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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 92-2441
Hon. John C. Lifland, U.S.D.J.

| | | |
|---|---|---|
| WALLWORK BROS., INC., | : | |
| Plaintiff, | : | |
| vs. | : | Argument Date: |
| RHEEM MANUFACTURING COMPANY, | : | December 13, 1993 |
| Defendant. | : | |

# REPLY BRIEF IN SUPPORT OF DEFENDANT RHEEM MANUFACTURING COMPANY'S MOTION FOR SUMMARY JUDGMENT

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## TABLE OF CONTENTS

PAGE NO.

PRELIMINARY STATEMENT.............................. 1

POINT I

WALLWORK'S CERTIFICATIONS FAIL TO RAISE AN ISSUE OF MATERIAL FACT SUFFICIENT TO FORESTALL SUMMARY JUDGMENT.................................... 2

POINT II

WALLWORK HAS NOT SET FORTH MATERIAL ISSUES OF FACT PRECLUDING ENTRY OF SUMMARY JUDGMENT IN RHEEM'S FAVOR............. 6

A. Wallwork repudiated the distribution arrangement............. 6

B. Rheem's exercised its rights on receipt of Wallwork's repudiation......................... 9

C. Wallwork's argument that it offered to modify the existing arrangement is specious.............. 10

D. Wallwork's notice argument presumes facts outside the record.............................. 12

CONCLUSION....................................... 14

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## TABLE OF AUTHORITIES

### CASES

Bak-A-Lum Corp. v. Alcoa Building Prod., 69 N.J. 123 (1976) .................................... 13

Cherwell-Ralli, Inc. v. Rytman Grain Co., Inc., 433 A.2d 984 (Conn. 1980) ..................... 10

Chi-Mil Corp. v. W.T. Grant Co., 70 F.R.D. 352 (E.D. Wis. 1976) ............................. 4

Chirinos de Alvarez v. Creole Petroleum Corp., 613 F.2d 1240 (3d Cir. 1980) ...................... 3

Church v. Bobbs-Merrill Co., 272 F.2d 212 (7th Cir. 1959) .................................... 12

Fitzsimmons v. Greater St. Louis Sports Enterprises, Inc., 63 F.R.D. 620 (S.D. Ill. 1974) ........................................... 4

Frommeyer v. L. & R. Constr. Co., 261 F.2d 879 (3d Cir. 1958) .................................... 12

In re Gas Reclamation, Inc. Securities Litigation, 741 F. Supp. 1094 (S.D.N.Y. 1990) ............. 4

Gillette Foods, Inc. v. Bayernwald-Fruchterverwertun GMBH, 1991 WL 25455 (D.N.J. 1991) (Wolin, J.) ............... 7

Green Manor Constr. Co. v. Highland Painting Serv., 345 F.2d 657 (1st Cir. 1965) ........... 11

Invengineering, Inc. v. Foregger Co., 293 F.2d 201 (3d Cir. 1961) .............................. 11

Klopfenstein v. Pargeter, 597 F.2d 150 (9th Cir. 1979) ........................................... 5, 6

Levy v. Massachusetts Accident Co., 124 N.J. Eq. 420 (Ch. 1938) .............................. 10

Orkin Exterminating Co., Inc. v. Federal Trade Comm'n., 849 F.2d 1354 (11th Cir. 1988) ....... 4, 5

S.S. Silberblatt Inc. v. Seaboard Maturity Co., 417 F.2d 1043 (8th Cir. 1969) ................. 11

### STATUTES

N.J.S.A. 12A:2-703 ............................... 9, 10, 12

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**TREATISES**

J. Calamari and J. Perillo, Contracts §12 (1970).. 5

**OTHER**

17 Am. Jur. 2d Contracts §582 at 592 ............. 10

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## PRELIMINARY STATEMENT

Wallwork Brothers Inc.'s ("Wallwork") response to Rheem Manufacturing Company's ("Rheem") Motion for Summary Judgment attempts to inject disputed fact where none exists. To do this, Wallwork has had to go beyond the evidence adduced in discovery. Desperate to create controverted fact, it submits a long-winded certification. Wallwork insists that this Court must rely on its subjective view of the evidence, as set forth in the certification, to decide the motion. But, as will be discussed herein, the certification has no force to defeat Rheem's motion for summary judgment.

The fact remains that Wallwork has not created a material issue of fact regarding the key evidence regarding its repudiation of the distribution arrangement. And, once the repudiation issue is resolved, it is clear that Rheem had the right to cancel its long-standing relationship and stop further shipment of goods. In other words, Wallwork's cause of action fails because it is built entirely upon the faulty premise that Rheem repudiated, and Rheem is entitled to judgment as a matter of law.

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## POINT I

### WALLWORK'S CERTIFICATIONS FAIL TO RAISE AN ISSUE OF MATERIAL FACT SUFFICIENT TO FORESTALL SUMMARY JUDGMENT.

Wallwork's brief and certifications throw up scores of facts and factoids in an attempt to create a fact issue to forestall summary judgment. These efforts fail, however, because they do not address head-on the ultimate basis for this summary judgment: that Wallwork's December 4, 1991 letter, and not any act by Rheem, repudiated an intent to continue Wallwork's Rheem distributorship. After Wallwork's repudiation, Rheem was no longer obligated to continue dealing with Wallwork. See Point II, infra.

Wallwork principal Matthias Sheeleigh III's certifications serve to recapitulate his view of the history of the case, his characterization of the evidence, and his subjective interpretation of the record. In fact, the only relevation in the certification is Matthias Sheeleigh's admission of the motivation for Wallwork's repudiation. He states that in January 1991 he requested a special meeting with Rheem to address issues that were contributing to declining sales. Certification of Matthias Sheeleigh III "Sheeleigh Cert." at ¶5. He continues

> At the December 1, 1991 meeting, Rheem representatives to my extreme disappointment presented absolutely no new strategies or alternatives which in my

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> mind would address the poor performance of the Rheem products as part of the Wallwork distributorship. I considered this total lack of new ideas overnight ... and it was only on December 2, 1991, that I determined that Wallwork must take on an additional product line in the form of a Trane distributorship.

Sheeleigh Cert, at ¶13. These statements prove that Wallwork was dissatisfied with Rheem's response to its voiced concerns. They show that the switch from Rheem to Trane was motivated by Rheem's failure to act as Wallwork wished. These certifications do not, however, suggest a logical, alternative interpretation of the damning paper trail left by Wallwork.

Rheem's repudiation argument is built upon objective evidence, not the subjective view of an interested party. Moreover, Rheem's argument has at its foundation facts drawn solely from materials originating from Wallwork and its present supplier, The Trane Company ("Trane"). Unlike Wallwork, Rheem happily will allow the record to speak for itself. "[W]hen an issue of fact is supported by affidavits or other evidence which admit of only one conclusion, the court may not draw an opposite conclusion merely on the basis of unsupported allegations." Chirinos de Alvarez v. Creole Petroleum Corp., 613 F.2d 1240, 1244 (3d Cir. 1980). The only conclusion that can be drawn here is that Wallwork repudiated its Rheem distribution agreement.

On a motion for summary judgment, the court must give effect to the parties' objective intent as indicated

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by a document's unambiguous terms. In re Gas Reclamation, Inc. Securities Litigation, 741 F. Supp. 1094, 1097 (S.D.N.Y. 1990). Thus, on a motion for summary judgment, "[t]o the extent that legal conclusions as to the construction and application of [undisputedly authentic] documents [are] asserted in the pleadings as matters of 'fact,' such 'facts' [will be] disregarded as amounting to no more than conclusions of law." Chi-Mil Corp. v. W.T. Grant Co., 70 F.R.D. 352, 358 (E.D. Wis. 1976). Wallwork's certification-based assertions should be treated as nothing more than conclusions of law.

In short, no facts relevant to this motion are genuinely in dispute. The only question requiring adjudication is the legal effect of the undisputed actions of each party. Where the only conflict is the legal consequence of undisputed acts, summary judgment is appropriate. Fitzsimmons v. Greater St. Louis Sports Enterprises, Inc., 63 F.R.D. 620, 622 (S.D. Ill. 1974).

The documentation of the chronology of events in this case is beyond cavil. Wallwork's vain attempt to put a gloss on the record by attributing intentions and meanings to the objective proofs cannot alter the record. The words of the documents are straightforward; in any event only this Court may decide otherwise. See, Orkin Exterminating Co., Inc. v. Federal Trade Comm'n., 849 F.2d 1354, 1360 (11th Cir. 1988). Indeed, Wallwork's voluminous efforts to create ambiguity where none is present

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has no legal import -- "[a]n ambiguity in a contract cannot be created by a mere assertion of a party to it." Id. (citing Vreeland v. Federal Power Comm'n., 528 F.2d 1343, 1351 (5th Cir. 1976)).

Virtually on point is Klopfenstein v. Pargeter, 597 F.2d 150 (9th Cir. 1979). There the plaintiff swore in an affidavit that he did not intend to rescind or abandon a joint venture, despite a letter to his partner to that effect and other behavior consistent with withdrawal. The Ninth Circuit Court of Appeals rejected the plaintiff's assertion that his affidavit raised a material issue of fact sufficient to forestall summary judgment, explaining:

> Appellant contends his own affidavit, submitted in opposition to appellee's motion for summary judgment, raises a material issue of fact. In the affidavit appellant Klopfenstein avers that he did not intend to rescind or abandon the contract. But the affidavit does not point to any conduct from which Pargeter or anyone else could infer that this was Klopfenstein's intention. Appellant's conduct unequivocally implied that he no longer intended to follow through with the joint venture, but instead intended to seek the franchise alone or with a new partner. Undisclosed, subjective intentions are immaterial in this commercial transaction, especially when contradicted by objective conduct. Thus, the affidavit has no legal effect even if its averments are accepted as wholly truthful.

Id. at 151-52 (emphasis added), citing J. Calamari and J. Perillo, Contracts §12 (1970).

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After all is said and done, Wallwork's opposition to this motion is nearly identical to the one rejected in Klopfenstein. Wallwork would have the Court believe that if it looks like a duck, walks like a duck, and quacks like a duck, it still might be a swan if it submits a lengthy certification to that effect. Rheem need not rely on anything but the record. It asks the Court to read the December 4, 1991 letter and other relevant documents and decide who terminated whom.

## POINT II

### WALLWORK HAS NOT SET FORTH MATERIAL ISSUES OF FACT PRECLUDING ENTRY OF SUMMARY JUDGMENT IN RHEEM'S FAVOR.

Wallwork's entire cause of action is premised on the assertion that Rheem acted unlawfully on receipt of Wallwork's notice dated December 4, 1991. For reasons stated in Rheem's moving brief, and discussed more fully herein, Wallwork's premise is unsupportable and Wallwork's action must fail.

#### A. Wallwork repudiated the distribution arrangement

Wallwork's damage claims relate to notice and its right to continue the business relationship for a "reasonable" period of time. Wallwork now has come to understand that if this Court finds that Wallwork repudiated the distribution arrangement, its cause of action fails. This should have been obvious from the start -- by definition, one cannot be entitled to notice

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of one's own intent to terminate a distributorship arrangement. Gillette Foods, Inc. v. Bayernwald-Fruchter-verwertun GMBH, 1991 WL 25455 (D.N.J. 1991) (Wolin, J.). Such a rule in law would be an absurdity.

To circumvent the absurdity, Wallwork recently has claimed that Rheem, not it, terminated the long-standing distribution relationship between the parties. To get the Court to accept this theory, Wallwork must obfuscate the fact that in its April 1992 Complaint, it alleges that:

> on or about December 4, 1991, the plaintiff [Wallwork] advised the defendant [Rheem] that it was *terminating* its representation of the defendant in Northern New Jersey and Staten Island effective as of January 2, 1992. Notification was given both orally and in written form.

Complaint, ¶7 (emphasis added). There is no mention of the complaint in Wallwork's response to Rheem's motion brief.[1] Wallwork's silence as to the integrity of its claim in view of the language in its own Complaint is damning.

In fact, Wallwork's intent to terminate, as expressed in the complaint, is consistent not only with

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[1] The Complaint's next paragraph alleges that "on or about December 5, 1991, the defendant notified the plaintiff that they had received a formal notification of the *termination* of plaintiff's representation of the defendant in the areas of northern New Jersey and Staten Island effective January 2, 1992." ¶8 (emphasis added).

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its initial pleadings but also with contemporaneous correspondence between Rheem and Wallwork's attorney. In a January 17, 1992 letter to Rheem's General Counsel Vincent J. Debo (attached as Exhibit 1), Wallwork's attorney states explicitly that Wallwork cancelled the distributorship arrangement. Responding to a letter from Mr. Debo which memorialized a prior phone conversation between himself and Wallwork counsel David Schechner, Mr. Schechner writes to correct Mr. Debo's memorialization:

> You also failed to note in your letter that I advised you that [as a result of Rheem's conduct] we were suffering and would continue to suffer substantial losses between the time of our advising your organization of *our cancellation* of our relationship and the end of December."

Id. (emphasis added).

Schechner's January 17, 1992 letter, written within six weeks of the December 4, 1991 Wallwork termination letter, is consistent with the clear statement in Wallwork's complaint that the December letter repudiated continued maintenance of the distribution relationship. The wording of the January 17 letter was no accident -- it was finalized only after consultation with Wallwork's Matthias Sheeleigh, III.[2] Similarly,

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[2] Schechner faxed the Debo letter to Sheeleigh on January 6, 1992 with a note to call him regarding Debo's assertions (See facsimile cover sheet attached as Exhibit 2). Sheeleigh was copied on the letter to Debo.

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Sheeleigh testified that he provided all the essential facts contained in the Complaint and reviewed it before it was filed (it has never been amended). (See excerpt of Sheeleigh Deposition attached as Exhibit 3.) Wallwork has made no attempt to deal with its own representations. In light of these facts, Wallwork's insistence that there are material questions of fact as to the intent of the December 4, 1991 letter is simply incredible.

B. Rheem properly exercised its rights on receipt of Wallwork's repudiation.

The significance of Wallwork's repudiation is weighty and determinative. Wallwork's act constituted a repudiation of a long-standing unwritten agreement with its seller-supplier. Given this repudiation, Wallwork's response brief improperly focuses on a buyer's rights on breach of contract. More properly, in light of Wallwork's abrupt repudiation, it is the seller's rights which must be analyzed.

More specifically, the relevant legal framework here is the law regarding a buyer's repudiation of a contract, as Wallwork's actions are best characterized. To that end, N.J.S.A. 12A:2-703 provides in part:

> [W]here the buyer . . . repudiates . . . then with respect to any goods directly affected and, if the breach is of the whole contract, then also with respect to the whole undelivered balance, the aggrieved seller may
>
> (a) Withhold delivery of such goods;
>
> . . .

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(e) Recover damages for non-acceptance or in the proper case the price;

(f) cancel.

By communicating its intent to discontinue distribution of Rheem products in New York and New Jersey, Wallwork repudiated its distribution arrangement with Rheem. Rheem was therefore acting within its rights under N.J.S.A. 12A:2-703 (a) and (f) in withholding further shipment of goods and cancelling the arrangement to distribute goods. See generally 17 Am.Jur. 2d Contracts §582 at 592 ("as a general rule, the recision of a contract by one party thereto is permitted for the other party's repudiation of the contract or any essential part of it."); Levy v. Massachusetts Accident Co., 124 N.J. Eq. 420, 430 (Ch. 1938) (wronged party in unjustifiable repudiation may cancel); Cherwell-Ralli, Inc. v. Rytman Grain Co., Inc., 433 A.2d 984, 987 (Conn. 1980) (repudiation creates right to cancel apart from rights delineated in agreement between the parties).

Further, Wallwork had notice that should it terminate Rheem, Rheem reserved the right to reject orders theretofore submitted and to cancel the unshipped portion of any accepted order. (See ¶10(a)(i) and (ii) of the Rheem Manufacturing Company Distributorship Agreement attached as Exhibit 4). This agreement was forwarded to Wallwork under cover letter dated 1983, 1987, 1988, 1989 and 1990. (See e.g., letter dated February 16, 1990

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attached as Exhibit 5). That letter states: "Until signatures of both parties are affixed, no agreements or distribution rights, implied or written, will exist." Id. Certainly, Wallwork could not expect that its rights were greater without a written agreement than with one.

C. Wallwork's argument that it offered to modify the existing distributorship arrangement is specious.

Wallwork's alternative argument that its December 4, 1991 letter constituted an offer to modify the existing distributorship relationship is untenable, given the facts in this case. There is nothing in the record to support an interpretation of the December 4, 1991 letter consistent with an offer to amend or modify the existing relationship. See Point IIA, supra. Absent such proof, Wallwork's citation to cases regarding mutual contract rescission are inapposite.

In each of the cases cited, the issue was not, as here, repudiation by one party but rather rescission of a contract by mutual agreement of the parties. See, S.S. Silberblatt Inc. v. Seaboard Maturity Co., 417 F.2d 1043, 1054-1055 (8th Cir. 1969) (issue was whether plaintiff "consented to a recision or abandonment" of the contract); Green Manor Constr. Co. v. Highland Painting Serv., 345 F.2d 657, 660 (1st Cir. 1965) (no termination by mutual agreement when each party alleged a purported termination for cause); Invengineering, Inc. v. Foregger Co., 293 F.2d 201, 203-204 (3d Cir. 1961) (distinguishing rescission

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from termination); Church v. Bobbs-Merrill Co., 272 F.2d 212, 215 (7th Cir. 1959) (mutual rescission of the contract); Frommeyer v. L. & R. Constr. Co., 261 F.2d 879, 992 (3d Cir. 1958) (no facts to prove agreement for novation of original contract).

There is no question of rescission by mutual agreement here. As stated, the pleadings, correspondence and other evidence adduced from Wallwork indicate an intent by Wallwork to repudiate the distribution arrangement. The objective facts are unrebutted. Wallwork's intention in sending its December 4, 1991 notice was not to modify the then-existing distribution arrangement, it was to terminate it. This Court should so find as a matter of law.

D. Wallwork's notice argument presumes facts outside the record.

Wallwork alleges that however the clear language of the December 4, 1991 letter is "interpreted," Wallwork was entitled to reasonable notice before the cancellation of future shipments of goods and, failing this, was specifically entitled to the shipment of goods already accepted by Rheem. This argument is premised on, again, a breach by Rheem; it emphasizes a buyer's rights when the seller terminates. If, however, this Court agrees that there is no factual issue as to Wallwork's repudiation of the distributorship, it should also find that Rheem properly withheld outstanding orders pursuant to N.J.S.A. 12A:2-703(a).

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The facts here are virtually a mirror image of those in Bak-A-Lum Corp. v. Alcoa Building Prod., 69 N.J. 123 (1976). There the Court held that the distributor was entitled to fair notice of the manufacturer's intent to cancel an exclusive distribution arrangement, specifically in light of the manufacturer's actions inducing the distributor to make large purchases before the manufacturer cancelled the exclusive arrangement. Id. at 129-130. Our facts are the reverse of Bak-A-Lum. It was Wallwork which induced Rheem to supply goods to it as if the arrangement were static, even though it was not.

In sum, as stated in Rheem's moving brief and in the Gillette case, the notion of providing "reasonable" notice to Wallwork is meaningless, because Wallwork held the knowledge of the intent to terminate. Rheem did not have to -- and could not -- give Wallwork notice of that which it was already aware, i.e., that it would soon discontinue distribution of Rheem's goods.

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**CONCLUSION**

Wallwork's arguments in opposition to Rheem's motion are based on the faulty premise that Rheem ended the business relationship. Indeed, Wallwork's entire cause of cause relies on this faulty premise. Discovery has revealed no fact to controvert the objective proofs that were cast very early in this litigation; indeed, the proofs were cast in Wallwork's first pleading and in correspondence contemporaneous to the dispute. Wallwork repudiated the distribution arrangement. Rheem's response was proper as a matter of law. For the foregoing reasons defendant Rheem Manufacturing Company respectfully requests that its motion for summary judgment on the plaintiff's complaint be granted.

Respectfully submitted,

LOWENSTEIN, SANDLER, KOHL,
FISHER & BOYLAN, P.C.
Attorneys for Defendant
Rheem Manufacturing Company

By:
Richard C. Szuch

Dated: November 8, 1993

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80 MAIN STREET, WEST ORANGE, N.J. 07052
TELEPHONE (201) 325-2411
FAX NO. (201) 325-8131

January 17, 1992

Vincent J. Debo, Vice President and General Counsel--Int'l
RHEEM MANUFACTURING COMPANY
405 Lexington Avenue, 22nd Floor
New York, New York 10174-0307

**RE: WALLWORK BROTHERS, INCORPORATED/RHEEM MANUFACTURING**

Dear Mr. Debo:

I have your letter of January 3, 1992, which purports to recite our telephone conversation. I am afraid that you have not been entirely accurate. I did inform you that upon receipt of your Air Conditioning Division's notice that Wallwork would not be receiving goods, Wallwork did contact its dealers which it placed orders for Rheem equipment and advised those dealers that Wallwork would not be able to fulfill the orders which it had accepted because your organization had without cause cancelled confirmed orders placed by Wallwork. You also failed to note in your letter that I advised you that as a result of those actions, we were suffering and would continue to suffer substantial losses between the time of our advising your organization of our cancellation of our relationship and the end of December.

We are also assuming based upon the letter as sent and the last paragraph that there is no desire on the part of Rheem to adjust any outstanding loss which Wallwork has suffered as a result of your action, and that if we wish to make any recovery, it will have to be in a court of law. Frankly, my client is sorry that you have taken that position, and he is presently examining what steps, if any, he will take. Once a conclusion has been reached, we shall act upon it. In view of the tenor of your letter, I see no reason to obligate myself to advise you in advance if litigation is contemplated.

Very truly yours,

SCHECHNER AND TARGAN

David Schechner

DS:pr
cc: Wallwork Bros.
Attn: Matthias Sheeleigh III

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## FAX TRANSMISSION

**DATE:** January 6, 1992

**TO:** Matt Sheeleigh, III

**FAX NO:**

**FROM:** David Schechner, Esquire

**RE:** Rheem Manufacturing Co.

**MESSAGE:** Enclosed please find copy of letter from Vincent J. Debo of Rheem. Mr. Schechner is presently in Court but asks that you call him regarding attached.

Theresa

FAXED 4:12 pm

WE ARE TRANSMITTING 2 PAGES INCLUDING THIS COVER LETTER.
NOTE: IF TRANSMISSION IS INCOMPLETE OR COPY ILLEGIBLE, PLEASE CALL.

SCHECHNER AND TARGAN USE ONLY:

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RHEEM MANUFACTURING COMPANY
AIR CONDITIONING DIVISION

5600 OLD GREENWOOD ROAD
P.O. BOX 6444
FORT SMITH, AR 72906-0444
(501) 646-4311

February 16, 1990

Mr. Matt Sheeleigh
Wallwork Brothers, Inc.
9 West Patton Drive
West Caldwell, NJ 07006

Dear Matt:

We note from our files that we do not have a signed Distributor Agreement from your company. I am, therefore, enclosing two copies of our Distributor Agreement for your review and signature.

Until signatures of both parties are affixed, no agreements or distribution rights, implied or written, will exist.

We believe it extremely beneficial to both companies to have a written agreement in effect, and we are willing to discuss modification to those paragraphs which you may find objectionable.

Your attention to this matter will be greatly appreciated.

Very truly yours,

Micheal D. Kaasa
Vice President, Sales

/cab

Enclosures