

allegedly the principal shareholder of both corporations, as well as an officer and director. (Id. ¶ 10.) Koletty is alleged to be an officer and directed of both corporations. (Id. ¶ 11.) Tolsky is also allegedly an officer and director of both. (Id. ¶ 12.)

From May to July 2005, defendants allegedly approached Sunburst to provide them with paper products to be shipped out of the United States. (Id. ¶ 13.) Sunburst, in accord with its standard policy, requested Keating sign a personal guarantee. He refused because, as these were to be international shipments, payment would be guaranteed by letters of credit (“LOCs”). (Id. ¶ 14-16.) Sunburst accepted the LOCs in lieu of a personal guarantee. (Id. ¶ 24.) Shipments were made, (id. ¶ 28), the invoices were never paid (id. ¶ 33-34), and defendants Keating, Koletty and Tolsky allegedly kept the LOC proceeds for their own personal benefit. (Id. ¶ 48).

The complaint alleges claims for breach of contract against KFI and KFII (Count I), fraud against all defendants (Count II), misrepresentation against all defendants (Count III), quantum merit/unjust enrichment against all defendants (Count IV, incorrectly labeled as Count III), and a claim for “account stated” against KFI and KFII (Count V, incorrectly labeled Count IV). Each count, with the exception of the breach of contract claim, seeks punitive damages in addition to compensatory damages. Defendants move to dismiss the fraud and negligent misrepresentation counts, as well as the punitive damages claims. They assert that this is a simply action for breach of contract based on non-payment of monies owed, and does not rise to the level of fraud.

II. LEGAL STANDARD

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox,

Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). The court, however, “need not credit a complaint’s ‘bald assertions’ or ‘legal conclusions.’” Cal. Pub. Employees’ Ret. Sys. v. The Chubb Corp., 394 F.3d 126,143 (3d Cir. 2004) (citing Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997)). A Rule 12(b)(6) motion will be granted when a plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. DISCUSSION.¹

¹Both parties include a choice of law analysis in their moving papers. Defendants assert that Pennsylvania’s choice of law rules apply, see Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that federal district court sitting in diversity applies choice of law rules of forum state), and that under Pennsylvania’s governmental interests test, Pennsylvania law would apply. Sunburst argues that as the law of Alabama – its location – and Pennsylvania – the location of the defendants – are virtually identical, there is no actual conflict. We agree that there is no actual conflict between the two states’ laws.

“Pennsylvania choice-of-law analysis consists of two parts. First, the court must look to see whether a false conflict exists. Then, if there is no false conflict, the court determines which state has the greater interest in the application of its law.” LeJeune v. Bliss-Salem, Inc., 85 F.3d 1069, 1071 (3d Cir. 1996) (citing Cipolla v. Shaposka, 267 A.2d 854 (Pa. 1970); Lacey v. Cessna Aircraft Co., 932 F.2d 170, 187 & n.15 (3d Cir.1991)). A false conflict exists where “only one jurisdiction’s governmental interests would be impaired by the application of the other jurisdiction’s law.” LeJeune 85 F.3d at 1071; Lacey, 932 F.2d at 187.

Both Alabama and Pennsylvania law recognize nearly identical causes of action for fraud. Compare Brushwitz v. Ezell, 757 So.2d 423, 429 (Ala. 2000) (holding that the elements of fraud are: a misrepresentation of a material fact; made willfully to deceive, recklessly, without knowledge, or mistakenly; that was reasonably relied on by the plaintiff under the circumstances; and that caused damage as a proximate consequence) with Viguers v. Philip Morris USA, Inc., 837 A.2d 534, 540 (Pa. Super 2003) (holding that the elements of fraud are: a representation; which is material to the transaction at hand; made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; with the intent of misleading another into relying on it; justifiable reliance on the misrepresentation; and the resulting injury was proximately caused by the reliance). They also

A. Gist of the Action Doctrine

Defendants argue that Sunburst's fraud and negligent misrepresentation claims must be dismissed pursuant to the "gist of the action" doctrine. Under that doctrine, a plaintiff is precluded from recovering in tort for claims that actually sound in contract. The doctrine bars tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3) where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract. eToll, 811 A.2d at 19.² The gist of the action doctrine is

recognize nearly identical causes of action for and negligent misrepresentation. Compare Ala. Code § 6-5-101 (providing that the elements of negligent misrepresentation are misrepresentation concerning a material fact justifiably relied on by plaintiff and loss or damages proximately caused by misrepresentation) and Bortz v. Noon, 729 A.2d 555, 561 (Pa. 1999) (holding that the elements of negligent misrepresentation are: (1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation).

Both states also acknowledge that the "gist of the action doctrine" and the economic loss rule are defenses to fraud and negligent misrepresentation. Compare Wilson v. Dudley, 76 So.2d 509, 511 (Ala. App. 1954) (quoting 37 C.J.S. Fraud, § 88 ("Where the cause of action is that plaintiff was fraudulently induced to enter into a contract to his damage, the contract, not being the gist of the action, need not be precisely set out.")) with eToll, Inc. v. Elias/Savion Advertising, Inc., 811 A.2d 10, 19 (Pa. Super. 2002) (stating that under gist of the action doctrine, a plaintiff is precluded from recovering in tort for claims that actually sound in contract); compare Harris Moran Seed Co., Inc. v. Phillips, No. 2040746, 2006 WL 1719936 (Ala. App. June 23, 2006) (holding that the economic loss rule barred tort claims arising out of contract for tomato seed that proved defective) with Werwinski v. Ford Motor Co., 286 F.3d 661, 671 (3d Cir.2002) (barring a fraud claim based on the economic loss rule). Both states' laws also provide that punitive damages are not available on a contract claim. Compare Compass Bank v. Snow, 823 So.2d 667, 678 (Ala. 2001) (holding that punitive damages are not available in a breach of contract claim) with Baker v. Pennsylvania Nat'l Mut. Cas. Ins. Co., 536 A.2d 1357, 1367 (Pa. Super. 1987) (same).

As Alabama's governmental interests would not be impaired by the application of Pennsylvania's law, there is no actual conflict, and Pennsylvania law applies.

²Although the Pennsylvania Supreme Court has not yet adopted the gist of the action doctrine, both the Pennsylvania Superior Court and a number of United States District Courts have

applied to maintain the conceptual distinction between the theories of breach of contract and tort by preventing a plaintiff from recasting ordinary breach of contract claims as tort claims. Bash v. Bell Tel. Co. of Pennsylvania, 601 A.2d 825, 829 (Pa. Super. 1992) (“Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals To permit a promisee to sue his promisor in tort for breaches of contract *inter se* would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions.”). “When a plaintiff alleges that the defendant committed a tort in the course of carrying out a contractual agreement, Pennsylvania courts examine the claim and determine whether the ‘gist’ or gravamen of it sounds in contract or tort.” Sunquest Info. Sys., Inc. v. Dean Witter Reynolds, Inc., 40 F.Supp.2d 644, 651 (W.D. Pa. 1999).

To determine whether the gist of the claim sounds in contract or in tort, the court must determine the source of the duties allegedly breached. Werner Kammann Maschinenfabrik, GmbH v. Max Levy Autograph, Inc., Civ. A. No. 01-1083, 2002 WL 126634, *6 (E.D.Pa. Jan. 31, 2002). If the duties flow from an agreement between the parties, the claim is deemed to be contractual. Id. Conversely, if the duties breached were of a type imposed on society as a matter of social policy, the claim is deemed to sound in tort. Id. In other words, if the duties in question are intertwined with

predicted that it will. See eToll, 811 A.2d at 19 (predicting that gist-of-the action doctrine would be applied by Supreme Court to bar a fraud claim that arose from the performance of a contract, but may not apply to fraud in the inducement); Caudill Seed and Warehouse Co., Inc. v. Prophet 21, Inc., 123 F.Supp.2d 826, 833-4 (E.D. Pa. 2000) (predicting that fraud claim that essentially restated of the breach of contract claim would be barred by doctrine); but see Sullivan v. Chartwell Inv. Partners, LP, 873 A.2d 710, 718 (Pa. Super. 2005) (predicting that tort claims related to appellee’s fraudulent promises that induced appellant to enter employment contract would not be barred because they were collateral to the contract).

contractual obligations, the claim sounds in contract, but if the duties are collateral to the contract, the claim sounds in tort. Sunquest, 40 F.Supp.2d at 651 (holding that a tort claim is maintainable only if the contract is “collateral” to conduct that is primarily tortious).

The duties asserted by plaintiffs here – duties involving the payment for the sales of goods between commercial entities – arise exclusively from sales contract that the parties negotiated. In a case such as this, the gist of the action doctrine would bar tort claims because the gravamen of the claim sounds in contract. See eToll 811 A.2d at 20 (holding that doctrine barred alleged acts of fraud including billing irregularities, kickbacks, and misrepresentations as to services performed, since they arose in the course of the parties’ contractual relationship); Werner, 2002 WL 126634 at *6 (concluding that gist of the action doctrine barred fraud claim against manufacturer based on misrepresentation that certain heating elements would be enclosed in a furnace); Caudill, 123 F.Supp.2d at 833-834 (holding that the gist of the action doctrine barred fraud claim against a software company that provided software that never worked as promised); Horizon Unlimited, Inc. v. Silva, Civ. A. No. 97-7430, 1998 WL 88391 (E.D. Pa. Feb. 26, 1998) (concluding that gist of the action doctrine barred negligent misrepresentation claim premised on allegedly false statements made in promotional literature); Factory Mkt., Inc. v. Schuller Int’l, 987 F.Supp. 387, 394-395 (E.D. Pa.1997) (determining that the gist of the action doctrine barred fraud and negligence claims against roofer who agreed to repair a chronically leaking roof and repeatedly attempted to repair it, even though he knew from the outset that it was beyond repair as the obligation to make the roof watertight was imposed by the contract, not in tort).

Court have found exceptions to the gist of the action doctrine only where the fraud concerns an act collateral to the parties’ contract. See Sullivan, 873 A.2d at 718 (holding that tort claims

relating to appellee's fraudulent promises that induced appellant to enter employment contract would not be barred because they were collateral to the contract); First Republic Bank v. Brand, 50 Pa. D & C 4th 329 (Pa. Com. Pl. 2000) (holding that the gist of the action doctrine did not bar fraud claims where the fraud – taking cash out of the corporation targeted for takeover – was collateral to the contractual agreements contained in the letter of intent to acquire the corporation); Polymer Dynamics, Inc. v. Bayer Corp., Civ. A. No. 99-4040, 2000 WL 1146622 (E.D. Pa. Aug. 14, 2000) (concluding that fraud claims were not necessarily barred because they could have related to promises of future business not contemplated by the sales contracts).

The misrepresentation alleged in the Complaint here is that the bill for the paper goods would actually be paid. While fraudulent inducement to enter into a contract has been held to be collateral to the contract, that is not what Sunburst is alleging here. Its allegation is that it was induced to forego obtaining personal guarantees (§ 2, 16) and induced to deliver the goods (§ 3, 48) on the strength of defendants' representations that the LOCs would guarantee payment and that the defendants would actually pay for the goods from the LOC proceeds. There is no allegation, for example, that the LOCs never existed or that the defendants did not have actual orders to fill. The failure to pay for the goods sold out of the LOC proceeds cannot be considered collateral to the contract since Sunburst's allegations relate to the defendants' failure to perform their primary obligation under the contracts, i.e., to pay for the goods they contracted to buy. Accordingly, we conclude that the gist of the action doctrine bars the fraud and negligent misrepresentation claims.

B. Economic Loss Doctrine

Defendants also argue that Sunburst's tort claims are barred under the economic loss

doctrine. In a line of cases beginning with East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986) (applying admiralty law), whose rationale was adopted in Pennsylvania in REM Coal Co., Inc. v. Clark Equip. Co., 563 A.2d 128 (Pa. Super 1989) and subsequent cases, the economic loss doctrine has been construed to hold that negligence, strict products liability, fraud and negligent misrepresentation theories do not apply to actions between commercial enterprises where the only damages alleged are economic losses. Lower Lake Dock Co. v. Messinger Bearing Corp., 577 A.2d 631, 634-34 (Pa. Super 1990) (negligence and products liability claims barred); Werwinski, 286 F.3d at 671 (fraud claim barred); Duquesne Light Co. v. Westinghouse Elec. Corp., 66 F.3d 604, 620 (3d Cir.1995) (negligent misrepresentation claim barred); Factory Mkt., 987 F.Supp. at 397 (negligence claim barred); Sun Co. v. Badger Design & Constructors, Inc., 939 F.Supp. 365, 374 (E.D. Pa.1996) (negligence claim barred).³ As with the gist of the action doctrine, the economic loss rule is also directly applicable to the fraud and negligent misrepresentation claims, requiring their dismissal.

³Like the gist of the action doctrine, the rationale of the economic loss rule is that tort law is not intended to compensate parties for losses suffered as result of a breach of duties assumed only by agreement. Sun Co., 939 F.Supp. at 371. Compensation in such cases requires an analysis of damages which were in the contemplation of the parties at the origination of the agreement, an analysis within the sole purview of contract law. The policy consideration underlying tort law is the protection of persons and property from loss resulting from injury, while the policy consideration underlying contract law is the protection of bargained for expectations. Thus in the light of these distinctions, to recover in tort a plaintiff must allege facts showing a breach of some duty imposed by law, rather than the parties' contract. In other words, there must be a showing of harm that is distinct from the disappointed expectations evolving solely from an agreement. Id. (citing Auger v. The Stouffer Corp., No. 93-2529, 1993 WL 364622 at *2 (E.D. Pa. August 31, 1993). The economic loss doctrine "prohibits plaintiffs from recovering in tort economic losses to which their entitlement flows only from a contract." Werwinski, 286 F.3d at 671.

C. Punitive Damages

As both the gist of the action doctrine and the economic loss rule bar claims for fraud and negligent misrepresentation, Sunburst's tort claims cannot survive. Because the tort claims must be dismissed, so too must Sunburst's claims for punitive damages, which are not available for breach of contract claims, see Baker, 536 A.2d at 1367, and quantum meruit claims Martin v. Little, Brown and Co., 450 A.2d 984 (Pa. Super. 1981) (measure of recovery for unjust enrichment is the reasonable value of the goods or services rendered); West v. Peoples First Nat. Bank & Trust Co., 106 A.2d 427 (Pa. 1954) (recovery is limited to value of benefit conferred).

IV. CONCLUSION

As Sunburst's claims for fraud and negligent misrepresentation fail to state a claim under Pennsylvania law, the motion to dismiss is granted. The only claims that survive are the claims for compensatory damages in the counts for breach of contract and account stated. The only defendants remaining in the lawsuit are Keating Fibre International, Inc. and Keating Fibre, Inc.

An appropriate order follows.

