

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

HORIZON UNLIMITED, INC. & : CIVIL ACTION
JOHN HARE :
 :
v. :
 :
RICHARD SILVA & SNA, INC. : NO. 97-7430

MEMORANDUM and ORDER

Norma L. Shapiro, J.

February 26, 1998

Plaintiffs Horizon Unlimited, Inc. ("Horizon") and John Hare ("Hare") (collectively the "plaintiffs"), alleging violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law, Pa. Stat. Ann. tit. 73, § 201-1, et seq., negligent misrepresentation, fraud and deceit, and breach of warranty, filed this action against defendants Richard Silva ("Silva") and SNA, Inc. ("SNA") (collectively the "defendants"). Defendants have filed a motion to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, defendants' motion will be granted in part and denied in part.

BACKGROUND

Horizon is incorporated under the laws of Delaware,¹ and Hare is a citizen of Canada. (Cmplt. ¶¶ 6-7). Silva is the

¹ The caption to plaintiffs' Complaint and response to defendants' motion to dismiss describes Horizon as a Florida corporation. However, in the body of their Complaint, plaintiffs aver Horizon is a Delaware corporation; they do not state Horizon's principal place of business. For the purposes of this motion, the court will assume Horizon is incorporated and has its principal place of business in a state other than Pennsylvania.

president of SNA and resides in Pennsylvania; SNA is incorporated in and has its principal place of business in Pennsylvania. (Id. ¶¶ 8-9). Plaintiffs propose to represent a class of all persons who purchased a Seawind aircraft kit manufactured, marketed and sold by defendants. (Id. ¶ 1).

The Seawind kit contains a variety of fiberglass and machine parts, but the purchaser must provide certain aircraft parts, such as an engine and propeller. The purchaser is required to construct at least 51% of the aircraft under Federal Aviation Administration ("FAA") regulations. (Id. ¶ 21). The purchaser may obtain outside help to assist in building the airplane, but defendants cannot construct the airplane for the buyer. (Id.).

In order to market and sell the Seawind airplane kit, defendants printed a brochure and placed advertisements in national trade publications. (Id. ¶ 22). The advertizing materials described the design of the Seawind, its specifications,² and stated the building time should be "under

² According to plaintiffs, the relevant specifications are as follows:

Weight-	Max Takeoff	Land 3400, Water 3400 lbs.
	Empty	2300 lbs.
	Useful	1100 lbs.
Level Speed 100% Power		200 mph
Cruise 75% Power (8000 feet)		191 mph
Maximum Range (no reserve)		980 miles
Rate of Climb		1250 fpm
Stall Speed- Clean		72 mph
	Flaps and wheels	59 mph
Take Off Distance- Land		820 ft - 1175 ft

2,000 hours." Seawind Brochure at 6. However, plaintiffs claim "[s]ome of the customers purchased the aircraft based upon the 1,000 build time" allegedly represented by defendants in earlier promotional materials. (Cmplt. ¶ 24). It is not clear whether plaintiffs, who purchased their airplane in November, 1991, were among those "customers" who believed the build time was under 1,000 hours.

Plaintiffs claim they purchased the Seawind airplane kit based on the specifications listed in the brochure. After completing construction, their airplane did not perform as represented in the brochure. Plaintiffs do not state how their airplane was deficient or what specifications they are challenging; plaintiffs only allege the airplane did not "perform according to the specifications and building times" printed in the promotional materials. (Id. ¶ 28, 37, 47, 55, 57).

Plaintiffs initiated this action to seek redress for the alleged discrepancies between the specifications and building time in the promotional materials and the airplane's actual performance. They assert four counts: 1) violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"); 2)

	Water	1100 ft - 1450 ft
Landing Distance-	Land	770 ft - 1300 ft
	Water	620 ft - 1150 ft

See Seawind Brochure at 1, attached as Ex. to Pltffs.'Cmplt. ["Seawind Brochure"].

negligence/negligent misrepresentation; 3) fraud and deceit; and 4) breach of warranty. Defendants move to dismiss plaintiffs' Complaint.

DISCUSSION

I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988) (citations omitted), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Random v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only if the court finds the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See Conley v. Gibson, 335 U.S. 41, 45-46 (1957).

When deciding a motion to dismiss, the court properly may consider "matters of public record, orders, exhibits attached to the complaint and items appearing in the record of the case." Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 n.2 (3d Cir. 1994); see Williams v. Stone, 923 F. Supp. 689, 690

(E.D. Pa. 1996), aff'd, 109 F.3d 890 (3d Cir.), cert. denied, 118 S. Ct. 383 (1997). When the plaintiff attaches an exhibit to the Complaint and incorporates it therein, he is bound by the contents of the exhibit. See Chester County Intermediate Unit v. Pennsylvania Blue Shield, 896 F.2d 808, 812 (3d Cir. 1990). The court need not convert the motion to dismiss into a motion for summary judgment in order to consider the contents of an attached exhibit. See id.; Kolimaga v. Bartle, 871 F.2d 331, 340 n.3 (3d Cir. 1989).

II. Breach of Warranty

In Count IV, plaintiffs claim a breach of warranty regarding the Seawind's specifications and building time made by defendants in their promotional materials. (Cmplt. ¶ 54). Plaintiffs claim these statements created express warranties which they relied upon in purchasing the airplane kit. (Cmplt. ¶¶ 54-57). When the Seawind did not perform according to plaintiffs' expectations, defendants allegedly breached these express warranties.

The Purchase Agreement between plaintiffs and defendants contains the following warranty:

SNA, Inc. warrants that the contents of the Kit at the time of shipment will be free of defects in material and workmanship according to current standards of the experimental aircraft industry. SNA, Inc.'s sole obligation under such warranty shall be limited to replacing, correcting or repairing any part of said property, which, within six months after date of shipment and prior to assembly, is shown to be

defective and is returned by Purchaser to SNA, Inc.'s plant with all transportation charges, duties and excises paid by seller.

...

SNA, Inc.'s warranty (a) does not apply to any defect caused by accident, misuse, neglect, improper repair or modifications; (b) does not apply to any part or component not manufactured by SNA, Inc.; and (c) does not apply to any part after it has been assembled in the Aircraft.

Purchase Agreement ¶ 5, at 2, attached as Ex. to Pltffs.' Cmplt.

["Purchase Agreement"].

The Purchase Agreement also contains an integration clause stating:

SNA, Inc. hereby gives notice that it carries NO LIABILITY INSURANCE and Purchaser and SNA, Inc. agree that THE FOREGOING WARRANTY IS EXPRESSLY IN LIEU OF ANY AND ALL OTHER REPRESENTATIONS, WARRANTIES OR CONDITIONS EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OR CONDITIONS OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, AND IS IN LIEU OF ANY AND ALL OBLIGATIONS OR LIABILITIES OF SNA, INC. TO PURCHASER, WHETHER FOR PROPERTY LOSSES OR PERSONAL INJURY LOSSES OR LOSS OF USE OF THE AIRCRAFT, LOSS OF TIME, INCONVENIENCE, COMMERCIAL LOSS, OR FOR INDIRECT, DIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, OR OTHERWISE, ARISING OUT OF THE USE OF THE KIT OR THE FINISHED AIRCRAFT. THE PURCHASER SPECIFICALLY ACKNOWLEDGES AND AGREES THAT THE FOREGOING SHALL SURVIVE FUNDAMENTAL BREACH OF THIS AGREEMENT.

Id. ¶ 5, at 3. The parties initialed the Purchase Agreement directly beneath this clause.

The Purchase Agreement continued with the following language:

The entire understanding and agreement between SNA, Inc. and Purchaser regarding the subject matter hereof

is set forth in this document and the Exhibits A, B & C herein. All prior or contemporaneous agreements, understandings, negotiations, discussions, conditions, covenants, warranties and representations, whether written or oral, not incorporated herein are superseded except for the Release and Indemnity signed currently with this Agreement.

Purchase Agreement ¶ 14, at 5.

The Purchase Agreement further contains a choice of law clause stating the agreement "shall be construed and enforced in accordance with, and the rights of the parties hereto shall be governed by, the laws of the Commonwealth of Pennsylvania."

Purchase Agreement ¶ 9, at 4.

Plaintiffs, claiming the earlier representations in the brochure formed part of the "basis of the bargain," argue defendants cannot "hide behind" the integration clause. (Cmplt. ¶¶ 21-22). Plaintiffs, citing no Pennsylvania case law to support their position, assert that a subsequent, written contractual provision cannot contradict earlier express representations.

In Pennsylvania, "the intent of the parties to a written contract is to be regarded as being embodied in the writing itself." Steuart v. McChesney, 444 A.2d 659, 661 (Pa. 1982). "[T]he law declares the writing to be not only the best, but the only evidence" of the parties' agreement. Gianni v. Russell & Co., Inc., 126 A. 791, 792 (Pa. 1924); see Lenihan v. Howe, 674 A.2d 273, 275 (Pa. Super. 1996). "All preliminary negotiations,

conversations and verbal agreements are merged in and superseded by the subsequent written contract" Union Storage Co. v. Speck, 45 A. 48, 49 (Pa. 1899); see HCB Contractors v. Liberty Place Hotel Assoc., 652 A.2d 1278, 1279 (Pa. 1995).

The integration clause in the Purchase Agreement purports to supplant "any and all other representations" made prior to formation of the contract. Purchase Agreement ¶ 5, at 3. Where the contractual language is not vague or ambiguous, the court cannot rewrite the terms of the agreement to conform to a party's preferred state of affairs. The waiver of all other express or implied warranties contained in the Purchase Agreement bars an action for breach of warranty based on any representations defendants made prior to the date of the contract.

In certain, limited situations, a party can avoid a waiver of warranties and rely on evidence of prior representations. The party must allege fraud, accident or mistake. See Bardwell v. Willis Co., 100 A.2d 102, 104 (Pa. 1953). However, it is not sufficient for a plaintiff to allege that defendants made fraudulent misrepresentations; the plaintiff must allege fraud in the inducement, that is, "the representations were fraudulently or by accident or mistake omitted from the integrated written contract." HCB Contractors, 652 A.2d at 1279. "[I]f it were otherwise, the parole evidence rule would become a mockery, because all a party to a written contract would have to do to

avoid, modify or nullify it would be to aver (and prove) that the false representations were fraudulently made.'" Nicolella v. Palmer, 248 A.2d 20, 23 (Pa. 1968) (quoting Bardwell, 100 A.2d at 104).

Plaintiffs have made no allegation that defendants fraudulently induced them to sign the Purchase Agreement. The parties initialed the contract immediately underneath the integration clause, so plaintiffs were not unaware of that provision. An allegation that defendants' brochure made fraudulent representations of the Seawind's specifications or building time is not sufficient to avoid the waiver contained in the integration clause. The waiver in the Purchase Agreement bars plaintiffs' breach of warranty claim; the court will dismiss Count IV of plaintiffs' Complaint.

III. Negligent Misrepresentation

Plaintiffs' Count II alleges negligent misrepresentation. To establish a prima facie case of negligent misrepresentation, the plaintiff must show: 1) a misrepresentation of a material fact; 2) the representor either knew of the misrepresentation, made the misrepresentation without knowledge as to its truth or falsity or made the misrepresentation under circumstances in which he should have known of its falsity; 3) the representor intended the misrepresentation to induce the plaintiff to act on it; 4) the plaintiff acted in justifiable reliance on the

misrepresentation; and 5) injury resulted to the plaintiff. See Gibbs v. Ernst, 647 A.2d 882, 890 (Pa. 1994).

Plaintiffs allege defendants made unidentified misrepresentations concerning the specifications of the Seawind airplane and that defendants knew or should have known of the falsity of their statements. (Cmplt. ¶ 35). Plaintiffs also claim defendants intended for them to rely on the allegedly false statements in the brochure. (Cmplt. ¶ 39). But plaintiffs cannot claim to have relied on the brochure specifications and figures when the subsequent contract, incorporated in their Complaint, specifically disclaimed any prior representations. Plaintiffs cannot show reliance. On the face of the Complaint, in light of the incorporated contract, plaintiffs have not established a prima facie case of negligent misrepresentation.

Plaintiffs' further difficulty arises from the relationship between their breach of warranty claim and their claim for negligent misrepresentation. Under Pennsylvania law, when the tort involves actions arising from a contractual relationship, the plaintiff is limited to an action under the contract. See, e.g., Damian v. Hernon, 157 A. 520, 521 (Pa. Super. 1931). Only in limited circumstances may a plaintiff proceed under a tort theory for alleged wrongs arising from a contractual relationship.

"Breach of contract, without more, is not a tort." Windsor

Securities Co. v. Hartford Life Ins. Co., 986 F.2d 655, 664 (3d Cir. 1993). "[T]he 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., 663 A.2d 753, 757 (Pa. Super. 1995).

To maintain a tort action, "the wrong ascribed to defendant must be the gist of the action with the contract being collateral." Bash v. Bell Tele. Co., 601 A.2d 825, 829 (Pa. Super. 1992) (citation omitted). "A claim ex contractu cannot be converted to one in tort simply by alleging that the conduct in question was wantonly done." Closed Circuit Corp. v. Jerrold Electronics Corp., 426 F. Supp. 361, 364 (E.D. Pa. 1977); Nirdlinger v. American Dist. Telegraph Co., 91 A. 883, 886 (Pa. 1914).

The negligent misrepresentation claim is premised on defendants' statements in promotional literature. Plaintiffs have argued that those statements were part of the "basis of the bargain" that formed the contract between the parties. Plaintiffs claim those statements created express warranties breached by defendants. Plaintiffs' negligent misrepresentation claim is fundamentally intertwined with its breach of warranty claim; the contract is not collateral to the tort claim. Plaintiffs' mere allegation of negligence is not sufficient to

create a distinct tort remedy. See Phico, 663 A.2d at 758.

The claim for negligent misrepresentation is "an impermissible attempt to convert a contract claim into a tort claim." USX Corp. v. Prime Leasing, Inc., 988 F.2d 433, 440 (3d Cir. 1993). Plaintiffs' attempt to plead a negligence claim cannot survive a motion to dismiss under Rule 12(b)(6). See Kimberton Chase Realty Corp. v. Mainline Bank, No. 97-2767, 1997 WL 698487, at *10 (E.D. Pa. Nov. 3, 1997) (Shapiro, J.). Count II will be dismissed.

IV. Fraud & Deceit

Plaintiffs' Count III asserts a fraud and deceit claim. A plaintiff claiming fraud and deceit must establish the following elements: 1) a representation; 2) which is material to the transaction at hand; 3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; 4) with the intent of misleading another into relying on it; 5) justifiable reliance on the misrepresentation; and 6) injury proximately caused by the reliance. See Gibbs, 647 A.2d at 889; Wilson v. Donegal Mut. Ins. Co., 598 A.2d 1310, 1315 (Pa. Super. 1991). In addition, a plaintiff must establish fraud through "clear, precise and convincing" evidence. Yoo Hoo Bottling Co. of Pennsylvania, Inc. v. Leibowitz, 247 A.2d 469, 470 (Pa. 1968); see Gerfin v. Colonial Smelting and Refining Co., Inc., 97 A.2d 71, 74 (Pa. 1953) ("clear, precise and indubitable" evidence);

New York Life Ins. Co. v. Brandwene, 172 A. 669, 669 (Pa. 1934)
("clear and satisfactory" evidence).

Plaintiffs base their fraud and deceit claim on defendants' list of the Seawind's specifications and building time in the brochure. Plaintiffs aver that defendants intended for plaintiffs to rely on the statements and knew or should have known the representations were false. (Cmplt. ¶ 48). Plaintiffs also claim they reasonably relied on the statements and were injured thereby. (Cmplt. ¶¶ 49-51). There is a serious question whether statements in promotional literature are actionable as representations. See, e.g., Rodio v. Smith, 587 A.2d 621, 624 (N.J. 1991) (promotional materials were mere puffery, not representations). But the contract attached to plaintiffs' Complaint expressly disclaims any prior statements or representations; plaintiffs cannot claim they relied on prior statements in the brochure to their detriment. By signing the Purchase Agreement, plaintiffs acknowledged that all prior representations were superseded by the contract terms. Plaintiffs have not stated a prima facie case of fraud and deceit.

Plaintiffs' fraud and deceit claim also suffers from the same infirmity as their claim for negligent misrepresentation. Plaintiffs are attempting to recover under a tort theory for an alleged wrong properly characterized as a breach of contract.

The same misrepresentations forming the basis of plaintiffs' fraud and deceit claim underlie their claim for breach of warranty. There is no allegation of fraud in the inducement.

A plaintiff cannot "remove the transactions from the ambit of the Commercial Code to the area of tortious conduct simply by making general allegations of fraud." Closed Circuit Corp., 426 F. Supp. at 364. "'If a party could simply, by alleging that a contracting party never intended to fulfill his promise, create a tortious action in fraud, there would be no effective way of preventing almost every contract case from being converted to a tort for jurisdictional purposes.'" Id. at 365 (citation omitted). Because this Purchase Agreement is integral, not collateral, to the alleged fraud and deceit, plaintiffs could only claim a breach of the contract's warranty. See USX Corp., 988 F.2d at 440. Count III will be dismissed.

V. Unfair Trade Practices & Consumer Protection Law

In Count I of their Complaint, plaintiffs allege a violation of the Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), Pa. Stat. Ann. tit. 73, § 201-1, et seq.,³ based on defendants' representations in their promotional literature.

³ The relevant provision of UTPCPL states: "Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce ... are hereby declared unlawful." Pa. Stat. Ann. tit. 73, § 201-3. Actions that qualify as "unfair methods of competition" or "unfair or deceptive acts or practices" are listed in Pa. Stat. Ann. tit. 73, § 201-2.

"The general purpose of the UTPCPL is to protect the public from fraud and unfair or deceptive business practices." Burke v. Yingling, 666 A.2d 288, 291 (Pa. Super. 1995). Because UTPCPL is an anti-fraud, consumer protection statute, it should be "liberally construed to effect the purpose." Pennsylvania v. Monumental Prop., Inc., 329 A.2d 812, 816 (Pa. 1974).

A private right of action under UTPCPL exists for "[a]ny person who purchases or leases goods or services primarily for personal, family or household purposes⁴ and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by ... this act." Pa. Stat. Ann. tit. 73, § 201-9.2(a). Plaintiffs claim the "aircraft does not perform according to the specifications" in the brochure, (Cmplt. ¶ 28), and defendants' omissions and false representations amount to deceptive acts prohibited by UTPCPL.⁵

⁴ The Seawind aircraft is designated as "experimental" by the FAA. See Purchase Agreement at 6, 14. Under FAA regulations, "[n]o person may operate an aircraft that has an experimental certificate-- ... (2) Carrying persons or property for compensation or hire." 14 C.F.R. § 91.319. Plaintiffs were not permitted to use the Seawind for commercial purposes; therefore, the court assumes without deciding now that they purchased the kit for "personal" use.

⁵ Plaintiffs do not identify which statutory definition of "unfair methods of competition" or "unfair or deceptive acts or practices" they are relying upon. Conceivably, defendants' alleged actions might fall within the following definitions:

"Representing that goods or services have ... ingredients,

A claim under UTPCPL is separate and distinct from a claim for breach of contract, even though both claims may be based on the same facts. See Fink v. Delaware Valley HMO, 612 A.2d 485, 488 (Pa. Super. 1992); Bash v. Bell Tele. Co. of Pa., 601 A.2d 825, 828 (Pa. Super. 1992). The UTPCPL claim is not precluded because plaintiffs' breach of warranty claim is barred by an integration clause. The UTPCPL claim is also distinct from plaintiffs' common law tort actions for negligent misrepresentation and fraud and deceit; the fact that those claims are barred does not preclude plaintiffs' UTPCPL claim.

A. Limitation of Liability Clause

Defendants argue the Purchase Agreement contains provisions restricting liability. One clause limits defendants' liability for defective parts to "replacing, correcting or repairing any

uses, benefits or quantities that they do not have," 73 Pa. Stat. Ann. tit. 73, § 201-2(4)(v);

"Representing that goods or services are of a particular standard, quality or grade, or that the goods are of a particular style or model, if they are of another," 73 Pa. Stat. Ann. tit. 73, § 201-2(4)(vii);

"Advertising goods or services with intent not to sell them as advertised," 73 Pa. Stat. Ann. tit. 73, § 201-2(4)(ix);

"Failing to comply with the terms of any written guarantee or warranty given to the buyer at, prior to or after a contract for the purchase of goods or services is made," 73 Pa. Stat. Ann. tit. 73, § 201-2(4)(xiv) (emphasis added); or

"Engaging in any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding," 73 Pa. Stat. Ann. tit. 73, § 201-2(4)(xxi).

part" prior to assembly. Purchase Agreement ¶ 5, at 2.

A limitation of liability clause does not eliminate a contracting party's liability, but it restricts it to a certain amount or form of corrective action. "Limitation of liability clauses are routinely enforced under the Uniform Commercial Code when contained in sales contracts negotiated between sophisticated parties and when no personal injury or property damage is involved. This is true whether the damages are pled in contract or tort." Valhal Corp. v. Sullivan Assoc., Inc., 44 F.3d 195, 203 (3d Cir. 1995) (citing cases). Limitation of liability clauses are not disfavored under Pennsylvania law; Pennsylvania courts generally enforce them, finding the parties "[a]re at liberty to fashion the terms of their bargain." Vasilis v. Bell of Pa., 598 A.2d 52, 54 (Pa. Super. 1991).

The Purchase Agreement states, "Purchaser represents that he is an educated and/or sophisticated purchaser of aircraft and purchases this kit as such." Purchase Agreement ¶ 3, at 1. But the limitation of liability clause pertains only to contractual remedies. It warrants the contents of the Seawind kit will be free of defective parts; if defects exist, defendants agree to repair, correct or replace them. Plaintiffs are not alleging any of the airplane's parts are defective; they claim under the UTPCPL that defendants engaged in deceptive acts prior to formation of the contract. The clause limiting defendants' duty

to repairing defective parts does not apply to this action.

B. Exculpatory Clause

The Purchase Agreement contains a provision purporting to release defendants from any and all liability. A valid exculpatory clause "deprives one contracting party of a right to recover for damages suffered through the negligence of the other contracting party." Fidelity Bank v. Tiernan, 375 A.2d 1320, 1325 (Pa. Super. 1977); see Ellwood Consolidated Water Co. v. Johnson, 420 F.2d 787, 788 (3d Cir. 1970).

Three conditions must be met for an exculpatory clause to be valid: 1) the clause cannot contravene public policy; 2) the contract must involve only the private affairs of the parties and not a public matter; and 3) the contract cannot be one of adhesion. See Topp Copy Products, Inc. v. Singletary, 626 A.2d 98, 99 (Pa. 1993). Even if the exculpatory clause is valid, it is unenforceable "unless the language of the parties is clear that a person is being relieved of liability for his own acts of negligence." Id. The contract language is strictly construed and must state the parties' intentions with particularity. Any ambiguities must be resolved against the party seeking immunity from liability. See, e.g., Dilks v. Flohr Chevrolet, Inc., 192 A.2d 682, 687 (Pa. 1963).

In the Purchase Agreement's exculpatory clause, plaintiffs agreed to assume "the entire responsibility and liability for,

any and all damages or injuries of any kind or nature whatsoever, including property damage, personal injury or death, ... caused by, resulting from, arising out of, or occurring in connection with the supply to purchaser, or the use by purchaser or other persons, of the kit or finished aircraft." Plaintiffs also "generally release[d] SNA, Inc. from any and all liabilities above described, either occurring now and/or at any time in the future." Purchase Agreement at 6.

Plaintiffs also agreed that defendants' agreement to repair any defective parts was "IN LIEU OF ANY OBLIGATIONS OR LIABILITIES OF SNA, INC. TO PURCHASER, WHETHER FOR PROPERTY LOSSES OR PERSONAL INJURY LOSSES OR LOSS OF USE OF THE AIRCRAFT, LOSS OF TIME, INCONVENIENCE, COMMERCIAL LOSS, OR FOR INDIRECT, DIRECT, SPECIAL OR CONSEQUENTIAL DAMAGES, OR OTHERWISE, ARISING OUT OF THE USE OF THE KIT OR THE FINISHED AIRCRAFT." Id. ¶ 5, at 3.

If plaintiffs are claiming only their loss of time or the inconvenience of flying an airplane that does not conform to the specification in the brochure, the exculpatory clause would apply and preclude their recovery. However, plaintiffs appear to claim violation of UTPCPL based on defendants' alleged deceptive activity leading plaintiffs to enter into a commercial transaction. It is not clear from the language of the exculpatory clause whether the parties intended to bar actions

based on a separate statutory remedy for illegal activity inducing the formation of the contract as opposed to an action for damages incurred after the making of the contract. The nature of the damages claimed and their cause or causes are also very unclear at this time.

"[W]hen a contract does not provide for a contingency, it is not ambiguous; rather, it is silent, and the court may not 'read[] into the contract something it does not contain and thus make a new contract for the parties.'" Banks Engineering Co. v. Polons, 697 A.2d 1020, 1023 (Pa. Super. 1997) (citing Snellenberg Clothing Co. v. Levitt, 127 A. 309, 310 (Pa. 1925)). Because this matter is raised on a motion to dismiss, the court will not read into the exculpatory clause language barring an action under UTPCPL when the parties not did expressly contract for such a provision. The court will deny the motion to dismiss Count I of plaintiffs' Complaint without prejudice to a motion for summary judgment after the individual circumstances are revealed by discovery.

VI. Damages

A. Punitive Damages Under UTPCPL

Defendants move to dismiss any claims for punitive damages. Under UTPCPL, a successful plaintiff may "recover actual damages or one hundred dollars (\$100), whichever is greater." Pa. Stat. Ann. tit. 73, § 201-9.2(a). "The court may, in its discretion,

award up to three times the actual damages sustained, but not less than one hundred dollars (\$100), and may provide such additional relief as it deems necessary or proper ... [including] costs and reasonable attorney fees." Id.

"It is undisputed that the imposition of exemplary or treble damages is essentially punitive in nature." Johnson v. Hyundai Motor of Am., 698 A.2d 631, 639 (Pa. Super. 1997). "[Courts] will be guided by the well-established, general principles of law governing punitive damages when exercising discretion under the UTPCPL.'" Kimberton Chase Realty Corp., 1997 WL 698487, at *11 (citation omitted). The statute authorizes an award of treble damages, ultimately serving the same purpose as an award of punitive damages. Plaintiffs may be awarded statutory damages rather than punitive damages if successful at trial.

B. Punitive Damages in a Class Action

Defendants also argue punitive damages are unavailable because, "to the extent this is ever going to amount to a class action, no punitive damages are usually available to a common plaintiff and said claims must be dismissed." Defs.' Mem. Supp. Mot. Dismiss at 5. However, "each member of the putative class holds a separate and distinct interest in a punitive damages award." Pierson v. Source Perrier, 848 F. Supp. 1186, 1189 (E.D. Pa. 1994); see also Johnson v. Gerber Products. Co., 949 F. Supp. 327, 329 (E.D. Pa. 1996) (listing cases involving punitive

damages in class actions).

In support of their argument, defendants rely on Bishop v. General Motors Corp., 925 F. Supp. 294 (D.N.J. 1996). Bishop simply holds that a class plaintiff cannot aggregate punitive damage claims for all class members to satisfy the jurisdictional amount in controversy requirement, see id. at 297, a proposition established by Snyder v. Harris, 394 U.S. 332, 335 (1969). See e.g., Hamel v. Allstate Indemnity Co., No. 95-6554, 1996 WL 106120, at (E.D. Pa., Mar. 5, 1996). No class has yet been certified. However, only the UTPCPL claim remains, so plaintiffs are restricted to statutory damages, not punitive damages.

VII. Specificity

Defendants move to dismiss the Complaint for failure to plead fraud with specificity. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The court will dismiss plaintiffs' claim for fraud and deceit; therefore, defendants' Rule 9(b) argument is moot as to Count III. In Count I, plaintiffs rely on alleged fraudulent practices made illegal by UTPCPL. Viewing the Complaint in the light most favorable to plaintiffs, they have put defendants on sufficient notice that their claim is premised on the specifications listed in the Seawind promotional materials. Through discovery, defendants will be able to learn the specifications plaintiffs claim their

Seawind fails to meet and the statutory provisions claimed to have been violated.

CONCLUSION

The court will dismiss plaintiffs' claims for breach of warranty, negligent misrepresentation and fraud and deceit. The court will deny defendants' motion to dismiss plaintiffs' claim for violation of UTPCPL.

An appropriate Order follows.

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

HORIZON UNLIMITED, INC. & : CIVIL ACTION
JOHN HARE :
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v. :
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RICHARD SILVA & SNA, INC. : NO. 97-7430

ORDER

AND NOW, this 26th day of February, 1998, upon consideration of defendants' motion to dismiss the Complaint, plaintiffs' response thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Defendants' motion to dismiss is **GRANTED IN PART AND DENIED IN PART**.

2. Defendants' motion to dismiss is **GRANTED** as to Count II (Negligence/Negligent Misrepresentation), Count III (Fraud and Deceit) and Count IV (Breach of Warranty).

3. Defendants' motion to dismiss is **DENIED** as to Count I (Unfair Trade Practices and Consumer Protection Law) without prejudice to a subsequent motion for summary judgment.

4. Plaintiffs' request for punitive damages is amended to a request for statutory damages under UTPCPL.

5. Defendants shall file an Answer within ten (10) days of the date of this Order.

6. Plaintiffs shall move for class certification within twenty (20) days of the date of this Order. Defendants shall respond within ten (10) days thereafter; plaintiffs may reply to defendants' response within an additional ten (10) days.

7. A Rule 16 conference and oral argument on the motion for class certification will be scheduled by separate Order.

Norma L. Shapiro, J.