No. 09-3007

In the
United States Court of Appeals
for the Seventh Circuit

METAVANTE CORPORATION,

Plaintiff-Appellee,

v.

EMIGRANT SAVINGS BANK,

Defendant-Appellant.

Appeal from the United States District Court for the
Eastern District of Wisconsin, No. 05-CV-1221.
The Honorable **J.P. Stadtmueller**, Judge Presiding.

BRIEF AND SHORT APPENDIX OF DEFENDANT-APPELLANT

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Appellate Court No: 09-3007

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Constantine Cannon LLP

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Emigrant Bancorp, Inc., which is wholly owned by New York Private Trust Corporation

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

n/a

Attorney's Signature: _____ Date: 10/23/2009

Attorney's Printed Name: Robert L. Begleiter

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

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n/a

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☒

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PRELIMINARY STATEMENT

This case is about the fraud perpetrated by Plaintiff-Appellee Metavante Corporation ("Metavante") upon Defendant-Appellant Emigrant Savings Bank ("Emigrant") that induced Emigrant to purchase a non-existent banking system, and Metavante's subsequent material breaches of contract in failing to deliver its services in a commercially reasonable manner. Metavante made more than $10 million in fees – and damaged Emigrant many times that amount – by deceiving Emigrant before and during the term of the parties' Agreement.

Metavante defrauded Emigrant by misrepresenting that it could provide a complete, state-of-the-art, integrated, and scalable electronic banking system that Emigrant could use to launch its new internet bank, EmigrantDirect. But what Metavante delivered was a hodgepodge of disconnected services and software provided by unqualified subcontractors that was so defective that the final product lacked basic features of the most rudimentary banking system. Metavante had so little understanding and control over its system that it was not even able to identify, much less cure, the system's debilitating defects. As a result, although Emigrant was highly successful in attracting potential customers, the flaws in Metavante's system caused EmigrantDirect to lose a "staggering" number of them.

The District Court heard this evidence, most of it uncontested, at a two-week bench trial. But in its decision, the court failed to consider much of this evidence due to fundamental errors of law.

Ignoring undisputed evidence that Metavante's internal documents flatly contradicted the statements it was making to Emigrant, the court held there was no fraud because Emigrant supposedly had a duty to investigate Metavante's representations. However, Wisconsin law clearly provides that a party has a right to rely on a representation with no duty to conduct due diligence.

The court also held that there was no breach of contract by Metavante, failing to follow the rules that unambiguous terms of a contract cannot be modified and that every contract has an implied duty of good faith and fair dealing. The court reached this result by ignoring the plain terms of the Agreement's Performance Warranty, which required Metavante to provide "all services" in a commercially reasonable manner. Instead, the court drastically rewrote that unambiguous warranty to make EmigrantDirect's performance as a bank the measure of Metavante's performance as a technology vendor, thus ignoring Metavante's actual performance in providing specific services. The court adopted this measure from Metavante's unqualified "expert" business consultant, who admitted that he was not qualified to evaluate Metavante's provision of technical

services and that his testimony was based on his "life experiences" instead of any methodology.

The court compounded its errors by issuing an oral ruling that adopted wholesale 206 of Metavante's proposed findings of fact and conclusions of law without making any subsidiary findings to explain its chain of reasoning.

If the court had properly considered the evidence at trial, it would have found that after Emigrant signed the Agreement, Emigrant discovered that the banking system it had purchased from Metavante lacked the most basic feature imaginable for any savings account – a way to prevent customers from withdrawing more money than they had on deposit. Unbeknownst to Emigrant, Metavante was fully aware of this defect and knew that it made the system too risky to offer to any client, but sold it to Emigrant anyway.

As Emigrant scrambled to develop and maintain manual work-arounds to control withdrawals, it began to learn that Metavante's system was rife with other serious defects. Metavante reassured Emigrant that problems were being addressed. But internal documents showed that Metavante considered the system a "nightmare" with "old crappy code" and an "awful" track record. Meanwhile, Emigrant lost thousands of new and existing customers. From launch to the day Emigrant stopped using Metavante's system 18 months later, recurrent defects afflicted the system, defects which Metavante was never able to adequately resolve.

During this period, the system's problems caused Emigrant to lose some $1.3 billion in potential deposits, causing damages of some $241 million.

Had the court applied the correct law and considered the evidence, Emigrant should have prevailed on its counterclaims of fraud and breach of contract. Emigrant seeks a new trial so that the overwhelming evidence of Metavante's fraud and breaches of contract will be considered under proper legal standards.

JURISDICTIONAL STATEMENT

This appeal arises from a breach of contract action filed by Metavante and counterclaims of fraud and breach of contract filed by Emigrant.

Metavante is a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. (SA-40 ¶1.)[1] Emigrant is a New York corporation with its principal place of business in New York, New York. (SA-40 ¶3.) The amount in controversy exceeds $75,000. The District Court had jurisdiction under 28 U.S.C. § 1332.

After a bench trial, the District Court rendered an oral ruling ("Oral Ruling") on June 3, 2009. (A-1.) The court entered judgment on June 15, 2009 ("Judgment"). (A-109-11.) Emigrant moved for amended judgment on June 29 (tolling time to appeal), which the court denied on July 14, 2009. (A-112-15.)

[1] References to "A-" are to the annexed Appendix; "SA-" refers to Appellant's Separate Appendix.

The Oral Ruling, Judgment, and July 14 order constitute a final judgment disposing of all of the parties' claims, except for Metavante's petition for contractual attorneys' fees and costs pending in the District Court.

Emigrant filed a notice of appeal on August 11, 2009. (Docket No. 563.) This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the District Court erred as a matter of law in finding that Emigrant had a duty to investigate the truth of representations made by Metavante prior to execution of the parties' Technology Outsourcing Agreement (the "Agreement") to prevail on its counterclaims of fraud in the inducement and intentional misrepresentation.

2. Whether the District Court erred as a matter of law by revising the Agreement's Performance Warranty – to change its focus from Metavante's provision of services to Emigrant's achievement of its business objectives – and the Agreement's termination provision – to add a duty to inform a defaulting party of its rights to cure the default – even though those provisions are unambiguous.

3. Whether the District Court erred as a matter of law by finding the implied duty of good faith and fair dealing did not apply to the Agreement, even though Wisconsin law makes that duty part of every contract, as the court previously ruled in denying summary judgment.

4. Whether the District Court erred as a matter of law by adopting verbatim proposed findings of fact and conclusions of law drafted by Metavante and then failing to make sufficient subsidiary findings to show the court's chain of reasoning in reaching its ultimate findings.

5. Whether the District Court erred as a matter of law by admitting and relying on the testimony of Metavante's "expert" business consultant who based his opinions on his "life experiences" instead of any methodology and testified on matters outside the scope of his expert report.

6. Whether the District Court erred as a matter of law by not holding that Emigrant was the prevailing party on Metavante's claim that Emigrant did not convert to an in-house system and misused Metavante's confidential information during conversion.

7. Whether the District Court's findings that Metavante did not commit fraud or breach the Agreement were clearly erroneous given contrary and largely undisputed evidence.

STATEMENT OF THE CASE

Metavante brought this action alleging that Emigrant breached the parties' Agreement by failing to pay approximately $1.8 million in processing fees. Metavante expanded its breach of contract claim to include a claim (the "In-House Claim") that it was entitled to an additional nearly $17 million in termination fees

because Emigrant (a) failed to convert to an in-house system, and (b) used Metavante's confidential data to develop that new system.

Emigrant counterclaimed alleging Metavante caused it to lose more than $200 million in value, thousands of customers, and billions of dollars in deposits. Emigrant asserted claims that Metavante (1) fraudulently induced Emigrant to enter into the Agreement; (2) breached the Agreement, including the Performance Warranty that required Metavante to provide all services in a commercially reasonable manner; and (3) intentionally misrepresented its system's failings.

After a non-jury trial, the District Court ruled from the bench on June 3, 2009. In its Oral Ruling, the court (a) denied Emigrant's motion to strike the testimony of Metavante's expert witness, business consultant David Moffat; (b) granted judgment in favor of Metavante on all of the parties' claims with the exception of Metavante's In-House Claim; (c) stated ultimate findings of fact; (d) adopted verbatim 206 proposed findings of fact and conclusions of law previously drafted by Metavante (the "Metavante Findings and Conclusions"); and (e) concluded that Metavante was the only prevailing party entitled to attorneys' fees under the contract.

The District Court entered Judgment on June 15, 2009. The Judgment requires Emigrant to pay approximately $2 million in unpaid processing fees and

prejudgment interest. (A-109-11.) On July 14, 2009, the court denied Emigrant's motion to amend the judgment. (A-112.)

STATEMENT OF FACTS

A. Emigrant's Business Strategy

In early 2004, Emigrant decided to build on its 150-year history and 35 brick-and-mortar branches by opening a direct bank. (SA-40 ¶4, 42 ¶16.) A direct bank is a branchless bank that enables consumers to use the internet to open, fund and service accounts. (SA-695, 698.)

Emigrant was the first "brick and click" bank to implement a direct bank and thus enjoyed early to market advantage. (SA-612-15.) To ensure that EmigrantDirect would be successful, Emigrant embarked on an $18 million targeted marketing campaign (SA-593-94, 624), featuring a high-yield savings account offering higher interest rates than its competitors with no minimum balance (SA-622-23, SA-52 ¶67).

EmigrantDirect went live to the public on January 5, 2005. (SA-52 ¶66.) As a result of Emigrant's business strategy – innovative advertising, early market entry, and premium interest rates – Emigrant added over 257,000 new customers and nearly $6.7 billion in deposits in its first 18 months of operation. (SA-612-15, 622-24; SA-52 ¶67; SA-54 ¶73.) Nevertheless, although direct bank customers are rate sensitive, EmigrantDirect finished a distant third among direct banks in

attracting customers and deposits despite offering the highest interest rates. (SA-625.)

B. The Formation of the Agreement

From February to August 2004, Metavante marketed its direct banking services to Emigrant. (SA-314-19, 342-44, 346, 683.) In reliance on Metavante's representations, Emigrant chose Metavante as the vendor to provide the hardware and software functions needed to process transactions for Emigrant's new direct bank. (SA-166-85, 314-15, 686-87.)

