America's Collectibles Network, Inc. v. Sterling Commerce (Am.), Inc.

United States District Court for the Eastern District of Tennessee

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Case No. 3:09-cv-143

Reporter
2016 U.S. Dist. LEXIS 195369 *; 2016 WL 9132294

AMERICA'S COLLECTIBLES NETWORK, INC., d/b/a JEWELRY TELEVISION®, Plaintiff, v. STERLING COMMERCE (AMERICA), INC., Defendant.

Prior History: *America's Collectibles Network, Inc. v. Sterling Commerce (Am.), Inc., 2011 U.S. Dist. LEXIS 56719 (E.D. Tenn., May 26, 2011)*

Core Terms

software, parties, warranty, argues, representations, Services, promises, customers, fraud claim, implementing, misled, misrepresentations, damages, summary judgment motion, assurances, resources, alleges, licensed, summary judgment, capabilities, disclaimers, asserts, partial summary judgment, fraudulent, contractual, citations, contracts, induce, motion to strike, promissory fraud

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Judges: TRAVIS R. MCDONOUGH, UNITED STATES DISTRICT JUDGE. Magistrate Judge H. Bruce Guyton.

Opinion by: TRAVIS R. MCDONOUGH

Opinion

MEMORANDUM OPINION

Plaintiff America's Collectibles Network, Inc. d/b/a Jewelry Television ("JTV"), is a direct-to-consumer seller of jewelry and related items. JTV markets and sells its products via television and the Internet, and accepts payment from various forms of electronic transactions. Defendant Sterling Commerce, Inc. ("Sterling") produces and licenses commercial software **[*4]** and provides services implementing its software systems for licensees. The current dispute arises out of a multi-year, multi-contract business relationship for the purchase and implementation of Sterling's software at JTV. Now before the Court are cross-motions for summary judgment (Docs. 87, 258) as well as associated motions to strike (Docs. 333, 379).

I. BACKGROUND

In 2005, JTV decided it needed to replace the software system that handled its warehouse functions. (Doc. 32, at 4; Doc. 260-22, at 2, 3-4.) Its existing "Legacy System" was outdated and caused difficulties with day-to-day operations. (Doc. 260-21, at 2-3; Doc. 260-22, at 3-4, 5; Doc. 260-26, at 2.) To remedy these problems JTV launched its "Catalyst" initiative—an internal project in which JTV solicited input from its various departments regarding software needs. (Doc. 260-31, at 7-8.) JTV initially sought only an "outbound warehouse management system" ("WMS") to process and ship products to its buyers; it would retain the Legacy System for all other functions. (Doc. 32, at ¶ 18). JTV retained Keogh Consulting ("Keogh") to identify a vendor who could address JTV's needs. (*See* Doc. 260-21, at 4; Doc. 261-25.)

In early 2006, **[*5]** JTV, working with Keogh, solicited project proposals for WMS software. (Doc. 32, at 6; Doc. 260-21, at 4; Doc. 261-18; Doc. 261-25.) The Request for Proposal ("RFP") identified the "major objectives" that JTV required in a new system. (Doc. 32, at 6-7; Doc. 261-18.) JTV sought "to select and utilize a successfully implemented and proven system in a similar operating environment . . . accommodating the majority of Jewelry Television's requirements without requiring substantial modification . . . ." (Doc. 261-18, at 3.) The RFP defined the project scope as requiring a supplier to "implement a totally integrated and operational system" and listed specific critical functions. (*Id.* at 3-4.) JTV did not initially send the RFP to Sterling, because Keogh did not believe Sterling had the requisite experience with direct-to-consumer retail. (Doc. 261-20; *see also* Doc. 260-26, at 3.) However, after being less than impressed with the other vendors' proposals, JTV asked Keogh to reach out to Sterling. (*See* Doc. 261-20.)

JTV arranged for Sterling to visit JTV's new warehouse and make a sales presentation, after which it requested that Sterling respond to the RFP. (Doc. 260-26, at 4-5.) On October 3, 2006, **[*6]** Sterling submitted a detailed project bid describing its company profile and its warehouse management software, and providing a cost estimate. (Doc. 260-26, at 4-5; Doc. 261-21.) The bid also included a schedule of "customers in retail, distribution, and logistics leveraging Sterling supply chain solutions in ways similar to [JTV's] inventory and warehouse management scope" organized by industry, scope of the project, and date of implementation. (Doc. 261-21, at 24.) The list included several household names. (Doc. 261-21, at 4.) The bid also identified and provided CVs for "key resources that would be staffed." (Doc. 261-21, at 30-34.)

On the recommendation of its IT staff (Doc. 261-24), JTV ultimately chose Sterling to handle the project to replace the Legacy System ("the Project") and, in December 2006, executed a Universal Software License Agreement and WMS License Agreement. (Doc. 32, at 14; Doc. 260-18, at 5; Doc. 261-25; Doc. 260-8; Doc. 260-9.) Over the course of the parties' relationship, the arrangement continued to evolve as new elements were added to the Project. For example, JTV decided to expand its new system purchase beyond the WMS system. It ultimately licensed three **[*7]** Sterling software products to replace the Legacy System: the WMS, an Order Management System ("OMS"), and a Purchase Order System ("PO"). (Doc. 260-31, at 21-22.) Between December 22, 2006, and October 5, 2007, JTV and Sterling worked together to advance the Project,

executing multiple agreements at several different stages:[1]

- On December 22, 2006, the parties executed the initial Universal Software License Agreement ("USLA") for the WMS. (Docs. 260-8; 260-9.)
- On April 19, 2007, the parties executed a Professional Services Agreement ("Services Agreement") for the implementation of the software. (Doc. 260-10.)
- On the same day, and under the Professional Services Agreement, they executed a "Pre-Project Planning Statement of Work" ("Pre-Planning SOW"), which outlined obligations in the early stages of implementation. (Doc. 260-11.)
- The OMS and PO were incorporated into the Pre-planning SOW in May 2007. (Doc. 260-12.)
- On June 1, 2007, the parties executed a second USLA to license the OMS and PO. (Doc. 260-13.)

- On June 4, 2007, the parties entered a Solution Definition SOW (Solution Definition SOW"), whereby they would collaborate to determine JTV's specific needs so that the software **[*8]** could be customized to match (the "Solution Phase"). (Doc. 260-14.)
- On October 5, 2007, the parties executed the Implementation Statement of Work ("Implementation SOW"). (Doc. 260-16.)

Time delays arose early on, even as the Project expanded. Around June 2007, during the Solution Phase, Sterling began having personnel difficulties. Sterling's Project Manager and Solution Architect left the Project abruptly in June 2007 (Doc. 260-28, at 2-3; Doc. 261-1; Doc. 262-24; 260-27, at 2, 5), a replacement Project Manager left in July (Doc. 260-20, at 16), and there were problems in assigning a new "solution architect" (Doc. 318-1, at 224-27). JTV complained about the personnel turnover and also about the skills and work performance of other employees. (Doc. 260-18; Doc. 260-20, at 16; Doc. 260-18, at 9; Doc. 260-27, at 14, 15; Doc. 260-29, at 16-19.)

Despite the personnel issues and JTV's doubts as to Sterling's abilities, the Solution Phase was completed in September 2007. From it, the parties jointly produced three Solution Definition Documents for use in designing and implementing the systems. And the parties negotiated the Implementation SOW to set out the parties' responsibilities during **[*9]** the Implementation Phase. As part of these negotiations, Tim Matthews, JTV's Technology Steering Committee Chair, insisted on including "Section H," which he described as "a culmination of representations that had been made to [JTV]." (Doc. 260-29, at 21-24.) After resolving disputes regarding the precise wording of the section (Doc. 260-27, at 3-4), the parties executed the Implementation SOW to begin the implementation phase (Doc. 260-16). The Implementation SOW set a "Go-Live" date of June 15, 2008, for expected completion. (*Id.* at 5.) It also set the projected budget for the Project at $2,014,007 for all three systems. (*Id.* at 7.)

The problems and delays persisted into the Implementation Phase. In November 2007, JTV repeatedly complained about the competency of Sterling's onsite technical staff. (Docs. 262-14, 262-25, 262-26.) In December 2007, JTV assigned a new project manager to the Project, Mary Regan. (Doc. 32, at 33; Doc. 260-24, at 124.) On December 21, 2007, Regan met with Rich Jackson, Sterling's project manager at the time and asked whether Sterling had ever previously implemented WMS, OMS, and PO at the same time. (Doc. 32, at 33; Doc. 260-24, at 2; Doc. 260-35, at 3-4.) Jackson responded **[*10]** that Sterling had not. (Doc. 260-24, at 2; Doc. 260-35, at 3-4.)

By early 2008, the Project was significantly behind schedule. (Doc. 260-26, at 33; Doc. 260-34, at 6.) On February 1, 2008, the JTV Technology Steering Committee met to discuss the status of the project. (*Id.*; Doc. 261-29.) JTV made a unilateral decision to reduce the scope of the immediate work. (Doc. 261-29; Doc. 260-18, at 33; Doc. 260-29, at 25; Doc. 262-27.) The Project's new incarnation, which JTV dubbed "Phoenix Rising" would focus on completing the WMS-Inbound and PO systems in time for the 2008 holiday season. (Doc. 32, at 38.) Implementation of the WMS-Outbound and OMS components would be postponed indefinitely. (*Id.*) JTV has maintained that its decision was prompted by the previous delays and project difficulties. (*Id.* at 37-39.)

Despite this decision, JTV did not immediately tell Sterling of the altered plans. (Doc. 260-18, at 33; Doc. 260-26, at 36; Doc. 260-31, at 43, 44.) On April 16, 2008, Guy Read, Sterling's project manager at the time, learned of the decision JTV made to reduce the project scope. (Doc. 260-34, at 2.) He confirmed what he learned with Wayne Lambert, JTV's Chief Information Officer, who related to **[*11]** Read the details of the Phoenix Rising schedule modifications. (Doc. 260-34, at 2-3.) Read outlined the modified plan in an e-mail to Lambert. (Doc. 262-1.) Lambert received the e-mail and

[1] By their terms, all of the contracts are governed by Ohio law.

discussed it with other members of the JTV team. (Doc. 260-26, at 38-39.)

The parties continued with the plans for the WMS-Inbound and PO, both of which were implemented in September 2008. (Doc. 32, at 42; Doc. 260-35, at 2.) The relationship between the parties soured irreparably at some point after the September launch. Negotiations to complete the implementation of the WMS-Outbound and OMS collapsed. (Doc. 260-17, at 6-8.) JTV alleges that, after Sterling exhausted the agreed budget, Sterling submitted a change request that contemplated additional payment for services already included in the original plan. (Doc. 318-1, at 123, 136-137; Doc. 318-8, at 10.) JTV also claims that the implemented portion of the software was wholly inadequate and caused more problems than the Legacy System. (Doc. 318-1, at 120.) JTV's primary complaint is that the systems were not "interoperable"; that is, they could not communicate with one another to streamline functions for various aspects of the business. (Doc. 318-1, **[*12]** at 19.) In October 2008, JTV consulted legal counsel and initiated an investigation into the Project's collapse. (Doc. 318-1, at 141-42.) The investigation concluded in early 2009, with JTV claiming that Sterling had made multiple intentional false statements during the sales cycle and throughout the Implementation Phase. (Doc. 262-29.)

