UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CAMPMOR, INC., *Plaintiff,* - *vs.* - BRULANT, LLC *Defendant.*	CIVIL ACTION NO. 19-CV-5465 (WHW)
BRULANT, LLC, *Counterclaim Plaintiff,* - *vs.* - CAMPMOR, INC., *Counterclaim Defendant.*	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff Campmor, Inc. ("Campmor") submits this memorandum of law in opposition to the motion by defendant Brulant, LLC ("Brulant")[1] seeking summary judgment dismissing each of Campmor's claims. In the face of overwhelming evidence of Brulant's material breaches of contract and fraud/misrepresentations,[2] Brulant tries to avoid having that evidence reach the jury by erroneously arguing that (i) the evidence is inadmissible and (ii) Campmor has no evidence of its damages. As demonstrated in detail below, Brulant's arguments are completely without merit. Accordingly, Brulant's motion should be dismissed in its entirety and Campmor's claims be resolved at trial.

STATEMENT OF FACTS[3]

Campmor sells camping and related outdoor recreation equipment and accessories from its store, which is now located on Route 17 in Paramus. Morton Jarashow founded Campmor in Bogota, New Jersey in 1978. His son, Dan Jarashow, the present chief executive officer of Campmor, took on primary responsibility for management of the company in 1981. This included building on Campmor's 30 years of success in catalog sales by developing an Internet retail business. Dan Jarashow did well by this legacy: by 2006 Campmor had built an online business whose sales exceeded $60 million per year.

In around 2006, Campmor began the search for a larger, more sophisticated company to assist it in updating and improving its website to maintain its market position and gain ground

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[1] As discussed in Brulant's moving papers, during the course of the dealings between the parties, Rosetta, LLC ("Rosetta") purchased Brulant, the original name of the company with which Campmor entered into this relationship. There is no dispute that Rosetta is for all purposes Brulant's successor in interest, and for convenience both are referred to herein as "Brulant."

[2] This evidence includes Brulant's own written admissions – evidence which Brulant is indisputably aware of but chose not to bring to the Court's attention.

[3] All facts set forth in this Statement of Facts are drawn from the Certification of Daniel Jarashow filed herewith ("Jarashow Cert."), unless otherwise indicated.

against Campmor's Internet competitors. Campmor used an e-commerce platform called WebSphere that was developed by IBM, and asked IBM for guidance. IBM recommended Brulant and Mr. Jarashow contacted them and asked them to make a proposal.

In September of 2006, Brulant made a presentation to Campmor. Brulant represented itself as the "premier WebSphere Commerce partner in the United States" and claimed that it had more WebSphere Commerce resources that any other WebSphere partner company. The Brulant team, which consisted of Scott Young and Mark Fodor, made these claims both orally and in the Power Point presentation they made at that time; a copy of the Power Point show is attached as Exh. A to the Jarashow Cert. During the presentation Brulant urged Campmor to upgrade its website from the 5.6.1 WebSphere platform to the new 6.0 platform. Campmor's impression had been that it could continue utilizing the 5.6.1 version. Campmor had not been contemplating the expense and complications involved with a major upgrade.

It was in this context that Mr. Jarashow first heard the term "best practices" from Brulant. The Brulant team explained that "best practices" were known, accepted methods and standards established by the industry as the most effective in achieving given objectives. And when it came to upgrading Campmor's website to IBM WebSphere 6.0, Brulant insisted that it had industry-leading mastery of those best practices, as well as in the area of SEO – Search Engine Optimization. Brulant also insisted, during its presentation, that Brulant's unexcelled level of expertise in WebSphere was leveraged and enhanced by a special relationship it had with IBM that gave Brulant and its clients unique access to technical support and the latest, highest-quality information about the software. Campmor was not ready to turn its e-commerce system inside-out and do an expensive and complex platform upgrade, however. But based on Brulant's representations, Campmor did agree to have Brulant upgrade the SEO on Campmor's 5.6.1 website. On November 6, 2006, Campmor signed a Master Services Agreement ("MSA"),

retaining Brulant to provide technical maintenance and support on the 5.6.1 site and to enhance the site's SEO.

Soon after signing the MSA, however, Brulant intensified its drumbeat about Campmor's need to upgrade to WebSphere 6.0, asserting that the more time Brulant's people spent with its 5.6.1 site, the more certain they were that Tachyon's implementation of Campmor's 5.6.1 site was replete with problems. The website, which had been the foundation of so much e-commerce business success for Campmor in the then recent past, was, Brulant told Campmor, actually rife with technical deficiencies – essentially a ticking time bomb that threatened to bring down the Campmor e-commerce business. Campmor, Brulant insisted, would sooner or later have to upgrade the site to WebSphere 6.0. And the sooner, the better, for Brulant claimed that, as implemented by Brulant utilizing its vaunted "best practices," the 6.0 platform solve all of Campmor's website problems, including ones Campmor had no inkling existed at all.

Brulant's campaign to get Campmor to essentially trash the e-commerce operation that had brought it so much success and invest in a massively expensive upgrade to the new platform culminated in a presentation by Brulant in August of 2007. At that presentation, Brulant identified numerous defects with Campmor's 5.6.1 site, including disorganized, poorly structured and inconsistently managed data; poorly executed customized programming; and excessive and bizarre error messages which were confusing to debug (the "Old Defects"). (A copy of Brulant's PowerPoint presentation identifying the Old Defects is attached to the Jarashow Cert. as Exh. B).

Brulant told Campmor that the present Campmor site was limiting Campmor's competitiveness, and that merely maintaining the site would doom Campmor's web-based business. The site could not be merely upgraded or retrofitted to meet current needs, they told Campmor. Such a change would be highly complex, too costly and even risked a complete failure at some point. Indeed, Brulant was spending a significant percentage of the monthly

retainer simply on maintaining the existing 5.6.1 site, as opposed to enhancing it. All these problems, Brulant said once again, could be addressed efficiently and cost-effectively by an upgrade to WebSphere 6.0. The sum and substance of Brulant's message was that an upgrade was technologically and commercially necessary, but that given its expertise and command of "best practices," this change was not only financially justifiable but would actually more than pay for itself in a very short time.

Along with this "carrot," however, Brulant also introduced a "stick" concerning the future of WebSphere 5.6.1: According to Brulant, there was none. Brulant ominously warned Campmor that IBM was "discussing" terminating its provision of technical support for customers utilizing the 5.6.1 platform – and soon. Based on their uniquely reliable "information" from IBM sources, Brulant told Campmor that this would go beyond "discussions" but actually would occur in or around October 2008, little more than a year from then. "After-life" support from IBM would, Brulant asserted, likely be available only at the steep price of $25,000 per month. Brulant's prediction was even set out in its PowerPoint (Jarashow Cert. Exh. B, p. 15). This concrete representation, which turned out to be false, convinced Campmor that this prediction was not mere speculation but a very reliable description of future events – Brulant, after all, having insisted that it was in a unique position to know IBM's intentions because of their relationship with the company and about all things WebSphere- related.

