UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

CITY OF MORRISTOWN, TENNESSEE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:16-cv-59
	)	
AT&T CORP. and BELLSOUTH TELECOMMUNICATIONS, LLC d/b/a AT&T TENNESSEE and d/b/a AT&T SOUTHEAST,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter is before the Court on Defendants' Motion to Dismiss the Amended Complaint [doc. 17] and Plaintiff's Response [doc. 18]. For the reasons herein, the Court will deny Defendants' motion.[1]

I. BACKGROUND

Plaintiff City of Morristown, Tennessee ("City of Morristown"), alleges that it had a long-term contractual relationship for telephone services with Defendants that dates back to the 1970s and included the installation of multiple circuits. [Am. Compl., doc. 14, ¶¶ 5,

[1] In this motion, Defendants seek dismissal of the Amended Complaint [doc. 14], but beforehand, they filed a motion to dismiss the original Complaint [doc. 1-1]. Because an amended complaint replaces an original complaint, the Court will deny the first motion to dismiss [doc. 12] as moot. *See, e.g., Ky. Press Ass'n, Inc. v. Kentucky*, 355 F. Supp. 2d 853, 857 (E.D. Ky. 2005) ("Plaintiff's amended complaint supercedes the original complaint, thus making the motion to dismiss the original complaint moot.") (citing *Parry v. Mohawk Motors of Mich., Inc.*, 236 F.3d 299, 306 (6th Cir. 2000)).

13]. The City of Morristown claims that, between 1992 and 2004, it requested the cancelation of eight circuits, which have since been "removed from service" and inactive. [*Id.* ¶¶ 9, 11, 13, 15, 17, 19, 21, 23]. To investigate Defendants' billing practices, the City of Morristown alleges that in 2012 it hired an independent consulting firm and learned that Defendants had overcharged it by hundreds of thousands of dollars over several years. [*Id.* ¶¶ 7, 25]. The City of Morristown also alleges that "[t]his consulting firm has been involved in multiple municipal audits of [Defendants] and avers that it has uncovered a scheme where [Defendants] disconnect[] lines and/or circuits, but continues to bill its customers for these disconnected lines." [*Id.* ¶ 7].

In particular, the City of Morristown maintains that Defendants continued to charge it hundreds of dollars a month for each of the eight circuits even though they had been inactive for years. [*Id.* ¶¶ 9, 11, 13, 15, 17, 19, 21, 23]. According to the City of Morristown, these charges were "encrypted," [*id.* ¶ 44], and "bur[ied]" in "pages upon pages of data" in its billing statements, [*id.* ¶¶ 6, 44]. As a result, the City of Morristown brings this diversity action against Defendants for breach of contract (Count I), unjust enrichment (Count II), negligence (Count III), fraud and intentional misrepresentation (Count IV), and negligent misrepresentation (Count V). Defendants now seek dismissal of Counts III–V, arguing that these claims "are insufficiently pled, suffer from obvious legal defects, and should be dismissed." [Defs.' Mot. to Dismiss at 3].

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 8(a)(2), "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is

entitled to relief." In determining whether to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6), a court accepts the factual allegations in the complaint as true and construes them in a light most favorable to the non-moving party. *See Mixon v. Ohio*, 193 F.3d 389, 400 (6th Cir. 1999). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," however, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In addition, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

A pleading that contains allegations of fraud, however, must satisfy a heightened pleading standard under Federal Rule of Civil Procedure 9(b), which states: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." To satisfy this standard, a pleading must contain allegations of "the time, place and content of the misrepresentations; the defendant's fraudulent intent; the fraudulent scheme; and the injury resulting from the fraud." *Power & Tel. Supply Co. v. SunTrust Banks, Inc.*, 447 F.3d 923, 931 (6th Cir. 2006) (citations omitted). Although Rule 9(b) allows a party to plead intent and knowledge in general terms, conclusory assertions as to these states of mind will not suffice "without reference to [a] factual context." *Iqbal*,

556 U.S. at 686. In other words, the pleading requirements under Rule 8(a)(2) are "still operative" and apply to allegations of intent and knowledge. *Id.* (citation omitted); *see also Michaels Bldg. Co. v. Ameritrust Co.*, 848 F.2d 674, 680 (6th Cir. 1988) ("Rule 9(b)'s particularity requirement does not mute the general principles set out in Rule 8; rather, the two rules must be read in harmony." (citation omitted)). A party therefore may not simply plead "the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Iqbal*, 556 U.S. at 686.

III. ANALYSIS

Defendants assert that this case "is a simple contract dispute" but that the City of Morristown "attempts to allege tort theories by restating its contract claim in language of tort." [Defs.' Mot. to Dismiss at 2]. In this vein, they argue that the City of Morristown has not alleged an independent legal duty that supports its claim for negligence and has not alleged a misrepresentation of fact that sustains its claims for misrepresentation. [*Id.* at 3].

A. Negligence

The City of Morristown alleges that Defendants "owed it a duty of care as a service provider to provide reasonable services to the City, including but not limited to disconnecting and removing from its billing the aforementioned circuits." [Am. Compl. ¶ 37]. Defendants, however, contend that this allegation amounts only to a reiteration of the parties' contractual relationship, which, as an arms-length relationship, does not create a duty of care. [Defs.' Mot. to Dismiss at 5]. According to Defendants, "[i]t is black letter law that breach of a contractual duty cannot support a negligence claim." [*Id.* at 4].

A claim for negligence cannot succeed if a defendant does not owe a plaintiff a duty of care. *Bradshaw v. Daniel*, 854 S.W.2d 865, 869 (Tenn. 1993). "Whether a defendant owes a duty to a plaintiff in any given situation is a question of law for the court. . . . to be determined by reference to the body of statutes, rules, principles, and precedents which make up the law[.]" *Jones v. Exxon Corp.*, 940 S.W.2d 69, 71 (Tenn. Ct. App. 1996) (quoting *id.* at 869–70). When a contractual relationship exists between parties, a duty of care can "arise[] out of the circumstances surrounding or attending the transaction," in which case a breach of that duty is a tort and the contract "furnishes the occasion for the tort." *Green v. Moore*, No. M2000-03035-COA-R3-CV, 2001 WL 1660828, at *3 (Tenn. Ct. App. Dec. 28, 2001) (quotation omitted); *see Thomas & Assocs., Inc. v. Metro. Gov't of Nashville*, No. M2001-00757-COA-R3-CV, 2003 WL 21302974, at *6 (Tenn. Ct. App. June 6, 2003) ("Conduct constituting breach of contract becomes tortious only when it also violates a duty, independent of the contract . . . ." (citations omitted)). The survival of the City of Morristown's claim for negligence therefore depends on whether, under Tennessee law, a public utilities provider[2] has a "duty of care . . . to provide reasonable services" to its customers, "including but not limited to disconnecting and removing" those services. [Am. Compl. ¶ 37].

[2] Under Tenn. Code Ann. subsection 65-4-101(6)(A), a "public utility" means "every individual, copartnership, association, corporation, or joint stock company, its lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the state, any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof."

In *Trigg v. Middle Tennessee Electric Membership Corp.*, 533 S.W.2d 730 (Tenn. Ct. App. 1975), plaintiffs William and Ellen Trigg ("the Triggs") entered into a contract with defendant Middle Tennessee Electric Membership Corporation ("Middle Tennessee Electric"), a utilities provider, "whereby the defendant agreed to furnish electricity to the plaintiffs at their residence and the plaintiffs agreed to comply with the cooperative's rules and regulations." *Id.* at 732. A dispute between the parties regarding the payment of a bill prompted Middle Tennessee Electric to disconnect the Triggs' electrical service—an action that it took while the Triggs were away on vacation.[3] *Id.* When the Triggs returned from vacation, they discovered that the food in their refrigerator and freezer had spoiled, drained onto the floor and carpets, and created a "stench and odor of decay." *Id.* at 732 n.1. The icemaker had also flooded the kitchen and dining room. *Id.* The Triggs had to replace or treat all of their furniture because of the odor and flooding. *Id.*

As a result, they sued Middle Tennessee Electric for the damages to their home, and the court held that Middle Tennessee Electric had "acted unreasonably and was negligent in terminating the plaintiffs' service while they were on vacation." *Id.* at 734. In reaching this decision, the court reasoned that public utilities providers enjoy "certain rights and benefits" and "[a] concomitant of these rights and benefits is a duty to use a corresponding degree of care to protect the public." *Id.* Based on this rationale, the court made a broader ruling as well: "We hold that in Tennessee, a public utility, when terminating service to a

[3] The court noted that one of Middle Tennessee Electric's employees, after visiting the house twice, "was able to ascertain that the Triggs were not home." *Trigg*, 533 S.W.2d at 734.

customer, must act reasonably when the discontinuance of the service might present an obvious danger of damage to the property of the customer."[4] *Id.*

The only remaining question is whether *Trigg*'s holding applies when damages are not to property but are purely economic—the type of damages that the City of Morristown pursues here. The answer to this question depends on whether Tennessee law permits parties to recover damages under a theory of negligence without having suffered personal injury or damage to property. In short, it depends on the scope of Tennessee's economic loss rule, "a judicially created principle that reflects an attempt to maintain separation between contract law and tort law by barring recovery in tort for purely economic loss." *Lincoln Gen. Ins. Co. v. Detroit Diesel Corp.*, 293 S.W.3d 487, 488 (Tenn. 2009) (citation omitted). Although Tennessee's courts have not expressly adopted the economic loss rule, the Tennessee Supreme Court has agreed with the policy behind the rule, *see Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128, 133 (Tenn. 1995), and Tennessee's lower courts have also addressed the rule, *see, e.g.*, *Acuity v. McGhee Eng'g, Inc.*, 297 S.W.3d 718, 734 (Tenn. Ct. App. 2008).

In *United Textile Workers of America v. Lear Siegler Seating Corp.*, 825 S.W.2d 83 (Tenn. Ct. App. 1990), defendant Lear Siegler Seating Corp. ("Lear") operated a factory

[4] The court, in support of its holding, cited *Washington Gas Light Co. v. Aetna Casualty & Surety Co.*, 242 A.2d 802 (Md. 1968), a case in which the court observed: "The defendant is a public utility authorized to do business in this state. When its property is devoted to public use, certain reciprocal rights and duties are raised by implication of law between the utility and the public it undertakes to serve. It has a duty to use the highest degree of care to protect the public in rendering service to its customers." *Id.* at 804 (quoting *Kohler v. Kan. Power & Light Co.*, 387 P.2d 149, 151 (Kan. 1963)).

that local authorities closed after a storm had damaged propane tanks on the factory's property and caused them to leak. *Id.* at 83–84. Plaintiff United Textile Workers of America ("United Textile"), a union, sued Lear on behalf of Lear's employees based on a theory of negligence, seeking lost earnings that the employees would have been entitled to if not for the factory's need to close. *Id.* at 84. United Textile argued that Lear owed a duty of care to the employees to take reasonable measures in handling and storing the tanks, to avoid the risk of economic harm to the employees. *Id.* The court ruled against United Textile, refusing to allow the employees to recover "purely economic loss absent physical injury or property damage." *Id.* at 87. In reaching this decision, the court traced the economic loss rule to its origin in the United States Supreme Court's opinion *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), in which "the rule was expressed that liability is not legally recognized for indirect economic damages." *United Textile*, 825 S.W.3d at 84–85.

Tennessee's courts, however, acknowledge that *United Textile*'s holding is confined to cases in which the parties lack privity of contract. *See John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 430 (Tenn. 1991); *Acuity*, 297 S.W.3d at 734. In fact, the economic loss rule does not apply in Tennessee under two scenarios, when: (1) the parties in a case have privity of contract, *see John Martin*, 819 S.W.2d at 430 (describing the economic loss rule as "a general principle that prohibits the recovery of purely economic damages for negligence *when the plaintiff lacks privity of contract with the defendant*" (emphasis added) (citation omitted)); *Acuity*, 297 S.W.3d at 734 (stating that "[t]he economic loss doctrine provides that, *absent privity of contract*, one may not recover in negligence where there is no injury to person or property." (emphasis added) (citing *United Textile*, 825 S.W.2d at

87)); *see generally* Eddward P. Ballinger, Jr. & Samuel A. Thumma, *The History, Evolution and Implications of Arizona's Economic Loss Rule*, 34 Ariz. St. L. J. 491, 494 (2002) (noting that some states treat contractual privity as a requirement for the recovery of economic losses in a negligence action, whereas other states treat it as a bar to recovery (footnote omitted)), and (2) the action for pure economic loss is based on negligent supervision or negligent misrepresentation, *Acuity*, 297 S.W.3d at 734 (citing *John Martin*, 819 S.W.2d at 435).

Because Tennessee's economic loss rule does not bar recovery of economic losses in tort when parties have privity, it does not hamper the City of Morristown's claim for negligence, which includes allegations of privity. [*See* Am. Compl. ¶¶ 5, 36].[5] Based on these allegations, the Court finds no reason to curtail *Trigg*'s holding so that a public utilities provider's duty of care requires reasonable conduct to avoid risks only to a customer's property and not a customer's economic well-being. Indeed, outside of the economic loss rule's domain, a duty of care extends to any type of risk so long as "the foreseeable probability and gravity of harm posed by defendant's conduct outweigh the burden upon defendant to engage in alternative conduct that would have prevented the harm." *McCall v. Wilder*, 913 S.W.2d 150, 153 (Tenn. 1995) (citation omitted). To determine whether the foreseeability and gravity of harm outweigh a defendant's burden to take reasonable protective measures, a court considers several factors:

> [1] the foreseeable probability of the harm or injury occurring; [2] the possible magnitude of the potential harm or injury; [3] the importance or

[5] Defendants concede that this case involves a contractual dispute between the parties. [Defs.' Mot. to Dismiss at 2].

> social value of the activity engaged in by defendant; [4] the usefulness of the conduct to defendant; [5] the feasibility of alternative, safer conduct and the relative costs and burdens associated with that conduct; [7] the relative usefulness of the safer conduct; [8] and the relative safety of alternative conduct.

Id. (citation omitted). In assigning a duty of care to public utilities providers when they terminate a customer's service, the court in *Trigg* addressed several of these factors implicitly but addressed the third factor head-on. In doing so, the court, again, noted that public utilities providers "in the state of Tennessee enjoy . . . certain rights and benefits" and "[a] concomitant of these rights and benefits is a duty to use a corresponding degree of care to protect the public." *Trigg*, 533 S.W.2d at 734. When considering the third factor, this Court struggles to imagine that "the importance or social value" of a public utilities provider's function could fluctuate, flowing if it involves the protection of a customer's property but ebbing if it involves the protection of a customer's economic welfare. *McCall*, 913 S.W.2d at 153.

Reversing course to the first factor, the Court notes that the foreseeability of the harm in *Trigg* arose from "the manner in which" the termination of service occurred—conduct that also colors the issues in this case. *Trigg*, 533 S.W.2d at 734. The fact that the City of Morristown's claim for negligence is based on an omission—the termination of service without a cancelation of billing—does not cause the alleged harm to be unforeseeable. *See McWherter v. JACOA Alcoholism Ctr.*, No. W2006-01629-COA-R3-CV, 2007 WL 2155738, at *4 (Tenn. Ct. App. July 27, 2007) (stating that a duty of care arises when a defendant's *omission* creates a foreseeable, unreasonable risk of harm (emphasis added) (citing *McCall*, 913 S.W.2d at 153). The Court emphasizes that it is not commenting on

whether this alleged conduct—the termination of service without a cancelation of billing—involved the exercise of reasonable care or whether the alleged harm is foreseeable. Both of these issues are questions of fact, *see McClung v. Delta Square P'ship*, 937 S.W.2d 891, 900 (Tenn. 1996); *Holt v. Walsh*, 174 S.W.2d 657, 659 (Tenn. 1943), and the Court is unable to consider them on a motion to dismiss, *see, e.g.*, *Ecclesiastical Order of the ISM of AM, Inc. v. IRS*, 725 F.2d 398, 403 (6th Cir. 1984) (Jones, J., concurring in part and dissenting in part); *Mike Vaughn Custom Sports, Inc. v. Piku*, 15 F. Supp. 3d 735, 753 (E.D. Mich. 2014). Rather, the Court simply concludes that, when not performed in a reasonable manner, the termination of service *can* result in the foreseeable probability of the alleged harm in this case—the overcharges—and therefore must carry with it a duty to act reasonably. Along similar lines, the magnitude of the potential harm or injury under the second factor—based on the allegations, which the Court accepts as true—is several hundred thousand dollars, not a trifling amount. [Am. Compl. ¶ 25]. Under the factors that remain, any burden that Defendants have in disconnecting service in a reasonable manner is no more onerous than the burden that Middle Tennessee Electric, a fellow utilities provider, had in *Trigg*.

As a public utilities provider, Defendants therefore had a duty of care to disconnect the circuits in a reasonable manner, so as to avoid foreseeable harm—even economic harm—to the City of Morristown. The City of Morristown has sufficiently alleged this duty by asserting that Defendants "owed it a duty of care as a service provider to provide reasonable services to the City, including . . . disconnecting and removing from its billing the aforementioned circuits." [*Id.* ¶ 37]. The City of Morristown's claim for negligence

therefore does not warrant dismissal. The Court is careful to note, however, that its ruling here as to Defendants' duty of care does not extend beyond the facts of this case, in which the allegations of contractual privity have played an important role.

B. Fraud and Intentional Misrepresentation

As an initial matter, the Court begins by addressing the City of Morristown's dual description of its cause of action under Count IV as one for "fraud and intentional misrepresentation." [*Id.* at 8]. The Tennessee Supreme Court has stated that intentional misrepresentation and fraud "are different names for the same cause of action," and in cases involving these torts, it "suggest[s] that th[e] term [intentional misrepresentation] should be used exclusively." *Hodge v. Craig*, 382 S.W.3d 325, 342–43 (Tenn. 2012) (citations omitted). This Court therefore will treat the cause of action in Count IV as one for intentional misrepresentation.

To plead a plausible claim for intentional misrepresentation, the City of Morristown must allege sufficient facts that show:

> (1) that the defendant made a representation of a present or past fact; (2) that the representation was false when it was made; (3) that the representation involved a material fact; (4) that the defendant either knew that the representation was false or did not believe it to be true or that the defendant made the representation recklessly without knowing whether it was true or false; (5) that the plaintiff did not know that the representation was false when made and was justified in relying on the truth of the representation; and (6) that the plaintiff sustained damages as a result of the representation.

Id. (citation omitted). Defendants argue that the City of Morristown fails to state a claim for intentional misrepresentation because it has not alleged a misrepresentation of fact other than future promises, which cannot—as a matter of law—amount to a misrepresentation.

[Defs.' Mot. to Dismiss at 6–9]. In addition, Defendants claim that the City of Morristown "fails to plausibly allege" fraudulent intent and justifiable reliance. [*Id.* at 9]. They also maintain that the allegations lack particularity under Rule 9(b). [*Id.* at 12–13].

1. Misrepresentation of Present or Past Fact

In support of the argument that the City of Morristown has not alleged a misrepresentation of fact, Defendants contend that the City of Morristown "does not identify any fact misrepresented by . . . Defendant[s]" apart from an assertion that its "bills contained improper charges." [*Id.* at 7]. Relying on two federal opinions—each of which is out of circuit and does not involve Tennessee law—Defendants appear to argue, as a matter of law, that an improper charge on a bill cannot be a misrepresentation of fact because it would create an overly broad definition of a misrepresentation. *See Almanza v. United Airlines, Inc.*, No. CV 215-033, 2016 WL 722159, at *12 (S.D. Ga. Feb. 19, 2016) (stating that the inclusion of an improper line-item fee on an airline ticket "would have amounted only to a representation that Defendants assessed this fee as part of the purchase price—a representation that was, in fact, true"); *Braswell Wood Co. v. Waste Away Grp., Inc.*, No. 2:09-CV-891-WKW [WO], 2010 WL 3168125, at *4 (M.D. Ala. Aug. 10, 2010) (concluding that charges that allegedly amounted to double billing were not intentional misrepresentations because "it was entirely true that [the defendant] was levying [charges] in those amounts"). Based on these cases, Defendants conclude that "[t]he appearance of the disputed charges on Plaintiff's bills constitutes only a truthful representation that Plaintiff was, in fact, being assessed with those charges." [Defs.' Mot. to Dismiss at 7].

Defendants mischaracterize the City of Morristown's allegations; the City of Morristown does not allege that the actual charges in its billing statements are misrepresentations but alleges that the misrepresentations are Defendants' assurances that it would no longer be billed for the eight circuits: "[Defendants] fraudulently and intentionally misrepresented to the City that it would be billed only for the services it was actually receiving and that when a line was disconnected, it would also be removed from billing." [Am. Compl. ¶ 44]. Defendants argue, however, that this allegation, which they describe as "an allegation that Defendants failed to honor a future promise," [Defs.' Mot. to Dismiss at 9], is "not actionable in fraud as a matter of law," [*id.* at 8]. *See Stacks v. Saunders*, 812 S.W.2d 587, 592 (Tenn. Ct. App. 1990) (stating that a promise that pertains to future events "does not relate to an existing or past fact"). According to Defendants, this allegation's language—"*would* be billed," "*when* a line was disconnected," and "*would* also be removed from billing"—indicates a conjecture as to future event. [Defs.' Mot. to Dismiss at 8].

Under Tennessee law, "[s]tatements of future intention, opinion, or sales talk are *generally* not actionable because they do not involve representations of material past or present fact." *Power & Tel. Supply*, 447 F.3d at 931 (emphasis added) (citing *McElroy v. Boise Cascade Corp.*, 632 S.W.2d 127, 130 (Tenn. Ct. App. 1982)). Tennessee's courts, however, have recognized an exception in cases "where justice demands," *Steed Realty v. Oveisi*, 823 S.W.2d 195, 199 (Tenn. Ct. App. 1991) (quotation omitted), an exception that they describe as the doctrine of promissory fraud, *see Oak Ridge Precision Indus., Inc. v. First Tenn. Bank Nat'l Ass'n*, 835 S.W.2d 25, 29 n.1 (Tenn. Ct. App. 1992) (stating that

the Tennessee Supreme Court "has indicated a willingness to apply this doctrine for over a decade"); *Steed Realty*, 823 S.W.2d at 200 (affirming a trial court's application of the doctrine of promissory fraud); *Brungard v. Caprice Records, Inc.*, 608 S.W.2d 585, 590 (Tenn. Ct. App. 1980) (noting a "trend towards" the doctrine of promissory fraud). Under this doctrine, a future promise can support a claim for intentional misrepresentation if it "was made with the intent not to perform." *Fowler v. Happy Goodman Family*, 575 S.W.2d 496, 499 (Tenn. 1978). An allegation of a misrepresentation therefore must "embody a promise of future action without the present intention to carry out the promise," *Stacks*, 812 S.W.2d at 592 (quotation omitted), though neither a promisor's failure to keep a promise nor a promisee's subjective impression can establish this intent, *Oak Ridge Precision*, 835 S.W.2d at 29 n.2.

Accepting Defendants' argument that the City of Morristown alleges "a promise as to future billing activity," [Defs.' Mot. to Dismiss at 8], the Court must determine whether this alleged future promise is accompanied by "sufficient factual matter" that shows an intent not to perform the promise. *Iqbal*, 556 U.S. at 678. The City of Morristown has pleaded sufficient facts from which the Court is at least able to "draw the reasonable inference" that Defendants did not plan to keep their promise when they made it. *Id.* As part of the allegations against Defendants, the City of Morristown claims that they promised they would cease billing for disconnected services not once or twice or even three

times but on at least four separate occasions,[6] and failed to do so each time. [Am. Compl. ¶¶ 9, 11, 13, 15, 17, 19, 21, 23, 44]. This allegation—combined with the allegations that the charges were "encrypted," were "buried" in "pages upon pages of data," and required the interpretive assistance of a private investigator, [*id.* ¶¶ 6–7, 44]—is enough to support a reasonable inference that Defendants did not intend to keep their promises when they made them, *see Coffey v. Foamex L.P.*, 2 F.3d 157, 162 (6th Cir. 1993) (recognizing that "allegations of fraudulent misrepresentation must be made with sufficient particularity and with a sufficient factual basis to support an *inference* that they were knowingly made" (emphasis added) (quotation omitted)).

Even if the City of Morristown had alleged that the charges—and not the promises to discontinue billing for disconnected services—were the misrepresentations, Defendants' pursuit of dismissal would still fail because it invites this Court reach a decision that is far too expansive: that "every incipient billing dispute," as a matter of law, cannot be a misrepresentation. [Defs.' Mot. to Dismiss at 8 (quoting *Braswell Wood*, 2010 WL 3168125 at *4)]. The Court declines to accept this invitation, with not only common sense but also case law in Tennessee counseling against doing so. *See Knox-Tenn Rental Co. v. Jenkins Ins., Inc.*, 755 S.W.2d 33, 34, 40 (Tenn. 1988) (determining that the evidence at trial "clearly show[ed]" fraud, which arose from allegations that the defendant, an

[6] The City of Morristown alleges that it requested the cancellation of one circuit in October 1992, [Am. Compl. ¶ 23], two circuits in July 1996, [*id.* ¶¶ 11, 17], one circuit in July 2000, [*id.* ¶ 19], and four circuits in November 2004, [*id.* ¶¶ 9, 13, 15, 21].

insurance company, had over-billed the plaintiff by hundreds of thousand dollars over many years by "misrepresent[ing] the amount of insurance premiums paid").

As for the contention that the charges in the billing statements are "truthful representation[s]," [Defs.' Mot. to Dismiss at 7], the Court is unable to consider this argument on a motion to dismiss because it requires an improper factual finding—namely that the alleged excess charges are not imbued with an intent to misrepresent, *see Alley v. Quebecor World Kingsport, Inc.*, 182 S.W.3d 300, 303 (Tenn. Ct. App. 2005) ("When a party intentionally misrepresents a material fact . . . . [t]he representation must have been made with knowledge of its falsity and with a fraudulent intent." (quotation omitted)); *cf. Howell v. Colonial Penn Ins. Co.*, 842 F.2d 821, 823 (6th Cir. 1987) (recognizing that, under Tennessee law, the "threshold question of whether a misrepresentation exists" in an insurance application "is a question of fact which should ordinarily be determined by a jury"); *In re AEP ERISA Litg.*, 327 F. Supp. 2d 812, 832 (S.D. Ohio 2004) ("Defendants' contention that Plaintiffs fail to allege any material misrepresentations . . . is not persuasive on a motion to dismiss" because "[w]hether the communications constituted misrepresentations . . . [is a] question[] of fact that [is] properly left for trial." (quotation omitted)). The City of Morristown therefore has properly alleged a misrepresentation in support of its claim for intentional misrepresentation.

2. Intent to Misrepresent

As an additional argument for dismissal, Defendants maintain that the City of Morristown "fails to plausibly allege fraudulent intent," [Defs.' Motion to Dismiss at 9],

because it pleads facts that are merely "consistent" with fraudulent intent, [*id.* at 10–11 (quoting *Deom v. Walgreen Co.*, 591 F. App'x 313, 320 (6th Cir. 2014) ("When, as here, the context makes the factual allegations at most consistent with both conduct that is actionable and conduct that is not, more is required to 'nudge[] [the] claims across the line from conceivable to plausible.")]. Specifically, Defendants argue "it is *much more likely* this dispute has obvious, non-illegal, explanations—including but not limited to miscommunications regarding four decades' worth of changing service needs that have resulted in a billing disagreement." [*Id.* at 10]. Along these lines, Defendants contend that the City of Morristown "must 'allege more by way of factual content' to establish this billing dispute is not 'more likely explained by' non-fraudulent activity." [*Id.* at 11 (quoting *Iqbal*, 556 U.S. at 680, 683)].

The City of Morristown's allegations are not merely on par with an intent to misrepresent; instead they contain facts that raise a plausible assertion of an intent to misrepresent. The Court begins by deconstructing the Sixth Circuit's decision in *Deom*, a case on which Defendants rely in arguing that the City of Morristown's allegations are at most consistent with intentional misrepresentation. In *Deom*, the Sixth Circuit considered whether the plaintiff, an owner and operator of three pharmacies, pleaded sufficient facts to allege a claim for breach of the implied covenant of good faith and fair dealing. The case involved a dispute that stemmed from a transactional agreement between the plaintiff and the defendant, Walgreen Co. ("Walgreen"). *Deom*, 591 F. App'x at 314. The parties agreed that the plaintiff would sell his inventory and records to Walgreen, which would then pay the plaintiff a bonus if it filled a certain number of prescriptions for his former customers

in the months after the sale. *Id.* When Walgreen failed to fill enough prescriptions to trigger the bonus, the plaintiff sued it for breach of the implied covenant. *Id.* at 314–15. The plaintiff's allegations included assertions that Walgreen had failed to be "adequately prepared" to serve the former customers and provided "substandard customer service," including "unhelpful staff" and "long waiting times." *Id.*

In examining the sufficiency of the plaintiff's allegations, the Sixth Circuit first noted that, under the applicable state law, a breach of the implied covenant requires an improper motive, not just unreasonable behavior. *Id.* at 317–18. The Court therefore reviewed the allegations for a reasonable inference of bad faith, rather than simply poor or negligent judgment. *Id.* at 319. The Court determined that the plaintiff did not plausibly plead that Walgreen acted in bad faith by intentionally mismanaging the pharmacies because the allegations "are equally consistent with conduct taken either 'through negligence or by design' and could be explained by either 'ineptitude or deliberate subversion.'" *Id.* at 320. In reaching this decision, the Court derived its reasoning from a pair of sources: (1) the plaintiff's own admission—both at the trial and appellate levels—that Walgreen's failure to fill the prescriptions could have been the result of negligence or ineptitude and (2) case law. *Id.* at 320–21. The Court relied on precedent in which courts recognize that "when, as here, the seller's and buyer's economic interests are aligned and both stand to profit from attracting and retaining customers, it is facially implausible that a business buyer would intentionally drive off customers." *Id.* at 320 (citations omitted).

The circumstances that led to dismissal in *Deom* are not present in this case. First, the City of Morristown has not directly conceded that Defendants' alleged conduct may be

the result of negligence or ineptitude. Although the City of Morristown pleads a claim for negligence beside its claim for intentional misrepresentation, these concurrent claims are not a direct admission that Defendants' alleged conduct is equally consistent with negligence. Rather, these claims are simply an example of alternative pleading, which is permissible and common under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 8(a)(3) ("A pleading . . . . may include relief in the alternative or different types of relief."); *see also* Fed. R. Civ. P. 8(d)(3) ("A party may state as many separate claims . . . as it has, regardless of consistency."). Second, unlike in *Deom*, case law does not render the City of Morristown's claim facially implausible. To the contrary, case law in Tennessee indicates that claims for intentional misrepresentation are plausible when a corporation allegedly overbills a party by hundreds of thousands of dollars over several years. *See Knox-Tenn Rental*, 755 S.W.2d at 34, 40.

Despite the dissimilarities between *Demo* and this case, Defendants propose that this Court should rely on it in determining that the City of Morristown "must 'allege more by way of factual content' to establish this billing dispute is not 'more likely explained by' non-fraudulent activity." [Defs.' Mot. to Dismiss at 11 (quoting *Iqbal*, 556 U.S. at 680, 682)]. In doing so, they invite the Court to embrace the "obvious" explanation that the overcharges were the result of "miscommunications" between the parties. [*Id.* at 10]. This breezy rendition of the allegations, however, is neither obvious nor consistent with them in their full "factual context." *Iqbal*, 556 U.S. at 686. The Court strains to fathom how repetitious "miscommunications" are "*much more likely*" to explain Defendants' failures to carry out a relatively simple request—each and every time it received one. [Defs.' Mot.

to Dismiss at 10]. Instead, the allegations, accepted as true, establish that Defendants participated in a pattern of activity that resulted in the disconnection of services but not a reciprocal cancelation of billing for those services. The allegation that this pattern was intentional, accompanied by a specter akin to fraud, is certainly plausible—particularly in light of the allegation that the City of Morristown had discovered a more widespread pattern of identical conduct involving other municipalities. [*See* Am. Compl. ¶ 7].

3. Justifiable Reliance

Defendants go on to argue that the City of Morristown's allegations regarding the element of justifiable reliance suffer from the "same plausibility defect" as the allegations regarding intent. [Defs.' Mot. to Dismiss at 11]. Specifically, they contend that "the complaint forecloses any claim of justifiable reliance because Plaintiff alleges it discovered the purported overcharges through an investigation of its *own* billing statements." [*Id.*]. In other words, they argue that the City of Morristown's reliance on the alleged misrepresentations was not justified because the means for uncovering the misrepresentations—the billing statements—were at all times available to it. [*Id.* at 12]. *See Allied Sound, Inc. v. Neely*, 58 S.W.3d 119, 123 (Tenn. Ct. App. 2001) (stating that reliance was not justified because the plaintiff "had the means to obtain the information needed and discover any 'fraud' if he simply asked . . . for a copy of the actual lease agreement"); *Solomon v. First Am. Nat'l Bank of Nashville*, 774 S.W.2d 935, 943 (Tenn. Ct. App. 1989) ("Generally, a party dealing on equal terms with another is not justified in

relying upon representations where the means of knowledge are readily within his reach." (citation omitted)).

Justifiable reliance "is not blind faith" but "a showing . . . that the representation was relied on . . . and that the reliance was reasonable under the circumstances." *Homestead Grp., LLC v. Bank of Tenn.*, 307 S.W.3d 746, 752 (Tenn. Ct. App. 2009) (citation omitted). In determining whether a party is justified in relying on a representation or not justified because "the means of knowledge are readily within his reach," *Solomon*, 774 S.W.2d at 943, Tennessee's courts turn to a "guiding principle":

> [W]here the means of information are at hand and equally accessible to both parties so that, with ordinary prudence or diligence, they might rely on their own judgment, generally they must be presumed to have done so, or, if they have not informed themselves, they must abide the consequences of their own inattention and carelessness.

Capital TCP, LLC v. New Horizon Memphis, LLC, No. 2:07-cv-02157-JPM-dkv, 2010 WL 2734148, at *8 (W.D. Tenn. July 9, 2010) (quoting *Goodall v. Akers*, No. M2008-01608-COA-R3-CV, 2009 WL528784, at *7 (Tenn. Ct. App. Mar. 3, 2009)). The question of whether reliance on a representation is reasonable is one of fact. *Goodall v. Akers*, No. M2010-01584-COA-R3-CV, 2011 WL 721494, at *3 (Tenn. Ct. App. Mar. 1, 2011).

The Court can reasonably infer that the billing statements containing the charges for the eight circuits were available to the City of Morristown. [*See* Am. Compl. ¶ 6]. As a result, to make a plausible assertion of justifiable reliance, the City of Morristown must plead facts from which the Court can also reasonably infer that the "relevant information" in those statements—the overcharges—were not discernible through ordinary diligence. *Goodall*, 2011 WL 721494 at *4; *see Capital TCP*, 2010 WL 27341248 at *8. Construing

the allegations in a light most favorable to the City of Morristown—namely the allegations that the overcharges were "encrypted" and commingled with legitimate charges in "pages upon pages of data," [Am. Compl. ¶¶ 6, 44]—the Court can infer that an ordinary review of the statements would not necessarily reveal a distinction between charges for active circuits versus inactive circuits.[7] The Court can also infer that the City of Morristown's decision to retain a private investigator surely would have been unnecessary—both in terms of trouble and expense—if an ordinary review of or inquiry into the statements would have revealed the overcharges.

One of the most important takeaways from the allegations, accepted as true, is that the City of Morristown, by hiring a private investigator, did not blindly rely on Defendants' representations that billing for the eight circuits would cease but attempted verify that billing had ceased. *See Capital TCP*, 2010 WL 2734148 at *8 (concluding that justifiable reliance did not exist when a counter-plaintiff admitted that "there was no diligence performed inasmuch as [it] trusted [counter-defendants] to provide true and correct information about the occupancy . . . of the apartments"). The question of whether the multi-year gap between the alleged misrepresentation and the hiring of the investigator was reasonable under the circumstances is one of fact, which the Court will not address here on the motion to dismiss. *See Goodall*, 2011 WL 721494 at *3. Even if the Court had found merit in Defendants' argument that the City of Morristown had "the means of knowledge"

[7] Further complicating the billing statements is the allegation that each circuit contained multiple "points" and that the City of Morristown, at least with regard to one of these circuits, had requested disconnection of some points but not others, which remained active and in use. [*See* Am. Compl. ¶ 24].

in its reach, *Solomon*, 774 S.W.2d at 943 (citation omitted), it would still not be convinced that dismissal is proper because the availability of knowledge is only one of many factors that contribute to a determination of justifiable reliance, *see Goodall*, 2011 WL 721494 at *3–4 (stating that "a number of factors [are] relevant to the determination of whether a plaintiff's reliance was reasonable" and listing eight of them). The City of Morristown therefore makes a plausible assertion of justifiable reliance in support of its claim for intentional misrepresentation.

4. Particularity under Rule 9(b)

In a final volley for dismissal of the City of Morristown's claim for intentional misrepresentation, Defendants invoke Rule 9(b) to argue that several key assertions are missing from the allegations, including "the particulars of any supposed misrepresentation, such as who made them, when they were made, who allegedly received them or even the basic content of any misrepresentation." [Defs.' Mot. to Dismiss at 12].

"The Sixth Circuit reads this rule liberally" in cases involving common-law intentional misrepresentation, *Coffey*, 2 F.3d at 161–62 (citation omitted), requiring a pleading to include "the time, place and content of the misrepresentations; the defendant's fraudulent intent; the fraudulent scheme; and the injury resulting from the fraud," *Power & Tel. Supply*, 447 F.3d at 931. "The threshold test is whether the complaint places the defendant on 'sufficient notice of the misrepresentation,' allowing the defendants to 'answer, addressing in an informed way plaintiffs [sic] claim of fraud.'" *Coffey*, 2 F.3d at 162 (quotation omitted). Under this threshold test, the Sixth Circuit has noted that "[w]e

are reluctant to amputate plaintiffs' claim as long as there is a reasonable basis upon which to make out a cause of action from the events narrated in the complaint" and that "[i]f plaintiffs' claims are groundless, that conclusion will emerge as discovery proceeds." *Michaels*, 848 F.2d at 680.

Having already addressed the adequacy of the allegations regarding intent to misrepresent, the Court need only consider whether the City of Morristown has properly pleaded—with the requisite particularity—the time, place, and content of the misrepresentations; the scheme; and injury. The Court, however, is able to give only minimal consideration to Defendants' argument dealing with particularity under Rule 9(b) because it is itself lacking particularity under Local Rule 7.1(b), which requires parties to include in their briefs a "concise statement of the factual . . . grounds which justify the ruling sought from the Court." Defendants' argument is two sentences long. Defendants do not identify any portion of the Complaint—paragraphs, phrases, or words—that is wanting in particularity. The Court is not at liberty to scour the Complaint for defects that come within the wide net that Defendants have cast. *See McPherson v. Kelsey*, 125 F.3d 989, 995–96 (6th Cir. 1997) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not sufficient for a party to mention a possible argument in the most skeletal way, leaving the court to . . . put flesh on its bones." (quotation omitted)); *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in [the record].").

Even if a paucity of factual support did not plague Defendants' argument, it still is unlikely to succeed because the allegations—based on the Court's review of them to this

point—appear to be sufficiently particular under Rule 9(b). The City of Morristown pleads the precise content of the misrepresentations—Defendants' future promises that "when a line was disconnected, it would also be removed from billing." [Am. Compl. ¶ 44]. It tethers these misrepresentations to particular times by pleading the month and the year of the disconnections for each circuit. [*See id.* ¶¶ 9–23]. It pleads that statements relating to the disconnection of the circuits are present in the records it has on file, which include documentation it received from Defendants. [*Id.* ¶¶ 10, 12, 14, 16].[8] It pleads "a scheme where [Defendants] disconnect[] lines and/or circuits, but continue[] to bill its customers for these disconnected lines." [*Id.* ¶ 7]. Lastly, it pleads the amount of monetary damages—to the cent—from the alleged scheme. [*Id.* ¶ 25].

Again, Defendants fail to explain why these particular allegations do not provide them with "sufficient notice of the misrepresentation" so that they can answer "in an informed way." *Coffey*, 2 F.3d at 162 (quotation omitted). In the absence of this explanation, Defendants' argument under Rule 9(b) is a feeble one at best. Even so, the Court cannot fairly decline to dismiss the claim for intentional misrepresentation without considering one additional aspect of Defendants' argument: the contention that the City of Morristown has not specified which of the two Defendants made the misrepresentations. Indeed, the City of Morristown refers to the two Defendants collectively as "Defendants" throughout the Complaint and attributes the misrepresentations to both of them at once. [Am. Compl. ¶ 44].

[8] The Complaint contains sufficient particularity from which the Court can deduce that the place of the alleged misrepresentations is Morristown, Tennessee. [*See id.* ¶¶ 9–23].

Defendants argue that this practice is not permissible under Rule 9(b), citing *Gilliard v. Reconstruct Co.*, No. 1:11-cv-331, 2012 WL 4442525 (E.D. Tenn. Sept. 25, 2012). In *Gilliard*, the court determined that the plaintiffs' failure to identify which of the seven defendants made the alleged misrepresentations was "a substantial defect" under Rule 9(b). *Id.* at *10. The court, in reaching this decision, relied on the Sixth Circuit's opinion in *United States ex rel. Branham v. Mercy Health System of Southwest Ohio*, No. 98-3127, 1999 WL 618018 (6th Cir. 1999), a qui tam action under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729–3733. In *Branham*, a case with five defendants, the Court stated that Rule 9(b) "does not permit a plaintiff to allege fraud 'by indiscriminately grouping all of the individual defendants into one wrongdoing monolith.'" *Id.* at *9 (Clay, J., concurring in part and dissenting in part (quotation omitted)).

Because Defendants have provided the Court with no analysis that bridges the facts in *Gilliard* and *Branham* with the facts in this case, the Court is unconvinced that either of these cases apply in full force here. The *two* Defendants—compared to the five defendants in *Gilliard* and the seven defendants in *Branham*—hardly constitute the sort of "grouping" that resembles a "monolith." *Branham*, 1999 WL 618018 at *9 (Clay, J., concurring in part and dissenting in part (quotation omitted)); *see Cataldo v. U.S. Steel Corp.*, 676 F.3d 542, 551 (6th Cir. 2012) (determining that the plaintiffs failed to plead with particularity under Rule 9(b) because they vaguely attributed misrepresentations to sixteen defendants in the complaint); *see also Luce v. Edelstein*, 802 F.2d 49, 54 (2d Cir. 1986) (concluding that the allegations were lacking in particularity under Rule 9(b) because the plaintiffs pleaded several types of misrepresentations and simultaneously ascribed them to more than ten

defendants); *Fondren v. Schmidt*, 626 F. Supp. 892, 898 (D. Nev. 1986) (recognizing that in cases involving multiple defendants, a plaintiff should allege the role of each of them, but also noting that "group conduct may be pleaded" when "a category of defendants is allegedly responsible for a continuing course of conduct" (citation omitted)). In straightforward fashion, the City of Morristown has identified a single type of misrepresentation, not multiple types, in sufficient detail and has attributed that recurring misrepresentation to two specific parties.

When viewing the allegations for consonance with Rule 9(b)'s purpose—to ensure that a defendant has a "reasonable basis" to make out a claim and respond with an informed pleading, *Michaels*, 848 F.2d at 680; *see BAC Home Loans Servicing LP v. Fall Oaks Farm LLC*, 848 F. Supp. 2d 818, 827 (S.D. Ohio 2012)—the Court is satisfied that the allegations have enough specificity to accomplish that end. To the extent that the alleged misrepresentations are either groundless or attributable to only one of the two Defendants, that conclusion is sure to "emerge as discovery proceeds." *Michaels*, 848 F.2d at 680. In this vein, if the City of Morristown determines during discovery that it is no longer able to plead a factual basis for intentional misrepresentation against both Defendants, the "spectre of Rule 11 sanctions should guide the actions" of its counsel. *Id.* at 681. The Court therefore will not dismiss the City of Morristown's claim for intentional misrepresentation.

C. Negligent Misrepresentation

Defendants argue that the City of Morristown fails to state a claim for negligent misrepresentation because the billing statements "are not intended to guide Plaintiff in its

business transactions." [Defs.' Mot. to Dismiss at 13]. Specifically, Defendants contend that the City of Morristown's allegation that the bills contain improper charges is insufficient because it lacks a description of "any information, opinions or statements in the bills that were intended to guide . . . business transactions." [*Id.* at 15].[9] As a result, they maintain the City of Morristown's claim for negligent misrepresentation must fail "as a matter of law." [*Id.*]. Returning to Rule 9(b), Defendants also claim that the allegations of negligent misrepresentation lack particularity. [*Id.* at 15–16].

1. Faulty Information Meant to Guide Others in Business Transactions

A plausible claim for negligent misrepresentation requires sufficient facts showing that, among other elements, a defendant has provided (1) false information, (2) for the guidance of others, (3) in a business transaction. *Ritter*, 912 S.W.2d at 131. *Black's Law Dictionary* defines a "business transaction" as "[a]n action that affects the actor's financial or economic interests, including the making of a contract." (10th ed. 2014).

The allegations are sufficient to support a reasonable inference that Defendants provided the billing statements to the City of Morristown to guide it in a business transaction. The City of Morristown alleges that Defendants falsely "represent[ed] what the City's bill would be for certain services," [Am. Compl. ¶ 47], and "bill[ed] the City monthly for these services," [*id.* ¶ 6]. Based on these allegations, the Court can reasonably infer that the billing statements were meant to guide the City of Morristown in submitting

[9] Again, Defendants' argument is off point because the City of Morristown does not allege that the charges themselves are the misrepresentations. Even so, the Court will give Defendants the benefit of the doubt and address their argument as it is.

payments for services—payments that would "affect[] [Defendants'] financial or economic interests." *Business Transaction, Black's Law Dictionary*. The Court can also surmise that billing statements between a customer and utilities provider arise from a business relationship and not a personal one.[10] Defendants cite no precedent for their assertion that a billing statement, "as a matter of law," cannot guide a customer in this type of business relationship. [Defs.' Mot. to Dismiss at 15]. The City of Morristown's claim for negligent misrepresentation therefore includes a sufficient allegation that the billing statements were meant to guide it in a business transaction.

2. Particularity under Rule 9(b)

Defendants assert that "[t]he same defects requiring dismissal of the fraud claim also require dismissal of [the] negligent misrepresentation claim." [*Id.*]. In particular, they argue that "like the fraud claim, the complaint nowhere sets forth the content of any misrepresentation [of] any past or present material fact by either Defendant." [*Id.*]. Also, they contend that the city of Morristown has not alleged "how or why Defendants purportedly failed to exercise reasonable care in making the unidentified misrepresentations." [*Id.* at 16].

Although Defendants are correct that a claim for negligent misrepresentation requires particularity under Rule 9(b), *see Power & Tel. Supply*, 447 F.3d at 931, the Court has already addressed the sufficiency of the allegations as to the misrepresentations. The

[10] The allegation of a contractual relationship between the parties fortifies the Court's inference that the billing statements were Defendants' way of guiding the City of Morristown to make payments in support of a business transaction. [*Id.* ¶ 5]; *see Business Transaction, Black's Law Dictionary*.

Court need not readdress them here because the particularity requirement for intentional misrepresentation is even more exacting than that for negligent misrepresentation, which does not have a scienter requirement. *Henley v. Labat-Anderson, Inc.*, No. 03A01-9104-CV-126, 1991 WL 120403, at *2 (Tenn. Ct. App. July 9, 1991) ("[A]n action for negligent misrepresentation replaces the scienter requirement in fraudulent misrepresentation with a less stringent reasonable care standard[.]" (citation omitted)). Also, contrary to Defendants' contention, the City of Morristown does allege how and why Defendants did not exercise reasonable care: "[Defendants] owed the City the duty to act as a reasonable service provider and only bill for the services it was providing. In acting as a reasonable service provider, [Defendants] should have . . . not charged for services it knew or should have known it was not providing to the City." [Am. Compl. ¶ 47]. These allegations are sufficiently particular to apprise Defendants of the claim against them and allow them to respond in an informed way. *See Coffey*, 2 F.3d at 162. The Court therefore will not dismiss the City of Morristown's claim for negligent misrepresentation.

IV. CONCLUSION

The City of Morristown alleges plausible claims for negligence, intentional misrepresentation, and negligent misrepresentation under Tennessee law. The Court therefore will not dismiss Count III, Count IV, or Count V. Defendants' Motion to Dismiss the Amended Complaint [doc. 17] is **DENIED.** Defendants' Motion to Dismiss [doc. 12] is **DENIED as moot**. Defendants **SHALL** serve a responsive pleading within fourteen days from the date of this Order.

IT IS SO ORDERED.

ENTER:

s/ Thomas W. Phillips
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

CITY OF MORRISTOWN, TENNESSEE *Plaintiff*, vs. AT&T CORP. and BELLSOUTH TELECOMMUNICATIONS, LLC, d/b/a AT&T TENNESSEE and d/b/a AT&T SOUTHEAST *Defendants*.	)	CASE NO.: 2:16-CV-00059-RLJ-MCLC JURY DEMAND

DEFENDANTS' MOTION TO DISMISS COUNTS THREE THROUGH FIVE OF PLAINTIFF'S FIRST AMENDED COMPLAINT AND SUPPORTING MEMORANDUM OF LAW

Pursuant to Fed. R. Civ. P. 12(b)(6) and 15(a)(3), Defendants AT&T Corp. ("AT&T") and BellSouth Telecommunications, LLC d/b/a AT&T Tennessee ("BellSouth") move to dismiss Counts Three through Five of Plaintiff's first amended complaint, and respectfully show the Court as follows:

I. PRELIMINARY STATEMENT

On April 21, 2016, Defendants moved to dismiss Counts Three through Five of Plaintiff's original complaint, citing several dispositive defects in Plaintiff's attempt to plead those claims. [Dkt. 12.] Rather than respond to Defendants' arguments, Plaintiff filed a notice that it was amending its complaint "to address the alleged deficiencies" in its original pleading. [Dkt. 13.] The first amended complaint [Dkt. 14 (the "FAC")] modifies several of Plaintiff's original allegations, but in no way avoids the defects Plaintiff implicitly conceded when it chose to amend its pleading rather than meet Defendants' arguments. Accordingly, Defendants again move to dismiss Plaintiff's Counts Three through Five.

II. SUMMARY OF CLAIMS AND ALLEGATIONS

This action involves a contract dispute concerning the billing of telephone services. Plaintiff, the City of Morristown, Tennessee, claims that, pursuant to "various" unspecified contracts, it has purchased telephone service from Defendants since 1970. FAC ¶¶ 5, 17. Plaintiff alleges that, at various times between 1992 and 2004, it ceased using certain of the services it purchased, but the charges for those services remained on its monthly phone bills, which Plaintiff paid. *Id.* ¶¶ 7-25. Plaintiff asserts it did not discover that its bills contained those charges until 2012, when it conducted a review of its billing statements and payments. *Id.* ¶ 7. On February 19, 2016, Plaintiff filed suit in the Hamblen County Chancery Court to recover its past twenty years of payments on these disputed charges. [Dkt. 1-1.] On March 22, 2016, Defendants removed the case to this Court. [Dkt. 1.]

This is a simple contract dispute. Plaintiff expressly alleges this action sounds in contract, and claims Defendants breached their contracts with Plaintiff "specifically by continuing to bill for services that [Defendants] had ceased providing to [Plaintiff]." FAC ¶ 30. In addition to the breach of contract claim, Plaintiff asserts a quasi-contract claim for unjust enrichment (Count II) seeking to recover the same payments.[1]

Plaintiff also attempts to allege tort theories by restating its contract claim in language of tort. Plaintiff's tort claims seek to recover the same damages (the alleged overpayments) based on the same conduct (the continued billing) as its contract and unjust enrichment claims. These claims – negligence (Count III), fraudulent misrepresentation (Count IV) and negligent

[1] The unjust enrichment claim is legally incompatible with Plaintiff's allegations of an express contract. Plaintiff, however, has not alleged or attached to its pleading the specific contracts, tariffs or provisions at issue. Defendants therefore do not move to dismiss Count Two at this time. Defendants will address the unjust enrichment claim in a motion for summary judgment once the relevant contract or tariff provisions are established.

misrepresentation (Count V) – are insufficiently pled, suffer from obvious legal defects, and should be dismissed. Plaintiff has not and cannot allege an independent legal duty to support its negligence claim. Plaintiff also fails to allege a misrepresentation of fact capable of supporting its misrepresentation-based claims. The fraud and negligent misrepresentation allegations also do not approach the Supreme Court's plausibility requirement or the particularity required by Fed. R. Civ. P. 9(b). Accordingly, the Court should dismiss Counts Three, Four and Five.

III. MEMORANDUM OF LAW

A. Legal Standard

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits courts to dismiss complaints that fail to state a claim upon which relief may be granted. It is well settled that the failure to plead an essential element of a claim warrants dismissal. *See, e.g., Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 491 (6th Cir. 1990). Although courts accept well-pleaded facts as true, the facts must do more than merely create the suspicion of a legally cognizable right of action. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–57, 562–63 (2007). Thus, dismissal under Rule 12(b)(6) is appropriate when the plaintiff has failed to allege "enough facts to state a claim to relief that is plausible on its face" and failed to "raise a right to relief above the speculative level." *Bassett v. Nat'l Collegiate Athletics Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Twombly*, 550 U.S. at 555, 570).

Further, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 129 S. Ct. at 1949. The same is true for "unwarranted factual inferences." *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). Thus, "[t]o survive a Rule 12(b)(6) motion to dismiss, plaintiff's pleading for relief must provide 'more than labels and conclusions, and a formulaic recitation of the elements of a cause

of action will not do.'" *Bowman v. U.S.*, 304 F. App'x. 371, 374 (6th Cir. 2008, *cert. denied*, 130 S. Ct. 55 (2009) (quoting *Twombly*, 127 S. Ct. at 1964-65).

B. Plaintiff's Negligence Count (Count III) Fails To State A Claim Upon Which Relief May Be Granted.

To state a claim for negligence, Plaintiff must allege "(1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the applicable standard of care that amounts to a breach of duty; (3) injury or loss; (4) causation in fact; and (5) proximate, or legal, causation." *Thomas & Assocs., Inc. v. Metro. Gov't of Nashville*, No. M2001-00757-COA-R3CV, 2003 WL 21302974, at *5 (Tenn. Ct. App. June 6, 2003). "Establishment of a legal duty owed by the defendant is an absolute prerequisite to any recovery under a theory of negligence . . . where there is no duty there can be no negligence." *Id.*

It is black letter law that breach of a contractual duty cannot support a negligence claim. *Id.* ("If the only source of a duty between a particular plaintiff and a defendant is their contract with each other, then a breach of that duty, without more, will not support a negligence action"). Conduct in breach of a contractual duty becomes tortious only "when it also violate[s] a duty, independent of the contract, arising from wider principles of social responsibility." *Id.*

In its original complaint, Plaintiff admitted the negligence claim was based solely on an alleged breach of a contractual duty, which mandates dismissal. [*See* Dkt. 1-1 at p.13[2] ¶ 37 (alleging "[Defendants] owed [Plaintiff] a duty of care *under the contracts* to perform the agreed upon services") (emphasis supplied).][3] Plaintiff now seeks to avoid that defect by alleging

[2] Pinpoint citations to Docket entries herein cite to the Court's ECF file-stamp page number, rather than the native document's internal page number.

[3] There is no question that Plaintiff may not maintain a negligence claim based on a purported breach of a contractual duty. *See Williams v. SunTrust Mortgage, Inc.*, No. 3:12-CV-477, 2013 WL 1209623, at *4 (E.D. Tenn. Mar. 25, 2013) (granting 12(b)(6) motion to dismiss negligence claim where "plaintiffs have not alleged that defendants owed plaintiffs any duty other than the

Defendants had a duty "as a service provider to provide reasonable services" to Plaintiff, and breached that duty by not removing the disputed charges from Plaintiff's bills. FAC ¶¶ 37-38.

Plaintiff's re-labeling does not create an actionable duty. "Whether a defendant owes a duty to a plaintiff in any given situation is a question of law for the court" to consider based on whether "'such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of others – or, more simply, whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant.'" *Jones v. Exxon Corp.*, 940 S.W.2d 69, 71 (Tenn. Ct. App. 1996) (quoting *Bradshaw v. Daniel*, 854 S.W.2d 865, 869-70 (Tenn. 1993)). Determination of the existence of a legal duty is "to be determined by reference to the body of statutes, rules, principles, and precedents which make up the law." *Id.* Neither policy nor precedent supports Plaintiff's suggestion that Tennessee law imposes an independent legal duty, separate from their customer contracts, on "service providers" to ensure no inaccurate charges appear on a customer's bill. *See, e.g., Williams*, 2013 WL 1209623, at *4 (other than contractual duties, "arms-length relationship . . . does not create a duty of care").

In short, the amended complaint neither masks nor avoids Plaintiff's attempt to recast its breach of contract theory as a negligence claim.[4] Because Plaintiff alleges nothing beyond an arms' length service relationship between the parties, Count Three should be dismissed. *See Oak Ridge Precision Indus., Inc. v. First Tennessee Bank Nat. Ass'n*, 835 S.W.2d 25, 30 (Tenn. Ct.

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contractual duty"); *Permobil, Inc. v. Am. Exp. Travel Related Servs. Co.*, 571 F. Supp. 2d 825, 843 (M.D. Tenn. 2008) (dismissing negligence claim where plaintiff failed to allege "independent duty in tort outside the parties' written agreement").

[4] *Compare* FAC at ¶ 30 (alleging Defendants breached parties' contracts "specifically by continuing to bill for services that [Defendants] had ceased providing to the City") *with* FAC ¶ 38 (alleging negligence claim is based on breach of purported legal duty to not "bill[] the City for services that [Defendants were] no longer providing").

App. 1992) (dismissing negligence claim for lack of independent legal duty, finding "plaintiff's lengthy complaint was an attempt to recast its contractual counter-claim in language of tort"); *Williams*, 2013 WL 1209623, at *4 (same, holding "[p]laintiffs have not alleged any facts indicating that plaintiffs and defendants shared anything other than the arms-length relationship between debtor and lender, which does not create a duty of care").

C. Plaintiff's Fraud Count (Count IV) Fails To State A Claim Upon Which Relief May Be Granted.

To state a claim for fraud[5] under Tennessee law, Plaintiff must allege "(1) an intentional misrepresentation of material fact; (2) the misrepresentation was made 'knowingly,' 'without belief in its truth,' or 'recklessly without regard to its truth or falsity'; (3) the plaintiff reasonably relied on the misrepresentation and suffered damages; and (4) the misrepresentation relates to an existing or past fact." *Power & Tel. Supply Co. v. SunTrust Banks, Inc.*, 447 F.3d 923, 931 (6th Cir. 2006) (quoting *Stacks v. Saunders*, 812 S.W.2d 587, 592 (Tenn Ct. App. 1990)). In the Sixth Circuit, fraud claims also "must be stated with particularity, and the plaintiff must, at a minimum, allege the time, place and content of the misrepresentations; the defendant's fraudulent intent; the fraudulent scheme; and the injury resulting from the fraud." *Id.* (citing Fed R. Civ. P. 9(b); *Coffey v. Foamex, L.P.*, 2 F.3d 157, 161-62 (6th Cir. 1993)).

1. The amended complaint does not allege any misrepresentation of fact.

The amended complaint fails to allege the first essential element of fraud, an intentional misrepresentation of fact. The fraud count vaguely asserts Defendants "misrepresented material facts to the City *as referenced herein*." FAC ¶ 42 (emphasis supplied). But the amended

[5] Plaintiff styles Count IV as "Fraud and Intentional Misrepresentation." FAC p.8. In Tennessee, "fraud" is synonymous with "intentional misrepresentation," and a claim for the latter is analyzed as a claim for fraud under Tennessee law. *JLC Beechtree, Inc. v. A & E Healthcare of Tenn., LLC*, No. 3:10-CV-523, 2012 WL 1890359, at *6 (E.D. Tenn. May 23, 2012) (citing *Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 904 n.1 (Tenn. 1999)).

complaint does not identify any fact misrepresented by either Defendant (*see generally id.*) – it alleges only that Plaintiff's bills contained improper charges. *Id.* at ¶¶ 8-25.

The appearance of the disputed charges on Plaintiff's bills constitutes only a truthful representation that Plaintiff was, in fact, being assessed with those charges. *See Almanza v. United Airlines, Inc.*, No. CV 215-033, 2016 WL 722159, at *12 (S.D. Ga. Feb. 19, 2016) (inclusion of improper line item fee in airfare ticket price was not a misrepresentation that could support fraud claim because it "amount[s] only to a representation that Defendants assessed this fee . . . a representation that was, in fact, true"); *Braswell Wood Co., Inc. v. Waste Away Group, Inc.*, No. 2:09-CV-891-WKW[WO], 2010 WL 3168125, at *4 (M.D. Ala. Aug. 10, 2010) (inclusion of alleged overcharges in plaintiff's bill "[was not] a misrepresentation; it was entirely true that [defendant] was levying [the disputed charges] in those amounts"). Plaintiff's conclusory allegation that Defendants "knew or should have known" the charges were incorrect[6] does not cure Plaintiff's failure to identify any misrepresented fact. Indeed, the amended complaint does not allege any statement by either Defendant – let alone a false statement – concerning the nature or accuracy of the charges, or the circuits to which they applied. *See generally* FAC.

Whether the charges were properly billed is a different matter, and one that will be addressed by Plaintiff's breach of contract claim. Plaintiff, however, may not employ an "exceptionally broad" definition of "misrepresentation" to alchemize an isolated line-item charge into an affirmative misrepresentation of some related, but different, material fact. *Braswell Wood Co., Inc.*, 2010 WL 3168125, at *4. As the *Braswell Wood* court explained in rejecting the

[6] FAC ¶ 26.

same allegation that overbilled amounts were "misrepresentations" supporting a predicate act fraud claim:

> Whether those amounts were appropriate or correct under the contract was another matter, but every incipient billing dispute is not a "misrepresentation" from the time a bill is mailed to a customer, even if the customer ultimately prevails on the merits of the dispute. If, for example, a customer had demanded an explanation of the charges, and [defendant] had responded with false assertions about the [basis for the charges], that would be closer to a cognizable misrepresentation. But to hold that a wrongfully charged fee constitutes, in itself, a misrepresentation, would be to broaden the word's meaning . . . past the point of meaning.

Id. (alterations supplied). Accordingly, Plaintiff's allegation of intentional overbilling fails to satisfy the first essential element of a fraud claim.

2. An alleged promise as to future billing activity is not actionable in fraud as a matter of law.

The amended complaint attempts to cure Plaintiff's inability to allege a factual misrepresentation by asserting Defendants made promises concerning their *future* billing activities. Specifically, Plaintiff alleges Defendants failed to honor a promise that Plaintiff "*would be billed* only for the services it was actually receiving and that *when* a line was disconnected, *it would* also be removed from billing." FAC ¶ 44 (emphasis supplied).[7] Putting aside the lack of any particularized allegations (the "who, when, where and how") accompanying

[7] As Plaintiff concedes, the services Defendants are authorized to include in Plaintiff's bills is a matter governed by the parties' written "service contracts." FAC ¶ 30. Thus, beyond being insufficient as a matter of law to support a fraud claim, this new allegation again demonstrates Plaintiff's improper attempt to recast a contract claim in language of tort. And to the extent this alleged promise varied from the billing obligations in the parties' written contracts, any reliance on the promise would be unreasonable as a matter of law. *See Burton v. Hardwood Pallets, Inc.*, No. E2003-014390-COA-R3-CV, 2004 WL 572350, at *2 (Tenn. Ct. App. Mar. 22, 2004) ("promissory fraud is limited to subject matter which does not contradict or vary the terms that are plainly expressed in the written contract"); *Guesthouse Int'l Franchise Sys., Inc. v. British Am. Props. MacArthur Inn, LLC*, No. 3:07-0814 2009 WL 278214, at *7 (M.D. Tenn. Feb. 5, 2009) ("it is unreasonable to rely on prior oral representations that contradict the language presently before the individual signing the contract").

this purported promise, an allegation that Defendants failed to honor a future promise, without more, is insufficient as a matter of law to support a fraud claim. *See Stacks v. Saunders*, 812 S.W.2d 587, 592 (Tenn. Ct. App. 1990) (promise as to future events "by its own terms does not relate to an existing or past fact"). Rather, "[u]nder Tennessee law, a claim of promissory fraud must involve 'a promise of future action *without the present intention to carry out the promise*.'" *Jackson v. Alstom Power, Inc.*, 193 F. App'x 505, 509 (6th Cir. 2006) (quoting *Stacks*, 812 S.W.2d at 592) (emphasis supplied).

The amended complaint contains no allegation that, when Defendants purportedly promised to remove disconnected lines from Plaintiff's bills, Defendants had no intent to do so. *See generally* FAC. Plaintiff's allegations therefore do not state an actionable fraud claim as a matter of law. *See, e.g.*, *Wright v. Wacker-Chemie AG*, No. 1:13-CV-331, 2014 WL 3810584, at *9 (E.D. Tenn. Aug. 1, 2014) (dismissing fraud claim where plaintiff failed to allege "that the promisor had an actual present intent not to fulfill the promise"); *Gibson Guitar Corp. v. Elderly Instruments, Inc.*, No. 3:05-0523, 2006 WL 1638404, at *3 (M.D. Tenn. June 8, 2006) (same).

3. The complaint fails to plausibly allege fraudulent intent and justifiable reliance.

The fraud claim further fails with respect to the intent and reliance elements, which lack the requisite "further factual enhancement" to state a claim "that is plausible on its face." *Iqbal*, 556 U.S. at 678 (quotations omitted). Although Rule 9(b) permits Plaintiff generally to allege matters such as motive and intent, it "does not give a plaintiff license to 'plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss.'" *Katoula v. Detroit Entm't, LLC*, 557 F. App'x 496, 498 (6th Cir. 2014) (quoting *Iqbal*, 556 U.S. at 678-79). Rather, a "plaintiff still must plead facts" which make a motive or intent allegation "'plausible on

its face.'" *Republic Bank & Trust Co. v. Bear Stearns & Co., Inc.*, 683 F.3d 239, 247 (6th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678). Plaintiff fails to do this.

Plaintiff contends Defendants acted with fraudulent intent because "[Defendants] knew or should have known the circuits had been disconnected." FAC ¶ 26. At best, that allegation is simply *consistent* with Plaintiff's theory of a larger fraudulent scheme. But in light of the much more likely, non-fraudulent, explanations for this billing dispute, the Supreme Court holds that is insufficient to *plausibly* allege a fraudulent intent. *See Iqbal*, 556 U.S. at 678 (allegation that is "'merely consistent with' a defendant's liability" is insufficient because "it 'stops short of the line between possibility and plausibility'") (quoting *Twombly*, 550 U.S. at 557).

Indeed, Plaintiff's factual allegations are equally consistent with obvious, non-fraudulent explanations for this dispute. Plaintiff alleges it has purchased services from Defendants under "various" contracts for at least *forty years*, and that its service needs have changed over that period due to various external events. FAC ¶¶ 5, 17-18, 20-22, 24; *see also* FAC ¶¶ 17, 24 (alleging service began in 1970, and Plaintiff continues to use some services today). But Plaintiff has abandoned its prior allegations that it only submitted an actual "order to cancel" two of the eight circuits at issue. [Dkt. 1-1 p.9 at ¶¶ 14, 16.] Plaintiff now vaguely alleges it "requested" that each of the eight circuits be disconnected at various times between 1992 and 2004. FAC ¶¶ 9, 11, 13, 15, 17, 19, 21, 23. Given Plaintiff's shifting allegations about which circuits it requested to be disconnected and how it did so, it is *much more likely* this dispute has obvious, non-illegal, explanations – including but not limited to miscommunications regarding four decades' worth of changing service needs that have resulted in a billing disagreement.

"Where, as here, the context makes the factual allegations at most consistent with both conduct that is actionable and conduct that is not, more is required to "nudge[ ] [the] claims

across the line from conceivable to plausible." *Deom v. Walgreen Co.*, 591 Fed. App'x 313, 320 (6th Cir. 2014) (quoting *Twombly*, 550 U.S. at 570) (alterations in original). Specifically, Plaintiff must "allege more by way of factual content" to establish this billing dispute is not "more likely explained by" non-fraudulent activity. *Iqbal*, 556 U.S. at 680-83 (allegations of improper motive are insufficient where, in light of "more likely explanations" for defendant's conduct, allegations "do not plausibly establish [an improper] purpose").

Plaintiff has not done this, and the fraud claim is further subject to dismissal for failure to plausibly allege a fraudulent intent. *See Graham v. Davis*, No. 1:09-mc-42, 1:08-cv-299, 2010 WL 446933, at *1, 3 (E.D. Tenn. Feb. 2, 2010) (Collier, J.) (adopting magistrate's denial of motion to file new complaint on basis that, "[a]s in *Iqbal*, Plaintiff's complaint 'has not nudged [her] claims . . . across the line from conceivable to plausible'") (alteration in original, internal quotation omitted) (quoting *Iqbal*, 556 U.S. at 680); *Pugh v. Bank of Am.*, No. 13-2020, 2013 WL 3349649, at *15 (W.D. Tenn. July 2, 2013) (dismissing fraud claim where complaint alleged defendants provided inaccurate information but offered "no factual allegations that Defendants . . . communicated with an intent to defraud or deceive").

The same plausibility defect exists with respect to Plaintiff's reliance allegation. Plaintiff mechanically asserts it "justifiably and detrimentally relied on [Defendants'] misrepresentations and billing statements as true and accurate." FAC ¶ 44. But the complaint contains no fact allegations plausibly establishing Plaintiff's reliance was reasonable. *See Arrowood Indem. Co. v. Cristini*, 630 F. App'x 512, 516 (6th Cir. 2015) (affirming dismissal where plaintiff "failed to allege plausibly that his reliance on the insurers' misrepresentation was reasonable"). To the contrary, the complaint forecloses any claim of justifiable reliance because Plaintiff alleges it discovered the purported overcharges through an investigation of its *own* billing statements and

payments that it could have undertook at any time. FAC ¶¶ 7-8; *see Allied Sound, Inc. v. Neely*, 58 S.W.3d 119, 123 (Tenn. Ct. App. 2001) (under Tennessee law, party in arms' length transaction "'is not justified in relying upon representations where the means of knowledge are readily within his reach'") (quoting *Solomon v. First Am. Nat'l Bank of Nashville*, 774 S.W.2d 935, 943 (Tenn. Ct. App. 1989)).

Plaintiff's amended allegations further undermine any claim of justifiable reliance. In the amended complaint, Plaintiff attempts to excuse its twenty-year failure to raise this billing dispute by adding an allegation that Defendants' bills were "complicated" and "encrypted." FAC ¶ 44. But as a matter of law, Plaintiff cannot justifiably rely on billing statements it knew it did not fully understand. *See McNeil v. Nofal*, 185 S.W.3d 402, 411 (Tenn. Ct. App. 2005) (fraud claim fails where plaintiff "had the means to obtains the information needed and discover any 'fraud' if he had simply asked") (quotation omitted). Plaintiff cannot have it both ways. Either Plaintiff could understand the information in Defendants' billing statements (in which case Plaintiff cannot claim it justifiably believed Defendants were not billing on the disputed circuits), or the billing statements were too "complicated" and "encrypted" for Plaintiff to understand (in which case Plaintiff could not have relied on the statements and should have inquired).

4. The complaint does not plead fraud with the particularity required by Rule 9(b).

In addition to the defects described above, Plaintiff certainly does not allege the particulars of any supposed misrepresentation, such as who made them, when they were made, who allegedly received them, or even the basic content of any misrepresentation.[8] *See, e.g.*, FAC

[8] *See Rautu v. U.S. Bank*, 557 Fed. App'x 411, 414 (6th Cir. Feb. 6, 2014) (complaint that did not allege particulars of fraudulent statement, including specific content thereof, did "not come close to meeting [the Rule 9(b)] standard"); *Cullop v. Land Res. Co., LLC*, No. 2:06-CV-207, 2007

¶¶ 42-44 (vaguely alleging fraudulent actions, but omitting any specifics). Because Plaintiff's allegations satisfy neither the essential elements of a fraud claim, nor the Supreme Court's plausibility requirement, nor the heightened pleading standard under Rule 9(b), the fraud claim should be dismissed.

D. Plaintiff's Negligent Misrepresentation Count (Count V) Fails To State A Claim Upon Which Relief May Be Granted.

1. Negligent misrepresentation is not available because Defendants' bills are not intended to guide Plaintiff in its business transactions.

For claims of negligent misrepresentation, "the applicable law in Tennessee . . . is found in the Restatement (2d) of Torts § 552 (1977)." *John Martin Co., Inc. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 431 (Tenn. 1991). That section of the Restatement provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information *for the guidance of others in their business transactions*, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in the obtaining or communicating of the information.

RESTATEMENT (2D) OF TORTS § 552(1) (1977) (emphasis supplied). Applying the Restatement, the Tennessee Supreme Court holds a negligent misrepresentation plaintiff must allege:

> (1) the defendant is acting in the course of his business, profession, or employment, or in a transaction in which he has a pecuniary (as opposed to gratuitous) interest; and
> (2) the defendant supplies faulty information *meant to guide others in their business transactions;*[9] and

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WL 445823, at *3 (E.D. Tenn. Feb. 6, 2007) (dismissing fraud claim for failure to "allege the time, place, and content of the alleged misrepresentations at issue"); *Gilliard v. Recontrust Co., N.A.*, No. 1:11-cv-331, 2012 WL 4442525, at *10 (E.D. Tenn. Sept. 25, 2012) (plaintiffs' "failure to identify which Defendant allegedly made the misrepresentations" is "a substantial defect" warranting dismissal).

[9] As the text of the Restatement indicates, "liability for negligent misrepresentation . . . is more restricted than liability for intentional misrepresentation," and "is limited to 'a supplier of information to be used in commercial transactions.'" *Hodge v. Craig*, 382 S.W.3d 325, 344-45 (Tenn. 2012) (quoting RESTATEMENT (2D) OF TORTS § 552 cmt. a, at 128). Accordingly, the

(3) the defendant fails to exercise reasonable care in obtaining or communicating the information; and
(4) the plaintiff justifiably relies upon the information.

Robinson v. Omer, 952 S.W.2d 423, 427 (Tenn. 1997) (emphasis in original).

Unlike claims for intentional misrepresentation, the Tennessee Supreme Court has "consistently limited liability for negligent misrepresentation to 'business or professional persons who negligently supply false information for the guidance of others in their business transactions.'" *Hodge*, 382 S.W.3d at 345 (quoting *John Martin Co., Inc.*, 819 S.W.2d at 433). Thus, negligent misrepresentation may be available when, for example, an auditor provides a faulty audit upon which a manufacturer relies in extending credit to a customer;[10] a construction manager provides a false report about a construction project that is used by a subcontractor in performing work on the project;[11] or a land surveyor provides an incorrect plat relied upon by a purchaser of property.[12] The common thread between these scenarios is that the allegedly negligent information was provided to guide the recipient in future business transactions. *See Shelby v. Delta Air Lines, Inc.*, 842 F. Supp. 999, 1015 (M.D. Tenn. 1993) ("The Tennessee cases involving negligent misrepresentation all involve commercial transactions").

In contrast, Plaintiff does not allege, and cannot allege, that Defendants' bills were intended to guide Plaintiff in its business endeavors with other parties. Defendants' bills merely list the services and amounts being assessed to the customer, and Plaintiff does not allege otherwise. *See* FAC ¶¶ 9, 11, 13, 15, 17, 19, 21, 23 (alleging bills assessed charges for a circuit

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Tennessee Supreme Court characterizes the requirement that the alleged misrepresentation be made "to guide others 'in their business transactions' as an 'essential element' of a negligent misrepresentation claim." *Id.* (quoting *Robinson v. Omer*, 952 S.W.2d 423, 428 (Tenn. 1997)).

[10] *Bethlehem Steel Corp. v. Ernst & Whinney*, 822 S.W.2d 592, 592 (Tenn 1991).

[11] *John Martin Co., Inc.*, 819 S.W.2d at 429.

[12] *Tartera v. Palumbo*, 453 S.W.2d 780 (Tenn. 1970).

and the amount thereof). Consistent with that limited purpose, the complaint alleges the bills contained improper charges, *id.* at ¶¶ 8-24, but does not describe any information, opinions or statements in the bills that were intended to guide Plaintiff in its future business transactions. *See generally id.* Accordingly, Plaintiff's negligent misrepresentation claim fails as a matter of law. *See Shelby*, 842 F. Supp. at 1016 (dismissing negligent misrepresentation claim where information was not supplied to guide business transactions and plaintiff therefore "has no cause of action for negligent misrepresentation as a matter of law").

2. Plaintiff fails to plead negligent misrepresentation with the particularity required by Rule 9(b).

Like claims for fraud, negligent misrepresentation must also be plead with particularity under Rule 9(b). *See Marshall v. ITT Tech. Inst.*, No. 3:11-CV-552, 2012 WL 1205581, at *3 (E.D. Tenn. Apr. 11, 2012) ("[C]laims for intentional and negligent misrepresentation are analyzed under the heightened standard set forth in Rule 9(b)"). The same defects requiring dismissal of the fraud claim also require dismissal of Plaintiff's negligent misrepresentation claim, which is likewise void of any specificity.

Plaintiff vaguely alleges "[Defendants] negligently misrepresented material facts to the city *in regards to the billing statements*." FAC ¶ 47 (emphasis supplied). But like the fraud claim, the complaint nowhere sets forth the content of any misrepresentation or articulates any past or present material fact misrepresented by either Defendant. *See generally id.*; *see also McElroy v. Boise Cascade Corp.*, 632 S.W.2d 127, 130 (Tenn. Ct. App. 1982) (negligent misrepresentation "must consist of a statement of a material past or present fact").[13] Plaintiff's

[13] And like the fraud claim, Plaintiff's allegation of intentional overbilling does not constitute a false representation of material fact capable of sustaining a claim for negligent misrepresentation. *See* discussion *supra* Section III.C.1; *Marshall v. Bostic*, No. 02A01-9406-CV-00141, 1995 WL 115971, at *4 (Tenn. Ct. App. Mar. 15, 1995) ("To establish a cause of

failure to allege the content, time or place of the misrepresentations, or even the specific fact allegedly misrepresented, requires dismissal of Count Five. *Marshall*, 2012 WL 1205581, at *3 (dismissing negligent misrepresentation claim for failure to plead with particularity).

Plaintiff also does not allege how or why Defendants purportedly failed to exercise reasonable care in making the unidentified misrepresentations. *See generally* FAC (no allegations of any applicable standard of care or how it was alleged breached by the Defendants). For this reason, Plaintiff's negligent misrepresentation claim further fails as a matter of law. *Pugh*, 2013 WL 3349649, at *16 (W.D. Tenn. July 2, 2013) (dismissing negligent misrepresentation claim where complaint did not allege facts establishing defendants failed to exercise reasonable care or that plaintiff's reliance was reasonable); *LeBlanc v. Bank of Am., N.A.*, No. 2:13-CV-02001-JPM, 2013 WL 3146829, at *17 (W.D. Tenn. June 18, 2013) (same).

IV. CONCLUSION

For the reasons stated herein, and in Defendants' reply brief in support of this motion, Defendants request that this honorable Court dismiss Counts Three, Four and Five of Plaintiff's amended complaint for failure to state a claim upon which relief may be granted.

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action based upon negligent misrepresentation, a claimant must prove . . . that the representation was false and involved a material fact").

Respectfully submitted, this 31st day of May, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2016, I filed the foregoing with the Clerk of Court through the Court's CM/ECF filing system, which automatically serves a copy of same via electronic mail to the following counsel of record:

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UNITED STATED DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

CITY OF MORRISTOWN, TENNESSEE,

Plaintiff,

CASE NO.: 2:16-CV-00059-RLJ-MCLC

vs.

JURY DEMAND

AT&T CORP.,

and

BELLSOUTH TELECOMMUNICATIONS, LLC

d/b/a AT&T TENNESSEE and d/b/a AT&T SOUTHEAST

Defendants.

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS

Comes now the Plaintiff, City of Morristown, Tennessee ("City), to submit this response to the Defendants', AT&T Corp. and BellSouth Telecommunications, LLC d/b/a AT&T Tennessee and AT&T Southeast (collectively, "AT&T"), Motion to Dismiss Counts Three through Five of Plaintiff's First Amended Complaint.

Plaintiff's Negligence Cause of Action

Defendants allege that Plaintiff's negligence claim against them should be dismissed as there is only an arms' length service relationship between the parties. As stated in Plaintiff's First Amended Complaint, the Plaintiff averred that there was and is a very lengthy relationship between the parties, as the Plaintiff formed a relationship with Defendants over thirty (30) years ago and frequently relied upon Defendants' expertise and guidance in selecting the appropriate telephone services. FAC ¶5. Plaintiff avers that there is more than just an arms' length

transaction between these parties, but that over the years a more extensive relationship formed, rising to the level of a legal duty owed by Defendants to the Plaintiff.

A fiduciary relationship can exist in the form of a relationship where one party exercises dominion and control over another. *Foster Bus. Park, LLC v. Winfree*, No. M2006-02340-COA0R30CV, 2009 WL 113242, at *12 (Tenn.Ct.App. Jan. 15, 2009). Said confidential type relationship should be determined on a case by case basis. *Id*. Factors to be considered include whether or not the defendant was in a position to influence or control the plaintiff, whether or not the defendant used the confidences given it to obtain some benefit or advantage over the plaintiff, and whether or not the plaintiff, as the dominated party, suffered some detriment at the hands of the defendant. *Givens v. Mullikin*, 75 S.W.3d 383, 410 (Tenn. 2002). The Plaintiff avers that its relationship with Defendants does rise to the level of such a fiduciary relationship. Specifically, as telecommunication service providers, the Defendants learned what services the Plaintiff needed and recommended and sold various services to Plaintiff. Plaintiff avers that Defendants then learned and were informed of what lines were no longer used or what buildings had been torn down, but continued to include these charges on Plaintiff's bill and accept Plaintiff's money. *See generally*, FAC. Defendants held themselves out to be knowledgeable in the telecommunication service field and held the position of submitting the monthly statements. Plaintiff relied on their expertise and believed it was receiving accurate statements. Therefore, Plaintiff avers that the grounds for a negligence claim do exist and this cause of action should survive Defendants' Motion to Dismiss.

Plaintiff's Fraud and Intentional Misrepresentation Cause of Action

Defendants allege that Plaintiff's fraud and intentional misrepresentation claim against them should be dismissed as Defendants aver the elements of fraud have not been met, the plausibility

requirement has not been met, and that the Rule 9(b) pleading standard has not been met. As Plaintiff alleged in its First Amended Complaint, after making requests to Defendants to remove and disconnect certain telephone lines and circuits, Defendants continued to bill Plaintiff for these circuits. Defendants submitted monthly statements to Plaintiff for several years and decades that contained charges for these disconnected lines. Plaintiff believes that Defendants intentionally left these charges on the bills in order to wrongfully take money from Plaintiff. The monthly statements Plaintiff received from Defendants were false every time they contained a charge for a disconnected circuit. Each month Defendant continued to receive and accept money Plaintiff paid as a result of these false bills. Plaintiff averred that Defendants had the information for each circuit's usage, knew what the line item charges were when the bills were compiled, and thus knew that the bills contained numerous misrepresentations. Plaintiff relied on these monthly statements to its detriment, as it was overcharged over three-hundred and fifty thousand dollars ($350,000.00) by Defendants. *See generally*, FAC; *Hamilton County Emergency Communications District v. Bellsouth Telecommunications, LLC*, 890 F.Supp.2d 862, 878-879 (E.D.Tenn. Aug. 20, 2012).

Plaintiff further responds that its First Amended Complaint does meet the Rule 9(b) pleading requirement. Plaintiff has raised its fraud allegation against Defendants with specificity, as it referred to each specific circuit that Defendants continued to bill Plaintiff on after disconnect, it referred to the monthly charge Defendants overcharged, and it referred to the time frame that the overcharges occurred. *See generally*, FAC. With the exception of attaching each and every monthly statement that contained a false charge (which Plaintiff avers will be produced during the discovery process), the Plaintiff avers that it could not have plead the

fraudulent misrepresentation claim with any other particularity. As such, this cause of action should not be dismissed.

Plaintiff's Negligent Misrepresentation Cause of Action

In response to Defendants' argument that Plaintiff's negligent misrepresentation claim should be dismissed, Plaintiff argues that the elements of this cause of action have been met and that it has been plead with particularity. Plaintiff did aver that the Defendants were acting as a service provider, that the Defendants provided false information to Plaintiff on what the bill would be for certain services, that the Defendants did not act as a reasonable service provider in billing for these services that were not being provided, and the Plaintiff relied upon the information provided to it from Defendants in continuing their business relationship. FAC ¶47-48. Plaintiff also stated with specificity each individual circuit and circumstance when Defendants submitted these misrepresentations to Plaintiff. *See generally,* FAC. Plaintiff further believes that additional evidence of these misrepresentations will be revealed during the discovery process and that this cause of action should not be dismissed.

Conclusion

Plaintiff hereby respectfully requests that this Honorable Court deny the Defendants' Motion to Dismiss Counts Three, Four and Five of Plaintiff's Amended Complaint.

RESPECTFULLY SUBMITTED this the **16th** day of **June,** 2016.

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I hereby certify that on May 11, 2016, I filed the foregoing with the Clerk of Court through the Court's CM/ECF filing system, which automatically serves a copy of same via electronic mail to the following counsel of record:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE DIVISION

CITY OF MORRISTOWN, TENNESSEE *Plaintiff*, vs. AT&T CORP. and BELLSOUTH TELECOMMUNICATIONS, LLC, d/b/a AT&T TENNESSEE and d/b/a AT&T SOUTHEAST *Defendants*.	)	CASE NO.: 2:16-CV-00059-TPW-MCLC JURY DEMAND

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS COUNTS THREE THROUGH FIVE OF THE FIRST AMENDED COMPLAINT

In accordance with LR 7.1, Defendants submit this reply brief and respectfully show the Court as follows:

The City of Morristown's opposition does not meet the arguments or legal authority in Defendants' motion to dismiss. As explained below and in Defendants' motion, Counts Three, Four and Five of the First Amended Complaint ("FAC") should be dismissed.

A. The negligence claim (Count III) should be dismissed.

Defendants' motion to dismiss asserts the City has failed to allege an independent legal duty capable of supporting the City's negligent billing theory. [Dkt. 17 at 4-5.] The City's opposition brief does not meet this argument. Instead, the City claims it is a longstanding customer of Defendants, and argues Defendants therefore have a fiduciary duty to ensure no incorrect charges appear on the City's bills. [Dkt. 18 at 1-2.]

The City cites no authority supporting this claim. Moreover, the City's brief confirms its "relationship" with Defendants is that of a service provider and its customer. [*See id.* at 2

(alleging Defendants "learned what services the Plaintiff needed and recommended and sold various services to Plaintiff").] The City's suggestion of a fiduciary relationship is therefore contrary to the settled principle that "'absent extraordinary circumstances,'" no fiduciary relationship arises from "'parties dealing at arm's length[ ] in a commercial transaction.'"[1] The City provides no authority and alleges no facts suggesting this case presents extraordinary circumstances warranting departure from that principle. Because the FAC alleges only an arm's length business relationship with Defendants, the City cannot establish a legal duty supporting its negligence theory and Count Three should be dismissed.

B. The fraud and intentional misrepresentation claim (Count IV) should be dismissed.

Defendant's motion argues and cites authority establishing that an incorrect charge on an invoice, without more, is not a false statement or actionable misrepresentation. [Dkt. 17 at 6-8.] As other district courts have explained, the appearance of a charge on an invoice is only a truthful representation that the customer is being billed that amount.[2] It is not a representation that the charge is contractually authorized or the customer has no basis to dispute it.[3] While false statements regarding the nature of a charge, given in response to a customer's demand for an explanation of same, "would be closer to a cognizable misrepresentation," the appearance of an

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[1] *Hamilton Cty. Emergency Commc'ns Dist. v. BellSouth Telecomms., LLC*, --- F. Supp. 3d. ---, No. 1:11-CV-330, 2016 WL 70590, at *13 (E.D. Tenn. Jan. 5, 2016) (quoting *Dick Broad. Co. of Tenn. v. Oak Ridge FM, Inc.*, 395 S.W.3d 653, 673 (Tenn. 2013) (Koch, J., concurring)).

[2] *See Almanza v. United Airlines, Inc.*, No. CV 215-033, 2016 WL 722159, at *12 (S.D. Ga. Feb. 19, 2016) (fee listed on invoice "amount[s] only to a representation that Defendants assessed [those fees] . . . a representation that was, in fact, true"); *Braswell Wood Co., Inc. v. Waste Away Group, Inc.*, No. 2:09-CV-891-WKW [WO], 2010 WL 3168125, at *4 (M.D. Ala. Aug. 10, 2010) (alleged overcharges in plaintiff's bill "[was not] a misrepresentation; it was entirely true that [defendant] was levying [the disputed charges] in those amounts").

[3] *Almanza*, 2016 WL 722159, at *12 (inclusion of fee on invoice "does not constitute a false statement that Defendants were permitted to [charge the fee under the parties' contract], or that [Plaintiffs] were obligated to pay the same").

improper charge itself does not support a misrepresentation claim.[4] To hold otherwise would apply an "exceptionally broad" definition of "misrepresentation" that stretches that term "past the point of meaning."[5]

The City's opposition does not meet this argument or attempt to rebut Defendants' authority. [Dkt. 18 at 2-4.] Nor does the City allege that Defendants made any false statements in connection with, or regarding the nature or basis of, the charges at issue. [*Id.*][6] Rather, the City's opposition confirms the defect in its fraud claim by making it clear the City is contending that the appearance of the disputed charges is itself the misrepresentation underlying the claim. [*See id.* at 3 (arguing "[t]he monthly statements Plaintiff received from Defendants were false every time they contained a charge for a disconnected circuit").] But the disputed charge is not, in and of itself, a misrepresentation. The City's failure to allege the essential element of an actionable misrepresentation is dispositive of Count Four.

The City also claims its fraud pleading satisfies Rule 9(b)'s particularity requirement because the FAC identifies the allegedly improper charges with specificity. [Dkt 18 at 3-4.] The City misses the point. Details regarding the disputed charges do not satisfy the City's obligation to plead the specifics of an actionable misrepresentation of fact.[7] Beyond describing those charges, the FAC does not allege any factual misrepresentation (with particularity or otherwise) by Defendants. Because the disputed charges are not actionable misrepresentations of fact, the City's argument that it identified those charges with particularity is misplaced.

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[4] *Braswell Wood Co., Inc.*, 2010 WL 3168125 at *4.

[5] *Id.* (rejecting argument that overcharge on invoice was actionable misrepresentation); *accord Almanza*, 2016 WL 722159 at *12.

[6] The FAC also contains no such allegations. [*See generally* Dkt. 14.]

[7] *See Power & Tel. Supply Co. v. SunTrust Banks, Inc.*, 447 F.3d 923, 931 (6th Cir. 2006) (fraud plaintiff must allege "content of the misrepresentations" that support a fraud claim).

The City also does not address Defendants' arguments that the FAC fails (1) to properly allege the elements of promissory fraud,[8] or (2) allege facts sufficient to meet the Supreme Court's plausibility requirement under *Twombly* and *Iqbal*. As explained in Defendants' motion, [Dkt. 17 at 7-8], the City does not allege Defendants made a promise as to future billing activity with no intention of honoring it. Defendants' motion also demonstrates the FAC does not include factual allegations plausibly suggesting the City's reliance was reasonable, [Dkt. 17 at 11-12], or that this dispute is the result of intentionally fraudulent activity, rather than a bona fide billing disagreement. [*Id.* at 9-11.] The City's failure to address either of these arguments further warrants dismissal of Count Four.

C. The negligent misrepresentation claim (Count V) should be dismissed.

The City does not meet any of Defendants' arguments regarding the negligent misrepresentation claim. Under Tennessee law, negligent misrepresentation must consist of a false statement of material fact.[9] As with the fraud claim, an allegedly improper charge on an invoice is not a false statement and cannot support a cause of action for negligent misrepresentation. The FAC therefore fails to allege any false statement capable of sustaining the City's negligent misrepresentation theory, and the City's opposition does not address the absence of this threshold requirement. On this basis alone, the negligent misrepresentation claim should be dismissed.

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[8] In response to Defendants' original motion to dismiss arguing the City failed to allege an actionable misrepresentation, the City amended its complaint and added an allegation that Defendants promised in the future to not bill on circuits that had been disconnected. FAC ¶ 44. As explained in Defendants' motion to dismiss the FAC, that new allegation is insufficient to state a claim for promissory fraud under Tennessee law, and does not salvage the fraud claim.

[9] *Hodge v. Craig*, 382 S.W.3d 325, 345 (Tenn. 2012) (negligent misrepresentation is limited to defendant's provision of "false information") (quotation omitted); *McElroy v. Boise Cascade Corp.*, 632 S.W.2d 127, 132 (Tenn. Ct. App. 1982) (false information underlying negligent misrepresentation claim "must consist of a statement of material fact").

The City also does not respond to Defendants' argument that the disputed charges are not information intended to guide the City's business transactions, as required to assert a claim for negligent misrepresentation. [Dkt. 17 at 14-15.] As Defendants' motion explains, the FAC alleges only that Defendants' invoices included certain charges that were unauthorized. [*Id.*] But the appearance of a charge on an invoice is not a representation that the charge is authorized by the parties' contract or that the customer is legally obligated to pay it.[10] The FAC does not allege the invoices contained any other information, statements or opinions intended to guide the City in its business transactions. [*Id.*] The Supreme Court of Tennessee has emphasized that negligent misrepresentation is only available when false information is supplied "*for guidance of others in their business transactions.*" *Robinson v. Omer*, 952 S.W.2d 423, 427 (Tenn. 1997) (emphasis in original). The City cites no authority holding a charge on a customer invoice, without more, is intended to guide others in their business transactions. Count Five is therefore further subject to dismissal.[11]

Finally, like the fraud claim, the City's argument that it identified the allegedly improper charges with particularity, [Dkt. 18 at 4], misses the point with respect to the heightened pleading requirement for negligent misrepresentation claims. Because the allegedly improper charges are not factual misrepresentations that can sustain a claim for negligent misrepresentation, the City's argument that it identified those charges with particularity is misplaced.

[10] *Almanza*, 2016 WL 722159, at *12.

[11] *See Shelby v. Delta Air Lines, Inc.*, 842 F. Supp. 999, 1016 (dismissing negligent misrepresentation claim where information was not supplied to guide business transactions and plaintiff therefore "has no cause of action for negligent misrepresentation as a matter of law").

CONCLUSION

For the reasons stated herein, Defendants AT&T Corp. and BellSouth Telecommunications, LLC request that this Honorable Court dismiss Counts Three, Four and Five of the First Amended Complaint.

Respectfully submitted this 27th day of June, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2016, I filed the foregoing with the Clerk of Court through the Court's CM/ECF filing system, which automatically serves a copy of same via electronic mail to the following counsel of record:

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