

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

OXIS INTERNATIONAL, INC.	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
JOSEPH B. CATARIOUS, JR.	:	
	:	
Defendant,	:	
	:	
v.	:	00-CV-1491
	:	
OXIS INTERNATIONAL, INC. and OXIS	:	
HEALTH PRODUCTS, INC.	:	
	:	
Counter-Defendants.	:	

**MEMORANDUM**

BUCKWALTER, J.

February 16, 2001

Presently before the Court is Joseph Catarious’ (“Defendant”) Motion for Summary Judgment (Docket No. 24) and Oxis International’s (“Plaintiff” or “Oxis”) and Oxis Health Products’ (collectively “Counter-Defendants”) Response thereto (Docket No. 25), *et cetera*. For the reasons set forth below, the motion will be granted in part and denied in part.

**I. INTRODUCTION**

This action arises out of an agreement between Innovative Medical Systems Corp. (“IMS”) and Plaintiff (the “Agreement”) wherein Plaintiff purchased IMS in an all stock transaction. At that time, Defendant was IMS’ President and majority shareholder. The

Agreement contained *inter alia*, representations and warranties made personally by Defendant, a provision which required Plaintiff to make future payments in the form of Oxis stock to Defendant, and a provision which gave Plaintiff the right to offset any amounts of stock it owed Defendant if it had a claim against Defendant. In its Complaint, Plaintiff claims IMS failed to live up to Defendant's representations and warranties once Plaintiff began operating IMS, and therefore, Plaintiff exercised its offset right denying Defendant stock payout. Specifically, Plaintiff claims Defendant overvalued IMS' inventory and accounts receivable and failed to disclose to Plaintiff that primary customers had expressed intentions to discontinue buying IMS products. Defendant's instant motion begs the Court to dismiss three counts in Plaintiff's Complaint - a breach of contract claim, a negligent misrepresentation claim and a request for declaratory judgment - and for summary judgment on Defendant's counterclaim. The Court will grant Defendant's motion regarding the dismissal of Plaintiff's negligent misrepresentation claim but will deny the motion in all other respects.

## **II. NEGLIGENT MISREPRESENTATION**

Although the Agreement provides that it shall be "governed and construed under the laws of the State of Oregon without regard to conflict of laws principles," the Agreement § 15.1, Plaintiff does not bring its negligent misrepresentation claim on the contract, but rather as a tort outside of the contract. Thus, conflict of laws principals would appear to be applicable. Here, however, conflict of laws analysis is not necessary because the outcome of this issue will be the same whether Oregon or Pennsylvania law applies.<sup>1</sup>

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1. The parties in this case, Oxis and Catarious, are a corporation with a principal place of business in Oregon and a citizen of Pennsylvania, respectively. See Complaint at 1.

Under Oregon law, Plaintiff's negligent misrepresentation claim must be dismissed. The Oregon Supreme Court has adopted the economic loss doctrine under which a court will not hold a party liable for negligently causing another's "purely economic loss without injuring his person or property." Hale v. Groce, 304 Ore. 281, 744 P. 2d 1289, 1290 (Or. 1987). Although Oregon courts have found exceptions to the general rule placing liability on parties for economic loss despite the absence of injury to a person or property, this case falls outside those exceptions. See Portland General Elec. Co. v. Westinghouse Elec. Co., 842 F. Supp. 161, 164-66 (W.D. Pa. 1993) (explaining Oregon courts have found exceptions to the economic loss doctrine where a defendant owes a standard of care imported from an area of law independent of the contract). Here, Plaintiff does not assert its property or a person were injured by Defendant, and the Court does not believe any standard of care independent of the contract arises from the relationship between Plaintiff and Defendant. The economic loss doctrine is therefore implicated, and no exception to the doctrine applies under Oregon law.

The Court also believes the negligent misrepresentation claim would be dismissed under Pennsylvania law. The Court predicts the Pennsylvania Supreme Court would disallow the negligent misrepresentation claim in adopting a "gist of the action" test.<sup>2</sup> See Caudill Seed and Warehouse Co., Inc. v. Prophet 21, Inc., 123 F. Supp. 2d 826, 833 n.11 (E.D. Pa. 2000) (citing Pennsylvania Superior Court cases and explaining why the Pennsylvania Supreme Court would likely adopt the gist of the action test.) This test asks whether the crux of the claim sounds in

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2. In the absence of a definitive ruling by the Supreme Court of Pennsylvania, this Court predicts how the Supreme Court of Pennsylvania would rule if confronted with the instant issue by considering decisions by intermediate appellate courts as well as other state courts. See Robertson v. Allied Signal Inc., 914 F.2d 360, 368 (3d Cir. 1990); see also Ciccarelli v. Carey Canadian Mines, Ltd., 757 F.2d 548, 553 n.3 (3d Cir. 1985).

contract or in tort; and if the contract claim is merely collateral, only then is the tort claim appropriate. See Caudill Seed, 123 F. Supp. 2d at 833 (quoting Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 651 (W.D. Pa. 1999)). Much like the analysis performed in an economic loss doctrine case, the gist of the action test requires the Court to identify the source of the duty allegedly breached keeping in mind that “the important difference between contract and tort actions is that the latter lie from the breach of duties imposed as a matter of social policy while the former lie for the breach of duties imposed by mutual consensus.” Phico Ins. Co. v. Presbyterian Medical Servs. Corp., 444 Pa. Super. 221, 228-29, 663 A.2d 753 (1995) (citing Bash v. Bell Tel. Co., 411 Pa. Super. 347, 601 A.2d 825 (1992)). In the instant case, the Court believes the duties Defendant owed Plaintiff existed only because the parties entered into the Agreement, and therefore, solely arise from the mutual consensus the Agreement memorialized. Under either Oregon or Pennsylvania law, the negligent misrepresentation claim shall be dismissed.

### **III. CONCLUSION**

For the reasons set forth above, Defendant’s Motion for Summary Judgment will be granted in part and denied in part.

An appropriate order follows.

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HEALTH PRODUCTS, INC.	:	
	:	
Counter-Defendants.	:	

**ORDER**

AND NOW, this 16<sup>th</sup> day of February, 2001, upon consideration of Joseph B. Catarious, Jr.'s Motion for Summary Judgment (Docket No. 24) and the response thereto of Oxis International, Inc. and Oxis Health Products, Inc. (Docket No. 25), *et cetera*, it is **ORDERED** that Joseph B. Catarious' motion is **GRANTED** with respect to Count II of the Complaint and is **DENIED** in all other respects.

BY THE COURT:

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RONALD L. BUCKWALTER, J.