UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 18-cv-23199-KMW

TRANS-TEC INT'L, S.R.L.,

Plaintiff,

vs.

TKK SHIPPING (PTE) LTD, *et al*.,

Defendants.
_____/

ORDER ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER is before the Court on Plaintiff Trans-Tec International, S.R.L.'s ("Plaintiff") Motion for Summary Judgment as to Count VII of Plaintiff's First Amended Complaint and as to Defendant TKK Shipping (PTE) LTD's Counterclaim. (DE 55). TKK Shipping (PTE) LTD ("TKK") filed a response in opposition (DE 60), and Plaintiff replied (DE 68). For the reasons below, Plaintiff's motion (DE 55) is **GRANTED** in part and **DENIED** in part.

I. BACKGROUND

This is a maritime action that arose out of a contract to purchase marine fuel. On August 7, 2018, Plaintiff filed its complaint against TKK and Bomin Bunker Oil Corporation ("Bomin"). On August 21, 2018, Plaintiff filed a First Amended Complaint ("Amended Complaint") asserting claims for (1) breach of contract, (2) negligence, and (3) indemnity. (DE 8). Plaintiff also seeks declarations from the Court regarding the Parties' contractual rights, duties, and obligations. (*Id*.). Specifically, Count VII seeks a declaration of the applicable terms and conditions in the World Fuel Services Marine Group of Companies General Terms and Conditions (the "GTC") and the "Framework Agreement" governing

the sale and purchase of marine fuel, including but not limited to the choice of law and forum selection for disputes regarding fuel quality. On November 13, 2018, TKK filed its Answer and Affirmative Defenses to the Amended Complaint, along with a crossclaim for negligence against Bomin and counterclaims for breach of contract and negligence against Plaintiff. (DE 24). Plaintiff moved to dismiss TKK's counterclaim for negligence. (DE 35). The Court granted that motion, leaving TKK's counterclaim for breach of contract as TKK's only remaining claim against Plaintiff. (DE 49).

The following facts are undisputed by Plaintiff and Defendant TKK. On June 1, 2018, TKK, the "time charterer and disponent owner" of the M/V Thorco Lineage, ordered 680 metric tons of marine fuel ("bunkers") from Plaintiff. (DE 55 at ¶ 1). The specific agreement to purchase bunkers is governed by a prior contract known as the "Frame Agreement for Sale and Purchase of Marine Fuel" ("Frame Agreement") dated November 21, 2014 and entered into by World Fuel Services Europe Ltd. and Thorco Shipping A/S. (DE 8-4 at 12). Plaintiff Trans-Tec is a wholly-owned subsidiary of World Fuel Services Corp. (DE 8 at ¶ 5). The fuel invoice at issue was for $253,402.56. (DE 60 at ¶ 11). Plaintiff then contracted with Bomin to serve as the physical supplier of the bunkers. (DE 8-1). On June 7, 2018, the marine fuel was delivered to the Thorco Lineage at the port of Cristobal, Panama. (DE 55 at ¶ 2). The Thorco Lineage departed the Panama Canal on June 7, 2018 at approximately 11:00 PM, and the sea passage officially began on June 8, 2018 at 12:14 AM. (*Id*. at ¶ 3).

The Thorco Lineage began burning the supplied bunkers on or about June 13, 2018. On or about June 21, 2018, the Thorco Lineage suffered severe main engine failure, and the ship ultimately ran aground near the Raroia Atoll in French Polynesia

during the morning of June 24, 2018, approximately 11 days after switching over to the fuel supplied by Trans-Tec. (DE 24 at ¶ 17).

II. STANDARD OF REVIEW

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). Once the moving party demonstrates the absence of a genuine issue of material fact, the non-moving party must "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). The Court must view the record and all factual inferences in the light most favorable to the non-moving party and decide whether "the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (quoting *Anderson*, 477 U.S. at 251−52).

In opposing a motion for summary judgment, the non-moving party may not rely solely on the pleadings, but must show by affidavits, depositions, answers to interrogatories, and admissions that specific facts exist demonstrating a genuine issue for trial. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323−24 (1986). Thus, Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. The existence of a mere "scintilla" of evidence in support of the nonmovant's

position is insufficient; there must be evidence on which the jury could reasonably find for the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 252.

