STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

RENTAL SPECIALISTS, INC., a Michigan company, and T.K.M.S., LLC f/k/a T.K.M.S. INC., a Michigan Limited Liability Company,

Plaintiffs,

v.

OAKLAND TRUCK AND EQUIPMENT SALES, INC. d/b/a REEFER PETERBILT, a Michigan company,

Defendant.

Case No. 2021-188178-CB

Hon. Victoria Valentine

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At a session of said Court held on the
28th day of November 2022 in the County of
Oakland, State of Michigan

PRESENT: HON. VICTORIA A. VALENTINE

This matter is before the Court on Defendant Oakland Truck and Equipment Sales, Inc d/b/a Reefer Peterbilt ("Reefer") motion summary disposition under MCR 2.116(C)(8) with

regard to Plaintiffs Rental Specialists Inc ("RSI") and T.K.M.S, LLC ("TKMS")'s second amended complaint. The Court, after reviewing the briefs, hearing oral argument on November 23, 2022, and being fully advised in the premises, respectfully GRANTS Defendant's Motion under MCR 2.116(C)(8) as to Counts I, IV, V and VI and DENIES Defendant's motion as to Count II, III and VII for the reasons below.

PERTINENT FACTS

Plaintiff TKMS has been in business for over 35 years. It is an aggregate commodity hauler that hauls in Southeast Michigan, and specializes in hauling limestone, crushed concrete, sand, pea stone, and other aggregate commodities.[1] Plaintiff RSI provides trucks and other equipment to TKMS so it can perform its hauling services.[2] Because TKMS' primary business is hauling large loads of heavy materials, RSI purchases specialized equipment that is suitable for the heavy loads of aggregate that TKMS hauls.[3]

Defendant Reefer is a sales agent and dealership for PACCAR[4] and has sold PACCAR's Peterbilt trucks since 1989.[5] RSI and Reefer first began their business relationship over 25 years ago when RSI began purchasing heavy-duty trucks from Reefer.[6] Over these 25 years that RSI purchased trucks from Reefer, Reefer, RSI, and TKMS developed a relationship where Reefer knew (or should have known) the precise details about TKMS' business and the type of

[1] ¶8 of Plaintiffs' Second Amended Complaint.
[2] ¶9 of Plaintiffs' Second Amended Complaint.
[3] ¶11 of Plaintiffs' Second Amended Complaint.
[4] PACCAR d/b/a Peterbilt Motor Company, and Allison Transmission have been dismissed from this case by Stipulated Order of Dismissal dated June 8, 2022. Paragraph 7 of Plaintiffs' Second Amended Complaint. On July 20, 2022, the Court granted Defendant's motion for leave to file notice of nonparty fault, naming PACCAR and Allison Transmission as at fault parties.
[5] ¶13 of Plaintiffs' Second Amended Complaint.
[6] ¶15 of Plaintiffs' Second Amended Complaint.

trucks that were required by RSI to supply TKMS' business.[7]

It is alleged that between 2017 and 2018, when RSI was looking to purchase 20-25 new trucks for TKMS, various TKMS personnel including, but not limited to, Dave Laming ("Dave"), the previous president of RSI, and Tim Baugher had numerous conversations with Greg Reefer ("Greg") and Adam Reefer ("Adam") about TKMS' trucking needs.[8] Because Greg and Adam knew that TKMS had problems with the Eaton transmissions that had been installed on the trucks TKMS had been using, they recommended that RSI purchase new trucks with Allison transmissions because the Allison transmissions were better suited for TKMS' business and applications.[9] It is also alleged that Greg and Adam further reassured Dave that the Allison transmission would not have the issues that TKMS had in the past with the Eaton transmissions.[10] Allegedly, because Greg and Adam represented that the Allison transmissions would be suitable for TKMS' needs, RSI agreed to purchase new trucks, at a premium, containing the Allison transmissions. At Reefer's recommendation, and based upon Reefer's representations, TKMS did not purchase an extended Allison warranty because TKMS was assured it was not necessary.[11]

On or about November 2, 2017, RSI entered into agreements to purchase twenty (20) 2019 Peterbilt Model 567 Trucks (the "Trucks") from Reefer, for use by TKMS.[12] The Trucks were purchased new and came with a manufacturer's warranty from PACCAR, through

[7] ¶19 of Plaintiffs' Second Amended Complaint.
[8] ¶21 of Plaintiffs' Second Amended Complaint.
[9] ¶38 of Plaintiffs' Second Amended Complaint.
[10] ¶40 of Plaintiffs' Second Amended Complaint.
[11] ¶40 of Plaintiffs' Second Amended Complaint.
[12] ¶41 of Plaintiffs' Second Amended Complaint. The Court notes that the first amended complaint alleged that the parties entered into the agreement on August 11, 2017. (See ¶21 of First Amended Complaint).

Peterbilt Motors Company-one of PACCAR's divisions (the "Warranty" Attached to Plaintiffs' Second Amended Complaint). The Trucks were delivered in or about March 2018.[13]

Shortly after the Trucks were delivered to RSI, TKMS began having issues with the Trucks, and all but three of the Trucks had major issues, most of which were reoccurring, resulting in TKMS losing hundreds of thousands of dollars in revenue due to the unavailability of the Trucks.[14] Plaintiffs allege they have been damaged in excess of $1.6 million for costs they incurred for the repair, repurposing and retrofitting of the Trucks, for lost profits due to Truck downtime, and for the diminution in value of the Trucks, and reduced value on trade-in.[15]

PROCEDURAL HISTORY

On May 25 2022, Plaintiffs filed their 3-Count complaint again PACCAR and Defendant Reefer, alleging breach of contract against PACCAR; negligence against both PACCAR and Reefer; and fraud/misrepresentation against Reefer. Subsequently, on November 4, 2021, Plaintiffs filed their First Amended Complaint, adding Allison Transmission as a Defendant.

On February 14, 2022, Reefer filed its motion for summary disposition under MCR 2.116 (C)(8) as to Plaintiffs' claims of negligence and fraud and/or misrepresentation, based on the economic loss doctrine. Approximately four months later, on June 8, 2022, Plaintiffs filed their motion for partial summary disposition pursuant to MCR 2.116(C)(10), claiming

[13] ¶51 & 54 of Plaintiffs' Second Amended Complaint.
[14] ¶145 of Plaintiffs' Second Amended Complaint.
[15] ¶116 of Plaintiffs' Second Amended Complaint.

that, except as to damages, there is no question of fact that Reefer was negligent and/or fraudulently induced Plaintiffs to purchase the trucks.

On August 17, 2022, the parties were before the Court on their cross motions for summary disposition at which time the Court granted Defendant's motion under MCR 2.116(C)(8) based solely on the pleadings. Specifically, the Court found it was unable to determine the substantive legal issues based on the pleading, because the complaint grouped the two Plaintiffs together. The Court allowed Plaintiffs to file a second amended complaint, which Plaintiffs filed alleging negligence; fraud in the inducement; silent fraud; negligent misrepresentation; breach of fiduciary duty; breach of contract-obligation of good faith; and breach of warranty-unconscionability of applying disclaimer.

Defendant answered the second amended complaint and again filed a Motion for Summary Disposition under MCR 2.116(C)(8) to which Plaintiffs filed a response. Oral argument was heard on November 23, 2022.

STANDARD OF REVIEW

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the Complaint on *the basis of the pleadings alone. Beaudrie v Henderson,* 465 Mich 124, 129 (2001). All well-pleaded factual allegations are accepted as true and construed in the light most favorable to the nonmovant. *Wade v Dep't of* Corrections, 439 Mich 158, 162-63 (1992). A motion under MCR 2.116(C)(8) may be granted when the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* at 163. And once a document is attached as part of the pleading, the instrument becomes part of that pleading "even for purposes of review under

MCR 2.116(C)(8)." See *Laurel Woods Apartments v Roumayah,* 274 Mich App 631, 635, (2007). MCR 2.116(C)(8) "requires the court to consider evidence only from the pleadings, while (C)(10) motions denounce a claim's factual sufficiency and allow the court to consider evidence beyond the pleadings. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019).

ANALYSIS

Economic Loss Doctrine

The economic loss doctrine provides that a plaintiff cannot bring a tort claim where the legal duty breached arises out of a contractual promise. *Rinaldo's Const Corp v Michigan Bell Tel Co,* 454 Mich 65, 83 (1997). The purpose of the doctrine is "to avoid confusing contract and tort law." *Huron Tool & Engg Co v Precision Consulting Services*, 209 Mich App 365, 374 (1995). "The economic loss doctrine, simply stated, provides that '[w]here a purchaser's expectations in a sale are frustrated because the product he bought is not working properly, his remedy is said to be in contract alone, for he has suffered only "economic" losses.'" *Neibarger v Universal Cooperatives*, 439 Mich 512, 520- 521 (1992). "This doctrine hinges on a distinction drawn between transactions involving the sale of goods for commercial purposes where economic expectations are protected by commercial and contract law, and those involving the sale of defective products to individual consumers who are injured in a manner which has traditionally been remedied by resort to the law of torts." *Neibarger*, supra.

In determining whether a party may pursue a tort action against another party where the parties' relationship is governed by a contract, the Supreme Court in *Neibarger v Universal*

Cooperatives, 439 Mich 512, 521 (1992), focused on whether the duty allegedly breached arises from tort or contract:

> The purpose of a tort duty of care is to protect society's interest in freedom from harm, i.e., the duty arises from policy considerations formed without reference to any agreement between the parties. A contractual duty, by comparison, arises from society's interest in the performance of promises. Generally speaking, tort principles, such as negligence, are better suited for resolving claims involving unanticipated physical injury, particularly those arising out of an accident. Contract principles, on the other hand, are generally more appropriate for determining claims for consequential damage that the parties have, or could have, addressed in their agreement.

"[T]he threshold inquiry is whether the plaintiff alleges a violation of a legal duty separate and distinct from the contractual obligation." *Rinaldo's,* 454 Mich at 84. Where the plaintiff's allegations are that a defendant failed to perform according to the terms of its promise, plaintiff has no cause of action in tort. *Id. at 85*.

Though the term "economic loss doctrine" is frequently used in the context of the UCC, its core principle that a tort claim must be based on a legal duty separate and distinct from the contractual obligation also applies to contracts for services. See *id.* at 84-85; *Hart v Ludwig*, 347 Mich 559, 560, 562; 79 NW2d 895 (1956) (applying economic loss doctrine to bar tort claim arising out of oral service agreement related to the care and maintenance of an orchard.).

Even for service contracts, a similar theory will apply to block the assertion of tort claims when a contract is present unless the tort arises out of an independent duty outside of the contract. *Hart v Ludwig*, 347 Mich 559, 560 (1956); *Huron Tool & Eng'g Co v Precision Consulting Servs*, 209 Mich App 365, 374 (1995) ("Although the Supreme Court's discussion of the economic loss doctrine in *Neibarger* was linked closely to the UCC context of the case, the doctrine is not limited to the UCC.").

And in *Sullivan Industries, Inc v. Double Seal Glass Co, Inc,* 192 Mich App 333 (1991), the Court found that where all parties to a transaction are commercial entities, a contractual relationship was not necessary to invoke the economic loss doctrine "because, in transactions among such parties, one of the issues in the bargaining process is the allocation of the risk of nonperformance." *Id.* at 342-343.

> [C]ommercial law is concerned with economic expectations. Commercial enterprises allocate the risk of loss due to nonperformance among themselves and pass this cost on to the consumers by way of higher prices. In this manner, commercial problems can be solved with predictable consequences. The reliance on privity notions to ascertain whether tort or commercial law applies serves only to blur the distinction between, and the applicability of, commercial law and tort law to economic losses. Instead, a more logical and conceptually manageable approach is to determine the type of loss a plaintiff is alleging. Allegations of only economic loss do not implicate tort law concerns with product safety, but do implicate commercial law concerns with economic expectations. [*Id.* at 343-344.]

In *Citizens Ins Co v Osmose Wood Preserving, Inc,* 231 Mich App 40, 45 (1998), the Court of Appeals noted that in both *Sullivan, supra*, and in *Freeman v DEC Int'l, Inc,* 212 Mich App 34 (1995) the Court has "expressly rejected the argument that the economic loss doctrine does not apply in the absence of privity of contract."

As to tort claims of fraud, the Court of Appeals has stated that the economic-loss doctrine does *not* bar a tort action based on fraud in the inducement because such a claim goes directly to a party's ability to negotiate a fair contract. *Huron Tool,* 209 Mich App at 368. In *Huron Tool*, however, the Court distinguished between situations "where parties to a contract appear to negotiate freely ... but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior" and situations "where the only misrepresentation by the dishonest party concerns

the quality or character of the goods sold [and] the other party is still free to negotiate warranty and other terms to account for possible defects in the goods." *Id.* at 545. Only the former sort of deception would constitute fraud in the inducement. The Court simplified this distinction as that between "fraud extraneous to the contract and fraud interwoven with the breach of contract." *Id.*

Here Plaintiffs claim that the economic loss doctrine does not apply because there is no contract between TKMS and Reefer; because there was fraud in the inducement; and because the agreement was for services.

As previously indicated, ¶18 of Plaintiffs' Second Amended Complaint alleges that "TKMS has assigned all of its rights to any claims(s) against Defendant to RSI but out of an abundance of caution, TKMS is named as a Plaintiff in this case nonetheless." Further, Plaintiffs' Second Amended Complaint alleges "RSI and Reefer first began their business relationship over 25 years ago"; "RSI purchased trucks from Reefer"; "On or about November 2, 2017, RSI entered into agreements to purchase 20 2019 Peterbilt Model 567 Trucks (the "Trucks ") from Reefer, for use by TKMS"; "RSI purchased the Trucks which were not suitable for TKMS' needs"; and "Reefer, through Greg and Adam represented to Plaintiffs that the Trucks would be suitable for use by TKMS."[16]

Plaintiffs also allege they have been damaged in excess of $1.6 million for costs incurred for the repair, repurposing and retrofitting of the Trucks, for lost profits due to Truck downtime

[16] See ¶¶ 15, 19, 41, 153 and 155 of Plaintiffs' Second Amended Complaint.

and for the diminution in value of the Trucks and reduced value on trade-in.[17] Moreover, Plaintiff TKMS is corporation that is an aggregate commodity hauler, which specializes in hauling limestone, crushed concrete, sand, pea stone and other aggregate commodities.[18] Plaintiff RSI is a company that provides trucks and other equipment to TKMS to enable TKMS to perform its aggregate hauling services.[19] Reefer is a sales agent and dealership for PACCAR and has sold PACCAR's Peterbilt trucks since 1989.[20] On or about November 2, 2017, RSI entered into agreements to purchases twenty (20) 2019 Peterbilt Trucks from Reefer, for use by TKMS.[21]

The Court finds that both RSI and TKMS' tort claim of negligence (Count I) is barred by the economic loss doctrine.

As to fraud in the inducement and silent fraud (Counts II and III), the allegations concern pre-contractual misrepresentations and nondisclosures about the specification of the trucks, which prevented Plaintiffs from making an informed decision. It is alleged that there were specific communications between the engine manufacturer and Reefer indicating that the specifications of the truck were questionable.[22] Despite knowing that there were concerns about the trucks, Defendants intentionally failed to inform the Plaintiff about the issues with the trucks.[23] Plaintiffs further allege fraud in that they were induced by false claims "that the Trucks would

[17] ¶145 of Plaintiffs' Second Amended Complaint.
[18] ¶8 of Plaintiffs' Second Amended Complaint.
[19] ¶9 of Plaintiffs' Second Amended Complaint.
[20] ¶13 of Plaintiffs' Second Amended Complaint.
[21] ¶41 of Plaintiffs' Second Amended Complaint.
[22] ¶¶ 155-163 of Plaintiffs' Second Amended Complaint.
[23] ¶¶ 155-157 of Plaintiffs' Second Amended Complaint.

be suitable for use by TKMS... ," "that the Allison transmission on the Trucks would not have the same problems that TKMS had with the Eaton transmissions on its previous Trucks[,]" and "that RSI did not need and should not purchase an extended warranty from Allison covering the Trucks' transmissions."[24] These representations satisfy the pleading requirement for fraud in the inducement thereby defeating the defense of the economic loss doctrine. The alleged representations and the failure to disclose undermine Plaintiffs' ability to make an informed decision and constitute an exception to the economic loss doctrine as they are "extraneous to the contractual dispute." *Huron Tool,* 209 Mich App at 375. As a result, the Counts II and III for fraud in the inducement and silent fraud are not barred by the economic loss doctrine and Defendant's motion to dismiss these counts are DENIED.

Further, the Court disagrees with Defendant's claim that this is barred by the doctrine of res judicata. While the Court previously granted Defendant's Motion for Summary Disposition, it granted the motion based on the pleading, not on the substantive merits of the complaint. Further, the dismissal was not with prejudice and specifically allowed Plaintiffs to file an amended complaint. "A dismissal of a suit without prejudice is no decision of the controversy on its merits and leaves the whole subject of litigation as much open to another suit as if no suit had ever been brought." *Grimmer v Lee,* 310 Mich App 95, 102 (2015) quoting *McIntyre v McIntyre,* 205 Mich 496, 499 (1919).

Defendant seeks dismissal of Plaintiffs' claim of negligent misrepresentation and breach of fiduciary duty again based on the economic loss doctrine.[25] Plaintiffs, however, fail to

[24] ¶¶ 155-157 of Plaintiffs' Second Amended Complaint.
[25] See Defendant's Brief, pp 16-17.

specifically address Defendant's arguments relating to these counts. It is well-settled that "[t]rial courts are not the research assistants of the litigants" and that "the parties have a duty to fully present their legal arguments to the court for its resolution of their dispute." *Walters v Nadell*, 481 Mich 377, 388 (2008). *See also Moses, Inc v Southeast Mich Council of Governments*, 270 Mich App 401, 417 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.") Therefore, Plaintiffs abandoned this argument and Defendant's motion for summary disposition as to Counts (Negligent Misrepresentation) and Count V (Breach of Fiduciary Duty) is GRANTED. Based on the above, Counts IV and V are dismissed.

Count VI-Breach of Contract-Obligation of Good Faith

The Court also dismisses this Count as this is not recognized as an independent cause of action. As our Court of Appeals found in the case of *Gorman v Am Honda Motor, Co,* 302 Mich App 113, 133 (2013):

> Michigan does not recognize, nor does the UCC create, an independent cause of action for a breach of the obligation of good faith it imposes. The obligation of good faith is not an independent duty, but rather a modifier that requires a subject to modify. It is a principle by which contractual obligations or other statutory duties are to be measured and judged. Thus, while the obligation of good faith under the UCC may affect the construction and application of UCC provisions governing particular commercial transactions in various situations, it has no life of its own that may be enforced by an independent cause of action. Caselaw and the UCC itself provide no basis to infer that the obligation of good faith should be applied differently than the common-law implied covenant of good faith and fair dealing, which the parties agree is not enforceable as an independent cause of action. See *Belle Isle Grill,* 256 Mich App at 476, 666 NW2d 271; *Ulrich,* 192 Mich App at 197, 480 NW2d 910.

Count VII-Breach of Warranty-Unconscionability of Applying Disclaimer

Count VII of Plaintiffs' second amended complaint alleges that Reefer's disclaimer of the implied warranty for fitness for a particular purpose should be limited under MCL 440.2302 as to avoid any unconscionable result if the transaction is deemed a sale of goods. MCL 440.2302 which provides:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable *at the time it was made* the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination. (Emphasis added).

Defendant argues that Plaintiffs are required to prove unconscionability both procedurally and substantively and must demonstrate an absence of meaningful choice on the party of one of the parties together with contract terms which are unreasonably favorable to the other party.[26] Defendant also argues that "there is a two-pronged test for determining whether a contract is unenforceable as unconscionable, which is stated as follows: (1) What is the *relative bargaining power* of the parties, their relative *economic strength,* the *alternative sources of supply,* in a word, what are their options?; (2) Is the challenged

[26] Defendant's Brief, pp 18-19, citing *Whirlpool Corp v Grigoleit Co,* 713 F3d 316, 324 (6th Cir 2013) and *Pichey v Ameritech Interactive Media Servs, Inc*, 421 F Supp 2d 1038, 1045 (WD Mich 2006), citing *Nw Acceptance Corp v Almont Gravel, Inc,* 162 Mich App 294 (1987).

term substantively reasonable? *Hubscher & Sons, Inc v Storey,* 228 Mich App 478, 481 (1998)."[27]

The Court agrees with Plaintiffs that this is a (C)(8) motion, and factual development is needed to determine whether Plaintiffs satisfied the above required test. For purposes of this motion Plaintiffs have pled sufficient facts. Plaintiffs allege that while no concerns about the truck configuration were raised to TKMS or RSI, Reefer expressed concerns with the manufacturers, which were never brought to RSI or TKMS.[28] Plaintiffs also allege that Reefer made misrepresentations with the intention that RSA would act upon them and enter into a purchase order to pay a premium for new trucks with the Allison transmission and improper truck configuration.[29] It is further alleged that the "[t]rucks had numerous defects;" that "Plaintiffs could not reasonably rely upon the Trucks for their ordinary purpose, which Defendant knew of when they sold RSI the Trucks;" that "[a]lthough Reefer disclaimed the implied warranty for fitness for a particular purpose MCL 440.2302 authorized this Court to limit the application of this disclaimer to avoid any unconscionable result;" and that "because Reefer's actions led to the improper configuration of the Trucks, allowing Reefer to hid behind a warranty disclaimer is unconscionable."[30] As a result, Defendant's motion for summary disposition relating to Count VII is DENIED.

CONCLUSION

Based on the above:

- Defendant's motion for summary disposition is DENIED to Counts II, III and VII; and

[27] Defendant Brief, pp 18-19. (Emphasis in original).
[28] ¶¶ 40-41 of Plaintiffs' Second Amended Complaint.
[29] ¶ 160 of Plaintiffs' Second Amended Complaint.
[30] ¶¶ 193-197 of Plaintiffs' Second Amended Complaint.

- Defendant's motion for summary disposition is GRANTED as to Counts I, IV-VI.

IT IS SO ORDERED.

This is not a final order and does not close the case.

/s/Victoria A. Valentine