Brulant's Doug Denton followed up on the Brulant team's representation that an upgrade to WebSphere 6.0 would pay for itself in short order in the form of a September 24, 2007 email. In it, Brulant asserted that Campmor could conservatively expect net profits of $2.2 million above and beyond its current level of profitability by the end of 2009 as a direct result of the upgrade Brulant was pushing. (Jarashow Cert. Exh. D). Based on these representations, Campmor hardly seemed to have any choice in the matter: Brulant insisted that to remain with

the 5.6.1 platform was slow e-commerce suicide; and who knew better than Brulant, which practically slept at the foot of IBM's bed? Presented with this scenario, Campmor acquiesced to Brulant's recommendation that it upgrade its website to WebSphere 6.0 and to have that work done by Brulant – which described itself as "the leading WebSphere Commerce partner in the US." (Jarashow Cert. Exh. A).

By this point, Campmor had identified one feature it wanted in any future upgrade: the latest version of another IBM product called OmniFind, a highly-scalable, secure, high-quality enterprise search. Campmor's 5.6.1 website used an older version of OmniFind that, among other things, did not offer internal guided navigation on the website. The updated OmniFind includes tools for this feature as well as for indexing data and content from file shares, databases, collaboration tools, content management systems and online community-building tools that would allow Campmor to promote its business through social media. Campmor was also interested in OmniFind's analytical tools, which offered a deep and detailed understanding of how users utilized the website's features and navigated within the site. OmniFind, Campmor believed, would complement the "best practices" SEO that Brulant promised to deliver – and on time. For Brulant assured Campmor that it had the "technical expertise to ensure timely implementation of search engine optimization enhancements." (Coleman Cert. Exh. Q, p. 11).

Thus in January 2008, Brulant and Campmor executed a Statement of Work for the 6.0 upgrade (the "6.0 SOW") which provided for a launch date in September 2008. (Jarashow Cert. Exh. F.) Among other things, under the 6.0 SOW Brulant committed itself to:

a. upgrade Campmor to the 6.0 site "with a best-practices configuration and all major components functioning properly";

b. "Implement a new site and user experience design that compares favorably to market leaders and allows Campmor to compete with [competing] sites";

c. "Utilize OmniFind site search to provide 'guided navigation' so that visitors can browse search results by size, price, brand, and other useful characteristics";

d. "Improve the URL structure for search engine indexing and increase the value of the URL for organic SEO scoring by flattening the URL and utilizing keywords instead of cookies"; and

e. "Preserve the SEO scores of the existing site pages as a valuable baseline on which to build."

Based on the assurances made by Brulant and its sleek, polished presentations and sales materials, Campmor believed that this was the company that had the resources, personnel and technical know-how to identify what Campmor needed and to deliver what it promised. And in fact, in its progress reports to Campmor regarding the 6.0 upgrade in February 2008, this trust seemed more than justified. Doug Denton, the Brulant executive in charge of the Campmor account, assured Campmor that "Brulant is absolutely putting [its] best foot forward" and that Campmor's website "will be the best site Brulant has ever built." (Jarashow Cert. Exh. G.) Attached to Mr. Denton's email was a "roadmap" confirming that the 6.0 site would be created, tested and launched by September 15, 2008. (Jarashow Cert. Exh. H.) Indeed, throughout the spring and summer of 2008, Denton continued to assure Campmor that the 6.0 upgrade project was on schedule.

For its part, Campmor was in no position to evaluate those assurances. Campmor had hired Brulant precisely because Campmor did not have the in-house expertise necessary to do the work, whereas Brulant confidently assured Campmor that it had complete command of the technology involved and of the "best practices" required to implement it on Campmor's behalf. Relying on a steady flow of glowing reports from Brulant about its own work, Campmor paid Brulant's ever-more-bloated invoices in full and on time, in anticipation of being the proud owner of Brulant's "best site ever."

In fact, however, none of these assurances or reassurances was true. In fact, events demonstrated that Brulant never had any idea how to implement the WebSphere 6.0 upgrade for Campmor – that its results were so deficient that it can barely be credited with even having

fooled itself. In fact, Brulant had no idea how to integrate the new OmniFind into the new website. In fact, Brulant was so behind schedule, understaffed and in over its head that it had not taken a single step to optimize search on the new site, much less implemented any SEO "best practices." In fact, Brulant had more than run through the budget for the project, but nothing was ready when, in September 2008 – the month in which the 6.0 website was to be launched – Brulant's Adam Cohen and Doug Denton visited Campmor in Mahwah.

By now, Campmor was in deep with Brulant. It had sunk well over a million dollars into the 6.0 upgrade pushed by Brulant, and despaired of any way out of the relationship. Knowing this, Cohen and Denton acknowledged what anyone looking at the invoices knew: Despite the soothing song of reassurance that Brulant had emitted until then, the project costs on the 6.0 upgrade were far beyond the budget in the 6.0 SOW, and would continue soaring. And, as demonstrated on the 6.0 test site available for Campmor's evaluation just at the time when it was supposed to be launching its new, improved site in time for the busy fall season and tweaked to perfection in time for holiday shopping, not only were the costs out of control. Worse than that: there was no "there" there.

In the simple, limited evaluation made of the new site – for the Brulant representatives had only brought along a sort of portable simulation; the actual site itself was "down" because of "server problems" on the Brulant side – Mr. Jarashow quickly discovered how little had been accomplished by the target due date. Not only was the site not ready to "go live," but to Mr. Jarashow's considerable distress the test site clearly had no guided navigation, much less the sophisticated OmniFind enhancements that Campmor considered so central to this upgrade project. The 6.0 test site had no internal guided navigation at all – less than the supposedly rickety, obsolete 5.6.1 site it was supposed to replace.

Over Brulant's objections, Mr. Jarashow insisted that guided navigation and testing be

completed before the 6.0 site was launched. Christmas was lost; because of Campmor's seasonal sales patterns, the next window of opportunity to launch the new site would be March 2009, when buying for the summer camping season began in earnest. This gave Brulant six additional months to complete and test the site before the launch.

On or around January of 2009, Campmor began analyzing the 6.0 test site. It left much to be desired. One major issue was the consistent return of "shopping cart" errors. Specifically, a customer placing a product in the virtual shopping cart would then be asked to provide his zip code and state of residence. After providing the correct information, customers got an error message stating that the state and zip code did not match. Another serious problem on the 6.0 Site was credit card processing errors, whose seriousness became apparent only after the site went live. Customers ready to make purchases and not getting "bounced" by the shopping cart error, would input their credit card numbers and expiration dates, yet their cards were getting rejected. It was also obvious that no SEO whatsoever had actually been built into the new site, making it even less search engine-friendly than the 5.6.1 site that Brulant had itself optimized.

Brulant, of course, promised to fix everything, and continued work – and billing – at a feverish pace. Despite the unresolved issues, which Joe Rozsa, a Brulant project manager, and Doug Denton, assured Campmor would be resolved best when the site was in actual use, by March of 2009 Brulant was pressuring Campmor to take the site live. Ultimately relying on Brulant's assurances that the SEO was in place and that any remaining bugs would "work out" through actual use, Campmor acquiesced.

