IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ARKRAY AMERICA, INC.,	)
	)
Plaintiff,	)
	)
v.	) C.A. No. N20C-12-012 MMJ CCLD
	)
NAVIGATOR BUSINESS SOLUTIONS, INC. AND N'WARE TECHNOLOGIES, INC.,	)
	)
Defendants.	)

Submitted: May 16, 2023
Decided: July 18, 2023
Redacted: July 31, 2023

On Plaintiff Arkray's Motion
for Partial Summary Judgment
GRANTED IN PART AND DENIED IN PART

On Defendant Navigator Business Solutions, Inc.'s
Motion for Partial Summary Judgment
GRANTED IN PART AND DENIED IN PART

On Defendant N'Ware Technologies, Inc.'s
Motion for Partial Summary Judgment
GRANTED IN PART AND DENIED IN PART

On Plaintiff Arkray's Motion to File a Sur Reply
DENIED

OPINION

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JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

This is a contract dispute. ARKRAY America, Inc. ("Arkray") is a Delaware corporation. Arkray is a wholly-owned subsidiary of ARKRAY Global Business, Inc., which is a wholly-owned subsidiary of the Japanese parent company, ARKRAY, Inc. ("Arkray Japan"). "Arkray manufactures and sells blood-glucose testing, diabetes management equipment, and laboratory equipment and testing supplies."[1] Navigator is a Utah corporation that sells and implements Enterprise Resource Planning ("ERP") solutions. N'Ware Technologies, Inc. ("N'Ware") is a Delaware corporation that developed a warehouse management and shipping software called LISA. N'Ware also sells and implements ERP solutions. Both Navigator and N'Ware resell SAP's Business One and By Design

[1] Arkray's Compl. at ¶ 6.

software as the foundation for their ERP solutions. LISA is an add-on to SAP's ERP software—Business One and By Design.

In 2015, Arkray contacted Navigator to implement an SAP-driven ERP system. Between April and June of 2015, Navigator visited Arkray twice to scope out the project. To address Arkray's warehouse management and shipping needs, Navigator introduced Arkray to N'Ware as a "best in breed" partner for its LISA software. N'Ware joined Navigator for the second visit with Arkray in 2015. After multiple proposals, Navigator and Arkray executed a final contract in February 2016 (the "Navigator Agreement"), whereby Navigator agreed to implement an SAP driven ERP system for Arkray. In April 2016, Arkray and N'Ware executed the N'Ware Technologies Solution License Agreement (the "N'Ware Agreement").

The implementation did not go as planned. Arkray alleges that Navigator, together with N'Ware, failed to provide the fully integrated and functioning ERP system as expected. Arkray filed its complaint on December 1, 2020. In its complaint, Arkray alleges: (Count I) breach of contract against Navigator; (Count II) breach of warranty against Navigator; (Count III) breach of warranty against N'Ware; (Count IV) fraudulent misrepresentation against Navigator; (Count V) fraudulent misrepresentation against N'Ware; (Count VI) violation of Minnesota

Unlawful Trade Practices Act ("MUTPA") against Navigator; and (Count VII) violation of MUTPA against N'Ware.

Navigator and N'Ware moved to dismiss Counts III–VII. All counts survived the Motion to Dismiss. The Court resolved the parties' Motions to Dismiss, finding:

> The Court holds that Utah law governs ARKRAY's contract-based claims against Navigator in Counts I and II and Delaware law governs ARKRAY's breach of warranty claim against N'Ware in Count III. There are no conflicts of law related to fraudulent misrepresentation or the economic loss doctrine, so the Court need not engage in a conflict-of-law analysis for Counts IV and V. Additionally, a conflict-of-law analysis is not necessary for Counts VI and VII because Delaware public policy will not be offended by applying the Minnesota UTPA statute. The Court further finds that ARKAY's claims are not barred by the economic loss doctrine or Delaware's bootstrapping doctrine. ARKRAY's claims are sufficiently pled. The Rule 9(b) particularity requirements are met, and a more definite statement is not necessary. Based on the contractual provisions contained in the N'Ware License agreement, the Court finds that ARKRAY contractually waived its right to a trial by jury for Count III. Finally, the Court finds that it would be premature to decide the limitation of damages issue at this time.[2]

After the Court's ruling on the Motion to Dismiss, Navigator filed the following counterclaims against Arkray: (Counterclaim I) breach of contract; (Counterclaim II) breach of the duty of good faith and fair dealing; (Counterclaim

[2] *ARKRAY Am., Inc. v. Navigator Bus. Sols., Inc.*, 2021 WL 2355234, at *8 (Del. Super.).

III) fraudulent misrepresentation; and (Counterclaim IV) declaratory judgment as to the parties' rights and duties under the Navigator Agreement.

N'Ware asserted the following crossclaims against Navigator: (Crossclaim I) seeking indemnification/contribution from Navigator for any amount N'Ware is found liable to Arkray; and (Crossclaim II) breach of contract.

Arkray, Navigator, and N'Ware each filed Motions for Partial Summary Judgment. Arkray moves for Summary Judgment on Navigator's Counterclaim IV and Navigator's affirmative defense of unclean hands. Navigator moves for Summary Judgment on Arkray's Counts IV and VI, and on its own Counterclaim IV. N'Ware moves for Summary Judgment on Arkray's Counts III, V, and VII. Arkray filed a Motion for Leave to File a Sur-Reply. The Court heard oral argument on May 16, 2023.

For purposes of judicial economy and expediency, the Court hereby **DENIES** Arkray's Motion for Leave to File a Sur-Reply. The Court considered the following during argument: (1) the affidavit and report from Arkray's expert, James Mottern (the "Mottern Affidavit"); (2) the affidavit of John McCrea (the "McCrea Affidavit"); and (3) the parties' related arguments.

SUMMARY JUDGMENT STANDARD

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[3] All facts are viewed in a light most favorable to the non-moving party.[4] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[5] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[6] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[7]

Delaware Superior Court Civil Rule 56(h) states:

> Where the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions.

However, where the moving parties continue to argue disputed facts, "the standard of review on cross-motions for summary judgment is equivalent to the situation where one party moves for summary judgment."[8]

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[3] Super. Ct. Civ. R. 56(c).
[4] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).
[5] Super. Ct. Civ. R. 56(c).
[6] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[7] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).
[8] *Spivey v. USAA Cas. Ins. Co.*, 2017 WL 3500402, at *4 (Del. Super.), *aff'd*, 184 A.3d 1289 (Del. 2018) (citing *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997); *Capano v. Lockwood*, 2013 WL 2724634, at *2 (Del. Super.); *Total Care Physicians, P.A. v. O'Hara*, 798 A.2d 1043, 1050 (Del. Super. 2001)).

> [T]he existence of cross motions for summary judgment does not act *per se* as a concession that there is an absence of factual issues. Rather, a party moving for summary judgment concedes the absence of a factual issue and the truth of the nonmoving party's allegations only for purposes of its own motion, and does not waive its right to assert that there are disputed facts that preclude summary judgment in favor of the other party. Thus, the mere filing of a cross motion for summary judgment does not serve as a waiver of the movant's right to assert the existence of a factual dispute as to the other party's motion.[9]

ANALYSIS

ARKRAY'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Limitation of Damages

The parties agree that a limitation of damages does not apply to non-contract claims.

Section 3.6.1 of the Navigator Agreement states:

> 3.6.1 EXCEPT FOR CLAIMS BROUGHT UNDER SECTIONS 3.4 AND 3.5 ANYTHING TO THE CONTRARY HEREIN OR DAMAGES RESULTING FROM UNAUTHORIZED USE OR DISCLOSURE OF PROPRIETARY INFORMATION AND [NAVIGATOR]'S RIGHT TO COLLECT UNPAID FEES, UNDER NO CIRCUMSTANCES SHALL EITHER PARTY OR ITS AFFILIATES, LICENSORS, CONSULTANTS OR CUSTOMERS BE LIABLE TO EACH OTHER OR ANY OTHER PERSON OR ENTITY FOR AN AMOUNT OF DAMAGES IN EXCESS OF THE LESSER OF EITHER THE FEES PAID FOR THE APPLICABLE SERVICES IN THE TWELVE (12) MONTH PERIOD PRECEDING THE DATE OF THE

[9] *United Vanguard Fund, Inc. v. TakeCare, Inc.*, 693 A.2d 1076, 1079 (Del. 1997).

> CLAIM HEREUNDER OR ONE HUNDRED THOUSAND DOLLARS ($100,000.00 USD) DURING ANY TERM OR RENEWAL TERM OF THE AGREEMENT AND IN NO EVENT SHALL [NAVIGATOR]'S OR ITS LICENSORS' TOTAL LIABILITY EXCEED THREE HUNDRED THOUSAND DOLLARS ($300,000.00 USD) DURING THE ENTIRETY OF ALL TERMS OF THE AGREEMENT. WITHOUT LIMITING THE FOREGOING, UNDER NO CIRCUMSTANCES SHALL EITHER PARTY, ITS AFFILIATES, LICENSORS, CONSULTANTS OR CUSTOMERS BE LIABLE TO EACH OTHER OR ANY OTHER PERSON OR ENTITY BE LIABLE IN ANY AMOUNT FOR SPECIAL, INCIDENTAL, CONSEQUENTIAL OR INDIRECT DAMAGES, LOSS OF GOOD WILL OR BUSINESS PROFITS, WORK STOPPAGE, DATA LOSS, COMPUTER FAILURE OR MALFUNCTION, ANY AND ALL OTHER COMMERCIAL DAMAGES OR LOSS, OR EXEMPLARY OR PUNITIVE DAMAGES.

Section 3.6.2 of the Navigator Agreement states:

> 3.6.2 Customer's Remedies. Customer's sole and exclusive remedy for any damages or loss in any way connected with the SAP SBO Services provided hereunder by [Navigator], SAP and/or their Consultants, whether due to [Navigator]'s and/or SAP's negligence or breach of any other duty, shall be, at [Navigator]'s option, performance of the SAP SBO Services or refund the fees Customer paid for the infringing Deliverable, SAP SBO Services or other software.

