IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

BART A. BROWN, JR., AS CHAPTER 7 TRUSTEE FOR: FOXMEYER CORPORATION, FOXMEYER DRUG COMPANY, HEALTHCARE TRANSPORTATION SYSTEMS, INC., MERCHANDISE COORDINATOR SERVICES CORPORATION, FOXMEYER SOFTWARE, INC., AND HEALTH MART, INC.,	)	Civil Action No. 99-108 (GMS)
Plaintiff,	)	
v.	)	
THE BUSCHMAN COMPANY, WHITE SYSTEMS, INC., McHUGH SOFTWARE INTERNATIONAL, INC., ALVEY SYTEMS, INC., AND PINNACLE AUTOMATION, INC.	)	
Defendants,	)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On February 26, 1999, plaintiff Bart Brown ("Trustee"), filed this complaint as Chapter 7 trustee on behalf of the above named plaintiff corporations. The Trustee's complaint arises out of transactions that the defendants -- Buschman, White, McHugh, Alvey, and Pinnacle -- entered into with the Foxmeyer Corporation ("Foxmeyer"). The Trustee alleges that the defendants intentionally or negligently misrepresented their ability to install the warehouse computer equipment Foxmeyer ordered, and that this failure resulted in Foxmeyer's ultimate financial demise. Count One alleges breach of contract against McHugh and Buschman. Count Two alleges breach of contract against White on a third party beneficiary theory. Count Three alleges breach of express warranties against

McHugh and Buschman. Count Four alleges Breach of Express and Implied Warranties against Buschman, McHugh, White, and Alvey. Count Five alleges fraudulent misrepresentation against all of the defendants. Counts Six and Seven allege negligent misrepresentation and negligence, respectively, against all defendants. Count Eight alleges promissory estoppel against Buschman, McHugh, White, and Pinnacle. The Trustee seeks, *inter alia*, consequential damages as a result of the defendants' alleged breaches and misrepresentations.

Presently before the court are two motions to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). McHugh has filed one motion to dismiss (D.I. 17) and the remaining defendants have filed a separate motion (D.I. 24). In their motions, the defendants raise similar defenses. McHugh argues that Count One should be dismissed because it is dependent on the breach of express warranties that were not breached or implied warranties which were properly disclaimed.[1] White alleges that the Trustee has not properly plead the terms of the contract it allegedly breached. In response to Counts Three and Four, McHugh and Buschman aruge that the warranties were properly disclaimed, while White and Alevy argue that the lack of a contract bars any warranty claims. The defendants further assert that Count Five should be dismissed for failure to plead with specificity and failure to allege scienter. Additionally, the defendants allege that the negligent misrepresentation and negligence claims are precluded by the economic loss doctrine. Finally, Buschman, McHugh, White, and Pinnacle argue that Count Eight should be dismissed because promissory estoppel does not apply to a written contract, or, in the alternative, the statute of frauds will bar the claim.

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[1] Buschman has not moved to dismiss the breach of contract or express warranty claims against it in Counts One and Three. Therefore, the plaintiff will be permitted to proceed against Buschman on these claims.

The court agrees with the defendants that certain of the claims should be dismissed. However, the court also finds that other claims may be viable. The court will, therefore, deny the motions to dismiss as to Counts One, Three (as to the warranty to use best efforts only), and Eight (as to White and Pinnacle). However, the court will dismiss the claims stated in Counts Two, Three (as to any remaining warranties), Four, Five, Six, Seven, and Eight (as to McHugh and Buschman). Additionally, the court will strike all of the non-involved debtor plaintiffs (Healthcare Transportation Systems, Inc., Merchandise Coordinator Services Corporation, Foxmeyer Software, Inc., and Health Mart, Inc.) from this action. The court will now explain the reasons for its ruling.

II. FACTS

Foxmeyer was a distributor engaged in buying and selling medical supplies to hospitals and pharmacies throughout the nation. It had been in business for nearly a century prior to its bankruptcy, and was the fourth largest distributor of pharmaceuticals in the United States. According to Foxmeyer, the nature of its business dictated that customer orders be filled as quickly and accurately as possible. In 1993, Foxmeyer began exploring ways to achieve greater distribution efficiencies in its Ohio warehouse, known as the WCH warehouse. Foxmeyer eventually began discussions with the "Pinnacle Companies"- Buschman, White, Alvey, Pinnacle, and McHugh. The Pinnacle Companies proposed that they could create a fully integrated warehousing system for Foxmeyer. Buschman would provide the conveyers (which were designed by Alvey), White would provide the carousels, and McHugh would provide the software. Pinnacle was responsible for managing and coordinating the projects.

