IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO
CIVIL DIVISION

JAMES W. BATES,	:	
	:	
Plaintiff,	:	Case No. 15CV006657
	:	
vs.	:	JUDGE RICHARD FRYE
	:	
MERCHANTS HOLDINGS LLC ET AL,	:	
	:	
	:	
Defendants.		

DEFENDANT JEFF STARNER'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT AGAINST HIM IN ITS ENTIRETY

Defendant Jeff Starner ("Starner"), by and through his undersigned counsel, hereby files this Motion to Dismiss moving the Court to dismiss Plaintiff's Complaint, as against him, in its entirety pursuant to Ohio Civil Rules 12(B)(6) and 9(B). The reasons for Defendant Starner's motion if fully explained in the attached memorandum.

Respectfully Submitted,

/s/ Danny L. Caudill

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This case involves (1) the sale of the stock of Bates Truck Lines, Inc. by Plaintiff to Defendant Merchants 5 Star, Inc. (the "Purchase Agreement") and (2) an accompanying Consulting Agreement contemporaneously entered into between Bates Truck Lines, Inc. and Fairfield Leasing, Inc., an Ohio corporation dissolved in 2009 (the "Consulting Agreement").

Defendant Starner executed a personal guarantee with regard to a Promissory Note that accompanied the Purchase Agreement. He also executed a personal guarantee with regard to the Consulting Agreement. Over time, numerous successive agreements followed the execution of the Purchase and Consulting Agreements. These successive agreements ended with a Confidential Settlement Agreement entered into between Plaintiff, Defendant 5 Star, Inc. ("5 Star") and Defendant Merchants Holding LLC ("Merchants Holding").

Plaintiff has asserted a number of claims against Defendant Starner related to the agreements referred to above. Plaintiff's claims each fail, as against Defendant Starner, for the following reasons:

1. Plaintiff's First Claim for Relief (Breach of Contract) relating to the Purchase Agreement fails based on (a) the release contained in the Settlement Agreement and (b) the doctrine(s) of novation and substitution.

2. Plaintiff's First Claim for Relief (Breach of Contract) relating to the Consulting Agreement fails because Plaintiff lacks standing to sue.

3. Plaintiff's Second Claim for Relief (Unjust Enrichment) fails because no benefit was conferred upon Defendant Starner and because Plaintiff's claim seeks to cover the same subject matter as express, written agreements.

4. Plaintiff's Third Claim for Relief (Promissory Estoppel) is barred by the Statute of Frauds – R.C. § 1335.05.

5. Plaintiff's Fourth Claim for Relief (Negligent Misrepresentation) fails because (a) it is barred by the Economic Loss Doctrine, (b) it relates only to representations regarding future conduct, actions and opinions, which are not actionable, and (c) the claim is not plead with particularity, as required by Civil Rule 9(B).

6. Plaintiff's Fifth Claim for Relief (Common Law Fraud) also fails because (a) it is barred by the Economic Loss Doctrine, (b) it relates only to representations regarding future conduct, actions and opinions, which are not actionable, and (c) the claim is not plead with particularity, as required by Civil Rule 9(B).

For these reasons, which are more fully explained below, Defendant Starner respectfully requests that the Court dismiss Plaintiff's claims against him in their entirety.

II. FACTUAL BACKGROUND

The sale of the stock of Bates Truck Lines, Inc. to Defendant Merchants 5 Star, Inc. (Defendant 5 Star) involved a number of successive agreements. According to the Purchase Agreement, Defendant 5 Star purchased the stock for $700,000. Compl. Exhibit A, page 1. The terms of the Purchase Agreement indicate that Defendant 5 Star agreed to pay $350,000 at closing, with the remaining $350,000 to be paid pursuant to a promissory note in installments over a five-year period. Compl. Exhibit A, page 1; Exhibit B (Promissory Note #1).

Defendant Jeff Starner signed the Purchase Agreement as both President of Defendant 5 Star and individually only as to Section 3 of the Purchase Agreement. Compl. ¶ 10. Section 3 addressed the issues of Representations and Warranties. Compl. Exhibit A, page 8-9. Defendant Starner also signed a personal guarantee with respect to Promissory Note #1. Compl. Exhibit B, page 3.

By March 3, 2008, Defendant 5 Star had paid the principal balance of Promissory Note #1 down to $279,041.08. Compl. ¶ 18. At that time, Plaintiff and Defendant 5 Star executed Promissory Note #2, which addressed the remaining principal balance - changing the monthly payment amount and extending the time for repayment. Compl. ¶ 18; Compl. Exhibit D. Although

Defendant Starner signed this note, the note did not have separate signature blocks for Defendant Starner as President of Defendant 5 Star and individually, as did Promissory Note #1. Other than the payment terms, no other substantial changes to Promissory Note #1 are evident from the face of Promissory Note #2.

