STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
05 CVS 6371

HOSPIRA INCORPORATED,

Plaintiff,

v.

ALPHAGARY CORPORATION,

Defendant.

ORDER

The Court heard this matter on December 9, 2005, on Defendant's Motion to Dismiss Plaintiff's Complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure ("Rule 12(b)(6)"). For the reasons set forth below, and after considering the Complaint, the Motion, and counsel's memoranda and oral arguments, the Court **DENIES** the Motion as to Plaintiff's First, Second, Third, and Sixth Claims for Relief, and **GRANTS** the Motion as to Plaintiff's Fourth and Fifth Claims for Relief.

BACKGROUND

Taking Plaintiff's allegations in the Complaint as true for the purpose of this motion, the following are the relevant facts:

Plaintiff Hospira Incorporated ("Hospira") is a Delaware corporation, headquartered in Lake Forest, Illinois. Hospira manufactures and sells medical devices known as sight chambers. Complaint, ¶ 5. Sight chambers are small, transparent tubes that are attached to intravenous lines to allow monitoring of the flow of fluids through those lines. Complaint, ¶ 5. Hospira sterilizes the sight chambers through a process known as "irradiation," and then sells them as part of intravenous (or "IV") administration

sets, which are used by healthcare providers to administer medications and other fluids to patients. Complaint, ¶ 9.

To manufacture its sight chambers, Hospira prepares a custom polyvinyl chloride ("PVC") compound, known as "Ashland Dry-Blend Powder" (hereinafter "Ashland Powder"). Complaint, ¶ 6. Hospira converts the Ashland Powder into pellets (a process it calls "pelletizing"), which it then uses to mold the chambers. Complaint, ¶ 7. Ashland Powder is "radiation grade," meaning that it is formulated to meet FDA requirements, and is capable of withstanding the irradiation process used to sterilize the sight chambers. Complaint, ¶ 7.

Between 1999 and 2001, Hospira began exploring potential contracts with other companies, both to pelletize Ashland Powder, and to mold the pellets into sight chambers. In 1999, Hospira retained Moll Industries, Inc. ("Moll") to manufacture sight chambers using Ashland Powder pellets. Complaint, ¶ 15. In late 2001, Hospira retained Defendant AlphaGary Corporation, Inc. ("AlphaGary") to pelletize Ashland Powder for molding into sight chambers by Hospira. Complaint, ¶¶ 10-14. According to Hospira, AlphaGary fully understood and agreed that it was to use only Ashland Powder for this process.[1] Complaint, ¶¶ 11-13. In a series of transactions, Hospira sold Ashland Powder to AlphaGary, who, in turn, pelletized the compound and sold it back to Hospira. Complaint, ¶¶ 10-14.

In November 2001, Hospira again retained Moll to manufacture some of its sight chambers. Complaint, ¶¶ 18-19. Instead of supplying pellets directly to Moll, however, Hospira instructed Moll to purchase them from AlphaGary. *Id.* AlphaGary, in turn,

[1] In October 2001, AlphaGary's Manager of Quality Assurance signed a certification form, representing to Hospira that AlphaGary understood and accepted Hospira's pellet requirements and promising that AlphaGary would use only Ashland Powder to fill orders for Hospira's pellets. Complaint, ¶ 13.

agreed that it would supply Moll with pellets meeting Hospira's specification. Complaint, ¶¶ 21, 25. Despite representing to Moll and Hospira that it would use only Ashland Powder for supplying pellets to Moll for use in producing Hospira's sight chambers, AlphaGary substituted its own untested and unapproved, non-radiation grade PVC resin to make the pellets. Complaint, ¶ 26. AlphaGary not only concealed the product switch, but it also made false and misleading statements to Moll and Hospira designed to assure them that it was adhering to the correct specification. Complaint, ¶¶ 29, 32.