The result was, as would be expected, a disaster. The credit card issues had not been resolved at all. Countless credit card errors were being delivered as the useless by-product of customers ready, willing and able to buy merchandise. When Mr. Jarashow brought this issue up to Brulant, its response was, incredibly, that after years of contrary experience, suddenly

Campmor users were inputting incorrect credit card numbers in unprecedented numbers.

On the other hand, credit card errors had one redeeming feature: They indicated that at least some consumers were getting to the checkout stage of making a purchase. Many were not: The zip code errors were still bouncing many of them out of the purchasing system entirely. Some were committed enough to complete their purchases by telephone; many simply gave up. Between the credit card malfunction and the zip code errors, it is hard to imagine a more devastating failure for a consumer-based retail Internet website. But there were many other critical errors, including Brulant's incompetent implementation – if that word can even be used – of OmniFind. The OmniFind search box implemented by the "best practices" people was worse than useless, spitting out senseless and irrelevant results that merely annoyed customers and undermined their confidence that anything could be found, or relied upon, at the Campmor website.

In all, the site was replete with major errors that prevented customers from buying. Campmor received hundreds of angry emails from customers, would-be customers and lost customers, some of which are attached as Exh. J to the Jarashow Cert. Errors involved credit card expiration dates and verification data, zip codes (domestic, Canada and Puerto Rico), sizing charts and food pages searches resulting in error pages or improper results, user registration errors, and shopping cart errors. OmniFind was never implemented properly. Even basic left-hand navigation often resulted in error codes or improper internal search results continued to be an issue until remedied by Red Baritone, the company Campmor hired to correct the problems caused by Brulant and, subsequently, to replace Brulant. In fact, every single one of the Old Defects which were the premise of the upgrade was present in the 6.0 "upgrade."

Then there was the matter of SEO. In his March 24, 2009 email to Campmor confirming that the site was ready to launch, Brulant's Mike Rini advised Campmor that the SEO was also in

place, and that new, "flattened" URLs – web page addresses that are better suited for searching than the type Campmor had been using – would be uploaded the morning before the site was launched. (Jarashow Cert. Exh. I.) But this was a lie, and another one which Campmor paid dearly for relying on. Shortly after launching, Campmor saw a radical drop-off in traffic to the new Campmor site, and sales, almost immediately. When Mr. Jarashow complained to Brulant, its response was that the drop in SEO numbers was "minimal" and not uncommon. This was a lie. *(See* Cooper. Cert. filed on this date in opposition to Brulant's motion *in limine*.) In fact, Brulant deliberately chose to de-prioritize Campmor's requests regarding SEO, and acknowledged in internal emails that Brulant's abandonment of SEO and site usability and content issues were so negatively affecting Campmor's SEO that many of Campmor's SEO results were "almost back to square one" (Coleman Cert. Exh. G) – meaning they were about where they had been before Brulant's SEO enhancements to Campmor's 5.6.1 site.

Not only had no "best practices" been utilized to implement SEO on the site; Brulant had not even met the plain-vanilla requirements for SEO set out in the SOW and acknowledged to be basic SEO steps across the industry. (*See* Cooper. Cert. filed on this date in opposition to Brulant's motion *in limine*.) Brulant was committed under the SOW to create and implement an XML SiteMap, which essentially assist "spiders" that crawl a website in order to find pages for organic search engines (such as Google). These SiteMaps must be updated periodically to ensure they are working optimally. Although Brulant created an XML SiteMap for the 6.0 site, it was never even implemented or "switched on," let alone updated. Despite its explicit claim to having on hand a "best practices" level of SEO expertise, Mike Rini, Brulant's Project Manager for Search and Media – who was responsible for ensuring managing both SEO and paid search advertising on the Campmor project, testified that prior to being assigned to that position he had no experience at all with SEO. Far from being in a position to deliver "best practices," Rini

learned what they were for the first time via a dozen weekly meetings with Brulant's Paul Elliot – after Campmor had signed the SOW premised on Brulant's existing expertise. (Coleman Cert. Exh. P).

The proposition put forward by Brulant that there is no material factual question as to whether Brulant breached the contract with Campmor regarding its SEO commitments is almost as gargantuan a stretch as Brulant's claims of WebSphere expertise. For it was not only in the area of SEO, nor "minor" problems such as the ability of a retail website to process sales, that Brulant's incompetence fell short of any conceivable definition of "best practices." To add insult to injury, it was only after Campmor had already paid millions of dollars to Brulant for its upgrade to WebSphere 6.0 that Campmor learned that Brulant did not even install the right version of WebSphere on Campmor's site. Without telling Campmor, instead of building the site on the "WSC 6.0 Professional" edition of WebSphere – the appropriate, agreed-upon and licensed version – Brulant installed the "WSC Enterprise" edition, which is significantly, and unnecessarily, more complex and expensive. In light of such an error, it is hard to understand that Brulant ever believed it had any idea what it was doing, claims of "best practices" expertise notwithstanding.

Despite all this, Brulant claims that it had no role in Campmor's severe decline in sales, and that the falloff started in December 2008. But Brulant does not base this claim on any of the financial data provided by Campmor in this litigation, which empirically refutes its claim. Exh. J to Mr. Jarashow's Cert. is a breakdown of Campmor's December 2008 sales versus its December 2007 sales, all based on data provided in discovery. The abbreviation "M.O." on that exhibit stands for "mail order," which includes Internet sales. As demonstrated on this sheet, Campmor's mail and Internet sales in December 2008 dipped approximately 6%, not 20% as

claimed by Brulant.[4] The drop in revenue that did occur was in part due to Campmor's decision to cut its paid Internet advertising. Mr. Jarashow made this decision because of a significant increase in organic search revenue in 2008, which is reflected in Exh. L to the Jarashow Cert. This was a business decision Mr. Jarashow made not to go "out of pocket" and spend money in a weak economy when Campmor was already getting "free" or organic search traffic in the range of what Mr. Jarashow would have been seeking through paid advertising. This would have been a very exciting trend for Campmor if it had continued, and perhaps it would have if not for the devastating launch of Brulant's new 6.0 site.

In fact, Exh. M to Mr. Jarashow's Cert. is a breakdown of unique visitors to Campmor's site compared to its main competition obtained from Compete.com, an independent company that tracks this information for businesses. These figures demonstrate unequivocally, that the 2008 recession did not cause Campmor's customers to stop shopping. Rather, Brulant's "best practices" caused them to stop shopping, and buying, from Campmor. Campmor's damages are demonstrated in the Report and Supplemental Report of Dr. William Kerr. (Coleman Cert. Exhs. K and L, respectively). Dr. Kerr defended both his reports and explained the process by which he calculated Campmor's damages, which took into account all factors, including the recession at a deposition taken by Brulant's counsel. (Relevant sections of Dr. Kerr's deposition transcript is attached to the Coleman Cert. as Exh. M). These effectively refute Campmor's incredible suggestion that its actions and omissions did not cause damage to Campmor, much less that the question of whether they did so could possibly be decided on summary judgment in Brulant's favor.

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[4] Brulant relies for this counterfactual claim on an email from Mr. Jarashow to IBM (*see* Exh. L to the Declaration of Barry L. Cohen, dated March 30, 2011) written at the request of IBM's Sue Ruffalo so that she could go to her superiors at IBM and use it to get Campmor a better renewal price.

ARGUMENT

I. STANDARD OF REVIEW

Summary judgment under Fed. R. Civ. P. 56 must be denied where there is a dispute as to the facts of the controversy or the inferences that may be drawn from those facts. See *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Summary judgment is only appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Orvosh v. Program of Group Ins. for Salaried Employees of Volkswagen of Am., Inc.*, 222 F.3d 123, 129 (3d Cir. 2000). In deciding a summary judgment motion, the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000). The burden of persuasion on a party moving for summary judgment "is a stringent one which always remains with the moving party. If there remains any doubt as to whether a trial is necessary, summary judgment should not be granted." *Fagan v. Nordic Prince, Inc.*, CIV.A. 91-5143, 1992 WL 361704 (D.N.J. July 17, 1992).[5]

II. BRULANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON CAMPMOR'S BREACH OF CONTRACT CLAIM BECAUSE BRULANT'S BREACHES OF CONTRACT ARE INDISPUTABLE.

A. Brulant has repeatedly admitted liability.

Before being sued in an effort to make it accountable for its actions, Brulant made

[5] Brulant claims that Campmor made certain admissions when it failed to respond to a Request For Admissions (*see* Cohen Declaration, ¶ 8). But that Request for Admissions failed to include the exhibits it expressly referred to and relied on for meaning in its Requests. Because the Request was defective, it was a nullity and Campmor had no obligation to respond. *See, Outdoor Prod., Inc. v. The Deck Connection & More, Inc.*, 104 Ohio Misc. 2d 19, 23, 728 N.E.2d 44, 47 (Ohio Com. Pl. 1999).

numerous direct admissions that it breached its contract with Campmor. These took place orally, during a meeting on or about June 16, 2009, and Mr. Jarashow will testify as to those admissions at trial. (Jarashow Cert. ¶ 53). In addition, Brulant's own internal documents further, and conclusively, refute Brulant's claim that Campmor has no evidence to support its breach of contract claim solely on the basis of its own admissions. These include:

- An April 29, 2009 email from Scott Young to Dave Fazekas: *"Between Campmor guys, I am pretty embarrassed on the quality of the site that we created for them. DJ [Dan Jarashow] has very valid points and I suspect that his business will increase significantly when they are fixed."* (Coleman Cert. Exh. D).

- In his response, Mr. Fazekas writes: *"I am shocked that we released anything of this nature. Work that we are having to do was either completely overlooked, not tested, or there was a thought of just throwing something out there and catching up afterwards. I haven't spent energy figuring out why we are at this point, just what to fix. If anything it makes me feel better on where we are with JAB [Jos. A Bank - another Brulant account]."*[6] (*Id.*)

- A May 7, 2009 email from Scott Young to Joe McCrone: *"[I]t is totally unacceptable for Rosetta to have a site that has this many quality issues…. I think you and I agree that its site and coding issues is the deep rooted problem here. I have spent quite some time on the site lately and the issues are clearly there and they are clearly issues that we have caused."* (Coleman Cert. Exh. E).

- A May 14, 2009 email from Chris Boggs to Paul Elliot: *"Organic traffic and conversions are down… We are having some issues with keywords that are no longer addressed on the site due to removal and non-replacement of some old pages… All of its "kids/children's" terms seem to have tanked, due to lack of redirects from the old pages to the new. [Citing Dave Fazekas of Brulant]: "Testing methodologies are weak…. Lots of ordering issues…. Major defects include shipping issues and credit cards."* (Coleman Cert. Exh. F).

- A May 20, 2009 email from Chris Boggs to Adam Cohen (and others): *"[F]rankly there are way more serious usability/site content issues that are preventing the organic conversions…. We got very far with the 5.6 version of this site, yet from the redirects, error page and URL standpoint we are almost back to square one for many of the pages on the site. This is due to decisions that were made during the launch process to de-prioritize SEO requests."*

[6] Evidently Campmor's 6.0 site was a benchmark of Brulant's failures; reflecting on it helped Brulant feel better about other less egregious disasters.

(Coleman Cert. Exh. G).

These admissions, of which Brulant is certainly aware and which it saw no need even to acknowledge, much less refute, in its moving papers are all the evidence necessary to prove Campmor's liability for breach of contract. And there are more of them. At a minimum, these admissions raise far more than "a question of fact" that must be resolved at trial. Campmor, however, has a cornucopia of additional proof supporting its breach of contract claims.

B. Expert testimony regarding is not required to prove a breach of contract.

In its motion for partial dismissal under Fed. R. Civ. P. 12(b)(6), Brulant was at pains to argue that the parties had no special or fiduciary duty and the sole extent of their relationship was limited to the written agreements. This Court dismissed Campmor's fiduciary duty and negligence claims on that basis. Yet now Brulant asks the Court to turn Campmor's breach of contract claim "back into" a tort or negligence claim, asserting that Campmor is required go beyond the mounds of evidence and admissions that Brulant did not deliver what it promised. Rather, Brulant argues, an expert is required to testify that the Campmor website delivered by Brulant "actually had a lower level of functionality than the original website that had been utilized by Campmor" (Moving Brief at 13) and that "there was anything wrong" with Brulant's horribly dysfunctional, sale-killing website (*id*. at 13). Brulant essentially demands an expert testify as to whether Brulant met some supposedly esoteric "standard" or level of "adequacy" for Campmor to go to trial on its breach of contract claim. Brulant then launches into a discourse about which possible named witnesses may or may not be qualified to testify on this score and, finding them wanting, concludes that Campmor cannot prove a breach of contract.

Brulant's entire premise is mistaken. Rather than subject the array of fact and expert witnesses aligned against it to motions *in limine* – choosing only to seek exclusion of one, Mr. Brian Cooper, which Campmor addresses in a separate set of papers being filed contemporaneously herewith – Brulant asks the Court to essentially rule *in limine* on a summary

judgment motion and at the same time to impose a standard requiring expert testimony where none exists. "[A]bsent a state or federal mandate requiring expert testimony to maintain a claim, the Federal Rules of Evidence are quite clear; Rule 702 states that if testimony from a qualified expert will assist the trier of fact the court 'may' allow such testimony." *Legacy Healthcare Services, Inc. v. Provident Foundation, Inc.*, 2007 WL 257974, at *3 (N.D. Ohio 2007). It is certainly not required, and certainly is not necessary here where the breach is both admitted and readily discernable from the plain record. There is no legal mandate requiring expert testimony to establish Brulant's breaches of contract or, for that matter, the functional aspects of creating a website, because there is no such requirement—especially not in a breach of contract claim.

The Supreme Court of Wisconsin explained this in a very similar recent case under the same evidentiary and legal standards implicated here. *Racine County v. Oracular Milwaukee, Inc.*, 323 Wis. 2d 682 (2010) involved a breach of contract claim against a computer consultant. The defendant, as Brulant as done here, insisted that absent expert testimony, the "standard of care" to which the consultant was required to adhere could not be known to the jury. The court disagreed, explaining that a breach of contract claim was not a negligence or malpractice action, writing as follows in reference to the lower appellate court's rulings:

> [T]he Agreement between Oracular and Racine County was not a contract for professional services but rather a simple contract for services.
>
> The court of appeals further concluded that Racine County is not required to present expert testimony to recover on its breach of contract claim because the alleged breaches are within the realm of the ordinary experience of the average juror. Expert testimony is required when the jury will be presented with complex or esoteric issues" because it will assist the trier of fact. The court concluded that in this case, Racine County alleges two major breaches of contract, neither of which is complex or esoteric: the failure to provide training for Racine County's employees who would be using the software and the failure to fulfill the contract on a timely basis. Furthermore, the court of appeals decided that it would reach the same result even if the Agreement between Oracular and Racine County was a professional services contract:
>
> > Contrary to the circuit court's holding, expert testimony is not required as

> a matter of law to prove negligence in performance of a professional services contract. *Hoven* and *Micro-Managers* require only that, in actions on professional services contracts, negligence must be established for recovery; neither of those cases mandates expert testimony on professional services contracts.

Id., 323 Wis. 2d at 696-98 (internal quotes and citations omitted). Significantly, the court noted, in words that apply every bit as much to this case, "In this case, Racine County did not allege that Oracular breached the Agreement by failing to comply with industry standards; rather, Racine County alleged that Oracular breached the Agreement by not completing the project by the date agreed to and by failing to provide competent training." *Id.*

Here, too, to the extent Brulant's breaches are not deemed proved solely through Brulant's admissions, they can and will be addressed by fact witnesses who are quite competent to testify about what was promised and what was ultimately delivered – the difference between these being a breach of contract. Mr. Jarashow and other witnesses will testify as to the only material issues to be determined at trial regarding the creation of the 6.0 site: whether delivered on its promises, *inter alia*, to create a website (i) with all major components functioning properly, (ii) that compared favorably to market leaders and allowed Campmor to compete with its competitors; and (iii) that had improved Search Engine Optimization while maintaining rankings from Campmor's previous site. (Jarashow Cert. ¶¶ 26-54).[7] No "expertise" is required for Mr. Jarashow or any other first-hand observer to give this testimony any more than an automotive technology expert is needed to opine as to whether or not a car jumped off a cliff.

Indeed, if Brulant were taken at its word, Brulant would have to withdraw its earlier assertions that there was no special trust or position of power between it and Campmor and that the relationship was simply one between two sophisticated businesses. For that matter, it is

[7] Although not required, Campmor did elect to submit expert testimony to assist the jury in understanding Brulant's failures regarding SEO.

worth noting that Campmor rejected Brulant's first proposed Statement of Work for the 6.0 upgrade transmitted by Brulant in November of 2007 because Mr. Jarashow was "uncomfortable with that proposed SOW . . . and requested a simpler version that omitted what seemed to me to be superfluous and confusing language while retaining the essential elements of the agreement." (Jarashow Cert. ¶ 24) Certainly, considering the consumer fraud claims in this case, it cannot be Brulant's position that, despite this request, it managed to still deliver a contract whose deliverables were so inscrutable to a non-technical business owner that he had no business signing even this simplified version.

In fact, both Dan Jarashow and all the other witnesses who were personally involved in these events can testify as to their personal knowledge as to what was promised, what was delivered, what occurred along the way and what problems resulted. A witness who "was an actor or a viewer with respect to transactions or occurrences that are part of the subject matter of the lawsuit … should be treated as an ordinary witness [internal citation omitted]," not an expert, and is perfectly competent to testify about what he knows. *Fisher v. Ford Motor Company*, 178 F.R.D. 195, 197 (N.D. Ohio 1998).[8] Brulant should not get out of having its breach of contract heard by a jury by insisting only an expert could divine its occult incompetence.

C. <u>Campmor's customer emails are admissible evidence.</u>

Brulant's suggestion that "[Campmor] cannot seriously be contemplating relying on hearsay emails from customers to establish a breach of contract" is as specious as its argument that expert testimony is required. As discussed above, customer email complaints are hardly the only evidence of Brulant's admitted material and multiple breaches of contract. Nor are they

[8] Brulant's assertion that Mr. Jarashow's deposition transcript was an "admission" that expert testimony would be required to establish just what Campmor did wrong [Brulant Memorandum of Law, pp. 14-17] is not worthy of consideration. The Federal Rules or applicable case law determines when expert testimony is required, not Mr. Jarashow, who is not qualified to rule on such matters or even trained in the legal standards concerning expert witnesses.

hearsay evidence. Although certainly not the only evidence, these emails (attached as Exh. J to the Jarashow Cert.) do illustrate the scope and multitude of the problems (as well as the lost sales/customers) created by Brulant. They (along with all the other evidence) also show that Campmor's site did not compare favorably with its competitors and, in fact, Campmor was losing significant ground (and previously loyal customers) to its competition. In such a context, the use of emails to prove lost sales is entirely proper, as explained by the Third Circuit:

> The purpose for which the customers' statements are offered in this case differs in substance from the purpose for which the court in *Stelwagon* found them inadmissible. . . . While the plaintiffs here have also offered similar testimony that their customers told them that they were purchasing beer from the Beer World stores and not the plaintiffs, they offer it only for "the [limited] purpose of proving customer motive," for which purpose we found such evidence admissible under Rule 803(3). *Stelwagon*, 63 F.3d at 1274.11
>
> In addition, however, the record contains other non-hearsay evidence of a type not before the court in *Stelwagon*, that the plaintiffs offer to prove the fact of loss, the issue for which the court in *Stelwagon* found the customers' statements inadmissible.

Callahan v. A.E.V., Inc., 182 F.3d 237, 252-53 (3d Cir. 1999). Here Campmor, which did not have a face-to-face relationship with its Internet customers as a beer distributorship would, admittedly does not know the names of the customers whose non-purchases resulted in millions of dollars in non-sales. But, as in *Callahan*, these customer emails only corroborate testimony of lost business, including expert testimony, and sharply reduced sales, which was not available in *Callahan*, yet the Court admitted the complaint correspondence anyway. *See also*, *F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 608-09 (9th Cir. 1993) (admitting customer complaints under Rule 803(24)).

D. <u>Campmor has sufficient evidence of its damages</u>.

Brulant notes that a number of agreements governing the parties' contractual relationship limit its contractual liability, so that if found liable for a breach of contract, Campmor would be entitled to "the charges paid by Campmor to Brulant." (Def. Mem. at 17.) The existence of such

payments – totaling **$**1,561,707.88 (Jarashow Cert. ¶ 72) -- is not denied by Brulant. Thus there is no question that there is no bar based on evidence of damages to Campmor proceeding to trial on its claims for strict contract-based damages, i.e., at least to recover the amounts it paid to Brulant related to all aspects of the 6.0 upgrade.

This Court's April 1, 2010 ruling denying Brulant's motion to dismiss Campmor's fraudulent inducement and negligent misrepresentation claims provide for the possibility that additional damages, including damages for lost profits, may be obtained as well. Because all parties agree that Campmor would at least be entitled to these contract damages, the Court could disregard pages 17-22 of defendant's moving brief because, contrary to Brulant's claim, the payments by Campmor to Brulant are undisputed contract damages.

A plaintiff may recover lost profits on a breach of contract claim if the "(1) profits were within the contemplation of the parties at the time the contract was made, (2) the loss of profits is the probable result of the breach of contract, and (3) the profits are not remote and speculative and may be shown with reasonable certainty." *In re Nicole Energy Services, Inc.*, 385 B.R. 201, 248 (Bankr. S.D. Ohio 2008). "The ultimate purpose of requiring a party to prove both the existence and amount of lost profits is to avoid claims that are too remote and speculative." *Regal Cinemas, Inc. v. W & M Properties*, 90 F. App'x. 824, 833 (6th Cir. 2004), *citing Bobb Forest Products, Inc. v. Morbark Indus., Inc.*, 151 Ohio App. 3d 63, 87 (2002). When exact damages are not ascertainable by precise computation, "the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly." *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 484 (3d Cir. 1998). The Ohio *Bobb Forest* decision is particularly instructive because it demonstrates that defendant's suggestion that Campmor must have personal knowledge of the specific amount of profit from **each sale** lost due to Brulant's

breach[9] has no support in Ohio law. To the contrary, in Ohio "[t]he plaintiff's evidence of lost future profits as an item of compensatory damages need only be reasonable, not specific." *Charles R. Combs Trucking, Inc. v. Int'l Harvester Co.*, 12 Ohio St. 3d 241, 244 (1984). In *Bobb Forest*, *supra*, the lost damages expert "was an experienced accountant without any particular ties to the lumber industry" and used appropriate comparisons and projections of profitability and sales in light of the breach alleged, and this was enough. 151 Ohio App. 3d at 90. There was no requirement that plaintiff list each lost sale – a metaphysical exercise if required here, considering that a significant element of Campmor's claim is that potential customers never even got to Campmor's website.

Even in a more conventional lost profits case there is no such standard, as the Ohio Court of Appeals explained in *Rubbermaid, Inc. v. Hartford Steam Boilers Inspection Co., Inc.*, 96 Ohio App. 3d 406 (Ohio Ct. App. 1994). After exhaustively listing the analytical tools utilized by the testifying lost profits expert to prove damages even where an established company was nonetheless rolling out a new line of products, the court deemed that "indirect" testimony sufficient. "While Rubbermaid did not present evidence concerning actual lost sales to specific customers" wrote the court, "construing the evidence most strongly in Rubbermaid's favor, we find that reasonable minds could come to more than one conclusion as to whether Rubbermaid suffered business interruption losses. Thus, the trial court did not err in denying IRI's motion for a directed verdict." *Id*. at 410-411.

New Jersey law is in accord, of course. The language used by this Court in *Inter Med. Supplies Ltd. v. EBI Med. Sys., Inc.*, 975 F. Supp. 681 (D.N.J. 1997) is particularly applicable to the preposterous table laid out across three pages of Brulant's moving brief, in which it sets out

[9] Brulant's erroneous claim that Campmor's sales began to "precipitously" decline in December 2008, which it mistakenly believes was the start of the recent recession, is empirically refuted by the financial data provided to Brulant during discovery and, notably, Brulant does not include any of that data with its moving papers. (*See* Jarashow Cert. ¶ 55).

punch-list items (as if this were a limit on Campmor's claims) and proposes, erroneously, that no specific item of damage could be traced to any of them! As this Court wrote in response to a similar demonstration:

> Because plaintiffs never claimed any distinct or additional compensatory damages arising from the [individual] torts, it is of little consequence that there are no separate damage calculations. Plaintiffs' expert testified to the entire amount of plaintiffs' damages. Defendants challenged that testimony upon cross-examination. I concluded, at trial, that requiring plaintiffs to itemize their damages as to each legal claim would be unnecessarily confusing to the jury and would risk a double, or even treble, recovery. The entire amount of damages plaintiffs sought for "lost profits" was presented to the jury and supported by expert testimony. Accordingly, there is sufficient evidence of plaintiffs' damages for tortious interference to support the jury's verdict, as there is for plaintiffs' contract damages. . . .
>
> **Whether or not plaintiffs' damages expert connected the breach of a single contractual provision with a fixed amount of damages is ultimately irrelevant**. The jury heard testimony connecting this alleged breach with the defendants' successful attempt to secure sufficient inventory to squeeze Orthofix out of the U.S. market. This is all that is required.

Id. at 692 (emphasis added).

Here too the jury need only hear a highly competent expert's testimony connecting Brulant's breach with the damages that followed. No more is required. The summary judgment standard requiring only proof of the existence of disputed material facts is more than amply met by the Report and Supplemental Report of Dr. William Kerr (Coleman Cert. as Exhs. K and L). Dr. Kerr defended both his reports and explained the process by which he calculated Campmor's damages, which took into account all factors, including the recession at a deposition taken by Brulant's counsel. (Coleman Cert. Exh. M). It is telling that while Brulant engaged its own economist in an attempt to attack Dr. Kerr's report (a measure it did not take in connection with Brian Cooper's SEO Report despite filing a motion to exclude it), Brulant did not even attempt to exclude Dr. Kerr's testimony about lost profits. Its alternative approach of requiring a list of imaginary customers who did not buy from Campmor may have been easier than punching a

hole in Dr. Kerr's report, but it is not based on the law.[10]

III. CAMPMOR'S BREACH OF CONTRACT DAMAGES ARE NOT LIMITED BY THE TERMS OF THE MASTER SERVICES AGREEMENT

Under Ohio law, which governs the contract dispute between the parties,[11] a limitation of liability provision does not apply where the breaching party acts willfully or recklessly. *See Nahra v. Honeywell, Inc.*, 892 F. Supp. 962, 969-70 (N.D. Ohio 1995). Here it is impossible to say that there is no material proof that Brulant's Campmor's myriad and serial material failures were intentional or reckless.

Consider the allegations, all of which are supported by the proofs submitted on this motion: A consultant claiming world-class expertise promises to upgrade a successful company's e-commerce website, including best-practice-level SEO. The upgrade, while expensive, will pay for itself, says the consultant. In fact, however, the consultant has no such expertise. It is tutoring, on the fly, a manager with no experience in SEO so he can manage it on the project. It installs the wrong version of the e-commerce software platform. It is six months behind schedule and millions of dollars over budget, but consistently tells the client that all is well until the delays and overruns can no longer be hidden. It cannot make the basic job of closing sales via the website work dependably and blames customers for not knowing how to

[10] Brulant's only argument in support of its application for summary judgment dismissing Campmor's negligent misrepresentation and breach of warranty claims is its assertion that "Campmor has failed to proffer any evidence that it suffered any actual damages based on Brulant's work" [Brulant Memorandum of Law at 26, n. 12]. As demonstrated above, Campmor has demonstrated its damages through the Kerr Report and Kerr Supplemental Report. Therefore, there is no basis for dismissing those claims either. In any event there is more than adequate support for these claims in the record submitted here. *See e.g., Fresh Direct, LLC v. Blue Martini Software, Inc.*, 7 A.D.3d 487, 489 (N.Y. App. Div. 2004).

[11] As discussed *infra*, New Jersey law applies to Campmor's claim under New Jersey's Consumer Fraud Act and to the extent the contract is deemed to have been unlawfully or negligently induced.

input credit card data. Ultimately the "upgrade" not only fails to pay for itself, it costs the client millions in lost sales – and the consultant demands additional payment for its efforts.

If this were not itself a record raising issues of recklessness, consider the emails set out above at pp. 14-15. In them, the consultant's own employees admit privately that they are "shocked" and "embarrassed"; that performance on their client's site "tanked" and was "unacceptable"; that the problems were "deep rooted" and – perhaps worst of all – were the product of "work . . . either completely overlooked, not tested, or there was a thought of just throwing something out there and catching up afterwards." These stunning descriptions are merely the way Brulant itself described its treatment of Campmor. Based on these admissions alone, if the question of recklessness were to be determined in this case on summary judgment, it could not be in Brulant's favor.

In addition, Brulant, throughout its relationship with Campmor, made the utterance of false reports about the progress of the project a regular practice, raising far more than a dispute of material fact on the issue of willfulness. Brulant made multiple, material misrepresentations of fact regarding the status of the 6.0 site and its SEO up to and including the date of its launch. For example, in response to an email from Campmor's chief financial officer, Bill O'Donnell, as to the status of the SEO work for the 6.0 site, Brulant's Rini sent an email on March 24, 2009 assuring that the site was "ready to go" from an SEO perspective, explicitly listing all the SEO items that were in place and that flattened URLs had been generated and would be uploaded the following morning prior to the launch. This email was almost entirely composed of lies, as demonstrated both by the objective lack of SEO on the site and a May 20, 2009 email from Brulant's Chris Boggs to Adam Cohen, admitting that Brulant made a conscious decision to de-prioritize SEO requests leading up to the launch of the new site and by Boggs's subsequent testimony. (Coleman Cert. Exhs. G, H).

Mr. Jarashow's Certification, Brulant's admissions and the customer emails all demonstrate the magnitude and impact of the Brulant's willful and cumulative breaches and speak to the spuriousness of its representations. As set forth extensively above, in addition to lying about the progress on SEO prior to the launch, Brulant responded to Campmor's reports of massive problems with the 6.0 site by asserting to Campmor that the problems were Campmor's fault or its Campmor's customers' fault – all while admitting internally, evidenced by the emails cited above, that Brulant had utterly screwed up the project.

IV. CAMPMOR'S FRAUD CLAIMS MUST BE RESOLVED AT TRIAL

Fraud is demonstrated by showing the following elements by a preponderance of the evidence: (a) a representation, (b) which is material to the transaction at hand, (c) made knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (d) with the intent of misleading another into relying upon it, (e) justifiable reliance upon the representation, and (f) a resulting injury proximately caused by the reliance. *See Watkins v. Cleveland Clinic Found.*, 130 Ohio App. 3d 262, 277-78 (Ohio Ct. App. 1998).[12] Campmor's submissions here readily demonstrate the existence of material disputes over whether or not such representations were made, relied on and caused damage.

Brulant makes only two arguments in support of its motion to dismiss Campmor's fraud claim. First, it argues that Campmor has not proffered any evidence "that Brulant knowingly provided a material misrepresentation of fact" [Brulant memorandum of law, p. 26]. Second, it argues that Campmor's fraud claim is barred by the integration clause in the MSA. Each of these erroneous arguments is addressed in turn below.

A. There is sufficient evidence of Brulant's misrepresentations.

Misrepresentation of professional or technical qualifications is grounds for a claim of

[12] As noted in Brulant's memorandum of law, the standard under New Jersey law is similar.

fraudulent inducement under Ohio law. *Kinda Wood USA v. MGV Enterprises LLC*, 2009 WL 649793 (S.D. Ohio Mar. 10, 2009). Courts commonly distinguish "a prospective business partner's "promissory statements as to what will be done in the future, which give rise only to a breach of contract claim, and his or her false representations of present fact, which give rise to a separable claim of fraudulent inducement." *Stewart v. Jackson & Nash*, 976 F.2d 86, 89 (2d Cir. 1992) (internal quotes omitted). As the Second Circuit explained in *Stewart*:

> In the case of *Coolite Corp. v. American Cyanamid Co.*, 52 A.D.2d 486, 384 N.Y.S.2d 808 (1st Dep't 1976), for example, defendant Cyanamid, a manufacturer of light sticks, represented to Coolite that it had fully tested its product and had developed a means of correcting the product's defects. Coolite, allegedly in reliance on these statements, contracted to become the exclusive distributor of the light sticks. Coolite later found the product not to be of merchantable quality and sued for fraudulent misrepresentation. The Appellate Division let the fraud claim stand on the grounds that "Cyanamid's representations ... were representations of fact and not merely promises of future action." 52 A.D.2d at 488, 384 N.Y.S.2d at 810.

Stewart, 976 F.2d at 89. *See also*, *McMahan Sec. Co. L.P. v. FB Foods, Inc.*, 2006 WL 2659996 (M.D. Fla. Sept. 15, 2006) (no summary judgment granted in action for fraud in the inducement premised upon false representations regarding a defendant's experience, qualifications, or expertise in a particular area); *cf*., *Kramer Consulting, Inc. v. McCarthy*, 284 F. Supp. 2d 917, 920-21 (S.D. Ohio 2003) ("In this case, there is no evidence that McCarthy ever made any factual misrepresentations to Kramer. There is no evidence, for example, that McCarthy misrepresented his skills or experience or the capabilities of his company").

As set forth extensively *supra*, Brulant made repeated and false representations – both as an inducement to and throughout its contractual relationship with Campmor – regarding its expertise and its mastery of "best practices"[13] with respect to upgrading Campmor's website to the WSC 6.0 platform and optimizing it for search. These promises and the SOW itself were

[13] In his report, Brian Cooper explains "best practices" as they relate to Search Engine Optimization and demonstrates how Brulant failed to even meet minimum industry-based standards.

sold with and based on a phony "best practices" routine that, as described above, permeated every presentation, both oral and written, and was built right into the SOW itself.

There is a point where misrepresentations of expertise go beyond puffery. *See Kinda Wood USA*, 2009 WL 649793. Brulant's continual references to "best practices" implied that it had mastery of and would employ specific management and technical techniques, methodologies and processes that would deliver the "best" results for the premium prices being charged. And this was a song and dance that not even Brulant believed. Notwithstanding Brulant's "best practices" mantra, during his deposition Joseph McCrone admitted that the term "doesn't mean a lot to me. I think it's overused and too vague."[14] (Coleman Cert. Exh. B). Paul Elliot, a principal at Brulant and who was in charge of Search and Media for Brulant's work with Campmor, testified that "best practices" "doesn't mean a lot" to him either. (Coleman Cert. Exh. C).[15] Yet by including language in the SOW such as a commitment to upgrade Campmor to the 6.0 site "with a best-practices configuration and all major components functioning properly," Brulant not only induced Campmor into believing that it meant something, or at the very least that it meant something to Brulant, but that this something was very real and worth paying for.

Nowhere was the "best practices" lie more cynical than with respect to the SEO sale by Brulant. One example of Brulant's misrepresentation of its expertise is illustrated by its appointment of Mike Rini as Project Manager for Search and Media for the Campmor project, which included SEO. Mr. Rini testified that (i) he managed SEO as part of his duties as project manager, (ii) that he had zero experience with SEO prior to being moved into that position and

[14] This testimony took place in 2010. Despite this, Mr. McCrone's profile still uses this "overused and vague" term to describe what Mr. McCrone does.

[15] Nonetheless, McCrone's profile on Rosetta's website currently states, in a uniquely Brulantesque mix of latter-day tech-marketing-speak, that he "is focused on helping his clients drive maximum value from the online channel by blending interactive marketing **best practices** with the appropriate use of technology and sound business decision making to ensure a measurable ROI is achieved." (Coleman Cert, Exh. A; emphasis added).

(iii) that his training was limited to approximately 12 informal meetings with Paul Elliot to "run through SEO best practices…"[16] (Coleman Cert. Exh. P). These facts do not amount to a "mere" breach of contract, for no one knew better than Brulant what the SEO experience level was of its mangers. There is ample evidence in this record for the fraud claim to go to the jury.

B. The integration clause does not bar Campmor's fraud claims.

In its decision on Brulant's motion, the Court declined to dismiss Campmor's claims based on promissory estoppel, relying on the Ohio decision in *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 28 (2000). Brulant now argues that though the Complaint "alleges that Brulant made certain promises that induced it to enter [into] the MSA and/or subsequent SOW's," Campmor has "proffered no evidence to support these allegations." [Brulant Mem. of Law. at 32.] But it has, above, and there is more. There is Brulant's ongoing representation of expertise that did not exist; the repetition of empty "best practices" gibberish and assurances from sale to signing; the claim of a non-existent "special relationship" between Brulant and IBM whose benefits would flow to Campmor; the imminent imposition of a $25,000 "end of life" fee by IBM on WebSphere 5.6.1 users; and of course the use of budget numbers that were so far off from reality that a jury is certainly entitled to hear testimony to determine if they were no more than props utilized to "get the business," in the knowledge that they were ultimately not binding on Brulant.

There are others, too. Notable is the September 25, 2007 email from Brulant's Denton to Campmor, copied to three other Brulant personnel, promising – as explicitly as could be asked – that the 6.0 implementation would more than pay for itself by the end of 2009:

> The estimated fees to Brulant through the end of 2009 is $757,700. Estimated costs to others is $136,000. The ROI is estimated to "cash flow positive" in August of 2008 and result in additional profits of $2.2mm by the end of 2009. I have been conservative at every opportunity during the estimation process. I am confident that we can beat this estimate. The way the ROI is presented allows us

[16] As noted above, Mr. Elliot's deposition revealed that he didn't have any true understanding of what 'best practices' meant, testifying only that "it doesn't mean much" to him.

to track forecast vs. actual on a monthly basis starting in January of 2008.

(Jarashow Cert. Exh. D). The projections in this email were not only fantastic and completely opposite from the real results delivered, but they could not even have been believed by Brulant when made given the vast distance between what was promised and what was never delivered.

V. CAMPMOR'S NEW JERSEY CONSUMER FRAUD CLAIM SHOULD NOT BE DISMISSED.

Defendant accurately states the requirements for a claim under New Jersey's Consumer Fraud Act (CFA). *See Maniscalco v. Brother Int'l Corp. (USA)*, 627 F. Supp. 2d 494, 499 (D.N.J. 2009). Unlike traditional fraud, under the CFA "[a] defendant who makes an affirmative misrepresentation is liable even in the absence of knowledge of the falsity of the misrepresentation, negligence or the intent to deceive." *Szczubelek v. Cendant Mortgage Corp.*, 215 F.R.D. 107, 125 (D.N.J. 2003). The record recounted above is rich with such misrepresentations.

Despite the fact that the CFA is broadly designed to protect the public and "should be liberally construed" to protect consumers as defined by the statute, *Boyes v. Greenwich Boat Works, Inc.*, 27 F. Supp. 2d 543, 547 (D.N.J. 1998), Brulant argues that the choice of law clause controls. But the Court acknowledged Campmor's right to bring a claim under the CFA even though it applied Ohio law to the remainder of Campmor's claims when it allowed Campmor to amend its pleading to comply with the requirements of Rule 9. This determination was sound[17] and is there are no grounds for it to be revisited by the Court. "Courts apply the law of the case

[17] Courts sitting in New Jersey apply the Restatement 2d's "most significant relationship" test and the corresponding choice of law factors when considering choice of law challenges to CFA claims. *In re NorVergence, Inc.*, 424 B.R. 663, 697-98 (Bankr. D.N.J. 2010). "Courts have recognized that significant conflicts exist between the NJCFA and the consumer protection statutes of other states." *Agostino v. Quest Diagnostics Inc.*, 256 F.R.D. 437, 461 (D.N.J. 2009). Ohio's statute is limited to products and services used on a personal, family or household level. *See* Ohio Rev. Code Ann. § 1345.01, *et seq*. Given this policy distinction, it can hardly be argued that it is in the interest of this State to remove an entire class of claimants, including a corporation doing all its business in New Jersey, from that protection.

doctrine when their prior decisions in an ongoing case either expressly resolved an issue or **necessarily resolved it by implication**." *United Artists Theatre Circuit, Inc. v. Twp. of Warrington, PA*, 316 F.3d 392, 397-98 (3d Cir. 2003) (emphasis in original).

VI. BRULANT IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIM FOR UNJUST ENRICHMENT

Brulant's claim for unjust enrichment is barred as a matter of law by the existing contract between the parties. *See Bickham v. Standley*, 183 Ohio App. 3d 422, (Ohio Ct. App. 2009). Therefore Brulant must seek recovery of any alleged damages through a breach of contract claim, not unjust enrichment. Even then, here Brulant cannot demonstrate a *prima facie* case under *Hambleton v. R.G. Barry Corp.*, 12 Ohio St. 3d 179, 183 (1984). In fact, it appears that the only purpose Brulant had in including this obviously meritless claim was to attempt to "balance out" purported bad acts by placing before the Court the narrative concerning the filing by Campmor of a complaint without service of the same while Campmor attempted to salvage the relationship between the parties. Campmor's purpose in doing so was solely to assure itself of a New Jersey forum and avoid the possibility of being hailed into an Ohio court to vindicate its rights, much less defend against threatened claims by Brulant. There is nothing improper in this. "Of course, the mere delaying of notice and service of a complaint in the hopes of avoiding litigation through settlement does not constitute bad faith or improper forum shopping where both parties had a reasonable apprehension that filing suit was imminent." *Zokaites v. Land-Cellular Corp.*, 424 F. Supp. 2d 824, 838 (W.D. Pa. 2006). It certainly it does not provide a ground on which to make a claim for damages under any theory of recovery.

CONCLUSION

For the foregoing reasons, defendant's summary judgment motion should be denied in its entirety.

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