

RECEIVED

Aug 08 2022

SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J. DERHAM COLE, CIRCUIT COURT JUDGE
THE HONORABLE SHANNON M. PHILLIPS, MASTER-IN-EQUITY

APPELLATE CASE NO. 2022-000348
CIVIL ACTION NO. 2021-CP-42-01163

Custom Performance Engineering, Inc.,

RESPONDENT-APPELLANT,

versus

AM Industrial Group, LLC,

APPELLANT-RESPONDENT.

**INITIAL RESPONDENT'S BRIEF OF
APPELLANT-RESPONDENT AM INDUSTRIAL GROUP, LLC**

Carmen V. Ganjehsani (S.C. Bar No. 73515)
R. Wilder Harte (S.C. Bar No. 101228)
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
(803) 771-4400
cganjehsani@richardsonplowden.com
wharte@richardsonplowden.com
**ATTORNEYS FOR
APPELLANT-RESPONDENT
AM INDUSTRIAL GROUP, LLC**

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

COUNTERSTATEMENT OF ISSUE ON APPEAL..... 1

COUNTERSTATEMENT OF THE CASE..... 2

COUNTERSTATEMENT OF FACTS 3

STANDARD OF REVIEW 7

ARGUMENT..... 9

 I. The Master-In-Equity properly determined that Custom Performance was not entitled to cover damages: (1) because the Replacement Machine contained additional capabilities and features which would have provided Custom Performance with an improper windfall and was therefore not a reasonable substitute for the AMI Machine, and (2) because Custom Performance unreasonably delayed making cover.....9

CONCLUSION..... 16

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE(S)</u>
<u>Apex Mining Co. v. Chicago Copper & Chem. Co.</u> , 340 F.2d 985 (8th Cir. 1965)	10, 14
<u>Bockman Printing and Servs., Inc. v. Baldwin Gregg, Inc.</u> , 213 Ill. App. 3d 516, 572 N.E.2d 1094 (Ill. App. Ct. 1991).....	11, 14, 16
<u>Butler Contracting, Inc. v. Court Street, LLC</u> , 369 S.C. 121, 631 S.E.2d 252 (2006)	8
<u>Catawba Indian Tribe of S.C. v. South Carolina</u> , 372 S.C. 519, 642 S.E.2d 751 (2007)	8
<u>Cetkovic v. Boch, Inc.</u> , 2003 Mass. App. Div. 1 (2003).....	9, 10, 13
<u>Chicago Copper & Chem. Co. v. Apex Mining Co.</u> , 226 F. Supp. 941 (E.D. Mo. 1964).....	14
<u>Dakota Gasification Co. v. Didion</u> , No. 1:10-CV-015, 2011 U.S. Dist. LEXIS 77281 (D.N.D. July 15, 2011)	10, 14
<u>Federal Ins. Co. v. Walker</u> , 53 N.Y.2d 24, 439 N.Y.S.2d 888, 422 N.E.2d 548 (1981).....	14, 16
<u>Freitag v. Bill Swad Datsun</u> , 3 Ohio App.3d 83 (10th Dist. 1981)	9, 11
<u>Gooding v. St. Francis Xavier Hosp.</u> , 326 S.C. 248, 487 S.E.2d 596 (1996)	8
<u>Huntington Beach Union High Sch. Dist. v. Cont'l Info. Sys. Corp.</u> , 452 F. Supp. 538 (C.D. Cal. 1978)	14
<u>Huntington Beach Union High Sch. Dist. v. Cont'l Info. Sys. Corp.</u> , 621 F.2d 353 (9th Cir. 1980)	12, 15
<u>In re Lifeguard Indus., Inc.</u> , 42 B.R. 734 (Bankr. S.D. Ohio 1983).....	13, 15
<u>Irwin Indus. Tool Co. v. Worthington Cylinders Wisconsin, LLC</u> , 747 F. Supp. 2d 568 (W.D.N.C. 2010)	13

<u>Kanzmeier v. McCoppin,</u> 398 N.W.2d 826 (Iowa 1987)	11
<u>Maddux Supply Co. v. Safhi, Inc.,</u> 316 S.C. 404, 450 S.E.2d 101 (Ct. App. 1994).....	8
<u>Martella v. Woods,</u> 715 F.2d 410 (8th Cir. 1983)	11, 13
<u>Mueller v. McGill,</u> 870 S.W.2d 673 (Ct. App. Tex. 1994).....	12, 15
<u>Thorstenson v. Mobridge Iron Works Co.,</u> 87 S.D. 358, 208 N.W.2d 715 (S.D. 1973).....	12, 15
<u>Townes Assocs., Ltd. v. City of Greenville,</u> 266 S.C. 81, 221 S.E.2d 773 (1976), <i>abrogated on other grounds by In re Estate of Kay</i> , 423 S.C. 476, 816 S.E.2d 542 (2018)	7
<u>Universal Builders Corp. v. United Methodist Convalescent Homes of Conn., Inc.,</u> 7 Conn. App. 318, 508 A.2d 819 (App. Ct. Conn. 1986).....	12, 15

STATUTES

S.C. CODE ANN. § 36-2-712.....	9, 10, 14
--------------------------------	-----------

RULES

Rule 67, SCRCF.....	3
Rule 208(b)(1)(C), SCACR	3

COUNTERSTATEMENT OF ISSUE ON APPEAL

- I. The Master-In-Equity properly determined that Custom Performance was not entitled to cover damages: (1) because the Replacement Machine contained additional capabilities and features which would have provided Custom Performance with an improper windfall and was therefore not a reasonable substitute for the AMI Machine, and (2) because Custom Performance unreasonably delayed making cover.**

COUNTERSTATEMENT OF THE CASE

This action arises out of a dispute regarding Appellant-Respondent AM Industrial Group, LLC's ("AMI") delivery of a refurbished bender machine ("AMI Machine") to Respondent-Appellant Custom Performance Engineering, Inc. ("Custom Performance").

On April 13, 2021, Custom Performance filed a complaint against AMI in the Court of Common Pleas for Spartanburg County for breach of contract, breach of express warranty, and breach of implied warranty of merchantability related to a dispute about the purchase and performance of the machine AMI sold to Custom Performance ("Complaint"). [R.pp. ____; Compl., ¶¶ 19-34.] Custom Performance served AMI with the Summons and Complaint on June 9, 2021. [R.pp. ____; July 1, 2021 Affidavit of Service.] With an agreed extension of time, the deadline to respond to the Complaint was August 9, 2021. [R.p. ____; Sept. 28, 2021 Transcr., 7:12-13.] Unfortunately, after failures in communication by both AMI's insurer and legal counsel rendered AMI unable to secure timely legal services, AMI failed to timely answer or otherwise respond to the Complaint. [R.pp. ____; ____; Sept. 28, 2021 Transcr., 3:22-4:3; Motion to Set Aside, pp. 2-3.] Three days after the deadline, Custom Performance filed a Motion for Entry of Default on August 12, 2021. Six days later, on August 18, 2021, the Spartanburg County Clerk of Court granted the Motion for Entry of Default and entered default against AMI. [R.pp. ____; ____; Motion for Default; Order of Default.]

After becoming aware of the entry of default, AMI filed a Motion to Set Aside Entry of Default on September 8, 2021. [R.pp. ____; Motion to Set Aside.] On September 28, 2021, after a hearing before The Honorable J. Derham Cole, the Motion to Set Aside Entry of Default was denied, and the matter was referred to the Master-In-Equity for a hearing on damages. [R.pp. ____; Sept. 28, 2021 Order on Motion to Set Aside, p. 2.]

A hearing on damages was held on December 20, 2021 before The Honorable Shannon M. Phillips, Master-In-Equity ("Damages Hearing"). [R.p. ____; Damages Transcr., 1.] The Master-In-Equity issued an Order dated February 21, 2022 awarding \$398,667.80 in damages to Custom Performance but declining to award the difference in the cost of the AMI Machine and the cost of the machine Custom Performance later purchased as a purported replacement ("Replacement Machine"). [R.p. ____; Damages Order, p. 3.] During the Damages Hearing, the Master-In-Equity held that "I am not allowing the difference in the price of the [R]eplacement [M]achine. It appears that it is a machine that performs additional functions." [R.p. ____; Damages Transcr., 34:9-10.]

AMI timely filed and served its Notice of Appeal on March 21, 2022. [R.pp. ____; Notice of Appeal.] Custom Performance filed and served its Notice of Cross-Appeal on March 25, 2022. [R.pp. ____; Cross-Appeal.] Pursuant to Rule 67 of the South Carolina Rules of Civil Procedure, AMI deposited \$398,667.80 with the Clerk of Court for Spartanburg County on April 26, 2022. [R.pp. ____; Deposit of Funds.]

COUNTERSTATEMENT¹ OF FACTS

In the Complaint, Custom Performance alleged that in July and August of 2020 the parties contracted for AMI to provide the AMI Machine in "refurbished" condition. [R.pp. ____; ____; Compl., ¶ 7; Damages Hearing, Defendant's Exhibit 1 (identifying the AMI Machine as "refurbished").] As part of that transaction, Custom Performance agreed to pay \$112,000.00 for the AMI Machine and to also provide AMI with a new seam welder valued at \$20,000.00 in order to obtain an invoice for \$132,000.00. [R.pp. ____; ____; Damages Transcr., 13:13-14:20; Damages Hearing, Defendant's Exhibit 1.] The invoices AMI issued for the AMI Machine contained terms

¹ The Appellant's Brief of Respondent-Appellant does not contain a Statement of Facts. Contrary to Rule 208(b)(1)(C), SCACR, Custom Performance's "Statement of the Case" includes contested matters relevant to this appeal. Accordingly, AMI responds to all contested matters asserted in the Appellant's Brief of Respondent-Appellant via this "Counterstatement of Facts."

which provided in part that "this sale of these items is on an as-is and with all faults basis, without any representation or warranties, expressed or implied, of any kind including safety, condition, or quality." [R.pp. ____; ____; Damages Hearing, Plaintiff's Exhibit 1 and Defendant's Exhibit 1.]

It is undisputed that AMI did in fact deliver the AMI Machine to Custom Performance, and Custom Performance did provide AMI with the seam welder. [R.p. ____; Damages Transcr., 14:8-12.] The Complaint alleges that the AMI Machine was delivered to Custom Performance in September 2020, that Custom Performance "immediately" informed AMI that the AMI Machine was not performing as warranted (despite the invoice terms that the AMI Machine was sold "as is" and without any warranties), and that Custom Performance later rejected the AMI Machine in January or February of 2021. [R.pp. ____; Compl., ¶¶ 11-12, 16-17, 23.]

Custom Performance characterizes the process of securing the AMI Machine as the result of a "diligent" "nationwide search" that included "comparison with other available machines," but there are no allegations in the Complaint regarding the scope of Custom Performance's process for sourcing the AMI Machine. [Appellant's Brief of Respondent-Appellant Custom Performance, p. 1.] At the Damages Hearing, Joseph Adams, Custom Performance's co-owner and Chief Financial Officer, testified only that "[p]rior to purchasing from AM Industrial [Custom Performance was] looking at a competitor . . . out of California" but that during that time Custom Performance was still "determining which way we were going to go." [R.pp. ____; Damages Transcr., 18:23-19:1.]

Custom Performance contends that after rejecting the AMI Machine it "immediately undertook efforts to find a replacement machine," which included inquiring with a third-party inspector about purchasing another bender machine and "review[ing] the findings of its earlier search for a workable bender machine." [Appellant's Brief of Respondent-Appellant Custom Performance, p. 2.] The record does not support such contentions. Mr. Adams testified that he

could not remember when he first contacted YLM, the supplier of the Replacement Machine. [R.p. ____; Damages Transcr., 18:10-15.] Apart from YLM, the only other entity Mr. Adams testified as having queried was the third-party inspection company AMI arranged to send to South Carolina, and even that testimony failed to explain the scope of Custom Performance's actual replacement efforts:

Q – Did you contact anyone else besides [YLM] looking for a replacement to the [AMI Machine]?

A – Actually, [AMI] contacted a company to come inspect the machine, who also sells machines and we were trying to do the best we could to alleviate having to be here today. . . he actually came to our facility and actually inspected the machine and, you know, came to the same conclusion that it was refurbished incorrectly. So, yes, we did. And at that time I reached out and said do you know how to fix this and you want to fix this and we can figure out how to get into another bender and we can avoid all this dispute, be more than happy to. Yes. So, we did. The short answer is yes, we were in contact with them. I believe he is out of Tennessee or Kentucky.

[R.pp. ____; Damages Transcr., 17:19-18:5.] Mr. Adams testified that he was also unable to recall when Custom Performance had contact with the third-party inspection company. [R.p. ____; Damages Transcr., 18:8-9.] When asked whether Custom Performance had contact with "any other company, party, individual about purchasing a replacement machine," Mr. Adams referred only to the single previous interaction Custom Performance had prior to purchasing the AMI Machine but made no mention of "review[ing] the findings of its earlier search" as claimed in Custom Performance's Appellant's Brief. [Appellant's Brief of Respondent-Appellant Custom Performance, p. 2; R.pp. ____; Damages Transcr., 18:20-19:1.]

Custom Performance signed a financing agreement to secure the Replacement Machine on November 1, 2021 ("Financing Agreement"), fourteen months after the Complaint alleges Custom Performance first identified deficiencies with the AMI Machine. [R.pp. ____; ____; Damages

Hearing, Plaintiff's Exhibit 2 (Financing Agreement for Replacement Machine signed November 1, 2021); Compl., ¶¶ 11-12 (Custom Performance notified AMI that the AMI Machine was not performing as warranted "[i]mmediately following delivery" in September 2020).] Custom Performance provided no testimony during the Damages Hearing to explain its substantial delay in securing the Replacement Machine.

The testimony elicited during AMI's cross-examination at the Damages Hearing also established that the Replacement Machine provided significant additional capabilities and features than those provided by the AMI Machine. For example, the Replacement Machine has a 90-millimeter diameter capacity whereas the AMI Machine has only a 76-millimeter capacity. [R. p. ____; Damages Transcr., 19:17-20:3.] Moreover, while the AMI Machine provides only a single stack, the Replacement Machine is a multi-stack machine, meaning that it has the capacity to bend multiple objects simultaneously, thereby ensuring identical bends, faster output, and less material handling. [R.p. ____; Damages Transcr., 20:4-7.] When asked directly whether there are "things that the [Replacement Machine] does that the [AMI Machine] was never going to do," Mr. Adams answered:

Yes, sir, but it doesn't --- It has still got to bend 3 inch pipe, stainless, 18 gauge, **so whether we did better in revenue and castings and decided to up our ante and be more automated and more efficient**, that's you know. I don't see what you're getting at, sir. It's still --- It was a great refurbished machine for a good value.

[R.p. ____; Damages Transcr., 19:11-16 (emphasis added).] Mr. Adams also testified about the Replacement Machine that: "**It has the capacity to do a lot of other things and a lot of things change in a year and a half[.]**" [R.p. ____; Damages Transcr., 20:14-15 (emphasis added).] Further, Mr. Adams' testimony that Custom Performance was running the Replacement Machine in "a single stack mode right now before we triple stack it" indicated that Custom Performance

planned to soon use the additional functions of the Replacement Machine, contrary to Custom Performance's claims in its Appellant's Brief that it was only going to utilize the single stack capacity on the Replacement Machine. [R.p. ___; Damages Transcr., 20:12; Appellant's Brief of Respondent-Appellant Custom Performance, pp. 2, 8.]

During the Damages Hearing, the Master-In-Equity held that "I am not allowing the difference in the price of the [R]eplacement [M]achine" because "[i]t appears that it is a machine that performs additional functions." [R.p. ____; Damages Transcr., 34:9-10.] On February 21, 2022, the lower court granted the proposed order filed by Custom Performance that same day which provided in pertinent part that: "During cross-examination, Custom Performance's witness testified that the Replacement Machine is not identical to the Machine and contains more features not available on the Machine. Because of this, the court declines to award the cost of 'cover' or the tooling and installation costs for the Replacement Machine." [R.p. ____; Damages Order, p. 3.] Custom Performance now appeals the Master-In-Equity's order declining to award Custom Performance cover damages for its purchase of the Replacement Machine, arguing that the Damages Order demonstrates that the Master-In-Equity failed to adequately consider "whether the substitute was commercially usable as a reasonable substitute under the circumstances." [Appellant's Brief of Respondent-Appellant Custom Performance, p. 5.]

STANDARD OF REVIEW

The proper standard of review here is for abuse of discretion. In an action at law referred to a master or a special referee for final judgment, the appellate courts will correct errors of law and will not disturb the master's or referee's factual findings unless no evidence reasonably supports these findings. Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976), *abrogated on other grounds by* In re Estate of Kay, 423 S.C. 476, 816 S.E.2d 542 (2018). "An abuse of discretion occurs when there is an error of law or a factual conclusion which

is without evidentiary support." Gooding v. St. Francis Xavier Hosp., 326 S.C. 248, 252, 487 S.E.2d 596, 598 (1996). Therefore, the appellate court may reverse the ruling of the master if the master's findings of fact are wholly unsupported by the evidence or controlled by an erroneous conception or application of the law. Maddux Supply Co. v. Safhi, Inc., 316 S.C. 404, 406, 450 S.E.2d 101, 102 (Ct. App. 1994).

Custom Performance seeks to cast the Master-In-Equity's decision awarding damages as based on "an improper statutory standard" and thus subject to *de novo* review, but the record makes clear that the Master-In-Equity properly applied S.C. CODE ANN. § 36-2-712. Unlike the statutes at issue in Catawba Indian Tribe of S.C. v. South Carolina, 372 S.C. 519, 642 S.E.2d 751 (2007) (statute governing the use of electronic gambling devices) or Butler Contracting, Inc. v. Court Street, LLC, 369 S.C. 121, 631 S.E.2d 252 (2006) (statute governing perfection of mechanic's liens), here the relevant statute is contained within the South Carolina Commercial Code and turns on an individualized and fact-determinative analysis of whether a buyer made a "good faith" "reasonable purchase" "without unreasonable delay." S.C. CODE ANN. § 36-2-712(1). There is sufficient evidence from the record to support the Master-In-Equity's judgment that Custom Performance's purchase of the Replacement Machine was not proper cover. Custom Performance's objection to the Master-In-Equity's decision, then, lies not with which standard the Master-In-Equity applied but with the way in which she applied it to the facts in this record. That decision is not subject to *de novo* review.

ARGUMENT

- I. The Master-In-Equity properly determined that Custom Performance was not entitled to cover damages: (1) because the Replacement Machine contained additional capabilities and features which would have provided Custom Performance with an improper windfall and was therefore not a reasonable substitute for the AMI Machine, and (2) because Custom Performance unreasonably delayed making cover.**

After hearing the testimony elicited during the Damages Hearing, the Master-In-Equity properly concluded that Custom Performance was not entitled to cover damages for the Replacement Machine. As set forth more fully below, the Master-In-Equity's decision to deny Custom Performance's request for cover damages was supported by the law and the evidence and should therefore be affirmed.

A buyer may only "cover" upon "making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller." S.C. CODE ANN. § 36-2-712(1). Most courts applying the cover provision of the Uniform Commercial Code have held that the buyer carries the burden of demonstrating the reasonableness of cover. Cetkovic v. Boch, Inc., 2003 Mass. App. Div. 1, 2 (2003) ("The buyer has the burden to show that the goods procured are a reasonable substitute."); Freitag v. Bill Swad Datsun, 3 Ohio App.3d 83, 84 (10th Dist. 1981) ("In order to be entitled to 'cover,' plaintiff must have established that the 1980 automobile he purchased was a reasonable substitute for the 1979 model he had ordered from defendant.").

Custom Performance relies upon an unpublished decision from North Dakota in arguing that it is the seller's burden to show that the cover was unreasonable or made in bad faith, but even Custom Performance's own caselaw explains that "[i]t is generally accepted that if the buyer

complies with the requirements of Section 2-712, U.C.C., his purchase is presumed proper[.]"²
Dakota Gasification Co. v. Didion, No. 1:10-CV-015, 2011 U.S. Dist. LEXIS 77281, at *14
(D.N.D. July 15, 2011) (emphasis added). Custom Performance did not establish before the
Master-in-Equity that its cover complied with the requirements of S.C. CODE ANN. § 36-2-712(1);
therefore, Custom Performance's cover is not presumed to be proper and there is no burden of
proof shifted to AMI. Nevertheless, the Master-In-Equity's refusal to award cover was reasonably
supported by the evidence regardless of which burden this Court applies here because Mr. Adams'
testimony at the Damages Hearing on behalf of Custom Performance failed to demonstrate the
reasonableness of the timing, nature, or scope of Custom Performance's efforts to cover while
AMI's cross-examination revealed that the Replacement Machine was an inappropriate substitute
for the AMI Machine.

A. Custom Performance May Not Seek Cover Damages to Secure the Windfall of the Replacement Machine that Provided Significantly Better Capabilities and Features.

The Master-In-Equity correctly determined that Custom Performance was not entitled to cover damages because those damages would be an improper windfall. "The Uniform Commercial Code's fundamental injunction is to render such damages to the aggrieved party as to place that party in as good a position as if the other party had performed the contract." Cetkovic v. Boch, Inc., 2003 Mass. App. Div. 1, 1 (2003) (reversing award of cover damages where plaintiff covered the loss of a 1998 Mitsubishi Diamante LS by purchasing a 2000 Nissan Maxima for \$8,400 more). Covering by purchasing replacement goods with better capabilities or features is improper because "[a] buyer may not utilize cover to put himself in a better position than he would have been in had

² Custom Performance also cites to Apex Mining Co. v. Chicago Copper & Chem. Co., 340 F.2d 985, 987 (8th Cir. 1965) for the proposition that it is the seller's burden to show that cover was unreasonable or made in bad faith, but the Apex case originated prior to Missouri's adoption of the UCC and does not apply Section 2-712.

the contract been performed." Id. at 2 (citing Martella v. Woods, 715 F.2d 410, 413 (8th Cir. 1983) (reversing award of cover damages where buyer covered by purchasing pregnant heifers capable of producing more milk which were therefore not reasonable substitutes for the heifers contemplated by the parties' contract)); see also Freitag v. Bill Swad Datsun, 3 Ohio App.3d at 84-85 (reversing award of cover damages where "[t]here was . . . a difference in the way the two automobiles were equipped, and there [was] no evidence to indicate that plaintiff was unable to purchase an automobile without the extra equipment[.]").

Courts have also held that, although they need not be identical, goods that provide merely different (not necessarily better) capabilities than those due from the seller are not proper substitutes for purposes of cover. For example, in Bockman Printing and Servs., Inc. v. Baldwin-Gregg, Inc., an Illinois Appellate Court reversed an award of cover damages where replacement machinery had different manufacturing capabilities that provided a different rate of production and accuracy and therefore different cost advantages. 213 Ill. App. 3d 516, 525, 572 N.E.2d 1094 (Ill. App. Ct. 1991) ("Under these facts, plaintiff's purchase was not a reasonable substitute or replacement[.]"). Similarly, in Kanzmeier v. McCoppin, the Iowa Supreme Court reversed an award of cover damages where the replacement cattle were lighter and "require[ed] a feeding break-in-period" and therefore could not be sold as quickly as the contracted-for-cattle. 398 N.W.2d 826, 832-33 (Iowa 1987) ("After reviewing the record we must agree with the defendant that there is not substantial evidence that the 358 cattle purchased were a reasonable substitute for the cattle promised under the contract.").

Here, AMI's cross-examination at the Damages Hearing revealed that the Replacement Machine provided Custom Performance with capabilities and features that the AMI Machine "was never going to" be able to provide. [R.p. ____; Damages Transcr., 19:11-16.] Unlike the AMI

Machine, which is a single-stack machine only capable of bending one item at a time, the Replacement Machine has the capacity to increase Custom Performance's efficiency and output by simultaneously and identically bending up to three items at once. [R.p. ___; Damages Transcr., 20:4-7.] Whether Custom Performance currently uses the Replacement Machine's three stacks is irrelevant to whether the Replacement Machine provides capabilities or features that the AMI Machine does not. Custom Performance's own testimony reflects the fact that the Replacement Machine offers Custom Performance the chance to improve revenue and to become more automated and efficient. [R.pp. ___; ___; Damages Transcr., 19:11-16 ("[W]hether we did better in revenue and castings and decided to up our ante and be more automated and efficient, that's, you know. I don't see what you're getting at, sir."); 20:14-15 ("It has the capacity to do a lot of other things and a lot of things change in a year and a half[.]").] Regardless, Custom Performance's testimony indicated that it does plan to utilize the three stack capacity of the Replacement Machine. [R.p. ___; Damages Transcr., 20:12 ("We're running in a single stack mode right now before we triple stack it.").

Tellingly, none of the cases Custom Performance relies on describe differences in the capabilities or features of cover goods as significant as the differences between the AMI Machine and the Replacement Machine. To the contrary, the bulk of the cases Custom Performance cites involve "slightly different" or "virtually identical" substitutes. Huntington Beach Union High Sch. Dist. v. Cont'l Info. Sys. Corp., 621 F.2d 353, 357 (9th Cir. 1980) (subsequent purchase of a replacement computer conformed to buyer's original bid specifications); Universal Builders Corp. v. United Methodist Convalescent Homes of Conn., Inc., 7 Conn. App. 318, 324 (App. Ct. Conn. 1986) ("slightly different" substitute trusses); Mueller v. McGill, 870 S.W.2d 673, 674-75 (Ct. App. Tex. 1994) ("virtually identical" substitute vehicle); Thorstenson v. Mobridge Iron Works

Co., 87 S.D. 358, 359-60, 208 N.W.2d 715 (S.D. 1973) (reversing directed verdict where buyer replaced a "Case 730 farm tractor" and "F-11 Farmhand loader" with a "Case 730 tractor" and "F-11 Farmhand" but seller contended the replacement was different because the loader was mounted to the tractor); Irwin Indus. Tool Co. v. Worthington Cylinders Wisconsin, LLC, 747 F. Supp. 2d 568, 579 (W.D.N.C. 2010) (no indication that replacement cylinders with different size and shape provided different capabilities or features than cylinders contemplated by the parties' contract)³; In re Lifeguard Indus., Inc., 42 B.R. 734, 738 (Bankr. S.D. Ohio 1983) (no indication that "higher-quality" replacement siding provided any additional capabilities or features).

Like the replacement cattle in Martella v. Woods, Custom Performance's purchase of the Replacement Machine allowed it to increase its capacity and efficiency and is therefore not a reasonable substitute for the AMI Machine. 715 F.2d 410 at 413. Awarding Custom Performance cover damages for the Replacement Machine would be tantamount to forcing AMI to finance a windfall for Custom Performance in direct contradiction of the notion that "[a] buyer may not utilize cover to put himself in a better position than he would have been in had the contract been performed." Cetkovic, 2003 Mass. App. Div. at 2. The Master-In-Equity provided a reasoned explanation, based on the testimony of Custom Performance's own witness, that the Replacement Machine was sufficiently different from the AMI Machine to preclude cover damages. This decision was not an abuse of discretion, and the Master-In-Equity's judgment not to award cover damages should be affirmed.

³ Plaintiff Bernzomatic's Memorandum in Opposition to Defendants' Motion for Judgment as a Matter of Law and For a New Trial (See 2010 WL 11671979), p. 20 referenced trial testimony that the replacement cylinders "do the same thing" and were "interchangeable" and contended that "Worthington did not introduce any evidence that Fat Boy cylinders were used for different functions or that they were not interchangeable[.]"

B. Custom Performance Unreasonably Delayed Making Cover.

Moreover, Custom Performance has provided no reasonable explanation for its failure to replace the AMI Machine for more than a year after discovering that the AMI Machine did not perform as warranted. Cover cannot be considered made in good faith when it is only made after an "unreasonable delay." S.C. CODE ANN. § 36-2-712(1); Federal Ins. Co. v. Walker, 53 N.Y.2d 24, 33-35, 439 N.Y.S.2d 888, 422 N.E.2d 548 (1981) (reversing award of cover damages where indemnitee delayed cover for 11 months because awarding cover would "pass on any unnecessary loss resulting from delay" to the indemnitor). In Bockman Printing and Servs., Inc. v. Baldwin Gregg, Inc., the appellate court reversed an award of cover damages in part because "we cannot say that plaintiff purchased the [replacement machines] without unreasonable delay under the statute" where buyer sought cover damages for replacement machines purchased nearly a year after the seller breached. 213 Ill. App. 3d at 525.

Indeed, none of the cases Custom Performance relies upon describe delays as significant as Custom Performance's delay here of over a year. Dakota Gasification Co. v. Didion, No. 1:10-CV-015, 2011 U.S. Dist. LEXIS 77281, at *3-4 (D.N.D. July 15, 2011) (buyer contracted for replacement "shortly thereafter" it became clear that seller could not perform, and buyer's replacement contract went into effect less than a month later); Chicago Copper & Chem. Co. v. Apex Mining Co., 226 F. Supp. 941, 941-42 (E.D. Mo. 1964) (buyer covered within 8 months of repudiation, during the same term covered by the original contract with seller)⁴; Huntington Beach Union High Sch. Dist. v. Cont'l Info. Sys. Corp., 452 F. Supp. 538, 539-40 (C.D. Cal. 1978) (school district reissued its bid for a replacement computer roughly two weeks after seller repudiated the

⁴ Chicago Copper is one of the predecessor decisions referenced in Apex Mining Co. v. Chicago Copper & Chemical Co., 340 F.2d 985 (8th Cir. 1965) which sets out the facts underlying the dispute that formed the partial basis of Apex's subsequent appeal.

contract)⁵; Universal Builders Corp. v. United Methodist Convalescent Homes of Conn., Inc., 7 Conn. App. 318, 320-21, 508 A.2d 819 (App. Ct. Conn. 1986) (buyer covered three months after initial order, within the same month that scheduling difficulties arose); Mueller v. McGill, 870 S.W.2d 673, 674-75 (Ct. App. Tex. 1994) (buyer purchased "virtually identical" model Porsche within two months of seller repudiating); Thorstenson v. Mobridge Iron Works Co., 87 S.D. 358, 359-60, 208 N.W.2d 715 (S.D. 1973) (seller repudiated in the "fall of 1968" and buyer covered in December 1968); In re Lifeguard Indus., Inc., 42 B.R. 734, 736 (Bankr. S.D. Ohio 1983) (buyer ordered replacement siding the day after seller's second batch of siding also proved defective).

Custom Performance's testimony at the Damages Hearing demonstrated Custom Performance's haphazard efforts to replace the AMI Machine. Custom Performance's witness failed to offer any reason for Custom Performance's decision to wait over a year to purchase the Replacement Machine from YLM and could not even provide the date on which Custom Performance first approached YLM. [R.p. ____; Damages Transcr., 18:10-15.] Apart from YLM, the only other diligence Custom Performance claimed to have conducted after its alleged rejection of the AMI Machine was a single conversation with the third-party inspection company AMI arranged to send to South Carolina. [R.pp. ____; Damages Transcr., 17:19-18:5.] Even as to that contact, Custom Performance was unable to provide any specifics about its efforts to find a replacement machine, testifying only that "at that time I reached out and said do you know how to fix this and you want to fix this and we can figure out how to get into another bender and we can avoid all this dispute[.]" [R.pp. ____; Damages Transcr., 17:19-18:5.] Indeed, the Financing Agreement introduced during the Damages Hearing as Plaintiff's Exhibit 2 suggests that Custom

⁵ The 1978 decision from the Central District of California is the trial court's decision which Huntington Beach Union High School District subsequently appealed in Huntington Beach Union High Sch. Dist. v. Cont'l Info. Sys. Corp., 621 F.2d 353 (9th Cir. 1980).

Performance did not take meaningful efforts to replace the AMI Machine until over a year after Custom Performance first identified issues with the AMI Machine. [R.pp. ____; ____; Damages Hearing, Plaintiff's Exhibit 2 (Financing Agreement for Replacement Machine signed November 1, 2021); Compl., ¶¶ 11-12 (Custom Performance notified AMI that the AMI Machine was not performing as warranted "[i]mmediately following delivery" in September 2020).]

As in Bockman, Custom Performance's purchase of the Replacement Machine after over a year of delay "cannot" be deemed to have been made without unreasonable delay. 213 Ill. App. 3d at 525. As noted in Walker, awarding Custom Performance the difference in price between the AMI Machine and the Replacement Machine would "pass on any unnecessary loss resulting from delay" to AMI. 53 N.Y.2d at 35. This result would be unjust under the law, and the unreasonable delay in purchasing the Replacement Machine provides a separate and independent basis for affirming the Master-In-Equity's judgment not to award cover damages.

CONCLUSION

For the reasons set forth herein, Appellant-Respondent AM Industrial Group, LLC respectfully requests this Court to affirm the Master-In-Equity's order declining to award Custom Performance cover damages for its purchase of the Replacement Machine.

Respectfully submitted,

s/ Carmen V. Ganjehsani

Carmen V. Ganjehsani (S.C. Bar No. 73515)

R. Wilder Harte (S.C. Bar No. 101228)

Richardson, Plowden & Robinson, PA

1900 Barnwell Street (29201)

Post Office Drawer 7788

Columbia, South Carolina 29202

(803) 771-4400

cganjehsani@richardsonplowden.com

wharte@richardsonplowden.com

ATTORNEYS FOR

APPELLANT-RESPONDENT

AM INDUSTRIAL GROUP, LLC

August 8, 2022.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Richardson Plowden & Robinson, P.A., for Appellant-Respondent, AM Industrial Group, LLC, do hereby certify that I have this date served the foregoing Initial Respondent's Brief, dated August 8, 2022, by personally serving the same pursuant to Section (d)(1) of the Supreme Court's Order dated May 6, 2022, on the following counsel of record using the primary email addresses listed in the Attorney Information System (if applicable):

Adam C. Bach (S.C. Bar No. 74885)
Emily R. Godwin (S.C. Bar No. 103708)
ELLER TONNENSON BACH, LLC
1306 South Church Street
Greenville, South Carolina 29605
abach@etblawfirm.com
egodwin@etblawfirm.com
**ATTORNEYS FOR RESPONDENT-APPELLANT
CUSTOM PERFORMANCE ENGINEERING, INC.**

A copy of the sent email is enclosed with this Certificate of Service.

s/ Carmen V. Ganjehsani
Carmen V. Ganjehsani
S.C. Bar No. 73515
RICHARDSON, PLOWDEN & ROBINSON, PA
Post Office Drawer 7788
Columbia, South Carolina 29202
**ATTORNEYS FOR
APPELLANT-RESPONDENT
AM INDUSTRIAL GROUP, LLC**


Date: August 8, 2022.

Carmen Ganjehsani

From: Carmen Ganjehsani
Sent: Monday, August 08, 2022 11:17 AM
To: 'abach@etblawfirm.com'; 'egodwin@etblawfirm.com'
Cc: Wilder Harte
Subject: 2022-000348 Custom Performance Eng'g v. AM Industrial Group
Attachments: 2022-00348 Custom Perf. Eng'g v. AMI (DOM).pdf; 2022-00348 Custom Perf. Eng'g v. AMI (Int Res Brief).pdf

Pursuant to the Supreme Court's Order dated May 6, 2022, please find served upon you the Initial Respondent's Brief and Designation of Matter to be Included in the Appeal on behalf of Appellant-Respondent AM Industrial Group, LLC.

Thank you,
Carmen Ganjehsani

HOME	VCARD	LOCATION
	Carmen V. Ganjehsani Shareholder Cganjehsani@RichardsonPlowden.com	Richardson Plowden & Robinson, P.A. 1900 Barnwell Street Columbia, SC 29201 Tel: 803.253.8692 Fax: 803.779.0016 www.RichardsonPlowden.com

The information contained in this e-mail message may be attorney-client privileged, attorney work product, or strictly confidential information. If the reader of this message is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone at (803) 771-4400 and permanently delete this e-mail.