STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

SUPERIOR TECHNICAL RESOURCES, INC. and
THE SUPERIOR GROUP, INC.,

Plaintiffs

MEMORANDUM DECISION

vs.

Index No. 2003-10104

LAWSON SOFTWARE, INC.,
Formerly known as
LAWSON ASSOCIATES, INC.,
JAMES DESOCIO,
RALPH E. MARSHALL, incorrectly sued as
EDWARD MARSHALL,
MICHAEL GAHN,
JEFFREY BREWSTER, and
MELISSA GRAY,

Defendants

BEFORE: **HON. JOHN M. CURRAN, J.S.C.**

APPEARANCES: **HARRIS BEACH PLLC**
Attorneys for Plaintiffs
Richard T. Sullivan, Esq., of Counsel
Teresa Brophy Bair, Esq., of Counsel

PHILLIPS LYTLE LLP
Attorneys for Defendant Lawson Software, Inc.
Michael B. Powers, Esq., of Counsel
William H. Baaki, Esq. of Counsel
Thomas M. Krol, Esq., of Counsel

CURRAN, J.

This action by Superior Technical Resources, Inc. and The Superior Group, Inc ("Superior") seeks recovery for damages allegedly arising out of its licensing of computer

software from Defendant Lawson Software, Inc., formerly known as Lawson Associates, Inc. ("Lawson"). Lawson now moves for summary judgment dismissing the complaint in its entirety.

FACTUAL BACKGROUND

Superior is a staffing company that places temporary employees nationwide. Its corporate office is located in Amherst, New York, but it and its affiliates have thirty-five (35) branch offices throughout the United States (*see* Stenclik Affid. ¶ 5).

As of 1998, Superior used a "legacy" system software, denoted "Keynote", for Superior's general accounting transactions as well as to assist in issuing paychecks to employees and invoices to customers (*see* Stenclik Affid. ¶ 10; George Affid. ¶ 8). Superior's Keynote software had a function known in the staffing industry as "pay-to-bill", which enabled the user to input certain information once, and from that information, generate both a paycheck for a particular employee and a related invoice to the customer (*see* George Affid. ¶ 8). The number of hours that a Superior temporary employee worked for a particular customer was used to determine the amount of the bill to that customer (*see* Stenclik Affid. ¶ 8). Although paychecks and bills were processed from the "main office", the data that went into the calculation of those checks and bills was routinely entered at individual branch offices (*see id.* ¶ 9). In an affidavit, Betty George, Superior's then Vice President of Corporate Administration, averred:

> Pay-to-bill was essential to Superior's operation. It enabled us to enter information in the numerous branch offices with a single entry. Pay-to-bill then converted that entry to a payroll and billing mode in what has been described as a "seamless" manner. The

> pay to bill function operated directly on Superior's IBM AS/400 "Platform" or hardware.

(George Affid. ¶ 8).[1] The AS/400 was a hardware/operating system which had proven to be relatively inexpensive to operate and "exceptionally stable" (Stenclik EBT at 115-116). The software company that had produced the "Keynote" system, however, was a small company with few employees, and Superior was concerned about its ability to support the technology in the future. Superior decided to seek out larger software companies "with greater support capabilities to bid on providing a replacement for the Keynote software" (Stenclik Affid. ¶ 12).

In 1998, Superior made the decision to purchase new computer software "to integrate the financial management information systems of Superior and its affiliated entities, including payroll, billing, invoice management, human resources, purchasing, accounts receivable, accounts payable, general ledger, and asset management" (Powers Affid., Exhibit A [hereinafter Complaint] ¶ 18). According to Scott Stenclik, Superior's President, there were several key considerations in Superior's decision:

> A. The software had to provide the pay-to-bill function. * * * [Superior] was not interested in software without [that] function;
>
> B. The software had to be run off the AS/400 platform;
>
> C. The software had to be written in "RPG" code compatible with the AS/400 platform; and

[1]Contrary to Lawson's view, the Court does not find that Superior's affidavits contradict the deposition testimony (*see e.g.* Law's Reply Memorandum of Law at 13).

> D. The data had to be [capable of entry] on a "quick screen" * * * without having to go in and out of several screens so that [Superior] could process payroll timely as part of the pay-to-bill function.

(Stenclik Affid. ¶ 13).

In January 1999, Superior sent out a Request for Proposal ("RFP") to a number of software companies, including Lawson (*see* Complaint ¶ 19; Stenclik Affid., Exhibit A; Powers Affid., Exhibit H, at Bates no. 378-385). Among others, Lawson responded (*see* Stenclik Affid. ¶ 14; Powers Affid., Exhibit G 22 [Lawson's response]).

According to Stenclik, the RFP contained a description of the "feature set" that Superior wanted its new software to contain (*see* Stenclik Affid.¶ 5 and Exhibit A). In responding to the RFP, the bidder had to give a score to various described features, for example, if it were a "feature [that was] already included in the software product and [was] available immediately", it was to be scored "1" (Stenclik Affid. Exhibit A, at Bates no. 1940).

In responding to the RFP, with respect to the functions underlying the "pay-to-bill" features, Lawson gave the features a "1" (*see* Stenclik Affid., Exhibit B). In addition, Lawson both advertised and stated in the response to the RFP that its applications ran on AS/400 platforms:

> Lawson's cross-industry, world-class, integrated business applications look, and run identically on all UNIX, AS/400 and NT platforms, providing a single, enterprise-wide solution for emerging operating systems.

(Stenclik Affid., Exhibit D [Response to RFP] at p. 419; *see* Stenclik Affid., Exhibit C).

The AS/400 is designed for software written in an "RPG" code (Stenclik Affid. ¶ 21). Stenclik asserts that Superior was "assured that the Lawson software was written in RPG" (id.)