On or about December 30, 2010, Plaintiff and Defendant 5 Star executed Promissory Note #3, which further reduced the monthly payment amount specified in Promissory Note #2. Compl. ¶ 20; Compl. Exhibit E. Promissory Note #3 is handwritten and other than the payment terms, no other substantial changes to Promissory Note #2 are evident from the face of Promissory Note #3. Although Defendant Starner signed this note, the note did not have separate signature blocks for Defendant Starner as President of Defendant 5 Star and individually, as did Promissory Note #1. Furthermore, "Amendment to Note" is handwritten on Promissory Note #3.

On or about January 16, 2012, Plaintiff and Defendant 5 Star executed Promissory Note #4. Compl. ¶ 22; Compl. Exhibit F. Unlike Promissory Note #2 and #3, however, Promissory Note #4 contained the following substantial changes from the original promissory note (Promissory Note #1):

- Unlike the other Promissory Notes, Promissory Note #4 listed several additional events that could trigger a default or otherwise render the note becoming immediately due.
- Unlike the preceding Promissory Note #3, Promissory Note #4 did not indicate that it was an "amendment."
- Where the last "amended" note (and the one preceding it) had reduced the amount of the monthly payment, Promissory Note #4 *increased* the required payment amount, thereby adding to Defendant 5 Star's last, agreed-to obligation.
- Unlike any of the previous promissory notes, including the original, Promissory Note #4 added the additional obligation of a liquidated damages provision for late payments.

- Unlike any of the other previous promissory notes, including the original, Promissory Note #4 expressly waived any "presentment, demand, notice, protest and all other demands and notices in connection with this Note."

- Unlike Promissory Notes #2 and #3, Promissory Note #4 contained a signature block for "Maker." Unlike the original promissory note (Promissory Note #1) the signature block for Promissory Note #4 contained only one name – Merchants 5 Star, Inc.

Unlike Promissory Notes #2 and #3, Defendant Starner specifically signed Promissory Note #4 as President of Defendant 5 Star. He did not sign Promissory Note #4 individually.

On or about April 24, 2015, Plaintiff entered into a Confidential Settlement Agreement ("Settlement Agreement") with Defendant 5 Star and Defendant Merchants Holding, LLC ("Defendant Merchants Holding"). Compl. ¶ 24; Compl. Exhibit G. Defendant Starner was not a signatory to the Settlement Agreement nor is there even a signature block with his name. James Pack signed the Settlement Agreement as President and CEO of Defendant 5 Star. This was due to the fact that Defendant Starner had sold Defendant 5 Star to Defendant Merchants Holding on or about July 18, 2014.[1]

The Settlement Agreement contains a number of important recitals and terms:

- The purpose of the Settlement Agreement was to "compromise, settle, buy complete peace from, and terminate any and all known and unknown disputes, claims controversies, demands, actions, causes of action, and in order to avoid the nuisance, time, and expense of litigation." Compl. Exhibit G, page 1.

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[1] To verify this factual allegation (it is not mentioned in Plaintiff's Complaint), Defendant Starner asks that the Court take judicial notice of the *Order Appointing Receiver* issued by Judge French on July 28, 2015, Franklin County Court of Common Pleas, Case No. 15-CV-006200. Judge French's Order grants Defendant 5 Star's *Motion for Immediate Appointment of Receiver* filed on July 22, 2015. That Motion and the preceding *Verified Complaint for Judicial Dissolution of Merchants 5 Star, Ltd., and Merchants 5 Star, Inc.* detail the facts surrounding Defendant Starner's sale of Defendant Merchants 5 Star, Inc. to Defendant Merchants Holding LLC. The *Certificate of Service for Notice of Appointment of Receiver and Deadline for Filing Proof of Claim* was sent by the Receiver to Plaintiff on September 4, 2015.

- As consideration for Plaintiff's release, Plaintiff received a new obligation from Defendant Merchants Holding, who "assumes the Fourth Note...." Compl. Ex. G, pg 2.

- In addition to receiving the new obligation from Defendant Merchants Holding, Plaintiff also received a new benefit – Defendant Merchants Holding and Defendant 5 Star agreed that Plaintiff would receive a "balloon payment" of $98,281.10 on or before May 16, 2017. Compl. Ex. G, pg 2.

- Plaintiff, by his execution of the Settlement Agreement, accepted the following from Defendant 5 Star in the provision titled "Assignment and Assumption": "Merchants Star assigns, transfers, sets over, and conveys to Merchants Holdings all of its obligations relating to the Fourth Note." Compl. Ex. G, pg 2.

- The Settlement Agreement is factually inaccurate where it states that Plaintiff "entered into a Stock Purchase Agreement with Merchants 5 Star and Jeffrey A. Starner." The Stock Purchase Agreement was entered into by Plaintiff and Defendant 5 Star only. As the Complaint and Exhibits demonstrate, Defendant Starner merely signed as a guarantor of Defendant 5 Star's obligation on Promissory Note #1.

- The Settlement Agreement is factually inaccurate where it states that Plaintiff, Defendant 5 Star and Defendant Starner entered into the agreement evidenced by Promissory Note #4. As the Complaint and Exhibits demonstrate, Defendant Starner did not personally guarantee Promissory Note #4.

According to Plaintiff's Complaint, Defendants have "failed to make timely payments under the Settlement Agreement or any of the other agreements, making only two (2) payments under the Settlement Agreements. Compl. ¶ 25.

III. LAW AND ANALYSIS

A. Standard of Review – Civil Rule 12(B)(6)

A trial court may grant a motion to dismiss when it appears beyond doubt that the non-moving party can prove no set of facts which would entitle him to the requested relief. See *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144, 573 N.E.2d 1063. The Court's examination should concentrate solely on the complaint as no factual findings are required. See *State, ex rel. Drake v. Athens Cty. Bd. of Elections* (1998), 39 Ohio St.3d 40, 41, 528 N.E.2d 1253.

In its examination of the complaint, all factual allegations contained therein must be accepted as true, as well as all reasonable inferences drawn there from. See *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. However, the Court should not consider unsupported conclusions that may be included among, but not supported by, the factual allegations of the complaint, because such conclusions cannot be deemed admitted and are not sufficient to withstand a motion to dismiss. *Grange Mutual Cas. Co. v. Klatt* (Mar. 18, 1997) Franklin App. No. 96AP-888, 1997 Ohio App. LEXIS 1125.

B. Plaintiff's Acceptance of Defendant 5 Star's Assignment of its Obligations to Defendant Merchants Holding and Plaintiff's Accompanying Release of Defendant 5 Star (the Principal Debtor) also Released Defendant Starner from His Guarantee.

By releasing Defendant 5 Star, Plaintiff also released Defendant Starner. "The general rule is that whatever discharges the principal discharges the surety. If the principal debtor has been released by the creditor, the guarantor or the surety also will be released." *Dressler Props., Inc. v. Ohio Heart Care, Inc.*, 2009 Ohio 1069 at P14 (5th Dist., March 7, 2005).

It is true that Plaintiff attempted to reserve his claims against Defendant Starner in Section 3 of the Settlement Agreement (Complaint Exhibit G, page 3), which reads:

> 3. Continuing Guarantee – *Status Quo* Preserved. The Parties understand and agree that the Agreement does not, and is not intended to, modify, release, extinguish, indulge, forgive, forbear, waive, or otherwise limit in any way any obligation owed to Mr. Bates by Mr. Starner in connection with the First Note, the Second Note, the Third Note, or the Fourth Note. The Parties agree that, in the event of a breach of the Agreement, Mr. Bates is not prejudiced from pursuing Mr. Starner pursuant to any such obligation.

Plaintiff's attempt to reserve his claims against the guarantor after releasing the principal, however, is ineffectual as a matter of law. In *Gholson v. Savin* (1941) 137 Ohio St. 551, 31 N.E.2d 858, the Ohio Supreme Court instructed that when a creditor "makes an absolute settlement with the

principal debtor, discharging him from the obligation, the debtor secondarily liable is discharged...." *Id.* at 861. The Court explained that to hold otherwise would operate as a fraud against the principal debtor since he must remain liable for reimbursement to the surety or debtor secondarily liable." *Id.*

Gholson instructed that "if by the terms of the release to the principal debtor he is discharged from the debt, the reservation of the right to enforce the claim against the surety is ineffectual." *Id.* at 863. *Gholson* further stated, "to be effectual, it must appear from the reservation that the release is, in fact, a mere covenant not to sue, and not a discharge of the principal debtor." *Id.*

Plaintiff might argue that his reservation is merely a "covenant not to sue" by virtue of Section 4 (Compl. Exhibit G, page 3), which uses language such as "forbear" instead of discharge. In that Section, Plaintiff promises not to commence "any collection action" as long as Defendant Merchants Holding met the payment terms detailed in the Settlement Agreement.

The Court should reject that argument for several reasons. First, that language in Section 4 should be read as only reserving the right to collect on the obligations arising under the Settlement Agreement – not on the previous agreements. To hold otherwise would render the recital language contained on page one of the Settlement Agreement superfluous ("compromise, settle, buy complete peace from, and terminate any and all known and unknown disputes claims, controversies, demands, actions, causes of action, and in order to avoid the nuisance, time, and expense of litigation"). Furthermore, by virtue of the Settlement Agreement's terms, Plaintiff accepted Defendant 5 Star's assignment of all of its previous obligations to Defendant Merchants Holding, and Merchants Holdings assumption of those obligations – thus, fully relieving Defendant 5 Star of any of its previous obligations to Plaintiff. In other words, despite the language

contained in Section 4, Section 2 of the Settlement Agreement (Assignment and Assumption) operated to fully discharge Defendant 5 Star' from performing under all agreements preceding the Settlement Agreement.

