-piercing discovery. (Pl.'s Mem. Supp. Mot. to Amend at 4-5 [Doc. No. 442].) Plaintiff's Motion for Leave to Amend their derivative liability claim is granted. Following completion of the veil-piercing discovery, Plaintiff is permitted to file an amended pleading.

4. Defendants' Request for Leave to Amend

Defendants move for leave to amend their Answer, in the event that the Court finds their pleading lacking. (Defs.' Mem. Supp. Mot. Leave to Amend [Doc. No. 450].) As noted, Defendants did not plead the limitations of liability theory in their Answer. However, as fully set forth above, the Court finds that there are no issues of material fact in dispute as to the limitations of liability defense. On this legal theory, the Court's ruling is as a matter of law. Accordingly, any amendment regarding this defense would be futile and, to the extent Defendants seek leave to amend as to this defense, their request is denied.

C. Plaintiff's Motion for Partial Summary Judgment

Plaintiff moves for partial summary judgment as to three defenses: (1) commercial impracticability/impossibility; (2) excuse of performance under the *force majeure* clause; and (3) denial of anticipatory repudiation. In addition, Great Lakes seeks summary judgment that, as a matter of law, the Foreign Essar Defendants are liable for any damages recoverable by Great Lakes against ESML under theories of veil piercing, alter ego and/or mere instrumentality. (Pl.'s Mem. Supp. Mot. for Partial Summ. J. at 14 [Doc. No. 418].)

1. Defenses of Commercial Impracticability/Impossibility and Excuse of Performance Under the *Force Majeure* Clause

In their answer, Defendants contend that the 2008 global financial crisis was the type of contingency – similar to fires, floods, labor strikes, war, or acts of god – excused under the *force majeure* clause. (First Am. Answer at 19 [Doc. No. 314].) Specifically,

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Defendants assert that the financial crisis rendered them unable to obtain financing for the Nashwauk facility, through no fault of their own. (Id.) Alternatively, they assert that due to the financial crisis, their performance is excused under the doctrine of commercial impracticability/impossibility. (Id.)

Earlier in this case, this Court ruled in Great Lakes' favor on its motions to dismiss Defendants' counterclaims based on the invocation of the *force majeure* clause and the doctrine of commercial impracticability/ impossibility. (Order of 5/15/12 [Doc. No. 397].) Great Lakes now moves for summary judgment on Defendants' affirmative defenses asserted under the same theories. (Pl.'s Mem. Supp. Mot. for Partial Summ. J. at 2 [Doc. No. 418].) Defendants acknowledge that the underlying factual predicates of these defenses are identical to those affirmatively pleaded in their now-dismissed Counterclaim. (Defs.' Opp'n Mem. at 5 [Doc. No. 435].) While Defendants disagree with the Court's analysis of the law, they concede that they have no legal basis on which to pursue these defenses. (Id.) Nonetheless, Defendants seek to preserve their right to appeal and therefore oppose Plaintiff's motion. (Id.)

This Court previously observed that while the *force majeure* clause enumerates a host of hardships that might excuse a party's contractual obligations, it does not include financial crises or changes in financial conditions. (Order of 5/15/12 at 18 [Doc. No. 397].) Moreover, construing the Contract as a whole, the Court found that Defendants' proposed application of *force majeure* made little sense in connection with the Contract's remedies section, which provides that neither party is excused from making payments of

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amounts due under the Contract. (Id.) In dismissing Defendants' *force majeure* counterclaim, the Court underscored the plain language of the Contract:

> . . . [W]hat is most determinative is the plain language of the Contract. The Contract is for the transportation of natural gas. Great Lakes' obligation under the contract is to provide the transportation, and ESML's obligation is to pay a fee for that service. The parties' obligations are not conditioned on ESML's ability to obtain financing, the status of the Nashwauk facility, or the status of the construction of any lateral pipelines necessary to transport natural gas to that facility. ESML's claim that the parties intended for the Contract to commence with the simultaneous commencement of operations at the Nashwauk facility (Countercl. ¶ 28 [Doc. No. 80]) is belied by the face of the Contract, which provides for a term from July 1, 2009 to March 31, 2024. Similarly, while ESML contends that the City of Nashwauk was responsible for building a lateral connecting pipeline, and failed to do so (id. ¶ 31), again, the Contract, between ESML's predecessor and Great Lakes contains no such provisions or conditions.
>
> The fact that ESML might not be able to obtain financing for the construction of the steel facility, even absent a global financial crisis, was a foreseeable event. Had MSI/ESML wanted to avoid its obligations under the Contract due to this possibility, it could have included a provision in the Contract conditioning its performance on the events which, ESML now contends, make its performance impossible or impracticable. ESML fails to connect its invocation of the *force majeure* clause directly with the terms of the Contract. It focuses on the financing needed for construction of the Nashwauk steel facility, but the Contract simply and plainly obligates ESML to make its monthly payments.

(Id. at 18-19.)

Applying the same reasoning to Defendants' counterclaim based on commercial impracticability/impossibility, this Court observed that it was completely foreseeable that ESML might not secure the necessary funding for the Nashwauk facility. (Id. at 23.) While it could have conditioned its performance on obtaining such financing, it failed to do so. (Id.)

Exhibit 2

Nothing in the record on summary judgment alters this Court's view, and Defendants concede that the factual predicates of these defenses are essentially identical to their now-dismissed counterclaims. Accordingly, for all of the reasons set forth above and in the Court's May 15, 2012 Order [Doc. No. 397]), the Court finds that there are no genuine issues of material fact in dispute as to Defendants' *force majeure* and commercial impracticability/impossibility defenses. Plaintiff's motion for partial summary judgment as to these two defenses is therefore granted.

2. Defense of No Anticipatory Repudiation

In its claim for breach of contract/anticipatory repudiation, Great Lakes alleges that "[ESML] breached the Contract by failing to make the payments due under the Contract and by repudiating its future obligations under the Contract." (First Am. Compl. ¶ 52 [Doc. No. 35].) In its general factual allegations, Great Lakes contends that Defendants "have failed and refused to make the payments due under the Contract despite Great Lakes' demands. The Essar entities have indicated to Great Lakes that they do not intend to fulfill their future contractual obligations under the Contract." (Id. ¶ 20.)

While not pleaded as an affirmative defense of "no anticipatory repudiation," Defendants nevertheless deny Plaintiff's allegation of breach of contract/anticipatory repudiation. (First Am. Answer ¶ 52 [Doc. No. 314].) Also, in the factual allegations supporting their Counterclaim, in a section captioned "ESML's Efforts to Sustain the Agreement," Defendants contend that they actively initiated discussions about their inability to use the pipeline capacity until the completion of the Nashwauk Facility.

Exhibit 2

(Countercl. ¶¶ 59-72 [Doc. No. 314].) Defendants further contend that while they attempted to fashion a solution to keep the Contract in place with delayed performance, Great Lakes rebuffed their overtures. (Id. ¶¶ 66-67.)

Plaintiff seeks summary judgment as to ESML's claim that it has not anticipatorily repudiated the Contract, or stated differently, that ESML anticipatorily repudiated the Contract as a matter of law. (Pl.'s Mem. at 10 [Doc. No. 418].) Plaintiff contends that Defendants had no intention of complying with the terms of the Contract, pointing to communications between Mahendra Mishra of ESML and Thomas Kasunic of Great Lakes. In a February 27, 2009 letter from Mishra to Kasunic, Mishra states on behalf of ESML, "While the present crisis may provide a legally justifiable reason for MSI to terminate the Contract, we believe, and hope, that an alternative, amicable solution is possible." (Letter of 2/27/09 from M. Mishra to T. Kasunic at 2, Ex. 5 to Goldstein Decl. [Doc. No. 424-4]) (emphasis added). In a June 30, 2009 letter, Mishra again refers to the economic crisis, stating,

> While you understand that strict Contract compliance is commercially unreasonable in this time of economic crisis, with due respect it seems inequitable and unreasonable to suggest that the solution is a large cash payment when globally companies are struggling to maintain even minimum levels of liquidity.

(Letter of 6/30/09 from M. Mishra to T. Kasunic, Ex. A to Wohlrabe Supp'l Aff. [Doc. No. 458-1].) Mishra then recommends a re-write of the material terms of the Contract, stating, "we believe the only sound business solution is for the Parties, now duly informed of the global market crisis and the effects thereof, to re-state the Terms and conditions of

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the Contract, including those pertaining to price, volume, term and commencement date." (Id.) Also in support of Plaintiff's contention that ESML had no intention of honoring the Contract, Plaintiff submits evidence showing that in September 2008, ESML solicited rate proposals from other natural gas transporters. (Emails of 9/2008, Ex. 4 to Wohlrabe Decl. [Doc. No. 419-4].)

In light of ESML's past-due status under the Contract, Great Lakes sought adequate assurances from ESML that ESML intended to honor its obligations under the Contract. Plaintiff sent two letters to ESML in September 2009 concerning the past-due amounts under the contract. (Pl.'s Mem. Supp. Mot. for Partial Summ. J. at 11 [Doc. No. 418].) In both letters, counsel for Great Lakes refers to the amounts past due under the Contract and demands that Defendants confirm their intention to honor the Contract. (Letter of 9/3/09 from D. Elrod to M. Mishra & S. Hicks, Ex. 2 to Wohlrabe Aff. [Doc. No. 419-2]; Letter of 9/29/09 from D. Elrod to M. Mishra, Ex. 3 to Wohlrabe Aff. [Doc. No. 419-3].)

On October 13, 2009, Mahendra Mishra responded to Plaintiff's letters on behalf of ESML. (Letter of 10/13/09 from M. Mishra to D. Elrod, Ex. C to Decl. of Mahendra Mishra [Doc. No. 436-2].) In his letter, Mishra expresses his "surprise" at receiving letters from Great Lakes' counsel, as the parties "[were] still in continued discussion" on the matters arising under the Contract. (Id. at 1.) Also in his letter, Mishra provides a chronology of events related to the Contract. (Id. at 1-2.) The entry for September 28, 2009 indicates that the parties participated in a conference call on that date, during which "ESML laid out possible options of alternative arrangements to reach a business solution."

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(Id. at 2.) Mishra concludes that because the parties were still involved in discussions to reach a "mutually acceptable solution," "[Great Lakes'] demand for payment of its invoices under the Agreement is not justified and or proper." (Id.)

Mr. Elrod, Counsel for Plaintiff, then responded with a letter dated October 23, 2009. (Letter of 10/23/09 from D. Elrod to M. Mishra, Ex. D to Mishra Decl. [Doc. No. 436-3].) In this letter, Plaintiff's counsel states that ESML is in default under the Contract "due to its repudiation and breach of the Contract." Regarding the parties' discussions, Plaintiff's counsel notes that

> [a]lthough [ESML] may have had certain discussions with [Great Lakes] in an attempt to resolve the damage claims resulting from its breach of contract, such discussions were for the purposes of settlement only and in no way absolved [ESML] from its obligations under the Contract.

(Id.) Plaintiff's counsel concludes by stating that Great Lakes will take necessary action to recover its damages under the Contract. (Id.)

Defendants offer the following arguments in opposition to Great Lakes' motion: (1) Great Lakes cannot invoke the doctrine of adequate assurances in light of the filed rate doctrine; (2) Plaintiff failed to plead the doctrine of adequate assurances; (3) the doctrine of adequate assurances has not been applied to common law breach of contract claims under Michigan law; and (4) the Contract is an installment contract, to which adequate assurances are inapplicable. (Defs.' Opp'n Mem. [Doc. No. 435].)

In support of their opposition memorandum, Defendants submit the Declaration of Mahendra Mishra [Doc. No. 436]. Mishra attests that ESML's September 2008 email rate

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solicitation communications with other natural gas pipeline transporters concerned bids for gas capacity on a lateral pipeline – not the pipeline capacity subject to the Contract with Great Lakes. (Mishra Decl. ¶ 2 [Doc. No. 436].) Mishra contends that because Great Lakes' pipeline would not connect directly to the Nashwauk facility, a lateral or connecting pipeline was always necessary. (Id.) In addition, Mishra asserts that at no point did anyone from ESML ever state that ESML had no intention of performing under the Contract, "although we did reiterate that ESML believed that the delay in construction of the facility temporarily prevented and excused performance." (Id. ¶ 5.) Similarly, Mishra contends that "[n]one of the business representatives from Great Lakes stated to me that they thought the [Contract] was repudiated, and none asked ESML directly for adequate assurances of performance." (Id.) Concerning the parties' communications in the fall of 2009, Mishra asserts that he and other senior management at ESML met with senior management at Great Lakes in order to find a solution to ESML's difficulties in obtaining financing and constructing the Nashwauk facility. (Id. ¶ 3.)

i. Filed Rate Doctrine

As to Defendants' claim that the filed rate doctrine precludes invocation of the doctrine of adequate assurances, the Court rejects this argument for all of the reasons set forth herein regarding Defendants' summary judgment motion. The filed rate doctrine does not prevent a party from enforcing its tariff-based agreement, nor does it prevent a court from interpreting such an agreement. Blue Earth, 613 F. Supp.2d at 1129-30. As Plaintiff notes, courts have recognized pipelines' rights to seek damages for the entire term of a long-term transportation agreement where the shipper has repudiated the agreement. See In re USGen New England, Inc., 2007 WL 1074055 at *6-7; In re Mirant, 332 B.R. at 159; see also In re Enron Corp., No. 01-16034 (AJG) (Bankr. S.D.N.Y. Feb. 10, 2005), Ex. 2 to Aff. of Lauri Newton [Doc. No. 432-2]; Newton Aff. ¶ 7 [Doc. No. 432] (awarding damages based on debtor's breach of a transportation service agreement, reduced to reflect transporter's ability to mitigate).

ii. Anticipatory Repudiation and Adequate Assurances

An anticipatory breach of contract is defined as a "definite and unequivocal manifestation of intention on the part of the repudiator that he will not render the promised performance when the time fixed for it in the contract arrives." 36th Dist. Court v. Michigan AFSCME Council 25, No. 285123, 2009 WL 3103829, *1 (Mich. Ct. App. Sept. 29, 2009) (citing 4 Corbin, Corbin on Contracts, § 973, p. 905). Michigan courts recognize the doctrine of anticipatory breach of contract, and in determining whether a repudiation has occurred, courts consider the party's intention manifested by acts and words, as opposed to "secret intentions." Stoddard v. Mfrs. Nat'l Bank of Grand Rapids, 593 N.W.2d 630, 640 (Mich. Ct. App. 1999). "Where there has been an anticipatory breach of a contract by one party * * * the other party may treat the entire contract as broken and may sue immediately for the breach." Carpenter, 383 N.W.2d at 250 (citing 17 Am. Jur.2d, Contracts, § 448, p. 910). A refusal to perform also enables the other party to sue immediately for future payments. Id. (citations omitted); see also Benson Assocs., Inc. v. Bodytechniques, Inc., Nos. 228852, 235835, 2002 WL 1308350, *10 (Mich. Ct. App.

June 11, 2002) (holding, "The anticipatory breach of the . . . commission agreement vested in plaintiff an immediate right of action to recover the entirety of the breaching party's outstanding contractual obligation.")

As noted, Plaintiff argues that Defendants repudiated the Contract by failing to make payments despite Great Lakes' demands. (Pl.'s Mem. Supp. Mot. for Summ. J. at 10-12 [Doc. No 418].) Plaintiff also argues that Defendants failed to provide adequate assurances of future performance, because Defendants refused to acknowledge their intent to abide by the contractual terms. (Pl.'s Mem. Supp. Mot. for Summ. J. at 12-13 [Doc. No. 418].) Great Lakes cites Section 251 of the Restatement (Second) of Contracts, which states:

> (1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he received such assurance.
>
> (2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

(Id. at12) (citing Restatement (Second) of Contracts, § 251 (1981)).

Defendants, however, argue that Michigan courts have not adopted Section 251 of the Restatement as it relates to contracts for services. (Defs.' Opp'n Mem. at 8-11 [Doc. No. 435].) They further argue that, in any event, Plaintiff has failed to specifically plead that Defendants did not provide adequate assurances. (Id. at 8.)

Exhibit 2

As Defendants assert, Section 251 of the Restatement has not been applied by the Michigan courts to commercial contracts. However, Michigan courts have applied the doctrine of adequate assurances in the context of contracts for the sale of goods governed by the Uniform Commercial Code. See, e.g., Steel Strip Wheels, Ltd. v. General Rigging, LLC, No. 08-CV-13737, 2009 WL 3190415, *9 (E.D. Mich. Sept. 30, 2009) (applying doctrine of adequate assurances pursuant to Michigan's enactment of the Uniform Commercial Code, Mich. Comp. Laws § 440.2609). Other jurisdictions have adopted Section 251 and applied the doctrine of adequate assurances to contracts for services. See, e.g., In re Broadstripe, LLC, 435 B.R. 245, 258, n.50 (Bankr. D. Del. 2010) (collecting cases). Discussing the expansion of this doctrine, one court has observed,

> [Commentators] have noted that the problems redressed by UCC 2–609 are not unique to contracts for sale of goods, regulated under a purely statutory regime. Thus, they have cogently identified the need for the doctrine to be available in exceptional and qualifying common-law contractual settings and disputes because of similar practical, theoretical and salutary objectives (e.g., predictability, definiteness, and stability in commercial dealings and expectations).

Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.,705 N.E.2d 656, 660 (N.Y. 1998) (citations omitted). In some jurisdictions, even where the right to demand or the duty to provide adequate assurances does not exist under state law, courts have nevertheless permitted the failure to provide adequate assurances after a demand to be presented to the jury as evidence of anticipatory repudiation. O'Shanter Resources, Inc. v. Niagara Mohawk Power Corp., 915 F. Supp. 560, 566 (W.D.N.Y. 1996). In such instances, the failure to provide adequate assurances, along with other evidence, may be used to prove absolute and unequivocal repudiation and anticipatory breach. Id. (citing Mollohan v. Black Rock Contracting, Inc., 235 S.E.2d 813, 816, n. 1 (W. Va. 1977)).

This Court, however, need not attempt to determine whether the Michigan Supreme Court would apply Section 251 to these facts. Plaintiff has clearly pleaded a claim for anticipatory repudiation, alleging that Defendants failed to fulfill their obligations under the Contract and did not intend to fulfill their future obligations. (First Am. Compl. ¶¶ 20, 52.) While Plaintiff's counsel may have "demand[ed] adequate assurances" from Defendants in the September 2009 letters, the fact that counsel used this language does not necessarily mean that Great Lakes was relying on Section 251 or that Plaintiff was required to plead "adequate assurances" as part of its anticipatory repudiation claim.

As noted, an anticipatory breach of contract requires a definite and unequivocal manifestation of intention on the part of the repudiator that he will not perform as promised, at the time fixed for performance. 36th Dist. Court, 2009 WL 3103829 at *1. While adequate assurances are often involved in anticipatory repudiation claims, adequate assurances are not a necessary "element" of such claim. Even assuming that the Restatement applied, under a plain reading of the Section 251, an obligee "may demand adequate assurances of due performance," and "may treat as a repudiation the obligor's failure to provide [such assurances]." Restatement (Second) of Contracts, § 251 (1981) (emphasis added). The failure to plead adequate assurances is not fatal to Plaintiff's anticipatory repudiation claim. Moreover, as Defendants contend, adequate assurances may not be applicable in this contract for services, regardless. Great Lakes' pleadings sufficiently support its claim for anticipatory repudiation.[4]

As to whether there remain issues of material fact regarding Defendants' asserted defense that it did not anticipatorily repudiate the Contract, the Court finds no such issues of fact in dispute. Mr. Mishra's claim that no Great Lakes business representatives directly asked for assurances of performance or indicated that the contract was repudiated is belied by the communications from Great Lakes' counsel, Mr. Elrod. The September 2009 letters from Mr. Elrod to Defendants apprised Defendants of their failure to abide by the terms of the contract, and demanded a response. (Letter of 9/3/09 from D. Elrod to M. Mishra & S. Hicks, Ex. 2 to Wohlrabe Aff. [Doc. No. 419-2]; Letter of 9/29/09 from D. Elrod to M. Mishra, Ex. 3 to Wohlrabe Aff. [Doc. No. 419-3].) Whether Great Lakes' demand was termed an "adequate assurance" is irrelevant to the issue – Defendants had not made payments due under the Contract and did not agree to fulfill their future contractual obligations. (Id.) Rather, the evidence shows that Defendants sought to re-write the Contract, rather than to comply with its terms. In June 2009, Mr. Mishra stated that "strict compliance with the Contract is commercially unreasonable," and recommended that the Contract's material terms – "including those pertaining to price, volume, term and commencement date" – be "re-state[d]." (Letter of 6/30/09 from M. Mishra to T. Kasunic, Ex. A to Wohlrabe Supp'l Aff. [Doc. No. 458-1].)

[4] Defendants further argue that adequate assurances are inapplicable to installment contracts. (Defs.' Opp'n Mem. at 11 [Doc. No. 435].) The Court need not reach this issue as the question of adequate assurances is not part of this Court's resolution of summary judgment on the defense disclaiming anticipatory repudiation.

While Mishra's Declaration refers to a series of meetings between ESML management and Great Lakes management, the October 23, 2009 letter from Plaintiff's counsel makes plain that such discussions in no way relieved ESML of its continuing obligations under the Contract. (Letter of 10/23/09 from D. Elrod to M. Mishra, Ex. D to Mishra Aff. [Doc. No. 436-3].) Defendants, however, asserted that Plaintiff's demand for payment under the Contract was neither "justified or proper." (Letter of 10/13/09 from M. Mishra to D. Elrod at 2, Ex. C to Mishra Decl. [Doc. No. 436-2].) The evidence thus demonstrates that Defendants sought to re-write the agreement, and did not agree to abide by the terms of the Contract. Defendants' efforts to release themselves from performance or to renegotiate the terms of the Contract constitute anticipatory repudiation – a "definite and unequivocal manifestation of intention" that they would not "render the promised performance when the time fixed for it in the contract arrives." See 36th Dist. Court, 2009 WL 3103829 at *1.

While Defendants contend that additional discovery on anticipatory repudiation is necessary, the Court disagrees. Under Fed. R. Civ P. 56, Defendants were required to submit evidence refuting Great Lakes' motion. They have done so. Whatever relevant evidence that might reveal their intent to honor the terms of the contract was presumably within their possession and has been brought to the Court's attention. They have failed to identify any plausible basis for requiring additional discovery. Accordingly, their request for further discovery is denied.

For all of the reasons set forth herein, the Court finds that any defense claiming that

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Defendants did not anticipatorily repudiate the contract fails as a matter of law. Plaintiff's motion for partial summary judgment is therefore granted in this regard.

3. Foreign Essar Defendants' Derivative Liability

In the instant motions, both parties seek summary judgment as to Plaintiff's claim against the Foreign Essar Defendants based on theories of veil piercing, alter ego, and mere instrumentality. As set forth herein in connection with Defendants' summary judgment motion, issues of fact remain as to these theories of liability primarily because the record is not developed. This applies equally to Plaintiff's motion for summary judgment on the derivative liability claim.

As to this claim, the Court nevertheless addresses the merits of Plaintiff's motion, which is based on certain language contained in Defendants' discovery responses. Great Lakes points to Defendants' August 8, 2012 responses and objections to Plaintiff's document discovery requests. In these requests, Great Lakes asked Essar Global, Essar Steel Holdings, and Essar Steel Limited for "[a]ll documents related to [their respective] agreements with MSI to provide quarterly financial reports at MSI after the acquisition." (Def. Essar Steel Holdings' Resp. to Req. for Docs., Req. No. 16, Ex. 9 to Wohlrabe Aff. [Doc. No. 419-9]; Def. Essar Steel Limited's Resp. to Req. for Docs, Req. No. 16, Ex. 10 to Wohlrabe Aff. [Doc. No. 419-10]; Def. Essar Global's Resp. to Req. for Docs., Req. No. 16, Ex. 11 to Wohlrabe Aff. [Doc. No. 419-11].) Each of the Foreign Essar Defendants objected to the request as "vague, ambiguous and non-sensical <u>as [each Foreign Essar Defendant] and MSI are the same entity</u>, and thus cannot provide documents to itself." (Id.) (emphasis added).

In response to Great Lakes' summary judgment motion on its derivative liability claim, Defendants contend that their discovery responses were "obvious typographical error[s] caused by virtue of 'supercopying' objections to deal with a multitude of identical requests . . . ." (Defs.' Opp'n Mem. at 18-19 [Doc. No. 435].) Defendants attest that they amended their discovery responses on August 27, 2012, upon receiving notification of this error. (Letter of 8/27/12 from R. Levine to B. Wohlrabe, Ex. 10 to Goldstein Aff. [Doc. No. 437-9]; Am. Responses, Req. No. 16 [Doc. Nos. 437-10-437-12].) The amended responses for each of the respective Foreign Essar Defendants state: "[Foreign Essar Defendant] objects to this request as vague, ambiguous and non-sensical insofar as it purports to treat ESML and MSI as separate entities." (Def. Essar Steel Holdings' Am. Resp. to Req. for Docs., Req. No. 16, Ex. 11 to Goldstein Aff. [Doc. No. 437-10]; Def. Essar Steel Limited's Am. Resp. to Req. for Docs, Req. No. 16, Ex. 10 to Wohlrabe Aff. [Doc. No. 437-11]; Def. Essar Global's Am. Resp. to Req. for Docs., Req. No. 16, Ex. 11 to Wohlrabe Aff. [Doc. No. 437-11]) (emphasis added). In addition, as further evidence of the typographical nature of their errors, Defendants cite various Court filings in which they have consistently contested Plaintiff's derivative liability claims. (Defs.' Opp'n Mem. at 18 [Doc. No. 435]) (citing First Am. Answer ¶¶ 56-58, 60-61, 63 [Doc. No. 314]; Initial Disclosures and Am. Initial Disclosures, Exs. 1-5 to Goldstein Aff. [Doc. Nos. 437-1 - 437-5]; Rule 26(f) Report at 5 [Doc. No. 118]; Defs.' Financial Statements, Exs. 6-9 to Goldstein Aff. [Doc. No. 437-6]; Joint Statement at 3 [Doc. No. 410]; and Defs' Mem.

Supp. Mot. for Summ. J. [Doc. No. 423].)

Courts have been reluctant to grant summary judgment based on typographical errors that were subsequently amended, see Coregis Ins. Co. v. Harrisburg, No. 1:03-cv-920, 2005 WL 2179734, at *5 (M.D. Pa. Sept. 9, 2005) (denying summary judgment premised on typographical error that was subsequently amended), unless the amended pleading is filed unreasonably late, well after the party became aware of the typographical error, see Vidosh v. Holsapple, No. 84CV2247DT, 1987 WL 273164, *20 (E.D. Mich. Feb. 2, 1987) (granting summary judgment on mis-cited statutory claim where plaintiff's typographical error in pleading, while known for months, was not amended). The Court accepts Defendants' typographical error explanation for the language in question. Given the many other instances in Defendants' filings in which they contest derivative liability, and their prompt amendment upon learning of the errors, the Court finds that Defendants' typographical errors cannot form the basis for entry of summary judgment and denies Great Lakes' motion in part on this basis.

However, because additional discovery may lead the parties to seek summary judgment on this claim in the future (discussed *supra* in connection with Defendants' cross motion on the derivative liability claim), Plaintiff's motion for summary judgment is also denied without prejudice in part as to the derivative liability claim against the Foreign Essar Defendants.

D. Motions to Amend Pleadings

The Court has addressed the parties' separate motions to amend the pleadings in the applicable portions of this Order pertaining to their summary judgment motions. Plaintiff may amend its pleading with respect to its derivative liability claim against the Foreign Essar Defendants. As to the portion of Plaintiff's motion seeking leave to amend its anticipatory repudiation claim, it is denied as moot.

Regarding Defendants' motion for leave to amend their Answer, because the Court finds as a matter of law that the limitation of liability defense fails, amendment would be futile. Accordingly, Defendants' request for leave to amend their Answer is denied.

E. Order to Show Cause

Various submissions of the parties were filed under seal. If the parties believe that any portion of this Order warrants redaction, the Court orders the parties to show cause ten days from the date of this Order, stating why the Order should not be unsealed and specifying any portion of the order warranting redaction.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion for Partial Summary Judgment [Doc. No. 416] is **GRANTED in part**, **DENIED in part,** and **DENIED without prejudice in part;**
2. Defendants' Motion for Summary Judgment [Doc. No. 421] is **DENIED in part**, and **DENIED without prejudice in part**;
3. Plaintiff's Motion for Leave to Amend the Complaint [Doc. No. 440] is **GRANTED in part**, and **DENIED AS MOOT** in part;

4. Defendants' Motion for Leave to Amend the Answer [Doc. No. 447] is **DENIED**; and

5. The parties are ordered to show cause ten (10) days from the date of this Order why the Order should not be unsealed, and to specify any portion warranting redaction**.**

Dated: March 19, 2013

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Court Judge

Exhibit 2

EXHIBIT 3

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Great Lakes Gas Transmission Limited Partnership Plaintiff, - against - Essar Steel Minnesota LLC, Essar Steel Limited f/k/a Essar Steel Holdings, Ltd., Essar Steel India Limited f/k/a Essar Steel Limited, and Essar Global Fund Ltd. f/k/a Essar Global Limited Defendants.	No. 09-CV-03037 SRN/LIB **OFFER OF JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 68 ("Rule 68"), Defendants Essar Steel Limited f/k/a Essar Steel Holdings, Ltd., Essar Steel India Limited f/k/a Essar Steel Limited, and Essar Global Fund Ltd. f/k/a Essar Global Limited (collectively, the "Foreign Defendants") hereby offer to settle, by way of judgment, the claims against them, on the Second, Third and Fourth Claims for Relief of the First Amended Complaint dated February 22, 2010, in favor of Plaintiff Great Lakes Gas Transmission Limited Partnership ("Plaintiff"). Foreign Defendants agree that they will pay all damages determined by the Court to be recoverable by Plaintiff as a result of any judgment entered against Essar Steel Minnesota LLC in this case for breach and anticipatory repudiation of the Transportation Service Agreement (Contract Identification FT6496) along with all costs in relation to such claims which have been incurred to date.

This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that Essar Steel Minnesota LLC or the Foreign Defendants are liable in this action, or that Plaintiff has suffered any damage or is entitled to any costs and/or

Exhibit 3

attorneys' fees. This offer of judgment and any judgment entered pursuant to Rule 68 based on this offer relate only to this case.

Evidence of this offer is not admissible in this action, or in any other legal action, except in a proceeding in this action to determine an award of costs and/or attorneys' fees.

Dated: July 3, 2013

By: /s/ Nicole M. Moen

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LEGAL_US_E # 104927750.1

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Great Lakes Gas Transmission Limited Partnership, Plaintiff, v. Essar Steel Minnesota LLC, Essar Steel Limited f/k/a Essar Steel Holdings, Ltd., Essar Steel India Limited f/k/a Essar Steel Limited, and Essar Global Fund Ltd. f/k/a Essar Global Limited, Defendants.	Court File No. 09-CV-03037 SRN/LIB **NOTICE OF ACCEPTANCE OF RULE 68 OFFER OF JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 68, Plaintiff Great Lakes Gas Transmission Limited Partnership by and through its counsel hereby accepts and provides notice that it accepts Defendants Essar Steel Minnesota LLC's, Essar Steel Limited f/k/a Essar Steel Holdings Ltd.'s, Essar Steel India Limited f/k/a Essar Steel Limited's, and Essar Global Fund Ltd. f/k/a Essar Global Limited's Rule 68 Offer of Judgment, dated July 3, 2013, providing for the entry of judgment in favor of Plaintiff and against Defendants on the Second, Third, and Fourth Claims for Relief in the First Amended Complaint, dated February 22, 2010.

Exhibit 3

Dated July 3, 2013

Respectfully submitted,

ELROD, PLLC

By: /s/ David W. Elrod
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ATTORNEYS FOR PLAINTIFF GREAT LAKES GAS TRANSMISSION LIMITED PARTNERSHIP

EXHIBIT 4

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Great Lakes Gas Transmission Limited Partnership,

Plaintiff,

v.

Essar Steel Minnesota, LLC; Essar Steel Holdings, Ltd.; Essar Steel Limited; and Essar Global Limited, a/k/a Essar Group,

Defendants.

Civil No. 09-CV-3037 (SRN/LIB)

MEMORANDUM OPINION AND ORDER
[FILED UNDER SEAL]

David W. Elrod, Barbara L. Wohlrabe, Brian A. Farlow, and Hayley Ellison, Elrod PLLC, 500 North Akard Suite 3000 Dallas, Texas 75201; David T. Schultz and Julian C. Zebot, Maslon, Edelman, Borman & Brand, LLP, 90 South Seventh Street Suite 3300, Minneapolis, Minnesota, 55402, for Plaintiff

Douglas Flaum, Shahzeb Lari, and Kevin P. Broughel, Paul Hastings, LLP, 75 East 55th Street, New York, New York 10022; Lousene M. Hoppe, and Nicole Moen, Fredrikson & Byron, PA, 200 South Sixth Street, Suite 4000, Minneapolis, Minnesota 55402, for Defendants

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SUSAN RICHARD NELSON, United States District Court Judge

This matter is before the Court on Plaintiff's Second Motion for Partial Summary Judgment [Doc. No. 678]; Plaintiff's Motion to Exclude the Testimony of Colin Blaydon and Michael Quinn [Doc. No. 683]; Plaintiff's Motion to Recover Mediation Costs [Doc. No. 689]; Defendants' Motion to Amend the Court's March 19, 2013 Order [Doc. No. 695]; Defendants' Motion to Preclude the Testimony and Report of Dr. Edward Foster

Exhibit 4

[Doc. No. 700]; Defendants' Motion to Preclude the Testimony and Reports of Richard G. Smead [Doc. No. 705]; and Defendants' Cross Motion to Recover Mediation Costs [Doc. No. 715]. For the reasons that follow, Plaintiff's Second Motion for Partial Summary Judgment is granted in part as to the issues of prejudgment interest and mitigation, and denied in part as to the application of a risk-free methodology to the calculation of present value damages; Plaintiff's motion to exclude expert testimony is denied as moot as to Michael Quinn, and granted in part, and denied in part as to Colin Blaydon; Defendants' Motion to Amend is denied as moot; Defendants' motion to exclude the expert testimony of Dr. Smead is denied as moot; Defendants' motion to exclude the expert testimony of Dr. Foster is granted in part, and denied in part; and the parties' cross motions to recover costs are denied.

I. BACKGROUND

A. Background

The facts of this matter have been thoroughly set forth in prior orders of this Court. In brief, this lawsuit stems from a September 6, 2006 contract (the "Contract") between Great Lakes (the "Transporter") and Minnesota Steel Industries ("MSI") (the "Shipper"). (Contract, Ex. 2 to Ellison Aff. [Doc. No. 681-2].) Under the general terms of the Contract, which is also referred to by the parties as the Transportation Services Agreement, or "TSA," Great Lakes agreed to transport up to 55,000 dekatherms of natural gas firm capacity per day on MSI's behalf, from Emerson, Manitoba to Carlton, Minnesota, or to "a new location near Mile Post 228." (Id.)[1] MSI had been developing plans to construct a fully-integrated steel making facility, which, when operational, would require natural gas as an energy source. (Countercl. ¶¶ 20-24 [Doc. No. 314].)

The Contract term began running on July 1, 2009 and was to end on March 31, 2024. (Contract, Ex. 2 to Ellison Aff. [Doc. No. 681-2].) In exchange for Great Lakes' transportation of natural gas, the Contract required MSI to pay Great Lakes its maximum reservation rates and charges on a monthly basis, plus all applicable surcharges, under the applicable rate schedule reflected in Great Lake's gas tariff (the "Tariff") on file with the Federal Energy Regulatory Commission ("FERC"). (Id.) The Contract was secured by a letter of credit in the amount of $580,000. (Countercl. ¶ 37 [Doc. No. 80]; Letter of Credit, Ex. C to Countercl. [Doc. No. 80-3].) In 2007, Defendant Essar Steel Minnesota LLC ("ESML") acquired the membership interests of MSI and is its successor in interest. (First Am. Answer ¶ 19 [Doc. No. 314].) ESML is affiliated with several foreign entities which are also Defendants in this action – Essar Steel Holdings, Ltd., Essar Steel Limited, and Essar Global Limited, a/k/a Essar Group (collectively, the "Foreign Essar Defendants").

In October 2009, Great Lakes filed this breach of contract action against Defendant

[1] "'Firm' transportation capacity is capacity that is usually subscribed to by long-term contract, is always available, and must always be paid for regardless of use. Firm capacity assures its holder a supply of gas." In re Mirant Corp., 332 B.R. 139, 145 n.7 (Bankr. N.D. Tex. 2005).

ESML and the Foreign Essar Defendants, alleging that ESML failed to make the first payment of $190,190, due on August 17, 2009, and has failed to make all subsequent payments. (Compl. ¶ 22 [Doc. No. 1].) In November 2009, Great Lakes drew upon the $580,000 letter of credit. (Countercl. ¶ 69 [Doc. No. 314].)

In September 2012, the parties filed cross motions for partial summary judgment. The primary argument advanced by Defendants, at that time, was that the filed rate doctrine and the limitation of liability provision in the Tariff limited Plaintiff's damages, if any, to the amount contained within the Letter of Credit. (Defs'. Mem. Supp. Mot. for Summ. J. at 10 [Doc. No. 423].) Plaintiff moved for summary judgment on its claims that ESML breached and repudiated the Contract, as well as Defendants' defenses based on the Contract's *force majeure* clause and the doctrine of commercial impossibility or impracticability. (Pl.'s Mem. Supp. Mot. for Partial Summ. J. [Doc. No. 418].) Both parties also moved for summary judgment on derivative liability issues related to the Foreign Essar Defendants. Finally, Defendant sought leave to amend its Answer in the event that its pleadings were found lacking. (Defs.' Mem. Supp. Mot. to Amend at 1 [Doc. No. 450].) In this Court's Order of March 19, 2013 (the "March 19 Order"), the Court denied Defendants' summary judgment motion as it related to the filed rate doctrine and granted Plaintiff's partial summary judgment motion regarding the defenses of anticipatory repudiation, the *force majeure* clause, and the doctrine of commercial impossibility or impracticability. (Order of 3/19/13 [Doc. No. 559].) As to claims based on veil piercing and the derivative liability of the Foreign Essar Defendants, the Court found that discovery was necessary and denied Defendants' motion for summary judgment without prejudice. (Id. at 29.) Finally, the Court denied Defendants' motion to amend as futile. (Id. at 30.)

In July 2013, the Foreign Essar Defendants made an Offer of Judgment pursuant to Fed. R. Civ. P. 68, agreeing to settle claims determined to be recoverable by the Court based on ESML's alleged breach of contract and anticipatory repudiation. (Offer of Judgment [Doc. No. 639].) Great Lakes accepted the Foreign Essar Defendants' Offer of Judgment. (Notice of Acceptance [Doc. No. 640].)

In July and August 2013, the parties exchanged expert reports on the issues of mitigation and the reduction of Plaintiff's damages to present value. Plaintiff's mitigation expert is Dr. Richard G. Smead, and Defendant's mitigation expert is Dr. Michael Quinn. As discussed more fully herein, Dr. Quinn opines that Great Lakes could have mitigated its losses in several ways, including entering into a renegotiated contract with ESML. (Quinn Report at 4, Ex. 10 to Ellison Aff. [Doc. No. 681].) In addition, Quinn asserts that Plaintiff could have mitigated by contracting with a third-party gas marketer, or by providing service to gas-fired power plants, or by converting its pipelines from carrying natural gas to crude oil. (Id.)

In response, Plaintiff argues that Defendants failed to plead a mitigation defense and should not be permitted to assert this defense now. (Pl.'s Mem. Supp. Second Mot. for Partial Summ. J. at 3 [Doc. No. 680].) Even if Defendants are now permitted to assert a mitigation defense, Great Lakes contends that there are no genuine issues of material fact in dispute as to whether Great Lakes failed to mitigate its damages. (Id.) In fact, Plaintiff asserts that all evidence is to the contrary. (Id. at 20.) Plaintiff contends that the law does not require Great Lakes to enter into a renegotiated contract with ESML in order to mitigate damages. (Id. at 16-19.) In addition, Plaintiff's expert Dr. Smead opines that Great Lakes was required as a FERC-regulated entity to treat the capacity for ESML as reserved, and thus was unable to market it to another natural gas shipper. (Smead Rebuttal Report at 4, Ex. 7 to Ellison Aff. [Doc. No. 681].) Furthermore, even after this Court determined on March 19, 2013 that the Contract was repudiated, Dr. Smead opines that Plaintiff could not find customers to purchase its pipeline capacity and Defendants provide no evidence to the contrary. (Id.)

Regarding the determination of prejudgment interest to be applied to its already-incurred damages, Plaintiff asserts that the prejudgment interest rate to be applied, based on Minnesota law, is 10%. (Pl.'s Mem. Supp. Second Mot. for Partial Summ. J. at 8 [Doc. No. 680].) The parties agree that Minnesota law applies to this calculation. (Letter of 1/21/14 from D. Flaum to J. Nelson at 1 [Doc. No. 751].)[2]

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[2] Defendants' expert on the discount rate did not apply a particular statutory rate to calculate prejudgment interest and employed a different methodology. (Blaydon Report at 16, n.20, Ex. 1 to Farlow Aff. [Doc. No. 686].) However, in a subsequent letter submission, Defendants acknowledge the parties' agreement that issues related to procedure and remedy, including prejudgment interest, are governed by Minnesota law. (Letter of 1/21/14 from D. Flaum to J. Nelson at 1 [Doc. No. 751]; see also Defs.' Opp'n Mem. to Pl.'s Second Mot. for Partial Summ. J. at 4, n.5 [Doc. No. 730]) (noting that Defendants do not object to the application of Minnesota's prejudgment interest statute to Plaintiff's past damages).

Exhibit 4

As to the adjustment to present value of Great Lakes' future damages, Plaintiff's expert, Dr. Foster, opines that the appropriate discount rate to be applied is the risk-free rate associated with zero coupon bonds of fixed durations offered by the United States Treasury – an averaged rate of approximately 1.94%. (Foster Report at 2, Ex. 4 to Ellison Aff. [Doc. No. 681].)

However, Defendants' damages expert, Dr. Blaydon, opines that the appropriate discount rate for determining Great Lakes' damages should reflect market risks. (Blaydon Report at 4, Ex. 1 to Farlow Aff. [Doc. No. 686].) Blaydon concludes that the discount rate applicable to Great Lakes' future damages is 12.18% based on the weighted average cost of capital ("WACC") of a composite group of comparable interstate natural gas transporters. (Id. at 10-14.)

The motions presently before the Court thus relate almost entirely to two issues: mitigation of damages and the reduction of damages to present value. Plaintiff seeks summary judgment on these issues, both parties move to exclude each other's experts on mitigation and damages, and Defendants move to amend their Answer to add a mitigation defense. Unrelated to these two primary issues, the parties have cross-moved for costs and fees associated with a mediation held on September 26, 2013.

II. DISCUSSION

A. Summary Judgment Standard of Review

Summary judgment is proper if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The Court must view the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the nonmoving party. Enter. Bank v. Magna Bank of Missouri, 92 F.3d 743, 747 (8th Cir. 1996). However, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action." Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

The moving party bears the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. Id. at 323; Enter. Bank, 92 F.3d at 747. A party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials, but must set forth specific facts in the record showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

B. Application of State Law

Pursuant to the Erie Doctrine, as a federal court sitting in diversity, this Court may apply state substantive law and federal procedural law. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). Minnesota courts recognize that contracting parties may agree that the law of another state governs their agreement. Milliken & Co. v. Eagle Packaging Co., Inc., 295 N.W.2d 377, 380 n. 1 (Minn.1980) (citation omitted). Consequently, Minnesota courts "will interpret and apply the law of another state where such an agreement is made." Id. However, a "general choice-of-law provision does not replace Minnesota's procedural law." Bannister v. Bemis Co., Inc., No. 07-CV-1662 (RHK/AJB), 2008 WL 2002087, at *1 (D. Minn. May 6, 2008) (citing U.S. Leasing v. Biba Info. Processing Servs., Inc., 436 N.W.2d 823, 825-26 (Minn. Ct. App.1989), aff'd, 556 F.3d 882 (8th Cir. 2009)). In Furlong v. Davis, 328 N.W.2d 150, 153 (Minn. 1983), the Minnesota Supreme Court observed that "[t]his court has for many years followed the almost universal rule that matters of procedure and remedies were governed by the law of the forum state" (citations omitted). Therefore, where the parties intend for the application of another state's law concerning matters of procedure and remedies, "they must expressly state it in their agreement." Schwan's Sales Enters., Inc. v. SIG Pack, Inc., 476 F.3d 594, 596 (8th Cir. 2007) (citing U.S. Leasing, 436 N.W.2d at 826)). In U.S. Leasing, the court held that although the parties designated Massachusetts law to apply to their contract, Minnesota's statute of limitations would apply because the parties' choice of law did not expressly relate to remedies. 436 N.W.2d at 825-26.

Under the Contract, any disputes arising under the agreement are to be determined in accordance with Michigan law. (Contract ¶ 13, Ex. 2 to Ellison Aff. [Doc. No. 681-2].) However, because the Contract does not contain choice-of-law language specifically concerning procedure and remedies, in the Court's analysis of the issues raised in the parties' motions, the Court briefly addresses whether Minnesota or Michigan law applies.

C. Prejudgment Interest Rate

In Schwan's, the Eighth Circuit noted that "Minnesota courts may consider prejudgment interest to be a procedural or remedial issue to be governed by the law of the forum state, and they have done so." 476 F.3d at 596-97 (citing Zaretsky v. Molecular Biosys., Inc., 464 N.W.2d 546, 548–51 (Minn. Ct. App. 1990)). Again, because the Contract's choice-of-law provision does not expressly refer to remedies, Minnesota law regarding the prejudgment interest rate shall apply. Id.

Pursuant to Minn. Stat. § 549.09, subd.1(b), prejudgment interest is generally computed "from the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim, whichever occurs first . . . ." until judgment is entered. Minn. § 549.09, subd. 1(a)-(b). If the interest runs from the time of a written notice of claim, "[t]he action must be commenced within two years of a written notice of claim. . . ." Minn. § 549.09, subd. 1(b). For judgments or awards over $50,000, other than judgments for or against the state or its political subdivisions, the interest rate is ten percent per year. Minn. Stat. § 549.09(c)(2). Prejudgment interest is not awarded for future damages. Minn. Stat. § 549.09, subd. 1(b)(2).

Great Lakes sent written notice of its claim to ESML on September 3, 2009 and commenced this litigation on October 29, 2009. (Compl. [Doc. No. 1].) Since the Contract required monthly payments of $190,190, the statutory provision for awards over

$50,000 applies.[3] Great Lakes is therefore entitled to prejudgment interest at the rate of ten percent from September 3, 2009 through the date of judgment.

D. Mitigation

As noted, Plaintiff moves for summary judgment on the defense of mitigation. Defendants move for leave to amend the March 19 Order to be permitted to amend their Answer to include the affirmative defense of mitigation. (Defs.' Mem. Supp. Mot. to Amend 3/19/13 Order at 1 [Doc. No. 697].)

