

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

MAINE OXY-ACETYLENE	)	
SUPPLY CO.,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 01-91-P-H
	)	
PROPHET 21, INC., et al.	)	
	)	
Defendants	)	

**RECOMMENDED DECISION ON  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Maine Oxy-Acetylene Supply Company (Maine Oxy), which describes itself as a supplier of industrial, medical, and specialty gasses based in Auburn, Maine, brought suit in the Maine Superior Court against Prophet 21, Inc. (Prophet 21),<sup>1</sup> a Yardley, Pennsylvania company. Prophet 21 is a seller of software to wholesale distributors engaged in various industries. Prophet 21 removed the action to this Court on the basis of diversity jurisdiction. (Docket No. 1.) Maine Oxy’s complaint arises from promises and agreements between the parties involving Prophet 21’s products and services for Maine Oxy’s order and inventory management. There are eight counts: breach of contract (Count I), breach of the Uniform Commercial Code (Count II), breach of express (Count III) and implied warranty (Count IV), breach of a duty of good faith and fair dealing (Count V), unjust enrichment (Count VI), promissory estoppel (Count VII), and

---

<sup>1</sup> Maine Oxy named Prophet 21, Inc. of Delaware and Prophet 21, Inc. of New Jersey as defendants and alleges that the communication between the plaintiff and the defendants do not clearly indicate which of the defendants promised the software and programming. This summary judgment motion does not require a determination of this question and consequently both defendants are referred to as Prophet 21.

negligent or intentional misrepresentation (Count VIII). For the reasons stated below I **RECOMMEND** that the court **DENY** the motion in its entirety.

*Overview of Summary Judgment Dispute*

First, and key to the disposition of this motion, because of the way it has shaped this motion, success for Prophet 21 at this stage hinges on whether this Court concludes that this dispute must be resolved in accordance with the terms of the “Sales and Licensing Contract” signed by Maine Oxy on August 13, 1999 (“the System Contract”). (Reply Br. at 1.) Maine Oxy contends that there are separate agreements, with different terms and conditions, involving a partnership arrangement and custom software modifications that are in addition to and distinct from the System Contract. However, when addressing Maine Oxy’s claims involving the partnership agreement and custom modifications Prophet 21 keeps coming back around to the terms of the System Contract and has not provided this Court with any substantial, record supported argument for why it should be granted summary judgment in the event that the Court disagrees with its interpretation of the scope of the System Contract.

In short, Prophet 21 contends that the language of the System Contract bars all of Maine Oxy’s contract and warranty claims; that all of Maine Oxy’s non-contract based claims are barred by the parol evidence rule and by Pennsylvania law (the choice of law provided for in the System Contract); and that Maine Oxy cannot establish a prima facie case for its tort and warranty claims. It argues that Maine Oxy should not be able to rescind the System Contract because of Prophet 21’s alleged failure to satisfy the terms of the partnership and custom modification agreements. (Id. at 2.)

Maine Oxy in response states that it seeks recovery not on the System Contract but on surrounding oral and written agreements betwixt the parties: “Maine Oxy does not allege violations of the original contract, but rather of these subsequent, separate agreements to provide customized programming, as well as the separate partnering agreement.” (Pl.’s Mem. Opp’n at 4; PSMF ¶ 182.) With regard to the System Contract Maine Oxy states that it is “not asserting claims under ‘this contract’ and is not seeking to have this Court ‘construe’ or ‘enforce’ ‘this contract.’” (Pl.’s Mem. Opp’n at 9-10.) Therefore, though Prophet 21 contends that this court must apply Pennsylvania law to the entire dispute, the choice of law provision in the System Contract does not govern the other written and oral contracts between the parties and Maine law, accordingly, governs this dispute. (*Id.* at 10.) With respect to its breach of warranty claims Maine Oxy contends that it is not a question of the warranties in the System contract: “The express warranties that Prophet 21 has breached are those concerning the customization that Prophet 21 repeatedly promised would enable Maine Oxy to conduct its business in accordance with its expressed needs and [Department of Transportation] requirements.” (*Id.* at 19.) Citing Sullivan v. Young Brothers & Co., 91 F.3d 242, 247 (1<sup>st</sup> Cir. 1996) and Phillips v. Ripley & Fletcher Co., 541 A.2d 946, 949-50 (Me. 1988), Maine Oxy contends that these express oral warranties are the basis of its warranty-based claims. (Pl.’s Mem. Opp’n at 19.) Regarding damages, Maine Oxy’s position in its summary judgment pleading appears to be that it is entitled to relief from the System Contract because Prophet 21’s actions vis-à-vis the oral partnership agreement and the subsequent customization agreements stripped Maine Oxy of the benefit of its bargain on the System Contract.

## *Discussion*

### *Summary Judgment Standard*

Prophet 21 is entitled to a favorable summary judgment order 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). I limit my consideration of the record to the parties’ statements of material facts. D. Me. Loc. R. 56 (“The court shall have no independent duty to search or consider any part of the record not specifically referenced in the parties’ separate statement of facts.”). The summary judgment factual record consists solely of those factual statements offered by the parties in their statements of material facts that are both material to the dispute and supported by citation to the record. If Prophet 21’s statement reveals the presence of a material fact entitling it to judgment as a matter of law, or the absence of a material fact required to support Maine Oxy’s claims, the Court will grant the summary judgment motion as to a claim unless Maine Oxy’s statement generates a genuine issue as to the presence or absence of that fact, for example, that the evidence in the record is “sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.” Nat’l Amusements v. Dedham, 43 F.3d 731, 735 (1<sup>st</sup> Cir. 1995). In evaluating whether a genuine issue is raised, I view all facts in the light most favorable to Maine Oxy and give it the benefit of all reasonable inferences its favor. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 52 (1st Cir. 2000).

### *Contract and Warranty Claims*

With respect to the four contract and warranty counts the choice of law dispute has somewhat mired the pleadings. The first step in clearing this convolution is to

address the question of whether the System Contract has an integration clause that integrates the alleged partnership agreement and the customization agreements. “The interpretation of unambiguous contract language is a matter of law reserved to the courts.” Mirra Co., Inc. v. School Administrative Dist. No. 35, 251 F.3d 301, 304 (citing Golden Rule Ins. Co. v. Atallah, 45 F.3d 512, 516 (1st Cir.1995)). Appearing immediately above the signature lines of the System Contract is the clause: “This agreement represents the entire understanding of the parties hereto. No verbal representations by or among the parties hereto shall be accepted.” (Mot. Summ. J. Ex. 3.)

Though there is much back and forth in the summary judgment pleadings about whether Maine or Pennsylvania law should be applied to certain claims, for purposes of interpreting the integration clause of the System Contract the contract’s choice of law provision indisputably applies. The “GOVERNING LAW AND JURISDICTION” paragraph reads:

This Contract shall be governed by the laws of Pennsylvania, without regard to choice of law principles. Prophet 21 and Purchaser agree that any legal or equitable action for claims, debts or obligations arising out of, or to enforce the terms of this Agreement shall be brought exclusively in the United States District Court for the Eastern District of Pennsylvania, or in the Court of Common Pleas of Bucks County, Pennsylvania, and that either court shall have personal jurisdiction over the parties to this Agreement, and that venue for such action shall be appropriate in each court. This Contract shall be construed and enforced in accordance with the laws of the State of Pennsylvania.

(Mot. Summ. J. Ex. 3 ¶ 23.)

Under Pennsylvania law and in view of the (somewhat modestly framed) integration clause, Maine Oxy could not attempt to prove for purposes of getting relief from the August 13, 1999, agreement that it was induced into the System Contract by

precedent oral representations not included in the contract. The Pennsylvania parol evidence rule provides:

Where the alleged prior or contemporaneous oral representations or agreements concern a subject which is specifically dealt with in the written contract, and the written contract covers or purports to cover the entire agreement of the parties... the law is now clearly and well settled that in the absence of fraud, accident or mistake the alleged oral representations or agreements are merged in or superseded by the subsequent written contract, and parol evidence to vary, modify or supersede the written contract is inadmissible in evidence[.]

Nicolella v. Palmer, 248 A.2d 20, 22–23 (Pa. 1968) (emphasis added, quoted and cited authorities omitted). As to subsequent agreements however, viz the alleged customization agreements or the materialization of a formal partnership agreement concerning these customizations, the Nicolella court’s further reflection is of import:

[T]he parol evidence rule bars only prior or contemporaneous oral agreements, not subsequent ones. However, where the writing contains an express provision that it constituted the entire contract between the parties and should not be modified except in writing, the party seeking to show subsequent oral modification in the agreement must prove it by clear, precise, and convincing evidence, as in cases where fraud, accident, or mistake is alleged.

Id. at 508, 23 (emphasis added).

Prophet 21 would have this Court view the partnership agreement as subsumed within the System Contract and the subsequent customizations as modifications to that contract. It argues that under Pennsylvania law the only exception to the inadmissibility of parol evidence in this case would be a demonstration that the alleged representations were fraudulently omitted from the System Contract, an allegation that Maine Oxy is not making and indeed could not make with a straight face given the integration clause.

The trouble with Prophet 21’s position is that Maine Oxy is not attempting to prove-up the terms of, or modification of the terms to, the System Contract. And, at least with respect to the customization agreements, it appears on the face of this record that the

parties anticipated separate agreements governed by separately expressed terms and conditions. (See, e.g., PSMF 221; Def.'s Resp. to PSMF ¶¶ 221.)<sup>2</sup>

The System software and service contract is entitled “Terms and Conditions.”

Paragraph 4 states,

Purchaser agrees to accept as the complete software for this System that software which is listed in this contract. If a purchaser wants additional software, Prophet 21 may offer to provide it. In that case, the specifications, the price and the delivery date of such additional software, together with the terms and conditions that apply, will form a separate agreement.

(Id. ¶4 (all emphasis added).) A straight reading of this provision points to the conclusion that any “additional software” to that in “the System” would be governed by a different set of “terms and conditions.”<sup>3</sup>

“The System” governed by the System Contract is defined in the contract’s first paragraph as including only the software and hardware identified in the software and hardware sections of the August 1999 Contract. The hardware section lists no hardware and the software section lists the “Prophet 21 Application Software (included in Base Price)”; “Prophet 21 Application Software Documentation”; and “Prophet 21 Application Software License Fee include in Base Price.” This is the software that Maine Oxy bought for that contract’s price.

---

<sup>2</sup> If the shoe were on the other foot and Maine Oxy was trying to prove that the customizations are governed by the System Contract the language of the System Contract would certainly make this a hard argument to win. In light of the absence of a written anti-modification provision, Maine Oxy might try to argue, under Pennsylvania law, that these were subsequent oral modifications to this contract. But the real assertion here is that there are separate contracts that, though they may relate to and be dependent on the provision of the System software by Prophet 21 to Maine Oxy, were expressly not included in the System Contract.

<sup>3</sup> In Prophet 21’s own words, the warranty, limitation on liability, and choice of law provisions are “terms and conditions.” (Reply Br. at 6.) As noted by Prophet 21, paragraph 25 of the System Contract provides that the headings are for convenience of reference only and are not part of the contract and do not “limit or otherwise affect the meaning of the contract.” However, the fact that the entire contract is headed “Terms and Conditions” and the phrase is repeated in a clause of the contract supports my interpretation of the contract. It just makes sense that the contract would have internal consistency.

Paragraph 20 sets forth the “LIMITATION OF LIABILITY” provision relied on by Prophet 21 in its argument that Maine Oxy’s sole remedy for its complaints vis-à-vis the supplemental agreements are found in the “the System” contract. It states:

In no event shall Prophet 21 be liable for any direct, indirect, consequential or resulting damages or injury due to failure of or arising out of the System, or any lost profits or injury due to failure of the System, or for any lost profits, time, business, records, or other monetary damages, nor for any claim or demand against Purchaser by any other person. Purchaser shall indemnify and hold Prophet 21 harmless against any claim asserted against Prophet 21 as a result of, or arising out of, Purchaser’s use of the System. PURCHASER’S SOLE AND EXCLUSIVE REMEDY FOR ANY FAILURE OF THE SYSTEM SHALL BE THE HARDWARE AND SOFTWARE WARRANTIES CONTAINED HEREIN AND THESE ARE IN LIEU OF ANY AND ALL OTHER WARRANTIES. THERE ARE NO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE EXCEPT AS HEREIN EXPRESSLY PROVIDED.

(Id. ¶ 20 (underline emphasis added).)

The software warranty paragraph provides, in turn:

Prophet 21 warrants that if the licensed software fails to function in accordance with the documentation, it will, for a period for one (1) year from the date of shipment, without charge to Purchaser, make all corrections to make the System operate. The Purchaser is responsible for sending evidence of the failure to Prophet 21. Prophet 21 will respond by finding the cause of the problem and sending to Purchaser a new set of programs on tape. The Purchaser is responsible for loading this tape onto the System.

(¶ 16 (emphasis added).)

If “the System” included all future agreements about customization between the parties and a realization or prohibition of a partnership-type arrangement vis-à-vis these customizations, then Prophet 21 would have bound itself to all the other terms of the Contract for these subsequent agreements and products; the qualification of paragraph 4 regarding additional software would be meaningless. Such an assertion flies in the face of the integration clause that provides that there is nothing relevant to this agreement that

is not expressed within the four corners of the System Contract. And, Prophet 21 expressly disclaims that the System Contract obligated it to provide any customizations (Reply Br. at 5) observing that these customizations would be subject to a separate agreement (id. at 6).

Furthermore, contrary to Prophet 21's contention to the contrary (Reply Br. at 2-3, 12), the terms of the System Contract do not contradict Maine Oxy's assertions vis-à-vis the alleged separate agreements for customization and partnership.<sup>4</sup> The 'integration clause' relied on by Prophet 21 does not pretend to bar future amendments that are not in writing. Compare Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1299 n.11 (3d Cir. 1996) (quoting an integration clause that resulted in the nonadmissibility of parol evidence under Pennsylvania law: "This Agreement contains the entire understanding between the parties hereto with respect to the subject matter hereof. All previous documents, undertakings and agreements with respect to this subject matter, whether verbal, written, or otherwise, between the parties are hereby cancelled and shall not affect or modify any of the terms or obligations set forth in this Agreement except by written agreement between the parties."). I cannot agree with Prophet 21 that Maine Oxy's arguments about the relationship between the Partnership agreement and the customizations "turns contract law on its head" because I do not agree that the terms of the alleged partnership agreement "directly contradict" the terms of the System Contract. (Reply Br. at 2.) Contra to Prophet 21's reliance on Turner v. Johnson & Johnson, 809 F.2d 90, 96 (1<sup>st</sup> Cir. 1986) the System Contract and its terms are not "flatly contradictory" to or "directly at odds with" the contracts that Maine Oxy hopes to prove-up. The

---

<sup>4</sup> Oddly Prophet 21 cites paragraph 4 of the System Contract, without explication, to support its position that there is a conflict between the terms of the System Contract and Maine Oxy's description of the other agreements.

acquisition of the base system via the System Contract seems to be a piece to what Maine Oxy anticipated would be a larger puzzle. Indeed, Prophet 21 acknowledges that Maine Oxy's theory of the case is that the customizations were part of a larger partnership agreement. (Reply Br. at 6.)

Prophet 21 argues that the subsequent customization agreements were modifications to the System Contract. It contends that, “[e]ach contract for custom software is covered by the same terms and conditions set forth in the Sales and Licensing Contract,” citing Exhibit 3. (Def. Resp. to PSMF ¶ 221.) It avers that the documentation accompanying the custom software “indicates that they represent addenda to the Sales and Licensing Contract.” (Id.) However, the exhibits cited by Prophet 21 include no express language to this effect and the deposition relied upon by Prophet 21 fails utterly in establishing this factual assertion. (See Lavin Dep. Aug. 27, 1901, at 142-43; see also 141, 144-48). Prophet 21 has presented no record evidence sufficient to establish that these customizations were treated as addenda to the System Contract.

Prophet 21 discusses these custom modifications in its introductory statement of fact. (Mot. Summ. J. at 1-2.) It states that it delivered these modifications to Maine Oxy with documentation on its functionality. (Id. at 2.) In a footnote it asserts that the second page of that documentation accompanying each modification “provides that all provisions of the Contract – including all warranty provisions – which are applicable to the Licensed Software are applicable to the modification software,” citing the fourth page of Exhibit 61 as an example. (Id. 2 n.4.) Counting to the fourth page of Exhibit 61 one reaches a page entitled “Delivery Charges.” On the next page appears the following paragraph:

The documentation in this publication is provided pursuant to a Sales and Licensing Contract for the Prophet 21 System entered into by and between Prophet 21 and the Purchaser to whom this documentation is provided (“License Agreement”). ... All warranties, conditions of use, transfer restrictions, and other provisions in the License Agreement ... which are applicable to Licensed Software, are applicable to this publication. ....

Nothing in this statement amends or extends the terms of your agreement with Prophet 21 including any warranties that may be included in our products. Warranties for such agreements are set forth in your agreement with Prophet 21.

(Mot. Summ. J. at Ex. 61, fifth page in.)

Skimming through the exhibits in this area I could find no better support for Prophet 21’s assertion. (See PSMF ¶¶ 35, 64, 176; Def.’s Resp. to PSMF ¶¶ 176.) I do not construe the above quoted representation as working a nunc pro tunc integration of the customization agreements into the System Contract; at best it might integrate some of the terms of the System Contract into the custom modification contracts. If it served to do the opposite, Paragraph 4 of the System Contract would become meaningless.

To the extent that Prophet 21 is arguing that subsequent customization agreements between the party reached back and integrated terms of the System Contract into these later agreements, this concern must be addressed when Maine Oxy attempts to prove the existence and terms of these alleged contracts. Thus, whether the warranty limitations are imported into the custom modifications contracts is left for trial; by framing this motion as it has, Prophet 21 has failed to argue that point in this motion and I am unable to discern from this record whether there are indeed material facts in dispute on that issue.

Prophet 21 does advance a rather strained argument that the licensing agreement in the System Contract, with its provision that “additional software, modifications or updates to Licensed Software will be covered by the terms and conditions of this License,” integrates any subsequent agreements for the purposes of the “Warranty,” the

“Limitations of Liability,” and the “Governing Law” section. (See Reply Br. at 6-7 & ns. 5,6, 10.) Along this line it states that the “separate contracts for custom software (which Maine Oxy claims were breached) are for modifications to the Licensed Software.” (Reply Br. at 7.) However, the “Licensed Software” is the “Prophet 21 Application Software (included in Base Price)”; “Prophet 21 Application Software Documentation”; and “Prophet 21 Application Software License Fee include in Base Price.” This application software might itself become subject to additions, modifications, and updates initiated by Prophet 21 without regard to customizations requested by Maine Oxy to meet, what both parties concede, was the latter’s special needs. The contract term makes sense when read in this manner.

Even if the Maine Oxy envisioned customizations are subject to the conditions on use detailed in paragraph 18, a license is, roughly stated, a limitation on the buyer and the obligation runs from the buyer to the seller rather than visa-versa. Furthermore, the contract terms regarding choice of law and the warranty limitation that Prophet 21 seek to bootstrap are not interlinked with the licensing agreement of the contract. The “use of software” paragraph of the contract contains five subparagraphs: the definition of licensed software, restrictions on use; breach and termination due to purchaser’s use not in accordance with the Contract provisions; third party concerns vis-à-vis hardware (not applicable to this dispute); and provisions in the event of a lease to a third party. (Mot. Summ. J. Ex. 3 ¶ 18.) The fact that the contract term regarding the license applies to the “licensed software” and that term is defined in the contract itself further supports Maine Oxy’s position that paragraph 4 software is something apart, subject to different “terms and conditions.”

There is one last stop that needs to be made before addressing the non-contract theories for recovery: the sustainability of the Count III and IV warranty claims. Prophet 21 argues that the System Contract precludes both these counts because the express warranty that Maine Oxy claims exists in relation to these customizations is not in the System Contract and the System Contract expressly disclaims implied warranties. (Mot. Summ. J. at 19.) It argues, further, that even if the System Contract’s provision does not govern, Maine Oxy cannot survive summary judgment by dint of its theory of a “broad, amorphous, and undefined warranty” to meet its needs and requirements. (Mot. Summ. J. at 17-20.) Prophet 21 contends that there were only four custom modifications that did not function to the satisfaction of Maine Oxy and asserts that Maine Oxy has produced no evidence that Prophet 21 was unable or unwilling to provide a solution. (Id. at 18.) However, the material facts as framed by Prophet 21 are hotly contested, as is the admissibility of the supporting evidence (see, e.g., PSMF ¶¶ 37, 40-41, 103, 122-23, 126, 130, 132; see also Robitaille Dep. at 81, 146, 180-82),<sup>5</sup> and summary judgment is plainly not in order.

For these reasons I recommend that the Court reject Prophet 21’s summary judgment argument that Maine Oxy’s contract-based claims are limited to claims seeking recovery on the System Contract. For the reasons stated above Maine Oxy’s Count I, Count II, Count III, and Count IV should survive summary judgment.

---

<sup>5</sup> For ease of reference and conservation of space, when citing to disputes concerning the defendant’s statement of fact I cite only to the plaintiff’s statement that, in exemplary conformance with the local rule, first recites the defendant’s statement of material of fact, then provides its response. Defendant has also complied with the local rule admirably well.

### ***Non-Contract Claims***

In light of the forgoing discussion it hardly needs stating that I reject Prophet 21's assertion that the Systems Contract's choice of law provision apply to Maine Oxy's noncontractual claims. (Reply Br. 7-8.) My conclusion that Maine Oxy's claims do not arise out of the System Contract means that the choice of law provision of that contract is inapposite unless Prophet 21 took it on itself to prove that that provision or its mirror image was part of the parties bargain vis-à-vis the customizations and partnership agreements. Again, relying on an assumption that the Court will conclude that the terms of the System Contract govern all of Maine Oxy's claims, Prophet 21 has not attempted to provide an alternative basis for judgment in its favor. Though for the purposes of this motion I analyze the claims as if Maine Law applies in accordance with diversity jurisdiction choice of law principals, I do not mean to foreclose a future determination that the parties agreed to a different choice of law.

#### ***1. Breach of Duty of Good Faith and Fair Dealing***

In a chorus that is now familiar, Prophet 21 argues that "Maine Oxy cannot alter the parties' bargain under the guise of a claim for breach of duty of good faith and fair dealing." (Mot. Summ. J. at 9.) It asserts that this claim either duplicates or attempts to insert new terms and agreements concerning the partnership rebate and compensation agreements and customizations into the "express integrated contract." (*Id.* at 9-10.) In its reply brief Prophet 21 declines to readdress this count other than citing Cauduill Seed & Warehouse Co. v. Prophet 21, Inc., 126 F.Supp.2d 937 (E.D. Pa. 2001) for its dismissal of a claim for a breach of duty of good faith and fair dealing in light of a

written agreement on the subject. (Reply Br. at 10 n.10.) In Cauduill Seed & Warehouse Co., the District Court did grant the defendant's motion for reconsideration on this score, dismissing a bad faith claim on a second time around. However, the allegations in that case related to a single written contract with an express provision that Pennsylvania law controlled. Having concluded above that Prophet 21 has not established on this record that the contracts on which Maine Oxy is suing are governed by the System Contract, its argument that it is entitled to summary judgment on Count V, framed narrowly as it is, fails.

## ***2. Unjust Enrichment and Promissory Estoppel***

Briefly, Maine Oxy pleads two counts in equity: unjust enrichment and promissory estoppel. Prophet 21 argues that Maine Oxy cannot rely on alternative pleading, there being no dispute between the parties that there is a contract, to wit, the System Contract. (Reply Br. at 9-10.) Once again, summary judgment is not appropriate vis-a-vis these counts in light of the contours of the dispute; Maine Oxy is alleging the existence of separate contracts and it is these contracts that it intends to establish. Under Maine Law it can plead unjust enrichment and promissory estoppel as an alternative means of recovery should the jury determine that it has not met its burden on a contract theory. See June Roberts Agency, Inc. v. Venture Properties, Inc., 676 A.2d 46, 49–50 (Me. 1996). If Maine Oxy's contract claims fail these equitable doctrines could provide some remedy.<sup>6</sup> They do not negate the existence of the System Contract nor does Maine

---

<sup>6</sup> At trial Maine Oxy would be required to demonstrate with respect to Prophet 21's alleged unjust enrichment that:

(1) [Maine Oxy] conferred a benefit on [Prophet 21], (2) [Prophet 21] had appreciation or knowledge of the benefit, and (3) [Prophet 21's] acceptance or retention of the benefit was under such circumstances as to make it inequitable for it to retain the benefit without payment of its value.

Oxy allege a breach of that contract. Prophet 21 has not argued that Maine Oxy has failed to make a prima facie showing on these two counts. Thus, I conclude that the Count VI unjust enrichment and the Count VII promissory estoppel claims should survive Prophet 21's summary judgment assault.

### ***3. Tort Claim for Intentional or Negligent Misrepresentation***

With respect to Count VIII, Prophet 21 does argue that Maine Oxy cannot make out a prima facie case on its tort claims even if Pennsylvania "gist of the action"<sup>7</sup> rule is inapplicable. (Mot. Summ. J. at 10-13.)

Prophet 21 has not argued that anything but Maine Law would govern this claim in this diversity action if the court concludes that the partnership agreement and customization agreement are not governed by the System Contract choice of law provision.<sup>8</sup> Whether the count is a fraud count alleging the scienter element of an intentional misrepresentation under Letellier v. Small, 400 A.2d 371, 376 (Me. 1976) or a negligent misrepresentation count under Devine v. Roche Biomedical Laboratories, Inc., 637 A.2d 441 (Me. 1994), it proceeds only to the extent that the allegedly false representations pertain to the customization modifications contract or the partnering

---

June Roberts Agency, Inc., 676 A.2d at 49. Regarding a claim of promissory estoppel Maine Oxy would need to establish:

A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Id. at 49-50 (quoting Restatement (Second) of Contracts § 90). "The promise relied on by the promisee need not be express but may be implied from a party's conduct." Id. at 50.

<sup>7</sup> I do not discuss this doctrine in any detail because I have concluded that the claims that Maine Oxy is bringing are not governed by the System Contract and, thus, its choice of law provision. In brief, the doctrine provides that tort claims associated with a contractual relationship cannot be brought when they essentially duplicate an action for a breach of the underlying contract.

Maine law is contrary to Pennsylvania on this score. See Jones v. Route 4 Truck & Auto Repair, 624 A.2d 1306, 1309 (Me. 1993) (concluding in a case that involved a breach of contract claim and a negligence claim that a directed verdict for the defendant on the negligence claim was improper).

<sup>8</sup> Prophet 21 argues that this claim would fail under Pennsylvania law because all the promises alleged are for the performance of a future act. (Mot. Summ. J. at 10-11.) Maine law in this regard is not quite so clear. See Veilleux v. Naitonal Broadcasting Co., 206 F.3d 92, 119–121 (1<sup>st</sup> Cir. 2000).

agreement. It is apparent to me that Maine Oxy cannot use this count to attempt to argue that the System Contract should be rescinded because of fraudulent inducement. While Maine Oxy's discussion on page seventeen of its memorandum in opposition to summary judgment is rather wide ranging in its approach to fraudulent inducement, if the alleged misrepresentations are viewed as connected to the two contracts under which Maine Oxy now claims it is suing, the limitations imposed under the System Contract's integration clause and choice of law provision may have no applicability. Certainly Prophet 21 has not argued in this motion how these counts fail under those alleged contracts.

The facts concerning whether and when there were misrepresentations made concerning the customized software to meet the welding-related needs of Maine Oxy (see, e.g., PSMF ¶¶ 143-146, 151-53, 152, 159, 168-70, 186, 190-91, 206-11, 229, 238, 235; Def.'s Resp. to PSMF ¶¶ 159, 168-70), whether Maine Oxy justifiably relied on Prophet 21's misrepresentations<sup>9</sup> (see, e.g., PSMF ¶¶ 22, 25-26, 28, 37-42, 40-41, 121-126, 129-136, 142, 151, 190-91; Def.'s Resp. to PSMF ¶¶ 168), and the nature of the representations made concerning a partnership agreement (see, e.g., PSMF ¶¶ 147, 212-14, 217; Def's Reply to PSMF ¶¶ 212-14, 217) are contentiously disputed by competing statements of fact and record citations. As long as the misrepresentations are alleged to apply to a purported partnership agreement and these separate customization modifications contracts,<sup>10</sup> they do not run afoul of the integration clause in the System

---

<sup>9</sup> "Reliance is unjustified only if the plaintiff knows the representation is false or its falsity is obvious to him." Letellier, 400 A.2d at 376.

<sup>10</sup> In its reply brief Prophet 21 states that the system contract "expressly addresses [the] very issues that are the subject of the alleged misrepresentation." (Reply Br. at 9.) I find the system contract silent on the alleged partnership agreements – rebates or compensation flowing to Maine Oxy -- and any future customizations to be made to Maine Oxy specifications (beyond the paragraph 4 exclusion of such products from the terms and conditions of the contract).

Contract. In light of these disputes of material fact Maine Oxy's Count VII tort claim is not ripe for summary judgment.

### ***Remaining Remedy***

Though Maine Oxy may win this battle it still may lose the bulk of its case. Its concession and my conclusion that it is not suing under the System Contract will in all likelihood have a profound effect on the remedy available to it should it prove breaches of the other alleged contracts. For one, assuming Maine Oxy can prove a partnership agreement relating to the customizations, I note that establishing damages for a breach of the alleged partnership agreement could prove to be a highly speculative undertaking. Whether Maine Oxy would be entitled to relief from the System Contract in the event that it did prove the existence of and breach of customization agreements by Prophet 21 remains an unanswered question on the state of these pleadings. Though Prophet 21 insists that Maine Oxy is seeking rescission of the System Contract (Reply Br. at 2, 12), it is not clear from Maine Oxy's assertions in its motion in opposition to summary judgment what its expectations are on this score (compare Pl.'s Mem. Opp'n at 14, 20 with Compl. ¶¶ 18, 25-28, 39-40, 68, 78).

### ***Conclusion***

For these reasons I **RECOMMEND** that the Court **DENY** Prophet 21's motion for summary judgment in its entirety.

### **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 of 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.

January 31, 2002

---

Margaret J. Kravchuk  
U.S. Magistrate Judge

TRLIST MAGREC  
BANGOR STNDRD

U.S. District Court

District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 01-CV-91

MAINE OXY ACETYLENE v. PROPHET 21 INC, et al Filed: 04/03/01

Assigned to: JUDGE D. BROCK HORNBY Jury demand: Plaintiff

Demand: \$0,000 Nature of Suit: 190

Lead Docket: None Jurisdiction: Diversity

Dkt # in AndroscogginSuperior : is 01-cv-33

Cause: 28:1332 Diversity-Breach of Contract

MAINE OXY ACETYLENE SUPPLY PETER J. BRANN

COMPANY [COR LD NTC]

plaintiff BRANN & ISAACSON

184 MAIN STREET, P. O. BOX 3070

LEWISTON, ME 04243-3070

786-3566

v.

PROPHET 21 INC DEIRDRE M. SMITH, ESQ.

defendant [COR LD NTC]

DRUMMOND, WOODSUM & MACMAHON

245 COMMERCIAL ST., P.O. BOX 9781, PORTLAND, ME 04101

207-772-1941

JON A. BAUGHMAN, ESQ.

[COR NTC]

ROBYN Y. ETTRICKS, ESQ.

[COR]

STUART D. LURIE, ESQ.

[COR]

ANDREW K. FLETCHER, ESQ.

[COR NTC]

PEPPER HAMILTON LLP, 3000 TWO LOGAN SQUARE

EIGHTEENTH AND ARCH STREETS, PHILADELPHIA, PA 19103

(215)981-4637

PROPHET 21 NEW JERSEY INC DEIRDRE M. SMITH, ESQ.

defendant (See above)

[COR LD NTC]

JON A. BAUGHMAN, ESQ.

(See above)

[COR NTC]

ROBYN Y. ETTRICKS, ESQ.

(See above)

[COR]

STUART D. LURIE, ESQ.

(See above)

[COR]

ANDREW K. FLETCHER, ESQ.

(See above)

[COR NTC]

PROPHET 21 INC DEIRDRE M. SMITH, ESQ.

counter-claimant [COR LD NTC]

DRUMMOND, WOODSUM & MACMAHON

245 COMMERCIAL ST., P.O. BOX 9781, PORTLAND, ME 04101

207-772-1941

JON A. BAUGHMAN, ESQ.

[COR NTC]

ROBYN Y. ETTRICKS, ESQ.

[COR]

STUART D. LURIE, ESQ.

ANDREW K. FLETCHER, ESQ.

PEPPER HAMILTON LLP

3000 TWO LOGAN SQUARE, EIGHTEENTH AND ARCH STREETS  
PHILADELPHIA, PA 19103 (215)981-4637

PROPHET 21 NEW JERSEY INC DEIRDRE M. SMITH, ESQ.

counter-claimant (See above)

[COR LD NTC]

JON A. BAUGHMAN, ESQ.

(See above)

[COR NTC]

ROBYN Y. ETTRICKS, ESQ.

(See above)

[COR]

STUART D. LURIE, ESQ.

(See above)

v.

MAINE OXY ACETYLENE SUPPLY PETER J. BRANN

COMPANY [COR LD NTC]

counter-defendant BRANN & ISAACSON

184 MAIN STREET, P. O. BOX 3070, LEWISTON, ME 04243-3070  
786-3566