Plaintiff's attempted reservation is also ineffectual for another reason. *Gholson* specifically stated that "in fairness and honesty, the reservation agreement should in terms reserve not only the creditor's right against the surety, but the surety's right against the principal as well." *Gholson's* instruction in this regard is clear and unmistakable. See also, *New Mkt. Acquisitions, Ltd. v. Powerhouse Gym*, 154 F.Supp. 2d 1213 (S.D. Ohio, Mar. 29, 2001)("...the covenant not to sue must not only expressly reserve the creditor's right to enforce the claim against the surety, but must also expressly reserve the right of the surety to seek indemnification from the principal debtor."). Upon review, there is no language in the Settlement Agreement reserving Defendant Starner's rights to indemnification against Defendant 5 Star as required by *Gholson*. Accordingly, Plaintiff's attempted reservation of his right to sue Defendant Starner is ineffectual.

For the preceding reasons, Plaintiff's claim against Defendant Starner fails because Plaintiff released Defendant Starner when he released Defendant 5 Star pursuant to the Settlement Agreement.

C. Plaintiff's Breach of Contract Claims Against Defendant Starner Under the Promissory Notes (First Claim for Relief) are Barred by the Doctrine of Novation. Further, Defendant Starner is not liable under the Settlement Agreement because He Did Not Sign It.

Promissory Note #4 was not merely an amendment to the original note, it was a replacement – a novation. Likewise, the Settlement Agreement entered into by Plaintiff, Defendant 5 Star and Defendant Merchants Holdings was also a novation.

"A novation occurs where 'the principal contractors enter into a new agreement, covering the subject matter of the former contract.'" *Hunter v. BPS Guard Servs.*, 100 Ohio App. 3d 532 (10th Dist., Jan. 31, 1995). "A novation may be effected by changing the terms of a contract, or by substituting a new contract, without a change in the parties, or it may consist of a new contract between different parties whereby the original contract and its obligation is discharged." *Boblitt v. Briggs*, 1997 Ohio App. LEXIS 6089 at *8, Montgomery App. No. 97-CA-0006 (November 21, 1997). "The effect of a novation is to discharge the obligation of the parties under the original contract." *NCS Healthcare of Ohio LLC v. Van Cleef Asset Mgmt.*, 2010 Ohio 5353 at P24 (8th Dist., November 4, 2010)(citing *Union Cent. Life Ins. Co. v. Hoyer* (1902), 66 Ohio St. 344, 64 N.E. 435).

Promissory Note #4 was a new contract. It did cover the same subject matter as the old contract – it specifically referred to the "stock of Bates Truck Lines, Inc. But Note #4 never mentioned either the original Purchase Agreement or any of the preceding Promissory Notes. Furthermore, Promissory Note #4 contained many *new obligations* – not simply *revised terms*. For instance Promissory Note #4 included a liquidated damages provision, which no other preceding Note contained. It added several new conditions upon which an immediate default could be declared. And, it expressly waived any "presentment, demand, notice, protest and all other demands and notices in connection with [the] Note." Last, unlike Promissory Note #3, Note #4 did not expressly state that it was merely an amendment.

Importantly, Defendant only signed Promissory Note #4 as President of Merchants 5 Star, Inc. Unlike Promissory Note #1, he did not sign Note #4 individually. Indeed, unlike Note #1, Note #4 did not even contain a signature block for Defendant Starner to sign individually. The conduct of the parties, and the addition of new obligations, demonstrate their intention to enter into

a new contract. Moreover, Plaintiff received consideration for entering into the new contract in the form of the new obligations from Defendant 5 Star. Plaintiff also received consideration by virtue of the fact that he did not have to litigate to collect on the old debt. Reduced litigation expenses can constitute consideration for a novation. See *RMI Titanium Co. v. Occidental Chem. Corp.*, 1997 Ohio App. LEXIS 4114 at *16, Cuyahoga App. No. 71471, 71486, & 71487, (September 11, 1997).

The Settlement Agreement entered into between Plaintiff, Defendant 5 Star and Defendant Merchants Holding is likewise a novation *and* substitution. "An agreement between the parties to a contract and a third person, whereby one party is released from the obligations of the contract, and the third person substituted in his stead, is a novation, and requires no further consideration than such release and substitution." *Hunter supra*, at 542. As explained above, Plaintiff accepted the substitution of Defendant Merchants Holding to perform the obligations of Defendant 5 Star in the Settlement Agreement. Plaintiff may argue that Defendant Starner was not a party to the Settlement Agreement. But he was never technically a party to any agreement – he was merely a *guarantor* of Defendant 5 Star. As a mere guarantor, Defendant Starner's obligations could be no greater than Defendant 5 Star's.

Furthermore, the Settlement Agreement contained one very substantial new obligation – a balloon payment of $98,281.10 to be paid on or before May 16, 2017. Accordingly, because of the substitution of parties and the new substantial obligations, the Settlement Agreement was clearly a novation.

To hold that Defendant Starner's personal guarantee could extend to the new obligations contained in Promissory Note #4 and/or the Settlement Agreement without his express consent would be unfair and inconsistent with established contract law. By not signing individually

(Promissory Note #4), or not even signing at all (the Settlement Agreement), Defendant Starner signaled that he did not intend for his guarantee to extend to either new contract, both of which contained substantial new obligations. "It is well settled that a guarantor is discharged from liability whenever the terms of the contract or the nature of the obligation guaranteed is materially altered without the guarantor's consent." *Chase Bank of Ohio v. Brookstone Ohio Partnership*, (Mar. 5, 1990), Clermont App. No. CA89-07-065, 1990 Ohio App. LEXIS 764, citing *Cambria Iron Co. v. Keynes* (1897), 56 Ohio St. 501, 47 N.E. 548.

The novation(s) extinguished any obligations Defendant 5 Star owed under any contracts preceding Promissory Note #4 and/or preceding the Settlement Agreement. As a guarantor with no greater liability than the principal, Defendant Starner's obligations were also extinguished by those novations.

D. Plaintiff Lacks Standing to Sue Under the Consulting Agreement Because He Was Not a Party to the Agreement.

"It is well established that before an Ohio court can consider the merits of a legal claim, the person seeking relief must establish standing to sue." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward,* 86 Ohio St. 3d 451, 469 (1999)(citing *Ohio Contractors Assn. v. Bicking* (1994), 71 Ohio St. 3d 318, 320, 643 N.E.2d 1088, 1089). To the extent Plaintiff is bringing a breach of contract claim based on the Consulting Agreement, Plaintiff does not have standing to sue. Compl. Exhibit C.

The Consulting Agreement was entered into between Bates Truck Line, Inc. and Fairfield Leasing, Inc. Plaintiff has failed to join Bates Truck Lines in this case. Further, Fairfield Leasing, Inc. is not a Plaintiff in this case. Indeed, Fairfield Leasing does not even exist anymore – it was

dissolved in 2009.[2] It is the "legal existence" that gives a corporation the legal capacity to sue. *Bain Builders v. Huntington Nat'l Bank*, 2001 Ohio App. LEXIS 3025 at *7 (8th Dist., July 5, 2001).

Although, Plaintiff's signature appears on the Consulting Agreement, he signed merely as a guarantor. By the express terms of the agreement, Defendant 5 Star was only obligated to make payments to Fairfield Leasing, Inc. – not to Plaintiff. Nor can Plaintiff be considered a third-party beneficiary to the Consulting Agreement. Pursuant to the terms of the agreement, Defendant 5 Star was only obligated to pay Fairfield Leasing, Inc. The Consulting Agreement does not state whether or not Fairfield Leasing, Inc. would in turn pay over the money from Defendant 5 Star. Without more, it is just as likely that Fairfield Leasing, Inc. would continue to pay its employee, Plaintiff, whether Defendant 5 Star made good on its obligations under the Consulting Agreement or not. If the parties had intended for Plaintiff to be a third-party beneficiary, they could have easily included language saying so. Because the Consulting Agreement does not describe any benefit that was specifically intended for Plaintiff, Plaintiff is at best an "incidental beneficiary." *Bain, supra* at *11-12.

Finally, it should be pointed out that Defendant Starner's guarantee on the Consulting Agreement obligates him only to pay Fairfield Leasing, Inc. or "its successors and assigns." The guarantee says nothing about Defendant Starner paying Plaintiff nor has Plaintiff alleged that he is a "successor" or "assign" of Fairfield Leasing, Inc.

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[2] Defendant Starner asks the Court to take judicial notice that the Ohio Secretary of State's website indicates Plaintiff filed a Certificate of Dissolution for Fairfield Leasing, Inc. on December 14, 2009. See Document ID No. 200935200524. Put another way, Fairfield Leasing, Inc. no longer exists as an active Ohio Corporation and hasn't since 2009.

E. Plaintiff's Unjust Enrichment Claim Fails Against Defendant Starner Because Plaintiff Did Not Confer a Benefit on Defendant Starner and Because Plaintiff Cannot Maintain an Unjust Enrichment Claim Where an Express Contract Covers the Same Subject Matter.

In order to recover under a theory of unjust enrichment or quasi-contract, a plaintiff must prove by a preponderance of the evidence that "(1) the plaintiff conferred a benefit upon the defendant, (2) the defendant had knowledge of such benefit, and (3) the defendant retained the benefit under circumstances where it would be unjust for him to retain that benefit without payment." *Anchor Realty Constr., Inc. v. New Albany Links Golf Course Co.*, 2010 Ohio 6347 at P15 (10th Dist., Dec. 23, 2010). Paragraph 35 of Plaintiff's Complaint alleges that Plaintiff "provided all outstanding shares of stock in the Company to Defendants." But this allegation is directly contradicted by the allegations of Paragraph 8 of Plaintiff's Complaint, and the Complaint Exhibits, which demonstrate that Plaintiff sold his outstanding shares of stock in the Company to Defendant 5 Star only. See Compl. ¶ 8; Compl. Exhibit A. Defendant Starner was merely a guarantor of one-half of the purchase price Defendant 5 Star paid for the stock. Furthermore, Plaintiff makes absolutely no allegations that Defendant Starner somehow received the stock from Defendant 5 Star or was otherwise unjustly enriched by Defendant 5 Star's receipt of the stock.

