

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NORTH AMERICAN ROOFING & SHEET	:	
METAL CO., INC. et al.,	:	
Plaintiffs	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 99-2050
BUILDING & CONSTRUCTION TRADES	:	
COUNCIL OF PHILADELPHIA & VICINITY,	:	
AFL-CIO et al.,	:	
Defendants	:	

MEMORANDUM AND ORDER

YOHN, J. February , 2000

Plaintiffs North American Roofing & Sheet Metal Co., Inc. [“North American”] and ANVI & Associates, Inc. [“ANVI”], their principles, Timothy Mancini and Kaitlin Do respectively, and several of their employees, Jose Mora and Francisco Lopez [“North American employees”] and Travis Nguyen and Vinh Nguyen [“ANVI employees”], brought suit against the owners of a public housing complex, National Equity Fund, Inc. [“NEF”] and Southwark Plaza Limited Partnership [“SPLP”], the general contractor for construction of the complex, Shoemaker/Dale Joint Venture Corp. [“Shoemaker/Dale J.V.”], a joint venture between Dale

Corp. and R.M. Shoemaker Co.,¹ as well as various unions² with members doing construction work there and certain of the unions' officers.³

In their first amended complaint, the plaintiffs assert claims that Shoemaker/Dale violated the plaintiffs' civil rights (Counts VII-X), breached contracts with North American (Count XI), and committed two state law torts involving misrepresentation (Counts XII-XIII). Pending before the court is the motion to dismiss these claims filed by Shoemaker/Dale (Doc. No. 26).

The court will grant this motion with respect to the § 1981 civil rights claim as it relates to all of the plaintiffs except North American because all of the plaintiffs except North American lack standing. The court will also grant this motion with respect to the § 1985(3) claims because the plaintiffs fail to sufficiently allege Shoemaker/Dale's participation in any conspiracy. Additionally, the court will grant this motion with respect to the misrepresentation claims because of the application of the parol evidence rule to the fraudulent misrepresentation claim and the economic loss doctrine to the negligent misrepresentation claim. The court will,

¹Shoemaker/Dale J.V., Dale Corp., and R.M. Shoemaker Co. may be referred to collectively as "Shoemaker/Dale."

²The unions named as defendants are Roofers Local 30 ["Local 30"], Sheet Metal Workers' International Association, Local Union 19 ["Local 19"], Local Union 98, International Brotherhood of Electrical Workers ["Local 98"], Metropolitan Regional Council of Philadelphia and Vicinity, United Brotherhood of Carpenters and Joiners of America ["Carpenters"], and Steamfitters Local Union 420 ["Local 420"]. The Building and Construction Trades Council of Philadelphia and Vicinity, AFL-CIO ["BCTC"], an association of local trade unions, is also named as a defendant. These entities may be collectively referred to as "unions."

³The union officers named as defendants are Thomas Pedrick, President of Local 30, Thomas Kelley, President of Local 19, John Dougherty, President of Local 98, Edward Coryell, Executive Secretary and Business Manager of Carpenters, and Daniel Hill, Business Agent of Local 420. Patrick Gillespie, the Business Manager of BCTC, was also named as a defendant. These people may be collectively referred to as "union officers."

however, deny the motion to dismiss with respect to the plaintiffs' other claims against Shoemaker/Dale.

I. Background

The first amended complaint contains the following allegations. This case arose from construction of Southwark Plaza, a public housing project. *See* First Am. Compl. (Doc. No. 22) [“Am. Compl.”] ¶ 1. In July, 1998, the unions threatened a work stoppage if Shoemaker/Dale J.V. contracted with any non-union subcontractors. *See id.* ¶ 45. On November 5, 1998, North American, a non-union roofer, contracted with Shoemaker/Dale J.V. as a subcontractor for roofing and vinyl siding work at Southwark Plaza. *See id.* ¶¶ 10, 47. In compliance with the minority hiring provisions of federal law, North American later subcontracted some of the vinyl siding work to ANVI, a non-union minority-/woman-owned business enterprise. *See id.* ¶¶ 38, 41, 50-51.

