IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

GALAXY POWERSPORTS, LLC d/b/a JCL INTERNATIONAL, LLC,	§	
Plaintiff,	§	
v.	§	3:10-CV-00360-P
BENZHOU VEHICLE INDUSTRY GROUP CO., LTD.,	§	
Defendant.	§	

ORDER

Now before the Court are two Motions. Plaintiff Galaxy Powersports, LLC filed a Motion for Summary Judgment on July 12, 2012. (Docs. 58-73) Defendant Benzhou Vehicle Industry Group Co., Ltd. filed a Response on August 2, 2012. (Doc. 77) Plaintiff filed a Reply on August 16, 2012. (Doc. 79) In addition, Ufot Umana Jr. ("Umana") and Stanley Kuan ("Kuan") filed a Second Motion to Withdraw as Counsel for Defendant on August 17, 2012. (Doc. 80) Plaintiff filed a Response on August 22, 2012. (Doc. 82) Umana and Kuan filed a Reply on August 28, 2012. (Doc. 83) After reviewing the parties' briefing, the evidence, and the applicable law, the Court DENIES Plaintiff's Motion for Summary Judgment, GRANTS Umana and Kuan's Motion to Withdraw, and ORDERS Defendant to retain counsel by October 5, 2012.

I. Background

This lawsuit involves motor scooters that Defendant, a Chinese manufacturer, produced and shipped to Plaintiff, a wholesale distributor and importer of sport and leisure vehicles. (Pl.'s Mot. Summ. J. 1; Def.'s Resp. 2) In June 2007, Plaintiff began purchasing sport vehicles from

Soking Power Co., Ltd. ("Soking Power"), a Chinese exporter of sport vehicles. (Pl.'s Mot. Summ. J. 3, App. 2) Beyond this, the parties agree about very little.

Defendant contends that the parties entered into a series of six contracts around July 2008, obligating Defendant to sell motor scooters to Plaintiff. (Def.'s Resp. 3, App. 1) The six contracts were substantially similar, varying by date, contract numbers, models ordered, and quantities. (*Id.* at 2, App. 15-59) The contracts guaranteed that the "quality of the product" would fulfill the "requirements of the purchaser." (*Id.* at 2, App. 15, 23, 31, 39, 47, 55) The contracts required "the purchaser to notify the supplier within three months" of any "complaints" and settle all legal disputes "before the People's Court of China." (*Id.*) In addition, the contracts required Defendant to provide Plaintiff with "free components accounting for 1% of the contract quantity." (*Id.* at 5, App. 15, 23, 31, 39, 47, 55) Defendant claims that Soking Power "inserted itself" into these transactions after the fact and "demanded that it become the supplier to [Plaintiff]." (*Id.* at 4, App. 2) In essence, Soking Power became the middleman in these transactions after the parties executed the contracts.

In contrast, Plaintiff asserts that these contracts only bind Soking Power and Defendant without the implication of an agency relationship between Plaintiff and Soking Power. (Pl.'s Reply 7) In support of this proposition, Plaintiff never directly paid Defendant for the motor scooters. (Pl.'s Mot. Summ. J. 4, App. 3, 437-513) In short, the contracts merely created a supply chain where Soking Power purchased motor scooters from Defendant and shipped the units to Plaintiff. (*Id.* at 4, App. 3, 4092-93) Notably, all six contracts list Plaintiff as the purchaser.[1] (Def.'s Resp. App. 15, 23, 31, 39, 47, 55)

[1] On July 13, 2010, the Huyang District People's Court entered a civil judgment in favor of Defendant in a suit to collect payments due under the alleged six contracts. (Def.'s Resp. 3, App. 3, 65-90)

