UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

NESTLE PURINA PETCARE COMPANY, Plaintiff, v. BLUE BUFFALO COMPANY LTD., Defendant.	
BLUE BUFFALO COMPANY LTD., Counterclaim Plaintiff, v. NESTLE PURINA PETCARE COMPANY, BLUE STATE DIGITAL INC., PRCG/HAGGERTY LLC, Counterclaim Defendants.	Case No. 4:14-cv-00859-RWS
BLUE BUFFALO COMPANY LTD., Third-Party Plaintiff, v. WILBUR-ELLIS COMPANY and DIVERSIFIED INGREDIENTS, INC., Third-Party Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT WILBUR-ELLIS COMPANY'S MOTION TO DISMISS CLAIMS 4-7 and CLAIMS 10-12 OF BLUE BUFFALO'S THIRD-PARTY COMPLAINT

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I. INTRODUCTION

As the Court knows, this litigation is part of a large, bitter public relations war between two behemoths of the pet food industry, Purina and Blue Buffalo. As part of its fusillade responding to Purina's attacks, Blue Buffalo has now trained its guns—both litigation and public relations—on one of its contract suppliers (Diversified Ingredients) and one of that supplier's suppliers (Wilbur-Ellis Company).

Blue Buffalo wishes to draw Wilbur-Ellis—one ingredient supplier that conformed to industry practices—into the industry public relations-litigation vortex it has created. It is undisputed that some mislabeling of poultry products mixed at and shipped from Wilbur-Ellis' Rosser, Texas, plant occurred prior to May 2014. It is undisputed also that while Blue Buffalo has touted its pet food products as free of poultry byproduct, Blue Buffalo has conceded publicly that poultry byproduct in pet foods "does not raise any health or safety issue for pets." Nevertheless, Blue Buffalo contends it received pet food ingredients that did not conform to its contractual specifications with Diversified, some of which originated at a Wilbur-Ellis' facility in Texas. The evidence will show that Diversified and/or Blue Buffalo knew or should have known the composition and nature of the ingredients Wilbur-Ellis provided to Diversified. The nature and constituents of the poultry products Wilbur-Ellis shipped were not hidden from Diversified or Blue Buffalo; to the contrary, they were well-known (or at least easily knowable) at the time throughout the industry. These ingredients were usually labeled as poultry meal "blends" or specifically referred to as "byproduct," and the prices at which Wilbur-Ellis sold to Diversified Industries reflected the actual ingredients it was selling. If Diversified misled Blue Buffalo as to the products Diversified agreed to provide and delivered, that is not Wilbur-Ellis' responsibility.

Of course, Blue Buffalo has denied any liability to Purina and the public, and Blue Buffalo could and should have waited to see what liability, if any, it has before asserting claims against minor third-party players such as Wilbur-Ellis. At that point, Blue Buffalo would have known the basis, if any, for its liability, and could have brought focused and reasonable claims, if any, against third parties. Blue Buffalo already had sought discovery from Wilbur-Ellis and was poised to take more, so Blue Buffalo did not need to make Wilbur-Ellis a party for the sake of discovery.

However, Blue Buffalo did not wait and hurled the kitchen sink at Wilbur-Ellis as an ostensible third-party defendant. Instead of simply making the breach of contract and warranty claims that it might have asserted once liability became known, Blue Buffalo seeks to bring a dozen claims against Wilbur-Ellis, including many that are patently improper, as explained below. This scorched-earth approach unnecessarily burdens Wilbur-Ellis and Diversified, the other parties to this litigation, and, unavoidably, the Court.[1]

Specific evidence as to what Blue Buffalo knew about the ingredients it purchased from Diversified, when it knew, and whether that knowledge bars Blue Buffalo's claims here must

[1] Inexplicably, Blue Buffalo pleads the same causes of action for the same alleged liability against Wilbur-Ellis in both this action and in the MDL class action proceeding before this Court. The indemnity and contribution claims in the third-party complaint against Wilbur-Ellis in this action explicitly include indemnity and contribution as to liability Blue Buffalo may have to consumer plaintiffs in the MDL action. *See* Dkt. 271 at 73, ¶ 215 (referring to Blue Buffalo's potential liability in MDL class action); *id.* at 81, ¶ 280 (seeking indemnity, *inter alia*, to the extent "Blue Buffalo may be held liable . . . to consumers who purchased Blue Buffalo's products"); *id.* at 82, ¶ 284 (seeking contribution in the event "Blue Buffalo may be held liable . . . to consumers who purchased Blue Buffalo's products").

Yet Blue Buffalo *also* filed a separate third-party complaint against Wilbur-Ellis in the MDL action, seeking indemnity and contribution *for the exact same potential liability* of Blue Buffalo. *See* No. 4:14-md-02562-RWS (E.D. Mo.), Dkt. No. 61 at 6, ¶¶ 20-22 (seeking indemnity for potential class action liability); *id.* at 6-7, ¶¶ 24-25 (seeking contribution for potential class action liability). The tactic of asserting indemnity and contribution claims against Wilbur-Ellis in both proceedings serves no purpose other than to harass and impose additional burden and expense on Wilbur-Ellis.

wait for another day. Ultimately, Blue Buffalo may try to establish that its supplier's supplier, Wilbur-Ellis, somehow breached a warranty, or owed a contractual duty to a party such as Blue Buffalo. Wilbur-Ellis believes Blue Buffalo will not succeed on such claims, because Wilbur-Ellis disclosed the nature of its products and conformed with widely understood and adopted industry practice. But in any case, Blue Buffalo may not pursue its barrage of wide-ranging tort theories here. Specifically, as explained below, the economic loss doctrine bars Blue Buffalo from asserting its four tort claims—fraudulent and negligent misrepresentation, fraud in the inducement, and negligence—for what is a contract or warranty dispute seeking economic damages.

In addition, Blue Buffalo's odd attempt to state a claim under California's Unfair Competition Law—a claim that has nothing to do with California and would not be proper even if it did—also must be dismissed as a matter of law. Finally, Blue Buffalo's claims for indemnity and contribution cannot proceed here as a matter of law because Blue Buffalo is not entitled to seek indemnity or contribution with respect to the specific claims asserted against it by Purina—and any other indemnity or contribution Blue Buffalo might seek as to Wilbur-Ellis is part of Blue Buffalo's third-party complaint in the MDL action also before this Court.

II. ARGUMENT[2]

A. As a Matter of Law, Blue Buffalo's Tort Claims Must be Dismissed Under the Economic Loss Doctrine.

In addition to a contract claim and two warranty claims, Blue Buffalo asserts a series of tort claims against Wilbur-Ellis, including intentional/fraudulent misrepresentation (Claim 4),

[2] In recognition of the Court's familiarity with this proceeding and in the interest of efficiency, pertinent factual allegations relevant to each of Blue Buffalo's claims at issue on this motion are set out below in the discussion of specific claims, rather than in a separate section.

negligent misrepresentation (Claim 5), fraud in the inducement (Claim 6), and negligence (Claim 7). *See* Third-Party Complaint, Dkt. 271 at 75-78, ¶¶ 234-58. These claims are all barred by the economic loss doctrine and must be dismissed as a matter of law.

Under the economic loss doctrine, a commercial buyer of goods is prohibited "from seeking to recover in tort for economic losses that are contractual in nature." *Dannix Painting, LLC v. Sherwin-Williams Co.*, 732 F.3d 902, 905-06 (8th Cir. 2013) (citation and internal quotation marks omitted). As the Supreme Court has noted, "[g]iven the availability of warranties, the courts should not ask tort law to perform a job that contract law might perform better." *Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 880 (1997); *accord Dannix Painting, LLC*, 732 F.3d at 908. Thus, "remedies for economic loss sustained by reason of damage to or defects in products sold are limited to those under the warranty provisions of the UCC." *Renaissance Leasing, LLC v. Vermeer Mfg. Co.*, 322 S.W. 3d 112, 130-31 (Mo. 2010) (*en banc*).

Here, the injuries alleged by Blue Buffalo's tort claims against Wilbur-Ellis are contractual in nature, and the losses alleged are purely economic.

1. The Economic Loss Doctrine Bars Blue Buffalo's Tort Claims Because They Seek to Recover Losses That Are Contractual in Nature.

Blue Buffalo alleges four tort claims against Wilbur-Ellis: intentional/fraudulent misrepresentation, negligent misrepresentation, fraud in the inducement, and negligence. *See* Dkt. 271 at 75-78, ¶¶ 234-58. However, each of Blue Buffalo's tort claims arises out of its alleged contractual relationships with Diversified Ingredients and Wilbur-Ellis concerning goods governed by the Uniform Commercial Code. Courts have ruled that the economic loss doctrine bars each of these claims in the circumstances alleged here.

a) Blue Buffalo's Two Misrepresentation Claims Are Barred by the Economic Loss Doctrine.

Blue Buffalo asserts two misrepresentation claims against Wilbur-Ellis, one for intentional or fraudulent misrepresentation and one for negligent misrepresentation. *See* Dkt. 271 at 75-77, ¶¶ 234-47. The two claims allege essentially the same conduct: that Wilbur-Ellis, whether intentionally or negligently and whether directly or indirectly, made false representations about shipments of products it was providing (in particular, that the shipments met Blue Buffalo's specifications) and that Blue Buffalo paid for the products based on those false representations. *Compare id.* at 75-76, ¶¶ 234-40, *with id.* at 76-77, ¶¶ 241-47. In short, the claims assert that Blue Buffalo did not get what it thought it was getting and what it paid for.

