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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, PART III

SCHREIBER HOLDINGS, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 17-967-BC**
	)	
GT SERVICES, LLC, EMANUEL REED, DERRICK MOORE, and CLINTON GRAY, III,	)	
	)	
Defendants.	)	

MEMORANDUM AND ORDER: (1) DENYING PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT AND (2) GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This lawsuit pertains to the Plaintiffs purchase of the assets of the Defendants' moving and storage business known as "The Green Truck Moving and Storage" for $1,025,000.00. The Plaintiff claims that the Defendants breached the asset purchase agreement and committed fraud and other torts by grossly over-inflating the assets, finances, and overall condition of this business.

The Plaintiff has alleged the following causes of action in the *Amended Complaint*: (1) fraud/fraudulent inducement/intentional misrepresentation; (2) negligent misrepresentation; (3) trademark infringement/false endorsement under the federal Lanham Act; (4) violations of TENN. CODE ANN. § 47-29-101 and breach of contract

regarding three allegedly unpaid invoices totaling $12,067;[1] (5) violations of a non-compete agreement; and (6) breach of implied duty of good faith and fair dealing. As a remedy, the Plaintiff seeks "[r]estitution and rescission, including a refund of the Purchase Price" or, alternatively compensatory damages not less than $500,000.00, specific performance, and declaratory relief. In addition the Plaintiff seeks recovery of attorneys fees, court costs, pre-and post-judgment interest, and punitive damages.

The case is presently before the Court on cross-motions for summary judgment and Defendants' motion to quash third-party subpoenas.

The Plaintiff seeks summary judgment on all its claims except negligent misrepresentation, violations of a non-compete agreement, and breach of implied duty of good faith and fair dealing.

The Defendants seek summary judgment to dismiss all of the claims in the *Amended Complaint*.

The Court conducted oral argument on the cross-motions for summary judgment on April 19, 2018 and took the matter under advisement.

After considering the arguments of counsel, the summary judgment record, and the applicable law, it is ORDERED as follows.

— The Defendants' motion for summary judgment is granted dismissing all of the Plaintiff's claims of breach of contract, and intentional and negligent misrepresentation concerning the asset purchase agreement and marketing materials,

[1] At oral argument, the Plaintiff voluntarily withdrew this claim because the Plaintiff stated that this issue had been resolved prior to summary judgment and was no longer an issue in the lawsuit. For this reason, the Court shall not address this claim.

except for the $19,500.00 Soon LLC debt which remains an issue for liability and damages at trial. Additionally, because all but one of these claims have been dismissed, the Plaintiff's claim for application of the remedy of rescission is dismissed.

— Defendants' motion for summary judgment is also granted dismissing Plaintiff's claims of trademark infringement, and breach of the covenant of good faith and fair dealing.

— Defendants' motion for summary judgment is denied with respect to Plaintiff's claims of violation of the noncompete, and this claim remains an issue for liability and damages at trial.

— The Plaintiff's partial motion for summary judgment is denied.

As to the Defendants' April 5, 2018 *Motion To Quash Third-Party Subpoenas* the ruling will be issued on Monday, May 7, 2018.

The law and analysis on which these rulings are based are as follows.

Summary Judgment Legal Standard

On motions for summary judgment, pursuant to Rule 56 of the Tennessee Rules of Civil Procedure, the following is the legal standard to apply.

> Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. The Tennessee Supreme Court in *Rye* succinctly laid out the processes and principles of summary judgment. A moving party that "does not bear the burden of proof at trial … may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving

party's claim or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense." *Rye*, 477 S.W.3d at 264. "A moving party seeking summary judgment by attacking the nonmoving party's evidence must do more than make a conclusory assertion that summary judgment is appropriate on this basis." *Id.* "Tennessee Rule 56.03 requires the moving party to support its motion with 'a separate concise statement of material facts as to which the moving party contends there is no genuine issue for trial.' " *Id.* (citing Tenn. R. Civ. P. 56.03). " 'Each fact is to be set forth in a separate, numbered paragraph and supported by a specific citation to the record.' " *Id.* (citing Tenn. R. Civ. P. 56.03).

After the moving party so moves, "any party opposing summary judgment must file a response to each fact set forth by the movant in the manner provided in Tennessee Rule 56.03." *Id.* " '[W]hen a motion for summary judgment is made [and] … supported as provided in [Tennessee Rule 56],' to survive summary judgment, the nonmoving party 'may not rest upon the mere allegations or denials of [its] pleading,' but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, 'set forth specific facts' at the summary judgment stage 'showing that there is a genuine issue for trial.' " *Id.* (citing Tenn. R. Civ. P. 56.06).

The nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986)). The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party. *Id.*

Summary judgment should be granted when the nonmoving party's evidence at the summary judgment stage is "insufficient to establish the existence of a genuine issue of material fact for trial." *Id.* (citing Tenn. R. Civ. P. 56.04). If the moving party does not meet its initial burden of production, the nonmoving party's burden is not triggered and the motion for summary judgment should be denied. *Town of Crossville Hous. Auth.*, 465 S.W.3d 574, 578 (Tenn. Ct. App. 2014) (citations omitted).

In reviewing the trial court's decision, we must view all of the evidence in the light most favorable to the nonmoving party and resolve all factual inferences in the nonmoving party's favor. *Luther v. Compton*, 5 S.W.3d 635, 639 (Tenn. 1999); *Muhlheim v. Knox. Cnty. Bd. Of Educ.*, 2 S.W.3d 927, 929 (Tenn. 1999). If the undisputed facts support only one conclusion,

> then the court's summary judgment will be upheld because the moving party was entitled to judgment as a matter of law. *See White v. Lawrence*, 975 S.W.2d 525, 529 (Tenn. 1998); *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995).

Jackson v. CitiMortgage, Inc., No. W201600701COAR3CV, 2017 WL 2365007, at *5 (Tenn. Ct. App. May 31, 2017). In deciding the cross-motions for summary judgment, the Court has applied this standard.

Undisputed Timeline Of Events

The record establishes that the Defendants – Emanuel Reed, Derrick Moore and Clinton Gray III – formed and built up a moving and storage business, Green Truck Moving and Storage, LLC, which is now known as GT Services, LLC. From the time it was formed in April 2010 until 2013, GT Services, LLC operated solely as a residential and commercial moving company. The business then expanded over the years to include waste removal, recycling, warehousing and storage services, as well as administrative staffing and logistics services. By the end of 2015, GT Services, LLC was operating under two distinct and independent branches: (1) residential and commercial moving and storage services; and (2) waste removal, recycling, administrative staffing, logistics and other related-services.

In January 2016, the Defendants decided to sell the moving and storage sector of the business, "The Green Truck Moving and Storage" but retain the waste removal, recycling, administrative staffing, logistics and other related-services. In response to

Defendants' marketing, the Plaintiff became interested in and ultimately purchased the business on November 21, 2016 for $1,025,000.00 with the closing occurring on January 18, 2017. Part of the compensation for the purchase was that the Plaintiff was allowed to pay $150,000.00 of the purchase price five years after closing, as memorialized in the form of a promissory note. Also, the Defendants continued to be responsible for the truck and building leases that the Plaintiff used in the moving and storage business purchased in the asset purchase agreement.

The Plaintiff is an LLC formed by Tom and Robin Schreiber, who are natives of Wisconsin. Their background is in the medical sales field. They had at one time owned and operated a healthcare recruiting firm in Wisconsin for approximately three to four years, which they acquired through a purchase. Prior to that, Mr. Schreiber worked in the banking industry for approximately 12 years. Mr. Schreiber holds a bachelor's degree in finance, and Mrs. Schreiber holds a bachelor's degree in marketing. Neither Mr. nor Mrs. Schreiber had ever owned, operated or worked for a moving and storage business. They moved to Nashville in 2016 to relocate their family from California to Middle Tennessee.

