IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

ADA LISS GROUP (2003), fka ADA LISS GROUP, LTD.	)	
Plaintiff,	)	
v.	)	No. 06CV610
SARA LEE CORPORATION, (formerly d/b/a Sara Lee Branded Apparel) and HANESBRANDS, INC.,	)	
Defendants.	)	

MEMORANDUM ORDER

Tilley, Senior District Judge

This matter is before the Court on a motion to dismiss by Defendants Sara Lee Corporation and Hanesbrands, Inc. [Doc. # 121] and on a motion for partial summary judgment by Plaintiff Ada Liss Group [Doc. # 133]. The parties have responded in opposition to the motions and on September 30, 2009 Magistrate Judge Wallace Dixon submitted a Recommended Decision, recommending that the court deny Defendants' motion to dismiss in part and grant it in part and that the court grant Plaintiff's motion for partial summary judgment. The parties submitted Objections to the Recommendation [Doc. #s 166 & 167], as well as

Responses to the Objections [Doc. #s 171 & 172] and a Reply to the Response by Ada Liss [Doc. # 173].

Pursuant to Federal Rule of Civil Procedure 72(b), when a party states proper objections to a Magistrate Judge's recommended disposition, the court must conduct a de novo review of the portions of the Magistrate Judge's recommendation to which objection has been made. FED. R. CIV. P. 72(b)(3); see also Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310, 315 (4th Cir. 2005)(District court required to "make a de novo determination of those portions of the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made.") Proper objections to the Magistrate Judge's Recommended Ruling were presented and a de novo review of the source of the objections has been conducted. The matter is now ripe for disposition. For reasons stated in detail below, the Court adopts portions of the Recommendation with modifications, granting Plaintiff's Motion for Partial Summary Judgment and granting Defendants' Motion to Dismiss in part and denying it in part.

I. BACKGROUND

Plaintiff Ada Liss Group filed this action against Defendants Sara Lee Branded Apparel Division ("Sara Lee") and Hanesbrands, Inc. alleging claims for

negligent misrepresentation and/or fraud, unfair and deceptive trade practices, and breach of the implied covenant of good faith and fair dealing. The claims stem from two distributorship agreements and a settlement agreement entered into between Plaintiff and Sara Lee arising out of Plaintiff's status as the exclusive distributor of certain of Sara Lee's products in Israel.

Plaintiff originally filed this case in Wake County Superior Court on February 15, 2006. In the original complaint, Plaintiff brought only a claim for breach of contract. On March 17, 2006, Sara Lee removed the case to the Eastern District of North Carolina based on diversity jurisdiction. After the case was removed, Sara Lee's assignee, Hanesbrands, was added as a co-defendant. On March 24, 2006, Sara Lee filed a motion to dismiss for improper venue or, alternatively, to transfer venue to this district.

On June 30, 2006, the Eastern District transferred the case to this court. On July 14, 2006, Sara Lee filed an Answer to Plaintiff's Complaint. Discovery commenced after the court approved the parties' Rule 26(f) report on August 23, 2006. Sara Lee subsequently filed a motion for judgment on the pleadings on November 22, 2006. On December 12, 2006, Plaintiff filed a motion to amend the complaint. On January 12, 2007, Plaintiff filed a motion to remand.

On February 26, 2007, the Magistrate Judge granted Plaintiff's motion to

amend the complaint, denied Plaintiff's motion to remand, and held that Defendant Sara Lee's motion for judgment on the pleadings was moot since the amended complaint superseded the original complaint. On May 31, 2007, the district court adopted these rulings. Furthermore, on April 12, 2007, Defendants filed a motion to dismiss the amended complaint. On July 2, 2007, the Magistrate Judge recommended that the Court deny Defendants' motion to dismiss in part and grant it in part. To this extent, the Magistrate Judge recommended that all claims by Plaintiff for recovery of incidental or consequential damages and/or lost profits for breach of the 2004 Distributorship Agreement be dismissed and that the motion to dismiss should otherwise be denied.

On December 28, 2007, the Recommendation of the Magistrate Judge was adopted. On March 4, 2008, an order was entered allowing Plaintiff to take a voluntary dismissal without prejudice, after Plaintiff stipulated that it would abide by certain terms and conditions upon refiling. On August 13, 2008, Plaintiff filed a motion to reopen the case, which was subsequently granted, and a new complaint. The complaint filed on August 13, 2008, brings the following claims for relief: (1) Count I–Breach of the 1994 Distributorship Agreement; (2) Count II–Breach of the 2004 Settlement Agreement; (3) Count III–Breach of the

2004 Distributorship Agreement; (4) Count IV–Fraud; (5) Count V–Negligent Misrepresentation; (6) Count VI–Unfair and Deceptive Trade Practices; and (7) Count VII–Breach of Duty of an Implied Covenant of Good Faith and Fair Dealing.

Defendants have now filed the pending motion to dismiss [Doc. #121], requesting that the court dismiss Plaintiff's claims for fraud, negligent misrepresentation, unfair and deceptive trade practices, and breach of the implied covenant of good faith and fair dealing. Defendants further seek a finding from the court that the damages exclusion provisions in the Distributorship Agreements apply to all of Plaintiff's claims, including the newly alleged tort claims, therefore prohibiting recovery of lost profits and damages for diminution in the value of the distributorship. Plaintiff has filed a motion for partial summary judgment [Doc. # 133], seeking a finding from the court that Defendants have breached the 2004 Settlement Agreement.

The Magistrate Judge issued a Memorandum Opinion and Recommended Ruling [Doc. # 162]. On October 26, 2009, both parties submitted Objections to the Recommended Ruling [Doc. #s 166 (Ada Liss) & 167 (Sara Lee)]. On November 12, 2009, both parties submitted Responses to the Objections [Doc. #s 171 (Ada Liss) and 172 (Sara Lee)]. On November 30, 2009, Ada Liss

submitted a Reply to Sara Lee's Response to its objections [Doc. #173].

II. FACTS

The following facts are taken from the Complaint filed on August 13, 2008 [Doc. # 107] and are assumed to be true for the purpose of Defendants' motion to dismiss. Ada Liss is an Israeli company that imports and sells women's intimate apparel to retailers in Israel. (Compl. ¶¶ 21-22.) Ada Liss's president is Ervin Lissauer. (Id. ¶ 22.) In 1994, Sara Lee and Ada Liss entered into a Distributorship Agreement pursuant to which Ada Liss began purchasing Bali-branded intimate apparel from Sara Lee.[1] (Id.¶¶ 27-34.) The 1994 Distributorship Agreement granted Ada Liss the exclusive right to distribute Bali-branded intimate apparel ("Products") in Israel and the territories (hereinafter referred to as "Israel" or the "Territory"). (Id.) Under the Agreement, Defendant Sara Lee was "prohibited from (a) selling the Products to anyone in the Territory other than Ada Liss, and (b) selling the Products to anyone whom [Defendant] 'knows or has reason to believe is likely to resell or deliver the Products to customers located in the Territory.'" (Id. ¶ 32.)

Ada Liss alleges that beginning in 2000, Plaintiff first noticed "parallel imports" in its Territory, *i.e.*, Products that were imported into the Territory by

[1] Sara Lee formerly conducted business as Sara Lee Branded Apparel and Hanesbrands, Inc., but will simply be referred to as Sara Lee in this Order.

persons or companies other than Ada Liss. (Compl.¶¶ 36-37.) Ada Liss alleges that these Products violated Ada Liss's exclusive distributorship rights and were sold at prices far below those that Ada Liss was able to charge retailers for legitimately imported Products because the illegitimate importers purchased Products from Sara Lee at deeply discounted prices. (Id.) Ada Liss notified Sara Lee that parallel imports were penetrating the market and that they were causing Ada Liss to lose market share. (Id. ¶¶ 38-39.)

Ada Liss further alleges that over the next several years, it repeatedly informed Sara Lee that Atlantic Hosiery in Miami was supplying one of the major parallel importers in Israel–Mr. Avrahami of Sera Lingerie–with Bali Products. (Compl. ¶¶ 40-51.) Plaintiff alleges that Atlantic Hosiery was purchasing Bali Products from Sara Lee at prices far below what Sara Lee charged Plaintiff for the same Products. (Id. ¶¶ 37, 40-42, 49.) In 2003, Plaintiff notified Sara Lee that Atlantic Hosiery was also supplying an Israeli firm, Peer G.I.A., with parallel imports. (Id. ¶¶ 53-55.)

In February 2004, Sara Lee sent export manager Fabian Bouquet to Israel to investigate the problem of parallel imports. (Compl. ¶¶ 60-61.) During the trip to Israel, Bouquet confirmed the existence of large quantities of parallel imports of Bali Products and that Atlantic Hosiery was supplying Bali Products

to Mr. Avrahami of Sera Lingerie. (Id. ¶¶ 60-66.) Bouquet confirmed that parallel imports (1) were affecting active (not discontinued) Bali styles; (2) were widely available at premium retail locations; (3) were offered to Israeli retailers at an average discount of 40 percent below Plaintiff's prices; and (4) were damaging Plaintiff's business. (Id. ¶¶ 60-70.)

In a written report dated February 20, 2004, Bouquet submitted his findings to Sara Lee's in-house counsel. (*See* Compl. ¶¶ 62-72 & Ex. 1.) Plaintiff alleges that, although Sara Lee knew that parallel imports were originating from its U.S. wholesale customers and that Sara Lee's sales to its U.S. customers such as Atlantic Hosiery were damaging Ada Liss's business, Defendants continued to sell Bali Products to those same customers, thereby breaching the 1994 Distributorship Agreement. (*See* id. ¶¶ 81-88, 359-65.) Plaintiff notes that, in an e-mail dated April 14, 2004, it notified Sara Lee, including in-house counsel Christopher Fox, that Plaintiff's damages "are measured in millions of US dollars." (Id. ¶ 106.)

Shortly after Bouquet's investigation in Israel, Sara Lee's in-house counsel Christopher Fox proposed to Ada Liss that Sara Lee would begin to "mark" Bali Products to catch the U.S. wholesalers supplying the parallel importers. (Compl. ¶ 89.) Fox again proposed marking in August 2004. (Id. ¶ 91.) Ada Liss

alleges that in October 2004, Plaintiff notified Sara Lee that another Sara Lee customer, Hosiery Street (in New York), was supplying parallel imports through Mayer Gelbart, and that Gelbart was running Hosiery Street's website. (Id. ¶¶ 12, 173-88.) Plaintiff alleges that for at least a year after Sara Lee received this information, the Sara Lee-Gelbart-Hosiery Street supply chain continued to thrive as Gelbart received Products directly from Sara Lee. (*See* id. ¶¶ 186-88.)

To resolve the parallel imports dispute, Ada Liss's president, Lissauer, traveled from Israel to Winston-Salem, North Carolina and met on November 1-2, 2004, with Sara Lee's legal counsel Fox and Mickey Swaim, Vice-President of Operations for Sara Lee's Asia division. On November 2, 2004, Ada Liss and Sara Lee executed a second Distributorship Agreement as well as a Settlement Agreement. (Compl. ¶¶ 92-98, 138-65.) Under the 2004 Distributorship Agreement, Ada Liss was again given an exclusive right to distribute Bali-branded intimate apparel in the Territory. (Id.)

Moreover, as with the 1994 Distributorship Agreement, under the 2004 Distributorship Agreement Defendant Sara Lee was again prohibited from (a) selling the Products to anyone in the Territory other than Ada Liss, and (b) selling the Products to anyone whom Sara Lee knew or had reason to believe was likely to resell or deliver the Products to customers located in the Territory.

(Compl. ¶¶ 138, 143.)

In the Settlement Agreement, Sara Lee promised to take certain actions in an effort to stop parallel imports, including "mark[ing] Bali Products being sent to various wholesalers" in order to track the origin of the parallel imports. (Id. ¶¶ 92-98.) In exchange, Ada Liss agreed to release Defendant from liability for existing claims concerning parallel imports from June 1, 1994, up to the date of the Settlement Agreement. (Id. ¶ 135.) Plaintiff alleges that before Lissauer signed the Settlement Agreement, he asked counsel Fox how marking would work and whether it would be too expensive for Sara Lee. (Id. ¶ 100.)