Two recent Eighth Circuit decisions bar a negligent misrepresentation claim in such circumstances under Missouri's economic loss doctrine. In *Dannix*, *supra*, the plaintiff accused the defendant of negligently misrepresenting a particular type of paint as being suitable for a project. 732 F.3d at 906. Finding the claim barred by the economic loss doctrine, the Eighth Circuit noted that it found no Missouri case "allowing a commercial buyer of goods under the U.C.C. to maintain a negligent misrepresentation claim against the seller based upon the seller's recommendation as to the fitness or performance of those goods." *Id*. at 907. Similarly, in *Graham Construction Services v. Hammer & Steel, Inc.*, 755 F.3d 611 (8th Cir. 2014), a construction company accused an equipment lessor of making false representations about the suitability of drilling equipment for a particular project. *Id*. at 616. The Eighth Circuit vacated a jury verdict in favor of the plaintiff and entered judgment for the defendant, because the negligent misrepresentation claim was "the essence of a warranty action" barred by the economic loss doctrine. *Id*. at 617.

Similarly, here, Blue Buffalo is a commercial buyer of goods, while the defendant, Wilbur-Ellis, allegedly made representations about the fitness of the goods for Blue Buffalo's "specifications." *See* Dkt. 271 at 76, ¶ 242; *accord id.* at 75-76, ¶ 235. That is, Blue Buffalo essentially alleges here that it did not receive the goods it was told it would receive and for which it paid. But as the Eighth Circuit has held, there is no basis for a commercial buyer of goods under the U.C.C. to bring a negligent misrepresentation claim based on the seller's recommendation of the fitness of the goods. *See Dannix*, 732 F.3d at 907.

Courts in this District have applied this rule to claims of fraudulent misrepresentation as well. In *Trademark Medical, LLC v. Birchwood Labs., Inc.*, 22 F. Supp. 3d 998, 1004 (E.D. Mo. 2014) (Ross, J.), for example, plaintiff Trademark Medical sought to pursue a claim for fraudulent misrepresentation, alleging that the defendant

> 'represented to its distributors and/or customers, including Trademark Medical, that the mouthwash was safe for use including for use in the Plak-Vac Oral Care System which defendant knew would be sold to medical providers and their patients for patient oral care.' Trademark Medical alleged damages resulting from the expense of the recall, loss of business from sales of its oral care kits, loss of existing contracts and lost revenues, and lost goodwill in the marketplace.

Id. at 1001 (internal citation omitted). The court held that, under Missouri law, "'a fraud claim to recover economic losses must be independent of the contract or such claim would be precluded by the economic loss doctrine.'" *Id.* at 1003 (citation omitted); *accord Self v. Equilon Enters.*, LLC, No. 4:00CV1903TA, 2005 WL 3763533, at *11 (E.D. Mo. Mar. 30, 2005). But the claim was not independent, as the *Trademark Medical, LLC* court explained:

> Trademark Medical alleges that Birchwood represented its 'mouthwash would be mixed with purified water and was safe for use.' Where the representation concerns the quality or safety of the goods sold, the Eighth Circuit has held that the economic loss doctrine bars the fraud claims because they are 'substantially redundant' with warranty claims. *Marvin Lumber and Cedar Co. v. PPG Industries, Inc.*, 223 F.3d 873, 885 (8th

> Cir.2000). Here, the only fraud Trademark Medical alleges arises out of the same facts that serve as the basis for its breach of warranty claims.

22 F. Supp. 3d at 1003 (record citation omitted); *accord Zoltek Corp. v. Structural Polymer Group, Ltd.*, No. 4:08-CV-460 (CEJ), 2008 WL 4921611, at *4 (E.D. Mo. Nov. 13, 2008) (fraud claim "is not outside or collateral to the [contract] and thus is barred by the economic loss doctrine").

Here, too, the core allegations of Blue Buffalo's fraudulent misrepresentation claim are that Wilbur-Ellis knowingly and falsely represented that its shipments complied with certain specifications, that Wilbur-Ellis intended for Blue Buffalo to rely on this misrepresentation, and that Blue Buffalo did so rely by "accepting and paying for the shipments"—that is, contracting for them. Dkt. 271 at 75-76, ¶¶ 235-38. These allegations track precisely the allegations of Blue Buffalo's express warranty and contract claims, which allege that Wilbur-Ellis made false representations that its products complied with certain specifications, that Blue Buffalo relied on those representations, and that those representations were a basis of the bargain between Blue Buffalo and Wilbur-Ellis. *Id.* at 73-73, ¶¶ 217-27. Just as in *Trademark Medical, LLC* and *Self*, the alleged misrepresentation underlying the fraud claim is the same as the "alleged misrepresentation . . . incorporated into the parties' contract"—here, the contention that Wilbur-Ellis represented its products met certain specifications. *Trademark Med., LLC.*, 22 F. Supp. 3d at 1003; *see Self*, 2005 WL 3763533 at *11. Accordingly, the intentional/fraudulent misrepresentation claim also is barred by the economic loss doctrine.

b) Blue Buffalo's Fraud in the Inducement Claim Is Barred By the Economic Loss Doctrine.

