IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DUOLINE TECHNOLOGIES, L.P., OPINION and ORDER

Plaintiff, 10-cv-252-bbc

v.

McCLEAN ANDERSON, LLC,

Defendant.

- -

In this civil action for monetary relief, plaintiff Duoline Technologies, L.P., brings claims for breach of contract, breach of warranties, intentional misrepresentation, fraudulent inducement and unjust enrichment against defendant McClean Anderson, LLC. Plaintiff contends that defendant failed to deliver industrial equipment in accordance with representations and an agreement for a new industrial facility in Gilmer, Texas. This court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because the parties are completely diverse and the matter in controversy exceeds $75,000.

Now before the court is defendant's motion for summary judgment, dkt. #55, in which it contends that plaintiff cannot adduce evidence to support any of its claims and that several of plaintiff's claims are barred by the language of the governing contract. Plaintiff opposes the motion, arguing that material factual disputes exist that make summary

judgment improper.

In its response to defendant's proposed findings of fact, plaintiff frequently inserted additional statements of proposed fact that are not directly responsive to defendant's proposed fact, rather than raising genuine disputes. These additional facts have been disregarded. Procedure to be Followed on Motions for Summary Judgment, ¶ 2.D.4, dkt. #31. Additionally, many of plaintiff's own proposed facts were too vague, too conclusory or lacking in foundation to be considered. (E.g., "Upon delivery of [defendant's] equipment to [plaintiff's] facility, multiple defects, design problems and operation shortcomings deviating from known process requirements and specific winding requirements for the equipment were present and brought timely to the attention of [defendant]"; and "[Defendant] was unable or unwilling to cure all of the defects it was notified of." Plf.'s PFOF ¶¶ 18, 20, dkt. #62.)

After considering the facts that are supported properly by evidence in the record, I conclude that plaintiff has failed to develop a persuasive argument in support of its claims for breach of contract or breach of express warranties. Also, I conclude that plaintiff's claims for intentional misrepresentation and fraudulent inducement are barred by the economic loss doctrine. Thus, I will grant summary judgment in favor of defendant on those claims. Finally, because plaintiff failed to respond to defendant's arguments for summary judgment on plaintiff's claims for breach of implied warranties and unjust enrichment, thereby conceding implicitly that it cannot defend against them, defendant is entitled to summary

judgment on those claims as well.

UNDISPUTED FACTS

A. The Parties

Plaintiff Duoline Technologies, L.P. is a limited partnership made up of two partners: Robroy Conduit, Inc. and Robroy Holdings–Texas, Inc., both Delaware corporations with their principal places of business in Gilmer, Texas. Plaintiff manufactures tubular lining to prevent corrosion of steel tubular pipes used in the oil industry.

Defendant McClean Anderson, LLC is a limited liability company with two members: Herbert Liedke and Michael Liedke, both Wisconsin citizens. Defendant manufactures filament winding machines.

B. Job Quotation

Sometime in 2006, plaintiff decided to build a facility in Gilmer, Texas, for manufacturing corrosion resistant glass reinforced epoxy liners for oilfield steel tubular goods. The facility would require filament winding equipment. Beginning in May 2006, defendant provided plaintiff various written proposals for the construction of filament winding equipment and mandrel extractors for use in the new plant. Beginning in late 2007 and continuing through 2008, plaintiff consulted representatives of defendant and other companies regarding the design and manufacture of the filament winding equipment.

Eventually, plaintiff contracted with numerous vendors to build and integrate various pieces of equipment for its new manufacturing facility in Gilmer.

Plaintiff hired SNC-Lavalin, Inc. as its project manager. SNC generated the technical specifications for the manufacturing equipment that plaintiff required. Plaintiff hired Radyne Corporation of Milwaukee to design and test induction curing equipment for the project. Plaintiff also hired Isthmus Engineering and Manufacturing in Madison, Wisconsin, to be involved in the final assembly and integration of the machinery for the project.

Initially, the parties involved in the project planned to complete it in two separate phases. In Phase I, all of the vendors, including defendant, were to develop and build the equipment for which they would contract individually with plaintiff. Then, the parties would build a prototype spindle filament winding system. Once plaintiff approved the design and one production cell was created, the vendors were to ship the equipment to Isthmus Engineering to be assembled, integrated and tested. Once the bugs were worked out of the first cell and it was accepted by plaintiff, Phase II was to commence. This phase would consist of the manufacturing of three additional cells to the specifications of the accepted first cell with shipment directly to plaintiff in Gilmer, Texas, after which the building and installation of the remaining three machines would proceed.

In April 2008, defendant submitted two documents to plaintiff, identified as Quotation No. 8073. Dkt. #62-2. The quotation did not include costs for any production or equipment and was solely for engineering work to be performed by defendant. In

particular, the quotation states that it is a "proposal to begin Phase I of the FRP Liner project . . . based on preliminary estimates for material handling and project management required to deliver the first system to Gilmer, Texas." Id. The quotation provides that it "will engage engineering resources to provide final definition of the Phase I scope and also identify longer lead requirements, critical path operations and subsequent impact on Phase II" as well as "the integration of these processes into the system automation." It provides for a "Phase I System Estimate," proposing a Filament Winding Extraction System that can produce 12 liners an hour and would be ready for shipment to Isthmus on September 1, 2008. Finally, it states that defendant appreciates "[t]he opportunity to bid on [the] project" and "is confident that given the opportunity [defendant would] meet or exceed [plaintiff's] expectations." The price for the quotation was $51,638.40. Plaintiff accepted the quotation in Purchase Order No. 11-11558.

Between April and August 2008, defendant was in communication with Robert Marzetti, a Senior Project Engineer at SNC-Lavlin, regarding the project. Marzetti emailed a number of questions regarding defendant's proposed filament winding machines to Bradley Schmitt, a sales engineer for defendant. In an email dated June 25, 2008, Marzetti asked Schmitt to confirm that the proposed machine "could meet the production targets of 12.9 pieces per hour for 2.25in tubes and 7.5 pieces per hour for 5.80in casings." Dkt. #63-5. Defendant's general manager, David Dombeck, emailed Marzetti on June 26, 2008, stating, "Yes, the Titan machine platform will meet the production targets that are required." Id.

Sometime before August 2008 and before any of the other vendors, including defendant, shipped machinery to Isthmus for testing, plaintiff terminated its relationship with both Isthmus Engineering and Radyne Corporation. After plaintiff terminated Isthmus, it hired Tegron, LP, as a project integrator. (It is not clear whether the parties involved in the project abandoned the phased approach after the termination of Isthmus and Radyne.)

C. The Proposal

On August 8, 2008, defendant sent plaintiff Proposal 8073 Rev.5, dkt. #58-1, which provided that defendant would provide four filament winding machines and mandrel extractors for plaintiff to use as a part of its manufacturing facility. The first part of the proposal describes the specifications of the Titan filament winding machines and mandrel extractors.

Under "Payment Terms and Delivery," the price for the manufacture of the four filament winding machines and mandrel extractors is $1,514,665.00 and the installation price of the machines is $69,000. Id. at ¶ 25. Under the payment provisions, 80% of the purchase price was due before the machinery would be shipped to plaintiff's Texas facility. The remaining 20% was broken down into 5% payments, with each 5% payment not due until "14 days after production run-off of 12, 2.75 [inch] mandrels per hour" and "7, 5.80 [inch] mandrels per hour" on the four machines. Id.

Under the "Terms and Conditions" of the proposal, a provision titled "Products"

states that plaintiff "agree[s] to purchase, upon the terms and conditions set forth in these Terms and Conditions, the products specified in the Job Quotation provided." A section titled "Warranties, Limitations & Claims," ¶ 26(4) states as follows:

> **A. Warranties.** . . . (I) The products are warranted to be free of defects in workmanship or materials for a period of one (1) year. Warranty will go into effect 45 days after completion of said product. In the event of a defect in workmanship or materials during such period, [defendant] will provide all parts and labor needed to correct such defect. . . .
>
> **B. Warranty Limitations.** [Defendant's] responsibility under this warranty is limited as follows:
>
> (I) [Defendant] will repair or replace defective or non-conforming products or allow a credit for such products, solely at [defendant's] option. [Defendant's] maximum liability with respect to the products furnished hereunder, whether under warranty or otherwise, shall in no event exceed the original purchase price thereof.
>
> (ii) [Defendant] shall not be liable for consequential, indirect or incidental damages, including but not limited to, anticipated profits, liquidated damages or penalties of any kind, whether arising from the products' performance or the warranty obligations herein. . . .
>
> (v) [Defendant] will not be responsible for product malfunction due to normal wear and tear, damage in transit, negligence or abuse by you or your agents, or other reasons that are not a result of a defect in a part of said product. . . .
>
> THE WARRANTY PROVIDED HEREIN IS EXCLUSIVE AND IN LIEU OF ALL EXPRESS AND IMPLIED WARRANTIES. THERE ARE NO WARRANTIES, WHICH EXTEND BEYOND THE WARRANTY SET FORTH IN THESE TERMS AND CONDITIONS. [DEFENDANT] DISCLAIMS ALL OTHER WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. [DEFENDANT'S] SOLE RESPONSIBILITY IS AS STATED, AND YOU ACKNOWLEDGE THAT YOU ARE

> PURCHASING THE PRODUCTS SOLELY ON THE BASIS OF THE COMMITMENTS OF [DEFENDANT] EXPRESSLY SET FORTH HEREIN.

Paragraph 26(10) states in part:

> A. These Terms and Conditions, including the specific Job Quotation issued in conjunction with it, constitutes the exclusive, complete and final agreement between the parties, and both parties agree that there are no other agreements, representation, promises or statements, either oral or written, express or implied, which relate to the matters contained in these Terms and Conditions.
>
> B. All changes to these Terms and Conditions, including the specific Job Quotation, must be in writing and executed by both parties.
>
> ***
>
> J. Any oral statement or representation by any representative of [defendant], changing or supplementing the contract or any condition of the contract, is unauthorized and confers no right to the purchaser and may not be relied on. No interpretation of any provision of the contract, including applicable performance requirements, is binding on [defendant], unless agreed to in writing by [defendant].

On September 5, 2008, plaintiff accepted the proposal with Purchase Order 11-11558.

D. Manufacture and Delivery of the Machinery

Defendant manufactured the equipment identified in the proposal in its Wisconsin facilities. As project integrator, Tegron had developed a factory acceptance testing procedure that was to be implemented at defendant's facility to determine whether the machinery was acceptable to plaintiff. On June 18 and 19, 2009, defendant demonstrated certain aspects of the operation of the equipment at its facility. Plaintiff approved defendant's equipment

for integration before shipment by signing the factory acceptance testing documents generated by Tegron. Tegron also signed the factory acceptance testing documents at defendant's facility, agreeing that the machinery met plaintiff's and Tegron's specifications. After plaintiff signed off on the testing, defendant delivered all of the equipment to plaintiff's Gilmer, Texas facility by July 2, 2009 and completed installation of the equipment by the end of September 2009. Defendant's machinery was never assembled and tested together with that of the other individual vendors before being shipped to plaintiff's facility, but rather, was tested individually at the facilities of the various vendors.

(The parties dispute whether the machinery manufactured by defendant was in working order and capable of producing liners at plaintiff's target production rate that were acceptable to plaintiff. Defendant contends that the machinery was in working order at the time it was shipped, while plaintiff contends that the machinery was not in working order and contained a number of problems that defendant either was unable to correct or refused to correct. David Marshall, plaintiff's president, identifies a number of asserted problems with the machinery that are discussed in more detail in the opinion below. The parties also dispute whether plaintiff has made an unconditional offer to return the equipment to defendant. Plaintiff alleges that Marshall made an unconditional offer to return the equipment during a telephone conversation with David Dombeck (defendant's general manager, but that Dombeck wanted to continue working on the problems. Defendant denies that any such offer was ever made or any such conversation occurred. Finally, the

parties dispute whether plaintiff is still using the machinery in its Gilmer, Texas facility. It is undisputed that at least some of the machinery is in use, but plaintiff alleges that it is not using several parts of the machinery.)

E. Procedural History

On November 24, 2009, plaintiff commenced this case in the United States District Court for the Eastern District of Texas. On January 7, 2010, defendant filed a motion to dismiss for improper venue or alternatively, to transfer to the Western District of Wisconsin. Simultaneously, defendant filed its answer to plaintiff's complaint and counterclaims against plaintiff for breach of contract, unjust enrichment and quantum meruit, seeking damages in excess of $300,000. In a decision dated March 15, 2010, the Texas court stated that "[t]his dispute arises from a contract entered into between the parties in April 2008 and later modified in September 2008." Dkt. #19. The court found that "[a]s this lawsuit concerns the delivery of equipment, the terms of the September 2008 contract, including the forum selection clause, are in force." Id. The court held that under the terms and conditions in Proposal 8073 Rev.5, Wisconsin was the proper forum for this lawsuit and transferred the case to this court. After transfer, plaintiff filed an amended complaint on October 13, 2010.

During the discovery process, defendant sought to determine the precise nature of plaintiff's claims for breach of contract and breach of express warranty. Defendant served its first set of written interrogatories to plaintiff on September 23, 2010, to which plaintiff

filed responses and supplemental responses. Dkt. #52 at 29-31. Two of the relevant exchanges are as follows:

> **Interrogatory No. 5:**
>
> Please identify each specific provision in proposal 8073-Rev5, dated August 8, 2008, and purchase order 11-11558 that you allege McClean breached and identify all documents that support your contention.
>
> **Answer:** McClean Anderson failed to deliver equipment meeting the requirements of Duoline with respect to productivity, quality, safety and housekeeping as detailed in multiple face to face meetings, e-mails and telephone calls. McClean Anderson represented that it had the expertise and experience to provide equipment meeting the requirements and that the equipment described in the proposal in question would satisfy those requirements. It did not. Documents that detail the exchanges between the parties concerning the equipment in question have already been produced.
>
> **Interrogatory No. 6:**
>
> In paragraph 24 of your Complaint, you allege that McClean breached express warranties. Please identify:
> a. Each express warranty you claim that McClean breached;
> b. Whether the express warranty you claim McClean breached was verbal or written, and if verbal, please identify the McClean representative who communicated the express warranty and the Duoline representative who received this communication.
> c. The date each express warranty was provided;
> d. All documents which contain an express warranty that you claim was breached; and
> e. All documents that support your contention that McClean breached express warranties.
>
> **Answer:** Plaintiff objects to this request as the number of requests for information, including subparts, exceeds 25 in number. The Federal Rules of Civil Procedure do not permit this number of request for information.
> **Supplemental Response:** Plaintiff objects to this request as the number of requests for information, including subparts, exceeds 25 in number. The

> Federal Rules of Civil Procedure do not permit this number of request for information. Subject to the foregoing objections, and without waiving same, warranty of fitness for a particular purpose which was articulated both orally and in writing, primarily by David Dombeck, Alex Rasmussen, Meghna Mohan and Bradley Schmitt. These warranties were provided over time and ware documented throughout the process of equipment development and proposals, in documents, meeting minutes, e-mails and related communications which have already been produced.

OPINION

Plaintiff asserts seven legal theories against defendant: (1) breach of contract; (2) breach of express warranty; (3) breach of implied warranty of merchantability; (4) breach of implied warranty of fitness; (5) intentional misrepresentation; (6) fraudulent inducement; and (7) unjust enrichment. Proposal 8073 Rev.5 states explicitly that "[t]he interpretation and enforcement of these Terms and Conditions shall be governed and construed according to the laws of the State of Wisconsin." Dkt. #58-1, ¶ 9. Because the parties do not identify any reason for not applying this choice of law provision to this dispute and do not dispute that Wisconsin law governs plaintiff's claims, I will apply Wisconsin law. RLI Insurance Company v. Conseco, Inc., 543 F.3d 384, 390 (7th Cir. 2008) ("When neither party raises a conflict of law issue in a diversity case, the applicable law is that of the state in which the federal court sits.")

Defendant has moved for summary judgment on all of plaintiff's claims. Under Fed. R. Civ. P. 56(a), summary judgment should be granted "if the movant shows that there is

no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

A. Breach of Contract

In plaintiff's amended complaint, it contends that it entered into a "valid and enforceable contract for the delivery of a filament winding system," and that defendant "failed to perform its obligations under the contract because it could not deliver a feasible working system for the agreed upon price." Dkt. #39, ¶¶ 19, 20. Defendant contends that plaintiff's breach of contract claim should be dismissed because plaintiff has failed to identify any contract provision of Proposal 8073 Rev.5 that defendant breached. Defendant points to plaintiff's responses to defendant's interrogatories in which plaintiff fails to identify any specific contractual provisions.

Plaintiff's first response to this argument is that defendant is operating on a "false premise regarding the contract between the parties," by assuming that plaintiff's complaint asserts only a breach of Proposal 8073 Rev.5. Plt.'s Br., dkt. #60, at 1, 4 (contending that defendant "blatantly ignores 50% of the agreement between the parties"). In fact, plaintiff argues, defendant breached both the April 2008 job quotation and proposal 8073 Rev.5.

This argument goes nowhere for several reasons. First, plaintiff's amended complaint says nothing about the April 2008 quotation and plaintiff's breach of contract claim is based on defendant's "failure to deliver a feasible working system for the agreed upon price." Plt.'s Am. Cpt., dkt. #39, ¶ 21. It is undisputed that the quotation was simply a proposal to begin

engineering services and that plaintiff is complaining now about defendant's failure to deliver a filament winding machine that worked properly. As the District Court for the Eastern District of Texas found, the April 2008 quotation was a start order for engineering services and "did not include delivery of equipment." Dkt. #19, at 2. Thus, because "this lawsuit concerns the delivery of equipment, the terms of [Proposal 8073 Rev.5]. . . are in force." Id. Plaintiff cannot use their brief in opposition to summary judgment as a vehicle for adding claims about the April quotation to the case. EEOC v. Lee's Log Cabin, Inc., 546 F.3d 438, 443 (7th Cir. 2008); Conner v. Illinois Dept. of Natural Resources, 413 F.3d 675, 679 (7th Cir. 2005); Grayson v. O'Neill, 308 F.3d 808, 817 (7th Cir. 2002).

Even if plaintiff's amended complaint could be construed to include a claim for breach of the April job quotation, in support of its theory plaintiff points only to the statement at the end of the quotation that "[t]he staff at [defendant] is confident that given the opportunity we will meet or exceed your expectations." This statement is nothing more than defendant's expression of appreciation for the opportunity to bid on the project and belief it can satisfy plaintiff's needs. There is nothing concrete or specific about this statement that could be enforced as a contractual provision.

Finally, even if plaintiff had raised the issue of the April 2008 quotation in its amended complaint and pointed to specific promises of the quotation that were not followed, the language of Proposal 8073 Rev.5 indicates that it is the only controlling document between the parties with respect to the delivery and installation of the machinery

at issue. The contract's integration clause provides that the proposal and its terms and conditions constitute "the exclusive, complete and final agreement between the parties, and both parties agree that there are no other agreements, representations, promises or statements, either oral or written, express or implied, which relate to the matters contained in these Terms and Conditions." Dkt. #58-1, ¶ 26(10(A). This clause is clear and unambiguous and expresses acknowledgment by both parties that the proposal is the fully integrated agreement between the parties and is a final expression of all warranties, agreements and promises related to the subject matter of the contract. Bushendorf v. Freightliner Corp., 13 F.3d 1024, 1027 (7th Cir. 1994) (applying Wisconsin law) (holding non-binding a oral warranty made in precontractual negotiation and not repeated in written contract containing integration clause). Thus, plaintiff cannot rely on a pre-proposal document for its breach of contract claim.

Having concluded that plaintiff cannot rely on the April 2008 job quotation to support its breach of contract claim, I return to defendant's argument that summary judgment should be granted because plaintiff has failed to identify any contract provision of the Proposal 8073 Rev.5 that defendant breached. In its brief, plaintiff contends that defendant breached its promise to provide machinery that would meet plaintiff's "specific winding requirements," including "wall thickness, liner length, target production rate, improved quality from past operations, reduction of waste from past operations and improved safety." Plt.'s Br., dkt. #60, at 6. Plaintiff contends that upon arrival, defendant's

machinery "failed to meet" these requirements "and as a result, [defendant] failed to perform under the contract and is in breach." Id.

The main problem with plaintiff's argument is that it cannot point to any provision of the parties' contract that requires defendant's machines to meet "specific winding requirements." (There are also problems with the many conclusory statements plaintiff offers as sole support for its assertion that defendant's machines do not meet the winding requirements.) Instead, plaintiff argues that the specific winding requirements "were expressed to [defendant] in various in-person meetings, telephone conversations, emails and many are contained in the Technical Specification Fibreglass Reinforced Pipe Liner Manufacturing Equipment ("Winding Requirements") generated by SNC Lavalin Engineers & Constructors." Id.; Plf.'s PFOF, dkt. #62, ¶ 21. Without details regarding the meetings and conversations and particular requirements discussed, this statement does not support a finding that defendant was aware of plaintiff's specific winding requirements. Even if the statement could support such a finding, plaintiff cannot contend that defendant breached a contract by not complying with information garnered from meetings, phone conversations or specifications not made part of the contract. The proposal's integration clause makes it clear that the proposal contains the whole agreement between the parties. Finally, although the proposal's payment structure allows plaintiff to withhold payment until certain production rates are achieved, no provision or paragraph in the contract actually guarantees these production rates.

(Defendant also raised an argument that because plaintiff has not made an unconditional offer to return defendant's machinery, it cannot sue for breach of the contract. Grams v. Milk Products, Inc., 2005 WI 112, ¶ 15, 283 Wis. 2d 511, 521, 699 N.W.2d 167, 172 ("When a product proves to be defective, the UCC allows the aggrieved buyer to sue for breach of warranty or (under certain circumstances) to return the goods and sue for breach of contract."); see also Dunck Tank Works, Inc. v. Sutherland, 236 Wis. 83, 294 N.W. 510, 512-13 (1940) (if buyer elects to keep defective goods, it may maintain action for breach of warranty but not recision of contract). Plaintiff responds to this argument by contending that David Marshall made an unconditional offer to return defendant's equipment during a phone conversation with David Dombeck, and that Dombeck refused the offer. Aff. of David Marshall, dkt. #63, ¶ 16. Plaintiff provides no description of the "unconditional offer" and provides no details regarding the phone conversation, including when the conversation took place or what was said. However, because I conclude that plaintiff has failed to point to any provision of the proposal to support its breach of contract claim, I do not need to decide whether plaintiff's vague averment is sufficient to create a genuine factual dispute about this issue. Even if plaintiff has made an unconditional offer to return the machinery, defendant is entitled to summary judgment on the beach of contract claim.)

B. Breach of Expressed Warranties

In its amended complaint, plaintiff contends that defendant "represented and

expressly warranted that it would provide a working filament winding system that met the functional requirements of [plaintiff] and further that said equipment would fully integrate with the existing design which [defendant] was well aware of," and that defendant failed to provide such a system. Plt.'s Am. Cpt., dkt. #39, ¶¶ 24, 25. Defendant contends that plaintiff's breach of express warranty claim should be dismissed because plaintiff cannot identify any express warranty in the contract that was breached and that any other alleged warranty is not actionable in light of the contract's integration clause and warranty waiver language. Defendant points to plaintiff's response to its interrogatories in which plaintiff points to oral and written "warranties" that are not part of the contract as support for its claim.

Plaintiff disagrees that it must point to specific warranties in Proposal 8073 Rev.5 that defendant has breached. First, it points to language in the April 2008 job quotation, such as "[t]he staff at [defendant] is confident that given the opportunity we will meet or exceed your expectations"; and that defendant "will address the process requirements of the Phase I FRP Liner System and the integration of these processes into the system automation." These statements are not express warranties and do not promise anything in particular with respect to the machinery that was delivered by defendant under the August proposal; rather, they are descriptions of the engineering services that defendant undertook as part of the initial start order. Thus, they cannot form the basis for plaintiff's breach of express warranty claim.

Next, plaintiff points to the statement made by David Dombeck, defendant's general manager, in a June 26, 2008 email addressed to Robert Marzetti, a Senior Project Engineer at SNC-Lavlin, in which Dombeck states that defendant's Titan machinery will meet plaintiff's production rate requirements. Plaintiff contends that despite Proposal 8073 Rev.5's integration clause, this email should be considered an express warranty because the proposal provides that

> Any oral statement or representation by any representative of [defendant], changing or supplementing the contract or any condition of the contract, is unauthorized and confers no right to the purchaser and may not be relied on. No interpretation of any provision of the contract, including applicable performance requirements, is binding on [defendant], unless agreed to in writing by [defendant].

Dkt. #58-1, ¶ 26(10)(J). This argument makes no sense. Dombeck's statement was made *before* the proposal was submitted by defendant and accepted by plaintiff. Even if it could be considered a representation by defendant, rather than merely being Dombeck's opinion, the language of the proposal makes it clear that plaintiff cannot rely on such a statement to modify the express terms of the contract. In sum, to maintain a claim for breach of express warranties, plaintiff must point to express warranties in the proposal that defendant breached.

Under the terms of the proposal, defendant warranted only that "[t]he products are . . . to be free of defects in workmanship or materials for a period of one (1) year." Id. at ¶ 26(4)(I); see also id. ¶ 26(4)(B)(v) (disclaiming defendant's responsibility for any product

malfunction that is "not a result of a defect in a part of said product"). Thus, in order to survive summary judgment, plaintiff must adduce sufficient evidence to enable a jury to find that defendant's machinery contained "defects in workmanship or materials."

Plaintiff did not allege specifically in its amended complaint that the parts delivered by defendant were defective and it did not state in response to defendant's interrogatory regarding warranties that it was seeking to enforce the warranty against defects in the product. However, in its opposition to summary judgment, plaintiff offers a list of alleged defects in the equipment, including:

> "[t]he fiber break detection system was not put into a hold state when a fiber tow breaks"; "[t]he Doctor Blade needed adjusting daily from previous day set point, there was nothing to keep it centered which caused it to bind and did not control resin metering"; "[t]he resin pumping system was extremely problematic and upon arrival was not operating in a manner that would permit any quality production—the flow rate was too low for the system, and the flow sensors were not alerting that there was not a flow of hardener going into the bath"; "the holiday tester was unable to accurately test product quality, resulting in necessary manual inspection"; "pumps leaking at the hoses"; "the resin delivery system had stuck valves"; "the resin and hardener were not sufficiently heat controlled"; "pumps would frequently stop"; "all hardener pumps failed"; "the resin bath quick disconnect couplings failed"; "bearing assemblies were installed incorrectly"; "tailstock assemblies did not have enough clearance"; "bearing assembly has a spacer installed which was not part of the design"; "blocking valves are not working properly on tail stock hydraulic valves"; "spacers needed to be installed in headstock tooling"; "headstock and tailstock anchor bolts became loose after operation"; "tail stock unit casing systems had to be repositioned"; "tension set points were not properly adjusted on casing system"; "tray for mold release not stationary"; "missing 2.251" inserts"; "mandrel present sensor not mounted"; "broken air bags"; "mounting of horizontal attachment on carriage becomes loose and causes sensors to operate incorrectly"; "Phoenix Contact 24 VDC power supply failed"; "contactor and servo drive failed"; "resin bath heater did not

> operate"; "hydraulic motor wiring incomplete"; and "mandrels installed backwards."

Plt.'s Br., dkt. #60, at 8-9; see also plt.'s PFOF, dkt. #62, ¶¶ 31-65. Plaintiff says that it "timely notified [defendant] of each of these defects and that defendant "corrected some defects . . . [but] was unwilling or unable to correct a number of defects." Plt.'s Br., dkt. #60, at 9.

Plaintiff's laundry list of alleged defects does not save its claim for breach of express warranties because most of its proposed facts about the problems with the machinery are nothing more than mere conclusions. All of them are supported by one source only, the affidavit of David Marshall, plaintiff's president. Marshall's averments of the problems are conclusory. For example, stating that "pumps failed . . . which was a defect," air bags are "broken . . . which was a defect" or "wiring [was] incomplete . . . which was a defect" provides no information about the alleged problems or why the problems are necessarily the result of "defects in workmanship or materials." Marshall does not explain in his affidavit anything about the machinery itself, such as whether and how the alleged problems affected the functioning of the machinery, the likely cause of the problems, how the problems were detected and measured and whether the equipment's integration and interaction with other equipment contributed to the problems. Notably, Marshall does not explain how he arrived at his conclusions that these problems constitute defects, beyond stating that the affidavit is "based upon [his] personal knowledge." Dkt. #63, ¶ 2. He does not state that he is an

engineer or an expert in this machinery or otherwise involved personally with the operation of the machinery at issue so that he would have sufficient knowledge to conclude that the issues in the machinery were actual "defects" or even that they "failed" or were "broken" or "incomplete." In sum, a reasonable jury could not rely solely on Marshall's conclusory statements to find that defendant delivered machinery to plaintiff that was defective in workmanship or materials. The jury would need more information, such as a complete description of the machinery by an expert or documentary evidence or testing. However, plaintiff has provided no indication that it has conducted such tests or produced any expert testimony regarding the alleged problems. In fact, the only mention of testing in the record is the testing of the machinery that occurred at defendant's facilities, after which plaintiff approved the machinery for shipment to Texas.

Plaintiff's omissions are fatal to its claim at the summary judgment stage. Lujan v. National Wildlife Federation, 497 U.S. 871, 888 (1990) ("The object of [summary judgment] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit."); Hall v. Bodine Electric Co., 276 F.3d 345, 354 (7th Cir. 2002) ("It is well-settled that conclusory allegations and self-serving affidavits, without support in the record, do not create a triable issue of fact."); Drake v. Minnesota Mining & Manufacturing Co., 134 F.3d 878, 887 (7th Cir. 1998) ("Rule 56 demands something more specific than the bald assertion of the general truth of a particular matter[;] rather it requires affidavits that cite specific concrete facts establishing the existence of the truth of the matter

asserted."). Because defendant moved for summary judgment, plaintiff has the burden of showing that a reasonable jury could rule in favor of it on its claims. As the Court of Appeals for the Seventh Circuit has reminded parties, "[s]ummary judgment is not a dress rehearsal or practice run; it is the . . . [moment] when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." Steen v. Myers, 486 F.3d 1017 (7th Cir. 2007) (citations omitted); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-51 (1986) (the standard for surviving motion for summary judgment "mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)," which is whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party"). Because plaintiff has failed to adduce sufficient evidence to support its claim for breach of express warranties, defendant is entitled to summary judgment on this claim.

C. Breach of Implied Warranties

In its amended complaint, plaintiff asserts that defendant breached an implied warranty and merchantability and implied warranty of fitness. Defendant contends in its motion for summary judgment that plaintiff's breach of implied warranty claims should be dismissed because they were waived by the specific language of the contract. Bushendorf, 13 F.3d at 1027. In particular, the contract states that

THE WARRANTY PROVIDED HEREIN IS EXCLUSIVE AND IN LIEU OF

> ALL EXPRESS AND IMPLIED WARRANTIES. THERE ARE NO WARRANTIES, WHICH EXTEND BEYOND THE WARRANTY SET FORTH IN THESE TERMS AND CONDITIONS. [DEFENDANT] DISCLAIMS ALL OTHER WARRANTIES, INCLUDING ANY IMPLIED WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. [DEFENDANT'S] SOLE RESPONSIBILITY IS AS STATED, AND YOU ACKNOWLEDGE THAT YOU ARE PURCHASING THE PRODUCTS SOLELY ON THE BASIS OF THE COMMITMENTS OF [DEFENDANT] EXPRESSLY SET FORTH HEREIN.

Dkt. #58-1, ¶ 26(4).

In its brief in opposition to summary judgment, plaintiff fails to respond to defendant's factual and legal arguments for dismissal of these claims. By failing to oppose defendant's contentions that its claim is barred by the language of the proposal, plaintiff has conceded the issue. Wojtas v. Capital Guardian Trust Co., 477 F.3d 924, 926 (7th Cir. 2007). Therefore, I will grant defendant's motion for summary judgment on the implied warranty claims.

D. Intentional Misrepresentation and Fraudulent Inducement

Plaintiff's intentional misrepresentation and fraudulent inducement claims are a little difficult to pin down. It is not clear whether they represent different claims or simply slightly different legal theories for the same alleged misrepresentations. Plaintiff does not differentiate the two claims in its brief. In its amended complaint, it alleged that defendant committed intentional misrepresentation by "ma[king] [false] representations to [plaintiff] regarding [its] expertise, experience and ability," including a representation made by Bradley

Schmitt in 2008 "regarding [defendant's] experience and ability to meet the functional requirements of [defendant's] Gilmer, Texas facility." Plt.'s Am. Cpt., dkt. #39, ¶¶ 38-41. With respect to its fraudulent inducement claim, plaintiff alleges generally that defendant made misrepresentations regarding its capabilities and expertise. In its brief, plaintiff points to two additional statements in support of its fraud claims, namely, David Dombeck's June 2008 email regarding the Titan machines' capability of meeting plaintiff's target production rates and a statement by Bradley Schmitt that defendant's "products are designed specific to each customer's unique and demanding requirements." Plt.'s Br., dkt. #60, at 11. Plaintiff contends that defendant made these representations knowing they were untrue with the intent to defraud plaintiff and induce it to act upon them.

Defendant contends that plaintiff's fraud claims should be dismissed because plaintiff failed to plead them with specificity, they are barred under the contract and they are barred by the economic loss doctrine. Because I agree that they are barred by the economic loss doctrine, I need not address the additional arguments.

Wisconsin's "economic loss doctrine" is "a judicially-created remedies principle that operates generally to preclude contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." Tietsworth v. Harley-Davidson, Inc., 2004 WI 32, ¶ 23, 270 Wis. 2d 146, 162, 677 N.W.2d 233, 242. The general idea behind the doctrine is straightforward and 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, 47, 662 N.W.2d 652, 659. Difficulties often arise in applying the doctrine because there is no test with a list of factors to be applied by rote; rather, each case requires a policy determination 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).

An exception to the economic loss doctrine exists when a party uses fraud to induce another to enter into a contract and the "fraud is extraneous to, rather than interwoven with, the contract." Kaloti Enterprises, Inc. v. Kellogg Sales Co., 2005 WI 111, ¶ 42, 283 Wis. 2d 555, 585, 699 N.W.2d 205, 219. A fraud is extraneous to the contract when it "concerns matters whose risk and responsibility did not relate to the quality or the characteristics of the goods for which the parties contracted or otherwise involved performance of the contract." Id.

Although plaintiff contends that its claims fall under the fraudulent inducement exception, it makes no attempt to explain why defendant's alleged misrepresentations are "extraneous to, rather than interwoven with, the contract." This is probably because plaintiff cannot argue plausibly that statements regarding defendant's capability and expertise in providing the machinery and the machinery's ability to meet performance goals were extraneous to the contract for purchase and installation of the same machinery. Plaintiff has

provided no reason to believe that it could not have used the contract to protect itself against the risks and damages at issue in this case. Thus, it is appropriate to apply the economic loss doctrine. Because the alleged misrepresentations are interwoven with the agreement, defendant is entitled to summary judgment on plaintiff's claims for intentional misrepresentation and fraudulent inducement.

E. Unjust Enrichment

Defendant contends that plaintiff's unjust enrichment claim should be dismissed because the parties entered into a written contract covering the subject matter of defendant's unjust enrichment claim and thus, plaintiff can assert only claims for breach of contract or express warranty. Greenlee v. Rainbow Auction/Realty Co., 202 Wis. 2d 653, 671, 553 N.W.2d 257, 265 (Ct. App. 1996) ("The doctrine of unjust enrichment does not apply where the parties have entered into a contract.") (citing Continental Casualty Co. v. Wisconsin Patients Compensation Fund, 164 Wis. 2d 110, 118, 473 N.W.2d 584, 587 (Ct. App. 1991)).

Plaintiff failed to respond to defendant's factual and legal arguments for dismissal of the unjust enrichment claim, thereby conceding that it may not assert this claim. Wojtas, 477 F.3d at 926. Therefore, I will grant defendant's motion for summary judgment on that claim.

F. Conclusion

Because plaintiff has not shown that there are any material facts in dispute that would preclude summary judgment for defendant on all of plaintiff's claims, I will grant defendant's motion in full. Because all of plaintiff's claims will be dismissed, I need not resolve the parties' dispute regarding the types of damages plaintiff may recover.

One final note. Because neither party moved for summary judgment with respect to defendant's counterclaims, defendant's motion does not resolve the case. The dispositive motion deadline has expired and this case is scheduled for trial on May 23, 2011. However, I note that plaintiff appears not to have answered or otherwise responded to defendant's counterclaims. Thus, defendant should notify the court of the status of its counterclaims and how it wishes to proceed.

ORDER

IT IS ORDERED that

1. Defendant McClean Anderson LLC's motion for summary judgment, dkt. #55, is GRANTED.

2. Defendant may have until April 1, 2011 to inform the court how it wishes to

proceed with respect to its counterclaims.

Entered this 25th day of March, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB
District Judge