

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

<b>TRUEPOSITION, INC.</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
vs.	:	<b>NO. 05-3023</b>
	:	
<b>SUNON, INC. , SUNONWEALTH</b>	:	
<b>ELECTRIC MACHINE INDUSTRY</b>	:	
<b>CO., LTD., and DA CROWLEY AND</b>	:	
<b>ASSOCIATES,</b>	:	
<b>Defendants.</b>	:	

**ORDER**

**AND NOW**, this 23rd day of May, 2006, upon review of Defendant D.A. Crowley & Associates (Pennsylvania), Inc.'s<sup>1</sup> Motion to Dismiss (Document No. 12, filed October 31, 2005) and Defendant Sunon, Inc.'s Motion to Dismiss (Document No. 13, filed October 31, 2005), Defendants Sunon, Inc.'s and D.A. Crowley & Associates (Pennsylvania), Inc.'s Motion to Strike Jury Demand (Document No. 14, filed October 31, 2005), Plaintiff's Omnibus Response to Motions to Dismiss of Sunon, Inc. and D.A. Crowley & Associates (Pennsylvania), Inc. and Motion to Strike Jury Demand (Document No. 17, filed November 14, 2005), and Defendants Sunon, Inc.'s and D.A. Crowley & Associates (Pennsylvania), Inc.'s Joint Omnibus Reply to Plaintiff's Omnibus Opposition to Motion to Dismiss (Document No. 19, filed November 29, 2005), **IT IS ORDERED**, for the reasons set forth below, as follows:

1. Defendant D.A. Crowley & Associates (Pennsylvania), Inc.'s Motion to Dismiss is **DENIED**;

---

<sup>1</sup> The defendant identified as DA Crowley and Associates states that its correct corporate name is D.A. Crowley & Associates (Pennsylvania), Inc.

2. Defendant Sunon, Inc.'s Motion to Dismiss is **DENIED**; and
3. Defendants Sunon, Inc.'s and D.A. Crowley & Associates (Pennsylvania), Inc.'s Motion to Strike Jury Demand as to Count V of the complaint is **GRANTED**.

**IT IS FURTHER ORDERED** that the caption and the complaint are amended so as to substitute D.A. Crowley & Associates (Pennsylvania), Inc. for the defendant identified as DA Crowley and Associates.

### MEMORANDUM

#### **I. BACKGROUND**

The following facts are taken from plaintiff's Complaint.

##### **A. The Parties**

Plaintiff, TruePosition, Inc., is a Delaware corporation that maintains its principal place of business in Pennsylvania. Compl. ¶ 2. Plaintiff designs, sells, installs, and maintains Location Measurement Units ("LMUs"), which enable law enforcement to locate cell phone users who utilize the 911 emergency system. *Id.* ¶¶ 3,15. As a by-product of their operations, the LMUs produce significant amounts of heat and rely on small fans to maintain a steady temperature. *Id.* ¶ 16.

Defendant Sunonwealth Electric Machine Industry Co., Ltd. ("Sunonwealth") is a Taiwanese corporation which produces small fans used in larger products. *Id.* ¶¶ 4-5. Defendant Sunon, Inc. ("Sunon"), a California corporation, is a wholly-owned subsidiary of Sunonwealth. *Id.* ¶¶ 6-7. The principal function of Sunon is to act as the sales agent in the United States for

Sunonwealth.<sup>2</sup> Id. ¶ 8. Defendant D.A. Crowley & Associates (Pennsylvania), Inc. (“D.A. Crowley”) is a company engaged by Sunonwealth and Sunon to sell Sunonwealth’s fans to product manufacturers in several states, including Pennsylvania. Id. ¶¶ 10-11.