Blue Buffalo also asserts a claim for fraudulent inducement that is effectively indistinguishable from its fraudulent misrepresentation claim. As in that claim, Blue Buffalo alleges that Wilbur-Ellis made false representations that its products met certain specifications,

inducing Blue Buffalo to enter into contacts to purchase those products. *See* Dkt. at 77-78, ¶¶ 249-54; *compare id.* at 75-76, ¶¶ 235-40. And, like its fraudulent misrepresentation claim, Blue Buffalo's fraud in the inducement claim is barred by the economic loss doctrine.

Of course, fraudulent inducement claims can sometimes fall outside the economic loss doctrine, where they "plead breach of a duty extrinsic to the contract." *Dubinsky v. Mermart, LLC*, No. 4:08CV1806, 2009 WL 1011503, at *6 (E.D. Mo. Apr. 15, 2009) (citation and internal quotation marks omitted), *aff'd*, 595 F.3d 812, 820 (8th Cir. 2010). As the Eighth Circuit has explained, "[a] fraud claim independent of the contract is actionable, but it must be based upon a misrepresentation that was outside of or collateral to the contract, such as many claims of fraudulent inducement." *AKA Distrib. Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1086 (8th Cir. 1998) (citation omitted); *accord Compass Bank v. Eager Rd. Assocs., LLC*, 922 F. Supp. 2d 818, 827 (E.D. Mo. 2013).

Where, in contrast, "the subject matter of the alleged misrepresentations was incorporated into the parties' contract," a fraudulent inducement claim will not be independent of the contract and so will be barred by the economic loss doctrine. *Compass Bank*, 922 F. Supp. 2d at 827. So, for example, in *Compass Bank*, the plaintiffs alleged "that Defendants made pre-contract misrepresentations with respect to their ability to perform obligations that became part of the parties' contract. These asserted misrepresentations—concerning subject matter incorporated within the four corners of the contract—are insufficient to state a claim for fraud." *Id.* at 827-28 (citations omitted). Similarly, in *Dubinsky*, the plaintiffs alleged that the defendant developers "knew that its representations concerning the absence of lead-based paint were false" representations that were part of the parties' contract. *Dubinsky*, 2009 WL 1011503 at *6. The court explained that "[t]he economic loss doctrine is no less applicable in this case simply

because the plaintiffs alleged that they were induced into purchasing the bonds as a result of defendant's misrepresentations." *Id*. at *7; *see id.* at *6 (where the "alleged misrepresentation only concerns the quality of the subject matter at issue in the contract," fraudulent inducement claim barred) (citation omitted).

Here, Blue Buffalo's allegations of "material false representations" in its fraud in the inducement claim all relate to the quality of the product that Wilbur-Ellis sold to Diversified, and that Diversified sold to Blue Buffalo. *See* Dkt. 271 at 77, ¶¶ 249-50. In particular, the third-party complaint alleges that Wilbur-Ellis falsely represented that its chicken and turkey meal would meet Blue Buffalo's specifications and complied with AAFCO ingredient definitions. *Id.* at 77, ¶ 250. These are exactly the same allegations that form the basis for Blue Buffalo's contract and warranty claims—contentions that Wilbur-Ellis breached contractual obligations because its products did not meet certain specifications. *See id.* at 73, ¶ 219; *id.* at 74, ¶ 224; *id.* at 75, ¶¶ 230-32. And, these are all representations relating to the "quality of the subject matter at issue in the contract." Like the plaintiff in *Dubinsky*, Blue Buffalo has just "re-style[d] [its] breach of contract claim" as a fraud claim, so the fraud claim is barred. *Dubinsky*, 2009 WL 1011503 at *7; *see Compass Bank*, 922 F. Supp. 2d at 827-28.

c) Blue Buffalo's Negligence Claim is Barred by the Economic Loss Doctrine.

Blue Buffalo's last tort claim, for negligence, also improperly seeks relief for alleged injuries that are contractual in nature. Both the Eighth Circuit and the Missouri Supreme Court have held that Missouri law precludes recovery on a negligence cause of action seeking damages for only economic loss. *See R.W. Murray Co. v. Shatterproof Glass Corp.*, 697 F.2d 818, 828 (8th Cir. 1983); *Crowder v. Vandendeale*, 564 S.W.2d 879, 884 (Mo. 1978). In *R.W. Murray*, the plaintiffs alleged that the defendants negligently supplied them with defective construction

materials. 679 F.2d at 820. The Eighth Circuit held that the rule of *Crowder*, "that recovery in tort is limited to cases in which there has been 'personal injury, or property damage either to property other than the property sold, or to the property sold when it was rendered useless by some violent occurrence,' precludes the appellants from pursuing a negligence cause of action seeking recovery for only economic loss." *Id.* at 828-29. Rather, the Eighth Circuit held, the plaintiff was restricted to proceeding on warranty claims. *Id.*

Blue Buffalo's negligence claim simply alleges that Wilbur-Ellis "owed Blue Buffalo a duty of care in connection with [the] provision of chicken and turkey meal" and that Wilbur-Ellis was negligent in "failing to take commercially reasonable measures to ensure that the product they provided was free of material amounts of by-product or feathers." Dkt. 271 at 78, ¶¶ 256-57. This claim asserts the same conduct and the same injury as Blue Buffalo's contract claims. *See id.* at 73-75, ¶¶ 217-33. So, Blue Buffalo essentially alleges that Wilbur-Ellis was negligent in failing to fulfill its contractual duty to provide products that met certain specifications—a claim barred by the economic loss doctrine. *See Dubinsky*, 2009 WL 1011503 at *5 (negligence claim barred where it "in essence, states that defendant breached [a] contractual duty"); *R. W. Murray Co. v. Shatterproof Glass Corp.*, 529 F. Supp. 297, 300 (E.D. Mo. 1981) ("there is no justification for allowing [the plaintiff] to bring a parallel claim for economic loss based on a negligence theory"), *aff'd in part, rev'd in part*, 697 F.2d 818 (8th Cir. 1983); *see generally Am. Mortg. Inv. Co. v. Hardin-Stockton Corp.*, 671 S.W.2d 283, 293 (Mo. Ct. App. 1984) ("The courts of our state have never recognized the mere breach of a contract as providing a basis for tort liability.").

2. The Economic Loss Doctrine Also Bars Blue Buffalo's Tort Claims Because They Allege Purely Economic Damages.

Courts have also barred tort claims where they seek purely economic damages that should be properly sought, if at all, through contract law. Under Missouri law, "economic loss" is defined as the "cost of repair and replacement of defective property which is the subject of the transaction, as well as commercial loss for inadequate value and consequent loss of profits or use." *Dannix*, 732 F.3d at 905 (citation and internal quotation marks omitted). Economic loss includes "consequential economic loss such as loss of profits and loss of good will or business reputation." *Trademark Med., LLC*, 22 F. Supp. 3d at 1004 (citing *Glaxosmithkline Consumer Healthcare, L.P. v. ICL Performance Prods. LP*, No. 4:07CV2039HEA, 2008 WL 880173, at *3 (E.D. Mo. Mar. 31, 2008)). "Recovery in tort for pure economic damages are only limited to cases where there is personal injury, damage to property other than that sold, or destruction of the property sold due to some violent occurrence." *Graham Const. Svcs.*, 755 F.3d at 616 (applying Missouri law) (citation and internal quotation marks omitted).

Blue Buffalo does not claim any such damages here. It pleads solely economic injuries that fall within the scope of contract law. Blue Buffalo's only allegations of injury assert (1) that the market price for the chicken and turkey meal Blue Buffalo claimed it required was higher than the market price for poultry byproduct meal, thus depriving Blue Buffalo of "the benefit of its bargain," (2) that Blue Buffalo suffered a loss of consumer goodwill, and (3) that Blue Buffalo is exposed to potential liability in this and other actions pending in this Court. Dkt. 271 at 72-73, ¶¶ 213-15. These are the "consequential economic loss[es]" that courts in Missouri have held are encompassed by the economic loss doctrine, such that they cannot support an independent tort claim. *See Trademark Med., LLC*, 22 F. Supp. 3d at 1001 (allegations of "the expense of the recall, loss of business from sales of its [products], loss of existing contracts and

lost revenues, and lost goodwill in the marketplace" all within economic loss doctrine, so fraudulent misrepresentation claim barred); *Glaxosmithkline*, 2008 WL 880173 at *3 (E.D. Mo. Mar. 31, 2008) ("the economic loss doctrine encompasses damage to a product's reputation and goodwill."); *Self*, 2005 WL 3763533, at *12 (E.D. Mo. Mar. 30, 2005) (concluding that harm to future business expectations is a "purely economic loss[]"). So Blue Buffalo's tort claims seek only economic loss damages and are barred for this reason, too.

B. Blue Buffalo's Tenth Claim for Relief, under California's Unfair Competition Law, Must Be Dismissed as a Matter of Law.

The tenth claim for relief purports to allege a violation of California's Unfair Competition Law ("UCL"), California Business & Professions Code Section 17200 *et. seq.* *See* Dkt. 271 at 80, ¶¶ 271-78. Specifically, this claim alleges that Wilbur-Ellis engaged in fraudulent and unfair business acts by making "false or misleading statements" about "its products and/or manufacturing processes." *Id.* at 80-81, ¶¶ 272-74. This claim fails as a matter of law for two independent reasons.

1. Because It Is Not a Consumer or a Competitor of Wilbur-Ellis, Blue Buffalo Lacks Standing to Bring an Action Under the UCL.

California's UCL prohibits "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by [the false advertising law (§ 17500 et seq.)]." Cal. Bus. & Prof. Code § 17200. The purpose of the UCL is "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." *Kasky v. Nike, Inc.*, 27 Cal. 4th 939, 949 (2002). While the UCL protects consumers and competitors, "California courts have refused to allow commercial parties to use § 17200 to resolve disputes over their economic relationships." *Graphic Pallet & Transp., Inc. v. Balboa Capital Corp.*, No. 11 C 9101, 2012 WL 1952745, at *6 (N.D. Ill. May 30, 2012). In fact, a corporate plaintiff may not rely on the UCL where such an action "is based

on contracts not involving either the public in general or individual consumers who are parties to the contract." *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 135 (2007). Consequently, "dismissal of UCL actions is appropriate when the plaintiff is neither a competitor nor a consumer." *Dillon v. NBCUniversal Media LLC*, No. CV 12–09728 SJO (AJWx), 2013 WL 3581938, at *7 (C.D. Cal. June 18, 2013).

In *Linear Technology Corp.*, for example, Linear was sued in federal court for patent infringement. It then filed a third-party complaint (later severed and re-filed in state court) alleging that certain other parties were responsible for the infringement and had breached a "warranty of non-infringement." 152 Cal. App. 4th at 121. The Court of Appeal affirmed dismissal of the UCL claim, explaining:

> Here, the alleged victims are neither competitors nor powerless, unwary consumers, but Linear and other corporate customers in Silicon Valley, 'each of which presumably has the resources to seek damages or other relief . . . should it choose to do so.' And the source of the fraudulent and unfair practices is the misrepresentation made in purchase orders between respondent sellers and Linear, in which each seller warranted that no infringement claim would result from Linear's use of that seller's equipment. . . . *In these circumstances, where a UCL action is based on contracts not involving either the public in general or individual consumers who are parties to the contract, a corporate plaintiff may not rely on the UCL for the relief it seeks.*

Id. at 135 (emphasis added); *see Rosenbluth Int'l, Inc. v. Superior Court*, 101 Cal. App. 4th 1073, 1077 (2002).

Here, Blue Buffalo does not allege that it is either a competitor or a consumer. Nor could it. Blue Buffalo styles itself a large, sophisticated corporation—"the number one natural pet food brand in the United States and the number one brand in pet specialty stores across the United States" (Dkt. 271 at 24, ¶ 30)—and a commercial customer of Diversified Ingredients, which in turn is alleged to have been a customer of Wilbur-Ellis. *See* Dkt. 271 at 58-60, ¶¶ 154-60. And, just as in *Linear Technology Corp.*, Blue Buffalo's alleged harm arises from

commercial contracts it allegedly entered into—"binding, enforceable contracts," according to its third-party complaint. *Id.* at 73, ¶ 218. As in *Linear Technology Corp.*, Blue Buffalo cannot invoke California's UCL based on alleged misrepresentations made in a commercial contract. *See* 152 Cal. App. 4th at 135.

2. As a Matter of Law, the UCL Does Not Apply To Alleged Conduct and Injury Outside California.

In addition, Blue Buffalo's UCL claim must be dismissed because Blue Buffalo is an out-of-state party alleging conduct and injury that occurred outside of California.

California courts have repeatedly held that the UCL should not apply when "injuries [are] suffered by non-California residents, caused by conduct occurring outside of California's borders." *Norwest Mortg., Inc. v. Superior Court*, 72 Cal. App. 4th 214, 225 (1999); *see Fontenberry v. MV Transp., Inc.*, 984 F. Supp. 2d 1062, 1067 (E.D. Cal. 2013) ("California's UCL may only be applied extraterritorially where the unlawful conduct that forms the basis of the out-of-state plaintiff's claim occurs in California."); *Standfacts Credit Servs., Inc., v. Experian Info. Solutions, Inc.*, 405 F. Supp. 2d 1141, 1148 (C.D. Cal. 2005) ("the UCL does not apply to actions occurring outside of California that injure non-residents"). For example, in *Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011), plaintiffs sought to apply the UCL based on Fair Labor Standards Act ("FLSA") claims against Oracle Corporation. The plaintiffs relied on allegations that Oracle was headquartered in California and that the decision to classify certain employees as exempt from the FLSA overtime wage requirements was made primarily in the California office. *Id.* The California Supreme Court held that a UCL claim could not be asserted by out-of-state plaintiffs who were not paid overtime wages for work done in other states, even if the decision about overtime wages was made in California. *Id.*

Here, the allegations of the third-party complaint establish that, as to California, Blue Buffalo is an out-of-state party that did not suffer any alleged injury in that state. Blue Buffalo alleges that it is a Delaware corporation headquartered in Connecticut. Dkt. 271 at 55, ¶ 140. There are no allegations that Blue Buffalo has ties to California, let alone relevant ones. Nor are there any allegations of any relevant conduct in California (other than Wilbur-Ellis being incorporated and headquartered there).

In fact, the only allegations of conduct as to Wilbur-Ellis are of conduct outside California—specifically, Blue Buffalo alleges that Wilbur-Ellis made hundreds of shipments "from its Rosser, Texas plant." Dkt. 271 at 63-64, ¶¶ 178-79. Additional allegations contain specific information about the purported processes at the Texas plant. *See* Dkt. 271 at 65-67, ¶¶ 188, 190, 192, 195.

Nor does Blue Buffalo allege that any harm was suffered in California. Indeed, its UCL claim alleges only that "wrongful acts have proximately caused Blue Buffalo to suffer ascertainable loss of money or property"—without any reference to where the harm occurred. Dkt. 271 at 81, ¶ 277. This is in notable contrast to Blue Buffalo's cause of action under the Connecticut Unfair Trade Practices Act, which includes a specific allegation that wrongful acts "have proximately caused Blue Buffalo to suffer ascertainable loss of money or property *within the State of Connecticut*." Dkt. 271 at 80, ¶ 269 (emphasis added).

Without any allegation that relevant conduct or resulting harm occurred in California, Blue Buffalo cannot properly assert a violation of California's UCL. *See Norwest Mortg., Inc.*, 72 Cal. App. 4th at 222; *Fontenberry, Inc.*, 984 F. Supp. 2d at 1067; *Standfacts Credit Servs., Inc.*, 405 F. Supp. 2d at 1148.

C. Blue Buffalo's Contribution and Indemnity Claims Should be Dismissed as a Matter of Law.

Blue Buffalo's third-party complaint also asserts claims for indemnity and contribution. *See* Dkt. 271 at 81-82, ¶¶ 279-85. To the extent these two claims seek to recover with respect to any liability that Blue Buffalo may have to Purina on its claims against Blue Buffalo, the indemnity and contribution claims are barred as a matter of law.[3]

Two of Purina's claims against Blue Buffalo, for false advertising and commercial disparagement, are brought under the Lanham Act. *See* Dkt. 104 at 28-30, ¶¶ 59-74 (Counts I and II). However, federal courts have held that there is no right of indemnification or contribution as to claims brought under the Lanham Act. *See, e.g.*, *Getty Petroleum Corp. v. Island Transp. Corp.*, 862 F.2d 10, 16 (2d Cir. 1988) ("No express right of contribution exists under the Lanham Act, and [the district court] correctly concluded that it was inappropriate to imply such a right."); *Anderson v. Griffin*, 397 F.3d 515, 523 (7th Cir. 2005) ("[c]ourts have become reluctant to recognize a right of contribution as a matter either of federal common law or of statute;" recognizing that contribution not available as to Lanham Act); *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 69 F. Supp. 2d 678, 681–84, 687 (M.D.Pa. 1999) ("there is no right to contribution for violations of the Lanham Act" and "there is no federal common law

[3] To the extent Blue Buffalo may contend that the indemnification and contribution claims in this action extend to liability Blue Buffalo may have to consumer plaintiffs in the MDL proceeding, such indemnification and contribution claims would be entirely duplicative of Blue Buffalo's third-party complaint against Wilbur-Ellis in the MDL proceeding, as noted above. *See supra*, at 2 n.1.

Accordingly, to the extent Blue Buffalo argues that its claims for indemnification and contribution in this action should proceed as to its potential liability in the MDL action, the third-party complaint against Wilbur-Ellis in the MDL action should be dismissed entirely. *See Missouri ex rel. Nixon v. Prudential Health Care Plan, Inc.*, 259 F.3d 949, 953-54 (8th Cir. 2001) (under a "a prudential limitation on the exercise of federal jurisdiction," "Plaintiffs may not pursue multiple federal suits against the same party involving the same controversy at the same time").

right to indemnification and Congress has not explicitly or implicitly provided such a right to indemnification under . . . the Lanham Act. Thus indemnification with respect to violations of federal law is foreclosed.").[4]

Purina has also asserted a claim against Blue Buffalo for common law unfair competition, accusing Blue Buffalo of acting "in bad faith in making claims about its products that it knew and knows to be materially false and deceptive," with "Blue Buffalo's misleading and deceptive statements . . . caus[ing] . . . consumers to purchase Blue Buffalo's products over the products of competitors, including Purina." *See* Dkt. 104 at 30-31, ¶¶ 76-78. But a party such as Blue Buffalo may not seek indemnification or contribution for liability arising from intentional conduct. *See Purk v. Purk*, 817 S.W.2d 915, 917 (Mo. Ct. App. 1991) (Non-contractual indemnity allowed only to "one who *without any fault on his or her part* is exposed to liability because of the wrong-doing of another") (emphasis added) (citing *Campbell v. Preston*, 379 S.W.2d 557, 559 (Mo. 1964)); *TCI Cablevision, Inc. v. City of Jefferson, Mo.*, 604 F. Supp. 845, 847 (W.D. Mo. 1984) ("Nor does Missouri law allow a party who was adjudged liable under an intentional tort theory to bring a separate action for contribution."). So if Purina were to succeed

[4] *See also Elsevier, Inc. v. Comprehensive Microfilm & Scanning Servs., Inc.*, No. 3:10–cv–2513, 2012 WL 727943, at *4 (M.D. Pa. Mar. 6, 2012) ("Third–Party Defendants argue that Defendants are unable to adequately maintain an action against them for indemnity and contribution under . . . the Lanham Act . . . . They are correct. . . . The Lanham Act was not designed to protect trademark violators by allowing them to mitigate the effects of their wrongdoing by invoking equitable principles in an effort to distribute blame."); *Akhenaten v. Najee, L.L.C.*, No. 1:07–cv–00970–RJH, 2009 WL 794485, *2 (S.D.N.Y. Mar. 27, 2009), *amended in part*, No. 07 CV 970 (RJH), 2010 WL 305309, at *1 (S.D.N.Y. Jan. 26, 2010); *Wagner v. Circle W. Mastiffs*, No. 2:08-CV-00431, 2010 WL 1009904, at *9-10 (S.D. Ohio Mar. 12, 2010); *Gamla Enters. N. Am., Inc. v. Lunor-Brillen Design U. Vertriebs GmbH*, No. 98 CIV. 992 (MGC), 2000 WL 193120, at *6 (S.D.N.Y. Feb. 17, 2000) (denying motion to file a third-party complaint for contribution as to Lanham Act claims "because the proposed third-party complaint does not state a claim upon which relief can be granted"); *see also Zero Tolerance Entm't, Inc. v. Ferguson*, 254 F.R.D. 123, 127 (C.D. Cal. 2008) (denying motion for impleader for contribution claims).

in imposing unfair competition liability on Blue Buffalo, Blue Buffalo would not be entitled to indemnification or contribution.

Finally, Purina asserts a claim for unjust enrichment, contending that Blue Buffalo made sales (at a lower cost to itself) that it would not have made without the alleged misconduct and "should not be permitted to retain these unjustly acquired gains." *See* Dkt. 104 at 31-32, ¶¶ 80-83. Blue Buffalo cannot plausibly seek indemnification or contribution as to this claim. Any finding that Blue Buffalo was unjustly enriched would require a finding that Blue Buffalo was enriched by a benefit that it "would be unjust to allow [it] to retain." *Beeler v. Martin*, 306 S.W.3d 108, 112 (Mo. Ct. App. 2010); *see Pitman v. City of Columbia*, 309 S.W.3d 395, 403 (Mo. Ct. App. 2010) ("The essence of unjust enrichment is that the defendant has received a benefit that it would be inequitable for him to retain."). If Purina establishes this claim, it would make no sense to allow Blue Buffalo to seek indemnification or contribution from a third-party defendant for monies that the Court has necessarily held should never have been in the hands of Blue Buffalo—this would only perpetuate and transfer the inequity. *See generally Myzel v. Fields*, 386 F.2d 718, 744 n.21 (8th Cir. 1967) (in "an action for . . . unjust enrichment . . . only those who have benefited are liable, and then only to the extent thereof") (citing Restatement (First) of Restitution § 5, comments (a) and (b) (1937)). For these reasons, Blue Buffalo cannot seek indemnity or contribution as to Purina's unjust enrichment claim.

III. CONCLUSION

For the foregoing reasons, the Court should dismiss with prejudice the claims against Wilbur-Ellis in Blue Buffalo's third-party complaint for intentional/fraudulent misrepresentation (4th claim), negligent misrepresentation (5th claim), fraud in the inducement (6th claim),

negligence (7th claim), violation of the California Unfair Competition Law (10th claim), indemnification (11th claim), and contribution (12th claim).[5]

DATED: July 2, 2015

s/ Simon J. Frankel

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[5] Although Wilbur-Ellis disputes the allegations in Blue Buffalo's Claims 1, 2, 3, 8, and 9, Wilbur-Ellis is not moving at this time to dismiss those claims, which allege breaches of contract and warranty, unjust enrichment, and violation of the Connecticut Unfair Trade Practices Act. Nonetheless, Wilbur-Ellis' filing of this motion to dismiss extends the time in which it must answer all counts within the complaint. *See Ideal Instruments, Inc. v. Rivard Instruments, Inc.*, 434 F. Supp. 2d 598, 639 (N.D. Iowa 2006) ("a motion pursuant to Rule 12(b), even one that challenges less than all of the claims asserted in the complaint or other pleading, extends the time to answer as to all claims in the pleading"); *see generally* 5B Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.* §1346, at 46 (3d ed. 2004) ("[T]he weight of the limited authority on this point is to the effect that the filing of a motion that only addresses part of a complaint suspends the time to respond to the entire complaint, not just to the claims that are the subject of the motion.") (collecting cases).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of July, 2015, the foregoing was filed electronically with the Clerk of the Court, to be served by operation of the Court's electronic filing system upon all counsel of record.

s/ Simon J. Frankel
Simon J. Frankel