

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

A.C. NO. 2004-P-995

STONERIDGE CONTROL DEVICES, INC.
PLAINTIFF/APPELLEE and CROSS-APPELLANT

v.

TELEFLEX, INC.
DEFENDANT/APPELLANT

On Appeal From A Judgment Of The Superior Court,
Suffolk County

BRIEF OF THE PLAINTIFF/APPELLEE AND CROSS-APPELLANT
STONERIDGE CONTROL DEVICES, INC.

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STATEMENT OF THE ISSUES

- I. Whether the defendant is precluded from arguing on appeal, for the first time, that the issue of whether the Letter of Intent is a contract presented a question of fact for the jury, when it consistently argued to the contrary in the proceedings below.
- II. Whether the Superior Court correctly interpreted the unambiguous language of the Letter of Intent as a contract to which the parties intended to be bound.
- III. Whether the evidence, construed in the light most favorable to the plaintiff, supported the jury's finding that the plaintiff had met the technical requirements of the Letter of Intent, or that the parties had modified those requirements.
- IV. Whether the Superior Court correctly added prejudgment interest to the damage award, when plaintiff's evidence related to the present value of a lost business opportunity, and when evidence regarding the future income stream had been reduced to present value by plaintiff's expert.
- V. Whether the Superior Court improperly dismissed the plaintiff's 93A claim on jurisdictional

grounds by misconstruing the "center of gravity" test and disproportionately weighing the site of defendant's conduct, at the expense of other factors.

STATEMENT OF THE CASE

This is an appeal by the defendant-appellant, Teleflex, Inc. ("Teleflex"), from a \$2 million jury verdict in favor of the plaintiff-appellee and cross-appellant, Stoneridge Control Devices, Inc. ("Stoneridge"),¹ on Stoneridge's claim for breach of the implied covenant of good faith and fair dealing. As discussed below, Stoneridge's claim arises out of Teleflex's breach of a "Letter of Intent" ("LOI") which obligated Teleflex to use an automotive component known as an "actuator" made by Stoneridge in an "automatic pedal system" that Teleflex, in turn, supplied to Ford Motor Company and other major automobile manufacturers. Stoneridge has cross-appealed from the trial judge's order dismissing, on jurisdictional grounds, its separate claim for breach

¹ The Stoneridge division involved in this project was its Pollak Actuator Products Division ("Pollak") located in Canton, Massachusetts. For ease of reference, the term "Stoneridge" will be used in this brief to refer to the plaintiff.

of G.L. c. 93A arising out of the same course of dealings between the parties.

Stoneridge's claim for breach of the implied covenant of good faith and fair dealing was tried over the course of three weeks in January 2004. The trial judge instructed the jury that the LOI was a contract but left to the jury the question of determining the extent of the parties' obligations and performance under the LOI, as well as Stoneridge's damages, if any. Teleflex concurred that whether the LOI was a contract presented an issue of law for the trial judge, arguing, unsuccessfully, that the court should rule that it was not a contract. App. 48-49.

In its answers to special questions, the jury concluded that Stoneridge had fulfilled its promises under the LOI but that Teleflex had not, and that Teleflex had breached the implied covenant of good faith and fair dealing, causing Stoneridge damages of \$2 million. App. 2805-2806. (See Addendum).

Teleflex subsequently moved for judgment notwithstanding the verdict. The trial judge denied Teleflex's motion and entered judgment in Stoneridge's favor on February 25, 2004, adding pre-judgment

interest to the jury's award from April 8, 2002, the date suit was filed. App. 26.

On February 17, 2004, the trial judge ruled on Stoneridge's additional claim for breach of G.L. c. 93A. App. 28-40. The trial judge did not reach the merits of the claim,² instead dismissing it on jurisdictional grounds as not occurring primarily and substantially in Massachusetts. App. 28-40. Each party thereafter filed its Notice of Appeal.

STATEMENT OF FACTS

Introduction

Stoneridge and Teleflex are both engaged in the business of developing, manufacturing and distributing components used in the manufacture of automobiles, selling products both directly to major automobile manufacturers, known in the industry as "OEMs," and also to other component manufacturers. As discussed in more detail below, in this case, the parties agreed that Stoneridge would develop and supply Teleflex with

² While the merits of the c. 93A claim were not reached by the trial judge, Teleflex's course of unfair and deceptive conduct, as exemplified by the jury's finding that it breached the implied covenant of good faith and fair dealing, provided ample basis for a finding of a violation of G.L. c. 93A. See *Anthony's Pier Four, Inc. v. HBC Assocs.*, 411 Mass. 451, 471-72 (1991).

a small device with a motor and gears, known as an "actuator," for Teleflex's use in an automatic pedal system ("APS")³ that Teleflex expected to sell in large volumes to Ford Motor Company ("Ford") and other auto manufacturers.⁴ App. 715-22. After more than a year of discussions and initial prototype testing, the parties entered into a written LOI in mid-August 2001, App. 837-43, and it is the breach of this agreement, and Stoneridge's lost business opportunity arising from that breach, that formed the basis for the jury's award of damages.

Discussions Leading to the Letter of Intent

Discussions for a commercial collaboration between Stoneridge and Teleflex began in early 2000 when Teleflex asked Stoneridge to supply an actuator to replace a more basic electric motor that had been

³ An "APS" is a vehicle pedal system in which the accelerator and brake pedals can be adjusted forward or backward. App. 739-40. Stoneridge's actuator is referred to sometimes as an "APSA," or automatic pedal system actuator. App. 23.

⁴ It was undisputed that in the context of this particular deal, Teleflex, rather than Stoneridge, had the direct relationship with the auto manufacturers, including Ford, who were to purchase the APS.

used by Teleflex in its automatic pedal system.⁵ App. 722-23. On August 24, 2000 Teleflex issued a "pre-sourcing" letter which set forth "Teleflex's intention to use Pollak as the motor/actuator source for our future Adjustable Pedal Systems," subject to various contingencies, including "the approval of the Pollak actuator use by respective OEM customers," such as Ford. App. 21, 725-26. This document clearly signaled Teleflex's serious interest in pursuing a business relationship with Stoneridge, and was a green light for Stoneridge to start to invest the considerable resources needed to develop a new actuator for the APS. App. 736-37.

From the outset, it was clear that the most significant design challenge for Stoneridge would be to design an actuator that was quiet when operated. App. 742-43. Early in the development phase, Ford provided Teleflex with an audible noise "system specification" for the APS of "6 sones" (a measurement of noise volume) and "0.1 vacils" (a measurement of

⁵ The APS system that was being redesigned by Teleflex was referred to by the parties as the "first generation" system, or the "GenI" system. The replacement design which Stoneridge was collaborating on was referred to as the second generation, or "GenII" system.

noise fluctuation or quality). App. 743-46.

