IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MEDTRONIC SOFAMOR DANEK, INC.,	)	
	)	
Plaintiffs/	)	
Counterclaim Defendant,	)	
	)	
vs.	)	**No. 01-2373 MlV**
	)	
GARY K. MICHELSON, M.D.,	)	
and KARLIN TECHNOLOGY, INC.,	)	
	)	
Defendants/	)	
Counterclaimants,	)	
	)	
consolidated with	)	
	)	
MEDTRONIC SOFAMOR DANEK, INC.,	)	
and MEDTRONIC, INC.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**No. 03-2055 MlV**
	)	
GARY K. MICHELSON, M.D.,	)	
and KARLIN TECHNOLOGY, INC.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION ON PLAINTIFF'S/THIRD-PARTY DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DEFENDANTS'/THIRD-PARTY PLAINTIFFS' FRAUD AND UNJUST ENRICHMENT CLAIMS

Before the court is Plaintiff Medtronic Sofamor Danek, Inc.'s ("Medtronic") and Third-Party Defendant Sofamor Danek Holidings, Inc.'s ("SDHI") (collectively "plaintiffs") motion for partial summary judgment on Defendants'/Third-Party Plaintiffs' fraud and unjust enrichment claims, filed October 15, 2003. The defendants, Gary K. Michelson, M.D. ("Michelson") and Karlin Technology, Inc.

("KTI"), responded in opposition on November 24, 2003. According to the terms of the standing order, Medtronic and SDHI filed a reply brief on December 17, 2003, to which Michelson and KTI filed a surreply on January 12, 2004. The motion was referred to the United States Magistrate Judge for report and recommendation. For the reasons that follow, it is recommended that the plaintiffs' motion be granted.

UNDISPUTED FACTS

For the purposes of this motion, the court finds that the following facts are undisputed. This case involves multiple disputes between an inventor, Michelson, and Medtronic, a licensee/purchaser of intellectual property. The motion presently before this court addresses Michelson's and KTI's fraud and unjust enrichment counterclaims related to an agreement referred to as the Three-Party Agreement between Dr. Michelson, Wright Medical, and Medtronic.

Medtronic is an Indiana corporation having its principal place of business in Memphis, Tennessee. SDHI is a Delaware corporation that likewise has its principal place of business in Memphis, Tennessee. Michelson is a citizen of the state of California, and KTI is a corporation organized under the laws of California with its principal place of business also located in that state.

On January 3, 1997, Michelson entered into a sales agreement with Wright Medical for the purchase of his MultiLock technology.[1] (Defs.' Statement of Material Facts in Supp. of Defs.' Opp'n to

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[1] **MultiLock Technology refers to an "interior cervical plating system relating to vertebrae fusion." Am. Counterclaims ¶ 31; Third-Party Compl. ¶ 13.**

Pl.'s Mot. for Summ. J. on Fraud and Unjust Enrichment Claims and Resp. to Pl.'s Statement of Undisputed Material Facts at 9.) Under that contract, Michelson was to receive an eight percent (8%) royalty on all net sales of MultiLock products. (*Id.*) On January 14, 1999, Wright Medical entered into a licensing agreement with Medtronic's subsidiary, SDHI, concerning the MultiLock technology owned by Wright Medical (the "Wright Medical License Agreement"). (*Id.* 10.) As a result, SDHI obtained an exclusive license under Michelson's patents for sale of the MultiLock technology. (*Id.*) In return, Medtronic paid an up-front fee of $3.5 million and agreed to pay Wright Medical future royalty payments of three percent (3%) on net sales of licensed products. (*Id.*)

On January 28, 1999, Michelson filed a lawsuit against Wright Medical seeking to nullify the licensing agreement for the MultiLock technology, alleging among other things that Wright Medical was prohibited by the January 3, 1997 sales and assignment agreement and a related security agreement from granting the above license to Medtronic. (*Id.* at 11.) On October 18, 1999, Michelson informed Medtronic by letter that if he and Wright Medical did not resolve their differences by settlement, he would potentially join Medtronic as a party to the Wright Medical suit.[2] (*Id.*) However, Michelson never joined Medtronic as a party to the suit because the parties came to an agreement. (*Id.*)

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[2] In that letter, Michelson expressed his hesitation to join Medtronic as a party even though his attorneys had advised him to do so. (Defs.' Statement of Material Facts in Supp. of Defs.' Opp'n to Pl.'s Mot. for Summ. J. on Fraud and Unjust Enrichment Claims and Resp. to Pl.'s Statement of Undisputed Material Facts at 11.)