Analysis

In support of the *Motion For Partial Summary Judgment*, the Plaintiff alleges that rescission is appropriate in this case based the "sheer volume of issues with the business" including the "number of instances of mutual mistakes and/or fraud" that the "Plaintiff would not have entered into the Agreement had it known the truth of any" of the alleged

misrepresentations made by the Defendants. *Motion For Partial Summary Judgment*, p. 1 (Jan. 19, 2018).

The Plaintiff asserts that the Defendants breached and misrepresented the following provisions of the *Purchase And Sale Agreement*: (1) the financial documents provided as part of the sale were 'true, correct and complete in all material respects and present fairly the condition of the Business'; (2) the assets of the business were transferred 'free and clear of all liens'; (3) the assets of the business were not subject to any judgment and that neither GT Services, LLC nor the assets of the business were subject to any claim; (4) 'the operation of the Business is not in material violation of any law or regulation'; (5) the business had a number of current and pending federal government contracts that represented substantial continuing income; (6) 'the equipment and other tangible Assets are in good operating condition and repair, subject only to ordinary wear and tear'. (Agreement ¶ 10(e), (m), and (p), and Exhibit 8.)." *Id.* at pp. 1-2.[2]

The Court shall address these alleged breaches and misrepresentations in a manner similar to the briefing, by isolating each alleged breach/misrepresentation and the undisputed material facts surrounding each one, and applying the essential elements of the tort and breach. In doing so, the Court has applied the following Tennessee law.

The essential elements of the tort of misrepresentation are these.

[2] At oral argument, the Plaintiff stated that the allegation regarding alleged overdue invoices had been resolved and was no longer an issue in the lawsuit.

In order to prove a claim based on fraudulent or intentional misrepresentation, a plaintiff must show that:

> 1) the defendant made a representation of an existing or past fact; 2) the representation was false when made; 3) the representation was in regard to a material fact; 4) the false representation was made either knowingly or without belief in its truth or recklessly; 5) plaintiff reasonably relied on the misrepresented material fact; and 6) plaintiff suffered damage as a result of the misrepresentation.

Metro. Gov't of Nashville & Davidson County v. McKinney, 852 S.W.2d 233, 237 (Tenn.Ct.App.1992); *see First Nat'l Bank v. Brooks Farms,* 821 S.W.2d 925, 927 (Tenn.1991); *Lopez v. Taylor,* 195 S.W.3d 627, 634 (Tenn.Ct.App.2005). Similarly, to succeed on a claim for negligent misrepresentation, a plaintiff must establish "that the defendant supplied information to the plaintiff; the information was false; the defendant did not exercise reasonable care in obtaining or communicating the information and the plaintiffs justifiably relied on the information." *Williams v. Berube & Assocs.,* 26 S.W.3d 640, 645 (Tenn.Ct.App.2000); *see Robinson v. Omer,* 952 S.W.2d 423, 427 (Tenn.1997).

Walker v. Sunrise Pontiac-GMC Truck, Inc., 249 S.W.3d 301, 311 (Tenn. 2008).

The elements of fraudulent inducement are these.

> To prevail on a claim of fraudulent inducement, the party asserting the claim has the burden of proving that the defendant:
>
> > (1) made a false statement concerning a fact material to the transaction; (2) with knowledge of the statement's falsity or utter disregard for its truth; (3) with the intent of inducing reliance on the statement; (4) the statement was reasonably relied upon; and (5) an injury resulted from this reliance.

Deal v. Tatum, No. M2015–01078–COA–R3–CV, 2016 WL 373265, at *7 (Tenn. Ct. App. M.S., filed Jan. 29, 2016) (quoting *Baugh v. Novak*, 340 S.W.3d 372, 388 (Tenn. 2011)); *Regions Bank v. Bric Const., LLC*, 380 S.W.3d 740, 763 (Tenn. Ct. App. 2011).

Adams v. CMH Homes, Inc., No. E201501526COAR3CV, 2016 WL 1719373, at *4 (Tenn. Ct. App. Apr. 27, 2016), *appeal denied, not for citation* (Sept. 23, 2016).

Breach of contract consists of the following.

> "'The essential elements of any breach of contract claim include (1) the existence of an enforceable contract, (2) nonperformance amounting to a breach of the contract, and (3) damages caused by the breach of the contract.'" *ARC LifeMed, Inc. v. AMC–Tennessee, Inc.*, 183 S.W.3d 1, 26 (Tenn.Ct.App.2005) (quoting *Custom Built Homes v. G.S. Hinsen Co., Inc.*, No. 01A01–9511–CV–00513, 1998 WL 960287, at *3 (Tenn.Ct.App. Feb.6, 1998)).

Ingram v. Cendant Mobility Fin. Corp., 215 S.W.3d 367, 374 (Tenn. Ct. App. 2006).

After applying the foregoing law to the undisputed facts, the Court concludes that the Defendant's *Motion For Summary Judgment* shall be granted and the alleged misrepresentations and breaches listed on pages 6-7 *supra*, numbered 2, 3, 4, 5, 6 and, with one exception, 1, shall be dismissed. Additionally, the remedy of rescission is dismissed. The reason is that, with one exception, there is no genuine issue of material fact that the Defendants made any false statements or provided any false information to the Plaintiff with regard to the *Purchase And Sale Agreement*. The undisputed material facts on summary judgment are that, with one exception – a $19,500 debt – the Defendants provided fulsome, truthful, and transparent information to the Plaintiff regarding the assets, finances, and overall condition of the business.

When faced with summary judgment by the Defendants, the Plaintiff has failed to identify any portion of the financial statements where there is untrue, incomplete, or

inaccurate information. Based on these undisputed facts, summary judgment is proper in favor of the Defendants because they have either (1) affirmatively negated an essential element of the Plaintiff's claims or (2) they have demonstrated that the Plaintiff's evidence at the summary judgment stage is insufficient to establish the Plaintiff's claim. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015) (emphasis in original) ("[W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense.").

Item 1: Alleged Misrepresentations and Breach Concerning Financial Statements

The first allegation of breach and misrepresentation by the Plaintiff is that the Defendants failed to comply with paragraph 10(m) of the *Purchase and Sale Agreement* which provides,

> 10. Warranties, Representations and Covenants of Seller and Members. As of the Effective Date and against as of the Closing Date in the even this Agreement is not terminated in accordance with the terms hereof, Seller and the Members (individually, jointly and severally) represent, warrant and covenant to and with Purchaser as follows:
>
> > (m) The operating statements, balance sheet, profit and loss statements, and other financials delivered to Purchaser, as itemized on Schedule 10(m) (collectively, the "Operating Statements") are true, correct and complete in all material respects and present fairly the financial condition of the Business.

Purchase And Sale Agreement, pp. 9-10, ¶ 10(m) (Nov. 21, 2016).

The Plaintiff claims that the Defendants violated this provision because they failed to "present fairly the condition of the Business" which was defined in the *Purchase And Sale Agreement* as "a business located at 3330 Ambrose Avenue, Nashville, Tennessee 37207, that provides moving and storage services" and, instead, provided financial documents representing GT Services, LLC overall, which continued to do business and "performed various services other than moving and storage, including waste disposal, recycling, and staffing." *Memorandum Of Law In Support Of Motion For Partial Summary Judgment*, pp. 7-8 (Jan. 19, 2018). According to the Plaintiff, that the financial documents provided in response to this provision of the *Purchase and Sales Agreement* pertained to GT Services, LLC overall, and not just the moving and storage operation misled, breached and provided the Plaintiff the impression that the Defendants' business was worth more. This fact, according to the Plaintiff, is evidenced in paragraph 14 of the *Declaration of Emanuel D. Reed* where Defendant Reed admits that the financial information provided to the Plaintiffs includes $364,250 or 21% in total income which is not attributable to the moving and storage business.

> 14. As of August 31, 2016, the excluded categories of revenue amounted to $364,250, or approximately 21% of the total income for the GT Services, which was $1,740,484. Of this $364,250 in excluded revenue, $306,796.92 was attributable to the GT Services' participation in SBA's 8(a) program, $27,529.07 resulted from non-8(a) government contracts, and $29,925.20 was derived from waste collection. See Agreement, at Schedule 10(m).

Declaration of Emanuel D. Reed, p. 4, ¶ 14 (Mar. 29, 2018).

Applying the standard for summary judgment in Tennessee, the Court finds that the Plaintiff has failed to show that the Defendants misrepresented the financial documents. The Plaintiff does not dispute that the financial information provided by the Defendants was accurate. Instead, the Plaintiff argues that the Defendants somehow mislead them as to the finances of the moving and storage business. This claim is not supported by the undisputed material facts in the record.

Starting with the Plaintiff's prominent argument derived from the preceding quoted paragraph of the *Declaration of Emanuel D. Reed*, the Court finds that it is undisputed that Defendant Reed had explained to the Plaintiff prior to closing that not all of the total revenue depicted on the financial statements was related to the moving and storage company. Paragraph 13 of the Reed Declaration is undisputed that the Plaintiff knew the financial information it was being provided did not break out the moving and storage operation and contained the financials of all the sectors of GT Services, LLC.

> 13. Prior to the closing, I specifically informed the Schreibers that a portion of the GT Services' total revenue depicted on the financial statements was derived from its 8(a) contracts and differentiated services that were not related to Green Truck. I explained that the following categories of revenue were unrelated to Green Truck and would be retained by the GT Services: '8(a) Gov't Income;' 'Non 8(a) Gov't Income,' and 'Waste Collection.' *See* Agreement, at Schedule 10(m). We disclosed to the Schreibers that we were still in the early stages of the 8(a) program and we could not transfer the 8(a) contracts to the Schreibers because it was not allowed under the 8(a) program and because we wanted to grow our federal contracting division of GT Services.

Declaration of Emanuel D. Reed, pp. 3-4, ¶ 13 (Mar. 29, 2018).

Thus, it is undisputed that the information provided by the Defendants prior to closing was completely transparent with regard to the finances of the business.

To this, the Plaintiff focuses on the definition of "Business" in the *Purchase And Sale Agreement* and argues that by failing to delineate the moving and storage business from the Defendants' overall business, the Defendants intentionally misrepresented the condition of the moving and storage business.

> 3. All of the financial statements provided to Plaintiff in connection with the Agreement were complete and accurate. (Reed Decl., Ex. 2, ¶ 12).
>
> **RESPONSE: Disputed, provided it is immaterial whether the financial statements were 'complete and accurate' – the issue is whether they presented fairly the condition of the moving and storage business. The agreement provides that the financial documents attached to the agreement are 'true, correct and complete in all material respects and present fairly the condition <u>of the Business</u>.' (Agreement ¶ 10(m) (emphasis added).) Page 1 of the agreement defines 'Business' as 'a business located at 3330 Ambrose Avenue, Nashville, Tennessee 37207, that provides moving and storage services.' (*Id.*) However, the financial documents provided to Plaintiff presented the condition of GT Services, LLC <u>overall</u>, not of the <u>Business</u>, thus representing and providing an impression that the business was worth more.**

Plaintiff's Response To Defendants' Statement Of Undisputed Material Facts In Support Of Their Motion For Summary Judgment, p. 2, ¶ 3 (April 13, 2018).[3]

[3] Page 2 of the *Purchase And Sale Agreement* identifies the business as follows:

> RECITALS
>
> Seller owns and operates a business located at 3330 Ambrose Avenue, Nashville, Tennessee 37207, that provides moving and storage services (the "<u>Business</u>"). Purchaser desires to acquire from Seller, and Seller desire to sell to Purchaser, all Assets (as defined herein) owned by and used in the operation of the Business on the terms and subject to the conditions set forth in this Agreement. The purchase and sale of all Assets is sometimes referred to herein as the "<u>Acquisition</u>."

The Court concludes that the Plaintiff's textual argument as to the meaning of "the Business" is an attempt to create some metaphysical doubt as to the material facts. This is insufficient under Tennessee law. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015) ("The nonmoving party 'must do more than simply show that there is some metaphysical doubt as to the material facts.' *Matsushita Elec. Indus. Co.*, 475 U.S. at 586, 106 S.Ct. 1348. The nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party."). The Plaintiff then has failed at the summary judgment stage to rebut the undisputed facts that the information provided to the Plaintiff was complete, accurate and transparent.

For these reasons, the Court concludes that the Defendants' summary judgment should be granted on this issue because the Defendants have satisfied their burden of production by "either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense." *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 264 (Tenn. 2015).

Purchase And Sale Agreement, p. 2 (Nov. 21, 2016).

Item 2: Alleged Undisclosed Liens

The Plaintiff alleges the Defendants breached the *Purchase And Sale Agreement* and misrepresented that the "assets were transferred 'free and clear of all liens' because "at the time of execution of the Agreement, there were at least two liens on the assets totaling $196,000.00" and the Defendants "knew about at least one of these liens at the time of closing." *Memorandum Of Law In Support Of Motion For Partial Summary Judgment*, p. 3 (Jan. 19, 2018).[4]

On this issue, the Court grants the *Defendants Motion For Summary Judgment* because the Defendants have demonstrated that the Plaintiff's evidence at the summary judgment stage is insufficient to establish the Plaintiff's claim that the Defendants breached the *Purchase And Sale Agreement* or misrepresented any material facts regarding the sale.

It is undisputed that one lien in the amount of $121,000.00 was paid off as part of the closing, as is stated in the Settlement Statement (Settlement Statement, Ex. 7). It is

[4] The provision of the *Purchase and Sale Agreement* relied on by the Plaintiff is Section 10(p).

> (p) Seller has good and marketable title in and to all the Assets, other than as set forth on Schedule 10(p). Except as set forth on Schedule 10(p), the Assets are not subject to any liens or encumbrances and at Closing, all of the Assets shall be transferred or conveyed to Purchaser free and clear of all liens, claims, encumbrances, leases, or rights of any other person whatsoever. The equipment and other tangible Assets are in good operating condition and repair, subject only to ordinary wear and tear, and the operation of the Business is not in material violation of any law or regulation. The Assets comprise all of the assets, properties, contracts, permits, authorizations and rights (tangible and intangible) required to operate the Business in the same quality and manner as that reflected in the Operating Statements and as such operations have heretofore been conducted and to continue to operate and conduct the Business as currently conducted.

Purchase And Sale Agreement, p. 9, ¶10(p) (Nov. 21, 2016) (emphasis added).

undisputed that the other lien in the amount of $75,000 was part of a line of credit on which Defendants owed no money at the time of closing.

These liens did not affect the Plaintiff's good and marketable title of the assets that were purchased at closing. That is because it is undisputed that pursuant to section 3 of the *Purchase And Sale Agreement*, these liens fell under the *No Assumed Liabilities* section as existing prior to closing.

> 3. No Assumed Liabilities. Notwithstanding anything else to the contrary contained in this Agreement, the parties expressly agree that Purchaser is only acquiring the Assets of the Business, and by such acquisition shall not assume or otherwise become liable for any expenses, charges, claims, liabilities, and obligations of Seller (except for obligations under the Assumed Agreements arising from and after the Closing Date), including, but not limited to the following (collectively, the "Excluded Liabilities"):
>
> > (i) any liability or obligation of the Business or Seller with respect to, or arising out of, any employee benefit plan, executive deferral compensation plan or any other plans or arrangements for the benefit of any employees of the Business;
> >
> > (ii) any liability or obligation of the Business to Seller or any of its affiliates or to any party claiming to have a right to acquire any ownership interests or other securities convertible into or exchangeable for any ownership interests of the Business;
> >
> > (iii) any and all liabilities or obligations of any nature whatsoever of or relating to claims for (i) taxes of the Business or Seller, (ii) taxes assessed against Purchaser or the Assets, which arise out of or are related to Seller's operation or conduct of the Business prior to the Closing Date, or (iii) taxes incurred in connection with the sale of the Assets and the consummation of the transaction contemplated herein except such taxes as Purchaser shall pay pursuant to Section 9 hereof;

> (iv) any obligation or liability accruing, arising out of, or relating to acts or omissions of any person in connection with the Assets, the operation or management of the Business before the Closing, including any liability resulting from any breach or default under any Assumed Agreements outstanding or occurring at or prior to the Closing, or arising or resulting from any event occurring at or prior to the Closing, which event with the giving of notice or the passage of time or both would result in a breach or default;
>
> (v) any obligation or liability accruing, arising out of; or relating to (including those accruing, arising out of, or relating to any federal, state or local investigations commenced as a result of) any act or omission by Seller or any of its affiliates; and
>
> (vi) any other liability, fixed or contingent, known or unknown, relating to or arising out of the ownership, operation or use of the Business or Assets, prior to the Closing.

Purchase And Sale Agreement, pp. 4-5, ¶3 (Nov. 21, 2016).

Item 3: Alleged Undisclosed Judgment and Claims

The Plaintiff alleges that the Defendants violated section 10(e) of the *Purchase And Sale Agreement* because, prior to closing, the Defendants knew that a judgment in General Sessions Court was entered against GT Services, LLC, and, in addition, "there were two car accidents for which GT Services, LLC was at fault that had not been resolved and, as a result, Plaintiff is now liable for a $2,000.00 deductible under the Business' insurance policy." *Memorandum Of Law In Support Of Motion For Partial Summary Judgment*, p. 3 (Jan. 19, 2018).

> (e) Neither the Seller nor any of the Assets are subject to claim, demand, suit or proceeding or litigation of any kind, or to the best of Seller's knowledge, threatened, pending or outstanding, before any court or administrative governmental or regulatory authority agency or body, domestic or foreign, or to any order, judgment, injunction or decree of any court, tribunal or other governmental authority, that would have a materially adverse offset on the Business or in any way be binding upon Purchaser or affect or limit Purchaser's full use and enjoyment of any of the Assets or operation of the Business or that would limit or restrict in any way the Seller's right or ability to enter into this Agreement and consummate the assignments, transfers, conveyances and any other transaction contemplated hereby.

Purchase And Sale Agreement, p. 9, ¶10(e) (Nov. 21, 2016).

On this issue, the Court grants the *Defendants Motion For Summary Judgment* because the Defendants have demonstrated that the Plaintiff's evidence at the summary judgment stage is insufficient to establish the Plaintiff's claim that the Defendants breached the *Purchase And Sale Agreement* or misrepresented any material facts regarding the sale.

Pursuant to the terms of the *Purchase And Sale Agreement*, neither the judgment nor claims was required to be disclosed under paragraph 10(e) of the *Agreement* because the Plaintiff did not assume liability for events that occurred before the Closing Date and these are excluded liabilities under the *Agreement*. Additionally, neither would have a materially adverse effect on The Green Truck Moving and Storage Business purchased by the Plaintiff.

This General Sessions Judgment related to garnishment of an employee's wages. This was an excluded liability under section 3 of the *Agreement* because it was an event

which occurred before the Closing Date and constituted for Plaintiff an excluded liability. In any event, because this judgment was entered against GT Services, it is in no way binding on Plaintiff nor does it limit or affect Plaintiff's full use and enjoyment of any of the Assets conveyed or have any materially adverse effect on the business.

As to the $2,000.00 claim relating to two car accidents, it also falls under section 3 "Excluded Liabilities." GT Services, as the insured, was responsible for paying the insurance deductible under this insurance policy – not the Plaintiff. (Reed Decl. Ex. 2, ¶ 36).

Item 4: Alleged Undisclosed Violation of Law

The Plaintiff argues that "the Defendants represented that 'the operation of the Business is not in material violation of any law or regulation'", however, "at the time of closing, GT Services, LLC was in violation of federal law and was making payments toward a fine of approximately $18,000.00 levied by the Federal Motor Carrier Safety Administration. ("FMCSA")." *Memorandum Of Law In Support Of Motion For Partial Summary Judgment*, pp. 3-4 (Jan. 19, 2018).[5]

[5] The provision of the Purchase and Sale Agreement relied on by the Plaintiff is Section 10(p).

> (p) Seller has good and marketable title in and to all the Assets, other than as set forth on Schedule 10(p). Except as set forth on Schedule 10(p), the Assets are not subject to any liens or encumbrances and at Closing, all of the Assets shall be transferred or conveyed to Purchaser free and clear of all liens, claims, encumbrances, leases, or rights of any other person whatsoever. The equipment and other tangible Assets are in good operating condition and repair, subject only to ordinary wear and tear, and the operation of the Business is not in material violation of any law or regulation. The Assets comprise all of the assets, properties, contracts, permits, authorizations and rights (tangible and intangible)

On this issue, the Court grants the *Defendants Motion For Summary Judgment* because the Defendants have demonstrated that the Plaintiff's evidence at the summary judgment stage is insufficient to establish the Plaintiff's claim that the Defendants breached the *Purchase And Sale Agreement* or misrepresented any material facts regarding the sale.

It is undisputed that the FMCSA claims against Defendants were resolved in a settlement agreement where Defendants agreed to pay a civil penalty of $18,000.00 to FMCSA for a past violation. Past conduct does not equate to a present violation of law. (Reed Dec., Ex. 2, ¶ 37). Additionally, the obligation to pay the settlement agreement of $18,000.00 was tied to GT Services, not the Assets relating to the moving and storage sector, Green Truck. The settlement agreement was between FMCSA and GT Services, and GT Services has a DOT Number that is separate and distinct and has no bearing on Plaintiff. (Reed Decl., Ex. 2, ¶ 37). When Plaintiff took over Green Truck, Plaintiff was required to obtain a separate DOT number. (T. Schreiber Dep., Ex. 3, at 111:4-5; 125:1-7).

Additionally, as with previous claims, under section 3 of the asset purchase agreement, the Plaintiff specifically did not assume liabilities or obligations that accrued

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> required to operate the Business in the same quality and manner as that reflected in the Operating Statements and as such operations have heretofore been conducted and to continue to operate and conduct the Business as currently conducted.

Purchase And Sale Agreement, p. 9, ¶10(p) (Nov. 21, 2016) (emphasis added).

or arose out of acts before the closing. The undisputed facts are that the settlement agreement between FMCSA and GT Services is dated May 4, 2016, which is before the Closing Date.

Item 5: Alleged False Representations Regarding Income

The Plaintiff argues that the Defendants "represented the Business had a number of current and pending federal government contracts which represented substantial continuing income (including with the U.S. Army Corp of Engineers)." *Memorandum Of Law In Support Of Motion For Partial Summary Judgment*, p. 4 (Jan. 19, 2018). Specifically, the Plaintiff listed the following alleged misrepresentations regarding the income of the business:

1. That the business' "Fort Campbell contract is a $500K contract over the course of 4 years." (Exhibit 8 to Pl.'s Motion at page 2.) The Business in fact had no guaranteed future income from any government entity. Defendants do not dispute that this representation was made or that it was false. They merely claim the integration clause in the Agreement bars the use of this misrepresentation. However, integration clauses and the parol evidence rule have "no application" to a case involving fraudulent inducement. *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 588 (Tenn. Ct. App. 1980); *Ewan*, 2012 Term. App. LEXIS 240 at *22.

1. That the business had a two-year contract with "Green Standards Co." that generated $5,000.00 to $8,000.00 per month. (*See* Defs.' Document Production at Bates 112-17, filed under seal under separate notice of filing.)

2. That the business was "corporate partners" with various entities to which Plaintiff would have access, including Tennessee State University. In reality, the partnership with Tennessee State University

was apparently dependent on the business being minority-owned. (Response at 9-10. n3.)

3. That the business had an "asset" worth $19,500.00 in the form of money due from "related party Soon." (Agreement. Schedule 10(m), Balance Sheet.) On April 9. 2018, Defendants produced a promissory note showing that the $19,500.00 "asset" was actually a debt owed to Soon, LLC. (*See* Promissory Note, filed under seal under separate notice of filing.)

Response to Defendants' Motion for Summary Judgment and Reply to Defendants' Response to Plaintiff's Motion for Partial Summary Judgment, p. 8 (April 13, 2018) (footnote omitted).

These arguments are based on the *Business Profile Green Truck Movers* provided to the Plaintiff which was included with the financial documents as marketing materials for the sale of the business. The relevant portion of these marketing materials for which the Plaintiff's claim for alleged misrepresentations derive is quoted as follows:

Buyer Q&A

P&L:

- **Break down of revenue driven by storage Vs. moving?** Currently storage makes up a small part of our overall revenue. Based on projections storage makes up only 3% of our overall revenue. This represents a ton of opportunity. We moved into our storage January 2015 so we have yet to fully ramp up this part of the business. We are currently only at 60% storage capacity with approximately 10 vaults full. If additional capital was set aside it would be extremely feasible to increase our storage revenue.
- **Understanding cash flow to partners and or salary VS. distributions?** The 3 owners have a salary. Up to this point all profits have been put back into the business as we've invested into other industries as well as federal contracting.
- **Price sheet, both storage rates and moving rates?** — See Attached –

Contracts:

- **Understanding what we are buying and what current ownership would be retaining?** We are currently SBA 8a Certified. This allows us access to federal contracts that are set aside strictly for 8a Certified firms, similar to a Woman Owned or Veteran Owned Small Business. We currently have (3) 8a Contracts and (2) being reviewed for potential awards. These contracts we [sic] are as follows:
    - Fort Campbell – Moving Services
    - TN Air Nat'l Guard – Temporary Staffing
    - US Army Corps of Engineers – Transportation and Moving Services

  The buyer would have access to the Fort Campbell and USACE contracts. The Fort Campbell contract is a $500K contract over the course of 4 years. The USACE is more of an as requested contract and has no ceiling or completion date. Since January 2015 we've done approximately $65,000 in USACE work.

  In addition, we have a contracts [sic] with Vanderbilt Universities non-profit furniture distribution partner Green Standards Co. This contract generates roughly $5-8K per month. In March 2015 we completed a $70,000 contract with Mars PetCare. We still have a positive relationship with them and are working with them to secure additional contracts. We receive recurring business from some of the largest Real Estate Companies in the city like Village, Zeitlin, and Keller-Williams. Some of our corporate partners include companies like: Carrier Enterprises, Habitat for Humanity, Tennessee State University, Citizens Bank, Big Machine Records, Metro Nashville Airport Authority, The Nashville Zoo, and The Cupcake Collection to name a few.

  We are certified to do business with the State of TN. In 2016 we have done approximately $25,000 worth of state business. This includes moving services, packing services, and short-term storage.

- **What revenue would leave the company and be retained by current ownership?** No revenue related to moving or storage would leave the company. All of these clients [sic] relationships and/or contracts would be pledged to the buyer.

> We have 8a and solid waste collection/recycling revenue that would be retained by the current ownership. These contracts are not related to The Green Truck Moving Company brand and/or are differentiated services. This revenue makes up a very small portion of our overall revenue.
>
> - **What relationship if any would new ownership have with the current owners new co.?** We would develop relationships on a contract basis. For example, we would develop a Sub-Contracting or Teaming Agreement to service the Fort Campbell moving contract that we currently have. Any moving or storage contract that we come across we'd work together on.
>
>   It is our goal to focus on other industries. However, we have a ton of relationships and are known for offering a great service in the moving/storage industry. We will look to be your partner and go after these types of contracts together. There are several federal agencies that will have a large contract with moving/storage services as a small part of it. Our goal is to go after these larger contracts and sub the buyer out work. We will be very aggressive in attracting new business of which will be beneficial to both firms.

Business Profile Green Truck Movers, Exhibit 8 to Plaintiff's Motion For Summary Judgment (Jan. 19, 2018).

Nowhere in the marketing materials that Plaintiff relies upon does it state that there is guaranteed government work with continuing income with respect to the *Purchase And Sale Agreement* or the Fort Campbell contract. Instead, the marketing materials state that the Plaintiff would have "access to" Defendants' five-year, $500,000.00 contract with Fort Campbell relating to moving and storage work, which is a true statement. For instance, although the Fort Campbell contract was awarded for up to $500,000 of federal contract work, this work was only performed on an as-needed basis.

(Reed Decl., Ex. 2 ¶ 17). There is no guarantee of any monetary amount under that contract; instead, this $500,000.00 is simply a cap on the federal government's exposure as is commonly found in many state and federal government contracts. (*Id.*). Plaintiff did not understand how these federal government contracts worked (Kennedy Dep., Ex. 5 at 49:4-7).

Furthermore, pursuant to the asset purchase agreement, Defendants have referred all moving and storage federal work within a 250-mile radius to Plaintiff (Reed Decl., Ex. 2, ¶ 44).

Additionally, Defendants also disclosed to Plaintiff that they obtained these federal contracts because they are 8(a) certified (a certification reserved for socially and economically disadvantaged individuals), which allows them access to federal contracts that are set aside strictly for 8a Certified firms. (Reed Decl., Ex. 2, ¶¶ 5-6). The Plaintiff did not qualify for 8(a) certification and only applied for the equivalent certification for women nearly seven months after the Plaintiff purchased the Business. The Plaintiff further testified that he has lost government contracts because he was not the lowest bid (T. Schreiber Dep. Ex. 3 at 104:5-105:3), indicative that the price of bid is a factor and the work is not guaranteed. The evidence clearly shows that Defendants' representation that it had federal government contracts was truthful and accurate.

The Plaintiff's assertion that because Tennessee State no longer is a corporate partner with the Plaintiff is also some form of misrepresentation is not supported by the summary judgment record. For this alleged misrepresentation, the Plaintiff cites to the

Defendants' brief where it refers to testimony from Green Truck's current General Manager, Terrance Kennedy, where he discussed and attributed some of the Company's decreased sales to the fact that the Company was no longer minority-owned, and that is part of the reason the Company is no longer working with Tennessee State University. As a matter of law, the fact that Tennessee State was a corporate partner at the time of the closing of the sale but has subsequently decided to stop working with the Plaintiff is not a misrepresentation. Whether a new owner retains certain business from a previous owner involves numerous variables and the Plaintiff has not come forth with any proof that the Defendants somehow misrepresented their relationship with Tennessee State at the time of the closing.

The one exception to granting summary judgment on the Plaintiff's claims concerning Defendants' representations of income is a $19,500 asset referenced in the Schedule 10(m) Balance Sheet that was due from Soon, LLC. The Plaintiff claims this was a misrepresentation because it has learned through discovery that this was actually a debt of the Company owed to Soon, LLC at the time of closing. In support of this argument, the Plaintiff filed under seal a promissory note dated October 31, 2016 showing that the $19,500 asset listed on the Balance Sheet was really a debt owed to Soon, LLC. As the $19,500 asset representation concerns disputed issues of material facts and competing inferences, summary judgment is denied.

On all other claims of Plaintiff concerning misrepresentations of income, summary judgment is granted because the Defendants have demonstrated that the Plaintiff's

evidence at the summary judgment stage is insufficient to establish the Plaintiff's claim that the Defendants breached the *Purchase And Sale Agreement* or misrepresented any material facts regarding the sale.

Item 6: Physical Condition of Assets

The Plaintiff asserts that the Defendants "represented that 'the equipment and other tangible Assets are in good operating condition and repair, subject only to ordinary wear and tear'", however, "[s]hortly after closing, major repairs had to be performed on two of the three moving trucks included in the Agreement, two overhead doors on the Business premises were not in working condition and had to be repaired, and eight (8) heating systems on the Business premises had to be replaced because they were not operating properly." *Memorandum Of Law In Support Of Motion For Partial Summary Judgment*, p. 4 (Jan. 19, 2018).[6]

[6] The provision of the Purchase and Sale Agreement relied on by the Plaintiff is Section 10(p).

> (p) Seller has good and marketable title in and to all the Assets, other than as set forth on Schedule 10(p). Except as set forth on Schedule 10(p), the Assets are not subject to any liens or encumbrances and at Closing, all of the Assets shall be transferred or conveyed to Purchaser free and clear of all liens, claims, encumbrances, leases, or rights of any other person whatsoever. The equipment and other tangible Assets are in good operating condition and repair, subject only to ordinary wear and tear, and the operation of the Business is not in material violation of any law or regulation. The Assets comprise all of the assets, properties, contracts, permits, authorizations and rights (tangible and intangible) required to operate the Business in the same quality and manner as that reflected in the Operating Statements and as such operations have heretofore been conducted and to continue to operate and conduct the Business as currently conducted.

Purchase And Sale Agreement, p. 9, ¶10(p) (Nov. 21, 2016) (emphasis added).

On this issue, the Court grants the *Defendants Motion For Summary Judgment* because the Defendants have demonstrated that the Plaintiff's evidence at the summary judgment stage is insufficient to establish the Plaintiff's claim that the Defendants breached the *Purchase And Sale Agreement* or misrepresented any material facts regarding the sale.

Regarding the trucks, the Plaintiff could see that Truck 30 was inoperable when Plaintiff's owners toured the facility pre-closing and sat in the back parking lot visible to anyone. (Reed Decl., Ex. 2, ¶ 19; Kennedy Dep. Ex. 5 at p. 38:9-20). As to Truck 31, the record establishes its age was accurately represented (Reed Decl., Ex. 2, ¶ 21), which in turn put Plaintiff on notice of its value and risk of malfunctioning and potential need for repair. Regarding the overhead doors and heaters, Defendants did not believe at the time of closing that the representation regarding the condition of "equipment and tangible Assets" encompassed anything regarding the condition of the leased premises or any fixtures attached to the premises. (Reed Decl., Ex. 2, ¶ 29).

Regardless of the fact that Defendants were not aware that the heaters were not in good working condition and did not believe that the Defendants had any obligation to disclose any condition regarding the fixtures on the leased premises, GT Services paid Plaintiff $3,000.00 towards the cost of replacing the heaters. (*Id.*; T. Schreiber Dep. Ex. 3, at 90:1-17).

The Defendants also represented in section 10(h) of the asset purchase agreement that they operated the Business in the ordinary course of business and "shall provide

maintenance, repairs and service on the Assets consistent with past practice" Plaintiff was not harmed because the condition of the trucks, overhead doors, and heaters were maintained in a manner consistent with past practice.

Alleged Trademark Infringement

In addition to the allegations of misrepresentation, the Plaintiff has brought a claim for trademark infringement and false endorsement against the Defendants pursuant to section 1(a)(iii)[7] of the *Purchase And Sale Agreement* and 15 U.S.C. § 1125(a).[8] The *Amended Complaint* contains the following factual allegations supporting this claim:

[7] Section 1(a)(iii) of the *Purchase and Sale Agreement* states:

> (a) Sale and Purchase of Assets. For and in consideration of the mutual covenants and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Seller herby agrees to sell and convey to Purchaser, and Purchaser hereby agrees to purchase and take from Seller, all of the assets, properties and business of every kind and description used in an relating to the operation of the Business, whether persona, tangible or intangible, wherever located as shall exist on the Closing Date (as defined in Section 4), whether or not appearing on the Operating Statements (as defined in Section 10(m)) (collectively, the "Assets"), with the exception of those "Excluded Assets" set forth in Section 1(b). Without limiting the generality of the foregoing, the Assets shall include the following, subject to and in accordance with all of the terms and conditions of this Agreement:
>
> > (iii) All of the intellectual property and other proprietary rights of the Business, including without limitation all rights of the Business in and to all licenses, trademarks, service marks, tradenames and assumed names (whether registered or unregistered), including, but not limited to "The Green Truck Moving Company, LLC" and "The Green Truck Moving & Storage Company" (the "Trade Name"), internet web sites, internet domain names, copyrights, proprietary computer software, proprietary inventions, proprietary technology, know how, trade secrets, technical information, discoveries, designs, proprietary rights and nonpublic information, whether or not patentable, any source codes, object codes, manuals and other documentation and materials (whether or not in written form) and all versions thereof, and all other permits and other

45. In addition, after the sale, Defendants continued to use the mark "The Green Truck Moving and Storage" (and confusingly similar variations thereof) in violation of paragraph 1(a)(iii) of the Agreement and Plaintiff's trademark rights.

46. Defendants continue to own and operate the website gtservices-llc.com, which, until after the filing of this lawsuit, state: (a) "The Green Truck Moving Company, LLC is the residential relocation division of GT Services"; (b) "Please visit the link below to schedule your move and find out more about The Green Truck"; (c) "The Green Truck Moving and Storage Commercial Division offers innovative sustainable relocation solutions designed to relieve the stress of our clients during their office and industrial transitions"; and (d) "Learn more at thegreentruckmovers.com". A true and correct copy of excerpts of the website are attached hereto as Exhibit 5.

> similar intangible property and rights relating to the Business 9collectively, the "Intellectual Property");

Purchase And Sale Agreement, pp. 2-3, ¶ 1(a)(iii) (Nov. 21, 2016).

[8] 15 U.S.C. § 1125(a) states:

> (a) Civil action
> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which--
>
> > (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or
> > (B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.
>
> (2) As used in this subsection, the term "any person" includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.
> (3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

15 U.S.C.A. § 1125(a) (West 2018).

> 47. At the bottom of each page of the gtservices-llc.com website, there were links to the Business' Facebook page and Twitter account, Plaintiff's business address, and Plaintiff's business phone number. The website also included various photos of Plaintiff's moving trucks.
>
> 48. Furthermore, on various user-generated government databases, including the government system for award management, dynamic small business profile, and federal procurement data system, Defendants are using the mark "The Green Truck Moving and Storage" (or confusingly similar variations thereof).
>
> 49. Defendants' foregoing uses are likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of Defendants with Plaintiff, or as to the origin, sponsorship, or approval of Defendants' goods, services. In fact, Plaintiff is aware of actual confusion arising from Defendants' foregoing uses.

Amended Complaint, pp. 9-10, ¶¶ 45-49 (Dec. 4, 2017).

As a matter of law, the Court grants the Defendants' *Motion For Summary Judgment* regarding the trademarks because the Defendants have affirmatively negated an essential element of the Plaintiff's claims.

First, as to the claim for breach of contract, it fails as a matter of law because the Plaintiff can not prove the essential element of damages for any alleged breach of section 1(a)(iii) of the *Purchase And Sale Agreement*. The Plaintiff has not come forward at summary judgment with proof of any alleged damages for this breach of contract claim.

Second, as to the claim for trademark infringement and false endorsement pursuant to 15 U.S.C. § 1125(a), the Court concludes that the Defendant has affirmatively negated an essential element of the claim and/or the Plaintiff's evidence at the summary judgment state is insufficient to establish the nonmoving party's claim for relief. In

granting the Defendants summary judgment on this claim, the Court adopts and incorporates by reference as its reasoning the Defendants arguments and authorities on pages 34-39 of the *Memorandum Of Law (1) In Support Of Defendants' Motion For Summary Judgment And (2) In Opposition To Plaintiff's Motion For Partial Summary Judgment*.

Alleged Negligent Misrepresentation Claim

The Defendants also seek summary judgment on the Plaintiff's negligent misrepresentation claim. It is based on the same factual allegations supporting the Plaintiff's fraud/fraudulent inducement/intentional misrepresentation claim, and which the Plaintiff argues, at a minimum, establishes a claim for negligent misrepresentation.

> At a minimum, Defendant's misrepresentations were negligent. *See Robinson v. Omer*, 952 S.W.2d 423 (Tenn. 1997) ("One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of other in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information").

Response To Defendants' Motion For Summary Judgment And Reply To Defendants' Response To Plaintiff's Motion For Partial Summary Judgment, pp. 8-9 (April 13, 2018).

As a matter of law, the Court concludes that the Defendant is entitled to summary judgment on this claim, with the exception of the $19,500.00 Soon LLC debt represented to be an asset. Except for the representation concerning the $19,500.00 Soon LLC debt,

summary judgment for Defendants dismissing the negligent misrepresentation claim is granted based on the same grounds stated above in granting summary judgment on the fraud/fraudulent inducement/intentional misrepresentation claim. It is undisputed in the summary judgment record that the Defendants did not provide any false information to the Plaintiff in relation to *the Purchase And Sale Agreement*. Without proof that the Defendants provided false information to the Plaintiff, the claim for negligent misrepresentation necessarily fails because the Defendants have affirmatively negated an essential element of the claim. At all times, the Defendants were completely transparent in the information provided to the Plaintiff and the Plaintiff has failed "demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the [Plaintiff]" on this claim. *Rye v. Women's Care Ctr. of Memphis, MPLLC*, 477 S.W.3d 235, 265 (Tenn. 2015).

Alleged Breach of Implied Duty of Good Faith and Fair Dealing

In paragraph 61 of the *Amended Complaint*, the Plaintiff alleges a claim for breach of the implied duty of good faith and fair dealing. In the *Plaintiff's Response To Defendants' Motion For Summary Judgment And Reply To Defendants' Response To Plaintiff's Motion For Partial Summary Judgment*, the Plaintiff explains the basis for this claim.

> 9. Defendants breached their implied duty of good faith and fair dealing by, among other things, (a) continuing to use company trademarks and exploiting company goodwill after the sale (Pl.'s Mot. at Exs. 10-11); (b) failing to assign the above referenced Memphis job to Plaintiff; and (c)

> subcontracting some government jobs to Plaintiff and then failing to pay Plaintiff in a timely manner, bouncing a check intended for payment, and making only partial payment (*id.* at Exs. 12-14).

Plaintiff's Response To Defendants' Motion For Summary Judgment And Reply To Defendants' Response To Plaintiff's Motion For Partial Summary Judgment, p. 7 (April 13, 2018).

As a matter of law, the Court grants the Defendants' *Motion For Summary Judgment* because the implied duty of good faith and fair dealing is not an independent, stand-alone cause of action in Tennessee. Because the Court has granted summary judgment in favor of the Defendants on all of the Plaintiff's contract claims, the claim of the implied duty of good faith and fair dealing necessarily fails as a matter of law. The Court further adopts and incorporates by reference for its reasoning the arguments and authorities on pages 42-43 of *Memorandum Of Law (1) In Support Of Defendants' Motion For Summary Judgment And (2) In Opposition To Plaintiff's Motion For Partial Summary Judgment*.

Alleged Violation of Non-Compete Agreement

The Defendants seek summary judgment on the Plaintiff's claim that the Defendants violated the non-compete agreement in the *Purchase And Sale Agreement*. The basis of the non-compete claim is contained in paragraphs 38-44 of the *Amended Complaint* quoted as follows.

> 38. An Agreement Not to Compete is attached to the Agreement at schedule 8(a)(iii).

39. Paragraph 1 of the Agreement Not to Compete provides as follows:

> For a period of five (5) years from the Effective Date, [Defendants] agree that neither they, nor any business entity with which they are or may become affiliated (or employed by), shall directly or indirectly own, operate, invest in, consult for, benefit from or engage in any Restricted Activities or competitive business engaging in Restricted Activities, whether compensated or not, similar to the Business within the State of Texas, and all portions of the Continental United States that are east of the Mississippi River.

40. "Restricted Activities" is defined in the recitals as "the moving and storage business" but does "not include any activities of [GT Services, LLC] in connection with its SBA 8(A) contract or resulting activities therefrom".

41. In addition, Defendants "affirmatively covenant[ed] to (i) subcontract to [Plaintiff] all moving and storage work within a 250-mile radius of Nashville, Tennessee, and (ii) give [Plaintiff] a first right of refusal regarding all moving and storage work outside a 250-mile radius of Nashville, Tennessee included in any government contract work [Defendants] are awarded or engage in, through the SBA 8(A) Business Development Plan or otherwise…." (Paragraph 1).

42. Despite this plain language, on or about June of 2017, Defendants performed moving services for the United States Citizenship and Immigration Services in Memphis, Tennessee.

43. Defendants did not subcontract this work to Plaintiff and did not give Plaintiff a right of first refusal with respect to the work.

44. Upon information and belief, Defendants have performed other services that violate the Agreement Not to Compete.

Amended Complaint, pp. 8-9, ¶¶ 38-44 (Dec. 4, 2017).

On summary judgment, the Defendants argue that Plaintiff can not prove its claim for breach of the non-compete agreement because "[c]ontrary to Plaintiff's assertion…the

job in Memphis was not 'moving and storage' but waste disposal work." *Memorandum Of Law (1) In Support Of Defendants' Motion For Summary Judgment And (2) In Opposition To Plaintiff's Motion For Partial Summary Judgment*. In support of this argument, the Defendants put forth the *Declaration of Emanuel D. Reed* which stated that "Contrary to Plaintiff's assertions, the government work that GT Services performed on or about June 2017 for the United States Citizenship and Immigrant Services in Memphis was not 'moving and storage,' but rather waste disposal work." *Declaration of Emanuel D. Reed*, p. 10, ¶ 39 (Mar. 29, 2018).

Also included as further proof that the Memphis job did not violate the non-compete agreement was an email attached as *Exhibit 11* to the *Defendants' Motion For Summary Judgment* which show that the "subject line of e-mail communication between the government representative and Defendants is 'Items for Removal'" and "also show photos of the office items to be disposed." *Memorandum Of Law (1) In Support Of Defendants' Motion For Summary Judgment And (2) In Opposition To Plaintiff's Motion For Partial Summary Judgment*, p. 42 (April 2, 2018). This email correspondence also included pictures of various office items that the Defendants argued were to be removed and placed into a waste disposal bin.

In opposition, the Plaintiff claims there is "a genuine and material dispute as to the nature of this job" and pointed to the official government record attached to *Declaration of Emanuel D. Reed* "which classifies the job as 'TRANSPORTATION/ TRAVEL/ RELOCATION-RELOCATION' and 'USED HOUSEHOLD AND OFFICE GOODS

MOVING' and 'US CIS Additional Move – Memphis, TN'. Additionally, on April 17, 2018, the Plaintiff also filed a *Notice of Filing In Support Of Plaintiff's Response To Defendants' Motion For Summary Judgment And Reply To Defendants' Response To Plaintiff's Motion For Partial Summary Judgment* and attached screen shots from the Federal Procurement Data System which show the same description for the services as 'TRANSPORTATION/TRAVEL/RELOCATION-RELOCATION' and 'USED HOUSEHOLD AND OFFICE GOODS MOVING' and 'US CIS Additional Move – Memphis, TN'.

Following the hearing on summary judgment and with permission from the Court, the Defendants filed a *Motion To Strike Plaintiff's Late Filed Exhibit* containing the screen shots of the Federal Procurement Data System on the grounds that (1) it was filed untimely based on the Court's summary judgment scheduling order; (2) it is irrelevant because it references a job not at issue in the Plaintiff's non-compete claim; and (3) it was never authenticated, and is not a self-authenticating document under the Tennessee Rules of Civil Procedure.

On April 24, 2018, the Plaintiff filed a *Response To Defendants' Motion To Strike* arguing that the screen shots should not be stricken because (1) the Defendants included a screen shot of the same website in their notice of filing in support of their motion for summary judgment; (2) the non-compete claim alleged in the Amended Complaint was not limited to just the Memphis job, and the screen shot shows the Defendants performed another job in Memphis worth $83,000.00; and (3) these screen shots from the

government website are self-authenticating under the Federal and Tennessee Rules of Evidence.

In order for the Defendants who do not bear the burden of proof at trial on this claim to prevail on summary judgment, the Defendants must either (1) affirmatively negate an essential element of the Plaintiff's non-compete claim or (2) demonstrate that the Plaintiff's evidence at summary judgment is insufficient to establish the Plaintiff's claim for breach of the non-compete agreement.

The summary judgment rulings on the noncompete claims are that: (1) the Defendants' motion to strike is denied based upon the reasoning stated in the Plaintiff's *Response* and (2) Defendants' motion for summary judgment on the noncompete claims is denied because the record is not sufficiently developed on this point for the Court to determine if there are disputed facts and competing inferences.

Mutual Mistake Not Established And Not Basis For Rescission In This Case

As an alternative justification for seeking the remedy of rescission, the Plaintiff also argues that the facts alleged in the *Amended Complaint* present "a number of instances of mutual mistake." *Motion For Partial Summary Judgment*, p. 1 (Jan. 19, 2018).

Under Tennessee law, "rescission is not favored" and "[a] court may not rescind a contract for mistake unless the mistake is innocent, mutual, and material to the transaction and unless the complainant shows an injury." *Pugh's Lawn Landscape Co.,*

Inc. v. Jaycon Dev. Corp., 320 S.W.3d 252, 261 (Tenn. 2010) (citations omitted); see also *Vakil v. Idnani*, 748 S.W.2d 196, 199–200 (Tenn. Ct. App. 1987) (citations omitted) ("The equitable remedy of rescission is not enforceable as a matter of right but is a matter resting in the sound discretion of the trial court and the court should exercise the discretion sparingly.").

In *Gibbs v. Gilleland*, the Court of Appeals explained the grounds for a claim of mutual mistake.

> A "mistake" is an act that would not have been done, or an omission that would not have occurred, but for ignorance, forgetfulness, inadvertence, mental incompetence, surprise, misplaced confidence, or imposition. *State ex rel. Mathes v. Gilbreath*, 17 Beeler 498, 181 S.W.2d 755, 757 (Tenn.1944); *Williams*, 3 S.W.3d at 509–510. A mistake must relate to a past or present fact, not an opinion as to the future result of a known fact. *Collier v. Walls*, 51 Tenn.App. 467, 495, 369 S.W.2d 747, 760 (1962) (citing *Metro. Life Ins. Co. v. Humphrey*, 167 Tenn. 421, 426, 70 S.W.2d 361, 362 (1934)). "In mistake cases, a 'fact' is something that can be contemporaneously verified, i.e., independently and objectively established at the time of contracting." 21 Steven W. Feldman, *Tenn. Practice Series—Contract Law and Practice* § 6:45 (2006). Some examples of "material and vital" mistakes include mistakes as to the existence of title, location of boundaries, quantities and conditions of land being sold. *Harris v. Spencer*, Williamson Ch. No. 21628, 1995 WL 413391, at *3 (Tenn.Ct.App. July 14, 1995) (citing *Isaacs v. Bokor*, 566 S.W.2d 532, 541 (Tenn. 1978); *Wilson v. Mid–State Homes, Inc.*, 384 S.W.2d 459 (Tenn.Ct.App.1964); *Robinson v. Brooks*, 577 S.W.2d 207, 209 (Tenn.Ct.App.1978)).

Hunt v. Twisdale, No. M2006–01870–COA–R3–CV, 2007 WL 2827051, at *7 (Tenn.Ct.App. Sept. 28, 2007).

> A "mistake" exists in a legal sense when a person, acting on an erroneous conviction of law or fact, executes an instrument that he or she would not have executed but for the erroneous conviction. *Pugh's Lawn Landscape Co., Inc. v. Jaycon Dev. Corp.*, 320 S.W.3d 252, 261 (Tenn.2010). "A court may not rescind a contract for mistake unless the mistake is innocent, mutual, and material to the transaction and unless the complainant shows an injury." *Id.* (citing *Klosterman Dev. Corp. v. Outlaw Aircraft Sales, Inc.*, 102 S.W.3d 621, 632 (Tenn.Ct.App.2002) (quoting *Robinson v. Brooks,* 577 S.W.2d 207, 209 (Tenn.Ct.App.1978)). In order for relief to be granted on the grounds of mistake, the mistake must have been: (1) mutual or fraudulent; (2) material to the transaction; (3) not due to the complainant's negligence; and (4) the complainant must show injury. *Robinson,* 577 S.W.2d at 209 (citing 17A C.J.S. *Contracts* § 418(2) (1978)); *Wilson v. Mid–State Homes, Inc.*, 384 S.W.2d 459 (1964)).

No. M201500911COAR3CV, 2016 WL 792418, at *7 (Tenn. Ct. App. Feb. 29, 2016).

Based upon the above rulings that the Plaintiff's only claim of breach or misrepresentation which survives summary judgment dismissal is the $19,500.00 Soon LLC debt, there is no basis for the remedy of rescission due to mutual mistake to be applied to this case. There were no mutual mistakes.

s/ Ellen Hobbs Lyle
ELLEN HOBBS LYLE
CHANCELLOR

cc by U.S. Mail, email, or efiling as applicable to:
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