Although the parties do not directly address choice of law as it relates to mitigation, by primarily citing Michigan authority, they appear to impliedly agree that Michigan law applies to this issue. (See, e.g., Pl.'s Mem. Supp. Mot. to Exclude Blaydon & Quinn at 11-13 [Doc. No. 685]; Pl.'s Mem. Supp. Second Mot. for Partial Summ. J. at 14-15 [Doc. No. 680]; Defs.' Opp'n Mem. to Pl.'s Mot. to Exclude Blaydon & Quinn at 25-28 [Doc. No. 729].) While the pleading of an affirmative defense such as mitigation is a procedural matter, Sayre v. Musicland Group, Inc., 850 F.2d 350, 353 (8th Cir. 1988), this Court applies Michigan law, as contemplated by the Contract, to the analysis of mitigation, finding that mitigation is a substantive matter that regulates parties' rights. See Meagher v. Kavli, 88 N.W.2d 871, 879-80 (Minn. 1958) (noting that for choice-of-law purposes,

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[3] Although evidence in the record indicates that Great Lakes' FERC-approved firm transportation rate was changed to $174,955, effective May 1, 2010, this amount is likewise over $50,000. (5/21/10 Stipulation & Agreement, Great Lakes Gas Transmission Ltd. P'ship, FERC Doc. No. RP10-149, at B-2, B-13, Ex. 3 to Lari Decl. [Doc. No. 703-3]; see also Defs.' Mem. Supp. Mot. to Exclude Foster at 16, n.5 [Doc. No. 702].)

substantive law is "that part of the law which creates, defines, and regulates rights.") In any event, general principles of mitigation under Minnesota law do not appear to conflict with Michigan law. The Court therefore additionally cites Minnesota precedent where it supports Michigan authority and notes any differences.

1. Procedural Posture

In September 2012, in connection with Defendants' summary judgment motion, Defendants also moved for leave to amend their Answer to include the defense that the limitation of liability provision in the Tariff and the filed rate doctrine barred Great Lakes' recovery. (Defs.' Mem. Supp. Mot. to Amend at 1-9 [Doc. No. 450].) At that time, Defendants devoted over nine pages out of ten to this argument in their memorandum in support of their motion to amend. (Id.) In a two-sentence paragraph at the conclusion of Defendants' brief, they also sought leave to add, "as a cautionary measure, a defense that Great Lake's [sic] failed to mitigate damages, a defense which was explicitly raised in the 26(f) Report." (Id. at 9.) Defendants did not address their motion to add a mitigation defense during oral argument before the Court on October 4, 2012. (Tr. of 10/4/12 Hearing [Doc. No. 470].)

Ultimately, in the March 19 Order, this Court rejected Defendants' arguments based on the filed rate doctrine and Tariff provisions, finding that Great Lakes was not precluded from seeking common law breach of contract remedies. (Order of 3/19/13 at 15-16 [Doc. No. 559].) Although the Court did not expressly address the affirmative defense of mitigation, the Court denied Defendants' motion to amend. (Id. at 47-48.) On May 14, 2013, Defendants sought permission to file an interlocutory appeal of the March 19 Order regarding the Court's rulings on the filed rate doctrine. (Defs.' Mem. Supp. Mot. to Certify at 2-3 [Doc. No. 581].)[4] Defendants did not, however, seek reconsideration or clarification as to whether the March 19 Order addressed their motion to amend their Answer to include mitigation at that time.

In June 2013, as the expert disclosure deadline drew near, defense counsel, Mr. Flaum, informed Great Lakes' counsel, Mr. Elrod, that Defendants planned to move the Court for a ruling on, or reconsideration of, their motion to amend to add the defense of mitigation. (Elrod Aff. ¶ 3 [Doc. No. 727].) In light of the impending expert disclosure deadline, Mr. Elrod indicated that Great Lakes would not oppose Defendants' motion on procedural grounds, but would oppose the substantive request for relief. (Id.) The parties proceeded to conduct mitigation discovery and to disclose their mitigation experts' reports. (Pl.'s Opp'n Mem. to Defs.' Mot. to Amend 3/19/13 Order [Doc. No. 726].)

On July 29, 2013, Defendants moved to amend their Answer to assert a mitigation defense, as planned, but directed the motion to Magistrate Judge Brisbois. (Defs.' Mot. to Amend [Doc. No. 642].) Mr. Elrod communicated to defense counsel that the motion, while ordinarily non-dispositive, was improperly filed before Magistrate Judge Brisbois, who lacked the authority to modify or reconsider the Court's March 19 Order. (Elrod Aff. ¶ 4 [Doc. No. 727].) Defendants did not re-file the motion and Magistrate Judge Brisbois

[4] The Court denied Defendants' request for an interlocutory appeal. (Order of 8/7/13 [Doc. No. 660].)

denied it, noting that, as a magistrate judge, he lacked the authority to modify a district court order. (Order of 9/17/13 [Doc. No. 663].)

Defendants now seek to amend the March 19 Order, to the extent that it denied Defendants' previously requested leave to amend to assert a mitigation defense. Defendants argue that both parties have acknowledged that the question of mitigation is a key issue in this case and, to that end, have conducted fulsome mitigation-related discovery. In addition, Plaintiff provided Defendants with the report of its mitigation expert, Dr. Smead, prior to the production of Defendants' expert report on mitigation. (Defs.' Mem. Supp. Mot. to Amend 3/19/13 Order at 4 [Doc. No. 697]; Defs.' Mem. Supp. Mot. to Exclude Smead at 7, n.1 [Doc. No. 708].) Dr. Smead also produced a rebuttal report. Defendants contend that the parties' conduct demonstrates a joint intent to litigate the issue of mitigation.

Great Lakes opposes Defendants' motion to amend on procedural and substantive grounds. Procedurally, Great Lakes argues that this Court, in the March 19 Order, denied any such proposed amendments to the Answer. (Pl.'s Opp'n Mem. to Mot. to Amend 3/19/13 Order at 4-5 [Doc. No. 726].) Great Lakes also argues that Defendants' undue delay in seeking to add a mitigation defense initially – over three years into the litigation – in addition to Defendants' delay in seeking reconsideration or clarification of the March 19 Order, militates against granting relief. (Id. at 5.) Further, Plaintiff denies that it has acceded to Defendants' mitigation defense by its conduct in this litigation, including its participation in mitigation discovery and in procuring the opinion of a mitigation expert.

(Id. at 2.). Great Lakes also argues, both in opposition to Defendants' motion to amend and in support of its motion for summary judgment on the mitigation defense, that even if the Court considers the mitigation defense on the merits, it fails. (Id. at 6-7.)

The Court acknowledges that the March 19, 2013 Order did not expressly address mitigation. Because the parties' briefing, oral argument, and Defendants' efforts to seek interlocutory appeal focused almost exclusively on the filed rate doctrine, the March 19 Order likewise focused on this issue. To cure any ambiguity, it would have been prudent for Defendants to seek clarification or reconsideration with the undersigned judge shortly after the issuance of the March 19 Order.

Federal Rule of Civil Procedure 8(c) requires that a party "must affirmatively state any avoidance or affirmative defense . . . ." Although failure to mitigate damages is not among the enumerated list of affirmative defenses found in Rule 8(c), federal courts have construed it as an affirmative defense that a party must plead at risk of waiver. Sayre, 850 F.2d at 354. The rule governing pretrial amendments to pleadings – Fed. R. Civ. P. 15(a) – provides that leave to amend should be freely granted, as justice requires. The Court applies the more liberal standard to amend under Rule 15(a)(2), as opposed to the "good cause" standard under Rule 16(b)(4), because Defendants' previous Motion to Amend [Doc. No. 447], included the request to add a mitigation defense.[5] In addition, there is no

[5] Defendants' previous motion was filed on September 20, 2012, in advance of the October 15, 2012 deadline for moving to amend the pleadings. (See Am. Pretrial Scheduling Order of 7/18/12 at 3 [Doc. No. 412].)

evidence demonstrating that Defendants' actions in seeking leave to amend were intentionally dilatory or undertaken in bad faith. See Sherman v. Winco Fireworks, Inc., 532 F.3d 709, 715 (8th Cir. 2008) (noting that leave to amend may be denied where compelling reasons exist such as "undue delay, bad faith, or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment.") Moreover, the parties have proceeded with discovery and the exchange of expert reports on mitigation. Defendants contend that "[mitigation] discovery is now complete." (Defs.' Mem. Supp. Mot. to Amend 3/19/13 Order at 7 [Doc. No. 697].) In addition, Great Lakes itself seeks summary judgment on the mitigation defense. The Court does not find that Plaintiff has "consented" to the inclusion of mitigation as a defense merely by virtue of its actions with respect to discovery, expert reports, and motion practice. Ultimately, however, given the full record on mitigation, neither side will be prejudiced by the Court's consideration of the substance of the parties' motions on this issue. Accordingly, the Court addresses the defense of mitigation on the merits.

2. General Mitigation Principles

"Mitigation of damages is a legal doctrine that seeks to minimize the economic harm arising from wrongdoing." Morris v. Clawson Tank Co., 587 N.W.2d 253, 264 (Mich. 1998). The question of whether a party has mitigated its damages is a question of law. Ayar v. Foodland Distribs., No. 214293, 2000 WL 33400197, at *20 (Mich. Ct. App. 2000); see also DeRosier v. Utility Sys. of Am., Inc., 780 N.W.2d 1, 6 (Minn. Ct.

App. 2010) (stating, "[w]hether damages are subject to mitigation is a question of law. . . .") In a breach of contract action, the plaintiff is generally required to make reasonable efforts to mitigate its damages arising from the breach. Morris. 587 N.W.2d at 263-64. "An injured plaintiff need not take every measure available to avoid further injury, but must only take any reasonable steps under the circumstances of the case to lessen damages; these steps need not be successful if they are reasonable." Ayar, 2000 WL 33400197, at *21 (citing M & V Barocas v. THC, Inc, 549 N.W.2d 86 (1996)).

The defendant, however, bears the burden of proving that the plaintiff failed to mitigate its damages. Hughes v. Park Place Motor Inn, Inc., 446 N.W.2d 885, 889 (Mich. Ct. App. 1989) (citing Fothergill v. McKay Press, 132 N.W.2d 144 (Mich. 1965) and Froling v. Bischoff, 252 N.W.2d 832 (Mich. Ct. App. 1977)). The question of whether mitigation was reasonable under the circumstances, is "an inquiry that is typically the province of the finder of fact." Hillside Prods., Inc. v. Cnty. of Macomb, No. 06-CV-11566-DT, 2008 WL 268888, at *11 (E.D. Mich. 2008) (applying Michigan law); see also Retained Realty, Inc. v. Mich. Pioneer Title Ins. Corp., 472 F. App'x 361, 364 (6th Cir. 2012) (applying Michigan law). The issue underpinning the instant motions related to mitigation is whether there is a genuine issue of material fact in dispute regarding mitigation which precludes summary judgment.

3. Parties' Mitigation Evidence

Defendants claim that disputed issues of material fact make summary judgment on the issue of mitigation inappropriate. (Defs.' Opp'n to Pl.'s Second Mot. for Partial

Summ. J. at 10 [Doc. No. 730].) Defendants' mitigation expert Dr. Quinn opines that not only could Great Lakes have (1) renegotiated the terms of the contract, it could have (2) contracted for transportation service with a gas marketer, or (3) the markets and demand for gas transportation services could evolve over time, to Great Lakes' advantage. (Quinn Report at 4, Ex. 3 to Farlow Aff. [Doc. No. 686].) Defendants note that Plaintiff repeatedly refused to discuss entering into a new contract with ESML to reduce its damages. (Defs.' Opp'n to Pl.'s Second Mot. for Partial Summ. J. at 10 [Doc. No. 730].) In addition, Defendants point to testimony from Plaintiff's former and current marketing directors that Great Lakes did not attempt to sell the 55,000 dekatherms per day of capacity for which Defendants had contracted. (Id.) Consequently, Defendants contend that these facts raise questions for the jury regarding the reasonableness of Plaintiff's mitigation actions. (Id.)

Defendants also move to exclude the opinion and testimony of Plaintiff's mitigation expert Dr. Smead, arguing that he will improperly testify as to legal conclusions, that his conclusions merely reiterate facts provided by Plaintiff's fact witnesses, and that his opinions are generally unreliable and unfounded. (Defs.' Mem. Supp. Mot. to Exclude Smead at 8 [Doc. No. 708].) Defendant's expert, Dr. Quinn, also disagrees with Dr. Smead's opinion that there is no likelihood that another shipper would contract for the firm capacity reserved for ESML. (Quinn Report at 4-5, 12-26, Ex. 10 to Farlow Aff. [Doc. No. 681].) To the contrary, Dr. Quinn provides the following examples of ways in which the gas transportation services market could eventually develop and improve: (1)

the need for service for new gas-fired power plants in the area, or conversions of coal-fired electrical plants to gas-fired electrical plants could increase demand for transport services; and (2) the conversion of Great Lakes' pipelines from carrying natural gas to crude oil "could decrease supply of natural gas transportation services in the area and therefore increase demand for transport services on the [Great Lakes] pipeline (e.g., the proposed Energy East project of [Great Lakes'] corporate parent, [TransCanada Pipelines]; and (3) "other geologic, economic, and political factors could affect supply and demand" for transport services. (Id.) In addition, Defendants argue that because Dr. Smead was initially identified as a rebuttal expert, if Dr. Quinn's mitigation testimony is precluded, then Dr. Smead's testimony must also be excluded as irrelevant. (Def.'s Mem. Supp. Mot. to Exclude Smead at 7, n.1 [Doc. No. 708].)[6]

In response, Plaintiff argues that, as a matter of law, it was not required to renegotiate the Contract with ESML, the breaching party. (Pl.'s Mem. Supp. Second Mot. for Partial Summ. J. at 16-18 [Doc. No. 680].) Moreover, Great Lakes emphasizes that as a FERC-regulated transporter, it was not permitted to sell the capacity reserved for ESML on its pipeline until FERC or this Court determined that the Contract was repudiated. (Smead Rebuttal Report at 4, Ex. 7 to Ellison Aff. [Doc. No. 681].) After this Court's March 19, 2013 ruling on repudiation, Great Lakes argues that the undisputed facts show

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[6] However, in Defendants' memorandum in support of its motion to amend the March 19 Order, Defendants take the position that Dr. Smead is not a rebuttal expert, noting that his report – disclosed prior to Dr. Quinn's report – was not a rebuttal report. (Defs.' Mem. Supp. Mot. to Amend 3/19/13 Order at 4 [Doc. No. 697].)

that it has substantial unsubscribed firm capacity available on its pipeline and cannot sell this capacity to another shipper. (Pl.'s Mem. Supp. Second Mot. for Partial Summ. J. at 3 [Doc. No. 680].)

Great Lakes' mitigation expert, Dr. Smead, opines that there is no likelihood that any alternate shipper would be interested in purchasing the firm capacity previously reserved for ESML. (Smead Report at 11, Ex. 1 to Broughel Decl. [Doc. No. 707-1].) In reaching his conclusion, Dr. Smead analyzed the market value of pipeline capacity between Emerson and Carlton, the relative unattractiveness of Carlton as a gas delivery point, the nature of Plaintiff's customers and markets, the relevance of the TransCanada Pipeline's market and capacity, and Great Lakes' efforts to resell pipeline capacity. (Id. at 9-22.) With a high volume of unsubscribed firm capacity, Great Lakes contends that it is a lost volume seller. (Pl.'s Mem. Supp. Second Mot. for Partial Summ. J. at 3 [Doc. No. 680].) As a lost volume seller, Great Lakes asserts that, as a matter of law, it has no duty to mitigate its damages until it can first sell all of its excess firm capacity. (Id.) Accordingly, Plaintiff contends that there are no disputed issues of fact relating to mitigation and it is entitled to summary judgment. (Id. at 20.)

Also, Plaintiff seeks to exclude the expert opinion of Defendants' mitigation expert, Dr. Quinn, arguing that his opinion fails to meet the standard under Fed. R. Evid. 702 and Daubert v. Merrell Dow Pharm., 509 U.S. 579, 592-93 (1993). (Pl.'s Mem. Supp. Mot. to Exclude Blaydon & Quinn at 11-17 [Doc. No. 685].) Great Lakes asserts that Dr. Quinn failed to conduct a market analysis and failed to consider Great Lakes' excess capacity.

(Id. at 15-17.) In addition, Great Lakes argues that Quinn's renegotiated-contract-theory of mitigation has no basis under the law. (Id. at 12-13.) Such a requirement to renegotiate contracts with breaching parties "would encourage breaches of contract and render bargained-for agreements worthless," Plaintiff argues. (Pl.'s Mem. Supp. Second Mot. for Partial Summ. J. at 5 [Doc. No. 680].) In addition, Plaintiff disagrees with Quinn's opinion that Great Lakes could have mitigated its damages "by various speculative methods that would require it to expend substantial sums of money and/or radically alter its business model, which Great Lakes has no legal obligation to do." (Id.)

4. Renegotiation of the Contract as Mitigation

Defendants contend that Great Lakes failed to mitigate its damages by refusing to renegotiate the terms of the Contract. (Quinn Report at 4; 7, Ex. 10 to Ellison Aff. [Doc. No. 681].) Defense expert Dr. Quinn cites the Declaration of Mahendra Mishra, ESML's Commercial and Project Finance Manager, in support of the proposition that "ESML has indicated its willingness to use its available transport capacity on [Great Lakes'] pipeline between Emerson and Carlton to meet its needs." (Id. at 7, n.9.) Mishra avers that in discussions between the parties in early 2009, ESML "consistently advised Great Lakes that ESML intended to use the pipeline capacity once [Essar's] [steel-making] facility became operational." (Id.) (citing Mishra Decl. at 2 [Doc. No. 436]) (emphasis added). The Contract, however, provided no such conditions regarding performance, but rather, with reference to the Tariff, required ESML to pay Great Lakes $190,190 per month, from July 1, 2009 through March 31, 2024, regardless of whether ESML actually used the pipeline capacity. (Contract, Ex. 2 to Ellison Aff. [Doc. No. 681-2].) Dr. Quinn opines that Plaintiff could have mitigated by providing firm capacity for ESML's iron ore pellet production facility beginning in 2014, initially at a rate of 23 percent of ESML's originally contracted amount, increasing to 65 percent of the contracted amount at some unspecified time. (Quinn Report at 6-7, Ex. 10 to Ellison Aff. [Doc. No. 681].) Great Lakes argues that, as a matter of law, it is not required, to its great detriment, to renegotiate the terms of a contract with the breaching party in order to mitigate its damages. (Pl.'s Mem. Supp. Second Mot. for Summ. J. at 4-5 [Doc. No. 680].)

Many courts have adopted the proposition that "[a]s a matter of law, a party that alleges that its contract has been breached is not obligated to accept some other, less valuable, performance proposed by the breaching party, and the rejection of such an offer cannot possibly establish a viable mitigation defense." <u>Auto. Fin. Corp. v. EEE Auto Sales, Inc.</u>, No. 1:10-CV-1407, 2011 WL 2580399, at *6 (E.D. Va. June 28, 2011); <u>see</u> <u>also</u> <u>East Lynn Fertilizers, Inc. v. CHS, Inc.</u>, No. 09-2085, 2011 WL 6029329, at *4 (C.D. Ill. Dec. 5, 2011) ("The duty to mitigate damages does not include an obligation to renegotiate a contract in the event of an unforseen falling market."); <u>Ner Tamid Congregation of North Town v. Krivoruchko</u>, 638 F.Supp.2d 913, 921 (N.D. Ill. 2009) (rejecting defendant's mitigation theory that plaintiff was required after defendant's breach to renegotiate the contract and agree to terms more favorable to defendant); <u>In re Sisson Welding & Constr. Co., Inc.</u>, No. 95-50335 S., 1997 WL 160427, at *5 (Bankr. E.D. Ark. Feb. 21, 1997) (observing that "[a] refusal to renegotiate damages does not justify abandonment of a contract[, n]or does it constitute a failure to mitigate damages.")

The Michigan Court of Appeals addressed this issue in a commercial possession case that concerned a right of first refusal agreement and a sublease between a grocery store owner and the Kroger's grocery store chain. Ayer, 2000 WL 33400197, at *21. The court rejected Kroger's mitigation argument:

> Kroger's argument that [plaintiff] Ayar had to accept the sublease is, in fact, quite a radical position. Forcing Ayar to accept the sublease in order to mitigate his damages would effectively deliver a windfall to Kroger even though it was the wrongdoer. If accepting a sublease was the only way Ayar could mitigate his damages, a party in Kroger's position would have a significant advantage if it breached the right of first refusal because it could dictate the terms of the sublease unilaterally. The party holding the preemptive right simply could not refuse the sublease offered without forfeiting the right to recover other damages for "failure to mitigate."

Id. Affirming the jury's verdict, the appellate court thus found that "requiring [Ayar] to accept an unsatisfactory sublease that did not conform to the terms he expected to receive pursuant to the [right of first refusal] agreement was not reasonable under the circumstances." Id. Notably, in rejecting the renegotiated sublease as a form of mitigation in Ayer, there was an actual alternative, renegotiated sublease on offer. Id. Here, as discussed further herein, there has never been a concrete alternative proposal on the table.

At the hearing on the instant motions, defense counsel acknowledged that in most cases, requiring the renegotiation of a contract with the breaching party is not the typical method of mitigation. (Tr. of 12/19/13 Hearing at 53 [Doc. No. 754].) However, Defendants argue that, in some circumstances, courts have required plaintiffs to mitigate damages by renegotiating the contract with the defaulting party, particularly where there are no other alternatives. (Def.'s Opp'n Mem. to Pl.'s Mot. to Exclude Blaydon & Quinn at 25-26 [Doc. No. 729].) Notably, in such cases, the subsequent offer generally requires the same or substantially similar performance, at little to no net loss to the plaintiffs. Those cases almost exclusively arise in the employment law context. For instance, in Flickema v. Henry Kraker Co., 233 N.W. 362, 410-11 (Mich. 1930), the Michigan Supreme Court found that an employer's offer to reinstate the plaintiff to his previous position almost immediately after his discharge was admissible evidence in mitigation of the plaintiff's damages. Similarly, in Life Care Ctrs. of Am., Inc. v. Charles Town Assoc. Ltd., 79 F.3d 496, 514-15 (6th Cir. 1996), the Sixth Circuit, applying Tennessee law, held that the plaintiff was obliged to accept the Defendants' conditional offer of continued employment, provided that the plaintiff was not required to surrender any legal or contractual rights and the renewed employment was otherwise feasible. See also Lawrence v. Porter, 63 F. 62, 66 (6th Cir. 1894) (finding that where defendant refused to sell lumber on credit as contractually agreed, plaintiff was required to mitigate losses by accepting defendant's offer to sell same quantity of lumber for cash at a discounted rate that "more than equalized" the value of the credit); Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. (UAW) v. Fed. Forge, Inc., 583 F. Supp. 1350, 1352 (W.D. Mich. 1984) (finding a fact issue on mitigation in a case arising from termination of health care benefits where defendant offered to continue payment of insurance premiums, which plaintiffs refused, or to which plaintiffs attached additional conditions); Small v.

Springs Indus., Inc., 388 S.E.2d 808, 811 (S.C. 1989) (observing that a wrongfully discharged employee must accept an employer's good faith, bona fide offer of re-employment, so long as it is for the same or substantially similar position at the same pay, and does not require the employee to waive any legal rights to pursue a wrongful discharge claim).

