IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

THE SELMER COMPANY,

Plaintiff,

v.

DTE STONEMAN, LLC,

Defendant.

OPINION AND ORDER

11-cv-00182-wmc

In this civil diversity action, plaintiff The Selmer Company ("Selmer") is suing defendant DTE Stoneman, LLC for breach of contract, intentional misrepresentation, negligent misrepresentation, violation of Wis. Stat. § 100.18 and unjust enrichment. The matter is presently before the Court on Selmer's motion to dismiss the complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. #8.) Because the parties' construction contact is ambiguous on key issues and Selmer has alleged sufficient facts to support claims for breach of contract and misrepresentation, the motion will be denied except as to the claims under § 100.18 and unjust enrichment.

FACTS[1]

Plaintiff Selmer is a Wisconsin corporation with its principal place of business in Green Bay Wisconsin. Selmer's primary business is construction services for commercial construction projects. Defendant DTE Stoneman is a Wisconsin Limited Liability Company, whose sole member is DTE Energy Services, Inc., a Michigan corporation with

[1] The following facts are undisputed for the purposes of this motion.

its principal place of business in Michigan. DTE Stoneman operates the DTE Stoneman Power Generation Plant in Cassville, Wisconsin.

Selmer and DTE Stoneman executed a contract on October 14, 2009. In exchange for $1,861,259, Selmer agreed to perform steel and equipment erection for the conversion of a boiler from wood to biomass consumption at the Stoneman Generating Station using material and equipment supplied by DTE Stoneman at the project site. The contract incorporated certain previously issued documents such as the drawings, specifications, schedules, exhibits, and any modifications agreed upon by the parties pursuant to prescribed procedures after its date of execution.

Because the contract and related documents are referenced in the complaint, they may be considered by the court in resolving the motion to dismiss. Five sections of the Contract are particularly relevant to this dispute:

> Section 7.13 Changes in Work
>
> (b) Change Orders:
>
> For Purposes of this Contract, a "Change Order" shall mean a written instrument issued by Owner after the date of this Contract, and signed by Contractor which documents an agreed upon substitution for, addition to, or deletion of any Work, or a change in the method or manner of the Work. It is the desire of the parties to keep changes in the scope of the Work to a minimum, but the parties recognize that such changes may become necessary and agree that they shall be handled as follows:
>
> i. Owner may initiate a Change in Work by advising Contractor in writing of the change believed to be necessary, using the Change Order Request Form.... Unless otherwise specified by Owners, Contractor shall submit written proposal for accomplishing the requested change within ten (10) days of the date of

Owner's issuance of the Change Order Request Form….

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iv. Contractor may initiate a Change in Work by advising Owner in writing that in Contractor's opinion a change is necessary, using the Change Order Request Form. If Owner agrees, it shall so advise Contractor and, thereafter, the change shall be handed as if initiated by Owner.

v. Except in an emergency endangering life or property, no extra work or change shall be made unless in pursuance of a written Change Order issued by Owner authorizing the extra work or change, which has been signed by Contractor.

Section 7.14 Delays

If Contractor is delayed at any time in the progress of the Work by any act or neglect of Owner, or by any contractor employed by Owner, or by changes ordered in the scope of the Work, or by fire, adverse weather conditions not reasonably anticipated, or any other causes beyond the control of the Contractor, then the required completion date or duration set forth in the Construction Project Schedule shall, upon written approval by Owner, be extended by the amount of time that Contractor shall have been delayed thereby. However, to the fullest extent permitted by law, Owner, and their agents and employees, shall not be held responsible for any loss or damage sustained by Contractor, or additional costs incurred by Contractor, through delay caused by Contractor's subcontractors, or by abnormal weather conditions.

(Dkt. # 6-5 at 8-9.)

Section 7.22 Limitation of Liability

(a) Notwithstanding any other provision in this Contract, Owner shall not be liable to Contractor for any special, indirect, incidental or consequential damages of any nature, including without limitation, Contractors loss of actual or anticipated profits or revenues, loss of use, cost of

> capital, damage to or loss of property or equipment of Contractor.

(Dkt. # 6-5 at 14.)

> Section 7.29 Applicable Law
>
> This Agreement shall be construed under and enforced in accordance with the laws of the State of Michigan (without regard for choice of law provisions).

(Dkt. # 6-5 at 16.)

> Section 7.31 Entire Agreement
>
> This Contract represents the entire and integrated agreement between Owner and Contractor and supersedes all prior or contemporaneous negotiations, representations of agreements, either written or oral. This Contract may be amended only by written instrument signed by both Owner and Contractor. This Contract consists of this Lump Sum Contract for Construction, drawings, specifications and the following attached schedules and exhibits [omitted].

(Dkt. # 6-5 at 16.)

Six days before the execution of the contract, Selmer and DTE Stoneman agreed on a Construction Project Schedule, which was incorporated into the contract as Schedule 2. The Project schedule was agreed upon in part based on DTE Stoneman's representations about its ability to deliver steel and equipment to the Project site no later than November 24, 2009.

Unfortunately, DTE Stoneman did not provide the equipment and substantially all of the steel in a timely manner. It also failed to complete foundation work necessary for Selmer's steel erection in a timely manner and to obtain necessary State of Wisconsin

permits for construction on the Project to begin. The lack of material, permits and foundation significantly delayed the Project.

Despite these delays, DTE Stoneman asked, and at times is alleged to have insisted, that Selmer keep its largely idled equipment and manpower on site. On January 22, 2010, Selmer made an initial written request to be compensated for following DTE Stoneman's directives to maintain staff and equipment on site. Over dinner one week later, representatives from DTE Stoneman promised to compensate Selmer for this accommodation at the conclusion of the Project.

Some weeks later, Selmer again informed DTE Stoneman that it would submit a Change Order Form to claim reimbursement for complying with the directive to remain on site. In response, DTE Stoneman again intimated that Selmer would be compensated, but asked Selmer to wait to present the claim until the completion of the work. That way, DTE Stoneman would only need to review a single claim rather than several interim claims. This was a common request, so Selmer complied.[2]

After completing its work on the Project, Selmer submitted a comprehensive Change Order Form regarding the delays. Selmer calculated that the disruptions and delays caused it to remain on the Project for an additional 23 weeks. DTE Stoneman refused to consider the Change Order request, ostensibly because Selmer had not obtained prior written approval of the requested "work" as required by the contract. DTE Stoneman also denied responsibility to compensate Selmer for the delays and

[2] Throughout the course of construction, DTE Stoneman frequently directed Selmer to perform work outside the scope of the contract and provided a Change Order Form only after Selmer completed the directed work.

offered what Selmer characterizes as a "miniscule amount" for keeping its equipment and staff on the Project. (Compl., dkt. #6-4 at ¶21.)

The Contract price, including approved Change Orders, was $2,364,398.11, which DTE Stoneman has now paid in full.[3] Selmer estimates that the 23-week delay resulted in additional costs in the amount of $716,620.39. On February 11, 2011, Selmer sued to collect the remaining contract price and the additional costs from the delay.

OPINION

Dismissal pursuant to Rule 12(b)(6) is proper "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007). To survive a motion to dismiss, a complaint must contain sufficient factual matter to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009). In deciding a motion to dismiss, a court must construe all of plaintiff's factual allegations as true and draw all reasonable inferences in plaintiff's favor. *Savory v. Lyons*, 469 F.3d 667, 670 (7th Cir. 2006).

A. Claim 1: Breach of Contract

1. Asserted prohibition on damages for delay

DTE Stoneman argues that the breach of contract claim should be dismissed because the contract unambiguously prohibits Selmer from recovering damages for delay. The construction of an unambiguous contract is a matter of law, but the resolution of

[3] At the time this lawsuit was started, DTE Stoneman had paid $2,083,014.51 or roughly 88% of the contract price, but was withholding final payment. Following the commencement of this suit, DTE Stoneman paid the remaining amount due under the contract.

ambiguity in a contract is a question of fact. *Patti v. W. Mach. Co.*, 72 Wis. 2d 348, 353, 241 N.W.2d 158 (Wis. 1976); *Klapp v. United Ins. Grp Agency, Inc.*, 468 Mich. 459, 469 (Mich. 2003). Provisions in a construction contract specifying that one party may not receive damages for delay are generally enforceable, whether or not the delay was contemplated by the parties. *John E. Gregory & Son, Inc. v. A. Guenther & Sons Co.*, 147 Wis. 2d 298, 304-05, 432 N.W.2d 584 (Wis. 1988); *John E. Green Plumbing & Heating Co. v. Turner Constr. Co.*, 742 F.2d 965, 966 (6th Cir. Mich. 1984).

DTE Stoneman asserts that §§ 7.14 and 7.22(a) of the contract prohibit Selmer from recovering damages from delays caused by DTE Stoneman. Unfortunately for DTE Stoneman, the portion of § 7.14 quoted in its opening brief says nothing about damages. It merely provides that "[i]f Contractor is delayed at any time in the progress of Work by any act or neglect of Owner… then the required completion date or duration set forth in the Construction Project Schedule shall… be extended by the amount of time that Contractor shall have been delayed." It is only the next sentence -- notably omitted in DTE Stoneman's opening brief -- that limits the Owner's liability for "delays *caused* by *Contractor's subcontractors*, or by abnormal weather conditions."

While DTE Stoneman argues that *implied* in § 7.14 is a limit on Selmer's remedy for delay solely to an extension of the completion date, it is actually silent as to any other remedy on other causes of delay, including damages based on delays caused by DTE Stoneman. This is not to say that DTE Stoneman may not ultimately prevail on its interpretation, but rather that the contract is ambiguous on its face and will require extrinsic evidence before a final construction. Indeed, DTE Stoneman's construction of §

7.14 is arguably contradicted by its terms. The first and second sentence both address delay due to weather conditions (albeit "adverse … not reasonably anticipated" versus "abnormal"); if the only remedy for weather delays is an extension of the completion date allowed in the first sentence, then the damages limit in the second sentence is arguably unnecessary.

The language of § 7.22(a) of the contract is also not dispositive on a motion to dismiss. While § 7.22(a) of the contract disavows liability "for any special, indirect, incidental or consequential damages of any nature," the Court is unable to determine from the pleadings and contract language alone whether the damages claimed by Selmer will fall strictly within one of the categories listed in that sub-section as a matter of law or contract interpretation. Wisconsin common law is unclear about the classification of damages caused by a delay in contractual performance. At least one court applying Michigan law has held on summary judgment that "various kinds of delay damages," such as "the loss of resale, idle equipment, [and] loss of efficiency," are "'special, incidental and consequential damages' within the meaning of [the contract at issue] and Michigan law." *Performance Abatement Servs. v. Lansing Bd. of Water & Light*, 168 F. Supp. 2d 720, 741 (W.D. Mich. 2001). Even this determination, however, rested on additional facts outside the pleadings. *Id.*

Consider, as just one example, the question whether the damages Selmer suffered from the delay should be classified as general or special damages. Under Michigan law, "[t]he distinction between general and special damages is … that general damages are such as naturally and ordinarily follow the breach, whereas special damages are those that

ensue, not necessarily or ordinarily, but because of special circumstances." *Id.* (citations omitted). DTE Stoneman does not explain, based on the pleadings, why the delay it is alleged to have caused constitutes "special circumstances."[4] Under the law of either state, additional facts are required to determine the precise nature of Selmer's alleged damages and to classify those damages.

DTE Stoneman argues that the court in *Performance Abatement Services* meant losses from delay are *always* "special, incidental and consequential damages" under Michigan law. Even if that is the correct interpretation, Michigan law may not govern this issue. In its opening brief, DTE Stoneman took the position that "there is no appreciable difference between Michigan and Wisconsin law regarding Selmer's claims," and, accordingly, "this brief generally applies Wisconsin law." (Br. in Support, dkt. #9, at 4.) In a footnote, DTE Stoneman reserved the right to argue that Michigan law should apply "if factual discovery supports such an application." (*Id.*, n.2.) Selmer's opposition brief accepted this representation, except for a short aside disputing the possibility that Michigan law might apply. In DTE Stoneman's reply brief, it changed its approach, arguing for the first time that the contract should be construed according to Michigan law. (Reply Br., dkt. #11, at 3-4.) As DTE Stoneman acknowledged in its opening brief,

[4] DTE Stoneman is also left with the same arguable inconsistency: if § 7.22(a) precludes an award of all damages caused by delay, then what is the purpose of the second sentence of § 7.14? While the answer may be that it provides an additional, express protection from such claims, like "belt and suspenders," the answer cannot be found on the face of the contract.

however, the choice of law question here raises both questions of law and fact that cannot be resolved on the record developed for the motion to dismiss.[5]

Even if the court were to conclude that damages for delay are classified as special, incidental or consequential damages under either Wisconsin or Michigan law, that conclusion would not be dispositive. Selmer alleges that the parties modified their contract orally when DTE Stoneman promised to provide additional compensation for Selmer's promise to remain on site despite the extensive delay. Losses caused by DTE Stoneman's alleged breach of this alleged, modified contract would almost certainly constitute general damages. *See* discussion below.

2. Asserted requirement for approved Change Order

Apparently acknowledging the limitations of its original argument, DTE Stoneman's reply brief offers a slightly different argument: DTE Stoneman did not breach the contract. This new argument relies on a reading of § 7.14 in conjunction with § 7.13(b) and § 7.22(a). Specifically, the first sentence of § 7.14 entitles the Contractor

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[5] The contract's choice of law provision and Wis. Stat. § 799.135 appear to be in conflict. Section 7.29 of the contract calls for construction under and enforcement "in accordance with the laws of the State of Michigan," but Wis. Stat. § 799.135 provides that any provisions in a construction contract "making the contract subject to the laws of another state or requiring that any litigation, arbitration or other dispute resolution process on the contract occur in another state" are "void." Wis. Stat. § 779.135. DTE Stoneman argues that this means Wisconsin law governs the "enforcement of rights and remedies under the contract," but Michigan should be used to construe the contract and classify damages. (Reply Br., dkt. #11, at 3-4.) Because DTE Stoneman raised this choice of law argument for the first time in its reply brief, the Court declines to determine whether Wisconsin or Michigan law applies to the interpretation of the contract. To the extent important to resolution of this dispute, the application of Wisconsin's choice of law rules requires full briefing by both parties on summary judgment.

to an extension for any delay caused by the Owner. According to DTE Stoneman, any delay constitutes a "change" under the contract and, therefore, the Contractor must still request an extension by filing a Change Order in writing as outlined in § 7.13(b). Thus, the Contractor is entitled to damages for delay only if it filed a Change Order requesting an extension and the Owner materially breached the contract by denying that extension. Otherwise, any damages from delays caused by the Owner fall within the "special, indirect, incidental or consequential damages" barred by § 7.22(a). Together, DTE Stoneman asserts, these clauses dictate that Selmer cannot sue for any damages resulting from the delays caused by DTE Stoneman, because Selmer did not timely request an extension in writing and DTE Stoneman never denied that written request.

Although the Court could ignore this interpretation because DTE Stoneman offers it for the first time in its reply brief, the argument is considered and rejected as not dispositive. First, as previously discussed, DTE Stoneman relies on a federal diversity case applying Michigan law as precedent for the premise that any delay damages are incidental or consequential damages as a matter of law. Second, if the idling of equipment and men was insisted upon by the Owner as alleged here, § 7.14 would likely have required the Owner to agree to a reasonable Change Order unless the costs were unjustified -- a factual question as yet unanswered. Third, even if Michigan law applies and the written contract required an advance Change Order, Selmer argues that the parties modified the contract. DTE Stoneman's practice of requesting additional work from Selmer and approving Change Orders only after the work was completed arguably modified the contract, so that advance written Change Orders were no longer required.

See S & M Rotogravure Serv., Inc. v. Baer, 77 Wis. 2d 454, 469, 252 N.W.2d 913 (Wis. 1977) (parties may evince by their words or conduct their mutual intent to waive a provision requiring written change orders, even if the contract provides it may only be modified in writing); *Boulanger Const. Co., Inc. v. United Fire and Cas. Co*. 2004 WL 2676561, *5 (Wis. Ct. App. 2004).[6] Thus, DTE Stoneman's motion to dismiss Claim 1 will be denied.

B. Claims 2 & 3: Negligent and Intentional Misrepresentation

DTE Stoneman next argues that Selmer's claims for negligent and intentional misrepresentation are barred by the economic loss doctrine. The economic loss doctrine prevents parties to a commercial contract for the sale of products from recovering in tort for solely economic losses. *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.*, 148 Wis. 2d 910, 921, 437 N.W.2d 213 (Wis. 1989). The doctrine does not apply to contracts for the provision of services. *Ins. Co. of N. Am. v. Cease Elec. Inc.*, 2004 WI 139, ¶52, 688 N.W.2d 462 (Wis. 2004). Whether a contract is one for products or services depends on its "predominant purpose." *Linden v. Cascade Stone Co.*, 2005 WI 113, ¶8. 699 N.W.2d 189 (2005). The court determines the predominant purpose of a contract by examining the "totality of the circumstances," including objective and subjective factors such as "the language of the contract, the nature of the business of the supplier, the intrinsic worth of the materials, the circumstances of the parties, and the primary

[6] Although the contract contains an integration clause permitting amendments "only by written instrument signed by both Owner and Contractor," Wisconsin does not enforce contractual provisions that would preclude subsequent oral modifications of a written contract. *S&M Rotogravure Serv.*, 77 Wis. 2d at 469; Michael B. Apfeld et al., *Contract Law in Wisconsin*, § 7.16 (3d ed. 2007).

objective they hoped to achieve by entering into the contract." *Id.* at ¶¶5, 21 (citations omitted). *See also 1325 N. Van Buren, LLC v. T-3 Grp, Ltd.*, 2006 WI 94, ¶¶ 29, 42, 716 N.W.2d 822 (Wis. 2006).

Here, Selmer and DTE Stoneman have a contractual relationship, and Selmer seeks recovery only for economic losses, but the parties dispute the nature of their contract. According to DTE Stoneman, they contracted for a completed product: Selmer agreed to provide a converted boiler according to the detailed specifications for a fixed lump sum that was not itemized between service and materials.

On the other hand, Selmer argues persuasively that the contract was at least for mixed services and product. DTE Stoneman owned the boiler before the contract and hired Selmer to *convert* it to biomass burning. DTE Stoneman provided the material and equipment, while Selmer provided services to erect the steel and equipment. Despite the lump sum price, the contract also required Selmer to submit monthly invoices itemizing the work accomplished.

Given this factual dispute, it is at best premature to determine the nature of the contract. Certainly, Selmer has pled sufficient facts to support a reasonable inference that the contract was predominately a services contract and, thus, not subject to the economic loss doctrine.

Even if the contract is predominantly one for a product, the economic loss doctrine may not bar Selmer's Claim 3 for intentional misrepresentation. Wisconsin law recognizes a narrow exception to the economic loss doctrine if (1) the contract was induced by an intentional misrepresentation made before the formation of the contract

and (2) the "fraud is extraneous to, rather than interwoven with, the contract." *Kaloti Enters. Inc., v. Kellogg Sales Co.*, 2005 WI 111, ¶42, 699 N.W.2d 205 (Wis. 2005). A misrepresentation is extraneous to the contract if it relates to risks or responsibilities not expressly dealt with in the contract and outside the parties' reasonable expectations. *Id.* at ¶43.

DTE Stoneman argues that Selmer's complaint fails to allege any false statements made before the formation of the contract or any misrepresentations made extraneous to the contract. Certainly, the alleged misrepresentations about DTE Stoneman's intention to pay Selmer for the additional time were made during the course of the contract (Complaint, dkt. #6-4, ¶35) and concerned the parties' performance under the contract. In its Responsive Brief, however, Selmer denies that Claim 3 rests on DTE Stoneman's alleged post-contract misrepresentations; rather, it maintains that DTE Stoneman made intentional misrepresentations several days before the contract was signed as to its ability to perform timely when the parties were establishing the Schedule. (Brief in Opp., dkt. #10, at 18.) Although Claim 3 refers to DTE Stoneman's representations about additional payment for delays, it also uses the open language "including but not limited to" and incorporates Paragraphs 1-33. (Complaint, dkt. #6-4, at ¶34-35.) Paragraph 8 alleges that the parties "agreed upon a Schedule dated October 8, 2009, which reflected DTE Stoneman's representations as to its delivery of steel and equipment." (*Id.* at ¶8.)

While the contract certainly contains provisions relating to delays, the scope of these clauses is precisely the debate discussed above with respect to Claim 1. At this stage, it is also at least arguable whether DTE Stoneman's intentional misrepresentation

as to its ability or willingness to provide the necessary equipment and steel timely was beyond the parties' reasonable expectations.[7]

Thus, DTE Stoneman's motion to dismiss Claims 2 and 3 will be denied.

C. Claim 4: Wisconsin Statutes § 100.18

Wisconsin Statute § 100.18 protects consumers from fraudulent representations. In relevant part, Wis. Stat. § 100.18(1) provides:

> "No … corporation, … with the intent to sell, distribute, increase the consumption of or in any way dispose of real estate, merchandise, securities, employment, service… to the public for sale, hire, use or lease… or with intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service shall make, publish disseminate, circulate or place before the public … an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease … contain[ing] any assertion, representation or statement of fact which is untrue, deceptive or misleading."

Wis. Stat. § 100.18(1).

A plaintiff is considered a member of "the public" for purposes of Wis. Stat. § 100.18(1) "unless a particular relationship exists between him or her and the defendant." *K&S Tool & Die Corp. v. Perfection Mach. Sales, Inc.*, 2007 WI 70, ¶27, 732 N.W.2d 792

[7] Neither Selmer's complaint, nor its responsive brief, identifies the specific misleading content of these pre-contract representations, beyond asserting that DTE Stoneman engaged in a general misrepresentation as to its ability to timely perform on the schedule agreed to a few days before contracting. A cause of action for fraudulent conduct must be pled with particularity, including "the time, place and content of the alleged false representation." *Friends of Kenwood v. Green*, 239 Wis. 2d 78, 87, 619 N.W.2d 271 (Wis. Ct. App. 2000). As DTE Stoneman's motion largely focused on whether the misrepresentations were made before the contract was signed, it would be inappropriate to dismiss based on any arguable deficiency in the particulars of the alleged, pre-contract misrepresentations.

(Wis. 2007). After the parties enter a contract, they have just such a particular relationship and are no longer members of "the public" for purposes of post-contractual statements. *Id.* at ¶26; *Kailin v. Armstrong*, 2002 WI App. 70, ¶44, 643 N.W.2d 132 (Wis. Ct. App. 2002). Whether a particular relationship exists even before a contract "will depend upon its own peculiar facts and circumstances and must be tested by the statute in the light of such facts and circumstances." *Id.* at ¶27 (quoting *Cawker v. Meyer*, 147 Wis. 320, 326, 133 N.W. 157 (1911)).

DTE Stoneman offers two arguments in support of its motion to dismiss Claim 4: (1) Selmer was the purchaser, not the seller, of goods or services as required by the unambiguous meaning of Wis. Stat. § 100.18(1); and (2) the only misrepresentations alleged occurred after the Contract was executed, at which time Selmer was no longer a member of "the public" as a matter of law.[8] Though a seemingly reasonable interpretation, DTE Stoneman offers no citations to support its claim that Wis. Stat. § 100.18(1) protects only purchasers. Moreover, the statute by its terms protects the public from misleading representations made "with the intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any… merchandise… or service." Wis. Stat. § 100.18(1). Arguably, a buyer that solicits construction bids based on specifications may make misrepresentations that fraudulently induce others in the public to enter into goods or services contracts, just as a contractor may so induce buyers. There is no indication in the statutory language that the legislature intended to exclude contractors from its consumer protection laws. *K&S*

[8] "[T]he economic loss doctrine does not apply to claims under Wis. Stat. § 100.18. *Kailin*, 2002 WI App. ¶43.

Tool & Die Corp., 2007 WI 70, ¶35 (stating that the purpose of Wis. Stat. § 100.18(1) is "protecting Wisconsin residents from untrue, deceptive or misleading representations made to induce action").

As DTE Stoneman points out, however, some of Selmer's allegations plainly concern misrepresentations made after the contract was entered. The allegations in Claim 4 are similar to those discussed above with respect to Claim 3. The complaint only explicitly identifies the "representations made in ¶35," which describes the post-contract extensions as misrepresentations. (Compl., dkt. #6-4, at ¶45.) In its Opposition Brief, Selmer asserts that the parties "formed additional oral contracts for Selmer to perform work outside of the scope of the Contract" based on DTE Stoneman's "representations to Selmer that it would compensate Selmer for the extra work." (Br. in Opp., dkt. #10, at 22.) Even if these alleged misrepresentations concerned a modification of the contract, they were made after the parties had already entered into an ongoing relationship. *Kailin*, 2002 WI App. 70, ¶44. Thus, these misrepresentations cannot support a claim under Wis. Stat. § 100.18(1).

This finding may nevertheless not be sufficient to dismiss the claim in its entirety. As in Claim 3, Claim 4 incorporates Paragraphs 1-43 and uses the phrase "including the representations in ¶35." (Compl., dkt. #6-4, at ¶44-45.) Read as a whole, Claim 4 indicates that the post-contract misrepresentations to which it explicitly refers ("representations in ¶35") were not the *only* misrepresentations. In its Response Brief, Selmer again clarifies that the "misrepresentations were the plans, specification and Schedule shown to Selmer prior to entering the Contract." (Br. in Opp., dkt. #10, at

12.) Unlike the economic loss doctrine, however, these alleged pre-contract misrepresentations do not save Selmer's § 100.18 claim. On the contrary, because any misrepresentations occurred only with respect to the details of performance pursuant to a commercial construction contract and were negotiated only days before contracting, Selmer was no longer, for the purposes of the representations, a member of the "public." Instead, on the face of its complaint, Selmer had by then entered into a "particular relationship" with DTE Stoneman. *K&S Tool & Die Corp.*, 2007 WI at ¶27. Therefore, DTE Stoneman's motion to dismiss Claim 4 will be granted.

D. Claim V: Unjust Enrichment

Selmer's fifth claim is that DTE Stoneman was unjustly enriched when Selmer followed DTE Stoneman's directive to keep its equipment and manpower on site. DTE Stoneman moves to dismiss Selmer's unjust enrichment claim on grounds that unjust enrichment is unavailable to supplant contractual remedies, and the alleged benefits conferred fall within the scope of the parties' contract.

Under Wisconsin law, a party claiming unjust enrichment must show three elements: "(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention by the defendant of the benefit under circumstances making it inequitable for the defendant to retain the benefit without payment of its value." *Puttkammer v. Minth*, 83 Wis. 2d 686, 689, 266 N.W.2d 361 (Wis. 1978). Unjust enrichment is a quasi-contractual theory under which the law implies an obligation "*in the absence of any agreement*, when and because the acts of the parties or others have placed in the

possession of one person money, or its equivalent, under such circumstances that in equity and good conscience he ought not to retain it." *Grossbier v. Chi., St. P., M. & O. Ry. Co.*, 173 Wis. 503, 181 N.W. 746, 748 (Wis. 1921). Accordingly, Wisconsin law bars claims for unjust enrichment where the parties have entered a contract, unless the alleged benefits fall outside the scope of the parties' contractual relationship. *N. Crossarm Co. v. Chem. Specialities, Inc.*, 318 F. Supp. 2d 752, 767 (W.D. Wis. 2004); *Meyer v. Laser Vision Inst., LLC*, 2006 WI App. 70, ¶26, 714 N.W.2d 223 (Wis. Ct. App. 2006).

While the court has found the parties' contract to be ambiguous on its face, there is no question that the contract governs their relationship. If DTE Stoneman breached the contract by refusing to honor the Change Orders Selmer submitted at the end of their contractual relationship, then unjust enrichment is an inappropriate substitution for contractual remedies. On the other hand, if DTE Stoneman did not breach the contract and Selmer went beyond its obligations by remaining on the site, the Complaint fails to allege any *benefit conferred* on DTE Stoneman that is outside the scope of the parties' contractual relationship, since DTE Stoneman ultimately received only the conversion of the boiler for which it contracted. Accordingly, Selmer fails to state a separate claim for unjust enrichment.

ORDER

Accordingly, IT IS ORDERED that:

1. defendant DTE Stoneman's motion to dismiss the complaint, dkt. #8, is GRANTED as to Plaintiff Selmer's Fourth and Fifth Claims;

2. in all other respects, DTE Stoneman's motion to dismiss, dkt. #8, is DENIED; and

3. in light of this order, the dispositive motion deadline is extended to December 12, 2011. All other deadlines remain the same.

Entered this 4th day of November, 2011.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge