--- F.Supp.2d ----, 2010 WL 2540481 (D.Me.), 72 UCC Rep.Serv.2d 212
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United States District Court,
D. Maine.
HOUSE OF FLAVORS, INC., Plaintiff
v.
TFG-MICHIGAN, L.P., Defendant.
Civil No. 09-72-P-H.

June 17, 2010.

Background: Ice cream manufacturer brought action against financing company, alleging promissory estoppel and fraudulent inducement to sign equipment lease, based on alleged misrepresentations as to estimated end-of-term buyout value of leased equipment.

Holdings: After bench trial, the District Court, D. Brock Hornby, J., held that:
(1) company fraudulently induced manufacturer to sign equipment lease;
(2) manufacturer failed to state promissory estoppel claim; and
(3) manufacturer was entitled to rescission-type damages and to recover certain rent and security paid under lease.

Judgment for manufacturer in part.

West Headnotes

[1] Fraud 184 3

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184I Deception Constituting Fraud, and Liability Therefor
184k2 Elements of Actual Fraud
184k3 k. In General. Most Cited Cases
Under Utah law, to prevail on a fraudulent inducement claim, the plaintiff must show by clear and convincing evidence that the defendant made a representation of a presently existing material fact that was false and that the defendant knew to be false, or that it made recklessly, knowing that there was insufficient knowledge upon which to base such a representation, for the purpose of inducing the plaintiff to act upon it, and that the plaintiff, acting reasonably and in ignorance of its falsity, did in fact rely upon it and was thereby induced to act to its injury and damage.

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184k24 k. Acts Induced by Fraud. Most Cited Cases
Under Utah law, financing company fraudulently induced ice cream manufacturer to sign equipment lease; company represented that it could close lease-finance deal at buyout price of 12 percent, even though it had not estimated end-of-term value or buyout price for manufacturer, with knowledge that manufacturer wanted to buy equipment at end of lease and wanted solid buyout price from company so it could compare deal with other offers, and manufacturer relied on this misrepresentation when it signed lease, which in turn led to injury in form of difference between what manufacturer expected to pay under lease and what manufacturer actually paid under lease.

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115I Nature and Grounds in General
115k6 k. Certainty as to Amount or Extent of Damage. Most Cited Cases
Under Utah law, remote, contingent, and speculative harm does not constitute a cognizable injury recoverable as damages.

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Under Utah law, the elements of a promissory estoppel claim must be proven by a preponderance of the evidence.

[5] Estoppel 156 85

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156k85 k. Future Events; Promissory Estoppel. Most Cited Cases
To prevail on a promissory estoppel claim under Utah law, a plaintiff must show that (1) it acted with prudence and in reasonable reliance on a promise made by the defendant, (2) the defendant knew that the plaintiff had relied on the promise which the defendant should reasonably expect to induce action or forbearance on the part of the plaintiff or a third person, (3) the defendant was aware of all material facts, and (4) the plaintiff relied on the promise and the reliance resulted in a loss to the plaintiff.

[6] Estoppel 156 85

156 Estoppel
156III Equitable Estoppel
156III(B) Grounds of Estoppel
156k82 Representations
156k85 k. Future Events; Promissory Estoppel. Most Cited Cases
Ice cream manufacturer failed to show that financing company ever promised that it would sell leased equipment at buyout price of 12-percent of cost, precluding manufacturer's Utah-law claim for promissory estoppel; company's oral and written commitments and assurances actually disclaimed any such promise to sell, as any misrepresentation concerned then-existing fact, rather than any future fact.

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95k274 k. Operation and Effect. Most Cited Cases
Under Utah law, rescission traditionally is not technical, but practical; it is designed to restore the parties to the status quo to the extent possible or as demanded by the equities in the case.

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50k22 k. Termination, Rescission, and Option to Purchase Property. Most Cited Cases
Ice cream manufacturer was entitled to rescission-type remedy in its Utah-law claim against financing company for fraudulent inducement to sign equipment lease; to put parties back in status quo ante, all that was required was to transfer title to equipment back to manufacturer and cancel lease contract. West's U.C.A. §§ 70A-2a-501(4), 70A-2a-505(4, 5), 70A-2a-508(1)(a).

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In its fraudulent inducement claim, ice cream manufacturer was entitled to recover rent and security paid to financing company to extent of disgorging $14,097, which was amount company had received as monthly rental payments pursuant to lease above expected amount based on implicit interest rate manufacturer thought it had obtained based on company's fraud, $13,000 for extra financing fees that manufacturer incurred to maintain its letter of credit beyond termination of initial lease, any security deposit paid under lease, and release of letter of credit and other security provided by manufacturer to company. West's U.C.A. § 70A-2a-508(1)(b).

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184k49 k. Issues, Proof, and Variance. Most Cited Cases
Ice cream manufacturer, in its complaint for fraudulent inducement under Utah law, requested all available relief under Utah law, and thus company was on notice that rescission was possible outcome in action and manufacturer did not waive its claim to rescission-type relief by purportedly retaining benefits of equipment lease after discovering alleged fraud and raising rescission claim only on eve of trial.
Lee H. Bals, Marcus, Clegg & Mistretta, P.A., Portland, ME, for Plaintiff.

Alexia Pappas, Verrill Dana LLP, Portland, ME, Richard F. Ensor, Vantus Law Group, Salt Lake City, UT, for Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

D. BROCK HORNBY, District Judge.

***1** This is a lawsuit over whether a financing company fraudulently induced an ice cream manufacturer to sign an equipment lease by misrepresenting that it had estimated an end-of-term buyout value for the leased equipment and by providing that value to the ice cream manufacturer to make the offered lease appear commercially competitive. I conducted a bench trial on April 13-15, 2010. These are my findings of fact and conclusions of law.

I. FINDINGS OF FACT

1. House of Flavors is an ice cream maker, incorporated under Michigan law, with its corporate headquarters in Maine and its manufacturing plant in Michigan. House of Flavors is a subsidiary of Protein Holdings, Inc.

2. At all relevant times, Whitcomb Gallagher was and is the president of House of Flavors and the president and chief executive officer of Protein Holdings, Inc.

3. Tetra Financial Group ("Tetra") is a Utah limited partnership in the business of equipment leasing. TFG-Michigan is Tetra's operating entity in Michigan.

4. Scott Scharman was the executive vice president of Tetra in 2005-2006 and is currently its chief executive officer.

5. Ryan Secrist was a senior vice president (sales manager) at Tetra in 2005-2006 and is currently Tetra's executive vice president.

6. Greg Emery was a national account executive (salesman) at Tetra in 2005-2006 and is currently a senior vice president at Tetra.

7. In 2005, House of Flavors had production problems because ice cream containers at the bottom of pallets were compacting due to the ice cream being insufficiently hardened (frozen).

8. As a result, House of Flavors decided to acquire an additional ice cream hardening system to remedy the problem.

9. Coincidentally, in October 2005, Tetra's Emery cold-called Sarah Holmes, vice president of finance at House of Flavors, to inquire whether there were possible projects at House of Flavors that Tetra might finance.

10. Holmes told Emery about the plan to acquire a hardening system and asked Emery about **Tetra's** ability to structure different kinds of financing deals. Emery said that **Tetra** could offer financing through either a capital **lease** with a fixed buyout or an operating **lease** with end-of-term options to purchase the equipment, extend the **lease**, or return the equipment.

11. In October 2005, House of Flavors met with its bank and decided that, given the soft costs related to installation of a hardening system, a bank loan (which under its bank term loan agreement was limited to financing of hard assets) was not feasible.

12. Thereafter, House of Flavors sought to finance the project through a **lease** with either **Tetra** or another financing company, Orix.

13. On about October 18, 2005, Gallagher began discussing House of Flavors's financing needs with Tetra's Emery. Secrist subsequently joined the negotiations.

14. Gallagher explained that he wanted to develop a

long-term business relation with a leasing company.

15. Gallagher told Emery and Secrist that House of Flavors intended to buy the hardening system at the end of any lease.

***2** 16. Secrist told Gallagher that for tax reasons **Tetra** could not put a fixed buyout price into a **lease**.

17. On October 28, 2005, **Tetra** sent Gallagher a draft letter of intent to fund House of Flavors's acquisition of a spiral tunnel hardening system for $1,500,000 by means of a five-year operating **lease**. *See* Letter of Intent from Whitcomb W. Gallagher to **Tetra** (Oct. 28, 2005) (Def.'s Ex. 2) ("Letter of Intent").[FN1] The Letter of Intent provided three options at the end of the **lease**: (i) House of Flavors could purchase the equipment at a price "not [to] exceed twenty percent (20%) of the original cost of equipment"; (ii) House of Flavors could extend the **lease**; or (iii) House of Flavors could return the equipment to **Tetra**. *Id.*[FN2] The Letter of Intent also stated that the **lease** would be a tax **lease** and that **Tetra** would receive all benefits of ownership of the leased equipment. *Id.*

18. Gallagher called Emery and Secrist to discuss the Letter of Intent and told them that the twenty-percent buyout cap was not acceptable to him and that he needed an agreement about the end-of-term purchase price.

19. Gallagher explained that he previously had an equipment lease in which the buyout price had not been set and that he ended up paying much more than anticipated.

20. In response, Emery and Secrist told Gallagher that the twenty percent figure was a cap, but that most deals with Tetra closed with a buyout in the ten-to-twelve percent range and that Tetra could probably accomplish the same for House of Flavors.

21. In early November 2005, House of Flavors learned that a tri-tray hardening system would be auctioned in Maryland.

22. On November 10, 2005, the chief operating officer of House of Flavors attended the auction in Maryland and purchased the system for $105,000.

23. On November 15, 2005, Gallagher informed Emery that the equipment had been purchased and, at Emery's request, sent him a document detailing three funding scenarios, each of which included both hard costs for the tri-tray system and associated equipment and soft costs for transportation, assembly, and installation of the system in the House of Flavors plant.

24. To prepare for a later conference call with Secrist and Emery, Gallagher created agenda notes reflecting his need for a fixed buyout price. *See* E-mail from Emery to Gallagher, with Notes (Nov. 15, 2005) (Pl.'s Ex. 6).

25. Gallagher wanted a buyout price from Tetra in order to compare Tetra's financing package with financing offered by Orix.

26. On November 18, 2005, during the scheduled conference call, Gallagher pressed Secrist and Emery about locking down a buyout price and repeated his concerns with the twenty percent cap in Tetra's proposal. Secrist and Emery explained to Gallagher that the twenty percent cap had been included in the Letter of Intent because any number less than twenty percent would preclude Tetra from reaping certain tax advantages.[FN3] But Secrist and Emery said that Tetra could provide a side letter reflecting a buyout value of twelve percent of cost.[FN4] Secrist also assured Gallagher that Tetra had never lost a deal due to documentation issues and that he would not pursue a deal on terms that he did not think could be approved. *See* Handwritten Notes (Nov. 15, 2005) (Pl.'s Ex. 8).

***3** 27. During this conversation, Secrist and Emery knew that they were competing for House of Flavors's business and that Gallagher needed a valuation of the buyout price to compare it to competing proposals.[FN5] As Emery remembered the conversation, Gallagher told him, "I need to make sure the economics work on our end comparing it to our other options."

28. In response to Gallagher's concerns about the end-of-term price, Secrist modified a pre-existing side letter from a different transaction and sent it to Gallagher on November 22, 2005. This letter stated:

> Pursuant to our conversation, we have reviewed the list of property expected to be purchased and have estimated an end of term value of ten percent (10%) of its original cost. Please note that this end of term value estimation is not intended to represent a commitment by you, or an obligation by us, to buy or sell the equipment, as the case may be for that, or any other price at the conclusion of the Base (or extended, if applicable) Lease Term.

Letter from Secrist to Gallagher (Nov. 22, 2005) ("first side letter") (Joint Ex. 2).

29. When Secrist sent the first side letter, he and Emery knew that no one at Tetra had estimated or otherwise calculated an end-of-term value for the leased equipment either by appraising the equipment or by determining Tetra's cost of funds and necessary profit margin.[FN6]

30. When Gallagher received the first side letter, he was surprised by the estimate at ten percent of cost rather than the twelve percent that he had discussed with Secrist, but he surmised that Tetra had re-run its numbers and had determined that it could offer a better deal.

31. Shortly after receiving the first side letter, Gallagher signed the Letter of Intent and sent it to Tetra.

32. Tetra later told Gallagher that the deal could not go forward without additional security.

33. Gallagher then contacted Orix and asked Orix to put together a new proposal.

34. Thereafter, Gallagher had one or two phone conversations with Secrist in which Secrist told him that he could not get the deal approved with a ten percent buyout, but assured Gallagher that he could get the deal approved with a twelve percent buyout.

35. On December 22, 2005, Tetra informed House of Flavors by e-mail that the financing had been credit-approved on the condition that House of Flavors provide a security deposit and a letter of credit. Tetra stated that "[a]ll other terms and conditions of the initial proposal will remain the same." E-mail & Attach. from Secrist to wgallagher@proteingroup.com (Dec. 22, 2005) (Joint Ex. 3).

36. Shortly after receiving the revised terms from Tetra, Gallagher-apparently not yet content with the Tetra deal-told Holmes that he would "giv [e] Orix the go[-]ahead." E-mail from Gallagher to Holmes (Dec. 22, 2005) (Def.'s Ex. 31). But House of Flavors's deal with Orix never was submitted for credit approval.

37. On January 5, 2006, Gallagher informed Secrist that House of Flavors accepted **Tetra's** revised terms and requested that **Tetra** begin preparing **lease** documents.

***4** 38. Shortly thereafter, also on January 5, 2006, Emery sent Gallagher a revised side letter ("second side letter") from Secrist, identical to the first side letter except that it referred to Tetra's December 22, 2005 e-mail and stated that Tetra estimated an end-of-term value at *twelve* percent of the equipment's original cost.

39. In fact, as Secrist knew, contrary to the side letter, no one at Tetra had estimated or otherwise calculated an end-of-term value for the leased equipment by January 5, 2006.

40. In March 2006, **Tetra** and House of Flavors executed a **lease**, dated January 13, 2006, that provided:

> a. House of Flavors had three options at the end of the **lease** term: (i) "purchase all, but not less than all" of the equipment "for a price to be agreed upon" by the parties; (ii) "extend the **Lease** for twelve (12) additional months"; or (iii) return the equipment. Master **Lease** Agreement § 19(d) (Joint Ex. 10).
>
> b. If the parties could not agree on a price and if House of Flavors elected not to return the equipment, the **lease** extended for twelve months. *Id.*
>
> c. "At the conclusion of the extension period ... the **Lease** shall continue in effect ... for successive periods of six (6) months each subject to termination at the end of any such successive six-month period" by either party upon notice. *Id.*
>
> d. **Tetra** had all rights of ownership. *Id.* § 8(a).

e. The **lease** was an integrated contract, *id.* § 19(a), governed by Utah law, *id.* § 19(f).

Contrary to the Letter of Intent and the side letters, the **lease** did not include either a fixed purchase price or a cap on a purchase price. No provision in the **lease** provided for transfer of ownership to House of Flavors at the end of any extension period. Nevertheless, Secrist and Scharman (**Tetra's** CEO) testified that, if House of Flavors did not purchase or return the tri-tray system at the end of the base **lease** term, ownership of the equipment would transfer automatically from **Tetra** to House of Flavors after eighteen months (a twelve-month extension and a six-month extension).[FN7]

41. House of Flavors provided Tetra with a $502,296 letter of credit and a security deposit of $35,502. House of Flavors, Inc. Fin. Statements, Years Ended Sept. 30, 2007 & Sept. 24, 2006, at 14 (Joint Ex. 13); House of Flavors, Inc. Fin. Statements, Years Ended Sept. 28, 2008 & Sept. 30, 2007, at 13 (Joint Ex. 14).

42. From March to August 2006, Tetra funded the installation of the tri-tray system in the House of Flavors plant at a cost of $1,435,130.36.

43. On August 30, 2006, House of Flavors executed a bill of sale of the tri-tray system, transferring ownership of the equipment to Tetra. *See* Bill of Sale (Joint Ex. 15).

44. Also on August 30, 2006, House of Flavors and **Tetra** executed an amended **lease** schedule that incorporated by reference the terms and conditions of the Master **Lease** Agreement and provided for a thirty-six month base **lease** term, total funding of $1,435,130.36, and monthly payments of $43,972.39 (plus tax). Am. & Restated **Lease** Schedule No. 1 (Def.'s Ex. 11).[FN8]

***5** 45. Holmes prepared financial statements for House of Flavors's internal use reflecting the twelve percent end-of-term value,[FN9] but House of Flavors's external auditors did not include it in financial statements because the lease provided for three end-of-term options.

46. In August 2008, Gallagher approached **Tetra** about an early termination of the **lease** by means of a buyout.

47. To provide Gallagher with a buyout price, Scharman reviewed Tetra's documentation file for the House of Flavors transaction. The file did not include the first or the second side letters about end-of-term value that Secrist had sent Gallagher.

48. On August 28, 2008, Tetra informed House of Flavors that House of Flavors could buy the tri-tray system for $542,958.26, approximately forty percent of the original cost of the equipment. *See* E-mail from Secrist to wgallagher @proteingroup.com (Aug. 27, 2008) (Joint Ex. 11).

49. Gallagher asked Secrist why Tetra was not offering a price at twelve percent in accordance with the second side letter, and Secrist stated that he did not have the side letter. Gallagher then sent him a copy.

50. When Scharman asked Secrist about the status of the House of Flavors account, Secrist told him that Gallagher was frustrated with the forty percent offer and told Scharman about the side letters.

51. Scharman did not investigate the circumstances that led Secrist to send either the first or the second side letter to Gallagher.

52. Tetra subsequently offered a buyout option at thirty-five percent and later at thirty percent of cost, but Gallagher refused to budge from the twelve percent estimate of the second side letter.

53. On January 30, 2009, House of Flavors notified **Tetra** of its intention to purchase the equipment at twelve percent of cost pursuant to the side letter of January 5, 2006. Letter from Whitcomb Gallagher to **Tetra** Re: Master **Lease** Agreement (Jan. 30, 2009) (Def.'s Ex. 29).

54. Tetra did not formally respond to House of Flavors's January 2009 attempt to exercise the option to buy at twelve percent of cost.

55. In February 2010, House of Flavors incurred additional financing fees of approximately $13,000 to maintain its $502,296 letter of credit as a guaranty on the **Tetra lease**.

56. As of April 14, 2010, House of Flavors had paid **Tetra** $1,769,319 pursuant to the **lease**.[FN10]

II. CONCLUSIONS OF LAW

1. House of Flavors is a Maine corporation; **Tetra** is a Utah limited partnership; more than $75,000 is at stake. Jurisdiction is therefore based on diversity of citizenship. 28 U.S.C. § 1332(a). The **lease** provides, and the parties agree, that Utah law governs the substantive issues.

A. Fraudulent Inducement

[1] 2. Under Utah law, to prevail on its fraudulent inducement claim, House of Flavors must show by clear and convincing evidence that Tetra made a representation of a "presently existing material fact," that was false and that Tetra knew to be false (or that it made recklessly, knowing that there was insufficient knowledge upon which to base such a representation), for the purpose of inducing House of Flavors to act upon it; and that House of Flavors, acting reasonably and in ignorance of its falsity, did in fact rely upon it and was thereby induced to act to its injury and damage. *Daines v. Vincent*, 190 P.3d 1269, 1279 (Utah 2008) (citation omitted).

(i) Representation of a Presently Existing Material Fact

***6** [2] 3. In November 2005, Secrist (and Emery) represented to Gallagher that **Tetra** typically could close **lease**-finance deals at buyout prices of between ten and twelve percent of cost; that **Tetra** had, in fact, run the numbers on the House of Flavors deal; and that **Tetra** had estimated an end-of-term value and buyout price at ten percent of original cost for this deal. Later, they changed that number to twelve percent.

4. Whether Tetra had in fact run the numbers on the deal and could provide Gallagher with an end-of-term value or buyout price that he could use in valuing the Tetra deal, as compared to that of a competitor, was a then presently existing material fact.

(ii) Falsity

5. Secrist and Emery knew that their assertion was false because they knew that Tetra had not estimated an end-of-term value or buyout price for the House of Flavors deal by either reviewing or appraising the equipment or calculating the cost of funds. Their representation that Tetra had calculated an end-of-term value or buyout price at ten (or twelve) percent of cost was knowingly false.

(iii) Purpose of False Representation

6. Secrist and Emery knew both that Gallagher wanted to buy the tri-tray system at the end of any **lease** and that he wanted a solid buyout price from **Tetra** in order to value the deal and compare it to other offers. Gallagher had told them that he could not agree to a deal without a buyout number. Secrist and Emery told Gallagher that **Tetra** had estimated the buyout price in order to persuade him to sign a **lease** with **Tetra** rather than with a competitor.

At trial, Secrist and Emery testified that Gallagher came up with a twelve percent value on his own and that Gallagher knew that no one had actually appraised the equipment or "estimated" its cost. I find this testimony not credible. Gallagher testified that he understood that to evaluate the transaction, **Tetra** would analyze the economics of the deal to determine a buyout price that guaranteed **Tetra** an acceptable profit. Gallagher made clear that he wanted to know that price so that he could value the deal against the competition. Whatever the phrase "estimated an end of term value of ten percent" means in the first side letter, it certainly does not mean that **Tetra** had done *nothing.* Rather, at a minimum, the plain language of both side letters states that **Tetra** had done a calculation of some kind. **Tetra's** witnesses could not explain why Gallagher would request a financially and legally meaningless estimate. **Tetra** also could not explain why it would provide such a letter-especially considering that Secrist and Emery knew that if **Tetra** provided a nominal buyout price, it would probably not be able to maintain its preferred tax treatment of the **lease**. By contrast, Gallagher convincingly testified that he was worried, given prior experience, that House of Flavors could end up on the hook for more than it bargained for and that he needed a reliable estimate from **Tetra** of the **lease's** total cost. Gallagher may have floated the idea that to be competitive, **Tetra** had to offer a buyout price in the ten-to-twelve percent range. However, I find that the evidence is overwhelming that Secrist and Emery

gave Gallagher the fraudulent end-of-term value/price estimate to get him to finance the project with **Tetra**.

(iv) Reasonable Reliance

***7** 7. Secrist and Emery did not tell Gallagher that **Tetra** had not actually calculated a buyout price; Gallagher did not know that Secrist had simply recycled an existing side letter in sending the "estimate." In context, the side letter appeared genuine. It referred to a previous conversation and to a list of property to be purchased. Gallagher had a previous conversation with Secrist and Emery days before about a buyout price and, at Emery's request, had sent **Tetra** a list of equipment. House of Flavors could and did reasonably rely on the representation that **Tetra** had estimated an end of term value of ten, then twelve, percent, that would guide the final buyout. While the letter did not, on its face, create a contract or promise to sell, it could reasonably be understood as a reliable representation that **Tetra** had evaluated the economics of the transaction and calculated that it could make a sufficient profit by selling the equipment at the end of the term for twelve percent of cost, within the range that Emery and Secrist told Gallagher that **Tetra** usually operated. The fact that the letter did not create a legally binding commitment to buy or to sell is consistent with the structure of the **lease** as a tax **lease** because it maintains all three end-of-term options and does not contractually bind **Tetra** to offer a nominal price for the buyout.

8. As a result of **Tetra's** fraud, House of Flavors entered into a **lease** contract by which it has spent, or will have to spend, more money than it otherwise would have if the fraud had not occurred.

9. **Tetra** argues that as a matter of law, Gallagher could not have reasonably relied on Secrist's and Emery's false oral representations about their estimation of the buyout price given **Tetra's** later, contradictory written statements both in the side letters and in the **lease** itself. *See* Def.'s Post-Trial Br. at 13 (Docket Item 92). **Tetra** relies on *Gold Standard v. Getty Oil Co.*, 915 P.2d 1060, 1068 (Utah 1996), where the Utah court stated that "a party cannot reasonably rely upon oral statements by the opposing party in light of contrary written information," *id.* at 1068 (citation omitted). But the Utah court has also held more recently that reasonable reliance on oral representations that conflict with written materials depends on the "facts of the individual case." *See* *Youngblood v. Auto-Owners Ins. Co.*, 158 P.3d 1088, 1096 (Utah 2007).[FN11] At trial, there was no evidence that **Tetra** told House of Flavors that the buyout price was completely open [FN12] or that Gallagher learned that Secrist and Emery had lied about the value estimate before House of Flavors signed the **lease**. Rather, the evidence is that **Tetra** explained the peculiarities of the language in the side letters by representing to House of Flavors that it could not include a provision for the purchase of the equipment at less than twenty percent of cost or it would lose the ability to treat the financing arrangement as a tax **lease**. Moreover, rather than contradicting the first side letter, **Tetra** reemphasized its content and reassured Gallagher that it had calculated a reliable buyout price by sending the second side letter in January 2006.[FN13] Thus, House of Flavors could reasonably believe that **Tetra** had calculated the financing of the deal and that a twelve percent purchase price would give it a satisfactory profit and guide its negotiations on a buyout price. Gallagher needed to know this in order to determine both whether to go forward with the deal and whether **Tetra's** offer was competitive with other financing arrangements.

***8** I conclude that Gallagher reasonably relied on Secrist's and Emery's oral and written representations that Tetra had calculated an end-of-term value/buyout price based on the information that he had provided.

(v) Reliance in Fact

10. Gallagher relied on the end-of-term value/buyout price provided by **Tetra** to determine how much the **lease** would cost House of Flavors and considered the **Tetra** deal to be a viable option because he could calculate a total cost. He testified credibly that he would not have signed the **lease** with **Tetra** without assurances about the final cost of the **lease**. House of Flavors's internal bookkeeping also reflects that the company had relied on **Tetra's** representations as to the total cost of the transaction.

(vi) Injury

[3] 11. **Tetra** argues that House of Flavors has not shown by clear and convincing evidence that it has been injured. Def.'s Post-Trial Br. at 13-14. [FN14] In Utah, as in most jurisdictions, remote, contingent,

and speculative harm does not constitute a cognizable injury. *See Graham v. Street*, 2 Utah 2d 144, 270 P.2d 456, 459 (1954). But the injury here is not speculative. The difference between what House of Flavors could expect to have paid, if **Tetra** had honestly estimated the end-of-term value of twelve percent price, and what House of Flavors has now in fact paid **Tetra** can be calculated easily. *See Atkin Wright & Miles v. Mountain States Tel. & Tel. Co.*, 709 P.2d 330, 336 (Utah 1985) (explaining that if evidence "give[s] rise to a reasonable probability that the plaintiff suffered damage as result of a breach [,] ... [t]he amount of damages may be based upon approximations"). If at the end of the **lease's** base term, House of Flavors had been able to purchase the equipment at twelve percent of cost, the total cost of the **lease** would have been less than the $1,769,319 that the parties have stipulated that House of Flavors has already paid **Tetra**.[FN15] Thus, House of Flavors has proven the *fact* of injury by clear and convincing evidence.

12. I therefore conclude that House of Flavors has proven all the elements of fraudulent inducement under Utah law.

B. Promissory Estoppel

[4] 13. Under Utah law, the elements of estoppel must be proven by a preponderance of the evidence. *See Andreason v. Aetna Cas. & Sur. Co.*, 848 P.2d 171, 176 (Utah Ct.App.1993).

[5] 14. House of Flavors pleaded promissory estoppel, which applies when "a party promises that things will be a given way in the future, knowing at the time of the promise all of the material facts, but is ultimately wrong, and where the other relied on that promise in acting." *Youngblood*, 158 P.3d at 1092. To prevail on a promissory estoppel claim, a plaintiff must show that "(1) [it] acted with prudence and in reasonable reliance on a promise made by the defendant; (2) the defendant knew that the plaintiff had relied on the promise which the defendant should reasonably expect to induce action or forbearance on the part of the plaintiff or a third person; (3) the defendant was aware of all material facts; and (4) the plaintiff relied on the promise and the reliance resulted in a loss to the plaintiff." *Id.* (citation omitted).[FN16]

***9** [6] 15. House of Flavors has not shown that Tetra ever *promised* that it would sell the equipment at a buyout price of twelve percent of cost. Instead, the oral and written commitments and assurances disclaim any such promise to sell. The misrepresentation here concerned not a future fact but a presently existing fact.

16. I conclude therefore that House of Flavors has not proven promissory estoppel.

C. Remedy

17. House of Flavors has chosen not to seek money damages and instead seeks equitable relief such as rescission or specific performance. Pl.'s Trial Br. at 1 (Docket Item 65) (rescission); Pl.'s Post-Trial Br. at 4 (Docket Item 93) (specific performance of buyout at twelve percent of cost); Compl. at 9 (Prayer for Relief for Fraud) (Docket Item 1) ("Plaintiff demands ... such relief and remedy for fraud as the Court may deem to be appropriate ... and for such other and further relief as the Court may deem just and proper.").

[7] 18. The Utah Uniform Commercial Code ("UCC") provides: "Rights and remedies for material misrepresentation or fraud include *all* rights and remedies available under this chapter [concerning leases] for default." Utah Code Ann. § 70A-2a-505(4) (emphasis added). One of those remedies is that the lessee may "cancel the lease contract" and "recover so much of the rent and security as has been paid and is just under the circumstances." Utah Code Ann. § 70A-2a-508(1). This is obviously an equitable remedy, analogous to rescission.[FN17] I observe that under Utah law, rescission traditionally is not technical, but practical. *Ong Int'l (U.S.A.) v. 11th Ave. Corp.*, 850 P.2d 447, 457 (Utah 1993) ("The status quo rule 'is not a technical rule, but rather it is equitable, and requires practicality in adjusting the rights of the parties.' ") (quoting *Dugan v. Jones*, 724 P.2d 955, 957 (Utah 1986)). It is designed "to restore the parties to the status quo *to the extent possible or as demanded by the equities* in the case." *Dugan*, 724 P.2d at 957 (emphasis added) (citations omitted).[FN18] Moreover, as further explained below, "[n]either rescission nor a claim for rescission ... may bar or be deemed inconsistent with a claim for damages or other right or remedy." Utah Code Ann. § 70A-2a-505(5); *see also* Utah Code Ann. § 70A-2a-501(4) (providing that remedies under Article 2a are "cumu-

lative").

[8] 19. **Tetra** argues that principles of rescission would be extremely difficult to apply here because, to unwind the transaction completely, House of Flavors would need to tear out all the equipment that it did not possess prior to the **lease** and "turn over to [**Tetra**] all of the benefits House of Flavors enjoyed by virtue of the use of all the equipment." Def.'s Post-Trial Br. at 9. **Tetra** maintains that fully unwinding the transaction would require "extensive discovery and expert opinion regarding the value of the property and both the nature and the extent of the benefits it conferred on House of Flavors as well as the value of those benefits." *Id.*

***10** Applying principles of rescission in this case is not so complicated, however, especially given the flexibility of the UCC's remedy provisions. **Tetra** loaned money-$1,435,130.36-to House of Flavors through a **lease** financing transaction. The benefit to House of Flavors was the value or cost of borrowing that money. In exchange, House of Flavors conveyed title to the ice cream hardening system to **Tetra** and paid **Tetra** a total of $1,769,319 in monthly rental payments for the thirty-six month base term and part of a twelve-month extension period.[FN19] To put the parties back in the *status quo ante*, title to the hardening system must transfer from **Tetra** back to House of Flavors. (**Tetra's** Scharman and Secrist testified that **Tetra** always planned on that outcome, and **Tetra's** attorney argued that both parties understood that the **lease** provided for transfer of title.) This can be accomplished by a transfer of title now.[FN20] In addition, it is necessary to "cancel the **lease** contract" under the statutory remedy. Utah Code Ann. § 70A-2a-508(1)(a).

[9] The remaining question is how much House of Flavors should recover of the rent or security that it has paid to **Tetra**. The UCC allows a defrauded party to recover "so much of the rent and security as has been paid and is just under the circumstances." Utah Code Ann. § 70A-2a-508(1)(b). To determine what is just here, I consider that if the remedy were common law rescission, House of Flavors would have to return the loan of $1,435,130 to **Tetra** and pay **Tetra** "the fair rental value" or interest on the loan. *Dugan*, 724 P.2d at 957. House of Flavors has already paid back the principal of the loan in full. The question is thus how much interest House of Flavors should pay on the loan. House of Flavors notes that Gallagher testified that Orix offered a financing package with a 7.67 percent interest rate on December 22, 2005 (with a one dollar end-of-term buyout option) and argues that I should treat the Orix rate as a reasonable market rate of interest. Pl.'s Post-Trial Br. at 7 (Docket Item 93). However, I observe that House of Flavors did not successfully consummate the Orix deal at 7.67 percent. At trial, moreover, Scharman testified that **Tetra** borrowed money for this transaction from Republic Bank at 9.5 percent interest, a higher amount. It is reasonable to infer from the trial testimony that **Tetra**, as a leasing company with a regular relationship with a syndicate bank, could borrow on better terms than House of Flavors, which was highly leveraged in 2005-2006. I conclude that 7.67 percent interest, therefore, is too low an interest rate for House of Flavors to pay.[FN21] Gallagher testified, however, that based on his calculations, he considered the implicit interest rate in the **Tetra** transaction (with a buyout at twelve percent of cost) to be commercially competitive. Gallagher Trial Test. Tr. 50:2-14, Apr. 13, 2010 (Docket Item 94).[FN22] I conclude that it is just under the circumstances for House of Flavors to pay interest at the implicit rate that Gallagher believed he had obtained based on **Tetra's** fraud. The cost of the transaction that Gallagher believed he had was $1,755,222 (thirty-six monthly payments of $43,972.39 plus a buyout at twelve percent of cost or $172,216). That value is also the baseline for determining that House of Flavors has suffered an injury due to **Tetra's** fraud. **Tetra** must therefore disgorge any monies it has received from House of Flavors in excess of $1,755,222. Based on the parties' stipulation that House of Flavors has paid a total of $1,769,319, **Tetra** must disgorge $14,097.[FN23] (If House of Flavors has continued to make payments after the effective date of the stipulation, **Tetra** must also disgorge those payments.) **Tetra** must also reimburse House of Flavors $13,000 for extra financing fees that House of Flavors incurred to maintain its letter of credit beyond September 2009 and must return to House of Flavors any security deposit paid under the **lease** and release the letter of credit and other security provided by House of Flavors to **Tetra**.

***11** [10] 20. **Tetra** argues that House of Flavors waived any claim to rescission-type relief by retaining the "benefits of the **lease** after discovering the alleged fraud in August 2008, by declining to assert a rescission claim in its January 2009 complaint, and by failing to bring a claim for rescission until days

before trial in March 2010." Def.'s Post-Trial Br. at 4. But in its Complaint, House of Flavors requested all available relief that Utah law provides for fraud. *See* Compl. at 9 (Prayer for Relief) (demanding "such relief and remedy for fraud as the Court may deem to be appropriate ... and for such other and further relief as the Court may deem just and proper."). **Tetra** was therefore on notice that rescission was a possible outcome in this case. Nevertheless, **Tetra** argues that under Utah law, "a party waives his right to rescind a contract if he remain[s] in possession of the property received by him under the contract" or "if he uses the property which was the subject of the sale after he discover[s] ... the ground for rescission." Def.'s Post-Trial Br. at 4 (quoting *Cont'l Ins. Co. v. Kingston*, 114 P.3d 1158, 1161-62 (Utah Ct.App.2005)). The Utah cases cited by **Tetra** are not persuasive here, because House of Flavors all along was trying to enforce what it believed the contract to be; if it had succeeded, it would not have sought rescission. This is not a case where House of Flavors's conduct was inconsistent with seeking the alternate remedy of rescission if it could not succeed on its contract claim. Utah case law instructs me to determine whether a party has waived a right to rescission by "consider[ing] all of the relevant facts" and to base my decision upon the "totality of the circumstances." *Cont'l Ins. Co.*, 114 P.3d at 1161 (citation omitted). Here, considering all the facts of the case, I find that House of Flavors never intentionally gave up the right to seek rescission for fraud.

III. CONCLUSION

For the reasons discussed herein, it is **ORDERED:**

1. Judgment shall enter in favor of House of Flavors on its fraud claim.

2. Judgment shall enter against House of Flavors on its promissory estoppel claim.

3. The lease is hereby cancelled.

4. Within thirty (30) days of this Order, **Tetra** shall:

a. Tender to House of Flavors $27,097 ($14,097 in excess interest payments plus $13,000 in financing fees);

b. return all security deposits provided by House of Flavors pursuant to the **lease**; and

c. release any and all other forms of security, including letters of credit, that House of Flavors provided pursuant to the **lease**.

d. Transfer ownership of the ice cream hardening equipment to House of Flavors.

SO ORDERED.

FN1. Tetra drafted the Letter of Intent to be signed by Gallagher and sent back to Tetra.

FN2. Two subsequent letters of intent, dated November 18, 2005 and November 20, 2005, respectively, also included a buyout price cap at twenty percent of the original cost of the leased equipment. *See* Letter of Intent (Nov. 18, 2005) (Pl.'s Ex. 4); Letter of Intent (Nov. 20, 2005) (Joint Ex. 1).

FN3. At trial, Secrist, Emery, and Scharman testified that Tetra's profit flowed in part from depreciating the equipment for tax purposes.

FN4. Gallagher testified, "They said that we can give you a side letter that will set the price at 12 percent, but we can't give it to you in the format that you're going to be satisfied with because we need to maintain our position with the IRS, but what we can do is we'll give, you know, enough information there to say that effectively that we are agreeing to a 12 percent buyout." Gallagher Trial Test. Tr. 54:8-14, Apr. 13, 2010 (Docket Item 94). Gallagher also testified that later "Ryan Secrist made the representation that the letter of intent-that they could do the deal, they could close the deal at 12 percent, and I said to him finally-somewhere along the line I said look, I've got to have that in writing, and he said he would put it in a side letter and we went through the reasons why he told me that the side letter had to be, what I would describe, as vague." *Id.* at 62:14-23.

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FN5. Emery testified, "Where we couldn't provide a fixed buyout on our letter of intent with our terms, he needed to for accounting purposes to be able to sell the transaction, our transaction to his board, to be able to run his accounting calculations, and I believe it was a competitive situation to where he was looking at our options and looking at the cost of funds." (The only official transcript filed in this case was for testimony offered by Gallagher. I therefore quote testimony from witnesses based on transcript rough drafts created in real time during proceedings and on notes.)

FN6. Secrist testified that he was concerned with giving Gallagher a satisfactory number and with ensuring that the letter was non-binding.

Q And had someone estimated the end of term value at ten percent?

A No. We did not do an estimate.

Q Why did you phrase the letter that way?

A It was, you know, as I think back, in putting the letter together, it was like I said, it was in the previous letter that I used and in my thinking was, you know, I want to make sure I got the number in there that he wanted and I had to make sure it is a non-binding agreement. We, you know, we didn't use, or we didn't do an estimate of the equipment.

Q So are you saying, are you telling us the language here was just lifted from another letter, that's why it reads that way?

A Well, other than the number that's in there, yes, we used it from another letter based on the intent of the request.

Q And then it has this language about non-commitment, correct?

A Correct.

Q Is that from the other letter too?

A It is.

FN7. On direct examination by House of Flavors, Secrist testified as follows.

Q In a situation similar to what House of Flavors has, what would happen to the equipment at the termination?

....

A My understanding is at that point, if we terminate ... then they would own the equipment.

Q That they own the equipment?

A That they would-that title would transfer back to them of the equipment.

Q So that should be in the master **lease** agreement, that provision?

A Something to that effect is in there, yes. I don't know exactly how it reads but that is how I understand it.

On direct examination by **Tetra**, Scharman offered similar testimony.

Q If there is no agreement with the lessee on an end of term purchase price, is there a way for this **lease** to end?

A Absolutely.... Once they have provided [notice], then they can go through those options, and there is absolutely an opportunity for them to terminate the **lease** once all obligations under that **lease** have been satisfied. When that happens, we terminate the **lease**, transfer of the property goes to the lessee.

Q So if there is no agreement on a purchase price, it goes to an extension?

A Yes.... At the conclusion of that six-

month extension after the initial **lease** extension, they can provide us notice and the **lease** terminates.

Q At that point, the property becomes theirs?

A The property becomes theirs absolutely.

FN8. The amended lease schedule also provided for a deposit of $43,972.39 to be applied to the last billing period. Am. & Restated Lease Schedule No. 1 (Def.'s Ex. 11).

FN9. Holmes's amortization schedules reflect a start date of August 30, 2006 and an end date of August 1, 2009; an initial payment on August 31, 2006 of $2,816.49; and fixed monthly payments of $43,972.39. Amortization Schedule, Oct. 2, 2006, at 1 (Pl.'s Ex. 18); Amortization Schedule, Dec. 11, 2006, at 1 (Pl.'s Ex. 20).

FN10. At trial, the parties stipulated the amount of funding that **Tetra** provided to House of Flavors and the amount of the rental payments that House of Flavors had made pursuant to the Master **Lease** Agreement. The stipulation did not include the number of monthly payments, but House of Flavors has subsequently represented that the stipulated amount represents forty-two monthly payments. Pl.'s Post-Trial Br. at 7 (Docket Item 93). **Tetra** has not objected to this representation. However, the stipulated total payment to **Tetra** is not equal to forty-two monthly payments of the amount listed in House of Flavors's amortization schedules or in the amended **lease** schedules.

FN11. In *Youngblood*, an insurance agent met with a customer and orally misrepresented what a policy would cover. *Youngblood v. Auto-Owners Ins. Co.*, 158 P.3d 1088, 1095 (Utah 2007). After the meeting and after agreeing to purchase the insurance, the customer received a copy of the policy, but did not read it and instead "relied solely" on the agent's oral statements, *id.* at 1091, which turned out to be "in direct conflict with the language of the policy," *id.* at 1095. Yet the *Youngblood* court treated reasonable reliance as a triable question of fact rather than a question of law for summary judgment and suggested that at trial it would be necessary to consider the oral representations in the context both of the relationship between the agent and the customer and of the written contract at issue. *Id.* at 1096. In sum, the court stated that when a writing is "clear, direct, understandable to ordinary people, and complete, it will be *more difficult* to prove reasonable reliance on contrary oral promises." *Id.* (emphasis added). It did not say *impossible*. I note that in *Gold Standard*, the Utah Supreme Court found that a party had not reasonably relied on an oral promise because it subsequently received multiple written communications that "explicitly indicated that the situation was not as [the plaintiff] understood it to be." *Gold Standard v. Getty Oil Co.*, 915 P.2d 1060, 1067 (Utah 1996). That is not what happened here.

FN12. Of course, the price was not really open. Scharman and Secrist testified that **Tetra** assumed that regardless of what the **lease** says, at the outside, House of Flavors would own the equipment after the base **lease** term and eighteen months of extension. So, in fact, **Tetra** did contemplate selling the equipment at a much higher price than it "estimated" in its correspondence with House of Flavors.

FN13. Emery forwarded the second side letter with an e-mail that stated simply, "Hi Whit, Attached is the updated side letter. Thanks." Email from Greg Emery to Whit Gallagher (Jan. 5, 2006) (Joint Ex. 5).

FN14. Tetra correctly notes that "because House of Flavors has not sought to recover damages for fraud, it was not required to prove the *amount* of its damages" but is required to prove "the existence of damages" (injury) as part of its prima facie case. Def.'s Post Trial Br. at 13 n. 3 (Docket Item 92).

FN15. I base my analysis of injury first, on the parties' trial stipulation; second, on the

Amended and Restated **Lease** Schedule No. 1 of August 30, 2006; and third, on House of Flavors, Inc. Financial Statements, Years Ended September 28, 2008, September 30, 2007, and September 24, 2006. With a base **lease** term of thirty-six months and a monthly rental payment of $43,972.39, the total cost of the base **lease** term would have been $1,582,992. The total that **Tetra** advanced on House of Flavors's behalf was $1,435,130.36. Twelve percent of $1,435,130.36 is $172,216. The total cost of the transaction (exclusive of taxes and fees for letters of credit) based on a buyout at the end of a thirty-six month base term would therefore have been $1,755,222.

FN16. At the summary judgment stage, House of Flavors argued that promissory estoppel could apply due to procedural unconscionability. Pl.'s Resp. in Opp'n to Def.'s Mot. for Summ. J. at 12-13 (Docket Item 24). At trial and thereafter, House of Flavors has not developed an argument based on unconscionability, and the relief it has requested is not consistent with a finding of unconscionability, which would render the contract (or a provision of the contract) void rather than merely voidable. I conclude that House of Flavors has forfeited its unconscionability argument for promissory estoppel.

FN17. Because I have found no contract to sell, specific-performance-type relief is probably not an appropriate remedy. *See Pitcher v. Lauritzen*, 18 Utah 2d 368, 423 P.2d 491, 493 (1967) ("The court cannot compel the performance of a contract which the parties did not mutually agree upon.") (citation omitted).

FN18. Likewise, "it is not the intent of equity actions ... to punish a transgressor or to permit any party, whether innocent or not, to reap a benefit from the fraudulent transaction that he would not have reaped if the transaction had not taken place." *Horton v. Horton*, 695 P.2d 102, 107 (Utah 1984). Instead, the party seeking rescission must "return ... the benefits received by him that he otherwise would not have received." *Id.*

FN19. There is some uncertainty as to when House of Flavors began and stopped (or even whether it has stopped) making payments under the lease and about how many payments House of Flavors made. In its Post-Trial Brief, House of Flavors represented that payments were made from April 2006 to September 2009. Pl.'s Post-Trial Br. at 7 (Docket Item 93). Based on the parties' stipulation at trial as to the total amount paid ($1,769,319) and the documentary evidence at trial, House of Flavors appears to have paid a deposit of one monthly payment ($43,972.39), an initial partial monthly payment ($2,816.49) in August 2006, and approximately thirty-nine or forty regular monthly payments from September 2006 until up until March 2010, when this case was originally scheduled for trial. For the purposes of calculating damages, the precise number of payments is immaterial because the total payment has been stipulated.

FN20. It could also be accomplished by rescission of the August 2006 bill of sale, which originally transferred title from House of Flavors to Tetra. A transfer of title, however, seems cleaner, unless the parties prefer otherwise.

FN21. At Tetra's 9.5 interest rate, the total cost of the loan ($1,435,130) for a base thirty-six month term would be $1,654,972.

FN22. At trial, Gallagher acknowledged that he had erred in calculating the imputed interest rate for both Tetra and Orix, Gallagher Trial Test. Tr. 50:9-14, but that does not change my conclusion that it is just to limit recovery to the terms of the Tetra transaction that he believed he had obtained.

FN23. If House of Flavors had paid interest at Tetra's rate with Republic Bank for the three-year base term, Tetra would now have to disgorge approximately $114,347 ($1,769,319 in total payments minus $1,654,972, the total transaction cost of a three-year loan of $1,435,130 at 9.5 percent

> interest). Such a remedy would effectively provide House of Flavors with better terms than those offered by Tetra or Orix in 2005, a result that is not just under the circumstances.

D.Me.,2010.
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H

United States District Court,
D. Maine.
HOUSE OF FLAVORS, INC., Plaintiff
v.
TFG-MICHIGAN, L.P., Defendant.
Civil No. 09-72-P-H.

Dec. 18, 2009.

Background: Ice cream machinery lessee brought action against lessor, alleging breach of contract, fraudulent inducement, and promissory estoppel, relating to lessor's failure to sell machinery to lessee at set purchase price at end of lease. Lessor moved for summary judgment.

Holdings: The District Court, D. Brock Hornby, J., held that:
(1) estimate letters did not create contractual obligation to sell machinery at certain price;
(2) fact issues existed as to underlying reason for lessor's use of estimate letters during lease negotiations;
(3) fact issues existed as to whether lessee would be entitled to promissory estoppel; and
(4) lessee lacked standing under Utah Unfair Practices Act.

Motion granted in part and denied in part.

West Headnotes

[1] Bailment 50 22

50 Bailment
50k22 k. Termination, rescission, and option to purchase property. Most Cited Cases
Even if equipment lease contemplated consideration of letter estimating end-of-term purchase price to set purchase price of equipment at end of lease, letter created no obligation to purchase at that price, under Utah law, where letter explicitly stated that lessor had no obligation to sell at that price.

[2] Bailment 50 22

50 Bailment
50k22 k. Termination, rescission, and option to purchase property. Most Cited Cases
Lessor of ice cream equipment did not breach implied covenant of good faith and fair dealing under Utah law by refusing to sell equipment at end of lease period at price listed in estimate letter; estimate letter did not create contractual obligation on part of lessor.

[3] Contracts 95 168

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k168 k. Terms implied as part of contract. Most Cited Cases
Under Utah law, good faith and fair dealing are implied terms of every contract, but are limited to the terms of a contract and have no independent existence.

[4] Federal Civil Procedure 170A 2492

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2492 k. Contract cases in general. Most Cited Cases
Genuine issue of material fact as to underlying reason for lessor's use of letters estimating cost of purchase of leased equipment at end of lease period during negotiation of lease precluded summary judgment on claim that lessor fraudulently induced lessee to sign lease based on estimated cost of purchase.

[5] Fraud 184 3

184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k2 Elements of Actual Fraud
184k3 k. In general. Most Cited Cases
Under Utah law, the elements of a fraud claim include the following: (1) a representation; (2) concern-

ing a presently existing material fact; (3) which was false; (4) which the representor either knew to be false, or made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage.

[6] Federal Civil Procedure 170A 2492

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)2 Particular Cases
170Ak2492 k. Contract cases in general. Most Cited Cases
Genuine issues of material fact as to whether lessee reasonably relied on lessor's representations about the purchase price of leased equipment at the end of lease period, whether lessor knew that lessee was relying on such representations, and whether lessor proffered estimate letters fraudulently to induce lessee to enter the lease precluded summary judgment on lessee's promissory estoppel claim, since the lease could either be voidable for fraud or void for procedural unconscionability.

[7] Antitrust and Trade Regulation 29T 290

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)1 In General
29Tk287 Persons Entitled to Sue or Seek Remedy
29Tk290 k. Private entities or individuals. Most Cited Cases
Lessee, as equipment lessor's consumer, lacked standing as a commercial competitor to bring claim under Utah Unfair Practices Act. West's U.C.A. § 13-5-14.

***307** Lee H. Bals, Marcus, Clegg & Mistretta, P.A., Portland, ME, for Plaintiff.

Daniel L. Rosenthal, Verrill Dana LLP, Portland, ME, Richard F. Ensor, Vantus Law Group, Salt Lake City, UT, for Defendant.

DECISION AND ORDER ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

D. BROCK HORNBY, District Judge.

This is a dispute over whether a Utah company breached an agreement to sell ice cream machinery to a Maine company at a set purchase price at the end of an equipment **lease**. The **lease** does not contain a purchase price. Before signing the **lease**, the Utah company, TFG-Michigan ("**Tetra**"), sent the Maine company, House of Flavors, Inc. ("House of Flavors"), a letter estimating the end-of-term purchase price for the machinery. In due course, House of Flavors tried to buy the equipment at the estimated price, and **Tetra** refused to sell at that price.

On the defendant **Tetra's** motion for summary judgment, I conclude that there is no genuine issue of material fact on House of Flavors's claims of breach of contract, breach of implied covenant of good faith and fair dealing, and breach of the Utah Unfair Practices Act. But there is a genuine issue of material fact as to whether **Tetra** used the estimate letter fraudulently to induce House of Flavors to sign the **lease**. Since there is a genuine issue as to fraud during negotiations, there is also, necessarily, a genuine issue as to promissory estoppel since the **lease** could either be voidable for fraud or void for procedural unconscionability. I therefore **DENY** summary judgment to **Tetra** on House of Flavors's fraud and promissory estoppel claims but **GRANT** summary judgment to **Tetra** on the breach of contract, breach of implied covenant of good faith and fair dealing, and unfair practices claims.

***308 STATEMENT OF FACTS**

(1) Undisputed Facts

In October 2005, House of Flavors decided to acquire an ice cream hardening system at auction.[FN1] For financing, it opened negotiations with **Tetra**, an equipment leasing company, Orix (another leasing company), and Fifth Third Bank.[FN2] House of Flavors president Whitcomb Gallagher and vice-president Sarah Holmes spoke with **Tetra** senior vice-president Greg Emery about having **Tetra** buy the equipment and **lease** it back to House of Flavors.[FN3] During ne-

gotiations, Gallagher told Emery and **Tetra's** executive vice-president Ryan Secrist that House of Flavors needed a firm commitment on an end-of-term purchase price.[FN4] He rejected a proposal to set the price at no more than 20 percent of original cost.[FN5]

FN1. Def. TFG-Michigan's Statement of Material Facts in Support of its Mot. for Summ. J. ("SMF") ¶¶ 19-20 (Docket Item 19); Pl. House of Flavors, Inc.'s Opposing Statement of Material Facts ("OSMF") and Statement of Additional Facts ("SAF") ¶¶ 19-20 (of OSMF) (Docket Item 25).

FN2. Pl.'s SAF ¶¶ 6-7; Def. TFG-Michigan's Reply Statement of Material Facts ("RSMF") ¶¶ 6-7 (Docket Item 29).

FN3. Def.'s SMF ¶¶ 12, 17, 3, 22; Pl.'s OSMF ¶¶ 12, 17, 3, 22.

FN4. Def.'s SMF ¶¶ 4, 25; Pl.'s OSMF ¶¶ 4, 25.

FN5. Def.'s SMF ¶¶ 24-25; Pl.'s OSMF ¶¶ 24-25.

On November 10, 2005, House of Flavors submitted a winning bid for the equipment at auction,[FN6] and on November 22, 2005, signed a letter of intent to have **Tetra** finance the purchase and **lease** the equipment back to House of Flavors.[FN7] Although the November letter of intent included the 20 percent purchase price, **Tetra's** Secrist, at Gallagher's request, sent House of Flavors a separate letter ("first estimate letter") that stated in relevant part: [FN8]

FN6. Def.'s SMF ¶¶ 20-21; Pl.'s OSMF ¶¶ 20-21. House of Flavors qualifies Tetra's statement regarding the cost of the equipment. Pl.'s OSMF ¶ 21.

FN7. Def.'s SMF ¶¶ 22-23; Pl.'s OSMF ¶¶ 22-23.

FN8. Def.'s SMF ¶¶ 24, 26; Pl.'s OSMF ¶¶ 24, 26.

> Pursuant to our conversation, we have reviewed the list of property expected to be purchased and have estimated a value of ten percent (10%) of its original cost. Please note that this end of term value estimation is not intended to represent a commitment by you, or an obligation by us, to buy or sell the equipment, as the case may be for that, or any other price at the conclusion of the Base (or extended, if applicable) Lease Term.[FN9]

FN9. November 22, 2005 Letter to Gallagher (Ex. 3, pt. 2, to Def.'s SMF at 11) (Docket Item 19-4); *see also* Def.'s SMF ¶ 26; Pl.'s OSMF ¶ 26.

Tetra later informed House of Flavors that it could not complete the deal on the existing terms and submitted an alternative proposal for financing the equipment purchase.[FN10] **Tetra** also sent a revised estimate letter ("second estimate letter") to House of Flavors on January 5, 2006, increasing the estimated purchase price to 12 percent of cost.[FN11] The second estimate letter was in other material respects identical to the first. [FN12] Notwithstanding the statement in ***309** both estimate letters that **Tetra** had "reviewed the list of property expected to be purchased and ha[d] estimated an end of term value," [FN13] **Tetra** in fact "did not estimate the end of term purchase price prior to the execution of the **Lease**." [FN14]

FN10. Def.'s SMF ¶¶ 27-28; Pl.'s OSMF ¶¶ 27-28.

FN11. Def.'s SMF ¶ 30; Pl.'s OSMF ¶ 30. House of Flavors denies that Gallagher requested the second estimate letter and states that Secrist sent it of his own accord. House of Flavors's denial does not otherwise controvert Tetra's statement regarding the fact of the letter or its contents. Pl.'s OSMF ¶ 30.

FN12. *See* January 5, 200[6] Letter to Gallagher (Ex. 3, pt. 2, to Def.'s SMF at 13) (Docket Item 19-4).

FN13. November 22, 2005 Letter to Gallagher; January 5, 200[6] Letter to Gallagher.

FN14. Pl.'s OSMF ¶ 20; Def.'s RSMF ¶ 20. Tetra qualifies House of Flavors's statement that Tetra had not estimated a purchase price at the time it sent the first estimate letter by

stating that Gallagher requested that Tetra include an estimate figure in the letter. Def.'s RSMF ¶ 20.

Gallagher subsequently negotiated a lease with Emery and Secrist but did not discuss the second estimate letter during the negotiations.[FN15] Gallagher signed the lease for House of Flavors on February 28, 2006. [FN16] According to its terms, the lease expires in spring 2009.[FN17]

FN15. Def.'s SMF ¶¶ 32, 37; Pl.'s OSMF ¶¶ 32, 37.

FN16. Def.'s SMF ¶ 38; Pl.'s OSMF ¶ 38.

FN17. Def.'s SMF ¶ 29; Pl.'s OSMF ¶ 29; *see also* Master Lease Agreement at 1 (Ex. 3, pt. 2, to Def.'s SMF at 34) (Docket Item 19-4).

The lease includes a provision regarding contract integration and a provision laying out the options available to House of Flavors at the end of the lease. Paragraph 19(a) of the lease states:

> This Lease and all Schedules duly executed and attached hereto from time to time constitute the entire agreement between the parties hereto with respect to the Equipment, and any modification hereto and any related agreement must be in writing and signed by the parties hereto.[FN18]

FN18. Def.'s SMF ¶ 33; Pl.'s OSMF ¶ 33; *see also* Master Lease Agreement at 13.

Paragraph 19(d) of the lease provides House of Flavors with three options at the end of the initial lease term.[FN19] It states in relevant part:

FN19. Def.'s SMF ¶ 35; Pl.'s OSMF ¶ 35; *see also* Master Lease Agreement at 13-14.

> Upon the completion of the Base Term of any Lease, Lessee shall ... elect one of the following options: (i) purchase all, but not less than all, of the Items of Equipment for a price to be agreed upon by both the Lessor and.... Lessee, (ii) extend the Lease for twelve (12) additional months at the rate specified on the respective Schedule, or (iii) return the Equipment to the Lessor.... With respect to options (i) and (iii), each party shall have the right in its absolute and sole discretion to accept or reject any terms of purchase or of any new Schedule, as applicable. In the event Lessor and Lessee have not agreed to either option (i) or (iii) by the end of the Base Term ... then option (ii) shall apply at the end of the Base Term. At the conclusion of the extension period provided for in option (ii) above, the Lease shall continue ... for successive periods of six (6) months each subject to termination at the end of any such successive period by either Lessor or Lessee [with required notice].[FN20]

FN20. Master Lease Agreement at 13-14.

The **lease** document does not otherwise specify an end-of-term purchase price or explicitly mention the estimate letters that **Tetra** sent to House of Flavors in November 2005 and January 2006.

In August 2008, House of Flavors attempted to purchase the equipment for 12 percent of original cost.[FN21] Tetra ultimately countered with a sale price of 30 percent of ***310** cost.[FN22] During negotiations in October 2008, Gallagher sent a letter to Tetra stating that the estimate letters were not legally binding agreements.[FN23] The parties negotiated without success over price, and this lawsuit ensued.

FN21. Pl.'s SAF ¶ 31; Def.'s RSMF ¶ 31.

FN22. Def.'s SMF ¶ 46; Pl.'s OSMF ¶ 46.

FN23. Def.'s SMF ¶¶ 48-49; Pl.'s OSMF ¶¶ 48-49. House of Flavors qualifies Tetra's description of the October 2008 letter by quoting an additional section of the letter. Pl.'s OSMF ¶ 49; *see also* October 15, 2008 Letter to Ryan Secrist at 2 (Ex. 3, pt. 2, to Def.'s SMF at 53) (Docket Item 19-4).

(2) Disputed Facts

House of Flavors states that Emery and Secrist told Gallagher during the **lease** negotiations that the 20 percent purchase price in the November letter of intent was a "cap" and that the parties could probably agree to a purchase price in the range of 10 to 12 percent of cost.[FN24] At his deposition, Gallagher testified,

first, that he told Emery and Secrist that he needed **Tetra** to commit the purchase price to writing before House of Flavors could sign a **lease** and, second, that Secrist agreed to provide a written estimate "that would effectively memorialize [the] agreement with regard to the 10 percent buyout," but told Gallagher that, for **Tetra** tax reasons, the estimate would have to be "vague" and could not be an "exact final valuation." [FN25] House of Flavors also states that **Tetra** sent the second estimate letter in January 2006 on its own initiative rather than in response to a request from Gallagher.[FN26] Gallagher has stated under oath that he signed the **lease** for House of Flavors believing that the parties had agreed on an end-of-term purchase price of 12 percent of cost.[FN27] House of Flavors states that it did not have a preferred tax treatment for the **lease**.[FN28] **Tetra** states, however, that it sent the estimate letters with the 10 and 12 percent price estimates because "Gallagher requested that those specific figures be included and because House of Flavors needed a number for internal accounting purposes." [FN29]

FN24. Pl.'s SAF ¶ 12.

FN25. *Id.* ¶¶ 13-17; *see also* Dep. of Whitcomb Gallagher 94:9-11, July 31, 2009 (Ex. 3, pt. 1, to Def.'s SMF at 25) (Docket Item 19-3).

FN26. Pl.'s OSMF ¶ 30.

FN27. Pl.'s SAF ¶ 26.

FN28. *Id.* ¶ 28.

FN29. Def.'s RSMF ¶ 12, 13-18, 20 (Docket Item 29).

PROCEDURAL SETTING

House of Flavors sued **Tetra** under Utah law for breach of contract, breach of the implied covenant of good faith and fair dealing, fraudulent inducement, promissory estoppel, and violation of the Utah Unfair Practices Act.[FN30] **Tetra** moved for summary judgment, arguing that the **lease** is a fully integrated contract that does not include a purchase price for the equipment. **Tetra** also contends that Utah law does not support the plaintiff's breach of covenant or unfair practices claims; that promissory estoppel does not apply in the context of a valid contract; and that the estimate letter could not reasonably have induced House of Flavors into signing the **lease**.

FN30. The parties agree that Utah law governs the lease.

ANALYSIS

(1) Breach of Contract

House of Flavors contends that in Paragraph 19(d) of the **lease**, the parties provided that the purchase price would be established outside the **lease** document, ***311** that the second estimate letter is the "agreed upon" price that Paragraph 19(d) contemplates, and that the letter satisfies Paragraph 19(a)'s requirement that "any related agreement must be in writing." **Tetra** maintains that the Paragraph 19(d) language that price is "to be agreed upon" demonstrates that any agreement on price was in the *future*, whereas the second estimate letter preceded the **lease** execution by several weeks. Moreover, it points out that the estimate letter states explicitly that it does *not* represent "an obligation" by **Tetra** to sell the equipment at that price. [FN31]

FN31. *See* November 22, 2005 Letter to Gallagher; January 5, 200[6] Letter to Gallagher. ("Please note that this end of term value estimation is not intended to represent a commitment by you, or an obligation by us, to buy or sell the equipment, as the case may be for that, or any other price at the conclusion of the Base (or extended, if applicable) Lease Term.").

[1] I conclude that the contract documents do not create a contractual obligation on **Tetra's** part to sell the machinery to House of Flavors for 12 percent of cost. Even if I conclude that the **lease** document permits consideration of the estimate letter, there is nothing ambiguous in the estimate letter's statement that **Tetra** has no obligation to sell at the 12 percent price. House of Flavors explicitly does not rely upon an ambiguity argument to bring in parol evidence about what the parties otherwise agreed. [FN32] As a result, on the clear language of the documents, **Tetra** is entitled to summary judgment on the breach of contract count.

FN32. House of Flavors makes contradictory assertions on this point, arguing both that parol evidence does not come into play and that I should consider the context of the discussions in interpreting the estimate letter. *See* Pl. House of Flavors, Inc.'s Mem. of Law in Opp'n to Def.'s Mot. for Summ. J. at 10 (Docket Item 24). It also suggests that Tetra might argue that the estimate letter is ambiguous, *id.*, but Tetra does not do so. House of Flavors also admitted during the 2008 negotiations that the estimate letters are not, by their terms, legally binding. *See* Pl.'s OSMF ¶ 49 (qualifying Def.'s SMF ¶ 49). As I have stated in text, the estimate letter is not at all ambiguous. Therefore, I do not consider other evidence. *See* *Tangren Family Trust v. Tangren*, 182 P.3d 326, 330 (Utah 2008) (holding that absent fraud, extrinsic evidence may not be used to vary or add to the terms of an integrated contract) (quoting *Hall v. Process Instruments & Control, Inc.*, 890 P.2d 1024, 1026 (Utah 1995)); *Giusti v. Sterling Wentworth Corp.*, 201 P.3d 966, 975 (Utah 2009) (explaining that parol evidence may clarify contractual ambiguities).

(2) Breach of the Implied Covenant of Good Faith and Fair Dealing

[2][3] House of Flavors also asks me to find that **Tetra** breached the implied covenant of good faith and fair dealing by refusing to sell the ice cream equipment at 12 percent of cost, the price of the second estimate letter. FN33 Under Utah law, "good faith and fair dealing are implied terms of every contract," FN34 but the duties of good faith and fair dealing are limited to the terms of a contract and "have no independent existence." FN35 Here, I have concluded that nothing in the **lease** required **Tetra** to sell the equipment at 12 percent of cost. To be sure, **Tetra** could have breached its duties of good faith and fair dealing by refusing to negotiate with House of Flavors about a purchase price.FN36 But as ***312** House of Flavors concedes, **Tetra** began negotiations of the purchase price in 2008 at 39 percent of cost and came down to approximately 30 percent of cost while House of Flavors refused to move from the 12 percent figure in the second estimate letter.FN37 I conclude that on the undisputed facts, **Tetra** has not breached the covenant of good faith and fair dealing.

FN33. Pl.'s Mem. in Opp'n at 13; Compl. and Demand for Jury Trial ¶¶ 42-44 (Docket Item 1).

FN34. *Peterson & Simpson v. IHC Health Servs.*, 217 P.3d 716, 722 (Utah 2009) (quoting *Christiansen v. Farmers Ins. Exch.*, 116 P.3d 259, 262 (Utah 2005)).

FN35. *Id.*

FN36. *See* *Christiansen*, 116 P.3d at 262 ("[T]he refusal to bargain or settle, standing alone, may, under appropriate circumstances, be sufficient to prove a breach.") (quoting *Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 798 (Utah 1985)).

FN37. Pl.'s OSMF ¶¶ 46-47.

(3) Fraudulent Inducement

[4][5] House of Flavors asserts that **Tetra's** Emery and Secrist made fraudulent statements to induce Gallagher to sign the **lease**. I find that there is a genuine issue of material fact on the fraud claim regarding **Tetra's** use of the estimate letters during negotiation of the **lease**. "The elements of a fraud claim include the following: (1) a representation; (2) concerning a presently existing material fact; (3) which was false; (4) which the representor either (a) knew to be false, or (b) made recklessly, knowing that he had insufficient knowledge upon which to base such representation; (5) for the purpose of inducing the other party to act upon it; (6) that the other party, acting reasonably and in ignorance of its falsity; (7) did in fact rely upon it; (8) and was thereby induced to act; (9) to his injury and damage." FN38

FN38. *Giusti*, 201 P.3d at 977 n. 38 (quoting *Dugan v. Jones*, 615 P.2d 1239, 1246 (Utah 1980)).

Although the estimate letters disavow any **Tetra** "obligation" to sell at the estimated price, House of Flavors says through Gallagher's deposition that Secrist represented that the estimate letters did in fact memo-

rialize an agreement, but that the letter had to be "vague" and could not be an "exact" valuation only because of **Tetra's** tax needs.[FN39] Gallagher also testified that he told **Tetra** that he would not sign a **lease** without assurance as to the final purchase price.[FN40] **Tetra** concedes that it sent at least one estimate letter to Gallagher in response to his concern.[FN41] Gallagher testified that he only signed a letter of intent with **Tetra** once he received the first estimate letter [FN42] and that he believed that he had an agreement with **Tetra** on the purchase price when he signed the **lease**. [FN43]

FN39. Pl.'s Mem. in Opp'n at 14. The estimate letters say that Tetra has reviewed the list of property to be purchased, but Tetra states now that, in fact, it did not do so. Def.'s RSMF ¶ 20. It would be reasonable for a jury to infer that just as the estimate letter does not mean what it says regarding Tetra's review of the property and estimation of a sale price, it also does not mean what it says when it disclaims a price commitment. Tetra maintains that House of Flavors cannot point to the misrepresentation of a presently existing fact, but the assertion that Secrist said that the estimate letters memorialize an agreement refers to a then presently existing fact.

FN40. *Id.* at 14-15.

FN41. Def.'s Mot. for Summ. J. at 4; *see also* Def.'s SMF ¶¶ 25-26.

FN42. Pl.'s SAF ¶ 19.

FN43. *Id.* ¶ 26.

Tetra disputes these assertions, but they are enough to avoid summary judgment. Based on this record, a jury could reasonably conclude that **Tetra** represented to House of Flavors that it had estimated the end-of-term cost (even though it had not) so as to satisfy Gallagher's concerns about locking down the purchase price before signing the **lease**; that Secrist told Gallagher the estimate letters memorialized an agreement knowing that they did not; and that Secrist offered the tax ***313** explanation for the wording of the estimate letters to mislead Gallagher. A jury could also reasonably find that Gallagher signed the contract with **Tetra** because Secrist's explanation was reasonable and that Gallagher, without knowing that Secrist had misled him, believed that the companies had agreed on a price and therefore signed the **lease**-a **lease** whose terms actually allow **Tetra** now to demand a higher price for the equipment than it "estimated" in 2005 and 2006.

Summary judgment is not appropriate on the plaintiff's fraud claim.[FN44]

FN44. I note that under Utah law, "a contract induced by fraud ... [is] voidable" at the election of the defrauded party. *Baldwin v. Burton*, 850 P.2d 1188, 1193 n. 15 (Utah 1993) (quoting *Frailey v. McGarry*, 116 Utah 504, 211 P.2d 840, 845 (1949)).

(4) Promissory Estoppel and Unconscionability

[6] **Tetra** argues that House of Flavors cannot claim promissory estoppel because the **lease** is a valid, enforceable contract.[FN45] But if House of Flavors prevails on its fraud claim, the **lease** will be voidable. As explained in the discussion of fraud above, there are genuine issues of fact as to whether Gallagher reasonably relied on **Tetra's** representations about the purchase price; whether Emery and Secrist knew that Gallagher was relying on their representations; and whether **Tetra** proffered the estimate letters fraudulently to induce House of Flavors to enter the **lease**. Those facts make out a case for promissory estoppel under Utah law.[FN46] If House of Flavors voids the **lease**, promissory estoppel may apply.

FN45. Mot. for Summ. J. at 14.

FN46. *Youngblood v. Auto-Owners Ins. Co.*, 158 P.3d 1088, 1092 (Utah 2007).

Youngblood v. Auto-Owners Insurance Company does not alter that conclusion. In *Youngblood*, a motorist admitted that the language of his insurance policy did not cover his claim, but sought to expand the scope of the policy based on misrepresentations of the policy's scope by the insurance agent who sold him the policy.[FN47] The Utah Supreme Court reversed the trial court's determination that the motorist should be held to the plain language of the policy. It found that the insurance agent made statements "in direct

conflict with the language of the policy," [FN48] and since "[r]eliance upon ... material misrepresentations ... may or may not be reasonable, depending on the facts of the individual case," [FN49] it remanded the case for determination of the factual issues. Here, House of Flavors argues that, like the insurance agent in *Youngblood*, Secrist materially misrepresented the extent of the parties' agreement. Whether Gallagher reasonably relied on **Tetra's** representations is a question of fact. A jury could conclude that Gallagher acted reasonably by telling **Tetra** that he needed a commitment on price and by negotiating a final draft of the **lease** only once he had the estimate letters in hand and had been assured by Secrist.[FN50]

FN47. *Id.* at 1090.

FN48. *Id.* at 1095.

FN49. *Id.* at 1096.

FN50. House of Flavors also claims promissory estoppel on the separate basis that Paragraph 19(d) is substantively unconscionable because it binds House of Flavors to a subsequent **lease** term if it does not agree with **Tetra** on a purchase price. House of Flavors relies on *Andin International Inc. v. Matrix Funding Corporation*, 194 Misc.2d 719, 756 N.Y.S.2d 724 (N.Y.Sup.Ct.2003), where the New York Supreme Court found that a **lease** involving a Utah company was unconscionable because it made it "almost impossible for a lessee to terminate its relationship with the lessor," *id.* at 726. The **lease** in *Andin* provided that at the end of the **lease**, the lessee could buy the equipment "at a mutually agreeable price," extend the **lease** for another year, or "return the equipment in exchange for new equipment pursuant to a new **lease**." *Id.* The New York court concluded that if the lessee failed to choose, the second option applied, and the **lease** would renew indefinitely, and that under such a **lease**, a lessor could oppress a lessee by refusing to agree on a price. *Id.* The New York court decided the case under New York law, but noted that it might have concluded that a contract creating such a "perpetual obligation" could be "sufficiently one-sided and imbalanced" as to be unconscionable under Utah law as well. *Id.* at 728.

> **Tetra's lease** with House of Flavors is different. Paragraph 19(d) provides that if House of Flavors does not agree on a price with **Tetra** or decide to return the equipment, the **lease** will renew for a term of eighteen months at the end of which either party can terminate the **lease** with proper notice. *See* Master **Lease** Agreement at 13-14 (providing for a twelve-month renewal followed by a six-month extension). This provision is, without doubt, burdensome, but it does not create a situation comparable to that in *Andin. Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 402 (Utah 1998) ("Even if a contract term is unreasonable or more advantageous to one party, the contract, without more, is not unconscionable."). I conclude that the **lease** with **Tetra** is not void for substantive unconscionability.

***314** House of Flavors's argument that promissory estoppel is available due to procedural unconscionability poses a closer question. While unconscionability is a question of law for the court rather than the trier of fact,[FN51] I cannot rule on procedural unconscionability in this case without a factual determination of House of Flavors's fraud claim.[FN52] Given the genuine issue of material fact as to fraud, I cannot rule out the possibility that this is the rare case where fraud during negotiations creates procedural unconscionability. I do remain doubtful that procedural unconscionability will survive as a practical matter.

> FN51. *Sosa v. Paulos*, 924 P.2d 357, 360 (Utah 1996). The law provides different remedies for unconscionability and fraud. A finding of unconscionability renders a contract void. *Id.* at 359 (citing *Bekins Bar v. Ranch v. Huth*, 664 P.2d 455, 459-62 (Utah 1983)). A finding of fraud only makes a contract voidable. *Ockey v. Lehmer*, 189 P.3d 51, 56 n. 11 (Utah 2008) ("Contracts that offend an individual, such as those arising from fraud, misrepresentation, or mistake, are voidable. Only contracts that offend public policy or harm the public are void *ab initio.*") (citing *Fletcher v. Stone*, 20

Mass. 250, 252 (1825)).

FN52. House of Flavors also asserts its right, under Utah law, to a "reasonable opportunity to present evidence" of the **lease's** unconscionability. Pl.'s Mem. in Opp'n at 13; *see also* Utah Code Ann. § 70A-2-302(2) (2009). Utah law considers "a commercial transaction for the acquisition of equipment ... in the form of a **lease** ... [to be] a sale." *Colonial Leasing Co. v. Larsen Bros. Constr. Co.*, 731 P.2d 483, 485 (Utah 1986). However, House of Flavors has a right to a hearing even if the **lease** with **Tetra** is not construed as a sale of goods. *See* Utah Code Ann. § 70A-2a-108(3) (2009).

(5) Utah Unfair Practices Act

[7] The Utah Unfair Practices Act prohibits "[u]nfair methods of competition in commerce or trade." FN53 In 2009, the Utah Supreme Court held that the statute lacks "an independent reference to unfair acts or practices" and therefore applies "only to anticompetitive behavior." FN54 House of Flavors does not claim that Tetra's conduct***315** harmed House of Flavors's ability to compete. Rather, it argues that Tetra's practices allowed Tetra to gain "an unfair competitive advantage" over other potential finance companies "by making its terms seem more attractive" than those offered by companies "disclos[ing] [their] true intent regarding an end of term purchase price." FN55 That may be so, but the Utah Supreme Court suggested in *Garrard* that only competitors may state a claim under the Act and that it would require a legislative amendment for the Act to "protect consumers as well as commercial competitors." FN56 Under *Garrard* 's logic, House of Flavors is not a commercial competitor to Tetra, but a "consumer" that cannot claim an injury from Tetra's anticompetitive behavior vis-à-vis other competitors. Thus, while Orix or Fifth Third Bank might have a claim that Tetra violated the Utah Unfair Practices Act,FN57 House of Flavors does not. Accordingly, since House of Flavors lacks standing under the statute, I need not determine if there is a genuine issue of material fact whether Tetra engaged in anticompetitive behavior.

FN53. Utah Code Ann. § 13-5-2.5 (2009); *see also* Utah Code Ann. § 13-5-17 (2009) ("[T]he purpose of this act is to safeguard the public against the creation or perpetuation of monopolies and *to foster and encourage competition*, by prohibiting unfair and discriminatory practices by which fair and honest *competition* is destroyed or prevented. This act shall be liberally construed that its beneficial purposes may be subserved." (emphasis added)).

FN54. *Garrard v. Gateway Fin. Servs.*, 207 P.3d 1227, 1230 (Utah 2009).

FN55. Compl. ¶ 61.

FN56. *Garrard*, 207 P.3d at 1230. I note that the Court of Appeals of Utah had previously questioned whether the Utah statute is so limited given the plain language of the statute: "Any person ... may maintain an action to enjoin a continuance of any act in violation of this chapter, and, if injured by the act, for the recovery of damages." *See Russell v. Lundberg*, 120 P.3d 541, 547 (Utah Ct.App.2005) (quoting Utah Code Ann. § 13-5-14). But I follow the later Utah Supreme Court decision.

FN57. Even this is uncertain because the statute limits the meaning of "commerce" to "intrastate commerce in the state of Utah." Utah Code Ann. § 13-5-5 (2009).

CONCLUSION

For the reasons stated above, Tetra's motion for summary judgment is **GRANTED** as to breach of contract (Count 1), breach of the covenant of good faith and fair dealing (Counts 2 and 3), and violation of the Utah Unfair Practices Act (Count 6) and **DENIED** as to fraud (Count 4) and promissory estoppel (Count 5).

SO ORDERED.

D.Me.,2009.
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