Section 2.4.1 of the Navigator Agreement states:

> 2.4.1 Customer, on receipt of notification from [Navigator] that the Deliverable has been provided, shall provide written notification within thirty (30) business days (the "Acceptance Period") to [Navigator] if the

> Deliverable has failed to comply with the applicable specifications in a Statement of Work and is therefore rejected. If Customer accepts the Deliverable within the Acceptance Period, the Deliverable shall be deemed to have been accepted by Customer (the "Acceptance Date"). If the Deliverable is rejected because of a non-conformity with the specifications in a Statement of Work, [Navigator] shall correct such Deliverable so it conforms to the specifications in a commercially reasonable period of time. All Deliverables that are re-delivered to Customer shall he subject to a new thirty (30) day acceptance period. In the event Customer fails to notify [Navigator] of its acceptance or rejection of the Deliverable within the thirty (30) day acceptance period, then the Deliverable shall be deemed accepted by Customer and the Warranty Period defined in Section 3.3.1 will begin. If the Deliverable still displays deviations from the agreed specifications set out in the applicable Statement of Work. Customer may rescind the applicable Statement of Work and receive a full refund of all amounts paid for such Deliverable.

Section 3.3.1 of the Navigator Agreement states in part:

> Customer agrees to notify [Navigator] during the Warranty Period of any nonconformity with the warranties hereunder in enough detail for the NOS Project Manager to make a reasonable determination of the alleged unsatisfactory Deliverables, and the [Navigator] Project Manager will evaluate the alleged breach and NOS shall repair such non[-]conformity with the Deliverable during the Warranty Period or provide a reasonable work around. If a correction of the Deliverable cannot be produced by [Navigator] in a commercially reasonable time not to exceed thirty (30) days, Customer shall have, in addition to any other remedies it has and its sole discretion, the right to a full refund of all amounts paid to NOS for the non-conforming Deliverable.

All contractual provisions must be read together.[10] If possible, all contractual terms should be given effect.[11]

Navigator contends that Section 3.6.1 limits Arkray's potential damages. Navigator argues that the language, "ANYTHING TO THE CONTRARY HEREIN" from Section 3.6.1 does not refer to the Navigator Agreement as a whole. Rather, Navigator contends that "herein" only may refer to the language within Section 3.6.1. Therefore, Navigator contends that potential damages arising from Sections 2.4.1, 3.3.1, and 3.6.2 are limited by the amounts in Section 3.6.1.

To the extent "herein" applies to the entire Navigator Agreement—thus exempting contrary provisions within the Navigator Agreement from the limitation provision in 3.6.1—Navigator argues Sections 2.4.1, 3.3.1, and 3.6.2 are not contrary to Section 3.6.1. Rather, Navigator contends Sections 2.4.1, 3.3.1, and 3.6.2 are harmonious with 3.6.1.

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[10] *Brady v. Park*, 445 P.3d 395, 408 (Utah 2019) ("Under our caselaw a reasonable interpretation is an interpretation that cannot be ruled out, after considering the natural meaning of the words in the contract provision in context of the contract as a whole, as one the parties could have reasonably intended."); *see also Weinberg v. Waystar, Inc.*, 2023 WL 2534004, at *4 (Del.) ("We will read the contract as a whole and 'enforce the plain meaning of clear and unambiguous language.'" (quoting *Manti Hldgs, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021))).

[11] *Encon Utah, LLC v. Fluor Ames Kraemer, LLC*, 210 P.3d 263, 269 (Utah 2009) ("In interpreting a contract, we look for a reading that harmonizes the provisions and avoids rendering any provision meaningless."); *see also Weinberg*, 2023 WL 2534004, at *4 ("[W]e endeavor 'to give each provision and term effect' and not render any terms 'meaningless or illusory.'" (quoting *Manti Hldgs, LLC v. Authentix Acquisition Co., Inc.*, 261 A.3d 1199, 1208 (Del. 2021))).

Arkray contends that the language, "ANYTHING TO THE CONTRARY HEREIN" from Section 3.6.1 refers to anything contrary within the entire Navigator Agreement. Thus, Arkray contends that Sections 2.4.1, 3.3.1, and 3.6.2 are contrary to 3.6.1—making damages under these provisions not limited by Section 3.6.1.

The Court finds the limitation provision in Section 3.6.1 of the Navigator Agreement is clear and unambiguous. The term, "herein," refers to the whole Navigator Agreement. The term "herein" is used in other places throughout the Navigator Agreement. In each instance, the context of the contractual language demonstrates that it is referring to the entire Navigator Agreement.

However, the Court finds there are questions of fact concerning claims under Sections 2.4.1 or 3.3.1[12]—which account for a refund as damages. These questions of fact include: (1) whether Arkray proved it rejected a non-conforming deliverable under Section 2.4.1; (2) whether an accepted deliverable under 3.3.1 is defective because it does not meet specifications; (3) whether Arkray declined final acceptance when Navigator failed to ensure "the correct interaction of the separate modules or components accepted at an earlier date . . .";[13] (4) whether Navigator

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[12] The Court notes that damages claims cannot arise under Section 3.6.2. Rather, Section 3.6.2 provides that customer remedies may exist in two forms at the election of Navigator: (1) specific performance; or (2) a refund. The Court need not decide remedies at this juncture due to pending questions of fact.

[13] Navigator Agreement, § 2.4.4.

used “commercially reasonable efforts to complete” the project by the targeted completion date;[14] and (5) whether Navigator “performed in a commercially reasonable manner consistent with generally accepted industry standards.”[15]

The Court finds Arkray’s failure of essential purpose arguments not persuasive. The Court finds that the limitation of damages provision in Section 3.6.1 does not apply to all contract claims. Sections 2.4.1 and 3.3.1 of the Navigator Agreement both allow for a “full refund.” Section 3.6.1 attempts to limit damages. Thus, claims under Sections 2.4.1 and 3.3.1 are contrary to the damages limitation in Section 3.6.1. Therefore, claims arising under Sections 2.4.1 and 3.3.1 may be excepted from Section 3.6.1’s damages limitation. To the extent Section 3.6.2 allows for a full refund, it is also contrary to Section 3.6.1 and may be excepted from Section 3.6.1’s damages limitation.[16] Summary judgment on this issue is hereby **GRANTED IN PART AND DENIED IN PART**.

Unclean Hands

The doctrine of unclean hands requires that parties who come into equity for relief must show that their “‘conduct has been fair, equitable, and honest as to the

[14] Navigator Agreement, § 3.3.1.
[15] *Id.*
[16] The Court notes that damages claims cannot arise under Section 3.6.2. Rather, Section 3.6.2 provides that customer remedies may exist in two forms at the election of Navigator: (1) specific performance; or (2) a refund. The Court need not decide remedies at this juncture due to pending questions of fact.

particular controversy in issue.'"[17] "'The Court of Chancery has broad discretion in determining whether to apply the doctrine of unclean hands."[18]

Arkray argues Navigator's affirmative defense of unclean hands is barred under both Delaware and Utah law because it is an equitable defense that does not apply to legal claims. To support this proposition, Arkray cites to both Utah and Delaware case law: *Hill v. Estate of Allred*[19] and *American Healthcare Administrative Services, Inc. v. Aizen*.[20]

Navigator contends the affirmative defense of unclean hands is not barred. Navigator cites two Delaware cases to support its position: *American Healthcare Administrative Services, Inc. v. Aizen*[21] and *XRI Inv. Holdings LLC v. Holifield*.[22] In the alternative, Navigator contends the affirmative defense of *in pari delicto* is available to it.

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[17] *Kartchner v. Kartchner*, 334 P.3d 1, 11 (Utah 2014) (quoting *Goggin v. Goggin*, 299 P.3d 1079, 1097 (Utah 2013)); *see also RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 875–76 (Del. 2015) ("The doctrine of unclean hands is '[e]quity's maxim that a suitor who engaged in his own reprehensible conduct in the course of [a] transaction at issue must be denied equitable relief . . ., a rule which in conventional formulation operated *in limine* to bar the suitor from invoking the aid of the equity court . . . .'").

[18] *RBC Cap. Markets, LLC v. Jervis*, 129 A.3d 816, 876 (Del. 2015); *see also Allen v. State*, 2012 WL 1658351, at *1 (Del.) ("The clean hands doctrine allows a court of equity to refuse relief to a party whose inequitable conduct relates directly to the claim presented.").

[19] 216 P.3d 929 (Utah 2009).

[20] 285 A.3d 461 (Del. Ch. 2022).

[21] *Id.*

[22] 283 A.3d 581 (Del. Ch.), *judgment entered*, (Del. Ch. 2022).

In *Wilmington Trust, National Association v. Sun Life Assurance Company of Canada*,[23] the Supreme Court reviewed the Superior Court's decision to strike the affirmative defenses of laches and unclean hands.[24] The Superior Court had granted a motion to strike the affirmative defenses because the Court lacked jurisdiction to consider those defenses.[25] The Delaware Supreme Court did not directly address whether the Superior Court may address the defense of unclean hands when a legal claim is at issue. However, the Delaware Supreme Court agreed that the Superior Court correctly granted the motion to strike the equitable affirmative defenses.[26]

In *XRI*, the Court of Chancery stated:

> [E]quitable defenses that emerged solely as defenses against requests for equitable relief are generally not available in response to legal claims. The two primary examples are laches and unclean hands. The former is generally regarded as only available to address equitable claims. The latter remains unsettled, and although the Court of Chancery decisions discussed above state that it is only available in equity, there is no real consensus about whether the defense should be available in actions at law

[23] 294 A.3d 1062, 1065 (Del. 2023), *as revised* (Mar. 21, 2023).
[24] *Id.* at 1069.
[25] *Id.*; *Sun Life Assurance Co. of Canada v. Wilmington Tr., Nat'l Ass'n*, 2018 WL 3805740, at *4 (Del. Super.); *see also Sun Life Assurance Co. of Canada v. Wilmington Tr., Nat'l Ass'n*, 2022 WL 179008, at *1 (Del. Super.), *aff'd in part, rev'd in part and remanded*, 294 A.3d 1062 (Del. 2023), *as revised* (Mar. 21, 2023).
[26] *Wilmington Tr., Nat'l Ass'n*, 294 A.3d at 1074 ("The Superior Court correctly averted that result by dismissing Wilmington Trust's promissory-estoppel counterclaim and striking its equitable affirmative defenses . . . ."); *Id.* at 1079 ("The Superior Court properly dismissed Wilmington Trust's promissory-estoppel counterclaim and struck its equitable defenses . . . .").