Foxmeyer alleges that the Pinnacle Companies made various statements during the contract negotiations.[2] First, Foxmeyer asserts that the Pinnacle Companies stated that their system would enable Foxmeyer to process 135,000 invoices per night, save money, achieve faster delivery, and otherwise increase productivity. (D.I. 1 at ¶¶ 20,21.) Second, the Pinnacle Companies touted the technical expertise of its staff and its ability to complete the project by April 1995. (*Id*. at ¶ 21.) Third, the Pinnacle Companies made various representations about the quality of their product in an Executive Summary, using terms such as the "finest" equipment, the "best" equipment," "seamless data communications,"and the like. (*Id.*) Finally, the Pinnacle Companies allegedly made numerous statements regarding their skill and experience at working together as a coordinated team.

Foxmeyer alleges that based in part on these representations, it entered into a contract with the Pinnacle Companies in September 1994. On September 1, 1994, Foxmeyer signed a contract with McHugh wherein McHugh agreed to "develop, assemble and provide to Customer [Foxmeyer Drug] a computer system . . . consisting of certain data-processing systems and programs . . ." (D.I. 19 at ¶ 1.1 (McHugh Contract)). McHugh does not mention any of the other Pinnacle Companies in the contract. Section 6 of the contract discusses warranties. In section 6.1, McHugh warrants that its equipment will conform in all material respects to specifications, but that this warranty would expire after one year. (*Id.* at ¶ 6.1.) McHugh further warranted to use its "best efforts" in resolving any mechanical failures. Additionally, section 6.3 contains a warranty disclaimer stating that "except as expressly set forth in this agreement, vendor [McHugh] disclaims any and all promises,

[2] Due to sheer numerosity, the court will not delineate each individual statement allegedly made by the Pinnacle Companies. The court has grouped the statements into the four categories that are described above.

representations, and warranties, express or implied, with respect to the computer system . . . including all warranties . . . of merchantability or fitness for a particular purpose . . ." (*Id.* at ¶ 6.3) The disclaimer is in the same type size and font as the surrounding sections and paragraphs. Finally, the McHugh Contract indicated that Wisconsin law would control, and that the contract represented the final agreement between the parties. (*Id.* at ¶¶ 13.8, 13.9.)

On September 9, 1994, Foxmeyer signed a contract with Buschman, wherein Buschman agreed to supply both the Buschman conveyors and the White carousels. (According to the Trustee, White would subcontract with Buschman. (D.I. 1 at ¶ 24.)) Article 16 of the Buschman contract stated. "THERE ARE NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OTHER THAN AS SPECIFICALLY SET FOR ABOVE." (D.I. 25, Exh. A at 119 (The Buschman Contract).) The typeface is completely in capital letters, whereas the surrounding paragraphs are printed in normal sentence case. The contract also indicates that it should be interpreted according to Ohio law. (*Id.* at 120.)

Shortly after the contracts were signed, the Pinnacle Companies began working on their various portions of the warehouse inventory system. As the work progressed, the system experienced numerous problems. There were several problems with Buschman's components, and McHugh's computer software was incompatible with the other Pinnacle Companies' products. Moreover, Foxmeyer alleges that rather than working together, the Pinnacle Companies bickered endlessly as it was apparently the first time these particular Pinnacle systems (conveyors, carousels, and software) were integrated into one system. Foxmeyer alleges that these malfunctions caused the WCH warehouse to open in August 1995, five months later than scheduled.

In February 1996, Foxmeyer complained to the Pinnacle Companies about the lack of coordination and project management. The "Pinnacle Task Force" was formed to address the problems. Despite the efforts, the WCH warehouse system was not fully operational until August 1996. Foxmeyer alleges that the cost overrun, coupled with the extra money it expended to compensate for the faulty warehouse, cost it millions of dollars. Moreover, Foxmeyer alleges that it suffered "massive losses of inventory." (D.I. 1 at ¶ 37.) Foxmeyer filed for Chapter 7 bankruptcy in August 1996, and was liquidated in November 1996. In November 1996, Foxmeyer's purchaser signed a document indicating that all warranty work by McHugh was complete.

III. STANDARD OF REVIEW

In ruling on a motion to dismiss, the factual allegations of the complaint must be accepted as true. *See Graves v. Lowery*, 117 F.3d 723, 726 (3d Cir. 1997); *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir.1996). Moreover, a court must view all reasonable inferences that may be drawn from the complaint in the light most favorable to the non-moving party. *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Schrob v. Catterson*, 948 F.2d 1402, 1405 (3d Cir. 1991). A court should dismiss a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *See Graves,* 117 F.3d at 726; *Nami,* 82 F.3d at 65 (both citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)).

IV. DISCUSSION

The court will now determine whether the Trustee's claims will be dismissed. Before discussing the claims, however, the court will address the choice of law issues presented.

A. Choice of Law

The court accepts the view of the parties that Wisconsin law governs the McHugh contract and Ohio law governs the remaining defendants. A federal district court sitting in diversity must apply the choice of law rules of the state in which it sits to determine which state's law governs the controversy before it. *Hionis Int'l Enterprises, Inc. v. Tandy Corp*., 867 F. Supp. 268, 271 (D. Del. 1994) (citing *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975); *Klaxon Co. v. Stentor Mfg. Co*., 313 U.S. 487, 496 (1941)). Therefore, the court will apply Delaware's choice of law rules.

In Delaware, express choice of law provisions in contracts are generally given effect. *See Weiss v. Northwest Broadcasting*, 140 F.Supp.2d 336, 342 (D.Del. 2001) (citing *Hionis*, 867 F.Supp. at 271. In the present case, the McHugh contract clearly states that it will be construed according to Wisconsin law. Similarly, the Buschman contract states that Ohio law will control. The parties do not dispute these assertions, and the court sees no reason to disturb the parties' choice of law. The court will, therefore, apply Wisconsin law to the claims against McHugh and Ohio law to the claims against the remaining defendants.[3]

[3] The court recognizes that White, Alvey, and Pinnacle were not parties to the Buschman contract. Nevertheless, their actions are also governed by Ohio law. In Delaware, "the place of performance" must be considered. *Liggett Group v. Affiliated FM Ins. Co.*, 788 A.2d 134, 141 (Del. Super. 2001). In the present case, the WCH warehouse - the place of performance - was located in Ohio. Therefore, the court will also apply Ohio law to the claims against the non-contracting parties.

B. Foxmeyer's Claims Against the Defendants

1. Counts Three and Four - Breach of Express and Implied Warranties

a. Breach of Contract and Breach of Express Warranty against McHugh

Count One of the complaint alleges that McHugh "materially breached" its contract with Foxmeyer, but does not state which terms were breached. The complaint then asserts breach of express and implied warranty claims against McHugh in Counts Three and Four. Given the Trustee's failure to identify a specific breach in Count One, the court will assume that the alleged breach of contract flows from the alleged warranty breaches.[4] Therefore, the resolution of the warranty claims will resolve the breach of contract issue as well.

The Trustee's claim against McHugh for breach of express warranty rests upon the McHugh's express warranty that its software would be free of defects, comport with the Functional and Equipment Specifications, and that it would use its best efforts to remedy any problems. McHugh asserts that the Trustee's allegations are not based on the organic defects of the McHugh software, but rather the software's failure to work properly with the other warehouse components. McHugh states that it did not warrant that all of the components would work together, and therefore, the claim should be dismissed.

The court is persuaded by McHugh's contention that the claim here centers around the failure of the McHugh software to work with the other Pinnacle Companies' products. Although the complaint does mention some instances of McHugh's software deficiency, they all occur in the context of failure to work with the other components. In fact, in his reply brief, the Trustee states

[4] The Trustee apparently agrees with this characterization because he did not respond when McHugh made this argument.

that the complaint "details how McHugh's software failed to comply with certain design plans [with the other Pinnacle Companies' components] because of its numerous defects . . ." (D.I. 30 at 28 n.14.) Thus, it seems reasonable to conclude that the gist of the complaint is for the failure of McHugh's software to function with the other components.

In light of the court's conclusion that the claim is primarily for the failure of McHugh's software to properly function with the other Pinnacle Companies' products, the court must consider whether the express warranty covered that defect. McHugh argues that the contract does not contain an express warranty regarding its software's ability to function with other Pinnacle Company components. Indeed, a careful review of the contract reveals that there is no such warranty. The court will not re-write the warranty to create that result. *See Kennedy v. National Juvenile Detention Ass'n*, 187 F.3d 690, 694 (7th Cir. 1999) ("Under Wisconsin law, contracts are to be construed as they are written.").

However, the Trustee also argues that McHugh's warranty to use its best efforts was breached. In response, McHugh contends that it was only required to use its best efforts upon receiving notice of a software problem. McHugh alleges that Foxmeyer failed to provide notice. Conversely, the complaint alleges that Foxmeyer made numerous complaints about the software to McHugh as well as the other Pinnacle Companies. Given the disputed factual record on this point, the court is reluctant to dismiss this count entirely at this time.[5] Moreover, whether McHugh used

[5] McHugh asserts that the "release" signed by it and Foxmeyer's successor-in-interest declaring that the warranted work had been completed absolves it from any liability on the notice issue. The court disagrees. The release was not signed until November 1996, after Foxmeyer became insolvent and filed for bankruptcy. Thus, if Foxmeyer provided notice prior to the bankruptcy, a subsequent release would not prove that McHugh's best efforts were employed before the insolvency.

its best efforts is a fact intensive inquiry. *See United States v. Board of Educ. of City of Chicago,* 799 F.2d 281, 292 (7th Cir. 1986) (noting that a best efforts clause "can be satisfied by any of a wide range of possible levels and types of performance that comport with the exercise of 'good faith' by the obligor."). For these reasons, the court will not dismiss the breach of contract or breach of express warranty claims against McHugh as the relate to the failure to use best efforts at this time.

Although the court will not dismiss the Trustee's claim at this time, the court is also aware that the factual record on the notice issue is largely based on conclusory allegations. For instance, although the Trustee states that "frequent demands for corrective action" were made, he never states when these demands were made. The court will, therefore, permit the trustee to amend the complaint on this issue to provide more facts establishing the context of how, when, where, and to whom, notice was provided.[6]

b. Breach of Implied Warranty against McHugh and Buschman

The Trustee also argues that McHugh and Buschman breached their implied warranties. In response, both McHugh and Buschman argue that the warranties were effectively disclaimed. Indeed, the Uniform Commercial Code as adopted by both Ohio and Wisconsin will permit a party to disclaim the implied warranty of merchantability as long as the language uses the words "merchantability" and is conspicuous. *See* OHIO REV. CODE ANN. § 1302.29, cmt. n. 3 ("Disclaimer

[6] The court further notes that although it is permitting the breach of contract and breach of express warranty claims against McHugh to proceed, the Trustee cannot recover consequential damages from McHugh. As McHugh points out, section 6.4 of the Foxmeyer-McHugh contract expressly limits damages to claims for fees paid to McHugh. (D.I. 18 at 16.) Section 6.5 clearly excludes consequential damages. (*Id.*) Therefore, although these claims will be allowed to proceed, the Trustee's relief will be limited as provided by the terms of the contract.

of the implied warranty of merchantability is permitted . . . with the safeguard that such disclaimers must mention merchantability and in case of a writing must be conspicuous."); WISC. STAT ANN. § 402.316 (2) (same). A warranty of fitness for a particular purpose may be disclaimed if it is in writing and is conspicuous. *See id.* ("[T]o exclude or modify any implied warranties of fitness the exclusion must be by a writing and conspicuous."); OHIO REV. CODE ANN. § 1302.29 (same).

The parties do not dispute that the language used would be appropriate to disclaim warranties of both fitness and merchantability. However, the Trustee submits that McHugh's waiver is not conspicuous. Unlike Buschman, McHugh did not set forth its disclaimer in capital letters or different type. (Although McHugh asserts that the "disclaimer" heading is in bold typeface, the Trustee correctly points out that all of the headings are in bold.) Therefore, the Trustee claims the McHugh warranty was not effectively disclaimed.

Although it is clear that a disclaimer that is placed in bold type or capital letters is more conspicuous than one that is not, this is not the end of the inquiry. The purpose of disclaimers is to prevent surprise. *See* WISC. STAT ANN. § 402.316 (2), cmt. 1 ("This section is designed principally to . . . protect a buyer from unexpected and unbargained language of disclaimer."). To that end, if a party was not surprised by the disclaimer, it will be deemed valid despite technical deficiencies. *See Twin Disc, Inc. v. Big Bud Tractor, Inc.*, 772 F.2d 1329, 1335 n. 3 (7th Cir. 1985) (noting that there is no need to determine whether a disclaimer is conspicuous where "the buyer's knowledge of disclaimer can be inferred [or] when the buyer has actual knowledge of the disclaimer."). In the present case, the Trustee does not allege that Foxmeyer was unaware of or surprised by the disclaimer. Indeed, Foxmeyer was a very sophisticated company - the fourth largest in its field. Thus, it is unlikely that it would enter into a contract where it was unaware of the provisions.

Therefore, the court finds that the disclaimer was not unexpected and is, therefore, valid.

The Trustee also asserts that both the McHugh and Buschman disclaimers are ineffective because they were procured by fraud. The court rejects this argument for two reasons. First, for reasons that will be explained below, the court finds that there was no fraud in the formation of the contract. Second, even assuming that the contract was procured by fraud, a contract clause cannot be invalidated on the basis of fraud unless the particular clause in question was procured by fraud. *See General Envrinomental Science Corp. v. Horsfall*, 753 F.Supp. 664, 675 (N.D.Ohio 1990) (rejecting the plaintiff's argument that fraud should invalidate contract provision where the plaintiff "alleges only general fraud, not fraud in the inducement to enter into the choice of law provision."); *Polar Mfg. Corp. v. Michael Weinig, Inc.,* 994 F.Supp. 1012, 1015 (E.D.Wis.1998) (noting that contract clause would be enforced unless "the *provision* was procured by fraud or overreaching.") (emphasis added). Here, the Trustee has provided no facts that would allow the court to find that either warranty clause was induced by fraud. The court therefore finds that the clauses were not procured by fraud. Thus, both disclaimers were valid and no breach of implied warranty action can proceed against McHugh or Buschman.

c. Breach of Implied Warranty against Alvey and White

The breach of implied warranty claims against Alvey and White must also fail. As the defendants point out, neither White nor Alvey was a party to the either the Buschman contract or the McHugh contract. In Ohio, where breach of implied warranty is asserted against one who is not a party to a contract, the claim must be construed as a tort claim. *See Trgo v. Chrysler Corp*., 34 F.Supp.2d 581, 591 (N.D. Ohio 1998) ("In Ohio, when a party brings a claim for breach of implied warranty absent privity of contract, the cause of action is one sounding in tort."). Since neither

White nor Alvey are signatories to either contract (and the Trustee does not dispute this), the court agrees with the defendants that the claims for breach of implied warranty must be considered tort claims.

Under Ohio law, the economic loss doctrine prevents recovery in tort for purely financial losses. *See Chemtrol Adhesives, Inc. v. American Manufacturers Mutual Ins. Co.*, 537 N.E.2d 624,635 (Ohio 1989) ("[I]n the absence of injury to persons or damage to other property the commercial buyer may not recover for economic losses premised on tort theories of strict liability or negligence."). Ohio has grouped economic loss into two categories - direct and indirect. Direct economic loss "result[s] from the diminished value of the defective product itself." *See Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661, 668 (Ohio1995). Conversely, indirect economic loss comprises lost profits and consequential losses. *Id.* at 667.

Nowhere does the Trustee allege that there was diminished value to the allegedly defective White or Alvey products. Rather, the Trustee seeks to recover lost profits and other lost goodwill flowing from the alleged product failures. Thus, the trustee's claim is one for indirect economic damages. However, in Ohio, "in order to recover indirect economic damages in a negligence action, the plaintiff must prove that the indirect economic damages arose from tangible physical injury to persons or from *tangible* property damage." *Id.* (emphasis added). In the present case, the Trustee merely provides a conclusory allegation that there were "losses of inventory." (D.I. 1 at ¶ 37). He does not describe any actual, tangible physical damage to that inventory. *Cf. Ferro Corp. v. Blaw Knox Food & Chem. Equip. Co.*, 700 N.E.2d 94, 100 (noting that liner attached to defective reactor was damaged). A careful review of the complaint reveals no facts that would allow the court to infer that tangible damage occurred as a result of the defendants' actions. In the absence of any factual

allegations regarding tangible property damage, the court finds that there can be no claim for indirect economic loss. Thus, the Ohio economic loss doctrine will bar the Trustee's claim.

2. Count Two - Breach of Contract Against White

The claim for breach of contract against White cannot proceed. The Trustee argues that Foxmeyer was a third party beneficiary of a contract between White and Buschman. White argues that this claim should be dismissed, *inter alia*, because the complaint fails to assert the specific terms of the contract between White and Buschman that were breached. The court agrees.

Although the Trustee argues otherwise, it is clear that Ohio courts require parties to clearly plead the terms of the contract that were allegedly breached. *See Palm Beach Co v. Dun & Bradstreet*, 665 N.E.2d 718, 721 (Ohio App. 1995) (noting that "nowhere in the complaint can there be found any identification by Palm Beach of what express provisions of the contract were allegedly breached"). Count Two of the complaint merely states that "White materially breached its contract with Buschman." (D.I. 1 at ¶ 55.) Assuming that Foxmeyer was a third-party beneficiary of the Buschman-White contract, the Trustee has failed to state the terms of that contract. More important, reading the well-pleaded facts of the complaint in the most liberal fashion possible, the Trustee has not asserted any facts that tend to prove when or how the White-Buschman contract was breached. Thus, the Trustee has not adequately plead the terms of the contract. The court will, therefore, dismiss this claim.[7]

[7] Although it may seem that dismissal at this stage is a harsh penalty, the court does not believe it is. Under similar circumstances, courts have held that dismissal is appropriate. *See Shoreham Hotel Ltd. Partnership v. Wilder*, 866 F.Supp. 1, 4 (D.D.C.1994) (finding failure to state a claim where plaintiff did not plead that defendants were corporate agents as required by applicable contract law); *Picture Lake Campground, Inc. v. Holiday Inns, Inc.*, 497 F.Supp. 858, 862 (D.Va.1980) ("The mere references . . . to the breach of various warranties and representations in Paragraph 8 are insufficient to state a breach of the Commitment Agreement.

3. Count 5 - Fraud

The fraud allegations cannot stand against any defendant. In Ohio, in order to prove fraud, the plaintiff must demonstrate that there was : "(1) a misrepresentation; (2) of a material fact; (3) made with knowledge of its falsity, or reckless disregard for its truth or falsity; (4) upon which the plaintiff justifiably relied; and (5) a resulting injury proximately caused by the reliance." *Rubin v. Schottenstein, Zox & Dunn*, 119 F.Supp.2d 787, 790 (S.D.Ohio 2000). Similarly, in Wisconsin, the plaintiff must prove "(1) false representation; (2) intent to defraud; (3) reliance upon the false representation; and (4) damages." *Mackenzie v. Miller Brewing Co.,* 623 N.W.2d 739, 745 (Wis. 2001).

Two common elements of fraud in Ohio and Wisconsin are that the statement be false and be made with the intent to defraud. The Trustee cannot meet either of these elements. First, the Trustee has provided only conclusory statements regarding the intent to defraud. The complaint is devoid of any specific facts on this issue. Rule 9(b) of the Federal Rules of Civil Procedure dictates that plaintiffs must plead fraud with specificity. *See* FED. R. CIV. P. 9(b). The Trustee's failure to allege specific facts alone would be enough to permit the court to dismiss the claim. However, the Trustee has not just failed to provide specific facts regarding intent - he has failed to provide *any* facts on this point. If the court saw even one factual allegation in the complaint from which it could be inferred that the defendants intended to defraud Foxmeyer, it might permit the Trustee to amend his complaint on this issue. The Trustee, however, provides absolutely no facts in his complaint or any of the pleadings that would permit the court to find that any of the defendants acted with

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Accordingly, with respect to the Commitment Agreement, First Management has failed to state a claim for which relief can be granted.").

scienter. On the current record, then, the court cannot find that the Trustee has adequately plead that the defendants acted intentionally.

Moreover, even if the Trustee had plead the facts with specificity, the allegedly fraudulent statements are not false in any actionable sense. First, the statements regarding the quality of the products and the expertise of the staff do not constitute fraud. Statements such as "best," "finest," "seamless," and the like are clearly puffery. *See All-Tech Telecom v. Amway Corp.*, 174 F.3d 862, 868 (7th Cir. 1999) (defendant's statement that its product was "the best" was "pure puffery"); *Tibbs v. National Homes Const. Corp.*, 369 N.E.2d 1218, 1224 (Ohio Ct. App. 1977) (noting statement that lumber was of "highest quality" was puffery, not actionable fraud). More important, the Trustee has not alleged sufficient facts to demonstrate that the representations the Pinnacle Companies provided about their past performance (e.g. the ability to process 135,000 inventory lines per night, their experience working together) were false. Indeed, many, if not most. of the Pinnacle Companies' claims of past performance appear to be true. No where does the Trustee state that the Pinnacle Companies had not saved their customers money or had never processed 135,000 lines per night. Although the court is slightly more troubled by the Trustee's allegation that the Pinnacle Companies had not previously worked on a project of this type, the complaint reveals that the companies stated that they had worked on "large-scale" projects previously. (D.I. 1 at ¶ 32.) Therefore, the court cannot find that the alleged misrepresentations were false.

Since the court cannot find that the Pinnacle Companies' underlying statements were false, the Trustee's only remaining argument is that the defendants failed to measure up to their claims. In other words, the Trustee contends that they did not do for Foxmeyer what they apparently did for

their previous clients. However, statements regrading expectations and predictions are not actionable fraud unless a party makes a promise knowing that it cannot or will not be kept. *See Schurmann v. Neau*, 624 N.W.2d 157, 161 (Wis. Ct. App. 2000) (noting that unfulfilled promises not actionable unless speaker had present intent not to perform when statement was made); *Williams v. Edwards*, 717 N.E.2d 368, 374 (Ohio Ct. App. 1998) (noting same). The Trustee does not allege any facts to support the conclusion that the Pinnacle Companies intended to dishonor their promises regarding their performance. Thus, the fraud claim is not actionable and will be dismissed.

4. Counts Six and Seven - Negligence and Negligent Misrepresentation

As noted earlier, the economic loss doctrine will limit recovery in tort for purely economic losses.[8] Since these are tort claims, the Trustee must prove that the losses are not purely economic. In the present case, as previously stated, the Trustee has failed to prove that there was any tangible, physical damage to property or any other non-economic damages. Thus, the Trustee has failed to overcome the hurdle raised by the economic loss doctrine. Therefore, the negligence claims will be dismissed as to all defendants.

The Trustee further asserts that although the negligence claims may be disallowed, there is a growing trend toward permitting negligent misrepresentation claims even in the absence of

[8] The earlier discussion focused on Ohio law but Wisconsin law is similar in this regard. *See Ice Bowl v. Weigel Broadcasting Co.*, 14 F.Supp.2d 1080, 1082 (E.D. Wis. 1998) (noting that Wisconsin economic loss doctrine does not permit parties to "reallocate contractually bargained for risk" by pleading economic losses in tort); *Wausau Tile, Inc. v. County Concrete Corp.*, 593 N.W.2d 445, 452 (Wis. 1999) (noting that there must be actual "physical harm" to property other than the product to overcome economic loss doctrine).

property damage.[9] Assuming this is true, the Trustee still cannot prevail. In both Ohio and Wisconsin, in order to prevail in a negligent misrepresentation claim, the statements at issue must be false. *See Martin v. Ohio State University Foundation*, 742 N.E.2d 1198, 1209 (Ohio Ct. App. 2000) (noting that second element of claim for negligent misrepresentation is that the defendant "supplie[d] false information for the guidance of others in their business"); *Ramsden v. Farm Credit Services of North Cent. Wisconsin*, 590 N.W.2d 1, 8 (Wis. Ct. App. 1998) (noting that second element of negligent misrepresentation is that defendant's statement "was untrue"). However, as previously noted, the statements made by the defendants were not false in any actionable sense. Thus, even if the economic loss doctrine does not bar recovery, the Trustee cannot prove an essential element of the negligent misrepresentation claim. Therefore, this claim will also be dismissed.

5. Count Eight - Promissory Estoppel

Under Ohio and Wisconsin law, a valid contract is a bar to a promissory estoppel claim. *See Kashif v. Central State University*, 729 N.E.2d 787, 791 (Ohio Ct. App. 1999) (noting that promissory estoppel cannot be asserted where there is binding, unambiguous contract); *Kramer v. Alpine Valley Resort,* 321 N.W.2d 293, 297(Wis. 1982) ("Generally, we agree with the proposition that the existence of a contractual relationship will bar a claim based on promissory estoppel."). Both Buschman and McHugh had valid contracts with Foxmeyer. Neither Wisconsin nor Ohio permit promissory estoppel claims under these circumstances. The claims against McHugh and

[9] *See, e.g., Bugetel Inns, Inc. v. Micron Systems*, 34 F. Supp. 2d 720, 724-25 (E.D. Wis. 1998); *McCarthy, Lebit, Crystal & Haiman v. First Union*, 622 N.E.2d 1093, 1106 (Ohio Ct. App. 1993).

Buschman must, therefore, be dismissed.[10]

The promissory estoppel claims against White and Pinnacle, however, are viable. The defendants assert that the Trustee's claims arise out of a sale of goods to Foxmeyer, and that those claims must arise from a written contract. White and Pinnacle further assert that since neither party had a contract with Foxmeyer, the statute of frauds will bar the Trustee's claim. The court disagrees. The statute of frauds requires a party to provide some proof that a contract exists. *See* OHIO REV. CODE ANN. § 1302.04. However, the court has not found - and the parties have not provided - any authority for the proposition that a contract is a prerequisite to a promissory estoppel claim. Indeed, quite the opposite is true. As the cases cited above indicate, promissory estoppel is most appropriate where there is *no* contract. *See Kashif*, 729 N.E.2d at 791; *Kramer*, 321 N.W.2d 293 at 297. If the statute of frauds requires proof of a contract but no contract is required for a promissory estoppel claim, the statute of frauds is an inadequate defense to that claim. Here, with respect to White and Pinnacle, there was no contract. Thus, the statute of frauds is an inadequate defense. Therefore, the claims against White and Pinnacle will be allowed to proceed.

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[10] The court notes that the Trustee asserts that, as to McHugh, this case fits into the exception outlined by the *Kramer* court. In *Kramer*, the court noted that promissory estoppel claims could be viable "where the contract fails to address the essential elements of the parties' total business relationship." The court interprets this language to mean that the exception applies where the promises allegedly relied on by the parties do not make it into the contract. However, the Trustee does not allege which *pre-contract* representations did not make it into the McHugh contract. In other words, the Trustee does not dispute that the McHugh contract represented the entire agreement of the parties. (In fact, there is an integration clause in the contract that declares otherwise.) The court therefore rejects his argument. (The court further rejects any argument that the integration clause was procured by fraud, for reasons previously discussed.)

9. Dismissal of the Non-Involved Plaintiffs

The defendants assert that the non-involved plaintiffs (Healthcare Transportation Systems, Inc., Merchandise Coordinator Services Corporation, Foxmeyer Software, Inc., and Health Mart, Inc.) were not involved in any of the events that give rise to this claim. Thus, the defendants argue the Trustee has failed to state a claim with respect to these plaintiffs. The court agrees. The complaint focuses solely on the relationship between Foxmeyer and the Pinnacle Companies. At no point does the complaint disclose that any of these plaintiffs were privy to the alleged contracts, misrepresentations, or other activities that gave rise to this action. Thus, each of these non-involved plaintiffs has failed to state a claim for which relief can be granted. Therefore, each of the above mentioned plaintiffs will be dismissed from this litigation.

V. CONCLUSION

For all of the foregoing reasons, the court will grant the defendants' motions to dismiss in part and will deny them in part. Counts Two, Four, Five, Six, and Seven are dismissed. Counts One and Three will be allowed to proceed only against McHugh and Buschman. Moreover, Counts One and Three against McHugh can only proceed on the best efforts issue, and any recovery will be limited to the fees paid to McHugh. Count Eight is dismissed as to McHugh and Buschman, but the promissory estoppel claims against White and Pinnacle will proceed. Finally, all non-involved plaintiffs will be dismissed from this action, and the caption shall be revised accordingly.

For the foregoing reasons, IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss of Buschman, et al. (D.I. 24) is GRANTED as to Counts Two, Four, Five, Six and Seven. The motion is GRANTED as to Count Eight for the defendant Buschman. It is DENIED as to Count Eight for defendants White and Pinnacle.

2. The defendant McHugh's Motion to Dismiss (D.I. 17) is GRANTED as to Counts Three (as to implied warranties only); Four, Five, Six, Seven, and Eight. The motion is DENIED as to Counts One and Three (for express warranty to use best efforts only).

3. The Plaintiff will be permitted to amend his complaint as to the issues of notice and best efforts as they relate to Counts One and Three.

4. The defendants' request to dismiss the non-involved plaintiffs (Healthcare Transportation Systems, Inc., Merchandise Coordinator Services Corporation, Foxmeyer Software, Inc., and Health Mart, Inc.) is GRANTED.

5. Plaintiffs Healthcare Transportation Systems, Inc., Merchandise Coordinator Services Corporation, Foxmeyer Software, Inc., and Health Mart, Inc. shall be terminated as plaintiffs and the caption revised accordingly.

6. Buschman's Motion to Extend Time to Answer or to Stay (D.I. 22) is DISMISSED as MOOT.

Dated: March 12, 2002

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE