

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

<b>WERNER KAMMANN</b>	:	<b>CIVIL ACTION</b>
<b>MASCHINENFABRIK, GmbH</b>	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>MAX LEVY AUTOGRAPH, INC. and</b>	:	
<b>WISE ELECTRONIC SYSTEMS,</b>	:	
<b>Defendants/Third-Party Plaintiffs</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>COORSTEK; RESONETICS, INC.;</b>	:	
<b>LINDBERG/BLUE, and LSP</b>	:	
<b>INDUSTRIAL CERAMICS, INC.</b>	:	
<b>Third-Party Defendants.</b>	:	<b>NO. 01-1083</b>

**Reed, S.J.**

**January 31, 2002**

**M E M O R A N D U M**

Currently before the Court in this diversity breach of contract case is the motion of third-party defendant Lindberg/Blue (“Lindberg”) to dismiss the first amended third-party complaint (Document No. 25) pursuant to Federal Rule of Civil Procedure 12(b)(6). Upon consideration of the motion, as well as the response and reply thereto, and for the reasons which follow, the motion will be granted in part and denied in part.

**I. Background**

This multi-party case stems from an alleged breach of contract for the development of a print head assembly asserted by plaintiff Werner Kammann Maschinenfabrik GmbH (“Kammann”) against defendants/third-party plaintiffs Max Levy Autograph, Inc. (“Max Levy”) and Wise Electronic Systems (“Wise”) who in turn have brought suit against third-party

defendant Lindberg among others.<sup>1</sup>

The amended third-party complaint alleges the following: Max Levy purchased a Lindberg furnace through a distributor on or about May 11, 1999 based upon Lindberg's express representation that the heating elements of the furnace were enclosed. (Compl. ¶¶ 24-25.) Max Levy required such enclosure to eliminate the risk of contamination to the materials being fired from the oxidation of heating element particles. (Id. ¶ 26.) The furnace supplied by Lindberg, however, failed to have such enclosure. (Id. ¶ 27.) Lindberg failed and refused to assist Max Levy in rectifying the problem, and Max Levy was forced to design and purchase custom-made shelving and related products which were not received until on or about November 22, 1999. (Id. ¶¶ 28-29.) The project involving Kammann and defendants/third-party plaintiffs was delayed as a result. (Id. ¶ 27.)<sup>2</sup>

Max Levy and Wise bring the following four causes of action against Lindberg: (1) breach of contract; (2) breach of warranty; (3) fraudulent misrepresentation; and (4) negligent misrepresentation.

## **II. Standard**

Rule 12 (b) of the Federal Rules of Civil Procedure provides that “the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which

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<sup>1</sup> Jurisdiction is proper pursuant to 28 U.S.C. § 1332(a)(2), as plaintiff Werner Kammann Maschinenfabrik GmbH (“Kammann”) is a citizen of Germany, and the amount in controversy exceeds \$75,000, exclusive of interest and costs.

<sup>2</sup> Third-party plaintiffs make additional allegations in their counterclaim: They assert that Max Levy contacted Lindberg about the problem, and Lindberg suggested that Max Levy use half of a ceramic tube to shield the parts being fired. (Counterclaim ¶ 43.) Third-party plaintiffs further claim that Lindberg offered to find something and ship it to Max Levy, but never did. (Id.) As these allegations were not incorporated into the amended third-party complaint, I will not rely on those allegations.

relief can be granted.” In deciding a motion to dismiss under Rule 12 (b) (6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969). Because the Federal Rules of Civil Procedure require only notice pleading, the complaint need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a).

A motion to dismiss should be granted 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, 104 S. Ct. 2229, 2232, 81 L. Ed. 2d 59 (1984). In considering a motion to dismiss, the proper inquiry is not whether a plaintiff will ultimately prevail, but rather whether a plaintiff is permitted to offer evidence to support its claims. See Children’s Seashore House v. Waldman, 197 F.3d 654, 658 (3d Cir. 1999), cert. denied, 120 S. Ct. 2742 (2000) (quoting Nami v. Fauver, 82 F.3d 63, 65 (3d Cir.1996)). The moving party bears the burden of showing that the non-moving party has failed to state a claim for which relief can be granted. See Gould Elec. Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000).

### **III. Analysis**

#### *A. Limitations of Damages Clause*

Lindberg first argues that the limitations of damages clause in Lindberg’s product warranty bars all claims asserted by Wise and Max Levy. Lindberg attaches the clause, which is not part of the pleadings, to its motion to dismiss. (Third-party Def.’s Ex. 1.) Under Rule 12(b), where “matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment.” This process is known as conversion. See In re

Rockefeller Ctr. Prop., Inc. Sec. Litig., 184 F.3d 280, 287 (3d Cir. 1999). The Court of Appeals has determined that a district court may consider “a document *integral to or explicitly relied upon* in the complaint.” Id. (quoting In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997) (quoting Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1<sup>st</sup> Cir. 1996))) (emphasis in original).

Thus, this Court can examine any “undisputedly authentic document” attached as an exhibit to a motion to dismiss where plaintiff bases his claims on the document. See id. (quoting Pension Ben. Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). The rationale behind this exception is that the main concern in looking at documents beyond the pleadings is that the plaintiff lacks notice; this problem is dissipated where the plaintiff relies on such document in framing the complaint. See id. (citing In re Burlington, 114 F.3d at 1426). Upon conversion, this Court is directed to provide parties “reasonable opportunity” to present all material relevant to a summary judgment inquiry which requires “unambiguous” notice to the parties; it is recommended that the notice also be “express.” See id. (citing Rose v. Bartle, 871 F.2d 331, 340 (3d Cir. 1989)). I conclude that the limitations of damages clause as part of the product warranty is integral to the third-party complaint; however, I further conclude that since, for the reasons which follow, this Court will be rejecting defendant’s argument that the clause bars recovery, express notice is not necessary here as plaintiff will not be prejudiced.

The clause at issue here provides:

**11.1 Domestic Warranty (United States and Canada)**

Lindberg/Blue M warrants this product to the owner for a period of twelve (12) months from the date of shipment by Lindberg/Blue M. Under this warranty Lindberg/Blue M through its authorized Dealer or service organizations, will

repair or at its option replace any part found to contain a manufacturing defect in material or workmanship, without charge to the owner, for a period of ninety (90) days, the labor, and a period of one (1) year, the parts, necessary to remedy any such defect.

....

This warranty is in lieu of any other warranties, expressed or implied, including merchantability or fitness for a particular purpose. The owner agrees that Lindberg/Blue M's sole liability with respect to defective parts shall be set forth in this warranty, and *any claims for incidental or consequential damages are expressly excluded.*

(Third-party Def.'s Ex. 1) (emphasis added).

As this is a contract for goods, the Pennsylvania Commercial Code ("the Code"), which is Pennsylvania's version of the UCC, governs this action. The parties agree that Pennsylvania courts routinely uphold limiting liability clauses as codified in 13 Pa.C.S.A. § 2719. See, e.g., Valhal Corp. v. Sullivan Assoc., Inc., 44 F.3d 195, 203 (3d Cir. 1995). Section 2719 provides:

**§ 2719. Contractual Modification or limitation of remedy**

**(a) General rule.**--Subject to the provisions of subsections (b) and (c) and of section 2718 (relating to liquidation or limitation of damages; deposits):

(1) The agreement may provide for remedies in addition to or in substitution for those provided in this division and may limit or alter the measure of damages recoverable under this division, as by limiting the remedies of the buyer to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts.

(2) Resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

**(b) Exclusive remedy failing in purpose.**--Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this title.

**(c) Limitation of consequential damages.**--Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

Lindberg argues that under the valid and enforceable limitation of remedies clause, the third-party plaintiffs are not entitled to any consequential damages thus their claims should be dismissed. Max Levy and Wise contend that the limitation clause does not apply because it falls under the enumerated exception found in subsection (b) of section 2719 since the clause failed in its essential purpose and therefore third-party plaintiffs are entitled to all remedies under the Pennsylvania Commercial Code.

This Court is not unfamiliar with section 2719. In Caudill Seed and Warehouse Co., Inc. v. Prophet 21, Inc., 123 F. Supp.2d 826 (E.D. Pa. 2000), I predicted that the Pennsylvania Supreme Court would conclude that where an exclusive remedy in a limitation on liability provision failed in its essential purpose because defective pieces were not repaired as warranted, the damages disclaimer within the clause is rendered inoperative, and the buyer may invoke all remedies available under the Code. Id. at 831-32 (acknowledging that (1) neither the Supreme Court of Pennsylvania nor the Pennsylvania Superior Court has ruled on the matter; and (2) courts are in disagreement on the issue of whether a finding that the exclusive remedy provision fails in its essential purpose automatically nullifies a clause excluding consequential damages). See also Amsan, LLC v. Prophet 21, Inc., Civ. A. Nos. 01-1950, 01-1954, 2001 WL 1231819 (E.D. Pa. Oct. 15, 2001) (reaffirming prediction rendered in Caudill Seed).

Lindberg contends that this case does not fit into the “repair and replace” rubric which most often serves as the basis for applying the “failure in its essential purpose” exception because this case boils down to the fact that Max Levy bought the wrong furnace, and Lindberg played no part in that decision. I find that, at the very least, a “repair and replace” analysis is awkward here because the furnace does in fact “function” in a very technical sense of the word. In other words,

this case involves a buyer who allegedly received a furnace which works, but is not the furnace for which it contracted. Thus, the issue is really whether an alleged fraud can void application of the limitations clause.

The majority of courts which have addressed this issue, have held that bad faith conduct on the part of the seller can prevent enforcement of an otherwise valid limitation of damages clause. See Select Pork, Inc. v. Babcock Swine, Inc., 640 F.2d 147, 149-50 (8<sup>th</sup> Cir. 1981) (seller cannot enforce limitations clause where it delivered different breed of pigs than that which parties had contracted); Jannus Group, Inc. v. Indep. Container, Inc., No. 98 Civ. 1075 (LBS), 1999 WL 294846, at \* 3 (S.D. N.Y. May 10, 1999) (under Kentucky law where seller sent corrugated cardboard boxes of a strength specification that was different than called for under contract, the limitation clause would be invalidated); Christina Marine Serv. Corp. v. Seaboard Shipping Corp., No. Civ. A. 96-8705, 1997 WL 587292, at \*2 (E.D. Pa. Sept. 10, 1999) (under New York law where seller conceals a defect, such bad faith estopps seller from invoking limitations clause); Brunsmann v. DeKalb Swine Breeders, Inc., 952 F. Supp. 628, 634-35 (N.D. Iowa 1996), aff'd, 138 F.3d 358 (8<sup>th</sup> Cir. 1998) (seller is prevented from applying limitations clause where it provided boars that did not conform to contract description; court found conformity, thus limitations clause found enforceable); PC COM, Inc. v. Proteon, Inc., 946 F. Supp. 1125, 1140 (S.D.N.Y. 1996) (under Massachusetts law, an intentional breach of contract bars seller from using clause to prevent payment of consequential damages); International Connectors Indus., Ltd v. Litton Sys., Inc., Civ. A. No. B-88-505 (JAC), 1995 WL 253089, at \*11 (D. Conn. Apr. 25, 1995) (multiple acts of bad faith conduct including, *inter alia*, failing to fill orders and misrepresenting that conforming goods would be forthcoming to replace non-

