IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LATINO FOOD MARKETERS, LLC,

ORDER

Plaintiff,

03-C-0190-C

v.

OLE MEXICAN FOODS, INC.,

Defendant.

- -

This case began as a relatively straightforward breach of contract claim, but it did not stay that way for long. In its complaint, plaintiff Latino Food Marketers, LLC alleged that defendant Ole Mexican Foods, Inc. failed to pay for cheese that plaintiff shipped to defendant in accordance with the purchase orders and invoices that governed their relationship. In response, defendant filed a motion to dismiss on the ground that the parties had entered into a contract in November 2001 in which they agreed to litigate disputes in Georgia. Plaintiff denied that the contract relied on by defendant was enforceable; it argued that the contract had not taken effect because defendant never accepted the changes plaintiff proposed. Although defendant argued that it had accepted the changes and had sent a signed copy of the contract to plaintiff, initially, defendant could not locate a copy of the

purported agreement.

Because of this factual dispute, I scheduled an evidentiary hearing on the issue of proper venue. Just before the hearing, defendant advised plaintiff that it had discovered a signed copy of the agreement. Plaintiff disputed the authenticity of this document. The hearing lasted three days, after which I denied defendant's motion to dismiss. In an opinion and order dated November 24, 2003, I concluded for the purpose of determining proper venue only that defendant had not signed the contract in dispute or otherwise demonstrated its intent to form a binding contract. However, I noted that the "evidence is not one-sided. A jury might come to a different conclusion than mine after hearing the witnesses at trial and reviewing the evidence." November 24, 2003 Op. and Order, dkt. #50, at 20.

Defendant then filed its answer, which included the following 17 counterclaims: (1) breach of contract; (2) fraud; (3) negligent misrepresentation; (4) anticipatory repudiation; (5) breach of the duty of good faith and fair dealing; (6) promissory estoppel; (7) misappropriation of trade secrets and proprietary information; (8) tortious interference with contractual relations; (9) tortious interference with business relations; (10) defamation; (11) punitive damages; (12) trademark infringement under federal law; (13) unfair competition in violation of federal law; (14) trademark dilution; (15) unfair competition in violation of state law; (16) trademark infringement under state law; and (17) set off and recoupment. The parties later stipulated to dismiss counterclaims 12 through 16 without prejudice.

The same contract that was at the heart of the dispute regarding proper venue is also at the heart of the dispute on the merits. The November 2001 contract includes provisions requiring plaintiff to provide defendant with the lowest price of any of its customers in the Southeast and restricting plaintiff's ability to do business with defendant's customers. Plaintiff admits that it was charging defendant more than some of its other customers and that it was selling products to defendant's customers. Thus, if the contract exists and is enforceable, there will be no question that plaintiff breached the contract. Along the same lines, if the November 2001 contract is not enforceable, defendant could be liable for breach of contract by failing to pay the prices listed on the invoices. Defendant admits it did not pay the charged prices; its defense is that the November 2001 contract entitled it to take a credit because plaintiff was charging defendant more than its other customers. Both parties agree that there is a material factual dispute as to the existence of the November 2001 contract, precluding summary judgment with respect to either party's breach of contract claim.

This is just about all the parties agree on. Plaintiff has filed a motion for summary judgment on all of defendant's tort counterclaims and its claims for promissory estoppel, anticipatory repudiation and breach of the duty of good faith. Defendant has conceded that "it does not have a claim for anticipatory repudiation," Dft.'s Br., dkt. #115, p. 47 n.22, so this claim will be dismissed. With respect to defendant's tort counterclaims, plaintiff argues

that the economic loss doctrine bars them all because each arises out of the parties' contractual relationship. Alternatively, plaintiff contends that defendant's tort claims fail on their merits. Although I do not view the scope of the economic loss doctrine as broadly as plaintiff, I agree with plaintiff that, to the extent the doctrine does not bar defendant's tort claims, defendant has failed to show that there are genuine issues of material fact precluding summary judgment on these claims.

Plaintiff contends also that defendant cannot maintain claims for promissory estoppel and breach of the duty of good faith at the same time that it is asserting a breach of contract claim. I conclude that defendant's promissory estoppel claim must be dismissed because defendant has not identified any promises that plaintiff made apart from those in the contracts. However, plaintiff cites no authority that would prohibit defendant from asserting a bad faith claim in the alternative to its breach of contract claim. Accordingly, I will deny plaintiff's motion for summary judgment with respect to defendant's claim for breach of the duty of good faith and fair dealing.

Jurisdiction is present under 28 U.S.C. § 1332(a)(1), which permits federal courts to hear cases arising under state law when the plaintiff and defendant are citizens of different states and the amount in controversy is greater than $75,000. Plaintiff's members are citizens of Wisconsin and Florida. Belleville Catering Co. v. Champaign Marketplace, LLC, 350 F.3d 691, 692 (7th Cir. 2003) ("limited liability companies are citizens of every state

of which any member is a citizen"). Defendant is incorporated and has its principal place of business in Georgia. Metropolitan Life Ins. Co. v. Estate of Cammon, 929 F.2d 1220, 1223 (7th Cir. 1991) (corporations are citizens of state in which they are incorporated and state in which their principal place of business is located). Plaintiff alleges in its complaint that it is owed more than $1,000,000 according to the prices listed in the invoices. Smith v. American General Life and Accident Insurance Co., 337 F.3d 888, 892 (7th Cir. 2003) (when plaintiff seeks more than $75,000 in complaint, amount in controversy requirement is met unless it appears to "a legal certainty" that claim is worth less than jurisdictional amount).

Before setting forth the undisputed facts, I must pause to comment on the proposed findings of fact submitted by defendant. More often than not, the evidence defendant cited did not fully support the fact proposed. In many instances, parts of the proposed fact were supported but defendant appeared to have "added" facts that were not included in the cited evidence. For example, defendant's proposed finding of fact #34 states: "On November 9, 2001, Mr. Leal requested and obtained the most recent draft of the contract between the parties for the purpose of making the agreed upon changes previously discussed with Mrs. Moreno." Defendant cites several pieces of evidence in support of this citation, but they show only that Leal received a draft of the contract on November 9, 2001. The evidence does not show that Leal "requested" the draft or that his purpose for doing so was to "mak[e]

the agreed upon changes previously discussed with Mrs. Moreno." Other proposed facts were completely unsupported by the record. Defendant's proposed finding of fact #71 states: "At the same time, [defendant] was forced to purchase greater quantities of cheese and manipulate its own deliveries of cheese to prevent problems with its larger accounts such as Wal*Mart." In support of this proposed fact, defendant cites several portions of the deposition of Kimberly Greenway, defendant's controller. However, Greenway testified only generally about "issues" and "problems" that defendant was having with shipments from plaintiff. She does not mention Wal*Mart or any extra purchases of cheese that defendant had to make in order to keep Wal*Mart satisfied.

There are many other similar examples, some of which are discussed in the opinion. The discrepancies between defendant's proposed findings of fact and the cited evidence are so great that it is almost as if defendant prepared its proposed findings of fact before it even examined the evidence. Instead, it seems that defendant proposed facts that, if true, would support its case and *then* searched the record for any piece of evidence that might remotely support at least part of the proposed fact. When such evidence could not be found, it attempted to make the deficiencies less obvious by inserting a string of citations addressing the same basic subject as the proposed finding of fact. Defendant's practice of using the same string of citations to support many different proposed findings of fact confirmed the lack of evidence to support its position on many disputed issues. E.g., Dft.'s PFOF, dkt.

#117, at ¶¶ 53-57.

Needless to say, I have not considered any facts proposed by defendant that were not supported by the record. It would be appropriate to strike all of defendant's proposed facts as a sanction for forcing this court and opposing counsel to go through the exhausting process of checking the citation for every fact proposed by defendant to determine whether any portion of the proposed fact was supported by the record. Although I considered imposing a sanction, I have concluded that it is unnecessary to do so. Whether or not I take into account defendant's proposed facts that were properly supported, plaintiff would still be entitled to summary judgment on a vast majority of defendant's counterclaims.