Moll molded the nonconforming pellets into millions of sight chambers, which Hospira purchased and incorporated in medical kits, and then distributed to healthcare providers. Complaint, ¶ 35. The sight chambers became severely discolored over time after being sterilized. Complaint, ¶ 36. As a result, Hospira was required to recall, replace, and destroy the sight chambers (and associated kits) because they no longer met FDA requirements. Complaint, ¶ 37.

APPLICABLE LEGAL STANDARD

The essential question on a motion to dismiss "'is whether the complaint, when liberally construed, states a claim upon which relief can be granted on *any* theory.'" *Oberlin Capital, L.P. v. Slavin,* 147 N.C. App. 52, 56, 554 S.E.2d 840, 844 (2001) (citation omitted). On a motion to dismiss, the complaint's material factual allegations are taken as true. *Hyde v. Abbott Labs., Inc.,* 123 N.C. App. 572, 575, 473 S.E.2d 680, 682 (1996).

DISMISSAL OF PLAINTIFF'S FIRST CLAIM FOR RELIEF

AlphaGary seeks dismissal of Hospira's First Claim for Relief asserting fraud on the ground that it is barred by the economic loss doctrine. At the outset, AlphaGary

argues that the underlying transaction is one for the sale of goods (PVC pellets), governed by Article 2 of the Uniform Commercial Code ("U.C.C."). Specifically, AlphaGary asserts that "[t]he U.C.C. is generally regarded as the *exclusive* source for ascertaining when the seller is subject to liability for damages if the claim is based on an intangible economic loss and not attributable to physical injury to person or to a tangible thing other than the defective product itself." *See Reece v. Homette Corp.*, 110 N.C. App. 462, 466, 429 S.E.2d 768, 770 (1993).

The Court has no quarrel with this general principle of law, so far as it goes.[2] *Reece*, however, does not answer the precise question before me. As Hospira notes in its brief, the relevant contract for the sale of the PVC pellets was between AlphaGary and Moll. AlphaGary also provided PVC pellets directly to Hospira, but those transactions are not the source of Hospira's fraud claim. That claim arises instead from Hospira's reliance on AlphaGary's allegedly false promise to use Ashland Powder to supply Moll's pellet needs, AlphaGary then knowing that Moll would use those pellets to manufacture sight chambers for Hospira's use.

The elements of a fraud claim under North Carolina law are: "'(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party.'" *Rowan County Bd. of Educ. v. United States Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 658 (1992)(citations omitted). Accepting the facts alleged

[2] I note that North Carolina's version of the U.C.C. states that "[u]nless displaced by the particular provisions of this chapter, the principles of law and equity, including . . . the law relative to capacity to contract, principal and agent, estoppel, **fraud, misrepresentation** . . . , or other validating or invalidating cause shall supplement its provisions." N.C. Gen. Stat. § 25-1-103 (emphasis added). AlphaGary's brief does not cite any specific U.C.C. provision that would displace Hospira's common law fraud claim. *See, e.g., Williams v. Metro Life Ins. Co.*, 367 F. Supp.2d 844, 849 (M.D.N.C. 2005)(stating that it is defendant's burden to show a specific displacement because otherwise, "the U.C.C. supplements the common law rights.").

in the Complaint as true, Hospira has pled all the requisite elements of fraud. Put simply, Hospira has alleged that it was fraudulently induced into purchasing defective sight chambers from Moll, based on AlphaGary's representations that it had supplied Moll with the proper raw materials to manufacture the product. The question remains, however, whether North Carolina law conclusively bars such a claim where the aggrieved party seeks to recover economic losses. For the reasons set forth below, I hold that it does not.

A. The Economic Loss Doctrine

North Carolina recognizes the economic loss doctrine, which **generally** bars a tort action "against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract." *Spillman v. Am. Homes of Mockville, Inc.*, 108 N.C. App. 63, 65, 422 S.E.2d 740, 741-42 (1992).