conforming goods, barred application of limitations clause); Potomac Plaza Terraces, Inc. v. QSC Prod., Inc., 868 F. Supp. 346, 353 (D.D.C. 1994) (seller's bad faith proposals to repair goods made limitations clause inoperable); AT&T v. New York City Human Res. Admin., 833 F. Supp. 962, 989-90 (S.D.N.Y. 1993) (recognizing rule but determining that record failed to demonstrate bad faith conduct); Colonial Life Ins. Co. of Am. v. Elec. Data Sys. Corp., 817 F. Supp. 235, 243 (D.N.H. 1993) (selling products with known defects precluded use of limitations clause); Long Island Lighting Co. v. Transamerica Delaval, Inc., 646 F. Supp. 1442, 1458-59 (S.D.N.Y. 1986) (limitations clause did not apply where seller concealed defects); See also McNally Wellman Co., a Div. of Boliden Allis, Inc. v. New York State Elec. & Gas Corp., 63 F.3d 1188, 1198 n. 9 (2<sup>nd</sup> Cir. 1995) (recognizing legal support exists for proposition that bad faith exception exists under Commercial Code, but not resolving issue because record lacked evidence of bad faith conduct); Metalized Ceramics for Elec., Inc. v. Nat'l Ammonia Co., 444 Pa. Super. 238, 248, 663 A.2d 762, 767 (1995) (concluding that essential purpose of provision was met, but noting that the buyer "does not allege fraud or incompetence to excuse itself from the terms of the contract;" thus suggesting that fraud or bad faith conduct may be an exception).

I am persuaded by the inherent logic and reasonableness of this rule and predict that the Pennsylvania courts would not depart from this majority approach, particularly when the Pennsylvania Code imposes a duty of good faith in every contract thereunder. See 13 Pa.C.S.A. § 1203. Rejection of this rule would not only be counter to the good faith requirement embodied in the code, but also to one of the general policies behind permitting limitations clauses at all; that is, allowing the parties to allocate risks among themselves. See Jim Dan, Inc. v. O.M. Scott & Sons Co., 785 F. Supp. 1196, 1200 (W.D. Pa. 1992). If sellers who act in bad faith may still

invoke a limitations clause, that means a buyer could be left without a remedy in a situation where such buyer did not contract to assume that risk.<sup>3</sup> In addition, the first comment to § 2719 of the Code provides:

Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect.

However, it is of the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.

Accordingly, if a bad faith exception were disallowed, “at least minimum adequate remedies” may be unavailable.

To the extent that Lindberg argues that even if the limitations on damages clause were rendered inoperable, the exclusive remedy provision still bars recovery, I disagree. In Caudill Seed, as explained above, I concluded that where an exclusive remedy provision, which is included in a limitation on liability clause, is found to have failed in its essential purpose, the remaining damage disclaimers are mooted. See Caudill Seed, 123 F. Supp. 2d at 830-32. In so holding, I disagreed with the logic that the limited remedy and an exclusion of consequential damages are not inextricably linked clauses in a contract. See id. at 831-32 (“exclusive remedy clauses often (if not only) arise in situations where there is also a disclaimer of damages, because without a disclaimer of

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<sup>3</sup> Related to this point is Lindberg’s argument that this case is analogous to latent defect cases. See Borden, Inc. v. Advent Ink Co., 701 A.2d 255 (Pa. Super. 1997). The Court in Borden, however, reasoned that latent defects do not deem the limitation clause inoperable because limitations clauses are meant to apportion undeterminable risks. See id. at 263. In other words, a latent defect case would be one in which the furnace came with the heating elements enclosed and there existed some sort of latent defect concerning that enclosure. Here, the buyer did not agree to assume the risk that he may receive a product other than what he bargained for; rather, the buyer agreed to assume the risk that the enclosure would not work exactly how the buyer had hoped.

damages, a remedy is not exclusive.”). I now conclude that where a limitations of damages clause is rendered invalid because of alleged bad faith conduct, the exclusive remedy provision must also be rendered invalid for the same reasons that the bad faith conduct prevents the seller from invoking the limitations on damages clause. See Potomac Plaza, 868 F. Supp. at 353 (“Most jurisdictions . . . hold that a seller who acted in bad faith may not claim the benefit of a limitation of *remedy* that by itself would be valid.”) (citation omitted).

Third-party plaintiffs here allege that third-party defendant misrepresented that the heating elements of the furnace were enclosed, when in fact they were not. (Compl. ¶ 25.) Under Pennsylvania law, bad faith conduct includes, but is not limited to: “‘evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.’” See Kaplan v. Cablevision of Pa., Inc., 448 Pa. Super. 306, 318, 671 A.2d 716, 722 (1996) (quoting Somers v. Somers, 418 Pa. Super. 131, 135, 613 A.2d 1211, 1213 (1992) (quoting Restatement (Second) of Contracts § 205(d)); Fremont v. E.I. DuPont DeNemours & Co., 988 F. Supp. 870, 877 (E.D. Pa. 1997) (quoting the same). If such a misrepresentation were in fact shown, I conclude it would meet the definition of bad faith conduct.<sup>4</sup>

I therefore conclude that Lindberg will not be granted relief under its converted motion to

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<sup>4</sup> In support, third-party plaintiffs present an internet catalogue description of the furnace. (Third-Party Pls.’ Ex. 1.) As this exhibit was not part of the pleadings, I will not here consider it. It is sufficient for the purpose of resolving the pending motion that the complaint alleges that Lindberg misrepresented that the heating elements were enclosed. (Compl. ¶¶ 25, 27.) Wise and Max Levy need not prove such misrepresentation at this stage in the litigation.

dismiss the claims on the ground that the limitation on damages clause bars recovery for consequential damages. Accordingly, to be clear, the claims for breach of contract (First Cause of Action), as well as for breach of express warranty (Second Cause of Action) will not be dismissed.

*B. Gist of the Action Test*

Lindberg's second argument is that the claims for fraudulent misrepresentation (Third Cause of Action) and negligent misrepresentation (Fourth Cause of Action) are essentially a recasting of the relief sought under the breach of contract claims and should therefore be dismissed under the "gist of the action" test. I have previously predicted that the Pennsylvania Supreme Court would adopt this test, and I reaffirm that holding here. See Asbury Automotive Group LLC v. Chrysler Ins. Co., No. 01-3319, 2002 WL 15925, at \*3 n.3 (E.D. Pa. Jan. 7, 2002) (citing Phico Ins. Co. v. Presbyterian Meed. Serv. Corp., 444 Pa. Super, 221, 227-30, 663 A.2d 753 (1995) and Redevelopment Auth. v. Int'l Ins. Co., 454 Pa. Super. 374, 391-95, 685 A.2d 581 (1996)); Caudill Seed, 123 F. Supp. 2d at 833 n.11; Amsan, 2001 WL 1231819, at \*3 n.4. Accord Bohler-Uddeholm Am., Inc. v. Ellwood Group, Inc., 247 F.3d 79, 103 (3d Cir. 2001), cert. filed, 70 USLW 3444, No. 01-94 (Dec. 21, 2001).

“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; a tort claim is maintainable only if the contract is ‘collateral’ to conduct that is primarily tortious.” 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) (citing cases)). The gist of the action test requires the court to determine the essential

nature of the claim alleged by distinguishing between contract and tort claims on the basis of the source of the duties allegedly breached; where the duties essentially flow from an agreement between the parties, the claim is deemed contractual in nature, whereas if the duties breached were of a type imposed on members of society as a matter of social policy, the claim is deemed essentially based in tort. See id. (citing Phico, 444 Pa. Super at 229, 663 A.2d 753).

Wise and Max Levy assert that Lindberg misrepresented the fact that the heating elements of the purchased furnace were enclosed, when they were not. The express statement that the heating elements would be enclosed was part of the contract, and third-party plaintiffs have, as discussed, alleged breaches of the contract and that specific express warranty. Thus, the misrepresentation claims are completely intertwined with those contractual claims, and the contract claim is not collateral to the tort claims. The duties allegedly breached were created and grounded in the contract itself. A mere allegation of fraud and negligence is insufficient to create a distinct tort remedy. See Horizon Unlimited, Inc. v. Silva, No. Civ. A. 97-7430, 1998 WL 88391, at \*5 (E.D. Pa. Feb. 26, 1998) (dismissing negligent misrepresentation claim premised on statements in promotional literature).

Third-party defendants argue that under this Court's reasoning in American Guarantee and Liability Insurance Company v. Fojanini, 90 F. Supp. 2d 615 (E.D. Pa.), recon. granted in part, 99 F. Supp. 2d 558 (E.D. Pa. 2000), the misrepresentation claims should survive. I find that case distinguishable. In Fojanini, the defendants misrepresented the financial soundness of the defendant corporation. While I observed that the tort action there presented was grounded "in the general duty to exercise reasonable care in making representations that could result in reliance," id. at 623, it was also essential that the representations did not concern specific duties outlined in

the contract. I thus concluded that the plaintiff's contract allegations were collateral to the tortious conduct alleged. See id. Such is not the case here where the claims of misrepresentations are rooted in the agreement between the parties.

I therefore conclude that the claims for fraudulent misrepresentation (Third Cause of Action) and negligent misrepresentation (Fourth Cause of Action) will be dismissed. Because third-party defendant has been successful in its argument that the claim should be dismissed under the gist of the action test, I will not address the merits of its arguments concerning the economic loss doctrine,<sup>5</sup> the heightened pleading requirements of Federal Rule of Civil Procedure 9, or what appears to be an argument that third-party defendants fail to state a claim of misrepresentation.

#### **IV. Conclusion**

The motion of Lindberg that the claims should be dismissed because Max and Wise Levy are not permitted under the limitation clause to pursue consequential damages will be denied and the claims for breach of contract (First Cause of Action) and breach of express warranty (Second Cause of Action) will not be dismissed. The motion of Lindberg that the claims for fraudulent misrepresentation (Third Cause of Action) and negligent misrepresentation (Fourth Cause of Action) should be dismissed under the gist of the action test will be granted and those claims will be dismissed.

An appropriate Order follows.

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<sup>5</sup> This doctrine prevents plaintiffs from "recovering in tort economic losses to which their entitlement flows only from a contract." Bohler-Uddeholm, 247 F.3d at 79.

**IN THE UNITED STATES DISTRICT COURT  
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<b>Plaintiff,</b>	:	
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<b>v.</b>	:	
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<b>MAX LEVY AUTOGRAPH, INC. and</b>	:	
<b>WISE ELECTRONIC SYSTEMS,</b>	:	
<b>Defendants/Third-Party Plaintiffs</b>	:	
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<b>v.</b>	:	
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<b>COORSTEK; RESONETICS, INC.;</b>	:	
<b>LINDBERG/BLUE, and LSP</b>	:	
<b>INDUSTRIAL CERAMICS, INC.</b>	:	
<b>Third-Party Defendants.</b>	:	<b>NO. 01-1083</b>

**ORDER**

**AND NOW** this 31<sup>st</sup> day of January, 2002, upon consideration of the motion of third-party defendant Lindberg/Blue (“Lindberg”) to dismiss (Document No. 25) pursuant to Federal Rule of Civil Procedure 12(b)(6), and for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that:

1. The motion is **GRANTED** in part and **DENIED** in part.
2. It is **DENIED** because the claims for breach of contract (First Cause of Action) and breach of warranty (Second Cause of Action) are not barred by any limitation clause in the warranty and will remain in the case.
3. It is **GRANTED** because the claims for fraudulent misrepresentation (Third Cause of Action) and negligent discrimination (Fourth Cause of Action) are **DISMISSED** under the gist of the action test.

**IT IS FURTHER ORDERED** that Lindberg shall file an answer to the amended third-party complaint, except for the Third and Fourth Causes of Action, no later than February 21, 2002.

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**LOWELL A. REED, JR., S.J.**