Developing an actuator that, in combination with the other parts of the APS, would enable this specification to be met would require significant engineering innovations and re-tooling commitments.

Stoneridge's initial conceptual prototypes were too noisy, illustrating the complexity of the design challenge posed by the project. App. 1205-06.

However, Stoneridge continued to invest engineering resources (and money) to refine its design to decrease the audible noise levels throughout 2001. App. 1207-08. By July of 2001, Stoneridge had developed and tested a radically new prototype, referred to as the "worm gear" or "watch plate" concept, which was significantly quieter than the initial prototype. App. 1208-09, 1228-29, 1232-33. Stoneridge was prepared to make additional investments of resources to further decrease noise levels, but only if it had some assurance that if it was successful, it would get the business. App. 838.

Stoneridge's desire for a firm commitment from Teleflex was made more urgent by the emergence of a competitor on the scene: Daewoo. In May 2001, Stoneridge learned that Teleflex had been in

discussions with Daewoo, App. 1211-12, and a few months later discovered that Teleflex had equipped a mock-up version of the APS with a Daewoo actuator. App. 1239-40. Teleflex reassured Stoneridge that it had not replaced Stoneridge as the ultimate component supplier and that it viewed Daewoo as only a back-up. App. 1217-18.

Even though the true nature of Teleflex's discussions with Daewoo were concealed from Stoneridge,⁶ the appearance of a competitor, coupled with the additional investment required to refine the technical performance of the actuator, gave Stoneridge pause about Teleflex's commitment to use its product in the long-term roll out of the APS. It was to confirm Teleflex's commitment to give Stoneridge the

⁶ As reflected in an internal Teleflex document created around this time period, Teleflex was well aware of the importance of this development to Stoneridge and its likely impact on Stoneridge's willingness to continue to work with Teleflex on the project. After disclosing Teleflex's intent to begin "seriously negotiating" with Daewoo, the author warned:

Guys: This initiative should be kept confidential. If Pollak should discover that we are investigating other options, they may become uncooperative/de-motivated. Thanks. (Try not to inform anyone of this project - including James and Randy at this time).

App. 86 (emphasis added).

business, provided its actuator met specifications, that the parties negotiated and signed an LOI. As a Stoneridge witness testified at trial, "we really wanted to set forth a line in the sand, if you will, that clearly laid out expectations to which, if we obtained those, that Teleflex would award us the business." App. 838.

The Letter of Intent

The LOI was signed on August 13/14, 2001. App. 23-24. (See Addendum). Among other things, the LOI set forth Teleflex's agreement that:

In addition to the pre-sourcing nomination letter provided by Teleflex dated August 24, 2000, Teleflex further agrees that Pollak shall be their designated production supplier of the Adjustable Pedal System Actuator . . . for the Teleflex GenII Adjustable Pedal System (hereinafter "GenII APS") contingent upon Pollak successfully completing its APSA Design Verification Tests, subject to the technical requirement defined in section four (4) of this agreement.

Those "Technical Requirements" were the existing system noise specifications of a maximum of 6 sones and 0.1 vacils that the parties had been working with for the past year. As discussed below, the protocol for testing the actuator's compliance with these

specifications was also spelled out. (see *infra* at p. 11-14)

Section 4 of the LOI also set forth a timetable for achieving the technical requirements:

Teleflex agrees to carry forth this agreement contingent upon Pollak's proof-of-concept APSA meeting the [above] technical requirements. An evaluation shall be scheduled no more than eight (8) weeks following the signing date of this agreement to determine Pollak's adherence to these requirements. The target date for the proof of concept APSA is September 14, 2001.

App. 24(emphasis added). The meaning of this language, and, in particular, the date by which Stoneridge was required to produce a conforming component, was a central issue at trial. While Teleflex argued that the "target date" of September 14, 2001 was an absolute deadline for meeting the technical requirements, the jury agreed with Stoneridge that the "target date" was only an aspirational goal, and that the eight-week window provided for in the LOI gave it until October 9, 2001 to test and perfect the actuator.⁷ App. 2805-2806.

⁷ The LOI also included the requirement that the parties negotiate and finalize a "Teleflex Supply Agreement" in good faith. App 24. It is undisputed that the parties never entered into the "Supply Agreement."

Stoneridge's Compliance With the Letter of Intent

After the LOI was signed, Stoneridge continued to refine and test several prototypes until it achieved success shortly before the expiration of the eight-week evaluation period.⁸ App. 450, 761. As noted, the LOI addressed the testing protocol that should be used to determine whether use of a Stoneridge actuator would enable the GenII APS to be in compliance with Ford's noise specification. One aspect of the testing protocol that received attention at trial, and formed a basis for Teleflex's unsuccessful motion for JNOV, was the specification that the test be conducted at 12.6 volts. The voltage at which the actuator was to be tested was significant because of the correlation between voltage and the revolutions per minute (RPMs) of the actuator motor. Higher voltage to the actuator motor would increase the RPMs of the motor, which, in turn, would increase the amount of noise generated. App. 1780, 1783. 12.6 volts was selected as the testing specification because it is the voltage that would be applied to the actuator when actually installed in a car.

⁸ The two prototypes were referred to as the POC2 and POC4. "POC" refers to "proof of concept." App 760.

The successful test results obtained by Stoneridge in October 2001 were conducted primarily at 10.5 volts rather than 12.6 volts, because of the need to use a slightly different motor on the tested prototypes from what would be present in the production actuator. App. 1775-80. Appropriate adjustments to the testing protocol were made in order to ensure that the RPMs that would be generated by the test motor - the critical feature as far as motor noise was concerned - would match the RPMs that would be generated by a production motor at 12.6 volts.

More specifically, Stoneridge presented detailed evidence to the jury explaining the testing that was done on the prototype, the scientific basis for its use of 10.5 volts, and the reliability of that testing protocol as the scientific equivalent of testing conducted on the production actuator at 12.6 volts. App. 1776-86. Stoneridge's Principal Project Design Engineer, Tom Schregardus, explained in detail the engineering calculations which he had made to ensure that the tests were accurate measures of the noise specifications in the LOI. As he explained, the test motor actually operated at approximately 8% higher RPMs at 10.5 volts than the production motor would at

12.6 volts. App. 1783. Thus, the test motor at 10.5 volts made more noise than the equivalent production motor would make at 12.6 volts. App. 1783.

Significantly, Stoneridge had used this very same test protocol in tests it ran in September 2001 at Teleflex's facilities, in the presence of Teleflex's engineers. As Mr. Schregardus further testified, at the time, he explained the reasons for the change in voltage to Teleflex's project engineer, Randy Bushong, Teleflex accepted this explanation without objection. App. 1787. Notably, it chose not to call Mr. Bushong to testify, and this evidence of Teleflex's knowledge and acceptance of testing at 10.5 volts was not rebutted in any way. Indeed, neither the test results nor the methodology used by Stoneridge to test the actuators was ever questioned by Teleflex prior to trial.⁹

⁹ Teleflex had several opportunities to do so, even after it received notice of the results. For example, in setting forth its reasons for reneging on its obligations under the LOI, Teleflex never contended that Stoneridge had not met its technical criteria, instead claiming to have based its decision on Stoneridge's failure to meet more stringent standards that Teleflex attempted to unilaterally impose after the LOI was signed. App. 77-78.

Based on this evidence, the jury found that Stoneridge had "created a proof of concept APSA that complied with all of the technical requirements of the letter of intent within the time frame required." ¹⁰ App. 2805-06.

Teleflex's Breach

On October 8, 2001, even before the expiration of the eight-week evaluation period in the LOI, Teleflex reneged on its promise and unilaterally attempted to change the deal. Specifically, Teleflex took the extraordinary step of notifying Stoneridge that it was "amending" the technical requirements of the LOI to lower the maximum permitted sound level from 6.0 sones to 5.5 sones. App. 58, 77, 248. It also demanded that these new requirements be met by October 31, 2001 - a matter of a few weeks' time - changed the location of the testing laboratory to Teleflex's much cruder facility (App. 1811-12), and mandated that Stoneridge absorb all future necessary tooling and funding costs

¹⁰ As the trial judge remarked to counsel: "On this issue of 12.6 volts, I did hear enough evidence for the jury to say that that doesn't mean you have to test it at 12.6 volts when you're dealing with a particular machine and if you do it at 10.5, it's the equivalent. . . So I think there's enough evidence for them to say you met 12.6 by testing at 10.5 the way you tested it...." App. 2586.

necessary to make these further changes to the actuator design. App. 58. These demands were referred to by both sides at trial as an "ultimatum."

Stoneridge strongly objected, and informed Teleflex that the technical requirements had not only already been agreed to in the LOI but, had just been met by Stoneridge. App. 248. A report demonstrating technical compliance with those agreed-to specifications was forwarded to Teleflex that day. App. 248, 251, 252. As noted, Teleflex never responded to - or questioned - the results of that testing until trial.

Nor did Teleflex undertake to fulfill its obligations under the LOI by promoting Stoneridge as the actuator supplier to Ford and other auto manufacturers. In fact, it did the very opposite, recommending to Ford in October 2001 that the actuator component supplier be changed from Stoneridge to Daewoo, a fact that was not disclosed to Stoneridge until suit was filed. App. 202. While Teleflex claimed at trial that it was Ford and not Teleflex that initiated the change in supplier from Stoneridge to Daewoo, this claim was flatly contradicted by the

principal engineer at Ford who was responsible for this project. App. 1896-97.

In addition, unbeknownst to Stoneridge, Teleflex entered into a written commercial supply agreement with Daewoo on November 16, 2001 that effectively eliminated Stoneridge from the APS project by making Daewoo the "sole source (100%) of Teleflex motor requirements" effective October 25, 2001. App. 66-71. There was thus ample evidence to support the jury's conclusion that Teleflex breached its obligations by preventing or interfering "with any opportunity for Ford or any other OEM to consider use of the [Stoneridge] APSA." App. 2806.¹¹ As Ford's engineer testified, "if the Stoneridge actuator was to be reintroduced at any point [after initial manufacture], that would occur only if that change was advocated by the system supplier, which was Teleflex." App. 1911-12. Teleflex made no such efforts.¹²

¹¹ For example, there was substantial evidence that while Ford engineers would have accepted whatever conforming component supplier Teleflex chose to use, it preferred the Stoneridge actuator to the Daewoo product because of its lower weight and versatility for use in different model vehicles. App. 1511-14; 1528-29; 1533.

¹² Teleflex continued to string Stoneridge along by periodically meeting with Stoneridge and holding out

Negotiations and Dealings up Through Early 2002

On January 28, 2002, Teleflex finally revealed to Stoneridge that it would not be getting any part of the promised business because Teleflex had decided to use Daewoo. App. 1747-48.¹³ Significantly, until it presented this defense at trial, Teleflex had never contended that Stoneridge failed to meet the technical specifications set forth in the LOI. Indeed, in response to Stoneridge's demand for a written explanation for the termination, on March 14, 2002 Teleflex wrote that the LOI was "invalidated" for several reasons. The principal reason was Stoneridge's failure to "accept" the "amended" technical specifications unilaterally imposed by

the likelihood that the Stoneridge actuator would be substituted for the Daewoo product after initial production runs - a proposition that clearly could not have been true in light of the signed Daewoo/Teleflex contract. App. 1723-24.

¹³ Teleflex went through the motions of attending Stoneridge's further testing in November and December 2001, and continuing discussions with Stoneridge about a Supply Agreement, even negotiating unit price. However, Teleflex not only failed to reveal the true nature of its relationship with Daewoo, but it flatly misrepresented the price it had agreed to pay Daewoo in November in an effort to obtain a lower price from Stoneridge. App. 458, 1738-42. Teleflex's conduct in conducting these negotiations provided the jury with further evidence of its breach of its implied covenant of good faith and fair dealing.

Teleflex, over Stoneridge's objection, including the claimed requirement of reducing the sone requirement to 5.5. Teleflex even asserted that it was allowed to unilaterally amend the technical specifications (implicitly admitting they had been met) because there was "no provision in the [Letter of Intent] that disallows revisions to Technical Requirements." App. 77-78.

On April 8, 2002, Stoneridge brought suit to enforce the LOI and Teleflex's promise and obligation to designate Stoneridge as its APSA supplier. App. 20.

SUMMARY OF ARGUMENT

Having consistently asserted below that the question of whether the LOI was a contract presented an issue of law for the trial judge, Teleflex is foreclosed from arguing for the first time on appeal that this issue presented a question of fact for the jury. (Brief, pp. 20-22). In any event, the trial court correctly treated the issue as a matter of law, in ruling that the mandatory language of the LOI created a binding contract, even though the parties also contemplated a later commercial agreement. (Brief, pp. 22-33).

The evidence was ample, and indeed compelling, that Stoneridge had met the technical requirements of the LOI. The adjustment of voltage applied to the tested prototype part resulted from an engineering calculation made to ensure that the test requirements were satisfied. (Brief, pp. 33-38). Moreover, the jury had ample evidence to conclude that the adjustment represented a modification of the agreement, to which the defendant had assented. (Brief, pp. 39-40).

The addition of prejudgment interest to the jury verdict was appropriate, because the verdict represented the *present* loss of a valuable future business opportunity. (Brief, pp. 41-43).

The trial court erred, however, in dismissing Stoneridge's G.L. c. 93A claim by interpreting the "center of gravity" jurisdictional test too narrowly. In particular, the court focused almost exclusively on where Teleflex's conduct had occurred, ignoring the effect of the impact of those actions on Stoneridge, in Massachusetts. (Brief, pp. 44-49). The c. 93A claim should therefore be remanded to the trial court for consideration of all the factors relevant to the

"center of gravity" analysis and, if appropriate, resolution of the c. 93A claim on the merits.

LEGAL ARGUMENT

- I. THE SUPERIOR COURT CORRECTLY FOUND THAT THE LETTER OF INTENT WAS A CONTRACT AS A MATTER OF LAW AND THE DEFENDANT HAS WAIVED ANY ARGUMENT TO THE CONTRARY
- A. Teleflex is Precluded From Arguing That The Superior Court Erroneously Treated The Determination Of Whether The Letter Of Intent Was A Contract As An Issue Of Law For The Court Rather Than The Jury Because It Took The Opposite Position At Trial

Teleflex's first issue on appeal is "[w]hether the Superior Court usurped the function of the jury by instructing it that the LOI at issue here 'is a contract'...." Teleflex's Brief, p. 1. However, Teleflex is precluded from raising this issue on appeal by the position it took at trial. While it did dispute the correctness of *the substance* of the Superior Court's instruction at issue - Instruction No. 15, App. 48 - it agreed that the question of whether the LOI was a contract was one of law for the court and *never* argued that should be submitted to the jury.

Thus, in its proposed jury instruction headed "Existence of a Contract," Teleflex requested that the Superior Court affirmatively tell the jury that "as a

matter of law, the Letter of Intent, standing alone, is not a binding contract." See Teleflex's Proposed Jury Instructions, pages 20-21 (emphasis added) (Addendum, *infra*.) Likewise, in its written objections to the Superior Court's draft version of jury instructions, Teleflex based its argument against Instruction No. 15 solely on "[t]he *plain language* of the Letter of Intent" and on its reading of the applicable case law, thus again acknowledging that the task of interpreting that document in order to establish its legal effect was an issue of law for the trial judge and not one of fact for the jury. App. 48. Continuing in the same vein at the jury charge conference, Teleflex reiterated its disagreement with the Superior Court's "*conclusion* in proposed instruction No. 15 that the Letter of Intent is a binding contract," App. 48 (emphasis added), and urged a contrary conclusion, that "*as a matter of law*, the letter was not a contract," App. 2537 (emphasis added). Offered yet another opportunity to state a procedural objection to the court's handling of the issue after the jury was charged, Teleflex merely reiterated its position. App. 2757-58.

At no time before or in the course of the trial - not even in the alternative after learning that the Superior Court did not agree with its interpretation of the LOI - did Teleflex argue that it was for the jury to determine whether or not the LOI was a contract, or propose any instruction to that effect. Having consistently argued below that the legal effect of the LOI as a contract was an issue of law and having equally consistently refrained from arguing that it was an issue for the jury, Teleflex forfeited any right to raise this issue on appeal. *Wynn & Wynn, P.C. v. Massachusetts Com'n Against Discrimination*, 431 Mass 655, 674 (2000) (issues that have not been raised in the trial court are deemed to have been waived on appeal).

B. The Superior Court Was Correct In Ruling That The Question Of Whether The Letter Of Intent Was A Contract Was For The Court And In Answering This Question In The Affirmative

Even if Teleflex's about-face were procedurally permissible, its revisionist argument that the issue of the contractual nature of the LOI was for the jury has no merit. Given that the issue was whether a writing executed by both parties should be interpreted to constitute a contract, the Superior Court properly

treated it as one of law for the court. See, e.g. *Raffaele v. Ryder Dedicated Logistics, Inc.*, 931 F.Supp. 76, 79 (D.Mass. 1996) ("Whether a document is a contract is a question of law"); accord *Mass. Cash Register, Inc. v. Comtrex Systems Corp.*, 901 F.Supp. 404, 415 (D.Mass. 1995) (citing *Schwanbeck v. Federal-Mogul Corp.*, 31 Mass. App. Ct. 390, 406 (1991), modified 412 Mass. 703, 709-10 (1992), and *Coll v. PB Diagnostic Systems, Inc.*, 50 F.3d 1115, 1122 (1st Cir. 1995)).

The Superior Court was also substantively correct in construing the LOI as a contract, "despite what it is called." App. 2740. Massachusetts law has long accepted letters of intent as potential contracts. *Fickes v. Sun Expert, Inc.*, 762 F.Supp. 998, 1000 (D.Mass. 1991); *Sands v. Arruda*, 359 Mass. 591 (1971); and *Nigro v. Conti*, 319 Mass. 480 (1946)). "[A] letter of intent may be binding or non-binding, depending on the intentions of the parties." *Giuliano v. Nations Title, Inc.*, 134 F.3d 361, *4 (1st Cir. 1998) (unpublished); accord, *Rand-Whitney Packaging Corp. v. Robertson Group, Inc.*, 651 F.Supp. 520, 535 (D.Mass. 1986).

As with any type of writing, in the absence of ambiguity, the parties' intent is a matter of law to be derived from the language of the document. The nature of the required analysis is well illustrated in *Schwanbeck*, a case on which Teleflex places much reliance. Based on the language employed in the LOI at issue there, the Court concluded that it contained both binding and non-binding provisions. It construed a provision setting forth only the parties' intentions as "a mere expression of intent" and, therefore, non-binding. By contrast, a provision couched in promissory language – "you **will** have **the right** of first refusal" – was, in the Court's view, "far more than a mere expression of intention," and rendered the defendant "contractually bound" to recognize the promised right. *Schwanbeck*, 412 Mass. at 706 n.2 & 707 (emphasis added).

In this case, the parties demonstrated a clear understanding of the difference between expressions of intention and expressions of commitment and carefully chose their words. With respect to the central issue in this litigation, the pre-sourcing letter stated that it was "Teleflex's *intention* to use [Stoneridge] as the motor/actuator source for our future Adjustable

Pedal Systems," subject to various contingencies. App. 21 (emphasis added). However, by the time they progressed to the LOI, the parties not only shifted from that expression of intention to language of unmistakable mutual commitment and obligation, but expressly characterized the LOI as an "agreement":

Teleflex further **agrees** that [Stoneridge] **shall** be their **designated** production supplier of the Adjustable Pedal System Actuator . . . for the Teleflex GenII Adjustable Pedal System . . . contingent upon [Stoneridge] successfully completing its APSA Design Verification Tests, subject to the technical requirement defined in section four (4) of **this agreement**.

App. 23 (emphasis added).

As the Superior Court read this language, it meant that

If, Stoneridge/Pollak, you do all these things, and you meet all of these criteria, then we're going to designate you, and then we're going to sit down and have a commercial agreement for what goes on from there.¹⁴

App. 2539.

¹⁴ Only with respect to the issue of the time-frame within which Stoneridge was required to achieve technical compliance did the Superior Court find an ambiguity in the LOI and, fully cognizant of the proper division of its and the jury's roles, submitted the resolution of that ambiguity to the jury. App. 2742-43. Teleflex agreed that this issue was for the jury and, indeed, that it was a key question. App. 2529-30.

There is no other plausible reading of the LOI. Teleflex's suggestion that Stoneridge sought the agreement merely because it "wanted some assurance that it was still in the running" (Teleflex's Brief at 10) ignores not only the testimony of Stoneridge's witnesses, but the mandatory language of the LOI itself. In fact, while purporting to address who should have decided whether the LOI was a contract, in its actual argument on appeal, Teleflex changes the subject and addresses instead whether the LOI could, as a matter of law, be deemed the separate supply contract contemplated by the parties. Teleflex's failure to suggest any contrary construction only reinforces the point that it was for the court to decide whether the LOI was a contract.

Teleflex gives three interrelated reasons why the Superior Court erred in instructing the jury that the LOI was a contract: First, that the LOI is not a "commercial contract" (Defendant's Brief, p. 26). Second, that the parties had merely agreed to negotiate such a contract (Defendant's Brief, p. 28). And third, there was no agreement on price, duration, and desourcing terms (Defendant's Brief at 33, 35-36).

The fundamental problem with these arguments is that they ignore the theory upon which this case was tried.¹⁵ From Stoneridge's opening statement, its case was about "a broken promise" which precluded the parties from negotiating a commercial agreement, App. 662, 676, and not about whether the parties had in fact reached a full commercial agreement to buy and sell actuators and all the terms that they might have expected to include in such an agreement.

If Teleflex had somehow managed to miss what contract was at issue in the course of the opening statements and the evidence, the trial judge had no such difficulty. For example, at the jury charge conference, Judge van Gestel offered a crystal clear and succinct summary of Stoneridge's case:

[A]s I see the letter of intent, it is an agreement that says, "If, Stoneridge/Pollak, you do all these things, and you meet all of these criteria, then we're going to designate you, and then we're going to sit down and have a commercial agreement for what goes on from there.

¹⁵ Oddly, both at the jury charge conference, App. 2584, and on this appeal, see Defendant's brief, page 26, Teleflex focuses solely on the allegations of Stoneridge's Complaint, as if unfamiliar with the reality of complex litigation that theories of liability evolve between an initial pleading and trial, and that what matters ultimately is how claims are presented and supported by evidence admitted at trial.

And it seems to me - I come back to the Air Technology Corporation case that counsel cited to me. It's a very similar kind of situation. And the Court recognizes that General Electric and whomever the other, Dresser, didn't get together with Air Technology in the ultimate contract, but they reached a point, and they dragged them into this thing far enough that they had an expectancy that they were entitled to something more....

App. 2538-40.

The trial judge was here referring to the case principally relied on by the plaintiff and one which it too found persuasive: *Air Technology v. General Electric Co.*, 347 Mass. 613 (1964). Remarkably, Teleflex fails to even mention this case in its brief, let alone seek to distinguish it. Instead, it persists in its preoccupation with whether the LOI constituted the ultimate commercial agreement. The reason for its continuing "confusion" is transparent: applied to the LOI as a separate and distinct contract, Teleflex's arguments about the ultimate supply agreement simply miss the point. As the trial judge recognized, complex commercial transactions often proceed in stages and involve - indeed require - interim partial agreements in order to enable the parties to invest the effort and resources necessary

to get to the full-scale comprehensive deal that is their ultimate objective.

For example, in *Lafayette Place Associates v. Boston Redevelopment Authority*, another case Teleflex invokes, the parties entered into an interim agreement relating to a contemplated development project that, like the LOI here, was not their final agreement but, rather, provided that after the occurrence of specified events, the parties "shall in good faith negotiate and enter into an agreement calling for the purchase and sale of the rights in question." 427 Mass. 509, 512 (1998).

The SJC rejected the argument that the interim agreement was too indefinite and incomplete, concluding that it "was an enforceable contract, under which both parties had certain rights and obligations." *Id.* at 519. Its reasoning applies with equal force here:

Rules of contract must not preclude parties from binding themselves in the face of uncertainty. If parties specify formulae and procedures that, although contingent on future events, provide mechanisms to narrow present uncertainties to rights and obligations, their agreement is binding.

Id. at 518. The SJC cited with approval, *id.* at 518, n.9, the seminal analysis of preliminary contracts in

Teachers Ins. Annuity Ass'n v. Tribune Co., 670 F.Supp. 491, 497-498 (S.D.N.Y. 1987), where Judge Leval (now of the Second Circuit) recognized the commercial utility and legal validity of the type of contract he labeled as a "preliminary binding agreement," i.e. one in which

the parties can bind themselves to a concededly incomplete agreement in the sense that they accept a mutual commitment to negotiate together in good faith in an effort to reach final agreement within the scope that has been settled in the preliminary agreement. . . . [O]pen terms obviously have a somewhat different significance where . . . the nature of the contract alleged is that it commits the parties in good faith to negotiate the open terms. To consider the existence of open terms as fatal would be to rule, in effect, that preliminary binding commitments cannot be enforced. That is not the law.

670 F.Supp. at 498 & 499 (internal footnote and citations omitted).

Judge Leval's analysis has been endorsed as applicable under Massachusetts law to a variety of documents, including those set forth in letters of intent. *Fickes v. Sun Expert, Inc.*, 762 F. Supp. 998, 1000 - 1001 (D.Mass. 1991) (letter of intent); *One to One Interactive, LLC v. Landrith*, 2004 WL 1689790, *6-7 (Mass.Super. 2004)(term sheet).

Indeed, the logic of Judge Leval's analysis has long been part of Massachusetts law. Notably, *Air Technology v. General Electric Co.*, 347 Mass. 613 (1964) - the case that was expressly invoked by the Superior Court in support of its Instruction No. 15 but which Teleflex studiously ignores - was extensively cited by the Third Circuit as authority for finding that a teaming agreement intended ultimately to lead to a sub-contract, was a binding contract:

As with most other "preliminary agreements" precedent to an executed contract, the question arises whether the teaming agreement itself, absent an executed subcontract, may constitute the basis for contractual liability... The fact that the parties never finalized an implementing subcontract is usually not fatal to enforcing the teaming agreement on its own - if the parties intended the teaming agreement itself to constitute a binding agreement that enumerated definite terms of behavior governing the parties during, or even after, the bidding process. See, e.g. *Air Technology Corp.*, 199 N.E.2d at 547-48.

ATACS Corp. v. Trans World Communications, Inc. 155 F.3d 659, 666 & 667 (3d Cir. 1998) (emphasis added). See also, *Rand-Whitney*, supra, 651 F.Supp. at 534-35.

Courts recognize that "[o]f course, if the parties to a [preliminary] agreement do not wish to create binding obligations before executing an

ultimate subcontract, they need only to say so."

ATACS Corp., at 667. However,

a proviso of that sort should *speak plainly*, e.g., "The purpose of this document is to memorialize certain business points. The parties ... contemplate the drafting of a more detailed agreement. They intend to be bound only by the execution of such an agreement and not by this preliminary agreement."

Goren v. Royalty Investments, Inc., 25 Mass.App.Ct.

137, 142-43 (1987) (emphasis added); see also

Schwanbeck, *supra* at 706, n.2.

However, where, as in the case at bar, an LOI signed by sophisticated parties, using the language of rights and obligations and internally referring to itself as "[t]his agreement," App. 23, conspicuously lacks any disclaimer of binding effect, this further reinforces the conclusion that it constitutes a contract and imposes obligations. Therefore, the Superior Court's Instruction No. 15 was correct and should be affirmed.

A partial preliminary contract neither constitutes the ultimate commercial agreement contemplated by the parties nor "guarantees that the parties will conclude" such an agreement. It "precludes, however, *renouncing the deal, abandoning*

the negotiations, or insisting on conditions that do not conform to it." *Fickes, supra*, 762 F.Supp. at 1001 (emphasis added). In the case at bar, the jury found that after Stoneridge satisfied the conditions required of it under the LOI, Teleflex responded with a bad faith refusal to live up to its side of the bargain. In so doing, Teleflex deprived Stoneridge of the benefit of its bargain - the promise that upon meeting the technical requirements, it would be awarded the APS GenII actuator business. As the SJC recognized in *Air Technology*, Stoneridge was entitled to recover damages for the loss of this valuable business opportunity. 347 Mass. at 627.

II. THE JURY WAS ENTITLED ON THE BASIS OF THE EVIDENCE AND APPLICABLE LAW TO FIND COMPLIANCE WITH THE TECHNICAL REQUIREMENTS OF THE LETTER OF INTENT

The trial court correctly rejected Teleflex's motion for judgment notwithstanding the verdict because the evidence, viewed in the light most favorable to Stoneridge, amply supported the jury's conclusion that Stoneridge created a "proof of concept" actuator that "complied with all the technical requirements of the letter of intent" by October 9, 2001 the date found by the jury to be the

deadline. App. 2806. See *Tosti v. Ayik*, 394 Mass. 482 (1985); *Edinburg v. Merry*, 11 Mass. App. Ct. 775 (1981); *Alholm v. Wareham*, 371 Mass. 621 (1976); *Porier v. Plymouth*, 374 Mass. 206 (1978).

On appeal, Teleflex focuses its argument on the particular voltage used by Stoneridge to test the prototypes, and contends that because Stoneridge did not test the prototypes at 12.6 volts, the jury could not have found in its favor. As discussed below, however, this argument ignores the extensive evidence before the jury that the testing conducted met the technical requirements of the LOI and that Teleflex admitted as such, and/or that the parties modified the technical requirements to the extent a change in voltage was required by the design of the test prototype. For all of these reasons, Teleflex's arguments on appeal are without merit.

A. There Was Ample Evidence From Which The Jury Could Have Concluded That The Tests Performed At 10.5 Volts Met The Technical Requirements Of The Letter Of Intent

Notwithstanding Teleflex's efforts on appeal to recharacterize the evidence as only establishing Stoneridge's "substantial compliance" with the technical requirements, the jury was not asked to

decide whether there was "substantial compliance" by Stoneridge, but, rather was asked whether Stoneridge *complied* with the technical requirements.¹⁶ The jury's affirmative answer to this question was fully supported by the evidence.

The evidence at trial included a detailed technical explanation of the reasons the tests conducted by Stoneridge in October 2001 were run at 10.5 volts rather than 12.6 volts - evidence which the trial judge expressly viewed as providing the jury with a sufficient basis to find that the technical requirements of the LOI were met. App. 2586. More specifically, it was undisputed that the purpose of

¹⁶ Teleflex's principal argument on appeal is that Stoneridge's "substantial compliance" with the requirements of the letter of intent is insufficient. It again misses the point by ignoring the fact that the case was not submitted to the jury on a "substantial compliance" theory. To the contrary, the trial judge specifically declined to instruct the jury on "substantial compliance" stating:

I wouldn't say, 'Did they substantially comply?' It would be, 'Did they comply?' But on this issue of the 12.6 volts, I did hear enough evidence for the jury to say that that doesn't mean you have to test it at 12.6 volts when you're dealing with a particular machine, and if you did it at 10.5 it's the equivalent. . . So I think there's enough evidence for them to say you met 12.6 by testing at 10.5 the way you tested it

App. 2586 (emphasis added).

the technical requirements contained in ¶ 4B of the LOI (the focus of Teleflex's complaints) was to measure the level of noise created by the prototype actuators in a way that would reflect the noise the actuator would make when it was actually installed in a car. The figure of 12.6 volts was specified in the LOI because this is the voltage that would be applied to the actuator by a standard car battery. In turn, this voltage would generate a certain level of revolutions per minute in the actuator motor which, in turn, would create noise. Because noise is directly correlated to the RPMs of the motor inside the actuator, the key aspect of any test of the system noise level was the RPMs of the motor. App. 1780, 1783.

At trial, Stoneridge presented evidence that it used 10.5 volts rather than 12.6 volts to compensate for differences between the production motor and the motor used on the test prototypes. In conducting its tests, Stoneridge ensured that the test motor produced RPMs that would duplicate those generated by the production motor at 12.6 volts, thereby ensuring that the noise created by the motor would be the same. App. 1776-86. The evidence was that the lower voltage

as applied to the test motor replicated the results of a production-intent motor tested at 12.6 volts. Significantly, this evidence was *not rebutted by Teleflex*.

Moreover, there was evidence from which the jury could have concluded that Teleflex had admitted that the LOI's technical requirements were met by Stoneridge. On March 14, 2002, Teleflex sent Stoneridge a written explanation of the reasons it had not designated Stoneridge as its component supplier as required by the LOI. By this date, Teleflex was well aware that the actuators had been tested at 10.5 volts [see below] and had every incentive to identify each reason why the LOI did not obligate Teleflex to award the business to Stoneridge. However, Teleflex did not claim that Stoneridge had used the wrong voltage to test the actuators or that it otherwise failed to meet the technical specifications in the LOI. Quite to the contrary, it claimed that it was "invalidating" the agreement because of Stoneridge's refusal to accept the more stringent technical requirements that Teleflex had tried to unilaterally impose after the agreement was signed. App. 77-78.

Teleflex's failure to assert prior to trial that Stoneridge had not met a voltage requirement contained in ¶ 4B not only demonstrates the contrived nature of this defense, but constituted an admission that Stoneridge's test results satisfied the technical requirement. *See General Elec. Co. v. Board of Assessors of Lynn*, 393 Mass. 591, 603 (1984) (noting that "[e]videntiary admissions are the conduct of a party while not on the stand used as evidence against him at trial. The conduct may be in the form of an act, a statement, or a failure to act or make a statement") (other quotations and citation omitted). *See also, e.g., Genova v. Genova*, 28 Mass. App. Ct. 647, 650-51 (1990) (report containing defendant's earlier version of accident admissible as an admission).

Under all of these circumstances, Teleflex's contention that there was no rational view of the evidence that supported the jury's finding that Stoneridge met the technical requirements of the LOI is plainly without merit.

B. In The Alternative, There Was Also Ample Evidence From Which The Jury Could Have Concluded That The Parties Modified The Testing Protocol To Reflect The Need For Different Voltage

Although there was ample evidence from which the jury could have determined that Stoneridge's test at 10.5 volts fully complied with the technical requirements of the LOI, the jury could also have concluded that the parties modified the LOI to change the voltage that should be used to test the prototype actuator.

The circumstances of the modification were explained by Mr. Schregardus who testified that in late August/early September of 2001, he told a Teleflex project engineer, Randy Bushong, that Stoneridge was not able to immediately obtain the production motor with the appropriate length shaft, but that it had another motor that had the same frame size, correct shaft length, but a different winding; and that by running that winding or motor at 10.5 volts, it would match the performance of the production motor at 12.6 volts. App. 1786-87. Mr. Bushong accepted this explanation without objection. App. 1787. Teleflex did not call Mr. Bushong or any other witness to rebut Mr. Schregardus's testimony.

The jury was instructed that contracts may be "extended, modified or changed by later words or actions of the parties, if those words or actions themselves, together with or in addition to the letter of intent, meet the definition of a contract." App. 2740. See *First Pennsylvania Mortgage Trust, et al. v. Dorchester Savings Bank, et al.*, 395 Mass. 614, 625 (1985); *Flynn v. Wallace*, 359 Mass. 711, 715 (1971). Based on the evidence presented that Teleflex engineers were fully aware of the testing at 10.5 volts, and the reasons for it, and did not object, the jury was free to conclude that this specific aspect of the Letter of Intent was modified. See *Turiello v. City of Revere*, 15 Mass.App.Ct. 185, 190 (1983) (construction contact requirement for self-tapping screws modified to staples where change was agreed to by party); *Pas-tuer v. Energy Sciences, Inc.*, 11 Mass.App.Ct. 967, 968-69 (1981) (evidence may permit a conclusion that the defendant had waived or excused performance of a contract precondition by the plaintiff).¹⁷

¹⁷ The trial court instructed the jury that it should decide "whether the letter of intent was modified or extended in any way that affected whether Pollak complied with the requirements," in particular

III. THE TRIAL COURT PROPERLY AWARDED PRE-JUDGMENT INTEREST TO STONERIDGE BASED UPON ITS PRESENT LOSS OF A VALUABLE BUSINESS OPPORTUNITY

Pursuant to G.L. c. 231 §6C, in a breach of contract action, prejudgment interest "shall" be added to the amount of the judgment, to be calculated from the date of breach, if established, or from the date of the commencement of the action. Consistent with this statutory directive, the trial court properly added pre-judgment interest to Stoneridge's \$2,000,000 damages award, running from the date that Stoneridge filed suit. App. 26.

Teleflex objects to the interest award by invoking a narrow judicial exception to G.L. c. 231 §6C expressed in *Conway v. Electro Switch Corp.*, 402 Mass. 385 (1988). That decision is inapplicable to the facts of this case. In *Conway*, the SJC refused to add prejudgment interest to an award for loss of future earnings in an employment discrimination case. *Id.* at 390. The court reasoned that the purpose of interest is to compensate a damaged party for the loss of use or unlawful detention of money, and that such a

"whether the technical requirements were changed in any way, or whether the timing requirements were extended in any way." App. 2744.

loss or detention does not occur prior to the entry of a judgment for front pay. *Id.* at 390-91.

Teleflex incorrectly argues that the damages awarded to Stoneridge represented compensation for future profits. In fact, Stoneridge made clear throughout trial that the true nature of its damages was the loss of a valuable business opportunity, as articulated by the SJC in *Air Technology v. General Electric Company*, 347 Mass. 613, 626-627 (1964) ("What [the plaintiff] lost by [the defendant's] breaches of contract was a business opportunity").

Such a loss is a *present* loss, not a future one. Since the damages are measured by the value of a lost opportunity and not merely the mathematical addition of known future sums, the loss is analogous to a loss of earning capacity, not an award of front pay. Indeed, in *Conway*, the SJC noted that an award for loss of earning capacity – as opposed to an award of front pay under G.L. c. 151B – *would* carry an award of prejudgment interest, stating: "we view the loss of earning *capacity* as a present loss, although the determination of the extent of the loss necessarily takes into account future losses." *Id.* at 391, n.9 (emphasis in original).

Stoneridge's loss occurred when Teleflex breached the terms of the Letter of Intent by failing to designate Stoneridge as the supplier of the actuator for its APS system. Stoneridge introduced evidence of the value of that lost business opportunity at the approximate time that it occurred, well before the commencement of trial in this case. Thus, the analysis of Stoneridge's economic expert, Thomas Barocci, while guided to some extent by an attempt to estimate the profitability of that business opportunity (just as it would be in valuing a loss of earning capacity), valued the loss as of *January 1, 2003* and applied an appropriate discount figure (17%) in order to reduce the award to that prejudgment value.¹⁸ App. 1615-16, 1619-22.

Failing to award prejudgment interest on that loss would deprive Stoneridge of the use of that money for the period after the loss occurred but prior to trial. Interest was properly added to the jury verdict, and Teleflex's argument should be rejected.

¹⁸ Moreover, Stoneridge's loss included substantial sums representing out-of-pocket losses in reliance on the promises that were breached by Teleflex. These losses necessarily occurred before suit was filed. App. 735-36, 966-67.

**IV. THE TRIAL COURT IMPROPERLY DISMISSED STONERIDGE'S
G.L. C. 93A CLAIM BASED UPON ITS ERRONEOUS
APPLICATION OF THE "CENTER OF GRAVITY" TEST**

The trial court dismissed Stoneridge's G.L. c. 93A claim on jurisdictional grounds, without reaching the merits of the claim, based upon its determination that the actions Stoneridge complained of did not occur "primarily and substantially" in Massachusetts. App. 40 (citing G.L. c. 93A, § 11). Purporting to apply the jurisdictional test recently established by the SJC in *Kuwaiti Danish Computer Co. v. Digital Equipment Corp.*, 438 Mass. 459 (2003), the court ruled that the "center of gravity" of the circumstances giving rise to Stoneridge's 93A claim occurred at Teleflex's Michigan headquarters, not at Stoneridge's Massachusetts facility. App. 39-40. This was reversible error, as the judge improperly focused on the place of the wrongdoer's actions, and placed little to no weight on the abundant Massachusetts-based occurrences which also gave rise to Stoneridge's 93A claim.

The court's ruling that Michigan, rather than Massachusetts, was the locus of the circumstances giving rise to Stoneridge's c. 93A claim "presents a question of law for plenary review." *Auto Shine Car*

Wash Systems, Inc. v. Nice 'N Clean Car Wash, Inc., 58 Mass.App.Ct. 685, 688 (2003). Stoneridge challenges not the fact-finding per se, but the *de facto* use of a mechanistic "site of conduct" test, that is fundamentally at odds with *Kuwaiti* analysis. That analysis focuses on the "context of the entire [93A] § 11 claim" and "whether the center of gravity of the circumstances that give rise to the claim is primarily and substantially within the Commonwealth." *Kuwaiti*, 438 Mass. at 473. That analysis also "takes into account the purpose of chapter 93A to a greater degree than a test that systematically identifies and applies a particular set of factors to every case." *RGJ Associates, Inc. v. Stainsafe, Inc.*, 338 F.Supp.2d 215, 233 (D.Mass. 2004).

As the Appeals Court recently observed, this analysis "would include, but not be limited to, looking at the place of conduct and the 'situs of loss.'" *Auto Shine*, 58 Mass.App.Ct. at 689 (citing *Kuwaiti* at 472 n.13); see also *RGJ Associates* at 234 (noting that the *Kuwaiti* analysis "does not reject applying such factors and assessing the importance or impact of a particular factor if appropriate under the facts and circumstances of a case").

Measured by these standards, the trial court's determination that the "center of gravity" of circumstances giving rise to Stoneridge's claim occurred in Michigan is clearly based upon an incorrect application of the appropriate standard. The judge correctly noted that certain actions of Teleflex (particularly with respect to the issue of Ford approval and Teleflex's interactions with Stoneridge's competitor, Daewoo) occurred in Michigan. App. 33-34. However, the judge placed an inordinate emphasis on these Michigan-based actions, and improperly allowed them to eclipse the Massachusetts-based occurrences which constitute a central part of Stoneridge's 93A claim.

The court's error was undoubtedly promoted by Stoneridge's selection of facts in its post-trial 93A submission to the court which made no effort to address factors other than Teleflex's wrongful conduct. However, this was due to Stoneridge's understanding that Teleflex did not contest jurisdiction since it had not asserted it as an affirmative defense. App. 2823. The court subsequently determined that there had not been a waiver of the defense and then proceeded to rule on

the merits of the claim, including the jurisdictional issue, without affording the plaintiff an opportunity to submit proposed findings and argument to address the center of gravity factors other than the conduct of the defendant. App. 35-37.

The essence of Stoneridge's 93A claim is that Teleflex failed to comply with the requirements of the parties' Letter of Intent – the contract that the jury found had been violated by Teleflex. App. 2806. Thus, while the majority (though not all) of Teleflex's wrongful actions took place in Michigan, the effect upon Stoneridge took place almost exclusively within Massachusetts, which was where all its development activities took place and where its financial loss was suffered.

For example, it is highly significant, as the judge found, that Stoneridge "continued its engineering work" in Massachusetts in the fall of 2001 even after the "target date" established in the Letter of Intent had passed. App. 32, 24. Teleflex's urging of Stoneridge to continue its actuator development efforts was directed at Stoneridge in Massachusetts, see *RGJ Associates* at 237 ("a number of the deceptive and misleading communications were made to

Massachusetts. [Plaintiff] received and acted upon the misconduct in Massachusetts"), and was plainly unfair and deceptive, given Teleflex's prior decision to substitute the Daewoo motor in the Ford platforms. App. 32.

As noted above, the location of performance and the place of injury may properly be considered in the *Kuwaiti* analysis. See *RGJ Associates* at 237 ("The manufacturing of products in [plaintiff's] product line . . . took place entirely in Massachusetts"); *Auto Shine* at 689 ("result [of defendant's unlawful conduct] for both plaintiffs was a loss of business within the Commonwealth").

Assessing these facts in the context of the entire 93A claim, as instructed by *Kuwaiti*, it is apparent that the trial court attributed insufficient weight to the Massachusetts-based occurrences. Chapter 93A's purpose of encouraging more equitable marketplace behavior is ill-served by allowing Teleflex to avoid liability by overemphasizing its Michigan-based instances of misconduct. See *id.* at 473 (analysis should not be based on test that shifts focus "away from the purpose and scope of 93A"). The trial judge's approach – so heavily weighted to the

site of the offensive conduct – would make it extremely difficult, if not impossible, for a Massachusetts plaintiff to bring the unethical conduct of an out-of-state defendant within the sweep of Chapter 93A. That result can not be squared with the rationale of *Kuwaiti*.

Accordingly, the trial court's dismissal of Stoneridge's 93A claim on jurisdictional grounds should be reversed, and the matter remanded for a determination of Stoneridge's claim on its merits, consistent with the holding of *Kuwaiti*.

CONCLUSION

For the reasons stated above, Stoneridge respectfully asks this Court:

C. To affirm the judgment in its favor on Count II for \$2 million, with interest to date from the date of filing; and

D. To reverse the judgment on Count V, and remand the matter to the trial court for re-determination of the 93A claim under a proper application of the "center of gravity" test, and (if the Superior Court finds the "center of gravity" of the circumstances to be within the Commonwealth) for a decision on the merits of plaintiff's 93A claim.

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