Between 2007 and 2008, Defendant shipped thousands of motor scooters to Plaintiff. (Pl.'s Mot. Summ. J. 5, App. 3, 239-435; Def.'s Resp. 4, App. 2) Although neither party directly identifies the final shipment date in their briefing, the evidence reflects that Plaintiff accepted the final shipment of motor scooters on September 3, 2008. (Pl.'s Mot. Summ. J. App. 3, 243) During the course of performance, Plaintiff argues that it received motor scooters exhibiting four general types of defects: (1) "decoding issues with the motor scooters' vehicle identification numbers ("VINs")"; (2) "issues with duplicate VINs"; (3) "malfunctioning units or . . . parts"; and (4) "issues with [the United States] Environmental Protection Agency ("EPA") conformance and compliance." (Pl.'s Mot. Summ. J. 5) Plaintiff claims that it notified Soking Power via email of the defects. (*Id.* 18) Defendant contends that it did not receive notice until October 2009. (Def.'s Resp. 4, App. 2, 61-62)

First, Plaintiff contends that several VINs represented incorrect manufacturer information, causing Plaintiff to recall scooters in certain states. (*Id.* at 7, App. 5, 2638-3821) The first three digits of a VIN identify the manufacturing site. (Def.'s Resp. 5, App. 3) Defendant has a single manufacturing facility that uses the code "LD5." (*Id.*) Plaintiff identities several motor scooters with VINs other than "LD5." (*Id.*) Defendant maintains that it is only responsible for scooters with "LD5" as the VIN. (*Id.*)

Second, Plaintiff asserts that several of the scooters displayed duplicate VINs, resulting in additional recalls. (Pl.'s Mot. Summ. J. 8, App. 6, 3822-35) Defendant again argues that it cannot be responsible for VINs potentially from other locations. (Def.'s Resp. 5, App. 3)

Third, Plaintiff alleges that several motor scooters "did not properly function and/or start at all." (Pl.'s Mot. Summ. J. 8) In particular, 185 units "could not be repaired" and "some of the motor scooters had defective parts that had to be replaced by [Plaintiff]." (*Id.* at 8-9, App. 6-7,

3911-4037) These alleged defects resulted in added costs associated with refunds and storage. (*Id.* at 9, App. 7, 4044) To counter, Defendant argues that Plaintiff never availed itself of any contractual protections or allowed Defendant to cure the defects. (Def.'s Resp. 5, App. 3)

Finally, Plaintiff avers that Defendant represented the motor scooters as compliant with EPA standards and later sold non-conforming units. (Pl.'s Mot. Summ. J. 5) The motor scooters with 50cc engine sizes were accompanied by a EPA Certificate of Conformity with the Clean Air Act of 1990 ("the Certificate"). (*Id.* at App. 4047) The Certificate states that the scooter model conforms with certain emission standards, details the engine models certified, and lists several components as included with the scooter. (*Id.* ("air injection, 1-catalyst, carburetor")) Models with different engine sizes did not contain a similar certification. (*Id.* at 10) For the motor scooters with 50cc engines, Plaintiff alleges that "there were not any United States EPA-conforming catalysts inside the mufflers" and that the scooters did not contain the engine specified in the Certificate. (*Id.* at 12, App. 4047) Defendant maintains that these parts were not necessary so long as the vehicle's emission range was within permissible limits. (Def.'s Resp. 5, App. 3) For those scooters with 150cc and 250cc engines, Plaintiff incurred additional costs associated with handling scooters that should have conformed with EPA standards. (Pl.'s Mot. Summ. J. 11, App. 4046) In addition, regardless of the engine size, the scooters did not have anti-tampering devices on the carburetors as required by the EPA and did not use EPA-approved fuel lines notwithstanding that the fuel lines were stamped with the word "EPA." (*Id.* at 12, App. 4132)

After purchasing scooters through September 2008, on February 25, 2010, Plaintiff filed suit and subsequently moved for summary judgment on its breach of warranty and fraud claims. (Pl.'s Mot. Summ. J. 1-2) Thereafter, Umana and Kuan moved to withdraw as counsel, alleging

that they "cannot effectively communicate nor agree on case strategy to the extent that Moveants are unable to provide competent representation." (Doc. 54, p. 1) Umana and Kuan further alleged that Defendant discharged their services effective March 30, 2012. (*Id.*) The Court denied the attorney's motion and required them to timely respond to Plaintiff's Motion for Summary Judgment. (Doc. 76) After filing a Response, Umana and Kuan again move to withdraw. (Umana & Kuan's 2d Mot. to Withdraw 2, 8) In their second motion, the attorneys assert effectively the same contentions as before and also note that "around June or July 2012, [Defendant] paid, retained, and consulted with a Seattle based law firm regarding this matter." (*Id.* at 6) The Seattle based law firm has yet to file its appearance in this case.