**B. The Relevant Facts**

In February 2003, Dr. Mark Jones (“Jones”) of TruePosition contacted Mike Shannon (“Shannon”) at D.A. Crowley and inquired whether Sunonwealth had any fans appropriate for plaintiff’s newly-planned 2U LMU model. Id. ¶ 32. On March 20, 2003, Shannon faxed to Jones a Life Test Report (hereinafter the “2003 Life Test Report”) regarding Sunonwealth’s fan model KDE1206PFV1 (the “V1” fan). Id. ¶ 33. The 2003 Life Test Report stated that, based on testing performed, the V1 fan would have a useable life of between 10 and 28 years. Id. ¶ 37. The life span of the V1 fan was a critical factor in plaintiff’s evaluation of whether the V1 was appropriate for plaintiff’s 2U LMU model. Id. ¶ 40.

Beginning in May 2003, plaintiff purchased both directly and indirectly, through the LMU’s manufacturer, Sanmina-SCI Corp. (“Sanmina”), approximately 50,000 Sunonwealth V1 fans from Sunon. Id. ¶¶ 48-52. Once the V1 fans were installed and the 2U model LMUs were manufactured, plaintiff’s new LMUs were distributed throughout the country starting in March 2004. Id. ¶¶ 59-60. By December 2004, the V1 fans were experiencing widespread failure. Id. ¶ 62. Because of these technical failures, plaintiff has replaced the fans in LMUs that were at over 6,500 cell phone substations around the country. Id. ¶ 70.

---

<sup>2</sup> Plaintiff has also alleged that Sunonwealth and Sunon operate as a single entity or alter egos. Compl. ¶ 9.

### **C. Plaintiff's Claims**

Counts I and II of the Complaint – breach of contract and breach of warranty – are not at issue in these motions and need not be discussed here. The instant motions address Counts III, IV, and V – fraudulent inducement, negligent misrepresentation, and violation of the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et. seq. – which pertain to representations made in the 2003 Life Test Report.<sup>3</sup>

Plaintiff alleges that the testing described in the 2003 Life Test Report, created by Sunonwealth, was never performed by Sunonwealth, Sunon, or anyone acting on their behalf. Id. ¶¶ 34, 38. Plaintiff also alleges that Sunonwealth gave the 2003 Life Test Report to Sunon and D.A. Crowley knowing that Sunon and D.A. Crowley would provide the Report to potential customers, and that these customers, like plaintiff, would rely on the accuracy of the information contained in the Report. Id. ¶ 35. Moreover, plaintiff alleges it relied on the false information in the 2003 Life Test Report in deciding to purchase the V1 fans. Id. ¶ 44.

### **II. STANDARD OF REVIEW**

In addressing a motion to dismiss, a court must accept the allegations in the complaint as true and draw all reasonable inferences from those facts in favor of plaintiff. Lum v. Bank of America, 361 F.3d 217, 223 (3d Cir. 2004). A court should grant a motion to 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 of the complaint. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984).

---

<sup>3</sup> Count III is asserted against Sunonwealth and Sunon only. Compl. ¶¶ 85-90. Counts IV and V are asserted against all defendants. Id. ¶¶ 91-94.

### III. DISCUSSION

Presently before the Court are Motions to Dismiss the Complaint filed by Sunon and D.A. Crowley and their joint Motion to Strike Jury Demand as to Count V of the Complaint. The Court will analyze the merits of each motion in turn.

#### A. Sunon's Motion to Dismiss

Sunon asserts several arguments in support of its Motion to Dismiss. For the reasons set forth below, the Court rejects all of Sunon's arguments and denies its Motion to Dismiss.

##### 1. Gist of the Action Doctrine

Sunon argues that plaintiff's claims of fraudulent inducement, negligent misrepresentation, and violation of California's Unfair Competition Law ("UCL") are barred by the gist of the action doctrine because they are interwoven in plaintiff's underlying contract claims. Plaintiff responds that the "gravamen" of these three claims "is not that the V1 fans failed to perform as promised, but that a test report . . . was fabricated to mislead potential customers into believing that the V1 fans had been tested." Pl. Opp. at 11.

The gist of the action doctrine bars plaintiffs from recovering under tort theories for failure to perform a contract. Air Products & Chemicals, Inc. v. Eaton Metal Products Co., 256 F. Supp. 2d 329, 340 (E.D. Pa. 2003). In this case, however, plaintiff has alleged tort claims pertaining to the inducement to enter the contracts, which does not necessarily trigger the doctrine. eToll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 17 (Pa. Super. 2002); see also Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 719 (Pa. Super. 2005). Significantly, Sunon's obligation to make truthful representations about its testing of the V1 fans derives from social policy embodied in tort law, rather than a consensus reached in contract, which makes the

fraud (not the contract) the gist of the action. See Chemtech International, Inc. v. Chemical Injection Technologies, Inc., 2006 U.S. App. LEXIS 6865, at \*10 (3d Cir. Mar. 20, 2006).

In reaching the conclusion that plaintiff's tort claims as alleged are not barred by the gist of the action doctrine, the Court finds Judge Van Antwerpen's analysis in Air Products to be particularly instructive. In Air Products, the court allowed the plaintiff to amend its complaint to add a claim of fraudulent inducement based on the defendant's alleged fraudulent misrepresentations of objective qualifications to induce the plaintiff to enter a contract. Air Products, 256 F. Supp. 2d at 342. In this case, like Air Products, plaintiff alleges that the 2003 Life Test Report contained false statements of objective fact relating to the testing of Sunonwealth's V1 fan and that these misrepresentations were intended to induce plaintiff to contract with Sunon.

The Court is unpersuaded by Sunon's reliance on Horizon Unlimited, Inc. v. Silva, 1998 U.S. Dist. LEXIS 2223 (E.D. Pa. Feb. 26, 1998), in which Judge Shapiro dismissed the plaintiffs' fraud and deceit and negligent misrepresentation claims under the gist of the action doctrine because representations about the performance of the products were incorporated into the purchase contracts. Id. at \*14-17. Sunon contends that, like Horizon Unlimited, representations about the performance of the V1 fans were incorporated into the purchase orders and, therefore, became the "basis of the bargain." As a result, Sunon argues that its alleged failure to provide products conforming with these representations sounds in contract alone. The Court rejects that argument. As alleged in the Complaint, the misrepresentations at issue in Counts III, IV, and V do not pertain to the question of whether the fans performed as promised. To the contrary, the alleged misrepresentations pertain to the statements in the 2003 Life Test Report that the V1 fans

were tested and that the test results demonstrated a life span of between 10 and 28 years.

Compl. ¶ 37, 38.

For all of the foregoing reasons, the Court concludes that on the present record Counts III, IV, and V against Sunon are not barred by the gist of the action doctrine.<sup>4</sup>

## 2. Fraudulent Inducement

Sunon asserts that the Complaint fails to meet the pleading specificity requirements of Fed. R. Civ. P. 9(b) and that plaintiff has not alleged the elements of a fraudulent inducement claim. The Court disagrees.

Rule 9(b) requires that, when a plaintiff makes allegations of fraud, “the circumstances constituting fraud . . . shall be stated with particularity,” but “[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally.” *Id.* The Third Circuit has explained that a plaintiff must plead “all of the essential factual background that would accompany ‘the first paragraph of any newspaper story’ – that is, the ‘who, what, when, where, and how’ of the events at issue.” *In re Rockefeller Ctr. Props., Inc. Securities Litig.*, 311 F.3d 198, 216-217 (3d Cir. 2002) (quoting *In re Burling Coat Factory Securities Litig.*, 114 F.3d 1410, 1422 (3d Cir. 1997)).

Under Pennsylvania law, fraudulent inducement requires: (1) a representation; (2) material to the transaction; (3) made falsely, with knowledge of its falsity or recklessness as to

---

<sup>4</sup> Sunon contends, as part of its gist of the action argument, that plaintiff should be precluded from asserting its fraudulent inducement, negligent misrepresentation, and UCL claims because the purchase orders contains integration clauses. On this issue, the Court is aware of cases that hold parol evidence is inadmissible to establish fraudulent inducement claims when contracts contain integration clauses. See *Freedom Medical, Inc. v. Royal Bank of Canada, RBC*, 2005 WL 3597709, at \*4-5 (E.D. Pa. Dec. 30, 2005); *Goldstein v. Murland*, 2002 WL 1371747, at \*1- 3 (E.D. Pa. June 24, 2002). Because this issue was not fully briefed by the parties, the Court declines to rule on it on the present state of the record.

whether it is true or false; (4) with the intent of misleading another to relying on the misrepresentation; (5) justifiable reliance on the misrepresentation; and (6) injury proximately caused by the reliance on the misrepresentation. Shapiro v. UJB Fin. Corp., 964 F.2d 272, 284 (3d Cir. 1992); Gibbs v. Ernst, 647 A.2d 882, 889 (Pa. 1994).

The Court concludes that the Complaint states a claim of fraudulent inducement with the specificity required under Rule 9(b) based on the following allegations. First, Shannon at D.A. Crowley, acting on behalf of Sunon, provided plaintiff with the 2003 Life Test Report on March 20, 2003. Compl. ¶ 33. Second, the 2003 Life Test Report contained information that was critical to plaintiff's evaluation of the efficacy of incorporating the V1 fans into the 2U-LMUs. Id. ¶ 40. Third, the testing of the V1 fans reported in the 2003 Life Test Report never took place, and Sunon knew that the testing had not occurred. Id. ¶¶ 38-39. Fourth, Sunon knew customers would rely on the information in the 2003 Life Test Report, and it was provided to convince plaintiff to purchase the fans. Id. ¶¶ 35-36. Fifth, it is a common practice in the industry to rely on such data in choosing equipment. Id. ¶ 41. And sixth, after plaintiff purchased the fans and incorporated them into the 2U LMUs, the fans began to experience widespread failure. Id. ¶¶ 44, 59-75.

### 3. Negligent Misrepresentation

Sunon makes similar arguments with respect to plaintiff's negligent misrepresentation claim – namely, that plaintiff fails to meet the pleading requirements under Rule 9(b) and fails to plead the elements of negligent misrepresentation.

First, Rule 9(b) does not apply to claims of negligent misrepresentation. McHale v. NuEnergy Group, 2002 U.S. Dist. LEXIS 3307, at \*18-19 (E.D. Pa. Feb. 27, 2002) (citing Small

v. Provident, 1998 U.S. Dist. LEXIS 19413, at \*3 (E.D. Pa. Dec. 4, 1998)). Second, plaintiff has alleged facts sufficient to plead a claim of negligent misrepresentation.

Negligent misrepresentation requires proof of: (1) a misrepresentation of a material fact; (2) made under circumstances in which one ought to have known its falsity; (3) with an intent to induce another to act on it; (4) which results in injury to a party acting in justifiable reliance on the misrepresentation. Bortz v. Noon, 729 A.2d 555, 561 (Pa. 1999). Negligent misrepresentation has essentially the same elements as fraudulent inducement but with a lesser scienter requirement. See Sullivan v. Sovereign Bancorp., Inc., 2001 WL 34883989, at \*9 (D. N.J. Jan. 19, 2001) (applying Pennsylvania law). For the reasons set forth in Part III.A.2 with respect to the fraudulent inducement claim against Sunon, the Court concludes that plaintiff has stated a claim for negligent misrepresentation against Sunon.

#### 4. UCL Violation

Sunon asserts that plaintiff's claim under the UCL must be dismissed because of the presumption against extraterritorial application of California statutes and because plaintiff has failed to assert a claim under any of the prongs of the UCL. The Court disagrees.

A claim under the UCL may be asserted by a non-resident plaintiff alleging unfair business conduct that occurred in or emanated from California. Norwest Mortgage, Inc. v. Superior Court, 72 Cal. App. 4th 214, 222 (1999); see also Clothesrigger, Inc. v. GTE Corp., 191 Cal. App. 3d 605 (1987). Reading the Complaint in the light most favorable to plaintiff, plaintiff has alleged that Sunon's unfair activities occurred in, or emanated from, California, because Sunon is a California-based company and because several purchase orders (those made by Sanmina, the LMU manufacturer) specify that they are governed by California law.

Compl. ¶¶ 6, 54.

The Court also rejects Sunon's argument that plaintiff fails to state a claim under the UCL. The UCL is a broad remedial statute that proscribes any "unlawful, unfair, or fraudulent business act," referred to as the three prongs of the UCL, and was drafted "to permit courts to enjoin ongoing wrongful business conduct in whatever context such activity might occur." Committee on Children's Television, Inc. v. General Foods Corp., 35 Cal. 3d 197, 210 (1983). The "unlawful" prong of the UCL "proscribes 'anything that can be properly called a business practice and that at the same time is forbidden by law.'" National Rural Telecomms. Coop. v. DIRECTV, Inc., 319 F. Supp. 2d 1059, 1074 (C.D. Cal. 2003) (quoting Smith v. State Farm Mut. Auto Ins. Co., 93 Cal. App. 4th 700, 717-718 (2001)). The "unlawful" practices prohibited by the UCL "are any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory or court-made." Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-839 (1994). The second prong, "unfair" business acts, has been defined broadly in order to provide courts with the maximum discretion to prohibit newly-developed means to defraud. Motors, Inc. v. Times Mirror Co., 102 Cal. App.3d 735, 740 (1980). Finally, under the fraudulent prong, a business practice is fraudulent if "members of the public are likely to be deceived." Committee on Children's Television, 35 Cal. 3d at 214.

Plaintiff argues that it has alleged a claim for a violation of all three prongs of the UCL. While that may be true, the Court need only find that the Complaint alleges a violation under one prong to allow plaintiff's UCL claim to proceed. The Court focuses on the unfair prong. The "test for determining an 'unfair' practice is [whether] the gravity of the harm to the victim outweighs the utility of the defendant's conduct." DIRECTV, 319 F. Supp. 2d at 1075 (quoting

People ex rel. Renne, 86 Cal. App. 4th at 1095).

With respect to plaintiff's claim under the "unfair" business act prong of the UCL, Sunon asserts two arguments. First, Sunon contends that, because plaintiff is a sophisticated business entity, plaintiff does not qualify as a member of the public and, therefore, is not entitled to protection under this prong of the UCL. Relying on the opinion in DIRECTV, the Court concludes plaintiff need not allege that it is a member of the general public in order to assert a claim for an unfair business act. DIRECTV, 319 F. Supp. 2d at 1077.

Next, Sunon argues that plaintiff cannot "recast its breach of contract/warranty claims as one for unfair competition." Sunon Mot. at 12. But Sunon misconstrues the nature of a claim under the unfair business act prong of the UCL. Plaintiff is not using the UCL to seek court review of the fairness of its contracts with Sunon. To the contrary, plaintiff's UCL claim, as alleged, is based on Sunon's actions relating to the 2003 Life Test Report. Moreover, the presence of a contractual relationship does not, in and of itself, preclude plaintiff from asserting a claim under the unfair business act prong of the UCL. See Allied Grape Growers v. Bronco Wine Co., 203 Cal. App. 3d 432, 450-51 (1988).

For the foregoing reasons, the Court concludes that plaintiff has stated a claim under the UCL because the use of false promotional materials to induce purchasers could be deemed to be unfair under the UCL.

**B. D.A. Crowley's Motion to Dismiss**

D.A. Crowley seeks dismissal of the two claims – negligent misrepresentation (Count IV) and violation of the UCL (Count V) – asserted against it. For the reasons stated below, D.A. Crowley's Motion to Dismiss is denied.

1. Negligent Misrepresentation

D.A. Crowley argues that plaintiff's claim for negligent misrepresentation should be dismissed because the Complaint does not aver that D.A. Crowley knew or reasonably should have known that the 2003 Life Test Report was false. Plaintiff responds that the Pennsylvania Supreme Court has adopted Section 552 of the Restatement (Second) of Torts and that, under § 552, the Complaint states a claim for negligent misrepresentation. See Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270 (Pa. 2005). The Court concludes that plaintiff has alleged a claim of negligent misrepresentation under § 552.

Section 552 states in part:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Restatement (Second) of Torts § 552.

The Complaint alleges that D.A. Crowley supplied the 2003 Life Test Report to plaintiff as part of its effort, along with Sunon and Sunonwealth, to convince plaintiff to purchase the V1 fans and that the 2003 Life Test Report was false. Compl. ¶¶ 32-33, 38. Under these allegations, D.A. Crowley supplied false information in the course of business in a transaction in which D.A. Crowley had a pecuniary interest. Plaintiff also alleges justifiable reliance on the information contained within the 2003 Life Test Report. Id. ¶ 41.

On this issue D.A. Crowley argues that it did not owe a duty to plaintiff to verify the information in the 2003 Life Test Report. Plaintiff contends that D.A. Crowley had such a duty of care because D.A. Crowley was in a better position than plaintiff to verify the accuracy of the

2003 Life Test Report. See Bortz, 729 A.2d at 563. On the present state of the record, the Court cannot conclude that there was no such duty. Accordingly, the Court denies D.A. Crowley's Motion to Dismiss plaintiff's negligent misrepresentation claim.

2. UCL Violation

D.A. Crowley makes three arguments in opposition to plaintiff's UCL claim. First, D.A. Crowley contends that plaintiff's UCL claim requires unlawful extraterritorial application of the statute because plaintiff has failed to allege that D.A. Crowley's unlawful, unfair, or fraudulent conduct occurred in or emanated from California. The Court disagrees.

In the Complaint, plaintiff alleges that Sunonwealth gave D.A. Crowley the 2003 Life Test Report and that D.A. Crowley, acting on behalf of Sunonwealth and Sunon, faxed the report to plaintiff. Id. ¶¶ 33, 35. Reading the Complaint in the light most favorable to plaintiff, plaintiff has alleged that D.A. Crowley has sufficient links with California through Sunon and the 2003 Life Test Report to warrant a denial of the Motion to Dismiss on this ground.

Second, D.A. Crowley joins Sunon in its argument that plaintiff has failed to allege a claim under any of the prongs of the UCL. For the reasons stated above, the Court concludes that plaintiff has alleged, at the least, a claim under the unfair business act prong of the UCL against Sunon. Because the Complaint alleges that D.A. Crowley participated in this unfair act by providing the false 2003 Life Test Report on behalf of Sunon, plaintiff's UCL claim under the unfair business act prong is sufficient against D.A. Crowley as well.

Third, and finally, D.A. Crowley points to Klein v. Earth Elements, Inc., 59 Cal. App. 4th 965 (1997), and argues that liability under the UCL cannot be premised upon negligent or unintentional conduct. In Klein, the court concluded that unintentional distribution of a defective

product was not sufficient to support a claim under the unlawful prong of the UCL. 59 Cal. App. 4th at 969. That holding is inapposite to plaintiff's claim under the unfair business act prong of the UCL. Moreover, plaintiff alleges that D.A. Crowley intentionally provided plaintiff with the 2003 Life Test Report, which was false.

For all of the foregoing reasons, the Court denies D.A. Crowley's Motion to Dismiss plaintiff's UCL claim.

**C. Sunon and D.A. Crowley's Motion to Strike Jury Demand**

Pursuant to Fed. R. Civ. P. 12(f), Sunon and D.A. Crowley have moved to strike plaintiff's jury demand with respect to plaintiff's UCL claim in Count V because plaintiff is only entitled to equitable relief under the UCL. Plaintiff does not oppose defendants' motion, but asserts that it is entitled to a jury trial on the remaining counts. Because only equitable relief is available under the UCL, the Court will grant the motion to strike jury demand with respect to Count V. The remainder of plaintiff's claims will be tried to a jury.

**IV. CONCLUSION**

For all of the foregoing reasons, the Court concludes that both Sunon's Motion to Dismiss and D.A. Crowley's Motion to Dismiss are denied. Sunon and D.A. Crowley's Motion to Strike Jury Demand as to plaintiff's UCL claim in Count V of the Complaint is granted.

**BY THE COURT:**

/s/ Jan E. DuBois  
**JAN E. DUBOIS, J.**