

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

BOB CHAMBERS FORD, et al.,)
)
 Plaintiffs)
)
 v.)
)
 DEALER COMPUTER SERVICES, INC.)
 et al.,)
)
 Defendants)

Docket No. 98-140-B-C

**RECOMMENDED DECISION ON MOTIONS AND CROSS-MOTIONS FOR
PARTIAL SUMMARY JUDGMENT**

The plaintiffs, Bob Chambers Ford d/b/a/ Augusta Ford and Bob Chambers Chevrolet d/b/a Augusta Chevrolet, move for summary judgment on Count I of the first amended complaint¹ and on the counterclaim of defendant Dealer Computer Services, Inc. (“DCS”) for declaratory judgment. Defendant DCS moves for summary judgment on its counterclaim; all three defendants, DCS, Universal Computer Services, Inc. (“UCS”) and Ford Dealer Computer Services, Inc. (“FDCS”), move for summary judgment on Counts III and V of the amended complaint; and defendants DCS and UCS move for summary judgment on Counts IV, VI and VIII.² I recommend that the court deny

¹ Judgment on the pleadings has already been entered in favor of defendant Universal Computer Services, Inc. on Count I. Order Affirming the Recommended Decision of the Magistrate Judge (“Order”) (Docket No. 26) at 2.

² Judgment on the pleadings has been granted in favor of defendant FDCS on Counts IV, VI and VIII. Order at 2.

the plaintiffs' motion and grant the defendants' motion in part and deny it in part.

I. Summary Judgment Standard

Summary judgment is appropriate only if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). “In this regard, ‘material’ means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, ‘genuine’ means that ‘the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party’” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (“Wright, Miller & Kane”) § 2720 at 327-28 (3d ed. 1998). For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720.

II. Factual Background

The following undisputed material facts are appropriately supported in the summary judgment record. On or about July 22, 1993 the plaintiffs entered into contracts for computer hardware and services with FDCS, which later changed its name to DCS. Defendants’ Statement of Material Facts as to Which There is No Genuine Issue of Dispute (“Defendants’ SMF”) (Docket No. 33) ¶1; Plaintiffs’ Statement of Material Facts in Opposition to the DCS/UCS Statement of Material Facts, Demonstrating Facts as to Which There Remains a Dispute (“Plaintiffs’ Responsive SMF”) (Docket No. 39) ¶ 1; Plaintiffs’ Statement of Undisputed Material Facts (“Plaintiffs’ SMF”) (Docket No. 31) ¶1; Defendants’ Statement of Material Facts as to Which Defendants Contend that There is a Genuine Issue of Dispute (“Defendants’ Responsive SMF”) (Docket No. 37) ¶ 1. FDCS and DCS are the same corporate entity. Plaintiffs’ SMF ¶ 2; Defendants’ Responsive SMF ¶ 2.

Each of the contracts includes the following language at Section 10:

The term of this Agreement shall be for eighty-four (84) months from the date when the computer system is operational (“Original Term”), such date to be conclusively designated by FDCS. Following the expiration of the Original Term, this Agreement shall automatically be extended for like periods (“Extension Term”), unless either party gives the other written notice to terminate one hundred eighty (180) days prior to the expiration of the Original Term or the then current Extension Term.

Defendants’ SMF ¶ 2; Plaintiffs’ Responsive SMF ¶ 2. The plaintiffs chose an option presented by FDCS that reduced the term to 60 months. Continu[ed] Deposition of David R. Chambers, filed with Defendants’ SMF (“D. Chambers Dep. II”), at 72-75. Each of the contracts provides at Section 18(C) that “This Agreement shall be governed by the laws of the State of Michigan.” Plaintiffs’ SMF ¶ 11; Defendants’ Responsive SMF ¶ 11. By letter dated October 23, 1997 DCS designated September 7, 1993 as the operational date under Section 10 of the contracts. Letter from Marc D. Dolgow to David R. Chambers, Exh. 28 to Rule 30(b)(6) Deposition of Bob Chambers Chevrolet and Bob Chambers Ford. Each of the contracts also provides, at Section 18, that “[n]o change, termination, or attempt to waive any of the provisions hereof shall be binding unless in writing and signed by an authorized representative.” Defendants’ SMF ¶ 22; Plaintiffs’ Responsive SMF ¶ 22.

By January 1997 Matt McCullough, a regional sales manager for DCS, Plaintiffs’ SMF ¶ 4, Defendant’s Responsive SMF ¶ 4, had received a written survey response from the plaintiffs’ controller “saying that they are planning to change computer vendors.” Oral Deposition of Matt McCullough, Item 11 attached to Local Rule 26(c) List (Docket No. 41), at 85-86.

At a meeting on December 15, 1997 Andy Klekar, a field manager for DCS who also worked for UCS, was told by Bob Chambers (“Chambers”) that the plaintiffs were looking at other competitors to provide the services that they were then receiving from DCS. Oral Deposition of Andy Klekar (“Klekar Dep.”), Item D attached to Table of Contents (“Table”), attached to Plaintiffs’

Motion for Partial Summary Judgment and Incorporated Memorandum of Law (“Plaintiffs’ Motion”) (Docket No. 30), at 14-15, 18, 78-79, 81-83. Klekar was told at this meeting that the plaintiffs’ computer system was going out to bid, that the plaintiffs should be treated like a customer rather than an existing client, and that this was a competitive bid situation. *Id.* at 88. Chambers said during this meeting that he wanted a proposal from DCS by January. *Id.* at 85. During a meeting on January 27, 1998 at which both Klekar and McCullough, who supervised Klekar, Plaintiffs’ SMF ¶ 4, Defendants’ Responsive SMF ¶ 4, were present, the plaintiffs said that they were looking at other systems. Klekar Dep. at 96-101.

Chambers sent a letter dated April 24, 1998 to Ray Hoffman, vice president of sales for the eastern United States at DCS and UCS, Plaintiffs’ SMF ¶ 7, Defendants’ Responsive SMF ¶ 7, which stated, *inter alia*,

We will not be extending our term with UCS unless you are notified otherwise.

As of April 24, 1998, we have not received a written proposal from UCS for consideration. We hope to make a final decision by the end of May and will be happy to consider UCS as an option should you decide to re bid the contract.

Letter dated April 24, 1998, Item J attached to Table. Hoffman received this letter. Plaintiffs’ SMF ¶ 17; Defendants’ Responsive SMF ¶ 17.

DCS responded to the April 24 letter with a letter dated May 8, 1998 and signed by Marc Dolgow, its contract administrator, stating that “the Original Term of our Agreement has automatically extended for an additional 60 months. Thus, the Extension Term will expire on September 7, 2003.” Plaintiffs’ SMF ¶ 18; Defendants’ Responsive SMF ¶ 18. Chambers send a letter dated May 13, 1998 to Hoffman stating, *inter alia*, “Should you decide to extend our term

without our agreement, we will no longer consider you as a candidate for a new contract and will take whatever steps necessary to end our agreement in [sic] September 7, 1998.” Letter dated May 13, 1998, Item K attached to Table. Hoffman received this letter. Plaintiffs’ SMF ¶ 20; Defendants’ Responsive SMF ¶ 20.

David Chambers, the person who was primarily responsible for negotiating the contracts on behalf of the plaintiffs, D. Chambers Dep. II at 70, acknowledges that the FDSC sales representative verbally explained the automatic renewal provision of section 10 of the contracts before David Chambers signed them. Defendants’ SMF ¶ 11; Plaintiffs’ Responsive SMF ¶ 11. The need to notify DCS “well in advance” of the expiration date if the plaintiffs wanted to get out of the contracts was discussed by David Chambers and other employees of the plaintiffs at a meeting during the summer of 1996. D. Chambers Dep. II at 86-88. David Chambers left the plaintiffs’ employ on October 20, 1997. *Id.* at 130. After the discussion between David Chambers and the sales representative at the time the contracts were signed, the plaintiffs and the defendants never discussed the automatic renewal provision or the requirement of a written termination until after DCS notified the plaintiffs on May 8, 1998 that the contracts had been automatically renewed. Defendants’ SMF ¶ 20; Plaintiffs’ Responsive SMF ¶ 20.

Klekar sent a letter dated May 18, 1998 entitled “Configuration Summary” to the plaintiffs. Plaintiffs’ SMF ¶ 25; Defendants’ Responsive SMF ¶ 25; Letter dated May 18, 1998, Item M attached to Table. Klekar presented a second set of new contract proposals to the plaintiffs on May 29, 1998. Plaintiffs’ SMF ¶ 28; Defendants’ Responsive SMF ¶ 28.

Before selling its Dealer Computer Services department, Ford Motor Company (“Ford”) had a business providing dealer computer equipment and services to dealerships. Dealerships’

Additional Statement of Material Facts in Dispute (“Plaintiffs’ Supp. SMF”) (Docket No. 40) ¶ 2; Defendants’ Reply to Plaintiffs’ Additional Statement of Material Facts in Dispute (“Defendants’ Reply SMF”) (Docket No. 45) ¶ 2. Ford Dealer Computer Services, Inc. (“FDCS”), now Dealer Computer Services (“DCS”) purchased Ford’s Dealer Computer Services department by Purchase Agreement dated December 19, 1991 among Ford, FDCS and DCS’s parent corporation, Universal Computer Consulting Holding, Inc. Plaintiffs’ Supp. SMF ¶ 146; Defendants’ Reply SMF ¶ 146. Ford realized that this was not a sale but rather an “outsourcing” of Ford’s computer services business with its dealerships. Plaintiffs’ Supp. SMF ¶¶ 4-7; Defendants’ Reply SMF ¶¶ 4-7. Ford Motor Company does not own any stock of any of the defendants. Defendants’ SMF ¶ 29; Plaintiffs’ Responsive SMF ¶ 29. None of the defendants is a parent or subsidiary of Ford Motor Company, nor does any of the defendants share any officers or directors with Ford Motor Company. Defendants’ SMF ¶ 26; Plaintiffs’ Responsive SMF ¶ 26.

Ford announced to dealerships in January 1992 that it was “concluding negotiations with Universal Computer Systems . . . for the formation of a new entity called Ford Dealer Computer Services” and that “[t]hrough contractual agreements, Ford will continue to exert strong influence over key elements of the business including basic systems architecture and product planning.” “On-Line,” Volume V., No. 4, Exh. 29 to Deposition of Rob Nalley, at 004684. “[T]here would be a degree of partnership of influence between UCS/FDCS and Ford Motor Company.” Deposition upon Oral Examination of Michael Hoyt at 56. Ford does not have a relationship with any of DCS/UCS’s competitors in the dealer computer systems provider market like the one it has with DCS/UCS. Plaintiffs’ Supp. SMF ¶ 15; Defendants’ Reply SMF ¶ 15. Under the Purchase Agreement, none of the FDCS stock could be transferred to any motor vehicle manufacturer,

distributor, or importer, or a subsidiary or affiliate thereof, without the prior written consent of Ford and for ten years after the sale, any sale of FDCCS stock to an entity other than a subsidiary or affiliate of Universal Computer Consulting Holding, Inc. is subject to a right of first refusal and acceptance of certain terms set by Ford. Plaintiffs' Supp. SMF ¶¶ 53, 55; Defendants' Reply SMF ¶¶ 53, 55.

Ford collects payments for DCS's computer services directly from Ford dealerships and makes disbursements to DCS. Plaintiffs' Supp. SMF ¶ 58; Defendants' Reply SMF ¶ 58. FDCCS used the Ford logo on contracts and documents, as did DCS until some time in 1997. Plaintiffs' Supp. SMF ¶¶ 62-63; Defendants' Reply SMF ¶¶ 62-63.

III. Discussion

A. Count I

The plaintiffs move for summary judgment on Count I, which seeks a declaratory judgment that the contracts at issue terminated on September 7, 1998 and that the contracts forbid DCS³ from commencing litigation against the plaintiffs with respect to the contracts. First Amended Complaint (Docket No. 8) at 14. The plaintiffs state that they seek summary judgment on this count "only under the factual scenario discussed herein," and that "[a]ll . . . issues not pressed herein are reserved for trial." Plaintiffs' Motion at 1 n.2. Essentially, the plaintiffs argue that DCS has waived any right to timely written notice of intent to terminate the contracts under Section 10 by its conduct. *Id.* at 7-11.

The parties agree that Michigan law governs this issue. The defendant relies on the "anti-waiver" provision in Section 18 of the contracts and the May 8, 1998 letter informing the plaintiffs

³ Judgment on the pleadings has been entered in favor of UCS on Count I. Order at 2.

that automatic renewal had taken place to support their argument that summary judgment cannot be entered for the plaintiffs on Count I. The plaintiffs argue that the defendant's conduct, both before and after the deadline for notification of termination, constitutes a waiver of the notification provisions found in Section 10 of the contracts, as a matter of law.

Under Michigan law, anti-waiver provisions in written contracts may themselves be waived by subsequent conduct. *Morley Bros., Inc. v. F. R. Patterson Constr. Co.*, 253 N.W. 213, 214 (Mich. 1934). Accordingly, the fact that the contracts at issue contain an anti-waiver provision is not dispositive. DCS cites *Moore v. First Security Cas. Co.*, 568 N.W.2d 841 (Mich. App. 1997), and *Capac Bus Drivers Ass'n v. Capac Community Schs. Bd. of Educ.*, 364 N.W.2d 739 (Mich. App. 1985), as support for its argument that its conduct in this case did not constitute waiver of the anti-waiver provision as a matter of law, but neither case provides dispositive authority for that position. Both cases were decided by an intermediate appellate court, while *Morley* is a decision of the Michigan Supreme Court. Further, in *Moore*, a case involving construction of the terms of an insurance policy, the court held that "conduct that does not express any intent to relinquish a known right is not a waiver, and a waiver cannot be inferred by mere silence," 568 N.W.2d at 844, citing 6 Couch, *Insurance* (3d ed.) § 85:25. In the instant case, which does not involve an insurance contract, the plaintiffs do not contend that DCS waived the written anti-waiver contract provision merely by silence, but rather by actively engaging in negotiations for a replacement contract. In *Capac*, a case involving a collective bargaining agreement and relying on decisions of the National Labor Relations Board as authority, the court held that "the notice requirement of an automatic renewal clause cannot be waived absent a mutual agreement between the parties to do so." 364 N.W.2d at 742. In that case, the party invoking the clause had engaged in a single negotiating

session for a new contract, then invoked the clause and refused to negotiate further. *Id.* at 741. The court found it significant that “it cannot be maintained that the union [after the school board invoked the automatic renewal clause] was . . . drawn into extensive negotiations, especially here where the Board offered no counter proposals. *Id.* at 743. “Once the issue of automatic renewal was raised, the Board steadfastly refused to bargain on that very basis.” *Id.* Here, the evidence in the summary judgment record certainly allows the inference that DCS did not refuse to bargain further after invoking the automatic renewal clause.⁴ *See also Fitzgerald v. Hubert Herman, Inc.*, 179 N.W.2d 252, 254 (Mich. App. 1970) (waiver needs no consideration and, once made, cannot be retracted).

For similar reasons, DCS’s written invocation of the automatic renewal clauses in the letter dated May 8, 1998 is not dispositive. Its conduct after sending that letter, most importantly its submission of a contract proposal after that date that differed from the terms of the contracts that it now contends were automatically renewed, could be sufficient under Michigan law to constitute a waiver of the automatic-renewal provisions.

The fact that DCS is not entitled to summary judgment on Count I as a matter of law does not necessarily mean that the plaintiffs are entitled to summary judgment, however. The evidence in the summary judgment record, requiring as it does that inferences be drawn concerning the existence of a waiver, does not lead inevitably to only a single conclusion that the automatic renewal

⁴ Similarly, the case of *Formall, Inc. v. Community Nat’l Bank of Pontiac*, 360 N.W.3d 902 (Mich. App. 1984), cited by DCS, does not offer support for judgment in its favor. While the court does note that “[t]here reasonably must be a threshold below which the ‘anti-waiver’ clause is protection for [a contracting party],” it holds that “[j]ust what that threshold level should be remains to be decided on a case by case basis.” *Id.* at 907. A reasonable inference from the facts in the summary judgment record in this case is that the plaintiffs were given reason to believe by DCS’s conduct that it had waived the requirement of written notice of termination and, therefore, the anti-waiver provision, in the contracts. The “threshold level” to which *Formall* refers has therefore been exceeded. *Id.* at 907-08.

provisions were in fact waived by DCS. The burden of proof of subsequent oral modification is on the party alleging that such modification occurred. *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 939 (6th Cir. 1989) (Michigan law). The plaintiffs are not entitled to summary judgment on this basis.

In the alternative, the plaintiffs argue that DCS entered into a new contract with them based on the Chambers letter dated May 13, 1998, contending that that letter imposed a condition upon further negotiations between the parties that DCS waive automatic renewal, a condition that was accepted by DCS's subsequent submission of a new contract proposal. Michigan law provides that departure from the performance of the terms of a written contract may be made by mutual consent expressed in conduct (without "express agreement"), without payment of further consideration. *Jacob v. Cummings*, 182 N.W. 115, 117 (Mich. 1921); accord, *McCarty v. Mercury Metalcraft Co.*, 127 N.W.2d 340, 344 (Mich. 1964).⁵ It also provides that acceptance of the offered terms of a contract may be implied from conduct. *Patrick v. U. S. Tangible Inv. Corp.*, 595 N.W.2d 162, 167 (Mich. App. 1999); *St. Paul Fire & Marine Ins. Co. v. Ingall*, 577 N.W.2d 188, 191 (Mich. App. 1998) (citing case law specific to insurers). Contrary to DCS's argument on this point, Michigan law requires only nominal consideration under these circumstances; "any consideration, however slight, is legally sufficient to support a promise." *Cochran v. Ernst & Young*, 758 F. Supp. 1548, 1555 (E.D.Mich. 1991).

Again, the undisputed facts in the summary judgment record do not support only the

⁵ Any suggestion to the contrary in *G. P. Enterprises, Inc. v. Jackson Nat'l Life Ins. Co.*, 509 N.W.2d 780, 784-85 (Mich. App. 1993), cited by DCS, is not binding because the decision in *Jacob*, a decision of the Michigan Supreme Court which is not mentioned in the *G.P. Enterprises* decision, is to the contrary.

conclusion that a second contract was formed by DCS's submission of a new contract proposal after the May 13, 1998 letter. The terms of that letter, as presented in the summary judgment record, do not limit the possible conclusions to be drawn by a factfinder to the outcome suggested by the plaintiffs — that DCS, by submitting a proposal, would necessarily be waiving its claim to automatic renewal and agreeing to enter into an entirely new contract. Accordingly, the plaintiffs are not entitled to summary judgment on Count I on this basis.

B. Counterclaim

Defendant DCS moves for summary judgment on its counterclaim, which seeks a declaratory judgment that the contracts were automatically renewed and are in effect. Defendants' Answer to First Amended Complaint and Counterclaim (Docket No. 16) at 14-15. For the reasons discussed above, DCS is not entitled to summary judgment on its counterclaim.⁶

C. Counts III, IV, V, and VI

All three defendants seek summary judgment on Counts III and V of the amended complaint, which allege negligent misrepresentation and innocent misrepresentation. Defendants DCS and UCS also seek summary judgment on Counts IV and VI, which allege fraudulent misrepresentation and fraud. The parties agree that Maine law applies to these claims. Defendants' Motion for Partial Summary Judgment with Incorporated Memorandum of Law ("Defendants' Motion") (Docket No. 32) at 13 n.7; Plaintiffs' Opposition at 11 n.6. The parties do not differentiate in their arguments

⁶ Under the circumstances, it is not necessary to reach the plaintiffs' argument that DCS may not enforce the operational date that it designated under the contracts due to violation of an implied covenant of good faith and fair dealing. Plaintiffs' Opposition to DCS's and UCS's Motion for Partial Summary Judgment with Incorporated Memorandum of Law ("Plaintiffs' Opposition") (Docket No. 38) at 2-5. I do note, however, that the material facts with respect to this issue are clearly in dispute.

among the four claims.

First, by agreeing that FDCS and DCS are the same entity, Defendants' SMF ¶4, Plaintiffs' Responsive SMF ¶ 4, and failing to provide any factual statements in their statements of material facts that could be interpreted to provide a basis for liability of the part of FDCS independent of DCS on these claims, the plaintiffs have failed to oppose the entry of summary judgment in favor of FDCS on Counts III and V. Accordingly, I recommend that summary judgment be entered in favor of FDCS on these claims.

1. Count III.

Count III of the amended complaint alleges negligent misrepresentation. Under Maine law, the legal standard for negligent misrepresentation is provided by section 552 of the Restatement (Second) of Torts:

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.

Binette v. Dyer Library Ass'n, 688 A.2d 898, 903 (Me. 1996). “[F]or purposes of negligent misrepresentation, although not every failure to disclose constitutes a misrepresentation, silence rises to the level of supplying false information when such failure to disclose constitutes the breach of a statutory duty.” *Id.* (emphasis omitted). While the plaintiffs do not submit evidence of any express misrepresentation by the defendants, they contend that “DCS’s actions in this case constitute more than silence, and are, in fact, a pattern and practice calculated to deceive, or were, at the very least, a reckless or negligent course of action, or active concealment.” Plaintiffs’ Opposition at 12

(emphasis in original). The Law Court has also held that there is no duty to disclose information in a case alleging negligent misrepresentation “absent a fiduciary or confidential relationship.” *Brae Asset Fund, L.P. v. Adam*, 661 A.2d 1137, 1140 (Me. 1995).

On the undisputed facts in the summary judgment record, the only silence, or “pattern or practice,” a term not found in Maine law concerning negligent misrepresentation, is DCS’s failure to respond to the plaintiffs’ statement in December 1997 that they were looking for a new proposal, from DCS as well as its competitors, for computer services after the contract then in effect with DCS expired in September 1998 with any indication that it would do anything other than participate in such a process; its failure to submit a proposal until after the 180-day notification deadline had passed; and its submission of a proposal after the plaintiffs had stated that they would not consider a proposal from DCS if it continued to insist that the initial contracts had been automatically renewed. Whether or not these facts may be considered as a “pattern or practice,” the only means of proving negligent misrepresentation under Maine law are an express misrepresentation — that is, a statement that is untrue — or failure to disclose information when there is a duty to do so.

Here, the plaintiffs offer no evidence to support a conclusion that DCS or UCS had any fiduciary or confidential relationship to them. Accordingly, for purposes of their negligent misrepresentation claim, they must rely on the existence of a statutory duty. The plaintiffs identify 10 M.R.S.A. § 1171(1-B)(9), a nonexistent section of the Maine statutes, as the source of “an affirmative statutory duty to disclose all material facts” running from DCS to them. Plaintiffs’ Opposition at 12. If the plaintiffs mean to cite 10 M.R.S.A. § 1171(9), that statutory subsection merely defines “fraud” for purposes of Chapter 204 of Title 10; it imposes no duty running from DCS or UCS to any other party, regardless of whether DCS or UCS may properly be characterized

as a “manufacturer” under that chapter. If the plaintiffs mean to cite 10 M.R.S.A. § 1171(1-B), that subsection merely defines the term “broker” for purposes of Chapter 204, and that definition offers nothing that could reasonably be construed as a duty running from or to anyone. If the plaintiffs mean to cite 10 M.R.S.A. § 1171-B, that section concerns licensing of automobile manufacturers and distributors and cannot be construed to create a duty of disclosure running from such entities to private parties.

Applying Maine law, on the basis of the summary judgment record, the plaintiffs have not demonstrated the existence of a disputed issue of material fact relative to their claim of negligent misrepresentation, and accordingly DCS and UCS are entitled to summary judgment on Count III.

2. *Count IV.*

Count IV alleges fraudulent misrepresentation.

Under Maine law, the essential elements of fraudulent misrepresentation are: (1) a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act in reliance upon it, and (5) the plaintiff justifiably relies upon the representation as true and acts upon it to his damage. Both omissions and affirmative misrepresentations are actionable under Maine law.

Reed Paper Co. v. Procter & Gamble Distrib. Co., 807 F. Supp. 840, 844 (D. Me. 1992) (citations omitted). Here again, the plaintiffs rely on alleged omissions rather than any affirmative misrepresentations.

When a plaintiff alleges a failure to disclose rising to the level of a [fraudulent] misrepresentation, the plaintiff must prove either (1) active concealment of the truth, or (2) a specific relationship imposing on the defendant an affirmative duty to disclose.

Fitzgerald v. Gamester, 658 A.2d 1065, 1069 (Me. 1995). As noted above, the summary judgment

record provides no evidence of a relationship imposing a duty to disclose on either DCS or UCS under the circumstances of this case. It is possible to infer from the summary judgment record, however, that DCS's agents or employees who had contact with the plaintiffs knew that DCS would insist on enforcement of the 180-day notification clause if they could induce the plaintiffs to believe that DCS would instead propose an entirely new contract, based on the plaintiffs' verbal, and possible written, representations before the cutoff date that they were seeking a different deal following the coming end of the term of their contracts with DCS. This evidence could therefore possibly give rise to an inference that DCS or UCS engaged in active concealment of the truth and is sufficient to avoid the entry of summary judgment on this count.

3. *Count V.*

The parties essentially ignore Count V, which alleges innocent misrepresentation, in their arguments on this motion. The Maine Law Court has not yet explicitly recognized this tort, although it has referred with approval to the section of the Restatement (Second) of Torts that defines innocent misrepresentation. *Emerson v. Ham*, 411 A.2d 687, 690 (Me. 1980). That section of the Restatement provides:

One who, in a sale, rental or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation, even though it is not made fraudulently or negligently.

Restatement (Second) of Torts, § 552C(1) (1977). Here, the plaintiffs make no attempt to identify any misrepresentation made by DCS or UCS that was neither fraudulent nor negligent. Indeed, the tort would not seem to be amenable to proof by failure to disclose, or a "pattern or practice" of deception, when by its very nature cannot be "innocent." *See id.*, comment e. Accordingly, DCS

and UCS are entitled to summary judgment on Count V, which alleges a “strict liability” tort. *Id.*, comment a.

4. Count VI.

Count VI of the amended complaint alleges “silent” fraud. The term “silent” fraud is not used in Maine case law and appears in reported federal case law only in opinions discussing Michigan law. *E.g.*, *Peterson v. Daka Int’l, Inc.*, 61 F.Supp.2d 634, 640 n.6 (E.D.Mich. 1999).⁷ The plaintiffs make no argument and cite no authority suggesting that “silent” fraud differs in any significant respect from the cause of action known in Maine common law merely as fraud. In fact, under the definitions used by the Maine Law Court, there is little discernable difference between fraud and fraudulent misrepresentation.

Traditionally, a party commits fraud if he (1) makes a false representation (2) of a material fact (3) with knowledge of its falsity or in reckless disregard of whether it is true or false (4) for the purpose of inducing another to act or to refrain from acting in reliance on it, and (5) the other justifiably relies on it to his damage.

Glynn v. Atlantic Seaboard Corp., 728 A.2d 117, 119 (Me. 1999) (internal punctuation and citation omitted). By emphasizing the “silent” nature of the alleged fraud, the plaintiffs base their claim on a failure to disclose or an active concealment rather than any express or affirmative misrepresentation.

To the extent that this count states a claim distinct from that asserted in Count IV, the analysis of the Count IV claim set forth above would nonetheless appear to govern this claim as well. In addition, the plaintiffs have produced evidence, disputed by the defendants, of particular

⁷ Claims of silent fraud under Michigan law are analyzed in a manner essentially identical to that used to analyze claims of fraudulent misrepresentation. *Id.*

misrepresentations or omissions by Klekar both before and after the 180-day contract notification deadline. *E.g.*, Deposition of Wendy Chambers Brown at 71-72, 129 (after the plaintiffs received letter saying contracts had been automatically renewed, Klekar told her that it was “[n]othing to worry about,” and that he and McCullough “had in their notes that we had given them notice in December,” and continued to negotiate for a new contract); 59-61, 99 (at a meeting on December 15, 1997 attended by Klekar and McCullough, neither mentioned the need to put the plaintiffs’ decision not to renew with DCS into writing). Whether Klekar had apparent authority to bind either DCS or UCS at the time of these events is also a factual issue in dispute.

Accordingly, to the extent that Count VI of the amended complaint states a claim separate from that set forth in Count IV, the defendants are not entitled to summary judgment on that claim.

D. Count VIII

Count VIII of the amended complaint alleges violations of the Maine Regulation of Business Practices Between Motor Vehicle Manufacturers, Distributors and Dealers Act (“the Act”), 10 M.R.S.A. § 1171 *et seq.* Specifically, the amended complaint alleges violations of 10 M.R.S.A. §§ 1174, 1177 and 1182. Amended Complaint ¶ 142. The defendants contend that they are not “manufacturers” as that term is defined at 10 M.R.S.A. § 1171(10) and therefore cannot be held liable to the plaintiffs under the Act. The plaintiffs do not assert any other basis upon which they might recover under the Act. Plaintiffs’ Opposition at 14-18. The parties do not discuss the particular statutory sections invoked by the amended complaint.

However, the parties appear to have mistaken the issue under the Act. A private cause of action under the Act is created by 10 M.R.S.A. § 1173(1), which provides, in relevant part:

Civil remedies. Any franchisee or motor vehicle dealer who suffers

financial loss of money or property, real or personal, or who has been otherwise adversely affected as a result of the use or employment by a franchisor of an unfair method of competition or an unfair or deceptive act or any practice declared unlawful by this chapter may bring an action for damages and equitable relief, including injunctive relief. When the franchisee or dealer prevails, the court shall award attorney's fees to the franchisee or dealer, regardless of the amount in controversy, and assess costs against the opposing party.

The dealer or franchisee's private right of action may be asserted only against a franchisor. That term and "manufacturer" are defined separately under the Act.

"Franchisor" means a manufacturer, distributor or wholesaler who grants a franchise to a motor vehicle dealer." 10 M.R.S.A. § 1171(8).

"Manufacturer" means a person, partnership, firm, association, corporation or trust, resident or nonresident, who manufactures or assembles new motor vehicles or imports for distribution through distributors of motor vehicles or any partnership, firm, association, joint venture, corporation or trust, resident or nonresident, that is controlled by the manufacturer. The term "manufacturer" includes the terms "franchisor," "distributor," "distributor branch," "factory branch" and "factory representative."

10 M.R.S.A. § 1171(10).

There is no suggestion in the summary judgment record that either DCS or UCS granted a franchise to either of the plaintiffs. Whether DCS or UCS, or both, was "controlled" at relevant times by Ford Motor Company, clearly a manufacturer under the Act, is not relevant to the question whether the plaintiffs may maintain a cause of action against them under the Act. The relevant question is whether either DCS or UCS was a franchisor under the Act, a question none of the parties has addressed. The defendants did not seek summary judgment on this basis. They are not entitled to summary judgment on the basis that they do assert.

IV. Conclusion

For the foregoing reasons, I recommend that the plaintiffs' motion for partial summary judgment be **DENIED** and that the defendants' motion for partial summary judgment be **GRANTED** only as to Counts III and V of the amended complaint and otherwise **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of January, 2000.

*David M. Cohen
United States Magistrate Judge*