Minnesota courts have likewise addressed this issue, holding that "when one party to the contract defectively performs and subsequently offers to correct the breach through a new contract, the nonbreaching party may generally decline the offer and still recover its full damages." De Rosier, 780 N.W.2d at 7. In DeRosier, the court also noted, however, that "special circumstances may rebut the reasonableness of the rejection and call for exceptions to this rule." Id. at 7-8. The court considered whether any special circumstances applied, and found that the nonbreaching party was not required to mitigate its damages by accepting the breaching party's offer to correct the breach. Id. In reaching its decision, the court noted that the amount demanded by the breaching party was substantial, the plaintiff was not unreasonable in thinking that acceptance would constitute accord and satisfaction in discharge of the contract, similar services were available elsewhere, and the plaintiff's relationship with the breaching party was strained. Id.

In the instant case, Defendants did not offer to renegotiate the Contract on terms remotely similar to the provisions of the Contract. In 2009, Mr. Mishra advised Great Lakes that ESML intended to use Great Lakes' pipeline capacity once ESML's steel-making facility became operational. (Quinn Report at 7, n.9, Ex. 3 to Farlow Aff. [Doc.

No. 686]) (citing Mishra Decl. at 2 [Doc. No. 436].) Defendants contemplated a radically different contract, with terms far more favorable to Defendants than the original Contract. As this Court noted in the March 19 Order,

> [i]n June 2009, Mr. Mishra stated that "strict compliance with the Contract is commercially unreasonable," and recommended that the Contract's material terms – "including those pertaining to price, volume, term and commencement date" – be "re-state[d]."

(Order of 3/19/13 at 42 [Doc. No. 559]) (citing Letter of 6/30/09 from M. Mishra to T. Kasunic, Ex. A to Wohlrabe Supp'l Aff. [Doc. No. 458-1].)

More specifically, Dr. Quinn opines that Plaintiff could have mitigated its losses by providing firm capacity for ESML's iron ore pellet facility beginning in 2013, at an initial rate of 23 percent of the originally contracted amount, increasing to 65 percent of the original amount at some unspecified time. (Quinn Report at 4; 7, Ex. 10 to Ellison Aff. [Doc. No. 681].) However, as of his January 16, 2013 deposition, Mr. Mishra testified that there had been no progress on the steel plant – in fact, construction had not yet commenced. (Mishra Dep. of 1/16/13 at 364-66, Ex. 1 to Ellison Aff. [Doc. No. 742].) Mishra stated that the current iron ore project contemplates a pellet-only plant, with an estimated need for approximately 15,000-18,000 dekatherms per day of pipeline capacity. Id. Mishra could foresee a possible future need for more than 15,000 dekatherms per day based on early discussions to increase the scope of the project. Id. at 366. However, he conceded that nothing had been finalized and he was unable to identify a date on which a greater amount of dekatherms would be needed. Id. The facts of this case are therefore distinguishable from Defendants' authority, in which the renegotiated contract terms were identical to, or substantially similar to, the original contract terms, and the plaintiff did not suffer a net loss. Here, there is no concrete proposal for the provision of capacity to ESML today, on any terms, renegotiated or otherwise, since ESML's iron ore facility has not yet been completed. Accordingly, there is no fact issue for the jury to consider as to the reasonableness of a renegotiated contract as mitigation.

Similarly, although a comment to the Restatement of Contracts provides that "[i]f the party in breach offers to perform the contract for a different price, this may amount to a suitable alternative," Restatement of Contracts 2d § 350 cmt. e (1981), the Restatement also provides that an injured party is not required to mitigate if doing so subjects it to "undue risk, burden or humiliation." Id. § 350(1). In light of the length and heavily-contested nature of this litigation, Great Lakes argues that requiring it to renegotiate the contract and to maintain a contractual relationship with Defendants would expose it to an undue risk of future litigation. (Pl.'s Reply Mem. Supp. Mot. to Exclude Blaydon & Quinn at 11 [Doc. No. 741].) Plaintiff thus likens itself to the plaintiff in Canadian Indus. Alcohol Co. v. Dunbar Molasses Co., 179 N.E. 383, 385 (N.Y. 1932), about which then-Judge Benjamin Cardozo commented, "The plaintiff replied in substance that it had no longer any faith in the defendant's readiness or ability to live up to its engagements, and did not wish to add another contract to the one already broken. The law did not charge it with a duty to make such an experiment again." Given the circumstances of this case, Great Lakes' concerns are not unreasonable. It should not be required to assume this type of risk in order to mitigate its damages.

Based on these facts, and in light of this clear legal authority, the Court finds, as a matter of law, that Defendants have failed to establish that Great Lakes was required to enter into a renegotiated contract with Defendants in order to mitigate its damages. The evidence shows that Defendants contemplated a very different renegotiated contract – a speculative, future contract, at that – with terms far more favorable to Defendants than under the original Contract. Yet again, there is no fact issue here because Defendants' offer of "renegotiation" was an offer to possibly perform at some unknown time in the future, under different terms. The law does not require a plaintiff to accept such a speculative, radically different offer in mitigation of its damages under these circumstances. Requiring a plaintiff to do so, under these facts, would distort the law of contracts by permitting a breaching party to unilaterally dictate the terms of a significantly different, renegotiated contract.

5. Other Mitigation Arguments

a. Mitigation with Other Shippers

Great Lakes argues that its ability to mitigate its losses was severely limited. As a FERC-regulated entity, Great Lakes contends that it was legally required to keep the 55,000 dekatherms per day of firm capacity reserved for ESML until this Court or FERC determined that ESML had repudiated the Contract. (White Dep. at 21-22, Ex. 14 to Lari Decl. [Doc. No. 731]; Wilde Dep. at 160, Ex. 15 to Lari Decl. [Doc. No. 731]; Smead Report at 22, Ex. 9 to Ellison Aff. [Doc. No. 681].) Thus, until this Court ruled to that effect on March 19, 2013, Plaintiff claims it was unable to resell that capacity. (Pl.'s Reply Mem. in Supp. Second Mot. for Partial Summ. J. at 2-3, n.1 [Doc. No. 743]; Tr. of 10/4/12 Hearing at 79-80 [Doc. No. 470].)

Defendants point to the testimony of Jimmy White and Martin Wilde, Great Lakes' marketing employees, in support of their position that Great Lakes undertook no measures to sell the capacity reserved for ESML. (Defs.' Opp'n Mem. to Pl.'s Second Mot. for Partial Summ. J. at 9-10 [Doc. No. 730].) White and Wilde, who were both deposed in January 2013, testified that from the time of the breach in 2009, Great Lakes did not attempt to market the 55,000 dekatherms per day to other customers. (White Dep. at 21-22, Ex. 14 to Lari Decl. [Doc. No. 731]; Wilde Dep. at 160, Ex. 15 to Lari Decl. [Doc. No. 731].) Both witnesses explained that they did not attempt to sell that capacity based on their understanding that it was already contracted for by ESML. (Id.) Defendants offer little in response to Plaintiff's argument that as a FERC-regulated entity, it was obliged to honor the terms of the Contract until there was a ruling on repudiation.[7] In fact, during the earlier course of this litigation, defense counsel indicated that Defendants wished to perform under the Contract. (See Tr. of 10/4/12 Hearing at 47-48 [Doc. No. 470]) (arguing that doctrine of adequate assurances was inapplicable where Defendants had only

[7] As Plaintiff's counsel observed at the hearing on the instant motions, the parties raised this very issue with FERC. (Tr. of 12/19/13 Hearing at 9-10 [Doc. No. 754].) FERC did not inform Great Lakes that it could refuse to honor the Contract and market the ESML-reserved capacity elsewhere. (Id.) Instead, FERC ultimately deferred to this Court, in light of the pending lawsuit. (Id. at 10.)

missed two payments under the fifteen-year Contract and were attempting to "sit down and talk to [Plaintiff] – which doesn't suggest people who don't care about performing at all.") Defendants offer no contrary evidence, other than the argument that Great Lakes could have renegotiated the contract with them, while reserving the right to file a breach of contract action. For all of the reasons noted above, however, the renegotiation argument fails, as Plaintiff was not required to renegotiate the contract under the unfavorable, speculative and radically different terms that Defendants contemplated. The Court finds that Great Lakes' actions in not marketing the reserved capacity for sale from the date of the breach until the Contract was found to be repudiated were reasonable. Defendants' mitigation argument based on this theory fails as a matter of law.

The Court therefore examines Defendants' other evidence of Plaintiff's failure to mitigate after the Contract was found to be repudiated. In his expert report, Dr. Quinn opines that Great Lakes could have mitigated its damages by contracting with a gas marketer such as BP. (Quinn Report at 8-9, Ex. 3 to Farlow Aff. [Doc. No. 686].) Dr. Quinn observes that Great Lakes maintains service contracts with a number of gas marketers, to which Great Lakes provides either firm or interruptible pipeline service. (Id. at 9.) Dr. Quinn points to a reference in Dr. Smead's expert report to a May 2010 offer from BP Gas and Power to ESML, which Dr. Smead cited as evidence of the unattractiveness of the capacity in dispute. (Id.) (citing Smead Report at 9, 24.) The offer – again from BP to ESML – was for a volumetric rate of approximately $0.04 per MMBtu for the capacity between Emerson, Manitoba and Carlton, Minnesota. (Id.) Dr. Quinn states that "BP's offer reflects the fact that the capacity has tremendous potential upside, even if basis differentials are (or were) narrow. Were the basis differential to increase, even briefly (e.g., during a winter cold snap), a gas marketer such as BP can make substantial profit." (Id.) More generally, Dr. Quinn opines that "[a] gas marketer, unlike a customer with a single contract serving a single use, could be able to capitalize on upward price shocks." (Id.)

The Court finds that Defendants have offered no proof whatsoever that Great Lakes – as opposed to ESML – actually received the BP offer or that Great Lakes could have accepted it. First, as noted above, Great Lakes reserved the capacity for ESML until the Court found that ESML had repudiated the Contract. Second, the purported BP offer was made to ESML, not Great Lakes. (Id.) Moreover, ESML appears to have declined the offer. Additionally, Defendants fail to provide sufficient evidence in support of the BP mitigation strategy. For example, Dr. Quinn admitted that he did not independently analyze whether BP was interested in purchasing the capacity, he did not contact BP to determine if it was interested in purchasing the capacity, he had no evidence that BP actually offered to purchase the capacity, he did not know if BP ever made a proposal to Great Lakes, nor did he know why ESML declined to accept the offer. (Quinn Dep. at 230, 236, 241-42, Ex. 4 to Farlow Aff. [Doc. No. 686].) Such a claim without any evidence is insufficient to create a genuine issue of material fact. Furthermore, to the extent that Defendants contend that Great Lakes could have mitigated its damages by contracting with a gas marketer in general (see Quinn Report at 8-9, Ex. 3 to Farlow Aff.

[Doc. No. 686]), this argument similarly fails for lack of evidence. Defendants have not submitted any evidence of a gas marketer who offered to purchase the capacity from Great Lakes, to say nothing of evidence quantifying the amount of such an offer. In the matter of <u>In re USGen New England, Inc.</u>, No. 03-30465 PM, 2007 WL 1074055, * at 7 (Bankr. D. Md. 2007), the court found that "unless the court can find the dollar amount of mitigation credit, the party breaching the contract is not entitled to mitigation credit." Other than the BP example found deficient above, Defendants point to no specific gas marketing transactions that Great Lakes could have entered into.

Instead, the evidence shows that even if Great Lakes had not held ESML's capacity in reserve pending a repudiation ruling, developments in the natural gas industry rendered the reserved natural gas capacity virtually unmarketable. In addition, Plaintiff's expert Dr. Smead opines that not only was ESML's 55,000 dekatherms of capacity unmarketable, Great Lakes has found that the market for long-term firm capacity across its entire pipeline system is "terrible." (Smead Report at 17, Ex. 9 to Ellison Aff. [Doc. No. 681].) Dr. Smead performed a market analysis, analyzing the market value of pipeline capacity between Emerson, Manitoba and Carlton, Minnesota based on natural gas market prices and price forecasts as of the date of Defendants' 2009 breach to the present. (<u>Id.</u> at 9.) Dr. Smead's analysis shows that the market value of the capacity across the entire Great Lakes system is lower than the full cost of transportation. (<u>Id.</u> at 3.) In addition, the contracted-for Carlton delivery point is unattractive to the market in general and is not a trading point for natural gas transactions. (<u>Id.</u>)

Dr. Smead's research also indicates that in 2009, "the extent and implications of shale gas development in the United States were largely apparent in the market, but had not yet made their way into many forecasting models." (Id. at 15.) He notes that the emergence of Eastern shale gas "substantially reduced the attractiveness of west-east transportation across TransCanada and Great Lakes." (Id. at 4.) Defendants' expert acknowledges these new developments, citing to a 2012 FERC report on the state of the natural gas and electricity markets that confirms these changes in the natural gas industry. (Quinn Report at 19, Ex. 10 to Farlow Aff. [Doc. No. 681].) Dr. Quinn quotes the following passage from the 2012 FERC report: "The erosion of regional price differences over the past few years has reduced the value of many long-haul pipeline routes. Pipelines that move natural gas into the Northeast from the Gulf Coast and the Rocky Mountains experienced the greatest declines in utilization in 2012." (Id.) (quoting FERC, 2012 State of the Markets Report at 4 (2012).) The same FERC report also observes that

> [e]xports of Marcellus Shale gas to Canada also began in the latter half of 2012. Natural gas imported from Canada fell 9 percent in 2012 due largely to the fact that U.S.-produced natural gas generally had a transportation advantage over Canadian natural gas, particularly in the Northeast and upper Midwest.

FERC, 2012 State of the Markets Report at 8, Ex. 2 to Ellison Aff. [Doc. No. 722-2].) Citing 2009 industry reports, Dr. Smead opines that a "paradigm shift" in the natural gas market prompted by the shale gas production "provoked caution in any new commitments, especially to transportation from traditional supply areas to traditional market areas," such as transportation east of Emerson, Manitoba. (Smead Report at 15, Ex. 9 to Ellison Aff.

[Doc. No. 681] at 16.)

In addition, Dr. Smead opines that Great Lakes' population of firm shippers is dominated by entities that would never be expected to show interest in transportation to Carlton; and the general west-east transportation function of Great Lakes is under extreme pressure from the reconfiguration of supplies. (Id. at 3-4) Dr. Smead notes that Great Lakes' marketing team has tried to sell its uncommited capacity during the relevant period, and the Emerson to Carlton path is the least attractive in the market. (Id. at 26.) Moreover, "for the loss caused by ESML's breach to be made up by new firm contract quantities, [Great Lakes] would have to secure thirty-three firm contracts of similar size at tariff rates, before new business could be said to be displacing he ESML loss." (Smead Rebuttal Report at 4, Ex. 7 to Ellison Aff. [Doc. No. 681].) There are no pending requests to Great Lakes for new firm service from Emerson at tariff rates. (Id.) In short, Dr. Smead finds that Great Lakes possesses an overabundance of capacity for which there is little demand, if any. (Smead Report at 26, Ex. 9 to Ellison Aff. [Doc. No. 681].) Defendants point to no evidence that refutes the undisputed fact of Great Lakes' excess capacity.

Dr. Quinn, however, contends that the market analysis conducted by Dr. Smead is unjustifiably pessimistic and uncertain. (Quinn Report at 12-13, Ex. 10 to Farlow Aff. [Doc. No. 681].) Quinn identifies ways in which demand for natural gas could increase in the Carlton area. (Id. at 13-23.) First, he contends that service for new gas-fired power plants converted from coal-fired power plants in the Carlton area could affect demand for

Exhibit 4

natural gas. (Id. at 13-18.) However, in Dr. Quinn's deposition, he conceded that he did not know when or if any of the coal-fired plants would be converted to natural gas. (Quinn Dep. at 213, Ex. 4 to Farlow Aff. [Doc. No. 686].) Second, he asserts that Great Lakes could convert its natural gas pipeline to a crude oil pipeline, noting that TransCanada is involved in a similar $12 billion project to transport oil from Alberta and Saskatchewan to refineries in eastern Canada. (Quinn Report at 21, Ex. 10 to Farlow Aff. [Doc. No. 681].) Third, he contends that "other geologic, economic, and political factors could affect supply and demand" for natural gas transportation in the area. (Id. at 22.) Finally, Dr. Quinn asserts that should market conditions change, a variety of buyers might be interested in entering into transportation service contracts with Great Lakes. (Id. at 23.)

The Court finds that Dr. Quinn's speculation about what "could" or "might" happen is far too uncertain to serve as a basis for mitigation, or to undermine Dr. Smead's market analysis. In addition, his opinion that Great Lakes could undertake various costly measures to better market the use of its pipeline capacity is both speculative and not required by the law. The court in Mirant, 332 B.R. at 149, found it unreasonable to require the pipeline transporter plaintiff, Kern River, to undertake extraordinary measures in mitigation of its damages. The court observed that while a party has an active duty to mitigate its losses, "it is not required to take extraordinary efforts to avoid losses from a breach of contract and is not required to spend substantial sums of money to protect the party in default under the contract." Id. (citations omitted). Balancing the cost of the proposed extraordinary measures against the mitigation value of such measures, the court found that the cost would equal or exceed any mitigation offset. Id. Here too, Great Lakes is not required to change its business model, nor is it required to undertake extraordinary financial expenditures in order to mitigate its damages.

b. Lost Volume Seller

Finally, Plaintiff argues that as a lost volume seller, Defendants' mitigation defense is inapplicable, because a lost volume seller has no duty to mitigate its losses. (Pl.'s Mem. Supp. Second Mot. for Partial Summ. J. at 14-16 [Doc. No. 680].) "'A lost volume seller is one who has the capacity to perform the contract that was breached in addition to other potential contracts due to unlimited resources or production capacity.'" In re WorldCom, Inc. , 361 B.R. 675, 685 (Bankr. S.D.N.Y. 2007) (quoting Precision Pine & Timber, Inc. v. United States, 72 Fed. Cl. 460, 490 (Fed. Cl. 2006)). Because a lost volume seller would have entered into another contract and would have had the benefit of both contracts but for the breach, the seller need not mitigate its damages. "A seller is not a 'lost volume seller' unless the seller would have made the sale to the breaching buyer and the sale to the party who purchased the buyer's goods." Barrick Enters., Inc. v. 2257 Waterman Operating Co., L.L.C., No. 275038, 2008 WL 582551, at *5 (Mich. Ct. App. 2008) (citing White & Summers, Uniform Commercial Code (4th ed.), § 7-9, p. 386).[8] A party claiming to be a

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[8] The lost volume seller argument often arises in the context of calculating damages, as the following example illustrates:

> assume a contract for the sale of a washing machine with a list price of $500. Assume further that the seller has or can obtain more machines than it can sell. The buyer breaches, and the seller resells the washing machine

lost volume seller generally bears the burden of proof. See Green Leaf Nursery, Inc. v. Kmart Corp., 485 F.Supp.2d 815, 819 (E.D. Mich. 2007) (applying Michigan law and finding that the plaintiff failed to show it was a lost volume seller); see also In re Worldcom, 361 B.R. at 686 (noting that the majority of cases place the burden of proof of establishing lost volume seller status on the plaintiff). Here, however, because Defendants have failed to meet their burden, as a matter of law, with respect to mitigation, the Court need not reach the issue of whether Great Lakes is a lost volume seller. See Storage Tech. Corp. v. Trust Co. of New Jersey, 842 F.2d 54, 57 (3d Cir. 1988) (declining to address question of whether plaintiff was a lost volume seller where defendant failed to meet its burden of establishing that plaintiff failed to mitigate its damages).

Because the Court finds that a mitigation defense fails as a matter of law, the Court denies as moot Defendants' request to amend to assert this defense. Similarly, having found that the defense of mitigation fails, the parties' cross motions to exclude the opponent's mitigation experts at trial are also denied as moot. While the parties raise a

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> destined for the breacher at the same list price to another. However, the resale buyer is one of seller's regular customers who had intended to purchase a washing machine from seller anyway. If the seller's total cost per machine was $300, seller stood to gain an aggregate profit of $400, that is, $200 profit from each of two sales. Clearly the . . . contract-market differential [damages] formula is inadequate in this situation since it gives no damages to the seller who has lost a $200 profit because of the breach. In such a case the damage award should be the lost profit, that is, $200, for this will place the seller "in as good a position as performance would have done."

Id. (quoting White & Summers, § 7-9, p. 385).

number of grounds for the exclusion of their opponent's mitigation experts, the parties' respective Daubert motions primarily contemplate the exclusion of the expert witnesses at trial. Because the Court grants summary judgment on the issue of mitigation, trial testimony on this issue is unnecessary.

E. Discounting Future Damages

Plaintiff contends that it is entitled to past and future damages based on Defendants' repudiation of the Contract. The parties disagree about whether the method used to reduce future damages to present value should be risk-free or risk-adjusted. As a threshold matter, the Court must determine which state's law applies to this issue. While the parties agree that Minnesota law applies to the prejudgment interest rate, Defendants argue that Minnesota law should likewise apply to the present value determination, because it is similarly procedural. (Letter of 1/21/14 from D. Flaum to J. Nelson at 1 [Doc. No. 751].) Although Plaintiff does not strongly oppose the application of Minnesota law, Plaintiff contends that there is no authority for the assertion that Minnesota law must apply to the reduction of future damages to present value simply because Minnesota law applies to the determination of prejudgment interest. (Letter of 1/28/14 from D. Elrod to J. Nelson at 2 [Doc. No. 752].) The Court thus briefly addresses whether the reduction of damages to present value is a substantive or procedural matter, since the Contract's choice-of-law provision does not replace Minnesota's procedural law. Bannister, 2008 WL 2002087, at *1.

Minnesota does not currently have a present value adjustment statute. However, from 1986 until 1988, Minnesota had such a statute, Minn. Stat. § 604.07 (1986) (repealed 1988). The statute, which specifically applied to actions for personal injury, wrongful death, or loss of means of support, specified a discount rate formula to reduce future damages to present value. Id., subd. 2. Discussing the repealed statute in Olsen v. Special Sch. Dist. No. 1, 427 N.W.2d 707, 714 (Minn. Ct. App. 1988), the Minnesota Court of Appeals referred to its "procedural nature."[9] Prior to the enactment of the discount statute, the Minnesota Supreme Court required that certain damages be discounted to present value, but had not specified the discount factor. Kleeman v. Cadwell, 414 N.W.2d 433, 437 (Minn. Ct. App. 1987) (citing Ossenfort v. Assoc. Milk Prods., Inc., 254 N.W.2d 672, 684 (Minn. 1977)). After the repeal of the present value statute, Minnesota courts returned to the common law practice in place before the statute was enacted, permitting the parties to present evidence of discounting factors and allowing the factfinder, "'in its own good discretion,'" to determine the discount rate that should actually be used. Olsen, 427 N.W.2d at 714 (quoting Busch v. Busch Constr., Inc., 262 N.W.2d 377, 396 (Minn.

[9] As the Minnesota Supreme Court explained, the present value statute was repealed "to remedy a perceived inequity in its operation, particularly as it applied to reduce awards for long term future medical expenses." Lieser v. Sexton, 441 N.W.2d 805, 807 (Minn. 1989) (citing Hearings on House File No. 1493, before the Civil Law Subcommittee of the House Judiciary Committee, 1988 Minn. Legis. March 11 (audio tape) (remarks of Rep. Kelly)).

1977)).