> or whether, as a practical matter, it already is available under functional equivalents like *in pari delicto*.[27]

Navigator contends that the last sentence of the *XRI* excerpt above demonstrates that the unclean hands defense may be offered as a defense to legal claims. The authority for the last sentence of the excerpt above cites primarily to secondary sources and a case from Michigan.[28] Although the defense of unclean hands is an equitable defense, there is scholarly debate as to its applicability to legal claims.[29]

In *American Healthcare*, the Court of Chancery further clarified the applicability of the unclean hands doctrine to legal claims.[30] "The *XRI* decision devoted many pages to explaining why the broad assertion that equitable defenses cannot be raised to defeat legal claims constitutes an erroneous generalization. Many equitable defenses can be used to defeat legal claims."[31] The Court of Chancery again stated there is not a consensus regarding whether the affirmative defense of unclean hands is available for legal claims.[32] A series of opinions from the Court of Chancery have arrived at the conclusion that "the unclean hands doctrine . . . can be raised to defeat an equitable remedy, but not one that defeats

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[27] *Id.* at 640 (internal citations omitted).
[28] *Id.* at 640 n.53.
[29] *Id.* at 640.
[30] 285 A.3d at 485–93.
[31] *Id.* at 485.
[32] *Id.* at 486.

other remedies."[33] After reviewing the history of the unclean hands defense and acknowledging the differing opinions, the Court of Chancery concluded that "a defense of unclean hands is generally unavailable to defeat a legal claim, but becomes available if the plaintiff seeks equitable relief."[34]

Some Delaware Superior Court cases have considered application of the doctrine of unclean hands to legal claims.[35] Other Superior Court cases

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[33] *Id.* at 490.
[34] *Id.* at 493.
[35] *Id.* at 491 (citing *Mfrs. & Traders Tr. Co., Wilm. Savs. Fund Soc., FSB v. Wash. House P'rs, LLC*, 2012 WL 1416003, at *4 (Del. Super.) ("While the unclean hands doctrine is generally an equitable defense available in the Court of Chancery, this Court is permitted to consider equitable defenses raised by parties."); *Kroll, Inc. v. Salesorbit Corp.*, 2008 WL 2582989, at *2 (Del. Super.) (denying summary judgment on defendant's claim that plaintiff acted with unclean hands when seeking to collect on promissory note); *Korotki v. Hiller & Arban, LLC*, 2017 WL 2303522, at *11 & n.78 (Del. Super.) (characterizing the unclean hands defense as "purely equitable" and "'generally inappropriate' where legal remedies are sought," but recognizing conflicting authority; stating that the *in pari delicto* defense is "[a]kin to the doctrine of unclean hands"); *USH Ventures v. Glob. Telesystems Grp., Inc.*, 796 A.2d 7, 19–20 (Del. Super. 2000) (explaining why the Delaware Superior Court should be able to consider equitable defenses, but acknowledging that unclean hands, balance of hardships, and laches may present adoptability problems)).

The Court notes that of the cases cited by *American Healthcare* above, only one applies the unclean hands doctrine: *Mfrs. & Traders Tr. Co.* In *Mfrs. & Traders Tr. Co*, the Court concluded the party's unclean hands argument was meritless because a "party cannot come to court with unclean hands and then claim unclean hands as a defense." 2012 WL 1416003, at *4. The *Kroll* Court stated that a party made the unclean hands argument, but the *Kroll* Court did not address it. Rather, the *Kroll* Court concluded summary judgment was denied on the basis of the existence of genuine issues of material facts. 2008 WL 2582989, at *2. The *Korotki* Court refused to apply the unclean hands doctrine, stating that the "Court will not grant summary judgment according to the doctrine of unclean hands. The Complaint seeks only legal remedies and monetary damages in connection with the malpractice claim. As such, summary judgment based on the equitable doctrine of unclean hands would be inappropriate here." 2017 WL 2303522, at *12. The *USH* Court did not apply the doctrine of unclean hands. Rather, the *USH* Court advocated for the applicability of equitable defenses to legal actions, but acknowledged the doctrine of unclean hands is generally inappropriate for legal remedies. 796 A.2d 7, 20 & n.16.

acknowledge that the doctrine of unclean hands is not appropriate as a remedy for a legal claim, while also concluding the party asserting the unclean hands defense could not use the defense when the doctrine is applied.[36] Other Superior Court cases have declined to elaborate on the propriety or application of the doctrine.[37] The Court is not aware of any Delaware Superior Court cases that have used the unclean hands doctrine to bar a plaintiff's claim.

The most compelling Delaware Superior Court case that considered the unclean hands doctrine is *Manufacturers & Traders Trust Company v. Washington House Partners, LLC*.[38] In that case, a mortgage was erroneously satisfied based on a mistake.[39] The petitioner filed a rule to show cause under 25 *Del. C.* § 2122 as to why the mortgage satisfaction should not be stricken.[40] The respondent—

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[36] *See Del-One Fed. Credit Union v. Sokolove*, 2019 WL 6711443, at *3 (Del. Super.) (stating the Superior Court may consider the unclean hands defense, then concluding the unclean hands defense fails as a matter of law because the plaintiff was seeking monetary relief, and then addressing the unclean hands doctrine by stating that the defendant "has not pleaded any facts that would give rise to a defense of unclean hands"); *State v. Gold Fever, LLC*, 2018 WL 4693143, at *3 (Del. Super.) (stating the Court did "not find that the State's conduct ha[d] so offended the integrity of the court that the claims should be denied, regardless of merit[,]" but declining to dismiss the case on that basis because the complaint only sought legal damages).

[37] *See Sun Life Assurance Co. of Canada v. Wilmington Tr., Nat'l Ass'n*, 2018 WL 3805740, at *4 (Del. Super.) ("The motion [to strike] is granted as to the equitable defenses of laches, waiver and estoppel, and unclean hands because this Court lacks jurisdiction."); *Korotki*, 2017 WL 2303522, at *12 ("[T]he Court will not grant summary judgment according to the doctrine of unclean hands. The Complaint seeks only legal remedies and monetary damages in connection with the malpractice claim. As such, summary judgment based on the equitable doctrine of unclean hands would be inappropriate here."); *U.S. Bank Nat. Ass'n v. Gunn*, 2012 WL 3642703, at *1 (Del. Super.) ("'Unclean hands,' however, is only an affirmative defense to an equitable claim.").

[38] 2012 WL 1416003 (Del. Super.).

[39] *Id.* at *4.

[40] *Id.* at *1.

who asserted the unclean hands defense—was the party that stood to benefit the most from the mistake.[41] The Court concluded the unclean hands defense was meritless because it was not equitable to allow the respondent to "take advantage of a mistake for its own benefit."[42] The Court reinstated the mortgage.[43]

The instant case is distinguishable from *Manufacturers*. First, the instant case does not concern a rule to show cause under 25 *Del. C*. § 2122. Second, the remedy requested by the petitioner in *Manufacturers* was to reinstate a mortgage, which arguably is more akin to an equitable remedy than a legal remedy. The petitioner was not seeking monetary damages. Thus, the Court decided it was pertinent to cross Delaware's equity-law divide to address the respondent's argument concerning the doctrine of unclean hands.[44] Even so, the Court refused to allow the respondent to benefit from the doctrine.[45] In contrast, the instant case is a contractual dispute where monetary damages is the primary remedy sought by the parties. Thus, *Manufacturers* does not control.

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[41] *Id.* at *4.
[42] *Id.*
[43] *Id.*
[44] *See id.* (concluding that the Court would not let the respondent benefit from a mistake because it would not be equitable).
[45] *Id.*

Utah case law regarding the affirmative defense of unclean hands is more easily defined. The Utah Supreme Court has found that the defense of unclean hands is only appropriate where the plaintiff is seeking equitable relief.[46]

The Court finds that the unclean hands defense is not available to Navigator in this case. The Court finds controlling the precedent from the Court of Chancery and Utah courts, which states that an unclean hands defense is not available where the plaintiff does not seek equitable relief. Therefore, the Court will not consider Navigator's unclean hands defense. The Court finds Navigator's arguments concerning the affirmative defense of *in pari delicto* are waived because it failed to raise that affirmative defense in its Answer to the Complaint and Counterclaim, dated June 29, 2021.[47]

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[46] *Goggin v. Goggin*, 299 P.3d 1079, 1097 (Utah 2013) ("In this case, Dennis's request for salary and rent was a request for equitable relief. . . . The court was well within its discretion to apply the doctrine of unclean hands and deny Dennis the equitable relief he sought."); *Hill v. Estate of Allred*, 216 P.3d 929, 935 (Utah 2009) ("Because the court never invoked equitable powers to award . . . damages, it was not justified when it turned to an equitable principle to defeat her [legal] claims. . . . We find that because [Plaintiff] was not awarded damages on equitable grounds, the . . . court erred in denying [Plaintiff] punitive damages based on unclean hands.").

[47] *Annestella v. GEICO Gen. Ins. Co.*, 2014 WL 4229999, at *4 (Del. Super.) ("Failure to raise an affirmative defense waives it if the defense 'is not raised in a timely fashion.'"); *Kaplan v. Jackson*, 1994 WL 45429, at *2 (Del. Super.) ("Generally, if a defendant does not plead an affirmative defense, he or she waives that defense."); Super. Ct. Civ. R. 8(c).