On January 27, 1999, Shoemaker/Dale's Project Superintendent, Frank Owens, made a derogatory comment about plaintiff Mora, calling him “just another Puerto Rican” after learning that he was deaf and could not hear verbal instructions. *Id.* ¶ 60. On February 3, 1999, Owens refused to let plaintiff Travis Nguyen drive his truck onto the job site in order to allow Nguyen easier access to his tools and materials even though Owens had allowed other white workers to do so. *See id.* ¶ 69. Owens also complained about the quality of Nguyen's work despite it's being more than satisfactory. *See id.* ¶ 70.

After learning that North American and ANVI were non-union subcontractors employing Hispanics and Asians, Local 30 began picketing North American and ANVI at 6:00 A.M. on

February 17, 1999, at the reserve gate Shoemaker/Dale had set up for that purpose. *See id.* ¶¶ 81, 87. At 7:45 A.M. on February 17, the union members staged a walkout and work stoppage that lasted at least until February 25, leaving the North American employees and the ANVI employees as the only people working at the site for that period of time. *See id.* ¶¶ 90-92. The work stoppage was intended to force Shoemaker/Dale to cease doing business with North American and ANVI. *See id.* ¶¶ 119-39. The North American employees, who are Hispanic, suffered acts of discrimination at the hands of union members or their compatriots on February 19, 22, and 23. *See id.* ¶¶ 95-100.

Sometime between February 17, 1999, and March 5, 1999, a minority subcontractor who is not a party to this litigation telephoned Local 30's president to ask that picketing be stopped and work be resumed. *See id.* ¶ 102. At the direction of Local 30's president, Local 30's business agent took the call and told the minority subcontractor that picketing would not cease until Mancini, the principal of North American, was gotten rid of. *See id.* ¶ 103.

On March 5, 1999, Shoemaker/Dale J.V. suspended North American's contracts and directed North American to vacate the premises. *See id.* ¶ 105. After North American left, all union members resumed working. *See id.* ¶ 107.

II. Legal Standard

Shoemaker/Dale has filed a motion to dismiss for failure to state claims upon which relief can be granted under Rule 12 (b)(6) of the Federal Rules of Civil Procedure. The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. *See Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). In deciding a motion to dismiss, the court must "accept as true

all allegations in the complaint and all reasonable inferences that can be drawn from them after construing them in the light most favorable to the non-movant.” *Jordan v. Fox, Rothschild, O’Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1991). At this stage of the litigation, then, “[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

III. Discussion

A. Count VII: Standing to Assert § 1981 Claims

In Count VII, the plaintiffs assert § 1981 claims against Shoemaker/Dale for interfering with their right to make and enforce North American’s contracts with Shoemaker/Dale J.V.⁴ *See* Am. Compl. ¶¶ 179, 181. In order to state a claim under § 1981, a plaintiff must allege: “(1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute.”⁵ *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 7 F.3d 1085, 1087 (2d Cir. 1993);

⁴The right of North American and ANVI to contract with their employees is cursorily mentioned once. *See* Am. Compl. ¶ 181. The court is persuaded, however, that the plaintiffs are not asserting § 1981 claims for interference with the making or enforcement of such contracts due to the absence of any other discussion of such contracts, as well as the failure of the plaintiffs to attach any such contracts to the first amended complaint as an exhibit, as they do with the contracts between North American and Shoemaker/Dale J.V. *See* Am. Compl. Exs. 1, 2.

⁵Although being a member of a racial minority is frequently listed as a required element of a § 1981 claim, courts allow corporations to maintain § 1981 actions if the corporation was discriminated against because of the race of its owner and/or its employees. *See, e.g., Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8, 14 (1st Cir. 1999); *Gersman v. Group Health Ass’n, Inc.*, 931 F.2d 1565, 1569-70 (D.C. Cir. 1991), *vacated and remanded*, 502 U.S. 1068 (1992), *and adopted*, 975 F.2d 886 (1992); *Hudson v. Radnor Valley Country Club*, No. CIV. A. 95-

see Seeney v. Kavitski, 866 F. Supp. 206, 211 (E.D. Pa. 1994) (listing the same elements and citing *Mian*), *aff'd*, 107 F.3d 8 (3d Cir. 1997). One of the activities protected by § 1981 is the right to make and enforce contracts.⁶ *See* 42 U.S.C. § 1981(a).

Someone who is not a party to a contract, however, does not have standing to make a § 1981 claim for interference with their right to make and enforce that contract. *See Hudson*, 1996 WL 172054, at *3 (concluding that the employees and principals of a valet parking company lacked standing to assert a § 1981 claim for interference with the making and enforcement of a contract between the valet parking company and the country club because the individual plaintiffs were not parties to the contract); *see also Danco*, 178 F.3d at 14 (stating that § 1981 does not provide a cause of action “to one who is merely affiliated—as an owner or employee—with a contracting party” that suffers interference with its making and enforcement of a contract); *Gersman*, 931 F.2d at 1569-70 (recognizing that a company’s shareholder has no standing to bring a § 1981 claim for interference with the making and enforcement of a contract to which the company, but not the shareholder, is a party). *Cf. Gregory v. Mitchell*, 634 F.2d 199, 202 (5th Cir. 1981) (noting that a shareholder has no standing to sue under the Civil Rights Act of 1866, codified in part at 42 U.S.C. § 1981, for damage suffered by the corporation in which the shareholder has an ownership interest).

4777, 1996 WL 172054, at *3 (E.D. Pa. Apr. 11, 1996).

⁶Section 1981 provides, in pertinent part: “All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” 42 U.S.C. § 1981(a).

Other than North American, none of the plaintiffs were parties to the contracts with Shoemaker/Dale J.V. *See* Am. Compl. Exs. 1, 2.⁷ Consequently, none of the plaintiffs except North American has standing to assert a § 1981 claim for interference with the right to make and enforce the contracts between North American and Shoemaker/Dale J.V.

The North American employees, the ANVI employees, as well as ANVI and its principal, claim that they are third party beneficiaries of the contracts between North American and Shoemaker/Dale J.V. *See* Pls.’ Mem. of Law in Opp’n to Defs.’ Mot. to Dismiss (Doc. No. 38) [“Pls.’ Mem.”] at 28. Applying Pennsylvania’s test for third party beneficiary status to these plaintiffs, however, reveals that they are not third party beneficiaries of the contracts between North American and Shoemaker/Dale J.V. In Pennsylvania, third party beneficiary status depends on satisfying a two part test:

(1) [T]he recognition of the beneficiary’s right must be “appropriate to effectuate the intention of the parties,” and (2) the performance must “satisfy an obligation of the promisee to pay money to the beneficiary” or “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.”

Guy v. Liederback, 459 A.2d 744, 751 (Pa. 1983) (quoting Restatement (Second) of Contracts § 302 (1979)). That Shoemaker/Dale J.V. required North American to comply with federal regulations concerning minority hiring does not render these plaintiffs third party beneficiaries and overcome their lack of standing. *See* Am. Compl. ¶¶ 38, 41, 50.

Because the North American employees, the ANVI employees, and ANVI and its principal lack standing, the court will grant the motion to dismiss with respect to Count VII

⁷The court may properly consider exhibits attached to the complaint in deciding a motion to dismiss. *See Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808, 812 (3d Cir. 1990).

insofar as that count asserts claims by those plaintiffs. The court will deny the motion to dismiss with respect to Count VII insofar as it states claims by North American.⁸

B. Counts VIII-X: § 1985(3) and § 1986 Claims

In Counts VIII and IX, the plaintiffs assert § 1985(3) conspiracy claims against the unions, union officers, and Shoemaker/Dale. *See* Am. Compl. ¶¶ 182-91 (asserting a § 1985(3) claim by North American, Mancini, and the North American employees), 192-201 (asserting a § 1985(3) claim by ANVI, Do, and the ANVI employees). In order to state a cause of action under § 1985(3), a plaintiff must allege:

- (1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons to [sic] the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States.

Lake v. Arnold, 112 F.3d 682, 685 (3d Cir. 1997) (citing *United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott*, 463 U.S. 825 (1983); *Griffin v. Breckenridge*, 403 U.S. 88, 91 (1971)).

Although the Federal Rules of Civil Procedure generally require only a short and plain statement of the facts to put a defendant on notice of a plaintiff's claim and the grounds on which the claim rests, *see* Fed. R. Civ. P. 8(a)(2); *Rannels v. S.E. Nichols, Inc.*, 591 F.2d 242, 245 (3d Cir. 1979) (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)), a plaintiff's complaint must contain more than conclusory allegations of conspiracy to support a § 1985(3) claim. *See D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1377 (3d Cir. 1992) (stating that

⁸The allegations of a hostile working environment are sufficient to allow the survival of such a § 1981 claim, as well. *See* Am. Compl. ¶¶ 60-61, 69-70, 177.

conclusory allegations are insufficient and requiring specific facts regarding a conspiracy to be pleaded in support of a § 1985(3) claim); *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1173 (3d Cir. 1978) (recognizing the requirement that a plaintiff allege specific facts in support of a § 1985(3) claim). The plaintiffs' first amended complaint lacks sufficient allegations of specific facts to support the assertion that Shoemaker/Dale participated in a conspiracy to deprive the plaintiffs of the equal protection of the laws.

Count VIII lacks any allegation—even a conclusory one—that Shoemaker/Dale conspired with anyone to do anything. Shoemaker/Dale is not alleged to have reached any agreement, either tacitly or expressly, with anyone. The only allegation in Count VIII at all related to Shoemaker/Dale's participation in a conspiracy states that Shoemaker/Dale furthered the conspiracy by tolerating and condoning the work stoppage and by eventually removing North American from the project. *See* Am. Compl. ¶ 190. That Shoemaker/Dale gave in to the unions' alleged demands does not demonstrate Shoemaker/Dale's participation in a conspiracy to force out North American. If Shoemaker/Dale had been a member of such a conspiracy, then the work stoppage would have been unnecessary: Shoemaker/Dale could have simply suspended North American's contracts without having to deal with the hassle of a work stoppage.

The absence of any allegations either that Shoemaker/Dale was a part of a conspiracy or of specific facts that would support the inference of Shoemaker/Dale's participation in a conspiracy are fatal to the plaintiffs' § 1985(3) claims against Shoemaker/Dale in Count VIII. Therefore, the court will grant Shoemaker/Dale's motion to dismiss with respect to Count VIII. The court will dismiss that count as it relates to Shoemaker/Dale without prejudice to the

plaintiffs' right to amend Count VIII within ten (10) days of the date hereof to remedy the deficiencies therein.

The plaintiffs' § 1985(3) claims in Count IX fare no better. In addition to the allegation that Shoemaker/Dale gave in to the unions' alleged demands, Count IX contains a conclusory statement that "some or all of the enumerated Defendants engaged in a conspiracy that was designed to deprive [the plaintiffs] of the equal protection of the laws." Am. Compl. ¶ 194. As already noted, however, a conclusory statement such as this one cannot remedy the lack of factual allegations supporting even the inference of Shoemaker/Dale's membership in a conspiracy. *See D.R.*, 972 F.2d at 1377; *Bethel*, 570 F.2d at 1173. As a result, the court will also grant Shoemaker/Dale's motion to dismiss with respect to Count IX. The court will dismiss that count as it relates to Shoemaker/Dale without prejudice to the plaintiffs' right to amend Count IX within ten (10) days of the date hereof to remedy the deficiencies therein.

In Count X, the plaintiffs assert a § 1986 claim against Shoemaker/Dale.⁹ *See* Am. Compl. ¶¶ 202-05. As Shoemaker/Dale points out, a § 1986 claim presupposes a valid § 1985 claim. *See Rogin v. Bensalem Township*, 616 F.2d 680, 696 (3d Cir. 1980). Because the § 1985(3) claims against Shoemaker/Dale do not survive, Shoemaker/Dale urges the court to dismiss the § 1986 claim. *See* Mem. of Law in Supp. of the Mot. of Defs. Shoemaker/Dale Joint

⁹Section 1986 provides, in part:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed; and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . . for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented.

42 U.S.C. § 1986.

Venture et al. to Dismiss Counts VII through XIII of the Am. Compl. (Doc. No. 27) [“Shoemaker/Dale Mem.”] at 23. Although the plaintiffs’ § 1985(3) claims against Shoemaker/Dale will not survive, the plaintiffs’ § 1985(3) claims against the unions and the union officers remain viable. *See* Memorandum and Order of Feb. 17, 2000. Thus, the plaintiffs’ § 1986 claim against Shoemaker/Dale may be viable, as well.

Considered in the light most favorable to the plaintiffs, the first amended complaint contains allegations that allow the court to draw the inference that Shoemaker/Dale knew of the § 1985(3) conspiracies to force North American and ANVI off the project and could have prevented the success of these conspiracies. Consequently, the court will deny Shoemaker/Dale’s motion to dismiss with respect to Count X.

C. Count XI: Breach of Contract

In Count XI, North American asserts a breach of contract claim against Shoemaker/Dale. *See* Am. Compl. ¶¶ 206-12. Shoemaker/Dale argues that this claim should fail because the contracts specifically allow for North American’s termination for any or no reason. *See* Shoemaker/Dale Mem. at 23-25. North American admits that the contracts contain provisions allowing such termination, but North American claims that under the contracts Shoemaker/Dale still owes North American money for construction North American completed before the contracts were suspended. *See* Pls.’ Mem. at 32-33, n.14. Thus, North American has identified a claim on which it might recover regardless of the propriety of the suspension of its contracts with Shoemaker/Dale J.V.

North American has pleaded a viable breach of contract claim. Consequently, the court will deny Shoemaker/Dale's motion to dismiss with respect to Count XI.

D. Count XII: Fraudulent Misrepresentation

In Count XII, North American asserts a fraudulent misrepresentation claim against Shoemaker/Dale. Specifically, North American claims that, in order to induce North American to sign the contracts with Shoemaker/Dale J.V., Shoemaker/Dale failed to disclose the likelihood that North American would be forced off the project by the unions and that this failure to disclose constituted a misrepresentation. *See* Am. Compl. ¶¶ 222-23. Evidence of this kind of representation, however, is barred by the parol evidence rule.¹⁰

Until recently, the applicability of the parol evidence rule to a claim of fraudulent inducement under Pennsylvania law has been unclear. For example, in *Betz Laboratories, Inc. v. Hines*, 647 F.2d 402 (3d Cir. 1981), the Third Circuit took note of conflicting lines of Pennsylvania cases addressing this issue and predicted that the Supreme Court of Pennsylvania “would hold that evidence of fraud in the inducement is outside the parol evidence rule.” *Id.* at 408. In the last five years, however, it has become clear that Pennsylvania law allows the application of the parol evidence rule to a claim of fraud in the inducement.

In 1995, the Superior Court of Pennsylvania decided *1726 Cherry Street Partnership v. Bell Atl. Properties, Inc.*, 653 A.2d 663 (Pa. Super. Ct. 1995). After considering the same cases as the Third Circuit in *Betz Laboratories*, as well as cases decided since *Betz Laboratories*, the

¹⁰The Third Circuit has made it clear that “[t]he parol evidence rule is a matter of substantive [Pennsylvania] law,” and thus applicable to Count XII. *Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Investments*, 951 F.2d 1399, 1404 (3d Cir. 1991).

Superior Court panel concluded that, under Pennsylvania law, the parol evidence rule bars a claim of fraudulent inducement based on a prior representation if that representation is not reflected in the fully-integrated written agreement entered into by the claimant. *See id.* at 670.

On the same day *1726 Cherry Street Partnership* was decided, the Supreme Court of Pennsylvania decided *HCB Contractors v. Liberty Place Hotel Assocs.*, 652 A.2d 1278 (Pa. 1995), and reached a similar conclusion. In *HCB Contractors*, the court applied the parol evidence rule to bar the plaintiff's recovery for fraud in the inducement because the allegedly fraudulent representations were not reflected in the fully-integrated written contract that was the subject of that suit. *See id.* at 1279.

Since these two decisions, the federal courts have taken notice of the newfound clarity of Pennsylvania law concerning the applicability of the parol evidence rule to claims of fraud in the inducement.¹¹ *See, e.g., Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1299-1301 (3d Cir. 1996); *Sunquest*, 40 F. Supp. 2d at 653-56. For example, in *Dayhoff*, the Third Circuit cited *HCB Contractors* and *1726 Cherry Street Partnership* and applied the parol evidence rule to bar the plaintiff's fraudulent inducement claim because the contract at issue was a fully-integrated written agreement. *See Dayhoff*, 86 F.3d at 1299-1301. Interestingly, in *Dayhoff*, the Third Circuit did not cite its earlier decision in *Betz Laboratories*, which would have suggested a contrary result.

¹¹For a more detailed account of the evolution of Pennsylvania law on this issue, see *Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc.*, 40 F. Supp. 2d 644, 653-56 (W.D. Pa. 1999).

Considering these decisions, the court concludes that, under Pennsylvania law, the parol evidence rule prohibits a plaintiff's recovery on a claim that he was fraudulently induced into entering a contract if the contract represents a fully-integrated written agreement.¹²

Shoemaker/Dale J.V.'s contracts with North American contain an integration clause and are fully-integrated agreements. *See* Am. Compl. Exs. 1 ¶ 2, 2 ¶ 2. Thus, the parol evidence rule prevents North American from offering any evidence of a prior representation to prove fraudulent inducement. Indeed, North American acknowledges that the parol evidence rule prohibits "the admission of evidence of prior representations to a fully integrated [sic] written agreement." Pls.' Mem. at 38. North American argues, however, that the court should not apply the parol evidence rule in this case. In the face of clear legal authority requiring the application of the parol evidence rule to North American's contracts with Shoemaker/Dale J.V., the court declines to accept North American's argument. To paraphrase *1726 Cherry Street Partnership*, if North American intended to rely on what it perceived as Shoemaker/Dale's representation that North American's non-union status was not problematic and that North American would not be forced off the project by union interference, then North American should have insisted that the representation be set forth in the integrated written agreements. *See id.*, 653 A.2d at 670. Failure to do so results in evidence of the representation being barred. The court will grant Shoemaker/Dale's motion to dismiss with respect to Count XII and will dismiss that count with prejudice as it relates to Shoemaker/Dale.

¹²The parol evidence rule allows consideration of a prior representation if that representation were mistakenly or fraudulently omitted from the contract, as in a case of fraud in the execution. *See 1726 Cherry Street Partnership*, 653 A.2d at 666.

E. Count XIII: Negligent Misrepresentation

In Count XIII, North American asserts a claim against Shoemaker/Dale for negligent misrepresentation. *See* Am. Compl. ¶¶ 228-31. This claim is based on the same failure to disclose the likelihood of a work stoppage that formed the basis for North American's fraudulent misrepresentation claim in Count XII. Because any duty to disclose that Shoemaker/Dale owed to North American must have arisen out of the contractual relationship between them, this claim is barred by the economic loss doctrine.¹³

The economic loss doctrine dictates that negligence theories “do not apply to actions between commercial enterprises where the only damages alleged are economic losses.” *Auger v. Stouffer Corp.*, No. 93-2529, 1993 WL 364622, at *3 (E.D. Pa. Aug. 31, 1993). Pennsylvania courts have applied the economic loss doctrine to cases involving defective products, *see e.g.*, *REM Coal Co. v. Clark Equip. Co.*, 563 A.2d 128 (Pa. Super. Ct. 1989), but federal courts applying Pennsylvania law have extended its reach to cases involving misrepresentation. *See Auger*, 1993 WL 364622, at *5; *Palco Linings, Inc. v. Pavex, Inc.*, 755 F. Supp 1269, 1274 (M.D. Pa. 1990). In misrepresentation cases, however, there are two exceptions to the application of the economic loss doctrine. These exceptions are operative: (1) if the representation at issue is intentionally false or (2) if the defendant is “in the business of supplying information for the guidance of others.” *Palco Linings*, 755 F. Supp. at 1274.

In Count XIII, North American has claimed nothing but economic losses. Thus, as Shoemaker/Dale argues and North American fails to dispute, the economic loss doctrine should

¹³It is unclear that a duty to disclose even existed. The first amended complaint contains only a conclusory allegation in Count XII that Shoemaker/Dale was “obligated to disclose the probability of interference from the Defendant Unions.” Am. Compl ¶ 222.

apply to North American's negligent misrepresentation claim. *See* Shoemaker/Dale Mem. at 30-32; Pls.' Mem. at 36-39. Neither of the misrepresentation exceptions to the economic loss doctrine applies to Count XIII. Shoemaker/Dale is not "in the business of supplying information for the guidance of others." *Palco Linings*, 755 F. Supp. at 1274. Moreover, Count XIII merely claims that Shoemaker/Dale "failed to exercise reasonable care and/or competence" in its communications with North American. Am. Compl. ¶ 229. There are no allegations that any misrepresentation was intentionally false. Therefore, the court will grant Shoemaker/Dale's motion to dismiss with respect to Count XIII. The court will dismiss that count as it relates to Shoemaker/Dale without prejudice to the plaintiffs' right to amend Count XIII within ten (10) days of the date hereof to remedy the deficiencies therein.

IV. Conclusion

For the reasons stated, the court will grant Shoemaker/Dale's motion to dismiss with respect to Counts VIII, IX, XII, and XIII. The court will dismiss Counts VIII, IX, and XIII as they relate to Shoemaker/Dale without prejudice to the plaintiffs' right to amend these counts of their first amended complaint within ten (10) days of the date hereof to remedy the deficiencies therein. The court will dismiss Count XII as it relates to Shoemaker/Dale with prejudice. The court will also grant the motion to dismiss with respect to Count VII as it relates to ANVI and the individual plaintiffs and will dismiss that count to that extent with prejudice. The court will deny Shoemaker/Dale's motion to dismiss with respect to Counts X and XI, as well as with respect to Count VII as it relates to North American. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

NORTH AMERICAN ROOFING & SHEET	:	
METAL CO., INC. et al.,	:	
Plaintiffs	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 99-2050
BUILDING & CONSTRUCTION TRADES	:	
COUNCIL OF PHILADELPHIA & VICINITY,	:	
AFL-CIO et al.,	:	
Defendants	:	

ORDER

YOHN, J.

AND NOW, this day of February, 2000, upon consideration of the motion to dismiss (Doc. No. 26) of defendants Shoemaker/Dale J.V., R.M. Shoemaker Co., and Dale Corp., their supporting memorandum of law (Doc. No. 27), the plaintiffs' response to this motion (Doc. No. 38), and these defendants' reply thereto (Doc. No. 41), IT IS HEREBY ORDERED that the motion to dismiss is GRANTED IN PART AND DENIED IN PART. The motion to dismiss is GRANTED with respect to Counts VIII, IX, XII, and XIII of the plaintiffs' first amended complaint. As they relate to the moving defendants, Counts VIII, IX, and XIII are DISMISSED WITHOUT PREJUDICE to the plaintiffs' right to amend these counts within ten (10) days of the date hereof to remedy the deficiencies therein. As it relates to the moving defendants, Count XII is DISMISSED WITH PREJUDICE. The motion to dismiss is also GRANTED with respect to Count VII of the plaintiffs' first amended complaint insofar as it relates to plaintiff ANVI & Associates, Inc. and the individual plaintiffs, and to that extent that count is DISMISSED WITH PREJUDICE. The motion to dismiss is DENIED with respect to Counts X and XI of the

plaintiffs' first amended complaint. The motion to dismiss is also DENIED with respect to Count VII of the plaintiffs' first amended complaint insofar as it relates to plaintiff North American Roofing & Sheet Metal Co.

William H. Yohn, Jr.