Among the representations that Metavante made to Emigrant were that Metavante could provide Emigrant with services to support a direct bank that would be (1) a "proven model," (2) an "integrated" or "complete solution from one provider," and (3) "fully scalable to large volumes." (SA-321-25, 686-87; SA-44 ¶¶22, 23.) Metavante's and Emigrant's witnesses agreed that Metavante's ability to provide services with these characteristics was important to Emigrant. (*Id.*)

The evidence was undisputed that when Metavante represented that it could provide Emigrant with a "proven model," Metavante had never provided to any other bank the system that Metavante eventually sold to Emigrant. (SA-274, 288-89.) Metavante had only one other customer for a similar direct banking system, Capital One, which was launched only as a pilot program in April 2004, after Metavante had begun negotiating with Emigrant. (SA-270, 696, 113 ("system is

far from complete and hardening.").) Capital One had a unique, customized solution – "built fairly specifically for them and . . . additional efforts would be required before it could be implemented for other clients." (SA-47 ¶43; SA-375-76; SA-138 (May 2004: "We have one customer under our belt. We may not be appropriately appreciating challenges with a second."); SA-112.) Metavante eventually designed a system for Emigrant that did not even include the same applications provided to Capital One. (SA-288, 691-62.)

The evidence was undisputed that when Metavante represented that it could provide Emigrant with an "integrated" or "complete solution from one provider," Metavante was using a subcontractor, Teknowledge, to develop the central software function to allow customers to open accounts over the internet, and that software would be hosted by another subcontractor, NCR. (SA-48 ¶44; SA-254-57.) Before the Agreement was signed, Metavante did not tell Emigrant that Teknowledge would be used and even altered a workflow diagram it provided to Emigrant to delete references to Teknowledge (or "Tek"), making it look like Metavante was the sole provider. (*Compare* SA-142-44 *with* SA-145-48; SA-326-29; 345, 347-48, 501-04, 524-25, 528-29.)

The evidence was undisputed that at the time Metavante represented that it could provide Emigrant with services that would be "fully scalable to large volumes," Metavante knew that "[s]calability and reliability issues have caused

Metavante to lose customers," and did not know how Teknowledge would actually perform. (SA-48 ¶50; SA-103, 139, 158.) As Metavante acknowledged internally in March 2005 and again in September 2006, the services provided by Teknowledge were not scalable or reliable.[2] (SA-187-89, 215.)

On July 15, 2004, a company named Core-Teck analyzed a draft of the Agreement and proposed that Emigrant seek additional terms. (PX 21.) Core-Teck did not suggest that any of the statements made by Metavante were false or should be investigated. On July 22, 2004, Emigrant proposed changes to the Agreement and conducted a conference call with Metavante, addressing several issues raised by Core-Teck. (SA-45 ¶32; SA-90-91, 149-50.)

C. The Agreement

Emigrant and Metavante entered into the Technology Outsourcing Agreement on August 6, 2004. (SA-60.)

The Agreement's Performance Warranty required Metavante to "provide all Services in a commercially reasonable manner . . . ." (SA-64 § 6.1.) The Performance Warranty provided an exception that "Service Levels" would apply in lieu of the Performance Warranty "where the parties have agreed upon Service

[2] "Scalability" is "[t]he ability of a system to accommodate increasing numbers of users without unacceptable levels of performance degradation. A server that can accommodate a dozen users may fail catastrophically when the number of users expands to 1,000. A scalable system includes an upgrade path that enables administrators to add extra capacity as needed so that overall system performance is not degraded in the slightest." Bryan Pfaffenberger, *Webster's New World Computer Dictionary* 329 (10th ed. 2003).

Levels for any aspect of Metavante's performance." (*Id.*) Metavante's primary fact witness at trial, Dennis Paschke, testified that "availability" was the only aspect of Metavante's electronic banking services evaluated by Service Levels. Metavante's system could be "available," but performing poorly, in which case the Service Levels would not reflect the system's poor performance. (SA-266-67, 531-32, 672-73, 675.) The Performance Warranty governed all other aspects of Metavante's performance – including provision of software and hardware, testing and capacity planning. (SA-265-67.)

Metavante agreed that Metavante's subcontractors' performance of the Services would be deemed "performance by Metavante itself," and that "Metavante shall remain fully responsible for the performance or non-performance" by any of Metavante's subcontractors "to the same extent as if Metavante itself performed or failed to perform such services." (SA-61 § 3.1; SA-42 ¶15.) Metavante's witness Paschke admitted that any breach by Teknowledge was a breach by Metavante. (SA-268-69.)

D. Metavante's Direct Banking Services

Metavante's system was a "behind the scenes" system. Emigrant set interest rates and account terms, and managed marketing, advertising, and the bank's homepage. (SA-251, 613-19, 622-24.)

Metavante's system had two key components: Online Account Creation ("OAC") and Consumer Electronic Banking ("CeB"). OAC (also known as Online Applications, or "OLA") allowed a new customer to open a savings account over the internet. (SA-249-50.) OAC software was written by Teknowledge and hosted by another subcontractor, NCR. (SA-48 ¶¶44-45, 47.)

After a consumer opened an account over the internet using OAC, because the two components did not share data, that consumer had to enroll again in CeB, which provided access to the account over the internet. (SA-407-08, 569-71.) CeB provided the online mechanism to transfer funds to and from accounts. (SA-249.)

Unbeknownst to Emigrant, Metavante's CeB application lacked any mechanism to prevent depositors from withdrawing more money than they had deposited. (SA-328-29, 346, 361, 383.) Metavante employees concluded in internal documents that such a serious defect made the application a "high risk" model that was susceptible to "fraud" and should never have been sold. (SA-50 ¶56, 153, 155-56, 183, 192, 197-98, 206.)

Emigrant learned that Metavante's system lacked this basic control while preparing to launch its direct bank in late 2004. (SA-52 ¶62.) When Metavante proved unable to correct this problem promptly, Emigrant was forced to institute temporary manual risk controls to prevent customers from withdrawing more

money than they had in their accounts. (SA-52 ¶63; SA-362-64, 383, 565-73, 574-75, 585-86.) Metavante did not correct this "high risk" problem until June 2005, half a year after EmigrantDirect was launched. (SA-383, 585.)

E. Emigrant's Launch of Its Direct Bank

EmigrantDirect launched to the public on January 5, 2005 (SA-52 ¶66) and experienced rapid growth due to a number of factors. First was the size of the direct banking market. According to Metavante, the direct banking market was projected to grow from 500,000 customers in 2003 to as many as 10 million in 2010. (SA-117, 616-18.)

Second, Emigrant benefited from its early entry into the direct banking market, which occurred at a time when ING Direct was the only other direct bank offering high-yield savings accounts with no strings attached. (SA-614-15.)

Third, throughout its first year in operation, EmigrantDirect offered the highest savings account rate in the market for 340 out of 365 days. (SA-622.) Fourth, Emigrant spent more than $18 million in advertising. (SA-624, 703.)

Finally, Emigrant offered a unique and superior "brick and click" business model, which enabled Emigrant to generate deposits through its online direct bank (the "click") and deploy the deposits through its traditional banking methods and infrastructure (the "brick"). (SA-613-14.)

F. Metavante's Performance Under the Agreement

1. Problems of the Metavante System

Although EmigrantDirect grew rapidly, the system experienced recurrent problems preventing many potential customers from opening accounts and causing existing customers to withdraw their funds. (SA-395-407, 420-22; 426-30, 432-39, 475-77, 507-10, 533-34, 217.) Emigrant's computer systems expert, Roger Nebel, and Metavante's expert, business consultant David Moffat, both testified that problems with Metavante's system caused many failed applications, and that these problems were not measured by Service Levels. (SA-531-32, 672-76.)

Emigrant presented unrebutted evidence that Metavante's system was marked by poor quality and inadequate hardware, software, testing, planning, monitoring, capacity, scalability and integration. (SA-428-31, 454-58, 468-69, 481-86, 533-35.) The root cause of these problems was improper development and testing of the applications used by Metavante. (SA-166, 430-31, 449, 458-60, 494-500, 511-13, 517-24, 526-27; 100-01, 187-89; 689.)

In its internal documents, Metavante admitted that such problems were serious and caused EmigrantDirect to lose thousands of customers. For example, in January 2005, Metavante admitted OAC "had an extremely painful week" that had "eroded our customer's confidence in our product," including an outage which went unnoticed for more than 14 hours. (SA-168-69.) Such admissions continued

for the next year and a half. As late as August 2006, Metavante admitted that in the final months of Emigrant's use of Metavante's system, defects had caused thousands of EmigrantDirect applications to fail – losses that Metavante considered "staggering." (SA-209.)

2. Performance of Teknowledge

Metavante's subcontractor Teknowledge inadequately performed critical functions for the Metavante system.

When Emigrant discovered the existence of Teknowledge, Metavante assured Emigrant that it had performed due diligence and Teknowledge satisfied Metavante standards. (SA-164, 359-60.)

Metavante did not perform adequate due diligence on Teknowledge. (SA-48 ¶49; SA-109, 440-45, 693, 699; SA-98 ("Who is behind the curtain[?]"); SA-141 (Teknowledge "continues to have operational service quality issues").) Metavante experienced serious problems with Teknowledge from the beginning of their relationship. (SA-442-45; SA-103; SA-105 ("deliverables have been repeatedly late and of poor quality"); SA-446-49; SA-371-74, 377-78; SA-49 ¶51; SA-451-53 (problem was a "huge alarm bell"); SA-139.) Metavante concluded in November 2003 that "Tek is a small company, having project management issues" and put its OAC application on a "do not sell list." (SA-48 ¶49; SA-110.)

Metavante admitted internally that it shared responsibility for Teknowledge's failures of performance because Metavante had wanted a low-cost solution. (SA-188.)

Undisputed evidence of failures of performance by Teknowledge included:

- A Metavante Post-Implementation Review dated January 9, 2005, found that "Teknowledge's track record is awful." (SA-163.)
- In February 2005, Metavante drafted a "nonperformance warning letter" to Teknowledge and NCR. (SA-178.) Metavante sent the warning letter on March 1, 2005. (SA-180, 271-77, 466-72 (explanation of "capacity planning"); SA-484-89, 694, 699-700.) Metavante informed the subcontractors that their "substandard performance" had a "direct and substantial impact" on Metavante's clients, their products were "inadequate to support solutions of the current scale," "quality monitoring systems do not exist or are inadequate," and "[s]tress and performance testing has been inadequate: capacity planning appears non-existent." (SA-180.)
- Teknowledge itself repeatedly admitted that it provided "crappy code." (SA-172, 185.)
- In April 2005, Metavante acknowledged: "Te[]knowedge (TeK) - been a problem, still a problem." (SA-194.)