"The rule's rationale rests on risk allocation." *AT&T Corp. v. Medical Review of North Carolina, Inc.*, 876 F. Supp. 91, 93 (E.D.N.C. 1995). In the context of a contract for the sale of goods arising under the U.C.C., "[d]amage to a product itself is most naturally understood as a warranty claim. Such damage means simply that the product has not met the customer's expectations[.]" *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 (1986).

Although *Spillman* suggests a "privity of contract" limitation on the application of the economic loss doctrine, other cases clearly dispel that notion. *See Moore v. Coachmen Indus.*, 129 N.C. App. 389, 402, 499 S.E.2d 772, 780 (1998)(affirming

dismissal of plaintiff's negligence claim against the component manufacturer despite the absence of a contract between the plaintiff and defendant manufacturer); *Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 431-32, 391 S.E.2d 211, 216-17 (1990)(affirming summary judgment for defendant on plaintiff's negligence claim, which denied recovery for damages that were "economic or pecuniary" and not physical damage to other property, in spite of the lack of contractual privity between plaintiff and defendant manufacturer); *AT&T Corp.*, 876 F. Supp. at 93-95 (applying the economic loss doctrine to dismiss plaintiff's negligence claim against the manufacturer of a voice mail system, despite the lack of privity between plaintiff and the manufacturer).[3] Thus, the absence of a contract between the parties here does not bar application of the economic loss doctrine.

Moreover, Hospira is seeking recovery for its economic loss. Under North Carolina law, when an assembled or integrated product is injured by a defect in, or failure of, a component part or material, the result is economic loss. *See Moore*, 129 N.C. App. at 402, 499 S.E.2d at 780 (damage to recreational vehicle caused by faulty component constituted economic loss with respect to negligence claims brought against component manufacturer); *Gregory v. Atrium Door & Window Co.*, 106 N.C. App. 142, 144, 415 S.E.2d 574, 576 (1992) (water damage to flooring caused by malfunctioning and deteriorating doors constituted economic loss); *Chicopee, Inc.*, 98 N.C. App. at 431-32, 391 S.E.2d at 216-17 (damage to drying ranges caused by explosion of component pressure vessels was economic loss that was not recoverable in a negligence action

[3] Hospira attempts to distinguish the North Carolina cases dismissing negligence claims for economic loss by asserting that they dealt with plaintiffs who were remote purchasers who had no connection to the defendants they sued. North Carolina law does not recognize this distinction, and both *Chicopee v. Sims* and *AT&T Corp. v. Medical Review* refute Hospira's argument.

against the manufacturer of the component parts)); *Wilson v. Dryvit Sys.,* 206 F. Supp. 2d 749, 753 (E.D.N.C. 2002)(plaintiff's claims barred because damage to house caused by the defective external cladding constituted economic loss), *aff'd,* 2003 U.S. App. LEXIS 16161 (4th Cir. 2003).

The cases also distinguish between recovery for monetary losses and physical harm. As to the former, "[t]he U.C.C. is generally regarded as the *exclusive* source for ascertaining when the seller is subject to liability for damages if the claim is based on an intangible economic loss and not attributable to physical injury to person or to a tangible thing other than the defective product itself." *Reece*, 110 N.C. App. at 466, 429 S.E.2d at 770.

Hospira admits that its sight chambers are a component part of the larger IV administration sets that it sells to healthcare providers. Complaint, ¶ 9. Hospira also concedes that no one was physically harmed as a result of AlphaGary's alleged actions. Complaint, ¶ 37. Instead, what Hospira seeks to recover are the financial losses it suffered when it was forced to recall a product that did not perform as expected because of a defect in a component part. By any definition, Hospira's damages are properly classified as economic loss.

B. <u>Does the Economic Loss Doctrine Bar Hospira's Fraud Claim?</u>

I now come full circle to the central issue in this case: Does the economic loss doctrine, as applied in North Carolina, bar a claim for fraud under the facts of this case? Unfortunately, while the doctrine is easily stated as a general principle, the breadth of its application in North Carolina has been less than uniform. For example, the Fourth Circuit in *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998),

has counseled trial courts to be vigilant against a party's attempt "'to manufacture a tort dispute out of what is, at bottom, a simple breach of contract claim[,]'" a practice that is "'inconsistent both with North Carolina law and sound commercial practice.'" *See id.* at 346 (quoting *Strum v. Exxon Co.*, 15 F.3d 327, 329 (4th Cir. 1994)).

Broussard, however, does not square fully with opinions from our state appellate courts holding that—the economic loss doctrine notwithstanding—a plaintiff may pursue tort remedies (including punitive damages) where the alleged breach "'smack[s] of tort because of the fraud and deceit involved[.]'" *Zubaidi v. Earl L. Pickett Enters., Inc.,* 164 N.C. App. 107, 115, 595 S.E.2d 190, 194 (2004), *rev. denied*, 359 N.C. 76, 605 S.E.2d 151 (2004) (quoting *Oestreicher v. Am. Nat'l Stores, Inc.*, 290 N.C. 118, 136, 225 S.E.2d 797, 808-09 *(1976) (internal citations omitted)). See also Becker v. Graber Builders, Inc.*, 149 N.C. App. 787, 795, 561 S.E.2d 905, 911 (2002) (reversing trial court's order dismissing fraud and UDTPA claims arising from a contract for construction of a home); *Indem. Ins. Co. of N. Am. v. Am. Eurocopter, LLC,* 2005 U.S. Dist. LEXIS 34011, *slip op.* at *38 (M.D.N.C. July 8, 2005)(stating that "as a general principle under North Carolina law, claims for fraud take a claim beyond a simple breach of contract").

Despite the uncertainty in the cases, I have gleaned the following guideposts regarding the scope of the economic loss doctrine:

> 1. A tort action generally will not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. *North Carolina State Ports Auth. v. Lloyd A. Fry Roofing Co.*, 294 N.C. 73, 82, 240 S.E.2d 345, 350-51 (1978).

2. Where the contract involves the sale of goods, the U.C.C. will (at a minimum) bar negligence claims seeking recovery for damages to the product itself, even as to remote manufacturers who are not in privity of contract. *Moore,* 129 N.C. App. at 401-02, 499 S.E.2d at 780; *Reece,* 110 N.C. App. at 466, 429 S.E.2d at 770.

3. That bar, however, does not appear to extend to claims alleging negligent misrepresentation. *See Wilson,* 206 F. Supp. 2d at 754.

4. Moreover, where a breach of contract "'smack[s] of tort because of the fraud and deceit involved,'" North Carolina law will allow a party to pursue punitive damages based on the fraudulent act. *See Zubaidi,* 164 N.C. App. at 115, 595 S.E.2d at 194 (quoting *Oestreicher*, 290 N.C. at 136, 225 S.E.2d at 808-09 *(internal citations omitted)*).

5. The North Carolina appellate courts have yet to extend the application of the economic loss doctrine to bar claims based on fraud. *Coker v. DaimlerChrysler Corp.,* 617 S.E.2d 306, 318 (N.C. Ct. App. 2005)(Hudson, J., dissenting).

6. But North Carolina courts must remain vigilant against a party's unsupported attempt to engraft tort liability on what is at bottom a breach of contract action. *See Broussard,* 155 F.3d at 346.

Applying these principles to the case before me, because (a) there is no contract governing the relationship between the parties to this lawsuit; (b) Hospira's Complaint is replete with allegations of fraud and deceit purportedly committed by AlphaGary; (c) there is no binding precedent mandating dismissal of a fraud claim under these circumstances; and (d) at least at this stage, Hospira is entitled to every benefit of the doubt regarding the merits of its claims, the Court declines to dismiss Hospira's fraud claim.