III. DISCUSSION

A. Declaratory Judgment

In Count VII, Plaintiff seeks a declaratory judgment to resolve any doubt as to the applicability of the Frame Agreement and its application to this transaction. Specifically, Plaintiff seeks:

> a declaration from the Court that the subject fuel transactions and any and all claims, loss, damages, and expenses arising out of the sale and the grounding of the Thorco Lineage are governed by the Framework Agreement[1], and where the Framework Agreement is silent or conflicts with the GTC, then the GTC applies, and any such other relief that this Court deems necessary and proper.

(DE 8 at 12). Plaintiff further alleges in support of Count VII that "a dispute exists between the parties as to the applicable terms and conditions in the GTC and the Framework Agreement, including but not limited to the choice of law and forum selection for disputes regarding fuel quality." (*Id.*). In TKK's Answer and Affirmative Defenses, TKK states:

> The bunker agreement is governed by the "Frame Agreement for Sale and Purchase of Marine Fuel" dated November 21, 2014 and entered into by World Fuel Services Europe Ltd. and Thorco Shipping A/S. *See* Frame Agreement, [DE-8-4]; *see also* Exhibit 1, June 27, 2018 Email exchanged between TKK and WFS/TRANS-TEC confirming that the Frame Agreement governed the supply of bunkers to the Thorco Lineage. TRANS-TEC never challenged and/or refuted the applicability of the Frame Agreement to the bunker supply.

(DE 24 at 14).

In response to the present Motion, TKK reaffirms, "The supply of fuel is governed by the Frame Agreement between Trans-Tec and TKK." (DE 60 at 1). TKK does not

[1] The Document is titled "Frame Agreement for Sale and Purchase of Marine Fuel," but Plaintiff refers to it as "Framework Agreement" in the Amended Complaint. (DE 8). The Court will refer to the document as "Frame Agreement."

make any arguments or offer any evidence in opposition to Plaintiff's allegations in Count VII. Accordingly, there is no genuine issue of material fact as to whether the Frame Agreement governs the bunker supply, and therefore, the Court shall look to the Frame Agreement for a determination of the appropriate choice of law and forum for the current dispute.

Typically, federal admiralty law governs maritime contracts, unless the matter is inherently local. *See generally Norfolk S. Ry. Co. v. Kirby,* 543 U.S. 14, 27, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004) (analyzing choice of law between federal admiralty law or state law). "[C]hoice-of-law clauses 'are presumptively valid where the underlying transaction is fundamentally international in character.'" *Lipcon v. Underwriters at Lloyd's, London,* 148 F.3d 1285, 1295 (11th Cir.1998) (quoting *Roby v. Corp. of Lloyd's,* 996 F.2d 1353, 1362 (2d Cir.1993)). In 1972, the Supreme Court articulated the *Bremen* Test to determine the reasonableness and enforceability of choice provisions in international contracts. *M/S Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972). Under the *Bremen* Test, choice provisions are unreasonable and unenforceable only when:

> (1) their formation was induced by fraud or overreaching; (2) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (3) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (4) enforcement of the provisions would contravene a strong public policy.

Lipcon, 148 F.3d at 1292 (citing *Bremen,* 407 U.S. at 15–18, 92 S.Ct. 1907).

The Frame Agreement provides, in relevant part:

> 3. Spot deals
>
> 3.1. A spot deal is when Seller agrees with a Third Party Supplier to physically deliver quantities and qualities of Marine Fuel to the Buyer on behalf of the Seller as defined in a specific request for a single supply (a "Spot Deal"). The vessels

> listed in Appendix 2[2] are specifically excluded from this agreement and any request by Buyer to supply those vessels will not be considered a "Spot Deal" as defined herein. . . .
>
> 3.4. With respect to Spot Deals the Seller's agreement with the Third Party Seller shall be in conformity with Buyer's offer in respect of quality(ies), delivery location(s), terms of delivery and date(s) of delivery as well as any other particulars stated in the Buyer's offer. The Seller shall be deemed to have accepted the Buyer's offer(s) only with respect to those consignments of Marine Fuel for which the Seller has entered into a binding agreement with a Third Party Seller.
>
> 3.5. **Specific requirements or terms for each supply shall be set forth in the Seller's confirmation of the Spot Deal. The terms applicable to Spot Deals shall be governed by the terms set forth in Appendix 1 and shall replace the General Terms and Conditions on Seller's website which may be automatically referenced in Seller's confirmation**. **In the event that there is any other conflict with regard to the terms set forth in the Seller's confirmation and those set forth in Appendix 1, the terms set forth in the Seller's confirmation shall govern.**

(DE 8-4 at 4−5) (emphasis added). In other words, the Frame Agreement provides that where the parties enter a Spot Deal for the sale of marine fuel, specific terms for that deal are governed by the Seller's Confirmation and Appendix 1 of the Frame Agreement. However, the Seller's Confirmation may incorporate the GTC from the Seller's website. Where there is a conflict between the terms in the Seller's Confirmation and the terms in Appendix 1, the terms set forth in the Seller's Confirmation prevail.

Here, Plaintiff and Defendant entered a Spot Deal for the purchase of 680 metric tons of marine fuel from Plaintiff. (DE 24 at 14). Therefore, this deal is governed by the Seller's Confirmation (DE 8-2) and Appendix 1 of the Frame Agreement (DE 8-4). The Seller's Confirmation provides:

> This confirmation is governed by and incorporates by reference the Seller's Marine Group of Companies General Terms and Conditions for the sale of marine fuel products and related services, including the law and jurisdiction clause therein, in effect as of the date that this confirmation is issued, unless alternative terms and conditions have been prior agreed in writing by an authorised [sic] representative

[2] The Thorco Lineage is not listed in Appendix 2.

> of the Seller. The Seller's Marine Group of Companies General Terms and Conditions can be found at: https://www.wfscorp.com/Marine/pdf/Marine-Terms.pdf

(DE 8-2 at 3). Thus, as set forth by the Frame Agreement, the Seller's Confirmation specifically incorporates the GTC, "including the law and jurisdiction clause therein." (*Id.*). With regard to controlling law and jurisdiction, the GTC provides:

> LAW, VENUE AND JURISDICTION; WAIVER OF JURY TRIAL: These General Terms and each Transaction shall be governed by the general maritime law of the United States of America, the applicable federal laws of the United States of America, and, in the event that such laws are silent on the disputed issue, the laws of the State of Florida, without reference to any conflict of laws rules which may result in the application of the laws of another jurisdiction. The General Maritime Law and the applicable federal laws of the United States of America shall apply with respect to the existence of a maritime lien, regardless of the country in which Seller takes legal action. Any disputes concerning quality or quantity shall only be resolved in a court of competent jurisdiction in Miami-Dade County, Florida. Disputes over payment and collection may be resolved, at Seller's option, in the Miami-Dade, Florida state or federal courts or in the courts of any jurisdiction where either the Receiving Vessel or an asset of Buyer may be found. Each of the parties hereby irrevocably submits to the jurisdiction of any such court, and irrevocably waives, to the fullest extent it may effectively do so, the defense of an inconvenient forum or its foreign equivalent to the maintenance of any action in any such court. Seller shall be entitled to assert its rights of lien or attachment or other rights, whether in law, in equity or otherwise, in any country where it finds the vessel. **BUYER AND SELLER WAIVE ANY RIGHT EITHER OF THEM MIGHT HAVE TO A TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING FROM OR RELATED TO THESE GENERAL TERMS OR ANY TRANSACTION.**

(DE 8-3 at ¶ 18) (emphasis in original).

The Court finds that the nature of the contracts is sufficiently international to deem the choice provision presumptively valid pursuant to *Lipcon*, 148 F.3d 1285. According to the Amended Complaint, TRANS-TEC is a Costa Rican limited liability company. TKK is a Singaporean limited company. The contracts govern the sale of marine fuel for vessels that travel international waters, and the fuel was provided for a vessel in Panama. Therefore, the contracts and transactions are of an international nature.

Furthermore, the Court finds that the choice provision does not fall within any of the four categories of the *Bremen* Test. Nothing in the record suggests the choice provisions in the Parties' contracts meet any of the criteria of unreasonableness and unenforceability, and neither Plaintiff nor Defendant argue as much. Accordingly, the Court finds that the GTC, which was incorporated by the Seller's Confirmation, unambiguously states the transaction is governed by United States maritime law, applicable federal law, and Florida law where either of the former are silent on the disputed issue. Furthermore, the Court finds that venue is proper in Miami-Dade County, Florida given that the crux of this dispute is over the quality of the marine fuel provided to Defendant TKK.

B. Breach of Contract Counterclaim

1. Dismissed Claim

Plaintiff moves for summary judgment on Defendant's breach of contract counterclaim. In support, Plaintiff relies on the Court's July 29, 2019 order granting Plaintiff's motion to dismiss Defendant's negligence claim, (DE 49). Plaintiff argues summary judgment is appropriate because the limitation of liability clause in the Frame Agreement—which the Court upheld as enforceable in the order on the motion to dismiss—limits Plaintiff's liability against "indirect, special, incidental, or consequential damages." Given that it is undisputed that Defendant paid $253,402.56 for the portion of marine fuel that is at the heart of the dispute, (DE 60 ¶ 11), it is Plaintiff's view that the limitation of liability clause caps damages at the amount Defendant paid for the fuel.

Defendant argues the limitation of liability clause does not cap damages at the amount paid by Defendant. In support of this contention, Defendant points to the entire

section where the limitation of liability clause is located and argues that the contract does provide for additional damages above the cost of the fuel.

The liability portion of the Frame Agreement states, in relevant part:

> 10. Indemnity . . .
>
> 10.2. The Seller will indemnify and hold harmless the Buyer and the Vessel Owner/Operator against any claims, losses, costs, damages, or expenses incurred by the Buyer or Vessel Owner/Operator and resulting from the supply of the Marine Fuel under this agreement to the extent that such claims, losses, costs, damages, or expenses caused by the negligence, error, omission, or violation of law of the Seller, or its agents or subcontractors, in performing any obligation under this Agreement. Notwithstanding any other provision, the Seller will not indemnify or hold harmless the Buyer and the Vessel Owner/Operator against any claims, losses, costs, damages, or expenses caused by the act or omission of any third party that is not an agent or subcontractor of the Seller.
>
> 10.3. In the event that the Marine Fuel is found to be outside the applicable quality specifications of this Agreement, Seller shall pay Buyer full compensation for any direct costs, expenses, or damages to the extent incurred by the Buyer as a consequence of such breach, including however not limited to mechanical damages and loss of time and hire for the Vessel to which the Marine Fuel was supplied. . . .
>
> 10.5. It is the duty of the Buyer to take all reasonable actions to eliminate or minimize any damages or costs associated with any off-specification or suspected off specification Products. To this end Buyer and Seller shall cooperate with each other in achieving the most cost effective [sic] solution which may include the receiving vessel's consumption of the Product after treatment, special handling and/or debunkering if such treatment/special handling fails to render the product consumable. In the event that the Product is off-specification and cannot be consumed by the vessel, Buyer's remedies shall be limited exclusively and solely to replacement of the nonconforming products. If Buyer removes Product without the express written consent of Seller, then all such removal and related costs shall be solely for Buyer's account. UNLESS SELLER IS NOT ACTING IN IN GOOD FAITH, FOLLOWING APPLIES. IN ANY EVENT, SELLER'S LIABILITY HEREUNDER FOR ANY CLAIMS, WHETHER ARISING FROM QUALITY, QUANTITY, ACCIDENT, DELAY, SPILL OR OTHER CAUSE, SHALL NOT EXCEED THE PRICE OF THAT PORTION OF THE PRODUCT SOLD HEREUNDER ON WHICH LIABILITY IS ASSERTED. FURTHERMORE, NO LIABILITY WILL BORNE BY SELLER FOR (1) ANY DEMURRAGE OR OTHER VESSEL DELAY OR FOR INDIRECT, SPECIAL, INCIDENTAL OR CONSEQUENTIAL DAMAGES, INCLUDING BUT NOT LIMITED TO, DAMAGES ARISING FROM THE EXERCISE OF SELLER'S RIGHT TO SUSPEND AND/OR TERMINATE DELIVERY OF PRODUCT, OR (2) ANY ACTS OR OMISSIONS OF

AGENTS AND/OR SUBCONTRACTORS OF SELLER, INCLUDING, WITHOUT LIMITATION.

(DE 8-4 at 17−18) (emphasis in original).

In ruling on the motion to dismiss, the Court analyzed the limitation of liability language in section 10.5. The Court upheld the limitation of liability language as enforceable, but the Court's dismissal of Defendant's negligence counterclaim was reached on grounds other than those Plaintiff asserts in the present Motion. In dismissing the negligence claim, the Court based its ruling on the maritime economic loss doctrine, reasoning that maritime law does not allow a party to bring a tort action where the basis for liability lies in contract. As the Court stated in its order, "the maritime economic loss doctrine has been expanded to reach situations where a party is attempting to bring a breach of contract action couched as a tort claim." (DE 49 at 5−6) (quoting *R/V Beacon, LLC v. Underwater Archeology & Expl. Corp.*, No. 14-CIV-22131, 2014 WL 4930645, at *5 (S.D. Fla. Oct. 1, 2014) (citing *BVI Marine Const. Ltd. v. ECS-Florida, LLC,* 2013 WL 6768646, at *3-4 (S.D. Fla. Dec. 20, 2013)). Furthermore, the Court noted that "there [was] no material difference between TKK'S negligence claim and its breach of contract claim. . . . Moreover, the damages and recovery sought based on Plaintiff's alleged breach of its duties [were] the same under both the breach of contract and the negligence counts." (DE 49 at 6). Therefore, the negligence claim was, in essence and substance, the same as the breach of contract claim and was barred by the maritime economic loss doctrine.[3]

[3] In the order on the motion to dismiss, the Court cited *Korea Line Corp. v. World Fuel Serv. Corp.*, No. 14-20122-CIV-WILLIAMS (DE 41) (June 30, 2015) in upholding the general validity and enforceability of the limitation of liability clause. It should be noted that at this juncture and on this issue, *Korea Line Corp.* is distinguishable given that the contract at issue here has acceptance of liability language that was not included in the contract in *Korea Line Corp.* The two clauses discussed in the Court's previous order are identical, but the contracts are not. There are additional provisions in the present contract that warrant treating the two differently at this stage.

2. Contract Interpretation

"When a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." *Internaves de Mexico s.a. de C.V. v. Andromeda Steamship Corp.*, 898 F.3d 1087, 1093 (11th Cir. 2018) (quoting *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. at 22–23). Given that maritime law sounds in federal common law, the Court must interpret the contract using the general common law of contract interpretation. *Id.* "Contract interpretation is generally a question of law." *Lawyers Title Ins. Corp. v. JDC (Am.) Corp.*, 52 F.3d 1575, 1580 (11th Cir. 1995). Questions of fact arise only when an ambiguous contract term forces the court to turn to extrinsic evidence of the parties' intent, such as precontract negotiations, to interpret the disputed term. *Id.* "[A] [contract] should be read to give effect to all its provisions and to render them consistent with each other." *Id.* (second alteration in original) (quoting *In re FFS Data, Inc.*, 776 F.3d 1299, 1305 (11th Cir. 2015)). "Further, '[w]hen general propositions in a contract are qualified by the specific provisions, the rule of construction is that the specific provisions in the agreement control.'" *Id.* (alteration in original) (quoting Goldberg v. Bear, Stearns & Co., 912 F.2d 1418, 1421 (11th Cir. 1990)).

As raised by Defendant TKK, section 10.3 states:

> In the event that the Marine Fuel is found to be outside the applicable quality specifications of this Agreement, Seller shall pay Buyer full compensation for any direct costs, expenses, or damages to the extent incurred by the Buyer as a consequence of such breach, including however not limited to mechanical damages and loss of time and hire for the Vessel to which the Marine Fuel was supplied.

(DE 8-4 at 17). The terms of the contract facially evince an intent of the Seller to accept liability for "any direct costs, expenses, or damages to the extent incurred by the Buyer as a consequence of such breach." Although Plaintiff points to an enforceable limitation

of liability provision in the contract, the Court must give effect to all of the contract's provisions, and, in moving for summary judgment, Plaintiff has not met its burden of showing that Plaintiff's actions do not fall squarely within the "direct costs, expenses, or damages" anticipated by section 10.3. In reading section 10 to give effect to all of the contract's provisions, the Court finds that the general limitation of liability in section 10.5 is in tension with the specific acceptance of liability in sections 10.2 and 10.3. In opposition to the Motion, Defendant argues there is no ambiguity, and "the clause [capping liability to the cost of the goods] is restricted to situations where there has been a determination that the marine fuel '***cannot be consumed by the vessel***.'" (DE 60 at 8) (emphasis in original) (quoting DE 8-4).

Nonetheless, the Court finds that there is an ambiguity arising from three different clauses in section 10. Two of the clauses are specific, and one is general. First, section 10.3 specifically states:

> In the event that the Marine Fuel is found to be outside the applicable quality specifications of this Agreement, Seller shall pay Buyer full compensation for any direct costs, expenses, or damages to the extent incurred by the Buyer as a consequence of such breach, including however not limited to mechanical damages and loss of time and hire for the Vessel to which the Marine Fuel was supplied.

Second, the sentence quoted by Defendant from section 10.5 specifically states, "In the event that the Product is off-specification and cannot be consumed by the vessel, Buyer's remedies shall be limited exclusively and solely to replacement of the nonconforming products." And finally, the clause relied on by Plaintiff from section 10.5 generally states, "IN ANY EVENT, SELLER'S LIABILITY HEREUNDER FOR ANY CLAIMS, WHETHER ARISING FROM QUALITY, QUANTITY, ACCIDENT, DELAY, SPILL OR OTHER

CAUSE, SHALL NOT EXCEED THE PRICE OF THAT PORTION OF THE PRODUCT SOLD HEREUNDER ON WHICH LIABILITY IS ASSERTED." (Emphasis added).

The language of the final clause, "in any event," demonstrates that this clause is general. Furthermore, the second "hereunder" in the limitation of liability suggests that both "hereunders" in the clause apply to the entire contract for the sale of bunkers, or at the very least the entire contract addendum. That said, the contract must still be construed against the drafter and in a way that gives effect to all of its terms. Thus, this general clause cannot control the entire document in favor of the drafter where the drafter also included specific clauses to the contrary.

In assessing the former two clauses, the Court notes that they both begin with "in the event." This language creates a condition for each clause to apply. In the first, the clause applies, and the Seller agrees to pay the buyer "full compensation" if "the Marine Fuel is found to be outside the applicable quality specifications of this Agreement." In the second, the clause applies, and the Seller caps the Buyer's remedies at replacement of the nonconforming goods if "the Product is off-specification and cannot be consumed by the vessel." The contract does not define the difference between fuel being "outside the applicable quality specifications" versus when the fuel is "off-specification and cannot be consumed by the vessel." Consequently, and viewing the contract in its entirety, an ambiguity exists. The Court is then required to look to the intent of the Parties, which is a question of fact that has not been answered on this record or in this Motion. Finally, even if this ambiguity was reconcilable on the record presented by the Parties at this time, material questions of fact also remain as to whether the other damages sought by TKK (above the cost of the fuel) were caused by Trans-Tec's alleged breach of the contract

and whether they fall within "direct costs, expenses, or damages" under the contract. Therefore, Plaintiff is not entitled to summary judgment on Defendant's breach of contract counterclaim.

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that Plaintiff's Motion (DE 55) is **GRANTED IN PART AND DENIED IN PART**. Plaintiff's Motion for Summary Judgment on Count VII is **GRANTED**. Plaintiff's Motion for Summary Judgment on Defendant's counterclaim for breach of contract is **DENIED**.

DONE AND ORDERED in chambers in Miami, Florida, this 27th day of November, 2020.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE