IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

SRC SALES, INC.
Plaintiff,
v.

BLUE STAR CLOTHING CO., INC.,
JACK EZON, and
SION BETESH,
Defendants,
and

J.P. MORGAN CHASE BANK, N.A.,
Trustee-Process Defendant.

BLUE STAR CLOTHING CO., INC.,
Counterclaim-Plaintiff,
v.

SRC SALES, INC.,
Counterclaim-Defendant,
and
RAY WYSOCKI, JR.,
Third-Party Claim Defendant.

Case No. 11-cv-10329

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

I. SRC May Not Unilaterally Amend its Complaint to Avoid Dismissal.

SRC does not contest the fact that the "oral agreement" on which it explicitly bases its entire complaint is void and unenforceable under the Massachusetts Statute of Frauds. Instead, SRC instead radically changes the basis for its claims to allege that the "oral agreement" was actually a written agreement. SRC ignores the facts alleged in its Complaint and focuses instead on its characterizations of statements made in other documents that are neither incorporated by reference nor even referred to in its Complaint. However, in deciding whether a complaint fails to state a claim for relief, the Court "must limit its focus to the allegations of the complaint." *Orria-Medina v. Metro. Bus Auth.*, 565 F. Supp. 2d 285, 309 (D. Puerto Rico 2007) (citing *Litton Indus., Inc. v. Colon,* 587 F.2d 70, 74 (1st Cir.1978)). The complaint must set forth sufficient factual allegations to state a claim under some viable legal theory. *Vergato v. Piantedosi Baking Co.*, 1996 WL 208478, at *6 n.6 (D. Mass. Apr. 3, 1996).[1]

SRC's Complaint alleges that, after the admitted expiration of the written Representation Agreement, the parties allegedly reached an "oral agreement" by which SRC would continue acting as a sales broker for Blue Star's products under the "same commission structure that existed under the [written] Representation Agreement – three percent (3%) commission."

[1] In ruling on a motion to dismiss or for judgment on the pleadings, the Court may consider documents that are "integral to or explicitly relied upon in the complaint, even though not attached to the complaint, without converting the motion into one for summary judgment." *Clorox Co. P.R. v. Proctor & Gamble Commercial Co.*, 228 F.3d 24, 32 (1st Cir. 2000). SRC's focus on exhibits to Blue Star's Counterclaims that are neither integral to nor explicitly relied upon in SRC's Complaint is, therefore, misplaced. Accordingly, the Court need not consider Exhibits 3, 4, and 5 to SRC's opposition brief, which are Exhibits C, E and G to Blue Star's Counterclaims.

For the same reason, SRC may not rely on factual allegations in Blue Star's Counterclaims to state a claim for relief, and the Court should disregard the entirety of Section II.C of SRC's Opposition brief (at p. 13) and any argumentation based thereon. SRC may not escape its obligations to state a claim for relief by pointing to Blue Star's counterclaims asserted only in response to SRC's allegations.

(Complaint ¶ 9.) Nowhere does SRC allege that this "oral agreement" was reduced to writing. In its Opposition brief, SRC essentially admits that this "oral agreement" is barred by the Statute of Frauds but argues for the first time that the "oral agreement" was actually sufficiently reduced to writing to satisfy the Statute of Frauds.

SRC is the master of its own complaint and it was fully capable of asserting an alleged written agreement if it had actually believed that there were one. Its sudden contention, that what it repeatedly emphasized was an "oral agreement" actually was not, is a transparent effort to avoid dismissal and an improper *de facto* unilateral amendment of its complaint in violation of Fed. R. Civ. P. 15.[2] This is an inappropriate effort to sidestep Blue Star's motion:

> we will not entertain any attempts to amend the complaint by adding an underdeveloped claim in the response to a motion to dismiss.

Nieves-Garay v. P.R. Police Dep't, 2011 WL 2518801, at *3 n.3 (D. P.R. June 23, 2011) (citing *Rodriguez v. Doral Mort. Corp.*, 57 F.3d 1168, 1171 (1st Cir.1995). *See also Ruiz Rivera v. Pfizer Pharm., LLC*, 521 F.3d 76, 85 (1st Cir. 2008) ("Faced with a well-reasoned and convincing motion for summary judgment on her ADA claim, however, Ruiz Rivera shifted legal theories and sought to re-characterize her Complaint in a way that might parry Pfizer's blow. It simply will not do for a plaintiff to fail to plead with adequate specificity facts to support a […] claim, all-the-while hoping to play that card if her initial hand is a dud."). The

[2] We note that Counts II (breach of implied covenant), IV (promissory estoppel) and V (*quantum meruit*) must be dismissed even under SRC's new theory of its case because the legal premise of each is a "contract implied in fact or in law" that is explicitly barred by the Statute of Frauds. *See* cases cited at page 8 of Blue Star's opening brief.

Court should therefore ignore those allegations and decide Blue Star's motion on the basis of the Complaint that SRC actually filed.[3]

II. The Statute of Frauds Precludes SRC's Attempt to Piece Together a Sufficient Writing.

SRC argues that in the absence of a written agreement, various writings may be cobbled together in order to satisfy the Statute of Frauds. This approach is barred by the Statute of Frauds applicable here.

The general statute of frauds provides in part that an agreement not to be performed within one year is unenforceable, unless "the promise, contract or agreement upon which such action is brought, *or some memorandum or note thereof*, is in writing and signed by the party to be charged therewith…." M.G.L. c. 259 § 1 (emphasis added). By contrast, the Statute of Frauds applicable to broker commission agreements is far more restrictive and requires that the agreement *itself* be in writing:

> Any agreement to pay compensation for service as a broker or finder …, shall be void and unenforceable unless *such agreement is in writing*, signed by the party to be charged therewith….

M.G.L. c. 259 § 7 (emphasis added). Thus, although Section 1 explicitly permits the writing requirement to be satisfied by reference to other documents that establish the terms of the agreement, Section 7 precludes such reliance.

If this case were governed by Section 1, SRC's attempt to piece together a writing sufficient to satisfy that statute of frauds might have some legal basis (though, as explained below, the attempt would fail on the merits). Here, however, Section 7 explicitly requires that the *agreement itself* be in writing, and the scattered, ambiguous, and incomplete emails upon

[3] To the extent that SRC seeks leave to amend its Complaint, the Court should deny leave as futile. As described in detail below, the Statute of Frauds does not permit SRC's attempt to piece together a written agreement from various documents, and even if it did, the documents upon which SRC relies are insufficient as a matter of law to satisfy the writing requirement.

which SRC relies are insufficient as a matter of law under Section 7. *See SAR Group Ltd. v. E.A. Dion, Inc.*, 79 Mass. App. Ct. 1123 (table), 2011 WL 2201063 at *2, n.3 (*sua sponte* raising question whether different statutory language in Section 7 imposes stricter writing requirement than Section 1, but noting that defendant had not raised, and therefore had waived, issue). Notably, the cases upon which SRC relies in support of its position that the alleged "oral agreement" may be shown by reference to scattered writings are, with one exception, cases arising under Section 1 rather than Section 7. *See* SRC Opp. Br. at 6-7. The exception is *SAR Group*, in which the court raised the issue on its own but did not address it.

The Legislature is "presumed to be aware of existing statutes when it amends a statute or enacts a new one," *Commonwealth v. Russ R.*, 433 Mass. 515, 520, 744 N.E.2d 39, 43 (2001), and the decision to adopt different statutory language must be assumed to have been deliberate. *Cf. Gen. Elec. Co. v. Dep't of Envtl. Prot.*, 429 Mass. 798, 804, 711 N.E.2d 589, 594 (1999) ("If the language of a statute differs in material respects from a previously enacted analogous Federal statute which the Legislature appears to have considered, a decision to reject the legal standards embodied or implicit in the language of the Federal statute may be inferred."). The language of the statute is the "primary source of insight into the intent of the Legislature." *International Fid. Ins. Co. v. Wilson*, 387 Mass. 841, 853 (1983). A court may not add words to a statute that the Legislature did not use, *Gen. Elec.*, 429 Mass. at 803, and the language must be given its plain meaning unless it would achieve an illogical result. *Sullivan v. Brookline*, 435 Mass. 353, 360 (2001). Where the language of the statute is clear and unambiguous, it is conclusive as to Legislature's intent. *Pyle v. School Comn. of So. Hadley*, 423 Mass. 283, 285 (1996).

There is little room for dispute that the different language used in Sections 1 and 7 reflects the Legislature's deliberate choice to impose a stricter writing requirement on broker

commission agreements than otherwise applicable under the general statute of frauds. Section 7 explicitly bars reliance on contracts implied in fact or in law, such as promissory estoppel and *quantum meruit*, that are commonly accepted bases for relief in other statute of limitations contexts. The Legislature's choice to bar enforcement of broker commission agreements unless "such agreement is in writing" similarly contrasts with the general statute of frauds' acceptance that an agreement may be sufficiently reflected in other "memoranda or notes." Especially considering the stark differences between the two statutes, there is no justification for deviating from the established rules of statutory construction. Nor does the plain language lead to an "illogical result." To the contrary, Section 7 establishes a bright-line rule intended to address the problem the Legislature identified by ensuring that no unwritten broker commission agreement will be enforced. Requiring that "such agreement" be in writing carries out that goal, while deeming other things to be "sufficient" writings undermines the Legislative purpose.

Importantly, the Section 7 Statute of Frauds is specific to the sales broker industry in which SRC operates and SRC is properly held to know the legal environment that regulates its chosen business. This is quite unlike the general statute of frauds reflected in Section 1, which applies to any contract not to be performed within one year. In the absence of the "escape clause" provided by the "or some memorandum or note thereof" provision of Section 1, many otherwise enforceable contracts would unwittingly be rendered void without regard to whether the parties had any reason to be aware of the statute of frauds or the technicalities governing whether a contract will be performed within one year. Such a result would undermine the validity of contracts and leave unsuspecting consumers vulnerable to sharp practices by those with more legal knowledge. No such concerns exist in the sales brokerage industry, where those engaged in the activity are sophisticated businesses reasonably held to the legal requirements

applicable to that industry. To the contrary, permitting other writings to overcome the requirement that "such agreement" be in writing would eliminate the certainty provided by the plain language and undermine the Legislature's solution to the problem of oral agreements.

Accordingly, SRC cannot overcome Blue Star's motion for judgment on the pleadings by reference to writings that it contends are "sufficient" to satisfy the statute of frauds because the applicable statute requires that the agreement itself be in writing, which is admittedly not the case here. The Court therefore need not consider SRC's arguments further and should enter judgment in favor of Blue Star on SRC's Complaint for failure to state a claim for relief.

III. The Documents Upon Which SRC Relies Are Insufficient as a Matter of Law to Satisfy the Statute of Frauds.

Even if Section 7 did not require that "such agreement [be] in writing," the documents upon which SRC relies are insufficient as a matter of law to satisfy the Statute of Frauds. Where the agreement itself is not written but the statute permits a "memorandum or note" to serve as the writing, the "essential elements of the contract must be in writing to meet the requirements of the statute." *SAR Group*, 2011 WL 2201063 at *2 (citing *Schwanbeck v. Federal–Mogul Corp .*, 412 Mass. 703, 710 (1992)). Unless the writing(s), considered alone, "expresses the essential terms with sufficient certainty to constitute an enforceable contract, it fails to meet the demands of the statute, … [and] it follows that recovery may not be predicated upon parol proof of material terms omitted from the written memorandum, even though the oral understanding is entirely consistent with, and in no way tends to vary or contradict, the written instrument." *Simon v. Simon*, 35 Mass. App. Ct. 705, 711, 625 N.E.2d 564 (1994). The documents upon which SRC relies fall far short of the level that could constitute a "sufficient" writing.

Moreover, although it is possible that emails may, in certain circumstances, establish a "sufficient" writing, the informal nature of emails mandates that careful consideration in using

them to satisfy the statute of frauds.[4] The informality and rapidity of email communication, though a strength in some contexts,

> is one of its chief drawbacks, when the guarding purpose of the statute of frauds must be served. It is far from obvious that average parties launching e-mails to each other appreciate that their quickly composed electronic missives are contractual in nature, and will constitute, when assembled into one long "thread" after the fact, a memorandum of a binding and enforceable agreement. In many instances, the e-mails reveal that the parties are really just "talking" with the help of the internet, and not sitting down across a virtual table to electronically "write up" a memorandum of any contractual significance. … But what may be lacking in many e-mails, and in those at issue in this case, is any sense that when Costa sent his messages to Singer, the manner of communication gave him any pause, any appreciation that he was memorializing anything of any legal significance.

Singer, 2003 WL 23641985 at *6. The emails here manifestly fall into the informal "conversation" category rather than establishing a binding legal document.

According to SRC, the April 25, 2010 email from Jack Ezon to Ray Wysocki "acknowledged the existence of the agreement" and "that SRC would be paid a three (3%) percent commission on its accounts." (SRC Opp. at 7.) In fact, the April 25, 2010 email string establishes precisely the opposite and shows that, six months after the acknowledged expiration of the written Representation Agreement, the parties had not reached any agreement on any of the essential terms of an agreement. In fact, SRC has apparently deliberately omitted the

[4] As at least one court has noted, the Uniform Electronic Transactions Act, M.G.L. c. 110G, § 7, applies only where both parties have agreed to conduct transactions electronically, which is determined from the parties' conduct. M.G.L. c. 110G, § 5(b). *See Singer v. Adamson*, 2003 WL 23641985 at *6 n.12 (Mass. Land Ct. 2003). Here, the parties' prior conduct indicates that any agreement would be memorialized in a formal writing, as they had done with the prior written Representation Agreement. There is no evidence that the parties agreed to memorialize a new agreement in the form of various email exchanges rather than in a formal document. Moreover, the Uniform Electronic Transactions Act explicitly provides that any such transaction will be subject to other applicable substantive law, including the statute of frauds, and certainly does not establish that emails automatically satisfy the writing requirement. *Id.*

remainder of the April 25 email string that it attached as Exhibit 3, but which is completely reproduced as Exhibit C to Blue Star's counterclaims. The complete email string shows that the parties were actively discussing the terms of any potential agreement. In an earlier email on April 25, Mr. Wysocki listed several topics to be discussed, including: "What accts will we have?" and "How much $$ will we make?" (Counterclaims Exh. C. at 4-5.) Mr. Wyosocki acknowledged that they were simply discussing whether to enter into an agreement, asking Mr. Ezon to

> Put a solid two-way-street plan on the table & we are open to discuss… Always open to listen & with give & take, find common workable ground.

(*Id.* at 5.) Mr. Ezon responded by requesting a specific proposal from SRC, noting only his absolute requirement of exclusivity. (*Id.* at 3-4)

In response, Mr. Wysocki suggested a significant expansion beyond the six accounts that were included in the prior written Representation Agreement (*see* SRC Opp. Exh. 1 Exhibit A "Account/Department List"). SRC's proposed list of accounts included four of the six that had been covered by the prior written Representation Agreement (CVS, XTS [Christmas Tree Shops], BJ's, and Menards), plus an additional eight accounts (BBB, SAMs, Costco, Rite Aid, Shopko, Wal Mart, Ocean State, and Variety Wholesale). *See* Counterclaims Exh. C at 2-3. There was no subsequent agreement on the scope of the accounts to be included.

Critically, the April 25 emails conclusively show that the parties had not even agreed on the commission rate if they were to reach an agreement on the other matters. Under the expired written agreement, Blue Star paid SRC a 3% commission. However, in the very April 25 email that SRC contends establishes that Blue Star had agreed to a 3% commission, Mr. Wysocki *rejected* that rate and instead demanded 5%:

> 4. We need more than 3% / your call./ We can always have sliding scale for 'new business' once we agree on 'base per centage' So, what can you live with as base line?
>
> ***
>
> Jack / consider 5% as base line commission.

(Counterclaims Exh. 3 at 2-3.) In response, Mr. Ezon emphasized that "we are not on the same page." (*Id.* at 1.) Although Mr. Ezon noted that "all the accounts are open if you bring business," he expressly rejected SRC's demand for a 5% commission:

> On certain items and at some times we may have higher margins to pay more, but 3% is what we can pay now based on the gross margins we have made with your po's to date. So if you are going to insist on a higher rate, profits must be much higher. And yet my margins are shrinking.....

(*Id.*) Mr. Ezon concluded by asking whether SRC wished to reach an agreement with Blue Star: "So we want you, do you want us??? You can't marry 2 sisters." (*Id.*)

The parties continued to discuss a potential business arrangement throughout the Spring of 2010, with Blue Star continuing to insist on exclusivity and SRC continuing to reject this requirement. On May 18, 2010, Mr. Ezon again reiterated that Blue Star required exclusivity and asked SRC to confirm this agreement in writing.[5] (SRC Opp. Exh. 4 at 3-4, Counterclaim Exh. E.) When Mr. Wysocki asked "what are you afraid of?" Mr. Ezon was quite explicit:

> I am not sharing a rep with them.
>
> Decide. I will not make the mistake again of sharing an appointment or a rep.
>
> Think till monday and give me your firm decision. Either way we will be friends.

(*Id.* at 3.) Rather than accept the terms on which Blue Star would agree to do business, Mr. Wyosocki engaged in a personal rant. (*Id.* at 2.) Mr. Ezon again responded that exclusivity was

[5] To be clear, the references to "2011" are to the 2011 product line year, for which sales would be made in earnest through the remainder of 2010. Thus, the 2010 product line year was covered within the scope of the written Representation Agreement that expired in late 2009.

an absolute requirement to a business arrangement. Contrary to SRC's characterization (SRC Opp. at 7), Mr. Ezon's statement "We use you exclusively with your accounts" certainly did not "acknowledge" the existence of an agreement but rather emphasized the *absence* of an agreement, as the very next sentence shows: "You must pick if you want to use us exclusively with them as well on our lines." (*Id.*) Mr. Ezon emphasized that SRC's agreement to represent Blue Star's lines exclusively was a threshold issue without which there could be no agreement:

> You know this is simple business barrier to entry.... Not allowing a rep to go to rite aid or cvs and show my line and a competing line soon thereafter. So either we are together for the next 10 years (the last 4 were very good- thank you) or we are not.

(*Id.*)

As for the supposed "resignation letter and acceptance," the June 18, 2010 email from Mr. Wysocki does nothing more than acknowledge that the parties were at an impasse in their discussions. Accordingly, Mr. Wysocki advised that the parties would go their separate ways "based on differences of opinion." (SRC Opp. Exh. 5 at 2-3, Counterclaims Exh. G.) Nothing in this email, or in Mr. Ezon's responsive email of June 28, 2010, acknowledges the existence of an actual brokerage representation agreement rather than of ultimately fruitless negotiations toward such an agreement. Most importantly, there is nothing in either the June 18 or June 28 email that sets out a single term of the supposed oral agreement such that those emails could possibly rise to the level of a "sufficient" writing. Among other things, neither email confirms the existence of any agreement as to the accounts that were to have been included in any agreement, or the commission structure that would apply. SRC has presented no evidence that the parties ever agreed to a commission rate or that they even discussed the matter further after SRC explicitly rejected the prior 3% rate and demanded 5% and Blue Star expressly rejected this demand.

Nor does Check 3239 contain the terms of the alleged oral agreement. To begin with, the check represents commissions at the previously-agreed 3% commission rate under the expired written Representation Agreement, for sales for the 2010 product line year that SRC brokered in 2009 during the term of the written agreement. *See* SRC Opp. Exh. 6 (noting that check covered sales to CVS and Christmas Tree Shops "for 2010"). SRC is fully aware of which sales this check covered, and it has provided no evidence at all to suggest that the check was for sales that SRC supposedly brokered during the term of the alleged "oral agreement." Nor does the check contain any reference to the commission applicable under the alleged "oral agreement" or to the accounts that were to be included within that supposed agreement. In short, the check does not come close to establishing all of the essential terms of the alleged "oral agreement" such that it could be considered a "sufficient" writing. This is especially true considering the other documents, which conclusively establish that the parties never reached agreement on any of the essential terms of the supposed contract even after the check was written.

The documents upon which SRC relies are starkly different from those in the cases it cites.[6] None of the documents—considered individually or collectively—establishes any of the essential terms of the supposed agreement, whether the accounts to be included, the exclusivity requirement, or the commission rate to be applied, and the documents conclusively establish that

[6] *See Cousbelis v. Alexander*, 315 Mass. 729 (1944) (Section 1 statute of frauds; writing consisted of a check that identified the subject land and the agreed price per foot; SJC held it adequately contained the terms of the agreement); *SAR Group*, 2011 WL 2201063 (fixed written commission agreement combined with years of checks paying commissions at rate shown in written agreement); *A.B.C. Auto Parts, Inc. v. Moran*, 359 Mass. 327, 329, 268 N.E.2d 844, 846-47 (1971) (Section 1 statute of frauds; endorsed check clearly stated nature of transaction, parties, *locus*, and purchase price, and "no essential element of a contract for sale of land was omitted"); *Blackstone Realty LLC v. F.D.I.C.*, 244 F.3d 193 (1st Cir. 2001) (holding only that documents were not necessarily too ambiguous to be a "sufficient" writing under Section 1); Tzitzon Realty Co. v. Mustonen, 352 Mass. 648 (1967) (various documents clearly setting out specific land and terms of sale under Section 1).

SRC in fact *rejected* the 3% commission rate that it now claims Blue Star had agreed to pay. Moreover, the documents do not resolve the clear conflict between the prior written Representation Agreement, which provided for commissions only on sales "received, shipped, and paid for" within the term of the written agreement plus 60 days, and SRC's present claim to entitlement to commissions for sales made through September 2010, long after its supposed "resignation." The sales upon which SRC would be entitled to a commission is another essential element of the purported "oral agreement" that SRC's documents do not even address, let alone prove. Accordingly, even assuming that a "sufficient" writing could be established where the agreement itself is not in writing as required by Section 7, SRC has failed to show that a "sufficient" writing can be cobbled together here to satisfy the Statute of Frauds.[7] *See, e.g., Schwartz v. Inductotherm Indus., Inc.*, 1993 WL 818579, at *3 (Mass. Super. Ct. Nov. 30, 1993) ("The passing reference to Kaiser in plaintiff's October 17, 1986, letter, even when coupled with a business course of practice, does not constitute an enforceable contract under G.L.c. 259, § 7, which expressly requires a business brokerage commission agreement to be in writing."). *See also Donahue v. Heritage Invest. Trust*, 74 Mass. App. Ct. 1105 (Table), 2009 WL 1011064 (Mass. App. Ct. 2009) (letter that noted compensation would be negotiated was not an offer and could not be accepted by subsequent performance, as Section 7 precludes implied contracts).

CONCLUSION

For the foregoing reasons, Blue Star respectfully requests that the Court enter judgment on the pleadings in favor of Blue Star on all counts of SRC's Complaint.

[7] SRC's suggestion that it should be permitted discovery because it "expects to uncover additional documents further proving the existence of an enforceable contract," (SRC Opp. at 20) is unserious and removes any doubt that SRC's goal is to impose unwarranted litigation costs on Blue Star. SRC's speculation that Blue Star might be harboring a written agreement cannot be taken seriously. In any event, this is not a motion for summary judgment and SRC's desire to engage in a discovery fishing expedition cannot ameliorate its failure to state a claim for relief.

Dated: July 20, 2011

Respectfully submitted,

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Certificate of Service

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/s/ Mitchell J. Matorin