**E-FILED**
**10/4/2021 11:58 AM**
**CLERK & MASTER**
**DAVIDSON CO. CHANCERY CT.**

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

| | | |
|---|---|---|
| **GREG CARL, BOB CLAYTON, MATTHEW INGBER, LAWRENCE KAHLDEN, TIM LEAHY, CHRIS MERRITT, MICHAEL MORGAN, JON MORRELL, EDDIE PORTER, STEVE SUSCE, and JOHN ECKERT,** | ) | **Case No. 21-0252-BC** |
| **Plaintiffs,** | ) | **JURY DEMAND** |
| **v.** | ) | |
| **TENNESSEE FOOTBALL, INC. and CUMBERLAND STADIUM, INC.,** | ) | |
| **Defendants.** | ) | |

## ORDER

This matter came to be heard on September 9, 2021, upon the motion of Defendants Tennessee Football, Inc. and Cumberland Stadium, Inc. to dismiss Counts II through VI of Plaintiffs' First Amended Complaint pursuant to Tenn. R. Civ. P. 12.02(6). Having reviewed the pleadings and relevant caselaw, and having considered the argument of counsel, the Court is ready to rule.

## Background

Plaintiffs are holders of several permanent seat licenses ("PSLs") for the Tennessee Titans. Over the course of several years, Plaintiffs purchased these PSLs from Defendants, and all the Plaintiffs sell tickets to third parties for the purpose of making a profit. On March 19, 2021, Plaintiffs filed suit against Defendants, and filed an amended complaint on May 13, 2021 ("Amended Complaint"). The gravamen of the complaint is that Defendants have recently implemented a policy that discriminates against those PSL owners deemed to be "ticket resellers."

In particular, Plaintiffs allege, among other things, that Defendants have increased the price of tickets for those identified as ticket resellers and restricted the ability of PSL owners to transfer their tickets or PSLs. The Amended Complaint alleges that "Plaintiffs and [Defendants] have entered into certain PSL Agreements," Am. Compl. ¶ 51, 73, and identifies four separate "Reserved Seat License Agreements" issued by Defendants: 1) March 15, 1996; 2) March 15, 1999; 3) 2014 or 2015 revision; 4) 2019 revision (hereinafter collectively identified as "PSL Agreements"). Am. Compl. ¶ 35 – 42. The PSL Agreements were not attached to the initial complaint or Amended Complaint due to apparent issues with obtaining same from Defendants. However, after limited discovery between the parties, the PSL Agreements are now included in the record and are incorporated by reference to the Amended Complaint.

The Amended Complaint alleges six causes of action against Defendants:

- Count I – Declaratory Judgment
- Count II – Breach of Contract and Breach of the Duty of Good Faith and Fair Dealing
- Count III – Violation of the Tennessee Consumer Protection Act ("TCPA")
- Count IV – Negligent Misrepresentation
- Count V – Breach of Contract and Breach of the Duty of Good Faith and Fair Dealing (Course-of-Dealing) (in the alternative)
- Count VI – Promissory Estoppel

In support of these claims, Plaintiffs set forth relevant contractual provisions from each of the PSL Agreements. Plaintiffs allege the 1996 and 1999 agreements have similar provisions and set forth relevant contractual provisions in the Amended Complaint:

> Section 2(b) provides: "So long as Licensee timely makes each such payment and subject to the provisions hereof, Licensee shall have the right to maintain the Permanent Seat License in force and to purchase season tickets with respect to the Seats covered hereby for so long as the Team plays its NFL home games in the Stadium. The price of season tickets for the Seats shall be established by the Team."

> Section 3(c): "Subject to restrictions and guidelines established by Licensor, Licensee has the right to transfer by gift, bequest or otherwise the Permanent Seat License and its rights under this Reserved Seat Agreement."
>
> Section 3(f): "Licensor, in its sole and absolute discretion, may limit the number of seats licensed to any one individual or entity."
>
> Section 7: "This Reserved Seat Agreement contains the entire agreement of the parties with respect to the matters provided for herein, and shall supersede any and all oral or written agreements and discussions previously made or entered into concerning the subject matter hereof. No modification hereto shall be valid and enforceable unless in writing and signed by both parties."