Furthermore, Plaintiff also alleged that he and Defendant 5 Star entered into a Consulting Agreement. Compl. ¶ 15. First, this is factually incorrect because the Consulting Agreement clearly states that it was between Bates Truck Lines, Inc. and Fairfield Leasing, Inc. In any event, however, the Consulting Agreement contained a covenant not to compete. Compl. Exhibit C, page 1, Sections 2 and 5. In Paragraph 37 of his Complaint, Plaintiff alleges that Defendants have benefited from Mr. Bates' non-competition in the marketplace, and Mr. Bates has been deprived of income and other business opportunities, associated with the Company.

As with the purchase of stock, the covenant not to compete was entered into between two parties other than Defendant Starner. Defendant Starner was merely a guarantor of Bates Truck Lines, Inc.'s obligations under the Consulting Agreement – he was not a beneficiary of the Consulting Agreement nor does Plaintiff's Complaint explain at all how Plaintiff's "non-competition" conferred a benefit on Defendant Starner. Furthermore, as pointed out above, the Consulting Agreement was entered into between Bates Truck Line, Inc. and Fairfield Leasing, Inc. Plaintiff has failed to join Bates Truck Lines in this case and Fairfield Leasing, Inc. no longer exists and is not a Plaintiff in this case in any event.

Last, it is the general rule that there can be no recovery on an unjust enrichment claim if there is an express contract covering the same subject. See *Anchor supra*, at P18. Plaintiff's unjust enrichment claim is a textbook violation of this rule because it covers the exact same subject covered by two express, written contracts.

F. Plaintiff's Third Claim for Relief (Promissory Estoppel) is barred by the Statute of Frauds – R.C. § 1335.05.

"Agreements that do not comply with the statute of frauds are unenforceable." *Olympic Holding Co., LLC v. ACE Ltd.*, 122 Ohio St. 3d 89, 94 (2009). Plaintiff's breach of contract claim against Defendant Starner is based on (1) Defendant Starner's personal guarantee of Defendant 5 Star's payment obligations related to 5 Star's purchase of the stock of Bates Truck Lines, Inc. and (2) Starner's personal guarantee of Bates Truck Lines, Inc.'s Consulting Agreement with Fairfield Leasing, Inc. Compl. ¶ 40-43.

R.C. § 1335.05 is Ohio's codification of the Statute of Frauds and reads:

> No action shall be brought whereby to charge the defendant, upon a special promise, to answer for the debt, default, or miscarriage of another person; nor to charge an executor or administrator upon a special promise to answer damages out of his own estate; nor to charge a person upon an agreement made upon

> consideration of marriage, or upon a contract or sale of lands, tenements, or hereditaments, or interest in or concerning them, or upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized.

All of the agreements referred to in Plaintiff's Complaint, by their terms, were not to be performed within one year and therefore, each agreement was subject to R.C. § 1335.05.

- The Purchase Agreement and Promissory Note #1 required monthly installment payments to be made over a "period of five years."
- Promissory Note #2 required monthly installment payments to be paid over a five-year period.
- Promissory Note #3 merely amended the monthly amount payable under Note #2 and therefore was payable over a five-year period.
- Promissory Note #4 required monthly installment payments to be made over a ten-year period.
- The Settlement Agreement required monthly installment payments to be made over a two-year period, at the end of which a balloon payment would be made.
- The Consulting Agreement required Fairfield Leasing, Inc. to provide services for a three-year period.

Each of the agreements related to the purchase of Bates Truck Lines, Inc. by Defendant 5 Star were for definite installment periods extending beyond a year and were, therefore, subject to R.C. § 1335.05. See *Humitsch v. Collier*, 2000 Ohio App. LEXIS 6196, Lake App. No. 99-L-099 (Dec. 29, 200). Likewise, the Consulting Agreement between Bates Trucking Lines, Inc. and Fairfield Leasing, Inc. also extended beyond a year and was, therefore, subject to the R.C. § 1335.05. See *REDOT Dev. of Ohio, LLC v. Waste Mgmt. of Ohio*, 2013 Ohio 2364 (6th Dist., June 7, 2013).

To the extent that Plaintiff' Third Claim for Relief (Promissory Estoppel) is based on any of the foregoing agreements (and it clearly is) the claim fails because it doesn't comply with the

statute of frauds. "Courts have long held that a signed contract constitutes a party's final expression of its agreement." *Olympic supra* at 95. In *Olympic*, the Ohio Supreme Court further explained:

> If promissory estoppel is used as a bar to the writing requirements imposed by the statute of frauds, based on a party's oral promise to execute the agreement, the predictability that the statute of frauds brings to contract formation would be eroded. Parties negotiating a contract would no longer know what signifies a final agreement. Promissory estoppel used this way would open contract negotiations to fraud, the very evil that the statute of frauds seeks to prevent. Thus, "[t]o allow [a] plaintiff to recover on a theory of promissory estoppel where the oral contract is precluded by the Statute of Frauds, '"would abrogate the purpose and intent of the legislature in enacting the statute of frauds and would nullify its fundamental requirements."'" *Olympic,* at 95 (citing *Essco Geometric, Inc. v. Harvard Industries, Inc.* (Sept. 30, 1993), E.D.Mo. No. 90-1354C(6), 1993 WL 766952, *3, quoting *Sales Serv. v. Daewoo Internatl.* (Am.) (Mo.App.1989), 770 S.W.2d 453, 457, quoting *Morsinkhoff v. De Luxe Laundry & Dry Cleaning Co.* (Mo.App.1961), 344 S.W.2d 639, 644.

Here, Plaintiff's promissory estoppel claim(s), if permitted to proceed, would essentially nullify the statute of frauds requirement that the agreements referred to be in writing. For this reason, Plaintiff's Third Claim for relief (Promissory Estoppel) must fail.

G. Plaintiff's Negligent Misrepresentation and Fraud Claims are Barred by the Economic Loss Doctrine.

Plaintiff's negligent misrepresentation and fraud claims seek to improperly turn a contract claim into torts. In Ohio, a breach of contract does not create a tort claim. See, e.g., *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 151 (9th Dist. 1996), quoting *Wolfe v. Continental Cas. Co.*, 647 F.2d 705, 710 (6th Cir. 1981). Generally, "the existence of a contract action * * * excludes the opportunity to present the same case as a tort claim." *Id.* "A tort claim based upon the same actions as those upon which a claim of contract breach is based will exist independently of the contract action only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed." Id.

quoting *Battista v. Lebanon Trotting Assn.*, 538 F.2d 111, 117 (6th.Cir. 1976). Where the causes of action in tort and contract are "factually intertwined," a plaintiff must show that the tort claims derive from the breach of duties that are independent of the contract and that would exist notwithstanding the contract. *Cuthbert v. Trucklease Corp.*, 10th Dist. Franklin No. 03AP-662, 2004-Ohio-4417, ¶ 44 (Aug. 24, 2004)(citing *Wexler v. Jewish Hosp. Assoc. of Cincinnati*, 1st Dist. Hamilton No. C-820654, 1983 Ohio App. LEXIS 11806 (Oct. 26, 1983)). Thus, absent a separate duty and damages, a fraud claim based on a breach of contract will not survive a Civ. Rule 12(B)(6) dismissal. *Textron*, 115 Ohio App.3d at 151.

The prohibition on bringing a tort claim based on the same facts as a contract claim is explained, in part, by the *economic loss doctrine*. That doctrine holds that "a party cannot recover purely economic losses in a tort action against another party based upon the breach of contractually created duties." See *Stancik v. Deutsche Nat'l Bank*, 2015-Ohio-2517 at P39 (8th Dist., June 25, 2015)(citing *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St. 3d 412, 2005-Ohio-5409, 835 N.E.2d 701, syllabus). The economic loss doctrine was created, in part, to preclude parties from incurring liability beyond what they had bargained for.

It is true that Ohio courts have created a limited exception to the economic loss doctrine for some negligent misrepresentation claims. See *Haddon View Invest. Co. v. Coopers & Lybrand* (1982), 70 Ohio St.2d 154, 24 O.O.3d 268, 436 N.E.2d 212. But that exception only applies when a duty in tort exists separately from contractual duties. See *Corporex supra*, at 415. In *Haddon View*, the duty in tort was found in professional liability.

In this case, all of the allegations supporting Plaintiff's negligent misrepresentation claim are tied to duties Defendants would owe only under the contract(s) being sued upon. No separate duty arising in tort is either alleged nor can be discerned from the allegations. Indeed, the "Facts

Common to All Counts" section of Plaintiff's Complaint is telling and can be summed up thusly – Defendants agreed to pay certain amounts; Defendants failed to pay the amounts. There is no indication that any duties separate from contractual duties were owed to Plaintiff by Defendants nor is there even one single, specific false representation or misrepresentation alleged. This was nothing more than an arms-length transaction, where one party is alleged not to have fully performed.

IV. Plaintiff's Negligent Misrepresentation and Fraud Claims are Not Plead with Particularity, in Violation of Civil Rule 9(B).

The doctrine of negligent misrepresentation provides recovery where: 1) a party who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, provides false information; 2) for the guidance of another party in its business transaction, 3) causing the other party to suffer pecuniary loss, 4) as a result of justifiable reliance on the information, 5) if the one providing the information failed to exercise reasonable care or competence in obtaining and communicating the information. See *Brothers v. Morrone-O'Keefe Dev. Co., LLC*, 2007-Ohio-1942 (10th Dist., April 24, 2007).

Fraud requires proof of the following elements: (1) a representation; (2) that is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 462 N.E.2d 407 (1984).

Ohio Rule of Civil Procedure 9(B) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." As one Ohio

appellate court stated recently: "[t]his court has held that the particularity requirement of Civ.R. 9(B) includes 'the time, place and content of the false representation, the fact misrepresented, and the nature of what was obtained or given as a consequence of the fraud.'" *Stancik v. Deutsche Natl. Bank*, 2015 WL 3899224, 2015-Ohio-2517 (8th Dist., June 25, 2015), citing *Pointe at Gateway Condo. Owners' Assn. v. Schmelzer,* 8th Dist. Cuyahoga Nos. 98761 and 99130, 2013–Ohio–3615, ¶ 65. A "[f]ailure to plead the elements of fraud with particularity results in a defective claim that cannot withstand a Civ.R. 12(B)(6) motion to dismiss." *Glazer v. Chase Home Fin., L.L.C.*, 2013 WL 7869273 (8th Dist. Dec. 19, 2013), quoting *Morrow v. Reminger & Reminger Co. L.P.A.,* 183 Ohio App.3d 40, 2009–Ohio–2665, 915 N.E.2d 696, ¶ 21 (10th Dist.); see also *Dottore v. Vorys, Sater, Seymour & Pease, L.P.P.*, 2014 WL 72538 at *18 (8th Dist. Jan. 9, 2014) (appellate court upholding trial court's dismissal of fraud claim for failure to plead with particularity). Ohio courts have also required negligent misrepresentation claims alleging false statements to be plead with particularity. See *Miller v. Medical Mut. of Ohio*, 2013 Ohio 3179 at P44-48 (5th Dist., July 18, 2013).

Plaintiff's negligent misrepresentation and fraud claims provide general assertions, but no specifics. For example, the sum total of all allegations in support of Plaintiff's fraud claim include: (1) "Defendants made a number of material misrepresentations of fact, and omitted material facts, which induced Mr. Bate's performance under the Agreements." (Complaint at ¶51); and (2) "Defendants knew that the representations or omissions were false at the time they were made; or alternatively, Defendants made those misrepresentations and, or, engaged in those omissions with reckless disregard for the truth." (Complaint at ¶52).

The allegations fail to identify with sufficient particularity precisely who made any such representations. Further, the Complaint completely fails to articulate the time or place of the

alleged negligent or fraudulent misrepresentations. Consequently, Plaintiff's Fourth and Fifth Claims for Relief should be dismissed.

V. Plaintiff's Negligent Misrepresentation and Fraud Claims Fail to the Extent They are Based on Promises or Representations Relating to Future Actions or Conduct.

"Negligent misrepresentation" and "fraud" claims require a common element: a misrepresentation of material fact. *Texlon Corp. v. Smart Media of Del., Inc.*, 2005 Ohio 4931 at P33 (9th Dist., September 21, 2005). "This means past or existing facts, not promises or representations relating to future actions or conduct." *Id.* "An unfulfilled promise to do something in the future gives rise to an action for breach of contract, not a fraudulent misrepresentation." *Id.* (citing *Gervace v. Master Foods, Inc.* (Oct. 12, 1978) 8th Dist. No. 37643, 1978 Ohio App. LEXIS 7981, at *13).

Paragraph 46 of Plaintiff's negligent misrepresentation claim alleges: "Defendants made a number of materially false and misleading statements and omissions in regard to their intention to make timely payments, their ability to make timely payments, and their guarantee in case of default." There are a number of problems with these allegations. First, negligent misrepresentation claims cannot be based on omissions – an affirmative misrepresentation is required. See *Interstate Gas Supply, Inc. v. Calex Corp.*, 2006 Ohio 638 at P91 (10th Dist., February 14, 2006). To the extent Plaintiff's negligent misrepresentation claim is based on omission(s), it should be dismissed. Second, Plaintiff's allegation that Defendants' negligently misrepresented their "intention" to pay violates the rule that conduct cannot be both negligent and fraudulent at the same time. See *Textron supra*, at 149.

But equally problematic is that all of Plaintiff's allegations supporting its negligent misrepresentation claim relate to Defendants' future promise to pay. The allegations contained in

the "Facts" section of Plaintiff's Complaint make it clear that Defendants were to make installment payments over a period of *years*. Indeed, it's clear from the allegations in Plaintiff's Complaint that Defendants did, in fact make many payments – the $350,000 principal note balance was paid down to "a current principal balance of $127,491.30." See Compl. ¶ 11-24. Likewise, Plaintiff's fraud claim also fails to describe any misrepresentations that are unrelated to future promises to pay. Indeed, as described above, Plaintiff's fraud claim fails to describe any specific misrepresentations at all.

Because Plaintiff's negligent misrepresentation and fraud claims only allege misrepresentations related to future conduct and/or opinions about future conduct, they should be dismissed.

VI. Conclusion.

For the reasons set forth herein, Defendant Starner respectfully move this Court to dismiss Plaintiff's Complaint, as against Defendant Starner, in its entirety.

Date: September 22, 2015

Respectfully Submitted,

/s/ Danny L. Caudill

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was served upon counsel for all parties via the Court's electronic filing system and/or by e-mail on September 22, 2015.

/s/ Danny L. Caudill

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