Finally, I address briefly defendant's eleventh-hour motion to supplement its response to plaintiff's summary judgment motion, which defendant filed more than three weeks after its response was due and ten days before trial is scheduled to begin. Defendant argues that it should be allowed to supplement its response because the summary judgment deadline fell before the end of discovery. Such a deadline is not unusual and does not provide grounds for amending defendant's summary judgment submissions. The later discovery date allows parties to obtain additional evidence for *trial*, not to "update" their summary judgment materials if they uncover something they believe is helpful. Defendant knew what the deadlines were; in fact, the parties proposed the schedule that the magistrate judge adopted. Thus, defendant had sufficient notice that it should obtain the evidence needed to survive

summary judgment before it filed its response. Further, I have already extended the summary judgment deadline in this case 60 days. Defendant is not entitled to additional extensions of time.

In any event, it would be futile to allow defendant to file additional proposed findings of fact. The only additional evidence defendant has submitted is related to its defamation claim. Specifically, defendant points to testimony showing that plaintiff told defendant's customers that defendant was no longer in business. However, as discussed below, that statement is not defamatory under Wisconsin law. Accordingly, defendant's motion to supplement its summary judgment response will be denied.

From the parties' proposed findings of fact and the record, I find the following facts to be material and undisputed. (Because so many of the facts in this case *are* disputed, the undisputed facts section provides only a basic outline of the relevant facts. I will discuss the disputed facts throughout the opinion as they become relevant, construing them in favor of defendant as favorably as the record permits. Hunt v. City of Markham, Illinois, 219 F.3d 649, 652 (7th Cir. 2000).)

UNDISPUTED FACTS

Plaintiff Latino Food Marketers markets and sells Mexican-style cheese products that are manufactured by Mexican Cheese Producers, Inc. Plaintiff's members are Miguel Leal,

Martina Leal, Fred Yoder and Albert Garcia. Martina and Miguel Leal are the majority owners of both Latino Food and Mexican Cheese Producers.

Defendant Ole Mexican Foods distributes Mexican cheese and distributes and manufactures tortillas. Defendant distributes cheese from both its own private labels and other manufacturers. Veronica Moreno is defendant's vice president. From 1998 until September 2001, defendant bought its private label cheese from Wisconsin Cheese Group, Inc., doing business under the name of CheesAmerica. CheesAmerica bought its cheese from the Mexican Cheese Producers.

Plaintiff and defendant began doing business together in September 2001. (The parties had discussed the possibility of a distribution and manufacturing agreement as early as January 2001, but these earlier discussions were not fruitful.) Defendant sent purchase orders to plaintiff for cheese products. Plaintiff filled the orders, prepared invoices and shipped the products to defendant. Also in September 2001, the parties entered into negotiations for a contract under which defendant would purchase all of its Mexican cheese from plaintiff. Mexican Cheese Producers would manufacture the cheese; plaintiff would market and sell the cheese. From September until mid-November 2001, the parties exchanged draft contract proposals. Plaintiff's primary goal was exclusivity: it wanted defendant to purchase all of its cheese, or at least all of its Mexican cheese, from plaintiff. Defendant wanted guarantees on price and non-competition, protection of its trademarks

and confidentiality provisions, among other things.

> In a letter to Veronica Moreno dated October 22, 2001, Miguel Leal wrote:
>
> Following is the wording we would like to use on the two contract provisions we have been discussing:
>
> Para. 1.01 **Grant of Exclusive License.** OMF grants and Manufacturer accepts, an exclusive license to manufacture and package those OMF Cheese Products listed in Exhibit A, attached hereto and made a part hereof (the "Licensed Products"). The parties hereto agree that OMF shall have the right to amend Exhibit A from time to time if OMF discontinuous [sic] marketing any of the Cheese Products. In addition, the parties may mutually agree to amend Exhibit A to add new Cheese Products.
>
> Para. 1.04 The last sentence of this paragraph should read, Manufacturer hereby agrees, warrants and represents that it shall sell the Licensed Products to OMF at the lowest prices it, or any of its affiliated entities, now or hereinafter offers for the same or similar products in the Southeast United States, which includes the states of Virginia and Tennessee and south and Arkansas and Louisiana and east.
>
> Exhibit A should include the following sentence. It is understood that Licensed Products includes the above package sizes plus any other package sizes of Queso Fresco, Crema, Cotija, Queso Enchilado and Quesadilla Cheese Products OMF may want to market.

Moreno and Leal also spoke on the telephone about changes that Leal wanted in the proposed contract.

On November 9, 2001, Miguel Leal received the most recent draft of the contract. The draft included provisions guaranteeing that plaintiff would: (1) sell "the Licensed Products to [defendant] at the lowest prices it, or any of its affiliated entities, now or hereinafter offers for the same price and similar products anywhere in the world" (art. 1.04);

(2) not sell "the Licensed Products, or any similar or competitive products, to any of the present or future customers of OMF" (art 1.07); and (3) provide products that were not "impure, deteriorated, adulterated or misbranded . . . or otherwise deficient in quality" (art. 2.01). In addition, the contract would give plaintiff a "non-exclusive license to manufacture and package those OMF Cheese Products listed in Exhibit A" (art. 1.01). Both parties would agree "to hold the Confidential Information of the other party in confidence" (art. 3.03(d)).

On November 12, 2001, Miguel Leal and Yoder made handwritten changes to three provisions of the latest proposed contract so that (1) defendant could not purchase Mexican cheese from anyone else; (2) the list of products to be manufactured by plaintiff could be amended by mutual agreement; and (3) defendant's price guarantees from plaintiff were limited to the "Southeast United States." Leal initialed each of these changes, signed the contract and faxed it to Moreno. The cover letter to the contract directed Moreno to initial the changes, sign the agreement and fax a copy back to plaintiff.

(What happened next is hotly disputed. Defendant says that Moreno initialed Leal's changes, signed the contract and sent it back to Leal via Federal Express. Plaintiff says that it never received a contract signed by defendant.)

From November 2001 to March 2003, plaintiff did not send anything in writing to defendant to confirm whether defendant had accepted or rejected the contract. After November 2001, plaintiff continued selling products that were similar to defendant's private

label Mexican cheese to defendant's customers. Plaintiff made no effort to provide defendant with the lowest prices in the Southeast. Defendant purchased its private label cheese products exclusively from plaintiff and Mexican Cheese Producers through April 2003.

In the spring of 2002, defendant was presented with an opportunity to do business with HEB, a large grocery chain in Texas. This opportunity would allow defendant to market its own private label in HEB's stores and to manufacture HEB's private label Mexican cheese products. Moreno and Samuel Rodriguez, defendant's sales manager, met with Miguel Leal about this opportunity. Moreno wanted to purchase a percentage of Latino Food so that defendant could manufacture cheese for HEB, but Leal denied this request. Moreno, Rodriguez and Leal also discussed the possibility of drafting a contract to cover the HEB opportunity. Although the parties did not enter into a written contract with respect to HEB, plaintiff agreed to produce a private label brand, La Banderita, that defendant could distribute to HEB.

Beginning in the fall of 2002, defendant began complaining to plaintiff about quality problems with the cheese. For example, defendant said that it found foreign objects in the cheese and that some of the cheese was past its expiration date. At some point in 2002, Moreno discovered that plaintiff was still selling cheese to defendant's customers and selling cheese to plaintiff's other customers at a lower price than it was giving defendant. When

Moreno confronted Leal about these practices, he denied it, at least initially.

In February 2003, Moreno and Rodriguez agreed to meet with the Leals to discuss various issues. During this meeting, Moreno raised the issue of the November 2001 contract. (The parties dispute whether Martina Leal told Moreno that she could not remember the contract or that plaintiff did not have a contract with defendant.) After the meeting, Moreno sent the Leals a copy of the contract. Martina Leal did not write or call Moreno after receiving the contract to deny that it was properly executed.