As for the 2014 or 2015 revised agreement, Plaintiffs set forth relevant provisions from this agreement in the Amended Complaint:

> Section 3(e): "LICENSOR, IN ITS SOLE AND ABSOLUTE DISCRETION AND WITHOUT REGARD TO GOOD FAITH OR ANY OTHER STANDARD, MAY (i) LIMIT THE NUMBER OF SEATS LICENSED TO ANY ONE INDIVIDUAL OR ENTITY, AND (II) PROHIBIT THE TRANSFER OF PERMANENT SEAT LICENSE(S) TO INDIVIDUALS OR ENTITIES WHICH IT BELIEVES ARE TICKET RESELLERS AND/OR TICEKET [sic] BROKERS. IN THE EVENT A TICKET RESELLER OR TICKET BROKER INTENTIONALLY VIOLATES THE SPIRIT OF THIS SECTION 3(e) BY PURCHASING PERMANENT SEAT LICENSES WITH AFFILIATED AND/OR RELATED INDIVIDUALS AND/OR ENTITIES, LICENSOR RETAINS THE RIGHT TO TERMINATE, UPON DISCOVERY, ALL OF SUCH TICKET RESELLER OR TICKET BROKER'S [sic] (ALONG WITH THE AFFILIATED AND/OR RELATED INDIVIDUAL OR ENTITIES) PERMANENT SEAT LICENSES WITHOUT ANY COMPENSATION TO SAME.

As for the 2019 revised agreement, Plaintiffs allege that this agreement is "similar to the provisions in the 2014 document." Plaintiffs provide that this 2019 document also includes the following relevant contractual provisions:

> Section 3(h)(iv): Licensee agrees that it will not "[v]iolate (a) any of Licensor, Team, NFL and/or any of their third party ticketing vendor's (including, but not limited to, Ticketmaster) rules or regulations regarding the issuance, printing or resell [sic] of any admission ticket, (b) the printed terms on any admission ticket, (c) any Stadium or Licensor rule or regulation, or (d) fail to follow the instructions of Stadium personnel…."

> Section 3(k): "Upon the termination of this Agreement or any Permanent Seat License granted under this Agreement, Licensor may relicense the Seats formerly subject to this Agreement or such Permanent Seat Licenses or otherwise sell season tickets or individual game tickets with respect to such Seats on terms and conditions established by Licensor in its sole discretion, without any further compensation to Licensee."
>
> Section 3(m): "In the event any of Licensee's Permanent Seat Licenses granted herein are transferred or terminated, all parking rights of Licensee, if any, shall be terminable by Licensor, in Licensor's sole discretion."

In its Motion to Dismiss, Defendants seek to dismiss all claims but the declaratory judgment claim. Defendants assert specific arguments to support the dismissal of each claim. The Court will address each claim individually.

## Standard of Review

Defendants' motion to dismiss pursuant to Rule 12.02(6) is governed by well-established provisions of Tennessee law. The resolution of a motion to dismiss "is determined by an examination of the pleadings alone." *Webb v. Nashville Area Habitat for Humanity, Inc.,* 346 S.W.3d 422, 426 (Tenn. 2011). A defendant seeking a motion to dismiss "admits the truth of all of the relevant and material allegations contained in the complaint, but . . . asserts that the allegations fail to state a cause of action." *Id.* (quoting *Freeman*, 172 S.W.3d at 516). Courts considering a motion to dismiss "must construe the complaint liberally, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Id.* (quoting *Trau-Med of Am., Inc. v. AllState Ins. Co.,* 71 S.W.3d 691, 696 (Tenn. 2002). A motion to dismiss may be granted only "when it appears that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." *Collum v. McCool,* 432 S.W.3d 829, 832 (Tenn. 2013).

## Analysis

*Counts II and V – Breach of Contract and Breach of the Duty of Good Faith and Fair Dealing; in the alternative, Breach of Contract and Breach of the Duty of Good Faith and Fair Dealing (Course-of-Dealing)*

Plaintiffs contend that Defendants have breached the PSL Agreements in part by violating the implied covenant of good faith and fair dealing and instituting discriminatory practices against those PSL owners deemed ticket resellers. In the alternative, Plaintiffs contend that, even if Defendants had the discretion to act as they did, they waived the right to do so due to the parties' course of dealing over the years.

In their motion, Defendants contend that Plaintiffs cannot allege a breach of contract claim because the terms of the PSL Agreements are clear, "undermine [Plaintiffs'] claims," and that Plaintiffs cannot rely on the covenant of good faith and fair dealing to modify the terms of the agreements. As to the alternative claim based on the parties' course of dealing, Defendants contend that the express terms of the PSL Agreements control despite any inconsistent course of dealing.

Under Tennessee law, it is "firmly established that the implied covenant of good faith and fair dealing is imposed in the performance and enforcement of every contract." *Jones v. BAC Home Loans Servicing, LP*, No. W2016-00717-COA-R3-CV, 2017 WL 2972218, at *7 (Tenn. Ct. App. July 12, 2017) (citing *Dick Broad. Co., Inc. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 668 (Tenn. 2013)). A claim based on the implied covenant of good faith and fair dealing is not a stand-alone claim, but rather, it is part of an overall breach of contract claim. *Jones v. LeMoyne-Owen Coll.*, 308 S.W.3d 894, 907 (Tenn. Ct. App. 2009) (citing *Lyons v. Farmers Ins. Exch.*, 26 S.W.3d 888, 894 (Tenn. Ct. App. 2000)).

As to Plaintiffs allegation that the parties' course of conduct modified the terms of the PSL Agreements, the Court of Appeals in *Bull Mkt., Inc. v. Elrafei*, No. W2016-01767-COA-R3-CV, 2017 WL 464923 (Tenn. Ct. App. Feb. 3, 2017) provided as follows:

> After a contract is made, it may be modified by express agreement or by conduct that evidences the contracting parties' consent. *Lancaster v. Ferrell Paving, Inc.*, 397 S.W.3d 606, 611-12 (Tenn. Ct. App. 2011). A modification has been defined as "'a change to one or more contract terms which introduces new elements into the details of the contract, or cancels some of them, but leaves the general purpose and effect of the contract undisturbed.'" *Id*. (quoting *Constr. Crane & Tractor, Inc. v. Wirtgen Am., Inc.*, No. M2009–01131–COA–R3–CV, 2010 WL 1172224, at *10 (Tenn. Ct. App. Mar. 24, 2010) (further citation omitted)). A party's agreement to modify a contract "'need not be express, but it may be implied from a course of conduct.'" *Id*. at 612 (quoting *Constr. Crane & Tractor*, 2010 WL 1172224, at *10. The parties' course of conduct in carrying out the contract is the best evidence of their original intent. *Univ. Corp. v. Wring*, No. W2011-01126-COA-R3-CV, 2012 WL 4078517, at *6 (Tenn. Ct. App. Sept. 18, 2012) (citing *Long v. Langley*, W2001-01490-COA-R3-CV, 2002 WL 818224, at *5 (Tenn. Ct. App. Apr. 23, 2002). A new contract is created when a contract is modified, but the original contract is still in effect to the extent that its terms have not been modified. *Constr. Crane & Tractor*, 2010 WL 1172224, at *10.

*Bull Mkt., Inc. v. Elrafei*, No. W2016-01767-COA-R3-CV, 2017 WL 464923, at *3 (Tenn. Ct. App. Feb. 3, 2017).

Here, Plaintiffs have alleged breach of the implied covenant of good faith and fair dealing, but it is not a stand-alone claim and is tied to their breach of contract claim. Defendants argue that the terms of the PSL Agreements are clear and that Plaintiffs cannot rely on the duty of good faith and fair dealing to expand or alter those terms. While the common law duty of good faith "does not create new contractual rights or obligations, it protects the parties' reasonable expectations as well as their right to receive the benefits of their agreement." *Dick Broad. Co. of Tennessee v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 666 (Tenn. 2013) (citing *Long v. McAllister–Long*, 221 S.W.3d 1, 9 (Tenn. Ct. App. 2006)). In addition, contracts can be modified impliedly from a course of conduct and this is true even where the agreement expressly provides that the parties may only

modify the agreement in writing. *Lancaster v. Ferrell Paving, Inc.*, 397 S.W.3d 606, 611-12 (Tenn. Ct. App. 2011) (citing *Constr. Crane & Tractor, Inc. v. Wirtgen Am., Inc.*, No. M2009–01131–COA–R3–CV, 2010 WL 1172224, at *10 (Tenn. Ct. App. Mar. 24, 2010); *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1990); *Coop. Stores Co. v. United States Fid. & Guar. Co.*, 195 S.W. 177, 180 (Tenn. 1917)). As such, the Court finds that Plaintiffs have sufficiently pled their breach of contract claims to survive a motion to dismiss. Moreover, Plaintiffs are owners of multiple PSLs, and at this stage, the parties cannot identify which PSL agreement applies to which particular PSL as Plaintiffs purchased them over the course of many years, further supporting a denial of Defendants' motion to dismiss as to these claims.

*Count III – Violation of the TCPA*

Plaintiffs allege that Defendants' acts and misrepresentations violate the TCPA under Tenn. Code Ann. § 47-18-104(b)(3), (5), and (9). The TCPA prohibits "unfair or deceptive acts or practices affecting the conduct of any trade or commerce." Tenn. Code Ann. § 47-18-104(a). The Act is to be liberally construed consistently with expressed specific purposes that relate to fair consumer practices. *Sherwood v. Microsoft Corp.*, No. M2000-01850-COA-R9CV, 2003 WL 21780975, at *31 (Tenn. Ct. App. July 31, 2003). Section 47–18–104(b) provides a list of "unfair or deceptive acts or practices," and Plaintiffs have specifically referenced those "[c]ausing likelihood of confusion or misunderstanding as to affiliation, connection or association with, or certification by, another," Tenn. Code Ann. § 47–18–104(b)(3), "representing that goods . . . have . . . characteristics . . . . [or] benefits . . . that they do not have," Tenn. Code Ann. § 47–18–104(b)(5), and "advertising goods or services with intent not to sell them as advertised," Tenn. Code Ann. § 47–18–104(b)(9).

In order to recover under the TCPA, a plaintiff must prove: (1) that the defendant engaged in an unfair or deceptive act; and (2) that the defendant's conduct caused an "ascertainable loss of money or property...." *Audio Visual Artistry v. Tanzer*, 403 S.W.3d 789, 809–10 (Tenn. Ct. App. 2012) (citations omitted). Though the TCPA does not define the terms "unfair" or "deceptive," the Tennessee Supreme Court has recognized that a deceptive act or practice is a material representation, practice or omission likely to mislead a reasonable consumer. *Cloud Nine, LLC v. Whaley*, 650 F. Supp. 2d 789, 796–97 (E.D. Tenn. 2009) (citing *Ganzevoort v. Russell*, 949 S.W.2d 293, 299 (Tenn. 1997)).

Defendants first argue that Plaintiffs have not met the enhanced pleading requirements for TCPA claims as required by Tenn. R. Civ. P. 9.02. TCPA claims require specific pleading "to ensure that the defendant receives fair notice of the alleged misconduct or fraudulent acts of which the plaintiff complains in order to prepare a responsive pleading." *Union Ins. Co. v. Delta Casket Co., Inc.*, No. 06-2090, 2009 WL 10665129, at *4 (W.D. Tenn. Dec. 1, 2009) (quoting *Beard v. Worldwide Mortgage Corp.*, 354 F. Supp. 2d 789, 799 (W.D. Tenn. 2005)). Fair notice occurs when "a plaintiff, at a minimum, . . . allege[s] the time, place, and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud." *Union Ins. Co.*, 2009 WL 10665129, at *4 (quoting *Sanderson v. HCA-The Healthcare Co.*, 447 F.3d 873, 877 (6th Cir. 2006)).

Plaintiffs assert Defendants represented to them that the PSLs "had certain characteristics that they did not have," such as the right to purchase season tickets at a fair and reasonable rate comparable to similarly situated seats and that PSL owners had the right to transfer their PSLs. In particular, Plaintiffs point to inaccurate statements made on Defendants' website related to these issues, including that prices of season tickets would be associated with specific zones and that

consumers could transfer their PSLs. Plaintiffs also point to statements made by Defendants to the media, such as the "resale of tickets to NFL games is a common and accepted practice," and to a 2010 brochure regarding the resale of PSL tickets. In addition, the Amended Complaint refers to statements made by Defendants' employee, Tim Zenner, to particular Plaintiffs encouraging them to buy additional PSLs beyond the PSL purchase limit. At this stage, Plaintiffs' factual allegations are adequate to demonstrate their contention that Defendants' position was unfair and deceptive. Because there is sufficient information "to ensure that the defendant receives fair notice of the alleged misconduct or fraudulent acts of which the plaintiff complains in order to prepare a responsive pleading," *Beard*, 354 F. Supp. 2d at 799, the allegations in the Amended Complaint are adequate to withstand the TCPA's heightened pleading requirement.

Defendants next allege that the Plaintiffs' pleadings are inadequate because their TCPA claim does not allege that such conduct caused injury to any plaintiff. Defendants specifically contend that the complaint does not contain an allegation that any plaintiff bought a PSL or unsuccessfully tried to transfer a PSL based on any of the claimed advertisements, misrepresentations, or omissions. Parties seeking recovery under the TCPA must show that the unfair or deceptive acts or practices proximately caused their injuries. *Union Ins. Co.*, 2009 WL 10665129, at *5 (citing *White v. Early*, 211 S.W.3d 723, 741 (Tenn. Ct. App. 2006)). "[P]roximate cause is ordinarily a question for the jury to decide unless the uncontroverted facts and inferences to be drawn from them make it so clear that all reasonable persons must agree on the proper outcome." *Cloud Nine, LLC*, 650 F. Supp. 2d at 798 (quoting *Steamfitters Local Union No. 614 Health and Welfare Fund v. Philip Morris, Inc.*, No. W1999-01061-COA-R9-CV, 2000 WL 1390171, at *2 (Tenn. Ct. App. Sept. 26, 2000)). Here, there is evidence that Plaintiffs have suffered an ascertainable loss of money due to Defendants' conduct. In the Amended Complaint,

Plaintiffs allege that Defendants targeted inflation of ticket prices and restriction of the resale of tickets has caused and continues to cause Plaintiffs to lose money. These are ascertainable economic damages and satisfy the pleading requirements of the TCPA. Therefore, Plaintiffs have sufficiently pled their TCPA claim to withstand a motion to dismiss.

*Count IV – Negligent Misrepresentation*

Plaintiffs also contend that Defendants' various misrepresentations and omissions support a claim for negligent misrepresentation. Defendants argue that this claim should be dismissed because Plaintiffs failed to plead either a duty to disclose or an affirmative misrepresentation. Defendants further contend that a statement regarding future events cannot support a claim of negligent misrepresentation.

Liability for negligent misrepresentation will result if (1) defendant is acting in the course of his business, profession, or employment, or in a transaction in which he has pecuniary interest, (2) defendant supplies faulty information meant to guide others in their business transactions, (3) defendant fails to exercise reasonable care in obtaining or communicating the information, and (4) plaintiff justifiably relies upon the information. *Williams v. Berube & Assocs.*, 26 S.W.3d 640, 644-45 (Tenn. Ct. App. 2000) (citing *Robinson v. Omer*, 952 S.W.2d 423 (Tenn. 1997); Restatement (Second) of Torts § 552)). Nondisclosure of a material fact may also give rise to a claim for negligent misrepresentation when the defendant has a duty to disclose. *Cloud Nine, LLC*, 650 F. Supp. 2d at 799 (citing *Sears v. Gregory*, 146 S.W.3d 610, 620 (Tenn. Ct. App. 2004)).

Generally, "[o]ne party to a transaction usually has no duty to disclose material facts to the other." *Homestead Grp., LLC v. Bank of Tennessee*, 307 S.W.3d 746, 751–52 (Tenn. Ct. App. 2009) (citing *Wright v. C & S Family Credit, Inc.*, No. 01A01–9709–CH–00470, 1998 WL 195954 at *2

(Tenn. Ct. App. Apr. 24, 1998)). The Court of Appeals in *Homestead* identified three exceptions to this general rule:

> Tennessee courts have identified three exceptions to this general rule and have held that a duty to disclose exists: where there is a previous definite fiduciary relationship between the parties; where it appears one or each of the parties to the contract expressly reposes a trust and confidence in the other; or where the contract or transaction is intrinsically fiduciary and calls for perfect good faith such as a contract of insurance which is an example of this last class. *Macon* at 349. Moreover, the courts have extended the duty of disclosure of material facts to real estate transactions under certain circumstances.

*Homestead Grp., LLC*, 307 S.W.3d at 751-52.

> Regarding this point, Plaintiffs Amended Complaint alleges:
>
> 68. The Titans negligently failed to inform Plaintiffs, when they had a duty to do so, that, if they were to buy PSLs, they would be treated fundamentally differently than other PSL owners and that the Titans would actively attempt to destroy the value of the PSLs that Plaintiffs had purchased by, among other things, grossly inflating the prices of the season tickets in an effort to force Plaintiffs to abandon the PSLs and restricting their right to transfer the PSLs to willing purchasers.

Thus, the Amended Complaint appears to assert a claim for negligent misrepresentation based on a failure to disclose; Defendants argue that Plaintiffs cannot allege such a claim because they cannot show that Defendants had such a duty to disclose. In their response to the motion, Plaintiffs do not argue that Defendants had a duty to disclose despite alleging same in their Amended Complaint; instead, Plaintiffs contend that Tennessee law allows for omissions to underlie a negligent misrepresentation claim even absent a fiduciary duty when the omission involves facts basic to the transaction. According to Plaintiffs, Tennessee courts have adopted the Restatement (Second) of Torts § 551, which establishes that "each party to a contract is bound to disclose to the other all he may know respecting the subject matter materially affecting a correct view of it." *Simmons v. Evans*, 206 S.W.2d 295, 296 (Tenn. 1947) (quoting *Perkins v. McGavock*, 3 Tenn. 415, 417 (1813)); *GuestHouse Int'l, LLC v. Shoney's N. Am. Corp*., 330 S.W.3d 166, 196 (Tenn.

Ct. App. 2010). The comments to § 551 provide that "[a] basic fact is a fact that is assumed by the parties as a basis for the transaction itself. It is a fact that goes to the basis, or essence, of the transaction, and is an important part of the substance of what is bargained for or dealt with." *GuestHouse Int'l, LLC*, 330 S.W.3d at 196 (citing Restatement (Second) of Torts § 551 cmts. (1977)). In their response to the motion, Plaintiffs contend that "a fact basic to the PSL transactions at issue would be that the Plaintiffs are treated fairly, not discriminated against, and not intentionally targeted with a scheme to force Plaintiffs to give up their PSLs so that the Titans can snatch them back." However, Plaintiffs reliance on these cases is misplaced. Tennessee courts apply this rule only to sales of physical property or to disputes tangentially related to real estate (like construction disputes). *EPAC Techs., Inc. v. HarperCollins Christian Publ'g, Inc.*, 810 F. App'x 389, 396 (6th Cir. 2020) (citing *Classic City Mech., Inc. v. Potter S. E., LLC*, No. E2015-01890-COA-R3-CV, 2016 WL 5956616, at *14-15 (Tenn. Ct. App. Oct. 14, 2016); *Case Handyman Serv. of Tenn., LLC v. Lee*, No. M2011-00751-COA-R3-CV, 2012 WL 2150857, at *1, 7 (Tenn. Ct. App. June 13, 2012); *Robert J. Denley Co., Inc. v. Neal Smith Const. Co., Inc.*, No. W2006-00629-COA-R3-CV, 2007 WL 1153121, at *1, 6 (Tenn. Ct. App. Apr. 19, 2007)). This is also supported by the Court of Appeals in *Homestead*, cited above, which provided that "the courts have extended the duty of disclosure of material facts to real estate transactions under certain circumstances." *Homestead*, 307 S.W.3d at 751-52.

Thus, the Court finds that Plaintiffs have failed to allege, nor could they, that any of the exceptions exist which would give rise to a claim of fraud based on concealment of a material fact. In reality, the parties negotiated an arms-length transaction which forecloses a claim based on a failure to disclose. *See EPAC Techs., Inc.*, 810 F. App'x at 395. As such, Plaintiffs cannot prove their claim for negligent misrepresentation based on a failure to disclose.

However, Plaintiffs can still bring a claim of negligent misrepresentation based on an affirmative misrepresentation. Plaintiffs contend that they do not solely rely on omissions as the foundation of their negligent misrepresentation claim. Plaintiffs point to paragraph 70 in the Amended Complaint which alleges that "Plaintiffs reasonably relied on these *statements* and/or material omissions made by [Defendants]." (Emphasis added). Plaintiffs further contend that the complaint elsewhere references affirmative misrepresentations that were made in advertisements, brochures, Defendants' website and to individual Plaintiffs by Defendants' representatives or employees. In contrast, Defendants contend that a negligent misrepresentation claim must consist of a statement of a material past or present fact and that Plaintiffs' allegations involve statements regarding future events. For a negligent misrepresentation claim, it is well-settled that the misrepresentation must consist of a statement of a "material past or present fact." *Jones v. BAC Home Loans Servicing, LP*, No. W2016-00717-COA-R3-CV, 2017 WL 2972218, at *11 (Tenn. Ct. App. July 12, 2017) (citing *McElroy v. Boise Cascade Corp.*, 632 S.W.2d 127, 130 (Tenn. Ct. App. 1982)). As such, a statement of intention is not actionable, nor is a representation concerning future events. *Id*. In the Amended Complaint, Plaintiffs allege that Defendants made public statements to the media, on their website, and in other literature and communications that reselling tickets was a "common and accepted" practice and encouraged season ticket holders to resell tickets in order "to get something back on [their] season ticket investment." Am. Compl. ¶ 20 – 23. The Amended Complaint also alleges statements made by Defendants' employee, Tim Zenner, to certain Plaintiffs encouraging the sale of PSLs over the limit. *Id.* At this time, taking all of these allegations as true, there appear to be statements of existing fact capable of supporting a claim for negligent misrepresentation at this time. Thus, Plaintiffs have adequately pled a claim for negligent misrepresentation based on an affirmative misrepresentation.

*Count VI – Promissory Estoppel*

Lastly, Plaintiffs bring a claim of promissory estoppel, relying on statements made by Defendants over the years that their PSLs would continue to have value and could be considered as an investment. In the Amended Complaint, Plaintiffs specifically provide in part:

> 81. As detailed above, the Titans made promises to Plaintiffs over the course of many years that, to the extent they continued to purchase PSLs, those PSLs would continue to have value, that those PSLs could be seen as an investment, and that the Titans would not intentionally make efforts to destroy the value of those PSLs.

Defendants contend that this claim fails because the PSL Agreements address the conduct of which Plaintiffs complain and that promissory estoppel is not available to change the terms of existing contracts.

Tennessee courts describe the doctrine of promissory estoppel as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." *Adams v. Delk Indus., Inc.*, No. 3:19-CV-00878, 2021 WL 354096, at *13 (M.D. Tenn. Feb. 2, 2021) (citing *Alden v. Presley*, 637 S.W.2d 862, 864 (Tenn. 1982) (quoting Restatement (First) of Contracts § 90)). To succeed on their promissory estoppel claim, Plaintiffs are required to show (1) that a promise was made; (2) that the promise was unambiguous and not unenforceably vague; and (3) that they reasonably relied upon the promise to their detriment. *Chavez v. Broadway Elec. Serv. Corp.*, 245 S.W.3d 398, 404 (Tenn. Ct. App. 2007). A claim of promissory estoppel is not dependent upon the existence of an express contract between the parties. *EnGenius Entertainment, Inc. v. Herenton*, 971 S.W.2d 12, 19 (Tenn. Ct. App. 1997). "The key element in finding promissory estoppel is, of course, the promise." *Amacher v. Brown–Forman Corp.*, 826 S.W.2d 480, 482 (Tenn. Ct. App. 1991). Tennessee does not liberally apply the doctrine of promissory estoppel; to

the contrary, it limits application of the doctrine to "exceptional cases where to enforce the statute of frauds would make it an instrument of hardship and oppression, verging on actual fraud." *Chavez,* 245 S.W.3d at 406 (citing *Shedd v. Gaylord Entertainment Co.,* 118 S.W.3d 695, 700 (Tenn. Ct. App. 2003).

Defendants argue that promissory estoppel is not available to "change the terms of existing, valid contracts." *Jones v. BAC Home Loans Servicing, LP*, No. W2016-00717-COA-R3-CV, 2017 WL 2972218, at *10 (Tenn. Ct. App. July 12, 2017). Tennessee courts do not allow promissory estoppel claims to proceed "[w]here the parties have an enforceable contract ... and merely dispute its terms, scope or effect." *Sparton Tech., Inc. v. Util-Link, LLC,* 248 F. App'x 684, 690 (6th Cir. 2007). Despite this, Tennessee courts have permitted promissory estoppel claims to proceed alongside breach of contract claims "where a claim of promissory estoppel was advanced to expand the terms of, not change the terms of, an existing contract." *Adams v. Delk Indus., Inc.*, No. 3:19-CV-00878, 2021 WL 354096, at *15 (M.D. Tenn. Feb. 2, 2021) (citing *Sparton Tech., Inc. v. Util-Link, LLC*, 248 F. App'x 684, 690 (6th Cir. 2007); *Bill Brown Constr. Co. v. Glens Falls Ins. Co.*, 818 S.W.2d 1, 9–11 (Tenn. 1991)). Defendants point to language set forth in the 1996 and 1999 PSL Agreements, which provides, "This Reserved Seat Agreement and the Permanent Seat License granted hereunder should not be viewed or acquired as an investment, and Licensee should not expect to derive any economic profits as a licensee under this Reserved Seat Agreement." The Court also notes the specific language Plaintiffs set forth in the complaint and cited above. All of Plaintiffs' allegations regarding statements, acts, practices and omissions made by Defendants stem from their argument that Defendants encouraged Plaintiffs to buy PSLs, but are now restricting Plaintiffs' ability to resell, increase ticket prices, and other allegations, which affects Plaintiffs ability to make a profit. However, the provisions as set forth by Plaintiffs in their

Amended Complaint address these allegations: a) the 1996 and 1999 agreements allow Defendants to set the price of season tickets and grant the right to transfer PSLs "subject to restrictions and guidelines established by Licensor"; b) the 2014 agreement provides that Defendants may prohibit the transfer of PSLs to those it deems ticket resellers; and c) the 2019 agreement provides that a licensee will not violate Defendants or third party ticketing vendors rules regarding reselling of tickets. Since Plaintiffs allegations go directly to the provisions set forth in the Amended Complaint, they cannot rely on promissory estoppel to change the terms of an existing and valid contract. Thus, the Court finds that Plaintiffs' promissory estoppel claim seeks to change the terms of existing, valid contracts and caselaw indicates that promissory estoppel is not available as a claim for such purposes. *Jones*, 2017 WL 2972218, at *8-10. In light of this and caselaw demonstrating that promissory estoppel claims should not be construed liberally, the Court finds that Plaintiffs promissory estoppel claim cannot survive a motion to dismiss. The Court distinguishes this claim from Plaintiffs' breach of contract claims, as those claims properly seek to modify the terms of the PSL Agreements based on the covenant of good faith and fair dealing, or, alternatively, based on the parties' course of conduct.

**Conclusion**

The Court declines to dismiss Counts II, III, and V of the Complaint pursuant to Rule 12.02(6) and DENIES Defendants' Motion to Dismiss as to those claims. The Court GRANTS in part Defendants' Motion to Dismiss Count IV for Negligent Misrepresentation as it relates to any omission or failure to disclose. The Court further GRANTS Defendants' Motion to Dismiss Count VI for Promissory Estoppel, as the Court finds that Plaintiffs have failed to sufficiently plead that claim.

It is so ORDERED.

*s/Anne C. Martin*
ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

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

John R. Jacobson, Esq.
Timothy L. Warnock, Esq.
Stuart A. Burkhalter, Esq.
Riley Warnock and Jacobson, PLC
1906 West End Avenue
Nashville, TN 37203
jjacobson@rwjplc.com
twarnock@rwjplc.com
sburkhalter@rwjplc.com

Gary C. Adler, Esq.
Adler Law, PLLC
1818 Library Street, Suite 500
Reston, VA 20190
gadler@adlerlawpllc.com

Anthony J. McFarland, Esq.
E. Steele Clayton, IV, Esq.
Wesley S. Love, Esq.
Bass, Berry & Sims, PLC
150 Third Avenue South, Suite 2800
Nashville, TN 37201
amcfarland@bassberry.com
sclayton@bassberry.com
wesley.love@bassberry.com