Both Plaintiff's Motion for Summary Judgment as well as Umana and Kuan's Motion to Withdraw as Counsel are ripe and ready for disposition.

II. Motion for Summary Judgment

a. Legal Standard

Summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party must inform the district court of the basis for its belief that there is an absence of a genuine issue of fact and identify those portions of the record that demonstrate such absence. *See Celotex*, 477 U.S. at 323. The district court views all evidence and reasonable inferences in the light most favorable to the nonmoving party. *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Once the moving party makes an initial showing, the party opposing the motion must come forward with competent summary judgment evidence showing genuine issues of fact exist for trial. Fed. R. Civ. P. 56(e); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). The nonmoving party must provide specific facts demonstrating a genuine issue of material fact such that a reasonable jury could return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment. *Id.* at 249-50. In other words, conclusory statements, speculation, and unsubstantiated assertions will not defeat a motion for summary judgment. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc); *see also Abbott v. Equity Grp., Inc.*, 2 F.3d 613, 619 (5th Cir. 1993) ("[U]nsubstantiated assertions are not competent summary judgment evidence." (citing *Celotex*, 477 U.S. at 324)). Furthermore, a court has no duty to search the record for evidence of genuine issues. *See Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998).

A party who carries the burden of proof at trial cannot attain summary judgment unless it provides "conclusive" evidence of its claims. *Torres Vargas v. Santiago Cummings*, 149 F.3d 29, 35 (1st Cir. 1998). Therefore, a plaintiff's "showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the [plaintiff]." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986). Otherwise, summary judgment cannot be granted. *Id.* Indeed, "[t]hat the movant appears more likely to prevail at trial is *no* reason to grant summary judgment; it is *not* the province of the court on a motion for summary judgment to weigh the evidence, assess its probative value, or decide factual issues." *Byrd v. Roadway Exp., Inc.*, 687 F.2d 85, 87 (5th Cir. 1982) (emphasis added); *see also Aubrey v. Sch. Bd. of Lafayette*, 92 F.3d

316, 318 (5th Cir. 1996). Nevertheless, if the nonmovant's "evidence is merely colorable, or is not sufficiently probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50.

Where, as here, a diversity action is present, federal courts apply state substantive law and federal procedural law. *See Foradori v. Harris,* 523 F.3d 477, 486 (5th Cir. 2008). If no state court decisions control, a federal court must make an "*Erie* guess" as to how the high state court would apply the substantive law. *Beavers v. Metro. Life Ins. Co.*, 566 F.3d 436, 439 (5th Cir. 2009) (quoting *Travelers Cas. & Sur. Co. of Am. v. Ernst & Young LLP*, 542 F.3d 475, 483 (5th Cir. 2008)).

b. Analysis

Plaintiff moves for summary judgment on (1) breach of implied warranty of merchantability, and (2) fraud.[2]

i. Breach of Warranty

First, Plaintiff moves for summary judgment on breach of warranty. To establish breach of implied warranty of merchantability, a plaintiff must prove: "(1) the defendant sold or leased a product to the plaintiff; (2) the product was unmerchantable; (3) the plaintiff notified the defendant of the breach; and (4) the plaintiff suffered injury." *Polaris Indus., Inc. v. McDonald*, 119 S.W.3d 331, 336 (Tex. App.—Tyler 2003, no pet.) (citing Tex. Bus. & Com. Code Ann. §§ 2.314, 2.314 cmt. 13, 2.607(c)(1), 2.714, 2.715 (West 2009)); *see also Helen of Troy, L.P. v. Zotos Corp.*, 511 F. Supp. 2d 703, 724 (W.D. Tex. 2006). Defendant does not dispute that it sold goods to Plaintiff. (Def.'s Resp. 8) Moreover, Defendant is unable to refute that Plaintiff

