



SO ORDERED,

A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: September 7, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

KITCHENS BROTHERS MANUFACTURING
COMPANY,

CASE NO. 13-01710-NPO

DEBTOR.

CHAPTER 11

KITCHENS BROTHERS MANUFACTURING
COMPANY

PLAINTIFF

VS.

ADV. PROC. NO. 14-00083-NPO

PHIL ROBINSON; EQUITY PARTNERS HG, LLC;
HERITAGE GLOBAL PARTNERS, INC.;
HERITAGE GLOBAL, INC.; AND ROBINSON
AUCTIONS

DEFENDANTS

KITCHENS BROTHERS MANUFACTURING
COMPANY

PLAINTIFF

VS.

ADV. PROC. NO. 16-00020-NPO

EQUITY PARTNERS HG, LLC; HERITAGE
GLOBAL, INC.; ROBINSON AUCTIONS;
PHIL ROBINSON; AND HERITAGE
GLOBAL PARTNERS, INC.

DEFENDANTS

**MEMORANDUM OPINION AND ORDER
ON MOTIONS FOR SUMMARY JUDGMENT**

There came on for consideration three contemporaneous motions for summary judgment filed by Equity Partners HG, LLC (“Equity Partners”), Heritage Global, Inc. (“Heritage”), Heritage Global Partners, Inc. (“HGP” or, together with Equity Partners and Heritage, the “Heritage Defendants”), Robinson Auctions, and Phil Robinson (collectively, the “Defendants”) in the above-referenced adversary proceeding (the “Adversary”), including:

(1) Defendants’ Motion for Partial Summary Judgment as to Claims of Gross Negligence and Punitive Damages (the “Summary Judgment Motion on Punitive Damages”) (Adv. Dkt. 256)¹ and Memorandum Supporting Defendants’ Motion for Partial Summary Judgment as to Claims of Gross Negligence and Punitive Damages (Adv. Dkt. 257) filed by the Defendants;

Kitchens Brothers’ Response to Defendants’ Motions for Summary Judgment on Specific Performance and Punitive Damages (the “Response to Summary Judgment Motion on Punitive Damages”) (Adv. Dkt. 267) filed by Kitchens Brothers Manufacturing Company (“Kitchens Brothers”); and

Reply Memorandum in Further Support of Defendants’ Motion for Partial Summary Judgment as to Claims of Gross Negligence and Punitive Damages (the “Reply Brief in Support of Summary Judgment Motion on Punitive Damages”) (Adv. Dkt. 268) filed by the Defendants.

(2) Defendants’ Motion for Partial Summary Judgment as to the Claim of Specific Performance (the “Summary Judgment Motion on Specific Performance”) (Adv. Dkt. 258) and Memorandum Supporting Defendants’ Motion for Partial Summary Judgment as to the Claim of Specific Performance (the “Brief in Support of Summary Judgment Motion on Specific Performance”) (Adv. Dkt. 259) filed by the Defendants; and

¹ Citations to the record are as follows: (1) citations to docket entries in the Adversary are cited as “(Adv. Dkt. ____)”;

(2) citations to docket entries in adversary proceeding 16-00020-NPO are cited as “(Adv. Proc. 16-00020-NPO, Adv. Dkt. ____)”;

and (3) citations to docket entries in the above-styled bankruptcy case (the “Bankruptcy Case”) are cited as “(Bankr. Dkt. ____)”.

Kitchens Brothers' Response to Defendants' Motions for Summary Judgment on Specific Performance and Punitive Damages² (the "Response to Summary Judgment Motion on Specific Performance") (Adv. Dkt. 267) filed by Kitchens Brothers.

(3) Defendants' Motion for Summary Judgment Based on the Doctrine of Judicial Estoppel (the "Summary Judgment Motion on Judicial Estoppel") (Adv. Dkt. 260) and Memorandum Supporting Defendants' Motion for Summary Judgment Based on the Doctrine of Judicial Estoppel (the "Brief in Support of Summary Judgment Motion on Judicial Estoppel") (Adv. Dkt. 261) filed by the Defendants;

Kitchens Brothers' Response to Defendants' Motion for Summary Judgment on Judicial Estoppel (the "Response to Summary Judgment Motion on Judicial Estoppel") (Adv. Dkt. 265) and Memorandum of Authorities Supporting Kitchens Brothers' Response to Defendants' Motion for Summary Judgment on Judicial Estoppel (the "Brief in Support of Response to Summary Judgment Motion on Judicial Estoppel") (Adv. Dkt. 266) filed by Kitchens Brothers; and

Reply Memorandum in Further Support of Defendants' Motion for Summary Judgment Based on the Doctrine of Judicial Estoppel (the "Reply Brief in Support of Summary Judgment Motion on Judicial Estoppel") (Adv. Dkt. 269) filed by the Defendants.

Together, the Summary Judgment Motion on Punitive Damages, the Summary Judgment Motion on Specific Performance, and the Summary Judgment Motion on Judicial Estoppel are referred to as the "Motions for Summary Judgment."

Introductory Statement

Local Rule 7056-1 of the Uniform Local Rules of the U.S. Bankruptcy Courts for the Northern and Southern Districts of Mississippi ("Local Rule 7056-1") required the Defendants to list and separately number the material facts upon which they seek summary judgment in their Motions for Summary Judgment. Instead, the Defendants incorporated by reference the findings

² Kitchens Brothers' Response to Defendants' Motions for Summary Judgment on Specific Performance and Punitive Damages (Adv. Dkt. 267) is responsive to two of the three Motions for Summary Judgment. For clarity, it is referred to as either the Response to Summary Judgment Motion on Specific Performance or the Response to Summary Judgment Motion on Punitive Damages, depending on the context.

of fact rendered by the Court in the Memorandum Opinion and Order on Plaintiff's Motion for Partial Summary Judgment (the "Memorandum Opinion") (Adv. Proc. 16-00020-NPO, Adv. Dkt. 47 at 3-8) on January 3, 2017, (Adv. Dkt. 257 at 2; Adv. Dkt. 258 at 2; Adv. Dkt. 259 at 2) and supplemented the Court's findings with additional facts they allege are not in dispute. (Adv. Dkt. 257 at 2; Adv. Dkt. 258 at 2; Adv. Dkt. 259 at 2). The Court questions whether the Defendants complied with Local Rule 7056-1(1)(A) by incorporating all of the findings of facts in the Memorandum Opinion rather than listing and separately numbering the material facts relevant to the relief they seek. Because Kitchens Brothers did not file a motion to compel the Defendants' compliance with the requirements of Local Rule 7056-1(1)(A) and because the trial of the Adversary is fast approaching, the Court considers the Motions for Summary Judgment with the adopted factual findings notwithstanding the Defendants' apparent failure to satisfy the requirements of Local Rule 7056-1(1)(A).

The Defendants did not attach any new exhibits to the Motions for Summary Judgment but instead rely on the exhibits considered by the Court in the Memorandum Opinion. These exhibits include Exhibits "1" through "11" (Adv. Proc. 16-00020-NPO, Adv. Dkt. 30-1 to 30-11), attached by Kitchens Brothers to the Plaintiffs' Motion for Partial Summary Judgment (Adv. Proc. 16-00020-NPO, Adv. Dkt. 30); Exhibits "A" through "C" (Adv. Proc. 16-00020-NPO, Adv. Dkt. 40-1 to 40-3), attached by the Defendants to the Defendants' Response in Opposition to Motion for Partial Summary Judgment (Adv. Proc. 16-00020-NPO, Adv. Dkt. 40); and Exhibits "D" through "F," submitted by the Defendants in paper form under seal (Adv. Proc. 16-00020-NPO, Adv. Dkt. 44) pursuant to the Agreed Protective Order Regarding the Production and Use of Private and Confidential Information (Adv. Proc. 16-00020-NPO, Adv. Dkt. 33). The Court will refer to these exhibits, adopted by the Defendants in support of the Motions for Summary Judgment, by the same

labels that appear in the Memorandum Opinion except that the citations will be preceded by “Adv. Proc. 16-00020-NPO.” Thus, Exhibits “1” through “11” (Adv. Proc. 16-00020-NPO, Adv. Dkt. 30-1 to 30-11) will be referred to as “(Adv. Proc. 16-00020-NPO, KB Ex. ____)”;

Exhibits “A” through “C” (Adv. Proc. 16-00020-NPO, Adv. Dkt. 40-1 to 40-3) will be cited as “(Adv. Proc. 16-00020-NPO, Defs. Ex. ____)”;

and Exhibits “D” through “F” will be cited as “(Adv. Proc. 16-00020-NPO, Defs. Sealed Ex. ____)”. Defendants did not attach any new exhibits to the Reply Brief in Support of Summary Judgment on Punitive Damages but did attach three (3) new exhibits to the Reply Brief in Support of Summary Judgment Motion on Judicial Estoppel. They are marked as Exhibits “1” through “3” and will be cited as “(Defs. Ex. ____)”.

Kitchens Brothers did not attach any exhibits to its Response to the Summary Judgment Motion on Punitive Damages or its Response to the Summary Judgment Motion on Specific Performance. Kitchens Brothers attached fifteen (15) exhibits to its Response to Summary Judgment Motion on Judicial Estoppel. They are marked as Exhibits “1” through “15” (Adv. Dkt. 265-1 to 265-15) and will be cited as “(KB Ex. ____)”.

Jurisdiction

The Court finds that it has subject matter jurisdiction pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Notices of the Motions for Summary Judgment were proper under the circumstances.

Facts³

The facts below generally consist of those set forth in the Memorandum Opinion and the additional facts presented in the Motions for Summary Judgment. They also include the procedural history of the Adversary after the entry of the Memorandum Opinion.

1. On May 30, 2013, Kitchens Brothers commenced the Bankruptcy Case by filing a voluntary petition for relief (Bankr. Dkt. 1) under chapter 11 of the Bankruptcy Code. The Bankruptcy Case is a liquidating case under chapter 11. (Bank. Dkt. 158 ¶ 4).

2. On August 13, 2013, Kitchens Brothers filed the Emergency Application to Employ Heritage Global, Inc. [and] Jacqueline L. Kittrell Appraisers, Inc. and for Expedited Hearing (the “Application to Employ”) (Bankr. Dkt. 78), asking the Court to approve its employment of Heritage, including its subsidiaries, Equity Partners and HGP,⁴ for the purposes of conducting a sale of its three (3) sawmills located in Utica, Mississippi, Hazlehurst, Mississippi, and Monroe, Louisiana.

3. Also on August 13, 2013, Kitchens Brothers and the Heritage Defendants entered into the Exclusive Marketing and Sale Agreement (the “Contract”) (Adv. Proc. 16-00020-NPO KB Ex. 1), which granted the Heritage Defendants the exclusive right “to advertise, market, and sell [Kitchens Brothers’] Assets . . . via privately negotiated sale(s) of all or a substantial portion or portions of the Assets in bulk (the ‘Entirety Sale’) and, if necessary, a public auction sale (the ‘Auction’) of any remaining Assets on a piecemeal basis.” (*Id.* at 1). Pursuant to the Contract, the Defendants were required, *inter alia*, to “[i]nspect the Assets to determine their physical

³ The following findings of fact and conclusions of law are made pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

⁴ In the Application to Employ, Kitchens Brothers identifies Equity Partners as “Equity Partners CRB LLC” and HGP as “Heritage Global Partners LLC.” (Bankr. Dkt. 78).

condition,” “[p]repare a program which may include marketing the Assets through newspapers, magazines, journals, letters, fliers, signs, telephone solicitation, the Internet and/or such other methods as Heritage may deem appropriate,” “[p]repare advertising letters, fliers and/or similar sales materials, which would include information regarding the Assets,” and “[p]erform related services necessary to maximize the proceeds to be realized for the Assets.” (*Id.* at 1-2). The term of the Heritage Defendants’ exclusive right to sell the assets began as of the date of the Court’s approval of the Contract and continued “for the greater of: (i) one hundred twenty (120) days or (ii) as long as any prospect identified during the 120 days is under a letter of intent for any transaction regarding the Assets.” (*Id.*).