- In an October 12, 2005, letter from Metavante's CEO to Emigrant's CEO, Metavante admitted that Teknowledge "did not have appropriate levels of control within its own environment to handle Emigrant's volumes and the specialized nature of its solution." (SA-201.)
- Metavante did not disagree with Capital One's February 3, 2006 assessment that "the Teknowledge system has a history of production problems" and that "[s]upport from Teknowledge has degraded since . . . mid-2005." (SA-706-07; SA-278-79.)
- Metavante deemed Teknowledge problems in April and May 2006 "a nightmare." (SA-209.)
- In September 2006, Metavante characterized the "Current State" of its system as follows:

  * Current OAC funding solution using the Intuit (formerly Teknowledge) solution not scalable or reliable.

  * Existing solutions lack the ability to share information across channels

  * Solutions are not integrated and require high degree of manual intervention

  (SA-215.)

- Metavante's business consultant Moffat admitted that "Metavante internally strongly criticized Teknowledge's failures to perform adequately." (SA-670-71.)

Metavante did not inform Emigrant of any of its conclusions that Teknowledge was failing to perform adequately. (SA-576-77.)

3. Metavante's Failure to Inform Emigrant

Metavante often did not notify Emigrant of problems with Metavante's system. (SA-207, 530.) Emigrant learned of many problems only through customer complaints. (SA-182 ("Why [did] this [problem] . . . not create an alert to operations when it occurred (since Emigrant customers called to report that transfers did not post)?") This frustrated Emigrant's ability to service customers. (SA-207, 396-400, 530.)

From December 30, 2005 to January 2, 2006, Metavante failed to process approximately 6,000 external transfers. (SA-203, 280-83, 305-09, 411-15, 552-53, 579-84.) Metavante was not aware of this problem until Emigrant alerted Metavante on January 4, 2006 that thousands of transactions failed to process. (SA-202, 282, 411-14.) This failure caused numerous complaints and lost deposits from customers withdrawing their funds. (SA-411-14.)

Metavante's repeated failure to notify Emigrant was due in part to an inability to monitor its system. (SA-167, 490-93.) Metavante's system involved

many different applications that required data transfers. (SA-187-89.) Data was often lost at points of transfer. (*See, e.g.,* SA-209, 449-50, 461-65.) This lack of integration led to gaps in monitoring. (SA-170, 492-92, 534-37, 538-39, 545.)

Emigrant sought confirmation from Metavante in February 2005 that Metavante's system could handle 2,000 account openings per day. (SA-175, 331-34.) Metavante confirmed to Emigrant that its system could handle that volume. (SA-578.) Metavante never told Emigrant that its subcontractors Teknowledge and NCR had "inadequate" stress and performance testing, as well as "nonexistent" capacity planning. (SA-178, 578.)

Although the Agreement required Metavante to provide an available system 24 hours per day, Metavante concluded in March 2005 that Teknowledge and NCR had not configured a "24x7" system. (SA-83, 188.) Metavante never told Emigrant this. (SA-587-91.)

Metavante was obligated under the Agreement to provide monthly reports of its performance against the Agreement's Service Levels. (SA-81.) Prior to July 2005, Metavante did not provide any such reports. (SA-195, 252-53, 416-17.)

Metavante did not provide <u>any</u> required Service Level reports for the critical OAC application during the entire 18-month period. (SA-252-53, 258-63, 664; 538, 546.) Metavante misinformed Emigrant that it was not actually required to meet any OAC Service Level. (SA-196, 260-62.) Metavante witnesses Paschke

and Moffat and Emigrant expert Nebel agreed that it would have been "extremely important" and "useful" for Metavante to have provided these reports so that Emigrant could monitor problems. (SA-259, 665.)

G. Effects of Metavante System Failures

Because of problems in Metavante's system, Emigrant's competitors ING Direct, HSBC Direct, and Citibank were able to acquire a larger share of the direct banking market than Emigrant. (SA-625.) Metavante's failures caused Emigrant to lose thousands of potential customers. (SA-507-08, 533-34, 209.) The parties' experts agreed that Metavante's numerous failures caused many failed applications while Metavante's system was technically "available," and thus were not measured by Service Levels. (SA-674-78, 680-81.) Emigrant lost thousands of customers due to Metavante's system failures. (SA-514-16.)

Emigrant's damages expert Paul Pocalyko explained that EmigrantDirect's performance would have been far better if it had not been for problems in Metavante's system. (SA-626.) Pocalyko testified that Emigrant lost between $1.2 billion and $1.3 billion in total deposit dollars due to the failures of Metavante's system. (SA-626.) These lost deposits resulted in approximately $7.3 million to $7.6 million of lost earnings (SA-627), and between $228 million and $241 million in lost value for EmigrantDirect. (SA-628-31.)

Emigrant also incurred approximately $3 million in increased costs of operation due to Metavante's system's failures. (SA-418-19.) Emigrant paid approximately $10.5 million in fees to Metavante. (SA-56 ¶89.)

H. Emigrant's Mitigation of Metavante's System Problems

Through its employees' hard work, premium interest rates, and aggressive marketing, Emigrant mitigated the harm from the defects of Metavante's system.

Less than one month after EmigrantDirect's launch, Emigrant began assigning additional employees to manage the "chaotic" problems with EmigrantDirect. (SA-388-92.) Emigrant expanded the customer service function in response to "overwhelming call volume" due to account opening and servicing problems. (SA-386-87, 389.) Metavante's failures caused Emigrant to hire many more customer service representatives. (SA-399-400.)

EmigrantDirect mailed thousands of paper applications in an effort to retain some of the consumers who were unable to open accounts online because of Metavante's failures. (SA-400-04, 592-94.) Emigrant's staff manually processed applications and performed other time-consuming processes that should have been performed by Metavante, including credit checks and identity validation. (SA-403-06, 592-96.)

William Scialabba of Emigrant's Information Technology department created a number of work-arounds to avoid the manual steps necessitated by the

Metavante system. These included processes to automate manual holds on deposits, to link applicant data held in separate non-integrated databases by Teknowledge and Metavante, and to check available balances before approving external transfers, which Emigrant used until June 2005 to mitigate the risk presented by the lack of balance verification in Metavante's system. (SA-362-64, 565-75, 585-86.)

I. Emigrant's Termination of the Agreement

The problems from Metavante's defective system began with the launch of EmigrantDirect in January 2005. (SA-168, 392-94.) Emigrant communicated with Metavante daily regarding problems. (SA-409.) Resolving "chaotic and frustrating" problems with Metavante became one of Romano's "routine duties." (SA-409-10.) Many of these problems were serious recurrent issues Metavante could not effectively resolve. (SA-409.)

On May 3, 2006, Emigrant notified Metavante it was terminating the Agreement for cause under section 8.2, and expected a termination date between June 17 and the weekend of July 22. (SA-92, 557-58.)

Under section 8.2, if a party fails to perform any material obligations, the other party may terminate the Agreement as of a date specified in a written termination notice. The defaulting party then has the option of taking steps to cure

the default within 30 days. If the defaulting party does not take such steps, the Agreement is terminated as of the specified date. (SA-65 § 8.2.)

Metavante responded on May 9, 2006. (SA-96, 557-59.) Rather than offer to cure its defaults, Metavante asserted it had performed under the Agreement and had already cured any issues. (SA-96, 559-60.) Emigrant transitioned off Metavante's system on July 23, 2006. (SA-559.) Metavante did not acknowledge any default at any time from May 3 to July 23, nor did it cure or implement a plan to cure pursuant to the Agreement. (*Id.*)

The Agreement required a termination fee if Emigrant terminated the Agreement "for convenience" before the 60-month term. (SA-87.) The amount of the fee depended upon whether Emigrant migrated to an "in-house" solution. If Emigrant failed to do so, it would owe an enhanced termination fee. (*Id.*) Emigrant migrated to an "in-house" solution. (A-5-6; 22-29.)

SUMMARY OF ARGUMENT

Emigrant paid more than $10 million for a direct bank system Metavante touted as state-of-the-art, but admitted internally was a low-cost solution that was a "nightmare" with an "awful" track record, and which ultimately cost Emigrant thousands of customers. The District Court concluded, however, that in light of Emigrant's success in obtaining deposits, Emigrant had no right to complain about Metavante's misrepresentations or its performance failures. The court reached this

conclusion by applying erroneous legal standards and ignoring contrary and largely undisputed evidence.

First, the District Court ignored the Wisconsin rule that a recipient of a misrepresentation is justified in relying on it unless he knows it to be false.

Second, the District Court rewrote unambiguous provisions in the Agreement, and excused Metavante from the duties of good faith and fair dealing, which required Metavante to be honest and forthright in providing services for which it was being well paid. The court ignored both the undisputed evidence of Metavante's admissions of failures and the court's own obligation to provide subsidiary findings showing its chain of reasoning.

Wisconsin law requires a vendor to live up to its warranty and to reveal known defects to purchasers. Wisconsin law also prohibits a court from rewriting a contract because the court thinks one party's profits extinguish its rights to get what was represented and paid for.

The Agreement required Metavante to provide "all" services in a commercially reasonable manner. Instead, the District Court focused on Emigrant's success in the marketplace and its overall business purpose – which Metavante refused to guarantee in the Agreement – and relieved Metavante of the warranty it actually made.

The District Court improperly relied on Metavante's purported expert business consultant who opined that a business's overall success defeats any claims against a vendor regardless of how that vendor performs. This business consultant admitted that this superficial opinion – not disclosed in either of his expert reports – was based on his life experiences, not any methodology.

The District Court also rewrote the Agreement by refusing to hold that Emigrant was the prevailing party on Metavante's In-House Claim – a distinct claim concerning Emigrant's new system and decided entirely in Emigrant's favor.

The District Court penalized Emigrant for its success, which the court found excused Metavante's admitted failings. The Judgment allows Metavante to walk away with more than $12 million for a low-cost solution it told Emigrant would be commercially reasonable, but was in reality a nightmare.

ARGUMENT

I. Standard of Review

On an appeal from a bench trial, this Court "review[s] the district court's conclusions of law *de novo* and its findings of fact for clear error." *Johnson v. West*, 218 F.3d 725, 729 (7th Cir. 2000).

A finding is "clearly erroneous" when "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Nickerson v. C.I.R.*, 700 F.2d 402,

405-06 (7th Cir. 1983). This Court's review of "findings of fact thus is deferential, but it is not abject." *Carr v. Allison Gas Turbine Div., Gen. Motors*, 32 F.3d 1007, 1008 (7th Cir. 1994).

This Court's "review [is] more searching if the district court has committed an error of law, including one that 'infect[s] a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.'" *Johnson*, 218 F.3d at 729.

As this Court has noted, "where a district court adopts a party's proposed findings of fact wholesale or verbatim, the resulting findings are 'not the original product of a disinterested mind.'" *Andre v. Bendix Corp.*, 774 F.2d 786, 800 (7th Cir. 1985). "Thus, when a district court adopts a party's proposed findings of fact, 'we examine the findings especially critically when deciding whether they are clearly erroneous.'" *Id*.

Here, this Court should "examine the findings especially critically" because the District Court adopted most of the Metavante Findings and Conclusions without even modifying those that contradicted not just undisputed evidence, but the court's own Oral Ruling.

The District Court adopted all of the Metavante Findings regarding liability on Emigrant's counterclaims of breach of contract, fraudulent inducement, and intentional misrepresentation. (A-16, 19, 22, 28, 29, 34-35.) The court adopted all

of the Metavante Findings on Metavante's breach of contract claim, with the exception of Metavante's frivolous In-House Claim. (*Id.*) The court also adopted all of the corresponding Metavante Conclusions. (A-30-32, 34.)

The District Court's approach of adopting the great bulk of the Metavante Findings and Conclusions simply by referring to literally hundreds of numbered paragraphs resulted in a morass of adopted findings and conclusions that contradicted the Oral Ruling, undisputed evidence and established law.

For example, in its Oral Ruling, the court unambiguously stated that "I make no findings with regard to damages as related to any of Emigrant's counterclaims . . . ." (A-30.) Yet the court adopted several Metavante Findings and Conclusions relating to Emigrant's damages. The court adopted Metavante Findings 1 to 112 (A-16, 19, 34-35), including Finding 41, which states that "Emigrant has not proven any damages relating to the 'good funds' issue." (A-54.) The court also adopted Metavante Conclusions 73 to 107, including Conclusions 96 and 103, which state Emigrant failed to prove "that Emigrant suffered any damages," and "has not proved the fact of damage." (A-95, 97.)

Similarly, in its Oral Ruling, the court found "that Emigrant had migrated its data processing for direct banking to an in-house solution," and found "insufficient evidence to show confidential information was used in Emigrant's in-house solution or that Emigrant breached the Agreement through the alleged use of

Metavante's information." (A-5-6, 24-28; Docket No. 552 at 30 (Court Minutes).) Notwithstanding these findings, the District Court adopted Metavante Conclusions 1 to 55, apparently without noticing that Conclusion 53 made the contradictory statements that "Emigrant materially breached the Agreement by . . . (iv) improperly using Metavante's confidential and proprietary information to create the Successor System . . . and (v) failing to protect Metavante's confidential and proprietary information . . . ." (A-88.)

The fact that the District Court adopted proposed findings inconsistent with its Oral Ruling means that those findings should be given no deference. *See, e.g., Mor-Cor Packaging Prods., Inc. v. Innovative Packaging Corp.*, 328 F.3d 331, 334 (7th Cir. 2003) (adoption of parties' proposed findings and conclusions, which contradicted court's oral ruling "disentitles his ruling to the usual deference"); *Machlett Labs., Inc. v. Techny Indus., Inc.*, 665 F.2d 795, 797 & n.4 (7th Cir. 1981) (vacating preliminary injunction where district court did not read proposed findings it adopted).

II. Emigrant Is Entitled to a New Trial on Its Fraud Claims

The District Court held that Metavante did not defraud Emigrant because Emigrant could not have justifiably relied on any misrepresentations. (A-12-14, 96-97 ¶¶99-100, 102.) The court imposed a burden on Emigrant, not found under

Wisconsin law, to have investigated further into the truthfulness of statements made by Metavante before it could justifiably rely on those statements.

This error of law caused the court to overlook substantial undisputed evidence which should have led to the conclusion that Metavante intentionally misled Emigrant prior to and during the term of the Agreement.

A. The District Court Made Errors of Law in Holding that Emigrant Did Not Justifiably Rely on Metavante's Misrepresentations

The District Court misconstrued Wisconsin law in holding that Emigrant could not have justifiably relied on any alleged misrepresentations because it did not conduct adequate due diligence prior to entering into the Agreement. (A-12-14, 96-97 ¶¶99-100, 102.)

The District Court stated that Emigrant had "an obligation to inquire as to whether" Metavante would use subcontractors, "was perhaps not as aware as they might have otherwise been," "had an obligation to have a frank and candid conversation with the folks at Metavante" and that "matters were not appropriately vetted." (A-11-13.) According to the District Court, "Emigrant through its own employees, agents, outside parties has only itself to look to in terms of these asserted deficiencies that have been catapulted, if you will, into a suggestion that there was fraud or they were misled . . . ." (A-13.)

In addition, among the numerous Metavante Conclusions that the District Court adopted were conclusions that Emigrant had not reasonably relied on any representations as a matter of law.

Metavante Conclusion 99 states that "[a]s a matter of law, Emigrant cannot justifiably rely on general statements in introductory presentations in light of the months of careful negotiations between the parties . . . ." (A-96.) Conclusion 100 states that Emigrant could not "justifiably rely on statements allegedly made by Metavante during negotiations before contract formation because Emigrant disregarded a warning by Core-Teck to negotiate for different provisions," and that "[a]s a matter of law, Emigrant could not rely on Metavante's alleged statements when Emigrant disregarded warnings to negotiate for specific and different provisions." (A-96.) Conclusion 102 states that "Emigrant could not and did not justifiably rely on any alleged misrepresentation that is not found in, or is inconsistent with, the terms of the Agreement." (A-97 (emphasis added).)

All of the above statements and Conclusions are based on a theory that a party to a contract cannot reasonably rely on any misrepresentations if that party had an opportunity to engage in research or take steps that might have uncovered the fraud. Wisconsin law rejects that theory.

Under Wisconsin law, even if a party fails to investigate, it is justified in relying on representations unless their falsity is obvious. *See Household Fin. Corp.*

v. Christian, 98 N.W.2d 390 (Wis. 1959). "The general rule in Wisconsin, as elsewhere, is that the recipient of a fraudulent misrepresentation is justified in relying on it, unless the falsity is actually known or is obvious to ordinary observation." *Henning v. Ahearn*, 601 N.W.2d 14 (Wis. App. 1999). *See also First Nat'l Bank & Trust Co. v. Notte*, 293 N.W.2d 530, 539 (Wis. 1980) ("recipient's fault in failing to discover the facts before entering the contract does not make his reliance unjustified unless his fault amounts to a failure to act in good faith or to conform his conduct to reasonable standards of fair dealing"); *Lewis v. Paul Revere Life Ins. Co.*, 80 F. Supp. 2d 978, 999 (E.D. Wis. 2000) (rejecting argument that party's "failure to investigate" meant that its reliance was not justified since "the law in Wisconsin is that a plaintiff is justified in relying on a defendant's representations unless their falsity is obvious").

The falsity of Metavante's statements was not obvious. It is undisputed that none of the matters cited by the court as eliminating Emigrant's right to rely on representations actually alerted Emigrant to the falsity of any of Metavante's representations. Similarly, not only was there no finding that Emigrant failed to discover any facts because of bad faith, but there was no evidence that would have supported such a finding.

Since the District Court's incorrect interpretation of the law on justifiable reliance was the basis of its judgment on the fraud claims, that judgment should be reversed and a new trial should be granted.

B. The District Court Failed to Make Necessary Subsidiary Findings of Fact on the Fraud Claims

After a bench trial, a district court must make subsidiary findings to show how it reached its ultimate findings of fact. The District Court failed to make such subsidiary findings on Emigrant's fraud claims.

As noted in *Andre*, "this circuit has held that 'substantial compliance with the fact-finding requirements of Rule 52(a) necessitates that the findings of fact on the merits include as many of the subsidiary facts as are necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue.'" 774 F.2d at 801. When this Court is "unable to follow the district court's chain of reasoning," it will remand for a new trial, usually before a different judge. *Id*. at 801.

Whether a district court made sufficient subsidiary findings is a question of law reviewed *de novo*. *See, e.g., Louis Vuitton, S.A. v. K-Econo Merch.*, 813 F.2d 133, 134 (7th Cir. 1987) (when court fails to find facts specially, "we cannot adequately review any findings of fact under the required clearly erroneous standard"); *Am. Bald Eagle v. Bhatti*, 9 F.3d 163, 165 (1st Cir. 1993) (argument that court failed to find facts specially reviewed *de novo*).

Although the court stated in its Oral Ruling that "the Court's comments . . . will provide . . . an analysis of how the Court arrived at the ultimate determinations that I've laid out," the court failed to discuss many of the elements of Emigrant's fraud and breach of contract claims. (A-6.) The District Court failed to make sufficient subsidiary findings with respect to reliance or any of the other elements of fraudulent misrepresentation to explain how it concluded that Metavante did not commit fraud when the evidence demonstrated the opposite.

Testimony of Metavante's own employees and contemporaneous Metavante documents show that Metavante made misrepresentations of present fact before and during the term of the Agreement.

For example, it was undisputed that Metavante represented to Emigrant that Metavante's system was a "proven model" that was both "truly integrated" and "fully scalable to large volumes." (SA-123, 125, 684-85; SA-44 ¶¶22-23.) As shown in the Statement of Facts, Metavante's internal documents contradicted these representations at the time they were made.

Similarly, it was undisputed that on the same day Metavante responded to Emigrant's concerns about "capacity problems" by assuring Emigrant that its system could handle large numbers of transactions, Metavante drafted a letter to inform its subcontractor Teknowledge that it failed to perform because its system

was "inadequate to support solutions of the current scale" and it failed to perform "capacity planning." (SA-174-75, 177-81.)

The evidence that Metavante misled Emigrant about Teknowledge's failures of performance – for which Metavante was responsible under the Agreement – was so overwhelming that even Metavante's business consultant, Moffat, admitted that "what Metavante said to Teknowledge and what Metavante said internally about Teknowledge's performance was indeed different from what they told Emigrant." (SA-662-63.)

The District Court further erred by failing to show its "chain of reasoning" in finding that Emigrant could not have reasonably relied on any representations because Emigrant failed to "address" unspecified "concerns." (A-13.) The court made no subsidiary findings explaining what these concerns were or how they could have alerted Emigrant to the falsity of any representations. It is undisputed that none of the matters cited by the court as eliminating Emigrant's right to rely on representations actually alerted Emigrant to the falsity of any of Metavante's representations. Nor was there evidence that Emigrant failed to discover such falsity because of its own bad faith.

Moreover, Emigrant's supposed failure to address concerns before entering into the Agreement could not have affected its reliance on Metavante's representations and omissions – made after entering into the Agreement – about

Teknowledge's performance in actually providing services to Emigrant. Without subsidiary findings, it is simply impossible to fathom why the District Court thought Emigrant had no right to rely on such representations.

Given the lack of subsidiary findings on Emigrant's fraud claims, this Court cannot follow the District Court's "chain of reasoning" and should reverse the judgment and remand for a new trial. *See, e.g., Mautz & Oren, Inc. v. Teamsters, Chauffeurs, & Helpers Union*, 882 F.2d 1117, 1125 (7th Cir. 1989) ("[w]e have repeatedly stated, however, that a district court's finding of 'ultimate facts' must be reversed where the district court has failed to make subsidiary factual findings, thus making it impossible to follow its chain of reasoning").

C. The District Court Made Clearly Erroneous Findings of Fact on the Fraud Claims

As discussed above, the court's Oral Ruling discusses none of the elements of fraud except for reliance. Given the court's legal error in considering reliance, the court's findings on fraud should be given a more searching review. *See Johnson*, 218 F.3d at 729 (findings of fact that are infected by error of law should be given more searching review).

To the extent the Oral Ruling contains findings of fact on fraud, virtually all of them deal with reliance and are clearly erroneous.

For example, Metavante represented that its services were integrated, which was false for several reasons, including the large (and incompetent) role played by

Metavante's subcontractor Teknowledge. The District Court refers to this misrepresentation when it points to the "candid testimony" of Emigrant's Ted Morehouse "about why he was not interested on behalf of Emigrant in pursuing a technology outsourcing agreement" with another technology provider that might have used a subcontractor. (A-10.) In that "candid testimony," Morehouse explained that Emigrant wanted one provider for its direct banking services. (SA-323-24.) Applying its incorrect view of the law of reliance, the District Court critically wondered "why some of those very concerns were not raised with [Metavante salesperson] Barry Holst during the March 4th, 2004 meeting, that is who are you actually using to implement the product that you are proposing for Emigrant." (A-10.) The District Court then compounded its legal error holding that Emigrant had an "obligation to inquire as to whether de facto there would or were going to be used any subcontractors in fulfilling Metavante's contract obligations." (A-11.)

The District Court's finding that Emigrant did not express its concerns about having one provider is clearly erroneous. As Morehouse testified, Metavante represented that its direct banking services were a "fully integrated program" that located in "one building." (SA-323-24.) Holst admitted that Emigrant told Metavante that one of "Emigrant's key requirements" was that it "wanted a complete solution from *one provider*," and that Metavante represented to Emigrant

that it could meet that key requirement. (SA-687 (emphasis added); SA-606-07.) Metavante clearly understood how important it was to Emigrant to have one provider since it went to the trouble of altering a workflow diagram provided to Emigrant to delete references to Teknowledge – deceiving Emigrant into believing that Metavante was the sole provider before contract signing. (*Compare* SA-142 *with* SA-146; SA-326-29, 345, 347-48.)

Similarly, in applying its mistaken view of the law on reliance, the District Court found that Emigrant had failed to sufficiently inform itself of "some of the nuances associated with technology," and had failed to meet its obligations to address issues raised by Core-Teck with "the technology team at Emigrant" and "the folks at Metavante." (A-13.) Once again, the District Court's findings contradict undisputed facts. Not only was there a stipulated fact that members of Emigrant's technology team were involved in dealing with these issues, but there was undisputed testimony that Emigrant addressed these issues with both its technology team and Metavante. (SA-44 ¶26; SA-88-89, 149-152, 314-17, 320, 335-36, 349-53, 354, 358.)

In light of the District Court's misapplication of Wisconsin law on reliance, uncritical adoption of Metavante Findings and Conclusions, failure to make subsidiary findings, and clearly erroneous findings, this Court should reverse the judgment on Emigrant's fraud claims and remand for a new trial.

III. Emigrant Is Entitled to a New Trial on the Breach of Contract Claims

The issue of whether Metavante materially failed to perform its obligations – and thus breached the Agreement – is dispositive of both Metavante's and Emigrant's contract claims since "a party who seeks to recover damages from another due to lack of performance normally must establish the party's own performance." 14 Wis. Practice, Elements of an Action § 3:10 (2008-09 ed.) (citing *Long Inv. Co. v. O'Donnel*, 88 N.W.2d 674, 677-78 (Wis. 1958)).

The District Court made errors of law by revising the Performance Warranty and termination provisions of the Agreement, even though those provisions were unambiguous, and in permitting a purported expert to give unreliable and previously undisclosed opinion testimony. The District Court failed to make essential subsidiary findings on the breach of contract claims, and made findings that were clearly erroneous in light of the court's verbatim adoption of the Metavante Findings and Conclusions. Accordingly, this Court should reverse the judgment on the breach of contract claims and remand for a new trial.

A. The District Court Made Errors of Law in Interpreting the Agreement

The District Court correctly held that the Agreement is unambiguous. (A-79 ¶6; A-30.) Under Wisconsin law,[3] "[c]onstruction of a written agreement is a matter of law for the Court where the agreement is unambiguous." *Harris v. Metro.*

[3] Section 17.1 provides that Wisconsin law governs the "construction and interpretation of this Agreement . . . ." (SA-70.)

Mall, 334 N.W.2d 519, 527 (Wis. 1983). Since "the interpretation of an established written contract is generally a question of law for the court," this Court will review a contract *de novo*. *Int'l Prod. Specialists, Inc. v. Schwing Am., Inc.*, 580 F.3d 587, 594 (7th Cir. 2009). *See also Harris*, 334 N.W.2d at 527 ("[w]here the construction is a question of law, it may be redetermined by [the appellate] court on appeal").

1. The District Court Rewrote the Agreement's Performance Warranty

The Agreement's Performance Warranty unambiguously states that "Metavante warrants that it will provide all Services in a commercially reasonable manner," with the exception of any aspect of Metavante's performance that the parties agreed would be measured by "Service Levels." (SA-64 § 6.1.) As Metavante's witnesses admitted, however, with respect to Metavante's direct banking services, Service Levels were only applicable to availability of the system, i.e., whether the system was down due to an outage. (SA-265-67.) Metavante's witnesses admitted that with respect to Metavante's provision of software and hardware and the design of its system, the Performance Warranty's standard of commercial reasonableness applied. (*Id.*)

Thus, under the plain language of the Agreement, Metavante was required to "provide all Services" to Emigrant in a commercially reasonable manner. The Performance Warranty did not cover the performance of EmigrantDirect in the

marketplace. In fact, as the District Court correctly found, although Emigrant asked in contract negotiations for a warranty that would cover EmigrantDirect's achievement of "its overall business purpose," Metavante refused. (A-49 ¶19.) The parties stipulated that the Agreement did not contain any warranty covering EmigrantDirect's "overall business purpose" because Metavante rejected such a provision. (SA-45-46 ¶¶32-36.)

Whether EmigrantDirect achieved "its overall business purpose" would depend on many factors unrelated to Metavante's provision of direct banking services, including the savings account interest rate set by Emigrant, Emigrant's marketing campaign for EmigrantDirect, Emigrant's performance of its duties relating to EmigrantDirect and the marketplace's receptivity to direct banking. (SA-613-19, 622-24.) Given such factors, it is not surprising that Metavante demanded that its Performance Warranty be limited to its provision of technology services to Emigrant – not to whether EmigrantDirect eventually was able to achieve "its overall business purpose."

In addition, the court properly found that the Agreement did not require Metavante to help EmigrantDirect achieve "a certain number of customers, or a certain volume of accounts, or a certain amount of deposits, or any number of processed transactions, or any number of completed applications." (A-48 ¶15.)

Notwithstanding these findings, the District Court interpreted the Performance Warranty in a way that contradicted the plain language of the Agreement. The court held that the warranty's standard of commercial reasonableness applied not to the electronic banking services Metavante sold to Emigrant, but to the overall "success of Emigrant's online banking product" in the "marketplace." (A-8-9, 16-19.) The court concluded that because EmigrantDirect was "a total commercial success," Metavante could not have breached the Performance Warranty. (A-19.)

The District Court also inexplicably criticized Emigrant's expert on computer systems and software, Nebel, for focusing on whether specific computer services Metavante provided to Emigrant were commercially reasonable instead of attempting to determine if EmigrantDirect was a commercial success in the marketplace – an issue beyond the expertise of a computer systems and software expert. (A-8-9.)

The District Court's interpretation of the Agreement contradicts the plain language of that contract, which required Metavante to meet a standard of commercial reasonableness at the time it provided the services to Emigrant. As the parties stipulated – and as the court itself found – Metavante made no warranty relating to Emigrant's "overall business purpose." Thus, the court's interpretation was a drastic rewriting of the Agreement.

Wisconsin law prohibits courts from rewriting contracts under the guise of interpretation. *See, e.g., Columbia Propane, L.P. v. Wis. Gas Co*., 661 N.W.2d 776, 783 (Wis. 2003) ("[i]n constructing a contract, courts cannot insert what has been omitted or rewrite a contract made by the parties").

The District Court's improper rewriting of the Agreement was exemplified by the court's inapposite comparison of Emigrant's criticism of Metavante's failures with criticizing Babe Ruth for excessive strikeouts. (A-8.) The District Court somehow read the Agreement as making Metavante just as responsible for EmigrantDirect's success as Babe Ruth was for his own home runs. The District Court's analogy was inapt because Metavante was not responsible for setting EmigrantDirect's interest rates, for its advertising and marketing campaigns and for its efforts to correct Metavante's flaws, and had warranted that all services – not the ultimate business result – would be commercially reasonable.