This lawsuit was filed on April 3, 2009. (Doc. 1.) JTV made eight claims for relief: (1) Fraud in the Inducement; (2) Promissory Fraud; (3) Negligent Misrepresentation; (4) Violations of the Tennessee Consumer Protection Act; (5) Negligence/Gross Negligence; (6) Breach of Contract; (7) Breach of Express and Implied Warranty as to "Statements of Work"; and (8) Breach of Express and Implied Warranty as to software licenses. JTV has now moved for partial summary judgment (Doc. 87), and Sterling has moved for summary judgment and partial summary judgment (Doc. 258). Sterling has also filed two motions to strike two affidavits and one of JTV's accompanying supplemental briefs in connection with their motion. (Docs. 333, 379.)

II. STANDARD OF REVIEW

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and **[*13]** the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. The Court views the evidence in the light most favorable to the nonmoving party and makes all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*; *Nat'l Satellite Sports, Inc. v. Eliadis Inc., 253 F.3d 900, 907 (6th Cir. 2001)*.

The moving party bears the burden of demonstrating that there is no genuine dispute as to any material fact. *Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*; *Leary v. Daeschner, 349 F.3d 888, 897 (6th Cir. 2003)*. The moving party may meet this burden either by affirmatively producing evidence establishing that there is no genuine issue of material fact or by pointing out the absence of support in the record for the nonmoving party's case. *Celotex Corp., 477 U.S. at 325*. Once the movant has discharged this burden, the nonmoving party can no longer rest upon the allegations in the pleadings; rather, it must point to specific facts supported by evidence in the record demonstrating that there is a genuine issue for trial. *Chao v. Hall Holding Co., Inc., 285 F.3d 415, 424 (6th Cir. 2002)*.

At summary judgment, the Court may not weigh the evidence; its role is limited to determining whether the record contains sufficient evidence from which a jury could reasonably find for the non-movant. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*. A mere scintilla of evidence is not enough; the Court must determine whether a fair-minded jury could return a verdict in favor of the non-movant based on the record. *Id. at 251-52*; *Lansing Dairy, Inc. v. Espy, 39 F.3d 1339, 1347 (6th Cir. 1994)*. If not, the Court **[*14]** must grant summary judgment. *Celotex, 477 U.S. at 323*.

The standard of review when parties file cross-motions for summary judgment is the same as when only one party moves for summary judgment. *Taft Broad. Co. v. United States, 929 F.2d 240, 248 (6th Cir. 1991)*. When there are cross motions for summary judgment, the court must "evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Id.* In considering cross motions for summary judgment, the court is "not require[d] . . . to rule that no fact issue exists." *Begnaud v. White, 170 F.2d 323, 327 (6th Cir. 1948)*.

III. ANALYSIS

The parties agree that the agreements in this case are governed by Ohio law, under a choice-of-law provision.

Therefore, the Court must apply the law of Ohio to interpret and to construe the agreements, and to determine the claims based in contract law. *Ohio Cas. Ins. Co. v. Travelers Indem. Co., 493 S.W.2d 465, 467 (Tenn. 1973)*. Plaintiff has also made claims under Tennessee tort law. The parties do not contest that Tennessee law applies to the tort claims, and the Court agrees with this conclusion.[2]

JTV filed a motion for partial summary judgment, arguing that the undisputed facts show that it is entitled to summary judgment, at least as to liability, on its claim of fraudulent inducement. Sterling has also filed a motion **[*15]** for summary judgment and partial summary judgment. The Court will first address JTV's motion for partial summary judgment.

A. JTV's Motion for Partial Summary Judgment

To recover for fraudulent inducement, JTV must prove five elements:

> (1) a false statement concerning a fact material to the transaction; (2) knowledge of the statement's falsity or utter disregard for its truth; (3) intent to induce reliance on the statement; (4) reliance under circumstances manifesting a reasonable right to rely on the statement; (5) an injury resulting from the reliance.

Lamb v. MegaFlight, Inc., 26 S.W.3d 627, 630 (Tenn. Ct. App. 2000). JTV seeks summary judgment on the first four elements, asserting they have been established as a matter of law.

As to the first element, JTV points to Section H of the Implementation SOW. The Implementation SOW was entered on October 5, 2007, and is governed by the Professional Services Agreement. Section H provides, in relevant part:

> Customer has participated with Sterling Commerce in the preparation of the Solution Definition Documents. Customer has also relied upon . . . [Sterling's] experience in implementing similar solutions in other companies . . . .

(Doc. 89-1, at 9.)

During the pendency of this litigation, JTV has attempted to discover **[*16]** what other companies Sterling had worked with on similar solutions, but contends that Sterling has either failed or refused to disclose the information. In interrogatory responses, Sterling identified other companies[3] that it had "assisted" with implementation projects and companies which had licensed and used its software solutions. (Doc. 97-3, at 3-7.) JTV argues that those disclosures do not match Sterling's pre-contractual representations of its prior experience and expertise. It contends that "[Sterling's] experience in implementing" was a representation that Sterling had been responsible for (rather than merely assisting with) the implementation of these prior solutions and that "similar solutions" meant the simultaneous implementation of WMS, OMS, and PO.

While JTV's interpretation of Section H is a reasonable interpretation, it is not the only one. For example, Sterling interprets the word "similar" in a way that is not constrained solely to those projects in which there was simultaneous implementation, but rather focuses more on the degree of similarity between the prior customer's use for the software. (Doc. 97-3, at 4-5 (listing customers who have licensed Sterling applications **[*17]** in the direct to consumer environment); *id.* at 5-7 (listing customers who licensed Sterling applications with similar inventory and warehouse scope).) Sterling also takes the position that "experience in implementing" does not equate to "had sole responsibility for implementing." It points to the language of the SOW itself, specifically the responsibilities assumed by JTV to show that it was not undertaking a project in which it was solely responsible for implementation. (Doc. 97-3, at 8-9.) The problem is that Section H is not itself a representation, but a contractual memorialization of prior representations,

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[2] Because this Court is sitting in diversity, it must apply the law of the state in which it sits, including on questions involving conflict of laws. *Klaxon Company v. Stentor Electric Manufacturing Co., Inc., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*; *Seals v. Delta Air Lines, Inc., 924 F. Supp. 854, 860 (E.D. Tenn. 1996)*. In tort cases, Tennessee follows the "most significant relationship" test outlined in the Restatement (Second) of Conflict of Laws. *Hataway v. McKinley, 830 S.W.2d 53, 59 (Tenn. 1992)*. Under the test, the law of the state in which the injury occurred applies unless some other has a more significant relationship to the controversy. *Id. at 57*. Here, many of Sterling's alleged representations were made at meetings held at JTV's facilities in Tennessee. The alleged injuries occurred in Tennessee, and Tennessee is the location where Sterling was to render performance of the contract. Therefore, the Court will apply Tennessee law to JTV's tort claims.

[3] The list, which has been sealed by the parties' agreement, includes several household-name corporations.

which Sterling and JTV dispute and interpret differently. Showing that a statement was made and showing that a knowingly false statement was made are two separate things. A claim of fraudulent inducement requires the latter, and JTV's own allegations and testimony are not conclusive.

Questions of fact remain as to what exactly was meant by these representations; therefore, JTV's motion for partial summary judgment is **DENIED**. (Doc. 87.)

B. Sterling's Motion for Summary Judgment and Partial Summary Judgment

Sterling has also filed a motion for summary judgment and partial summary judgment. **[*18]** It argues (1) JTV's TCPA claim is barred by the statute of limitations; (2) JTV has failed to produce evidence to support its fraud, negligent misrepresentation, and promissory fraud claims; (3) JTV waived its right to pursue its fraud claims because it ratified and affirmed the contract after it had knowledge of the alleged scheme; (4) JTV's fraud and negligent misrepresentation claims are barred by the merger and non-reliance clauses of the contracts; (5) JTV has failed to produce evidence to support its negligence and gross negligence claims; (6) JTV's negligence and gross negligence claims are barred by the economic loss doctrine and the independent duty doctrine; (7) JTV's implied warranties claims are barred by the contracts; (8) damages for JTV's express warranties claims are subject to the agreed limitation of liabilities clauses; and (9) JTV is barred from recovering consequential damages for its breach of contract claim and its claim based on Sterling's failure to perform according to Section H.

1. Tennessee Consumer Protection Act Claims

The *Tennessee Consumer Protection Act ("TCPA")* provides a cause of action against a defendant who engages in unfair or deceptive trade practices. **[*19]** *Tenn. Code Ann. §§ 47-18-101 et seq.* JTV claims that Sterling's fraudulent misrepresentations constitute deceptive trade practices under the TCPA. Assuming *arguendo* that they do, Sterling argues that the claims are barred by the one-year statute of limitations because JTV was aware of the alleged misrepresentations as early as the summer of 2007 or, at the latest, in February of 2008 and this action was not filed until April 2009. *See* *Tenn. Code Ann. § 47-8-110*.

a. Motion to strike

Before the Court addresses the evidence on when exactly JTV had knowledge of the facts giving rise to its TCPA claim, the Court must first address a procedural dispute. Sterling has filed a motion to strike portions of the affidavit of Chris Meystrik—JTV's Vice President of Software Engineering. (Doc. 333.) Meystrik was heavily involved in the project to implement Sterling's software. At his deposition on October 30, 2013, Meystrik testified that, by February 2008, he felt JTV had been "misled" by Sterling. The subject testimony is as follows:

> Q: Did you feel at that time in February 2008 that you had been misled by Sterling about its capabilities to deliver all three of its software programs within that agreed implementation schedule?
>
> A: Very specifically within the agreed, **[*20]** yes, yes, I felt like we had - - well more than just misled, but misled is one thing I would use, yes.
> Q: What other things would you use?
> A: Misled meaning, hey we can do this. Misled in that we'll have certain types of resources on the project, and they will be able to do the project. Misled in that we would have competent project management. Misled in that the right resources would be applied to this project, and then misled that, hey, we've already done all three of these things and we're kind of counting on the fact that they've done all three of them, and so you're finding out that that's maybe not true[.]

(Doc. 260-31, at 32-33).

In its Motion for Summary Judgment, Sterling argues that Mr. Meystrik's testimony established that JTV had knowledge of Sterling's misrepresentations in February 2008. In response, JTV presented a six-page affidavit, in which Meystrik asserts that his testimony was taken out of context and was misconstrued.

The affidavit concerns two areas of Meystrik's testimony. The first deals with failed promises of future performance:

> I testified that JTV had been "misled" by Sterling's promises of performance *under the contracts*, which had not occurred. I did not testify **[*21]** that I had been "misled" by statements made to me during the sales cycle.

(Doc. 318-2, at ¶ 4.)

> I testified at my deposition that, by February 2008, I did not have confidence that Sterling would be able

> to deliver all three components of the Sterling project prior to the 2008 holiday season. I explained that I reached this conclusion by doing an analysis of a document prepared by Sterling's Delivery Manager, Mr. Guy Read, entitled "Recovery Plan" and a Recovery Plan Schedule.

(Doc. 318-2, at ¶ 5.)

In short, Meystrik asserts that his testimony was not that he felt misled by Sterling's *pre-contractual representations*, but that he had felt misled by a second round of promises made in the "recovery plan," which was "a new schedule" created in early 2008 as an attempt to remedy the Project's earlier setbacks. Based on that document and his observation over the course of the project, he felt misled because Sterling had not provided appropriate or qualified personnel and would not be able to meet the agreed implementation deadline.

The second area of Meystrik's affidavit regards Sterling's representations of its past experience implementing similar systems:

> I also testified that I had been "misled" **[*22]** by Sterling because when I asked for the name of a customer for whom Sterling had previously implemented the software we had licensed, Sterling would not identify the customer because it could not get the customer's permission.

(Doc. 318-2 at ¶ 4.)

> When I was asked whether, by February 2008, I felt I had been misled about Sterling's capabilities, I testified that Sterling employees kept telling me [in December 2007 and January 2008] that Sterling had implemented all three components before JTV. . . . [Sterling executives] always led me to believe that Sterling had simultaneously implemented all three components before the JTV Project. I had, at that time, no reason not to trust these individuals.

(Doc. 318-2, at ¶ 12.) Meystrik contends that his testimony relayed his concern not about Sterling's pre-contractual representations of its experience implementing similar systems, but its repeated assurances of that experience and its continued refusal to disclose the identities of Sterling's prior customers. (Doc. 318-2, at ¶ 8.)

"[A] party may not create a factual issue by filing an affidavit, after a motion for summary judgment has been made, which contradicts [his] earlier deposition testimony." **[*23]** *Reid v. Sears, Roebuck & Co., 790 F.2d 453, 460 (6th Cir. 1986)*. *See also Aerel, S.R.L. v. PCC Airfoils, L.L.C., 448 F.3d 899, 907 (6th Cir. 2006)* ("*Reid* and its progeny have thus barred the nonmoving party from avoiding summary judgment by simply filing an affidavit that directly contradicts that party's previous testimony."). However, a party may "supplement the summary judgment record" with an affidavit that explains or clarifies earlier deposition testimony. *Aerel, S.R.L., 448 F.3d at 907-08*. The Court employs a two-part inquiry in determining whether to consider a potentially contradictory affidavit:

> [A] district court deciding the admissibility of a post-deposition affidavit at the summary judgment stage must first determine whether the affidavit directly contradicts the nonmoving party's prior sworn testimony. A directly contradictory affidavit should be stricken unless the party opposing summary judgment provides a persuasive justification for the contradiction. If, on the other hand, there is no direct contradiction, then the district court should not strike or disregard that affidavit unless the court determines that the affidavit "constitutes an attempt to create a sham fact issue."

Id. at 908 (internal citations omitted).

As to Meystrik's testimony regarding the scheduling of the software implementation, the transcript shows that the subject matter **[*24]** of the immediately preceding examination specifically addressed the recovery plan. (Doc. 260-31, at 32.) Meystrik's statements were broad and could be read to encompass the personnel issues over the course of the project, but can also reasonably be read to refer only to the promises of the "new schedule" in the recovery plan as distinct from earlier promises. Sterling argues that the pre-and post-contract promises must be treated the same because they are identical—that is, the deadlines or performance mandates did not change. (Doc. 369, at 13.) This is a logically appealing argument, except that it fails to account for the fact that *the circumstances* had changed by the time the post-contractual promises in the Recovery Plan were made. The fact that Meystrik did not believe Sterling's promises that it would be able to complete the project *in the short span* between February and June 2008 does not mean that he believed Sterling had been misleading about its abilities from the start. In other words, Meystrik may have believed that Sterling could have completed the project had it devoted the proper resources at the time of the implementation contract (when it had several more months to **[*25]** work), but he purportedly did not believe that it had the ability to rehabilitate the project on an abbreviated schedule.

Because the fraud claims focus on Sterling's pre-contractual representations, Meystrik's affidavit and his deposition testimony are not plainly contradictory. Ambiguity is not a ground to strike evidence, and it is not the province of this Court to make a determination about the intended meaning of ambiguous testimony where multiple interpretations are feasible. Meystrik's affidavit is, therefore, accepted and will be considered in conjunction with the other evidence submitted. Sterling's Motion to Strike is **DENIED** as to Meystrik's statements regarding the scheduling and personnel problems in the Recovery Plan. (Doc. 333.)

However, Meystrik's statements regarding Sterling's prior experience implementing all three software systems simultaneously are a different story. Unlike the scheduling promises, there were no new and separate representations, only repetitions of prior statements. Meystrik's statements that he felt misled by continued assurances of prior experience are not ambiguous and can only mean that he also felt misled by their original incarnations. The earlier **[*26]** assurances differ from the later assurances only in timing, not in substance. The same is true for Sterling's promises to disclose the identities of prior customers. Meystrik's deposition testimony that he felt misled because he was determining that "the [representation] that they've done all three of them [was] maybe not true" and his affidavit statements that he did not have reason to doubt Sterling's representations do not square. Sterling's Motion will be **GRANTED** as to the portions of Meystrik's affidavit regarding Sterling's representations of its prior experience. (Doc. 333.)

b. TCPA Statute of Limitations

Tenn. Code Ann. § 47-8-110 provides that a claim for unfair or deceptive actions "shall be brought within one year from a person's discovery of the unlawful act or practice." Tennessee's "discovery rule" applies to claims made under the TCPA. *Montesi v. Nationwide Mut. Ins. Co., 970 F. Supp. 2d 784, 789 (W.D. Tenn. 2013)*; Riad v. Erie Exchange, 436 S.W.3d 256, 269 (Tenn. Ct. App. 2013) ("This court has repeatedly held that a TCPA claim accrues when the unlawful act or practice is discovered, thereby making the discovery rule applicable to such actions."). Under the discovery rule, a cause of action accrues when a claimant "knows or in the exercise of reasonable care and diligence should know that an injury has been sustained as a result of wrongful **[*27]** or tortious conduct by the defendant." John Kohl & Co. P.C. v. Dearborn & Ewing, 977 S.W.2d 528, 532 (Tenn. 1998).

The discovery rule does not toll the statute of limitations until the full extent of the injury is realized. Redwing v. Catholic Bishop for Diocese of Memphis, 363 S.W.3d 436, 459 (Tenn. 2012). "[A] plaintiff is not entitled to delay filing until all injurious effects or consequences of the actionable wrong are fully known." Weber v. Moses, 938 S.W.2d 387, 393 (Tenn. 1996); *see also* Sec. Bank & Trust Co. of Ponca City, Okl. v. Fabricating, Inc., 673 S.W.2d 860, 864-65 (Tenn. 1983). Tennessee follows an inquiry notice standard; "[o]nce a plaintiff gains sufficient information to alert a reasonable person of the need to investigate the injury, the limitation period begins to run." Redwing, 363 S.W.3d at 459 (Tenn. 2012) (internal quotations and citations omitted). Stated simply, the limitations period is not tolled until plaintiff completes an investigation.

JTV first argues that its TCPA claim could not have accrued until June 16, 2008, the day after Sterling was contractually obligated to deliver the project. However, Tim Matthews, JTV's IT Committee Chair, testified that in January 2008 he believed that "the damage was . . . already done as far as the schedule was concerned." (Doc. 260-29, at 11-12.) In February 2008, JTV dramatically reduced the scope of the project and reallocated its resources. (*See* Doc. 261-29 (February 4, 2008 email discussing difficulties and delays and announcing the decision to reschedule **[*28]** the implementation dates for Sterling applications); Doc. 262-27, at 7-8 (showing that JTV's Technology Committee intended to refocus on delivering OMS, WMS and PO in 2009 rather than 2008).) This reduction in scope, reallocation of resources, and delay can constitute "actual injury" sufficient to trigger the discovery rule. *See* John Kohl, 977 S.W.2d at 532 (noting that inconvenience and expense can constitute actual injury). JTV's pleadings attribute this reduction in scope to "Sterling's technical incompetence" and the fact that Sterling had "woefully underestimated and understated the complexity of the project." (Doc. 32, at 37.) The question thus becomes whether JTV knew or should have known that this expense and delay resulted from Sterling's misrepresentations.

JTV acknowledges that it knew of Sterling's failed contract performance early on, but argues that it did not have knowledge of its fraud until much later. JTV asserts that the relationship between the parties changed in October 2008, when the partially-implemented systems failed and Sterling indicated that it would need to be paid more than the contract amount to

complete the Project. (Doc. 316, at 20.) The demand for additional payment was the catalyst **[*29]** for an investigation into Sterling's actions, conducted between October 2008 and March 2009. (*Id.* at 21-22.) JTV claims that it did not have sufficient facts to indicate fraud (the alleged "deceptive trade practice" of its TCPA claim) until the conclusion of that investigation; prior to this point, JTV maintains that it viewed the difficulties as contract breach, but "held out hope that Sterling would remedy its contract performance problems." (*Id.* at 22.) JTV claims to have relied on Sterling's continued assurances that it would complete the project. In short, JTV concedes that it was aware that Sterling was doing a poor job, but argues that it did not suspect intentional fraud until it looked closer into the matter. Even if it had known of some misrepresentations in February 2008, JTV asserts, it did not have "full knowledge" of the fraudulent scheme until later.

JTV also argues that it relied on Sterling's continued assurances that it would ameliorate its delays. However, a tortious party's reaffirmations and assurances do not erase inquiry notice. *See Aleo v. Weyant, No. M2013-00355-COA-R3CV, 2013 Tenn. App. LEXIS 801, 2013 WL 6529571, at *4-6 (Tenn. Ct. App. Dec. 12, 2013)*.[4] Moreover, JTV's complaint belies its assertions that it relied on Sterling's assurances that it would complete **[*30]** the Project on time. JTV asserted that by February 2008, it "had no confidence that Sterling could deliver what it had promised. . . . Sterling had woefully underestimated and understated the complexity of the project." (Doc. 32, ¶¶ 95-96.)

Tennessee courts are clear that the relevant test for the discovery rule is not a subjective question of when the claimant actually learned of the alleged conduct, but an objective inquiry into when a reasonable person could have learned of it. *See Redwing, 363 S.W.3d at 466* ("[T]he pivotal issue is whether [plaintiff] would have discovered the [defendant's] wrongful acts had he exercised reasonable care and diligence . . . .") (citations omitted).

JTV's complaint alleges that:

> "It became clear in or around October 2007 that Sterling, notwithstanding its representations to the contrary . . . had materially misrepresented the amount of work necessary to implement WMS, OMS, and PO."

(Doc. 32, ¶ 78). JTV further alleges that "[t]he extent to which Sterling had misrepresented its commitment to keeping experienced Sterling employees on the team was also apparent by [November 1, 2007]" (Doc. 32, ¶ 77), and that "[b]y January 2008 the Sterling employees' lack of technical expertise **[*31]** was painfully clear." (Doc. 32, ¶ 80).

JTV argues that these are "retrospective assessments" and that it should not be deemed to admit knowledge of Sterling's representations based on these statements. This argument is questionable, but because JTV's employees admitted to facts that constitute at least inquiry notice of Sterling's alleged misrepresentations, the Court need not reach the issue of whether JTV's pleadings constitute judicial admissions of knowledge.

On December 21, 2007, JTV project manager, Mary Regan, asked Sterling project manager Rich Jackson, whether "PO, WMS and OMS had been implemented at another customer" and he responded "No."[5] (Doc. 260-35, at 3.) Rich Jackson confirmed this conversation. (Doc. 260-24, at 2.) Chris Meystrik—JTV's Vice President of Software Engineering—testified that by February 2008, he felt JTV had been "misled" by Sterling, specifically as to whether Sterling had previously implemented all three projects simultaneously. (Doc. 260-31, at 32-33). Therefore, at least two of JTV's employees who were intimately involved with the project knew or should have known that Sterling had never previously conducted a simultaneous implementation of WMS, OMS **[*32]** and PO—an alleged misrepresentation central to JTV's claims. A principal is charged with notice of knowledge acquired by its agent where the agent acts within the scope of its employment, even if the agent did not report the knowledge. *Bland v. Allstate Ins. Co., 944 S.W.2d*

[4] In extreme cases, such reassurances may form the basis of equitable estoppel. Equitable estoppel may toll the limitations period where the plaintiff can show "that the defendant induced him or her to put off filing suit by identifying specific promises, inducements, suggestions, representations, assurances, or other similar conduct by the defendant that the defendant knew, or reasonably should have known, would induce the plaintiff to delay filing suit." *Redwing, 363 S.W.3d at 460*. JTV has made no such showing here.

[5] JTV argues that Jackson's statements were open to interpretation and that it is not clear whether Regan understood them to mean that Sterling had never integrated all three systems or merely that his particular team did not have experience in that area. Setting aside the fact that the JTV's Complaint gives no hint of such confusion, the statements should have given Regan notice at the very least that there was trouble sufficient to warrant a further investigation.

372, 376 (Tenn. Ct. App. 1996); Griffith Motors, Inc. v. Parker, 633 S.W.2d 319, 322 (Tenn. Ct. App. 1982).

JTV argues that, while it may have known about failures in contractual performance, it did not have notice of the fraud. JTV relies on *Thompson Power Corp. v. Millennium Tiles, LLC*, for its argument that the statute of limitations should not have accrued until the later investigation discovered the fraud. No. 3:09-CV-564, 2010 U.S. Dist. LEXIS 124420, 2010 WL 4867891 (M.D. Tenn. Nov. 23, 2010). In *Thompson Power Corp*. the plaintiff purchased stainless steel roofing tiles for a residence. The plaintiff acknowledged that, as of June 13, 2008, it knew that the tiles were not performing as expected, but argued that it did not discover facts that gave rise to its misrepresentation claim until July 2008. 2010 U.S. Dist. LEXIS 124420, [WL] at *4. The plaintiff filed suit June 18, 2009. 2010 U.S. Dist. LEXIS 124420, [WL] at *5. Because the plaintiff's TCPA claim was based on the misrepresentation rather than the defects in the product, the court held that the complaint was timely filed. 2010 U.S. Dist. LEXIS 124420, [WL] at *8. JTV argues that the same analysis applied here: while JTV may have known there was a problem of contractual performance, **[*33]** it had no idea that Sterling's representations were fraudulent. However, the undisputed facts tell a different story. By February 2008, Meystrik knew Sterling's representation that it had "already done all three of these things,"—a representation that JTV was "counting on"—was "maybe not true." (Doc. 260-31, at 32-33; Doc. 260-35, at 3-4.) Regan knew in December 2007 that this alleged representation was not true.[6] (Doc. 260-35, at 3-4.)

Sterling's alleged lack of prior experience implementing WMS, OMS, and PO simultaneously was known by February of 2008. Had JTV exercised diligence in investigating the truth of the matter then, it would have discovered most of the same facts that it eventually discovered following the October 2008 investigation. The fact that JTV waited to take those affirmative steps does not toll the limitations period under Tennessee's inquiry-notice standard, nor does its claim that it did not have "full knowledge" of the misrepresentations. While JTV could not have known that Sterling's software systems would not work as represented until they were actually in use around October 2008, JTV has alleged a fraudulent scheme extending well beyond the products **[*34]** themselves, and Tennessee law is clear that claims can accrue before all of the consequences are realized. John Kohl, 977 S.W.2d at 532. The undisputed facts show that JTV had sufficient notice of Sterling's alleged scheme more than one year before this case was filed. Therefore, Sterling's motion will be **GRANTED** as to the JTV's TCPA claim.

2. Fraud and Misrepresentation Claims

Sterling argues JTV has failed to produce evidence to support its fraud and negligent misrepresentation claims, asserting that the alleged misrepresentations are mere puffery and that, even if they are not, JTV has failed to produce evidence that the statements were false. As to the promissory fraud claims, Sterling argues that JTV has failed to produce evidence showing that Sterling made promises it never intended to keep. Finally, to the extent these claims are based on misrepresentations memorialized in Section H of the Implementation SOW, Sterling argues that these are barred because they are not independent of the terms of the implementation SOW.

a. Misrepresentations of Existing Fact

A plaintiff seeking recovery for fraud under Tennessee law must show that: (1) defendant made a false statement concerning an existing fact material to **[*35]** the transaction; (2) the defendant had knowledge of the statement's falsity or disregard for its truth; (3) the plaintiff reasonably relied on the defendant's statement; and (4) the plaintiff suffered an injury as a result of his reliance. Baugh v. Novak, 340 S.W.3d 372, 388 (Tenn. 2011). A plaintiff seeking recovery in negligent misrepresentation must show: (1) the defendant was acting in the course of its business, profession, or employment; (2) the defendant supplied false information for the guidance of others in its business transactions; (3) the defendant failed to exercise

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[6] JTV argues in its supplemental brief that the limitations period was tolled by some action of concealment, but such an argument is inapplicable here. The doctrine of fraudulent concealment applies where the defendant took affirmative steps to conceal a cause against it and the plaintiff could not have discovered the action through reasonable diligence. Vance v. Schulder, 547 S.W.2d 927, 930 (Tenn. 1977). Here, Sterling's employees acknowledged in late 2007 that they had never implemented all three programs simultaneously. (Doc. 260-35, at 3-4.) As to Sterling's motion to strike this portion of JTV's supplemental brief, because even considering this argument and evidence, the Court would grant Sterling's motion for summary judgment as to JTV's TCPA claim, the Court will **DENY** the motion as **MOOT** as to this portion of the affidavit and brief.

reasonable care in obtaining or communicating the information; and (4) the plaintiff justifiably relied on the information. *Robinson v. Omer, 952 S.W.2d 423, 427 (Tenn. 1997)* (citations omitted). Negligent misrepresentation also requires a statement of existing or past fact. *McElroy v. Boise Cascade Corp., 632 S.W.2d 127, 130 (Tenn. Ct. App. 1982)*.

Only specific and quantifiable misrepresentations of fact will support fraud charges. *Adkins v. Ford Motor Co., 446 F.2d 1105, 1108 (6th Cir. 1971)* (construing Tennessee law). "General assurances of good quality and sales talk are not enough." *Id.* Statements that a product is "good" or "superior" are deemed puffery, opinion, or sales talk and do not warrant a standard of quality. *Audio Visual Artistry v. Tanzer, 403 S.W.3d 789, 811-12 (Tenn. Ct. App. 2012)*; *see also Ladd v. Honda Motor Co., Ltd., 939 S.W.2d 83 (Tenn. Ct. App. 1996)* ("[A] seller's characterization of an automobile as a 'dandy' or a 'good little car' or the 'pride of **[*36]** our line' or the 'best in the American market' will not give rise to liability [for fraud or negligent misrepresentation]."); *Morris Aviation, LLC v. Diamond Aircraft Indus., Inc., 536 F. App'x 558, 563 (6th Cir. 2013)* (finding that "generalized, subjective terms like 'quality' and 'reliability'" cannot be considered misrepresentations because they are "puffery on which no buyer would reasonably rely."). Vague statements of ability are also insufficient. *See McElroy, 632 S.W.2d at 135* ("The word 'professional' standing alone should not make any person who might rely on the skills of such purported "professional" take like pablum anything he or she says or does, so as to attach liability . . . when things don't go as planned.").

JTV identifies hundreds of specific statements and omissions that it alleges were misrepresentations intended to induce it into the licensing and services contracts. (*See generally* Doc. 318-2, at 2-246). Some of the misrepresentations were made during presentations and bidding materials, others were made during meetings, phone conversations, and in correspondence over the course of the two-year relationship. (*Id.*) The misrepresentations fall into three general categories.

First, JTV alleges that Sterling made dozens of misstatements regarding the basic capabilities of its software. **[*37]** Sterling assured JTV that its software was suitable for JTV's requirements and that its systems could handle JTV's projected sales volume. For example, Sterling represented that its software systems were "highly interoperable" with other systems, (*id.* at 115, 134), that they could make the WMS, PO, and OMS systems work with the Legacy applications (*id.* at 139-40), and provide JTV with a "totally integrated and operational system" (*id.* at 130). (*See also* Doc. 318-1, at 73.) JTV's CEO testified that Sterling pitched its software as having "out-of-the-box interoperability between the different pieces of the puzzle[.]" (Doc. 318-1, at 51.) Sterling also made specific statements as to the software's unique features, such as its ability to "capture critical information throughout the fulfillment process, develop business rules for the critical information, and expose the results to the user community in a single, consistent, technology platform" (Doc. 318-2, at 27), and its ability to "eliminate the complexity of managing inventory across multiple systems by providing an adaptable solution that enables standardization of systems" (Doc. 318-2, at 10).

Second, at various times in 2006 and 2007, Sterling assured JTV that it had qualified **[*38]** resources, personnel, and planning abilities to implement the Project. For example, Sterling assured JTV that it could provide "consistent project leadership, architecture expertise and business/systems analysis" (*id.* at 32), that Sterling "has the ability to dedicate experienced resources," (*id.* at 241), and that it would "[a]ssign the [] resources necessary for a successful project" (*id.* at 265). Sterling represented that it could implement the software systems within JTV's budget and schedule, and promised to devote a project manager, a solution architect, and a supporting team of technicians. (*Id.* at 178.)

The third type of misrepresentation is closely related to the second and also concerns the expertise and capabilities of Sterling's team. JTV alleges that Sterling represented that it had extensive experience implementing similar Projects for other clients with similar business needs and that other customers were using its software successfully. (*See, e.g.*, *id.* at 141, 230, 241, 244.) Sterling also represented that its team members had "prior experience in a system implementation of similar design, size, interfacing, and complexity of operation." (*Id.* at 205.) Specifically, Sterling claimed that it had delivered "multi-channel, direct to consumer solutions" **[*39]** for several identified retailers. (*Id.* at 173.) The alleged misrepresentations were not made only during the sales cycle; Sterling continued to repeat its representations throughout the Project. Even as the Project fell into difficulties, JTV alleges that Sterling continued its fraud by assuring that it had the ability to complete the Project and that the software would achieve the stated goals.

Like the case at bar, *Dunn Appraisal Co. v. Honeywell Information Systems, Inc.*, involved an equipment and services transaction between a computer manufacturer and a business purchasing new computer systems. 687 F.2d 877 (6th Cir. 1982). The defendant, who was familiar with the plaintiff's business operations, represented that its computers would support the plaintiff's current software programs with little modification. The court's account is similar to JTV's portrayal of the facts in this case:

> [A]lmost from the very beginning the project was an unmitigated disaster. Although the contract called for a "projected" installation date of March 1, 1976, this was postponed until September at SIS's request because the conversion process was proceeding so slowly. At the end of March, HISI informed SIS that it would not convert all of the **[*40]** programs, but only 250, and SIS was forced to hire an independent contractor to complete the job. Even by the fall of 1976, HISI had not delivered all of its 250 programs, and many of those which were delivered were not correct.
>
> It developed that the [system] as installed did not have all of the capabilities it was supposed to have without the purchase of substantial additional accessories. . . . [B]y October 1976, the conversion was such a "botched up mess" that SIS couldn't use either the old machine or the new one to conduct its business with its customers whom it was required to serve.

Id. at 879-80. Finally, in December 1976, Dunn Appraisal terminated the agreement. *Id. at 880*. The trial court determined that defendant made the following misrepresentations, among others:

- the computer system was well-suited to plaintiff's business operations
- installation and conversion would be complete by a particular date
- required modifications would be minor
- the computers had "increased capability over [plaintiff's existing equipment], including communications capability, multi-processing capability, terminalized services and virtual memory capability"
- the computers would "improve [plaintiff's efficiency]"

Id. at 880-83. The **[*41]** trial court held, and the Sixth Circuit affirmed, that the defendant's actual and implied statements were actionable grounds for fraud claims. Discussing the question of whether the statements concerned existing facts, the court of appeals stated:

> We also agree with the district court that the implied representation that the 62/40 would be suitable for the intended use at SIS was a statement regarding a present fact rather than an opinion about the future, because it was a statement regarding the inherent, existing capabilities of the product. General representations that data processing equipment will be suitable for a customer's operations, based upon familiarity with both the equipment's capabilities and the customer's needs, are statements concerning present facts.

Id. at 882 (citations omitted).

Although applying Ohio tort law, the court considered elements common to Tennessee's current version of fraud in the inducement,[7] and Tennessee case law is consistent with the *Dunn Appraisal* court's view of fraud.[8] Tennessee courts agree that intentionally creating false impressions of ability can constitute statements of existing fact to support a fraud claim: "We believe one might subject himself to **[*42]** liability for intentionally or fraudulently creating 'impressions' designed to mislead." *McElroy, 632 S.W.2d at 132-33*; *Brungard v. Caprice Records, Inc., 608 S.W.2d 585, 589 (Tenn. Ct. App. 1980)* (falsely "convey[ing] the impression that [defendant] was a large company with extensive resources at hand for the promotion and distribution of its records" supported a claim for fraudulent inducement); *accord Warren v. Wheeler, 566 N.E.2d 1096, 1100 (Ind. Ct. App. 1991)* (falsely inflating client numbers were statements of existing fact sufficient to support fraud).

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[7] "In Ohio, the elements of fraud are as follows: (1) There must be an actual or implied representation of a matter of fact (2) which relates to the present or past, (3) which was material to the transactions and (4) which was false when made. (5) The statement must be made with knowledge of its falsity, or with reckless disregard for whether it is true or not and (6) with the intent to mislead the other party into relying upon it. (7) The other party must be ignorant of the fact averred, causing (8) justifiable reliance and (9) injury." *Dunn Appraisal Co., 687 F.2d at 882*.

[8] This ruling accords with other jurisdictions. *See, e.g., Accusystems, Inc. v. Honeywell Information Systems, Inc., 580 F. Supp. 474, 482 (S.D.N.Y. 1984)* (representations that software systems were capable of performing multiple functions simultaneously and that they had been successfully used in other businesses were statements of existing fact).

In this case, JTV claims that Sterling sold itself as an established company with proven products, when in reality it was mismanaged and inexperienced, with low-quality software that could not meet the functionality needs for JTV's direct-to-consumer sales operation. It contends that Sterling knew its software could not handle JTV's operations and knew its employees did not have the skill or expertise to design and implement the promised systems, but that it intentionally lied about its abilities to induce JTV into making, and then expanding, the deal. In a nutshell, JTV's theory is that Sterling had knowledge of JTV's unique business needs and knowledge that it could not meet them, but intentionally misled JTV to believe that its software systems were a "functional fit," that they **[*43]** could be easily configured to communicate with one another and with existing systems, and that Sterling had the technical expertise and experience to complete the Project, as shown by its prior success in similar projects. When JTV complained, it claims that Sterling repeated and renewed its previous misrepresentations.

Many of Sterling's alleged misrepresentations may amount to nothing more than generic statements of quality or ability. Phrases such as "maximize configurability" and "improve supply chain efficiency" arguably lack any quantifiable meaning. *See* Baney Corp. v. AGILYSYS NV, LLC, 773 F. Supp. 2d 593 (D. Md. 2011) ("Defendant's statement [in sales literature] that the program would be 'easy to use and perfect for a multi-property environment' is too much like an opinion to constitute a misstatement of fact and it is too vague to justify reliance."). And assurances of "top quality consultants" sets about as measurable a standard of service as assertions that one is a "professional." *Cf.* McElroy, 632 S.W.2d at 135.

However, many of Sterling's statements concern specific attributes of the software, such as its ability to communicate across systems or to simplify inventory and shipping processing by using a single platform. These statements are distinguishable from **[*44]** the classic examples of puffing using general statements of opinion that could apply to most any product or service. A software system is either able to communicate across systems, or it is not. Inventory and shipping processing can either be handled within a single platform, or not. Because Sterling was familiar with its software and with JTV's needs, statements about whether the software can meet those needs may be actionable. *See* Dunn Appraisal Co., 687 F.2d at 882 ("General representations that data processing equipment will be suitable for a customer's operations, based upon familiarity with both the equipment's capabilities and the customer's needs, are statements concerning present facts.").

Sterling also contends that JTV has not demonstrated that these statements are false. In response, JTV again lists dozens of statements, as well as the evidence on which it relies to demonstrate their falsity.[9] Some of this evidence is equivocal. For example, JTV argues Sterling's claim that nWMS (WMS-Inbound) is "highly interoperable with other applications" is fraudulent. As evidence demonstrating the statement's falsity and Sterling's knowledge of that falsity, JTV points to an e-mail chain in which May Bauer, an engineer, **[*45]** asks "I know this sounds like a stupid question but have we fully completed the integration between nWMS and OMS?? Isn't there issues if OMS and nWMS are separate machine and [databases]?" (Doc. 317-1, at 1.) The mere asking of this question proves nothing. And as Sterling points out, Bauer clarifies at her deposition that there had been previous problems when customers had tried to run different versions of nWMS and OMS together, but that WMS and OMS released on the same version were fully interoperable. (Bauer Dep at 97-99.) However, JTV also points to evidence that is more persuasive. For example, in a November 2007 email, a Sterling employee identifies "platform and integration technology" as "technical gaps" that Sterling needs to shore up, indicating that Sterling was aware of its interoperability problems. (Doc. 318-9.)

Similarly, if Sterling knowingly created a *false impression* of itself as an established software company with extensive experience and resources, or of its products as capable of handling functions well outside their actual abilities, then its communications may constitute statements of existing fact that rise above sales talk. To illustrate with just one example, **[*46]** JTV alleges that Sterling claimed to be implementing a similar project for one of JTV's primary competitors. (Doc. 318-1, at 152 ("They gave us information like QVC was a big customer of theirs, and the information that they provide suggests QVC is a big customer of theirs.") Later, JTV learned that the project was of much more limited scope, and was in fact just getting off the ground. (Doc. 318-1, at 151-52.) JTV later discovered that the project was also a gigantic failure. "We relied on the fact

[9] Sterling responds with its own chart explaining why the evidence is taken out of context, or is actually true, or otherwise does not support JTV's theory. (Doc. 343-23.) However, at this stage, the Court is required to draw all inferences in favor of the nonmoving party.

that the big boy in our industry was using them to do a similar project, and we find out that it's a complete disaster . . ." (*Id.* at 150.)

There is some dispute as to when the "complete disaster" at QVC occurred. If that project failed *after* the agreements, representations of the project's existence were not themselves false, and JTV could not have been induced by the project's success. However, to the extent that Sterling implied that its work for QVC was of equivalent magnitude as the proposed JTV project, and that the QVC project was in a sufficiently developed stage to say that it had been a success, these statements may have been false statements sufficient to support JTV's fraud theory. Taking **[*47]** all inferences in JTV's favor, Sterling's representations regarding whether it had the experience and resources necessary to complete large projects for the leader in JTV's industry satisfies the false-impression theory viable under Tennessee law. *See* McElroy, 632 S.W.2d at 132-33.

Within the thousands of statements alleged by JTV to constitute fraud, there are many that amount to mere puffery, but there are also statements of existing fact capable of supporting a claim for fraud. At this stage, the Court need not sort the wheat from the chaff. JTV has produced sufficient evidence to support these claims at this stage, and the Court will **DENY** Sterling's motion for summary judgment as to this argument.

b. False Promises

Tennessee law also recognizes promissory fraud as a basis of a fraud-in-the-inducement claim. Promissory fraud, is a "a type of fraud perpetrated by means of a false promise of future action." Shahrdar v. Glob. Hous., Inc., 983 S.W.2d 230, 237 (Tenn. Ct. App. 1998). An actionable claim requires "a promise of future action without the present intention to carry out the promise." Stacks v. Saunders, 812 S.W.2d 587, 592 (Tenn. Ct. App. 1990); *see also* Keith v. Murfreesboro Livestock Mkt., Inc., 780 S.W.2d 751, 754 (Tenn. Ct. App. 1989).

A party seeking to prove promissory fraud must present some evidence other than the fact of a contract breach and its own subjective belief that fraud has been committed. Oak Ridge Precision Indus., Inc. v. First Tenn. Bank Nat'l Ass'n, 835 S.W.2d 25, 29 n.2 (Tenn. Ct. App. 1992); Stacks, 812 S.W.2d at 593. "Not every **[*48]** broken promise starts with a lie." Am. Cable Corp. v. ACI Mgmt., Inc., No. M199700280C0AR3CV, 2000 Tenn. App. LEXIS 615, 2000 WL 1291265, at *5 (Tenn. Ct. App. Sept. 14, 2000). "When a promise is made in good faith, with the expectation of carrying it out, the fact that it subsequently is broken gives rise to no cause of action, either for deceit, or for equitable relief. Otherwise any breach of contract would call for such a remedy." Houghland v. Sec. Alarms & Servs., Inc., 755 S.W.2d 769, 774 (Tenn. 1988) (quoting Keeton, *et al., Prosser and Keeton on The Law Of Torts*, § 109 (5th ed. 1984)).

Typically, the question of defendant's present intent is a question of fact. Dog House Invs., LLC v. Teal Properties, Inc., 448 S.W.3d 905, 916 (Tenn. Ct. App. 2014). However, "when confronted by a motion for summary judgment supported by evidence, it is incumbent upon a party asserting fraud to produce some competent and material evidence legally sufficient to support his claim of fraud." Fowler v. Happy Goodman Family, 575 S.W.2d 496, 499 (Tenn. 1978). Intent does not necessarily require a showing of ill will; it can be proven by showing knowledge of impossibility. *See* id. at 500 n.3 ("The intention may be shown by any other evidence that sufficiently indicates its existence, as, for example, the certainty that he would not be in funds to carry out his promise." (quoting Restatement (Second) of Torts § 530, Comment (d) (1977))).

JTV characterizes some of Sterling's statements as promises of future performance. Sterling does not deny that it promised competent **[*49]** personnel and that it struggled with staffing the project, but argues that it cannot be liable for fraud because it believed it could deliver on the promises when it made them. Sterling does present evidence that it made attempts to implement the software and to mitigate the problems as they arose. And both parties agree that Sterling continued to replace personnel as it was lost. However, if Sterling knew with certainty that the Project was outside its reach, then its attempts are irrelevant to the question of intent.

JTV points to testimony that suggests Sterling may have known that staffing a project the size and scope of JTV's was possibly outside of its capability. For example, in May 2007—before the Implementation SOW was signed—an internal Sterling email expresses concern about of a "lack of fully trained resources" for the JTV project. (Doc. 318-9, at 30.) A March 2007 email identifies the need "to be creative with the resource constraints." (Doc. 318-6, at 99.) Within that same email chain, a Sterling engineer comments, "[a]s you know, we are very tight on resources and starting three

projects simultaneously is almost impossible." (*Id.*) This evidence is sufficient to create **[*50]** a jury issue as to whether Sterling knew it would not be able to deliver on its promises of consistent high-quality staffing. This is only one of many unanswered factual questions that go to Sterling's knowledge and intent.

Accordingly, JTV has produced sufficient evidence to support its promissory fraud claims at this stage, and the Court will **DENY** Sterling's motion for summary judgment as to this argument.

*** * ***

Having determined that JTV's fraud and misrepresentation claims can proceed on their merits,[10] the Court now turns to whether they can survive Sterling's affirmative defenses:

c. The Contract's Merger and Non-Reliance Clauses

Sterling argues that the merger and anti-reliance clauses in each of the agreements operate to bar JTV's fraud claims. The clauses are typical in their disclaimer of extraneous agreements, representations, and warranties.[11] For example, the 2006 USLA, provides that:

> Each party acknowledges and agrees that there are no covenants, conditions, or other understandings or agreements, oral, written or otherwise, relating to the subject matter of this Agreement, other than as set forth herein, and that (in entering into this Agreement, including any Schedule) each party is not (and will not be) relying on **[*51]** any representation or warranty made by or on behalf of the other party (or any representative thereof) other than as expressly set forth in this Agreement, including the applicable Schedule.

(Doc. 260-8, at § 11(a).) Similarly, the Services Agreement (which is incorporated by reference into the other services related contracts) provides that:

> This Agreement (including its Schedules and CCRs) (i) supersedes and merges in full all prior and contemporaneous proposals, discussions, and agreements between the parties relating to the subject matter hereof, and (ii) constitutes the entire agreement between the parties with respect to the subject matter hereof, including the Services and the Deliverables. The parties may modify or supplement the Agreement only by a written document signed by an authorized representative of each party.
>
> ...
>
> Each party acknowledges and agrees that there are no covenants, conditions, or other understandings or agreements, oral written or otherwise, relating to the subject matter of this Agreement, other than as set forth herein, and that (in entering into this Agreement, including any Schedule or CCR) each party is not (and will not be) relying on any representation or warranty **[*52]** made by or on behalf of the other party other than as expressly set forth in this Agreement, including the applicable Schedule or CCR.

(Doc. 260-10, at § 13(a).)

"The purpose of an integration clause stating that there are no agreements or understandings between the parties other than those reflected in the contract is, of course, to prevent either party from relying upon statements or representations made during negotiations that were not included in the final agreement." *Coral Resources, Inc. v. Gulf & Western Industries, Inc., 756 F.2d 443, 447 (6th Cir. 1985)*.

However, integration clauses do not preclude fraud claims. *Shah v. Racetrac Petroleum Co., 338 F.3d 557, 568 (6th Cir. 2003)*. *See also Lowe v. Gulf Coast Dev., Inc., 1991 Tenn. App. LEXIS 860, 1991 WL 220576 (Tenn. Ct. App. Nov. 1, 1991)*; *Brungard v. Caprice Records, Inc., 608 S.W.2d 585, 588 (Tenn. Ct. App. 1980)*. Similarly, disclaimers of reliance and liability have no application to claims of negligent misrepresentation. *Agristor Leasing v. A.O. Smith Harvestore Products, Inc., 869 F.2d 264, 268 (6th Cir. 1989)* (construing Tennessee law).

Sterling argues that Tennessee law does give effect to integration clauses to bar fraud claims. In support it relies on *Burton v. Hardwood Pallets, Inc.*, an unpublished Tennessee Court of Appeals decision

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[10] Sterling has also filed a motion to strike JTV's supplemental brief and the accompanying affidavit of Felton Lewis. Because the Court does not need to reach this information to deny Sterling's motion for summary judgment as to JTV's lack of evidence of fraud, the Court will **DENY** the motion as **MOOT** as to this portion of the affidavit and brief.

[11] To the extent that JTV's fraud claims are based on representations memorialized in Section H of the Implementation SOW, those claims would, of course, not be barred by the merger and integration clauses because they are not extraneous to the contract.

which relied on the parol evidence rule for its holding that fraudulent inducement and promissory fraud claims were barred by an integration clause. No. E200301439COAR3CV, 2004 Tenn. App. LEXIS 175, 2004 WL 572350, at *2 (Tenn. Ct. App. Mar. 22, 2004). The case that *Burton* cites in support of its holding, however, states that this rule applies only *in the absence of fraud. See* Airline Constr., Inc. v. Barr, 807 S.W.2d 247, 259 (Tenn. Ct. App. 1990). The Court **[*53]** therefore does not find this authority persuasive. Sterling also relies on a federal district court opinion, but that opinion expressly bases its ruling entirely on *Burton. See* Guesthouse Int'l Franchise Sys., Inc. v. British Am. Properties MacArthur Inn, LLC, No. 3:07-0814, 2009 U.S. Dist. LEXIS 8570, 2009 WL 278214, at *7 (M.D. Tenn. Feb. 5, 2009) (holding that *Burton* altered prior law which had held that a merger clause will not categorically bar a fraudulent inducement claim). Indeed, subsequent courts have held that Tennessee law continues to adhere to the rule that the parol evidence rule does not apply to fraudulent inducement or fraudulent misrepresentation claims. *See, e.g.,* Arch Wood Prot., Inc. v. Flamedxx, LLC, 932 F. Supp. 2d 858, 863 (E.D. Tenn. 2013); Ewan v. Hardison Law Firm, No. W2011-00763-COA-R3CV, 2012 Tenn. App. LEXIS 240, 2012 WL 1269148, at *7 (Tenn. Ct. App. Apr. 16, 2012) (holding that integration clause did not bar fraud claims).

The merger and anti-reliance clauses thus do not preclude JTV's fraud and misrepresentation claims.

d. Waiver by Ratification

Sterling also argues that JTV waived its fraud claims by agreeing to a modification of the contract in April 2008 and continuing to perform under the contract after learning of the alleged fraud in February 2008. A party who discovers a fraud must act promptly to repudiate the contract. Fed. Deposit Ins. Corp. v. Newton, 737 S.W.2d 278, 281 (Tenn. Ct. App. 1987). If the party ratifies or affirms the contract with full **[*54]** knowledge of the fraud, he waives his right to recover for the fraud. *See* Graham v. First American Nat'l Bank, 594 S.W.2d 723, 727 (Tenn. Ct. App. 1979). The question of actual knowledge is relevant here because waiver requires "a voluntary relinquishment of a known right." Freeman Mgmt. Corp. v. Shurgard Storage Centers, Inc., No. 3:06CV0736, 2007 U.S. Dist. LEXIS 38020, 2007 WL 1556604, at *10 (M.D. Tenn. May 24, 2007) (quoting Dallas Glass of Hendersonville, Inc. v. Bituminous Fire & Marine Ins. Co., 544 S.W.2d 351, 354 (Tenn. 1976)).

It is clear that JTV knew Sterling had made some misrepresentations in early 2008. However, there were critical elements of the alleged scheme that did not come to light until later. Most importantly, JTV did not know that the software systems did not have the basic interoperabilities and other features they believed it would have. Charles Wagner, JTV's General Counsel testified:

> We were told that this system was interoperable and seamlessly integrable into our systems. The very small part that they put in, as soon as it went in we realize it was not interoperable. It was not easily integrable into our systems. It didn't talk to each other the way it was supposed to . . . We learned an awful lot of that after it was installed.

(Doc. 318-1, at 149.) JTV also learned that Sterling's claims of a similar project at JTV's competitor were not as represented—the competitor only became a customer around the same time **[*55]** as JTV and only licensed a WMS system. (*Id.* at 150-52.) There are other facts in dispute, but these facts alone create a question for the jury as to when JTV had the full knowledge of fraud requisite to voluntarily waiver of its fraud claims.

e. Rescission as a Prerequisite to Fraud Claims

Sterling also claims that JTV's fraud claims are barred because it did not "rescind" the contract, i.e., return the defective software. Sterling argues that retaining the benefits of the contract amounted to a ratification of it. Tennessee law generally requires a party wishing to void a contract for fraud to promptly return the benefits of the contract. Brandon v. Wright, 838 S.W.2d 532, 534 (Tenn. Ct. App. 1992) ("The right to rescind a contract for fraud must be exercised immediately upon its discovery, and any delay in doing so, and continued employment, use and occupancy of property received under a contract will be deemed an election to confirm it."). A defrauded plaintiff is not, however, required to tender back the benefits of the contract where to do so would be impossible or impracticable.

> The matter has been thus summarized: That a party seeking rescission of a contract must return, or offer to return, what he has received under it, and thus put the other party **[*56]** as nearly as is possible in his situation before the contract, is the law. But this rule is wholly an equitable one; impossible or unreasonable things, which do not tend to accomplish equity in the particular transaction, are not required.

Staggs v. Herff Motor Co., 216 Tenn. 113, 390 S.W.2d 245, 249 (Tenn. 1965) (internal citations and quotations omitted).

JTV argues that it did not "tender back" the software, because it would have been "practically impossible" to separate JTV's software from its own without prejudicing its business. (Doc. 316, at 41-42, 51-54.) JTV effectively repudiated the contract when it severed the relationship and informed Sterling of its dissatisfaction in October 2008. *See* *Highland Rim Constructors v. Atlantic Software Corp., No. 01-A-01-9104CV00147, 1992 Tenn. App. LEXIS 675, 1992 WL 184872 (Tenn. Ct. App. Aug. 5, 1992)* (holding that the buyer "rejected" the computer system when it notified seller of dissatisfaction with services).

To the extent a plaintiff in a fraud claim must return the benefit of the fraudulent contract, there is a factual dispute as to whether JTV's failure to do so was excused by the practical impossibility of extracting the software from JTV's systems after the software had become integrated. (*See* Doc. 318-1, at 99 (Meystrik testimony that returning the software "would be a very difficult thing to do, if not impossible".) Equity is not served by forcing **[*57]** a wronged company to choose between financial ruin and exercise of its rights to recover damages for fraud. Accordingly, the Court will **DENY** Sterling's motion as to this argument.

3. Negligence Claims

Sterling next argues JTV has failed to allege a duty independent of the contract sufficient to support JTV's negligence and gross negligence claims and that those claims are precluded by Tennessee's[12] economic loss doctrine. To establish a prima facie case of negligence under Tennessee law, Plaintiff must show that a duty existed, that the duty was breached, that the duty caused an injury, and that plaintiff suffered damages. *Bennett v. Putnam Cty., 47 S.W.3d 438, 443 (Tenn. Ct. App. 2000)*. Under Tennessee law, a contract neither extinguishes common law duties nor creates common law duties. Where the only duty alleged arises from a contractual obligation, its breach cannot form the basis of a parallel negligence claim:

> While a contract may create a state of affairs in which a general duty arises the breach of which may constitute actionable negligence, negligence will not lie where the only duty breached is one created by contract. It is only where there is a breach of a general duty, even though it may arise out of a relationship created by contract, **[*58]** that breach of duty may constitute actionable negligence.

Marquette Cement Mfg. Co. v. Louisville & N. R. Co., 281 F. Supp. 944, 947 (E.D. Tenn. 1967). "[W]hen two parties enter into a contractual agreement, their obligations to each other arise out of the contract itself, so that a violation of the contractual duty supports an action in contract rather than in tort." *Williams v. SunTrust Mortg., Inc., No. 3:12-CV-477, 2013 U.S. Dist. LEXIS 41028, 2013 WL 1209623, at *4 (E.D. Tenn. Mar. 25, 2013)* (citing *Permobil, Inc. v. Am. Express Travel Related Servs., Inc., 571 F. Supp. 2d 825, 842 (M.D. Tenn. 2008)* ("[I]f the only source of duty between a particular plaintiff and defendant is their contract with each other, then a breach of that duty, without more, ordinarily will not support a negligence action.")) (other citations omitted).

Thus, in order to prove its negligence claim, JTV must

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[12] Sterling also argues that Ohio's independent duty doctrine bars JTV's claims for negligence. The independent duty doctrine is Ohio's version of the economic loss rule. "Ohio law prevents the recovery of purely economic losses . . . not based upon a tort duty independent of contractually created duties." *Pavlovich v. Nat'l City Bank, 435 F.3d 560, 569 (6th Cir. 2006)* (citations omitted). There is no dispute that JTV's tort claims are governed by Tennessee law. Because the argument concerns the validity of tort claims brought under Tennessee law, Ohio's independent duty doctrine is inapplicable here. To the extent Sterling argues that the parties' decision to memorialize certain representations in Section H of the implementation SOW transforms claims based on these representations from fraud claims into breach of contract claims (Doc. 259, at 47-49), the Court rejects this argument. The Eastern District of New York has persuasively rejected a similar argument:

> It simply cannot be the case that any statement, no matter how false or fraudulent or pivotal, may be absolved of its tortious impact simply by incorporating it verbatim into the language of a contract. Once you have told someone that you hold title to the Brooklyn Bridge to entice that person to buy it, executing a contract to sell it that states that you hold title to the Brooklyn Bridge does not make your prior statement any less fraudulent, nor does it convert the fraud into a breach of contract.

In re CINAR Corp. Secs. Litig., 186 F. Supp. 2d 279, 303 (E.D.N.Y. 2002).

show that Sterling owed it a common law duty in addition to its contractual **[*59]** obligations. JTV's complaint alleges that Sterling assumed a duty of ordinary care with respect to its contract performance. (Doc. 32, ¶ 152.) But where the only claim for negligence is based on a breach of a contract obligation and there is no extra-contractual duty, the first element of the tort claim fails. *Silvestro v. Bank of Am., N.A., No. 3-13-0066, 2013 U.S. Dist. LEXIS 37675, 2013 WL 1149301, at *4 (M.D. Tenn. Mar. 19, 2013)*. JTV also argues that Tennessee law imposes a professional duty of care outside of a contractual obligation. JTV points to a Tennessee Supreme Court case in which the court quoted the *Restatement § 299A* as stating that "one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities." *Cox v. M.A. Primary & Urgent Care Clinic, 313 S.W.3d 240, 259 (Tenn. 2010)*. While the quote is correct, the application is misplaced. *Cox* was a medical malpractice case, and the court's discussion concerned the applicable standard of care, not the imposition of a duty; there was no question of whether a duty existed. The purpose of *Restatement § 299A* is to define the standard of care for professionals; it does not to create a duty where none otherwise exists:

> This Section is thus a special application **[*60]** of the rule stated in *§ 299*. It applies to any person who undertakes to render services to another in the practice of a profession, such as that of physician or surgeon, dentist, pharmacist, oculist, attorney, accountant, or engineer. It applies also to any person who undertakes to render services to others in the practice of a skilled trade, such as that of airplane pilot, precision machinist, electrician, carpenter, blacksmith, or plumber. *This Section states the minimum skill and knowledge which the actor undertakes to exercise* . . .

Restatement 2d of Torts, § 299A, cmt. b (emphasis added). *See also Cleveland Indians Baseball Co., L.P. v. N.H. Ins. Co., 727 F.3d 633, 644 (6th Cir. 2013)* (J. Clay, dissenting) ("A professional's status as a professional ordinarily concerns the standard of care, rather than whether or not the professional owed a duty to the particular plaintiff."). In other words, JTV is putting the cart before the horse; *§ 299A* does not impose a duty, it defines one. Where no duty is shown, *§ 299A* is irrelevant.

JTV cites only one case for its argument that software professionals should be held to professional standard of care separate and apart from the contract. In *Invacare Corp. v. Sperry Corp.*, the court held that Ohio law allows a claim for negligence to proceed concurrently with a breach of contract claim. **[*61]** *612 F. Supp. 448, 453 (N.D. Ohio 1984)*. However, *Invacare* also relied on this mistaken understanding of *§ 299A*, and even judges within the Northern District of Ohio have failed to follow *Invacare* on this point. A more recent case, addressing a negligence claim against computer professionals, rejected *Invacare* and held that "negligence that results in intangible economic loss cannot support an action in tort when a contract governs the relationship between two or more parties." *Heidtman Steel Products, Inc. v. Compuware Corp., No. 3:97CV7389, 2000 U.S. Dist. LEXIS 21607, 2000 WL 621144, at *14 (N.D. Ohio Feb. 15, 2000)* order clarified, *No. 3:97CV7389, 2000 U.S. Dist. LEXIS 19458, 2000 WL 33125464 (N.D. Ohio Nov. 13, 2000)*. The Court finds the reasoning of *Heidtman* persuasive. The Court is especially reluctant to create a free-standing duty where, as here, the dispute is between two highly sophisticated parties operating under a tightly negotiated contract.

In this case, the entirety of Sterling's duty arose from the contract. The parties' only relationship was created by an arms-length agreement. Although JTV asserted that Sterling had a duty of ordinary care with respect to its contract performance, it has not alleged any facts that would create an independent common law duty of care to support a tort claim. Tennessee law does not impose an independent duty of care under these circumstances, and any breach that occurred was a breach of a contract obligation, **[*62]** not a tort duty. Accordingly, the court will **GRANT** Sterling's motion for summary judgment as to JTV's claim for negligence and gross negligence. The Court need not reach the economic loss doctrine.

4. Warranty Claims

JTV's complaint alleges two counts of warranty breach: one for the USLA warranties and one for the Implementation SOW warranties. The SOW count alleges that Sterling breached an express warranty to complete the Project within the estimated budget and an implied warranty as to the quality of performance. (Doc. 32, at ¶¶ 162-63). The USLA count alleges that Sterling made express and implied warranties that its software was integrable with other systems. (Doc. 32, at ¶¶ 167-68, 170). JTV also alleges that Sterling implied that its software was merchantable and fit for its particular

purpose of managing warehouse, purchase, and operations functions. (Doc. 32, at ¶¶ 171-72).

Sterling argues that JTV's claims for breach of express and implied warranties must be limited to the express warranties contained in the contract, and that the limitation of liability provision should limit JTV's damages. JTV responds that Sterling waived its affirmative defenses when it failed to disclose **[*63]** them in its answer. JTV asserts that it would be prejudiced by the defenses because it did not conduct discovery on the issue and discovery has now closed.

JTV is correct that failure to raise an affirmative defense in a responsive pleading can result in waiver. However, the waiver rule is not absolute. "The purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it. A defendant does not waive an affirmative defense if the defense is raised at a time when plaintiff's ability to respond is not prejudiced." *R.H. Cochran & Assocs., Inc. v. SheetMetal Workers Intern, Ass'n, 335 F. App'x. 516, 519 (6th Cir. 2009)* (internal citations and punctuation omitted). Thus, raising an affirmative defense in a dispositive motion can be sufficient to preserve a defense not asserted in an answer. *Smith v. Sushka, 117 F.3d 965, 969 (6th Cir. 1997)*. Further, contract construction is a legal question, not a factual one, and it is unclear what further discovery JTV would have conducted that would be material to the question. The terms of the contract are not disputed, and JTV cannot claim that it was unaware of the limitations they contained. The Court sees no prejudice to JTV that will result from enforcing the parties' contract.

Moreover, while it is true that Sterling did not explicitly reference the warranty defense **[*64]** in its answer, it did state that JTV's claims "are barred by the express terms of [the various agreements]." (Doc. 55, at 2.) Moreover, Sterling did in fact raise the warranty defense very early. In its pre-answer motion to dismiss and supporting brief, Sterling sought to dismiss JTV's implied warranty claims based on the same disclaimer provisions it argues now. (Doc. 19, at 20-21). Sterling's motion was filed in July of 2009, less than a month after the plaintiff's amended complaint. JTV responded to the argument by asserting that disclaimers have no application to fraud claims. (Doc. 22, at 29.) The Court finds that, between the answer's reference to the agreements' express terms and the arguments made in Sterling's early dispositive pleadings, JTV had sufficient notice of the warranty to satisfy the purpose of Rule 8(c). Accordingly, Sterling did not waive its warranty defenses.

Warranty disclaimers and clauses limiting liability do not apply to restrict Tennessee fraud claims. *Ingram v. Cendant Mobility Fin. Corp., 215 S.W.3d 367, 374 (Tenn. Ct. App. 2006)*; *Agristor Leasing v. Saylor, 803 F.2d 1401, 1407 (6th Cir. 1986)*. Plaintiff's fraud claims are not precluded and, if a jury finds the defendant liable for fraud and/or misrepresentation, the clauses will not operate to limit damages. However, JTV is also proceeding with alternative **[*65]** theories of recovery, a practice permitted by Tennessee law, as explained *infra*. Thus, finding that the clauses do not apply to the plaintiff's fraud claims does not extinguish those claims.

There is no dispute as to the content of the warranty and liability exclusions. Section 5(a) of the USLA provides that Sterling warranted the "functionality set forth for the Software in the applicable user documentation" for the sixteen months following the agreement. The USLA disclaimed all other warranties under Section 5(b):

> EXCEPT FOR THE EXPRESS WARRANTIES SET FORTH IN SECTION 5(A), ALL OTHER WARRANTIES ARE DISCLAIMED. STERLING MAKES NO OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO THE IMPLIED WARRANTIES OF NONINFRINGEMENT, MERCHANTABILITY, AND FITNESS FOR A PARTICULAR USE OR PURPOSE.

(emphasis in original). The Services Agreement's Section 8(c) contains an identical warranty disclaimer, in addition to the following warranty:

> Sterling Commerce warrants to [JTV] that the Services will be performed in a professional and workmanlike manner. If, within ten (10) days after completion of any defined portion or segment of the Services, Customer notifies Sterling Commerce that such portion or segment of the Services was not performed in conformance with such warranty, Sterling will, at **[*66]** its sole option, either re-perform or correct such portion or segment of the Services so that it conforms with such warranty . . . or refund to Customer the fees paid for such portion or segment of the Services.

(Doc. 33-4, at § 8(a).) Both the USLA and the Services Agreement contain a limitation of liability ("LOL") clause restricting damages to those sums paid under the contracts. The LOL clause also provides that:

> STERLING COMMERCE . . . WILL [NOT] BE LIABLE (UNDER ANY LEGAL THEORY) FOR

> DAMAGES OR OTHER AMOUNTS THAT EXCEED THE AMOUNT OF THE LICENSE OR SERVICE FEEES PAID . . . STERLING COMMERCE AND THE THIRD PARTY VENDORS ARE NOT LIABLE FOR CONSEQUENTIAL, INCIDENTAL, INDIRECT, SPECIAL, EXEMPLARY, OR PUNITIVE DAMAGES, OR LOST PROFITS . . . THE FOREGOING LIMITATIONS OF LIABILITY AND DISCLAIMERS OF DAMAGES APPLY REGARDLESS OF THE FORM IN WHICH AN ACTION (LEGAL, EQUITABLE OR OTHERWISE) MAY BE BROUGHT WHETHER IN CONTRACT, TORT, OR OTHERWISE . . . [THE LIMITATIONS] ARE AN ESSENTIAL ELEMENT OF THE BARGAIN BETWEEN THE PARTIES (WITHOUT WHICH THE TRANSACTIONS CONTEMPLATED BY THIS AGREEMENT WOULD NOT OCCUR) AND WILL APPLY EVEN IF A REMEDY FAILS IN ITS ESSENTIAL PURPOSE.

(Doc. 33-2, at § 8 (emphasis in **[*67]** original).)

Whether in a goods or services contract, Ohio permits parties to determine what warranties will attach to a particular transaction. Under Ohio's version of the U.C.C., the implied warranties of merchantability can be excluded by conspicuous terms including a specific reference to merchantability. *Ohio Rev. Code Ann. § 1302.29(B)*. The implied warranty of fitness can be excluded by a term limiting warranties to those expressly included in the agreement. *Id.* The disclaimers in § 8(c) of the Services Agreement and § 5(a) of the USLA are written in all capital letters, and they specifically refer to both merchantability and fitness for a purpose. They are thus sufficient to preclude implied warranties of merchantability under both the U.C.C. and Ohio law governing services contracts. *DG Equip. Co. v. Caterpillar, Inc., No. 3:08-CV-317, 2008 U.S. Dist. LEXIS 86905, 2008 WL 4758672, at *4 (S.D. Ohio Oct. 27, 2008)*; *Battelle Mem. Inst. v. Nowsco Pipeline Servs., 56 F. Supp. 2d 944, 953 (S.D. Ohio 1999)*. The general language excluding all other warranties is likewise sufficient to disclaim the warranties not expressly included in the agreements. *Battelle, 56 F. Supp. 2d at 953*. Furthermore, this was an arms-length transaction between sophisticated corporations who are not ignorant to the import of warranty disclaimers. The parties agreed to the contract terms, and the Court will uphold them. *See Flex Homes, Inc. v. Ritz-Craft Corp of Mich., Inc., No. 07CV1005, 2008 U.S. Dist. LEXIS 21339, 2008 WL 746669, at *7 (N.D. Ohio Mar. 18, 2008) aff'd*, *491 F. App'x 628 (6th Cir. 2012)*. There being no issues **[*68]** of material fact, the Court **GRANTS** Sterling's motion for summary judgment as to JTV's implied and extraneous warranty claims.

5. Limitations on Damages

Sterling asserts that any recovery must be limited by the choice of remedy and damages limitations provisions. JTV argues that it should be permitted to recover consequential damages under Ohio's essential-purpose exception. Whether in a goods or services transaction, Ohio generally permits contract parties to limit and/or exclude remedies and damages. *Ohio Rev. Code Ann. § 1302.93*; *Collins v. Click Camera & Video, Inc., 86 Ohio App. 3d 826, 621 N.E.2d 1294, 1298 (Ohio Ct. App. 1993)*. Absent unconscionability or other offense to public policy, limitations of liability are valid tools of risk allocation. *Collins, 621 N.E.2d at 1298* (citations omitted). However, Ohio law permits plaintiffs to pursue contractually limited damages where the "essential purpose" of a contractual remedy fails. *Ohio Rev. Code Ann. § 1302.93* cmt. 1; *Nordisk Aluminum A/S v. Stolle Corp., No. C-3-94-136, 1995 U.S. Dist. LEXIS 22179, 1995 WL 1671911, at *6 (S.D. Ohio Sept. 11, 1995)*.[13] A remedy fails of its essential purpose "only where the seller is unwilling or unable to make repairs within a reasonable time." *Nordisk Aluminum, 1995 U.S. Dist. LEXIS 22179, 1995 WL 1671911 at *6*; *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co., 42 Ohio St. 3d 40, 537 N.E.2d 624, 640 (Ohio 1989)*.

JTV claims that the contracts have failed of their essential purpose because Sterling was not willing to come back and fix the problems without demanding additional compensation. (Doc. 318-1, at 123.) Sterling contends **[*69]** that there is no failure of essential purpose, because the systems are still in use today, and Sterling was willing and able to fix any problems in 2008. (Doc. 260-34, at 8-9, 10-13.) There is a question of fact as to whether Sterling was unable or unwilling to cure the problems within a reasonable time. Accordingly, Sterling's motion is **DENIED** as to this argument.

6. Election of Remedies

To provide some clarity for the parties moving forward, the Court will address the "election of remedies"

[13] Sterling challenges JTV's failure to cite Tennessee law regarding the essential purpose exception; however, the contracts here are governed by Ohio law, not Tennessee law.

question that was previously raised by the Defendant's motion to dismiss and was briefed by both sides. (Docs. 39, 45, 46.) Sterling argued that JTV could not assert fraud and breach of contract claims because the theories were not consistent. The Court found that JTV was entitled to present alternate theories of relief, but declined to address the election of remedies argument at the early pleading stage. (Doc. 52, at 11.) "[T]o require a party to elect between inconsistent theories before the facts in the case are developed would work a great injustice." *Petty v. Darin, 675 S.W.2d 714, 717 (Tenn. Ct. App. 1984)*.

The election of remedies doctrine is intended to prevent a plaintiff from recovering multiple times for a single wrong. *Concrete Spaces, Inc. v. Sender, 2 S.W.3d 901, 909 (Tenn. 1999)*. The Tennessee Supreme **[*70]** Court has stated that "submitting incompatible and alternative theories of recovery to a jury creates no conflict or duplicative award because until the jury makes its findings of liability, no double recovery can exist." *Id.* Where a plaintiff proceeds to trial under multiple theories, the jury will be permitted to find the defendant liable under multiple theories and to determine damages for each theory (including punitive and statutory damages where available). *Id.* If a jury finds the defendant liable for more than one claim based on a single act, a plaintiff must elect which claim to recover under. *Id.* In accordance with the *Concrete Spaces* opinion, JTV will be entitled to present its claims to a jury.

The Court acknowledges and instructs the parties to be mindful of the difficulties that this case will present at trial. Not only could the inconsistent arguments confuse the jury, but there is the potential for evidentiary conflicts if evidence relevant to one claim is prejudicial to another. To name just one potentially difficult issue, the prospect of applying the parol evidence rule under the conflicting theories is troublesome. The parties are thus instructed to be mindful of **[*71]** the particular complexities that this case will present and to work together to resolve issues of law prior to trial.

IV. CONCLUSION

Based on the foregoing, JTV's Motion for Partial Summary Judgment is **DENIED** (Doc. 87); Sterling's motion to strike Chris Meystrik's affidavit is **GRANTED IN PART** and **DENIED IN PART** (Doc. 333); Sterling's motion to strike JTV's supplemental brief and the affidavit of Felton Lewis is **DENIED AS MOOT** (Doc. 379), and Sterling's motion for summary judgment and partial summary judgment is **GRANTED IN PART** and **DENIED IN PART** (Doc. 258).

Specifically, Sterling's motion for summary judgment is **GRANTED** as to JTV's claim under the Tennessee Consumer Protection Act (count four), and **GRANTED** as to JTV's claim for negligence and gross negligence (count five). Sterling's Motion for Summary Judgment is **DENIED** as to JTV's claims for fraud in the inducement, promissory fraud, and negligent misrepresentation (Counts One, Two, and Three). Sterling's motion for summary judgment is **GRANTED** as to JTV's implied and extraneous warranty claims. Sterling's motion for a judgment excluding consequential damages will be **DENIED**.

SO ORDERED.

/s/ Travis R. McDonough

TRAVIS R. MCDONOUGH

UNITED [*72] STATES DISTRICT JUDGE

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