After receiving the response to the RFP, Superior asked Lawson to meet with its officers and to prepare a demonstration of Lawson's software (*see* Stenclik Affid. ¶¶ 22-24; Powers Affid., Exhibit H, at Bates no. 686-690). Meetings took place in March, April and May of 1999 (*see* Stenclik Affid. ¶ 22).

The first meeting was attended by Stenclik and other Superior employees, along with Michael Gahn, Lawson's then Director of Field Operations for the AS/400 Unit, and Jeffrey Brewster, Lawson's Northeast Territory Manager of its AS/400 Business Unit. Concerning that meeting, Stenclik averred:

> I specifically recall emphasizing the critical components to our decision to acquire new software. First and foremost was pay-to-bill. We also wanted fast entry or "quick" screens so that we could make a single entry at each of the branch locations to process payroll and billing simultaneously. We also discussed the capacity of the Superior AS/400 and the ability of Lawson to provide software that would be compatible with Superior's AS/400 with native RPG code.

(Stenclik Affid. ¶ 23). According to Stenclik, Gahn and Brewster assured Superior that Lawson "had the capabilities to meet the critical components of our data processing requirements" and offered to demonstrate the software (*id*. ¶ 24).

Two demonstrations of the software by Lawson personnel were given to Superior personnel before any contract was executed (*see* George Affid. ¶¶ 12-13 & Exhibit A; Gahn EBT at 84-85; Powers Affid., Exhibits G 33 & 34). The first demonstration took place in April, 1999. The day before, Lawson's Brewster sent an email to Ms. George, Mr. Stenclik and another, stating that the "morning will be focused on Pay/Bill and your requirements" (*see* Powers Affid., Exhibit G 33).

At the demonstrations, Lawson showed through a Power Point presentation how the processing of employee time records flowed eventually to vendor payments (*see* George Affid., Exhibit A at p. 3). According to Ms. George, Lawson personnel then gave a live demonstration of how the software would produce both a paycheck and an invoice based upon a single entry on a quick screen, which was "exactly what we wanted" (George Affid. ¶ 13). The Power Point presentation and product demonstration were given by Gahn, among other Lawson employees (Gahn EBT at 70).

A second demonstration was done in May 1999 (*see* Gahn EBT at 92-93; Powers Affid., Exhibit G 34 [e-mail about meeting, attaching agenda for meeting on May 12, 1999]). In a printout of a Power Point presentation, Lawson detailed the major functions involved in being able to enter time and produce both a paycheck and an invoice (Gahn EBT at 96; *see* Powers Affid., Exhibit G 35 at p. 3).

Gahn claims that he told the Superior personnel at the May 1999 meeting that in order to run the pay-to-bill in an AS/400 environment, the data had to be run through an activities module, which he demonstrated. A module is a certain grouping of software programs (Gahn EBT at 105, 149). Gahn defined the word "activities" as being:

> another portion of the financial systems (sic) where you define what Superior was calling work orders, we call them activities, which define relationships, can define relationships with customers and it's where time and other billable items can flow to to (sic) ultimately be billed.

(Gahn EBT at 102; *see* Powers Affid., Exhibit G 35 at pp. 10-11 [Powerpoint presentation]). The Power Point page entitled "WORK ORDER SET UP" details some entries that need to be

made for each individual customer, in order to generate an invoice based upon the paycheck information/hours originally input (*see* Gahn EBT at 107-113, 164-166 & Exhibit G 35 at p. 7).

Superior's Programmer Analyst and Software Applications Manager Donna Graff disputes Gahn's testimony that Superior was shown the use of activities modules as the pay-to-bill functionality of Lawson's software (*see* Graff Affid.¶¶ 4-13). Graff attended the product demonstration and was involved in efforts to implement the software after the License Agreement was signed (*see id*. ¶ 3). Graff asserts that there was no mention during the demonstration of the necessity for the use of the "activities" function in the software to link payroll and invoicing (*see id*. ¶ 6). Rather, "[p]ay-to-bill was demonstrated live as a single entry, seamless process" with a "'quick screen' where the entry could be made on the single screen" (*id*.¶ 6). According to Graff:

> We were told that the "quick screen" was part of the software. We later learned it wasn't. * * *
>
> * * * It is particularly interesting to me that Lawson and Mr. Gahn are now claiming that the software had pay-to-bill functionality through the use of Activities. During the implementation period Lawson had no solution for the inability to achieve pay-to-bill. The suggestion to use Activities came belatedly from an outside computer consultant that Lawson recommended to us as a last resort solution. Unfortunately for Superior, Activities still did not produce pay-to-bill.

(*id*. ¶¶ 6, 10). Graff also observed that the activities function requires numerous entries to perform the pay-to-bill function (*see* Graff Affid. ¶ 8). The use of the activities function also allegedly required Superior to purchase a second AS/400 with more capacity, even though allegedly Lawson had determined their existing hardware had sufficient capacity to run the

software (*see* Graff Affid. ¶ 11). Moreover, all Lawson software code for the AS/400 was "ported" or translated from the computer code language "COBOL" to RPG (Gahn EBT at 76).

The software contract, entitled Lawson Software Product License Agreement, was negotiated during May 1999 and executed by Stenclik on May 25, 1999 (*see* Stenclik EBT 46-53; *see* Complaint, Exhibit A ["License Agreement and Addendum 1-2"; Powers Affid., Exhibit G 24 [Addendum 3], G 25 [Exhibits A & B]). Under the License Agreement, Superior obtained a copy of the licensed software and its documentation, along with technical support for an initial period of nine (9) months (*see* License Agreement § 2.0, 4.1 et al. & Addendum 1). The products licensed are listed on two exhibits to the Agreement (*see* Powers Affid., Exhibit G 25 [Exhibits A&B]). Exhibit A to the License Agreement, entitled Licensing and Pricing Terms for Lawson-Owned Products under the Product License Agreement, further states in the caption:

> THE PRODUCTS IN THIS EXHIBIT ARE RESTRICTED TO INSTALLATION AND USE ON ONLY THE PLATFORM TECHNOLOGY INDICATED IN SECTION 2 OF THIS EXHIBIT AS/400-ONLY

(*id.*). In addition, Superior agreed to pay a twenty-five (25) percent "Exchange Fee" (twenty five percent of the then current list price) if it chose to migrate to a new platform and obtain the same software for use on the new platform (*see* Powers Affid., Exhibit G 23 [Addendum # 2]; *see also* Exhibit G 24).

The License Agreement is silent concerning the existence of a pay-to-bill function in the licensed software (*see* Stenclik EBT at 89-90).

The total net license fee under the License Agreement was $650,000 (*see* Powers Affid. Exhibit G 25 [Exhibits A and B to License Agreement]). Support payments for the first nine (9) months were included (*see* License Agreement, Addendum 1), while support for the year following that nine-month period cost $111,000 (*see* Powers Affid. Exhibit G 20, at Bates no. 1173).

The License Agreement contains a merger or integration clause at section 27, which reads:

> This Agreement and the Exhibits listed below and referred to herein, together with any addenda signed by the Parties (collectively, the "Agreement"), constitute the entire agreement between Lawson and Client with respect to the Products, Support, and other subject matter of this Agreement, and may only be modified by a written amendment or addendum signed by both Lawson and Client. **No employee, agent, or other representative of either Lawson or Client has authority to bind the other with regard to any statement, representation, warranty, or other expression unless it is specifically included within the express terms of this Agreement or a written addendum signed by both Lawson and Client. All purchase orders, prior agreements, representations, statements, proposals, negotiations, understandings, and undertakings with respect to the subject matter of this Agreement are superseded by this Agreement**.

(License Agreement § 27 [emphasis supplied]).

The process of implementation of the software did not run smoothly. According to Ms. George, Superior learned during the prolonged attempt to implement the software that the Lawson software never had a pay-to-bill function and that there were separate modules for payroll and billing, requiring the payroll information to "flow through" the activities function to the billing module, which dramatically added to the number of entries that had to be made.

"We were deceptively shown a result, not a function" (George Affid. ¶ 14; *see* Powers Affid. Exhibits G 9-20).

As of December 2, 1999, according to Alan Spring, Superior's Project Manager for the implementation, the project was "not succeeding"; they had spent $803,385 and had technical quality issues, bugs in the software seemingly traceable to the "porting" from UNIX to AS/400; "fixes" slow in coming; "[s]oftware design leav[ing] significant gaps that require substantial modifications for Superior to use [it]", which would likely cost at least an additional $200,000; Superior had been assigned their third consecutive different client manager by Lawson; and the internal project team had "suffered from a number of problems", with team members having to complete their day-to-day responsibilities in addition to working on the project implementation, with the latter as a lesser priority (Powers Affid. Exhibit G 13 at Bates no. 1671).

In a long e-mail "discussion" on March 15, 2000, among several Superior personnel, there was a difference of opinion upon whether Lawson had "misrepresented" its product in the sales cycle (*see* Powers Affid. Exhibit G 8, at Bates no. 1361).

> * * * What is Lawson going to do to help us? It seems there was gross misrepresentation on their part. [Tom Strade] **Well, that may be slightly misstated. I'd, say, they grossly misunderstood our requirements and their abilities**. Do we have recourse? To what extent?
> [Alan Spring] At this point, I think the main misrepresentation is the quality of the product on the AS/400. We have previously analyzed representations made during the sales cycle, and based on our analysis Lawson gave us a $25,000 concession to cover the cost of creating a custom payroll hours entry screen. Since we have already gone down this path, I'm not sure it makes sense to go down it again. However, the issue of poor software quality gives us leverage in these ways:
> *Lawson is openly recommending a platform switch to UNIX to address our concerns with the technical quality of their AS/400

> software. As a result, we feel that we should not have to pay the technology transfer fee that our contract stipulates (approximately $250,000). Lawson's executives have already verbally agreed to waive this fee.
> *We have a strong argument that we have not received the level of support that we have paid for from their technical support group . . .

(*id*. at Bates no. 1361-1362 [emphasis supplied]). Even though Superior's personnel opined that Lawson had "failed miserably in supporting the AS/400 aspects" of the software project:

> [c]ompletion of the project will hinge on [Superior's] ability to dedicate qualified internal resources for the duration of the project. This has been an ongoing problem and one of the reasons that we have only now discovered the extent of the problems with Lawson's AS/400 software.

(*id*. at Bates no. 1362).

As of March 2000, the implementation was, in Alan Spring's words, "facing failure" (Powers Affid,. Exhibit G 19). As of April 13, 2000, Superior was considering what "costs . . . might be recoverable if we decided to take an aggressive stance toward Lawson" (*id*. Exhibit G 20 at Bates no. 1173). Among other problems, Spring cited inadequate first year technical support from Lawson personnel, little or no value from second year support, $20,000 in consultants' time spent attempting to resolve problems with the software, $72,000 providing incremental modifications to the software; and as much of 40 percent of the cost of the software he believed could be "refundable" because the activities function did not work well (*id*.). Spring also listed other direct and indirect costs, including consulting, training, conversions and travel, stating:

> [A] large portion of the cost of implementation has been incurred as the result of these efforts: over $600,000. I think it unlikely that the full amount could be recovered, although if our stance

> were extremely aggressive and we claimed gross misrepresentation, etc., these costs might be factored in in some way.

(Powers Affid,. Exhibit G 20 at Bates no. 1173-1174).

PROCEDURAL HISTORY

The Complaint was filed on October 14, 2003 (*see* Powers Affid., Exhibit A). The first cause of action alleges fraud in the inducement; the second cause of action alleges violations of General Business Law § 349; the third cause of action alleges promissory estoppel; the fourth cause of action seeks rescission of the License Agreement on the basis of fraud; and the fifth cause of action asserts unjust enrichment. Superior seeks over $4.7 million in damages (*see* Powers Affid., Exhibit G 21 ¶ 26 [b] [answers to interrogatories]).

In August 2004, Lawson moved for partial summary judgment to dismiss the Complaint as against all of the individually named Defendants (*see* Bair Affirm. Exhibit A [Notice of Motion and affidavit in support of Lawson's Motion pursuant to CPLR 3211-3212]). Plaintiff cross-moved, among other things, for leave to serve an Amended Complaint. The motion for partial summary judgment was granted, dismissing all claims against the individual Defendants, and the motion for leave to serve an Amended Complaint was denied (*see* Bair Affirm., Exhibit B [decision granted August 2005]). The parties conducted discovery, and a note of issue was filed. The instant motion for summary judgment was first brought in the fall of 2006, before Justice Eugene M. Fahey. After oral argument on the motion, the decision was reserved. Thereafter, Justice Fahey was elevated to the Appellate Division, Fourth Department, and the case was transferred to this Court. By the parties' request, there was a repeat oral argument before this Court, at which time, decision was again reserved.

DISCUSSION

A. Summary Judgment Standards

On a motion for summary judgment, the moving party bears the initial burden of making a *prima facie* showing of entitlement to judgment as a matter of law after tendering evidence sufficient to eliminate any material issue of fact from the case (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Defendant has the burden of affirmatively demonstrating the merits of its defense and does not meet its burden by merely noting gaps in the plaintiff's proof (*see Edwards v Arlington Mall Assocs.*, 6 AD3d 1136, 1137 [4th Dept 2004]). Until the movant establishes its entitlement to judgment as matter of law, the burden does not shift to the opposing party to raise an issue of fact and the motion must be denied (*see Loveless v Am. Ref-Fuel Co. of Niagara*, *LP*, 299 AD2d 819, 820 [4th Dept 2002]). The courts are required upon a defendant's motion for summary judgment to view the evidence in the light most favorable to the plaintiff (*see Evans v Mendola*, 32 AD3d 1231, 1233 [4th Dept, 2006]; *Esposito v Wright*, 28 AD3d 1142, 1143 [4th Dept 2006]). However, once the moving party establishes its entitlement to judgment through the tender of admissible evidence, the burden shifts to the non-moving party to raise a triable issue of fact (*see Gern v Basta*, 26 AD3d 807, 808 [4th Dept 2006], *lv denied* 6 NY3d 715 [2006]).

B. Law of the Case

Lawson contends that Superior's continued prosecution of its Complaint insofar as it alleges any cause of action other than breach of contract is barred by the law of the case doctrine. The Court determines that law of the case does not bar prosecution of the instant Complaint.

As noted in Plaintiff's papers, Lawson's earlier motion for summary judgment was brought only with respect to the claims against the individual Defendants (*see* Bair Affirm., Exhibit A [Powers Affid. ¶ 2]). Superior responded with a Notice of Cross Motion seeking to compel discovery and, if necessary, to serve an Amended Complaint adding allegations with respect to the individual Defendants. Superior's responding papers in part alleged that Superior **did not** claim breach of contract by Defendants; rather, its Complaint asserted causes of action for fraudulent inducement, violations of General Business Law § 349, promissory estoppel, rescission, and unjust enrichment (*see* Bair Affirm., Exhibit A to Exhibit A [Affidavit of Patrick Maxwell] ¶ 5).

Nonetheless, the Justice deciding the motion for partial summary judgment did not appear to see the case as Superior's counsel did. Justice Joseph G. Makowski's decision stated, in pertinent part:

> "A review of the record fails to reveal any factual allegations that the individual defendants acted either outside the scope of their employment or for personal profit"(*Freyne v Xerox Corp*., 98 AD2d 965 [4th Dept, 1983]) and therefore the Complaint against them should be dismissed. **The claim against defendants for fraudulent inducement has its basis in the contract entered into between the corporate parties and there is no separate legal duty owed independent of the contract.**
>
> **The contract between plaintiffs and Lawson is the real basis for any claims plaintiff may have for their [sic] alleged injuries. Employees of Lawson working solely within the scope of their employment for Lawson cannot be held individually liable for damages arising as the result of an alleged breach of contract as a result of the product's supposed failure to perform as expected and promised.**

(Powers Affid., Exhibit C, at p. 5 [emphasis supplied]).

Based upon that language, Lawson asserts that it is law of the case that the terms of the License Agreement govern this action, requiring dismissal of all of Superior's claims.

"The doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned" (*Martin v City of Cohoes,* 37 NY2d 162, 165 [1975]).

> The doctrine . . . is "not an absolute mandate on the court," since it may be "ignored" in "extraordinary circumstances" vitiating its effectiveness as a rule fostering orderly convenience .... The error sought to be corrected must, however, be so "plain ... [that it] would require [the] court to grant a reargument of a cause"

(*Foley v Roche*, 86 AD2d 887 [2d Dept], *lv denied* 56 NY2d 507 [1982][internal citations omitted]; *see also Welch Foods, Inc. v Wilson*, 262 AD2d 949, 950 [4th Dept 1999]). Thus, the doctrine is a "discretionary" one and does not constitute a limitation on the Court's power to decide the issue (*see Bialy v Honeywell International, Inc*., 12 Misc3d 1189(A), *9, 824 NYS2d 760 [Sup Ct Erie County 2006]).

Most importantly for the present case, the doctrine only applies to legal determinations that were "**necessarily resolved on the merits in the prior decision**" (*Matter of Oyster Bay Assocs. Ltd. Partnership v Town Bd. of Town of Oyster Bay*, 21 AD3d 964, 966 [2nd Dept 2005] [emphasis supplied; internal quotations omitted]). In other words, the determination deemed law of the case must have been made on an issue "essential to the prior determination" on which the "parties had a full and fair opportunity to litigate" (*Wright v. Rite Aid of NY, Inc.*, 288 AD2d 834, 835 [4th Dept 2001] [internal quotation marks omitted]).

Viewing the papers filed on the motion decided by the prior Court, this Court determines that Superior did not have notice that the Court would be deciding whether it could maintain a fraud in the inducement cause of action or any other cause of action against the corporate Defendant; procedurally, the only claims and issues involved on the motion were those concerning the individual Defendants.

Thus, even assuming, without deciding, that the prior Court's determination that "[t]he contract between plaintiffs and Lawson is the real basis for any claims plaintiff may have for their alleged injuries" was necessary to the decision to dismiss all claims against the individual defendants, it was not fully and fairly litigated as against the corporate Defendant.

C. Fraud in the Inducement

Lawson alleges that Superior's fraud cause of action must nonetheless be dismissed because it is merely a rephrased claim for breach of contract that is not cognizable under New York law, and because it is barred by the License Agreement's integration or merger clause.

It is well-settled that a cause of action for fraud does not arise "when the only fraud charged relates to a breach of contract" (*Krantz v Chateau Stores of Canada, Ltd.*, 256 AD2d 186, 187 [1st Dept 1998]; *cf. Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 [1987] [failure to exercise "due care" in carrying out the contract does not give rise to separate tort cause of action]; *Egan v New York Care Plus Ins. Co, Inc.*, 277 AD2d 652, 653 [3rd Dept 2000] [breach of medical insurance contract by determining treatment was not medically necessary does not give rise to fraud cause of action]). However, in the instant case, Superior is not alleging that the fraud occurred in relation to the non-performance of the contract. Rather, Superior is alleging that it was fraudulently induced into entering into a contract to license

software through misrepresentations made about the features it allegedly possessed, such as pay-to-bill. Plaintiff maintains that these false representations about the product and its functionality were made with knowledge of their falsity (*see* Complaint ¶66). Therefore, the above-quoted case law is inapplicable here.

The question remains whether the first cause of action for fraudulent inducement is barred due to the integration or merger clause.

To maintain a cause of action for fraudulent inducement of contract, Plaintiff must prove the representation of a material existing fact, falsity, scienter, deception and injury (*see Century 21, Inc. v F.W. Woolworth Co.*, 181 AD2d 620, 625 [1st Dept 1992], citing *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406-407 [1958]). In other words, Plaintiff must allege "a material representation, known to be false, made with the intention of inducing reliance, upon which [Plaintiff] actually relie[d], consequentially sustaining a detriment" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005]). Plaintiff also must prove that its reliance was reasonable (*see Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]).

Even assuming that Lawson made the representations Superior asserts that it made and that they were false – e.g., that the software contained a pay-to-bill feature – Lawson asserts that Superior is unable to establish reasonable reliance on those statements due to the integration clause, which specifically disclaims reliance on, *inter alia*, any prior representations by any agent or any understandings.

It is well-established that a general "merger" or "integration" clause is "ineffective to exclude parol evidence to show fraud in inducing the contract" (*Danann Realty Corp. v Harris*,

5 NY2d 317, 320 [1959]; *see Sabo v Delman*, 3 NY2d 155, 161 [1957]). In other words, "where the complaint states a cause of action for fraud, the parol evidence rule is not a bar to showing the fraud . . . despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made" (*Danann*, 5 NY2d at 320). *Sabo* and *Danann,* decided just two years apart and by the same members of the Court of Appeals, establish the contours of the debate involving merger clauses and fraud claims. In *Sabo*, Judge Fuld set forth a broad statement of the rationale authorizing fraud claims in the face of a merger clause. There were two dissenters in *Sabo* on the grounds that the rescission claim there was "of a contractual nature and does not sound in fraud" (*Sabo*, 3 NY2d at 162).

In *Danann*, the operative contract language provided that the seller of the property was not making any representations as to expenses, operation or anything else with respect to the premises, and that the Purchaser had agreed to take it "'as is'" (Danann, 5 NY2d at 320). The Court stated:

> Here . . ., plaintiff has in the **plainest language** announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a **specific disclaimer** destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations

(*Danann Realty Corp. v Harris*, 5 NY2d at 320-321 [emphasis added]). Judge Fuld dissented in *Danann* essentially on the grounds that the merger clause was so expansive as to be "boiler-plate" and at most created a question of fact as to the fraud issue (s*ee Danann*, 5 NY2d at 325-326, 333).

Since *Sabo* and *Danann*, the courts have focused on the extent to which a merger clause was expressly negotiated by sophisticated parties using specific language or whether it was merely a general or standard clause (s*ee Citibank, N.A. v Plapinger*, 66 NY2d 90, 95 [1985]; *Benjamin Goldstein Prods., Ltd v Fish*, 198 AD2d 137, 138 [1st Dept 1993]. The Fourth Department has held that, to be effective in barring a fraud claim, a merger clause must disclaim "reliance on the representation that allegedly induced [a party] to enter into the agreement . . ." (*Homestead Development Corp. v Ayres*, 244 AD2d 928 [4th Dept 1997]). The language of the merger clause must directly relate to the specific misrepresentations which form the basis of the fraud claim (*see Sugar Cr. Stores, Inc. v Pitts*, 198 AD2d 833, 834 [4th Dept 1993]). Still, where the specific alleged misrepresentations are contradicted by or expressly negated by the contract, such extrinsic evidence is inadmissible to establish fraud in the inducement and, in addition, the plaintiff cannot establish reasonable reliance (*see Bongdof Enterprises Inc. v Alchemy NoHo, LLC,* Index No. 2005-108197, Slip Op at 5-6 [Ramos, J.] [April 15, 2006]).

There is a parallel doctrine which holds that even a specific disclaimer of reliance is insufficient to bar a fraud claim where the facts misrepresented are "peculiarly within the [representer]'s knowledge" (*Yurish v Sportini*, 123 AD2d 760, 761-62 [2d Dept 1986]; *see Hi-Tor Indus. Park, Inc. v Chemical Bank*, 114 AD2d 838, 839 [2d Dept 1985]). As stated by the Second Circuit, "the peculiar-knowledge exception is designed to address circumstances where a party would face high costs in determining the truth or falsity of an oral representation" (*Warner Theatre Associates Limited Partnership v Metropolitan Life Ins. Co.*, 149 F3d 134, 136 [2d Cir 1998], citing *Yurish*, 123 AD2d at 761). If, however, "the facts represented are not matters peculiarly within the party's knowledge and the other party has the means available to

him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representations, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations" (*Dannann Realty*, 5 NY2d at 322).

Applying the above law, the Court determines that Lawson has failed to establish as a matter of law that there was no reasonable reliance upon Lawson's alleged misrepresentations, simply due to the existence of the integration clause in the License Agreement. In order to bar Superior's fraudulent inducement claim, based solely on the integration clause, the controlling case law requires that the clause be a negotiated one as opposed to generic boilerplate, and it must address the specific subject matter about which the fraud is claimed. The clause here meets neither requirement. While the record reflects that the material terms of the License Agreement were actively negotiated, there is no evidence that the integration clause itself was addressed as a material term or that its disclaimer language was the subject of negotiation. Rather, the License Agreement has all the earmarks of a pre-printed form containing a standard and general integration clause designed to preclude parol evidence from being used in the interpretation of the agreement. The wording of the clause also does not relate specifically to the misrepresentations purportedly made regarding the pay-to-bill function, AS/400 platform and RPG Code. Even the product warranty is generic and there are no specific representations or warranties expressly addressing those key issues. The Court construes the integration clause here as too standard[2] and non-specific to determine as a matter of law that Superior's first and

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[2] Even Lawson's Memorandum of Law refers to the clause as a "standard" one (*see* Defendant's Memo at 8; *see also* Stenclik EBT at 74-75).

fourth causes of action must be dismissed. Lawson has therefore failed to carry its prima facie burden on this motion as to this issue.

Even if the Court were to construe the integration clause as a sufficient basis upon which to conclude that Lawson had met its burden on this motion, Superior has raised triable issues of material fact concerning the misrepresentations allegedly made with knowledge of their falsity concerning the functionality of the licensed product. Superior has laid bare its proof to raise questions of material fact at least as to reliance, the issue attacked by Lawson through the integration clause. Such issues are of course most often inappropriate for resolution on a motion and the effect of an integration clause is usually one for a jury to consider (*see George v Lumbrazo*, 184 AD2d 1050, 1051 [4th Dept 1992]; *see also* NY PJI 3:20 at pp. 174, 179).

The same is equally true for the "special facts" doctrine or "peculiar knowledge" exception because, while the existence of a duty to disclose is one for the court, the facts upon which that conclusion can or cannot be made are for a jury to consider (*see* NY PJI 3:20 at p. 164).

Lawson places particular emphasis on the e-mail wherein Strade, a Superior employee, stated that Lawson's representations about the product's functionality were a gross misunderstanding rather than a gross misrepresentation. However, Strade's statement raises classic questions of fact concerning the context and meaning of the statement, the extent of Strade's involvement in and knowledge of the product, and his overall credibility in writing the statement. In any event, this one statement by a non-lawyer cannot be reviewed as dispositive of Superior's claims.

For all of these reasons, the Court rejects Lawson's arguments based on the integration clause and will permit the first and fourth causes of action to proceed to a jury trial.

D. <u>Unjust Enrichment</u>

Lawson contends that the cause of action for unjust enrichment must be dismissed because a written contract governs the relationship between the parties (*see Northeast Wine Develop., LLC v Service Universal Distributors, Inc.*, 23 AD3d 890,893 [3rd Dept 2005], *affd on other grounds* 7 NY3d 871 [2006]). Superior does not respond to that contention in its brief. The Court therefore grants the motion for summary judgment insofar as it seeks to dismiss the fifth cause of action for unjust enrichment.

E. <u>Promissory Estoppel</u>

Lawson does not make a specific argument with respect to the third cause of action alleging promissory estoppel, other than with respect to the Statute of Limitations (*see infra)* and those issues previously addressed (*see supra* under section B). Superior, on the other hand, raises no contentions in support of the cause of action. To establish a cause of action sounding in promissory estoppel, Superior must prove (1) " a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) an injury sustained in reliance on the promise" (*Fleet Bank v Pine Knoll Corp.*, 290 AD2d 792, 796-797 [3rd Dept 2002]; *see Skillgames, LLC v Brody*, 1 AD3d 247, 250-251 [1st Dept 2003]). Because promissory estoppel is a doctrine which applies specifically where the complaining party has no contract on which to sue, the Court determines that the motion for summary judgment must be granted insofar as it seeks to dismiss that cause of action here.

F. <u>Statute of Limitations</u>

Lawson contends that all of Superior's claims are barred by the two (2) year Statute of Limitations found in the License Agreement. The License Agreement states in pertinent part, with exceptions not here relevant, that "no action arising out of **or relating to** this Agreement may be brought later than two (2) years after the cause of action became known to the injured Party" (*see* License Agreement ¶23.0 [emphasis supplied]).

As noted, the Complaint alleges five causes of action: first, fraud in the inducement; second, General Business Law § 349; third, promissory estoppel; fourth, rescission; and fifth, unjust enrichment (*see* Complaint ¶¶62-91). Because none of those causes of action is based upon the License Agreement, they are therefore not governed by the contractual Statute of Limitations, despite the language in the Agreement that "no action . . . relating to this Agreement may be brought later than two (2) years after [it] became known to" Superior.

The law is well-settled that, notwithstanding that a contract between the parties contains a shorter Statute of Limitations, where a party has stated a cause of action for fraud in the inducement with regard to that contract, the fraud Statute of Limitations should be applied rather that contained in the contract which the party seeks to rescind (*see Triangle Underwriters, Inc. v Honeywell, Inc.*, 604 F2d 737, 748 [2d Cir 1979] [applying New York law]; *H. Novinson & Co. v City of New York*, 53 AD2d 831 [1st Dept 1976]). The applicable Statute of Limitations, therefore, is CPLR 213 (8), which provides that the cause of action must be asserted within "the **greater** of six years from the date the cause of action accrued or two years from the time the plaintiff ... discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213 [8] [emphasis supplied]).

Here, Lawson contends that Superior was aware of pay-to-bill functionality issues in the software as early as December 6, 1999, if not prior to the execution of the License Agreement, which took place in May 1999 (*see* Memo of Law at 15, citing Powers Affid., Exhibit G 3 and Exhibit H at Bates no. 2674-2676). Stenclik, Superior's President, testified at his deposition that as of early 2000, he believed that Lawson had been dishonest with Superior in the sales cycle (*see* Stenclik EBT at 118). However, because the Complaint was filed on October 14, 2003, that was well within the six-year Statute of Limitations even if it ran from the start of the parties' commercial relationship, in January 1999 (*see* Stenclik Affid., Exhibit A [RFP sent to Lawson]). Thus, the fraud in the inducement cause of action is timely.

The second cause of action under General Business Law § 349 is not contract-based, and therefore is not barred by the contractual Statute of Limitations. Rather, that cause of action is governed by the three (3) year Statute of Limitations found in CPLR 214 (2), concerning actions "to recover upon a liability, penalty or forfeiture created or imposed by statute" (*see Gaidon v Guardian Life Ins. Co. of America*, 96 NY2d 201, 209-210 [2001] [cause of action accrues when plaintiff has been injured by a deceptive act or practice violating Section 349]). Superior does not discuss the timeliness of this cause of action in its brief.

The Court determines that the latest date that a Section 349 claim could have arisen was the date of execution of the License Agreement. Therefore, because the Complaint was filed in October 2003, more than three years after the execution of the License Agreement, the second cause of action is barred by the Statute of Limitations. The Court need not reach the issue whether Superior is a "consumer" for the purposes of the statute (*see Citipostal, Inc. v Unistar*

Leasing, 283 AD2d 916, 918 [4th Dept 2001]*; see generally Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 24-25 [1992]).

The third cause of action based in promissory estoppel, the fourth seeking rescission, and the fifth cause of action for unjust enrichment are all governed by the six (6) year Statute of Limitations found in CPLR 213 (1) (*see Niagara Mohawk Power Corp. v Freed*, 288 AD2d 818, 818-819 [4th Dept 2001] [unjust enrichment]; *Elliott v Qwest Communications, Corp.*, 25 AD3d 897, 898 [3rd Dept 2006] [same]; *Brown v Tonawanda Housing, Inc.*, 123 AD2d 493 [4th Dept 1986] [rescission for fraud]; *see also* 75 NY Jur 2d, Limitations and Laches § 219 [CPLR 213 (1) applies to every form of equitable action]).

Thus, with respect to Statutes of Limitations, the motion for summary judgment is granted insofar as it seeks dismissal of the second cause of action under General Business Law §349, but is otherwise denied.

G. Disclaimers of Warranties and
Contractual Limitations of Damages

Lawson contends that the disclaimer found in section 4.9 of the License Agreement bars any claim by Superior "that the software was not fully compliant with what Superior claims it requested" (*see* Lawson's Memorandum of Law at 34). Lawson also asserts that it cannot be held liable for any consequential damages, having properly and clearly disclaimed any liability for such damages under the License Agreement (*see id*. at 34-35). Because Superior allegedly seeks only consequential damages under its Complaint, Lawson contends that the Complaint must be dismissed.

The License Agreement contains several provisions limiting any warranties or other promises Lawson makes. Initially, the only warranties that appear to have been made by Lawson under the Agreement are under sections 4.6, 4.7 and 4.9. Section 4.6 provides:

> Lawson warrants at the time of delivery of the Products, the media containing the Products shall be free of material defects. [Superior's] sole and exclusive remedy for breach of the Media Warranty is replacement of the defective media if any such defect is [fou]nd within six (6) months after delivery of the defective media.

(License Agreement §4.6). Section 4.7 provides a product warranty:

> Lawson warrants that during the Initial Support Period and any extended period of Support the Products shall materially or substantially perform in accordance with the Documentation in effect at the time the Support is provided . . . [Superior's] exclusive remedies for breach of the Product Warranty are (a) [Superior] may request Support from Lawson to enable the Products to comply with the Product Warranty, and (b) if the Support requested by [Superior] does not enable the products to comply with the Product Warranty within a reasonable period of time, [Superior] may seek direct damages for the affected Products subject to the limitations in Section 14.0 . . .

(License Agreement §4.7; *see also* section 4.8 [Year 2000 compliance]). Secction 14.0 provides a limitation on consequential damages:

> 14.1 AFTER THE PARTIES HAVE SIGNED THIS AGREEMENT, [SUPERIOR'S] EXCLUSIVE REMEDIES FOR PRODUCT RELATED MATTERS SHALL BE AS DESCRIBED IN THIS AGREEMENT, SUBJECT TO THE LIMITATIONS OF SECTION 14.0.
> . . . .
> 14.3 IN NO EVENT SHALL LAWSON OR ITS THIRD PARTIES BE LIABLE FOR SPECIAL, INDIRECT, THIRD PARTY, OR CONSEQUENTIAL DAMAGES, INCLUDING

> LOST PROFITS. NEITHER PARTY SHALL SEEK, OR OTHERWISE APPLY FOR, ANY PUNITIVE OR EXEMPLARY DAMAGES.

(License Agreement § 14.1, 14.3; *see also* §§ 14.4 and 14.5).

Finally, section 4.9 contains disclaimers:

> 4.9 THE EXPRESS LIMITED WARRANTIES IN THIS SECTION 4.0 ARE IN LIEU OF ALL OTHER WARRANTIES AND CONDITIONS EXPRESSED OR IMPLIED, CONTRACTUAL OR STATUTORY, INCLUDING BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. NOTWITHSTANDING ANY OTHER PROVISION IN THIS AGREEMENT, LAWSON DOES NOT WARRANT THAT THE USE OF THE PRODUCTS SHALL BE UNINTERRUPTED OR ERROR [FR]EE OR THAT ALL DEFICIENCIES OR ERRORS ARE CAPABLE OF BEING CORRECTED

(*id.* § 4.9).

Thus, all implied warranties were disclaimed and the only express warranty given was that the software would perform as the "documentation" stated it would and that the "media" would be free of material defects. Even then, Lawson did not warrant that any errors or deficiencies that became evident would be correctable (*see id.*§§ 4.6, 4.7, 4.9).

The Court agrees with Lawson that the disclaimers and limitations of warranties are clear. However, as Superior contends, these provisions do not bar Superior's cause of action, which seeks rescission of the contract on the basis of fraud (*see e.g. Word Management Corp v AT&T Information Systems, Inc.*, 135 AD2d 317, 320-321 [3rd Dept 1988] [fraud cause of action stands, notwithstanding disclaimer of all warranties on voice and data communications system]). The cases cited by Lawson, which are based upon breach of warranty claims properly

disclaimed by the contract and/or in which property was sold "as is", are inapposite (*see e.g. Naftilos Painting, Inc. v Cianbro Corp.*, 275 AD2d 975 [4th Dept 2000]; *Brennan v Shapiro*, 12 AD3d 547 [2d Dept 2004]).

With respect to Superior's damages, the Complaint alleges only non-contractual bases for recovery, including fraud, unjust enrichment and promissory estoppel. Therefore, any disclaimer of consequential damages under the License Agreement does not apply to those causes of action (*see e.g. Cayuga Harvester, Inc. v Allis-Chalmers Corp.*, 95 AD2d 5, 22-23 [4th Dept 1983] [ruling that consequential damages were potentially recoverable under fraud cause of action, where contract between parties disclaimed consequential damages; such damages not available on contract-based causes of action]). With respect to the fraud cause of action, it is well settled that New York follows the "out of pocket" rule for allocating damages based upon fraud, in other words, that the plaintiff is entitled to recover "that which is necessary to restore [plaintiff] to the position occupied before commission of the fraud" (*see Alpert v Shea Gould Climenko & Casey*, 160 AD2d 67, 71 [1st Dept. 1990]; *Cayuga Harvester*, 95 AD2d at 22). Thus, the motion for summary judgment is denied insofar as it seeks to dismiss all causes of action in the Complaint on the basis of the limitation of warranties and the consequential damage limitation clauses.

H. Governing Law

Although not raised by the parties on the current motions, the License Agreement contains a provision concerning governing law and forum selection. That clause states in pertinent part:

> This Agreement is governed by and construed in all respects in accordance with the laws of the State of Minnesota, USA (without regard to conflicts of laws principles), . . . Except only for disputes for which injunctive relief is sought . . . any disputes between [Superior] and Lawson (which are not otherwise resolved by the Parties) shall be submitted to binding arbitration in Minneapolis, Minnesota, USA, in accordance with the then prevailing rules of the American Arbitration Association. Any action, to confirm an arbitration award or any other legal action related to this Agreement, the Products or other dispute between [Superior] and Lawson, shall be instituted only in a federal or state court in the State of Minnesota, USA . . . . Lawson and [Superior] each waive their right to a trial by jury for any disputes between the Parties.

(License Agreement § 19.0).

Both parties have clearly waived their rights to arbitrate, by participating in litigation since 2003 (*see Sherrill v Grayco Builders, Inc.,* 64 NY2d 261, 272-273 [1985]; *DeSapio v Kohlmeyer*, 35 NY2d 402, 405 [1974]). The forum selection clause is likewise waiveable, and has been waived, as both parties failed to raise the issue during the past four years, even with respect to the instant motion for summary judgment (*see e.g. Leasecomm Corp. v Long Island Cellular Ltd.*, 16 Misc3d 1, *3 [App Term 2007]).

Therefore, after due consideration, the Court determines that the motion for summary judgment is granted with respect to the second cause of action under General Business Law § 349, the third cause of action alleging promissory estoppel, and the fifth cause of action alleging unjust enrichment, but is otherwise denied with respect to the first and fourth causes of action.

Plaintiff shall settle an order with Defendant, and a pretrial conference shall take place on Thursday, January 17, 2008 at 2:00 p.m.

DATED: December 7, 2007

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HON. JOHN M. CURRAN, J.S.C.