[2] Plaintiff brings suit under only one warranty claim (i.e., implied merchantability). (1st Am. Compl. ¶¶ 11-15) In addition, Plaintiff asserts common law fraud alone without any reference to statutory violations. (*Id.* at ¶¶ 16-20)

suffered at least some measure of harm. At best, Defendant insufficiently contends that Plaintiff "exaggerates" its losses. As such, the Court addresses the remaining two elements.[3]

1. Merchantability

Plaintiff asserts that there is no genuine issue of material fact that the motor scooters shipped by Defendant were unmerchantable. (Pl.'s Mot. Summ. J. 15-18) The Texas Business and Commerce Code provides a non-exhaustive list of minimum requirements for a product to be merchantable. *See* Tex. Bus. Com. Code Ann. § 2.314(b) (West 2009); *Helen of Troy*, 511 F. Supp. 2d at 724. Among these, Plaintiff alleges violations under the following provisions: (1) "the goods must pass without objection"; (2) "the goods must be fit for an ordinary purpose"; and (3) "the goods must conform to the promises or affirmations of fact on the goods' container or label." § 2.314(b)(1), (3), (6); (Pl.'s Mot. Summ. J. 15-16) To pass without objection, "a product must be of a quality comparable to other products that are sold in that line of trade under the contract description." *Polaris Indus. v. McDonald*, 119 S.W.3d 331, 336 (Tex. App.—Tyler 2003, no pet.) (citing *Harris Packaging Corp. v. Baker Concrete Constr. Co.*, 982 S.W.2d 62, 65-66 (Tex. App.—Houston [1st Dist.] 1998, pet. denied). To be fit for an ordinary purpose, "proof of a defect is required." *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444, (Tex. 1989). A plaintiff may meet this burden without direct evidence or expert opinion by relying on circumstantial evidence. *Id.* "Evidence of proper use of the goods together with a malfunction

[3] From the outset, the parties dispute whether the six contracts referenced by Defendant bind these transactions. The viability of these contracts alone creates a genuine issue of material fact to deny summary judgment because of the clauses involving, *inter alia*, forum selection, notice, and curative remedies. Although Plaintiff urges that the Court should not consider the contracts on multiple grounds, the Declaration of Xu Heng properly authenticates the contracts and translations by stating "True and correct copies of those contracts and their translations are attached hereto as Exhibit B." (Def.'s Resp. App. 2; Pl.'s Reply 1-5 (alleging hearsay, lack of personal knowledge, conclusory statements, and lack of consideration)) He further states under penalty of perjury that he had personal knowledge of the matters in his Declaration and held the position of "Vice President for Technology for Defendant." (Def.'s Resp. App. 2, 4) Nevertheless, even if the Court declines to consider the six contracts, summary judgment is not proper for the reasons set forth below.

may be sufficient evidence of a defect." *Id.* To conform with labeling promises or affirmations, an "obligation is imposed [on sellers] . . . not to deliver mislabeled articles." § 2.314 cmt. 10.

Here, Plaintiff presents literally thousands of pages of documents that suggest VIN decoding problems, VIN duplicates, malfunctioning parts, and EPA violations. (Pl.'s Mot. Summ. J. 7-12 (citing App. pages)). Plaintiff contends that 24 scooters were rejected and had to be recalled, thus failing to meet the quality standards of comparable industry products. (*Id.* at 16) Additionally, Plaintiff presents evidence that 3,923 units are awaiting recall. (*Id.*) Plaintiff further identifies 68 motor scooters with duplicate VINs. (*Id.* at 17) Beyond this, the evidence shows that an additional 185 units were defective, forcing Plaintiff to refund its dealers. (*Id.*) Finally, Plaintiff notes "serious EPA compliance issues" stemming from components allegedly failing to satisfy EPA standards.[4] (*Id.*)