I have considered the views expressed by my colleague Judge Ben Tennille in *Coker v. DaimlerChrysler Corp.*, 2004 NCBC 1, 2004 NCBC LEXIS 2 (Jan. 5, 2004), *aff'd on other grounds*, 617 S.E.2d 306 (N.C. Ct. App. 2005). In that case, plaintiffs alleged that the defendant committed fraud and violated the North Carolina Unfair and

Deceptive Trade Practices Act (the "UDTPA") by advertising its minivans as "the safest on the market" despite not having a brake shift interlock system. *Coker,* slip op. at **1.[4] Judge Tennille granted the defendant's Rule 12(c) motion to dismiss, concluding that plaintiffs lacked standing to sue because they suffered no actual or imminent injury from the alleged misconduct. *See Coker* at **3.

Judge Tennille also found that plaintiffs' fraud and UDTPA claims were barred by the economic loss doctrine. Relying on the Third Circuit's decision in *Werwinski v. Ford Motor Co.*, 286 F.3d 661 (3d Cir. 2002), Judge Tennille reasoned that awarding plaintiffs damages for alleged fraudulent misrepresentations "would violate the policy foundation of the economic loss rule by eviscerating the contract/warranty system now in place." *Coker* at **3. According to Judge Tennille:

> The economic loss doctrine is designed to place a check on limitless liability for manufacturers and establish clear boundaries between tort and contract law. Carving out an exception for intentional fraud would eliminate that check on liability that blurs the boundaries between the two areas of law, thus exposing manufacturers to substantial liability.

Id. (quoting *Werwinski,* 286 F.3d at 679).

While there is much to commend Judge Tennille's analysis, I am not convinced that existing North Carolina law supports a similar result here. In the first place, the fraud allegations in this case would not eviscerate a contractual or warranty relationship under the U.C.C. because there is no contract between the litigants. Second, if a claim alleging that a defendant willfully, fraudulently, and inaccurately reported the net sales under a lease agreement (which in turn led to defendant's underpayment of rents due under the lease) is sufficient under North Carolina law to support the recovery of tort

[4] Unlike the specific misrepresentations alleged in this case, the statement in *Coker* is more properly characterized as mere "puffing", which traditionally has not been sufficient to support a fraud claim under North Carolina law. *See Rowan County Bd. of Educ.,* 332 N.C. at 18.

and punitive damages, *see Oestreicher*, 290 N.C. at 131-36, then a claim that Defendant AlphaGary fraudulently misrepresented the specifications of PVC pellets to be delivered to third-party Moll for use in the manufacture of sight chambers, which in turn induced Plaintiff Hospira to purchase millions of defective sight chambers from Moll that were molded from the nonconforming pellets, also "smacks of tort" and thus, is sufficient to overcome a Rule 12(b)(6) motion to dismiss. *See, e.g., Shan Indus., LLC v. Tyco Int'l, Inc.*, 2005 U.S. Dist. LEXIS 37983 (D.N.J. September 12, 2005)(declining to apply economic loss doctrine to dismiss fraud claim where the alleged misrepresentation induced plaintiff to execute the contract); *Grispino v. New Eng. Mut. Life Ins. Co. (In re New Eng. Mut. Life Ins. Co. Sales Practices Litig.),* 2003 U.S. Dist. LEXIS 25664 (D. Mass. May 20, 2003), *aff'd,* 358 F.3d 16 (1st Cir. 2004) (stating that economic loss doctrine is properly extended to reach negligence claims on the basis that parties can protect themselves by negotiating the terms of a manufacturer's liability, but declining to apply the doctrine to common law and statutory fraud claims).

Moreover, there exist sound policy reasons for declining to extend the economic loss doctrine to bar the type of fraud claim alleged here. Boiled to its essence, AlphaGary's argument is that Hospira should have anticipated and planned for the possibility of fraud in this transaction and that, having failed to do so, it may look only to its contract remedies under the U.C.C. The law, however, should not foster commercial negotiations that "begin with the assumption that the other party is lying[.]" *Budgetel Inns, Inc. v. Micros Sys., Inc.,* 8 F. Supp. 2d 1137, 1148 (E.D. Wis. 1998).

To that end, our common law has always differentiated between a party who negligently causes harm and someone bent on intentional mischief. As a deterrent to

intentional wrongdoing, "[p]unitive damages or exemplary damages, as they are sometimes called, hold 'an established place' in North Carolina common law." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 166, 594 S.E.2d 1, 6 (2004) (citing *Hinson v. Dawson*, 244 N.C. 23, 27, 92 S.E.2d 393, 396 (1956)). Indeed, the sole basis for awarding punitive damages is to "punish intentional wrongdoing and to deter others from similar behavior." *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 113, 229 S.E.2d 297, 302 (1976).

Accepting AlphaGary's position in this case would immunize a defendant in a commercial transaction from any extra-contractual repercussions arising from its alleged misconduct, and thereby virtually invite fraud. Parties to a commercial transaction should not expect to be defrauded. When fraud does occur, however, it is not enough just to permit the offending party defendant to pay contract damages. As the court in *Zubaidi* explained, "If this were the law, defendant has all to gain and nothing to lose. If he is not caught in his fraudulent scheme, then he is able to retain the resulting dishonest profits. If he is caught, he has only to pay back that which he should have paid in the first place." *See Zubaidi*, 164 N.C. App. at 115, 595 S.E.2d at 194 (quoting *Oestreicher,* 290 N.C. at 136, 225 S.E.2d at 808-09).

Whether Hospira will be able to sustain its fraud allegations with proof remains to be seen. And consistent with the cautionary language in *Broussard,* I intend to carefully scrutinize the Plaintiff's allegations as this matter draws nearer to trial. At this stage, the Court concludes only that Hospira's fraud claim is sufficient to withstand a Rule 12(b)(6) motion to dismiss. Therefore, the Court **DENIES** AlphaGary's Motion to Dismiss as to the First Claim for Relief.

DISMISSAL OF PLAINTIFF'S SECOND CLAIM FOR RELIEF

Next, AlphaGary seeks dismissal of Hospira's Second Claim for Relief (asserting negligent misrepresentation) because it too is barred by the economic loss doctrine. As with the first claim for relief, AlphaGary argues that the economic loss doctrine mandates that the "exclusive source" of Hospira's remedies is Article 2 of the U.C.C. and a contract/warranty claim against Moll.

While AlphaGary's policy arguments regarding risk allocation are much more persuasive in the context of Hospira's claim of negligent misrepresentation, I am not satisfied that North Carolina law supports dismissal of the claim. Indeed, AlphaGary fails to cite a single North Carolina appellate decision that has applied the economic loss doctrine to dismiss a negligent misrepresentation claim. Moreover, Hospira directs me to *Wilson v. Dryvit Sys., Inc.*, 206 F. Supp. 2d 749 (E.D.N.C. 2002), a federal case interpreting North Carolina law, to support its position that the doctrine does not apply to bar a negligent misrepresentation claim.

In *Wilson*, the plaintiff homeowners sued a third-party contractor for economic loss resulting from the allegedly defective installation of a residential external cladding system. As in the case presently before me, the plaintiffs in *Wilson* had no contract with the defendant contractor. Despite the absence of a contract, the Court in *Wilson* found that North Carolina law may allow a party to allege the tort of negligent misrepresentation when he "'justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care.'" *See id.* at 754 (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206,

367 S.E.2d 609, 612 (1988), *rev'd on other grounds*, 329 N.C. 646, 407 S.E.2d 178 (1991)).[5]

In its Complaint, Hospira has alleged that (a) AlphaGary provided false information to it regarding the specifications of the PVC pellets to be supplied to Moll; (b) AlphaGary owed it a duty of care with respect to that information; and (c) Hospira justifiably relied on the information to its detriment. Consistent with *Wilson,* these allegations are sufficient to make out a claim for negligent misrepresentation. Accordingly, the Court **DENIES** Defendant's Motion to Dismiss as to the Second Claim for Relief.

DISMISSAL OF PLAINTIFF'S THIRD CLAIM FOR RELIEF

AlphaGary next seeks dismissal of Hospira's Third Claim for Relief alleging a violation of the UDTPA, asserting that this claim is also barred by the economic loss doctrine.

The elements of a UDTPA claim are "(1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce; and (3) plaintiff was injured as a result." *Phelps-Dickson Builders, L.L.C. v. Amerimann Partners*, 617 S.E.2d 664, 671 (N.C. Ct. App. 2005). Hospira's UDTPA claim is premised on the same fraudulent representations supporting its claim of common law fraud, and proof of fraud would necessarily constitute a UDTPA violation. *See Bhatti v. Buckland*, 328 N.C. 240, 243, 400 S.E.2d 440, 442 (1991). Accordingly, for the reasons discussed earlier with respect to Hospira's fraud claim, the Court **DENIES** Defendant's Motion to Dismiss as to the Third Claim for Relief.

[5] The court dismissed the claim, however, because plaintiffs failed to present any evidence of a misrepresentation (intentional or negligent) made by the defendant. *Wilson,* 206 F. Supp.2d at 754-55.

DISMISSAL OF PLAINTIFF'S FOURTH CLAIM FOR RELIEF

Next, AlphaGary seeks dismissal of Hospira's Fourth Claim for Relief alleging negligence, asserting that the economic loss doctrine bars such a claim. As to this particular claim, I agree with AlphaGary and will therefore **GRANT** the motion.

Notwithstanding the absence of a contract between the parties, North Carolina law prohibits the bringing of a negligence action against the manufacturer or seller of a product for economic losses sustained as a result of the product's failure to perform as expected. *Wilson,* 206 F. Supp. 2d at 753. In such a case, sound public policy requires that the parties consider and (if necessary) insure against this unintended risk through contract.

Accordingly, the Court **GRANTS** Defendant's Motion to Dismiss as to the Fourth Claim for Relief.

DISMISSAL OF PLAINTIFF'S FIFTH CLAIM FOR RELIEF

AlphaGary next seeks dismissal of Hospira's Fifth Claim for relief alleging "estoppel." This claim arises from the October 2001 written specification that Hospira sent to AlphaGary incorporating Hospira's requirements for pelletizing Ashland Powder. According to Hospira, AlphaGary accepted the specification and certified in writing that it would use only Ashland Powder to produce pellets identified by the unique specification number. Despite the lack of an enforceable contract between the parties, Hospira asserts that it reasonably relied to its detriment on this certification in accepting the sight chambers that Moll later manufactured with pellets purchased from AlphaGary.

Before addressing the sufficiency of Hospira's claim, I must resolve the parties' dispute as to the applicable law. According to Hospira, New York law governs the

estoppel claim because the document containing the promise at issue (i.e. the specification) was created at its headquarters in Buffalo, New York. AlphaGary retorts that North Carolina law applies because the promise (if any) was made in Pineville, North Carolina, where AlphaGary certified in writing its assent to the specification.

I view a claim of promissory estoppel as sounding in contract. As such, the claim would be "governed by the law of the place where the contract was made." *Tanglewood Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). Here, although there is no binding contract, AlphaGary made the alleged promise forming the basis for the estoppel claim in North Carolina, where its representative signed the specification. Accordingly, North Carolina law governs Hospira's estoppel claim.

North Carolina courts have not allowed promissory estoppel claims to proceed where the doctrine is used to seek affirmative relief. *See Home Electric Co. of Lenoir, Inc. v. Hall and Underdown Heating and Air Conditioning Co.*, 86 N.C. App. 540, 543, 358 S.E.2d 539, 541 (1987). Instead, the cases have limited application of the doctrine to defensive situations, "where there has been an intended abandonment of an existing right by the promisee." *Id.*

Thus, in the absence of any North Carolina law allowing "estoppel" to be asserted as a claim for affirmative relief, the Court **GRANTS** Defendant's Motion to Dismiss as to the Fifth Claim for Relief.

DISMISSAL OF PLAINTIFF'S SIXTH CLAIM FOR RELIEF

Finally, AlphaGary alleges that Hospira's Sixth Claim for Relief should be dismissed because it is a breach of implied warranty claim, and privity is required to assert a breach of implied warranty claim involving only economic loss. AlphaGary's

characterization of Hospira's claim as one for breach of implied warranty under the U.C.C. is incorrect.

"'[T]o withstand a motion to dismiss for failure to state a claim in a breach of contract action, a plaintiff's allegations must either show it was in privity of contract, or it is a *direct beneficiary* of the contract.'"[6] *Woolard v. Davenport*, 166 N.C. App. 129, 136, 601 S.E.2d 319, 324 (2004)(quoting *Lee Cycle Ctr., Inc. v. Wilson Cycle Ctr., Inc.*, 143 N.C. App. 1, 8, 545 S.E.2d 745, 750, *aff'd*, 354 N.C. 565, 556 S.E.2d 293 (2001) (emphasis added)). Hospira asserts that it is a third-party beneficiary of Moll's contracts with AlphaGary. Specifically, Hospira alleges that it was damaged as a result of AlphaGary's breach of its promise to supply Moll with PVC pellets made from Ashland Powder. Thus, I find that the cause of action is properly pled as a third-party beneficiary claim.

To establish a claim as a third-party beneficiary to a contract, a plaintiff must show: "'(1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; and (3) that the contract was entered into for [the plaintiff's] direct, and not incidental, benefit.'" *Metric Constructors, Inc. v. Indus. Risk Insurers*, 102 N.C. App. 59, 63, 401 S.E.2d 126, 129 (1991) *(citations omitted)*. *See also Woolard*, 166 N.C. App. at 136, 601 S.E.2d at 324.

---

[6] A third party beneficiary to a contract cannot, by definition, be in true privity with the contracting parties. If, as AlphaGary asserts, privity were an absolute requirement to such a claim, no third party beneficiary could ever sue for breach of contract. During the hearing on the motion to dismiss, AlphaGary's counsel suggested that the third party beneficiary provision with respect to warranties under the North Carolina U.C.C. (N.C.G.S. § 25-2-318), purports to require privity, except for the narrow class of persons (i.e. the buyer's family, household and guests) that the statute exempts from the requirement. This argument fails for two reasons: (1) AlphaGary has mischaracterized Hospira's claim as one for breach of warranty; and (2) the particular U.C.C. provision relied on by AlphaGary does not address or otherwise purport to exclude common law claims where a party asserts that it was an intended third-party beneficiary to a contract.

Hospira's Complaint easily satisfies all three elements. Specifically, the Complaint alleges the existence of valid and enforceable contracts between AlphaGary and Moll for the sale of PVC pellets. Further, Hospira specifically alleges that it was a direct third-party beneficiary of these contracts, and that both AlphaGary and Moll intended that result. Accordingly, the Court **DENIES** Defendant's Motion to Dismiss as to the Sixth Claim for Relief.

CONCLUSION

For the reasons set forth above the Court:

1. **DENIES** Defendant AlphaGary's Motion to Dismiss Plaintiff Hospira's First, Second, Third, and Sixth Claims for Relief; and

2. **GRANTS** Defendant AlphaGary's Motion to Dismiss Plaintiff Hospira's Fourth and Fifth Claims for Relief.

This the 16th day of February, 2006.

Albert Diaz
Special Superior Court Judge