On April 11, 2003, counsel for defendant informed plaintiff in a letter that plaintiff had breached a November 13, 2001 agreement between the parties. The letter states:

> It has come to [defendant's] attention that Mexican Cheese Producers, Inc. ("MCP") and Latino Food Marketers, LLC ("LFM") (1) have sold and are selling competitive products to customers of [defendant] in violation of Section 1.07 of the Agreement, (2) have offered "Licensed Products" (as defined in the Agreement) or similar products in the Southeast at prices lower than the prices it sold such products to [defendant] in violation of Section 1.04 of the Agreement, and (3) used for their own purposes confidential information about the market in violation of Section 3.03 of the Agreement.

The letter further states that because of plaintiff's breach, defendant's "duties and obligations under the Agreement are hereby terminated."

On April 14, 2003, defendant deducted approximately $550,000 in credits as a result of plaintiff's alleged overcharging. Around the same time, plaintiff stopped shipments to defendant. After several communications between plaintiff and defendant failed, plaintiff

filed this action.

OPINION

I. TORT CLAIMS

A. Economic Loss Doctrine – General Principles

Plaintiff contends that what courts have referred to as the "economic loss doctrine" bars defendant's various tort counterclaims. The Wisconsin Supreme Court has stated that the economic loss doctrine "bars tort recovery for economic loss suffered by commercial entities." State Farm Mutual Automobile Insurance Co. v. Ford Motor Co., 225 Wis. 2d 305, 311, 592 N.W.2d 201, 204 (1999). (With one caveat by defendant that I will address below, the parties have assumed in their briefs that Wisconsin law applies, so I have done the same. See FutureSource LLC v. Reuters Ltd., 312 F.3d 281, 283 (7th Cir. 2002) ("[T]here's no discussion of choice of law issues, and so we apply the law of the forum state."); see also State Farm Mutual Auto Insurance Co. v. Gillette, 2002 WI 31, ¶ 51, 251 Wis. 2d 561, 641 N.W.2d 662 (holding that Wisconsin courts should assume that Wisconsin law applies unless it is clear that non-forum contacts are more significant).)

The economic loss doctrine has had a great deal of play in recent years; its application is often raised in cases like this one involving tort claims that arise in the context of a commercial relationship. The basic purpose of the doctrine is often repeated and is now

generally uncontroversial: to prevent dissatisfied buyers from using tort law to recover losses that were or should have been protected against through contract law. Digicorp, Inc. v. Ameritech Corp., 2003 WI 54, ¶35, 262 Wis. 2d 32, 662 N.W.2d 652.

Although the basic rule is stated easily enough, courts and litigants still struggle with determining what the economic loss doctrine is, or more precisely, how broad its scope should be. "Economic loss" is not a self-defining term and it does not literally mean all monetary losses. All-Tech Telecom, Inc. v. Amway Corp., 174 F.3d 862, 865 (7th Cir. 1999); Wausau Paper Mills Co. v. Chas. T. Main, Inc., 789 F. Supp. 968, 971 (W.D. Wis. 1992). In fact, the phrase "economic loss doctrine" may be misleading because its application is not determined solely by the types of damages incurred. E.g., Digicorp, 2003 WI 54 (considering both type of injury and other policy concerns); Northridge Co. v. W.R. Grace & Co., 162 Wis. 2d 918, 931-32, 471 N.W.2d 179 (1991) ("the fact that the measure of the plaintiffs' damages is economic does not transform the nature of its injury into a solely economic loss"). Ultimately, the meaning of economic loss is a policy question that cannot be answered by applying a rigid formula; the overarching question in any case involving potential application of the economic loss doctrine is whether contract law adequately protects against the risks at issue in the case and whether it is more appropriate for the buyer or the seller to bear a particular loss. Daanen & Janssen, Inc. v. Cedarapids, Inc., 216 Wis. 2d 395, 412, 573 N.W.2d 842, 849-50 (1998).

Courts first applied the doctrine in the context of products liability cases, in which economic loss was defined to mean any loss caused by a defective product that did not cause personal injury or damage to property apart from the product itself. Northridge, 162 Wis. 2d at 925-26, 471 N.W.2d at 181. Although courts have provided several reasons for precluding tort recovery for a defective product, they can essentially be reduced to one: allowing a dissatisfied purchaser to recover under tort in this situation would undermine contract law because it would permit buyers to obtain more than they bargained for. Sunnyslope Grading, Inc. v. Miller, Bradford and Risberg, Inc., 148 Wis. 2d 910, 916, 437 N.W.2d 213, 215 (1989).

There is nothing remarkable about limiting parties to the benefit of their bargain with respect to a defective (but safe) product. Contracts for sales of goods would have little value to the seller if the buyer could resort to tort law any time the product did not meet his expectations. Nearly all courts, including the Supreme Court, have taken this view. East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858 (1986); see 63B Am. Jur. 2d Products Liability §§ 1913-14 (1997) (noting that most jurisdictions have adopted economic loss doctrine in products liability actions when only product itself is damaged). However, it is one thing to require buyers to decide before they make a purchase who should bear the risk of the product's not performing as expected. It is quite another to argue, as plaintiff appears to be doing in this case, that the economic loss doctrine should be applied

instinctively any time a party in a commercial relationship asserts a tort claim. Wisconsin courts have never suggested that the doctrine is so broad. Courts and litigants must consider whether the original purpose of the doctrine will be furthered before deciding to extend the doctrine's reach. Huron Tool and Engineering Co. v. Precision Consulting Services, Inc., 532 N.W.2d 541, 544 (Mich. Ct. App. 1995) (rejecting "simple argument that because 'tort' claims for economic losses are barred, and because fraud is a 'tort,' plaintiff's fraud claim is barred. Instead, a more thorough analysis of the issue is appropriate, one that takes into consideration the underlying policies of tort and contract law."), cited with approval in Digicorp, 2003 WI 54, ¶¶3, 21, 47-49, 62.

Defendant makes one general argument why the economic loss doctrine should not apply to any of its tort claims, at least at this stage of the proceedings: it would force defendant to elect its choice of remedy prematurely. In support, defendant relies on Olympia Hotels Corp. v. Johnson Wax Development Corp., 908 F.2d 1363 (7th Cir. 1990). In Olympia Hotels, the plaintiff sued the defendant for breach of contract; the defendant counterclaimed for breach of contract and fraud. The district court concluded that under the doctrine of election of remedies, defendant could not proceed under both a contract and a tort theory. Rather, it had to choose before trial whether it wanted to affirm the agreement under contract law or rescind it under tort law. The court of appeals reversed, holding that the doctrine of election of remedies was concerned only with preventing double recovery.

Therefore, it was unnecessary to force a plaintiff to choose between tort and contract remedies until after the jury reached its verdict.

It is not entirely clear how defendant believes Olympia Hotels supports its position. It writes only, "As Olympia makes clear, it is error to force a party to in effect 'elect' a contractual or non-contractual remedy where, as here, there is a possibility of a jury either affirming or disaffirming a contract." Dft.'s Br., dkt. #115, at 29. To the extent that defendant means to argue that the economic loss doctrine will not apply if the jury finds that the November 2001 contract does not exist, I will address that issue below. To the extent that defendant means to argue that the economic loss doctrine can *never* apply before a jury reaches its verdict, I disagree. Wisconsin courts have often applied the doctrine in the context of a motion to dismiss or a motion for summary judgment. E.g., State Farm, 225 Wis. 2d 305, 592 N.W.2d 201, Daanen, 216 Wis.2 d 395, 573 N.W.2d 842; Selzer v. Brunsell Brothers, Ltd., 2002 WI App 232, 257 Wis. 2d 809, 652 N.W.2d 806; Cincinnati Insurance Co. v. AM International, Inc., 224 Wis. 2d 456, 591 N.W.2d 869 (Ct. App. 1999).

The whole purpose of the economic loss doctrine is to take the choice of a tort remedy away from the party and limit it to what is provided under contract law. Unlike the doctrine of election of remedies, the economic loss doctrine is not concerned solely with how to prevent double recovery but also with the more fundamental question whether tort law is

an appropriate vehicle for protecting against a particular loss. In short, in cases in which the economic loss doctrine does apply, it supersedes the doctrine of election of remedies. The economic loss doctrine makes moot the question *when* a party must elect its remedy because, if it applies, there is no choice of remedies; the party is stuck with its contract remedies or nothing. It is therefore necessary to consider the applicability of the economic loss doctrine as to each of defendant's tort counterclaims.

B. Negligent Misrepresentation and Fraud

In Stoughton Trailers, Inc. v. Henkel Corp., 965 F. Supp. 2d 1227 (W.D. Wis. 1997), I concluded that Wisconsin's economic loss doctrine applies to claims for negligent misrepresentation that arise in the context of a commercial relationship. See also Maynard Cooperative Co. v. Zeneca, Inc., 143 F.3d 1099 (8th Cir. 1998) (applying Iowa law); International Ore & Fertilizer Corp. v. SGS Control Services, 38 F.3d 1279 (2d Cir. 1994) (applying New York law); Fennell v. Green, 77 P.3d 339 (Utah Ct. App. 2003); but see Keller v. A.O. Smith Harvestore Products, Inc., 819 P.2d 69 (Colo. 1991) (negligent misrepresentation claim survives economic loss doctrine when party relied on representation when entering into contract). Accidents or oversights that lead to economic losses in the context of a commercial relationship are best addressed through contract law. The seller is not in a particularly better position than the buyer to assess this risk in advance and there

is no strong tort policy that will be left unenforced if the parties are left where the contract puts them. The Court of Appeals for the Seventh Circuit and the Wisconsin Court of Appeals agree that parties may not bring negligent misrepresentation claims in the context of a commercial relationship. Badger Pharmacal, Inc. v. Colgate-Palmolive Co., 1 F.3d 621, 628 (7th Cir. 1993); Prent Corp. v. Martek Holdings, Inc., 2000 WI App 194, 238 Wis. 2d 777, 618 N.W.2d 201. The Wisconsin Supreme Court has not expressed disapproval of this position. See Digicorp, 2003 WI 54, ¶¶ 44-45 (citing Badger Pharmacal with approval).

The question is not so well-settled in the context of fraud, intentional misrepresentation and other intentional torts. In Stoughton Trailers, I concluded that the tort of intentional misrepresentation was not barred by the economic loss doctrine, even when the tort arose in the context of a commercial relationship. I recognized that, theoretically, parties to a contract could include a provision outlining the consequences for an intentional misrepresentation. See also All Tech, 174 F.3d at 867. However, this would be an unrealistic and unfair burden to place on any party to a contract. Contract law should not limit the liability of a dishonest party. Just as contract law does not force consumers to assume that the products they purchase may be unsafe, it also should not require parties to a contract to bargain as though they are being intentionally deceived. Budgetel Inns, Inc. v. Micros Systems, Inc., 8 F. Supp. 2d 1137, 1143-44, 1148 (E.D. Wis. 1998). Further, it does not undermine contract law to permit recovery for this claim. Contract law generally

cannot provide an adequate remedy for intentional misconduct; its aim is to compensate, not deter or punish. State Farm, 225 Wis. 2d at 318, 592 N.W.2d at 206.

The Court of Appeals for the Seventh Circuit appears to disagree with the view expressed in Stoughton Trailers. In Cooper Powers Systems, Inc. v. Union Carbide Chemicals & Plastics Co., 123 F.3d 675 (7th Cir. 1997), which was decided a few months after Stoughton Trailers, the court held with little discussion that intentional misrepresentation was not an exception to the economic loss doctrine. The court reaffirmed this view in Home Valu, Inc. v. Pep Boys, 213 F.3d 960 (7th Cir. 2000); see also Harley-Davidson Motor Co. v. Powersports, Inc., 319 F.3d 973, 981 (7th Cir. 2003) ("We implicitly overruled Stoughton Trailers in [Cooper].").

The Wisconsin Supreme Court's position has been a bit more equivocal. In Douglas-Hanson Co. v. BF Goodrich Co., 229 Wis. 2d 132, 598 N.W.2d 262 (Ct. App. 1999), the Wisconsin Court of Appeals held that the economic loss doctrine does not bar an intentional misrepresentation claim when the misrepresentation fraudulently induces a party to enter into a contract. Although the Wisconsin Supreme Court reviewed the court of appeals' decision, the justices split three-to-three, resulting in a per curiam affirmance without any precedential value (Justice Wilcox did not participate). Douglas-Hanson Co. v. BF Goodrich Co., 2000 WI 22, 233 Wis. 2d 276, 607 N.W.2d 621.

The supreme court addressed the issue again in Digicorp, 2003 WI 54, a case in

which a distributor of telephone calling services sued Ameritech for intentional misrepresentation, among other things. Ameritech argued that this claim was barred by the economic loss doctrine because the losses asserted by Digicorp were covered by the parties' contract. Justice Crooks, joined by Justice Prosser, wrote the lead opinion for the court. They concluded that a party to a contract could bring an intentional misrepresentation claim when the misrepresentation induced the party to enter into the contract *and* the misrepresentations "involved matters for which risks and responsibilities were extraneous to . . . the contract." Digicorp, 2003 WI 54, ¶ 53. These two justices concluded that the misrepresentations at issue were "interwoven" with the contract and thus were barred by the economic loss doctrine. Two members of the court, Justices Bradley and Bablitch, agreed that there is a fraudulent inducement exception to the economic loss doctrine. However, they would have upheld the rule of the court of appeals in Douglas-Hanson that the exception applies to all claims of fraudulent inducement and not just those "extraneous" to the contract. Finally, Justice Sykes concluded that there is no fraudulent inducement exception to the economic loss doctrine. Justices Abrahamson and Wilcox did not participate in the decision. Because three of the five participating justices concluded that the economic loss doctrine should apply under the facts of the case, the plaintiff was barred from recovering in tort.

Although there was no majority opinion in Digicorp, four of the five participating

justices recognized a fraudulent inducement exception to the economic loss doctrine. Each of the four agreed that the exception should apply when the misrepresentation related to risks that were extraneous to the contract. Accordingly, I conclude that the supreme court has made it clear that it would reject the categorical bar to intentional misrepresentation claims that the Seventh Circuit applied in Cooper Power Systems and Home-Valu and would allow a misrepresentation claim when the criteria set forth by Justice Crooks were met.

The parties appear to be in agreement with this conclusion. In its brief, defendant writes that it is seeking to recover under tort theories only if the jury finds that the November 2001 contract was not properly executed. Dft.'s Br, dkt. #115, at 19 ("[Defendant's] Counterclaim alleges tort claims in the alternative to its primary contract claim. [Defendant's] tort claims will come into play only if the jury finds that [defendant] and [plaintiff] did not execute the November Agreeement."). The issues that are the subject of defendant's misrepresentation claims are all addressed by the November agreement so, under the rationale of Digicorp, defendant could not escape the economic loss doctrine's reach. However, defendant argues that its tort claims may survive if the jury finds that no contract took effect in November 2001. In that case, the purchase orders and invoices would be the only "contracts" governing the parties' relationship. Because the purchase orders and invoices do not address price guarantees or sales to defendant's competitors, defendant argues, its tort claims remain viable if its breach of contract claim is unsuccessful. Plaintiff

argues that it is the scope of the November 2001 agreement that determines the application of the economic loss doctrine, whether or not that agreement actually exists. In other words, because the November 2001 contract addresses the actions that give rise to defendant's tort claims, this is enough to bar those claims.

Neither the Wisconsin courts nor the Court of Appeals for the Seventh Circuit has considered whether a *disputed* contract triggers the economic loss doctrine. However, in some cases, the state supreme court has suggested that it is not the existence of a contract that bars recovery in tort but rather the nature of the loss suffered. In Daanen & Janseen, Inc. v. Cedarapids, Inc., 216 Wis. 2d 395, 573 N.W.2d 842 (1998), the court held that the economic loss doctrine barred a buyer's negligence and strict liability claims against the manufacturer, even though the parties did not have a contract. The court reasoned that the plaintiff had alleged only that the product it purchased was defective, not that it was unsafe. Thus, the plaintiff's claims "fail[ed] to implicate any tort law concerns with unreasonably dangerous products or public safety." Id. at 406, 573 N.W.2d at 847. Other cases suggest that the question is not whether the plaintiff *did* contract with the defendant, but whether the plaintiff *could have* (and should have) contracted to cover a particular loss. All-Tech, 174 F.3d at 866. In fact, that is the main thrust of the economic loss doctrine in the products liability context. In those cases, the plaintiffs usually bring a tort claim to cover a loss that is not protected by warranty. E.g., Sunnyslope, 148 Wis. 2d 910, 437 N.W.2d 213.

There is sense to a rule that does not make the existence of a contract a requirement for applying the economic loss doctrine. If the doctrine applied only in cases in which the plaintiff obtained a contract and then only to the extent that the contract already covered a particular loss, it would create a perverse incentive for buyers to either refrain from entering contracts or to limit the scope of their contracts as much as possible so as to leave room for a tort claim in the event that the relationship goes sour.

However, at least in the context of intentional misrepresentation claims, the state supreme court has suggested that the scope of the contract *is* relevant to determining whether a tort claim survives the economic loss doctrine. As noted above, in Digicorp, 2003 WI 54, ¶3, the justices in the lead opinion stated that a claim for fraudulent inducement is barred by the economic loss doctrine "where the fraud in the inducement is interwoven with the contract in that it involve[s] matters *for which risks and responsibilities were addressed*." (Emphasis added.) If the loss suffered is "extraneous" to the contract, a party may recover in tort.

Thus, it appears that the court may have a different test for applying the doctrine depending on the type of tort that is being asserted. When the tort is based on a theory of negligence or strict liability, the economic loss doctrine always acts as a bar in the context of a commercial relationship, even when the parties do not have a contract and even when the plaintiff will be left without a remedy, because the plaintiff could have and should have

insured against any potential loss through contract. Wausau Tile, Inc. v. County Concrete Corp., 226 Wis. 2d 235, 265, 593 N.W.2d 445 (1999) ("We refuse to pass on to society the economic loss of a purchaser such as Wausau Tile who may have failed to bargain for adequate contract remedies.") However, when a plaintiff asserts a claim for an intentional tort, the court has recognized that "there are valid policy reasons" for preventing the defendant from "hid[ing] behind the protections of the economic loss doctrine." Digicorp, 2003 WI 54, ¶ 36. Thus, the primary concern shifts from encouraging the allocation of risk through contract to preventing double recovery for losses that are already protected by the contract. See Harley-Davidson, 319 F.3d at 986 (economic loss doctrine does not bar claim for intentional misrepresentation when party is seeking only rescission of contract; no danger that party will recover under both contract and tort).

Under this approach, the economic loss doctrine bars defendant's negligent misrepresentation claim regardless whether the jury finds that the November agreement was properly executed. Again, Wisconsin courts have held without exception that negligence claims do not sufficiently implicate a "societal interest" to justify overriding the parties' bargained for expectations. State Farm, 225 Wis. 2d at 321, 592 N.W.2d at 207. However, if the November 12 contract is unenforceable and the parties' relationship was governed by the purchase orders only, defendant's fraud claim could survive because the purchase orders, unlike the disputed contract, did not address issues such as what defendant would be charged

relative to other customers or to whom plaintiff would be allowed to sell its products. So long as defendant could prove that it was induced to continue buying from plaintiff because of plaintiff's alleged fraudulent misrepresentations, the economic loss doctrine would not bar this claim.

I disagree with plaintiff's contention that the November 2001 contract should control even if the jury finds that the contract did not exist. There is simply no basis on which I could conclude, consistently with Digicorp, that a nonexistent contract bars a tort claim for fraudulent inducement. Plaintiff does not explain the relevant distinction between a situation in which both parties agree that no contract exists and a case in which a jury finds that no contract exists. Plaintiff appears to be suggesting that because defendant has asserted the existence of a contract, it is stuck with that theory and only that theory. However, this argument is akin to the election of remedies argument rejected by the court in Olympia Hotels. Plaintiff points to no authority in which the economic loss doctrine was interpreted as requiring a party to abandon an otherwise viable tort claim because the claim *might* be preempted by a contract, depending on the jury's findings.

This conclusion does not get defendant very far, at least with respect to the misrepresentations that plaintiff allegedly made during and before November 2001. In its brief and proposed findings of fact, defendant refers repeatedly to "promises and misrepresentations" that plaintiff made before November 12, 2001. However, the evidence

defendant cites in its proposed findings of fact do not support these allegations. Defendant cites a letter from Miguel Leal to Veronica Moreno in which he proposes that certain provisions be included in the proposed contract, Leal's testimony about contract negotiations with Moreno and the cover letter to the contract itself. See Aff. of Kevin Hudson, dkt. #118, Exh. S ("Following is the wording we would like to use on the two contract provisions we have been discussing . . ."); id. at Exh. T ("We have made three changes to the agreement. . . . Please initial each of these changes and sign the agreement and fax a copy back to us."); Dep. of Miguel Leal, dkt. #17, at 27 ("Q: And during those discussions you would tell Ms. Moreno what changes you wanted, true? A: That Fred was going to send her the changes.")

The first element of an intentional misrepresentation claim is that the party made "a statement of fact that is untrue." Kailin v. Armstrong, 2002 WI App 70, ¶31, 252 Wis. 2d 676, 643 N.W.2d 132. Apart from the representations in the contract itself, which cannot serve as the basis for a tort claim, defendant has not identified any statements of fact, but only *proposals* by plaintiff for language that it wanted to be included in the contract. Nothing in the materials cited by defendant suggests that plaintiff was "promising or representing" to defendant that it would give defendant the lowest prices or sell only to defendant in the absence of a final, written agreement between the parties. Defendant cannot use contract negotiations to impose a tort duty on plaintiff. The effect on negotiations would be

catastrophic if every contract proposal became a binding promise.

Defendant also cites testimony by Moreno that she believed plaintiff was "accepting the points that I needed" in the October letter. Hearing Tr. Day One, dkt. #66 ("Q: What was your reaction to receiving the October 22, 2001 letter? A: In that letter they were accepting the points that I needed.") (testimony of Veronica Moreno). To the extent defendant is arguing that Moreno believed the letter was a promise or representation, her subjective belief is not determinative. The interpretation of a document is a question of law, Cohn v. Town of Randall, 2001 WI App 176, ¶5, 247 Wis. 2d 118, 633 N.W.2d 674; no reasonable interpretation of the letter supports a conclusion that defendant was making a representation of fact in the letter. Finally, defendant cites the allegations in its counterclaim, but these are not admissible evidence under Fed. R. Civ. P. 56. Sparing v. Village of Olympia Fields, 266 F.3d 684, 692 (7th Cir. 2001).

The only other misrepresentation that defendant identified in its counterclaim is in paragraph 17, in which defendant alleges that Leal "initially denied" making sales to one of defendant's customers in May 2002. Even if I were to assume that recovery in tort for such a misrepresentation would not be barred by the economic loss doctrine and that defendant satisfied the requirements of Fed. R. Civ. P. 9(b) for pleading fraud claims with particularity, Mayer v. Gary Partners & Co., 29 F.3d 330, 334 (7th Cir. 1994) (sufficiency of complaint in diversity case determined under Federal Rules of Civil Procedure), this claim would fail.

Defendant did not allege in its complaint or propose any facts showing that it relied on this representation in deciding to continue doing business with plaintiff. In fact, defendant conceded in its counterclaim that it *knew* that Leal was not telling the truth, Dft.'s Ans. and Countercl., dkt. #51, at ¶17, which would defeat an assertion that any reliance by defendant was reasonable. Hennig v. Ahearn, 230 Wis. 2d 149, 170, 601 N.W.2d 14, 24 (Ct. App. 1999). Because one of the elements of a misrepresentation claim is reasonable reliance, id. at 169, 601 N.W.2d at 23, and defendant has failed to adduce any evidence on this element, plaintiff's motion for summary judgment must be granted with respect to this claim.

Finally, in a footnote, defendant requests permission to raise another misrepresentation claim that was not included its counterclaim. Dft.'s Br., dkt. #115, at 19 n.8. Defendant has not filed a motion to amend its complaint and it does not explain the reason for this failure or otherwise argue persuasively why it failed to assert this claim until one month before trial. As plaintiff notes, the case defendant relies on to excuse its tardiness, Whitaker v. T.J. Snow Co., 151 F.3d 661 (7th Cir. 1998), counsels *against* consideration of defendant's new claim. In that case, the plaintiff attempted to raise a negligence theory for the first time in her summary judgment brief. The court held that "a plaintiff may not amend her complaint through arguments in her brief in opposition to a motion for summary judgment." Id. at 664 (internal quotations and alterations omitted).

Further, even if defendant had filed a proper motion under Fed. R. Civ. P. 15, I could

not conclude that amendment would be proper at this stage of the proceedings. Allowing defendant to add a new claim would almost certainly cause unfair prejudice to plaintiff, which has not had an opportunity to conduct discovery on this claim and in all likelihood would be unable to do so in time for the April 5 trial. Accordingly, I have not considered defendant's new misrepresentation claim.

C. Intentional Interference with an Actual or Prospective Contract

The parties recognize that neither the Wisconsin state courts nor the Court of Appeals for the Seventh Circuit has determined to what extent, if any, the economic loss doctrine acts as a bar to claims for tortious interference with a contract. As I noted in Stoughton Trailers with respect to intentional misrepresentation claims, there are strong policy reasons for resisting the extension of the economic loss doctrine in the context of intentional torts. A number of courts outside Wisconsin have concluded that even parties in a contractual relationship may recover in tort for intentional interference with a contract. E.g., Aikens v. Baltimore & Ohio Railroad Co., 501 A.2d 277 (Pa. 1985); Werblood v. Columbia College, 536 N.E.2d 750 (Ill. Ct. App. 1989). However, in light of Digicorp, 2003 WI 54, it is unlikely that the Wisconsin Supreme Court would exempt this claim entirely simply because it is an intentional tort. Rather, it is more likely that the court would adopt a test similar to the one in Dinsmore Instrument Co. v. Bombardier, Inc., 199 F.3d

318 (6th Cir. 1999), in which the court held that only interference claims that are "extraneous" to the contract may be maintained. See also City of Gastonia v. Balfour Betty Construction Corp., 222 F. Supp. 2d 771, 775 (W.D.N.C. 2002) (concluding that North Carolina Supreme Court would not recognize exception to economic loss doctrine for intentional inference claim when actions underlying claim were also breaches of contract).

In this case, defendant identifies three categories of conduct by plaintiff that constituted intentional interference with defendant's business and contractual relationships with third parties: (1) providing substandard products and failing to ship complete orders when plaintiff knew that defendant's customers demanded timely deliveries of high quality product; (2) telling defendant's customers that defendant could no longer provide them with product, which was untrue; and (3) removing and tampering with defendant's cheese in stores in Atlanta.

With respect to the first category, there is no tenable argument that a failure to provide quality product was extraneous to the parties' contractual relationship. The quality of goods is a classic example of a concern traditionally protected by contract law. Not surprisingly, the November agreement includes provisions regarding sub-standard product quality. Aff. of Hudson, Exh. T, art. II, dkt. #118. However, even if this agreement never took effect, defendant would still be protected under contract law by the implied warranties of Wis. Stat. §§ 402.314 (merchantability) and 402.315 (fitness for a particular purpose)

unless plaintiff expressly disclaimed these warranties. Neither party suggests that this is the case. Thus, whether or not the November 2001 contract is enforceable, the economic loss doctrine bars defendant's intentional interference claim as it applies to defendant's allegation that plaintiff provided inferior products that were not shipped on time.

With respect to the second two categories, there is no indication in the record that either lying to defendant's customers or tampering with defendant's store displays would be "interwoven" with the November agreement or the purchase orders. However, even assuming that the economic loss doctrine does not preclude these claims, they fail on the merits. To prevail on a claim for intentional interference with a contract, defendant must show that plaintiff "induc[ed] or otherwise caus[ed] the third person not to perform the contract," Restatement (Second) Torts § 766 (1979), adopted in Charolais Breeding Ranches, Ltd. v. FPC Securities Corp., 90 Wis. 2d 97, 279 N.W.2d 493 (Ct. App. 1979), or that plaintiff's actions made it more "expensive or burdensome" for defendant to perform a contract with a third party, Railway Express Agency v. Super Scale Models, Ltd., 934 F.2d 135, 139 (7th Cir. 1991) (applying Wisconsin law). See also Cudd v. Crownhart, 122 Wis. 2d 656, 364 N.W.2d 158 (Ct. App. 1985) (claim for interference with prospective contract requires proof that defendant interfered by inducing or otherwise causing third person not to enter into or continue prospective relation or preventing other from acquiring or continuing prospective relation). There is no cause of action for an *attempted* interference

with a contract. As with any tort, defendant must show that it was injured by plaintiff's actions.

Although defendant proposes facts that an agent of plaintiff told several of defendant's customers that they could not or should not purchase cheese from defendant and that plaintiff "removed" defendant's products and "intermixed" them with other brands, it proposes no facts showing that these actions had any effect on an actual or prospective contractual relationship with a third party. In its *brief*, defendant cites an expert report in support of an allegation that it was injured by plaintiff's actions. Dft.'s Br., dkt. #115, at 42 (citing Report of John Andrews, attached to Aff. of Andrew Clarkowski, dkt. #121). However, defendant has waived any reliance on this report for the purpose of summary judgment by failing to propose any facts based on the report. See Procedures to Be Followed on Motions for Summary Judgment, attached to Prelimary Pretrial Conference Order, dkt. # 15 ("Even if there is evidence in the record to support your position on summary judgment, if you do not propose a finding of fact with a proper citation, the court will not consider that evidence when deciding the motion."). In any event, it appears that the damages itemized in defendant's expert report are limited to those caused by overpricing, incomplete shipments and low quality product. Report of Andrews, dkt. #121, at 17. Because I have concluded that those losses cannot be recovered under tort law in this case, the expert report would not support plaintiff's claim for intentional inference with a

contract. Plaintiff's motion for summary judgment on defendant's claims for intentional inference with a contract will be granted.

D. Defamation

Plaintiff makes a half-hearted attempt to argue that defendant's defamation counterclaim should be barred by the economic loss doctrine, though it concedes it has found no authority directly supporting this point. My own research reveals no cases resolving this issue, though in one case the Court of Appeals for the Seventh Circuit assumed that injuries caused by defamation are not included in the meaning of "economic loss." Miller v. U.S. Steel Corp., 902 F.2d 573, 574 (7th Cir. 1990) (distinguishing economic loss from "damage to person, property or *reputation*") (emphasis added). In my view, there is little danger of eroding the distinction between tort and contract law by allowing a party in a commercial relationship to maintain a cause of action for defamation. Damages caused by defamatory remarks are not the sort of loss that parties to a contract contemplate when they sit down at the bargaining table, at least not when their relationship is limited to buying and selling merchandise. Because defamation is almost always extrinsic to a contract, it is unlikely that permitting a defamation claim will allow parties to do an "end run around contract law," Daanen, 216 Wis. 2d at 414, 573 Wis. 2d at 850, or obtain double recovery for the same injury.

Plaintiff argues that defendant's defamation claim should be dismissed even if the economic loss doctrine does not apply because defendant failed to provide fair notice of the claim in its answer and counterclaim. Plaintiff points out that defendant did not allege facts showing how plaintiff defamed defendant or otherwise identify the statements that plaintiff allegedly made. Instead, defendant alleged only that plaintiff "made false statements" and that it knew that its "communications" and "comments" to customers would cause harm. Dft.'s Ans. and Countercl., dkts. #51 & 52, at ¶¶ 82-84. Defendant does not address plaintiff's argument in its response brief, arguing only that it "has made [a] showing" of defamation. Dft.'s Br., dkt. # 115, at 42.

Plaintiff is correct that even under the liberal pleading standings of Fed. R. Civ. P. 8, defendant was required to provide plaintiff with fair notice of its claim. Speedy v. Rexnord Corp., 243 F.3d 397, 405 (7th Cir. 2001). Although defendant was not required to plead the defamatory words verbatim, Kelly v. Schmidberger, 806 F.2d 44, 46 (2d Cir. 1986), simply alleging defamation is insufficient to state a claim. Cf. Higgs v. Carver, 286 F.3d 437, 439 (7th Cir. 2002) (no claim for retaliation stated unless plaintiff identifies act that constituted retaliation); see also Caster v. Hennessey, 781 F.2d 1569, 1570 (11th Cir. 1986) (finding that plaintiff stated claim for defamation when she identified defamatory statement).

One could argue that plaintiff is being a bit disingenuous when it argues that

defendant failed to give fair notice. After all, Rule 8 requires only enough notice so that the party can file an answer, Higgs, 286 F.3d at 439, which plaintiff did on December 24, 2003, without filing a motion to dismiss the defamation claim or even a motion for a more definite statement. Further, when a claim is dismissed for a pleading deficiency, the general rule is to give the party a second chance to get it right. Hoeskins v. Poelstra, 320 F.3d 761 (7th Cir. 2003). Because defendant has now identified the statements made by plaintiff, it might be unfair to dismiss this claim on the basis of a pleading deficiency.

However, even if I were to ignore the problems with defendant's pleading, I would still have to dismiss the defamation claim. In its brief and proposed findings of fact, defendant identifies three allegedly defamatory statements made by agents of plaintiff: (1) plaintiff was no longer providing cheese to defendant, so defendant's customers would have to go through plaintiff if they wanted the same product; (2) defendant was no longer selling cheese products; and (3) defendant's products were "dirty." Dft.'s Br, dkt. # 115, at 42-43. Under Wisconsin law, a statement is defamatory only if it "tends to harm one's reputation so as to lower him or her in the estimation of the community or to deter third persons from associating or dealing with him or her." Hart v. Bennet, 2003 WI App 231, ¶21, 267 Wis.2d 919, 672 N.W.2d 306. "[W]hether a communication is capable of a defamatory meaning" is a question of law. Lathan v. Journal Co., 30 Wis. 2d 146, 153, 140 N.W.2d 417, 421 (1966).

The first two alleged statements are not defamatory under this definition. Defendant focuses on the "deterring third persons" portion of the definition, arguing that its customers might be deterred from doing business with it if they believed plaintiff was no longer distributing cheese to defendant. However, Wisconsin law does not provide a cause of action for any statement that might have the effect of interfering with a party's business relationships. That type of conduct may be addressed through a claim for intentional interference with a contract, which, as I discussed above, defendant cannot prove because it has adduced no evidence that plaintiff did interfere with any actual or prospective contract that defendant had with a third party.

To recover under a defamation theory, defendant must show that its customers did not want to associate with it because plaintiff made statements *that harmed defendant's reputation*. As the court of appeals has explained:

> The reference to reputation is important. Omitting [the plaintiff's] name from a list of [defendant's] dealers may have prevented third persons from dealing with him, but the same thing happens when the phone company accidentally drops a subscriber from the yellow pages. More is necessary than a diminution of transactional opportunities. In a business setting the imputation, to count as defamation, must charge dishonorable, unethical, unlawful, or unprofessional conduct.

Isaksen v. Vermont Castings, Inc, 825 F.2d 1158, 1166 (7th Cir. 1987) (applying Wisconsin law); see also Super Valu Stores, Inc. v. D-Mart Food Stores, Inc., 146 Wis. 2d 568, 431 N.W.2d 721 (Ct. App. 1988) (statement in newspaper that plaintiff might stop operating

his current store to open new one not defamatory). Plaintiff's alleged statements about the availability of defendant's product cannot be classified as charging "dishonorable, unethical, unlawful or unprofessional conduct." Plaintiff would not be calling defendant's character into question by stating that defendant was no longer making cheese, even if such statements were made maliciously and even if they could take business opportunities away from defendant. Accordingly, plaintiff's motion for summary judgment will be granted with respect to these claims. (Plaintiff argues in the alternative that these two claims must be dismissed because their only support comes from the deposition testimony of Luis Padron. Plaintiff has filed a motion to strike this deposition, arguing that defendant failed to provide reasonable notice of the deposition as required by Fed. R. Civ. P. 30(b)(1). Because I am dismissing these claims on other grounds, I will deny plaintiff's motion to strike as unnecessary.)

With respect to the third alleged statement, calling someone's product "dirty" could serve as a basis for a defamation claim, depending on the context in which the statement was made. Bilgrien v. Ulrich, 150 Wis. 532, 137 N.W. 759 (1912) (accusation against cheesemaker of selling adulterated milk was defamatory). However, as plaintiff points out, defendant has provided no evidence regarding the circumstances surrounding this alleged statement. Defendant cites the deposition of Veronica Moreno, who apparently overheard the statement herself but does not know the name of the person who made it or even

whether the speaker was an employee of plaintiff. Dep. of Veronica Moreno, attached to Aff. of Kevin Hudson, Exh. L, at 73-74. She testified only that "one of the people doing their demos was saying that our product was dirty." Id. at 73. When asked to clarify who "they" were, Moreno stated, "I don't know exactly." Id. Even assuming that the statement could be imputed to plaintiff, defendant has adduced no evidence that the statement was false (the demonstrator could have been simply making an observation that the cheese he was using had dirt on it) or that anyone other than Moreno heard the statement. Because defendant must show both that plaintiff made a false statement and that a third party heard the statement to prevail on a defamation claim, Mach v. Allison, 2003 WI App 11, 259 Wis. 2d 686, 656 N.W.2d 766, this claim must be dismissed.

E. Misappropriation of Trade Secrets

Wis. Stat. § 134.90 authorizes civil actions for damages against a person who "misappropriates" a "trade secret." Plaintiff again argues that the economic loss doctrine bars this claim and, again, there is no Wisconsin authority addressing this issue. Two courts have held, similarly to the court in Digicorp, that the doctrine applies to claims asserting misappropriation of trade secrets only when they overlap with a breach of contract claim. Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79 (3d Cir. 2001); Future Tech International, Inc. v. Tae Il Media, Ltd., 944 F. Supp. 1538 (S.D. Fla. 1996). One

court has held that the economic loss doctrine never bars a trade secrets claim, but the court's reason for this conclusion was that the state supreme court had not extended the doctrine outside the context of defective products. Bell Helicopter Textron, Inc. v. Tridair Helicopters, Inc., 982 F. Supp. 318 (D. Del. 1997).

I will assume for purposes of this motion that the economic loss doctrine does not apply to trade secret claims that are extraneous to the contract. Although the November 2001 contract did include provisions on "confidential information," it is unnecessary to decide whether the doctrine would apply to trade secret violations that are also contract violations because defendant seeks to assert this claim only in the absence of a finding that the November 2001 contract was executed. (Also, neither party argues that the economic loss doctrine might not apply to a *statutory* claim as opposed to one derived from common law, so I have not considered this question.)

Defendant asserts that plaintiff misappropriated the following three trade secrets: "(1) its financial and marketing plans and strategies regarding HEB grocery stores, (2) its list of customers and distributors, and (3) its pricing information." Dft.'s Br., dkt. #115, at 43-44. Plaintiff denies that any of these pieces of information are properly classified as "trade secrets." Section 134.90(1)(c) defines the term to mean "information, including a formula, pattern, compilation, program, device, method, technique or process" where

1. The information derives independent economic value, actual or potential, from not

being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

2. The information is the subject of efforts to maintain its secrecy that are reasonable under the circumstances.

With respect to defendant's first asserted trade secret, I note first that it is an overstatement to say that defendant told plaintiff about "financial and marketing plans and strategies." The evidence cited in defendant's proposed findings of fact shows only that Moreno told Leal that HEB had given defendant "the opportunity to give them service with a control label and that we had the opportunity also to make the private label of HEB." Hearing Tr. Day One, dkt. #66 at 1-A-65. In essence, defendant is asserting trade secret protection for the fact that it was going to do business with HEB, without even attempting to explain how this knowledge gave it an economic advantage over competitors who were unaware of this opportunity. Although it is reasonable to assume that *having* a relationship with HEB would be beneficial for defendant, it is quite a jump to say that *knowing* about a potential relationship had "independent economic value."

In any event, defendant has failed to meet its burden to show that this information was in fact a secret. Defendant has not adduced any evidence that no one else knew about its potential business relationship, that it would have been difficult for others to find out about the opportunity or that it took any efforts to keep the possible relationship secret. Minuteman, Inc. v. Alexander, 147 Wis. 2d 842, 851, 853, 434 N.W.2d 773, 777 (1989)

(listing factors to consider in determining whether information is trade secret). Defendant cannot show that its potential relationship was a secret simply by saying that it was. ECT International, Inc. v. Zwerlein, 228 Wis. 2d 343, 597 N.W.2d 479 (Ct. App. 1999). (In its proposed findings of fact, defendant alleges that the "HEB opportunity was not commonly known" and that "it did not disclose its opportunity without protections." Dft.'s PFOF, dkt. #117, at ¶53. However, the evidence it cites in support of the allegation contains *nothing* about confidentiality. Rather, defendant cites testimony of Moreno that defendant had an opportunity with HEB and that she told Leal about it. Hearing Tr. Day One, dkt. #66, at 1-A-65.)

Defendant's claims regarding customer and pricing information fare no better. In its brief, defendant identifies only one customer that it told plaintiff about and that plaintiff later solicited; it identifies no specific pricing infomation. Again, defendant fails to cite any admissible evidence that it took reasonable efforts to keep this customer or any of its prices a secret. Further, although defendant acknowledges that trade secret protection for customer information is limited to "those sectors of the economy where identical or nearly identical products are sold to a small group of purchasers," ECT International, 228 Wis. 2d at 353, 597 N.W.2d at 484, defendant points to no evidence showing that the Mexican cheese market would meet this test. Accordingly, plaintiff's motion for summary judgment will be granted with respect to these claims.

II. CONTRACT CLAIMS

In addition to its tort claims, defendant has brought claims for promissory estoppel and breach of the duty of good faith and fair dealing in the alternative to its breach of contract claim. A party breaches the duty of good faith and fair dealing when it technically complies with the terms of a contract but engages in conduct such as "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance." Foseid v. State Bank of Cross Plains, 197 Wis. 2d 772, 797, 541 N.W.2d 203, 213 (Ct. App. 1995). Plaintiff argues that defendant may not bring both a claim for breach of contract and a claim for breach of the duty of good faith. It is inconsistent, plaintiff says, to argue both that terms of the contract have been breached and that the spirit of the contract has been violated.

It is a bit odd for plaintiff to be making this argument when it too has asserted claims for both breach of contract and breach of the duty of good faith. In any event, defendant explains in its response brief that its good faith claim is, again, contingent on a finding by the jury that there is no November 2001 contract. If the purchase orders and invoices governed the parties' relationship, charging defendant more than other customers and targeting defendant's own customers would not violate any binding contract between the parties. Plaintiff does not argue that these actions could not constitute a breach of the duty

of good faith and fair dealing as a matter of law. Accordingly, plaintiff's motion for summary judgment will be denied with respect to defendant's counterclaim for breach of the duty of good faith and fair dealing.

However, I agree with plaintiff that defendant's claim for promissory estoppel is barred regardless whether the jury finds that the parties executed a contract in November 2001. As I noted with respect to defendant's misrepresentation claim, defendant has not identified any "promises" that plaintiff made apart from those in the contract itself. If the contract does not exist, plaintiff would not be bound by the provisions in the contract. It is true that a claim for promissory estoppel may be asserted even in the absence of an enforceable contract. However, in this case, if there is no contract, there is no promise either; plaintiff's promise to perform the contract was conditioned on defendant's accepting the changes plaintiff proposed. If the contract did take effect, defendant may recover under a breach of contract theory. It may not recover under both theories. All-Tech, 174 F.3d at 869.

III. EFFECT OF JURY'S FINDING ON THIS COURT'S DECISION ON PROPER VENUE

At the end of its brief, defendant makes one final argument against dismissing any of its claims at the summary judgment stage. The argument goes something like this: (1) the

November agreement includes a clause requiring the parties to litigate disputes arising out of the agreement in Georgia; (2) if the jury finds that the November 2001 agreement was properly executed, the forum selection clause must be enforced, requiring that the case be transferred to Georgia; (3) the tort law claims would be governed by Georgia law because tort cases tried in Georgia are governed by the substantive law of the state where the wrong occurred, which is Georgia in this case because that is where defendant is located; (4) if Georgia law applied, the economic loss doctrine would not bar any of defendant's tort claims.

As an initial matter, I note that it is surprising that defendant left this argument for the end of its brief and then devoted less than 1 1/2 pages to it. Considering the far-reaching implications of the argument, one would think that defendant would give it prominent placement in its brief and fully develop each of the argument's premises. Defendant's most audacious assertion is the one for which it cites *no* authority or reasoning: that this case will have to be transferred to Georgia if the jury finds that the parties entered into an agreement in November 2001. By failing to develop this argument, defendant has waived it. Huck Store Fixture Co. v. NLRB, 327 F.3d 528, 537 (7th Cir. 2003).

In any event, I doubt whether a favorable jury determination for defendant on the merits would have the effect of "overruling" this court's earlier decision on venue. It is true that, if the jury finds that the parties did enter into a contract on November 2001, this

finding will be inconsistent with my finding that they did not. It does not follow, however, that the jury's finding on the merits would require a re-evaluation of venue. Questions of venue are for the court, not the jury. Szabo v. Bridgeport Machines, Inc., 249 F.3d 672, 676-77 (7th Cir. 2001). Although in this case, the facts underlying the issue of venue overlap with the facts underlying the merits, this does not change the proper allocation of responsibility between the court and the jury. In a diversity case, when a jury finds that a plaintiff's damages are less than the jurisdictional minimum after the court had made a preliminary determination that the amount in controversy was satisfied, it is not necessary to dismiss the case for lack of jurisdiction. Fischer v. First Chicago Capital Markets, Inc., 195 F.3d 279, 285 (7th Cir. 1999). I am aware of no rule that would require dismissal or transfer when a jury's verdict on the merits is not completely consistent with a court's earlier determination on proper venue.

Further, defendant fails to explain what a transfer to Georgia would mean. Would all the proceedings in this court be a nullity? Defendant appears to assume that the answer to this question would be yes, with the convenient exception of the jury's finding that plaintiff breached the November 2001 contract. But how could this be the case if the suit should never have been brought in Wisconsin in the first place? Under defendant's view of the law, by finding the existence of a contract, the Wisconsin jury would in effect invalidate its own verdict; the jury would find that it had no authority to find anything. And if

defendant's breach of contract claim did have to be retried in Georgia, what would happen if the second jury found that the November 2001 contract did not exist? Would the case have to be transferred back to this court?

These questions need not be answered because I conclude that the jury's finding on the merits will have no effect on this court's determination of proper venue. To the extent that defendant believes that this court's decision on venue is incorrect as a matter of *law*, defendant's recourse is to make that argument before the Court of Appeals for the Seventh Circuit. Because defendant is arguing that Georgia law would apply to this case only in the event that this case must be transferred to Georgia, I need not engage in a choice of law analysis to determine whether Georgia or Wisconsin law should be applied to plaintiff's tort claims in this court.

ORDER

IT IS ORDERED that

1. Defendant Ole Mexican Foods' motion to supplement its response to plaintiff Latino Food Marketers' motion for partial summary judgment is DENIED.

2. The motion for partial summary judgment filed by plaintiff is GRANTED with respect to defendant's counterclaims for fraud, negligent misrepresentation, misappropriation of trade secrets and proprietary information, tortious interference with

contractual relations, tortious interference with business relations, defamation, anticipatory repudiation and promissory estoppel.

2. Plaintiff's motion for summary judgment is DENIED with respect to defendant's claim for breach of the duty of good faith and fair dealing.

3. Plaintiff's motion to strike the deposition testimony of Luis Padron is DENIED as unnecessary.

Entered this 29th day of March, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge