

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MATTINGLY, INC., a Kansas Corporation,)
and MATTINGLY POOLS, INC., a Kansas)
Corporation,)
)
Plaintiffs,)
)
vs.)
)
BEATRICE FOODS COMPANY, a Foreign)
Corporation,)
)
Defendant.)

No. 78-1094

FILED

AUG 10 1983

MEMORANDUM AND ORDER

ARTHUR G. JOHNSON, Clerk
By *J. Menis* Deputy

The following is the Court's resolution of a business fraud and breach of warranty claim involving the manufacture and sale of swimming pool coatings, wherein plaintiffs allege defendant's products caused their financial ruin. The parties presented their evidence in two separate sessions during the summer of 1982, and at the conclusion of testimony the Court recessed for counsels' presentation of post-trial legal briefs and suggested findings of fact. Plaintiffs' submission was filed December 17, 1982, and defendant's post-trial submissions were filed on March 8, 1983. The Court heard counsels' closing arguments on March 18, 1983, and at this hearing the Court overruled all pending motions for directed verdicts.

Resolution of this dispute has been difficult, since the transactions between the parties occurred over a 4-year span, and involved numerous changes in the relevant actors and products. Before trial began, plaintiffs presented the Court with

approximately eight file drawers of documents eventually referred to at trial. The attorneys for both plaintiffs and defendant have outstandingly organized and presented their respective positions regarding obtuse economic theories and fraud where the truth often lies in penumbral regions. After sifting and digesting the evidence and legal theories presented, the Court finds plaintiffs have proven breaches of warranties by defendant; moreover, the plaintiffs, by clear and convincing evidence, have proven to the Court's satisfaction that defendant's representatives committed fraud in the sale of their products to plaintiffs and fraud regarding the accord and satisfaction obtained from plaintiffs. The following are the Court's findings of fact and legal conclusions.

I. Findings of Fact

1. Mattingly, Inc. and Mattingly Pools, Inc., the plaintiffs, are both Kansas corporations engaged in the construction of swimming pools. Both companies had pool service divisions which sold supplies and maintained pools for their owners. Stock in both companies was closely held, and with the exception of Leroy Burns was primarily owned by members of the Mattingly family in Wichita, Kansas. Mattingly, Inc. primarily built swimming pools and operated primarily in the Wichita area. Mattingly Pools, Inc. was formed in the early 1970's and built pools and performed service functions exclusively in the Oklahoma City, Oklahoma, region. By 1978, when this litigation was instigated, Mattingly, Inc. was essentially out of business

and Mattingly Pools, Inc. was in bankruptcy court in Oklahoma. Plaintiffs' counsel has been authorized by the Oklahoma bankruptcy trustee for Mattingly Pools, Inc. to represent him in this action against defendant.

2. The unincorporated predecessor of Mattingly, Inc. was founded and operated by Charles M. Mattingly, Sr. He operated the business in the Wichita area for nearly 20 years prior to his retirement in 1974. While functioning as a sole proprietorship, he expanded his operations from a basement workshop to a much larger business concern that was eventually taken over by his sons upon his retirement. Charles Mattingly, Sr. invented and patented the process of constructing a swimming pool using wooden, and later fiberglass, forms. These processes and equipment were used exclusively by the two Mattingly companies.

3. When Charles Mattingly, Sr. retired, he turned over operation of the two companies to his eldest son, Charles Mattingly, Jr. ("Matt"). Matt Mattingly had received a Master's Degree in Business Administration from Wichita State University. Although Matt Mattingly received input from his two younger brothers involved in the companies, James and Givin Mattingly, he made the ultimate decisions regarding the management of both companies.

4. Although Matt Mattingly was responsible for the overall management of the Oklahoma City operation, Mattingly Pools, the day to day operations were under the control of Leroy Burns. The Oklahoma City operations were commenced in 1970 or 1971, and Mr. Burns moved permanently to Oklahoma City in late 1971. He

was the chief operating officer of Mattingly Pools, Inc. in Oklahoma City from 1974 through 1977.

5. From the early 1970's through 1977, when they quit utilizing defendant's pool coatings, the two plaintiffs had a continuous growth in number of customers and sales volume. At the peak of their operations they employed over 80 persons and had \$2,500,000.00 in sales. Mattingly, Inc. had at least 50% of the swimming pool service and construction market in the Wichita, Kansas, area. Mattingly Pools, Inc., at its zenith, controlled approximately 15% of the swimming pool market in Oklahoma City.

6. Defendant Beatrice Foods Company is a foreign corporation with its principal offices in Chicago, Illinois. Beatrice operates as what is commonly known as a "conglomerate" with numerous unrelated divisions. One such division is Beatrice Chemical, which serves as a control center for certain "profit centers" operating within it. One such profit center is the Farboil Company (Farboil), which is an unincorporated business organization located in Baltimore, Maryland.

7. Farboil was acquired by defendant Beatrice a few years before the sale of the pool coatings in question in this lawsuit. It is one of approximately 26 such profit centers operating within the Beatrice Chemical Division of Beatrice Foods Company. Beatrice Chemical is one of 10 divisions within Beatrice Foods Company.

8. By early 1974 plaintiffs were building approximately 65 pools per year in the Wichita area, and approximately 50 pools per year in the Oklahoma City area. The primary pool coating being utilized by plaintiffs at that time was Welcote, a cement-based product. Although plaintiffs had some warranty work with Welcote, primarily because it sometimes chipped off the pool floors, plaintiffs' warranty expenses attributable to Welcote were insignificant. Welcote was rolled on pool floors and walls like a paint and would last two to three years. Adhesion was sometimes a problem when Welcote was painted over an older layer of Welcote on a pool. Consequently, by the end of 1973 plaintiffs were receptive to the introduction of a new pool coating system, although they had not made a corporate decision to actively discover a new product to use.

9. Plaintiffs' first contact with defendant and its pool coating occurred in January 1974 at a pool contractors' convention in Anaheim, California. Matt Mattingly there met George Gurkovic, defendant's pool coating sales representative. During that meeting plaintiffs received the first representations regarding defendant's pool coating product, which was then called Marble Plastic. (Although defendant later changed the product's name to Marbalon, for consistency the Court will always refer to it as Marble Plastic).

10. The original formula for Marble Plastic was brought to Farboil by George Gurkovic from Sampson Paint Company. Gurkovic had worked for Farboil during the 1960's but left Farboil to work for another paint company called Perry-Austen on

Staten Island in New York City. Gurkovic left the Perry-Austen job when its plant burned down, and somehow he took with him Perry-Austen's book of paint formulations. Gurkovic then worked for Sampson Paint Company in Richmond, Virginia, for approximately two years before returning to Farboil in September 1972.

11. When Gurkovic returned to Farboil, he gave his paint formulations book, including the formula for what would be known as Marble Plastic, to his new employer. Two of Farboil's chemists, Paul Williams and Bill DeSantis, examined the pool coating formula and concluded it had potential as a marketable product. Farboil's laboratory then prepared certain tests, which included coating a sheet of glass to check its viscosity and coverage. The laboratory also checked application techniques and film continuity and integrity. The following month Farboil made a decision to market the product and the first production batch was made. Farboil decided to market the paint under the name of Marble Plastic, and the first sales of the coating occurred in 1973, when a total of 3,000 gallons was sold to various customers. Farboil made this decision even though Marble Plastic's original manufacturer recommended against its use as an immersion coating. Also, the manufacturer of the latex emulsion component of the original Marble Plastic base coat had designed it for use only in exterior house paints.

12. When Matt Mattingly met Farboil's Gurkovic at the Anaheim convention, Gurkovic represented that Marble Plastic was an excellent coating which could be used instead of plaster or

to recoat plastered pools. At the time, plaster was an alternative material for finishing swimming pools. Gurkovic represented that Marble Plastic was very white and could be easily applied. Gurkovic also represented that Marble Plastic would last four to five years, and that Farboil had an epoxy-based coating which could be used to recoat Marble Plastic. Mattingly explained to Gurkovic how plaintiffs built their pools and Gurkovic represented Marble Plastic would be very suitable for plaintiffs' method of construction.

Plaintiffs' unique method of pool construction involved placing fiberglass forms for the pool walls and floor into an excavated hole. Cement was then poured into the forms, and after the concrete had solidified, the forms were removed. The more common method of pool construction in the 1970's involved placing steel rebar in the excavation and then spraying concrete over the steel webbing on the floor and walls. Plaintiffs' method had the advantage of producing much truer floors and walls.

13. At the Anaheim convention, Matt Mattingly placed an order with Gurkovic for a sufficient quantity of Marble Plastic for a couple of pools so that plaintiffs could observe its application and appearance. However, Farboil never made the shipment and Matt had to call Farboil in February to place the order again. By this time Farboil had replaced Gurkovic with a new sales representative for Marble Plastic, John Holman.

14. The first shipment of Marble Plastic came to plaintiffs without application instructions. Plaintiffs elected to coat the first pool with the product in Oklahoma City in March 1974 at the home of a Mr. Buchanan. Since there were no application instructions, Matt Mattingly had to call John Holman in Baltimore, and Holman gave instructions for application over the telephone. Plaintiffs had these instructions typewritten, and they were initially used by plaintiffs' application crews.

15. The Buchanan pool was painted according to defendant's instructions by Al Knight and Jerry Bohannon, two of plaintiffs' principal employees. Plaintiffs were quite satisfied with the appearance of the new product and its application requirements. Although Matt Mattingly was not present when the Buchanan pool was coated, he later observed the pool and met with plaintiffs' principal employees. After that meeting he decided to commit plaintiffs to using the Farboil pool coating system exclusively.

16. Approximately one month after the Buchanan pool was coated, the first problems with Marble Plastic occurred. The new coating started peeling off the floor of the swimming pool in large sheets. In July 1974, plaintiff solved this problem by using Farboil's suggestion to broom finish the swimming pool floors in order to give them a better profile to which the paint could adhere. Although this tip was not included in Farboil's initial instructions, it did correct this part of plaintiffs' problems with adhesion. However, plaintiffs were required to drain, clean and then recoat the Buchanan pool and others initially coated without broom-finished floors to correct the adhesion defect.

17. When Matt Mattingly met defendant's representative Gurkovic in January 1974, he represented that Sylvan Pools was a Farboil customer and that Sylvan coated 1200 pools per year. Matt Mattingly knew the Sylvan name and respected that company's size and was impressed by the fact that Sylvan was using Marble Plastic. In fact, at that point in time Sylvan Pools was only considering using Marble Plastic, and it did not begin utilizing Marble Plastic in the construction of its pools until March 1974, and only its southern division in Maryland. However, Mattingly was led to believe that Sylvan Pools, by early 1974, was using Marble Plastic exclusively.

18. Throughout the time plaintiffs used Marble Plastic, Farboil's representatives, including Gurkovic and Holman, represented that Farboil had much experience with coatings. Defendant's representatives also used the name of Beatrice Foods Company, a giant and well-respected company in American commerce, to bolster the reputation of its swimming pool products.

19. During the time plaintiffs used Marble Plastic, Farboil conducted a large advertising campaign for its pool coating products. Although Matt Mattingly testified that he did not recall all of the Farboil advertisements introduced as exhibits during trial, he stated that he did see them in publications such as Pool News and the National Swimming Pool Institute Magazine. Although the Court will discuss in detail the representations on these advertisements subsequently, in virtually all of them Farboil represents that its pool coating products were the result of years of research and development ostensibly

by Farboil. One of Farboil's advertisements (Ex. 1055), although not distributed until 1975, insinuated that Farboil had 60 years of experience with swimming pool coatings. Actually, although Farboil had some experience with pool coatings in the 1950's, it had absolutely no experience with the vagaries of swimming pool coatings before it began producing Marble Plastic for sale in 1973.

20. During the course of plaintiffs' application of Marble Plastic to pools in 1974, plaintiffs experienced problems with staining and adhesion. The coating would sometimes blister or come off in even larger pieces, particularly on the pool steps and walls. The stains on Marble Plastic were general in nature and deeper and darker than the stains experienced with the Welcote product formerly used by plaintiffs.

21. During 1974 plaintiffs also experienced problems with recoating Marble Plastic onto an initial layer of Marble Plastic. For example, when plaintiffs recoated the Buchanan pool, the first pool coated by plaintiffs with Farboil's product, the paint blistered and started to come off within one or two months following recoat. In addition, following the advice of John Holman, Farboil's representative, plaintiffs recoated some Marble Plastic pools with epoxy, which also completely failed due to its chemical incapability with Marble Plastic. At plaintiffs' cost, they were required to sandblast the pools erroneously coated with epoxy over Marble Plastic. Sandblasting necessitated draining a customer's pool, bringing noisy and dusty sandblasting equipment to a customer's home, and interrupting a customer's use of the pool.

22. Farboil's salesman, John Holman, visited plaintiffs' operations in Wichita and Oklahoma City in July 1974. During this trip he advised plaintiffs to broom finish their floors rather than finish them with a steel trowel, and this did correct plaintiffs' severe problems with adhesion on their pool floors. He also suggested that algae was the cause for the staining problems.

23. While Holman was in Wichita, he also went to a pool being built for a Mr. Loren Shaw, which was ready to be coated. Under Mr. Holman's supervision plaintiffs prepared the pool for painting and then he supervised the painting job itself. The initial Marble Plastic product required two coats, which could normally be applied in the same day. While Holman was observing and supervising plaintiffs' coating operations, he made no suggestions regarding pool surface preparation other than to broom finish the floors.

24. After Mr. Holman supervised the painting of the Shaw pool, he went to Matt Mattingly's own pool, which had already been coated with Welcote. Holman advised that since Welcote was a cement-based paint like Marble Plastic, Marble Plastic could be coated over Welcote. Nevertheless, the Marble Plastic peeled off Mattingly's own pool and had a tendency to decompose. Mr. Holman later advised Mattingly to apply epoxy on his home pool, which soon thereafter began coming off in sheets.

25. During 1974 Sylvan Pools was also using Marble Plastic on pools being painted by its southern division operating out of Maryland. Sylvan Pools' biggest complaint regarding Marble

Plastic was that it would stain and the stains could not be cleaned satisfactorily. Sylvan Pools, by far one of Farboil's largest customers, urged Farboil to develop a more stain resistant product. Consequently, Farboil, in November 1974, began producing a clear topcoat (157E) to cap or seal the white base coat (133E) and hinder its staining characteristics. Initially Farboil instructed that only one application of the clear topcoat was needed over the base coat, but after application problems arose Farboil then instructed its customers to apply two coats of the clear top (157E) over two coverings of base coat (133E).

26. The new topcoat was introduced by Farboil based on its laboratory testing rather than any extensive field testing on swimming pools. Farboil's chemists believed that the acrylic polymer in the topcoat would prevent or at least hinder the staining of the white base coat, and that the two coatings were chemically compatible so that good inter-coat adhesion would occur.

27. In the spring of 1975 plaintiffs' service departments began taking the covers off pools which had been coated by plaintiffs the previous year with Farboil's Marble Plastic base coat. The pool owners' principal complaints were that the pools had developed severe stains over the winter months and that the paint on some pools was peeling off. Most of these pools were initially recoated with more of Farboil's products at plaintiffs' costs.

28. Defendant's salesman, John Holman, called on the plaintiff companies in Wichita and Oklahoma City in April 1975 to instruct them regarding application of the new clear topcoat. This coat was applied with a paint roller over the tinted white topcoat.

29. As previously noted, during the fall of 1974 and spring of 1975 John Holman advised plaintiffs that epoxy could be used to recoat pools already coated with the Marble Plastic base coat (133E). Sylvan Pools was initially given the same advice. However, epoxy and the Marble Plastic base coat were incompatible and thus would not adhere to each other, and this produced large blisters of the epoxy coating on the swimming pools. Plaintiffs were not advised of this problem until September 1975, when one of defendant's laboratory technicians, Ms. Chris Lijewski, visited plaintiffs' operations in Wichita and Oklahoma. In particular, she went to observe a pool constructed by plaintiffs at the Shangri-La Resort in Afton, Oklahoma, which, on Holman's advice, plaintiffs had coated with epoxy over Marble Plastic. To plaintiffs' chagrin, she advised them in front of their customer that it was a mistake to apply the epoxy, and that the only solution was to sandblast the pool down to bare concrete again. Since this was an enclosed pool surrounded by exotic tropical plants in a resort complex, plaintiffs expended extensive time and expense installing a bubble over the pool before sandblasting the pool as unobtrusively as possible.

30. Before September 1975, based on John Holman's advice, plaintiffs coated 10 to 12 pools with epoxy over Marble Plastic.

31. When Farboil began selling its new coating system consisting of the white base coat (133E) and the clear topcoat (157E) in late 1974 and early 1975, it changed the name of the product to Marbalon. Although this new coating system was designed to eliminate the staining problems experienced by the white base coat alone, new types of stains accompanied the new system. Since the new topcoat was clear and of rather thin consistency, and was applied over an extremely white base coat on the interior of the swimming pool, its applicators had a very difficult time seeing the topcoat well enough during application to obtain a complete and uniform covering. Plaintiffs, and later Farboil, discovered that to increase the chances of a satisfactory covering of clear topcoat, two coats would have to be applied, with the second coat being applied on a diagonal opposite of the first coat. The paint crews were especially hindered on bright, sunny days when they became virtually blinded by the whiteness of the base coat. At one point Farboil even suggested outfitting the paint crews with polaroid sunglasses to cut down the glare of the white base coat. However, this solution did not solve the problem.

32. Due to the difficulty of applying the clear topcoat satisfactorily, new types of stains occurred due to places where the topcoat was missed or applied too heavily. Where an applicator inadvertently skipped a spot on the pool surface, a dark angular stain occurred. When the topcoat was applied too

heavily by overlapping roller strokes, or failing to roll out drips or runs, a yellow stain would occur. An additional problem was caused by applying the topcoat so thickly that it contained bubbles wherein algae would later grow, leaving a dark stain.

33. As soon as plaintiffs began experiencing staining problems with the new Marble Plastic system, they immediately contacted the defendant and were advised plaintiffs' paint crews were the cause of the problems. Plaintiffs believed the stains were caused by incorrect application of the Farboil products by their paint crews, and they consequently continued to use the Farboil products with the anticipation of correcting the application problems. Farboil also advised plaintiffs in 1975 not to worry about the stains occurring with the new topcoat because defendant planned to introduce a new stain removal product in the fall of 1975 which would remove the stains. However, defendant's Ms. Lijewski brought the new stain remover to plaintiffs in September 1975, but it failed to remove the stains satisfactorily.

34. By the fall of 1975, plaintiffs began feeling the economic impact of the warranty costs caused by Farboil's pool coatings. The warranty work was taken on jointly by the construction and service departments of plaintiffs. The warranty work interrupted and delayed the regular maintenance work of the service department, such as opening and cleaning pools, which understandably upset customers. It also caused the construction crews to delay building new pools. Likewise, since plaintiffs'

sales staff initially fielded customers' telephone complaint calls, they had less time to deal with new swimming pool customers. Plaintiffs' former employees all testified that the warranty problems and complaints by 1975 started to affect their morale adversely. However, by the fall of 1975 Matt Mattingly, perhaps naively, believed that most of the chipping and peeling problem had been eliminated by the new topcoat, and that improved application of the Marble Plastic system would reduce the staining problems to manageable proportions.

After the September 1975 call on plaintiffs' operations by Farboil's Lijewski and Chodnicki, Matt Mattingly approached Holman regarding financial assistance from Farboil due to the unsatisfactory results with the new Marbalon 4-coat system. Mr. Holman asked Mattingly to write him a letter containing a list of plaintiffs' pools which had problems due to the Farboil system (Ex. 28). This letter contained the following statement regarding plaintiffs' problems:

Since April of this year, our company has been using the new Marble Plastic pool coating with a clear topcoat sealer. We have found that it is extremely difficult to obtain a satisfactory finish with the roller method of application. Staining of the paint results if the sealer is thin, rolled out to a foam, or if 100% coverage is not achieved. Due to this problem, we have been obligated to refinish a large number of pools at our expense under the terms of our warranty.

Matt Mattingly and Mr. Holman further discussed some type of financial settlement between the parties when they met in November 1975 at a pool contractors' show in New Orleans, Louisiana. At that meeting Holman stated that Farboil would help plaintiffs. Holman further represented that defendant had

developed a new system for spraying the clear topcoat onto the pool in order to achieve a complete and uniform covering of the base coat. Holman further represented that Farboil's customers in other parts of the country were not having any problems with either the topcoat or staining, and that only the plaintiffs had complaints.

35. At Mr. Holman's suggestion, Matt Mattingly wrote a subsequent letter on January 12, 1976, further detailing the problems and costs experienced by plaintiffs with Marble Plastic (Ex. 32). This letter requested free materials and other help with expenses, and it contained the following statements regarding plaintiffs' experiences with Farboil's products and personnel:

As you know, we have incurred major expense repainting and resealing pools painted with Marble Plastic. It is worth something to us to find the right product, but your help is also needed.

There has been some inconsistency from Farboil as to application and recommended repairs. For instance, we were told that if we had problems with Marble Plastic to go over it with Farboil Epoxy. This has been our most costly experiment. Your technical manager, Richard Chodnicki, saw our worst example of Epoxy over Marble Plastic at Shang-Ri-La Resort, and there told us that we should never use Epoxy over Marble Plastic. This pool alone cost us \$3,600.00 to repair. Three other pools in Oklahoma City will need to be sand-blasted to remove Epoxy at a minimum cost of \$900.00 each. We have repainted or resealed 65 pools this year, and will need to do the same to 53 pools this spring. One good thing is that the pools are not blistering, and chipping has been reduced to just a few pools. Staining is prevalent, but as experience is gained, we seem to be getting on top of this too.

* * *

It is my hope that we have learned the problems of application and you have solved the material problems by now, and next year will go smoothly.

Although this letter was addressed to John Holman at Farboil, it was never sent to him, but it was delivered to defendant. Just after the letter was composed in January 1976, John Holman telephoned Matt Mattingly to tell him that Holman was leaving Farboil's employment. Holman further stated that the plaintiffs could probably extract more than just free supplies from defendant and that plaintiffs should further pursue Beatrice. Although Holman did not tell Mr. Mattingly why he was leaving Farboil, plaintiffs later learned Holman was discharged because he was padding his expense account. Within hours or a day of Holman's call to Matt Mattingly, Mr. Edd Bush of Farboil telephoned Matt Mattingly to say he was replacing Mr. Holman and would work closely with plaintiffs regarding any problems. Shortly thereafter Mr. Bush came to Wichita to call on plaintiffs, and at that meeting Mr. Mattingly gave him the letter dated January 12, 1976 (Ex. 32). Matt Mattingly and Edd Bush did not discuss the letter at this initial meeting and Mr. Bush asked that he be allowed to take the letter back to Farboil's offices in Baltimore to develop a response.

36. At this initial meeting Farboil's new National Swimming Pool Director, Edd Bush, represented that he was familiar with the defendant's pool coating products and that he was capable of handling plaintiffs' problems with the products. After Bush's visit to Wichita in February 1976, Farboil gave plaintiffs credit on bills owing for Marbalon initially in the

amount of \$3,500.00. The details of this initial credit are contained in Exhibit 34, which is the first part of an accord and satisfaction agreement between the parties. Exhibit 34 is a letter dated February 18, 1976, from Edd Bush to Matt Mattingly.

The letter contains the following general terms:

A credit for \$3500 will be issued to Mattingly to help defer the cost on the pools that you have coated with Epoxy that must be recoated, and other pools that have been repaired since 9 February 1976. Additionally, we agree to provide technical assistance on repairing all upcoming pools as to what must be done to these pools. We will also provide the materials to correct these situations.

The original draft of Exhibit 34 states that the credit was extended due to John Holman's mistake of advising plaintiffs that epoxy could be coated over Marble Plastic. However, this admission was eliminated in the final draft, and this omission was typical of defendant's lack of honesty regarding material facts viz-a-viz plaintiffs.

37. In March 1976, Ken Hershner from Farboil called on plaintiffs to give technical assistance regarding the application of the Marbalon system. Givin Mattingly, who was in a management position in the Wichita company, met Hershner at the airport and drove him to a few of the Mattingly pools. While in Wichita, Hershner did not actually observe plaintiffs' coating crews at work, although he did talk with the Mattingly principals. Before going to Wichita, Hershner called on Mattingly Pools in Oklahoma City. There he met with Leroy Burns, manager of the Oklahoma City operations, and Eric Miller, the construction foreman in Oklahoma City. While there he observed certain deviations from Farboil's recommended application procedure.

However, none of these deviations by the plaintiffs' Oklahoma City personnel, such as adding a blue tint to the Marble Plastic, caused significant problems. Hershner did suggest sandblasting several pools which had been coated with Farboil paint before recoating with Farboil paint. Sandblasting a swimming pool cost at the time up to \$900.00.

38. In the spring of 1976, when plaintiffs' service crews began uncovering Wichita and Oklahoma City pools painted in 1975, plaintiffs were faced with a massive amount of customer complaints regarding staining and peeling. This caused plaintiffs' service and construction crews to devote much of their time to warranty work. Some of the pools which plaintiffs recoated in the spring of 1976 received their second or third coats of Farboil's product since the paint was initially applied in 1974. When plaintiffs recoated pools in the spring and summer of 1976, they were required to drain the pools, sand off all loose paint, and then wash the pool walls and floors with defendant's detergent before recoating with two coats of base coat and two layers of topcoat.

39. By June 1976, Sylvan Pools, which in 1975 had decided to use Farboil's pool products in both its northern and southern divisions, had decided to quit using Marble Plastic due to complete dissatisfaction with the coatings. Sylvan was required to borrow approximately one million dollars to take care of the warranty costs and other problems caused by the Farboil pool coatings.

40. Delray Pools of Southern Florida, which was operated by Joseph Rocchio, began using the Farboil 4-coat system in 1975. That year Mr. Rocchio was president of the National Swimming Pool Institute. In June 1976, he was forced to close his pool construction business down because of costs due to staining problems associated with the Farboil pool products.

41. On July 17, 1976, Matt Mattingly went to the Farboil offices in Baltimore to further discuss complaints regarding the pool coatings and to seek some type of settlement with Farboil. At this time plaintiffs had a large account payable to defendant, and Matt Mattingly had decided not to pay it even before arriving in Baltimore. At the Farboil offices Mattingly met with Edd Bush, who advised Mr. Mattingly that Farboil refused to write off the entire account and would stop selling plaintiffs the materials needed to fix the pools with staining and other problems. Bush further mentioned that defendant was about to begin marketing a new pigmented topcoat (167E) which would be easier to see during the application process, and would therefore eliminate all the problems associated with the Farboil clear topcoat. Following negotiations in the office of Mr. Bush, he and Mr. Mattingly agreed to a \$4,000.00 credit for plaintiffs. However, before final approval, Mr. Bush left the office to confer with his superior, Mel Hendrickson, who then stormed into Mr. Bush's office and essentially accused Mr. Mattingly of stealing from Farboil, in that plaintiffs were the only "sons of bitches who got any kind of deal from us." During these negotiations Mr. Bush again represented to Mattingly that

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plaintiffs were the only ones having problems with the Farboil products.

42. On August 3, 1976, Ed Bush sent plaintiffs a credit memo for \$4,000.00 "in full and final payment for all recoating jobs necessary because of the problems you had with Marbalon." (Ex. 49).

43. In the fall of 1976 plaintiffs received a free sample of about 25 gallons of the 167E tinted topcoat. Defendant's representatives orally advised plaintiffs this product could be used alone for recoating over pools with Marble Plastic, although the technical data sheet for 167E issued in October 1976 advised that it could only be applied over a pool freshly coated with 133E base coat.

44. The 167E tinted topcoat was to be applied with a sprayer, although there were additional application problems with this method. By the spring of 1977 plaintiffs decided to subcontract this work, and these hired painters complained the new topcoat would clog the nozzles of their sprayguns. In addition, the 167E topcoat applied on new pools developed yellow stains and blisters within the first year. Plaintiffs were the only customers to whom defendant was able to sell this product.

45. Plaintiffs' next personal meeting with a representative of defendant occurred in November 1976 at the pool contractors' convention in Chicago. While attending the meetings, Matt Mattingly had an inconsequential meeting with Ed Bush.

46. Plaintiffs entered the spring of 1977 with high hopes that they would be able to correct all of the coating problems with the new 167E pigmented topcoat; however, when plaintiffs' crews began uncovering pools in the spring of 1977, they faced another barrage of customer complaints and then found very quickly in the spring or early summer that the 167E topcoat could not be used to recoat pools and thus easily solve plaintiffs' warranty problems, despite the oral representations of defendant's employees.

47. By the early summer of 1977, plaintiffs quit using Farboil's products and went back to plastering their swimming pools. By the end of 1977 Mattingly Pools, Inc. virtually closed its operations in Oklahoma City, and subsequently entered into involuntary bankruptcy. Mattingly, Inc., in Wichita, ceased operations in 1978.

48. Farboil withdrew its pool coating products from production and marketing by the summer of 1978, except for some relatively small sales to Twin Custom Pools of Cleveland, Ohio, which stopped buying Farboil's products in 1980.

49. In addition to the lay testimony regarding plaintiffs' problems with the Farboil products given by the Mattingly Companies' principals and employees, plaintiffs presented the outside expert opinion of Dr. Ignacios Metil by his deposition testimony. Dr. Metil is a PhD chemist who operates his own consulting laboratory specializing in industrial coatings and paints. He was retained by Sylvan Pools in 1975 initially to investigate its coating application techniques and to suggest

improvement in those techniques, and to further investigate the Farboil coatings to determine the cause for their failure on Sylvan's pools. Dr. Metil presented a simple and persuasive explanation regarding the problems associated with both the Farboil base coat and topcoat. He explained that any water-based coating was inherently unsuitable as an immersion coating, because by nature it would be endemically too porous to prevent staining of the cement substrate. In contrast, solvent-based immersion coatings, when applied to a cement surface, characteristically will consist of an even spread of the coating molecules that seal off the concrete substrate, and the resulting seal generally hinders staining of that substrate. Consequently, when a water-based coating is applied to concrete, it is by nature water soluble enough to raise the ph level to an undesirable point at which staining will occur. Furthermore, when cement is added to the water-based coating, it increases the pigment volume concentration of the coating, and thus further promotes the water vapor transmission characteristics of the coating, allowing iron oxide molecules to collect on the cement substrate. In addition, the porous nature of the 133E Farboil base coat makes cleaning stains impossible, since the iron oxide stains are actually on the cement underneath the topcoating.

50. Dr. Metil further explained that the clear topcoat (157E), which Farboil began marketing in early 1975, was intended to be a solution to the staining problem. This product consisted primarily of an acrylic polymer dispersed in water.

This coating theoretically could solve the porosity and therefore staining problems inherent in the 133E base coat. However, due to its translucent nature, it was extremely difficult to apply in the field by pool coating applicators. Furthermore, a successful application of the clear topcoat necessitated a completely uniform coating. Dr. Metil testified that Farboil's 4-coat system would still have some staining problems, but that stains would occur on top of the acrylic topcoat and therefore be easily removed through cleaning. Consequently, according to Dr. Metil's testimony, a perfect application of the base coat followed by an optimum application of the clear topcoat would result in a swimming pool with only minor staining problems. However, since the clear topcoat was so difficult to apply, this goal was rarely reached by any of Farboil's pool contractor customers. The only satisfied customer produced by Farboil was Mr. Robert Stutz of Twin Custom Pools, whose application crews applied the coatings using methods which exceeded those recommended by Farboil. Mr. Stutz' application techniques were clearly in excess of what a residential pool owner would have exercised applying Farboil's coatings, even though Farboil stated in its advertisements that even a residential pool owner could apply the paints.

51. After reviewing all of the expert testimony regarding the Farboil coatings and the various lay witnesses' testimony regarding their coating problems, the Court concludes that defendant's initial coating sold to plaintiffs in 1974 (133E) was inherently defective due to its excessive staining character

istics. The Court further finds that these staining characteristics would have been discovered by Farboil had it invested more time in field testing the product before putting it into production. The Court reiterates that Farboil put the base coat into production after merely two months of testing in the laboratory. In addition, defendant's personnel at Farboil lacked sufficient practical experience and expertise with swimming pool coatings to decide to introduce a new product without field tests. Indeed, when this decision was made, almost all of the relevant people at Farboil would not have known what a good pool finish looked like.

52. Although the Farboil 4-part system was theoretically a viable product if applied under optimum conditions, these conditions could only be realized in a laboratory setting. When the system was attempted in the field, even by experienced coating applicators such as the Sylvan pool crews and to a lesser extent the plaintiffs' crews, there was clearly an unsatisfactory chance of success. The translucent nature of the topcoat made it extremely difficult to apply in an acceptable manner, making ultimate success with the product illusory. The Court finds that this would have been discovered had Farboil taken time to field test the 4-coat system in swimming pools instead of merely relying on laboratory testing.

53. Defendant presented the outside expert opinion of Dr. Shelby Thames regarding the Farboil coatings and their use by plaintiffs. Dr. Thames is a PhD organic chemist who is a professor at a state university in Mississippi and also does

consulting work regarding coatings. His theory, based on elaborate and impressive testing, was that plaintiffs' failures with Farboil coatings were primarily due to their inadequate initial cleaning of their pools. Specifically, Dr. Thames testified that plaintiffs failed to clean the residue of the form release agent, Noxcrete, left on the raw concrete once plaintiffs removed their construction forms after the concrete had hardened. Dr. Thames testified that plaintiffs' attempt to wash this residue off with acid (trisodium phosphate) merely turned the Noxcrete residue to a form of lard rather than removing it. Plaintiffs then applied grout over the pool to smooth out irregularities before applying the Farboil coatings. Dr. Thames theorized that the Noxcrete residue would eventually migrate into the grouting, causing stains and paint chipping which actually was a grout failure rather than a pool coating failure.

54. The Court finds that Dr. Thames' general theories regarding Noxcrete residue are valid, and it did cause some grout chipping problems for plaintiffs. However, other pool companies, specifically Sylvan Pools and Delray Pools, did not employ a form release agent such as Noxcrete in the construction of their pools. Nevertheless they experienced severe problems with Farboil's coatings which clearly resembled the problems experienced by plaintiffs. Consequently, the Court finds that the defective nature of Farboil's pool paints was the cause of the coating failures experienced by plaintiffs. Moreover, although Dr. Thames did analyze paint chips from some Mattingly-

built pools, much of his testimony regarding Farboil coatings in general was based on his observations of pools built in Florida. Only one of the Mattingly pools he personally observed was coated with Marble Plastic, and in the paint chip from that pool Dr. Thames did not find Noxcrete residue. Consequently, although this expert's theories were certainly impressive and superficially convincing, they do not, as a practical matter, explain plaintiffs' problems with defendant's product, and the Court rejects them.

55. The Court finds that in 1975 a general economic recession occurred nationwide as well as in the Wichita and Oklahoma City areas. During this time plaintiffs experienced a dramatic rise in the cost of steel and concrete, and plaintiffs were dealt a double blow by these price increases since the pools they constructed in 1975 were contracted for based on earlier prices for raw materials. Nevertheless, the 1975 recession was not the cause for the economic deaths of plaintiffs. Plaintiffs enjoyed a good relationship with their bankers, and at least in Wichita Mattingly, Inc. was a well-established and reputable company. The Court finds that the warranty expenses incurred on account of the failures of the Farboil coatings prevented plaintiffs from doing what all companies do in stormy economic times, which is to cut overhead by decreasing staff. Plaintiffs were forced to keep their employment high to perform the warranty work necessitated by the coating failures. Although some of defendant's economic arguments are interesting and persuasive, they ignore plaintiffs'

strengths. Defendant presented no credible evidence that plaintiffs' management team was incompetent. Plaintiffs' salaries were not excessive and profits were returned to the companies to buy more equipment for expansion. Plaintiffs built pools for some of the Wichita area's most reputable people. Indeed, Mattingly, Inc.'s pool customer warranty list exhibit resembles a "who's who" for Wichita, Kansas. Plaintiffs enjoyed a very good reputation until they began using the Farboil products.

56. Plaintiffs presented clear and convincing evidence that from their initial contact with Farboil's representatives in January 1974, the sale of Farboil products to plaintiffs was based on fraudulent misrepresentation. Farboil representatives fraudulently stated numerous material untrue statements regarding their products, including statements that Farboil had years of experience in the pool coating business, that Farboil pool coatings were tested products that could be easily recoated. The Court further finds that plaintiffs justifiably relied on these statements, since Farboil's products were backed by Beatrice Foods Company, a giant, well-respected and consumer oriented company.

57. The Court recognizes the obvious problems presented by reconstructing the costs incurred by plaintiffs in attempting to repair the pools coated by them with Farboil products. Based on the available records and memories of plaintiffs' key people, plaintiffs have assembled separate files for each pool coated with Farboil products.

The cost reconstruction effort for Mattingly, Inc. was accomplished primarily by Al Knight. The Court, with counsels' consent, reviewed his lengthy deposition testimony regarding his cost reconstruction analysis, and the Court finds his calculations and estimates to be reliable. Based on Knight's figures and similarly reliable cost reconstructions by former employees of Mattingly Pools, Inc., plaintiffs have attempted as best as possible to reconstruct the total costs incurred by them. The Court finds these warranty cost reconstructions to be reasonable and accepts them.

58. Plaintiffs also expended considerable effort calculating with certainty their liabilities to former pool customers with warranty claims against defendant. The Court accepts this evidence regarding damages and finds it reliable. The Court further accepts plaintiffs' evidence regarding their debts to general creditors resulting from their business demise caused by Farboil products.

The Court will further treat plaintiffs' damages in the legal section below.

II. Legal Discussion

This Court has proper jurisdiction over the parties based on diversity of citizenship. 28 U.S.C. §1332. The parties agree that venue is proper and that all necessary parties are before the Court. Likewise, there is no dispute that Kansas law, as determined by this state's appellate courts, shall control the outcome of this litigation. Erie Railroad Co. v. Thompkins, 304 U.S. 64 (1938).

A. Accord and Satisfaction. Defendant contends the parties entered into an accord and satisfaction agreement in 1976 concerning plaintiffs' complaints regarding Farboil's pool coatings, and that this agreement is an absolute defense to all claimed damages occurring prior to August 3, 1976. This matter was the subject of a partial summary judgment motion filed by defendant earlier in this litigation, which the Court overruled on April 15, 1982 (Dkt. 113). In that order the Court noted that if this situation were simply a matter of a plaintiff who thought it had struck a bad deal and now wanted a better one, the Court would agree that plaintiffs here would be bound by the accord and satisfaction agreement. However, the Mattinglys contend the necessary elements for an accord and satisfaction agreement never existed, and in the alternative, that the alleged settlement agreement was the result of fraud perpetrated by defendant's representatives upon plaintiffs.

1. "Meeting of the Minds." Plaintiffs contend the requisite "meeting of the minds" was absent in the alleged agreement. Barnes v. Mid-Continent Casualty Co., 192 Kan. 401,

388 P.2d 642 (1964). The nature of an accord and satisfaction agreement and its requirements were stated by the Kansas Supreme Court in Lippert v. Angle, 215 Kan. 629-30, 527 P.2d 1016 (1974):

An accord and satisfaction is a method of discharging a contract or a cause of action whereby the parties agree to give and accept something in settlement of the claim or demand of one against the other, the 'accord' being the agreement and the 'satisfaction' being its execution or performance. The theory is founded on contract and the essentials of a valid contract must be present before a subsequent action on the original claim will be barred. [Citations omitted]. To constitute an accord and satisfaction there must be an offer in full satisfaction of the obligations accompanied by such acts and declaration or under such circumstances that the party to whom the offer is made is bound to understand that if he accepts it is in full satisfaction of and discharges the original obligation.

The Kansas Supreme Court also emphasized the "meeting of the minds" requirement in Sanders v. Birmingham, 214 Kan. 769, 774, 522 P.2d 959 (1974).

On August 3, 1976, defendant issued plaintiffs a credit memo for \$4,000.00 "in full and final payment for all recoating jobs necessary because of the problems you had with Marbalon" (Ex. 49). This memorandum resulted from a meeting between Matt Mattingly and defendant's representatives the prior month in Baltimore where plaintiffs' complaints and relief from defendant were discussed. Nevertheless, plaintiffs claim defendant unilaterally issued the August 3, 1976, credit memo, and that they never formally accepted any settlement offer from defendant.

Plaintiffs' argument that they never agreed to the accord and satisfaction contained in the August 3 credit memo ignores the obvious purpose for the negotiations and discussions between the parties regarding plaintiffs' complaints beginning in late 1975. Plaintiffs had already accepted a \$3,500.00 credit on their account payable to defendant on May 28, 1976, "in full settlement for pools that must be recoated." This agreement regarded pools coated before the 1976 season.

Given these discussions and events, and Matt Mattingly's admission that he was giving up "all my costs" and "anything else that I had wanted at this time" when he agreed to the \$4,000.00 credit in July 1976, the Court must find the plaintiffs knew they had entered into an accord and satisfaction agreement that under the apparent circumstances appeared conclusive. The parties had disputed the appropriate amount of relief owing, and after discussions they arrived at a sum certain which plaintiffs accepted with the understanding that their claims were consequently given up. See Amino Brothers Co., Inc. v. Twin Caney Watershed District, 206 Kan. 68, 73, 476 P.2d 228 (1970). Plaintiffs' reliance upon Addis v. Bernardin, Inc., 226 Kan. 241, 597 P.2d 250 (1979), is unfounded. In that case it was clear that the plaintiff only received credit for the dollar amount of bad product purchased, and nothing else.

In conclusion, although accord and satisfaction is an affirmative defense to be proven by a preponderance of the evidence, id. 226 Kan. at 243, defendant has met its burden of proving an apparent agreement.

2. Fraud and the Settlement Agreement. Plaintiffs' alternative argument regarding the accord and satisfaction question is that if there was such an agreement it should be set aside due to fraud. It is quite clear a valid accord and satisfaction cannot be the product of fraudulent misrepresentations. Studiengesellschaft Kohle mbH v. Novamont Corp., 485 F.Supp. 471 (S.D. N.Y. 1980); 1 Am.Jur.2d Accord and Satisfaction §24 (1962) Like any other contract, an accord and satisfaction agreement can be rescinded if consummated through fraud.

The Kansas Supreme Court gives a classical definition of fraud:

Actionable fraud includes an untrue statement of fact, known to be untrue by the party making it, made with the intent to deceive or recklessly made with disregard for the truth, where another party justifiably relies on the statement and acts to his injury and damage.

Nordstrum v. Miller, 227 Kan. 59, 65, 605 P.2d 545 (1980). Our state Supreme Court has also noted, quoting from 37 C.J.S. Fraud §1:

While the broad outlines of fraud have been indicated by regarding it as including any cunning, deception, or artifice used, in violation of a legal or equitable duty, to circumvent, cheat, or deceive another, the forms it may assume and the means by which it may be practiced are as multifarious as human ingenuity can devise, and the courts consider it unwise or impossible to formulate an exact, definite, and all inclusive definition thereof. It is synonymous with, or closely allied to, other terms indicating positive and intentional wrongdoing, but is distinguishable from mistake and negligence.

Citizens State Bank v. Gilmore, 226 Kan. 662, 667, 603 P.2d 605 (1979).

The standard of proof where fraud is alleged is that of "clear and convincing evidence." Nordstrum v. Miller, 227 Kan. 59, 65, 605 P.2d 545 (1980). This standard means that a plaintiff must not only prove his cause by a preponderance of the evidence, but its evidence must be of a higher quality. Fox v. Wilson, 211 Kan. 563, 579, 507 P.2d 252 (1973). The phrase "clear and convincing" signifies:

[T]he witnesses to a fact must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct and weighty; and the witnesses must be lacking in confusion as to the facts at issue.

Modern Air Conditioning, Inc. v. Cinderella Homes, Inc., 226 Kan. 70, 78, 596 P.2d 816 (1979).

After careful review of the pertinent witnesses' testimony regarding the formulation of the accord and satisfaction agreement, particularly the testimony of Matt Mattingly, the Court finds plaintiffs have proven this agreement was procured by defendant through fraud. The principal fraudulent misrepresentation inducing plaintiffs into the settlement agreement was Edd Butch's statement to Matt Mattingly while Mattingly was at Farboil's offices on July 17, 1976, that only plaintiffs were having problems with the pool coatings and that all of plaintiffs' problems were due to application errors by plaintiffs. This statement by Butch, who was then the sales representative for Farboil's pool coatings, was supported in Mattingly's presence by Butch's superior, Mel Hendrickson, that only plaintiffs were receiving any special deals or compensation

defendant. These statements were persuasively made, and defendant's representatives knew they were false because they knew defendant had received numerous reports of coating failures in Florida and in the mid-Atlantic states where Sylvan Pools did business. Defendant's representatives knew that Sylvan and Delray Pools in Florida had stopped using Farbil's coatings in June 1976. Moreover, by July 1976, defendant's representatives knew Farboil was attempting to satisfy complaining customers by offering to fix their pools.

The Court finds the above statements to be material in nature. "A matter is material if it is one to which a reasonable person would attach importance in determining his choice of action in the transaction in question. [Citation omitted]." Lynn v. Taylor, 7 Kan. App.2d 369, 371, 642 P.2d 131 (1982). The statements by defendant's representatives that only plaintiffs had coating problems and that they were strictly of plaintiffs' own making were very material inducements for plaintiffs to agree to the accord and satisfaction. If plaintiffs had knowledge that other customers of Farboil also had disastrous results with defendant's coatings, it is quite reasonable to suppose plaintiff would not have accepted a \$7,500.00 credit in lieu of their actual damages caused by Farboil's products.

Although Edd Butch controverted Matt Mattingly's testimony regarding his July 17, 1976, meeting with Butch and Hendrickson, Mattingly's memory regarding the meeting appeared to be clear and concise. Moreover, Butch's statements that all the problems

were caused by application errors were consistent with defendant's statements regarding plaintiffs' coating problems throughout the parties' business relationship.

Lastly, Matt Mattingly was justified in relying upon defendant's statements that plaintiffs' difficulties were self-inflicted. Although plaintiffs earlier had a hint that Sylvan Pools also had complaints about defendant's coatings, a Sylvan Pools representative later told Matt Mattingly that Sylvan had no complaints. Nor did plaintiffs know of Farboil's pool failures in Florida when the July 17, 1976, meeting occurred. Of greatest importance regarding the reliance issue is the fact that Farboil was backed by a nationally known and respected corporation like Beatrice Foods. As the Court mentioned during the course of trial, the average consumer in this country, with justification, does not need to question statements made by national companies such as, for example, Sears Roebuck, or hopefully, Beatrice Foods. Their reputation for quality and reliability abviates such scepticism.

In summary, although the essential elements for an accord and satisfaction between the litigants were ostensibly present in 1976, the Court finds this agreement shall be rescinded due to its procurement by defendant by fraud.

B. Collateral Estoppel and the Florida Litigation.

As the Court mentioned in its prefatory remarks prior to counsels' closing arguments, the Court has not applied the doctrine of collateral estoppel in this litigation. Beatrice Foods was also a defendant in state court in Florida, where it

was sued by Delray Pools under claims that the Marble Plastic four coat system was defective, was inadequately tested before marketing, and that warranties were breached. On July 16, 1979, the Florida state trial court entered findings in accord with the above claims, and this judgment was subsequently affirmed on appeal. Plaintiffs in the case at bar urge this Court to adopt the findings of the Florida trial court in this case based on the doctrine of collateral estoppel. However, plaintiffs' contentions regarding collateral estoppel are inappropriate in the present setting, although this Court has considered portions of the evidence presented in the Florida litigation.

Although sometimes used interchangeably, the distinction between the doctrine of res judicata and the doctrine of collateral estoppel is pertinent here and should be noted:

Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. [Citations omitted].

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326, 58 L.Ed.2d 552, 559 note 5 (1979); see also Williams v. Evans, 220 Kan. 394, 396, 552 P.2d 876 (1976); Goetz v. Board of Trustees, 203 Kan. 340, 454 P.2d 481 (1969). It is commonly stated that collateral estoppel involves "issue preclusion" and res judicata involves "claim preclusion."

The obvious defect in plaintiffs' contentions regarding collateral estoppel is the absence of mutuality of parties in the Florida litigation and the case at bar. Although the defendant is the same in both matters, the plaintiffs in these cases are neither identical nor in privity with each other. Although strict mutuality of parties is not required in litigation in federal courts involving federal substantive law, Parklane Hosiery Co. v. Shore, supra, it does not follow that application of collateral estoppel when state law is controlling is governed by the same rules. As a general rule:

It has been generally held or recognized that state law governs the applicability of the doctrine of res judicata or collateral estoppel in a federal court action in which jurisdiction is based solely upon diversity of citizenship of the parties, at least where the issues involved in the prior judgment were issues of state law.

19 A.L.R.Fed. 709, 712 (1974); see Coppedge v. Clinton, 72 F.2d 531 (10th Cir. 1934); Crutsinger v. Hess, 408 F.Supp. 548 (D. Kan. 1976). Since the case at bar is based on diversity of citizenship jurisdiction, the Court must look to state law to determine whether the doctrine of collateral estoppel is appropriate here.

The Kansas Supreme Court's most recent discussion of collateral estoppel appears in Wells v. Davis, 226 Kan. 586, 603 P.2d 180 (1979). Here the plaintiff won a state court judgment against a certain commercial defendant, but the defendant was insolvent, and plaintiff was unable to satisfy his judgment. Consequently the plaintiff brought a second state court action against a sister corporation of the first defendant, and

plaintiff also sued the husband and wife who were the sole stockholders of both corporations on an alter ego theory. Plaintiff attempted to use collateral estoppel as a "sword" to estop the defendants in the second action from denying or litigating the question of their liability to plaintiff. The Kansas Supreme Court concluded collateral estoppel was not appropriate for two reasons: (1) there was no mutuality of parties, and (2) the critical issue in the second action was not adjudicated in the first action (i.e., whether the individual defendants were the alter ego of the two sister corporations). Consequently, it is clear that the Kansas Supreme Court, unlike the U.S. Supreme Court, requires mutuality of parties, at least when collateral estoppel is used offensively. Although Judge O'Connor, in Crutsinger v. Hess, supra, predicted the Kansas Supreme Court would not strictly require mutuality of parties when collateral estoppel was used as a defense, this case does not support plaintiffs' contentions here, since they clearly wish to use the Florida decision offensively.

Defendant contends this Court should apply the collateral estoppel rule of Florida since the prior judgment was rendered in that state. See 18 Wright & Miller, Federal Practice & Procedure §442 at 730-31. Defendant points out that the Florida courts also require strict mutuality for collateral estoppel. Seaboard Coastline Rail Co. v. Cox., 338 So.2d 190-91 (Fla. 1976); Newport Div., Tenneco Chemicals, Inc. v. Thompson, 330 So.2d 826, 828 (Fla.App. 1976); Zurich Ins. Co. v. Bartlett, 357 So.2d 921-22 (Fla.App. 1977).

In conclusion, regardless of whether the Court applies Kansas or Florida law, it is clear this Court may not adopt the findings of the Florida trial court regarding Farboil's pool coating products.

C. Fraud Claims.

1. Active Fraud. The elements of actionable fraud in Kansas were set forth above in the discussion of the accord and satisfaction issue:

Actionable fraud includes [1] an untrue statement of fact, [2] known to be untrue by the party making it, [3] made with the intent to deceive or recklessly made with disregard for the truth, [4] where another party justifiably relies on the statement and acts to his injury and damage. [Citations omitted].

Nordstrom v. Miller, 227 Kan. 59, 65, 605 P.2d 545 (1980).

Again, fraud must be proved by "clear and convincing" evidence.

Although plaintiffs contend defendant is liable because of negligence and breach of warranty, their fraud claim is the strongest and forms the heart of this suit. Defendant's fraudulent misrepresentations to plaintiffs began when Matt Mattingly first met a Farboil representative and continued throughout their commercial relationship. The fraud with which the Court is concerned here regarded statements about Farboil's experience and success with pool coatings rather than the statements relevant to the accord and satisfaction question, although they are interrelated.

Plaintiffs, through Matt Mattingly, were originally induced to purchase defendant's pool coatings by defendant's George Gurkovic at a pool manufacturers' convention in Anaheim,

California. At this meeting Gurkovic told Mattingly Farboil had developed and tested the pool coatings on its own. Moreover, Gurkovic represented that the coating was easy to apply and could be easily recoated. Lastly, Gurkovic represented that Sylvan Pools, a very large and respected pool contractor, was a Farboil customer.

Gurkovic knew all of these statements were untrue and were made with the intent that plaintiffs rely on them and buy Farboil products. Gurkovic knew Marble Plastic clearly was not a Farboil development, since he brought the product formula to defendant from a rival company in the first place. Furthermore, he knew defendant had not significantly tested the formula before making the decision to market the product. These statements were material since Mattingly, or any reasonable building contractor, would give substantial weight to a supplier's testing and acquaintance with a product before resting his or her company's future success on the product. Although another contractor might have purchased the coatings even though it knew Farboil had no track record in the pool coating industry, a reasonable contractor would have at least considered this lack of experience. Gurkovic further bolstered the product's image by telling Mattingly that Sylvan Pools was already a Farboil customer, when Gurkovic knew Sylvan had not yet even decided to buy Farboil coatings. Gurkovic obviously dropped the Sylvan Pools name into his sales pitch to Mattingly because he knew it was nationally known in the pool building industry and because he knew it would induce other pool contractors like plaintiffs to buy Farboil coatings.

Gurkovic's statement at the Anaheim convention that the Farboil coating (133E) was easy to apply and could be easily recoated was also a material statement which he knew was untrue or which was made with reckless disregard for the truth to entice plaintiffs to buy. Plaintiffs tested the coating on the Buchanan pool before deciding to use Marble Plastic full-scale, and they were initially impressed with how the product was applied. However, substantial problems occurred weeks later, in part because the coating was such a brilliant white that the applicators were partially blinded on hot days, making perfect applications, which were absolutely necessary, not only less than easy, but extremely difficult. Gurkovic's statement that the product could be easily recoated never proved out. When Gurkovic made this statement, Farboil had not performed any significant tests, especially field tests, regarding the recoating aspects of the 133E product. Consequently, Gurkovic's statement about recoating aspects was at least reckless. Lastly, it was certainly material, for a reasonable pool contractor would consider recoatability of a product before deciding to use it as an integral component of its construction process.

Defendant contends Gurkovic's statements were either "puffing" or literally true. "Puffing" and "sales talk" in general are not actionable statements because they tend to be matters of opinion regarding subjects about which a customer may be equally able to make his own opinion rather than relying on a seller's statement. When an opinion is given by someone with an adverse interest, the recipient may not justifiably rely upon it

Restatement (Second) of Torts §542 (1977). Nevertheless, in certain situations an opinion statement can be the basis of a fraud claim:

The rule is tempered by the fact all statements must be considered in the context of the circumstances under which they are made (37 CJS., Fraud, §10, pp. 228-229) and where the terms of dealing are not equal, and the representor has superior knowledge of the subject, a statement which would otherwise be one of opinion will be regarded as one of fact (37 CJS., Fraud, §10b., p. 230).

Fisher v. Mr. Harold's Hair Lab, Inc., 215 Kan. 515, 523, 527 P.2d 1026 (1974).

The Court agrees with defendant that certain statements by Gurkovic were clearly "puffing" or opinions, e.g., that Marble Plastic was a "pool contractor's dream." Nevertheless, in the context in which other statements by Gurkovic were made regarding ease of application and recoatability, they were representations of fact, because Farboil, at least presumably, possessed superior knowledge of the product not readily available to plaintiffs. Application requirements were critical to plaintiffs in their decision to switch to Marble Plastic from plaster and Welcote as the finish coating, because plaintiffs employed unskilled personnel, generally college students, on the paint crews. Plaster required skilled applicators who were subcontractors. Plaintiffs desired to finish their own pools to gain complete control over production and reduce costs. Consequently, Gurkovic's representations regarding ease of application were very material, yet they were made without any significant field tests by defendant to check for problems which

might occur outside the controlled environment of a laboratory. Instead of testing the pool coating on actual swimming pools, defendant elected to market the product within weeks after acquiring its formula. This action implies a callous lack of concern for possible defects, and it was clearly fraud to make representations regarding application requirements when defendant had not even coated swimming pools themselves with its new product. Actually, once Gurkovic left Farboil after only a few months employment, it did not have anyone with extensive practical experience with pool coatings. As plaintiffs have strenuously argued, Farboil in truth made customers like plaintiffs its "guinea pigs."

A most important fraudulent statement uttered by defendant's representatives during the parties' commercial relationship was that plaintiffs were the only Farboil customers having coating failures. When plaintiffs complained to defendant, they were always told the problems were caused by plaintiffs' application techniques rather than defects in defendant's paint. Plaintiffs presented clear and convincing evidence through testimony of other former Farboil customers that they were contemporaneously making similar complaints to the same Farboil people. This intentional misrepresentation was manifestly material since plaintiffs would have discontinued their use of Marble Plastic had they been told the truth. Instead, plaintiffs remained a Farboil customer because they believed defendant's statements that their problems were caused by plaintiffs' paint crews.

The Court rejects defendant's argument that plaintiffs were negligent or unjustified in choosing to use the Farboil coatings after their first full year of coating failures. It is entirely too facile to make such arguments when the assistance of hindsight is available. By 1975 plaintiffs had made Farboil products an integral part of their construction process, and switching to another coating would have caused major disruptions. Nor had plaintiffs received sufficient information of other Farboil customers' complaints to be put on notice that the product was the actual source of their woes. Of great importance regarding the reliance issue were the remarks by Farboil people that their products were backed by Beatrice Foods, a huge and successful giant in American industry. Certainly, plaintiffs would have been circumspect in their dealings with Farboil had it instead been part of the "Wichita Paint Company" or any industrial dwarf compared to Beatrice.

In conclusion, after considering all of the evidence and counsels' arguments, the Court, with little difficulty, finds plaintiffs have presented clear and convincing evidence that defendant knowingly or recklessly made affirmative fraudulent statements to induce plaintiffs to purchase its products. Farboil's treatment of plaintiffs throughout their relationship was a repugnant example of corporate arrogance. Plaintiffs suffered damages as a consequence which shall be discussed below.

2. Fraudulent Concealment. Plaintiffs contend defendant fraudulently concealed material facts which Farboil personnel had a duty to disclose to plaintiffs. It is clear that fraudulent concealment of such facts can be the basis for legal liability. Restatement (Second) of Torts §550 (1977). The Kansas Supreme Court, in a recent case, noted fraud can be both active and passive:

[F]raudulent misrepresentation not only includes affirmative acts and misstatements of fact but also the concealment of acts and/or facts which legally or equitably should be revealed.

Citizens State Bank v. Gilmore, 226 Kan. 662, 667, 603 P.2d 605 (1979); see U.S.D. No. 490 v. Celotex Corp., 6 Kan.App.2d 346, 629 P.2d 196 (1981).

The Court does not agree with plaintiffs' contentions that defendant had a legal duty to inform plaintiffs of every formula change it made while manufacturing Marble Plastic, nor the results of all its laboratory testing. Plaintiffs did not show that formula changes, in particular defendant's change in polymers, caused a material character change in the coating. Similarly, it would be unreasonable to hold that a manufacturer must reveal laboratory test results regarding its products unless, for example, they indicate a product defect unknown to its consumers. Here plaintiffs did not show to the Court's satisfaction that defendant possessed laboratory test results indicating any material product defects. In fact, defendant's testing indicated the product was suitable under laboratory conditions. As noted earlier, problems did not arise until pool

builders like plaintiffs began using defendant's coatings in the field. Indeed, defendant's product initially looked great immediately after its application on a pool. Problems did not appear until the pool was filled with water!

Plaintiffs do not distinguish their alleged damages from active fraud from damages due to fraudulent concealment. Plaintiffs also contend the same conduct by defendant's personnel should be deemed both active fraud and concealment. Thus, plaintiffs contend defendant wrongly concealed its lack of product testing while affirmatively stating defendant had thoroughly tested the product. Likewise, plaintiffs argue defendant concealed other customers' complaints at the same time defendant was telling plaintiffs that only they had pool coating failures. While under the circumstances presented here plaintiffs have demonstrated by clear and convincing evidence that the above two substantial concealments were perpetrated, defendant's liability and plaintiffs' damages for both are the same. Consequently, the Court finds defendant's fraudulent concealment to be a horse of the same color rather than an additional wrong for which compensation is due.

3. Fraud and the Statute of Limitations. Defendant contends plaintiffs cannot recover for fraud because their tort claims are barred by the applicable Kansas two year statute of limitations, K.S.A. 60-513. Since this action was filed March 10, 1978, the question becomes whether plaintiffs, as of March 10, 1976, had sufficient knowledge of facts making defendant's fraud evident, or could have discovered such fraud with

reasonable diligence. Augusta Bank & Trust v. Broomfield, 231 Kan. 52, 62, 643 P.2d 100 (1982). However, as this decision indicates, discovery of the fraud:

. . . impl[ies] actual knowledge, not mere suspicion of wrong. Further, even though his suspicions might have been aroused a party may be lulled into confidence by certain representations and forego any further investigation. See Mingenback v. Minganback, 176 Kan. 471, 478, 271 P.2d 782 (1954).

Id., 231 Kan. at 63.

As of March 10, 1976, plaintiffs had not yet begun taking pool covers off and thus were unaware of the extent of their warranty problems. Although plaintiffs had received a hint of Sylvan Pools' dissatisfaction with Marble Plastic in 1975, any reasonable suspicions on plaintiffs' part were lulled by defendant's steadfast representation that only plaintiffs had complaints, and defendant's apparent willingness to help with plaintiffs' warranty expenses. Again, Farboil's representations were backed by a huge and ostensibly reputable company, Beatrice Foods. Consequently, the Court concludes plaintiffs did not discover defendant's fraud till long after March 10, 1976, nor did plaintiffs have actual knowledge of sufficient facts requiring further investigation. The Court finds plaintiffs' fraud claim is timely.

D. Plaintiffs' Claim of Negligent Manufacture.

Plaintiffs contend defendant negligently manufactured its pool coatings. Specifically, plaintiffs argue defendant was totally negligent in the testing of its pool coating products before deciding to put them into the stream of commerce.

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Although the Court totally agrees as a practical matter that defendant's testing was woefully inadequate, the theory of negligence is inappropriate in this case due to the nature of plaintiffs' damages.

The elements of plaintiffs' alleged damages were the subject of an earlier memorandum opinion by this Court on April 15, 1982 (Dkt. 113). In that decision the Court intimated plaintiffs' damages were purely economic in nature, such as warranty costs, rather than losses involving injury to property or persons. See Broce-O'Dell Concrete Products, Inc. v. Mel Jarvis Construction Co., 6 Kan.App.2d 757, 634 P.2d 1142 (1981). Defendant, in its post-trial brief, strongly urges plaintiffs' negligence theory is out of place, and plaintiffs have not offered a counterargument. In fact, plaintiffs tacitly admit their negligence theory is inappropriate when they argue that the Court should not consider plaintiffs' negligence in the use of defendant's product, if any, because of the purely economic nature of their damages.

It is clear that in Kansas a plaintiff suffering only economic loss from the use of a defendant's product may not recover under a negligence theory. Fordyce Concrete, Inc. v. Mack Trucks, Inc., No. 81-2041 (slip op., D. Kan. Mar. 17, 1982); Broce-O'Dell Concrete Products, Inc., supra. Plaintiffs' breach of warranty and intentional tort theories fit the circumstances presented here. Consequently, the Court rejects plaintiffs' claim of negligent manufacture.

E. Warranty Claims.

1. Express Warranties. Plaintiffs claim defendant's representatives made certain express warranties or promises regarding the performance of its pool coatings which were never fulfilled. Plaintiffs claim numerous statements by defendant's personnel and advertising amounted to express warranties; for example, defendant asserted its coatings were a substantial advancement in the industry, of the highest quality, and an excellent material. However, the Court shall focus on the two representations of defendant already discussed in the fraud section above and that are most critical here: that the Farboil coatings could easily be recoated and were easy to apply.

The pertinent Kansas statutory provision regarding express warranties is the following:

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

* * *

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

K.S.A. 84-2-313. Unlike implied warranties, express warranties cannot be the subject of modifications or limitations. Young & Cooper, Inc. v. Vestring, 214 Kan. 311, 324, 521 P.2d 281 (1974) Though material, a plaintiff need not show a product defect in order to recover damages for a breach of an express warranty:

A manufacturer may by express warranty assume responsibility in connection with its products which extends beyond liability for defects. All express warranties must be reasonably construed taking into consideration the nature of the product, the situation of the parties, and surrounding circumstances. However, defects in the product may be immaterial if the manufacturer warrants that a product will perform in a certain manner and the product fails to perform in that manner. Defects may be material in proving breach of an express warranty, but the approach to liability is the failure of the product to operate or perform in the manner warranted by the manufacturer.

Huebert v. Federal Pacific Electric Co., Inc., 208 Kan. 720, 725, 494 P.2d 1210 (1972); see Cantrell v. R. D. Werner Co., 226 Kan. 681, 602 P.2d 1326 (1979).

As noted earlier, easy application and recoatability were material representations given the circumstances surrounding the parties' relationship, and they were facts susceptible to actual knowledge by defendant rather than mere opinions or "commendations of the goods." Again, the application of the finish coating is an integral part of any pool builder's construction process, and consequently, quickly achieving complete coverage is a prime factor when selecting a coating. However, as noted in the factual findings, it was almost impossible to gain successful results on a routine basis with either initial coatings or with recoats over old Marble Plastic. Only under

optimum conditions, such as Twin Custom Pools' application methods which exceeded Farboil's directions, was success with defendant's product possible.

Defendant strongly contends plaintiffs may not recover damages for breach of express warranties, because plaintiffs improperly prepared the pool surfaces and then incorrectly applied defendant's coatings. It is clear Farboil cannot be liable if plaintiffs' use of the coatings was not in accordance with adequate instructions. See, e.g., Chisholm v. J. R. Simplot Co., 495 P.2d 1113 (Idaho 1972); 2A Frumer & Friedman, Products Liability §19.08[1] (1982). Nevertheless, the Court reiterates its acceptance of plaintiffs' evidence that their coating crews almost always tried to follow defendant's directions. The characteristics of defendant's coatings were so inadequate for their intended use that it was impossible to achieve success a majority of the time in the field when directions were scrupulously adhered to. Even defendant's own representatives were unable to obtain satisfactory results when they demonstrated application techniques for Marble Plastic on plaintiffs' pools. Plaintiffs admit employees of Mattingly Pools, Inc. in Oklahoma City departed from defendant's directions on occasion by adding a blue tint to the coatings to disguise the staining problems. However, they did this only after receiving bad results while following defendant's specific preparation and application instructions. Further, plaintiffs received no complaints nor performed warranty work on these pools, and consequently they are not relevant in this litigation.

Thus the Court rejects all of defendant's claims of product misuse by plaintiffs.

In accordance with the preceding discussion, the Court finds plaintiffs easily proved by a preponderance of the evidence that defendant made express warranties regarding ease of application and recoatability. Furthermore, by a preponderance of the evidence plaintiffs proved defendant breached these two express warranties and that they were damaged thereby.

2. Implied Warranties. In addition to express warranties, plaintiffs contend defendant breached the implied warranties of merchantability and fitness for a particular purpose. Implied warranties are imposed by operation of law, K.S.A. 84-2-314 and 316, and even in a commercial setting such as the case at bar, they are liberally construed in favor of the buyer. See Christopher & Son v. Kansas Paint & Color Co., 215 Kan. 185, 194, 523 P.2d 709 (1974); J & W Equipment, Inc. v. Weingartner, 5 Kan.App.2d 466, 469, 618 P.2d 862 (1980). However, under the statutory law applicable to this case, implied warranties may be subject to disclaimers. K.S.A. 84-2-316.

Defendant contends it effectively disclaimed any and all implied warranties by virtue of exclusions carried in both its invoices sent to plaintiffs with paint shipments and on its paint can labels. On the reverse side of each Farboil invoice was a section titled "Standard Terms and Conditions of Sale" followed by the following paragraph printed in bold type:

1. SELLER WARRANTS THAT GOODS PURCHASED HEREUNDER WILL MEET STANDARD WRITTEN SPECIFICATIONS AS MAY BE CONTAINED IN ITS TECHNICAL DATA SHEETS. OTHERWISE, EXCEPT AS MAY BE PROVIDED BY MUTUAL AGREEMENT IN WRITING SIGNED BY BOTH SELLER AND BUYER, SELLER MAKES NO WARRANTIES EXTENDING BEYOND THE DESCRIPTION ON THE FACE HEREOF AND SELLER MAKES NO WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, WHETHER OF FITNESS OR MERCHANTABILITY, AND BUYER ASSUMES ALL RISK WHATSOEVER AS TO THE RESULT OF THE USE OF GOODS PURCHASED, WHETHER USED SINGLY OR IN COMBINATION WITH OTHER SUBSTANCES.

The warranty exclusion Farboil placed on its paint can labels was the following:

Our recommendations for the use of this product are based on tests believed to be reliable. However, as the use of the product is beyond our control, we make no warranty of any kind, express or implied, as to the effects of such use (including damage or injury), or the results to be obtained whether or not used in accordance with the directions or claimed to be.

After shipping swimming pool coatings, Farboil Company has no further control over the application or any other conditions which could influence the results obtained. Due to this, Farboil Company naturally cannot guarantee that satisfactory results will always be obtained.

Farboil Company guarantees that their products will be received in excellent condition for immediate use. If they are PROVEN defective at the time application begins, Farboil will replace these products and pay freight for both the returned materials and the replacement. Authorization for return or replacement should be obtained from Farboil Company, Division of Beatrice Foods, Baltimore, Maryland 21222.

The liability of Farboil Company is strictly limited to replacement of any products proven defective at the time application begins.

Under no circumstances will Farboil Company assume any liability for labor or any other costs incurred in the application and in the results obtained with our product. Let us emphasize that an experienced manufacturer, such as Farboil

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Company plus expertly formulated pool coatings using the best raw materials are your best insurance for satisfactory pool finish performance.

The Court agrees with plaintiffs that defendant's pool coating products were not "merchantable" as that term is defined at K.S.A. 84-2-314(2), for they were never "fit for the ordinary purposes for which such goods are used." The plaintiffs also argue defendant's awareness that plaintiffs constructed their pool walls using forms rather than sprayed on concrete (gunnite) created an implied warranty of fitness for a particular purpose. In essence, plaintiffs argue defendant should have known they used a form release agent and that plaintiffs therefore required some special instruction regarding surface preparation. The Court does not agree with this argument, nor do the facts indicate that residual form release agent on the pool walls was the proximate cause of plaintiffs' demise.

Plaintiffs contend the warranty disclaimers contained in defendant's invoices and can labels are ineffective exclusions, for they point out their contract with defendant was entered into during Matt Mattingly's meeting with Gurkovic at the January 1974 pool convention in Anaheim, California. Plaintiffs therefore argue defendant cannot subsequently disclaim implied warranties once a contract has been formed. This was the ruling of the Kansas Supreme Court in Christopher & Son v. Kansas Paint & Color Co., 215 Kan. 185, 523 P.2d 709 (1974). In this case, a commercial painting company contracted with the defendant paint manufacturer whereby it would make a special order of primer paint that plaintiff needed for an airplane hanger. After the

paint was eventually manufactured by the defendant, it was shipped to plaintiff periodically, and each separate shipment came with an invoice containing an implied warranty disclaimer. When plaintiff discovered the paint was defective, it sued, and the paint manufacturer made the disclaimers its defense. The Supreme Court stated the litigants' contract was made before the disclosures were received, and they were consequently ineffective:

The trial court took the position that a contract was made at the time defendant's bid was accepted and the disclaimer was inadmissible because it was made long after the date of the contract. We agree with the trial court that such a disclaimer cannot affect an implied warranty if the disclaimer was not known to the buyer. Likewise, such a disclaimer could not support a defense based on a "course of dealing."

Id. 215 Kan. at 191-92.

The critical factor in Christopher & Son was that the contract was formed long before the first deliveries and invoices were received by plaintiff. The Court held the periodic shipments were merely "fulfillments of defendant's obligations under the agreement entered into" previously. Id. at 193-94. The matter at bar is different, for the Mattinglys, unlike the plaintiff in the above case, made separate orders for Marble Plastic as their needs arose. Each order constituted a separate contract. Moreover, the implied warranty disclaimers on the invoices satisfied the "conspicuousness" requirements of K.S.A. 84-2-316. In conclusion, although the Court finds defendant's pool products were not merchantable, defendant's implied warranty disclaimers shield it from liability on this issue. Of course,

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since the Court has determined defendant is liable for fraud and breaches of express warranties, plaintiffs' loss on this point of contention is immaterial.

3. Statute of Limitations. Defendant contends plaintiffs' breach of warranty claims are barred by the 4-year statute of limitations applicable to causes of action based on contract. K.S.A. 84-2-725(1). Plaintiffs filed the instant action in March 1978, which would mean a cause of action accruing before March 1974 would be time barred. A breach of warranty cause of action accrues upon delivery of the goods regardless of the buyer's lack of knowledge of the breach:

A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made.

K.S.A. 84-2-725(2). In proposing this defense, Farboil adopts plaintiffs' argument from the above discussion on implied warranties -- that the parties' contract was formed in January/February 1974. However, the Court rejected this theory when it held the litigants' relationship was comprised by a series of contracts rather than one contract made in early 1974.

Since all or virtually all of plaintiffs' Marble Plastic deliveries occurred either in March 1974 or thereafter, they all fall within the 4-year limitations period for contract actions. Consequently, defendant's statute of limitations defense is irrelevant.

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F. Plaintiffs' Recovery for "Pool Owners' Claims."

1. Whether Pool Owners' Claims are "Certain." The defendant argues plaintiffs may not recover damages for repairs which plaintiffs' customers must do to their pools, for plaintiffs have no unavoidable legal liability to the pool owners for such repairs. Defendant contends such liability by plaintiffs to the pool owners must be certain before plaintiffs may recover any form of "future advance indemnity."

In support of plaintiffs' claim for this element of damages, they cite the dusty but venerable case of F. Hammer Paint Co. v. Glover, 47 Kan. 15, 27 Pac. 130 (1891). Here a house painter purchased 183 gallons of paint from the plaintiff manufacturer which he applied to several houses. Subsequently the paint developed defects, and the painter refused to pay his entire bill. As part of his damages, the painter requested monies for further work on the homes with the defective paint. The Supreme Court held that if the painter had an absolute liability to repair the homes already painted, he was entitled to the anticipated costs of such repairs, even though he had not yet performed this work:

If the plaintiff's breach of the warranty has involved the defendant in a legal liability to pay money or to incur expense to the parties for whom he did work, to relieve himself against the effects of the bad paint, such liability or expense, whether paid or not, constitutes an element of damages which the defendant was entitled to recover.

Id., 47 Kan. at 18.

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This form of advanced indemnity has been generally recognized as proper in a breach of warranty case when goods are purchased for resale, so long as the amounts the buyer says it owes are "foreseeable, reasonable and subject to calculation." Boyce v. Fowler, 87 F.Supp. 796, 799 (D. Mass. 1949); see also Coastal Modular Corp. v. Laminators, Inc., 635 F.2d 1102, 1105 (4th Cir. 1980).

Defendant argues plaintiffs' alleged damages for pool owners' claims are far from being fixed and certain, and as authority it cites Superwood Corp. v. Larson-Stang, Inc., 311 F.2d 735 (8th Cir. 1963). In this case plaintiff was a home builder who placed defective siding manufactured by defendant on 60 newly built homes. Part of plaintiff's claimed damages was the cost of future repairs he was obligated to make on the houses. The Eighth Circuit, noting the Kansas case of F. Hammer Paint Co., supra, held that to receive such advanced indemnity the plaintiff must show a legal liability to repair the houses, and that these costs were "foreseeable, reasonable and subject to calculation." Id., 311 F.2d at 740. However, the Court of Appeals held there was insufficient evidence to support a damage award for future repairs because the builder's future liability was improbable. Although plaintiff had already expended some money doing warranty work, there was no evidence that the homeowners might sue the builder due to the siding, that all the siding on the houses was defective, or that the statute of limitations might bar such suits. Id. at 741.

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In the case at bar, the Mattingly companies have more than adequately reduced their former pool customers' claims to fixed, certain or liquidated totals. Unlike the plaintiff in Superwood Corp., the Mattinglys have admitted their liability to pool customers with unrepaired pools and have admitted waiver of any statute of limitations defense they might have had against pool owners' claims. Consequently, their liability is clear. While admitting their liability to their pool customers, plaintiffs solicited their Wichita customers' estimates of costs for repainting pools with unsatisfactory Marble Plastic coatings. Plaintiffs then arranged for Jim Mattingly and Al Knight to separately review each claim for reasonableness, for they were the most familiar with repair costs and the pools themselves. Mattingly and Knight then adjusted the customers' claims accordingly. Most of the Wichita owners' claims were supported by sandblasting bills submitted by Wichita area contractors. Exhibit 995 contains a summary of the Wichita pool customers' claims, and they total \$393,270.41. The Court has reviewed the evidence supporting these claims and finds they are substantially corroborated and reasonable in amount. Though precision in this area is impossible, plaintiffs' claims here are reasonable, accurate and fair.

Similarly, Exhibit 996 summarized the Oklahoma pool owners' claims of Mattingly Pools, Inc. Plaintiffs arranged for Leroy Burns, the former general manager of Mattingly Pools in Oklahoma City, to review the claims. He was acquainted with the Oklahoma pools needing repair and with the reasonable costs of such

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repair, and he adjusted downward or upward owners' claims that were too high or low. The Court accepts his testimony that the total claims of the Oklahoma owners, which were submitted to the United States Bankruptcy Court in Oklahoma, after his adjustments, are reasonably accurate. These claims, represented in Exhibit 996, total \$260,131.35.

When a litigant's alleged damages are comprised of numerous relatively small, separate claims, which in turn are based on reasonable yet unprecise estimates, it would be impossible for the litigant to arrive at an exact figure. Consequently, the Court in fairness must focus on whether the estimated damages are reasonably certain. The Court finds the plaintiffs have more than adequately fulfilled this requisite. Moreover, the Court rejects defendant's accusations that plaintiffs voluntarily waived possible statute of limitations defenses against customers' claims merely to trump up their alleged damages. After observing the demeanor of the Mattingly brothers and their key employees, the Court believes they felt they had an admirable obligation toward their customers founded on a genuine feeling of remorse because of their inability to properly satisfy their customers. Such responsible behavior by a business toward its customers is commended.

2. Whether Plaintiffs Have Standing to Seek Indemnity for Their Pool Customers. Defendant also contends plaintiffs cannot recover damages to indemnify their pool customers for repairs not yet performed because of the Kansas comparative fault statute, K.S.A. 60-258a. Though defendant

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concedes comparative fault concepts may not apply directly to plaintiffs' suit against it, defendant proposes the statute would apply if the pool owners directly sued plaintiffs, defendant, or both, for their claims would involve property damages. Defendant thus theorizes that in such suits the fact finder could assess fault proportionally between Beatrice and the Mattingly companies. According to this theory, the Mattinglys could not collect damages against defendant to indemnify the customers for undone repairs, for the Mattinglys would only be responsible for their proportion of fault. See Ellis v. Union Pacific Railroad Co., 231 Kan. 182, 643 P.2d 158 (1982).

While there may be some merit in defendant's hypothetical arguments, they are not relevant here since the pool owners' claims are only indirectly involved. As announced earlier, comparative fault principles and their derivative indemnity rules do not apply in this case. This Court believes "what if" speculation is inappropriate in the case at bar. Consequently, the Court concludes plaintiffs do have standing to seek indemnity for their pool customers against defendant for future repair work.¹

¹ Several weeks after the parties submitted their post-trial briefs and closing arguments, defense counsel proffered a Georgia Supreme Court decision regarding the pool owner claims issue. GAF Corp. v. Tolar Constr. Co., 271 S.E.2d 811 (Ga. 1980). This one page opinion involved a dispute over a bad roof between a real estate developer and the general contractor, a subcontractor and a roofing supplier. It appears one of the defendants voluntarily waived a statute of limitations defense and allowed judgment against it by the original plaintiff. This defendant thus sought indemnity against

G. Plaintiffs' Actual Damages.

1. Proximate Cause. Defendant contends plaintiffs have not proven that their use of defendant's pool coatings was the cause of plaintiffs' commercial demise. Proof of causation is required in either a breach of contract case, Kansas State Bank v. Overseas Motosport, Inc., 222 Kan. 26, 27, 563 P.2d 414 (1977), or a fraud case where plaintiffs must show the detrimental effects of their purchase of defendant's products, Weigand v. Union National Bank of Wichita, 227 Kan. 747, 610 P.2d 572 (1980).

During trial and in their post-trial written and oral arguments, defendant's attorneys have most perceptively pointed out certain debilitating events which they say caused plaintiffs' ruin rather than Marble Plastic. Defendant presented evidence that plaintiffs were cash poor and too highly leveraged in a cyclical industry. Defendant argued plaintiffs' records indicated their sales kept increasing despite their problems with Marble Plastic. Defendant also pointed out plaintiffs were caught short in 1975 when material prices dramatically escalated after they had already signed contracts

GAF. Although this Court does not disagree with the legal principles stated in this opinion, it is not clear if this extremely brief decision applies to the case at bar. The Georgia Supreme Court held the defendant who allowed judgment against it could not legally seek indemnity for it had voluntarily waived a valid defense. However, if comparative fault principles applied to the Georgia case, then the reasoning of Ellis v. Union Pacific Railroad Co. might dictate the same results. Also, the Mattingly plaintiffs did not "voluntarily" waive a valid statute of limitations defense, rather it was given up in exchange for customers' assurances they would forebear suit. Although unclear, it appears this situation is different than the facts present in GAF v. Tolar Constr. Co.

for pool construction that season. However, plaintiffs have presented countervailing evidence indicating the enormous warranty costs incident to their use of Marble Plastic was the determining factor causing their dissolution.

Plaintiffs' warranty problems due to Marble Plastic created an enormous expense item making profitability impossible. For a small enterprise, plaintiffs possessed educated management personnel who were well acquainted with all aspects of pool construction. The Mattingly brothers had over a decade of experience with the business, and the Mattingly name was very respected and well-known in the Wichita area. The Court believes defendant's arguments regarding why plaintiffs closed their doors are partially valid and that economic downturns and cost/price squeezes would hurt any pool builder in plaintiffs' situation. The Court recognizes the complexity of the possible factors behind plaintiffs' unfortunate outcome; nevertheless, the Court is persuaded the warranty costs were the proverbial straw breaking plaintiffs' back. The warranty problems distracted plaintiffs' management and sales staff and prevented them from trimming personnel costs. Although sales were not immediately affected by the staining and other problems, they eventually caused referral business to decline, and plaintiffs had to devote more expense to selling. In short, the Court is persuaded that had the defendant's products performed as defendant represented, plaintiffs would still be in existence today.

2. Plaintiffs' "Going Concern" Value. Plaintiffs have requested damages equivalent to their "going concern" value as of December 1977, when they essentially ceased doing business. Beatrice concedes "going concern" value is a proper measure of damages if the Court rules against it. In Matter of King Resources Co., 651 F.2d 1326, 1335 (10th Cir. 1980), wherein valuation of a business was at issue, the Tenth Circuit referred to the following discussion from Consolidated Rock Products Co. v. DuBois, 312 U.S. 510, 526, 85 L.Ed. 982, 993-94:

As Mr. Justice Holmes said in Galveston, H. & S. A. R. Co. v. Texas, 210 U.S. 217, 226, 52 L.Ed. 1031, 1037, 28 S.Ct. 638, 'the commercial value of property consists in the expectation of income from it.' . . . The criterion of earning capacity is the essential one if the enterprise is to be freed from the heavy hand of past errors, miscalculations or disaster, and if the allocation of securities among the various claimants is to be fair and equitable. [Citations omitted]. Since its application requires a prediction as to what will occur in the future, an estimate, as distinguished from mathematical certitude, is all that can be made. But that estimate must be based on an informed judgment which embraces all facts relevant to future earning capacity and hence to present worth, including, of course, the nature and condition of the properties, the past earnings record, and all circumstances which indicate whether or not that record is a reliable criterion of future performance.

(Emphasis supplied).

Though the Court has determined defendant is liable for both fraud and breach of warranty, plaintiffs' actual damages in this matter will be based on the goal of compensating them for all reasonable and foreseeable damages caused by defendant. Defendant's representatives were well acquainted with plaintiffs' business and knew Marble Plastic was an integral and

important part of their construction process. Thus the Court has no difficulty concluding the destruction of plaintiffs' enterprise caused by defective product was foreseeable, and therefore plaintiffs are entitled to consequential damages.

Plaintiffs presented expert testimony from two economists regarding the value of their business. In particular, Dr. Jonathan Cunitz testified for plaintiffs regarding their going concern value as of December 1977. Dr. Cunitz was a 1968 graduate of the accounting doctoral program of Harvard Business School. Afterwards he taught accounting at New York University for four years, and then he worked for the Xerox Corporation doing business acquisition analysis. At the time Xerox was in the process of purchasing small companies in the high technology field. After three years at Xerox and one year at the Chase Manhattan Bank, he set up his own business consulting financial lenders on whether to foreclose on commercial borrowers with bad loans, and doing general financial consulting work for small corporations.

Though Dr. Cunitz explained and demonstrated various methods for arriving at a business's going concern value, his preferred method for evaluating plaintiffs was a formula that involved adding together book value and good will value. Book value is generally considered to be the value of a concern's assets less a concern's (trade) liabilities. From the individual plaintiffs' 1977 income tax returns, he calculated the following book values as of December 31, 1977 (Ex. 1116):

Mattingly, Inc.:	\$50,829
Mattingly Pools, Inc.:	\$40,704

In order to complete the picture of plaintiffs' value as an ongoing business, Dr. Cunitz added to the above figures an additional value representing good will. Though good will is based on a subjective estimate, it is an accepted element of damages in Kansas. Avery v. City of Lyons, 183 Kan. 611, 621, 331 P.2d 906 (1958). Cunitz stated that an ongoing business is generally worth more than its book value and this difference is the good will. Before arriving at good will values, he evaluated plaintiffs' management and found it to be good, and he talked to a Mattingly pool owner. He also interviewed a principal in a large Wichita real estate office and learned that it specifically mentioned that a home's pool was built by the Mattinglys since their pools had a good reputation. Based on these investigations, Dr. Cunitz arrived at the following ranges of values for plaintiffs' good will as of December 31, 1977:

Mattingly, Inc.:	Between \$40,000 and \$100,000
Mattingly Pools, Inc.:	Between \$20,000 and \$50,000

Taking the midpoint of these two ranges would yield good will values of \$70,000 for Mattingly, Inc., and \$35,000 for Mattingly Pools, Inc.

According to Dr. Cunitz, a reasonable estimate of plaintiffs' going concern value would be the sum of the book values and good will values listed above:

Mattingly, Inc.:	\$120,829
Mattingly Pools, Inc.:	\$ 75,704

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Although there are numerous methods to estimate going concern values, none of them would render anything but estimates, and the Court confidently believes ten different economists would produce ten different figures for plaintiffs' going concern value. However, the Court concludes the foregoing valuations are fair and reasonable, and that they should be awarded plaintiffs.

3. Plaintiffs' Liabilities to Trade Creditors.

Plaintiffs contend that in addition to going concern value, they should be awarded damages equal to their liabilities to their trade creditors. Defendant argues such an award would be inappropriate because trade liabilities were part of the calculation for going concern value discussed above, and that consequently damages for trade liabilities would be an improper duplication. In other words, defendant states that Dr. Cunitz deducted current liabilities from current assets to arrive at plaintiffs' going concern value and that to now add plaintiffs' liabilities back in would artificially inflate the values of the companies.

The obvious flaw in defendant's argument is that defendant's products were responsible for plaintiffs' doom, and therefore responsible for putting plaintiffs out of business as of December 1977. Thus, defendant must pay plaintiffs the value of their business at that time. (Although Mattingly, Inc. did some business in 1978, plaintiffs have agreed to December 31, 1977, as the temporal benchmark for setting damages). As a practical matter, to fully compensate plaintiffs, Beatrice must

buy the two businesses, which necessarily means buying both assets and liabilities. Commonly, when an ongoing business is sold, the buyer assumes and becomes responsible for the current liabilities of the newly acquired enterprise. The Court believes it just and equitable that defendant be liable for plaintiffs' trade liabilities just as any theoretical buyer of plaintiffs would be.

Exhibits 996 and 997 reflect plaintiffs' liabilities to trade creditors. As of July 1, 1982, Mattingly, Inc. owed its trade creditors \$325,165.99. The trade liabilities of Mattingly Pools, Inc., as revealed by the claims filed with the Bankruptcy Court in Oklahoma, are \$253,412.39. These amounts are certain and liquidated, and defendant does not contest their accuracy. The Court concludes these sums shall be part of plaintiffs' damages.

4. Plaintiffs' Recovery of Incurred Warranty

Expenses. Plaintiffs' prayer also requests damages for expenses incurred while performing warranty work on customers' pools to rectify problems with defendant's coatings. Plaintiffs made a laborious attempt to reconstruct these costs on a pool-by-pool basis. A file was made for each pool requiring warranty work due to Marble Plastic, and into each file plaintiffs collected all available relevant documentation regarding expenses, including time sheets and material sheets. Al Knight, the former construction supervisor for Mattingly, Inc., then reviewed each file, and based on the available documents and his own memory, he reconstructed the warranty costs of the Marble

Plastic pools. His end result of these efforts is contained in Exhibit 925. It indicates Mattingly, Inc. incurred the following expenses each year to fix customers' pools having problems with Marble Plastic:

1974 - \$	749.20
1975 - \$	16,785.08
1976 - \$	30,656.90
1977 - \$	59,779.60
1978 - \$	<u>7,620.76</u>

\$115,591.54

Plaintiffs arranged for the former manager of Mattingly Pools in Oklahoma, Leroy Burns, to review the warranty cost documents for pools on which Mattingly Pools performed warranty work due to defective Marble Plastic. When Mr. Burns lacked specific knowledge regarding a pool, Mattingly Pools' former employee, Eric Miller, reconstructed the estimated warranty costs. Exhibit 926 summarizes their reconstruction of Mattingly Pools' warranty expenses because of Marble Plastic on a yearly basis:

1974 - \$	2,464.97
1975 - \$	17,204.01
1976 - \$	24,678.56
1977 - \$	28,949.48
1978 - \$	<u>906.26</u>

\$74,203.28

Defendant argues plaintiffs should not be awarded these damages for they are insufficiently supported. Plaintiffs admit that certain pool owner files contain no documentation and that the expense reconstruction for these pools is based solely on memory. However, Messrs. Knight, Burns and Miller were in key positions with plaintiffs and were very acquainted with

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plaintiffs' warranty work, and consequently the Court accepts their estimates as reliable. Further, plaintiffs introduced testimony that these estimates were quite conservative, for they ignored such costs as supervisory time by salaried employees. Dr. Cunitz, plaintiffs' economic expert, stated a certain percentage of plaintiffs' fixed overhead could legitimately be added to these warranty costs, though they are not included in the above figures. Lastly, the Court notes that awarding plaintiffs damages for warranty costs already incurred does not duplicate sums awarded for plaintiffs' going concern value.

In conclusion, plaintiffs are entitled to a total of \$189,794.82 as compensation for monies expended to repair customers' pools with defects due to Marble Plastic.

5. Plaintiffs' Recovery for Pool Owners' Claims.

Plaintiffs' prayer for damages equivalent to plaintiffs' liability to pool customers with uncompleted warranty work due to Marble Plastic was discussed in Part F above. The total amount of each plaintiff's liability for such unfinished warranty work is as follows:

Mattingly, Inc.: \$393,270.41

Mattingly Pools, Inc.: \$260,131.35

The Court concludes plaintiffs' damages for which defendant is liable shall include the above amounts, subject to directions which the Court will subsequently discuss.

6. Punitive Damages. Defendant's conduct toward plaintiffs involving the sale of Marble Plastic clearly is deserving of exemplary damages. The general principles enunciated by the Kansas Supreme Court regarding when punitive damages are appropriate were reviewed in Slough v. J. I. Case Co., 8 Kan. App.2d 104, 111, 650 P.2d 729 (1982); quoting from Sanders v. Park Towne, Ltd., 2 Kan.App.2d 313, 578 P.2d 1131 (1978):

Our court has stated that punitive damages 'are permitted whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy. (Malone v. Murphy, 2 Kan. 250; Albert Wiley v. Keokuk, 6 Kan. 94; and Cady v. Case, 45 Kan. 733, 26 Pac. 448.) Such damages are allowed not because of any special merit in the injured party's case, but are imposed by way of punishing the wrongdoer for malicious, vindictive or a willful and wanton invasion of the injured party's rights, the purpose being to restrain and deter others from the commission of like wrongs. (Stalker v. Drake, 91 Kan. 142, 136 Pac. 912; see, also, Townsend v. Seefeld, 102 Kan. 302, 169 Pac. 1157; and 15 Am.Jur., Damages, §266, p. 700.)' Watkins v. Layton, 182 Kan. 702, 705, 324 P.2d 130 (1958). In determining the amount of punitive damages, the trier of fact may consider 'the nature, extent and enormity of the wrong, the intent of the party committing it and generally all the circumstances attending the particular transaction, together with any mitigating circumstances tending to reduce the verdict or wholly defeating the damages.' Sweaney v. United Loan & Finance Co., 205 Kan. 66, Syl. 7, 468 P.2d 124 (1970). The trier may also take into account the 'probable expenses of litigation, including attorney's fees . . . where such expenses are not stated to be matters which must be made a basis of compensation.' Brewer v. Home-Stake Production Co., 200 Kan. 96, Syl. 2, 434 P.2d 828 (1967).

Slough v. J. I. Case Co. also contains discussion of the distinction between higher punitive damage awards where the defendant's wrongdoing endangered persons' physical security or

was particularly egregious, and lower punitive damage awards where defendant's conduct was neither life-endangering nor flagrant. 8 Kan.App.2d at 112-13.

Lastly, punitive damages may be assessed against a corporation for its agents' acts only when corporate management has directed or ratified the acts. This was announced recently by the Kansas Supreme Court in a case certified to it for guidance regarding this point of law. Kline v. Multi-Media Cablevision, Inc., No. 55,403 (July 15, 1981). The Supreme Court decided not to follow the majority rule making corporations vicariously "liable for punitive damages wherever the employee, acting within the scope of employment, could be held liable." Id., slip. op. at 3. Instead, the Supreme Court adopted the majority rule, called the "complicity rule", taken from the Restatement (Second) of Torts §909 (1977):

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

- (a) the principal or a managerial agent authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
- (d) the principal or a managerial agent of the principal ratified or approved the act.

The principal advantage of the complicity rule is that it focuses on the corporate defendant's blameworthiness, for theoretically exemplary damages are intended to deter wrongful conduct that is otherwise preventable. Kline v. Multi-Media Cablevision, Inc., slip op. at 7.

In the matter at bar, Farboil's failure to test Marble Plastic in the field rather than relying on inextensive laboratory tests before deciding to market the product was clearly gross negligence. Although possible damages to users' health are not relevant factors here, Farboil still had a duty to be reasonably certain the product would be at least merchantable before selling it. By itself, this failure to test certainly was grossly negligent. However, defendant's conduct became qualitatively worse when it advertised Marble Plastic as developed and tested by Farboil, easily applied and easily recoated. Defendant's first Marble Plastic sales representative clearly implied to Matt Mattingly at their first meeting that Sylvan Pools was already using the product when Sylvan was only considering it. After plaintiffs began complaining about the product's performance, at approximately the same time other Marble Plastic customers were making similar complaints, defendant's representatives told plaintiffs that only they had such complaints and that plaintiffs' problems were self-made.

Merely classifying the above actions and statements as so conspicuously wrongful that exemplary damages are warranted would be an inadequate depiction of what the Court believes occurred here. Although it appeared Farboil had extensive experience with marine and other industrial coatings, it prematurely jumped into the swimming pool coatings business without as much as actually first coating a pool with their "pool builder's dream" product. This decision was obviously prompted by the substantial sales Farboil thought were possible in this

market on a nationwide basis. Defendant's denial of its product's defectiveness can only be described as corporate arrogance, for plaintiffs were obviously too miniscule to question the quality of a product backed by a commercial giant like Beatrice Foods. Again, although the analogy is not perfect, the average American consumer would not question the truth of representations by giant American concerns like Sears Roebuck, for he or she expects such a company to sell only merchantable products and to responsibly discontinue defective ones and satisfy consumer complaints. Farboil's managerial personnel, in contrast, obviously had no concern for either the truth or plaintiffs' fate or problems.

Plaintiffs introduced evidence regarding defendant's organizational structure. It has various unrelated "profit centers" or divisions under the overall direction of the Beatrice headquarters in Chicago. Decision making regarding product marketing is relatively decentralized and typical of conglomerates. Although plaintiffs did not introduce specific evidence regarding Beatrice's business philosophy, the Court can readily surmise it strongly emphasizes sales and that it acquires and disposes of small companies, or profit centers, based on just how much profit or sales they generate. Though ultimately irrelevant regarding who should win this case, the Court believes the cause of Farboil's arrogance and folly herein was a desire to "sell, sell, sell." This conclusion is not intended to intimate a disdain for big business; to the contrary, large corporations generally are responsible for the high living

standards Americans enjoy. However, in a giant concern's drive to maximize sales, it may be tempted to sacrifice responsibility and honesty to a quest for profits. Here, the Court believes Farboil's management and sales representatives were pressured to increase sales by marketing a product without adequate testing, and then decided to deny to its customers that the product was defective in the hope of somehow correcting the problems to realize their dreams of high sales.

Defendant has attempted to persuade the Court that a punitive damage award against it, if any, should be small, because no personal injuries were caused, and defendant's total sales of Marble Plastic over the years did not exceed \$500,000.00. Lastly, defendant argues the deterrence value of exemplary damages is unneeded here, because Beatrice has already incurred substantial legal expense defending itself in Florida, here, and in Pennsylvania. Although the Court does consider the nature of plaintiffs' damages to be relevant to the proper size of exemplary damages, defendant's focus on relatively small sales of Marble Plastic is an endeavor to avoid a consideration of its size. In Beatrice Foods' fiscal year ending February 28, 1982, it had net earnings of \$390,136,000.00. During the years 1975 to 1978, while plaintiffs were purchasing Marble Plastic, defendant's chemical division, of which Farboil is a part, had operating earnings of \$92,832,000.00 on sales of \$747,539,000.00. During the same period, Beatrice Foods had total net earnings of \$738,072,000.00 on net sales of \$21,507,831,000.00.

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After careful consideration of all the relevant factors discussed above, including plaintiffs' legal expenses,² the Court concludes \$1,000,000.00 is an appropriate exemplary damage award. The Court believes this amount a suitable punishment for defendant's behavior and of sufficient size to deter and restrain defendant and others from like wrongdoing, and it is reasonable and modest, given defendant's worth. The Court further directs the entire amount of punitive damages to be paid to plaintiff, Mattingly, Inc., since the owners of both plaintiffs are the same, and the claims against Mattingly Pools, Inc. will be satisfied from the damages provided herein of its trade creditors and former pool owners.

7. Account for Pool Owners' Damages. Exhibit 995 is a breakdown of the individual pool owners' claims against Mattingly, Inc. in Wichita, Kansas. The Court has already determined the individual claims are reasonably certain and liquidated, and the Court concluded above that \$393,270.41 should be paid Mattingly, Inc. by defendant for these claims. Upon satisfaction of the total judgment by defendant, plaintiffs' counsel is directed to forthwith disburse checks to the pool owners reflected in Exhibit 995, less a thirty-three percent (33%) collection fee and the costs of mailing. Within sixty (60) days of this disbursement, plaintiffs' counsel is

² In the proceeding section regarding payment of individual pool owners' claims the Court allows plaintiffs' counsel fees for collecting the monies owed to the former pool customers of Mattingly, Inc. The Court has taken this collection fee into account in its calculation of punitive damages and made a fitting reduction to avoid duplication of damages.

directed to make a report to the Court by affidavit, showing that checks were mailed to the individual owners.

Exhibit 996 is a breakdown of the individual pool owners' claims in Oklahoma against the bankrupt Mattingly Pools, Inc. The Court has already concluded as well that these individual claims are reasonably certain and liquidated, and that defendant shall pay, as part of the judgment against it, to the bankrupt's trustee, the sum of these claims, \$260,131.76.

III. Summary

The Court finds that plaintiffs are entitled to receive actual and punitive damages from defendant due to its wrongdoing in the following amounts:

Pool Owners' Claims:

Mattingly, Inc.:	\$393,270.41
Mattingly Pools, Inc.:	\$260,131.76

"Going Concern" Value:

Mattingly, Inc.:	\$120,829.00
Mattingly Pools, Inc.:	\$ 75,704.00

Plaintiffs' Liabilities to Trade Creditors:

Mattingly, Inc.:	\$325,165.99
Mattingly Pools, Inc.:	\$253,412.39

Plaintiffs' Incurred Warranty Expenses:

Mattingly, Inc.:	\$115,591.54
Mattingly Pools, Inc.:	\$ 74,203.28

Punitive Damages:

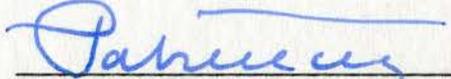
Mattingly, Inc.:	\$1,000,000.00
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In accord with the preceding findings of fact and conclusions of law, the Court orders that judgment shall be entered against defendant Beatrice Foods Company. Plaintiffs' total judgment against defendant Beatrice Foods Company for actual damages shall be divided as follows:

Mattingly, Inc.:	\$954,856.94
Mattingly Pools, Inc.:	\$663,451.43

Plaintiffs' judgment for punitive damages against defendant Beatrice Foods Company is \$1,000,000.00.

IT IS SO ORDERED this 9 day of August, 1983.


PATRICK F. KELLY, JUDGE

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