4. The Contract provided for the payment of expenses in the maximum amount of \$20,000 for the Entirety Sale and an additional \$30,000.00 for the Auction, to be advanced by the Heritage Defendants and reimbursed by Kitchens Brothers as a deduction from the net proceeds. (*Id.* at 3). The Contract also provided for payment of a fee to the Heritage Defendants in the form of a commission “with respect to all sales of Assets consummated during or as a result of the Entirety Sale” equal to seven percent (7%) of the first \$2 million of aggregate gross sale proceeds. (*Id.*).

5. The Contract disclosed that Heritage would perform its obligations through its subsidiaries, Equity Partners and HGP. (*Id.* at 1). Kenneth Mann (“Mann”), as the senior managing director, signed the Contract on behalf of Heritage. (Adv. Proc. 16-00020-NPO, KB Ex. 1 at 7; Adv. Proc. 16-00020-NPO, KB Ex. 2 at 8-9).

6. To facilitate the collection and disbursement of sale proceeds, the Contract provided that Kitchens Brothers “shall have sole responsibility for obtaining all court approvals

necessary in connection with the settlement of [Kitchens Brothers'] Sale account," among other responsibilities. (*Id.*).

7. On August 26, 2013, the Court granted the Application to Employ.⁵ (Bankr. Dkt. 85).

8. On November 15, 2013, Kitchens Lumber Company, LLC, owned by Robyn Birdsong ("Birdsong"), who is the daughter of one of the principals of Kitchens Brothers, purchased the sawmill in Utica, Mississippi (the "Utica Sawmill"), at a public auction for \$485,000.00. (Bankr. Dkt. 142). The Court approved the sale on December 17, 2013. (Bankr. Dkt. 170). The sale of the Utica Sawmill was the only "entirety sale" of Kitchens Brothers' assets. (Adv. Proc. 16-00020-NPO KB Ex. 2 at 38-39).

9. On November 20, 2013, HGP conducted a live auction sale of Kitchens Brothers' remaining assets in Jackson, Mississippi (the "Live Auction"). (Bankr. Dkt. 158 ¶ 6; Adv. Proc. 16-00020-NPO, KB Ex. 2 at 30, 68-69). Under the heading "Offering Procedure," the Contract provided that "[d]uring the Auction phase, all Assets shall be sold to the highest bidder (subject only to the purchaser's timely payment in full and removal of purchased Assets)." (Adv. Proc. 16-00020-NPO, KB Ex. 1 at 3). In addition, the Contract prohibited Kitchens Brothers from withdrawing, selling, or otherwise disposing of any of the assets during the term of the agreement. (*Id.* at 1). Apparently, no minimum bid reserves were placed on any of the assets. (Adv. Proc. 16-00020-NPO, KB Ex. 2 at 45-46).

10. On November 21, 2013, Kitchens Brothers filed a Motion to Confirm Auction and Sale of Assets Free and Clear of Liens, Claims and Interests (the "Sale Motion") (Bankr. Dkt. 147)

⁵ The Court denied Kitchens Brothers' request to retain the services of an appraiser for reasons not relevant to the Motions for Summary Judgment. (Bankr. Dkt. 85).

in the Bankruptcy Case. Attached to the Sale Motion was an Auction Summary (the “Auction Summary”) (Bankr. Dkt. 147-1), consisting of forty-seven (47) pages. The first forty-three (43) pages of the Auction Summary listed the items sold at the Live Auction and included a description and the location of each such item, the name of the successful bidder, and the purchase amount. (*Id.* at 1-43). The total amount of sale proceeds, \$702,870.00, was reflected on the bottom of the last page of the list of sold items. (*Id.* at 43). The last four (4) pages of the Auction Summary identified the items that were not sold at the Live Auction. (*Id.* at 44-47). Mann testified at his deposition that he believed the Auction Summary constituted the “Settlement Report” required by the following provision of the Contract:

No later than 14 business days after the conclusion of the Sale, Heritage shall also issue Debtor a settlement report (the “Settlement Report”) showing, generally, a record of sales of the Assets and the allocation of the funds generated by such sales. The Settlement Report shall be deemed to comply with Federal Rule of Bankruptcy Procedure 6004(f)(1).

(Adv. Proc. 16-00020-NPO, KB Exs 1 at 4 & 2 at 25).

11. HGP conducted a “sealed bid” auction of the unsold items listed in the last four (4) pages of the Auction Summary (the “Sealed Bid Auction”). (Adv. Proc. 16-00020-NPO, KB Ex. 4; Adv. Proc. 16-00020-NPO, Defs. Ex. C ¶ 4; Adv. Proc. 16-00020-NPO, Defs. Sealed Ex. D; Adv. Proc. 16-00020-NPO, KB Ex. 2 at 30). On November 22, 2013, HGP sent an email to participants in the Live Auction, instructing them to make their “best and final offer” on any of the items “that went unsold at [the Live] [A]uction” in a “Sealed Bid Form” by November 26, 2013. (Adv. Proc. 16-00020-NPO, Defs. Sealed Ex. D). HGP attached to the email a one (1)-page list of the unsold items and the Sealed Bid Form. (*Id.*).

12. By the November 26, 2013, deadline, HGP received several completed Sealed Bid Forms. (Adv. Proc. 16-00020-NPO, Defs. Ex. C ¶ 5; Adv. Proc. 16-00020-NPO, Defs. Sealed Ex.

E). According to the Defendants, successful bidders of the unsold items included Birdsong, Associated Rigging Services, Ben Jones Machinery, and Oasis Trading, and the Sealed Bid Auction netted an additional \$28,007.00 in sale proceeds. (Adv. Proc. 16-00020-NPO, Sklar Aff. Defs. Ex. C ¶ 6; Adv. Proc. 16-00020-NPO, Defs. Sealed Ex. F). The combined sale proceeds from the Live Auction and the Sealed Bid Auction totaled \$730,877.00.⁶

13. On December 4, 2013, the Court entered the Order (the “Sale Order”) (Bankr. Dkt. 158), confirming that the assets sold at the Live Auction “should be sold free and clear of liens, claims and interests with all liens, claims and interests attaching to the sale proceeds.” (*Id.* at 3).

14. On February 18, 2014, Kitchens Brothers filed the Motion to Disburse Sales Proceeds (the “Motion to Disburse”) (Bankr. Dkt. 210), which identified sale proceeds of \$1,131,607.00 after deducting the seven percent (7%) commission and \$50,000.000 in expenses due the Heritage Defendants under the Contract. (*Id.* at 2). According to the Defendants, the net sale proceeds generally consisted of the following:

\$485,000.00	Entirety Sale (Utica Sawmill)
(\$33,950.00)	Seven percent (7%) Commission
\$730,877.00	Auction (Live Auction & Unsold Offerings)
(\$50,000.00)	Expenses
<u>\$1,131,927.00</u>	<u>Total Sale Proceeds</u>

(Adv. Dkt. 259 at 5).

15. In early April, 2014, Birdsong contacted Mann and Bruce Costello with HGP, inquiring about the sale of certain items after the Live Auction and questioning, *inter alia*, the purchase price of a particular building. (Adv. Proc. 16-00020-NPO, KB Exs. 7-8, 10-11).

16. On April 21, 2014, the Court entered the Order (the “Order Granting Motion to Disburse”) (Bankr. Dkt. 238).

⁶ \$730,877.00 = \$702,870.00 + \$28,007.00.

17. On November 12, 2014, Kitchens Brothers filed a lawsuit in the U.S. District Court for the Southern District of Mississippi, entitled *Kitchens Brothers Manufacturing Co. v. Equity Partners HG, LLC; Heritage Global, Inc.; Ken Mann; Matt LoCascio; Robinson Auctions; and Phil Robinson*, Civil Action No. 3:14-cv-880-HTW-LRA (the “District Court Action”). The defendants in the District Court Action filed a motion to dismiss for lack of jurisdiction or, alternatively, a motion for referral to this Court, which the U.S. District Court granted in part by referring the matter to this Court on March 25, 2016. (Adv. Proc. 16-00020-NPO, Adv. Dkt. 1).

18. On August 29, 2016, Kitchens Brothers filed the First Amended Complaint (the “Complaint”) (Adv. Proc. 16-00020-NPO, Adv. Dkt. 28), alleging that: (1) Heritage failed to provide the Settlement Report required by the Contract (*Id.* ¶ 53); (2) the “Defendants negligently failed to exercise reasonable care in selling Kitchens Brothers’ assets” (*Id.* ¶ 57); (3) the Heritage Defendants negligently failed to adequately train and supervise its employees in charge of the Live Auction (*Id.* ¶ 59); (4) the “Defendants’ conduct was grossly negligent because it was performed in a grossly negligent, willful, reckless and/or wanton manner” (*Id.* ¶ 62); and (5) the Defendants breached the Contract by: (a) failing to stop the Live Auction as Kitchens Brothers requested; (*Id.* ¶ 63); (b) selling property of the estate after the Live Auction (*Id.* ¶ 64); and (c) not maximizing sale proceeds (*Id.* ¶ 65). In the Complaint, Kitchens Brothers listed four (4) causes of action: specific performance, negligence, gross negligence, and breach of contract. (*Id.* ¶¶ 53-70). Kitchens Brothers requested actual and punitive damages, and attorneys’ fees and costs in an amount in excess of \$75,000.00. (*Id.* at 10).

19. On October 18, 2016, Kitchens Brothers filed the Plaintiff’s Motion for Partial Summary Judgment (Adv. Proc. 16-00020-NPO, Adv. Dkt. 30), seeking partial summary judgment on its breach of contract claims related to the Settlement Report and the sale of estate

assets after the Live Auction. (*Id.* ¶¶ 2-4). As relief, Kitchens Brothers asked the Court to order specific performance of the Contract and require Defendants to provide the Settlement Report “in order to allow Kitchens Brothers and the Court to compute Kitchens Brothers’ monetary damages for breach of contract.” (*Id.* ¶ 4). Kitchens Brothers did not seek summary judgment on any of its other claims or on the amount of its alleged monetary damages.

20. On January 3, 2017, the Court entered the Memorandum Opinion, denying the Plaintiff’s Motion for Partial Summary Judgment (Adv. Proc. 16-00020-NPO, Adv. Dkt. 47) on the ground that a genuine dispute existed as to whether the Heritage Defendants breached the Contract by either failing to provide the Settlement Report or selling assets after the Live Auction.

21. On January 10, 2017, the Court dismissed, at Kitchens Brothers’ request, the following named defendants in adversary proceeding 14-00083-NPO: Pro South Logging, Inc., Jim Abernethy, Industrial Boiler Systems, LLC, AbneyCo Equipment, LLC, American Hardwood Industries, LLC, Muniz Enterprises, Inc., Imran Equipment Export, USA, TDI Shipping, Jack Miller, Cedric Halfacre, and Mark Welch. (Adv. Dkt. 219). As a result, the only defendant who remained in adversary proceeding 14-00083-NPO was Phil Robinson.

22. On January 9, 2017, Kitchens Brothers filed the Motion to Consolidate (Adv. Dkt. 218; Adv. Proc. 16-00020-NPO, Adv. Dkt. 48), arguing that adversary proceeding 14-00083-NPO and adversary proceeding 16-00020-NPO should be consolidated because only one defendant remained in adversary proceeding number 14-00083-NPO and the adversaries shared common issues of operative facts. On March 7, 2017, the Court entered the Order Granting Motion to Consolidate (Adv. Dkt. 227; Adv. Proc. 16-00020-NPO, Adv. Dkt. 56), consolidating the adversaries and making adversary proceeding 14-00083-NPO the lead adversary proceeding.

23. On March 24, 2017, the Court entered a Scheduling Order setting certain pretrial deadlines and scheduling the trial of the consolidated Adversary to begin on October 17, 2017.

24. Kitchens Brothers filed the Fourth Amended Complaint (Adv. Dkt. 239) in adversary proceeding 14-00083-NPO, naming Phil Robinson as the only defendant. Phil Robinson filed the Defendant, Phil Robinson's, Answer and Affirmative Defenses to Plaintiff's Fourth Amended Complaint (Adv. Dkt. 242) on May 2, 2017.

25. On July 21, 2017, the Defendants filed the Motions for Summary Judgment as to the claims alleged in the Complaint⁷ regarding: (1) gross negligence and punitive damages, and (2) specific performance. In addition, the Defendants assert that the doctrine of judicial estoppel bars all of the claims in the Complaint, including the negligence and breach of contract claims.

26. In their Summary Judgment Motion on Punitive Damages, the Defendants contend that Kitchens Brothers failed to satisfy the heavy burden necessary under Mississippi law to demonstrate gross negligence warranting punitive damages. (Adv. Dkt. 256 at 2).

27. In their Brief in Support of Summary Judgment Motion on Specific Performance, the Defendants argue that the Auction Summary they provided to Kitchens Brothers complied with the Contract in that the Contract did not obligate them to provide a "total collected" or "total paid to the debtor." (Adv. Dkt. 259 at 4).

28. In their Summary Judgment Motion on Judicial Estoppel, the Defendants allege that Kitchens Brothers is equitably estopped from bringing any of its claims in the Adversary

⁷ It should be noted that the Motions for Summary Judgment and all related pleadings were filed in adversary proceeding 14-00083-NPO but relate to the Complaint filed by Kitchens Brothers in adversary proceeding 16-00020-NPO and not to the Fourth Amended Complaint (Adv. Dkt. 239) filed in adversary proceeding 14-00083-NPO.

because of its previous “affirmative steps to ratify the Auction conducted by Defendants.” (Adv. Dkt. 260 at 2).

29. On August 11, 2017, Kitchens Brothers filed the Response to Summary Judgment Motion on Punitive Damages; the Response to Summary Judgment Motion on Specific Performance; the Response to Summary Judgment Motion on Judicial Estoppel; and the Brief in Support of Response to Summary Judgment Motion on Judicial Estoppel. On August 25, 2017, the Defendants filed the Reply Brief in Support of Summary Judgment Motion on Punitive Damages and the Reply Brief in Support of Summary Judgment Motion on Judicial Estoppel.

Discussion

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure (“Rule 56”), as made applicable to adversary proceedings by Rule 7056 of the Federal Rules of Bankruptcy Procedure, provides in relevant part that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a). “[S]ummary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense.” FED. R. CIV. P. 56(a) advisory committee notes to 2010 amendment. Partial summary judgment serves the purposes of narrowing, simplifying, and focusing the issues for trial. *Calpetco 1981 v. Marshall Expl., Inc.*, 989 F.2d 1408, 1415 (5th Cir. 1993).

Summary judgment is looked upon as an important process through which parties can obtain a “just, speedy and inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citations & quotation omitted). Summary judgment is properly entered when the “depositions, documents, electronically stored information, affidavits or declarations, stipulations . . . , admissions, interrogatory answers, or other materials” show that there is no

genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c)(1)(A); *see also Celotex*, 477 U.S. at 322.

The initial burden of proof is on the movant to specify the basis upon which summary judgment should be granted and identify portions of the record that demonstrate the absence of a genuine issue of material fact. FED. R. CIV. P. 56(c)(1); *see also Celotex*, 477 U.S. at 322. Under Rule 56, there is no burden on the movant “to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof.” *Celotex*, 477 U.S. at 325. Instead, the movant may meet its burden by pointing out to the court “that there is an absence of evidence to support the nonmoving party’s case.” *Id.*

Once the movant’s initial burden is met, the burden of production shifts to the nonmovant who then must come forward with specific facts, supported by the evidence in the record, upon which a reasonable factfinder could find a genuine fact issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “[C]onclusory allegations” or “unsubstantiated assertions” do not meet the nonmovant’s burden. *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 399 (5th Cir. 2008). Moreover, “Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party’s opposition to summary judgment.” *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (“Judges are not like pigs, hunting for truffles buried in briefs.”). Summary judgment should be granted, after adequate time for discovery, against a nonmovant who “has failed to make a sufficient showing on an essential element of [the] case with respect to which [the party] has the burden of proof.” *Celotex*, 477 U.S. at 323.

B. Summary Judgment Motion on Punitive Damages

In support of their Summary Judgment Motion on Punitive Damages, the Defendants argue as a preliminary matter that Mississippi law does not favor punitive damages. *Standard Life Ins.*

Co. of Ind. v. Veal, 354 So. 2d 239, 247 (Miss. 1978). In any action in which punitive damages are sought, Mississippi statutory law requires that the plaintiff prove by clear and convincing evidence that the defendant “acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.” MISS. CODE ANN. § 11-1-65. Punitive damages are assessed in Mississippi only in “extreme cases” and are “allowed only with caution and within narrow limits.” *Beta Beta Chapter of Beta Theta Pi Fraternity v. May*, 611 So. 2d 889, 894 (Miss. 1992). The Defendants contend that Kitchens Brothers cannot prove by clear and convincing evidence that their conduct rose to the level of gross negligence necessary to support an award of punitive damages. The conclusory allegation in the Complaint that the Defendants acted in a manner to warrant punitive damages (Adv. Proc. 16-00020-NPO, Adv. Dkt. 28, ¶¶ 62, 72-73), according to the Defendants, does not satisfy the requirements of the statute or Mississippi case law. *Summers v. St. Andrew’s Episcopal School, Inc.*, 759 So. 2d 1203, 1215 (Miss. 2000).

In its Response to Summary Judgment Motion on Punitive Damages, Kitchens Brothers states that it “does not object to the dismissal of its punitive damages claim.” (Adv. Dkt. 267 at 2). As Kitchens Brothers explains, “[d]iscovery has revealed Defendants’ breaches to result from incompetence, lack of industry knowledge, over-worked and unqualified employees and lack of supervision.” (*Id.*). In its Reply Brief in Support of Summary Judgment Motion on Punitive Damages, the Defendants express confusion about whether Kitchens Brothers has agreed to dismiss its gross negligence claim as well as its punitive damages claim in that Kitchens Brothers has “remained silent as to its gross negligence claim.” (Adv. Dkt. 268 at 2).

In Mississippi, a claim for punitive damages is not “freestanding;” it does not exist apart from an underlying claim for actual damages. *Temple-Inland Mortg. Corp. v. Jones*, 749 So. 2d

1161, 1169 (Miss. Ct. App. 1999). In the Complaint, Kitchens Brothers sought punitive damages against the Defendants based on their alleged gross negligence. By agreeing not to seek punitive damages, the Court finds that Kitchens Brothers, in effect, has agreed to the dismissal of its gross negligence claim. Accordingly, because Kitchens Brothers does not oppose the relief sought by the Defendants and because mere negligence is not enough under Mississippi law to justify a claim for punitive damages, the Court finds that the Summary Judgment Motion on Punitive Damages should be granted in favor of the Defendants.

C. Summary Judgment Motion on Specific Performance

In the Complaint, Kitchens Brothers alleged, “Heritage did not provide Kitchens Brothers with the Settlement Report required by section 6 of the Contract. Further, to the extent Heritage provided any report of the sale it did not include items that HGP secretly sold after the auction.” (Adv. Proc. 16-00020-NPO, Adv. Dkt. 28, ¶ 53). In their Brief in Support of Summary Judgment Motion on Specific Performance, the Defendants argue that the Auction Summary provided Kitchens Brothers was adequate and complied with the Contract and other applicable bankruptcy rules. The Contract required that the Settlement Report show “a record of sales of the Assets and the allocation of the funds generated by such sales.” (Adv. Dkt. 259 at 4). Moreover, Rule 6004(f)(1) of the Federal Rules of Bankruptcy Procedure (“Rule 6004(f)(1)”) required only that the Defendants submit “an itemized statement of the property sold, the name of each purchaser, and the price received for each item.” FED. R. BANKR. P. 6004(f)(1). According to the Defendants, neither the Contract nor Rule 6004(f)(1) required that the Settlement Report list the “total collected” or “total paid to the debtor.” (Adv. Dkt. 259 at 4).

In its Response to Summary Judgment Motion on Specific Performance, Kitchens Brothers states it “does not object to the dismissal of its claim for specific performance, since discovery

suggests that Defendants cannot account for the post-auction cash sales made by Phil Robinson other than listing the total amount that [Phil] Robinson reported.” (Adv. Dkt. 267 at 2). Kitchens Brothers opposes, however, summary judgment in favor of the Defendants as to its breach of contract claim.

The Brief in Support of Summary Judgment Motion on Specific Performance is unclear. After discussing the Auction Summary and the Settlement Report, the Defendants argue that the sale of unsold assets after the Live Auction did not breach the Contract and ask the Court to render a finding to that effect. (Adv. Dkt. 259 at 5-6). The Defendants make no attempt, however, to show that they have met the requirements of Rule 56 for summary judgment as to the breach of contract claim. Indeed, the Court in the Memorandum Opinion denied Kitchens Brothers’ request for summary judgment on that same claim after finding a genuine dispute for trial. (Memo. Op. at 15-17). Accordingly, the Court finds that the Summary Judgment Motion on Specific Performance should be granted but only as to Kitchens Brothers’ specific performance claim and not as to its breach of contract claim.

D. Summary Judgment Motion on Judicial Estoppel

In their Brief in Support of Summary Judgment Motion on Judicial Estoppel, the Defendants contend that Kitchens Brothers’ legal position in this Adversary is inconsistent with their prior position in the Bankruptcy Case “ratify[ing] the Auction conducted by Defendants.” (Adv. Dkt. 261 at 4-7). Under the Contract, Kitchens Brothers was responsible for obtaining the approval of the Court necessary to settle the sale account after the Auction. In fulfilling that contractual obligation, Kitchens Brothers filed the Sale Motion, which included the following representations to the Court: (1) “Heritage determined that it is in [Kitchens Brothers’] best interest that these Assets were sold to the highest and best bidder, and it then liquidated the Assets

at the auction” (Bankr. Dkt. 147 ¶ 6); (2) “[t]he purchasers are good faith purchasers” (*Id.* ¶ 7); and (3) “[t]he assets should be sold free and clear of liens, claims and interest with the liens, claims and interests attaching to the sale proceeds [and] with the commissions and expenses due to Heritage to be deducted at closing.” (*Id.* ¶ 8). Based on those representations, Kitchens Brothers asked the Court for permission “to execute such deeds, bills of sale or related documents which are reasonably necessary to consummate and close the sale of the Assets sought herein.” (*Id.* ¶ 9). On December 4, 2013, the Court entered the Sale Order incorporating the above findings and noting that “[t]he Court shall order [Kitchens Brothers] to disburse the remaining proceeds after an appropriate motion is filed and after notice and a hearing.” (Adv. Dkt. 158 at 3).

Thereafter, Kitchens Brothers filed the Motion to Disburse, representing to the Court that the Auction generated net proceeds of \$1,131,607.00 and proposing a plan for the distribution of those proceeds. In the Order Granting Motion to Disburse, the Court authorized Kitchens Brothers to pay \$164,721.27 to certain taxing authorities; withhold \$36,426.92 for potential surcharge claims and potential real estate taxes; and pay the balance to its secured creditor.

According to the Defendants, Kitchens Brothers’ representations in the Sale Motion and Motion to Disburse are inconsistent with its allegations in the Adversary regarding the Defendants’ performance of the Contract and the manner in which they conducted the Auction. (Adv. Dkt. 261 at 7). The Defendants ask the Court to apply the doctrine of judicial estoppel and prevent Kitchens Brothers from pursuing its claims in the Adversary. *See Gabarick v. Laurin Mar. (Am.) Inc.*, 753 F.3d 550, 553 (5th Cir. 2014) (citation omitted). The Court having found that the Defendants are entitled to summary judgment on the specific performance, gross negligence, and punitive damages claims, the question before the Court narrows to whether judicial estoppel applies to Kitchens Brothers’ claims of negligence and breach of contract.

In the Reply Brief in Support of Summary Judgment Motion on Judicial Estoppel, the Defendants argue that the following excerpt from the deposition testimony of Kitchens Brothers' own expert, Benny Taylor ("Taylor"), further supports application of judicial estoppel:

Q. Do you know if the settlement of the sale account was ultimately [approved] by the court later on after the auction?

A. Yes.

Q. And by this provision that you read here, it would have been the debtor or the seller or debtor in possession who would have sought that court approval. Correct?

A. Yes.

Q. *If there was an issue with the sale, do you think that at some point the debtor/seller or debtor in possession should have not sought court approval?*

A. *Yes.*

(Defs. Ex. 1 at 35) (emphasis added). The Defendants interpret the above exchange as an admission by Taylor that "if Kitchens [Brothers] had any issues with the Defendants' sales of the Assets per the Auction Contract, then Kitchens [Brothers] should not have sought this Court's approval of the Auction or distribution of the sales proceeds." (Adv. Dkt. 269 at 3).

In its Brief in Support of Response to Summary Judgment Motion on Judicial Estoppel, Kitchens Brothers contends that judicial estoppel does not apply because it took no position whatsoever in the Bankruptcy Case as to whether the Defendants complied with the Contract or conducted the Auction in a reasonable manner. (Adv. Dkt. 266 at 9-10). Thus, no representations or findings contrary to the allegations in its Complaint appear in the Sale Motion, Sale Order, Motion to Disburse, or Order Granting Motion to Disburse. In that regard, Kitchens Brothers' negligence claim in the Adversary consists of its allegations that: (1) the "Defendants negligently failed to exercise reasonable care in selling Kitchens Brothers' assets" (Adv. Proc. 16-00020-NPO,

Adv. Dkt. 28, ¶ 57); and (2) the Heritage Defendants negligently failed to adequately train and supervise its employees in charge of the Live Auction (*Id.* ¶ 59). Kitchens Brothers' breach of contract claim in the Adversary consists of its allegations that the Defendants: (1) failed to stop the Live Auction as Kitchens Brothers requested (*Id.* ¶ 63); (2) sold property of the estate after the Live Auction (*Id.* ¶ 64); and (3) failed to maximize sale proceeds (*Id.* ¶ 65). Kitchens Brothers' representations in its Sale Motion, as discussed previously, included that the Auction was conducted on November 20, 2013, "after an extensive marketing process," assets were sold at the Auction, and the purchasers of the Assets are "good faith purchasers." (Bankr. Dkt. 147 at 2). In addition, Kitchens Brothers alleged, "*Heritage* determined that it is in [Kitchens Brothers'] best interest that these Assets were sold to the highest and best bidder, and it then liquidated the Assets at the [A]uction." (*Id.*) (emphasis added). Kitchens Brothers' representations in the Motion to Disburse consisted almost solely of an accounting of its proposed disbursement of the sale proceeds from the Auction. Thus, according to Kitchens Brothers, its positions in the Bankruptcy Case and in the Adversary are entirely consistent since it made no allegations in the Sale Motion or in the Motion to Disburse regarding the Defendants' conduct at the Auction.

More important, Kitchens Brothers points out that it did not conceal its claims against the Defendants from this Court in the Bankruptcy Case. Rather, it made some of the allegations in its Complaint known to the Court at the actual hearing on the Sale Motion, as reflected in the following language from another order of the Court entered in the Bankruptcy Case:

The parties alluded to problems in the auction process at the hearing held on December 2, 2013 on the [Sale Motion]. Thereafter, Kitchens Brothers provided greater detail of these same allegations at a status conference held on July 15, 2014 in connection with an order extending the time for Kitchens Brothers to file its plan of reorganization and disclosure statement.

(Bankr. Dkt. 400 at 18).

1. Doctrine of Judicial Estoppel

Judicial estoppel is an equitable doctrine that precludes a party from asserting a position that is inconsistent with the one taken by that party in a previous proceeding. *In re Evans*, No. 09-03763-NPO, 2012 WL 3518575, at *10-11 (Bankr. S.D. Miss. July 27, 2012) (citing *Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012)). In *New Hampshire v. Maine*, the U.S. Supreme Court explained that judicial estoppel is designed to safeguard the integrity of the judicial system and prevent a party from gaining an unfair advantage. 532 U.S. 742, 750-51 (2001). As a policy matter, the doctrine prevents litigants from playing fast and loose with the courts by deliberately changing their positions according to the exigencies of the moment. *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 205-06 (5th Cir. 1999); *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993); *see also Brandon v. Interfirst*, 858 F.2d 266, 268 (5th Cir. 1988) (stating that the purpose of the doctrine is to prevent parties from playing carelessly with the courts to suit the exigencies of self-interest). The Fifth Circuit Court of Appeals has held that three requirements must be met before a party can be judicially estopped: “(1) the party against whom judicial estoppel is sought has asserted a legal position which is plainly inconsistent with a prior position; (2) a court accepted the prior position; and (3) the party did not act inadvertently.” *Reed v. City of Arlington*, 650 F.3d 571, 573-74 (5th Cir. 2011). Moreover, the doctrine should not be applied inflexibly or without due consideration for the specific factual context. *Love*, 677 F.3d at 261.

In the bankruptcy context, judicial estoppel most often presents itself when a debtor fails to disclose an asset to a bankruptcy court but then pursues a claim in a separate tribunal based on that undisclosed asset. *See Flugence v. Axis Surplus Ins. Co. (In re Flugence)*, 738 F.3d 126, 128 (5th Cir. 2013); *Pryor v. DeBerry (In re Pryor)*, 341 B.R. 571 (Bankr. N.D. Miss. 2006). That scenario does not exist here. There is no undisclosed asset and no tribunal separate from this Court.

Rather, the Defendants argue that judicial estoppel applies because “if Kitchens [Brothers] had any issues with the Defendants’ sale of the Assets per the Auction Contract, then Kitchens [Brothers] should not have sought this Court’s approval of the Auction or distribution of the sales proceeds.” (Adv. Dkt. 269 at 3).

2. Plainly Inconsistent Legal Positions

The Court finds that the Defendants have not satisfied the first requirement for applying judicial estoppel—that Kitchens Brothers asserted a legal position in the Adversary that is plainly inconsistent with a prior position asserted in the Bankruptcy Case. The Sale Order and Order Granting Motion to Disburse contained no express findings inconsistent with the allegations of Kitchens Brothers in the Adversary. The purpose of the Sale Motion was to satisfy the statutory requirements in 11 U.S.C. § 363(f) for the sale of property of the estate, other than in the ordinary course of business, “free and clear of any interest in such property.” (Bankr. Dkt. 147); 11 U.S.C. § 363(f). The purpose of the Motion to Disburse was to comply with the Sale Order by obtaining the Court’s approval before distributing any of the sale proceeds.

For their judicial estoppel argument, the Defendants rely on findings (that the Defendants conducted the Auction in a reasonable manner and in conformance with the Contract), which do not appear in the Sale Order or the Order Granting Motion to Disburse but which they imply from the Court’s approval of the sale of property of the estate free and clear of liens and the distribution of the sale proceeds. The Fifth Circuit, however, has expressed reluctance to apply judicial estoppel in situations where a party’s alleged change of position is “merely implied rather than clear and express.” *Wells Fargo Bank, N.A. v. Oparaji (In re Oparaji)*, 698 F.3d 231, 237 (5th Cir. 2012) (quoting *In re Condere Corp.*, 226 F.3d 642 (5th Cir. 2000) (unpublished) (“This circuit has never held that judicial estoppel is appropriate when a party’s change of position is merely

implied rather than clear and express.”)). Moreover, Kitchens Brothers made the Court aware of its potential claims against the Defendants at the hearing on the Sale Motion before the Court entered either the Sale Order or the Order Granting Motion to Disburse. The Court found no inconsistency in Kitchens Brothers’ position at the sale hearing, whether express or implied, and approved the Sale Order and the Order Granting Motion to Disburse.

The Defendants rely on Taylor’s deposition testimony in support of their judicial estoppel argument. (Defs. Ex. 1 at 35). Taylor’s later deposition testimony, however, revealed that his earlier affirmative answer to the question whether Kitchens Brothers “should have not sought court approval” was limited by his lack of knowledge regarding the nature of the prior proceedings before the Bankruptcy Court:

Q. When the court approved the portion of the sale that was addressed in this November 21, 2013, [Sale O]rder, do you know whether the court made a determination one way or the other about whether the auction had been conducted properly?

A. No.

(Defs. Ex. 1 at 93-94).

In addition, in its Brief in Support of Response to Summary Judgment Motion on Judicial Estoppel, Kitchens Brothers attached a string of emails indicating that it did not become aware of certain post-Auction sales to Associated Rigging Services until April 11, 2014—almost five months after it had filed the Sale Motion and two months after it had filed the Motion to Disburse. (Adv. Dkt. 266 at 6-7; KB Exs. 11-15). Even assuming application of the doctrine would otherwise be warranted, the Court finds that judicial estoppel would not apply to Kitchens Brothers’ claim arising out of these post-Auction sales.

In *1st Franklin Financial Corp. v. Barkley (In re Anthony)*, our sister bankruptcy court discussed the application of judicial estoppel to a chapter 13 trustee’s claims of insurance fraud

against a creditor. 302 B.R. 843 (Bankr. N.D. Miss. 2003). In each of twenty-one (21) bankruptcy cases, the court had entered an order confirming a chapter 13 debt adjustment plan that included payments to the creditor against whom the trustee now pursued causes of action for fraud. Because the trustee had no knowledge of, and no opportunity to discover, the sophisticated fraud being perpetrated by the creditor before entry of the confirmation orders, the court found that judicial estoppel did not apply to preclude her claims against the creditor. *Id.* at 852-55. In a lengthy discussion of Fifth Circuit precedent governing prior adjudicatory defenses, the court was careful to note that in those cases, the debtor had a full and fair opportunity to raise an issue or claim at a previous proceeding but did not. *See id.* at 853 (citing *Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984) and *Howe v. Vaughan (In re Howe)*, 913 F.2d 1138 (5th Cir. 1990)). Without such an opportunity, the *Anthony* court declined to apply the doctrine of judicial estoppel. Likewise, the Court declines to apply the doctrine of judicial estoppel to Kitchens Brothers' claims relating to the post-Auction sales, even if its application otherwise would be appropriate, on the ground that Kitchens Brothers did not *know* about these potential claims when it filed the Sale Motion.

3. Judicial Acceptance

Because the Court finds that Kitchens Brothers did not assert a prior inconsistent position in the Bankruptcy Case, it is unnecessary to consider whether this Court accepted Kitchens Brothers' prior inconsistent position in the Bankruptcy Case.

4. Equitable Remedy

The Fifth Circuit has noted that in addition to the requirements on which it primarily relies in deciding whether to apply judicial estoppel, courts also should consider “whether the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.” *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 399 (5th Cir. 2003) (citing *New Hampshire*, 532 U.S. at 751). Here, there is no evidence that Kitchens Brothers received an unfair advantage or imposed an unfair detriment on the Defendants by the relief it obtained in the Sale Order and Order Granting Motion to Disburse. *Kane v. Nat’l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008). Kitchens Brothers was transparent at the hearing on the Sale Motion regarding its potential claims arising out of the Auction. Under these facts, the Court finds that the integrity of the bankruptcy system would not be threatened by allowing Kitchens Brothers to proceed with the litigation of its negligence and breach of contract claims against the Defendants.

Conclusion

Kitchens Brothers has indicated that it does not object to the dismissal of its claims for specific performance, gross negligence, and punitive damages. Accordingly, the Court finds that the Summary Judgment Motion on Punitive Damages should be granted and that the Summary Judgment Motion on Specific Performance should be granted, but not as to Kitchens Brothers’ breach of contract claim. The Court further finds, for the above and foregoing reasons, that the Summary Judgment Motion on Judicial Estoppel should be denied. As to the Summary Judgment Motion on Judicial Estoppel, the Court further notes that “[e]ven if the standards of Rule 56 are met, a court has discretion to deny a motion for summary judgment if it believes that ‘the better course would be to proceed to a full trial,’” so that the record might be more fully developed for

the trier of fact. *Firman v. Life Ins. Co. of N. Am.*, 684 F.3d 533, 538 (5th Cir. 2012) (quoting *Anderson*, 477 U.S. at 255); *River Region Med. Corp. v. Wright*, No. 3:13-cv-793-DPJ-FKB, slip op. at 4-6 (S.D. Miss. Aug. 5, 2014) (affirming interlocutory order denying summary judgment); *see also Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994); *Veillon v. Expl. Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989).

IT IS, THEREFORE, ORDERED that the Summary Judgment Motion on Punitive Damages is hereby granted in favor of the Defendants.

IT IS FURTHER ORDERED that the Summary Judgment Motion on Specific Performance is hereby granted in favor of the Defendants but not as to Kitchens Brothers' breach of contract claim.

IT IS FURTHER ORDERED that the Summary Judgment Motion on Judicial Estoppel is hereby denied.

##END OF OPINION##