Fox responded that marking would be relatively easy: Sara Lee would apply a transparent spray to Products sold to various wholesalers to distinctively mark the Products sold to them. (Compl. ¶ *100.*) If parallel imports came into Israel, then the Product could be examined with a machine to identify which wholesaler had purchased what Product. (Id.) Fox also told Lissauer that Sara Lee would begin marking the Products "immediately" and that marking would permit Sara Lee to trace the source of the parallel imports. (Id. ¶¶ 101-02.) Fox further promised that Sara Lee would cut off sales to its customers who were supplying the parallel imports and that marking would give Ada Liss a truly exclusive distributorship. (Id.¶¶ 99-103.)

Plaintiff alleges that Sara Lee, in fact, never intended to mark, trace the sources of the parallel imports, cut off sales to customers supplying the parallel imports, or give Plaintiff a truly exclusive distributorship. (Compl. ¶¶ 109-12.) Plaintiff alleges that at that time, neither counsel Fox nor Sara Lee had any idea whether marking was feasible and had no plans at all to actually implement it. (Id. ¶¶ 113-16.) Indeed, Plaintiff notes that during late 2006 and early 2007, the parties conducted document discovery. Plaintiff requested records of Sara Lee's intentions to mark Products, but Sara Lee produced no records whatsoever to show that it ever had any intention of marking. (Id. ¶¶ 121-32.)

Plaintiff maintains, for instance, that there is no record of how Sara Lee planned to fulfill the marking obligations in the Settlement Agreement, nor is there any record indicating that Sara Lee's counsel ever instructed Sara Lee's manufacturing/assembly personnel to implement a marking system, or that the legal department ever inquired about the cost, feasibility, or safety of the chemical spray discussed by counsel Fox. (Id.)

Plaintiff alleges that Sara Lee fraudulently induced Plaintiff to sign the Settlement Agreement simply to obtain a release of Sara Lee's "multi-million dollar liability" to Plaintiff. (*See* Pl.'s Response Br., p. 6.) Plaintiff further alleges that it subsequently purchased more than $600,000 in Products from Sara Lee

in further reliance on Sara Lee's promises of marking and exclusivity. (Compl. ¶ 137.) According to Plaintiff, in the two weeks after the 2004 Distributorship Agreement and the 2004 Settlement Agreement were signed, Sara Lee gave Plaintiff "false wishes of future success" in selling Bali Products. (Id. ¶¶ 166-70.) Plaintiff also alleges that Sara Lee obtained Plaintiff's agreement to participate in Sara Lee's co-op advertising program. (Id. ¶¶ 162-65.) A few months later, Sara Lee still had not marked any Products.

On March 23, 2005, Sara Lee employee Sammie Shanks asked Lissauer to forward samples of parallel imports and falsely indicated to him that Sara Lee had already marked Bali Products and that Sara Lee should be able to identify the customers who purchased the Products from Sara Lee. (Compl. ¶¶ 189, 200-04.) Thereafter, Sara Lee again informed Plaintiff that it was conducting an investigation and again requested that Plaintiff obtain samples of parallel imports and send them to Sara Lee. (Id. ¶¶ 207-32.)

Plaintiff alleges that, in fact, Sara Lee was not marking Products for the purpose of identifying the source of parallel imports. Plaintiff further alleges that "while Sara Lee was going through the charade of an investigation, it was in fact delivering Products directly to Mayer Gelbart, who at that time was a known conduit to one of the parallel importers, his sister-in-law Heniya Gelbart,"

who ran a company named Gym Gal. (Pl.'s Response Br., p. 7, citing Compl. ¶¶ 12, 176, 192, 227-29.)

Plaintiff further alleges that as part of Sara Lee's "sham investigation" in early May 2005, Shanks falsely represented that Sara Lee's legal department was prepared to act when the samples arrived, (Compl. ¶¶ 210-11, and that Sara Lee would be pursuing the sources of the parallel imports. (Id. ¶¶ 212-14.) On June 21, 2005, Lissauer notified Shanks that large quantities of parallel imports were still coming into the Territory and asked about the status of Sara Lee's investigation. (Id. ¶ 216.) Plaintiff alleges that Shanks acknowledged receipt of the samples and falsely claimed that Sara Lee's in-house counsel Grady Crosby was investigating the matter. (Id. ¶¶ 216-18.)

On July 25, 2005, Plaintiff informed Sara Lee that all twelve of the Bali styles that Defendants sold to Hosiery Street were being imported into the Territory by Heniya Gelbart and her company Gym Gal. (Compl. ¶¶ 176, 221-24.) Plaintiff contends that at that time Lissauer requested that Sara Lee stop selling to Hosiery Street, and that counsel Crosby falsely represented to Lissauer that Sara Lee intended to cut off sales to Hosiery Street. (*See* id. ¶¶ 223-25.) Plaintiff contends that Sara Lee did not, however, cut off sales to Hosiery Street and that Sara Lee instead delivered Bali Products directly to Mayer Gelbart,

despite Sara Lee's actual knowledge of the Hosiery Street-Gelbart-Gym Gal supply chain for parallel imports. (Id. ¶¶ 226-29.)

Plaintiff contends that on or about August 19, 2005, after repeated requests by Plaintiff for information regarding Sara Lee's purported "investigation," Crosby admitted that Sara Lee had not marked any Products. (Compl. ¶ 232.) At that time Crosby allegedly falsely represented that (1) Sara Lee had developed a strategy to distinctively mark Products sold to Hosiery Street and Atlantic Hosiery; (2) Sara Lee would notify Plaintiff once it had marked the Products sold to those customers; (3) Sara Lee needed more evidence from Plaintiff to verify that Hosiery Street was a source of parallel imports; and (4) Plaintiff needed to provide more samples of parallel imports. (Id.)

Plaintiff contends that it is undisputed that Sara Lee never marked any of the Bali Products and, furthermore, that Sara Lee continued to sell Bali Products to Atlantic Hosiery, Hosiery Street, and others with actual knowledge that the Products would be sold in the Territory. (Compl. ¶¶ 238-49.) Plaintiff contends that the false assertions of the intent to mark Products and further requests for samples by Fox, Shanks, and Crosby were part of a scheme intended to induce Plaintiff into believing that Defendants were abiding by the 2004 Distributorship

Agreement and the 2004 Settlement Agreement to avoid legal action by Plaintiff. (*See* id. ¶ 196.) Plaintiff contends that Sara Lee's scheme was also motivated by profiting from selling Bali Products to third parties in the United States, even though parallel imports of these Bali Products subsequently entered the Territory and harmed Ada Liss. (Id. ¶ 197.)

Plaintiff contends by implementing an unfair pricing strategy in which it sold the Bali brand to U.S. wholesalers at cheaper prices than it would sell to Plaintiff, Sara Lee was able to dispose of inventory while putting Plaintiff at a significant price disadvantage. (Compl. ¶¶ 16, 36-37, 298-305.) In October 2005, Shishir Babu, Sara Lee's Senior Vice President, visited Israel, saw first-hand that parallel imports were problematic and were damaging Plaintiff's business, and conceded to Plaintiff that Sara Lee had not marked any of the Bali Products because it was "too expensive." (Id. ¶¶ 262-64, 266.) Babu promised Lissauer, however, that Sara Lee would compensate Plaintiff for its damages, would stop the parallel imports, and would sue the parallel importers. (Id. ¶ 268.) According to Plaintiff, instead of doing this, Sara Lee subsequently refused Plaintiff's pre-suit request for any documents showing that Sara Lee had in fact marked any Products and then made a bad faith denial of the obligation to mark Products. Specifically, counsel Crosby sent a letter to Plaintiff in

November 2005 asserting, for the first time, that the Settlement Agreement did not require marking and that Sara Lee would not mark the Products because Sara Lee did not believe marking would be effective. (Id. ¶ 296 & Ex. 2.)

Based on the above-cited allegations, Plaintiff asserts claims for breach of both the 2004 Distributorship Agreement and the 2004 Settlement Agreement. Plaintiff also contends that because Defendant breached the 2004 Settlement Agreement, that agreement is null and void and Plaintiff is entitled to bring claims for breach of the 1994 Distributorship Agreement. Plaintiff also brings tort claims for fraud/fraudulent inducement, negligent misrepresentation, unfair and deceptive trade practices, and breach of the implied covenant of good faith and fair dealing.

III. DISCUSSION

The purpose of a motion to dismiss for failure to state a claim under Rule 12(b)(6)is to test the sufficiency of the complaint, not to decide the merits of the action. Food Lion, Inc. v. Capital Cities/ABC, Inc., 887 F. Supp. 811, 813 (M.D.N.C. 1995). At this stage of the litigation, a plaintiff's well-pleaded allegations are taken as true, and the complaint, including all reasonable inferences therefrom, is liberally construed in the plaintiff's favor. McNair v. Lend Lease Trucks, Inc., 95 F.3d 325, 327 (4th Cir. 1996); Schatz v.

Rosenberg, 943 F.2d 485, 489 (4th Cir. 1991).

Generally, a court looks only to the complaint itself to ascertain the propriety of a motion to dismiss. See George v. Kay, 632 F.2d 1103, 1106 (4th Cir. 1980). A plaintiff need not plead detailed evidentiary facts, and a complaint is sufficient if it will give a defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. Anderson v. Sara Lee Corp., 508 F.3d 181, 188 (4th Cir. 2007). This duty of fair notice under Rule 8(a) requires the plaintiff to allege, at a minimum, the necessary facts and grounds that will support his right to relief. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). As the Supreme Court has held, although detailed facts are not required, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. (internal quotation marks omitted).[2] The Supreme Court has further held that "[w]hen there are

[2] Since this a diversity case, North Carolina's choice-of-law rules apply to the contract and tort claims here. Both parties agree, and the Court concurs, that application of North Carolina's rule of lex loci contractus to the contract claims here results in the application of the substantive contract law of North Carolina. As for the alleged torts of fraud and negligent misrepresentation, North Carolina generally adheres to the rule of lex loci delicti, the law of the state where the injury occurred. Hensley v. Nat'l Freight Transp., Inc., __N.C. App. __, 668 S.E.2d 349, 351 (2008). Both parties assumed in their initial briefs that the substantive law of North Carolina applies to the tort claims for fraud and negligent misrepresentation. Because Plaintiff is located in and operates its business in Israel, however, I ordered the parties to submit further briefing on the issue of whether Israeli law should apply to these tort claims. After reviewing the parties' supplemental briefs on the choice-of-law issue, I agree that it is appropriate to apply the substantive law of North Carolina to Plaintiff's tort claims because the parties have shown that there are no significant differences between Israeli and North Carolina law regarding the alleged torts of fraud and negligent

well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. __, 129 S. Ct. 1937, 1950 (2009).

A. Exculpatory Clause and Consequential Damages

The 1994 and 2004 Distributorship Agreements state in identical terms in Paragraph 12(c):

> Neither party hereto shall be liable under any circumstances whatsoever, including any breach of its obligations hereunder, to the other party for any incidental or consequential damages and/or any claims for lost profits.

(Defs.' Ex. A ¶ 12(c); Defs.' Ex. B ¶ 12(c). This court previously held that Paragraph 12(c) is enforceable against Ada Liss as to its claims for breach of the Distributorship Agreements.[3] In support of the current motion to dismiss, Defendants now contend that Paragraph 12(c) prohibits Plaintiff from recovering incidental, consequential, and lost profits damages under any cause of action, including Plaintiff's pending tort claims.

Sara Lee's contention stretches the meaning of the contract beyond what

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misrepresentation.

[3] The court further held that the bar of recovery for incidental or consequential damages and/or lost profits in Paragraph 12(c) does not apply to any claims arising out of the 2004 Settlement Agreement because the Settlement Agreement is a separate contract. In the pending motion to dismiss, Defendants still contend that Paragraph 12(c) also applies to Plaintiff's claims arising out of the 2004 Settlement Agreement. Defendants' argument is simply incorrect.

is reasonable given the actual language of Paragraph 12(c) and the law on exculpatory provisions. Paragraph 12(c) is imprecisely worded as to the extent of exculpation and there is no explicit exculpatory provision for acts of negligence beyond the scope of the contractual relationship. By law, exculpatory clauses are construed against the party proposing enforcement, which weighs heavily against reading the sweeping meaning proposed by Sara Lee into the Paragraph. The further assertion that Paragraph 12(c) provides exculpation for willful misconduct not only lacks clear textual support in the agreement, it also has no basis in contract law and defies sound public policy.

It is well-established that the language of an exculpatory clause is read against the party seeking to enforce it, here Defendant Sara Lee. Andrews v. Fitzgerald, 823 F.Supp. 356, 378 (M.D.N.C. 1993)("Exculpatory provisions are not favored by the law and are strictly construed against parties relying on them.")(citing Tatham v. Hoke, 469 F.Supp. 914 (W.D.N.C. 1979)). The language of Paragraph 12(c), when read according to this standard, fails to provide an adequate basis to exculpate the proponent for anything outside of contractual liability. The general language included in Paragraph 12(c) that neither party "shall be liable under any circumstances whatsoever" applies, by the terms of the clause, to "incidental and consequential damages," and/or

"claims for lost profits." These are most readily understood on their face as contract damages. The plain language indicates, in other words, that exculpation applies to liability arising from the contract(s) in which this Paragraph 12(c) is contained, not to all liability arising from any circumstances whatsoever.

The language in the exculpatory paragraph that states "including any breach of its obligations hereunder" at least vaguely implies exculpation for acts outside the contract duties. The "including" seems to indicate something other than a breach of the contract obligations under the Distributorship Agreement is included in the clause. But this language is vague. It is so imprecise that, if taken as proposed by the Defendants, it would exculpate the Defendants for any actions taken with regard to the Plaintiff under any circumstances, no matter how tenuously related to the contract. This seems extremely unlikely to have been the intent of the contracting parties and, if it had been their intent, the clause could easily have been drafted to expressly exculpate for liability based on acts beyond mere breach. Paragraph 12(c) as actually drafted contains no such explicit exculpation. Because exculpatory clauses are disfavored and read against the proponent, the contract will not be read to exculpate for anything except the consequential and incidental damages enumerated in Paragraph

12(c).

Though they did no explicitly do so, it is at least conceivable that the parties could legally have contracted to exculpate one another for acts of negligence flowing from their contractual relationship. North Carolina law allows parties to contract for enforceable provisions for exculpation for ordinary negligence. See, e.g., Andrews, 823 F.Supp. 356 (M.D.N.C. 1993). Sara Lee's claim goes even further. The Defendants assert that Paragraph 12(c) not only exculpates for acts of negligence, but also for intentional torts, such as Plaintiff's cause of action for fraud. Not only does the language of the exculpatory clause not indicate the parties' intention to exculpate for liability based on intentional torts, such an exculpation would be invalid on its face.[4]

There is no support in the law for enforcement of clauses that exculpate parties for intentional wrongs. See Andrews, 823 F.Supp. 356, 379 (M.D.N.C. 1993)(Dismissing cause of action for ordinary negligence based on valid exculpatory clause, but allowing claim for gross negligence because exculpatory clause did not apply). The case law in North Carolina supports only the more

[4]In other words, the exculpatory provision, even without the legal and policy reasons for invalidating exculpatory clauses for tortious behavior listed below, cannot be read on its face to have that meaning. It seems axiomatic given the standard of reading the exculpatory provision against the proponent that, particularly where a party is propounding a contractual meaning that stretches the outer limits of the law, the language should be clear and precise and the drafting direct in order to support the meaning proposed.

limited proposition that exculpatory clauses eliminating liability for ordinary negligence, though strictly construed and disfavored, are enforceable under certain circumstances. See, Andrews, 823 F.Supp at 378 (For clauses seeking to exculpate only for ordinary negligence, the clause is void if it is "violative of a statute, contrary to a substantial public interest, or gained through inequality of bargaining position.")(emphasis added); Schenkel & Shultz, Inc. v. Hermon Fox & Assoc., 362 N.C. 269, 274, 658 S.E.2d 918, 922 (2008)("it is a universal rule that such [an] exculpatory clause is strictly construed against the party asserting it."); Sylva Shops, Ltd. v. Hibbard, 175 N.C.App. 423, 428, 623 S.E.2d 785, 790 (2006).

There is absolutely no case law in North Carolina, on either the state or federal level, supporting the enforcement of exculpatory clauses for intentional wrongdoing. The case law cited by Defendants from foreign jurisdictions does not support exculpation clauses for intentional wrongdoing, either.[5] On the other hand, the Restatement of Contracts clearly states that "[a] term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy." RESTATEMENT (SECOND) OF

[5]The cases from foreign jurisdictions cited include language that could be interpreted as allowing exculpatory clauses for intentional wrongs, but when read it context it becomes clear that those courts are speaking of exculpation from liability for negligence. See Trans Speck Truck Service, Inc., v. Caterpillar, Inc., 524 F.3d 315 (1st Cir. 2008); Lincoln Pulp & Paper Co. v. Dravo Corp., 445 F.Supp. 507 (D.Me. 1977).

CONTRACTS § 195 (2009). The Restatement's clear policy may not have the force of law, but it provides a ready explanation for the lack of case law on point: the issue is so obviously contrary to sound law and policy that courts simply have not written opinions on the subject. The precedent created if contracts with exculpatory clauses for intentional torts became enforceable would be noxious. Parties could simply circumvent tort law altogether, eliminating the natural check on intentional misconduct that comes from the potential for extensive tort liability.

Defendants' argument in this case is, in essence, that they have converted tort liability into contract liability and eliminated that liability through the exercise of the exculpatory provision, Paragraph 12(c). While the protection for freedom of contract between parties with equal bargaining power has historically been strong in North Carolina, the level of contractual freedom asserted by the Defendants threatens to swallow the entire field of tort law as it relates to contracting parties. The exculpatory clause will be enforced as drafted, to exclude all liability for consequential damages, incidental damages, and lost profits flowing from breach of the contractual duties between the parties.

As to the question of which contractual damages (if any) could be recovered pursuant to a successful verdict for the Plaintiff, there has not been

a sufficient showing on either side at this stage. The issue of whether diminution in value is direct or consequential has no clear definition in the law, and appears to depend on the nature of the contract and the circumstances of the breach. It cannot be said as a matter of law at this stage that Ada Liss' diminution in value claim is barred, but if diminution in value of an exclusive distributorship is later shown to be consequential, it would be barred as damages for breach of the 2004 Distributorship Agreement. The parties may, at some point later in the proceedings, revisit this issue when a more detailed showing can be made as to the consequential or direct nature of the diminution in value damages.

B. Ada Liss' Tort Claims

1. Fraud and Negligent Misrepresentation

In support of the claims for fraud and negligent misrepresentation, Plaintiff alleges that Sara Lee made fraudulent and/or negligent representations regarding Sara Lee's intent to mark Products and with regard to Sara Lee's intent to provide Plaintiff with an exclusive distributorship. Ada Liss contends that Sara Lee made material misrepresentations either without any intent of carrying out its obligation to mark Products, or with reckless disregard as to whether marking would be done, whether it could be done, and whether it

would be effective. Ada Liss alleges that Sara Lee made its representations about marking and exclusivity with the intent that Plaintiff would rely on the representations, that Plaintiff justifiably relied on the representations by executing the 2004 Distributorship Agreement and the Settlement Agreement, and that Plaintiff's reliance resulted in damage to Plaintiff. Finally, Ada Liss contends that Sara Lee owed a duty of care to provide truthful and accurate information regarding the representations, in exchange for Plaintiff's release of claims arising from or related to Sara Lee's breaches of the 1994 Distributorship Agreement. Plaintiff contends that it relied on Sara Lee's fraudulent and/or negligent misrepresentations to its detriment.

To state a claim for fraud, a plaintiff must plead with particularity facts showing (1) a false representation or concealment of a material fact; (2) reasonably calculated to deceive; (3) made with the intent to deceive; (4) which does in fact deceive, (5) resulting in damage to the plaintiff. Terry v. Terry, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981). The tort of negligent misrepresentation requires a plaintiff to plead that (1) the party justifiably relied (2) to his detriment (3) on information prepared without reasonable care (4) by one who owed the relying party a duty of care. Simms v. Prudential Life Ins. Co. of Am., 140 N.C. App. 529, 532, 537 S.E.2d 237, 240 (2000).

In this case, there is significant overlap between the facts giving rise to Plaintiff's claims for breach of contract and Plaintiff's tort claims. In addition to these basic pleading requirements for the torts themselves, in order to state a claim in tort for conduct that is also the basis for a party's claim against a defendant for breach of a contract, a plaintiff must allege a separate and independent duty owed by the defendant outside of the contractual relationship. See Broussard v. Meineke Discount Muffler Shops, Inc., 155 F.3d 331, 346 (4th Cir. 1998) (finding that the district court erred "by allowing plaintiffs to advance tort and [unfair and deceptive trade practices under N.C. GEN. STAT. § 75-1.1] counts paralleling their breach of contract claims")); Johnson v. Sprint Solutions, Inc., No. 3:08-cv-54, 2008 WL 2949253, at *3 (W.D.N.C. July 29, 2008) (discussing what is commonly referred to as the "economic loss doctrine" generally).

To the extent that Plaintiff's fraud and negligent misrepresentation claims simply mirror the claims for breach of contract, or are based on the same allegations of misconduct as the breaches, they cannot survive. The nature of the facts in this case, however, tends to show that there is a sufficient basis for both contract and tort pleadings. Plaintiff has plead sufficient facts to survive a motion to dismiss with respect to Defendants' fraudulent or negligent

misrepresentation of facts leading to the Settlement Agreement. Where separate allegations are sufficient to support tort claims, the existence of an underlying contract does not in itself bar recovery in both tort and contract. See Wilson v. McAleer, 368 F. Supp. 2d 473, 475-78 (M.D.N.C. 2005) (where the plaintiff sufficiently alleged that the defendants fraudulently induced him to enter into brokerage contracts and where the plaintiff alleged facts showing that the defendants "had a specific intent not to perform" at the time the defendants made the promise, the plaintiff stated a claim for fraudulent inducement); see also Lithuanian Commerce Corp. Ltd. v. Sara Lee Hosiery, 219 F. Supp. 2d 600, 607-08 (D.N.J. 2002) (where a plaintiff distributor alleged that Defendant Sara Lee fraudulently induced the distributor to execute a release involving parallel imports of panty hose, and then breached the settlement agreement, denying Defendant Sara Lee's Rule 50 motion for judgment as a matter of law and allowing plaintiff to proceed to trial on both its contract and fraudulent inducement claims).

Ada Liss has alleged specific facts showing Defendant Sara Lee's lack of intent to mark Products as it had promised to do under the Settlement Agreement. Plaintiff has alleged a complete absence of internal communications at Sara Lee to determine the feasibility or cost of marking, or to develop a plan

or prepare for marking Products, either before or after the execution of the Settlement Agreement, which, according to Plaintiff, "speaks volumes about Sara Lee's lack of intent to perform the marking obligations." (See Pl.'s. Response Br., p. 14.) Plaintiff has also shown facts suggesting Sara Lee made material representations about the feasibility of marking and tracing products specifically to induce Ada Liss to sign the Settlement Agreement. (See, e.g. Compl. ¶ 100.)

Plaintiff has "set out a scenario that, if proved, suggests the possibility of a fraudulent and deceitful scheme that extended prior to the formation of [the contracts between the parties] and continued through the execution of the contract[s]" and "[t]his is all that [Plaintiff] needs to survive a motion to dismiss." Wilson, 368 F. Supp. 2d at 478. If a fraudulent scheme existed prior to the formation of the contracts, the claims for tort and contract liability are not coextensive, and a separate cause of action may ensue.

For the same reasons, Plaintiff's claim for negligent misrepresentation also survives. Plaintiff has met the higher burden of facts showing that Defendants deliberately schemed to commit fraud in inducing Plaintiff to sign the Settlement Agreement. These same facts, read in the light most favorable to the Plaintiff, also support the claim for negligent misrepresentation. Sara Lee owed Plaintiff

a duty not to provide deceptive or misleading information with regard to the marking process and Sara Lee's efforts and intent to staunch the flow of goods imported into Israel. There is ample evidence that Sara Lee repeatedly referenced the feasibility of a marking process it had not investigated or planned to execute, and that Ada Liss relied upon these representations in agreeing to the Settlement. The facts advanced by Plaintiff adequately support the allegation that Defendants negligently provided information, that Plaintiff relied upon that information reasonably, and that Plaintiff did so to its detriment. The claim for negligent misrepresentation will not be dismissed.

2. Unfair and Deceptive Trade Practices

Ada Liss has alleged a claim for Unfair and Deceptive Trade Practices ("UDTP") under Chapter 75-1.1 of the North Carolina General Statutes. The elements of a claim for UDTP are (1) defendants committed an unfair or deceptive act or practice; (2) in or affecting commerce, and (3) plaintiff was injured as a result. Phelps-Dickson Builders, L.L.C. v. Amerimann Partners, 172 N.C. App. 427, 439, 617 S.E.2d 664, 671 (2005). A UDTP claim does not need to be based on fraud, bad faith, or actual deception. RD & J Props. v. Lauralea-Dilton Enters., LLC, 165 N.C. App. 737, 748, 600 S.E.2d 492, 500-01 (2004). "Instead, it is sufficient if a plaintiff shows that a defendant's acts

possessed the tendency or capacity to mislead or created the likelihood of deception." Id. at 748, 600 S.E.2d at 501. Plaintiff has sufficiently alleged an injury in or affecting commerce, and the facts pled are sufficient to find conduct that is deceptive under the terms of the statute. Further, because fraud is a *per se* violation of the UDTP statute, Ada Liss has, by adequately pleading fraud, adequately pled a claim for UDTP. Hardy v. Toller, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975).[6]

Defendants claim that Ada Liss's UDTP claim fails nonetheless on jurisdictional grounds pursuant to this court's prior precedent. See The "In" Porters, S.A. v. Hanes Printables, Inc. and Sara Lee Corp., 663 F.Supp. 494 (M.D.N.C. 1987) (hereinafter "'In' Porters"). For the following reasons, the court disagrees and holds that 'In' Porters, while still good law, is distinguishable and does not bar the UDTP claim in this case. The relevance of the 'In' Porters case for the present matter is that it restricted the reach of the UDTP statute with respect to foreign plaintiffs.[7] 'In' Porters held that a plaintiff suing in North

[6] It should also be noted that, due to the extensive facts showing Defendant had no intention of fulfilling the promises contained in the contract Plaintiff may have a basis for a UDTP claim on the breach of contract alone. The Fourth Circuit has observed, in analyzing North Carolina law, that a breach of contract can constitute an unfair or deceptive trade practice if the promisor enters into the contract with no intent to perform under the contract. See Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond, 80 F.3d 895, 903 (4th Cir. 1996) ("[A] broken promise is unfair or deceptive . . . if the promisor had no intent to perform when he made the promise.").

[7] Plaintiff Ada Liss is a resident of Israel.

Carolina for an injury incurred in a foreign jurisdiction cannot maintain an action for UDTP without a showing of a "substantial state interest in the litigation such that application of North Carolina's law is 'neither arbitrary nor unfair.'" Id. at 502. More specifically, this meant that the plaintiff had to show "a *substantial* effect on the plaintiff's in-state operations" to meet the jurisdictional requirements of the state. Id. (emphasis in original).

Judge Gordon's analysis in the 'In' Porters case was based on a"local injury / foreign act" scenario where the facts showed an alleged tort committed outside North Carolina as the basis for the tort and UDTP claims. When the 'In' Porters parties entered into the underlying contract at issue, an exclusive distributorship for a territory in France, the plaintiff purchased products in Europe from the defendant's Belgian subsidiary. Id. at 495. There were extensive negotiations between the parties in North Carolina, but there was no allegation that these negotiations were tainted by fraud or that the in-state negotiations gave rise to the Chapter 75 claim. See id. at 496. Based on that factual scenario, where the only conduct alleged to have violated the UDTP statute occurred outside the state, the court in 'In' Porters denied personal jurisdiction. 'In' Porters, 663 F. Supp. at 502-03.

The 'In' Porters court reviewed the UDTP claim through the lens of the

particular subsection of North Carolina's personal jurisdiction statute, § 1-75.4(4), which covers personal jurisdiction issues related to acts committed outside North Carolina, but causing injury to a party within the State. See N.C. GEN. STAT. § 1-75.4(4) (2009). Judge Gordon explained in 'In' Porters that the jurisdictional challenge to such a UDTP claim "requires the court to undertake a two-part analysis: (1) Are the facts within the intended scope of the [UDTP] Act; (2) Would an application of the Act violate the United States Constitution." 663 F. Supp. at 501. In the context of local injury/foreign act cases, the court found that applying the UDTP statute to foreign injuries would be constitutionally permissible under the Commerce Clause only if the plaintiff could show "a substantial effect on his business operations in North Carolina." Id. at 501. The court further held that the plaintiff "must show a sufficient state interest in the litigation such that application of North Carolina's law is 'neither arbitrary nor unfair'" in order to satisfy the Due Process Clause. Id.

The problem for the 'In' Porters plaintiff was that the record showed exclusively foreign misconduct with damages to the plaintiff's exclusively foreign operations. Plaintiff could not prove in-state injury, a sufficient state interest, or an effect on its substantial in state operations. 'In' Porters, 663 F.Supp. at 501. The distinction in the present case lies in the factual basis of the claims,

which requires the application of different law than 'In' Porters. In the present matter a significant portion of the alleged unfair or deceptive conduct, the predicate for the UDTP claim, took place in North Carolina. The jurisdictional basis for in-state wrongs is distinct from that analyzed in 'In' Porters. The North Carolina long-arm statute explicitly confers jurisdiction (to the allowable limits under the U.S. Constitution)"[i]n any action claiming injury to person or property or for wrongful death within or without this State arising out of an act or omission within this State by the defendant." N.C. GEN. STAT. §1-75.4(3) (emphasis added). Section 1-75.4(3), which immediately precedes the section relied upon in 'In' Porters, is entitled "Local Act or Omission." Id.

Where the alleged conduct occurred within the State, and therefore falls under the clear mandate of the North Carolina long-arm statute, the only further limits on personal jurisdiction are those imposed generally by the due process clause. See, e.g. Allison v. Lomas, 387 F. Supp. 2d 516, 518 (M.D.N.C. 2005)("Since in personam jurisdiction of a state court is limited by that state's laws and by the Fourteenth Amendment, [the court must] first inquire whether the state long-arm statute authorizes the exercise of jurisdiction over the defendant. If it does, [the court] must then determine whether the state court's exercise of such jurisdiction is consistent with the Due Process Clause of the

Fourteenth Amendment.")(internal citations omitted).

In the present case, where Sara Lee–itself a North Carolina resident–is alleged to have committed fraud in North Carolina against Ada Liss, the question of extra-territorial application of the UDTP statute, which was fatal to the UDTP claim in 'In' Porters, is simply not at issue. Because the conduct alleged took place in North Carolina, the court does not have to search for an impact on the Plaintiff's state operations or a strong state interest. There is no inquiry into the sufficiency of Plaintiff's relationship to North Carolina in a case involving local acts under 1-75.4(3). Instead the issue of jurisdiction is reduced to the traditional inquiry of whether the jurisdictional statute's provisions comport with the Due Process Clause. Christian Sci. Bd. of Dirs. v. Nolan, 259 F.3d 209, 215 (4th Cir. 2001)("North Carolina's longarm statute is construed to extend jurisdiction over nonresident defendants to the full extent permitted by the Due Process Clause. Thus, the dual jurisdictional requirements collapse into a single inquiry as to whether the defendant has such 'minimal contacts' with the forum state that 'maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" (citing Int.'l Shoe Co. v. Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945).

The exercise of personal jurisdiction by a court in North Carolina for acts

committed within the state by an in-state resident cannot reasonably be said to unduly burden interstate commerce, or to run afoul of traditional notions of fair play and substantial justice. Because the alleged conduct is unmistakably within the intended scope of the UDTP statute, and because the jurisdictional and constitutional issues fatal to jurisdiction in the 'In' Porters case are simply not present here, Ada Liss's UDTP claim will not be dismissed for want of personal jurisdiction.

3. Breach of Covenant of Good Faith and Fair Dealing

The parties appear to agree that this case involves contracts governed by the UCC's Article 2. Every UCC contract "imposes an obligation of good faith in its performance." N.C. GEN. STAT. § 25-1-304. Moreover, the North Carolina Supreme Court "has recognized that '[i]n every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.'" Murray v. Nationwide Mut. Ins. Co., 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996) (quoting Bicycle Transit Auth., Inc. v. Bell, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985)). Because the covenant of good faith and fair dealing is implied in a contract, however, a claim for breach of that covenant typically is "part and parcel" of a claim for breach of contract. See id.; see also Thomas, Lord of

Shalford v. Shelley's Jewelry, Inc., 127 F. Supp. 2d 779, 787 (W.D.N.C. 2000) (granting summary judgment on plaintiffs' claims for breach of contract and breach of implied covenant of good faith and fair dealing, noting that the latter was "part and parcel" of the former), aff'd, 18 F. Appx. 147 (4th Cir. 2001).

Because the implied covenant is simply a contract term not expressly included in the agreement, in most cases a breach of the covenant is simply another way of stating a claim for breach of contract. There are limited circumstances where a breach of the covenant of good faith would constitute a stand alone claim. See Meineke Car Care Centers v. RLB Holdings, LLC, No. 3:08CV240-RJC, 2009 WL 2461953, at *11 (W.D.N.C. Aug. 10, 2009)("North Carolina courts…do not consider breach of good faith claims independently from breach of contract claims unless there is a special relationship between the parties."). Because Sara Lee did not have a special relationship with Ada Liss, there is no basis for a separate claim for breach of the duty of good faith and fair dealing.[8]

C. Plaintiff's Claim for Partial Summary Judgment

Plaintiff's motion for partial summary judgment raises the issue of whether,

[8]As noted above, if Ada Liss is able to show that Sara Lee entered the contract with no intent of fulfilling it, this might rise to the level of UDTP liability and so make the breach of contract the equivalent of a tort. This is not the same as a stand alone tort for breach of the covenant of good faith and fair dealing, however.

as a matter of law, Defendant Sara Lee breached the Settlement Agreement by failing to "mark" Products that Defendant Sara Lee sold to certain third parties, as required by the Settlement Agreement. The Court agrees with the logic and disposition contained in the portion of the Recommended Decision issued by Magistrate Judge Dixon dealing with Plaintiff's Motion for Summary Judgment. Therefore, the section of the Recommendation dealing with the claim for partial summary judgment is hereby adopted by reference, and Plaintiff's claim for partial summary judgment is granted as to the "marking obligation" set forth in the 2004 Settlement Agreement. Sara Lee is deemed to have breached that portion of the Agreement as a matter of law.

CONCLUSION

Defendants' Motion to Dismiss [Doc. # 121] is DENIED IN PART and GRANTED IN PART. Plaintiff's stand-alone claim for breach of the implied covenant of good faith and fair dealing is coextensive with the claim for breach of contract and will not be treated as a separate claim. Pursuant to Paragraph 12(c) of the Distributorship Agreement, Plaintiff may not recover consequential damages for breach of the 2004 Agreement.[9] What exactly constitutes

[9]It was previously determined that Section 12(c) of the 2004 Distributorship Agreement excluding consequential damages does not apply to any breach of the Settlement Agreement. Therefore, Plaintiff is not barred from recovering consequential damages incurred as a result of Defendants' breach of the 2004 Settlement Agreement.

consequential and what constitutes direct damages remains an open issue at this point. Defendants' Motion to Dismiss [Doc. # 121] as to the claims for fraud, negligent misrepresentation, and Unfair and Deceptive Trade Practices is DENIED.

Finally, the Court GRANTS Plaintiff's motion for partial summary judgment (Doc. # 133) and finds that Defendants breached the 2004 Settlement Agreement by failing to mark Products sold by Sara Lee to various wholesalers.

This the 27th th day of April, 2010

/s/ N. Carlton Tilley, Jr.
Senior United States District Judge