Defendant necessarily fails to rebut Plaintiff's unmerchantability contentions because Defendant merely alleges that Plaintiff overstates the harm it suffered. (Def.'s Resp. 8-11) Even if the EPA regulations have questionable import in this dispute as Defendant suggests, conclusory statements about the "seriousness" of a defect does not render the product merchantable. (Def.'s Resp. 9-11) Further, while Defendant urges that many of the units encompassing Plaintiff's claim do not bear its distinctive VIN, whether Plaintiff's evidence is over inclusive of foreign manufactured units is an argument that goes to damages. To be sure, one defect is enough. *See* Tex. Bus. & Com. Code Ann. § 2.601 (West 2009) ("[I]f the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may (1) reject the whole; or (2) accept the whole; or (3) accept any commercial unit or units and reject the rest.").

[4] The Court declines to take a position on whether the motor scooters complied with EPA standards and regulations because, even if the scooters are non-conforming, summary judgment is not proper for the reasons set forth below.

In short, Plaintiff meets it burden by presenting evidence in support of unmerchantability and Defendant fails to respond with sufficient evidence to create a genuine issue of material fact.

2. Notice

Plaintiff asserts that there is no genuine issue of material fact that Defendant had notice of the breach. (Pl.'s Mot. Summ. J. 18) Under the Texas Business and Commerce Code, "[w]here a tender has been accepted the buyer must within a *reasonable* time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . . ." Tex. Bus. & Com. Code Ann. § 2.607(c) (West 2009) (emphasis added). Generally, reasonable notice is a fact question for trial. *Carroll Instrument Co. v. B.W.B. Controls, Inc.*, 677 S.W.2d 654, 657 (Tex. App.—Houston [1st Dist.] 1984, no pet.) ("Ordinarily, notice is a question of fact which is to be determined by the trier of fact; it becomes a question of law only where there is no room for ordinary minds to differ as to the proper conclusions to be drawn from the evidence."). For a merchant buyer, a reasonable time to notify the seller is determined by applying a commercial standard. § 2.607 cmt. 4.

The buyer bears the "burden of alleging and proving proper notice." *Lochinvar Corp. v. Meyers*, 930 S.W.2d 182, 189 (Tex. App.—Dallas 1996, no pet.) (citing Tex. Bus. & Com. Code Ann. § 2.607(c)(1) (West 2009); *Miller v. Spencer*, 732 S.W.2d 758, 761 (Tex. App.—Dallas 1987, no writ)). "Failure to notify the seller of the breach, thereby allowing the seller an opportunity to cure, bars recovery on the basis of breach of warranty." *Id.* (citing *Miller*, 732 S.W.2d at 761). A court must weigh the evidence and make determinations of fact "[i]n instances where the evidence is conflicting or consists solely of testimony of interested parties." *Id.* (citing *Mfg. Corp. v. Permaspray Mfg. Corp.*, 490 S.W.2d 866 (Tex. Civ. App.—Fort Worth 1973, no writ). "[A] person has 'notice' of a fact if the person: (1) has actual knowledge of it;

(2) has received a notice or notification of it; or (3) from all the facts and circumstances known to the person at the time in question, has reason to know that it exists." § 1.202.