The Minnesota Supreme Court has defined substantive law as “that part of the law which creates, defines, and regulates rights,” in contrast to procedural or remedial law, “which prescribes method[s] of enforcing . . . rights or obtaining redress for their invasion.” Meagher, 88 N.W.2d at 879-80. Moreover, the Minnesota Court of Appeals has referred to the “procedural nature”of the former present value statute. Olsen, 427 N.W.2d at 711. This Court finds that under Minnesota law, discounting damages to present value ‘prescribes a method of . . . obtaining redress,’ similar to prejudgment interest. Furthermore, the United State Supreme Court has acknowledged lower courts’ observations “that awarding prejudgment interest ‘is just the flip side of discounting’ future losses to present value.” State of Kan. v. State of Colo., No. 105, 2000 WL 34508307, at *18 (U.S. 2000) (unpublished) (citing Matter of Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1332 (7th Cir. 1992); In re Air Crash Disaster Near Chicago, III. on May 25, 1979, 644 F.2d 633 (7th Cir. 1981); Moore-McCormack Lines, Inc. v. Richardson, 295 F.2d 583 (2d Cir. 1961)). Consistent with this authority, since the awarding of prejudgment interest is regarded as procedural under Minnesota law, Schwan’s, 476 F.3d at 596-97, this Court considers the “flip side” of the equation – discounting damages to present value – to be procedural as well. Again, because the Contract’s choice-of-law provision does not expressly refer to remedies, the Court applies

Exhibit 4

Minnesota law to this issue. Id. at 596.[10]

This court is bound by the decisions of the Minnesota Supreme Court in interpreting Minnesota law. Minn. Supply Co. v. Raymond Corp., 472 F.3d 524, 534 (8th Cir. 2006). If the Minnesota Supreme court has not ruled on an issue, this Court must predict how the Minnesota Supreme Court would rule, with reference to Minnesota Court of Appeals decisions as persuasive authority. Id. This Court is unaware of a decision from the Minnesota Supreme Court or the Court of Appeals addressing the choice of applying a risk-free versus risk-adjusted present value reduction in a breach of contract action. Absent such authority, this Court must predict how the Minnesota Supreme Court would resolve this issue. Id.

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[10] To the extent that Minnesota and Michigan law differ, any distinctions may ultimately be without a difference. While Michigan has a 5% statutory discount rate statute in personal injury actions, Mich. Comp. Laws § 600.6306(2), Michigan courts have found that where a party rebuts the 5% presumption by presenting undisputed evidence that present value may be determined by using actual compounded market rates, the court must instruct the jury accordingly. Pontiac Sch. Dist. v. Miller, Canfield, Paddock & Stone, 563 N.W.2d 693, 705-08 (Mich. Ct. App. 1997); see also M. Civ. J.I. 53.03 & Note on Use (2004) (citing Pontiac Sch. Dist., 563 N.W.2d at 693, and noting that where a court determines that a 5% simple interest rate is inappropriate, the standard instruction regarding the 5% statute-based calculation should be revised.). Although on its face Mich. Comp. Laws § 600.6306 specifically applies to personal injury actions, the Michigan Civil Jury Instructions indicate that the standard 5% adjustment is applicable in non-personal injury actions. M. Civ. J.I. 53.03 & Note on Use (2004); see also Silberstein v. Pro-Golf of Am., Inc., 750 N.W.2d 615, 627 (Mich. Ct. App. 2008) (affirming the departure from the 5% statutory adjustment to a 4.5% rate based on plaintiff's unrebutted evidence in a wrongful discharge case); Pontiac Sch. Dist., 563 N.W.2d at 706 (discussing application of 5% present value adjustment in a legal malpractice action). Thus, it appears that under the laws of Michigan or Minnesota, parties may potentially advocate for a specific, non-statutorily-prescribed rate of reduction.

As a preliminary matter, the parties agree that determining whether a risk-free or risk-adjusted method applies is a question of law, while determining the particular rate that applies is a question of fact. (Defs.' Opp'n Mem. to Pl.'s Mot. to Exclude Blaydon & Quinn at 11 [Doc. No. 729]; Pl.'s Mem. Supp. Second Mot. for Partial Summ. J. at 10-12 [Doc. No. 680]; Defs.' Mem. Supp. Mot. to Exclude Foster at 7 [Doc. No. 702]; Tr. of 12/19/13 Hearing at 32; 37-40 [Doc. No. 754].) Absent Minnesota authority on this particular question, other authority supports the parties' position. See, e.g., In re Chemtura Corp., 448 B.R. 635, 673 (Bankr. S.D.N.Y. 2011) (stating, "First I need to decide whether a risk-free rate should be used, as compared and contrasted to one that is more reflective of the marketplace. . . ."); Teachers Ins. and Annuity Ass'n of America v. Ormesa Geothermal, 791 F.Supp. 401, 416 -417 (S.D.N.Y. 1991) (observing that "[i]n order to determine . . . the discount rate, the court must decide whether, as a matter of law, the discount rate should impute investment risk to the alternative investment (increasing the discount) or impute minimal credit risk to the alternative investment.").

1. General Principles of Breach of Contract Damages

Damages for breach of contract attempt to "place the plaintiff in the same situation as if the contract had been performed." Peters v. Mut. Benefit Life Ins. Co., 420 N.W.2d 908, 915 (Minn. Ct. App. 1988); see also Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 790 F.Supp. 1318, 1326-27 (E.D. Mich. 1992) (citing Maraldo Asphalt Paving, Inc. v. Harry D. Osgood Co., Inc., 220 N.W.2d 50, 52 (Mich. Ct. App. 1974) and Tann v. Allied Lines, Inc., 146 N.W.2d 682 (Mich Ct. App. 1966)). Put differently, the appropriate measure of damages for breach of contract is the pecuniary benefit the non-breaching party would have received but for the breach.[11] See Rogers Excavating, Inc. v. Mana Props., LLC, No. 308514, 2013 WL 5763028, at * 6 (Mich. Ct. App. Oct. 24, 2013) (per curiam). While a plaintiff's damages for breach of contract may not be speculative, "damages need not be proved with certainty, it being legally sufficient that a reasonable basis for approximating loss is shown." Conrad v. Clark Mem'l United Church of Christ, No. C2-98-1394, 1999 WL 138721, at* 3-4 (Minn. Ct. App. 1999) (citing Polaris Indus. v. Plastics, Inc., 299 N.W.2d 414, 419 (Minn.1980)).

Where a party has been found to have anticipatorily repudiated a contract, as here, "the general rule [is] that anticipatory repudiation of a contract permits the aggrieved party to sue for damages resulting from future as well as past non-performance." First State Bank of Floodwood v. Jubie, 86 F.3d 755, 760 (8th Cir. 1996) (applying Minnesota law); see also Stanton v. Dachille, 463 N.W.2d 479, 482 (Mich. Ct. App. 1990) (citing 25 C.J.S., Damages § 74 at 850-51) (stating, "[d]amages for an anticipatory repudiation are to represent full compensation for the loss caused by depriving the plaintiff of the benefit of the bargain."); Am. List Corp. v. U.S. News and World Report, Inc., 549 N.E.2d 1161,

[11] The parties' memoranda suggest some disagreement about whether the proper standard is one that puts the aggrieved party in the same position as if the contract had been performed or is one that puts the aggrieved party in the same position as if the contract had not been breached. (See Pl.'s Opp'n Mem. to Defs.' Mot. to Exclude Foster at 5 [Doc. No. 724]; Defs.' Reply to Defs.' Mot. to Exclude Foster at 8 [Doc. No. 737].) At the hearing on the instant motions, counsel for Defendants noted that any difference between the two standards is a meaningless difference of semantics. (Tr. of 12/19/13 Hearing at 47 [Doc. No. 754].) The Court agrees.

1165 (N.Y.1989) (observing that anticipatory repudiation entitles the aggrieved party to recover the present value of its future damages from the repudiating party's breach of the total contract).

Awards of future damages generally require adjustment, or discounting, to present value by the application of a discount rate. "[T]he discount rate performs two functions: (i) it accounts for the time value of money; and (ii) it adjusts the value of the cash flow stream to account for risk." Energy Capital Corp. v. United States, 302 F.3d 1314, 1333 (Fed. Cir. 2002); see also In re O'Connor, 145 B.R. 883, 894 (Bankr. W.D. Mich. 1992) (noting that future damages must be reduced to present value in order to account for the earning power of money). The lower the discount rate, the higher the present value of the future payments. Chemtura, 448 B.R. at 673, n. 139. Discussing the rationale behind reducing future damages to present value, the Minnesota Court of Appeals has explained that:

> [b]ecause proper investment of a damage award will generate income, an injured party is overcompensated if paid the full amount of future damages at the time the judgment is entered. On the other hand, an injured party is still made whole if the payment for future damages is received in discounted dollars, since those dollars, if invested wisely, will generate the entire amount necessary to compensate for the injury. The prudent plaintiff who invests the award is thus not disadvantaged.

Kleeman, 414 N.W.2d at 438. Observing that the general goal of recovery for breach of contract is to place the injured party in the position it would have been in had the contract been performed, the court in Chemtura noted the inherent tension

> between trying to match the original bargain in the damages award, on the

> one hand, and requiring the prevailing party to endure market risk to get the benefits of its damages award, on the other. Ultimately, however, I believe that existing caselaw and common sense require that the discounting to fix the damages award must reflect the same payment risk, insofar as the court can accomplish that, as the original contract did.

448 B.R. at 673.

Courts have observed that a reduction to present value essentially involves a case-specific inquiry, taking into consideration the "'the rate of interest which is reasonable in light of the risks involved.'" In re Monnier Bros., 755 F.2d 1336, 1339 (8th Cir. 1985) (quoting 5 Collier on Bankruptcy ¶ 1129 at 1129-65) (observing that the treasury bill rate, which the lower court applied, "reflected one rate of return available on a short term, low risk investment.").

Legal precedent in Minnesota on reduction to present value is largely in the personal injury or employment law context. See, e.g., Cox v. Crown CoCo, Inc., 544 N.W.2d 490, 499-500 (Minn. Ct. App. 1996) (discussing discounting of future damages in an employment law action); Kleeman, 414 N.W.2d at 436 (addressing present value in the context of personal injury).[12] Addressing the now-repealed former present value discount

[12] The Minnesota Jury Instruction on the present cash value of damages contemplates future medical expenses as a component of future damages. It provides that if a jury awards future damages, it must then find the present cash value of this amount, awarding only the present cash value. Minn. Civ. JIG 90.25 (2013). The instruction specifies the following steps in adjusting to present value: (1) decide if the plaintiff is entitled to future damages; (2) decide the amount of future damages in today's dollars, considering whether inflation will increase future health care costs or the value of future earning capacity; (3) decide for how long in the future the plaintiff will incur or experience the future expenses; and (4) decide the amount of money that the plaintiff needs in the future for such expenses, if invested now through the future. Id.

statute, Minn. Stat. § 604.07, the Minnesota Court of Appeals observed that Minnesota's discount statute sought to objectively determine the "real" yield of money, with reference to "virtually risk-free investments":

> the Minnesota discount statute is based on the "real" interest rate approach, in which the discount rate is adjusted for inflation. Under that approach, the rate is determined by subtracting the average annual change in the consumer price index over a period of years from the effective annual interest on government bonds held during the same period. The objective of the method is to determine the "real" yield of money: that portion of interest charged on virtually risk-free investments that represents only the real cost of money and not the additional cost the lender charges as a hedge against inflation.

Kleeman, 414 N.W.2d at 437. Courts have described a "risk-free" rate as "the rate of return an investor can obtain without taking market risk." Spectrum Sciences & Software, Inc. v. United States, 98 Fed. Cl. 8, 26, n.27 (Fed. Cl. 2011) (citation omitted). A risk-free rate is "often set at the rate of return on long-term Treasury securities." Id.

Because Minnesota's now-repealed statute specifically applied to future damages for personal injury, a risk-free methodology was appropriate, given the legislature's public policy objective to "achieve certainty, prevent overcompensation, and lower the cost of damage awards in order to reduce the cost of insurance." Kleeman, 414 N.W.2d at 439. Courts in other jurisdictions have also applied a risk-free or risk-adjusted discount rate based on public policy considerations, observing that "although it may not be appropriate to force unsophisticated individuals to assume risks in investing monetary rewards, those same concerns do not apply to sophisticated investors. . . ." Ormesa, 791 F.Supp. at 417. Conversely, where the parties are sophisticated business entities, as here, courts frequently apply a risk-adjusted approach. See, e.g., In re Magna Cum Latte Inc., No. 07-31814, 2008 WL 2047937, at *18 (Bankr. S.D. Tex. May 9, 2008) (finding a risk-adjusted discount rate the most appropriate rate for calculating a business's lost profits).

2. Parties' Positions on Present Value Reduction

Plaintiff argues that only a risk-free measure of risk will achieve the goal of placing Great Lakes in the position that it would have been in had the Contract been performed, while also accounting for the time value of money. (Pl.'s Mem. Supp. Second Mot. for Partial Summ. J. at 10-13 [Doc. No. 680].) Because a repudiated contract entitles the nonbreaching party to full performance, Plaintiff argues that, as a matter of law, it is entitled to full payment under the contract, reduced to present value. Accordingly, Great Lakes argues that the element of risk should be removed from the present value methodology here, since the Court has determined that the Contract was repudiated. Plaintiff contends that only a risk-free approach will ensure that it receives full performance and is placed in the position it would have been in had Defendants not breached the Contract. (Id. at 10-11.) Similarly, Plaintiff argues that there is no risk of non-performance in a repudiated contract that, as a matter of law, entitles the aggrieved party to damages for the full contract. (Id.)

Plaintiff proposes a risk-free method of reduction, with reference to the rate associated with zero coupon bonds of fixed duration offered by the United States Treasury. (Id. at 10-11.) Plaintiff contends that a risk-free measure of present value is appropriate in light of the type of damages at issue here – fixed and certain liquidated damages in the amount of $190,000 per month for a period of 177 months. (Id. at 10.) No lost profits or unliquidated damages are at issue. In addition, Plaintiff argues that because Defendants repudiated the Contract – thereby entitling Great Lakes to all amounts due under the total Contract – risk-free discounting is required. (Id. at 11.)

Defendants, however, advocate for the application of a risk-adjusted discount rate. (Defs.' Opp'n Mem. to Pl.'s Second Mot. for Partial Summ. J. at 5 [Doc. No. 730].) Their expert, Dr. Blaydon, proposes a risk-adjusted discount rate of 12.18%. (Id. at 6; Blaydon Report at 4, Ex. 1 to Farlow Aff. [Doc. No. 686].) Dr. Blaydon determined this rate based on the WACC of a proxy group of comparable, publicly traded natural gas transportation companies. (Id. at 4-6; 9-13.) In his deposition, Dr. Blaydon explained the perspective of his analysis: "It is the way the markets, the people who were investing in the stock of their parent [TransCanada Pipelines], and in companies that are very similar to that . . . how they would see the impact of a loss of revenue of [Great Lakes], what is the impact on the value of [Great Lakes]." (Blaydon Dep. at 74, Ex. 2 to Farlow Aff. [Doc. No. 686].)

Defendants also move to exclude the opinion and testimony of Plaintiff's expert, Dr. Foster, arguing that he fails to consider the market risks faced by Great Lakes in providing transportation services under the Contract. (Defs.' Mem. Supp. Mot. to Exclude Foster at 9-15 [Doc. No. 702].) In addition, Defendants argue that by not applying the new tariff rate resulting from Great Lakes' FERC settlement, Dr. Foster applied the wrong monthly payment rate. (Id. at 16, n.5.) Finally, Defendants argue that even if the Court finds that a risk-free rate should apply, the determination of a specific rate is a question of fact for the jury. (Defs.' Opp'n Mem. to Pl.'s Second Mot. for Partial Summ. J. at 7 [Doc. No. 730].)

Plaintiff responds that Dr. Blaydon determined the discount rate from the wrong perspective. (Pl.'s Opp'n Mem. to Def.'s Mot. to Exclude Foster at 5 [Doc. No. 724].) Dr. Blaydon's proxy investor-based analysis considers the impact of the lost revenue on the value of Great Lakes. Great Lakes argues that this methodology improperly "incorporates additional risks of non-performance in a situation where the contract has already been breached and repudiated." (Pl.'s Mem. Supp. Mot. to Exclude Blaydon & Quinn at 6 [Doc. No. 685].) Morever, Plaintiff argues that even if the Court were to apply a risk-adjusted approach, no other court has adopted "a methodology involving a determination of the WACC of the non-breaching party, much less a proxy group of companies." (Id. at 7.) Accordingly, Great Lakes contends that Dr. Blaydon's opinion is inadmissible because it fails to apply the proper legal standard. (Id.)

3. Legal Authority

Outside of personal injury claims, Courts in other jurisdictions have considered the application of a risk-free or risk-adjusted approach to future damages in several other contexts: calculating lost profits, determining future damages under fixed contracts, achieving parity among creditors in bankruptcy, and considering the creditworthiness of the parties to the contract. This Court refers to decisions of other courts for guidance in how the Minnesota Supreme Court might rule if faced with the decision to apply a risk-free or risk-adjusted approach in a breach of contract action.

a. Lost Profits

In the lost profits context, courts often apply a risk-adjusted approach to the determination of future damages. See, e.g., Franconia Assocs. v. United States, 61 Fed. Cl. 718, 766 (Fed. Cl. 2004); Energy Capital Corp., 302 F.3d at 1334; Magna Cum Latte, 2008 WL 2047937, at *18. Applying a risk-adjusted discount rate in a lender's breach of contract action for lost profits, the court in Energy Capital explained its reasoning:

> Energy Capital argues that once the Court of Federal Claims determined that its profits were reasonably certain, no further consideration of risk was appropriate, because risk already had been considered in determining whether there would have been profits. We disagree. A venture that is anticipated to produce $1 million in profits and that has a 95% chance of success is obviously more valuable than a venture that is anticipated to produce $1 million in profits with only a 90% chance of success—and yet, both ventures would likely be determined to have a reasonable certainty of producing profits. Therefore, the fact that the trial court has determined that profits were reasonably certain does not mean that risk should play no role in valuing the stream of anticipated profits

302 F.3d at 1333. Thus, this approach recognizes the risk that even reasonably certain future profits may not actually materialize.

b. Fixed Damages

In situations in which future damages are fixed or certain, however, courts have frequently applied a risk-free approach to the present-value determination. For example, the court in Kucin v. Devan affirmed a bankruptcy court's risk-free determination of the present value of retirement compensation agreements. 251 B.R. 269, 273 (D. Md. 2000). The parties to the compensation agreements were the bankrupt estate and its former long-time senior executives. The bankruptcy trustee argued that the reduction to present value should include consideration of the risk of nonpayment of the retirement benefits –

specifically a discount based on the creditworthiness of the bankrupt estate. Id. The court rejected the trustee's argument, observing that it ignored fundamental principles of contract law:

> In contract law, the nonbreaching party is entitled to damages for its "expectation interest," which are damages sufficient to place the nonbreaching party in as good a position as the party would have been had the contract been performed. Here, the Executives expected to receive from [the bankrupt estate] their retirement benefits upon reaching the age of sixty-five . . . . Therefore, their claims for retirement benefits, discounted to present value, are a legal certainty and need not be further discounted for the risk of nonpayment.

Id. at 273 (citing Restatement (Second) of Contracts §§ 344, 347 (1981)).

Courts have also applied a risk-free approach to present value adjustments in cases involving the breach of fixed term contracts such as leases. In a bankruptcy adversary proceeding, the court in In re O'Connor, 145 B.R. at 886-88, considered whether an unpaid balance of an office lease was a nondischargeable debt of husband-wife Chapter 7 debtors. Finding that the unpaid portions of the lease were nondischargeable as to the husband debtor, the court considered the landlord's damages estimates, which included total rent of $99,086.28 over a three-year period. Id. Reducing the damages to present value, the court applied a discount rate to reduce for what could be obtained in a relatively risk-free investment, noting that "[t]he future damages will not vary due to any factors because the amount was set by the terms of the lease." Id. at 894. Likewise, the court in Jack Burton Mgmt. Co. v. Am. Nat'l Ins. Co., 77 F. Supp.2d 1106, 1109-10 (E.D. Mo. 1999), applied a risk-free approach to the determination of present value in an action for the breach of a long-term sublease. Because "the future term of payments [was] fixed by the sublease," the court concluded that the plaintiff was "entitled to a risk-free stream of future income to replace its lost rent." Id. Similarly, in the matter of In re Highland Superstores, Inc., 154 F.3d 573, 579–80 (6th Cir.1998), a bankruptcy appeal, the Sixth Circuit Court of Appeals determined that a risk-free approach should be applied to determine the present value of a landlord-creditor's claim for future rental income. The Sixth Circuit found that the bankruptcy court had erred when it applied different discount rates for the debtor and a replacement tenant, based on their respective creditworthiness, in comparing the future income streams that would have been generated by the debtor or replacement tenant. Id. at 581. In reaching its decision, the court posed a hypothetical situation in which a landlord rents two identical apartments – one to Bill Gates, the other to a destitute person. Id. at 580, n.9. The court found that if both renters defaulted, the landlord's actual damages would be the same and that although the landlord would have a greater chance to collect a judgment against the more creditworthy Bill Gates, "contract law does not distinguish between the two individuals in determining the value of the lessor's award of damages." Id. While the court did not determine what the appropriate discount rate would be, it cited with approval the prevailing statutory rate of interest under the applicable state law. Id. at 580, n.8.

However, not all long-term leases merit the application of a risk-free approach. In Navigato v. SJ Restaurants, LLC, 09-CV-2101, 2011 WL 69099, at *24 (D. Kan. Jan. 10, 2011), the court endorsed a risk-adjusted discount rate in a case involving the breach of a commercial lease. The court based its decision on the reliability of the experts' opinions, finding that the process used by the defendant's expert, which involved extensive research to determine a market-derived discount rate, was more persuasive and reasonable than the methodology used by the plaintiff's expert. Id. Plaintiff's expert derived a discount rate half way between a risk-free U.S. treasury securities-based rate and the property's appraisal rate because the "market appear[ed] to be unstable," but "[might] turn around." Id. at *11. Finding this reasoning speculative and unclear, the court applied the risk-adjusted rate proposed by the defendant. Id. at *24.

c. Parity Among Bankruptcy Creditors

In addition to lost profit cases and cases involving damages for fixed terms, bankruptcy courts have also considered the issue of parity among creditors when making present value determinations. See, e.g., Mirant, 332 B.R. at 158-159. Because a significant factor in bankruptcy is the desire to achieve parity among creditors, some bankruptcy courts have applied a uniform risk-adjusted discount rate, as the court did in Mirant. Id. at 158 (observing that "[e]quivalent treatment of creditors is a key goal in bankruptcy," and noting that "[t]he purpose of application of the discount rate is to reduce the Claim to an amount consistent with the allowed amounts of other claims."). However, in the matter of In re USGen New England, Inc., 429 B.R. 437, 490-91 (D. Md. 2010), the bankruptcy court applied a risk-free rate, for the reasoning set forth in Kucin. The court noted that the Chapter 11 debtor, USGen, was a solvent bankruptcy estate and the pipeline creditor's claim would be paid in full with interest according to USGen's confirmed plan. Id.

d. Ability to Negotiate Risk Into Contract Terms

In evaluating risk, courts have also considered the degree to which the contracting parties are able to negotiate the element of risk – specifically, the breaching party's or debtor's creditworthiness – into the terms of the bargained-for contract. The Mirant court expressed its disagreement with Highland Superstores on the issue of whether creditworthiness risk should be factored into discounting to present value:

> With all respect to the Court of Appeals for the Sixth Circuit, the Bill Gates analogy is flawed. The creditworthy contract party would typically not enter into the same contract as the prospective debtor; their different creditworthiness would be accounted for in dickered terms of their respective bargains. There being small risk of Bill Gates being unable to perform, he could contract for better terms.

332 B.R. at 158. The Mirant court observed that in the ordinary course of business, the parties' respective levels of creditworthiness would be reflected in the terms of the contract, or in the "dickered terms of their respective bargains." Id. Even though the creditor-plaintiff, Kern River, was subject to FERC regulation in its contract terms – as is Great Lakes – the Mirant court nonetheless found, in determining that a risk-adjusted approach applied, that the risk of non-performance was accounted for in the rate-fixing process.[13] Id. at 158, n.51.

Courts also consider the point in time at which the element of risk is to be

[13] Specifically, the court noted that in a pending rate case before the FERC, Kern River argued that its losses under the contract at issue in Mirant were one reason warranting an increase in its rates. Id. Thus, the Mirant court concluded that risk should be a factor in determining the discount rate. Id. at 158-59.

calculated, as well as which party's creditworthiness is relevant to the estimation of risk. The Mirant court found that the discount rate chosen to reduce a claim to present value should account for the risk of non-performance at the time the debtors contracted with the plaintiff. Id. at 157-58. By taking the debtors' pre-bankruptcy risk into account, "the court will ensure that the discounted Claim is quantified similarly to, and will thus be treated on a parity with, other claims." Id. at 158-59. In reaching its decision, the Mirant court noted its disagreement with Highland Superstores and Kucin, in which the creditworthiness of the debtor or breaching party was considered only as of the time of the breach. Id. at 158, n. 49. The Mirant court explained that examining risk earlier, at a time when the debtor or breaching party is more creditworthy, "is a fair measure of the market's assessment of the risk associated with dealing with [the debtors/breaching party]." Id. at 159. Thus. the court found that by applying a risk-based rate "that reflects a bankrupt's lack of creditworthiness rather than the credit of the party with which [the plaintiff] initially contracted," an appropriate balance was struck between overcompensating the plaintiff as compared to other claimants and under-compensating the plaintiff. Id. Similarly, in American List Corp., the court held that future damages for the anticipatory breach of a contract may not reflect the risk of the plaintiff's non-performance:

> Defendant argues that in discounting the total amount due under the contract to its present value, the court may factor in the risk that the nonrepudiating party will be unable to perform the contract in the future. Such a rule, however, does violence to the settled principles of the doctrine of anticipatory breach because it would require the nonrepudiating party to prove its ability to perform in the future, despite the fact the doctrine is intended to operate to relieve the nonrepudiating party from that very performance.

549 N.E.2d at 1165 (emphasis added).

e. Repudiated Contract

The decision in Chemtura, 448 B.R. at 667-68, 676, is instructive because it involved a repudiated contract between two sophisticated entities, as is the case here.[14] Chemtura concerned a claim estimation motion filed by bankruptcy debtors, in which the repudiated contract arose as an underlying issue. Id. at 667-68. Under the contract, Chemtura's predecessor, Witco, had agreed to purchase certain minimum amounts of steam and heat for use at its refinery, irrespective of actual usage. Id. at 641. In exchange, Witco contracted to provide Oildale with certain raw materials at a fixed coast, as well as treatment and services related to water treatment waste. Id. Finding that the contract had been repudiated by Chemtura's predecessor, the bankruptcy court also noted that the breaching party's performance was then due, including any unpaid amounts under the contract. Id. at 668.

While the nonbreaching party, Oildale, sought a risk-free method of adjustment of between 0.048% and 2.9%, the court rejected this approach. Id. at 672. Absent from the court's determination of whether a risk-free or risk-adjusted rate applied, was any discussion of the ramifications of a repudiated contract, although the court expressly acknowledged that repudiation "resulted in an immediate total breach" of the contract. Id. at 668. Also, although it is not entirely clear from the opinion, the damages in Chemtura

[14] While Chemtura was decided by a bankruptcy court, the parties analyzed damages issues under general contract law principles. Id. at 673, n.141.

did not appear to involve lost profits, nor does the opinion discuss the uncertainty of estimating such losses.

Instead, the Chemtura court applied a risk-adjusted approach for other reasons. First, it discounted the opinion of Oildale's expert, finding that the expert had simply applied a risk-free rate because he had been instructed to do so by counsel, instead of making the determination based on economic principles. Id. at 672. Moreover, the court distinguished Highland Superstores and Kucin, two decisions in which a risk-free rate was applied:

> Highland Superstores is plainly distinguishable. I'm not asked here, as the Highland Superstores courts were, to approve the use of two different discount rates; I'm here required only to approve the use of one, and to determine what that one rate should be. And I'm here not asked to consider cash flow streams that aren't comparable. Rather, I'm asked to take a cash flow stream that is comparable to the original performance, and to determine the rate at which it should be discounted—and to decide whether that rate should be based on a risk different than the risk underlying the original bargain.

Id. at 675.[15] Ultimately, the court concluded that a risk-adjusted approach was the most appropriate method by which to "reflect the same payment risk, insofar as the court can accomplish that, as the original contract did." Id. at 673. Although the Chemtura court did not expressly state that it is the risk of the breaching party that is relevant, language referring to the "payment risk" and "risk (i.e., the risk of the obligor's nonpayment)," suggests that the court found the relevant risk to be the risk associated with the breaching

[15] As to Kucin, the court found that it cited no authority other than Highland Superstores and that it overlooked relevant authority. Id. at 676.

party.[16] Id. However, because the court found that Oildale's proffered risk-adjusted rate was too high to capture the risk in question, the court ordered the parties to attempt to agree upon a different rate. Id. at 677.

4. Determination of Risk-Free or Risk-Adjusted Approach

Based on all of the authority referenced above, the Court finds that a risk-adjusted approach is the most appropriate method by which to discount Great Lakes' future damages to present value. As noted, as a matter of policy, courts often consider the level of sophistication of the contracting parties, applying a risk-adjusted approach to sophisticated business entities such as the parties here. See, e.g., Ormesa, 791 F.Supp. at 417. In this business context, a fair, reasonable discount rate not only discounts for the time value of money, it also contemplates all possible risks, such as general non-performance or nonperformance due to inability to pay, and adjusts the present value of the damages accordingly. See Mirant, 322 B.R. at 156. Risks attendant to the contract itself may also be part of the risk determination. For example, the terms of the contract may change, such as the possible impact of the FERC rate change here. Courts then must determine how to fairly evaluate such risks and reflect them when discounting future damages to present value. See Chemtura, 448 B.R. at 673.

Although Plaintiff argues that as the aggrieved party to a repudiated contract, it is

[16] In addition, the Chemtura court noted that its ruling was consistent with that in Mirant, to which it cited favorably, and which found that the risk to be calculated is the risk associated with the defaulting party. Id. at 676-77.

entitled to risk-free discounting, Chemtura suggests otherwise. Chemtura involved an underlying repudiated contract to which the court applied risk-adjusted future damages discounting. 448 B.R. at 676. The court in Chemtura acknowledged the fundamental contract principle of restoring the aggrieved party to the position of full performance. 448 B.R. at 673. However, while the court determined that the contract had been repudiated and discussed the effect of repudiation in the context of the statute of limitations, id. at 667-68, the court did not address repudiation in the context of discounting future damages for risk. Rather, the court found that restoration of the aggrieved party to full performance required the discounting of damages reflective of the risk associated with the breaching party, at the time the contract was entered into. Id. at 676. At that point in time, the contract is fully in effect, and is not repudiated. Accordingly, this Court concludes that the fact of repudiation is not dispositive of whether a risk-free or risk-adjusted discount rate should apply to future damages.

While the risk-free cases involving long-term, fixed-rate contracts and leases are similar in some respects to the Contract here, some courts have applied a risk-adjusted discount rate even to such contracts. See Navigato, 2011 WL 69099, at *24. In addition, parties to a lease may not always consist of two sophisticated business entities, unlike the situation before the Court. Finally, the cases cited above in which discounting for risk is based on determining lost profits, achieving parity among creditors, or applying different rates to different parties are not factually applicable to the facts before the Court.

Having determined that a risk-adjusted approach is the most appropriate way in which to discount Plaintiff's future damages, the Court considers the methodology used by Defendants' expert in arriving at a risk-adjusted rate.[17] Defendants argue that once the Court has determined that a risk-adjusted approach applies, any disagreements as to Dr. Blaydon's methodology and assumptions go to the weight of his testimony, not its admissibility. (Defs.' Opp'n Mem. Pl.'s Mot. to Exclude Blaydon & Quinn at 11-12 [Doc. No. 729].) However, Plaintiff moves to exclude Dr. Blaydon's testimony, arguing that it can be of no assistance to the factfinder if it fails to meet the correct legal standard. (Pl.'s Reply Mem. Supp. Mot. to Exclude Blaydon & Quinn at 6-7 [Doc. No. 741].)

Again, applicable legal authority provides that the risk to be calculated is the risk associated with the defaulting party at the time the breached contract was entered into. Mirant, 332 B.R. at 158; see also Chemtura, 448 B.R. at 673, 676. The estimation of such risk requires consideration of what an investor would have paid to invest in the future stream of income from the contract at the time it was made. See Spectrum Sciences, 98 Fed. Cl. at 25 (discussing different approaches taken by experts, but noting that "both experts used a sixteen percent discount rate in their calculations, reflecting the risk that a potential buyer of [plaintiff's] proprietary information would associate with realizing the profit stream deriving from the use of that asset."); Fail-Safe, L.L.C. v. A.O. Smith Corp.,744 F.Supp.2d 870, 895, n.48 (E.D. Wis. 2010) ("Presumably, the discount rate should incorporate the risk of the investment."); Franconia, 61 Fed. Cl. at 764 ("the

[17] Because Plaintiff's expert provided only a risk-free approach, the Court does not address Plaintiff's methodology.

appropriate discount rate. . . must reflect risk, in order to take into account the return the market would demand were an investor called upon to invest capital in the same venture"); E. Minerals Int'l, Inc. v. United States, 39 Fed. Cl. 621, 626 (1997) ("The discount rate represents the rate of return an investor would require in order to risk capital on the project."), rev'd on other grounds, Wyatt v. United States, 271 F.3d 1090 (Fed. Cir. 2001). This requires analysis of ESML's likely performance under the Contract, as the risk to be reflected in the discounting process is the risk, including the creditworthiness, associated with the breaching party or bankrupt debtor. See, e.g., Mirant, 332 B.R. at 158-59.

Defendant's expert, however, focuses on the risk associated with Plaintiff, instead of determining the risk of contracting with ESML. (Blaydon Dep. at 85, Ex. 2 to Farlow Aff. [Doc. No. 686]; Blaydon Report at 7, Ex. 1 to Farlow Aff. [Doc. No. 686].) Dr. Blaydon testified that he examined the risk of being in the business of natural gas transmission, i.e., Plaintiff's business, and "the way the markets, the people who were investing in the stock of their parent [TransCanada Pipelines], and in companies that are very similar to that . . . how they would see the impact of a loss of revenue of [Great Lakes], what is the impact on the value of [Great Lakes]." (Blaydon Dep. at 74, 85, Ex. 2 to Farlow Aff. [Doc. No. 686].) The Court finds this methodology inconsistent with the authority noted above, which considers the element of risk associated with the breaching party. Moreover, even under Defendants' approach, instead of examining Great Lakes specifically, Defendants' expert considered a proxy group of comparable natural gas companies, including Great Lakes' parent company, TransCanada Pipelines. (Id.; Blaydon Report at 8; 12, Ex. 1 to Farlow

Aff. [Doc. No. 686].) While Defendants argue that other courts have accepted the use of proxy groups to determine the appropriate cost of capital, they have done so in quite different contexts, in cases that essentially involved future lost profits. See e.g., Energy Capital, 302 F.3d at 1334 (using a discounted cash flow to determine the rate of discounting the plaintiff's future lost profits); Navigato, 2011 WL 69099, at *24 (applying a discount rate for future lost rent based on market data of the cost of capital for commercial real estate similar to the plaintiff's property). Focusing on the risk associated with Great Lakes, Dr. Blaydon did not calculate the risks associated with ESML beyond checking published reports on the steel industry in general. (Blaydon Dep. at 88, Ex. 2 to Farlow Aff. [Doc. No. 686].) For all of these reasons, the Court finds that Dr. Blaydon's proposed discount rate of 12.18% is inaccurate because it is based on a flawed methodology, given the facts of this case.

The relevant risk to be evaluated is the risk associated with ESML at the time the Contract was entered into. Because Dr. Blaydon's approach contravenes the applicable legal authority, the Court finds that it is not helpful to the finder of fact.

As the Court has noted, the determination of the specific rate of discount is an issue of fact for the jury. Olsen, 427 N.W.2d at 714. While the Court finds that a risk-adjusted approach should apply, as opposed to the risk-free approach that Dr. Foster advocated, the Court also finds Dr. Blaydon's methodology inconsistent with the authority set forth above. Neither party's expert submitted alternative methodologies. However, because amended expert opinions will be helpful to the factfinder, the Court orders the parties to exchange revised present value calculations, using a risk-adjusted rate, consistent with this Order, within the next 60 days. The parties shall meet and confer and attempt to agree on an expedited schedule for rebuttal reports and limited depositions if necessary.

While it is not for the Court to determine the specific rate of discount, the Court offers some guidance to assist the parties in estimating risk, consistent with this Order. As noted, the parties should evaluate risk from the perspective of what an investor would have paid to invest in the future stream of income from this Contract at the time it was made. See, e.g., Spectrum Sciences, 98 Fed. Cl. at 25. When ESML purchased MSI – its predecessor to the Contract – ESML assumed the risk of the Contract. In doing so, ESML purchased the obligation to provide a future stream of payments to Great Lakes. Therefore, to the extent that ESML calculated that risk in its decision to purchase MSI, any such calculations would be highly relevant to the evaluation of a proper risk-adjusted rate in this case.

In addition, the applicability of the specific changed Tariff rate should also be considered in calculating the discount rate. Defendants presume that the revised rate applies (Defs.' Mem. Supp. Mot. to Exclude Foster at 15-16 [Doc. No. 702]), and Plaintiffs contend that the Court must determine whether the changes in the Tariff apply to ESML. (Pl.'s Opp'n Mem. to Defs.' Mot. to Exclude Foster at 9 [Doc. No. 724].) Again, a change in tariff rate, in either direction, appears to be a risk attendant to the Contract and should be addressed by the parties' experts.

Based on the foregoing analysis, the parties' motions to exclude each other's experts are granted, in part, as to the currently-submitted opinions of Drs. Blaydon and Foster, and denied, in part, as to any revised opinions that are consistent with this Order.

F. Estoppel

In their response in opposition to Plaintiff's Second Motion for Partial Summary Judgment, Defendants contend that their estoppel defense presents factual issues to be resolved by a jury, making summary judgment inappropriate. (Defs.' Opp'n Mem. to Pl.'s Second Mot. for Partial Summ. J. Mot. at 2-3 [Doc. No. 730].) Defendants argue that there has been no resolution of their affirmative defense of estoppel. (Id.) Specifically, Defendants contend that

> questions remain as to whether Plaintiff's conduct following Defendants' purported repudiation of the TSA – including its representations to the [FERC] that ESML remained a customer and its statements that the pipeline capacity covered by the TSA remained "contractually committed to ESML" (Smead Report at 22) – bars its anticipatory repudiation claim.

(Id.)

Defendants' argument that the estoppel defense remains an issue in the case, rendering summary judgment appropriate, is without merit. In the March 19 Order, this Court found no issues of material fact in dispute regarding Defendants' asserted defense that it did not anticipatorily repudiate the Contract. (Order of 3/19/13 at 42-44 [Doc. No. 559].) Accordingly, the Court granted Plaintiff's motion for summary judgment on anticipatory repudiation. (Id.) Contrary to Defendants' characterization, the anticipatory repudiation is not "purported" – this Court has ruled that Defendants anticipatorily repudiated the Contract. Moreover, this Court ruled that "any defense claiming that

Defendants did not anticipatorily repudiate the contract fails as a matter of law." (Id. at 43-44.) That ruling includes the defense of estoppel. To the extent that Defendants contend that their estoppel defense is premised on some other theory, they previously informed Great Lakes otherwise. In response to an interrogatory from Plaintiff, Defendants attested that their estoppel defense was based on the filed rate doctrine/Tariff limitations theory, stating, "Great Lakes is estopped from pursuing any claims outside the Tariff, which provides, along with the relevant FERC and other precedent, the sole and exclusive basis upon which relief can be sought against ESML." (Resp. & Objections to Pl.'s Interrog. No. 3 at 8, Def. ESML's Resp. to Pl.'s First. Set of Interrogs., Ex. 1 to Ellison Aff. [Doc. No. 744-1].)

Despite Defendants' previous representation that their estoppel defense was premised on the filed rate doctrine/Tariff limitations argument, Defendants apparently now contend, for the first time, that their estoppel defense is related to mitigation. (Defs.' Opp'n Mem. to Pl.'s Second Mot. for Partial Summ. J. Mot. at 2-3 [Doc. No. 730].) While this is a novel buttressing of defense theories, to the extent that Defendants' estoppel defense is based on mitigation, it fails for the reasons discussed herein concerning mitigation. Any defense based on estoppel is therefore rendered moot as a result of this Court's rulings.

G. Cross Motions to Recover Costs

At the May 28, 2013 hearing on Defendants' motion for interlocutory appeal, counsel for Defendants, Mr. Flaum, requested that the parties attempt mediation of this dispute. (5/28/13 Hearing Tr. at 33-34, Ex. 1 to Aff. of David Elrod [Doc. No. 692-1].)

The Court observed that "[Great Lakes] is not interested in renegotiating the contract. I think Essar has heard that, as well. I presume [ESML's] request for mediation is not to do with that, but to resolve this litigation in some fashion." (Id. at 32.) Plaintiff's counsel, Mr. Elrod, reiterated Plaintiff's position that renegotiation of the Contract was not acceptable:

> Based on how this litigation has progressed, the positions that have been taken in this litigation, the cost of this litigation, Great Lakes is not interested in renegotiating a contract for their benefit. We've told them that.
>
> We told them that at the first mediation. We even offered proposals back and forth on how to get them back on track so they could perform without getting too much. We told them they had to do a certain thing, and all they had to do was agree they were going to perform under the contract. Wouldn't do it. They wanted the terms changed. We're not changing the terms of the contract.

(Id. at 34.) The Court subsequently ordered the parties to mediate. (Minute Entry [Doc. No. 587].)

The parties attended a mediation on September 26, 2013, conducted by Judge George F. McGunnigle, a private mediator. (Elrod Aff. ¶ 3 [Doc. No. 734].) Mr. Elrod avers that at the mediation, Great Lakes made a monetary settlement demand. (Id.) He contends that Defendants refused to respond with a monetary offer and instead indicated that they were only prepared to discuss a renegotiated contract. (Id.) Mr. Elrod further asserts that Judge McGunnigle informed Great Lakes that Defendants lacked authority to reach a monetary settlement and would require authorization from their board of directors. (Id.) Mr. Elrod maintains that Great Lakes informed Judge McGunnigle that Great Lakes had long made clear to Defendants that it would not accept a renegotiated contract and that

Great Lakes had expected Defendants to have full authority to settle the lawsuit. (Id.) "Judge McGunnigle advised [Great Lakes] that Defendants stated that they were not aware and were surprised that Great Lakes was not willing to settle the case based on the concept of a renegotiated contract and that they had no authority to settle on a monetary basis." (Id.)

Following the mediation, Judge McGunnigle corresponded with the parties, expressing his disappointment that they were unable to resolve the dispute. (Id. ¶ 4; Ex. 1 to Elrod Aff. [Doc. No. 734-1].) He offered his assistance in the future if it would be helpful "to reconvene the mediation after the ESML representatives have consulted further with their board." (Id.)

Defendants oppose Plaintiff's motion to recover costs and cross move to recover the costs incurred in responding to Plaintiff's motion. (Defs.' Opp'n Mem. to Recover Costs and Mem. in Supp. of Cross Mot. [Doc. No. 717].) Defendants note that three senior ESML officers attended the mediation, along with two attorneys. (Id. at 2.) ESML's Acting General Counsel, Susan Fennessey, one of the ESML officers who attended the mediation, submitted a declaration in support of Defendants' position. (Fennessey Decl. [Doc. No. 718].) Ms. Fennessey attests that the ESML officers in attendance possessed the collective authority to settle the case. (Id. ¶ 5 [Doc. No. 718].) In addition, she contends that "[d]uring the course of the mediation, we did not take the position that the only settlement acceptable to the Defendants would be a renegotiated contract to the exclusion of all else. Instead, we had authority to reach a settlement that would include a multi-million dollar cash payment plus additional going-forward business considerations." (Id. ¶ 6.) Ms. Fennessey further asserts that Defendants asked Judge McGunnigle to keep the mediation "open" so that Defendants "could internally discuss and potentially formulate a new settlement proposal to Plaintiff." (Id. ¶ 9.)

Plaintiff contends that Defendants lacked the authority to enter into a monetary settlement. As a result, Great Lakes seeks $32,606.36 – the full amount of its costs and attorney's fees incurred in preparing for and attending the mediation, including the cost of the mediator. (Pl.'s Mem. Supp. Mot. to Recover Costs at 2 [Doc. No. 692].) In addition, Plaintiff seeks attorney's fees incurred in preparing its motion to recover mediation costs, totaling $5,000. (Id.)

Federal Rule of Civil Procedure 16(f) provides courts with the discretion to impose sanctions if a party or its attorney is substantially unprepared to participate in a settlement conference, or does not participate in good faith. The Local Rules of this Court further provide that "[e]ach party's trial counsel, as well as a party representative having full settlement authority, must attend each mediated settlement conference." Minn. L.R. 16.5(b). While it is unfortunate that the parties were unable to mediate this dispute, Defendants represent that they negotiated with full authority and in good faith. Plaintiff's belief that Defendants did not negotiate in this fashion was understandable under the circumstances, but appears to have been the result of some misunderstanding. Accordingly, Plaintiff's motion for costs is denied. Defendants' motion to recover costs is entirely without merit and is denied.

H. Order to Show Cause

Various submissions of the parties were filed under seal. If the parties believe that any portion of this Order warrants redaction, the Court orders the parties to show cause ten days from the date of this Order, stating why the Order should not be unsealed and specifying any portion of the order warranting redaction.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Second Motion for Partial Summary Judgment [Doc. No. 678] is **GRANTED in part** as to the issues of prejudgment interest and mitigation**, and DENIED in part** as to the application of a risk-free methodology to the calculation of present value damages**;**

2. Plaintiff's Motion to Exclude the Testimony of Colin Blaydon and Michael Quinn [Doc. No. 683] is **DENIED AS MOOT** as to Michael Quinn, and **GRANTED in part, and DENIED in part** as to Colin Blaydon;

3. Plaintiff's Motion to Recover Mediation Costs [Doc. No. 689] is **DENIED**;

4. Defendants' Motion to Amend the Court's March 19, 2013 Order [Doc. No. 695] is **DENIED AS MOOT**;

5. Defendants' Motion to Preclude the Testimony and Report of Dr. Edward Foster [Doc. No. 700] is **GRANTED in part, and DENIED in part**;

6. Defendants' Motion to Preclude the Testimony and Reports of Richard G. Smead [Doc. No. 705] is **DENIED AS MOOT**;

7. Defendants' Cross Motion to Recover Mediation Costs [Doc. No. 715] is **DENIED**; and

8. The parties are ordered to show cause ten (10) days from the date of this Order why the Order should not be unsealed, and to specify any portion warranting redaction**.**

Dated: March 11, 2014

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Court Judge

EXHIBIT 5

STATE OF MINNESOTA | **DISTRICT COURT**

COUNTY OF RAMSEY | **SECOND JUDICIAL DISTRICT**

Great Lakes Gas Transmission Limited Partnership

Plaintiff,

vs.

Essar Steel Minnesota LLC, Essar Steel Limited f/k/a Essar Steel Holdings, Ltd., Essar Steel India Limited f/k/a Essar Steel Limited, and Essar Global Fund Ltd. f/k/a Essar Global Limited,

Defendants.

Case Type: Contract
Court File No. ____________

COMPLAINT

Plaintiff Great Lakes Gas Transmission Limited Partnership ("Great Lakes"), as and for its causes of action against Defendants Essar Steel Minnesota, LLC, Essar Steel Limited f/k/a Essar Steel Holdings, Ltd., Essar Steel India Limited f/k/a Essar Steel Limited, and Essar Global Fund Ltd. f/k/a Essar Global Limited (collectively "Defendants" or "the Essar entities"), states and alleges as follows:

I. NATURE OF THE ACTION

1. This is a suit brought by Great Lakes to recover damages against parties that have breached and anticipatorily repudiated a contract and their duties under a Tariff related to the transportation of natural gas.

II. PARTIES

2. Great Lakes is a Delaware limited partnership with its principal business address in Houston, Texas. Great Lakes is an interstate pipeline that is regulated by the Federal Energy Regulatory Commission ("FERC").

3. Great Lakes has three partners: (1) TransCanada GL, Inc., a corporation organized under the laws of the state of Delaware; (2) TC GL Intermediate Limited Partnership, a Delaware limited partnership; and (3) Great Lakes Gas Transmission Company, a corporation organized under the laws of the state of Delaware. All three partners have their principal business address in Houston, Texas. TC GL Intermediate Limited Partnership has two partners: (1) TC PipeLines GP, Inc., a corporation organized under the laws of the state of Delaware, with a principal place of business in Houston, Texas; and (2) TC PipeLines, LP, a Delaware limited partnership with a principal place of business in Houston, Texas.

4. TC PipeLines, LP, is owned by TC PipeLines GP, Inc., TransCan Northern Ltd., and a variety of public unitholders. TC PipeLines, GP, Inc. is a Delaware corporation with its principal place of business in Houston, Texas. TransCan Northern Ltd. is a Delaware corporation with its principal place of business in Houston, Texas.

5. Essar Steel Minnesota, LLC ("ESML") is a Minnesota limited liability corporation with its principal place of business in Hibbing, Minnesota at 555 West 27th Street, Hibbing, Minnesota 55746. ESML's sole member is Essar Steel Limited f/k/a Essar Steel Holdings, Ltd.

6. Upon information and belief, Essar Steel Limited f/k/a Essar Steel Holdings Ltd. ("ESHL") is a foreign company incorporated under the laws of Mauritius and has its principal place of business and corporate office located at Essar House, 11, Keshavrao Khadye Marg, Mahalaxmi, Mumbai, India 400 034. Process may be served on ESHL through the Minnesota Secretary of State, 60 Empire Drive, Suite 100, St. Paul, MN 55103.

7. Upon information and belief, Essar Steel India Limited f/k/a/ Essar Steel Limited ("ESTL") is a foreign company incorporated under the laws of India and has its principal place

of business and corpoarate office located at Essar House, 11, Keshavrao Khadye Marg, Mahalaxmi, Mumbai, India 400 034. Process may be served on ESHL through the Minnesota Secretary of State, 60 Empire Drive, Suite 100, St. Paul, MN 55103.

8. Upon information and belief, Essar Global Fund Ltd. f/k/a Essar Global Limited ("Essar Global") is a foreign company incorporated under the laws of the Cayman Islands with offices in Asia, Africa, Europe, and the Americas, has its principal place of business is in Dubai, and has its corporate or registered office at Clifton House, P.O. Box 1350, 75 Fort Street, George Town Cayman Islands.[1] Process may be served on Essar Global through the Minnesota Secretary of State, 60 Empire Drive, Suite 100, St. Paul, MN 55103.

III. Jurisdiction and Venue

9. Proper venue lays in this Court pursuant to Minn. Stat. Sections 542.01 and 542.09 because, as described herein, the cause of action or some part thereof arose in Ramsey County, Minnesota. The agreement that underlies this suit was entered into in Ramsey County and ESML maintained its principal office in Ramsey County at the time the agreement was executed. Great Lakes believes that proper subject matter jurisdiction lies in the U.S. District Court due to the nature of the claims presented, but this case is filed as a precautionary measure as set forth more fully in Section III below.

10. Through the activities of ESML, and as a result of the close interconnection between Essar Global, ESHL and ESTL (collectively the "foreign Essar entities") on the one hand, and ESML on the other hand, including their symbiotic relationships and consolidation of corporate image and operations, the foreign Essar entities are subject to personal jurisdiction in the State of Minnesota. In addition, ESML's contacts with the State of Minnesota should be

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[1] The allegations concerning the constituent members of ESML, as set forth herein, are based on information provided by counsel for the Essar entities.

attributed to each of the foreign Essar entities under theories of alter ego/veil piercing/mere instrumentality, joint enterprise/joint venture, and/or agency. Furthermore, the Defendants previously have stipulated to and consented to personal jurisdiction in the State of Minnesota.

IV. Statement Regarding the Federal Court Litigation and Procedural History

11. This dispute has been the subject of litigation in the U.S. District Court for the District of Minnesota (the "U.S. District Court") for over five (5) years. The present lawsuit is being filed due to a jurisdictional issue raised by Defendants in the federal court litigation.

12. Great Lakes originally filed suit against Defendants in October 2009 in the U.S. District Court, which case is currently pending before the Honorable Susan R. Nelson. The present lawsuit is being filed due to issues that have arisen in the federal court litigation. For the first two years of the federal litigation, the parties engaged in discovery and motion practice relating to personal and subject matter jurisdiction as well as third-party claims asserted by the Defendants.

13. In January and February 2010, the U.S. District Court twice found that subject matter jurisdiction existed. Although they had originally objected to personal jurisdiction in the U.S. District Court, on May 20, 2011 the foreign Defendants entered into a *Stipulation for Withdrawal of Objections to Personal Jurisdiction*, which was filed with the U.S. District Court. In that stipulation, the foreign Defendants specifically agreed (1) to withdraw their objections to personal jurisdiction in the U.S. District Court, and (2) that if the U.S. District Court found that it did not have subject matter jurisdiction, they "consent to the personal jurisdiction of the Minnesota state court" for the purposes of this dispute. This stipulation is attached hereto as **Exhibit 1**.

14. In September and October 2011, the parties again argued the issue of subject matter jurisdiction based on diversity and filed cross-motions to dismiss. Before the U.S. District Court issued any ruling on those pending motions, Defendants agreed to dismiss their third-party claims and to withdraw their motion to dismiss for lack of subject matter jurisdiction. In doing so, on February 29, 2012, Defendants entered into a *Stipulation for Dismissal of Third Party Claims and Withdrawal of Rule 12 Motion to Dismiss for Lack of Subject Matter Jurisdiction* ("the Second Stipulation"), which was filed with the U.S. District Court. In the Second Stipulation, Defendants stipulated "that they have no objections to the [District] Court's subject matter jurisdiction in their dispute with Great Lakes, and that they will not raise any objections to the Court's subject matter jurisdiction either in this proceeding or in any appellate proceeding related to this proceeding." A copy of the Second Stipulation is attached hereto as **Exhibit 2**. Based on Defendants' stipulation, the case proceeded in the U.S. District Court.

15. Following the entry of the Second Stipulation, the parties engaged in extensive discovery regarding the merits of this case. In September 2012, the parties filed cross motions for partial summary judgment. Great Lakes moved for summary judgment on its claim that ESML breached and repudiated the parties' contract, as well as on Defendants' defenses based on the *force majeure* clause contained in Great Lakes' Tariff and the doctrines of "commercial impracticability" and/or "impossibility." In their motion, the Defendants argued that the "filed rate doctrine" and a limitation of liability provision contained in Great Lakes' FERC Tariff severely limited Great Lakes' damages. Both parties also moved for summary judgment with respect to derivative liability issues.

16. Before the U.S. District Court ruled on the motions for partial summary judgment, Defendants filed a separate, duplicative proceeding with FERC. In their FERC complaint, the

Defendants argued once again that they should be excused from performance under the parties' contract. A copy of Defendants' FERC complaint is attached as **Exhibit 3**. Great Lakes was forced to answer the FERC complaint, pointing out that the Defendants' arguments were already before the U.S. District Court and the FERC proceeding was nothing other than an attempt at forum-shopping by Defendants.[2] FERC agreed, and on March 21, 2013 it entered an *Order* dismissing Defendants' FERC complaint. A copy of the order is attached as **Exhibit 4**. FERC stated that "the Commission agrees with Great Lakes that ESML's complaint is essentially duplicative of the contractual dispute already before the federal U.S. District Court. That being the case, the Commission will decline to exercise its jurisdiction…."

17. Back in the federal court litigation, the U.S. District Court issued a *Memorandum Opinion and Order* on March 19, 2013 ruling and holding that, among other things: (1) Defendants' motion was denied with respect to the "filed rate doctrine," and (2) Great Lakes' partial motion regarding Defendants' defenses was granted. A true and correct copy of the March 19, 2013 order is attached as **Exhibit 5**. The U.S. District Court specifically found that ESML repudiated and breached the contract, which greatly reduced the issues going forward. The U.S. District Court specifically found that "[t]he parties' obligations are not conditioned on ESML's ability to obtain financing, the status of the Nashwauk facility, or the status of the construction of any lateral pipelines necessary to transport natural gas to that facility." Contrary to Defendants' arguments, the U.S. District Court further held that "the contract simply and plainly obligates ESML to make its monthly payments." Addressing Defendants' assertion that they were excused from performing their obligations due to commercial impracticability/impossibility, the

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[2] Defendants' filing of the FERC proceeding is demonstrative of both Defendants' recognition of federal issues and its propensity to seek another forum when it becomes unhappy with the way things have progressed in the District Court.

U.S. District Court stated: "ESML alleges that the 2008 financial crisis affected its ability to obtain the financing necessary for the Nashwauk facility. For the same reasons identified by the Court herein as to ESML's *force majeure* allegations, the Court finds that the doctrines of impracticability and impossibility are inapplicable, and, therefore, do not excuse or delay ESML's performance under the Contract."

18. In July 2013, the foreign Defendants made an Offer of Judgment pursuant to Federal Rule of Civil Procedure 68, agreeing to settle claims determined to be recoverable by the U.S. District Court based on ESML's breach of contract and anticipatory repudiation. In other words, they offered a judgment to resolve derivative liability claims. Great Lakes accepted the foreign Defendants' Offer of Judgment. With the U.S. District Court having found breach and repudiation, and the foreign Defendants having offered judgment on the derivative liability claims, this left only the issues of mitigation (Defendants' remaining defense) and damages for trial.

19. In July and August 2013, the parties exchanged expert reports on the remaining issues of mitigation and the valuation of Great Lakes' damages. The parties then filed cross motions regarding their respective experts and Great Lakes filed a second motion for summary judgment seeking to resolve the case in full.

20. On March 11, 2014, the U.S. District Court issued a *Memorandum Opinion and Order* ruling on the pending motions. Among other things, the U.S. District Court found and held that: (1) summary judgment was granted in Great Lakes' favor on Defendants' mitigation defense, rendering a trial on that issue unnecessary, and (2) trial would occur only to assess the amount of Great Lakes' damages (that is, discounting those damages to present value). Providing guidance on the methodology, the U.S. District Court allowed the parties to amend

their expert reports on the present value calculations. A copy of this order is attached as **Exhibit 6**.

21. The parties engaged new experts, exchanged extensive expert reports and conducted depositions of the experts. Following that exercise, on October 10, 2014, the U.S. District Court issued an Order striking the testimony of Defendants' damages expert. The U.S. District Court denied Defendants' motion to strike Great Lakes' damages expert, leaving only that expert to testify at trial. A copy of this order is attached as **Exhibit 7**.

22. Since the Defendants entered into the Stipulation regarding subject matter jurisdiction, the case proceeded for almost another three (3) years, during which Defendants have received a number of unfavorable rulings described above.[3] The U.S. District Court rejected all of Defendants' defenses to liability, found that Defendants repudiated the contract, and most recently struck the testimony of Defendants' second discount rate expert.

23. The case was set for trial on October 27, 2014 and was proceeding to trial based on the U.S. District Court's honing of the issues. Faced with proceeding to trial with no defenses and no expert, notwithstanding the Stipulation they already filed with the U.S. District Court, Defendants asserted that no subject matter jurisdiction exists in the U.S. District Court. Great Lakes believes that subject matter jurisdiction exists based on federal question jurisdiction due to Defendants' breach and violation of Great Lakes' Tariff, which is equivalent to a federal regulation. Great Lakes contends that federal question jurisdiction has existed since the inception of the federal court litigation.

[3] In reliance on the Stipulation, the District Court and the parties spent considerable time and resources on the various issues in the case, as well as experts.

24. Although Great Lakes contends that subject matter jurisdiction is proper in the U.S. District Court, this Complaint is filed in an abundance of caution to preserve Great Lakes' rights in Minnesota state court. Furthermore, although Great Lakes believes that the applicable statutes of limitations is tolled during the pendency of the federal court litigation,[4] this Complaint is filed to prevent any argument by Defendants that limitations are an issue.

V. FACTUAL BACKGROUND

A. The Parties

Great Lakes

25. Great Lakes owns and operates an interstate natural gas pipeline, which transports over 2.2 billion cubic feet of pipeline natural gas per day through 2,100 miles of dual, high-pressure pipelines. The Great Lakes pipeline serves as a link between western Canada's natural gas basin and major industrial and market centers in Minnesota, Wisconsin, Michigan, and eastern Canada. It extends from the Minnesota-Manitoba border at Emerson to the Michigan-Ontario border at St. Clair.

26. Great Lakes offers firm and interruptible transportation services on its pipeline, as well as market center services. The rates Great Lakes may charge shippers to transport gas on its

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[4] Under Michigan law, which controls the parties contract here, statutes of limitations are tolled from the time a complaint is filed. MICH. COMP. LAWS § 600.5856(a). Courts have consistently applied the tolling statute where a complaint was filed in federal district court and involuntarily dismissed for lack of subject matter jurisdiction. *E.g.*, *Wright v. Battani*, No. 303491, 2013 WL 3021370, at *4 (Mich. Ct. App. June 18, 2013) (per curiam); *Badon v. G.M. Corp.*, 470 N.W.2d 436, 439 (Mich. Ct. App. 1991); *Lee v. Grand Rapids Bd. of Educ.*, 384 N.W.2d 165, 168 (Mich. Ct. App. 1986); *Shrader, Inc. v. Ecclestone Chem. Co.*, 177 N.W.2d 241, 243 (Mich. Ct. App. 1970). Under § 600.5856, the limitations period is tolled until the federal action is no longer pending. *Badon*, 470 N.W.2d at 439. Furthermore, Minnesota law provides that if a claim is substantively based upon the law of another state, the limitations period of that state applies. MINN. STAT. ANN. § 541.31(a)(1). That statute also provides that the "relevant statutes and other rules of law governing tolling and accrual apply in computing the limitation period" as well. *Id.* § 541.32.

pipeline and the methods by which it sells capacity are regulated by FERC and embodied in Great Lakes' FERC-filed tariff, which has the force of federal law.

27. Great Lakes is an interstate pipeline regulated by FERC and is a "natural gas company" as defined by the Natural Gas Act ("NGA"). 15 U.S.C. § 717a(6). The NGA is a comprehensive scheme regulating the interstate transportation and sale of natural gas. Section 4(c) of the NGA requires regulated pipelines such as Great Lakes to file schedules and contracts showing all rates and charges for transportation. The NGA also prescribes that all rates and charges by a natural gas transporter must be "just and reasonable" and without "undue preference or advantage." 15 U.S.C. § 717c. Indeed, the NGA forbids regulated pipelines from discriminating or providing preferential treatment either in rates or in the provision of services. 18 C.F.R. § 284.7(b)(1). The NGA also restricts natural gas transporters from changing any rates without notice and the opportunity for comment and allows FERC to hold hearings to determine the lawfulness of rates. 15 U.S.C. § 717c(c)-(e). Accordingly, Great Lakes is expected and required to pursue and seek recovery of unpaid tariff rates from defaulting shippers to avoid preferential treatment. Great Lakes' Tariff is filed with and approved by FERC. The Tariff is the equivalent of federal law and carries the force of federal law.[5]

The Essar Entities

28. ESML, ESHL, and ESTL are owned and operated, directly or indirectly, by Essar Global, a/k/a Essar Group. ESML is 100% owned by ESHL and has operated as a subsidiary of

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[5] *MCI Telecomms. Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992); *accord Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998); *W. Union Int'l, Inc. v. Data Dev., Inc.*, 41 F.3d 1494, 1496 (11th Cir. 1995); *see also Bryan v. BellSouth Commc'ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004) ("[A] filed tariff carries the force of federal law."), *cert. denied*, 543 U.S. 1187 (2005); *Carter v. AT&T Co.*, 365 F.2d 486, 496 (5th Cir. 1966) ("[A] tariff, required by law to be filed, is not a mere contract. It is the law.").

ESHL and/or ESTL since 2007. ESHL is the holding company for ESTL. Both ESHL and ESTL are owned primarily by Essar Global and/or its subsidiaries.

29. Essar Global is an international conglomerate based in India that is engaged in manufacturing and services in a number of industries, including the steel industry. Essar Global has been referred to on the ESML website as "a diversified business corporation with a balanced portfolio of assets in the manufacturing and services sectors of Steel, Energy, Power, Communications, Shipping Ports & Logistics, and Construction. Essar employs more than 50,000 people across offices in Asia, Africa, Europe and the Americas."

30. On April 18, 2007, the Essar entities announced that Essar Global, through its wholly owned subsidiary ESHL, had executed an agreement to acquire MSI, a United States-based steel company with its principal place of business in Ramsey County, Minnesota. MSI owned or controlled in excess of 1.4 billion tons of iron ore resources located in Minnesota's Mesabi Iron Range. The acquisition of MSI was final in October 2007. ESHL purchased MSI for the purpose of constructing a steel plant in Nashwauk, Itasca County, Minnesota. ESML and/or ESHL expressly and/or impliedly assumed all of MSI's liabilities.

B. The Transportation Service Agreement

31. In accordance with Great Lakes' Tariff, MSI approached Great Lakes to acquire firm transportation service on Great Lakes' pipeline. MSI submitted a "Request for Service" as a potential shipper in the form required by Great Lakes' Tariff. Because MSI requested "pre-arranged" service, Great Lakes actually amended its tariff to provide for the availability of such service, with FERC's approval.

32. Subsequently, and prior to the Essar entities' acquisition of MSI, MSI entered into a firm Transportation Service Agreement (Contract Identification FT6496) ("TSA") with Great Lakes, whereby Great Lakes agreed to transport up to 55,000 dekatherms of gas per day from its

Emerson Receipt Point to its Carlton Delivery Point from July 1, 2009 to March 31, 2024. A true and correct copy of the TSA is attached hereto as **Exhibit 8**.[6] As consideration for such transportation services, MSI agreed to pay the rates set forth in Great Lakes' Tariff, which include the maximum reservation rate for the transportation path. A true and correct copy of relevant portions of Great Lakes' Tariff is attached hereto as **Exhibit 9**.

33. Great Lakes' Tariff is specifically incorporated into the TSA and is an integral part of the Agreement. The TSA provides:

> **INCORPORATION OF TARIFF INTO AGREEMENT:**
> This Agreement shall incorporate and in all respects be subject to the "General Terms and Conditions" and the applicable Rate Schedule (as stated above) set forth in Transporter's FERC Gas Tariff, Second Revised Volume No. 1, as it may be revised from time to time. Transporter may file and seek Commission approval under Section 4 of the Natural Gas Act (NGA) at any time and from time to time to change any rates, charges or provisions set forth in the applicable Rate Schedule (as stated above) and the "General Terms and Conditions" in the Transporter's FERC Gas Tariff, Second Revised Volume No. 1, and Transporter shall have the right to place such charges in effect in accordance with the NGA, and this Agreement shall be deemed to include such changes and any such changes which become effective by operation of law and Commission Order, without prejudice to Shipper's right to protest the same.

The parties are governed by and subject to the rights and obligations contained in the Tariff, and in particular, ESML is required to pay the rates and charges contained in the Tariff in accordance with the NGA. Indeed, the billing provisions and payment obligations that apply to ESML are set forth in the Tariff, not the TSA. Likewise, all applicable rates for transportation are stated in Great Lakes' Tariff, as it may be revised from time to time.[7]

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[6] While the "Contract Date" on the TSA is September 2006, Great Lakes did not sign the TSA until November 30, 2006, which coincided with the Essar entities' due diligence and prospective purchase of MSI.

[7] The TSA is a form agreement that is part of Great Lakes' Tariff, meaning that it has received FERC approval and is required to be used by Great Lakes for firm transportation arrangements.

34. Pursuant to the TSA, Great Lakes is required to reserve 55,000 dekatherms of gas transportation capacity in its pipeline regardless of whether ESML actually utilizes the Great Lakes system to transport natural gas, and ESML is required by the Tariff to pay the stated reservation rate regardless of whether it utilizes the capacity.

35. As a result of their acquisition of MSI, the Essar entities are successors-in-interest to MSI under the TSA. The Essar entities have admitted that ESML acquired the same obligations as MSI under the TSA and the Tariff.

36. Pursuant to the Tariff, the reservation fee for the agreed upon transportation services must be paid monthly. The Essar entities' first payment of $190,190.00 was due August 17, 2009. (*See* Exhibit 9). Subsequent payments for transportation services are due on or about the 17th day of each month, through the duration of the TSA's term. The amount of each such payment is driven by the rate sheets contained in the Tariff, which have changed over time, and therefore require the Court's interpretation of the Tariff in order to determine the amounts owed to Great Lakes by the Essar entities. A true and correct copy of the applicable rate sheets for firm transportation from 2007 to the present are attached hereto as **Exhibit 10**.

37. The Essar entities have failed and refused to make the payments due under the Tariff despite Great Lakes' demands. The Essar entities have indicated to Great Lakes that they do not intend to fulfill their future contractual obligations under the TSA.

(*See* Exhibit 9). Historically, FERC required pipelines to file every service agreement with FERC. However, that is no longer the procedure since FERC issued Order No. 582, which requires that pipelines include in their tariffs a *pro forma* copy of each form of service agreement. *Filing and Reporting Requirements for Interstate Natural Gas Company Rate Schedules and Tariffs*, 60 Fed. Reg. 52,960-01 (Oct. 11, 1995) (codified at 18 C.F.R. pt. 154) ("Order No. 582"). Here, because the TSA is a *pro forma* agreement that FERC has determined complies with NGA regulations, it does not need to be filed with FERC.

38. On February 27, 2009, ESML informed Great Lakes that it had been affected by the "global economic crisis," which had "rendered payment of the Contract commercially impracticable for the foreseeable future." ESML wanted to discuss an "amicable solution" to the problem. However, this eventually morphed into a claim by ESML that its performance was excused under the *force majeure* provision found in Great Lakes' Tariff.

39. On June 30, 2009, ESML sent a letter to Great Lakes stating that "strict compliance with the Contract is commercially unreasonable," and recommending that the Contract's material terms "including those pertaining to price, volume, term and commencement date" be "re-state[d]." Thereafter, ESML failed to make the August and September 2009 payments due under Great Lakes' Tariff. In September 2009, Great Lakes sent two letters to ESML regarding the past-due amounts under the Tariff. Great Lakes informed ESML that it considered the missed payments "consistent with the prior statements by [ESML] that it does not intend to fulfill its obligations" and "a clear repudiation of the [TSA]." Great Lakes asked that ESML provide adequate assurances that it intended to perform under the TSA. ESML failed to provide any adequate assurances of performance and refused to pay the reservation charges set forth in the Tariff. Taken together, these actions establish ESML's repudiation of the TSA and ESML's obligations under the Tariff. The U.S. District Court held that ESML had repudiated the TSA. (*See* Exhibit 5).

C. The Essar Entities' Activities

40. The facts and evidence, including the facts set forth below and the evidence produced by the Essar entities to Great Lakes in other litigation, establish that ESML is a mere alter ego or instrumentality of ESHL, ESTL, and Essar Global, and that ESHL and ESTL are mere alter egos or instrumentalities of Essar Global. Each parent or holding company treated its

subsidiary or related entity as a mere department or agent of its own enterprise, rather than as a separate entity. The Essar entities have operated in essence as a single entity or enterprise.

41. The facts and evidence establish that it was the joint intention of the Essar entities to acquire MSI for the sole purpose of constructing a steelmaking plant and facility using the experience and oversight of the parent Essar entities for the mutual benefit of all of the Essar entities. In this respect, the acquisition of MSI was the result of a joint enterprise or joint venture between and among the Essar entities.

42. The facts and evidence establish that ESML is the agent for the foreign Essar entities, and its undertakings with respect to the proposed steel manufacturing plant in Nashwauk, Minnesota, including its assumption of the TSA, were done for the benefit of the foreign Essar entities.

43. The facts and evidence that establish (1) ESML is a mere instrumentality or alter ego of the foreign Essar entities, (2) the acquisition of MSI was the result of a joint venture or joint enterprise between and among the Essar entities, and (3) ESML is the agent of the foreign Essar entities include, but are not limited to, the following:

a) Essar Global frequently has referred to its steel division and the Essar companies that fall under this umbrella simply as "Essar Steel." Essar Global has at times been referred to by the Essar entities as the parent of ESHL, and at times ESHL is referred to as part of Essar Global. In or about early 2007, Essar Global de-listed ESTL from the Bombay Stock Exchange and the National Stock Exchange in order to gain more flexibility in running ESTL.

b) ESHL has been referred to in the Essar entities' corporate literature as "the holding company that drives Essar Steel's expansion plans." According to the Essar entities' corporate literature, ESHL is a global producer of steel covering India, Canada, the USA, the Middle East, and Asia. Other than the ESML project in Minnesota's Mesabi Iron Range, ESHL has no steel facilities or plants in the United States.

c) ESTL has been referred to in its corporate literature as "a global producer of steel with a footprint covering India, Canada, USA, and Asia." Other than the ESML project in Minnesota's Mesabi Iron Range, ESTL has no steel facilities or plants in the United States. The Essar entities' corporate literature refers to ESTL as "part of Essar Steel Holdings, Limited." According to the corporate literature, ESML "controls over 1.4 billion tons of iron ore reserves, and will be a key contributor to Essar Steel's global capacity expansion plans."

d) ESML is referred to in its company literature as "part of Essar Steel, a global producer of steel with a footprint covering India, Canada, USA, Middle East and Asia." Press releases issued by the Essar entities concerning ESML have typically referenced that company's ties to ESHL, ESTL, and/or to Essar Global and to its place within those companies' overall business development plans with respect to the steel industry.

e) In connection with the acquisition of MSI, an Essar entities' corporate press release, as shown on their website, quotes Essar Global Chairman Shashi Ruia as stating that "Our investment in Minnesota Steel is exciting as it gives us a cornerstone in the North American market. From this we will further expand our global steel business."

f) In connection with the September 2008 groundbreaking for ESML's steel making facility in Minnesota's Mesabi Iron Range, an Essar entities' corporate press release quotes Essar Global Chairman Shashi Ruia as stating:

> We are excited about starting this project. Today's groundbreaking is another step towards our goal of building a large presence in the steel sector in the Americas. We thank Governor Pawlenty and the local administration for lending their support to our Iron Range project. Essar remains committed to North America with investments of over USD 4 billion in the region and currently employs more than 8,000 people here.

The groundbreaking ceremony also marked the unveiling of the new name for MSI, *i.e.*, Essar Steel Minnesota, LLC. MSI changed in name only; ESML was a mere continuation of MSI.

g) Newspaper articles published on or about October 27, 2007 indicate that Minnesota Governor Tim Pawlenty threatened to withhold state support for ESML's steel mill project once he learned that the India-based company behind it, Essar Global, might also have dealings with Iran that are frowned upon by the U.S. Government, specifically, plans by Essar Global to build an oil refinery in southern Iran. At that time, Governor Pawlenty is quoted as saying that "[t]here are some things in life more important than a steel plant, and one of those things is, the state of Minnesota is not going to be in a position, under my watch at least, of supporting companies who are engaged in inappropriate activities with the country of Iran, which is a terrorist state."

h) Newspaper articles published on or about October 31, 2007 indicate that Governor Pawlenty publicly stated that an understanding had been reached between him and Essar Global once Essar Global's officials pledged that they would fully comply with all U.S. laws. Governor Pawlenty is quoted as saying that "[t]hey have clarified their intentions in a way that satisfies my concerns regarding what would otherwise be problematic investments in Iran. They have written to us a letter that provides us those assurances in writing. And that allows us now to move forward with the project in northern Minnesota in a very positive way." Upon information and belief, Governor

Pawlenty's office issued the following statement, "[a]fter discussions between Essar officials, the Governor's Office and the US State Department, Governor Pawlenty received a letter today from Essar Americas chief executive Madhu Vuppuluri stating that Essar considers its investments in the State of Minnesota of strategic importance both to Essar and to the State and people of Minnesota."

i) The "support" to which Governor Pawlenty referred in his October 2007 statement was the proposed multi-million dollar business subsidy that was under discussion between Essar Global, ESML, the State of Minnesota, and Itasca County. Essar Global's decision to curtail its Iran investments so that ESML would be able to qualify for the Minnesota business subsidy illustrates the extent to which the two companies' economic interests are aligned.

j) Thereafter, in or about September 2008, Essar Global entered into two agreements with Itasca County whereby Essar Global secured business subsidies totaling approximately $65 million for the development of infrastructure, road, and rail improvements necessary to serve ESML's proposed steel making facility. Essar Global agreed that it would be responsible for repayment of some or all of the $65 million subsidy in the event that ESML does not create a certain number of jobs at its proposed steel plant project in Nashwauk, Minnesota. But for the agreement by Essar Global to be liable for repayment of the business subsidies provided by Itasca County and the State of Minnesota, ESML would not have been able to secure the business subsidies that it did. Likewise, in 2008 ESHL made a written commitment to Itasca County to make available all necessary financial resources for the completion of the facility. At the time that the business subsidies were provided, ESML had no current sales or source of revenues. At the time of the filing of this Complaint it is believed that ESML still has no current sales or sources of revenues, nor will it have any sales or revenues unless and until the steel plant in Nashwauk is built and becomes operational.[8]

k) ESML did not have any sales or sources of revenue at the time that it was acquired as MSI by ESHL, but it had substantial assets of at least $100 million in the form of mineral rights and mining leases. When the TSA was entered into, MSI intended to construct the Facility and have it be operational by late 2009, which would have been shortly after MSI's obligations under the TSA took effect. Once ESHL purchased MSI, the foreign Essar entities refused to adequately capitalize ESML and then used their control over ESML to saddle it with debt, encumber all of its assets, delay securing the necessary financing, and delay the construction of the facility so that (1) they could have the equipment necessary to construct the Facility produced overseas by other Essar Global-owned businesses, and (2) they could focus their attention on their other global business interests, all to the detriment of ESML. When the foreign Essar entities decided the time was right to proceed with construction of the Facility, they arranged for the planning and construction work to be performed by other Essar Global-owned entities and then provided most of the necessary funding and financing for the project themselves. In addition, the foreign Essar entities decided that they did not want to proceed with the TSA but instead determined that ESML could obtain its gas at a substantially lower cost from a different source, thereby removing the need for capacity on Great Lakes' pipeline.

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[8] The agreements between Essar Global and Itasca County provide that Essar Global submits to the jurisdiction of the courts of the State of Minnesota in any litigation arising out of or in relation to the agreements.

l) As a result of the acquisition of MSI, ESML acquired the rights, benefits, and liabilities associated with the TSA between MSI and Great Lakes, which obligated ESML to begin making monthly reservation payments of approximately $190,000.00 to Great Lakes commencing on August 17, 2009. As a result of the actions of the foreign Essar entities, ESML was rendered undercapitalized and unable to pay its obligations to Great Lakes. To the extent that ESML had any operating funds at all prior to obtaining credit facilities in or about September 2010, such funds were provided only by its parent and/or one or more of its related entities. After obtaining a $250 million credit facility from ICIC Bank Ltd., ESML turned around and loaned $79 million to Essar Global.

m) In addition to its financial obligations to Great Lakes, since its acquisition by ESHL, ESML has had obligations related to employee payroll and office expenses, as well as expenses associated with several multi-million dollar contracts for services that it has entered into since 2008. The only way that ESML was able to pay its employees, office expenses, and other expenses, if at all, was with funds provided by its parent and/or one or more of its related entities.

n) ESHL, ESTL, and ESML have not observed regular corporate formalities, such as holding regular meetings of officers, directors, or members, paying dividends, maintaining separate financial accounts, or maintaining separate books and records.

o) At the time that the claim made the basis of this Complaint arose and for an amount of time afterward, the three foreign Essar entities did not have individual websites; instead information concerning the operations and activities of each were merged into two different websites, with no or little delineation between the three entities as separate entities with respect to their steel businesses. As a result, it becomes nearly impossible to distinguish any one of the three foreign Essar entities and their steel-related activities from the others. Instead of referring to "Essar Steel Holdings Ltd." or "Essar Steel Limited," both websites referred simply to "Essar Steel." While it would appear that use of the name "Essar Steel" in the website is a reference to ESHL because the term is used in connection with operations which are owned by ESHL, including "Essar Steel Minnesota, LLC" and "Essar Steel Algoma, Inc." (a Canadian steel-making operation also acquired by ESHL in 2007), the only annual reports that appeared on the website with respect to steel operations were for "Essar Steel Limited," *i.e.*, ESTL. The information contained on the websites of the foreign Essar entities shows that these three entities have blurred the distinction between themselves.

p) Both of the websites of the foreign Essar entities provided links to the ESML website. ESML's website provided information concerning "Essar Steel and its North American Operations," as well as information about "Essar Steel's" operations in Hazira, India, Visakhapatnam, India, Canada, and Indonesia. In addition, all of the Essar entities have shared the same insignia, trademark, or logo, as shown on the three websites.

q) The foreign Essar entities owned and controled the ESML website, as evidenced by the appearance of "Essar Group of Companies" in the copyright information located at the bottom of each page of ESML's website. The copyright information located on the bottom of each page of the foreign entities' websites shows that those websites were owned and controlled by "Essar Group of Companies" and "Essar Group."

r) As shown on the foreign Essar entities' website, the foreign Essar entities issued a press release dated October 24, 2007 containing the following information:

> Essar Steel Holdings, part of Essar Global Limited, has, on receipt of regulatory and environmental approvals, completed the acquisition of Minnesota Steel LLC, a US based steel company with estimated reserves of over 1.4 billion tones of iron ore located on the Mesabi iron range in northeast Minnesota.
>
> Minnesota Steel will commence the project activities soon upon achieving the financial closure. This is one of the largest acquisitions by an Indian group in Minnesota.
>
> Madhu Vuppuluri, President, Essar, North America, said "Together with Minnesota Steel and Algoma Steel, we are optimistic about creating a new and vibrant steel manufacturing capability in North America."
>
> Commenting on the acquisition, Shashi Ruia, Chairman, Essar Global said "This acquisition follows our purchase of Canada's Algoma Steel earlier this year. These acquisitions are in line with our strategy of having a geographical spread close to high value steelmarkets as well iron [sic] ore sources. Essar's steel business is now poised to consolidate its position as a low cost, high value producer of carbon steel."

s) It was the intention of the Essar entities that once ESML became operational, it would become the primary supplier of iron ore to Essar Algoma. This arrangement would give ESML a built-in buyer and would give Essar Algoma a built-in supplier. As stated by ESML's president Madhu Vuppuluri in 2008, "the production from [the ESML] facility will also support the Essar Steel Algoma plant in Sault Ste. Marie, Ontario, Canada. The synergy between the Minnesota and Algoma facilities will strengthen Essar's presence as an integrated steelmaker of high value-added products."

t) The Essar entities have overlapping officers and directors, as can be seen from the information provided on their websites. In addition, the Essar entities have cloaked their officers, directors, managers, and/or insiders with apparent authority to act on their behalf or on ESML's behalf in connection with the conduct of ESML's business, but then later disavowed their authority to so act. ESML's president and CEO Madhu Vuppuluri has been listed on the foreign Essar entities' website as part of the foreign Essar entities' "Management Team." Mr. Vuppuluri has maintained his office in New York at the same address where ESTL has or formerly has maintained offices. Mr. Vuppuluri acts as president of another Essar entity called "Essar North America" or "Essar Americas," which also has its offices at the New York address of ESTL. ESML's website indicates that it has a New York office, however, the New York Department of State's records indicate that ESML is not registered to do business in the State of New York, nor is any entity with "Essar Americas" or "Essar North America" in its name.

u) Essar Americas or Essar North America appears to be a division of or agent of Essar Global, ESHL, and/or ESTL, through which much of the organizing, planning, negotiating, spearheading, and arranging for the construction and financing of ESML's planned steel facility was accomplished.

v) According to information contained on both of the websites of the foreign Essar entities:

> Essar Steel is a global producer of steel with a footprint covering India, Canada, USA, and Asia. It is a fully integrated flat carbon steel manufacturer – from iron ore to ready-to-market products. Essar Steel has a current capacity of 9 million tones per annum (MTPA). With its aggressive expansion plans in India as well as Asia and the Americas, its capacity will go up to 20 to 25 MTPA... No wonder we are India's largest exporter of flat products, selling almost one-third of our production to the highly demanding US and European markets, and to the growing markets of South East Asia and the Middle East... Our lean team gives us one of the highest productivities and lowest manpower costs among steel plants internationally. A major strategic advantage is our high level of forward and backward integration. We are totally integrated – from raw material to finished products, adding value at every stage of the manufacturing process.

w) The Essar entities' plans for Minnesota are to duplicate the foreign Essar entities' "fully integrated steel plant" model, which they have employed in their steel operations throughout the world, in order to create the first fully integrated steel plant in North America. According to the ESML website:

> Essar Steel Minnesota LLC has access to iron ore resources of over 1.4 billion tons. It has a 6 million ton pellet plant, a concentration plant and a direct-reduced iron plant. The company plans to set up an integrated steel plant on the Mesabi iron range in northeast Minnesota. The estimated cost of the project is US$1.65 billion; the plant will have an annual capacity of 2.5 million tons per annum (mpta) when completed. The strategy is to combine a high-quality ore body with modern and commercially proven technology, and develop a vertically integrated steel mill. It will be the first facility in North America to include iron ore mining, ore processing, direct reduction and steelmaking on a single site.

x) The Essar entities are controlled and dominated by the Ruia family, including Prashant Ruia, Ravi Ruia, Shashi Ruia, and Rewant Ruia, all of whom are Promoter-Directors of Essar Global and have been actively involved in decision-making concerning the acquisition of MSI, construction of ESML's facility, the financing for its facility, and its operations. In September 2009 the Promoter-Directors appointed Rewant Ruia as their representative to act as Coordinator for the EMSL project, even though Rewant Ruia was not an officer, director, or employee of ESML The written corporate resolutions of Essar Global and ESML reflect that in September 2008 Essar Global committed to providing or making available all funds ESML would need to complete and place into operation its steel-making facility.

44. Taken together, the evidence shows that ESML is a mere shell or façade that is dominated and controlled by ESHL, ESTL, and Essar Global, and that both ESHL and ESTL are mere shells or façades that are dominated and controlled by Essar Global. The formalities of corporate existence of ESML, ESHL, and ESTL have been disregarded by the parent or related

entities of each, and the requisite corporate separation between ESML and the foreign Essar entities does not exist, nor does the requisite corporate separation exist between ESTL, ESHL, and Essar Global. With respect to their steel businesses, each of the Essar entities has become indistinguishable from its parent and/or related entities.

45. ESML's acquisition of MSI, including the TSA, was made on behalf of and for the benefit of each of the Essar entities and was directed by the foreign Essar entities. It was the joint intention of the Essar entities to create a joint venture for the purpose of acquiring MSI for the mutual benefit of all of the Essar entities. It was the joint intention of the Essar entities to use the financial resources, steel-making experience and expertise, and oversight of the foreign Essar entities in order to duplicate their business model of an "integrated steel plant" and create the first fully integrated steel plant in North America, a model that the foreign Essar entities claim gives them "a major strategic advantage." In this respect, the acquisition of MSI was the result of a joint enterprise or joint venture between and among the Essar entities for the purpose of jointly owning and controlling MSI and its Minnesota assets. To the extent that there is not an express agreement between the Essar entities to operate as a joint venture in the acquisition of MSI and the proposed construction of a steelmaking plant and facility in Minnesota and to share in the profits and losses generated from the proposed Minnesota steelmaking plant and facility, an implied agreement existed.

46. Alternatively, and without waiving any of the foregoing, Great Lakes avers that based on information and belief, including the facts as outlined hereinabove, ESML has acted as an agent of the foreign Essar entities, transacting their business and further expanding their global presence in the steel industry by giving them a cornerstone in the North American market.

Since its acquisition, ESML has acted as the agent of the foreign Essar entities, at their direction, under their control, on their behalf, and for their benefit.

VI. Claims for Relief / Causes of Action

First Claim for Relief

Breach of the Tariff / Anticipatory Repudiation / Recovery of Tariff Fees

47. Great Lakes incorporates all preceding paragraphs and facts as if fully restated herein.

48. Great Lakes was obligated to provide service and reserve capacity for ESML under Great Lakes' Tariff. Great Lakes performed and was prepared to continue performing its obligations under the Tariff.

49. By virtue of its acquisition of MSI, ESML is liable for MSI's obligations under the Tariff.

50. As a provider and carrier of interstate gas transportation, Great Lakes is required to abide by its Tariff and provide service as stated in the Tariff. Conversely, as a shipper, ESML is required to make payments as stated in the Tariff.

51. ESML breached and violated the Tariff by failing to make the payments due under the Tariff and by repudiating its future obligations under the Tariff. After ESML breached the Tariff by failing to make the first required payments due thereunder, Great Lakes requested adequate assurances from ESML that it intended to perform its obligations under the Tariff, including payment of the past due sums. ESML failed to provide the requested assurances and instead sought to use the threat of termination based on the global economic environment to renegotiate the contract.

52. ESML failed to meet the payment terms required under the Tariff. Under the NGA, Great Lakes is expected and required to pursue and collect unpaid tariff fees from defaulting shippers such as ESML.

53. As a natural, probable, and foreseeable consequence of ESML's breach and its anticipatory repudiation of its future obligations under the Tariff, Great Lakes has suffered damages in an amount greater than $50,000 and will continue to suffer damages as a result of ESML's repudiation. Great Lakes seeks to recover from ESML all sums due under the Tariff as a result of the breach and violation, as well as all future sums due under the Tariff as a result of the anticipatory repudiation.

54. All conditions precedent to Great Lakes' recovery against ESML have occurred or been performed.

Second Claim for Relief

Breach of Contract / Anticipatory Repudiation

55. Great Lakes incorporates all preceding paragraphs and facts as if fully restated herein.

56. A valid contract existed between Great Lakes and MSI.

57. By virtue of its acquisition of MSI, ESML is liable for MSI's obligations under the contract.

58. Great Lakes performed and was prepared to continue performing its obligations under the parties' contract.

59. ESML breached the contract by failing to make the payments due under the TSA and the Tariff and by repudiating its future obligations under the contract and Tariff. After ESML breached the TSA and the Tariff by failing to make the first required payments due

thereunder, Great Lakes requested adequate assurances from ESML that it intended to perform its obligations under the contract and the Tariff, including payment of the past due sums. ESML failed to provide the requested assurances and instead sought to use the threat of termination based on the global economic environment to renegotiate the contract.

60. As a natural, probable, and foreseeable consequence of ESML's breach and its anticipatory repudiation of its future obligations under the contract, Great Lakes has suffered damages in an amount in an amount greater than $50,000 and will continue to suffer damages as a result of ESML's repudiation. Great Lakes seeks to recover from ESML all sums due under the TSA and the Tariff as a result of the breach, as well as all future sums due under the TSA and the Tariff as a result of the anticipatory repudiation.

61. All conditions precedent to Great Lakes' recovery against ESML have occurred or been performed.

Third Claim for Relief

Piercing the Corporate Veil and/or Liability Based on Alter Ego / Mere Instrumentality

62. Great Lakes incorporates all preceding paragraphs and facts as if fully restated herein.

63. The owners and related entities of ESML, ESTL, and ESHL have operated these entities as their alter egos or instrumentalities, and the formalities of the corporate existence of ESML, ESTL, and ESHL have been disregarded by each of their parent(s), related, and/or grandparent/related entities. In addition, since the time of the acquisition of MSI, ESML's assets have been fully encumbered, it has been saddled with debts and has been rendered undercapitalized in relation to its corporate undertaking by the foreign Essar entities.

64. Great Lakes is an innocent party that has been harmed by the foreign Essar entities' use of ESML as their alter ego or instrumentality, as set forth hereinabove. Under the circumstances, it would be fundamentally unjust or unfair to allow the foreign Essar entities to be shielded from liability for damages resulting from ESML's breach of the TSA and Tariff.

65. Under the equitable theories or remedies of piercing the corporate veil, alter ego, and/or mere instrumentality, the corporate structures of each of the Essar entities should be disregarded, and each of the foreign Essar entities should be held liable for the damages recoverable by Great Lakes as a result of ESML's breach of the Tariff and breach and anticipatory repudiation of the TSA and Tariff.

Fourth Claim for Relief

Joint Enterprise / Joint Venture Liability

66. Great Lakes incorporates all preceding paragraphs and facts as if fully restated herein.

67. The acquisition of MSI, including the assumption of the TSA, was made pursuant to a joint enterprise or joint venture between all of the Essar entities.

68. As a result of the Essar entities' joint enterprise or joint venture, each of the foreign Essar entities should be held liable for the damages recoverable by Great Lakes as a result of the breach of the Tariff and breach and anticipatory repudiation of the TSA and Tariff.

Fifth Claim for Relief

Agency Liability

69. Great Lakes incorporates all preceding paragraphs and facts as if fully restated herein.

70. Since the acquisition of MSI, ESML has acted as the agent of the foreign Essar entities. As a result of this agency relationship, all of the foreign Essar entities are liable for the damages suffered by Great Lakes as a result of ESML's breach of the Tariff and breach and anticipatory repudiation of the TSA and Tariff.

IV. PRAYER AND REQUEST FOR RELIEF

WHEREFORE, after a trial on the merits, Great Lakes respectfully prays for relief as follows:

A. For judgment against each of the Essar entities, in an amount proven at trial, together with interest as allowable by law in an amount exceeding $50,000.00;

B. For judgment awarding Great Lakes its costs, expenses, and attorney's fees; and

C. For such other and further relief, whether at law or in equity, to which it is justly entitled.

Dated: February 24, 2015

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ACKNOWLEDGMENT

I, the undersigned, hereby acknowledge that I am familiar with the terms of Minn. Stat. § 549.211, and that costs, disbursements and reasonable attorney and witness fees may be awarded to the opposing party pursuant to Subd. 2 thereof, in the event a party or an attorney acts in bad faith; asserts a claim or defense that is frivolous and that is costly to another party; asserts an unfounded position solely to delay the order and course of the proceedings or to harass; or commits a fraud upon the Court.

/s/David T. Schultz
David T. Schultz

CERTIFICATE OF SERVICE

Tobey M. Daluz, Esquire hereby certifies that on this 21st day of April, 2017, a true and correct copy of the foregoing *Great Lakes Gas Transmission Limited Partnership's Response to Objections to Debtors' Rule 9019 Motion Filed by the Official Committee of Unsecured Creditors and U.S. Bank National Association* was filed and noticed electronically via the Court's CM/ECF system, and served upon the addressees listed on the attached service list in the manner indicated.

Dated: April 21, 2017
Wilmington, Delaware

<u>/s/ Tobey M. Daluz</u>
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