In light of the District Court's error of law in rewriting the Agreement's Performance Warranty, Emigrant is entitled to a new trial on the issue of both its breach of contract claim and Metavante's breach of contract claim.

2. The District Court Rewrote the Agreement's Termination Clause

The District Court misinterpreted the Agreement's termination clause to impose on Emigrant a duty of reminding Metavante that it had a right to cure defects.

The Agreement's termination clause provides the following:

> For Cause. If either party fails to perform any of its material obligations under this Agreement (a "Default") and does not cure such Default in accordance with this Section, then the non-defaulting party may, by giving notice to the other party, terminate this Agreement as of the date specified in such notice of termination, or such later date agreed to by the parties, and/or recover Damages. A party may terminate the Agreement in accordance with the foregoing if such party provides written notice to the defaulting party and either (a) the defaulting party does not cure the Default within thirty (30) days, or (b) if the Default is not capable of cure within thirty (30) days, the defaulting party does not both (i) implement a plan to cure the Default within thirty (30) days of receipt of notice of the Default, and (ii) diligently carry-out the plan in accordance with its terms. . . .

(SA-65.)

Under the plain terms of the Agreement, a party terminating for cause must send a written notice to the other party stating that it will terminate the Agreement as of a certain date. After sending the notice, the first party may terminate the Agreement if the other party does not take steps to cure within 30 days. The Agreement imposes no obligation on the party giving notice to remind the other party that it can cancel the termination by taking steps to cure within 30 days. Instead, the Agreement places the responsibility to cure solely on the breaching party. The Agreement gives the breaching party the option to take steps to cure if it both believes it can cure and wants to avoid termination.

Emigrant followed this provision. In its May 3, 2006 letter, Emigrant notified Metavante that it was terminating the Agreement for cause effective

June 17, 2006, or later. (SA-92.) The letter detailed the systemic flaws of Metavante's system and its failure to cure those flaws over the past year and a half, and stated that it was evident "that the foregoing causes of the termination of the agreement cannot be cured by Metavante in any reasonable time frame." (SA-95.)

Under the Agreement, if Metavante had believed it could cure the system defects, it had the option of taking steps to cure within 30 days. Instead of taking steps to cure, however, Metavante responded with a letter dated May 9, 2006 that noted it had a right to take steps to cure within 30 days, but expressed its view that it had not breached the Agreement. (SA-96.) Thus, Emigrant had performed all of its obligations under the termination clause.

The District Court, however, again ignored Wisconsin law of contract interpretation by rewriting the Agreement to impose on Emigrant a duty "to call upon Metavante to comply with the terms of the underlying . . . agreement." (A-5.) Wisconsin law does not permit a court to add terms to a contract under the guise of interpretation. *See Columbia Propane*, 661 N.W.2d at 783 (courts can neither rewrite a contract nor insert terms).

Even if the court's interpretation of the termination provision were correct, Emigrant had no duty to give Metavante notice of an opportunity to cure since Metavante denied that it had failed to perform, making any such notice a futility. A party to a contract is excused from performing acts that the other party has

indicated would be futile. *J.I. Case Threshing Mach. Co. v. Johnson*, 122 N.W. 1037, 1038 (Wis. 1909) ("positive declaration by one party of a determination which would render a prescribed act by the other futile excuses a specified performance or tender of that act"); *see also Caisse Nationale de Credit Agricole v. CBI Indus., Inc*., 90 F.3d 1264, 1275 (7th Cir. 1996) (in many jurisdictions notice to cure is not required where the non-performing party makes clear that notice would be futile).

B. The District Court Made Errors of Law in Failing to Properly Apply the Implied Covenant of Good Faith and Fair Dealing

In its Oral Ruling, the court did not address Emigrant's claim that Metavante breached the Agreement's implied covenant of good faith and fair dealing. Instead, the court erred by adopting verbatim the Metavante Conclusions which misstated Wisconsin law on the implied covenant.

Emigrant presented evidence that Metavante breached its implied covenant of good faith and fair dealing by failing to inform Emigrant of substantial defects in its system. (*Supra*, at 19-20.)

For example, Metavante's business consultant Moffat admitted that (1) "under the parties' agreement, Metavante was responsible for Teknowledge," (2) "Metavante repeatedly informed Teknowledge that it was performing in a substandard manner," (3) "Metavante internally strongly criticized Teknowledge's failures to perform adequately," and "repeatedly, in its internal documents

acknowledged that Teknowledge's track record was awful," and (4) "what Metavante said to Teknowledge and what Metavante said internally about Teknowledge's performance was indeed different from what they told EmigrantDirect." (SA-656-57, 660, 663, 670-71, 679.)

The District Court never considered whether Metavante's failures to inform Emigrant of substantial defects in the system breached its implied duty of good faith. Instead, the court adopted Metavante Conclusion 82 that "[t]he implied covenant of good faith and fair dealing does not apply" because, as a matter of law, "Metavante did not have an 'implied' duty to notify Emigrant when a computer application used to provide Services under the Agreement experienced a problem or issue . . . ." (A-93.) The District Court's adoption of this Conclusion was particularly striking because it contradicted the court's previous order denying Metavante's motion for summary judgment, which held the covenant did apply to Metavante's conduct. (SA-29-30.)

The District Court was right the first time. Wisconsin does impose a duty of good faith on contracting parties to reveal known defects of a subject of the contract. As this Court noted in *AMPAT/Midwest, Inc. v. Illinois Tool Works Inc*., 896 F.2d 1035, 1041 (7th Cir. 1990) (applying Illinois law), under the common law duty of good faith that is read into contracts, a "seller cannot sit idly by while the buyer flails about trying to cope with the failure of the seller's product." Thus, "[a]

seller who has reason to know that the failure of his product to perform in the manner warranted is due to a defect in the product can neither keep silent while knowing the nature of the problem nor pretend that the failure is really due to improper installation by the buyer or to an isolated problem that will be corrected . . . ." *Id*.

This common law duty of good faith is read into contracts under Wisconsin law. *See, e.g., Harley-Davidson Motor Co., Inc. v. PowerSports, Inc*., 319 F.3d 973, 986 (7th Cir. 2003) ("[i]n contract, a duty not to defraud other contracting parties arises as part of the duty to bargain in good faith and fair dealing"); *Kreckel v. Walbridge Aldinger Co*., 721 N.W.2d 508, 514 (Wis. Ct. App. 2006) ("duty to provide prompt or reasonable notice is rooted in the duty of good faith and fair dealing, which in Wisconsin is part of every contract"); *Uebelacker v. Paula Allen Holdings, Inc*., 464 F.Supp.2d 791, 804 (W.D. Wis. 2006) (implied duty of good faith "could include reasonable efforts to minimize the risk of errors in the documents [contracting party] prepares").

In adopting Metavante's erroneous statement of the law, the District Court failed to consider whether Metavante's failure to reveal its system's defects to Emigrant breached the duty of good faith that exists under Wisconsin law.

C. The District Court Erred by Admitting Unreliable, Undisclosed, "Expert" Testimony

The District Court improperly admitted, over Emigrant's objection, purported expert testimony of Metavante's business consultant, Moffat, that was both unreliable and never disclosed to Emigrant until he took the stand near the end of trial.

Metavante had originally identified four areas of purported expert testimony for Moffat, including the reasonableness of Metavante's responsiveness to Emigrant. (SA-242.) Emigrant filed a motion in limine on November 26, 2008, asking the District Court to preclude Moffat from testifying on the grounds that, *inter alia*, his opinions were not based on any reliable methodology and were not the proper subject of expert testimony. (Docket No. 436.) Although Metavante opposed the motion, it agreed to withdraw most of Moffat's proposed testimony and limit his testimony to "Opinion C," which discussed only whether Metavante had met the Service Levels for availability of the system – and did not discuss any aspect of Metavante's performance covered by the Performance Warranty. (Metavante Opp. to Emigrant Mot. in Limine, Docket No. 479 at 1; SA-236-41.) The District Court did not rule on Emigrant's motion before trial.

After Emigrant rested on its case in chief, Metavante called Moffat to testify. Emigrant renewed its motion to preclude his testimony, but the District Court permitted Moffat to testify. (SA-632-33.)

Instead of limiting Moffat's testimony to Opinion C, Metavante elicited Moffat's opinion that Metavante had provided all services in a commercially reasonable manner. (SA-636, 639-41.) Moffat's expanded testimony on commercial reasonableness included testimony on the reasonableness of Metavante's responsiveness to Emigrant – the subject of Opinion D in Moffat's report, which Metavante had withdrawn. (SA-640; SA-241-43; Docket No. 479 at 1.)

Emigrant renewed its motion to preclude Moffat from testifying, adding the ground that Moffat's expanded testimony on the commercial reasonableness of Metavante's provision of all services was not disclosed to Emigrant before trial. The District Court permitted Moffat to testify. (SA-637-39.)

After Moffat testified, Emigrant moved to strike Moffat's testimony for all the reasons stated in its motion in limine as well as the ground that Moffat's opinions had not been properly disclosed to Emigrant. (Docket No. 534.) In its Oral Ruling, the court denied the motion, permitting Moffat's testimony to stand, becoming the first court to qualify this business consultant as an expert witness. (A-2; SA-650.)

1. The District Court Failed to Perform the Requisite *Daubert* Analysis

"The admissibility of expert testimony is governed by Federal Rule of Evidence 702, as well as *Daubert*." *Naeem v. McKesson Drug Co.*, 444 F.3d 593,

607 (7th Cir. 2006) (citation omitted). *Daubert* requires the district court to determine whether expert testimony – including non-scientific expert testimony – is both reliable and relevant. *Id.*; *see also In re Salem*, 465 F.3d 767, 777 (7th Cir. 2006) ("reliability requirement" applies in bench trial); *Neace v. Laimans*, 951 F.2d 139, 143 (7th Cir. 1991) (excluding expert testimony on a medical condition as irrelevant, where there was no evidence plaintiff had condition). Whether a district court "properly followed" *Daubert* is reviewed *de novo*. *Naeem*, 444 F.3d at 607.

Here, the District Court failed to perform the required *Daubert* analysis. In admitting Moffat's testimony, the District Court limited itself to one conclusory sentence: "I find nothing in Mr. Moffat's opinions to run afoul of either Rule 702 or notice requirements to opposing counsel." (A-2.)

In *Naeem* this Court held that a conclusory statement that expert testimony is admissible "is not enough to show that the district court applied the *Daubert* standard . . . ." 444 F.3d at 608. If the district court provides no analysis of the expert's methodology, admission of the testimony is not entitled to deference. *Id.* "When a district court fails to consider an essential *Daubert* factor, such as reliability, it has abused its discretion." *Id.*

2. Moffat's Testimony Was Unreliable and Irrelevant

Moffat's testimony does not meet the *Daubert* standards of reliability and relevance. Instead of performing a reasoned analysis of whether Metavante provided services in a commercially reasonable manner, Moffat gave a conclusory and irrelevant opinion about EmigrantDirect's overall success.

Although Moffat offered an opinion on the commercial reasonableness of Metavante's services, Moffat admitted that he did not actually analyze that issue. Instead, Moffat's opinion was based on whether Emigrant had met its "business objectives" with EmigrantDirect. (SA-646.) Moffat's approach contradicted both the parties' stipulation that the Agreement did not cover EmigrantDirect's achievement of "its overall business purpose," and the District Court's finding that the Agreement contained no such warranty. (SA-45-46 ¶¶32-36; A-49 ¶19.) Thus, Moffat's opinion was not relevant to the issue of whether Metavante met the Performance Warranty's standard of commercial reasonableness.

Moffat even admitted that he was not qualified to perform any analysis that would be relevant to determining the reasonableness of Metavante's provision of technology services. Moffat acknowledged that he was "not a technical expert," and did "not make any attempt to determine whether Metavante's system was actually performing transactions in a commercially reasonable way." (SA-651-52.) Moffat also admitted that "the extent to which Metavante's system prevented

consumers from becoming EmigrantDirect customers is a factor to consider in determining whether Metavante provided services in a commercially reasonable manner," but that he made no attempt to analyze that factor. (SA-652-53, 655.)

Lacking the technical expertise to analyze Metavante's provision of services, Moffat gave his impressions as a businessman about how well EmigrantDirect generated deposits. He then asserted that Metavante should be given credit for EmigrantDirect's success. He offered no analysis as to how Metavante's provision of technology services supposedly caused EmigrantDirect's success. Not only did Moffat concede that other factors, such as interest rates, were important in making EmigrantDirect a success, he admitted he was "not qualified to opine" on the factors that cause a direct bank to be a success. (SA-654.)

Mere assertions that are not based on any reasoned analysis are not considered reliable under *Daubert*. As this Court stated in *Lang v. Kohl's Food Stores, Inc*., 217 F.3d 919, 924 (7th Cir. 2000), "[m]any times we have emphasized that experts' work is admissible only to the extent it is reasoned, uses the methods of the discipline, and is founded on data."

Moffat's opinion was also unreliable because he discounted Metavante's internal documents that admitted that Teknowledge had failed to deliver services in a commercially reasonable manner. (SA-657-58.) Moffat claimed that based on his "experience," Metavante employees who admitted that Teknowledge had failed

to deliver services in a commercially reasonable manner were "just people trying to draw attention to themselves." (SA-658.) Moffat speculated that Metavante employees that criticized Teknowledge could have been "joking." (SA-659.)

Moffat's flippant dismissal of Metavante's business records highlights how unreliable his opinion was. "Talking off the cuff – deploying neither data nor analysis – is not an acceptable methodology." *Lang*, 217 F.3d at 924.

Moffat similarly dismissed Metavante's numerous criticisms of Teknowledge as simply a "business strategy." However, Moffat admitted that this testimony was based on his "life experiences," and that "there's nothing to indicate that that is the strategy used here." (SA-661.) As this Court noted in *Naeem*, "general observations regarding what is normal or usual business practice" do "not meet the requisite level of reliability." 444 F.3d at 608.

Moffat's unreliable and irrelevant opinion testimony was prejudicial to Emigrant. Moffat's testimony came during Metavante's rebuttal case – after Emigrant rested – giving Emigrant no time to prepare to examine Moffat on the subjects about which he opined or prepare a supplemental expert report responding to Moffat.

Moreover, the District Court heavily relied on Moffat's testimony. The only testimony cited in support of Finding 66 that "Metavante provided Services in a commercially reasonable manner in material conformance with the terms of the

Agreement" was Moffat's opinion testimony. (A-59.) Not only did the District Court adopt that finding verbatim, it recited Moffat's conclusions that Metavante's services were commercially reasonable in light of the number of accounts and amount of deposits EmigrantDirect generated, and that Nebel's analysis was flawed for not taking such numbers into account. (A-8-9; SA-642, 648-49.) Similarly, Moffat's dismissal of the many defects in Metavante's system with the conclusory statement that "clearly there were bumps along the way," was echoed by the District Court's conclusory statement that "to be sure, there were hiccups." (SA-642-43; A-18.)

Given the District Court's acceptance of Moffat's flawed approach, Emigrant's substantial rights were adversely affected by the District Court's reliance on this unreliable testimony.

3. Moffat's Testimony Was Not Disclosed Before Trial

The District Court should have excluded Moffat's testimony that Metavante provided all services in a commercially reasonable manner for the separate reason that Metavante failed to disclose that testimony before trial.

Fed. R. Civ. P. 26(a)(2) requires expert reports to "contain a complete statement of all opinions to be expressed." "The exclusion of non-disclosed [expert] evidence is automatic and mandatory under Rule 37(c)(1) unless non-disclosure was justified or harmless." *Musser v. Gentiva Health Servs.*, 356 F.3d

751, 758 (7th Cir. 2004). The party that failed to disclose the evidence has the burden to show that the non-disclosure was justified or harmless. *Ciomber v. Coop. Plus, Inc*., 527 F.3d 635, 641 (7th Cir. 2008). This Court reviews a district court's ruling on a motion to exclude non-disclosed evidence for abuse of discretion. *Id*. at 640.

Metavante cannot show that its non-disclosure was either justified or harmless. When Emigrant objected at trial to Metavante's expansion of Moffat's testimony to offer new opinions, Metavante did not offer any justification. (SA-637-39, 644-45, 647.) Far from being harmless, Moffat's testimony was the basis of the District Court's erroneous interpretation of the Agreement as providing that Metavante's performance should be measured by the achievement of Emigrant's overall business objectives.

District courts have abused their discretion in admitting evidence under far less egregious circumstances. *See, e.g.*, *Jacobsen v. Deseret Book Co*., 287 F.3d 936, 953-54 (10th Cir. 2002) (since party would be prejudiced by not knowing exactly what expert would testify to, district court abused discretion in not striking incomplete expert report before trial).

D. The District Court Failed to Make Necessary Subsidiary Findings of Fact on the Contract Claims

The District Court's ultimate finding that Metavante did not breach the Agreement was not supported by the necessary subsidiary findings of fact showing

its "chain of reasoning." Although Emigrant introduced evidence that Metavante breached the Agreement in multiple ways, the court merely found in conclusory fashion that Metavante did not breach the Agreement, making it impossible to follow the court's reasoning.

For example, one of Emigrant's main claims was that Metavante breached the Agreement through its agent Teknowledge. Emigrant also claimed that Metavante's failure to inform Emigrant of Teknowledge's failures breached the Agreement's implied covenant of good faith and fair dealing. The following facts were established at trial through Metavante's own documents and the testimony of Metavante's own witnesses:

- Under the Agreement, Metavante was responsible for its subcontractor Teknowledge and any failure of performance or breach by Teknowledge was considered a failure of performance or breach by Metavante (SA-61 § 3.1; SA-269);
- "Metavante repeatedly informed Teknowledge that it was performing in a substandard manner" (SA-660);
- "Metavante internally strongly criticized Teknowledge's failures to perform adequately" (SA-670-71);
- Metavante "repeatedly, in its internal documents acknowledged that Teknowledge's track record was awful" (SA-679); and

- "[W]hat Metavante said to Teknowledge and what Metavante said internally about Teknowledge's performance was indeed different from what they told EmigrantDirect." (SA-662-63.)

This overwhelming and undisputed evidence that Metavante breached the Agreement through Teknowledge was buttressed by additional evidence, including Metavante's internal documents and the testimony of Emigrant's expert Nebel. Nebel gave detailed testimony that specific technology services provided by Teknowledge were commercially unreasonable. (*Supra*, at 14-19.) Metavante did not call any witness to dispute Nebel's technical analysis of the specific failures of Teknowledge.

Given the substantial evidence that Metavante breached the Agreement through Teknowledge, the District Court should have supported its ultimate finding that Metavante did not breach the Agreement with subsidiary findings about Teknowledge that showed the court's "chain of reasoning" explaining why (1) Metavante was not responsible for Teknowledge's non-performance and (2) Metavante's failures to inform Emigrant of Teknowledge's non-performance was not a breach of the duty of good faith.

The District Court, however, made no such findings. The only finding that even arguably deals with the evidence that Metavante breached the Agreement through Teknowledge was the District Court's conclusory statement that "to be

sure, along life's path there will be a hiccup or two; and to be sure, there were hiccups in the Metavante/Emigrant relationship; but I suggest and I find on the basis of all of the relevant testimony including the documents that have been submitted, that while there have been hiccups none of them rose to the level of amounting to what might be viewed as a breach of the contractual obligations that Metavante provided as the relationship began, developed, matured . . . ." (A-18.)

This Court has repeatedly held that conclusory statements of ultimate facts are insufficient to satisfy a district court's duty to find subsidiary facts. *See, e.g., Sutter Ins. Co. v. Applied Sys., Inc.*, 393 F.3d 722, 727 (7th Cir. 2004) (subsidiary findings should "trace a clear path from the evidence to the judgment"); *Rucker v. Higher Educ. Aids Bd*., 669 F.2d 1179, 1183-84 (7th Cir. 1982) ("naked, conclusional findings" are inadequate; court should have "clearly resolv[ed] each genuine issue of material fact").

The District Court's failure to make subsidiary findings also infects its finding that Emigrant's commercial success meant that Metavante did not breach its Performance Warranty. As discussed above, this finding was based on the District Court's improper rewriting of the contract. Yet, even if this finding had not been based on a legal error, it would still be defective due to the court's failure to make subsidiary findings showing its chain of reasoning.

The District Court made no subsidiary findings explaining how Metavante's performance related to EmigrantDirect's success in the marketplace. Instead of finding a causal link between Metavante's performance and EmigrantDirect's "success," the court merely noted that EmigrantDirect achieved "over 250,000 depositors, almost $7 billion in deposits in the 18-month plus time frame that Metavante provided these services." (A-8-9.) The court made no subsidiary findings showing that Metavante's provision of these services actually caused EmigrantDirect's success in obtaining these accounts. Similarly, Metavante Finding 71, which the court adopted, does not explain how Metavante's services contributed to EmigrantDirect's "success." Instead, the Finding states in conclusory fashion, that "Emigrant benefited from those Services," and "EmigrantDirect became a smash success, and did so using Metavante's Services." (A-60.)

As the District Court recognized, however, "there are so many factors beyond the accessibility and availability and the nuances of website design that drive many individual customers who migrate toward this sort of product whether it be interest rate, whether it be how big the bank is as an institution compared to Citi or ING or many others who are competing for these same saving dollars." (A-9.)

Despite acknowledging the many factors unrelated to Metavante's provision of services that contributed to EmigrantDirect's enrollment and retention of customers, the District Court gave no explanation why any success of EmigrantDirect should necessarily be attributed to Metavante, and why no consideration should be given to Emigrant's Herculean mitigation efforts. Thus, it is impossible to follow the District Court's "chain of reasoning" in reaching its conclusion that Metavante did not breach the Performance Warranty.

E. The District Court Made Clearly Erroneous Findings of Fact on the Contract Claims

The District Court made clearly erroneous findings of fact on the breach of contract claims. As discussed above, such findings are not entitled to the usual deference due to the court's verbatim adoption of the Metavante Findings and errors of law. (*Supra*, at 27, 38.)

Emigrant proved that Metavante breached the Agreement in multiple ways with undisputed evidence, including the following:

- Metavante's witness Paschke admitted that the Performance Warranty – which required Metavante to provide all services in a commercially reasonable manner – applied to computer hardware, software and all other aspects of Metavante's performance other than availability (i.e., system outages), which was measured by Service Levels. (SA-266.)

- Emigrant's computer expert, Nebel, provided undisputed testimony that specific electronic banking services relating to computer hardware, software and system design were all commercially unreasonable. (*Supra* at 15.)
- Metavante's business consultant Moffat admitted that Metavante acknowledged in many internal documents that problems with Metavante hardware and software (not necessarily related to outages) caused many applicants to fail in their efforts to become EmigrantDirect customers. (SA-674, 676-77.)
- Although Metavante was obligated to design a system that would be available 24 hours a day, seven days a week, Metavante concluded its system was not designed for 24x7 operation. (SA-479-80, 504-06.)
- Paschke admitted Metavante failed to provide Service Level reports for OAC, which were required under the Agreement. (SA-258-60)
- Both Paschke and Moffat agreed that it would have been useful to Emigrant to have actually received the OAC Service Level reports. (SA-258-60, 665.)

In light of the undisputed evidence that Metavante breached the Agreement in numerous important ways, the District Court's finding that Metavante did not breach the Agreement was clearly erroneous.

IV. Emigrant Is the Prevailing Party on the In-House Claim

The District Court erred by not finding that Emigrant was a prevailing party entitled to attorneys' fees and costs under the Agreement. (A-113-14; SA-71 § 17.8.) Emigrant prevailed on a significant discrete issue – Metavante's "In-House Claim" – worth approximately $17 million.

Under the Agreement, if Emigrant terminated without cause and "migrate[d] its data processing . . . to an in-house solution," the termination fee would be $3.8 million – which Emigrant had already paid under protest before trial.[4] (SA-87 § 1(b); SA-88-89; A-77 ¶159; SA-303-04.) If Emigrant "acquire[d] software from another source to replace the Metavante services" or "convert[ed] its data to another vendor's system," the fee would be more than five times greater – $20.7 million. (SA-87 § 1(b); A-77 ¶158.)

Metavante argued that Emigrant's system did not qualify as "in-house" because Emigrant used non-banking software (including the Java operating system) and some independent contractors. (*See* A-74-76 ¶¶142-51; SA-295-96; 604-05.) Metavante also argued that Emigrant employees used Metavante's confidential information "subconsciously" to develop Emigrant's system. (SA-366-67; *see* A-69-74 ¶¶113-41.)

[4] As a result of finding in favor of Metavante on its main breach of contract claim, the court ruled that Metavante was entitled to keep this amount. (A-77 ¶¶159-60.) The underlying calculation of each termination fee was undisputed.

Metavante vigorously pursued this claim despite having no reason to doubt Emigrant's migration to an in-house system. (SA-284-85, 310-11, 701.) Because of its technical nature, the In-House Claim required a mini-trial within the trial, turning on its own contract provision, its own sets of facts (*see* A-22-29, 69-76), and its own fact and expert witnesses (*see* SA-292-94, 597-98, 599, 601-04.).

The District Court ruled that Emigrant created its new system "in-house" and that Metavante failed to prove any confidential information was used. (A-22-28, 31.) The Judgment, however, granted only Metavante leave to submit its fees and costs. (A-110 ¶4). The court denied Emigrant's motion to amend the judgment to reflect that Emigrant was the prevailing party with respect to the In-House Claim. (A-113-14.) The District Court reasoned that because Metavante styled the Second Amended Complaint with a single breach of contract count and a single declaratory judgment count (*see* Docket No. 79 ¶44), there was no "independent" "In-House Claim" upon which Emigrant could prevail, and Emigrant won only on a "partial defense." (A-113-14.)

This formalistic approach is contrary to the parties' intent and Wisconsin law. Even under this approach, however, Emigrant's complete success on this "partial defense" is sufficient to warrant "prevailing party" status. At the end of the day, the court awarded Metavante $1.8 million in unpaid processing fees and zero in unpaid termination fees.

Section 17.8 of the Agreement provides that the "prevailing party" in "any legal action" shall be entitled to costs, attorney's fees, and disbursements "as determined by the court." (SA-71.) Wisconsin law governs the prevailing party determination. *See Taco Bell Corp. v. Cont'l Cas. Co.*, 388 F.3d 1069, 1077 (7th Cir. 2004). This Court reviews the district court's interpretation *de novo*. *See Tidemann v. Nadler Golf Car Sales, Inc.*, 224 F.3d 719, 723 (7th Cir. 2000); *see also Dupuy v. Samuels*, 423 F.3d 714, 718 (7th Cir. 2005) (prevailing party determination under statute).

Under Wisconsin law, a prevailing party is one who "succeeds on any significant issue in litigation which achieves some of the benefit sought by bringing suit." *Footville State Bank v. Harvell*, 432 N.W.2d 122, 130 (Wis. Ct. App. 1988). Wisconsin courts apply *Harvell*'s "workable definition of 'prevailing party,'" *Community Credit Plan, Inc. v. Johnson*, 586 N.W.2d 77, 79-80 (Wis. Ct. App. 1998), for both statutes and contracts. Several unpublished opinions evidence a functional, non-formalistic approach. In *Wisconsin Seafood Co. v. Fisher*, 646 N.W.2d 855, 2002 WL 1307829 (Wis. Ct. App. 2002), the court concluded that the *Harvell* "significant issue" was in fact "money." *Id.* ¶22. Thus, defendant was the "prevailing party" despite a small damage award to plaintiff. *Id.* ¶27; *see also Borchardt v. Wilk*, 456 N.W.2d 653, 657 (Wis. Ct. App. 1990) (apportioning fees to opposing parties who each prevailed in part); *Ladopoulos v.*

PDQ Food Stores, Inc., 647 N.W.2d 468, 2002 WL 927616 ¶29 (Wis. Ct. App. 2002) (plaintiff who recovered little did not "prevail").

In *Sanfelippo Environmental Construction, LLC v. Mewes Co.*, 616 N.W.2d 922, 2000 WL 665695 (Wis. Ct. App. 2000), "both parties prevailed – [plaintiff] 'to the extent it recovered a small percentage of the amount it was seeking' and [defendants] 'to the extent [they] were successful in limiting [plaintiffs] recovery.'" *Id.* ¶9.

Thus, even under the District Court's approach, Emigrant's success on its "partial defense" is sufficient. In *Harvell*, although the litigant "did not succeed on every litigated issue, he succeeded in substantially reducing his preverdict interest liability" which was "a significant issue" and thus was "a prevailing party." 432 N.W.2d at 130. "[S]ince the customer prevailed on a distinct issue (preverdict interest liability), he was entitled to attorney fees in connection with that 'successful defense.'" *Radford v. J.J.B. Enter., Ltd.*, 472 N.W.2d 790, 797 n.2 (Wis. Ct. App. 1991).

Emigrant fully prevailed on Metavante's claim for a $20.7 million termination fee. (A-77 ¶¶155, 160.) The District Court's failure to recognize Emigrant as the prevailing party on the In-House Claim was error.

CONCLUSION

For the foregoing reasons, Emigrant respectfully requests that the District Court's decision be reversed and that a new trial be granted on all claims except the In-House Claim, as to which Emigrant should be deemed the prevailing party.

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CERTIFICATE OF COMPLIANCE WITH FRAP RULE 32

The undersigned certifies that the attached brief complies with the type-volume limitations set forth in Federal Rule of Appellate Procedure 32(a)(7)(B)(i), in that the brief contains 14,000 words.

In preparing this Certificate, the undersigned relied on the word count functions of Microsoft Office Word 2003, which was the word processing system used to prepare this brief.

Dated: New York, New York
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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Appendix.

Robert L. Begleiter

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 31(e), versions of the brief and all of the appendix items that are available in non-scanned PDF format. The undersigned also certifies the disk/CD is virus free.

Robert L. Begleiter

NOTICE OF FILING and PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and states that he filed with the United States Court of Appeals, Seventh Judicial Circuit, 1 original, 14 copies, and 1 pdf on CD of the Brief and Short Appendix of Defendant-Appellant. Two copies and 1 pdf on CD of the Brief and Short Appendix of Defendant-Appellant were served upon the below-listed counsel of record by first-class mail, proper postage prepaid by depositing the same in the United States Mail at Chicago, Illinois on the 4th day of November, 2009. 10 copies of the Separate Appendix of Defendant-Appellant, Volumes I through III were filed and 1 copy of the Separate Appendix of Defendant-Appellant, Volumes I through III were served upon the below-listed counsel of record by first-class mail, proper postage prepaid by depositing the same in the United States Mail at Chicago, Illinois on the 23rd day of October, 2009.

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Subscribed and sworn to before me
this 4th day of November, 2009.

_____ _____

Notary Public