

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

KONRAD FRIEDRICHS GMBH
& CO. KG,

Plaintiff

v.

METALWORKING INTERNATIONAL
SALES CORPORATION and FRANK
MAJHAN,

Defendants

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: NO. _____
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: FILED ELECTRONICALLY

Plaintiff Konrad Friedrichs GmbH & Co. KG ("KF"), by and through its undersigned counsel, files this Complaint and avers as follows:

THE PARTIES

1. KF is a German corporation with its principal place of business at Vorwerkstraße 20, D-95326 Kulmbach, Germany.
2. KF is a manufacturer of carbide products, including carbide rods.
3. Defendant Metalworking International Sales Corporation ("Metalworking") is a Pennsylvania corporation with a registered address of 614 West Main Street, Ligonier, Westmoreland County, Pennsylvania 15658.

4 Defendant Frank Majhan ("Majhan") is an adult individual with a business address of 614 West Main Street, Ligonier, Westmoreland County, Pennsylvania 15658.

5. Majhan is the President of Metalworking, and is registered in such capacity in Metalworking's filings with the Pennsylvania Department of State.

6. Metalworking previously served as a distributor of KF's products.

JURISDICTION AND VENUE

7. The Court has jurisdiction over this dispute pursuant to 28 U.S.C. § 1332, because KF is a citizen of Germany while Metalworking and Majhan are citizens of Pennsylvania, and because the amount in controversy exceeds \$75,000.00, exclusive of interest and costs.

8. Metalworking and Majhan reside in this judicial district. Therefore, venue is proper pursuant to 28 U.S.C. § 1391(a).

BACKGROUND

The Warehouse Agreement

9. This action arises out of a Consignment Warehouse Agreement (the "Warehouse Agreement") entered into between KF and Metalworking

on February 24, 1999. A true and correct copy of that Warehouse Agreement is attached hereto as Exhibit "A."

10. The Warehouse Agreement established a consignment relationship, by which KF, as consignor, agreed to store hard metal rods (the "Product") at a consignment warehouse for the use of Metalworking, as consignee. Id. at ¶¶ 2.1.

11. KF guaranteed it would maintain a supply of the Product at the warehouse for Metalworking's use. Id. at ¶ 13.

12. Pursuant to the Warehouse Agreement, all Product delivered to the warehouse by KF remained the property of KF until complete payment was made. Id. at ¶ 4.1.

13. KF and Metalworking agreed that Metalworking was entitled to remove Product from the consignment warehouse to meet Metalworking's needs (*i.e.*, sale of the Product), and that any Product removed would be paid for by Metalworking at the particular price applicable on the date of removal. Id. at ¶¶ 4.1, 8.

14. Under the Warehouse Agreement, Metalworking promised that it would make monthly reports to KF of the amount of Product removed from the consignment warehouse, so that KF could invoice Metalworking for the same. Id. at ¶ 5.

15. Metalworking promised that it would thereafter pay each resulting invoice within 30 days, or could pay the invoice within 10 days and receive a 3% discount. Id.

16. Upon breach of the Warehouse Agreement by Metalworking, KF was entitled to terminate the Warehouse Agreement immediately upon notice of the same to Metalworking. Exhibit A at ¶¶ 12.

17. Otherwise, either party was entitled to terminate the Warehouse Agreement, with three months notice, at the end of any fiscal quarter year. Exhibit A at ¶¶ 11.

18. The parties operated under the terms of the Warehouse Agreement between 1999 and 2009.

19. Since 2008, at latest, Majhan directed the financial operations of Metalworking.

20. Since 2008, at latest, Majhan directed Metalworking's performance , including Metalworking's activities in connection with its the Warehouse Agreement.

21. Majhan understood that by the terms of the Warehouse Agreement, Metalworking could remove Product from the consignment warehouse, sell the Product to third parties, then pay to KF the particular

price applicable on the date of removal, while retaining the profits made on the sale in excess of the applicable price.

Metalworking's Initial Failure To Pay And The Arrearage Agreement

22. By March 2008, Metalworking had begun to fall substantially into arrears on its payment of invoices for Product removed by Metalworking from the consignment warehouse.

23. As of March 11, 2008, Metalworking owed KF \$615,679.62 for overdue invoices on Product removed from the consignment warehouse by Metalworking pursuant to the Warehouse Agreement.

24. On June 13, 2008, the KF and Metalworking entered into a second agreement (the "Arrearage Agreement"), by which Metalworking entered into a payment plan, promising monthly payments of \$12,826.66 for a term of 48 months to catch up on the overdue invoices. A true and correct copy of the Arrearage Agreement is attached hereto as Exhibit "B."

25. The Arrearage Agreement provided that the parties' relationship under the Warehouse Agreement would continue, with Metalworking obligated to timely pay future invoices on the withdrawal of Product from the consignment warehouse as those future invoices became due.

26. The Arrearage Agreement explicitly required that Metalworking remain current on subsequent invoices by timely paying the same within 90

days; the parties on March 1, 2007 had initially agreed that Metalworking would pay its invoices within 90 days.

27. Majhan negotiated the Arrearage Agreement with KF on behalf of Metalworking.

28. Majhan executed the Arrearage Agreement on behalf of Metalworking.

Metalworking's Most Recent Failure To Pay

29. At the start of 2009, Metalworking again began falling into arrears on invoices that came due pursuant to the Warehouse Agreement.

30. By October 2009, Metalworking owed KF an additional \$396,671.14 pursuant to the Warehouse Agreement on Product removed from the consignment warehouse between January 2009 and June 2009.

31. On October 7, 2009, KF's counsel sent to Metalworking a letter including a "Schedule of Claims," calculating the principal due on 2009 invoices, totaling \$396,671.14. A true and correct copy of that letter, with accompanying Schedule, is attached hereto as Exhibit "C."

32. On October 8, 2009, KF, by letter from its counsel to Metalworking, exercised its unilateral authority to terminate the Warehouse Agreement pursuant to paragraph 12 of that Agreement, citing Metalworking's breach by failure to pay invoices due under the Warehouse

Agreement. A true and correct copy of this second letter is attached hereto as Exhibit "D."

33. Metalworking has failed to pay KF \$790,362.92 on now-overdue invoices for Product it removed from the consignment warehouse. A copy of a current accounting statement recording such invoice amounts is attached hereto as Exhibit "E."

34. In addition to this amount due on 2009 invoices, Metalworking still owes KF \$371,973.08 pursuant to the Arrearage Agreement. See Exhibit "E."

35. As President of Metalworking, Majhan made all decisions as to what checks were drawn from Metalworking's accounts.

36. As President of Metalworking, Majhan deposited or directed to be deposited in Metalworking's bank account the proceeds of Metalworking's sales of Product supplied by KF.

37. Despite Metalworking's obligations to KF under the Warehouse Agreement and Arrearage Agreement, and despite that the Product sold by Metalworking was never Metalworking's property, but remained the property of KF, Majhan used or directed the use of the proceeds of Metalworking's sale of the Product to sustain Metalworking's business enterprise, and to make payments to persons or entities other than

Metalworking, including but not limited to Metalworking's officers and employees or third parties.

38. Following KF's termination of the Warehouse Agreement on October 8, 2009, Metalworking was required to quit all sales of the Product.

39. Majhan nonetheless directed that Metalworking continue selling Product after October 8, 2009, and accept the proceeds from such sales into Metalworking's accounts.

COUNT I
BREACH OF THE WAREHOUSE AGREEMENT
KF v. METALWORKING

40. Paragraphs 1 through 39, above, are incorporated by reference.

41. The Warehouse Agreement constitutes a valid and binding contract between KF and Metalworking, by which KF agreed to provide the Product on consignment to Metalworking, and Metalworking agreed to pay for Product removed from the consignment warehouse.

42. Metalworking has breached the Warehouse Agreement by failing to pay KF on invoices for Product removed from the consignment warehouse from 2009 through the present, which invoices total \$790,362.90.

43. KF has been damaged by Metalworking's breach of the Warehouse Agreement, in that KF has not been compensated for Product that KF provided to Metalworking on consignment, which Metalworking then sold to third parties, which damages meet or exceed \$790,362.90.

WHEREFORE, Plaintiff Konrad Friedrichs GmbH & Co. KG requests that the Court enter judgment in its favor and against Defendant Metalworking International Sales Corporation and award compensatory damages in an amount in excess of \$75,000.00, together with interest, costs, and such other relief as the Court shall deem appropriate.

COUNT II
BREACH OF THE ARREARAGE AGREEMENT
KF v. METALWORKING

44. Paragraphs 1 through 39, above, are incorporated by reference.

45. The Arrearage Agreement constitutes a valid and binding contract between KF and Metalworking, by which KF agreed to forebear on immediate collection of invoices pursuant to the Warehouse Agreement due before March 11, 2008, and Metalworking agreed to pay \$12,826.66 to KF per month for a period of 48 months, and also to remain current on all subsequent invoices by timely paying the same within 90 days.

46. By failing to remain current on subsequent invoices for Product removed from the consignment warehouse from 2009 through the present, which invoices total \$790,362.90, Metalworking has breached the Arrearage Agreement.

47. KF has been damaged by Metalworking's breach of the Arrearage Agreement, in that KF has not been compensated for Product that KF provided to Metalworking on consignment, which Metalworking then sold to third parties.

48. Metalworking's breach of the Arrearage Agreement makes the entire amount due under that Agreement presently due.

WHEREFORE, Plaintiff Konrad Friedrichs GmbH & Co. KG requests that the Court enter judgment in its favor and against Defendant Metalworking International Sales Corporation and award compensatory damages in an amount in excess of \$75,000.00, together with interest, costs, and such other relief as the Court shall deem appropriate.

COUNT III
UNJUST ENRICHMENT
KF v. METALWORKING

49. Paragraphs 1 through 39, above, are incorporated by reference.

50. Over the course of the parties' consignment relationship, KF has provided Metalworking with Product, and has permitted Metalworking to remove Product from the consignment warehouse to sell to third parties, with such removed Product treated as having been sold to Metalworking at the particular price applicable on the date of removal

51. Metalworking has removed KF's Product from the consignment warehouse, and has sold it to third parties, realizing profits on such sales in excess of the price applicable to Metalworking as of the date of removal.

52. For those invoices remaining unpaid under the Warehouse Agreement and/or Arrearage Agreement, Metalworking has retained not only its profit but also the portion of the proceeds of such sales representing KF's price to Metalworking.

53. Metalworking has been and continues to be enriched by its continued possession of KF's portion of the sale proceeds.

54. It would be inequitable to allow Metalworking to retain possession of the proceeds of sales of Product provided to it by KF without paying KF the applicable price for such product.

WHEREFORE, Plaintiff Konrad Friedrichs GmbH & Co. KG requests that the Court enter judgment in its favor and against Defendant Metalworking International Sales Corporation and award compensatory damages in an amount in excess of \$75,000.00, together with interest, costs, and such other relief as the Court shall deem appropriate.

COUNT IV
CONVERSION
KF v. METALWORKING

55. Paragraphs 1 through 39, above, are incorporated by reference.

56. Pursuant to the Warehouse Agreement, all Product delivered to the warehouse by KF remained the property of KF until complete payment was made. Id. at ¶ 4.1.

57. KF and Metalworking agreed that Metalworking was entitled to remove Product from the consignment warehouse to meet Metalworking's needs (*i.e.*, sale of the Product), and that any Product removed would be paid for by Metalworking at the particular price applicable on the date of removal. Id. at ¶¶ 4.1, 8.

58. Throughout the course of the parties' relationship, Metalworking occasionally removed Product from the warehouse, sold the Product to third parties at a price higher than that charged by KF to Metalworking on the date of removal, and retained the difference in price as its profit.

59. This Product remained KF's property until such time as payment was made to KF.

60. Between January 2009 and November 2009, Metalworking removed Product from the warehouse, reported the amount removed to KF, and was invoiced by KF for this Product at the particular price applicable on the date of removal.

61. Metalworking sold this Property to third parties.

62. Metalworking failed to remit to KF the portion of the proceeds of these sales representing the price for Product applicable to Metalworking.

63. Metalworking, instead, retained or misappropriated the sales proceeds due to KF pursuant to the parties' consignment relationship.

64. KF was the rightful possessor of the Product sold by Metalworking, and is the rightful possessor of the portion of the proceeds of such sales representing the particular price of the Product applicable to Metalworking on the date of removal.

65. By refusing to pay KF the portion of the sales proceeds due to KF, Metalworking has deprived KF of its right to possession of those proceeds, without consent or lawful justification.

WHEREFORE, Plaintiff Konrad Friedrichs GmbH & Co. KG requests that the Court enter judgment in its favor and against Defendant Metalworking International Sales Corporation and award compensatory damages in an amount in excess of \$75,000.00, together with interest, costs, and such other relief as the Court shall deem appropriate.

COUNT V
CONVERSION – PARTICIPATION THEORY
KF v. MAJHAN

66. Paragraphs 1 through 26 and 56 through 65, above, are incorporated by reference.

67. Metalworking intentionally misapplied the proceeds of the sale of the Product, which had been consigned to Metalworking by KF, and failed to pay to KF the portion of the proceeds of such sales representing the particular price of the Product applicable to Metalworking on the date of removal.

68. At all times relevant hereto, Majhan was in control of Metalworking's accounts and the fund of proceeds of the sale of the Product.

69. Despite Metalworking's obligations to KF under the Warehouse Agreement and Arrearage Agreement, and despite that the Product sold by Metalworking was never Metalworking's property, but remained the property of KF, Majhan used or directed the use of the proceeds of Metalworking's sale of the Product to sustain Metalworking's business enterprise, and to make payments to persons or entities other than Metalworking, including but not limited to Metalworking's officers and employees or third parties.

70. Majhan intentionally misapplied the proceeds of the sale of the Product, rather than direct payment to KF of the portion of such proceeds representing the applicable price of the Product sold.

71. As an officer and/or agent of Metalworking, Majhan is individually liable for his personal participation in Metalworking's conversion of KF's Product and the proceeds of the sales of such Product.

WHEREFORE, Plaintiff Konrad Friedrichs GmbH & Co. KG requests that the Court enter judgment in its favor and against Defendant Frank Majhan and award compensatory damages in an amount in excess of \$75,000.00, together with interest, costs, and such other relief as the Court shall deem appropriate.

McNEES WALLACE & NURICK LLC

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