NAVIGATOR'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Fraudulent Misrepresentation

The Court of Chancery has outlined the required elements to establish a fraudulent misrepresentation claim:

> [T]o establish a claim for fraudulent misrepresentation, a plaintiff must show: (1) that the defendant made a false representation of a material fact to the plaintiff; (2) that the defendant must have knowledge of the falsity of the representation, while the plaintiff must be ignorant of the falsity; (3) that the misrepresentation was made with the intent that the plaintiff would believe it to be true, act in reliance thereon, and be deceived thereby; and (4) that the plaintiff actually did so believe, act, and was deceived, as well as having been harmed thereby.[48]

Arkray alleges that Navigator made the following false representations: (1) that Navigator had "expertise and ability to design and provide Arkray with an integrated and fully functioning Business One system"[49]—specifically that Navigator had experience working with N'Ware to integrate LISA with Business One; (2) that Navigator had experience working on projects of similar magnitude to Arkray's;[50] (3) that the "the add-on software and configuration that Navigator chose would work and meet Arkray's business needs" [51]—specifically that

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[48] *Lechliter v. Delaware Dep't of Nat. Res. & Env't Control*, 2015 WL 9591587, at *18 (Del. Ch.), *aff'd*, 146 A.3d 358 (Del. 2016); *see also State v. Apotex Corp.*, 282 P.3d 66, 80 (Utah 2012) (stating substantially similar elements of fraudulent representation).
[49] Arkray's Compl. at ¶ 69.
[50] *Id.*
[51] *Id.*

Navigator's recommended software combination would meet Arkray's shipping needs; and (4) that Navigator would host the ERP system on a private tenant. For the purpose of this motion, the Court assumes that Navigator's alleged representations were false.

Arkray's fraudulent misrepresentation claims are similar to its breach of contract claims.

> [T]he economic loss doctrine prohibits certain claims in tort where overlapping claims based in contact adequately address the injury alleged, because, the theory is, contract law provides a better and more specific remedy than tort law. . . . [T]he doctrine's bar on tort claims is not absolute. Claims of fraud that go directly to the inducement of the contract, rather than its performance, are not barred by the economic loss doctrine. [52]

The Court previously has ruled that Arkray's fraudulent misrepresentation claims are not barred by Utah's economic loss doctrine because fraud claims going directly to the inducement of a contract are not barred by the doctrine under Utah or Delaware precedent.[53] Navigator contends new case law from the United States District Court of the District of Utah precludes Arkray from claiming pre-contractual fraud as an exception to the economic loss doctrine. However, the controlling Utah Supreme Court case—*HealthBanc International, LLC v. Synergy*

[52] *Alltrista Plastics, LLC v. Rockline Indus., Inc.*, 2013 WL 5210255, at *4 (Del. Super.).
[53] *ARKRAY Am., Inc. v. Navigator Bus. Sols., Inc.*, 2021 WL 2355234, at *7 (Del. Super.).

Worldwide, Incorporated[54]—on the economic loss doctrine remains applicable law. The Court previously noted "that while the Supreme Court of Utah found that, under the facts of that case, the plaintiff's fraud claim was barred, it explicitly declined to 'foreclose the possibility that in a future case a limited exception for fraud in the inducement may be warranted.'"[55] Thus, the Court found there was no conflict of laws between Utah and Delaware.[56]

"Under Delaware law, a company's optimistic statements praising its own 'skills, experience, and resources' are 'mere puffery and cannot form the basis for a fraud claim.'"[57] Representations of future performance "'are mere puffery and cannot form the basis for a fraud claim.'"[58] "[A] promise of future conduct can be actionable in fraud if the plaintiff 'plead[s] specific facts that lead to a reasonable inference that the promisor had no intention of performing at the time the promise was made.'"[59]

Before the Arkray project, Navigator previously had implemented hundreds of ERP projects, including Business One ERP projects. Navigator had successfully implemented LISA with N'Ware on multiple projects. [redacted]

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[54] 435 P.3d 193, 196 (Utah 2018).
[55] *ARKRAY*, 2021 WL 2355234, at *7 (quoting *HealthBanc*, 435 P.3d at 196).
[56] *Id.*
[57] *Airborne Health, Inc. v. Squid Soap, LP*, 2010 WL 2836391, at *8 (Del. Ch.); *see also Boud v. SDNCO, Inc.*, 54 P.3d 1131, 1135 (Utah 2002) (explaining a similar definition of puffery under Utah law).
[58] *Edinburgh Holdings, Inc. v. Educ. Affiliates, Inc.*, 2018 WL 2727542, at *12 (Del. Ch.).
[59] *Id.* at *12.

[redacted] These facts are essentially undisputed. However, Arkray disputes Navigator's experience and ability concerning the exact combination of products required by Arkray—implementing Business One and LISA with N'Ware.

The evidence that Navigator had knowledge of its alleged misrepresentations when it made them is minimal. Navigator had conducted multiple on-site visits with Arkray to discover Arkray's system requirements. Navigator introduced N'Ware as Navigator's "best of breed partner for warehouse management."[60] Navigator allegedly knew that Navigator and N'Ware had never worked together to implement LISA for any Business One customer. Navigator and N'Ware had allegedly only worked together to implement LISA for a ByDesign customer. Concerning Navigator's knowledge as to whether its proposed solution would fail, no evidence demonstrates Navigator knew its proposed solution would not meet Arkray's business needs. Concerning the private tenant, no evidence demonstrates that Navigator knew it was falsely promising Arkray administrative access using Navigator's private tenant configuration.

The Court finds Arkray's alleged misrepresentations concerning Navigator's expertise relate to Navigator's general experience. Arkray has been unable to

[60] McCrea Aff., Ex. 2 (email from Navigator's Senior Vice President).

produce sufficient evidence that Navigator and N'Ware made specific misrepresentations that were sufficient to mislead Arkray about Navigator's and N'Ware's expertise.

Arkray seeks to infer specificity into the representations. For example, Arkray alleged Navigator promised in an email that LISA would "[g]reatly increase[] efficiency and accuracy of recording inventory transactions by lots, serial numbers, bins and expiration dates."[61] However, Arkray did not allege Navigator made a specific representation concerning first in, first out ("FIFO") inventory management.[62] The FIFO representation could only be demonstrated by a connect-the-dots analysis. Such inferences are insufficient to constitute the basis for a fraud claim.

The Court also finds that Arkray has provided insufficient evidence that Navigator knowingly made specific misrepresentations to Arkray concerning: (1) Navigator's expertise and ability; (2) Navigator's experience; (3) whether the software configuration would suit Arkray's business needs; and (4) the private tenant hosting. No evidence demonstrates that Navigator knew it was falsely promising Arkray administrative access using Navigator's private tenant configuration. Navigator's representations concerning its experience and future

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[61] N'Ware Dunn Aff., Ex. 17 at 1.
[62] Arkray's Compl. at ¶ 13.

performance were mere puffery. Arkray too narrowly construed Navigator's representation of experience and expertise to infer Navigator and N'Ware had worked together to implement Business One and LISA.[63]

Arkray's fraud and contract allegations are similar. The Court finds it is unnecessary to reconsider its prior ruling concerning the economic loss doctrine, and the conflict of law analysis. The Court hereby **GRANTS** summary judgment on the issue of fraudulent misrepresentation in favor of Navigator.

MUTPA
(MINNESOTA UNLAWFUL TRADE PRACTICES ACT)

MUTPA § 325D.13 provides that "[n]o person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality . . . of such merchandise."[64] Arkray claims it is entitled to relief under MUTPA § 325D.13 because Navigator allegedly "misrepresented the quality of the Business One system that it promised to provide to Arkray."[65] Navigator and N'Ware provided software and services to Arkray.

"Merchandise" is not defined under MUTPA. "Merchandise" is defined by the Minnesota Consumer Fraud Act ("MCFA"). The MCFA defines

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[63] John McCrae Dep. Tr., July 14, 2022, 161:6–12 ("Well, I feel the misrepresentation [was] that they could do that. You know, we are experienced at this, which suggests you've done it specifically before. We have the technical expertise to do it.").
[64] MINN. STAT. ANN. § 325D.13 (West 2023).
[65] Arkray's Compl. at ¶ 89; *see* MINN. STAT. ANN. § 325D.13 (West 2023).

"merchandise" as "any objects, wares, goods, commodities, intangibles, real estate, loans, or services."[66] Navigator contends the MCFA definition is inapplicable and that the statute is ambiguous. Arkray argues the MCFA definition is applicable. The Court need not decide. For purposes of this motion, the Court assumes the services Navigator and N'Ware provided to Arkray meet the definition of "merchandise."

To advance a claim under Minnesota's Private Attorney General Statute, that claim must benefit the public.[67] Arkray is not seeking relief for the benefit of the general public. Therefore, Arkray may not use Minnesota's Private Attorney General Statute[68] to advance its MUTPA claims. It appears undisputed that Arkray will not rely on Minnesota's Private Attorney General Statute to advance its MUTPA claims. Therefore, it is not appropriate for Arkray to receive a reward of attorneys' fees.[69]

MUTPA Section 325D.15 authorizes "[a]ny person damaged . . . by reason of a violation of [Section 325D.13] . . . to sue for and have injunctive relief . . . against any damage or threatened loss or injury by reason of a violation of [Section

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[66] MINN. STAT. ANN. § 325F.68 Subd. 2 (West 2023).
[67] *Ly v. Nystrom*, 615 N.W.2d 302, 313–14 (Minn. 2000).
[68] MINN. STAT. ANN. § 8.31 (West 2023).
[69] *Skelton Truck Lines Ltd. v. PeopleNet Commc'ns Corp.*, 2017 WL 11570877, at *26 (D. Minn.) ("[W]hile a party may bring a UTPA claim as a private party, attorneys' fees are available only if the UTPA claim is brought under the Private AG Statute.").

