IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LIVERY COACH SOLUTIONS, L.L.C.,

Plaintiff,

v.

MUSIC EXPRESS/EAST, INC.,

Defendant.

MUSIC EXPRESS, INC.,

Counterclaim-Plaintiff,

v.

LIVERY COACH SOLUTIONS, L.L.C., DAVID HIRSCH, and JACOB BOWMAN,

Counterclaim-Defendants.

C.A. No. 16-143 (LPS)

MUSIC EXPRESS'S BRIEF IN OPPOSITION
TO COUNTERCLAIM-DEFENDANTS' MOTION TO DISMISS

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I. NATURE AND STAGE OF THE PROCEEDING

Defendant Music Express has counterclaimed against Livery Coach Solutions, LLC, David Hirsch, and Jacob Bowman ("Counterclaim Defendants") on various grounds. Counterclaim Defendants have moved to dismiss those counterclaims. This is Music Express's brief in opposition to that motion.

II. SUMMARY OF ARGUMENT

Music Express's counterclaims allege in great detail the numerous misrepresentations that Counterclaim Defendants made to induce Music Express to sign an agreement with Livery Coach. It also alleges the significant harm to Music Express's business reputation and sales that resulted from its use of Livery Coach's defective software. In other words, Music Express has alleged with particularity facts showing that it is plausibly entitled to the relief requested.

Livery Coach does not contest that Music Express has adequately alleged the prima facie elements of the challenged causes of action. Rather, in contesting those claims, Livery Coach primarily takes the tack of (1) invoking inapposite legal doctrines and (2) making factual arguments that are improperly resolved on the pleadings.

For instance, Music Express's tort claims for fraudulent inducement and negligent misrepresentation are not barred by either the gist of the action doctrine or the economic loss rule, because they are separate and distinct from Music Express's contract claims. Those tort claims are directed at Defendants' misconduct prior to Music Express signing an agreement with Livery Coach. They are not directed at Livery Coach's failure to perform the obligations that arose from the purported agreement. Because Music Express's tort claims allege breaches of a duty that are separate and distinct from a contractual duty, those claims should survive.

Furthermore, Defendants' challenges to Music Express's proper revocation of acceptance as well as its assertion that a limitation of liability clause should cap Music Express's recovery are fact-intensive inquiries that are not appropriate for resolution on a motion to dismiss.

III. STATEMENT OF FACTS

A. Background

Music Express is the preeminent provider of chauffeured ground transportation in the United States. Given the volume of rides it services nationwide (more than 600 rides per day) Music Express requires a robust, stable software solution to manage its reservations, billing, and dispatching across the U.S. (D.I. 5, ¶¶ 10-12.) In February 2015, desiring a more modern software solution than its existing software, Music Express began talking with Livery Coach, specifically with Jacob "Chip" Bowman and David Hirsch, about Livery Coach's software. (*Id.* at ¶¶ 14-15.)

When selecting its new software, Music Express's primary objective was to increase the automation of its processes and reduce its labor costs. (*Id.* at ¶ 25.) It was therefore important for the new software to contain, among other things, an auto-billing feature, so that the number of billing personnel could be reduced. (*Id.* at ¶ 27.) It was also important for the new software to integrate seamlessly with Music Express's other software components, such as its accounting software, in order to increase efficiency and reduce overhead. (*Id.* at ¶ 14.)

B. Livery Coach's Material Misrepresentations

Throughout the period before Music Express signed an agreement with Livery Coach, David Hirsh and Chip Bowman made several material misrepresentations to Music Express's representatives to induce Music Express into signing. For instance, in an in-person meeting on or about April 23, 2015, Mr. Bowman made several significant misrepresentations to Music Express. For example:

- Mr. Bowman assured Music Express's Cheryl Berkman, Richard Badalamenti, and Melanie Barcena that Music Express would receive both versions of Livery Coach's software, i.e., both the so-called "Classic" version and the ".Net" platform. Music Express did not receive both versions.

- Mr. Bowman assured Music Express's representatives that any differences between the two versions of the software were primarily aesthetic. The differences were in fact foundational.

- Mr. Bowman represented that Livery Coach would be ready to have Music Express go "live" on its software in San Francisco by September 1, 2015. Livery Coach's software was nowhere near ready to go live by then, which Mr. Bowman knew at the time he gave the assurance.

- Mr. Bowman gave Ms. Berkman a list of companies that were purportedly operating on the Livery Coach software that Music Express would receive, knowing that those companies were all operating on Livery Coach's old "Classic" version.

(*Id.* at ¶¶ 18-22.)

This was the execution of Defendants' scheme, hatched by Mr. Hirsch and Mr. Bowman, to bait Music Express into adopting its new (but unstable) .Net software platform first, creating a "halo effect," thereby allowing Livery Coach to pitch that software more easily to others. (*Id.* at ¶ 23.) In furtherance of that scheme, Defendants made additional, material misrepresentations to Music Express in order to induce Music Express into licensing Livery Coach's software. For example:

- In May 2015, Mr. Bowman represented to Music Express's CFO, Gary Palatas, and Mr. Badalamenti that its software could integrate seamlessly with Music Express's accounting/financial management software, Sage. In fact, Livery Coach's software was designed for QuickBooks, a small-market software package, and could not seamlessly handle integration with a mid-market software suite such as Sage.

- In May 2015, Mr. Bowman represented to Mr. Badalamenti that an auto-billing feature was already operational on Livery Coach's software. Mr. Bowman and Mr. Hirsch expressly represented that another limousine service, Metro Cars in Detroit, was running the same Livery Coach software that Music Express would get, and that more than 90% of the rides on Metro Cars at the time were automatically billed. The automatic billing feature was not functional on the software Music Express received.

- Mr. Bowman and Mr. Hirsch promised to deliver an operations manual that could assist Music Express's employees in troubleshooting potential issues with the Livery Coach software. Music Express never received such a manual.

(*Id.* at ¶¶ 24-28, 48.)

Music Express relied on these misrepresentations and others. (*Id.* at ¶¶ 19-22, 24-29.) As a result, Music Express was induced into signing the End User Software License Agreement and Software Maintenance Agreement (the "Purported Software Agreement") with Livery Coach on or about June 6, 2015. (*Id.* at ¶ 32.) Music Express made a first tranche payment of $54,000 on June 9, 2015. (*Id.* at ¶ 33.)

C. Livery Coach's Failure To Perform And Resulting Harm

Music Express's offices went "live" in September 2015. (*Id.* at ¶ 35.) From the outset, the Livery Coach software "solution"—the untested .Net platform—was an unmitigated disaster. (*Id.* at ¶ 36.) As examples, the .Net platform operated too slowly, resulting in lost reservations and corresponding dispatches. (*Id.*). The Livery Coach software was also not capable of integrating properly with Music Express's accounting software. (*Id.* at ¶ 37.) As a result, for nearly three months after "launch," Music Express had no ability to make adjustments on invoices with the software. (*Id.* at ¶ 38.) Under Livery Coach's platform, Music Express's reservation, booking, and dispatching processes were severely impaired, causing call waiting times to balloon to 40 minutes, hundreds of calls to drop daily and rides to not dispatch properly or at all. (*Id.* at ¶ 44.) In addition, the Livery Coach software was incapable of auditing the financial figures it produced, which could have helped ensure their accuracy. (*Id.* at ¶ 44.) To make matters worse, Livery Coach never provided adequate technical support for its software nor a compatible user manual. (*Id.* at ¶¶ 46, 48.) In fact, the only user manual that Music Express ever received was directed entirely at the Classic version of Livery Coach's software. The manual was incompatible with the .Net platform and therefore of no use to Music Express.

After Music Express learned in October 2015, through a former Livery Coach employee, that it should be using the Classic version, not the .Net software, which was not nearly user-ready, Music Express requested the Classic version from Livery Coach. (*Id.* at ¶¶ 49-51.) Mr. Hirsch flatly refused, stating the Classic version and the .Net platform were foundationally incompatible, notwithstanding his earlier assurances the differences were primarily aesthetic. (*Id.* at ¶ 52.)

As a result of the myriad failures and indicia of bad faith, Music Express notified Livery Coach in February 2016 that it was terminating the Purported Software Agreement and that the agreement was not valid in any event because it had been improperly obtained. (*Id.* at ¶ 56.)

D. The Dire Consequences to Music Express's Business

As a result of Livery Coach's software, Music Express suffered immense reputational harm. (*Id.* at ¶ 57.) In addition, in order to address the havoc wreaked on its systems by Livery Coach's software, Music Express incurred large out-of-pocket losses from having to hire additional personnel and losing the benefit of the productivity of its most senior executives, all of whom had to work around the clock to address the issues. (*Id.* at ¶ 58.) Furthermore, Music Express lost several large accounts as a direct result of customers' dissatisfaction with the Livery Coach software. (*Id.* at ¶ 59.) Moreover, Music Express has been unable to recover millions of dollars in outstanding accounts receivable resulting from the massive volume of broken invoices caused by the Livery Coach software. (*Id.* at ¶ 60.)

IV. LEGAL STANDARDS APPLICABLE TO A MOTION TO DISMISS

In evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), this Court must accept as true all material allegations of the counterclaims. *See Spruill v. Gillis*, 372 F.3d 218, 223 (3d Cir. 2004). "The issue is not whether a plaintiff will ultimately prevail but

whether the claimant is entitled to offer evidence to support the claims." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997) (internal quotation marks omitted).

Thus, the Court may grant a motion to dismiss only if, after "accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." *Maio v. Aetna, Inc.*, 221 F.3d 472, 481-82 (3d Cir. 2000) (internal quotation marks omitted). To defeat a motion to dismiss, a plaintiff must allege facts that "raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact)." *Victaulic,* 499 F.3d 227, 234 (3d Cir. 2007) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A claim is facially plausible "when the plaintiff pleads content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In sum, "[t]he complaint must state enough facts to raise a reasonable expectation that discovery will reveal evidence of [each] necessary element" of a plaintiff's claim. *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 321 (3d Cir. 2008) (internal quotation marks omitted).

"In deciding motions to dismiss pursuant to Rule 12(b)(6), courts generally consider only the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim." *Lum v. Bank of Am.*, 361 F.3d 217 n.3 (3d Cir. 2004) (internal citations omitted).

V. ARGUMENT

A. Music Express has adequately pled its claims for fraudulent inducement and negligent misrepresentation.

Defendants do not contend that Music Express has failed to adequately plead the prima facie elements of a fraudulent inducement or negligent misrepresentation claim. Instead, Defendants argue that those claims are barred by (i) the so-called "gist of the action" doctrine

under Pennsylvania law and (ii) the economic loss rule. These arguments are unavailing for at least the following reasons.

1. Pennsylvania law does not govern Music Express's tort claims.

As a threshold issue, Counterclaim Defendants, the movants, have not established that Pennsylvania law—the source of the "gist of the action" doctrine, unrecognized in Delaware or California—should apply to Music Express's tort claims. Pennsylvania does not have the most significant relationship to those claims, and thus, its law should not govern them.

As noted in *Stanley Black & Decker, Inc. v. Gulian, et al.*, 70 F. Supp. 3d 719 (D. Del. 2014), Delaware[1] uses the "most significant relationship" test of the Restatement (Second) of Conflict of Laws § 145(1) to determine the governing law. *Id.* at 733 (citing *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 40 (Del. 1991)). That is, the governing law is "the law of the state with the most significant relationship to the occurrence and the parties[.]" *Gulian*, 70 F. Supp. 3d at 733 (citing *State Farm Auto. Ins. Co. v. Patterson*, 7 A.3d 454, 457 (Del. 2010)). For fraud and misrepresentation claims where plaintiff's reliance occurred in whole or in part in a state other than where the misrepresentations were made, this Court should evaluate the following contacts in determining which state's laws should govern:

> (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations,
> (b) the place where the plaintiff received the representations,
> (c) the place where the defendant made the representations,
> (d) the domicil, residence, nationality, place of incorporation and place of business of the parties,
> (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and

[1] A federal district court sitting in diversity applies the choice-of-law rules of the forum state. *See Sys. Operations, Inc. v. Scientific Games Dev. Corp.*, 555 F.2d 1131, 1136 (3d Cir. 1977) (citing *UMW v. Gibbs*, 383 U.S. 715, 726 (1966)).

> (f) the place where the plaintiff is to render performance under a contract which he has been induced to enter by the false representations of the defendant.

Gulian, 70 F. Supp. 3d at 733 (applying factors identified in § 148 of The Restatement).

Based on a consideration of those factors, California has the most significant relationship to Music Express's tort claims and its law should therefore govern. Music Express is a California corporation with its principal place of business in Burbank, California. Music Express's data servers are primarily located in California. Music Express acted in reliance on Counterclaim Defendants' misrepresentations in California by making the decision to sign the Purported Software Agreement there and thereafter installing the Livery Coach software in San Francisco and Los Angeles. It therefore suffered the most harm in California. And Music Express's primary performance obligation under the fraudulently obtained Purported Software Agreement—payment—was to occur in California, as its CFO and finance department sit there. Although Counterclaim Defendants are Pennsylvania residents, they are alleged to have defrauded a California citizen. California has a more significant relationship to these claims because it has an interest in protecting its citizens from being defrauded—and affording them remedies when they are. Thus, California has the most significant relationship to Music Express's tort claims. Hence, California law should govern.[2] Pennsylvania's gist of the action doctrine is therefore inapposite.

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[2] *But see American General Life Ins. v. Goldstein*, 741 F. Supp. 2d 604, 611 (D. Del. 2010) (While "a separate choice of law analysis is generally appropriate for each cause of action . . . in recent years, Delaware courts have rejected the 'argument that different states' laws should be applied to claims sounding in tort and contractual claims.'") (citations omitted). Ironically, while Counterclaim Defendants contend that Music Express's claims sound in contract, not in tort, the very agreement they contend is the basis—or "gist"—of the dispute, the Purported Software Agreement, contains a choice-of-law clause providing that Delaware law should govern. (D.I. 1-4 at 1.)

But even if Pennsylvania law applied, the gist of the action doctrine would not preclude Music Express's tort claims.

2. The gist of the action doctrine does not bar Music Express's claims.

Relevant to Music Express's tort claims, the duty that Defendants are alleged to have breached is a general social duty they owed to Music Express not to commit intentional (or negligent) torts. That duty is separate and distinct from the contractual duties that arose from the Purported Software Agreement.

As discussed in the non-precedential Third Circuit opinion cited in Defendants' motion, *Downs v. Andrews*, 2016 U.S. App. LEXIS 2272 (3d Cir. Feb. 10, 2016), the central question a court addresses in applying the gist of the action doctrine under Pennsylvania law is: what duty is defendant accused of breaching? *Id.* at *10 ("to evaluate whether the gist of the action doctrine applies, a court must identify the duty breached"). In addressing that question, the Pennsylvania Supreme Court's formulation in *Bruno v. Erie Ins. Co.*, 106 A.3d 48 (Pa. 2014) is particularly instructive:

> If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract – i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of a contract – then the claim is to be viewed as one for breach of contract.
> …
>
> If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort.

Id. at 68.

In *Bruno*, the plaintiffs found mold in their house, but were told by their insurance company's adjuster and engineer that it was nothing to worry about. In fact, the mold was toxic, and according to plaintiffs, gave them cancer. Plaintiffs sued their insurance company based on

the adjuster and engineer's misleading statements about the mold. The insurance company demurred, contending that because its agents' duty to inspect the mold arose from its contractual relationship with the insured plaintiffs, the gist of the action doctrine barred plaintiffs' negligence claim. The trial court agreed and dismissed the negligence claim, which the intermediate appellate court affirmed. The Pennsylvania Supreme Court, however, reversed. In so doing, the court focused on the source of the duties alleged to have been breached, and concluded that the plaintiffs' negligence claim was directed at the insurance company's alleged breach of a broader social duty, not a breach of its contractual obligations:

> Accordingly, while Erie had contractual obligations under its policy to investigate whether mold was present . . . the substance of the Brunos' allegations is not that it failed to meet these obligations; rather, it is that Erie, during the course of fulfilling these obligations through the actions of its agents, acted in a negligent manner by making false assurances regarding the toxicity of the mold . . . which caused them to suffer physical harm because of their reasonable reliance on those assurance. Consequently, these allegations of negligence facially concern Erie's alleged breach of a general social duty, not a breach of any duty created by the insurance policy itself.

Bruno, 106 A.3d at 71.

Here, Music Express has alleged that it relied on Defendants' multiple, material misrepresentations, and that it was therefore induced into contracting for Livery Coach's services. Those misrepresentations were in breach of a duty not to commit intentional (or negligent) torts imposed by society—not by the Purported Software Agreement. *See Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc.*, 247 F.3d 79, 103 (3d Cir. 2001) (adopting Pennsylvania state courts' interpretation that the important difference between contract and tort actions is that the latter stems from the breach of duties imposed as a matter of social policy, while the former stems from the breach of duties imposed by mutual consensus).

In fact, it was Defendants' multiple breaches of that social duty that created the purported contractual relationship between Music Express and Livery Coach in the first instance. In other words, Music Express has alleged that fraudulent conduct occurred *prior* to the signing of the contract, not during the *performance* of that contract or in contravention of a duty created by it. For instance, Music Express's counterclaims allege various lies that Defendants Bowman and Hirsch made in April and May 2015, including that (1) the auto-billing feature on Livery Coach's software was already operational, when it was not, (2) a competitor of Music Express, Metro Cars, was operating the same Livery Coach software that Music Express would get and that it was automatically billing 90% of its rides, when that was not true, (3) the differences between the old and new version of the software were primarily aesthetic, when the differences were in fact foundational, (4) various of Music Express's competitors were operating the same version of the software that Music Express would receive, when in fact they were all operating the old version, and (5) Music Express would receive both versions of the software, when Defendants only intended to deliver the new version. Music Express reasonably relied on these and other misrepresentations, and afterwards signed the Purported Software Agreement in June 2015. Music Express's tort claims are therefore entirely distinct from its breach-of-contract claim, since the duties allegedly breached are independent of the duties imposed on Defendants by the Purported Software Agreement. Put differently, the Counterclaim Defendants' duty not to lie about the above subjects was not a contractual duty. Nor were those *ex ante* lies a breach of the later-signed contract. Hence, the gist of the action doctrine cannot bar these claims.

Counterclaim Defendants invite this Court to apply a standard that would prevent any claim of fraud to induce a contractual relationship. But courts have allowed such claims so long as the fraud alleged is focused on the inducement to contract: "Essentially, a fraud claim alleged

contemporaneously with a breach of contract claim may survive, so long as the claim is based on conduct that is separate and distinct from the conduct constituting breach." *See, e.g.*, *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *8 (Del. Super. 2014). Thus, allegations that are focused on inducement to contract are "separate and distinct" conduct that is separately actionable. *See Osram Sylvania Inc. v. Townsend Ventures, LLC,* 2013 WL 6199554, at *16-17 (Del. Ch. 2013).

Here, Music Express has alleged sufficient facts from which the Court can reasonably infer that Counterclaim Defendants induced Music Express to enter into the Purported Software Agreement by making multiple misrepresentations—either fraudulently or negligently—*before* the Agreement was signed. Music Express's tort claims are therefore not subsumed by its breach-of-contract claim, which are directed at Defendant Livery Coach's failure to perform under the purported Agreement.

3. The economic loss rule does not bar Music Express's tort claims.

Likewise, the economic loss rule does not preclude Music Express's claims. The economic loss rule (or economic loss doctrine), like the gist of the action doctrine, is inapposite here, since it does not preclude tort claims directed at breaches of non-contractual duties. *See, e.g.*, *Robinson Helicopter Co. v. Dana Corp.*, 102 P.3d 268, 274 (Cal. 2004) (court found that plaintiff's fraud and intentional misrepresentation claims were not barred by the economic loss rule because they were based on allegations that defendant's conduct breached a tort duty independent of a breach of contract); *Erlich v. Menezes*, 21 Cal. 4th 543, 554 (1999); *Brasby v. Morris*, No. C.A. 05C-10-022-FS, 2007 WL 949485, at *7 (Del. Super. Mar. 29, 2007) (fraudulent inducement a recognized exception to the economic loss rule); *Montgomery County v. Microvote Corp.*, 2000 U.S. Dist. LEXIS 4021 (E.D. Pa. Mar. 31, 2000) (recognizing fraud exception to economic loss doctrine); *Bilt-Rite Contractors, Inc. v. The Architectural Studio*, 866

A.2d 270 (Pa. 2005) (economic loss rule did not bar contractor's negligent misrepresentation suit against architect). Thus, where as here the tort claims allege a breach of a duty independent of and distinct from a breach-of-contract claim, the economic loss rule cannot bar them. *See Brasby*, 2007 WL 949485, at *7 ("Claims of fraud, even where purely economic losses are asserted, are not always prohibited by the economic loss rule. . . . Allegations of fraud that go directly to the inducement of the contract, rather than its performance, would present a viable claim.").

Since Music Express has demonstrated the viability of its extra-contractual tort claims, Counterclaim Defendants request to have damages in excess of $62,715.51 stricken from Music Express's counterclaims should also be denied. After all, it is well settled that the remedies available to a party who has been fraudulently induced to enter a contract is either (1) rescission of that contract (and thereby, its terms), or (2) money damages. *See, e.g. Hegarty v. American Commonwealths Power Corp.*, 163 A. 616, 619 (Del. Ch. 1932); *Rosenthal v. Great Western Fin. Securities Corp.*, 14 Cal.4th 394, 415 (Cal. 1996); *Elgen v. Textron Lycoming Reciprocating Engine Div.*, 874 A.2d 1179 (Pa. 2005).

But even without those available remedies, Music Express's damages should not be so limited by the Purported Software Agreement.

B. The limitation of liability clause in the purported agreement is unenforceable.

Livery Coach argues that the limited liability provision in the Purported Software Agreement bars damages in excess of the fees Music Express paid to Livery Coach. As an initial matter, the question of whether the Agreement's limited liability clause is enforceable is a highly factual inquiry that is improperly resolved on a motion to dismiss. Courts have "repeatedly recognized that the issue of whether limitation provisions are enforceable under the contractual

relations of the parties and the nature of the contractual performance are matters which generally should not be decided on the pleadings or on summary judgment." *J.A. Jones Const. Co. v. City of Dover*, 372 A.2d 540, 553 (1977) (citations omitted); *see also Petroleum v. Magellan Terminals Holding, L.P.*, 2015 WL 3885947, at *24 (Del. Super. June 23, 2015); *RHA Construction, Inc. v. Scott Engineering, Inc.*, 2013 WL 3884937, at *8 (Del. Super July 24, 2013) ("Limitation of liability clauses that relieve a party of liability for its own negligence are generally disfavored under Delaware law."). This is because the relative sophistication of the parties and the nature of the contractual relations—factors that courts consider in assessing the enforceability of a limited liability clause[3] because they go to substantive or procedural unconscionability—are matters that are more appropriate for determination at trial, or at a minimum, after discovery has been taken. *See, e.g.*, *Luick v. Graybar Elec. Co., Inc.*, 473 F.2d 1360, 1362 (8th Cir. 1973). This is underscored by Counterclaim Defendants' supporting argument that Music Express's in-house counsel "reviewed and accepted the terms of the contract[,]" a purported fact that has not been alleged in any of the pleadings.

Based on the facts that have been pled, however, it is apparent that the remedy provisions in the Purported Software Agreement fail of their essential purpose, and thus, under the Delaware Uniform Commercial Code,[4] the limited liability clauses should not be enforced. The Purported Software Agreement contains provisions for both a limited remedy to repair or replace and limited liability. Specifically, Section 12.02 includes the limited remedy:

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[3] Delaware courts also look to other factors such as the length of the contract, the clarity of language, the clarity of disclaimed liability, and whether the clause was in boldface type. *RHA Construction, Inc. v. Scott Engineering, Inc.*, 2013 WL 3884937, at *8 (2013).

[4] Under the choice-of-law provision contained in the Purported Software Agreement, the interpretation and enforceability of the agreement are governed by Delaware law. (D.I. 1-4 at 1.)

> [Livery's] sole obligation (and Customer's sole and exclusive remedy) will be at [Livery's] option to either repair the defect or replace the defective media. [Livery's] obligation there under will be limited to such repair or replacement.

The limited liability provision is under Section 12.03:

> [LIVERY'S] AGGREGATE LIABILITY IN CONNECTION WITH THIS AGREEMENT REGARDLESS OF THE FORM OF ACTION GIVING RISE TO SUCH LIABILITY (WHETHER IN CONTRACT, TORT OR OTHERWISE) SHALL NOT EXCEED THE REIMBURSEMENTS TO CUSTOMER OF THE COSTS OUTLINED IN SECTION 4.03.

The Purported Software Agreement further states:

> [LIVERY] SHALL NOT BE LIABLE FOR ANY EXEMPLARY, PUNITIVE, SPECIAL, INDIRECT, CONSEQUENTIAL OR INCIDENTAL DAMAGES OF ANY KIND (INCLUDING WITHOUT LIMITATION LOST PROFITS OR INTERRUPTION OF BUSINESS) . . . .

(D.I. 1-3 at 1.)

Under 6 *Del. C.* § 2-719(2), where circumstances cause an exclusive or limited remedy to fail of its essential purpose, "the purchaser may resort to the remedies provided by the Uniform Commercial Code." *Norman Gershman's Things to Wear, Inc. v. Mercedes-Benz of North America, Inc.*, 558 A.2d 1066, 1070 (1989). As one Delaware court explained:

> The draftsmen of the Sales Article of the U.C.C. were unwilling to leave the subject of contractual limitation of liability exclusively in the hands of the contracting parties. They permitted contractual limitation upon warranty and liability (6 Del. C. s 2-719) but they provided certain restraints which must be satisfied . . . . ***[One] restraint is that a limitation of liability or remedy will not be enforced where the circumstances cause the contractual remedy . . . 'to fail of its essential purpose.'*** 6 Del. C. s 2—719(2).

J.A. Jones Const. Co. v. City of Dover, 372 A.2d 540, 549 (1977) (emphasis added).

Under Delaware law, the purpose of the limited remedy of repair or replace, from the standpoint of the buyer, is to provide goods that conform to the contract within a reasonable time

after a defective part is discovered. *Beal v. General Motors Corp.*, 354 F. Supp. 423, 426 (D. Del. 1973). "The limited, exclusive remedy fails of its purpose and is thus avoided under § 2-719(2), whenever the warrantor fails to correct the defect within a reasonable period." *Id.*; *see also Concord Plaza Assoc., Inc. v. Honeywell, Inc.*, 1986 WL 9922, at *5 (Del. Super. Aug. 29, 1986) ("It has frequently been noted that the limited remedy is insufficient, and the detriment to the buyer the same, whether the seller diligently but unsuccessfully attempts to honor his promise or whether he acts negligently or in bad faith."); *Invacare Corp. v. Sperry Corp.*, 612 F. Supp. 448, 454 (N.D. Ohio 1984) (holding limited liability provision failed of its essential purpose when defendant's computer and accounting system was incapable of operating as promised). What a reasonable time is under the circumstances is generally a factual question. *See Concord Plaza*, 1986 WL 9922, at *5; *see also J.A. Jones Const.*, 372 A.2d at 549 (In determining whether a contractual limitation fails of its essential purpose, courts consider the following factors: "facts and circumstances surrounding the contract, the nature of the basic obligations of the party, the nature of the goods involved, the uniqueness or experimental nature of the items, the general availability of the items, and the good faith and reasonableness of the provision . . . .").

Here, the Purported Software Agreement's remedy provisions fail of their essential purpose because Livery Coach did not provide software that conformed to the Purported Software Agreement within a reasonable time. In fact, according to Music Express's allegations, which must be taken as true for present purposes, Livery Coach's software *never* proved workable. Livery Coach cannot therefore insulate itself behind a limited liability provision. As alleged in detail, from the time it went "live" in September 2015, the Livery Coach software was an unmitigated disaster. The platform operated too slowly, resulting in countless lost

reservations and corresponding dispatches. The Livery Coach software caused numerous billing and payroll issues, including that the software could not integrate properly with Music Express's accounting software as promised. For three months, the Livery Coach system did not allow Music Express to make any adjustments on invoices. These defects resulted in among other things: (1) countless broken customer invoices; (2) broken credit card files; and (3) missing invoices altogether. To make matters worse, Livery Coach never provided adequate technical support for its software. Instead of the software reducing the amount of labor and overhead to operate Music Express's business, it caused major disruption to its operations as Music Express executives and employees had to work around the clock for weeks to address the myriad problems. Due to the unworkable software, Music Express sustained not only significant lost revenue, but suffered immense reputational harm and loss of good will. Music Express notified Livery Coach of the above-mentioned defects, but Livery Coach was unable to fix them and, at a certain point, stopped trying. In February 2016, four months after the software went "live," Music Express, with its operations in disarray, had to seek an alternative software solution.

As evidenced by the substantial damage it caused Music Express, four months is an unreasonable amount of time for Music Express to wait for conforming software, particularly since, as a provider of chauffeured ground transportation, Music Express depends on a reliable reservation, billing, and dispatch management solution. Therefore, the limited remedy and liability provisions in the Purported Software Agreement failed of their essential purpose because Livery Coach could not provide conforming software within a reasonable time. Those provisions are therefore invalid. At a minimum, it is a factual question not properly resolved on a motion to dismiss.

C. Music Express properly revoked acceptance of the Livery Coach software.

To be clear, Music Express maintains that it did not "accept" Livery Coach's software within the meaning of the Purported Software Agreement. But even if Music Express is deemed to have accepted the software, it properly revoked its acceptance of that software with (1) its February 3, 2016 letter to Livery Coach (the "Notice of Revocation"), and (2) this lawsuit.

As an initial matter, Courts have found that the filing of a legal action to reclaim the purchase price is adequate notice of revocation. *Fenton v Contemporary Development Co., Inc.*, 16 U.C.C. Rep. Serv. 411, 349 (1974); *see also Bednarski v. Hideout Homes & Realty, Inc.*, 709 F. Supp. 90, 93-94 (M.D. Pa. 1988) (citing *Yates v. Clifford Motors, Inc.*, 283 Pa. Super 293, 309 n. 10 (1980) ("We can discern no reason to treat the filing of a complaint differently for purposes of rejection than is the custom of either revocation of acceptance or rescission."). Therefore, even if the Notice of Revocation is not considered a revocation, which as explained below, it certainly is, Music Express's counterclaims are a notice of revocation.

And while Livery Coach contends that Music Express's Notice of Revocation merely terminated the Purposed Software Agreement, but did not give notice of revocation, that is not so. In fact, Music Express's February letter serves as a notice of revocation. And at the very least, the question as to whether Music Express provided proper notice is a factual dispute not properly decided on the pleadings.

For instance, while Music Express's Notice of Revocation was not titled as such, it is "undisputed that notice of revocation of acceptance need not be in any particular form to be effective." *In re Wylie*, 1991 WL 42236, at *3 (E.D. Pa. Mar. 22, 1991). "A notice of revocation of acceptance will be given effect as such even though it does not bear the label of 'notice of revocation of acceptance' or even though it is improperly labeled as a notice of cancellation or rescission." 4 Anderson U.C.C. § 2-608:187 (3d. ed.); *see also Jensen v. Seigel Mobile Homes*

Group, 35 U.C.C. Rep. Serv. 804, 810 (1983). Therefore, the contents of a notice, not its title, determine whether it is a revocation of acceptance.

The Notice of Revocation satisfies the requirements for a revocation of acceptance. A revocation of acceptance is "sufficient if it informs the seller that the buyer is dissatisfied with the goods and *does not wish to retain them.*" *In re Wylie*, 1991 WL 42236 (emphasis included); *see also Concord Plaza Assoc., Inc. v. Honeywell, Inc.*, 1986 WL 15430, at *2 (Del. Super. Dec. 18, 1986) (Multiple jurisdictions maintain that "an expression of dissatisfaction coupled with a desire to relinquish dominion over the goods may constitute notice of an intent to revoke acceptance.").

Here, the Notice of Revocation communicated its dissatisfactions with the Livery Coach software and made clear that Music Express did not wish to retain the software. (*See, e.g.*, D.I. 5, ¶ 56.) Specifically, Music Express detailed the defects of Livery Coach's "unworkable" software and demanded "[Livery Coach's] cooperation as it convert[ed] to an alternative solution," i.e., that Music Express no longer wanted to retain the software. Music Express' February 3 letter therefore qualifies as a notice of revocation.

Moreover, even *assuming arguendo* that Music Express's Notice of Revocation was strictly a termination of the Purported Software Agreement, which it is not, such termination may also be considered a revocation of acceptance. *See* 4 Anderson U.C.C. § 2-608:216 (3d. ed.) ("When a buyer cancels a contract, there is implicit in the declaration of cancellation the assertion that the buyer has revoked acceptance as to all goods accepted under the contract. Thus a letter from a buyer stating that the buyer rescinds or cancels the contract constitutes a revocation of acceptance.").

Accordingly, Music Express has properly noticed a revocation of acceptance or, at the very least, raised a factual dispute that is not properly resolved on a motion to dismiss.

VI. LEAVE TO AMEND SHOULD BE FREELY GRANTED

Music Express respectfully requests leave to amend its unfair competition claims. Moreover, if the Court finds any legal infirmity in the other Counterclaims, Music Express should be given leave to cure the deficiency. Fed. R. Civ. P. 15(a) provides that "leave shall be freely given when justice so requires." There is a strong policy in favor permitting amendment. And the Third Circuit has adopted a liberal approach to the amendment of pleadings to ensure that "a particular claim will be decided on the merits rather than on technicalities." *Dole v. Arco Chemical Co.*, 921 F.2d 484, 487 (3d Cir. 1990).

VII. CONCLUSION

Music Express has pled plausible and viable claims for fraudulent inducement, negligence, and revocation of acceptance. Defendants' motion should therefore be denied.

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June 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2016, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on June 17, 2016, upon the following in the manner indicated:

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