

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DIESEL PROPS S.R.L. and
DIESEL KID S.R.L.,

Plaintiffs,

Civil Action No.
07 CV 9580 (HB)

-against-

GREYSTONE BUSINESS CREDIT II L.L.C.
and GLOBAL BRAND MARKETING INC.,

Defendants,
-----X

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ira S. Sacks
Jennifer Daddio
Law Offices of Ira S. Sacks LLP
575 Madison Ave.
10th floor
New York, New York 10022
212 605 0130
212 605 0353 (fax)

Mark S. Lafayette
Melanie J. Sacks
Olshan Grundman Frome
Rosenzweig & Wolosky LLP
65 E. 55th St
212 451 2300
212 451 2222 (fax)
Attorneys for Plaintiffs

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs and Counterclaim Defendants Diesel Props S.r.l. (“Props”) and Diesel Kid S.r.l. (“Kid”, and together with Props, “Diesel”) respectfully submit the following Proposed Findings of Fact and Conclusions of Law in lieu of a post trial brief. Plaintiffs rely on their February 11, 2009 Trial Memorandum (“Trial Memo”) in all other respects, incorporated as if set forth herein:

1. This case involves whether defendants Greystone Business Credit II L.L.C. (“Greystone”) and Global Brand Marketing, Inc. (“GBMI”) breached two Tripartite Agreements, each dated December 4, 2006, among (i) Props or Kid, (ii) Greystone and (iii) GBMI (the “TPA”). (Plaintiffs’ Trial Exhibit (“PX”) 4, PX 19). The evidence at trial demonstrates that Greystone materially breached the TPA on numerous occasions and in several different ways.

2. The TPA was a unique agreement for Greystone, because it created direct obligations for Greystone to its borrower’s (GBMI’s) supplier (Diesel). (Tr. 64, 280, 415).¹ In all other situations, Greystone only had obligations to its borrower. Here, Greystone obligated itself not only to its borrower, GBMI, but also directly to its borrower’s supplier, Diesel, who relied upon Greystone’s compliance with such obligations in making informed decisions about selling shoes to GBMI. (PX 4, PX 19; Mezzasoma, ¶¶ 90-93; Ferraro, ¶¶ 33-34).²

3. Greystone acted throughout as if its obligations arose solely from a typical bilateral agreement, as opposed to a tripartite agreement. It set up no systems to track and respond to letters received from Diesel. It set up no systems to track and respond to notice of customer invoices in Borrowing Base Certificates and/or receipt of customer invoices from GBMI, which triggered an irrevocable payment obligation on Greystone to Diesel. (Tr. 52-53, 78). Greystone hid like an ostrich from information which obligated it (i) to advise Diesel of GBMI’s numerous

¹ References to “Tr. ___” are to pages of the trial transcript.

² References to “[Witness name], ¶ _” are to the direct trial testimony declaration of the indicated witness.

defaults, GBMI's failure to comply with loan covenants and GBMI's lack of availability to receive Revolving Loans and (ii) to make payments to Diesel.

4. For example, Mr. Sarrica, Greystone's account executive for the GBMI loan, testified that:

(i) He never interacted with Diesel (Tr. 113-14);

(ii) Although he had a weekly list of all GBMI's customer invoices, and had computer access to all of the customer invoices, he never even attempted to view them (Sarrica, ¶ 9; Tr. 81-82, 120, 123-24);

(iii) When he received notice letters from Diesel concerning, *inter alia*, GBMI's availability to receive Revolving Loans, he evaluated availability in his head rather than based upon certified weekly Borrowing Base Certificates from GBMI, upon which Revolving Loans were actually made (Sarrica, ¶ 33; Tr. 52-53); and

(iv) He solely took instructions from GBMI to pay loan proceeds to Diesel, despite the fact that the TPA provided that the receipt of customer invoices by Greystone gave rise to an irrevocable request to pay to Diesel.

5. Greystone repeatedly failed to advise Diesel of GBMI's numerous defaults and breaches of covenants under the loan agreement, and lack of availability to request Revolving Loans, despite its clear obligation to do so. And Greystone repeatedly failed to pay Diesel as required by the TPA. Plainly, Greystone materially breached the TPA.

I. Background

6. The background of the parties and events in 2005 and 2006 are largely undisputed and set forth in ¶¶ 1-15 of the undisputed facts section of the Joint Pretrial Order ("JPTO"), incorporated as is set forth herein.

II. THE TRIPARTITE AGREEMENT AND RELATED DOCUMENTS

7. On December 4, 2006, GBMI entered into a loan and security agreement with Greystone (the "LSA"). The LSA provides for "Revolving Loans" of up to \$25 million from Greystone to GBMI, depending on "Availability," as defined in the LSA. The LSA also expressly authorizes Greystone to wire proceeds of Revolving Loans directly to Diesel. (PX 39).

8. On December 4, 2006, Props/Kid, GBMI and Greystone executed two substantively identical TPAs – each entitled “Instructions for Supplier Payments.” (PX 4, PX 19). The TPA has three separate key provisions that this Court has found are not interdependent as a matter of undisputed fact and law – the Customer Purchase Order Provision, the Notice Provisions, and the Payment Provision. *Diesel Props S.r.l. v. Greystone Business Credit II, LLC*, 2009 WL 89115, at *3 (S.D.N.Y. Jan. 14, 2009) (“*Diesel SJ*”) (“The plain language of the TPA undermines Greystone's contention that the Customer *Purchase Order* was a condition precedent”):

- a. The Customer Purchase Order Provision: [GBMI] hereby agrees that no orders shall be placed by [GBMI] pursuant to the terms of the Distribution Agreement until it has received a purchase order for product from a bona fide customer of [Diesel] products. (TPA, p. 1)³
- b. The Notice Provisions:
 - i. At any time prior to the shipment of any products, upon the written request of either [Diesel] or [GBMI] pursuant to the terms of the notice provisions set forth below, [Greystone] will provide written notice pursuant to the terms of the notice provisions set forth below whether at the time of such request there is (a) insufficient availability for [GBMI] to request Revolving Loans in the amount of the Diesel Invoice with respect to such shipment, (b) [GBMI] is otherwise prevented from requesting Revolving Loans under the Loan Agreement or (c) [GBMI] is not in compliance with any of the covenants and/or warranties under the Loan Agreement, or is in default under the Loan Agreement, irrespective of whether that non-compliance or default has been waived by Lender. (the “First Notice Provision”) (TPA, p. 1).
 - ii. Lender hereby agrees to provide [Diesel] with written notice of any Revolving Loan that is requested by [GBMI] with respect to a Diesel Invoice that is not permitted to be made pursuant to the terms of the Loan Agreement. (the “Second Notice Provision”) (TPA, p. 3).

³ Because the language of the TPA made plain that the Customer Purchase Order was not a condition precedent to Greystone’s notice or payment obligations (*Diesel SJ*, 2009 WL 89115, at *3) and because, as shown below, the December 2 Letter did not modify the TPA in this regard or any other way, the Customer Purchase Order Provision need not be addressed herein.

In addition, the Customer Purchase Order Provision was waivable by Diesel, and was in fact waived. (Tr. 154, 183; Mezzasoma, ¶ 29). Further, under the doctrines of waiver, estoppel and acquiescence, Greystone is barred from asserting that such provision may in any way bar Diesel from succeeding on any claim herein or is a condition precedent to any other provision in the TPA. (*See* PX 64; Defendant’s Exhibit (“DX”) I; Tr. 78, 92, 93, 96) (demonstrating that, despite GBMI’s failure to submit customer purchase orders to Greystone in response to Greystone’s inquiry, Greystone did nothing and performed under the TPA). Diesel respectfully refers the Court to its summary judgment papers and Trial Memo for further briefing on these issues.

- c. The Payment Provision: The delivery of the Customer Invoice to [Greystone] shall be deemed to be an irrevocable request for a Revolving Loan in the amount of the corresponding Diesel Invoice pursuant to the terms of the Loan Agreement. Subject to the terms and conditions of the Loan Agreement, [Greystone] shall wire within two (2) Business Days of the receipt of such request, the proceeds of a new Revolving Loan in an amount of the Diesel Invoice. (TPA, p. 2).

9. The TPA was signed after Diesel SpA (“SpA”), Props and Kid sent a December 2, 2006 letter to GBMI (copied to Greystone) (the “December 2 Letter”), confirming (*inter alia*) the willingness of Props and Kid to sign the TPA upon the occurrence of certain conditions. (PX 3 at DIESEL 007923-7926). GBMI indicated on December 7, 2006 – after the TPA was signed – that it agreed to the conditions in the December 2 Letter. Greystone did not sign the December 2 Letter or indicate that it agreed to the conditions in it. (PX 3).⁴

10. Although the December 2 Letter covered some of the same subjects as the subsequently-signed TPA, the December 2 Letter did not amend the TPA. (Mezzasoma, ¶ 31). At trial, Greystone agreed that the “December 2nd letter really is of no force or effect” and that “we don’t think that [the December 2 Letter] changes at all a December 4th [TPA] that was signed two days later” (Tr. 30-31).

11. Therefore, the December 2 Letter did not modify the TPA. As a result, the TPA remains clear on its face that customer purchase orders were not a condition precedent to Greystone’s notice or payment obligations. (*Diesel SJ*, 2009 WL 89115, at *3; Tr. 9).

⁴ The December 2 Letter also amended the Props and Kid Distribution Agreements with GBMI. (JPTO, ¶ 19). Under those amendments Diesel had the right to repurchase from GBMI, or its assignee, its entire inventory of Diesel footwear at GBMI’s cost of such footwear. (PX 3 at Diesel 7930, 7931, 7933-34).

In addition, the December 2 Letter incorporated Schedule C from a November 8, 2006 letter from SpA, Props and Kid to GBMI, which provided certain mechanisms for GBMI to pay amounts still due SpA and Kid under the license agreements. (JPTO, ¶ 17). Schedule C provided that GBMI was to make monthly payments to SpA and/or Kid in the amount of \$2 per pair of shoes delivered to GBMI by Props or Kid under the Props and Kid Distribution Agreements, beginning on January 31, 2007. (PX 3 at DIESEL 007935). GBMI did not fulfill the conditions of Schedule C. For example, the amount due SpA from GBMI with respect to the \$2 per pair payments was over \$1.5 million (less withholding) by July 12, 2007. Also GBMI failed to follow the modified payment procedures specified by the December 2 Letter. (JPTO, ¶ 18).

III. PERFORMANCE UNDER THE TPA NOTICE PROVISIONS

12. The First Notice Provision of the TPA provided Diesel the right to request notice from Greystone as to whether (i) there was insufficient availability for GBMI to request Revolving Loans in the amount of the Diesel invoice with respect to such shipment (the “Diesel Invoice”); (ii) GBMI was otherwise prevented from requesting Revolving Loans under the LSA; or (iii) GBMI was not in compliance with any of the covenants and/or warranties, or was in default, under the LSA, irrespective of whether the non-compliance or default had been waived by Greystone (the “Notice Letters”). (PX 5, PX 20). The only prerequisite for Diesel to receive such notice was that Diesel make a written request for notice prior to shipment of product to GBMI. (PX 4, PX 19; Mezzasoma, ¶ 27; Sartori, ¶ 25).

13. Diesel met that prerequisite. Prior to each shipment of Diesel shoes to GBMI, Mr. Mezzasoma sent a Notice Letter on behalf of Props or Mr. Dalla Bona sent a Notice Letter on behalf of Kid to Greystone. (JPTO, ¶ 22; PX 5, PX 20; Tr. 204-205, 270, 410-12; Mezzasoma, ¶¶ 76-77; Dalla Bona Dep. Tr. 35-36; Dep. Ex. 605; Sarrica, ¶¶ 24, 30). Props sent forty-five (45) Notice Letters, from early January through June 2007 and then again in July and September of 2007. (PX 5). Kid sent twelve (12) Notice Letters, between January and June of 2007. (PX 20; Dalla Bona Dep. Tr. 35-36; Depo. Ex. 605).⁵ Pursuant to the First Notice Provision, Greystone had an obligation to respond to these letters. (Tr. 410, 412; PX 4, PX 19, PX 193).

14. The only condition to Greystone’s obligation to respond to the Notice Letters was that the Notice Letters have been sent prior to the shipment of the products covered by the letter. As set forth above, there was uncontradicted testimony on that score at trial. Greystone has never argued to the contrary.

⁵ Citations to “Depo. Ex. ___” are to deposition exhibits offered into evidence at trial in connection with the submitted deposition excerpts.

15. The requirement in the TPA that Diesel deliver each Diesel Invoice “prior to the delivery of the products ordered by the applicable Diesel Customer to [GBMI] from the applicable third party factory” is not a limitation on Diesel’s right to receive notice under the First Notice Provision. (PX 4, PX 19). But even if it was, Diesel did so. (PX 4, PX 19, PX 40, PX 67, PX 110, PX 111; JPTO, ¶ 29; Tr. 263; Sartori, ¶ 58; Mezzasoma, ¶ 88; McDermut Dep. Tr. 189; *see* the correlation between PX 67 and PX 110 with PX 5 and PX 20; DX XXXX; Tr. 392-93 (three to four weeks transit time for shipping from Diesel Hong Kong warehouse to receipt by GBMI).⁶

A. Notice of GBMI’s Defaults and Breaches of Covenants

16. On two occasions – January 29, 2007 and August 6, 2007 – Greystone informed Props of defaults by GBMI under the LSA. (PX 6, PX 7). At no time did Greystone respond to Kid’s Notice Letters or provide Kid any notice of default. (Ferraro, ¶ 31; Tr. 270). Kid was not aware of any of GBMI’s defaults until after being verbally informed by a representative of Props

⁶ Comparing the dates of the emails in PX 67 and PX 110 to the Tripartite Shipment dates in the Inventory Report Certificates in the Borrowing Base Certificates (PX 40) confirms that Diesel sent Diesel Invoices to Greystone as required by the TPA. For example, on February 2, 2007, Props sent a Notice Letter to Greystone informing it that Props was going to ship product worth \$651,377.16. (PX 5). The invoices for this product were sent to Greystone on February 2, 2007 via email and are contained in PX 67. (GBMI 636240-51). This shipment first appears as Diesel Tripartite Shipment 6 on the inventory report certificate of BBC No. 12-13, dated February 12, 2007, indicating that the shipment had been placed in transit that week, and had not yet been delivered. (PX 40).

As another example, on March 7, 2007, Props sent a Notice Letter to Greystone informing it that Props was going to ship product worth \$397,805.52. (PX 5). The invoices for this product were sent to Greystone on March 7, 2007 via email and are contained in PX 67. (GBMI 636378-88). This shipment first appears as Diesel Tripartite Shipment 15 on the inventory report certificate of BBC No. 12-18, dated March 19, 2007, indicating that the shipment was placed in transit that week, and had not yet been delivered. (PX 40).

A third example: On February 6, 2007, Kid sent a Notice Letter to Greystone informing it that Kid was going to ship product worth \$481,609.23. (PX 20). The invoices for this product were sent to Greystone on February 9, 2007 via email and are contained in PX 110. (GBMI 383859-69). This shipment first appears as Diesel Kid Tripartite Shipment 1 on the inventory report certificate of BBC No. 12-17, dated March 12, 2007, indicating that the shipment was placed in transit that week, and had not yet been delivered. (PX 40).

In addition, PX 64 further illustrates that Diesel sent Greystone Diesel Invoices prior to delivery of product. Wire Transfer Request form dated March 8, 2007 has a DHL delivery order by air for arrival at Customs in the United States on February 5, 2007. That product was invoiced on January 26, 2007, which invoice was sent to Greystone by Diesel on that same date. (PX 67).

about the August 6, 2007 default notice. (Tr. 270-71).

17. In both notices to Props, Greystone expressly indicated that the notices were made because **Greystone was required to do so under the TPA**. (JPTO, ¶ 23; PX 6, PX 7; Tr. 410, 417). Greystone never suggested that it was excused from giving such notice. (JPTO, ¶ 23).

18. In the first notice, on January 29, 2007, Mr. Smith wrote to Mr. Mezzasoma and notified Props that GBMI had failed to satisfy LSA minimum revenue covenants for December and January (the “January Notice”). (PX 6). At no time after receiving that notice did Props waive its right to receive additional notices concerning further defaults and/or further covenant breaches by GBMI under the LSA pursuant to the First Notice Provision. (Mezzasoma, ¶ 81). And Greystone concedes that it was required to advise Diesel of any new defaults or breaches. (Tr. 421) (“new defaults would then again require another notification the way the document was written”).

19. Both GBMI and Greystone were extremely concerned about notifying Diesel of GBMI’s breach of the two revenue covenants, but Guy Smith of Greystone informed GBMI that notification was not a choice under the language of the TPA. (PX 193; Tr. 413, 417).

20. Once Greystone sent the January Notice, Greystone asked to be excused from repeatedly telling Props about those two breaches, but was aware that it was not excused from informing Props and/or Kid of any new or additional defaults or covenant breaches. (Tr. 418-421; Mezzasoma, ¶ 81; PX 4, PX 19).

21. In the January Notice, Mr. Smith told Mr. Mezzasoma that Greystone hoped to have GBMI’s breach of the covenants waived within a week. (PX 6). In fact, GBMI’s breach of those covenants was not waived until April 26, 2007. (Tr. 423; PX 37). At no time between January 29 and April 26 did Mr. Smith or anyone else from Greystone inform Diesel that GBMI was still in default or that the negotiation of a waiver of the default took three months. (Tr. 423).

In addition, during the period March 8, 2007 to April 26, 2007, Greystone wired \$2,738,235.80 in tripartite payments to Props and \$25,661.16 in tripartite payments to Kid. (PX 64).

22. Under the TPA, Greystone had an obligation to give notice to Diesel both (i) of breaches of covenants by GBMI and (ii) of defaults by GBMI: if “[GBMI] is **not in compliance with any of the covenants** and/or warranties under the [LSA], **or is in default** under the [LSA], irrespective of whether that non-compliance or default has been waived.” (PX 4, PX 19). Thus, even if (as Greystone absurdly argues (Tr. 118, 419)) there were no new “defaults” between January 29 and April 26, there were numerous additional covenant breaches of which Diesel was entitled to notice. Those covenant breaches prior to April 26 are among those set forth in PX 35. (PX 35). Greystone knew the covenant breaches listed in PX 35 were significant when they occurred. (Tr. 298-99).

23. By March 1, 2007, Greystone was focusing on at least four of the covenant breaches set forth in PX 35 (¶¶ 18-21) – breaches of the January 5, January 31 and February 28 net revenue covenants and the February 28 EBITDA covenant. (JPTO, ¶ 25; PX 38; Tr. 296-97, 423). Accordingly, on February 28, 2007, Drew Neidorf, President of Greystone, sent Mr. McDermut, CFO of GBMI, a Reservation of Rights letter, which described the serious nature of the covenant breaches and Greystone’s intent to pursue remedies. (PX 185). The next day, Mr. Neidorf emailed Mr. Smith and Joel Flig, executive vice president of Greystone, and indicated his desire to terminate GBMI’s overadvance since GBMI “tripped 4 covenants and they have mislead us greatly.” (PX 38).

24. On April 3, 2007, Mr. McDermut sent Mr. Smith an email indicating that GBMI needed to seek waiver of additional breaches and defaults under the LSA. Mr. McDermut further indicated that Diesel was not getting the TPA payments on time, and this was a default under the LSA. (PX 194).

25. Almost immediately after the April 26 waiver, Greystone learned that GBMI was again in default under the LSA. (Sarrica, ¶ 43; Tr. 430). GBMI missed the May 31 EBITDA covenant and June 30 EBITDA covenant. In fact, during the entire duration of the LSA, GBMI never met its monthly revenue/EBITDA covenants except when they were reset in April 2007. (Tr. 428). It was not until August 6, 2007 that Greystone informed Diesel of these missed covenants (the “August Notice”). (PX 7; Tr. 428).

26. The new breaches were serious. By July 2007, as a result of the breaches, Mr. Neidorf sought either a lien of Mr. Datta’s home or a guaranty from Indeka in order for Greystone to waive the defaults. (Tr. 428-29).

27. The August Notice consisted of a cover email from Mr. Smith to Mr. Mezzasoma, attaching a formal default notice. The cover email indicates that “we are required under the tripartite to notify you if GBMI becomes in default of our loan agreement.” (PX 7 (emphasis added)). Greystone sent the August Notice because it was aware that it was never excused from its obligation to send notice to Diesel in response to the Notice Letters. (Tr. 431). The August Notice was very different from the January Notice and sought a release of Greystone from Props and Kid to which Props and Kid refused to accede. (PX 44, PX 108).

28. Between May 2007 – when Greystone learned of the defaults that were the subject of the August Notice – and August 6, 2007 – when the August Notice was sent – Diesel Props shipped and invoiced over \$10 million in shoes to GBMI and Kid shipped and invoiced over \$124,000 in shoes to GBMI. (PX 5, PX 20, PX 31, PX 32, PX 33, PX 67, PX 110 and PX 111). Moreover, Greystone made \$4,856,000 in tripartite payments to Props during that period, of which \$456,190.23 was for Kid shoes. (PX 32, PX 64).

29. Greystone repeatedly materially breached the TPA by failing to provide Diesel notice

of GBMI's numerous and continuous defaults and covenant breaches under the LSA.⁷

B. Failure to Notify of Lack of Availability

30. Pursuant to the First Notice Provision, the Notice Letters specifically requested, *inter alia*, that Greystone inform Diesel if there was insufficient availability to request a Revolving Loan on the date of a Notice Letter in the amount specified. At no time did Greystone respond that there was insufficient availability. (Mezzasoma, ¶ 88; Ferraro, ¶ 31; Tr. 67).

31. As conceded by Greystone, and as unambiguously set forth in the TPA, the First Notice Provision required that Greystone make a determination of whether GBMI had sufficient availability for a Revolving Loan in the amount of the Diesel Invoice with respect to a shipment of products as of the date of the written request from Props or Kid. (PX 4, PX 19; Tr. 64-65).

32. "Availability" is determined by line 28 of a BBC. (Sarrica, ¶ 15; McDermut Dep. Tr. 25-26; Laguette Dep. Tr. 184-85; PX 39, ¶ 1.1, and Schedule A). On the following occasions Greystone received a request for notice from Props or Kid pursuant to the First Notice Provision and failed to advise Props and/or Kid that there was insufficient availability, as reflected on line 28 of the immediate preceding BBC, to request a Revolving Loan in the amount of the planned shipment:

- a. On January 22, 2007, Greystone received a Notice Letter stating that Props was going to ship **\$3,096,255.96** of product. (PX 5, letter dated 1/22 and faxed 1/22). The closest preceding BBC was No. 12-10, dated January 21, 2007, line 28 of which showed **\$1,017,696.28** of availability. (PX 40).
- b. On January 31, 2007, Greystone received two Notice Letters advising that Props was going to ship \$1,076,042.12 of product; and on February 2, 2007, Greystone received

⁷ As noted above, at trial, Greystone argued that once GBMI defaulted as to one LSA requirement, GBMI was in one continuous event of default because "once a borrower is in default, it stays in default until that default is waived." (Tr. 118, 418-19). That is absurd. **PX 35 lists two dozen covenant breaches, each of which was required to be noticed to Diesel.** As set forth above, the TPA requires that Greystone advise Diesel of each instance where GBMI has failed to comply with the covenants of the LSA, not just of defaults. (PX 4, PX 19).

Also, Greystone stipulated that "GBMI was in default under the LSA on multiple occasions." (JPTO, ¶ 24). Under Greystone's current theory, GBMI was in default only twice.

- another Notice Letter from Props advising that it was going to ship \$651,377.16 of product, for a total of **\$1,727,419.20**. (PX 5, two letters dated 1/29 and faxed 1/31; and dated 2/2 and faxed 2/2) The closest preceding BBC to all three Notice Letters was No. 12-11, dated January 29, 2007, line 28 of which shows availability of **\$1,715,876.11**. (PX 40).
- c. On February 6, 2007, Greystone received a Notice Letter advising that Kid was going to ship \$481,609.23 of product (PX 20, letter dated 2/6 and faxed 2/6); and on February 7, 2007, Greystone received a Notice Letter advising that Props was going to ship \$842,573.04 of product, totaling **\$1,324,182.27** (PX 5, letter dated 2/5 and faxed 2/7). The closest preceding BBC to both Notice Letters was No. 12-12, dated February 5, 2007, line 28 of which shows **\$756,698.49** in availability. (PX 40).
- d. On February 21, 2007, Greystone received two Notice Letters advising that Props was going to ship \$574,709.40 and \$1,989,397.68 of product, for a total of **\$2,564,107.08**. (PX 5, letters dated 2/15 and 2/16, both faxed 2/21). The closest preceding BBC is No. 12-14, dated February 19, 2007, Line 28 of which shows **\$1,012,167.56** in availability. (PX 40).
- e. On April 2, 2007, Greystone received two Notice Letters advising that Props was going to ship a total of **\$2,117,012.28** of product. (PX 5, letters dated 3/28 and faxed 4/2; Tr. 54). The closest preceding BBC is No. 12-20, dated April 2, 2007, Line 28 of which shows **\$783,290.08** in availability. (PX 40).
- f. On April 17, 2007, Greystone received two Notice Letters advising that Props was going to ship a total of \$1,164,729.46 of product (PX 5, letters dated 4/13 and faxed 4/17); on April 20, 2007 Greystone received a Notice Letter advising that Props was going to ship \$424,725.60 of product (PX 5, letter dated 4/18 and faxed 4/20); and on April 24, 2007, Greystone received a Notice Letter advising that Props was going to ship \$591,599.16. (PX 5, letter dated and faxed 4/24). The total amount of product to be shipped pursuant to these Notice Letters was **\$2,181,054.22**. The closest preceding BBC to all of these Notice Letters was No. 12-23, dated April 16, 2007, line 28 of which showed **\$1,000,486.12** in availability. (PX 40).
- g. On May 8, 2007, Greystone received a Notice Letter advising that Props was going to ship \$1,225,418.40 of product (PX 5, letter dated 5/7 and faxed 5/8); on May 11, 2007, Greystone received two notices from Props advising that it was going to ship \$3,190,075.20 of product. (PX 5, letters dated 5/8 and 5/11, both faxed 5/11; Tr. 57; Sarrica, ¶ 27, lines 37-39). The total amount to be shipped pursuant to the notices was **\$4,415,493.60**. (*Id.*) The closest BBC preceding Greystone's receipt of such notices was No. 12-27, dated May 3, 2007, line 28 of which showed **\$1,030,784.30** in availability. (*Id.*; PX 40)
- h. Between May 14, 2007 and May 18, 2007, Greystone received five Notice Letters advising that Props and/or Kid was going to ship a total of **\$1,592,801.64** of product. (PX 5, letter dated 5/14 and faxed 5/15; letters dated 5/16 and 5/17, both faxed 5/18; letter dated and faxed 5/18; PX 20, letter dated and faxed 5/14; Sarrica, ¶ 27, lines 40-

- 44). The closest BBC preceding such Notice Letters was No. 12-28, dated May 14, 2007, line 28 of which shows availability of **\$1,007,884.72**. (PX 40).
- i. Between June 18 and June 21, 2007, Greystone received four Notice Letters advising that Props and/or Kid was going to ship a total of **\$1,015,197.46** of product. (PX 5, letter dated 6/15 and faxed 6/18; letter dated and faxed 6/20; PX 20, letter dated 6/18; letter dated and faxed 6/21). The closest BBC preceding such notices was No. 12-33, dated June 18, 2007, line 28 of which showed availability of **\$842,258.42**. (PX 40).
 - j. On August 1, 2007, Greystone received a Notice Letter advising that Props was going to ship **\$584,004.00** of product (PX 5, letter dated 7/23 and faxed 8/1). The closest preceding BBC was No. 12-39, dated July 31, 2007, line 28 of which showed availability of **\$578.21**. (PX 40)

33. Greystone advances a number of conflicting explanations for why it was not required to respond to the Notice Letters concerning lack of availability to request Revolving Loans. First, Mr. Sarrica testified that while he administered the GBMI loan and TPA, he made a determination of availability in response to a Notice Letter based upon his general understanding and knowledge of the status of the GBMI loan in his head. (Sarrica, ¶ 33; Tr. 52-53). That only explains why Mr. Sarrica breached the TPA, but not the proper way to determine availability.

34. Greystone then argues that “Availability” should be the amount reflected on line 28 of the BBC **plus** the amount of the GBMI loan request reflected on line 23 of the BBC. (Sarrica, ¶¶ 16, 27). That is wrong. As of the date of the BBC, GBMI had already requested a Revolving Loan on line 23 pursuant to the LSA which, if availability existed and GBMI was not in default, Greystone was obligated to fund. (PX 39, ¶ 1). Indeed, those loan requests by GBMI were funded by Greystone as a matter of course. (PX 39; PX 40; PX 46). Therefore, the funds requested on line 23 on any BBC by GBMI were no longer available for disbursement for other purposes, including Revolving Loans in the amount of the planned Diesel shipment.

35. But even under Greystone’s fallacious “line 23 plus line 28” argument, on the following occasions Greystone received notice from Props or Kid pursuant to the First Notice Provision and failed to advise Props and/or Kid that there was insufficient availability:

- a. On January 22, 2007, Greystone received notice from Props that it was going to ship **\$3,096,255.96** of product. (PX 5, letter dated 1/22 and faxed 1/22). As shown in Mr. Sarrica's declaration, line 23 plus line 28 of the closest preceding BBC totaled **\$2,073,204.94**. (Sarrica, ¶ 27, line 4).
- b. On February 21, 2007, Greystone received two notices from Props advising that it was going to ship \$574,709.40 and \$1,989,397.68 of product, for a total of **\$2,564,107.08** of product. (Sarrica, ¶ 27, lines 14-15) The closest preceding BBC to both notices is No. 12-14, dated February 19, 2007, line 23 plus line 28 of which sums to \$2,839,167.56. (*Id.*) However, Greystone funded \$1,315,000 to GBMI on February 21, 2007 (PX 46 at GS 111602), leaving, at best, only **\$1,524,167.56** in availability, an amount insufficient as of the date of the Diesel notice for a Revolving Loan in the amount of the planned shipments.
- c. On April 2, 2007, Greystone received two notices from Props advising that it was going to ship a total of **\$2,117,012.28** of product. (Sarrica, ¶ 27, lines 27-28). The closest preceding BBC is No. 12-20, dated April 2, 2007, line 23 plus line 28 of which sums to **\$1,783,290.08**, leaving insufficient availability for GBMI to request a Revolving Loan in the amount of the planned shipments. (*Id.*; Tr. 55-57).
- d. On April 17, 2007, Greystone received two notices from Props advising that it was going to ship a total of \$1,164,729.46 of product; on April 20, 2007 Greystone received a notice from Props advising that it was going to ship \$424,725.60 of product; and on April 24, 2007, Greystone received notice from Props that it was going to ship \$591,599.16. (Sarrica, ¶ 27, lines 33-36; PX 5). The total amount of product to be shipped pursuant to these notices was **\$2,181,054.22**. The closest BBC preceding the date of these notices was No. 12-23, dated April 16, 2007, line 23 plus line 28 of which sums to **\$1,662,486.12**.⁸
- e. On May 8, 2007, Greystone received a notice from Props advising that it was going to ship \$1,225,418.40 of product; on May 11, 2007, Greystone received two notices from Props advising that it was going to ship \$3,190,075.20 of product. (Sarrica, ¶ 27, lines 37-39; PX 5). The total amount to be shipped pursuant to the notices was **\$4,415,493.60**. (*Id.*) The closest BBC preceding Greystone's receipt of such notices was No. 12-27, dated May 3, 2007, line 23 plus line 28 of which sums **\$2,110,784.30**, again demonstrating insufficient availability even under Greystone's fallacious analysis. (*Id.*) In addition, of this \$2,110,784.30, \$1,080,000 was wired out by Greystone on May 7, 2007 and May 8, 2007 (PX 46, at GS11605), reducing even what Greystone alleges to be "availability" as of May 8 to **\$1,020,000.00**.
- f. On August 1, 2007, Greystone received notice from Props that it was going to ship **\$584,004.00** of product. (PX 5, letter dated 7/23 and faxed 8/1). The closest

⁸ What is more, a funding request of \$662,000 was wired out by Greystone on April 19, 2007 (PX 46 at GS 111605), reducing availability on April 19 to \$1,000,486.12, which is less than the sum of the April 20 and April 24 notices from Props even under Greystone's fallacious argument. (Sarrica, ¶ 27, lines 35-36; PX 5).

preceding BBC was No. 12-39, dated July 31, 2007, line 23 plus line 28 of which sums to **\$477,453.24**. (PX 40).

36. Furthermore, Mr. Sarrica admitted that Greystone imposed a \$1 million minimum availability requirement on GBMI. (Tr. 67-68, 71-74, 83; PX 64, at 5/3/07 (GS113029); at 5/8/07 (GS113017); at 6/8/07 (GS113753)). Greystone should have advised Props and Kid that there was insufficient availability to request Revolving Loans whenever availability would have been below \$1 million. A Revolving Loan in the amount of the planned Diesel shipment would have resulted in that on several occasions (*see* Sarrica, ¶ 27), but no notice to Diesel was given.

37. In addition, on two occasions, Greystone refused to fund a Revolving Loan to GBMI to pay Diesel Invoices until after GBMI wired monies to Greystone in order for the availability to exceed \$1 million. (PX 64, at 3/8/07 (GS112877, GS112879) and 5/3/07 (at GS113029); PX 175). Greystone was required to notify Diesel of that under the Second Notice Provision of the TPA. (PX 4, p. 3). No such notice was given. (Tr. 65-67).

38. Desperately, Mr. Sarrica repeatedly testified that availability on a given date should actually have been calculated by adding the value of goods to be shipped, as indicated in a given Diesel Notice Letter, multiplied by 64%, to the availability indicated on a prior BBC. (Sarrica, ¶ 31; Tr. 50-51, 56, 62). Such a calculation – which takes into account the BBC value of goods to be shipped at some indefinite point in the future – flies in the face of Greystone’s obligation under the clear and unambiguous language of the TPA to determine availability as of the date of the Notice Letter from Diesel. (PX 4, PX 19; Tr. 64-65). The Notice Letters were sent prior to shipment of the goods described therein; and those goods did not yet constitute inventory as of the date of the Notice Letter. (Tr. 52, 65).

39. Greystone’s failure to provide Props and Kid notice of insufficient availability to fund a Revolving Loan repeatedly materially breached the TPA. If Props or Kid was advised

about lack of availability, they would have stopped shipping product to GBMI and sold such product to Diesel USA, Inc. at the same price as it sold such product to GBMI and avoided all losses which it incurred for unpaid shoes. (Mezzasoma, ¶¶ 88, 92, 93; Ferraro, ¶¶ 33, 34).

IV. GREYSTONE'S FAILURE TO COMPLY WITH THE TPA PAYMENT PROVISION

40. As demonstrated at trial, Greystone did not pay Diesel within two days of receipt of GBMI Customer Invoices. (PX 40 (BBC 12-11 (1/29), BBC 12-14 (2/19)), PX 176, PX 177, PX 178, PX 179, PX 180, PX 181, PX 182; Tr. 97-105). Greystone did not pay Diesel – as required by the TPA – within two days of receipt of the Shoe Pavilion and Genesco invoices discussed at trial, which would have been January 31 and February 21, respectively. Rather, Greystone waited until GBMI sent a letter asking that the invoices be paid. (PX 64). And that was true with respect to all GBMI Customer Invoices listed in the BBCs and all of the more than 4,400 GBMI Customer Invoices received by Greystone and GCS: Greystone did not pay Diesel within two days; rather it waited until a formal request was made for payment by GBMI. That totally eviscerates the TPA.

41. On at least 18 occasions between March 2007 and August 2007, Greystone made wire transfers directly to Props and Kid. (PX 64). The total amount wired was \$501,475 for the account of Kid and \$7,118,422 for the account of Props. (JPTO, ¶ 27). Many of the wire transfers expressly indicated that the purpose of the payment was “Diesel Tripartite Payment.” In addition, each request for payment by GBMI stated that the wire transfer was to be made to Diesel “pursuant to the Instructions for Supplier Payments.” (PX 64). All of those wires were untimely, some grossly so.

42. Under the TPA, the only conditions to Diesel receiving payment were the delivery of a Customer Invoice to Greystone and availability under the LSA. (PX 4; PX 19; Mezzasoma, ¶

26; Sartori, ¶ 23).⁹ This Court has already ruled that “the unambiguous language of the TPA required only two events to occur before Greystone was required to pay Plaintiffs: (1) GBMI had to send to Greystone a copy of its Customer *Invoice*, and (2) the Customer Invoice had to correspond to a Diesel Invoice, which would determine the amount of Greystone's payment.” (*Diesel SJ*, 2009 WL 89115, at *3).¹⁰ No additional request for payment or action by GBMI was necessary to obligate Greystone to pay Diesel in the amount of the Diesel invoice to GBMI. (Mezzasoma, ¶ 33; Sartori, ¶ 29).

A. Greystone's Receipt of Customer Invoices

43. GBMI fulfilled the first condition by sending its Customer Invoices to Greystone. Martin McDermut, the Chief Financial Officer of GBMI testified that GBMI sent customer invoices to Greystone. (McDermut Dep. Tr. 19, 21, 137; Tr. 175). Further, the BBC calculations were based on GBMI's invoices to customers. (Laguetta Dep. Tr. 203-04).

44. Moreover, Mr. Sarrica confirmed his receipt of GBMI's Customer Invoices when he told GBMI that “[Greystone] is in compliance of our tri-partite agreement as [Greystone is] wiring the requested amounts within the two business days of the receipt of the Customer Invoices” (PX 119 (emphasis added)).¹¹ Mr. Sarrica also acknowledged that the BBCs provided

⁹ While Mr. Ferraro testified that he believed that the TPA only required that GBMI invoice its customers in order to obligate Greystone to make payment pursuant to the TPA, the TPA is clear that such payment is to occur upon GBMI's delivery of its customer invoice to Greystone. (PX 4, PX 10, PX 19).

¹⁰ There was no obligation for GBMI or Diesel to match Diesel Invoices to Customer Invoices. *Diesel SJ*, 2009 WL 89115, at *3 (“contrary to Greystone's assertions, the TPA does not assign the responsibility of “matching” Customer Invoices to Diesel Invoices to any party. Plaintiffs assert that they sent all Diesel Invoices to Greystone, an assertion that Greystone does not dispute....Greystone presumably could have identified the corresponding Customer Invoices, if any”) (internal citations omitted). Matching also is irrelevant, however, because by December 14, 2007, all Diesel branded shoes were sold. As a result, Greystone received all Diesel Invoices and GBMI Customer Invoices, and a corresponding Diesel Invoice must exist. (*See JPTO*, ¶¶ 29, 35, 37, 39; PX 40, PX 67, PX 79, PX 109, PX 110, PX 172).

¹¹ On cross examination, Mr. Sarrica attempted to argue that his reference to “customer invoice” was a typo and that he must have intended to refer to Diesel Invoice. (Tr. 107-08). Comparison of the dates Diesel Invoices were sent to Greystone (PX 67) and the dates payments were made to Diesel (PX 64) makes clear there is no correlation between the two: Greystone payments were not made within two days of the time Greystone received Diesel

sales information. (Tr. 120, 124-25).

45. Importantly, GBMI also sent to Greystone Commercial Services (“GCS”) all the Customer Invoices issued by GBMI. (JPTO, ¶ 38; PX 109, PX 172; Tr. 80, 109). Over 7,000 pages of GBMI Customer Invoices for Diesel branded shoes were sent to and maintained by GCS. (JPTO, ¶ 38; PX 109; PX 172). GCS acted as Greystone’s agent with respect to the Greystone-GBMI business relationship.

46. Pursuant to the LSA, GBMI was **required** by Greystone to engage GCS as their third party credit and collections service provider within 3 month of closing. (PX 39, at Schedule A, ¶ 13(d) (at GS18881); Tr. 284). Mr. Neidorf testified that Greystone imposed this in GBMI because it “thought it would be nice if they used somebody within the Greystone family for no other reason than it could be brownie points for us, that we could refer a piece of the business to another company that’s indirectly or directly owned by Mr. Rosenberg.” (Tr. 284). Greystone and GCS are owned by the same parent company, owned (directly or indirectly) by Steve Rosenberg. (Tr. 282). Mr. Rosenberg is “numero uno” at Greystone. (*Id.*) Mr. Smith received a commission for referring GBMI to GCS, because GCS was viewed as an internal business unit. (Tr. 460; Flig Dep. Tr. 59).

47. As a result of the requirement imposed by Greystone, GBMI entered into an agreement with GCS on January 26, 2007, and GCS and Greystone entered into two related agreements on the same date. (PX 68, PX 120, PX 121). The GBMI/GCS agreement was for accounts receivable servicing (the “Servicing Agreement”), and was also signed by Greystone. (PX 68). Pursuant to the Servicing Agreement, GCS received invoice data from GBMI with respect to GBMI customer invoices and was paid on the basis of each invoice processed. (PX

Invoices. For example, the first Diesel Invoices were sent to Greystone on January 22, 2007; Greystone did not make the first TPA payment until the second week of March. (PX 64, PX 67).

68, PX 109; Tr. 287) This information was maintained on a website to which Greystone had access. (PX 109). In fact, Mr. Neidorf testified that pursuant to the Servicing Agreement, **GCS “was receiving the invoices, tracking the invoices, seeing what the aging was on the invoices and making sure the invoices got collected into a lock box.”** (Tr. 289).

48. GBMI provided GCS with over 4,400 Customer Invoices for Diesel branded product. (PX 172). Those invoices totaled net \$32,996,703.19 for 1,172,323 pairs of Diesel shoes. (PX 172). The intention of the Servicing Agreement was for GBMI to provide GCS with all of the invoices issued by GBMI to its customers during the term of the Servicing Agreement. There is no evidence that this failed to occur. All of these invoices were available to Greystone on GCS’s website. (PX 109). Any representative from Greystone could log onto a website maintained by GCS and access those invoice images and other information. (JPTO, ¶ 38; PX 109; Tr. 81, 124). Based upon the above, it is clear that for the purposes of the GBMI-GCS-Greystone relationship, GCS was Greystone’s agent.

49. And then there is the ostrich, Greystone. Greystone ignored the invoice information it had in its direct possession and control. The GBMI Customer Invoices were listed in each BBC. Mr. Sarrica was aware of the existence of the GCS website and accessed it, however, he did not access Customer Invoices for Diesel product. (Tr. 81-82, 123-24). In addition, Mr. Sarrica had contact with GCS with respect to the GBMI loan. (Tr. 80). Despite its TPA obligations, Greystone failed to access the GCS website to view invoices, and failed to use the Schedule of Accounts Assigned on each BBC which listed GBMI Customer Invoice Numbers. (Tr. 80-82, 97, 102-03, 105, 123).¹²

B. Availability under the LSA

¹² Mr. Neidorf testified at trial. He could have easily testified that GCS was not Greystone’s agent, and that Greystone did not have control over GCS. Instead, Greystone introduced the testimony of underwriter James O’Connell, who did not have any personal knowledge regarding the GCS and Greystone relationship. (Tr. 482-84). One must evaluate the O’Connell testimony against what Mr. Neidorf could have said and didn’t.

50. The only other condition to payment under the TPA was availability under the LSA. Starting in January 2007, Diesel sent Notice Letters to Greystone requesting whether there was availability for GBMI to request a Revolving Loan in the amount of a planned shipment, and did not receive a response stating that GBMI did not have sufficient availability. (PX 5, PX 20; Mezzasoma, ¶ 88; Ferraro, ¶ 31). Greystone also never advised Diesel that any request for payment of a Diesel Invoice under the TPA was declined because GBMI had insufficient availability or for any other reason, as was required under the Second Notice Provision. (PX 4, p. 3).

51. As a result, Greystone must now be estopped from claiming that there was lack of availability under the LSA. As Mr. Mezzasoma testified “never having received [any] information about any default on the part of GBMI, I assumed that the availability was there.” (Tr. 206; *see* Tr. 167). In addition, if advised by Greystone that there was no availability, Props and Kid would not have shipped shoes and would not have incurred damages. (Mezzasoma, ¶ 92; Ferraro, ¶ 33). Therefore, Greystone cannot be permitted to deny that availability existed. Greystone breached the TPA by failing to pay Diesel for shoes shipped to GBMI.

C. The Change in the TPA to FIFO

52. As this Court has explained, the matching of GBMI Customer Invoices to a corresponding Diesel Invoice was not an obligation imposed on GBMI or Diesel under the TPA. (*Diesel SJ*, 2009 WL 89155, at *4-5). In any event, in March 2007, the parties agreed to modify that aspect of the TPA to use a simpler “first in/first out” assumption – FIFO – instead of matching.¹³ Props and Kid (on the one hand) and GBMI (on the other) agreed to a written

¹³ Props and SpA met with GBMI in early March 2007 in Santa Barbara, California to discuss amounts overdue to Props, Kid and SpA and related payment issues. (Mezzasoma, ¶ 51; Sartori, ¶ 42). During the Santa Barbara meetings, Props conferred with Guy Smith of Greystone by telephone. (Mezzasoma, ¶ 52; Sartori, ¶ 43; Smith, ¶ 10; Tr. 437-38). At that time, Greystone confirmed to Props (and directly to Mr. Mezzasoma and Ms. Sartori) that Greystone was not concerned with the payment procedure utilized by GBMI and Props (and/or Kid), and was not

modification of the payment procedure under the TPA (the “Tripartite Payment Procedure”). (PX 62; Sartori, ¶ 47).

53. In a series of emails between Mr. Sperati, Mr. Mezzasoma and Mr. McDermut, Mr. McDermut confirmed that Greystone agreed to the modification of the payment procedure under the TPA. (PX 78). After the Tripartite Payment Procedure was entered into, that modification was acknowledged in writing and, thereafter, *all* parties conducted themselves in accordance with that modification, including Greystone. (Mezzasoma, ¶ 56; PX 65, PX 105, PX 156). Greystone received emails referencing tripartite payments throughout 2007, including emails attaching statements of account indicating overdue tripartite payments. (Tr. 92; PX 23, PX 42, PX 63, PX 130, PX 131, PX 132, PX 139, PX 141, PX 142, PX 145, PX 146, PX 148). Greystone constantly asserted that it was performing under the TPA throughout 2007. (PX 6, PX 7).

54. On at least 18 occasions between March and August 2007, Greystone wired over \$ 7.6 million to Diesel under the TPA. (PX 64). According to Greystone’s internal wire transfer form, on several occasions the stated “Reason/Purpose” for these transfers was “Diesel Tripartite Payment;” and the letter from GBMI to Greystone always asked: “[i]n accordance with the [TPA] ... please pay the attached invoices” (PX 64, PX 128, PX 129).¹⁴

concerned with the existence of Customer Purchase Orders prior to shipment by Props (and/or Kid) to GBMI. (Mezzasoma, ¶ 52; Sartori, ¶ 44). Mr. Smith made plain that so long as GBMI was able to sell shoes and invoice customers, Greystone would pay Props (and Kid) for the shoes under the TPA. (Mezzasoma, ¶ 52). At the Santa Barbara meetings, Props and GBMI agreed to a modified procedure to use in administering the TPA, and to operate on a first in/first out (“FIFO”) assumption for shoes sold under the TPA. (Mezzasoma, ¶ 53; Sartori, ¶ 46).

¹⁴ As this Court has also held, under the TPA, GBMI’s receipt of Customer Purchase Orders prior to placing an order with Diesel was not a condition precedent to Diesel receiving payment after GBMI sold and invoiced the shoes. *Diesel SJ*, 2009 WL 89115, at *3. Even if the Customer Purchase Order requirement was a condition precedent – which it was not – and was not waived by Diesel – which it was – GBMI had such Customer Purchase Orders for SS07, and Greystone had seen all of them. As of the signing of the TPA, Greystone had confirmed that all shoes on order by GBMI from Props and Kid for SS07 were backed by GBMI Customer Purchase Orders, as were all outstanding orders for Diesel-branded shoes for FW06. Mr. Smith testified that as of November 28, 2007, Greystone had the GBMI SS07 order book. (Tr. 407). The same was true for the GBMI SS07 order book as of

V. COMPLAINTS ABOUT PAYMENTS AND STATEMENTS OF ACCOUNT

76. Frequently between March 2007 and September 2007, Props sent GBMI and Greystone emails which demanded (i) a report of all the invoices issued by GBMI to its customers for the preceding week; (ii) documentation for all payments for all goods invoiced under the Props TPA; and (iii) a financial forecasting model for GBMI known as the “13-week model,” which forecasted GBMI’s cash flow going forward. (Sartori, ¶ 70; PX 23, PX 42, PX 130, PX 131, PX 132, PX 139, PX 141, PX 142, PX 145, PX 146, PX 148). Each email attached a “Statement of Account” from Props, which summarized the amount due and owing from GBMI and/or Greystone to Props under the TPA and the Props Distribution Agreement, and attached detail concerning the payment status for each Diesel Invoices which had been issued under the TPA or the Distribution Agreement. (Sartori, ¶ 71). Diesel sent nine such statements of account directly to Greystone between March 20 and August 29, 2007. (PX 23, PX 130, PX 131, PX 132, PX 139, PX 141, PX 142, PX 145, PX 146, PX 148).

77. The Account Receivable Statements indicated the total amount overdue under the TPA, ranging from \$9,892,640.88 to \$19,299,711.41. (PX 23). Mr. Smith received each of these statements of account. He did not do anything with the emails, and did not pass them onto Mr. Sarrica. (Tr. 450-52). Greystone never objected to any of the Statements of Account. (Sartori, ¶ 74).

78. On June 1, 2007, Props sent a letter to Mr. Smith of Greystone complaining about 5 week delays in TPA payments. (PX 66). On that same day, Mr. Sarrica forwarded this letter to

January 4, 2007. (PX 202). As of February 21, 2007, Greystone had confirmation of Customer Purchaser Orders for 169,000 pairs of shoes. (PX 206). In addition, all orders placed by GBMI for shoes to be sold to Genesco, GBMI’s largest customer, were covered by Customer Purchase Orders prior to the time that GBMI ordered such shoes from Props and/or Kid. (Mezzasoma, ¶ 47; Tr. 367). Finally, each GBMI Customer Invoice listed an order number and order date. (PX 172). As a result, the supposed Customer Purchase Order “condition” was satisfied at least for all such orders.

Mr. Datta, Mr. Laughlin and Ms. Laguette of GBMI. He indicated to GBMI that Greystone believed it was making payments under the TPA in a timely fashion. (PX 119). Greystone did not indicate that it was excused from payments under the TPA for any reason. (JPTO, ¶ 32).

79. Mr. Sarrica testified that through the entire period from December 4, 2006 to June 1, 2007, **Greystone** “never received a complaint or any other notice or indication from Diesel or Global that they felt that Greystone was late in making any “ISP payments.” (Sarrica, ¶ 41). This is clearly false. Mr. Smith plainly received such complaints, whether Mr. Sarrica knew about them or not.

80. Contrary to Mr. Sarrica’s testimony, the June 1 letter was not the first complaint from Diesel that Greystone had received concerning late payments. In fact, starting in March and continuing through August, Diesel repeatedly sent Greystone emails which indicated that payments were overdue and late under the TPA. (Tr. 112-13; 115-16; PX 8, PX 23, PX 24, PX 25, PX 42, PX 130, PX 132, PX 183, PX 184). Mr. Smith did nothing with any of these emails. He just ignored them. (Tr. 112-116, 440-41, 442-43, 444-52, 453-54).

81. Diesel sent communications concerning the TPA and outstanding amounts to Mr. Smith because Diesel believed Mr. Smith was the representative from Greystone responsible for administering the TPA. (Tr. 174). Mr. Sarrica testified that despite the fact that he was the individual at Greystone responsible for administering the TPA, he had no interaction with Diesel (Tr. 113-14) and Diesel was never advised to interact with Mr. Sarrica concerning the TPA.

82. In fact, Mr. Smith was deeply involved in the parties’ performance under the TPA. Mr. Smith – and not Mr. Sarrica – sent the January and August Notices of default to Diesel under his name. (PX 6, PX 7). In addition, over the course of the TPA, Mr. Smith – and not Mr. Sarrica – served as the point of contact between Greystone and GBMI when Greystone (i) sought a mortgage on Mr. Datta’s home as additional security; (ii) obtained additional investment from

a third party, Indeka; (iii) sought additional contributions from Mr. Datta; and (iv) requested that Mr. Datta contact Diesel prior to Greystone sending the January and August Notices. (Tr. 386-89; 402-03; PX 195, PX 204, PX 205). Mr. Datta testified that Mr. Smith was the primary contact for him at Greystone (Tr. 388-89) and that Mr. Smith would “step in” whenever there was an issue. (Tr. 384-85). In addition, when there were issues concerning the functionality of the TPA and the need to clarify it, it was Mr. Smith who participated in a conference call with Diesel on behalf of Greystone and who responded to e-mails. (Tr. 170-72).

83. Apparently, Mr. Smith did not tell Mr. Sarrica about the numerous emails he received from Diesel complaining of late TPA payments. (Tr. 440-54). This occurred notwithstanding the fact that Mr. Neidorf, the President of Greystone, testified that he would have expected that Mr. Smith would forward to Mr. Sarrica any information he received concerning the TPA (Tr. 292-93) and he would not be very surprised if Mr. Smith was sending out notices of default on behalf of Greystone. (Tr. 293). Perhaps Mr. Smith’s failure to forward information to Mr. Sarrica was why he was fired.

84. Greystone’s failure to respond to each of these statements of account was an acceptance of the amounts due and owing under the statements of account.

VI. DAMAGES: BREACH OF THE NOTICE PROVISION

85. For Spring/Summer 2007 (“SS07”), Props invoiced \$17,526,853.04 in shoes to GBMI; it was paid \$10,218,183.30. Those invoices extended from December 2006 thru April 2007, with a small number in May 2007. (PX 31, generally and at DIESEL 339224, 339227). For Fall/Winter 2007 (“FW07”), Props sold and invoiced \$11,987,526.40 in shoes to GBMI; it was paid \$0. Those invoices extended from March 2007 thru July 2007, with two in August 2007. (PX 31, generally and at DIESEL 339224, 339227). For SS07, Kid sold and invoiced \$994,209.30 in shoes to GBMI; it was paid \$501,474.63. Those invoices extended from January

2007 thru April 2007, with a small number in May and June 2007. (PX 32, PX 33). For FW07, Kid made a single shipment, invoiced on April 11, 2007, in the amount of \$207,522.24. (PX 32, PX 33).

86. Taking into account shoes covered by a settlement, Props is owed \$16,612,450.41 and Kid is owed \$695,717.38 under the TPA. (PX 174).

87. If Greystone had complied with its obligations under the Notice Provisions of the TPA, Props and Kid (i) would have terminated the TPAs in early March 2007, (ii) exercised their right under the Distribution Agreements to buy back unsold inventory at GBMI's cost (of \$0), and (iii) sold all shoes to Diesel USA, Inc. ("Diesel USA") as a new distributor (precisely what Props and Kid did in October 2007). (PX 9, PX 10, PX 12, PX 13, PX 41). **Thus, Props has been damaged in the amount of \$16,612,450.41 (PX 30, PX 31, PX 174) and Kid has been damaged in the amount of \$695,717.38 (PX 32, PX 33, PX 174) as a result of Greystone's material breach of the Notice Provisions.** (Sartori, ¶ 8; Sartori Supplemental Dec.; Dalla Bona Dep. Tr. 18; Dep. Ex 604).¹⁵

88. Messrs. Mezzasoma and Ferraro each testified that, had they been notified about the numerous defaults, breaches of covenants and lack of availability under the LSA, they would have terminated the agreement with GBMI by early March 2007. (Mezzasoma, ¶ 92; Ferraro, ¶ 33). Mr. Mezzasoma testified that "if Greystone had timely advised Props of the non-disclosed defaults under the LSA in response to the [Notice Letters] – as was required by the TPA – Props would not have continued to ship shoes to GBMI under the Distribution Agreement after being advised that GBMI failed to meet the February 28, 2007 EBITDA and Net Revenue covenants."

¹⁵ At the very least, Props and Kid would have shifted sales to Diesel USA for FW07 if Greystone had complied with its obligations under the Notice Provisions of the TPA. In that event, Props has been damaged in the amount of \$11,987,526.40 (PX 30, PX 31) and Kid has been damaged in the amount of \$207,522.24 (PX 32, PX 33) as a result of Greystone's material breach of the Notice Provisions. Those amounts should be reduced by a portion of the value of the FW07 shoes covered by the Settlement. (See PX 174).

(Mezzasoma, ¶ 86). Props continued to ship product to GBMI in February 2007 because they “had not received any notice from Greystone regarding default following the [Notice Letters].” (Tr. 257). Mr. Ferraro testified that Kid would have stopped shipping if he had been advised that GBMI failed to meet the February 28, 2007 EBITDA and Net Revenue Covenants. (Ferraro, ¶ 32). Greystone knew of GBMI’s failure to meet these covenants as early as February 28, 2007. (See PX 38, PX 185).¹⁶

89. There is no validity to Greystone’s contention that Diesel would have been unable to distribute SS07 shoes without GBMI. In October 2007, when Diesel terminated its business relationship with GBMI, it turned over distribution in the United States to Diesel USA. Diesel USA was no more prepared to take over distribution in October 2007 than it was in March 2007. If Diesel had terminated its distribution relationship with GBMI in March 2007, the steps necessary for putting together a sales force in March 2007 were the same as in October 2007. (Mezzasoma, ¶ 93; Ferraro, ¶ 34; Tr. 157-58, 188-89).

90. There also is no validity to Greystone’s contention that Diesel’s knowledge of GBMI’s poor financial condition is evidence that Diesel would have continued shipping even if it knew about the numerous defaults, covenant breaches and lack of availability. As shown above, Diesel was told, in essence, that GBMI was in poor financial condition but (i) was **not in breach of covenants** under the LSA and (ii) **had availability** to request Revolving Loans in the amount of planned shipments. In that circumstance, Diesel thought that the risk of nonpayment was low. (Mezzasoma, ¶ 87; Tr. 186). That is starkly different from a situation – as was in fact the case – that GBMI was in poor financial condition and **was in breach of covenants** under the LSA and had **frequently had no availability** to request Revolving Loans in the amount of

¹⁶ Props only shipped product on one occasion after the August Notice without a letter of credit in order to meet the requirements of Genesco, the largest customer for Diesel branded shoes in the United States, and because negotiations were underway between GBMI and New York Transit which would have resolved all payment issues. (JPTO, ¶ 33; PX 50; Tr. 359-62)

planned shipments. (PX 35, PX 40; *see* ¶¶ 32-38, above).

VII. DAMAGES: BREACH OF PAYMENT PROVISION

91. As set forth above, Greystone also materially breached the Payment Provision of the TPA. **Greystone owes Diesel \$17,308,167.79 (\$16,612,450.41 to Props and \$695,717.38 to Kid) as a result of that material breach.** (PX 31, PX 32, PX 174)¹⁷ The only limitation on such damages is to the extent to which there was lack of availability for a Revolving Loan in the amount of a Diesel Invoice at the time Greystone received GBMI's Customer Invoice. As noted above, Diesel sent 57 Notice Letters to Greystone requesting whether there was availability for GBMI to request a Revolving Loan in the amount of a planned shipment. Diesel was never told that there was lack of availability. As a result, Greystone must now be estopped from claiming that there was any lack of availability under the LSA to pay Diesel Invoices.¹⁸

VIII. DAMAGES: STATEMENTS OF ACCOUNT

92. The damages under Diesel's statements of account claim are \$19,299,711.41, the amount in the final statement of account sent to Mr. Smith on August 29, 2007. (PX 148).

IX. DAMAGES: UNJUST ENRICHMENT

93. In the event that Greystone and GBMI are not found liable for breach of the TPA, Diesel is still entitled to recover on the basis of unjust enrichment. Greystone received over \$50 million in proceeds from of the sale of the Diesel shoes by GBMI, deposited into a Greystone lockbox pursuant to the LSA.¹⁹ Those proceeds unjustly enriched Greystone to the tune of

¹⁷ Although Greystone sent wires to Props of \$7,594,235.80 and only \$25,661.16 to Kid, some of the money sent to Props should have been – and was – used to pay Kid invoices. As a result, some invoices that are shown as paid by wire transfers are in fact open because Props had to send that money to Kid. (PX 24, PX 30, PX 31, PX 32).

¹⁸ Mr. Mezzasoma testified that “never having received any information about any default on the part of GBMI, I assumed that the availability was there.” (Tr. 167, 206). Indeed, Greystone asserts that GBMI had availability to request a Revolving Loan at all times during the course of the loan. (Sarrica, ¶ 27). Availability on any given day should have gone first to Diesel.

¹⁹ The total deposited included, but was not limited to, over \$32 million reflected in invoices sent to GCS (PX 172),

\$17,308,167.79 – the amount of unpaid Diesel Invoices under the TPA. (PX 174).

X. GBMI'S DEFENSES

94. The foregoing also establishes GBMI's liability to Diesel. GBMI attempted to defend this action through the trial declaration of Mr. Datta, asserted that Diesel's actions caused GBMI's inability to pay Diesel; and baldly asserted that Diesel **unjustly** benefited from GBMI's expenditures to develop the U.S. market for Diesel footwear. However, Mr. Datta's testimony was not supported by a single contemporaneous exhibit. (Tr. 351-52). In fact, Mr. Datta conceded that (a) he did not know if orders were timely placed to meet agreed *ex factory* dates for timely shipping to retailers (Tr. 376-77); (b) he frequently complained that levels of sales were far below what he expected (Tr. 379-80); (c) he blamed his sales force for GBMI's poor performance (*Id.*); and (d) he was "unhappy" and "absolutely disappointed" in his sales force and the amount of GBMI's shipping and sales. (Tr. 381). In addition, Mr. Smith testified that Mr. Datta's first instinct when confronted with a problem was to blame someone else. (Tr. 464-65).

95. GBMI received all that it was entitled to for any alleged investment in building the Diesel brand or creating shoe styles – the proceeds from the sales of such shoes. (PX 1, PX 14, PX 15, PX 16, PX 40, PX 172). Under the License, Sourcing, and Distribution Agreements, GBMI was required to take the actions it did to build the Diesel brand. It was paid for its efforts; it was also required to pay royalties and pay for product, which it did not do. Therefore, GBMI's defenses to Diesel's claims are meritless.²⁰

XI. GREYSTONE'S COUNTERCLAIM FOR UNJUST ENRICHMENT

plus the \$8 million received by Greystone for the sale of GBMI's assets in December 2007. Indeed, a review of the sales set forth on the BBCs' Schedule of Accounts Assigned reflects sales of shoes which were invoiced for \$56,136,325.46 (PX 40), of which approximately 90% are Diesel shoes. (Shultz Dep. Tr. 33; Dep. Ex. 336; and compare PX 109, Exs. A and C). Thus, Greystone received over \$50 million for the sale of Diesel shoes.

²⁰ The defenses which GBMI asserts are actually nothing more than the counterclaims which it had asserted in this action as breach of the Distribution Agreements and unjust enrichment. Those counterclaims were dismissed because they are subject to a mandatory forum selection clause for Milan, Italy. *Diesel Props S.r.l. v. Greystone Business Credit II, LLC*, 2008 WL 4833001, at *10-11 (S.D.N.Y. Nov. 5, 2008).

96. Greystone claims that Props was unjustly enriched by its use of the so-called GBMI “Order Book.” That claim is without basis. First, dispositively, Props did not use the Order Book. (Mezzasoma, ¶ 95; Strippoli, ¶ 52). There was no evidence at trial to the contrary. That alone requires dismissal of the counterclaim.

97. Second, after termination of GBMI, Props sold Spring/Summer 2008 (“SS08”) shoes to Diesel USA, Inc. (“Diesel USA”); Diesel USA then attempted to re-sell those shoes to customers in the United States. Props did not receive any share of the proceeds Diesel USA got from the sale of the SS08 shoes. Props received the same amount of money regardless of whether Diesel USA used – or did not use – the Order Book. As a result, Props was not unjustly enriched.

A. Background to the Counterclaim

98. On September 4, 2007, Diesel sent notices of default to Greystone and GBMI with respect to the TPA and Distribution Agreements. (PX 9, PX 10, PX 11). By that time, GBMI owed SpA, Props and Kid approximately \$28 million. (Tr. 359). In September and October 2007, GBMI engaged in negotiations with New York Transit and Diesel to restructure GBMI. (JPTO, ¶ 33; PX 50). The New York Transit deal failed because of issues with New York Transit, not with Diesel. (Tr. 362).

99. On October 8, 2007, Props and Kid notified GBMI that the Distribution Agreements had been terminated effective October 4, 2007; and on October 17, 2007, Props and Kid made numerous demands of GBMI under the Distribution Agreements, including transfer of all inventory at cost (of \$0). (JPTO, ¶ 34; PX 12, PX 13, PX 102, PX 103). At that time, GBMI had approximately 164,000 pairs of Diesel branded footwear in its warehouse. (JPTO, ¶ 35).

100. On December 14, 2007, Greystone sold substantially all of the assets of GBMI to Titan Apparel, Inc. (“Titan Apparel”), including GBMI’s entire inventory of Diesel branded

footwear. (JPTO, ¶ 37; PX 79).

101. After termination of the Distribution Agreements, Diesel USA was appointed to replace GBMI as the U.S. distributor of Diesel branded footwear. (JPTO, ¶ 36). Diesel USA received information from two sources regarding SS08 orders for Diesel shoes existing as of the date of termination of GBMI: directly from Genesco and from Doug Nelson.

- The information that Diesel USA received from Genesco was Genesco's property and is not subject to Greystone's counterclaim for unjust enrichment. The Genesco orders comprised of the bulk of Diesel USA's sales outside of Diesel USA retail for SS08, and none of those orders were contained in the Order Book that is the subject of Greystone's cause of action for unjust enrichment. (PX 83).
- The Order Book that Diesel USA received from Doug Nelson was used only as a tool to discover smaller customers of GBMI, and was not used to fill orders for the SS08 season. (Strippoli, ¶ 49).

B. Genesco Orders

102. When Diesel USA took over the distribution of Diesel shoes in the United States after termination of the GBMI Distribution Agreement, Diesel USA spoke with representatives from Genesco. Genesco wanted to order from Diesel USA all shoes that they had previously ordered from GBMI. (Strippoli, ¶ 22).

103. Props had a comprehensive list of the orders that Genesco had placed with GBMI; however, Diesel USA needed confirmation that all of the orders matched up with what Props had in its system. (Strippoli, ¶ 28). On October 30, 2007, Genesco sent Mr. Tamai and Mr. Strippoli a spreadsheet labeled OpenPoVdr_Diesel_GBMI which contained information regarding all of the open orders that Genesco had for Diesel shoes. (PX 90). On October 31, 2007, Genesco sent Mr. Tamai and Mr. Strippoli, along with others from Diesel and Genesco, an email with a file attached, the gbmi_GCO production report. (PX 89).

104. These two spreadsheets – PX 89 and PX 90 – together with the information that Props and Kid already had in their systems, contained all of the information that Genesco and

Diesel USA needed to confirm the orders that Genesco wanted to place with Diesel USA. (Strippoli, ¶ 31). Both of the Genesco spreadsheets were Genesco's property. (Strippoli, ¶ 32).

105. Genesco used these spreadsheets to place orders for SS08 with Diesel USA. That those orders may have matched what Genesco had previously ordered from GBMI reflects what Genesco wanted; it does not reflect any wrongful conduct by Props. (Strippoli, ¶ 33).

C. Other SS08 Orders

106. Beginning in October and November 2007, Diesel USA contacted customers and solicited new orders for SS08. The primary focus of these contacts, however, was the Fall/Winter 2008 ("FW08") Sales Campaign which began early December 2007; the secondary focus was SS08 orders. (Strippoli, ¶ 17). At the time the Distribution Agreements were terminated, Diesel USA was already aware of the identity of several large customers of GBMI, with whom Diesel USA already had contacts. (Strippoli, ¶ 18). For accounts other than Genesco, Mr. Strippoli and others from Diesel USA contacted those accounts and told them what was – or would be – available from open stock from Diesel USA's inventory in California. Those other accounts ordered from that open stock. Those orders did not match the orders that those customers had placed with GBMI. (Strippoli, ¶ 34).

D. The Order Book

107. When Diesel USA took over the exclusive distributorship for Diesel shoes in the United States from GBMI, several GBMI employees looking for employment were in contact with Diesel USA, Props and/or Kid, including Doug Nelson. According to Diesel USA's records, Doug Nelson was hired by Diesel USA on November 8, 2007. (PX 152).

108. On November 8, 2007 – over a week after Genesco sent Diesel USA its SS08 order information – Tony Strippoli of Diesel USA was emailed a copy of GBMI's list of open orders for certain customers for SS08 (the "Order Book") by Doug Nelson. (PX 83).

109. First, as to Genesco, as the email transmitting the Order Book indicates, the Order Book “does not include Genesco other than a few pairs they were taking out of inventory.” (PX 83) (emphasis added).²¹ Thus, **the Order Book on its face was useless with respect to Genesco orders**, and indeed was not even sent to Diesel USA until after Genesco sent Diesel USA all of the relevant order information in the Genesco spreadsheets. (Strippoli, ¶ 39).

110. Second, of the total 342,699 pairs of orders reflected in Order Book, 68,001 pairs were ordered by Diesel USA retail. (PX 83). Obviously, Diesel USA did not need GBMI’s Order Book to obtain information concerning Diesel USA’s own orders. (Strippoli, ¶ 40).

111. Diesel USA did not use the Order Book to fill orders to other customers. The only use Diesel USA made of the Order Book was to review and evaluate the list of GBMI’s customers. (Strippoli, ¶ 42). Diesel USA was in possession of a similar list generated by GBMI and sent to Props in July 2007. (PX 51). As PX 82 demonstrates, the July 2007 list contained 185 customers, while the Order Book contained 135 customers. Out of those 135 customers in the Order Book, only 42 were not identified on the July 2007 list. Out of the 42 “new” customers, Diesel USA only sold SS08 shoes to eight of those customers, with net sales of 10,081 units to those eight customers for net sales of \$402,381. (PX 82).

112. Props and Kid contractually were entitled to the Order Book information under their Distribution Agreements within fifteen (15) days of the end of a sales campaign. (PX 1, PX 16, ¶¶ 4.3, 9.5; Sartori, ¶¶ 15-18; Mezzasoma, ¶ 10; Strippoli, ¶ 46). The sales campaign for SS08 ended on October 3, 2007 for Kid and October 12, 2007 for Props. (PX 163). Thus, Props and Kid were entitled to the Order Book by mid- or late October 2007.

113. The Order Book reflects orders for 273,597 pairs other than to Genesco and Diesel

²¹ The Order Book lists only 1071 pairs ordered by Genesco. (PX 83). Diesel USA eventually sold 228,484 pairs of shoes to Genesco for SS08. (PX 74).

retail, with a value of approximately \$10.4 million; Diesel USA's actual sales other than to Genesco and Diesel retail amounted to 58,105 pairs, for net sales of \$2,377,086. (PX 91; *see* PX 83, PX 98, PX 99, PX 110; PX 74, PX 75). This further demonstrates that Diesel USA did not use the Order Book to re-create or ship GBMI-obtained orders. (Strippoli, ¶ 61).

114. In addition, Props was not unjustly enriched in the amount of the costs which Greystone asserts GBMI incurred to allegedly produce the orders in the Order Book:

- First, GBMI had no ability to fill the orders. GBMI only had 1,861 pair of SS08 shoes in inventory at the time of termination. (PX 28).
- Second, Greystone did not establish at trial the costs GBMI incurred to obtain the orders in the Order Book.
- Third, the costs identified by Greystone were incurred by GBMI to comply, in part, with its obligations under the Distribution Agreements (PX 1, PX 16), which also included GBMI's obligations to pay for the shoes it sold which GBMI did not do.
- Finally, any claim that Props was unjustly enriched by not having to incur the costs GBMI incurred in obtaining the orders in the Order Book – which it was not – was not at the expense of Greystone, but to GBMI's detriment.

115. For all of those reasons, the counterclaim against Props must be dismissed.

CONCLUSIONS OF LAW

116. Greystone materially breached the TPA by failing to provide notice to Diesel of (i) GBMI's defaults and covenant breaches under the LSA; (ii) GBMI's lack of availability to request a Revolving Loan in the amount of a planned Diesel shipment in response to the Diesel Notice Letters; and (iii) GBMI's lack of availability to pay a Diesel Invoice. *See Daniel Perla Associates v. Krasdale Foods, Inc.*, 12 A.D.3d 555, 557, 786 N.Y.S.2d 75, 77 (2d Dep't 2004) (lender's failure to provide notice of defaults was a material breach of agreement).

117. Greystone also materially breached the TPA by failing to pay Diesel for over \$17 million due under the TPA. This Court has already rejected the notion that the Customer

Purchase Order condition was a condition to the notice or payment obligations under the TPA. *See Diesel SJ*, 2009 WL 89115 at **3-4. Rather, the only issue left open in that regard was “whether the parties intended for the December 2 Letter to make the Customer *Purchase Order* requirement a condition precedent to the TPA.” *Id.* at *4. There was no evidence of such intent; as a result, the Customer Purchase Order was not a condition precedent to the notice or payment provisions of the TPA.²²

118. In the alternative to Diesel’s breach of contract claim, Props and Kid are entitled to recover from Greystone under an unjust enrichment theory. “The basic elements of an unjust enrichment claim in New York require proof that (1) defendant was enriched, (2) at plaintiffs’

²² Even if Customer Purchase Orders were a condition precedent to Greystone’s notice and payment obligations, that requirement was waived by Diesel. It is well-settled that “a condition precedent in favor of one of the parties may be waived by that party.” *Walter E. Heller & Co., Inc. v. American Flyers Airline Corp.*, 459 F.2d 896, 901 (2d Cir. 1972). *See also Oleg Cassini, Inc. v. Couture Coordinates, Inc.*, 297 F.Supp. 821, 830 (S.D.N.Y. 1969) (“[a] party may, by words or conduct, waive a provision in a contract or eliminate a condition in a contract which was inserted for his benefit”); John D. Calamari & Joseph M. Perillo, *The Law of Contracts*, 494 (3d ed. 1987). Greystone introduced no competent evidence at trial that the customer purchase order requirement was intended other than to protect Diesel; Greystone’s attempt to assert that the customer purchase order requirement was intended to protect Greystone fails due to the incompetent testimony of James O’Connell. (Tr. 483-94).

In addition, even if Customer Purchase Orders or matching of invoices were conditions to Greystone’s obligations, Greystone waived such requirements by continuing to perform under the TPA. (*See e.g.*, PX 64; Tr. 92-93, 96). It is well-established that where, as here, “a party to an agreement has actual knowledge of another party’s breach and continues to perform under and receives the benefits of the contract, such continuing performance constitutes a waiver of the breach.” *Franklin Pavkov Const. Co. v. Ultra Roof, Inc.*, 51 F.Supp.2d 204, 217-218 (N.D.N.Y. 1999). *See also VCG Special Opportunities Master Fund Ltd. v. Citibank, N.A.*, No. 08-CV-01563, 2008 WL 4809078, at *6 (S.D.N.Y. Nov. 5, 2008).

Further, Greystone is equitably estopped from asserting that GBMI’s failure to obtain Customer Purchase Orders and GBMI’s and Plaintiff’s failure to match Customer Invoices with corresponding Diesel Invoices excuses its own performance under the TPA. Under New York law, a party asserting equitable estoppel must establish three elements: “(1) words, acts, conduct or acquiescence causing another to believe in the existence of a certain state of things; (2) willfulness or negligence with regard to the acts, conduct or acquiescence; and (3) detrimental reliance by the other party upon the state of things so indicated.” *Robert DeFilippis Crane Service, Inc. v. William L. Crow Constr. Co.*, 826 F.Supp. 647, 656 (E.D.N.Y. 1993). Here, Greystone acted at all relevant times as if the TPA was in full force and effect and, in particular, knowingly made payments directly to Props and Kid for shoes shipped to GBMI. (*See* Trial Memo, at 26-29; PX 64).

Finally, the payment provision of the TPA was modified by the Tripartite Payment Procedure to remove any requirement to match invoices. Under the Tripartite Payment Procedure, the parties agreed to a FIFO analysis, pursuant to which, upon Greystone’s receipt of a GBMI Customer Invoice, Greystone would pay, in like quantity, the most aged of the existing Diesel Invoices. By its words and actions Greystone agreed to the Tripartite Payment Procedure and indicated that it would continue to make payments to Props and Kid in the absence of a matching of “corresponding” invoices. (*See* ¶¶ 52-54, above).

expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover.” *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004). Here, as shown above, Greystone was enriched at Diesel’s expense, and equity and good conscience militate against permitting Greystone to retain what Diesel is seeking to recover.

119. The foregoing conclusions are equally applicable to Diesel’s remaining claims against GBMI.

120. Props and Kid are also entitled to recover on their account stated claim against Greystone. “An account stated may be implied when a creditor sends a statement of account to a debtor and the debtor, who has a duty to examine the statement to ascertain whether it is correct or not, keeps it for a reasonable time without objecting to the correctness of the account... [or] ...makes a partial payment towards reducing the balance of the account.” *Ally & Gargano, Inc. v. Comprehensive Accounting Corp.*, 615 F.Supp. 426, 429 (S.D.N.Y. 1985). *See Meadowbrook-Richman, Inc. v. Assoc. Fin. Corp.*, 325 F.Supp.2d 341, 360 (S.D.N.Y. 2004) (an account stated may be implied if a party keeps a statement of account delivered by another party without objecting to it).

121. Props was not unjustly enriched by the acquisition of the Order Book and Greystone is not entitled to recover in *quantum meruit*. “The theory of recovery in quantum meruit is that a party has received a benefit which would be unjust for him to retain without paying for it...in order to recover in quantum meruit, it is essential that the services performed by the claimant...be of some measurable benefit to the person from whom recovery is sought.” *Boyd v. University of Illinois*, No. 96 Civ. 9327, 2001 WL 246402, at *8 (S.D.N.Y. Mar. 13, 2001). Greystone’s claim for unjust enrichment fails for the reasons set forth above.

122. Judgment shall be entered as follows:

- a. In favor of Props against Greystone and GBMI, jointly and severally, in the amount of \$16,612,450.41 on the claim for breach of the Notice Provisions of the TPA,
- b. In favor of Props against Greystone and GBMI, jointly and severally, in the amount of \$16,612,450.41 on the claim for breach of the Payment Provision of the TPA,
- c. In favor of Kid against Greystone and GBMI, jointly and severally, in the amount of \$695,717.38 on the claim for breach of the Notice Provisions of the TPA,
- d. In favor of Kid against Greystone and GBMI, jointly and severally, in the amount of \$695,717.38 on the claim for breach of the Payment Provision of the TPA,
- e. In favor of Props against Greystone and GBMI, jointly and severally, in the amount of \$19,299,711.41, on the account stated claim,
- f. In the alternative to a and b above, in favor of Props against Greystone and GBMI, jointly and severally, in the amount of \$16,612,450.41 on the unjust enrichment claim,
- g. In the alternative to c and d above, in favor of Kid against Greystone and GBMI, jointly and severally, in the amount of \$695,717.38 on the unjust enrichment claim,
- h. Dismissing Greystone's counterclaim against Props with prejudice,
- i. Allowing Plaintiffs costs, interest and prejudgment interest.

Dated: New York, New York
March 25, 2009

By: s/ Ira. S. Sacks

Ira S. Sacks
Jennifer Daddio
Law Offices of Ira S. Sacks LLP
575 Madison Ave., 10th floor
New York, New York 10022
Tel: (212) 605-0130
Fax: (212) 605-0353

Mark S. Lafayette
Melanie Sacks
Olshan Grundman Frome Rosenzweig &
Wolosky LLP
Park Avenue Tower
65 East 55th Street
New York, New York 10022
Tel: (212) 451-2300
Fax: (212) 451-2222
Counsel for Plaintiffs