325D.13] and for the amount of the actual damages, if any."[70] MUTPA Section 325D.10 defines "person" as "any individual, firm, partnership, corporation or other organization."

MUTPA is designed to protect consumers, not sophisticated merchants.[71] "Merchant" and "sophisticated merchant" are not defined under MUTPA. "Merchant" is defined under the Uniform Commercial Code, as adopted in Minnesota ("UCC").[72] The UCC defines a "merchant" as:

> [A] person who deals in goods of the kind or otherwise by occupation holds out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by employment of an agent or broker or other intermediary who by occupation holds out as having such knowledge or skill.[73]

In *Church of Nativity of Our Lord v. WatPro Inc.*,[74] the Minnesota Supreme Court applied the UCC definition of "merchant" to determine whether a sophisticated merchant may bring suit under the MCFA.[75] The plaintiff sued

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[70] *See also Grp. Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 8 n.4 (Minn. 2001).
[71] *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 223 F.3d 873, 887 (8th Cir. 2000); MINN. STAT. ANN. § 325D.09 (West 2023); *see also Minnesota Life Ins. Co. v. Countrywide Fin. Corp.*, 2012 WL 6742119, at *6 (C.D. Cal.) ("'Merchants' cannot bring either MPCFA or MUTPA claims." (citing *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 7 (Minn. 1992), *overruled in part by Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000))).
[72] MINN. STAT. ANN. § 336.2-104(1) (West 2023).
[73] *Id.*
[74] 491 N.W.2d 1 (Minn. 1992), *overruled on different grounds by Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000).
[75] *Id.* at 7.

defendant for damages from producing and installing defective roofing materials.[76] Defendant had hired a consultant to help with the roofing project.[77] The Minnesota Supreme Court applied the UCC definition of merchant to conclude that "more than hiring a consultant is required to move a noncommercial entity within the scope of the definition of 'merchant.'"[78] The Minnesota Supreme Court held that plaintiff was not a merchant, and that the plaintiff was therefore not barred from relief.[79]

In *Ly v. Nystrom*,[80] the Minnesota Court of Appeals concluded that a plaintiff was not a consumer, and that the MCFA does not protect those who are not consumers.[81] On appeal, the Minnesota Supreme Court reversed, holding that because the plaintiff purchased a restaurant business for the purpose of selling restaurant services—rather than for the purpose of reselling the restaurant business—the plaintiff was a consumer, not a merchant.[82] The plaintiff was therefore not barred from obtaining relief under the MCFA.[83]

[76] *Id.* at 2.
[77] *Id.* at 8.
[78] *Id.*
[79] *Id.*
[80] 602 N.W.2d 644 (Minn. Ct. App. 1999), *aff'd in part, rev'd in part sub nom. Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000).
[81] *Id.* at 647.
[82] *Ly v. Nystrom*, 615 N.W.2d 302, 310 (Minn. 2000).
[83] *Id.* at 310.

In *Nystrom*, neither the Minnesota Court of Appeals, nor the Minnesota Supreme Court applied the UCC definition of "merchant." Rather, both the Minnesota Court of Appeals and the Minnesota Supreme Court focused on whether the plaintiff was a "consumer."[84] The Minnesota Court of Appeals applied the dictionary definition of "consumer," stating: "The dictionary defines consumer as 'one that acquires goods or services for direct use or ownership rather than for resale or use in production or manufacturing.'"[85] While the Minnesota Supreme Court did not directly reference the dictionary definition from the Minnesota Court of Appeals, it appears the Minnesota Supreme Court adopted the "consumer" definition cited in the Minnesota Court of Appeals opinion.[86]

In *Marvin Lumber and Cedar Co. v. PPG Industries, Incorporated*,[87] the Eighth Circuit interpreted MUTPA's intention to protect consumers to mean that a sophisticated merchant is precluded from bringing suit under MUTPA.[88] The Eighth Circuit did not provide a definition of "merchant" or "sophisticated

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[84] *Id.* at 308–10; *Nystrom*, 602 N.W.2d at 647.
[85] *Nystrom*, 602 N.W.2d at 647 (citing *The American Heritage Dictionary* 1238 (3d ed. 1996)).
[86] *Nystrom*, 615 N.W.2d at 310.
[87] 223 F.3d 873 (8th Cir. 2000).
[88] *Id.* at 887 (stating that Minnesota precedent shows that being a sophisticated party precludes relief under both MUTPA and the MCFA (citing *Ly v. Nystrom*, 602 N.W.2d 644, 647 (Minn. Ct. App.1999) (holding that MINN. STAT. § 325F.69 does not protect merchants); *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 8 (Minn. 1992), *overruled in part by Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000) (holding that because the plaintiff was not a sophisticated merchant, the transaction was within the scope of the U.C.C.))); *see also Minnesota Life Ins. Co. v. Countrywide Fin. Corp.*, 2012 WL 6742119, at *6 (C.D. Cal.) ("'Merchants' cannot bring either MPCFA or MUTPA claims.").

merchant" in its analysis. The plaintiff was a manufacturer and seller of custom-made wooden doors, windows, and other construction projects.[89] The dispute arose from the plaintiff's purchase of wood preservatives from the defendant.[90] The Eighth Circuit cited *WatPro*—which did apply the UCC definition of "merchant"—to conclude that the plaintiff was a "merchant with respect to window treatments."[91] The Eighth Circuit concluded that MUTPA was not applicable to the plaintiff's claims because plaintiff was not a consumer.[92]

The case law above that applied the UCC definition of "merchant" involved transactions in goods, which opened the door for Article 2 of the UCC to apply.[93] "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action."[94] However, the instant case involves software and services. Assuming for the purpose of argument that the ERP software is a "good," the transaction in the instant case involved both software and services.

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[89] *Marvin*, 223 F.3d at 875.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] MINN. STAT. ANN. § 336.2-102 (West 2023) ("[T]his article applies to transactions in goods.").
[94] MINN. STAT. ANN. § 336.2-105(1) (West 2023).

Minnesota has adopted the predominant purpose test to determine whether the UCC applies to a transaction.[95] "Under the predominant purpose test, a hybrid transaction is classified according to its dominant characteristic."[96] "A hybrid contract primarily covering goods is governed by the UCC[, while] . . . [a] hybrid contract primarily covering services falls outside the scope of the UCC . . . ."[97]

The nature of the contracts in the instant case focuses primarily on implementation services. The ERP software is ancillary to the implementation services of the software. It is Navigator's and N'Ware's alleged failure to implement the ERP software that rendered the ERP software "unworkable and unusable."[98] Therefore, the predominant purpose of the agreements between the parties was the services, rather than the software. Thus, the instant case is not governed by definitions from Article 2 of the UCC.

Nonetheless, in *Securian Financial Group, Incorporated v. Wells Fargo Bank, N.A.*,[99] the United States District Court for the District of Minnesota cited to Article 2 of the UCC in its definition of a "sophisticated merchant" in a securities transaction not governed by the UCC.[100] The plaintiff in *Securian* brought claims

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[95] *Vermillion State Bank v. Tennis Sanitation, LLC*, 969 N.W.2d 610, 620 (Minn. 2022).
[96] *Vesta State Bank v. Indep. State Bank of Minnesota*, 518 N.W.2d 850, 854 (Minn. 1994).
[97] *Vermillion State Bank*, 969 N.W.2d at 620.
[98] *See* Arkray's Compl. at ¶ 1 (characterizing the system Arkray was left with after the implementation as "unworkable and unusable").
[99] 2014 WL 6911100 (D. Minn.).
[100] *Id.* at *7.

under the MCFA and MUTPA.[101] The Defendant filed a motion for summary judgment with respect to the MCFA and MUTPA claims.[102] The District Court cited to the UCC's definition of "merchant" when defining "sophisticated merchant," despite the case involving a securities transaction not governed by Article 2 of the UCC.[103]

The District Court defined a "sophisticated merchant" as "a party [that has] knowledge or skill particular to the practices involved in the transaction at issue."[104] Furthermore, "[b]eing sophisticated in certain matters does not necessarily make one a sophisticated merchant in all matters."[105] The District Court summarized Minnesota state law precedent by stating that Minnesota courts "focus their analysis on whether a party can be considered a sophisticated merchant in the specific skills or goods at issue, and only those parties that are in fact deemed to be sophisticated merchants in the specific skills or goods at issue

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[101] *Id.* at *5.
[102] *Id.*
[103] *Id.* at *7.
[104] *Id.* (citing MINN. STAT. § 336.2-104(1)); *see also Minnesota Forest Prod., Inc. v. Ligna Mach., Inc.*, 17 F. Supp. 2d 892, 905 (D. Minn. 1998) ("[Plaintiff] may be considered a merchant only if it possessed specialized knowledge or skill peculiar to the sawmill equipment that it bought from [the defendant].").
[105] *Id.* at *7 (citing *Kinetic Co. v. Medtronic, Inc.*, 672 F.Supp.2d 933, 946 n.8 (D. Minn.2009) ("[T]he Court does not doubt [plaintiff] is sophisticated in its regular business dealings. But this is the purchase of a complex medical device. [Plaintiff] does not deal in such goods nor hold itself out as having special knowledge or skill in [that] business . . . the Court easily finds [plaintiff] is not a 'merchant,' [for purposes of the MCFA]."); *Minnesota Forest Prods., Inc. v. Ligna Mach., Inc.*, 17 F.Supp.2d 892, 905–06 (D. Minn.1998) (finding that a genuine issue of material fact existed with respect to whether the plaintiff was sophisticated in certain aspects of the sawmill business)).

have been precluded from asserting Minnesota consumer claims."[106] The District Court concluded that the plaintiff was not sufficiently sophisticated to warrant summary judgment because plaintiff "presented sufficient facts to establish that genuine issues of material fact existe[ed] regarding whether they were sophisticated merchants with respect to securities lending."[107]

Similarly, in *Minnesota Life Insurance Company v. Countrywide Financial Corporation*,[108] the United States District Court for the Central District of California used the UCC definition of "merchant" to interpret whether the plaintiff was a "sophisticated merchant."[109] The case also involved a securities transaction that would not be governed under the UCC. Nonetheless, the District Court used the UCC definition of "merchant" to inform its opinion. The District Court concluded the plaintiff was a sophisticated merchant that could not allege violations under MUTPA because the expertise of the plaintiff's investment firm was imputed to the plaintiff.[110]

In *Tisdell v. ValAdCo*,[111] the Court of Appeals of Minnesota found that the plaintiff was a sophisticated merchant who could not bring a claim under the

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[106] *Id.* at *6.
[107] *Id.* at *8.
[108] 2012 WL 6742119 (C.D. Cal.).
[109] *Id.* at *6.
[110] *Id.*
[111] 2002 WL 31368336 (Minn. Ct. App.).