Plaintiff employs a three-tiered argument for proper notice. First, Plaintiff timely notified Soking Power by email and Defendant cannot produce evidence to the contrary. (Pl.'s Mot. Summ. J. 18) Second, in the alternative, Plaintiff suggests that notice by October 2009 is reasonable. (Pl.'s Reply 9) Finally, Defendant had an opportunity to cure after October 2009 and failed to do so. (*Id.*) In rebuttal, Defendant contends that the email exchanges between Plaintiff and Soking Power failed to provide notice of any sort. (Def.'s Resp. 12) To bolster these contentions, Defendant's Vice President of Technology, Xu Heng, affirmatively stated that the company did not have knowledge of the defects until October 2009. (*Id.* at 12, App. 2, 4) Notably, although neither party directly identified the final shipment date, Plaintiff's evidence shows that the final shipment of motor scooters was accepted on September 3, 2008. (Pl.'s Mot. Summ. J. App. 3, 243)

One-by-one, Plaintiff's arguments erode to create a genuine fact issue to deny summary judgment because Plaintiff may have failed to provide notice within a reasonable time. First, Plaintiff cannot successfully connect how emailing Soking Power somehow resulted in Defendant becoming aware of the defects before October 2009. Indeed, Xu Heng stated under penalty of perjury that Defendant did not have notice before October 2009 and Plaintiff fails to controvert this assertion. Second, viewing the evidence in the light most favorable to Defendant, the records reflect a one-year gap between the last shipment and Defendant's date of notice. Plaintiff fails to present evidence of trade custom to suggest that this time period was reasonable. Without more, such a delay begs for additional fact finding. Finally, the Texas Business and Commerce Code requires notice within a "reasonable time *after* [Plaintiff] discovers or should

have discovered any breach." Tex. Bus. & Com. Code Ann. § 2.607(c) (West 2009). Therefore, even though Defendant failed to cure after October 2009, there still remains an issue of fact as to whether Defendant received notice within a reasonable time to trigger the obligation to cure.

Inasmuch as Plaintiff suggests that Defendant's Response is grounded on conclusory statements that lack personal knowledge and authentication, Plaintiff presents only bare accusations and no evidence to supplant Xu Heng's statement that "in October 2009, [Defendant] received (for the first time) notice of [Plaintiff's] rejection of those goods." (Pl.'s Reply 2-6; Def.'s Resp. App. 2) Without more, a genuine issue of material fact arises with respect to notice that necessitates proceedings beyond summary judgment.

Taken together, Plaintiff fails to rebut Defendant's evidence that it did not receive proper notice within a reasonable time. As such, Plaintiff is not entitled to summary judgment for its breach of warranty claim.

ii. Fraud

Second, Plaintiff moves for summary judgment on fraud. Plaintiff must demonstrate:

> (1) that a material representation was made; (2) the representation was false; (3) when the representation was made, the speaker knew it was false or made it recklessly without any knowledge of the truth and as a positive assertion; (4) the speaker made the representation with the intent that the other party should act upon it; (5) the party acted in reliance on the representation; and (6) the party thereby suffered injury.

Aquaplex, Inc. v. Rancho la Valencia, Inc., 297 S.W.3d 768, 774 (Tex. 2009) (per curiam). Assuming without ruling on the other elements, the record presents fact issues about whether Defendant (1) had knowledge of the alleged false statements, or (2) intended Plaintiff to rely on those statements.

First, even if Defendant's statements were false, there are fact issues as to whether it had knowledge of the falsity. A statement is not fraudulent unless the speaker *knew* it was false or made it *recklessly* without knowledge of the truth. *Prudential Ins. Co. v. Jefferson Assocs.*, 896 S.W.2d 156, 163 (Tex. 1995) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex. 1990)). Knowledge or recklessness may be proven by direct or circumstantial evidence. *See Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986). Partial performance of a promise can disprove that the defendant did not intend to perform. *IKON Office Solutions, Inc. v. Eifert*, 125 S.W.3d 113, 124 (Tex. App.—Houston [14th Dist.] 2003, pet. denied) ("Partial performance can negate an intent not to keep a promise at the time it was made.").

Plaintiff provides evidence that Defendant improperly stamped the motor scooters with defective VINs and EPA labels. (Pl.'s Mot. Summ. J. 21) Plaintiff contends that faulty VINs and failing to comply with the EPA evince false statements. (*Id.*) To these points, Plaintiff assumed that the labeling represented that the VINs were accurate, the Certificates were correct, and the units were EPA compliant. (*Id.*) Defendant counters that since some scooters were compliant, *a fortiori*, there cannot be a basis for a false or reckless act. (Def.'s Resp. 14) In essence, Defendant made a mistake without the requisite scienter. Stated differently, partial performance by delivering conforming units may dispel fraudulent intent. Viewing the record in the light most favorable to Defendant, a reasonable juror could find that Defendant acted *more* with negligence and *less* with reckless disregard of the truth. To be sure, there is a meaningful difference between mistakes in quality control and deceit. Moreover, the label "EPA" without more creates an issue of fact regarding what that label even means or what EPA standards it purports to satisfy. As such, whether Defendant knew it was mislabeling the units is a genuine issue of fact better suited for trial than summary judgment. *See Tony Gullo Motors I, L.P. v.*

Chapa, 212 S.W.3d 299, 305 (Tex. 2006) ("Proving that a party had no intention of performing at the time a contract was made is not easy, as intent to defraud is not usually susceptible to direct proof." (citing *Spoljaric*, 708 S.W.2d 432, 435 (Tex. 1986))).

Second, failing the aforementioned analysis, a reasonable fact finder could dispute whether Defendant intended Plaintiff to rely on the alleged false statements to its detriment. A person acts with intent to induce reliance if (1) the speaker intends or "has reason to expect" that the listener will act in reliance on the representation, and (2) the speaker intends or "has reason to expect" that the listener will suffer a pecuniary loss through justifiable reliance. *Exxon Corp. v. Emerald Oil & Gas Co.*, 348 S.W.3d 194, 218-19 (Tex. 2011) (quoting Restatement (Second) of Torts § 531 (1977)); *see also Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 578 (Tex. 2001); *Procter v. RMC Capital Corp.*, 47 S.W.3d 828, 831 (Tex. App.—Beaumont 2001, no pet.) (citing Tex. Bus. & Com. Code Ann. § 27.01(a)(2)(D) (West 2009)).

Plaintiff argues that it had reason to rely on the motor scooters' VINs, EPA labeling, and the Certificates. (Pl.'s Mot. Summ. J. 22) The timing of these transactions ultimately foils this argument because a party cannot rely on labels and stamps only known *after* the transaction was consummated. This argument seemingly places the horse before the cart. Moreover, Plaintiff produces no evidence to suggest affirmative representations of these qualities prior to the sale. In fact, Plaintiff principally alleges that it purchased the scooters directly through Soking Power without any direct involvement with Defendant. Furthermore, a reasonable fact finder could conclude that continually shipping allegedly nonconforming products for almost two years in installments suggests that Defendant had no intention of inducing reliance because, at some point, Plaintiff knew what it was receiving. At a more fundamental level, assuming the six contracts are not operative as Plaintiff suggests, it is unclear what the parties even agreed to

beyond buying and selling motor scooters. Again, these facts, without more, could sound in negligence and are not sufficient for summary judgment.

All told, the Court denies summary judgment on Plaintiff's breach of warranty and fraud claims because genuine issues of material fact surround these causes of action.

III. Motion to Withdraw as Counsel

As a final matter, Umana and Kuan again move to withdraw as counsel for Defendant. (Umana & Kuan's 2d Mot. to Withdraw 2, 8)

a. Legal Standard

Under the Local Rule 82.12, "an attorney desiring to withdraw in any case must file a motion to withdraw." N.D. Tex. Civ. L.R. 82.12. The attorney must:

> specify the reasons requiring withdrawal and provide the name and address of the succeeding attorney. If the succeeding attorney is not known, the motion must set forth the name, address, and telephone number of the client and either bear the client's signature approving withdrawal or state specifically why, after due diligence, the attorney was unable to obtain the client's signature.

Id. A corporation may not appear in federal court unless it is represented by a licensed attorney. *See Memon v. Allied Domecq QSR*, 385 F.3d 871, 873 (5th Cir. 2004) (per curiam) (citing *Rowland v. Cal. Men's Colony*, 506 U.S. 194, 202 (1993) ("[T]he lower courts have uniformly held that 28 U.S.C. § 1654 . . . does not allow corporations, partnerships, or associations to appear in federal court otherwise than by licensed counsel."). Although § 1654 authorizes individuals to appear in federal court *pro se*, the statute is silent regarding corporations. *See* 28 U.S.C. § 1654 (West 2012) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct

causes therein."). Nevertheless, courts interpret § 1654 as barring corporations from appearing in federal court without an attorney. *Rowland*, 506 U.S. at 202.

When a corporation finds itself without counsel, the appropriate action by the district court judge is "inherently discretionary." *Memon*, 385 F.3d at 873. The district court may, *inter alia*, warn or order the corporate entity to retain counsel or risk dismissal of claims and defenses. *Id.* at 874 ("In virtually every case in which a district court dismissed the claims (or struck the pleadings) of a corporation that appeared without counsel, the court expressly warned the corporation that it must retain counsel or formally ordered it to do so before dismissing the case." (citing *Donovan v. Road Rangers Country Junction, Inc.*, 736 F.2d 1004, 1005 (5th Cir. 1984) (per curiam))); *see also Adonai Commc'ns., Ltd. v. Awstin Invs., L.L.C.*, No. 3:10-CV-2642-L, 2012 U.S. Dist. LEXIS 35704, *5-6 (N.D. Tex. Mar. 16, 2012) (granting default judgment while striking the original answer and first amended answer because "[t]he court issued two orders instructing the January-served Defendants to obtain new counsel. In the latter order, the court admonished them that failure to obtain counsel would cause them to suffer default. To date, the January-served Defendants have not obtained new counsel").

b. Analysis

Umana and Kuan renew their motion to withdraw as Defendant's counsel, avering an inability to effectively communicate with their client, "fundamental disagreements," and that Defendant discharged their services effective March 30, 2012 and retained counsel from a "Seattle based law firm." (Umana & Kuan's 2d Mot. to Withdraw 2-4, 6) In particular, the attorneys describe numerous unreciprocated attempts to contact and communication with Defendant to no avail. (*Id.* at 2-4, 6-7) To date, no other law firm has filed an appearance in this

case. Plaintiff counters that Defendant must be represented and "trial is quickly approaching." (Pl.'s Resp. to Umana & Kuan's 2d Mot. to Withdraw 2)

Umana and Kuan have fulfilled their obligations under both the Local and Federal Rules and therefore may withdraw as counsel for Defendant. Specifically, the attorneys filed a motion providing their client's information and explaining, after due diligence, why communication proved futile. (*Id.* at 6-7) Further, the attorneys filed a Response to Plaintiff's Motion for Summary Judgment in accord with the Court's previous order denying withdrawal. (Doc. 76, p. 1, "If they wish to, counsel may re-urge their Motion to Withdraw after briefing is complete on Plaintiff's Motion for Summary Judgment.") The undisputed evidence shows that the ongoing professional relationship between the moving attorneys and Defendant is not productive and will not serve the ends of justice because instead of moving forward together, it appears that the representation is stuck in gridlock.

As Umana and Kuan are permitted to withdraw, the Court hereby orders Defendant to retain counsel by October 5, 2012. Defendant has been on notice that Umana and Kuan have been attempting to withdraw since June 11, 2012. (Doc. 54) Moreover, the moving attorneys renewed this position on August 17, 2012 after filing a Response to Plaintiff's Motion for Summary Judgment. (Doc. 80) Finally, the attorneys submit without contradiction that Defendant discharged their services and retained representation elsewhere. Taken together, these facts allay any concerns that Defendant would be placed at a disadvantage in a rapidly approaching trial.

IV. Conclusion

For the foregoing reasons, the Court DENIES Plaintiff's Motion for Summary Judgment, GRANTS Umana and Kuan's Motion to Withdraw, and ORDERS Defendant to retain counsel by October 5, 2012.

IT IS SO ORDERED.

Signed this 27th day of September, 2012.

JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE