STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY

MUKWONAGO REMODELING CORPORATION
JOHN GEORGOGOULOS,

Plaintiffs,

-vs-

Case: 17CV2011

MUKWONAGO REMODELING, LLC
ROBERT REIMER.

Defendants.

DECISION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

¶1. The Defendants moved for partial summary judgment against the Plaintiffs on various claims involving the sale of defendant Mukwonago Remodeling, LLC's assets to the purchaser/plaintiff, Mukwonago Remodeling Corporation, hereinafter "MRL" and "MRC," respectively.

¶2. MRL was formerly a home remodeling company formed in Wisconsin with a principal place of business in New Berlin. At all relevant times, Mr. Riemer was the sole member of MRL.

¶3. MRC is a home remodeling company incorporated in Wisconsin with a principal place of business in New Berlin. At all relevant times, Mr. Georgopoulos was the President of MRC.

¶4. Prior to the Agreement, Plaintiffs allege that the Defendants provided to them, through their sales agent, SunBelt, a Confidential Business Profile ("CBP") that contained a number of representations upon which they allege they relied to proceed with the purchase. According to the Plaintiffs, the CBP misrepresented MRL's business, that it was conducted in the normal, useful and regular manner, that it had a "steady revenue and cash flow history over the last several years," "steady sales," and employed three salespeople, two of whom were designated "key personnel," as well as two project managers, as part of its "competent staff."

¶5. The Court questioned Plaintiffs' counsel about the duty to allege with particularity any fraud claim, which the Complaint did not do. H'rg Tr. at 39. In response, Plaintiffs' counsel reviewed the CBP and identified on the record each statement from it that Plaintiffs claimed to be fraudulent. *Id.* at 40-44.

¶6. A Notice on the first page of the CBP filed with the Court provides:

> This Confidential Business Profile is being delivered to a limited number of parties who may be interested in acquiring the Company and its sole purpose is to assist the recipient in deciding whether to proceed with an in-depth study of the Company. While the Company and Broker have endeavored to include herein information they believe to be reliable and relevant, neither the Company nor Broker makes any representation or warranty as to the accuracy or completeness of such information or any other written or oral communication transmitted or made available to a prospective purchaser of the Company.

¶7. The sale of assets from MRL to MRC occurred on June 3, 2016, pursuant to a written Agreement of Sale ("Agreement").

¶8. The Agreement defines the assets sold to MRC in paragraph 1:

> 1. Agreement to Sell. Seller agrees to sell, transfer and deliver to Purchaser, and Purchaser agrees to purchase, upon the terms and conditions hereinafter set forth, all of the assets (other than cash, certificates of deposit, securities, cash equivalents and accounts

receivable) of the business known as Mukwonago Remodeling, LLC (the "Assets"), including without limitation the following:

(a) The furniture fixtures and equipment described in Exhibit A-l hereto (the "Equipment");

(b) The vehicles described in ExhibitA-2 hereto (the "Vehicles");

(c) The business known as Mukwonago Remodeling, LLC, and the books and records thereof (the "Business");

(d) All right, title and interest of Seller in the name "Mukwonago Remodeling, LLC" and any variants thereof (the "Name"); and

(e) The goodwill of the business (the "Goodwill").

¶9. Paragraph 2 of the Agreement identifies the purchase price of $1.7 million and how that amount is allocated by the parties to various assets.

¶10. Paragraph 7 of the Agreement contains the representations and warranties of MRL:

7. Representations and Warranties of Seller. Seller represents and warrants to Purchaser as follows:

(a) Seller has full power and authority to conduct its business as now carried on, and to carry out and perform its undertakings and obligations as provided herein.

(b) No action, approval, consent or authorization of any governmental authority is necessary for Seller to consummate the transactions contemplated hereby.

(c) Seller is the owner of and has good and marketable title to the Assets, free of all liens, claims and encumbrances, except as may be set forth herein.

(d) There are no violations of any law or governmental rule or regulation pending against Seller or the Assets.

(e) There are no judgments, liens, suits, actions or proceedings pending against Seller or the Assets.

(f) Seller has not entered into, and the Assets are not subject to, any: (i) written contract or agreement for the employment of any employee of the business; (ii) contract with any labor union or guild; (iii) pension, profit-sharing, retirement, bonus, insurance, or similar plan with respect to any employee of the business; or (iv) similar contract or agreement affecting or relating to the Assets.

(g) At the time of closing, there will be no creditors of Seller.

¶11. Paragraph 8 of the Agreement contains the representations and warranties of MRC:

> 8. Representations and Warranties of Purchaser. Purchaser represents and warrants to Seller as follows:
>
> (a) Purchaser is a corporation duly organized and validly existing under the laws of Wisconsin, and is duly qualified to do business in Wisconsin. Purchaser has full power and authority to carry out and perform its undertakings and obligations as provided herein. The execution and delivery by Purchaser of this agreement and the consummation of the transactions contemplated herein have been duly authorized by the Board of Directors of Purchaser and will not conflict with or breach any provision of the Certificate of Incorporation or Bylaws of Purchaser.
>
> (b) No action, approval, consent or authorization of any governmental authority is necessary for Purchaser to consummate the transactions contemplated hereby.

¶12. In paragraph 9 of the Agreement, MRC makes clear and acknowledges that neither MRL nor its representatives or agents have made any representations or warranties other than those contained in the Agreement, and that it is taking the assets sold "as is":

> 9. No Other Representations. Purchaser acknowledges that neither Seller nor any representative or agent of Seller has made any representation or warranty (expressed or implied) regarding the Assets or the business, or any matter or thing affecting or relating to this agreement, except as specifically set forth in this agreement. Purchaser has inspected the Assets, Purchaser agrees to take the Assets "as is" and in their present condition, subject to reasonable use, wear, and tear.

¶13. Paragraph 10 of the Agreement contains a provision regarding conduct of the business:

> 10. Conduct of the Business. Seller, until the closing, has:
> (a) Conducted the business in the normal, useful and regular manner;
> (b) Used its best efforts to preserve the business and the goodwill of the customers and suppliers of the business and others having relations with Seller; and

(c) Given Purchaser and its duly designated representatives reasonable access to Seller's premises and the books and records of the business, and furnished to Purchaser such data and information pertaining to Seller's business as Purchaser requested.

¶14. Paragraph 12 of the Agreement outlines the rights and obligations of the parties to close or decline to close the transaction:

> 12. Conditions to Closing. The obligations of the parties to close hereunder are subject to the following conditions:
> (a) All of the terms, covenants and conditions to be complied with or performed by the other party under this agreement on or before the closing shall have been complied with or performed in all material respects.
> (b) All representations or warranties of the other party herein are true in all material respects as of the closing date.
> (c) On the closing date, there shall be no liens or encumbrances against the Assets, except as may be provided for herein.
>
> If Purchaser shall be entitled to decline to close the transactions contemplated by this agreement, but purchaser nevertheless shall elect to close, Purchaser shall be deemed to have waived all claims of any nature arising from the failure of Seller to comply with the conditions or other provisions of this agreement of which Purchaser shall have actual knowledge at the closing.

¶15. Mr. Reimer executed the Agreement on behalf of MRL and Mr. Georgopoulos executed the Agreement on behalf of MRC.

¶16. MRC contends that work in process and outstanding contracts between MRL and third parties—work that MRC took over after the sale—constitute assets sold in the Agreement. It further contends that these contracts were not profitable and that the Defendants represented at the time of closing that this work was consistent with the historical profitability of jobs taken over the years.

¶17. The parties agreed that the Agreement is governed by Wisconsin law.

¶18. The Plaintiffs filed suit on November 15, 2017, alleging four counts: (1) Breach of Agreement of Sale; (2) Breach of Express Warranty; (3) Breach of Express Warranty (Conduct); and (4) Violation of Deceptive Trade Practices Act: Wis. Stat. § 100.18. All four counts are brought by the Defendants against both MRL and Mr. Reimer, individually.

¶19. Defendants moved for partial summary judgment, contending that Mr. Reimer is not a proper defendant. They also contend that partial summary judgment on counts 1, 3, and 4 is appropriate to the extent that the counts are based upon alleged underbid contracts and representations or warranties about the profitability of the business and the profitability of the work in process, and that there has been no material change in the operation of the business prior to closing.

DISCUSSION

¶20. Summary judgment must be granted "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." Wis. Stat. § 802.08(2). In making this determination, this Court must apply a two-step test. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Under the first step, this Court asks if the plaintiff stated a claim for relief. *Id.* at 315. Under the second step, this Court applies the summary judgment statute and asks if any factual issues exist that preclude summary judgment. *Id.*

MR. REIMER IS NOT A PROPER PARTY TO THE BREACH OF CONTRACT CLAIMS (COUNTS 1-3)

¶21. Counts 1-3 are contract claims based upon the Agreement. As a general matter, to sue on a contract or warranty under it, the defendant must be a party to the contract. Here, the

parties to the contract were MRL and MRC, not their members, beneficial owners, or constituents.

¶22. Wis. Stat. § 183.0305 provides:

> **Parties to actions**. A member of a limited liability company is not a proper party to a proceeding by or against a limited liability company, solely by reason of being a member of the limited liability company, except if any of the following situations exists:
>
> (1) The object of the proceeding is to enforce a member's right against or liability to the limited liability company.
>
> (2) The action is brought by the member under s. 183.1101.

¶23. Likewise, Wis. Stat. § 183.0304 makes clear that individual members are not responsible for the debts, obligations and liabilities of the limited liability company. It provides

> 183.0304 **Liability of members to 3rd parties.**
>
> (1) The debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company. Except as provided in ss. 73.0306, 183.0502, and 183.0608, a member or manager of a limited liability company is not personally liable for any debt, obligation or liability of the limited liability company, except that a member or manager may become personally liable by his or her acts or conduct other than as a member or manager.
>
> (2) Notwithstanding sub. (1), nothing in this chapter shall preclude a court from ignoring the limited liability company entity under principles of common law of this state that are similar to those applicable to business corporations and shareholders in this state and under circumstances that are not inconsistent with the purposes of this chapter.

¶24. To ignore the form of the limited liability company requires evidence that the company is merely the alter ego of its owner or owners.

> The general rule is that a corporation is treated as a legal entity distinct from its members and is not liable for the personal debts of a shareholder. However a shareholder's act will be treated as a corporate act and the existence of the corporation as an entity apart from the natural persons comprising it will be disregarded, if corporate affairs are organized, controlled and conducted so that the corporation has no separate existence of its own and is the mere instrumentality of the shareholder and the corporate form is used to evade an obligation, to gain an unjust advantage or to commit an injustice.

Olen v. Phelps, 200 Wis. 2d 155, 162, 546 N.W.2d 176 (Ct. App. 1996).

¶25. In the present case, the Plaintiffs have not alleged and shown that MRL is the alter ego of Mr. Reimer such that the company should be disregarded and Mr. Reimer held responsible for its obligations.

¶26. The Plaintiffs allege that Mr. Reimer is a party to the Agreement because he signed the Agreement and because he is the holder of a promissory note referenced in the Agreement.

¶27. Mr. Reimer, however, expressly signed the Agreement on behalf of MLC in his capacity as a member. In addition, MRC is the maker of a promissory note and promised to pay Mr. Reimer as the holder of the note. As holder of the note, Mr. Reimer did not agree to take on any of the obligations or liabilities of MRL. Accordingly, partial summary judgment in favor of Mr. Reimer on counts 1-3 is appropriate.

¶28. Count 4, on the other hand, alleges a claim for statutory fraud under Wis. Stat. § 100.18. An individual is responsible for his or her allegedly deceptive representations, even those made in an official capacity. *Cf. Rayner v. Reeves Custom Builders, Inc.*, 2004 WI App 231, ¶ 19, 277 Wis. 2d 535, 691 N.W.2d 705.

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT 3 AND CERTAIN ALLEGATIONS ALLEGED AS A BASIS FOR COUNT 1

¶29. The Defendants also seek summary judgment on counts 1 and 3. With respect to count 1, the Defendants seek partial summary judgment with respect to the following allegations:

> 47. Defendants materially breached the agreement by not conducting business in the normal, useful and regular manner prior to closing. Specifically, in order to inflate the value of the assets to a potential purchaser, Riemer on behalf of MR LLC intentionally took a number of unprofitable jobs knowing that [t]he eventual purchaser would lose money on them but intending to deceive them into entering

> the transaction by representing they were consistent with the historical profitability of jobs taken over the years.
>
> 48. MR LLC and Riemer materially breached the agreement by not using best efforts to preserve the business and the goodwill of the customers and suppliers of the business and others having relations with MR LLC prior to closing.
>
> 49. MR LLC and Riemer materially breached the agreement by bringing Georgopoulos only to select profitable jobs, thereby not furnishing to MRC accurate data and information as requested by MR LLC.

¶30. The Defendants also seek summary judgment dismissing count 3, which alleges

> 58. Defendants made affirmations of fact as to the Conduct of the Business, specifically that MR LLC, as Seller, until the closing, had conducted the business in the normal, useful, and regular manner; and that Seller had used his best efforts to preserve the business and the goodwill of the customers and suppliers of the business and others having relations with Seller, and that Seller had furnished to MRC such data and information pertaining to Seller's business as MRC requested, as described herein and in Sections 10(a)-(c) of the Agreement.

¶31. The Plaintiffs contend that paragraphs 10 and 12 of the Agreement (cited in full above) are express warranties, representing and warranting that there were no material changes to the assets of MRL prior to closing.

¶32. The language of a contract controls this Court's interpretation of the contract. *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2015 WI 65, ¶34, 363 Wis. 2d 699, 866 N.W.2d 679. When terms are clear and unambiguous, a court must construe the contract's language according to its literal meaning and presumes that the chosen words convey the parties' intent. *Id.* at ¶ 35. "When we interpret contracts, we do so to determine and give effect to the intentions of the parties. We presume their intentions are expressed in the language of the contract. Where the language of a contract is unambiguous and the parties' intention can be ascertained from the fact of the contract, we give the effect of the language they employed." *Estate of Kriefall v. Sizzler United States Franchise, Inc.*, 2012 WI 70, ¶ 21, 342 Wis. 2d 29, 816 N.W.2d 853.

¶33. Paragraph 10 of the Agreement is clearly and as a matter of law *not* a representation or warranty. The representations and warranties of the parties are contained in paragraphs 7 and 8 of the Agreement. Paragraph 9 then makes clear that there are no other representations except as specifically set forth in the Agreement. Specifically, as it relates to any representations or warranties from MRL, those would be the ones referenced in paragraph 7. None of those representations support the allegations challenged in counts 1 and 3.

¶34. Paragraph 10 is in fact and law an acknowledgement *by both parties* that during the pendency of the transaction until closing, the Seller has conducted the business in the normal useful and regular manner, used its best efforts to preserve the business and goodwill, and given the Purchaser reasonable access to the books and records prior to closing. The prior provisions (paragraphs 7-9) make clear that paragraph 10 is not a representation or warranty. If the contents of paragraph 10 were a representation or warranty, it would be contained in paragraph 7. "To ignore [a] part of the Agreement would violate one of the principles of contract-construction—no part of the contract should be ignored." *Kurt Van Engel Comm'n Co., Inc. v. Zingale,* 2005 WI App 82, ¶53, 280 Wis. 2d 777, 696 N.W.2d 280.

¶35. Moreover, *both parties* are agreeing to what is contained in paragraph 10, not just MRL. Clearly, it is meant to confirm that both parties acknowledge that those terms occurred, and that MLC had the opportunity to verify and confirm that they are true before agreeing and proceeding to close. In essence, this provision is meant to prevent the very claims MRC is pursuing now.

¶36. If MRC had a problem acknowledging the conditions spelled out in paragraph 10, or had concerns about MRL's compliance with any conditions or terms of the Agreement prior to closing, it could decline to close the transaction pursuant to paragraph 12. By electing to close

with actual knowledge of MRL's noncompliance with any provision of the Agreement, MRC has waived those issues of noncompliance.

¶37. Plaintiffs also contend that the Defendants represented that the work in process and contracts with third parties MRC took over after the sale were profitable. Paragraph 7 does not warrant that the work in process is profitable. In fact, paragraph 9 makes clear that there are no other warranties and representations regarding the Assets (which would include the work in process), and that MRC is taking the assets "as is." "Men, in their dealings with each other, cannot close their eyes to the means of knowledge equally accessible to themselves and those with whom they deal, and then ask courts to relieve them from the consequences of their lack of vigilance." *Nauga, Inc. v. Westel Milwaukee Co., Inc.,* 216 Wis.2d 306,314-15,576 N.W.2d 573 (Ct. App. 1998).

¶38. If MRC wanted a warranty regarding the profitability of the work in process, it could have bargained for one, and the parties could have allocated the risk accordingly. But the Agreement does not include any such warranty, or a reserve or claw-back of funds to guaranty the profitability of the work to be completed post contract. Hindsight is 20/20 and sometimes a party makes a bad deal. But a deal is a deal. "When parties of roughly equal bargaining power allocate risks of loss through negotiation, society has no special interest in overturning that allocation." *Grams v. Milk Prods., Inc.*, 2005 WI 112, ¶ 19, 283 Wis. 2d 511, 699 N.W.2d 167. "Whether in a commercial or consumer setting, there is 'no reason to intrude into the parties' allocations of the risk of economic loss and to extricate the parties from their bargains.' " *State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.*, 225 Wis. 2d 305, 592 N.W.2d 201 (1999) (*quoting Daanen & Janseen, Inc. v. Cedarapids, Inc.*, 216 Wis. 2d 395, 410, 573 N.W.2d 842 (1998.)

¶39. Therefore, there are no genuine issues of material fact and Defendants are entitled to judgment as a matter of law dismissing paragraphs 47-49 as a basis for count 1, and dismissing count 3 in its entirety.

DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON COUNT 4

¶40. To prevail on a claim for violation of Wis. Stat. § 100.18, a plaintiff must prove three elements: First, that with the intent to induce an obligation, the defendant made a representation to the public. Wis. Stat. § 100.18(1). Second, that the representation was untrue, deceptive or misleading. *Id.* Third, that the representation caused the plaintiff a pecuniary loss. Wis. Stat. § 100.18(1)(b)2. *See also Tietsworth v. Harley-Davidson, Inc.*, 2004 WI32, ¶39, 270 Wis.2d 146, 677 N.W.2d 233.

¶41. It bears mentioning that Wis. Stat. § 100.18 is a fraud-based statute, with a "broad remedial scope" and "protective purpose." *Tim Torres Enters., Inc. v. Linscott*, 142 Wis.2d 56, ¶ 72, 416 N.W.2d 670 (Ct.App.1987). Remedial statutes such as § 100.18 are to be "liberally construed to advance the remedy that the legislature intended to be afforded." *Stuart v. Weisflog's Showroom Gallery, Inc.*, 2008 WI 22, ¶121, 308 Wis.2d 103, 746 N.W.2d 762.

¶42. To succeed on a claim of fraud, a plaintiff must generally show that he or she reasonably relied upon the alleged misrepresentation. Although a plaintiff suing under § 100.18 need not prove reasonable reliance as an element of the claim, a circuit court may determine that the alleged representation did not materially induce the plaintiff's decision to act and that the plaintiff would have acted in the absence of the representation. *Novell v. Migliacco*, 2008 WI 44, ¶¶ 33-52, 309 Wis. 2d 132, 749 N.W.2d 544.

¶43. At the summary judgment hearing, the Court noted that count 4 is, at bottom, a fraud claim and that Wis. Stat. § 802.03(2) requires that, "[i]n all averments of fraud or mistake,

the circumstances constituting fraud or mistake shall be stated with particularity." H'rg Tr. at 39. To plead something with particularity, it is necessary to specify the time, place, and content of an alleged false representation. *Friends of Kenwood v. Green,* 2000 WI App 217, ¶14, 239 Wis. 2d 78, 619 N.W.2d. 88. Particularity means the "who, what, when, where and how." *Id.* The particularity requirement affords notice to a defendant and is "designed to protect defendants whose reputation could be harmed by lightly made charges of wrongdoing involving moral turpitude, to minimize 'strike suits,' and to discourage the filing of suits in the hope of turning up relevant information during discovery." *Id.*; *Ferris v. Location 3 Corp.*, 2011 WI App 134, ¶ 10, 337 Wis. 2d 155, 804 N.W.2d 822.

¶44. According to Plaintiffs' counsel at the hearing, the basis for the fraudulent statements is the CBP. H'rg Tr. at 39-44. Plaintiffs' counsel then reviewed the CBP page by page to identify what statements the Plaintiffs claim are fraudulent. In so doing, Plaintiffs claimed that the CBP misrepresented that MRL's business was conducted in the normal, useful and regular manner, and that it had a "steady revenue and cash flow history over the last several years," "steady sales," and employed three salespeople, two of which were designated "key personnel," as well as two project managers, as part of its "competent staff."

¶45. With the detail required of Wis. Stat. § 802.03(2) disclosed at the hearing, the Defendants filed a supplemental brief seeking summary judgment on count 4. In that brief, Defendants cite *Peterson v. Cornerstone Property Development*, 2006 WI App 132, 294 Wis. 2d 800, 720 N.W. 2d 716. In *Peterson,* the Court of Appeals held that an integration clause in a contract for purchase, excluding all prior negotiations from the contract and specifying that only the text contained in the written documents constituted the actual contract, precluded the asserted § 100.18 claim. In doing so, the Court of Appeals distinguished *Grube v. Daun*, 173 Wis. 2d 30,

496 N.W.2d 106 (Ct. App. 1992), which held that a simple "as is" clause" stating "Buyer is buying the property in a[sic] as is condition without any warranties," did not, by itself, preclude a § 100.18 claim.

¶46. This is because when a contract includes an integration clause, evidence of contemporaneous or prior oral agreements relating to the same subject matter are generally not admissible. *Matthew v. American Family Mut. Ins. Co.*, 54 Wis. 2d 336, 341-42, 195 N.W.2d 611 (1972). In conjunction with the parol evidence rule, an integration clause generally bars the introduction of extrinsic evidence to "vary or contradict the terms of a writing." *Ziegler Co. v. Rexnord, Inc.*, 139 Wis. 2d 593, 608-09 n.11, 407 N.W.2d 873 (1987). Absent claims of duress, fraud, or mutual mistake, integration clauses are given effect. *See, e.g. Matthew*, 54 Wis. 2d at 341-42.

¶47. Upon receiving the supplemental brief, the Court delayed a decision on the pending motion to permit Plaintiffs an opportunity to respond, which they did in a supplemental brief filed on February 20, 2019. In that brief, Plaintiffs attempted to distinguish *Peterson* and argued that this case is more akin to *Woodward Commc'ns, Inc. v. Shockley Commc'ns Corp.*, 2001 WI App 30, 240 Wis. 2d 492,499, 622 N.W.2d 756, 760, and *Fricano v. Bank of Am. NA*, 2016 WI App 11, 366 Wis. 2d 748, 875 N.W.2d 143.

¶48. The Court finds that *Peterson* is controlling, and concludes that *Woodward* and *Fricano* are distinguishable.

¶49. In *Woodward*, the defendant agreed to sell, and plaintiff agreed to purchase, pursuant to a written agreement, the assets of a radio station, including a communications tower, described as "tangible personal property." Unlike this case, in *Woodward* the agreement contained seller's express representation and warranty that it would maintain in good repair the

personal property until closing: "Representations and Warranties by Seller. The Seller represents and warrants as follows: (h) Seller, at its expense, shall keep in good repair and operating efficiency, all tangible personal property to be transferred to the Buyer." 2001 WI App 30, ¶ 2. When the communications tower collapsed post-closing and it was determined that the seller had not properly maintained it, the claim for breach of warranty was viable.

¶50. Unlike *Woodward*, none of the matters allegedly represented to MRC are identified as representations or warranties in the Agreement.

¶51. *Fricano* involved a jury verdict in favor of the plaintiff who had purchased a home from the defendant bank and later learned of extensive water and mold damage. The bank challenged the adverse verdict, noting that the purchase agreement contained "as is" and exculpatory clauses. The Court of Appeals held that the clauses in that case did not, as a matter of law, relieve the bank/seller of liability under § 100.18(1). 2016 WI App 11, ¶ 25. The Court of Appeals distinguished *Peterson* by explaining that *Peterson* involved application of disclaimer and integration clauses that provided that the parties could rely on the written terms of the contract, including warranties, but expressly disclaimed reliance on, and excluded extrinsic evidence of, pre-contract representations that varied the terms of the contract. *Id.* In *Fricano*, the Court of Appeals emphasized that the representations allegedly relied upon were in the same agreement containing the "as is" and exculpatory clauses. *Id.* ¶ 26.

¶52. The Court concludes that the Agreement's exculpatory provisions are, for all intents and purposes, the same as those found in *Peterson* and thus preclude any § 100.18 claim.

¶53. The Court also concludes, as a matter of law and in the alternative, that in the light of the disclaimer language contained in the CBP, as well as the other acknowledgments MRC made in the Agreement itself before ultimately proceeding to close on the transaction, no

reasonable jury could conclude that the alleged misrepresentations materially induced the Plaintiffs' decision to purchase the assets and thus were not a substantial factor in causing the Plaintiffs' injury.

¶54. In this regard, the Court notes that the alleged misrepresentations regarding the employees and staffing at MRL directly contradict the representations MRL expressly made in ¶ 7(f) of the Agreement.

¶55. The Court also notes that the alleged representations regarding "steady revenue and cash flow history over the last several years," and "steady sales," could not have materially induced the Plaintiffs' decision because of the specific information about the business to which MRC acknowledged having access in ¶ 10 of the Agreement. And if the representations are alleged to constitute representations about future performance, they fail as a matter of law because they are too vague to constitute a fact that could be substantiated or refuted and thus are not a basis for a § 100.18 claim. *See United Concrete & Constr., Inc. v. Red-D-Mix Concrete, Inc.*, 2013 WI 72, ¶¶ 24-30, 349 Wis. 2d 587, 836 N.W.2d 807.

¶56. For all these reasons, the Court finds that summary judgment dismissing count 4 is appropriate.

* **

¶57. Accordingly, the Court grants in part and denies in part the Defendants' motion for partial summary judgment and in doing so grants summary judgment in favor of the Defendants and against the Plaintiffs on Counts 3 and 4; grants summary judgment in favor of Mr. Reimer and against the Plaintiffs on Counts 1, 2, and 3; and grants partial summary judgment in favor of the Defendants and against the Plaintiffs dismissing paragraphs 47-49 of the Complaint as a basis for Count 1.

Dated this 5th day of March, 2019.

BY THE COURT:
/s/ Michael J. Aprahamian
Circuit Court Judge