MCFA.[112] The transaction at issue involved the purchase of five shares in a prospective hog cooperative.[113] The Court applied the UCC definition of "merchant" despite shares of a hog cooperative not being moveable "goods" governed by Article 2 of the UCC.[114] The plaintiff had owned and operated large commercial farms.[115] The plaintiffs "had sold farm produce before to cooperatives, investing on a large scale."[116] The Court concluded that the plaintiff was not an ordinary consumer.[117] Rather, the plaintiff had sold farm produce and invested on a large scale.[118] Thus, the plaintiff was more akin to a merchant than a consumer.[119] Therefore, the plaintiff was not entitled to bring a claim under the MCFA.[120]

The evidence demonstrating that Arkray is a "sophisticated merchant" is: (1) Arkray previously used two separate ERP software programs;[121] (2) Arkray employees attended the American SAP User Group annual conference in 2014 and 2015;[122] (3) Arkray's Vice President of Information Technology had been involved

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[112] *Id*. at *10.
[113] *Id*. at *1.
[114] *Id*. at *10.
[115] *Id*.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *See id*. (comparing plaintiff to a grain producer who acted as a merchant in selling grain products to a grain elevator).
[120] *Id*.
[121] Arkray's Compl. at ¶ 17.
[122] Arkray's Reply to Navigator's Counterclaims, dated July 19, 2021, at ¶ 12.

in three ERP implementations before starting on the instant ERP implementation with Navigator and N'Ware;[123] and (4) Arkray Japan possessed expertise in ERP implementation and was deeply involved in the transaction.[124]

The Court finds that to bring a claim under MUTPA, a party must be a consumer, not a sophisticated merchant. The preceding case law presents two methods of interpreting who may bring suit under MUTPA, or a similar Minnesota consumer statute: (1) a person who is a consumer;[125] or (2) a person who is not a sophisticated merchant.[126] Arkray is not a consumer under the "consumer" definition provided in *Nystrom* because it acquired the ERP software to assist it in the production and manufacturing of blood-glucose testing, diabetes management equipment, and laboratory equipment and testing supplies. While Arkray is not reselling ERP software or implementation, it was intending to use the software and

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[123] TR Piller Dep. Tr., July 7, 2022, 17:18–18:12.
[124] Craig Brosseau Dep. Tr., June 23, 2022, 170:15–172:24.
[125] *See Ly v. Nystrom*, 602 N.W.2d 644, 647 (Minn. Ct. App. 1999), *aff'd in part, rev'd in part sub nom. Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000); *Nystrom*, 615 N.W.2d 302 (Minn. 2000).
[126] *Church of the Nativity of Our Lord v. WatPro, Inc*., 491 N.W.2d 1 (Minn. 1992), *overruled on different grounds by Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000); *Tisdell v. ValAdCo*, 2002 WL 31368336 (Minn. Ct. App. 2002); *Marvin Lumber & Cedar Co. v. PPG Indus., Inc*., 223 F.3d 873, 887 (8th Cir. 2000); *Securian Fin. Grp., Inc. v. Wells Fargo Bank, N.A*., 2014 WL 6911100 (D. Minn.); *Minnesota Life Ins. Co. v. Countrywide Fin. Corp*., 2012 WL 6742119 (C.D. Cal.).

services it acquired "in production or manufacturing."[127] Therefore, the Court finds Arkray is not a consumer under *Nystrom*.[128]

The Court finds the UCC definition of "merchant" instructive in determining whether Arkray may bring a suit under MUTPA. The Court finds that Arkray possessed the "knowledge or skill particular to the practices involved"[129] in the ERP implementation. Therefore, the Court finds Arkray was a sophisticated merchant in this transaction. Arkray and Arkray Japan both had employees with professional experience implementing ERP software. Arkray Japan's experience may be imputed to Arkray.[130] While Arkray relied upon the expertise of Navigator and N'Ware, it was not helpless. Arkray had substantial sophistication and resources to assist with the ERP implementation. Arkray's contention that it is not a sophisticated merchant is unpersuasive. Arkray too narrowly parses the term, "sophisticated" as requiring that it be in the specific business of ERP implementation.

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[127] *Nystrom*, 602 N.W.2d at 647 ("The dictionary defines consumer as 'one that acquires goods or services for direct use or ownership rather than for resale or use in production or manufacturing.'").
[128] *Id.*
[129] *Securian Fin. Grp.*, 2014 WL 6911100, at *7 (citing MINN. STAT. § 336.2-104(1)); *see also Minnesota Forest Prod., Inc. v. Ligna Mach., Inc.*, 17 F. Supp. 2d 892, 905 (D. Minn. 1998) ("[Plaintiff] may be considered a merchant only if it possessed specialized knowledge or skill peculiar to the sawmill equipment that it bought from [the defendant].").
[130] *Minnesota Life Ins. Co.,* 2012 WL 6742119, at *6.

The Court hereby **GRANTS** summary judgment in favor of Navigator as to Arkray's Count VI.

Limitation of Damages

The Court previously addressed the limitation of damages issues in resolving Arkray's motion *supra*. The Court finds there are questions of fact concerning claims under Sections 2.4.1 or 3.3.1[131]—which account for a refund as damages. The Court finds that the limitation of damages provision in Section 3.6.1 does not apply to all contract claims. Sections 2.4.1 and 3.3.1 of the Navigator Agreement both allow for a "full refund." Section 3.6.1 attempts to limit damages. Thus, claims under Sections 2.4.1 and 3.3.1 are contrary to the damages limitation in Section 3.6.1. Therefore, claims arising under Sections 2.4.1 and 3.3.1 may be excepted from Section 3.6.1's damages limitation. To the extent Section 3.6.2 allows for a full refund, it is also contrary to Section 3.6.1 and may be excepted from Section 3.6.1's damages limitation.[132]

Summary judgment on this issue is hereby **GRANTED IN PART AND DENIED IN PART**.

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[131] The Court notes that damages claims cannot arise under Section 3.6.2. Rather, Section 3.6.2 provides that customer remedies may exist in two forms at the election of Navigator: (1) specific performance; or (2) a refund. The Court need not decide remedies at this juncture due to pending questions of fact.

[132] The Court notes that damages claims cannot arise under Section 3.6.2. Rather, Section 3.6.2 provides that customer remedies may exist in two forms at the election of Navigator: (1) specific performance; or (2) a refund. The Court need not decide remedies at this juncture due to pending questions of fact.

N’WARE’S MOTION FOR PARTIAL SUMMARY JUDGMENT

Breach of Warranty

Section 8.1 of the N’Ware Agreement provides N’Ware’s warranties to Arkray:

> N’WARE WARRANTS THAT THE SOFTWARE SHALL PERFORM SUBSTANTIALLY IN ACCORDANCE WITH THE FUNCTIONAL SPECIFICATIONS CONTAINED IN ITS ASSOCIATED DOCUMENTATION AND BE FREE OF BUGS AND DEFECTS FOR A ONE YEAR PERIOD FOLLOWING DELIVERY OF THE LICENSED SOFTWARE TO LICENSEE (“WARRANTY PERIOD”). N’WARE’S SOLE OBLIGATION UNDER THIS WARRANTY IS TO USE REASONABLE EFFORTS TO, AT ITS SOLE DISCRETION, EITHER: (i) CORRECT THE LICENSED SOFTWARE TO PERFORM IN ACCORDANCE WITH THE DOCUMENTATION; (ii) REPAIR DOCUMENTED BUGS AND DEFECTS; (iii) REPLACE THE LICENSED SOFTWARE; OR (iv) PROVIDE A FULL REFUND OF THE SOFTWARE UPON RETURN OF LICENSED SOFTWARE AND ALL N’WARE PROPRIETARY INFORMATION TO N’WARE.
>
> The above warranty shall apply only if:
>
> (a) The Licensed Software has been properly used by Licensee in accordance with the Documentation furnished by N’WARE or N’WARE Reseller to Licensee in connection therewith;
>
> (b) Licensee notifies N’WARE of the programming errors (bugs, defects) and describes with specificity the nature of the suspected errors and of the circumstances in which they occur;
>
> (c) N’WARE, using reasonable efforts, is able to confirm the existence of the programming errors; and

> (d)The defect is not caused by Licensee, third-party software, or third[-]party database.

Section 8.2 of the N'Ware Agreement provides an express disclaimer:

> EXCEPT FOR THE ABOVE LIMITED EXPRESS WARRANTY, THE LICENSED SOFTWARE IS PROVIDED TO LICENSEE "AS IS". NWARE MAKES NO REPRESENTATIONS, WARRANTIES OR CONDITIONS, EXPRESS OR IMPLIED, WRITTEN OR ORAL, INCLUDING, BUT NOT LIMITED TO, WARRANTIES OF MERCHANTABLE QUALITY, SATISFACTORY QUALITY, MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE OR NONINFRINGEMENT OR TITLE, OR THOSE ARISING BY LAW, STATUTE, USAGE OF TRADE, COURSE OF DEALING OR OTHERWISE, EXCEPT TO THE EXTENT THAT ANY WARRANTIES IMPLIED BY LAW CANNOT BE VALIDLY WAIVED. N'WARE DOES NOT WARRANT THAT THE OPERATION OF THE LICENSED SOFTWARE SHALL BE UNINTERRUPTED OR FREE FROM MINOR DEFECTS OR ERRORS THAT DO NOT MATERIALLY AFFECT THE PERFORMANCE OF THE LICENSED SOFTWARE, OR THAT THE APPLICATIONS CONTAINED IN THE LICENSED SOFTWARE ARE DESIGNED TO MEET ALL OF LICENSEE'S BUSINESS REQUIREMENTS. LICENSEE ASSUMES THE ENTIRE RISK AS TO THE RESULTS AND PERFORMANCE OF THE LICENSED SOFTWARE AND LICENSEE IS SOLELY RESPONSIBLE FOR THE ADEQUATE PROTECTION AND BACKUP OF THE DATA AND EQUIPMENT USED IN CONNECTION WITH THE LICENSED SOFTWARE.

Arkray alleges in its complaint that:

> N'Ware has breached the express warranties by, among other things, failing to ensure that LISA functioned in a

> manner consistent with the program's specifications and free from defects. LISA never operated in a manner sufficient to meet ARKRAY's needs. For example, among other things, LISA had multiple functionality failures, which resulted in poor performance during testing. Additionally, LISA could not perform simple tasks, such as processing the orders from ARKRAY's national customers.
>
> ARKRAY informed N'Ware about those defects, but N'Ware was either unable or unwilling to correct those and other problems with the system.[133]

The Court finds that there are genuine issues of material fact concerning: (1) whether Arkray provided notice pursuant to Section 8.1; (2) whether the software performed according to specifications; and (3) whether N'Ware breached the warranty. The Court hereby **DENIES** N'Ware's Partial Summary Judgment Motion as it relates to the alleged breach of warranty.

Fraudulent Misrepresentation

Integration Clause—Choice of Law

Section 1.4 of the N'Ware Agreement between N'Ware and Arkray contains an integration clause:

> This Agreement (including the documents and instruments referred to herein and the schedules, addenda and exhibits hereto) supersedes all prior representations, arrangements, negotiations, understandings and agreements between the Parties, both written and oral, relating to the subject matter hereof and sets forth the entire and complete and exclusive

[133] Arkray's Compl. at ¶¶ 65–66.

> agreement and understanding between the Parties hereto relating to the subject matter hereof; no Party has relied on any representation, arrangement, understanding or agreement (whether written or oral) not expressly set out or referred to in this Agreement. The terms of this Agreement may not be changed except by an amendment signed by an authorized representative of each Party. This Agreement shall prevail over any additional, conflicting, or inconsistent terms and conditions, which may appear on any purchase order, or other document furnished by Licensee to N'WARE or to a N'WARE Reseller.

The Court previously concluded that "[t]here are no conflicts of law related to fraudulent misrepresentation . . ., so the Court need not engage in a conflict-of-law analysis for Count[] []V."[134] However, the Court did not address whether a conflict of law existed between Delaware and Minnesota law regarding whether an integration clause may disclaim extra-contractual reliance.

In Delaware, to "relieve a party of its oral and extra-contractual fraudulent representations[,] [t]he integration clause must contain 'language that . . . can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract's four corners in deciding to sign the contract.'"[135]

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[134] *ARKRAY Am., Inc. v. Navigator Bus. Sols., Inc.*, 2021 WL 2355234, at *8 (Del. Super.).
[135] *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032, 1059 (Del. Ch. 2006) (citing *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004)).

In Minnesota, the courts follow a "disclaimer-unfriendly approach."[136] The Minnesota Supreme Court stated: "The law should not, and does not, permit a covenant of immunity to be drawn that will protect a person against his own fraud. Such is not enforceable because of public policy."[137]

The Delaware Supreme Court provided the test to apply when analyzing which state's law should apply if a conflict exists between state law:

> Delaware courts use a two-part test to determine which sovereign's law to apply when there is a conflict: first, the court determines whether there is an actual conflict of law between the proposed jurisdictions. If there is a conflict, the court determines which jurisdiction has the "most significant relationship to the occurrence and the parties" based on the factors (termed "contacts") listed in the Restatement (Second) of Conflict of Laws.[138]
>
> . . . .
>
> The four contacts, which "are to be evaluated according to their relative importance with respect to the particular issue," are:
> (1) the place where the injury occurred;
> (2) the place where the conduct causing the injury occurred;
> (3) the domicil, residence, nationality, place of incorporation and place of business of the parties; and

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[136] *Randall v. Lady of Am. Franchise Corp.*, 532 F. Supp. 2d 1071, 1083 (D. Minn. 2007).
[137] *Ganley Bros. v. Butler Bros. Bldg. Co.*, 212 N.W. 602, 603 (Minn. 1927); *see also Great Plains Educ. Found., Inc. v. Student Loan Fin. Corp*., 954 N.W.2d 844, 850 (Minn. Ct. App. 2020) ("The Minnesota Supreme Court has long held that fraud cannot be waived by a contractual disclaimer."); *Appletree Square I Ltd. P'ship v. Investmark, Inc.*, 494 N.W.2d 889, 893 (Minn. Ct. App. 1993) ("[W]here the major purpose of a contract clause is to shield wrongdoers from liability, the clause will be set aside as against public policy.").
[138] *Bell Helicopter Textron, Inc. v. Arteaga*, 113 A.3d 1045, 1050 (Del. 2015).

(4) the place where the relationship, if any, between the parties is centered. [139]

The Restatement also instructs that "if any two of the [four] contacts[—]apart from the defendant's domicil [sic], state of incorporation or place of business[—]are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues."[140]

The Court finds that a conflict exists between Minnesota and Delaware law as it relates to whether an integration clause may disclaim extra-contractual reliance. The Court finds that Minnesota law controls whether the integration clause may disclaim extra-contractual reliance. Arkray's alleged injury occurred in Minnesota. The primary location where N'Ware and Arkray developed their relationship was in Minnesota. Apart from being the state of incorporation for both N'Ware and Arkray, Delaware has virtually no contacts with this fraudulent inducement claim. Therefore, the Court finds that Section 1.4 of the N'Ware Agreement cannot disclaim N'Ware's reliance upon allegedly fraudulent extra-contractual representations.

Alleged Misrepresentations

The elements a party must prove to establish a fraudulent misrepresentation claim in Delaware and Minnesota substantively are the same:

[139] *Id.* (citing Restatement (Second) of Conflicts of Laws § 145(2) (1971)).
[140] Restatement (Second) of Conflicts of Laws § 148 cmt. j (1971).

> [T]o establish a claim for fraudulent misrepresentation, a plaintiff must show: (1) that the defendant made a false representation of a material fact to the plaintiff; (2) that the defendant must have knowledge of the falsity of the representation, while the plaintiff must be ignorant of the falsity; (3) that the misrepresentation was made with the intent that the plaintiff would believe it to be true, act in reliance thereon, and be deceived thereby; and (4) that the plaintiff actually did so believe, act, and was deceived, as well as having been harmed thereby.[141]

Arkray allegedly relied upon various pre-contractual misrepresentations made by N'Ware: (1) that LISA would work for Arkray's warehouse management system needs and provide a ProcessWeaver-equivalent solution with less than truckload ("LTL") shipping;[142] (2) that LISA could provide GS1 barcode scanning

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[141] *Lechliter v. Delaware Dep't of Nat. Res. & Env't Control*, 2015 WL 9591587, at *18 (Del. Ch.), *aff'd*, 146 A.3d 358 (Del. 2016); *Beckman v. Wells Fargo Bank, N.A.*, 2016 WL 5640664, at *5 (Minn. Ct. App.) (stating elements for fraudulent misrepresentation that are substantially the same as Delaware).

[142] McCrea Aff. ¶ 4; John McCrea Dep. Tr., July 13, 2022, 152:5–12 ("You know, we went in from day one, you guys understand this is a large order fulfillment operation, palletized shipments, LTL. . . . You guys understand this so that your solution is going to do this? Yep."), 157:3–158:7 ("I'm talking about, yes, ProcessWeaver. . . . N'Ware LISA did not have the ability to do any LTL shipping. . . . We trusted it was in LISA because Ralph said, This is your warehouse management, order fulfillment, and shipping best of breed solution. And everybody took Ralph on his word. Yet, you know, you never get to really see those things until you're really in deep into the implementation."), 165:10–167:7 (explaining that LISA did not have the capabilities that Arkray required for its warehouse management, and stating: "The whole point, though, is who wouldn't know that if it had ever been done before . . . . We all went into the project all assuming, of course it's in . . . LISA N'ware. . . . LISA N'Ware is your best-of-breed add-on for warehouse management, order fulfillment, shipping, and then, you know, other details."), 337:22–338:9 (N'Ware's John McCrea explaining he thought LISA would be the solution for large order fulfillment).

with handheld barcode readers;[143] and (3) that LISA would support integration with SAP Business One unit of measure functionality.[144]

N'Ware contends Arkray's claims do not contain sufficient specificity to be considered a fraudulent misrepresentation. Regarding whether LISA would work for Arkray's warehouse management system needs, N'Ware contends that Arkray could not name a particular statement made by N'Ware that was a specific misrepresentation. Rather, N'Ware contends that the "best of breed" and "expert" statements were not attributable to N'Ware.[145]

Regarding the GS1 barcode scanning with handheld barcode readers, N'Ware contends that it did not make an explicit representation of the GS1 barcode scanning capability because: (1) N'Ware did not use a handheld scanner during the LISA demonstration;[146] and (2) the document used to track the status of items that still needed work to meet Arkray's satisfaction ("Defect Tracker") showed that

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[143] *Id.* at 44:24–45:3; 159:17–160:1; Marvin Nelson Dep. Tr., July 21, 2022, 177:10–13.

[144] Email from N'Ware's Michael Griffin, September 2, 2016 ("I just want to validate that the customizations we are doing for US Arkray are being done against the Lisa 2016.2.x base code. GS1 Scanning, full B1 [unit of measure] functionality and handheld replenishment were all sold and plan[n]ed as part of this implementation."). The Court notes that the subject line for the email chain is "Custom code for US Arkray."

[145] *Cf.* John McCrea Dep. Tr., July 13, 2022, 157:3–158:7 ("I'm talking about, yes, ProcessWeaver. . . . N'Ware LISA did not have the ability to do any LTL shipping. . . . We trusted it was in LISA because Ralph said, This is your warehouse management, order fulfillment, and shipping best of breed solution. And everybody took Ralph on his word. Yet, you know, you never get to really see those things until you're really in deep into the implementation.").

[146] *Id.* at 182:4–16.

GS1 scanning had been tested.[147] N'Ware maintains that LISA was fully operational, as promised, by July 14, 2017.[148]

The Court finds that Arkray's alleged misrepresentations do not demonstrate that N'Ware made specific misrepresentations that it knew to be false. No evidence on the record demonstrates that N'Ware knew it would not be able to provide the promised solution. Rather, the evidence demonstrates that at the time it made any alleged misrepresentation, N'Ware believed it would be able to provide Arkray with the promised solution.[149] Arkray's allegations to the contrary are based on inferences or misunderstandings,[150] rather than on specific representations or statements by N'Ware. Therefore, Arkray's allegations against N'Ware are insufficient to demonstrate a claim for fraudulent misrepresentation.

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[147] Defect Tracker spreadsheet (Ex. 270), p. 1, both unnumbered rows below row 101 and before row 110.

[148] The Court notes that N'Ware did not directly make an argument in its reply regarding LISA's integration with SAP Business One's unit of measure functionality. However, N'Ware's contention that LISA was fully operational by July 14, 2017 appears to respond to whether LISA integrated with SAP Business One's unit of measure functionality.

[149] *See* John McCrea Dep. Tr., July 13, 2022 158:8–10 (acknowledging that it is not until one is "really deep into the implementation" that one learns of functionality gaps); Email from N'Ware's Michael Griffin, September 2, 2016 (confirming customizations for Arkray to attain Arkray's desired functionality).

[150] *See* John McCrea Dep. Tr., July 13, 2022 157:3–158:7 ("I'm talking about, yes, ProcessWeaver. . . . N'Ware LISA did not have the ability to do any LTL shipping. . . . We trusted it was in LISA because Ralph said, This is your warehouse management, order fulfillment, and shipping best of breed solution. And everybody took Ralph on his word. Yet, you know, you never get to really see those things until you're really in deep into the implementation."), 165:10–167:7 (explaining that LISA did not have the capabilities that Arkray required for its warehouse management, and stating: "The whole point, though, is who wouldn't know that if it had ever been done before . . . . We all went into the project all assuming, of course it's in . . . LISA N'ware. . . . LISA N'Ware is your best-of-breed add-on for warehouse management, order fulfillment, shipping, and then, you know, other details.").

The Court hereby **GRANTS** N'Ware's Motion for Summary Judgment as to Count V.

MUTPA

The Court resolved N'Ware's Motion for Summary Judgment regarding Arkray's MUTPA claim under Navigator's Motion for Summary Judgment *supra*. The Court finds that Arkray possessed the "knowledge or skill particular to the practices involved"[151] in the ERP implementation. Therefore, the Court finds Arkray was a sophisticated merchant in this transaction. Arkray and Arkray Japan both had employees with professional experience implementing ERP software. Arkray Japan's experience may be imputed to Arkray.[152] While Arkray relied upon the expertise of Navigator and N'Ware, it was not helpless. Arkray had substantial sophistication and resources to assist with the ERP implementation. Arkray's contention that it is not a sophisticated merchant is unpersuasive. Arkray too narrowly parses the term, "sophisticated" as requiring that it be in the business of ERP implementation. The Court hereby **GRANTS** summary judgment in favor of N'Ware as to Arkray's Count VII.

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[151] *Securian Fin. Grp.*, 2014 WL 6911100, at *7 (citing MINN. STAT. § 336.2-104(1)); *see also Minnesota Forest Prod., Inc. v. Ligna Mach., Inc.*, 17 F. Supp. 2d 892, 905 (D. Minn. 1998) ("[Plaintiff] may be considered a merchant only if it possessed specialized knowledge or skill peculiar to the sawmill equipment that it bought from [the defendant].").

[152] *Minnesota Life Ins. Co. v. Countrywide Fin. Corp.*, 2012 WL 6742119, at *6 (C.D. Cal.).

CONCLUSION

For purposes of judicial economy and expediency, the Court hereby **DENIES** Arkray's Motion for Leave to File a Sur-Reply. The Court considered the following during argument: (1) the affidavit and report from Arkray's expert, James Mottern (the "Mottern Affidavit"); (2) the affidavit of John McCrea (the "McCrea Affidavit"); and (3) the parties' related arguments.

The Court finds the limitation provision in Section 3.6.1 of the Navigator Agreement is clear and unambiguous. The term, "herein," refers to the whole Navigator Agreement. The term "herein" is used in other places throughout the Navigator Agreement. In each instance, the context of the contractual language demonstrates that it is referring to the entire Navigator Agreement.

However, the Court finds there are questions of fact concerning claims under Sections 2.4.1 or 3.3.1 of the Navigator Agreement—which account for a refund as damages. The Court finds that the limitation of damages provision in Section 3.6.1 does not apply to all contract claims. Sections 2.4.1 and 3.3.1 of the Navigator Agreement both allow for a "full refund." Section 3.6.1 attempts to limit damages. Thus, claims under Sections 2.4.1 and 3.3.1 are contrary to the damages limitation in Section 3.6.1. Therefore, claims arising under Sections 2.4.1 and 3.3.1 may be excepted from Section 3.6.1's damages limitation. To the extent Section 3.6.2 allows for a full refund, it is also contrary to Section 3.6.1 and may be excepted from Section 3.6.1's damages limitation. **THEREFORE**, Arkray's Motion for Partial Summary Judgment on the limitation of damages is hereby **GRANTED IN PART AND DENIED IN PART**. Navigator's Motion for Summary Judgment on the limitation of damages is hereby **GRANTED IN PART AND DENIED IN PART.**

The Court finds that the unclean hands defense is not available to Navigator in this case. The Court finds controlling the precedent from the Court of Chancery and Utah courts, which states that an unclean hands defense is not available where the plaintiff does not seek equitable relief. Therefore, the Court may not consider Navigator's unclean hands defense. The Court finds Navigator's arguments concerning the affirmative defense of *in pari delicto* are waived because it failed to raise that affirmative defense in its Answer to the Complaint and Counterclaim, dated June 29, 2021. **THEREFORE**, Arkray's Motion for Partial Summary Judgment on the issue of unclean hands is hereby **GRANTED**.

The Court finds Arkray's alleged misrepresentations concerning Navigator's expertise relate to Navigator's general experience. Arkray has been unable to produce sufficient evidence that Navigator and N'Ware made specific misrepresentations that were sufficient to mislead Arkray about Navigator's and N'Ware's expertise. The Court also finds that Arkray has provided insufficient evidence that Navigator knowingly made specific misrepresentations to Arkray concerning: (1) Navigator's expertise and ability; (2) Navigator's experience; (3) whether the software configuration would suit Arkray's business needs; and (4) the private tenant hosting.

The Court finds it is unnecessary to reconsider its prior ruling concerning the economic loss doctrine, and the conflict of law analysis. **THEREFORE**, the Court hereby **GRANTS** summary judgment in favor of Navigator on Arkray's Count IV for fraudulent misrepresentation.

The Court finds the UCC definition of "merchant" instructive in determining whether Arkray may bring a suit under MUTPA. The Court finds Arkray was a sophisticated merchant in this transaction. Arkray and Arkray Japan both had employees with professional experience implementing ERP software. Arkray Japan's experience may be imputed to Arkray. While Arkray relied upon the expertise of Navigator and N'Ware, it was not helpless. Arkray had substantial sophistication and resources to assist with the ERP implementation. Arkray's contention that it is not a sophisticated merchant is unpersuasive. Arkray too narrowly parses the term, "sophisticated" as requiring that it be in the business of ERP implementation. **THEREFORE**, the Court hereby **GRANTS** summary judgment in favor of Navigator and N'Ware as to Arkray's Counts VI and VII under MUTPA.

The Court finds that there are genuine issues of material fact concerning: (1) whether Arkray provided notice pursuant to Section 8.1; (2) whether the software performed according to specifications; and (3) whether N'Ware breached the warranty. **THEREFORE**, the Court hereby **DENIES** N'Ware's Partial Summary Judgment Motion on Arkray's Count III for breach of warranty.

The Court finds that a conflict exists between Minnesota and Delaware law as it relates to whether an integration clause may disclaim extra-contractual reliance. The Court finds that Minnesota law controls whether the integration clause may disclaim extra-contractual reliance. Arkray's alleged injury occurred in Minnesota. The primary location where N'Ware and Arkray developed their relationship was in Minnesota. Apart from being the state of incorporation for both N'Ware and Arkray, Delaware has virtually no contacts with this fraudulent inducement claim. Therefore, the Court finds that Section 1.4 of the N'Ware Agreement cannot disclaim N'Ware's reliance upon allegedly fraudulent extra-contractual representations.

The Court finds that Arkray's alleged misrepresentations do not demonstrate that N'Ware made specific misrepresentations that it knew to be false. No evidence on the record demonstrates that N'Ware knew it would not be able to provide the promised solution. Rather, the evidence demonstrates that at the time it made any alleged misrepresentation, N'Ware believed it would be able to provide Arkray with the promised solution. Arkray's allegations to the contrary are based on inferences or misunderstandings, rather than on specific representations or statements by N'Ware. Therefore, Arkray's allegations against N'Ware are insufficient to demonstrate a claim for fraudulent misrepresentation.

THEREFORE, the Court hereby **GRANTS** N'Ware's Motion for Summary Judgment as to Arkray's Count V for fraudulent misrepresentation.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston