At an IAS Term, COM 1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of June, 2011.

PRESENT:
HON. CAROLYN E. DEMAREST, JSC.

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FUJI PHOTO FILM USA, INC.,

Plaintiff(s),

-against-

ZALMEN REISS & ASSOCIATES, INC.,

Defendant(s),

----------X

Decision And Order

Index No. 1708/09

This case was tried before the court, without a jury, on March 21, 2011. Both parties have now submitted their post-trial briefs and the court makes the following findings of fact and reaches the following conclusions of law based upon the evidence adduced at trial.

Zalmen Reiss & Associates, Inc.(Zalmen) is a wholesale distributor of electronic products which has been purchasing various merchandise from plaintiff Fuji Photo Film USA, Inc. (Fuji) for approximately 20 years. In November, 2007, defendant placed orders for 10,000 one gigabyte XD Picture Memory Cards for use in digital cameras (cards) at an agreed price of $19.49 each, for a total price of $194, 900. Subsequent to the shipment of the merchandise, and after defendant had sold approximately 4000 of the cards, defendant discovered that Fuji's competitor, Olympus, was selling this product at a wholesale price less than that charged by Fuji under the terms of the orders at issue and defendant was no longer able to sell the remaining 6000 cards at a profit. Relying upon what it contended was a custom and practice in the industry to provide "price protection" for goods purchased, defendant sought a credit from Fuji for the unsold cards. On or about December 2, 2008, defendant returned the remaining 6000 cards to Fuji. It was not disputed at trial that no authorization had been issued by Fuji for the return of this merchandise as required under the applicable General Terms and Conditions of Sale.

Based upon the lack of authorization for return of the goods which had been sold and delivered a year earlier, Fuji declined to accept return of the 6000 cards and directed the carrier, Roadway, to return them to Zalmen. Zalmen also declined to accept the return and the cards were again returned to Fuji. After several back and forth transfers between Zalmen and Fuji, in light of Roadway's frustration at continuing to incur the expense of repeated shipment without compensation from either party, Fuji agreed to warehouse the shipment at its distribution center on or about January 26, 2009. The shipment was counted and the unauthorized return was "processed" at a discounted price of $4.50 per unit. A credit was issued to Zalmen for $27,994.50. The entire shipment was sold in a single lot to a reseller contacted by Fuji, at what Fuji contends was the market price for such merchandise, although plaintiff's Director of Marketing at the time of the transaction, James Avato, testified that, at the time of the return in 2009, the price charged by Fuji was still $19.49. Defendant Zalmen was not notified of the intent to sell the returned merchandise at the discounted price.

Plaintiff's Exhibit 9 in evidence is the statement of Fuji's Price Protection Policy as of May 27, 2007. It is clear from the document that, as testified by Mr. Avato, the policy is not applicable to price reductions by Fuji's competitors, but relates only to price adjustments in Fuji's own prices. As the evidence is that Fuji did not reduce the price of the subject cards at any time prior to the return of the cards by defendant, the Price Protection Policy is inapplicable to this case, as this court held at the close of the evidence. The only issue remaining open is whether plaintiff's failure to notify defendant of its sale of the returned merchandise at the discounted price precludes recovery of the difference between the original invoiced price and the credit of $27,994.50 given to Zalmen.

Defendant relies upon Uniform Commercial Code (UCC) § 2-706(3) requiring that a seller reselling goods which have been wrongfully rejected or for which acceptance has been wrongfully revoked, at a private sale pursuant to UCC §2-703(d), must give notice to the buyer of the intent to resell in such manner. It is not disputed that plaintiff Fuji solicited a private buyer for the returned goods and failed to notify defendant of the intent to sell at the discounted price. Testimony by

plaintiff's witness Mr.Amato established that, at the time of the return in 2009, Fuji's price for a card was still $19.49, that, although sales had slowed, there was still a "viable" market for the cards, and that Fuji did not sell below that price except for the resale of the defendant's returned shipment. There was no evidence of the allegedly lower price charged by Olympus or any other vendor of such merchandise. Mr. Amato further testified that the returned merchandise was evaluated as "A Stock", that is, not damaged or defective, but of "top quality". Fuji's justification for the severely discounted sale price was that, by returning the goods without authorization after a full year, defendant had abandoned the merchandise. This court rejects such conclusory argument. Clearly, defendant had not abandoned the goods as it had transferred the goods back to the plaintiff's possession in anticipation of receiving a credit, which it did receive.

Fuji contends that defendant purchased what was an unusually large quantity of merchandise that was "in tight supply" at the time in reliance upon a government order that did not perform as expected and sought to return the cards in order to recoup losses that had nothing to do with Fuji's price. It is noted that neither party produced at trial the individuals personally involved in the transaction so that the actual reason for the return was not established, nor was defendant's contention, that Mitchell, Fuji's Sales Director, authorized the return, competently addressed. Defendant's principal, Zalman Reiss, did not dispute Mr. Amato's testimony, but indicated that he had had no direct contact with Fuji about the matter. In any event, there is no doubt that acceptance of the goods purchased in 2007 was wrongfully revoked in 2008.

However, the mandate of UCC § 2-706(3), that notice be provided to a buyer which has wrongfully revoked acceptance prior to effecting a private sale of goods so returned, is unequivocal when seeking to recover damages pursuant to UCC § 2-703(d). Recovery of the difference between the contract price and the amount recovered upon resale is unavailable to the seller upon failure to comply. *B&R Textile Corp v Paul Rothman Industries Ltd,* 101 Misc 2d 98, 99 [CCCNY, NY Co, 1979], aff'd 1979 WL 30097 [App T, 1st Dept 1979]; *Acuri v Figliolli,* 91 Misc 2d 831, 836-37

[Nassau Co Dist Ct, 1977]; *Portal Galleries, Inc. v Tomar Prods, Inc.*, 60 Misc 2d 523, 525 [Sup Ct, Monroe Co, 1969].

The only alternative is to seek recovery pursuant to UCC §2-708 for "the difference between the market price at the time and place for tender and the unpaid contract price". UCC §2-708(1); *B&R Textile,* 1979 WL 30097. The burden, however, is upon the seller under that section to establish the applicable market price so as to demonstrate that the unnoticed private sale resulted in a fair price reflective of the actual value. *See Acuri,* 91 Misc 2d at 835 - 836; *Karen v Cane,* 152 Misc 2d 639, 643 [CCCNY, Queens Co, 1991]. Here, the evidence adduced by plaintiff established that the market value of the cards when returned to it in 2009 remained at $19.49 per unit, exactly the contract price. The merchandise at issue was not custom-made or in any manner unique. Fuji sold a product that it maintained in its inventory and marketed from a catalog. Plaintiff's witness testified that the returned items were not damaged and were "A Stock". Presumably, they could have been returned to inventory and sold at Fuji's market price of $19.49, without a loss.

Having failed to give notice to defendant pursuant to UCC §2-706(3) so as to afford it the opportunity to participate in the private sale or perhaps determine to pay plaintiff's invoice so as to avoid the greater loss to be sustained under the terms of plaintiff's proposed private sale, plaintiff had the burden to prove that its resale to a third party represented a transaction made in good faith and in a commercially reasonable manner (see UCC §2-706). This plaintiff failed to do. Plaintiff's evidence actually established that the resale of the returned merchandise, significantly below market value, to a single vendor selected by plaintiff, was not conducted in a commercially reasonable manner. Plaintiff has not, therefore, sustained its burden and its complaint must be dismissed.

CONCLUSION

Judgment is awarded to the defendant dismissing the complaint. No costs.

CAROLYN E. DEMAREST
JUSTICE OF THE SUPREME COURT