On January 18, 2001, Michelson, Wright Medical, and SDHI entered into the Three-Party agreement at issue in the present motion. (*Id.* at 12.) The Three-Party Agreement amended the Wright Medical License Agreement, and, except as amended, continued it in full force and effect. (*Id.*) Under the agreement, Medtronic agreed to continue paying three percent (3%) royalties on net sales of MultiLock products; however, the right to receive payment transferred from Wright Medical to Michelson. (*Id.*) Medtronic further agreed to mark Michelson's patent numbers on MultiLock products and literature and place Michelson's name on products and literature with a corresponding legend. (*Id.*) In addition to its promise to make royalty payments, Medtronic also paid Michelson a one-time fee of $2.25 million on the date of the execution of the Three-Party Agreement. (*Id.*) The Three-Party Agreement contains an integration clause that states, in pertinent part, "[t]his agreement represents the entire understanding and agreement of the parties regarding the subject matter hereof and supersedes and replaces any other agreement to the extent it is inconsistent with this Agreement." (*Id.*)

On September 24, 2001, Medtronic filed its Second Amended Complaint in this case. (*Id.* at 14.) In turn, on October 15, 2001, Michelson and KTI filed both their Counterclaims against Medtronic and Michelson's Third-Party Complaint against SDHI. (*Id.*) The defendants later amended their counterlcaims on August 14, 2003. (*Id.*)

In their Counterclaims and Third-Party Complaint, Michelson and KTI aver that Medtronic made misrepresentations as to the

expected performance of Michelson's MultiLock technology in an effort to fraudulently induce Michelson to enter into the Three-Party Agreement. Many of those alleged misrepresentations are disputed and will be set forth below in a separate section. However, Michelson has set forth several facts in support of his claims that are not disputed. What is not disputed is that while Michelson, Medtronic, and Wright Medical were negotiating the Three-Party agreement, Medtronic representatives Robert Rodrick and Michael DeMane made representations to Michelson regarding the level of Medtronic's sale of MultiLock products. (Resp. of Pl./Third-Party Def. To Defs.' Statement of Material Facts in Supp. of Defs.' Opp'n to the Mot. for Partial Summ. J. on Fraud and Related Unjust Enrichment Claims at 6.) Rodrick can recall one occasion where he arranged to provide Michelson with "projected sales of some kind" but cannot recall any specific information provided. (*Id.*)

It is undisputed that throughout the entire negotiations period leading up to the Three-Party Agreement that the physical record of actual sales of Medtronic's Atlantis MultiLock cervical plate product and the internal sales projections for all MultiLock products were in the exclusive control of Medtronic. (*Id.* at 13.) However, Medtronic asserts that Michelson was aware of the general profitability of the MultiLock products on the market and that he knew exact sales figures in some instances. (*Id.*)

Through discovery, Michelson discovered the following information that is undisputed. In August of 1999, Medtronic was internally projecting sales of the Atlantis product alone to exceed

$38 million, and its actual sales were running at a $44 million pace annually. (Resp. of Pl./Third-Party Def. To Defs.' Statement of Material Facts in Supp. of Defs.' Opp'n to the Mot. for Partial Summ. J. on Fraud and Related Unjust Enrichment Claims at 9.) Starting in September 1999 and continuing through April 2000, Medtronic's monthly actual sales of its Atlantis product far exceeded its monthly projections. (*Id.* at 10.) Medtronic's total sales of its Atlantis product for the twelve-months ending in April 2000 was over $59 million, and its sales for the month of April 2000 exceeded projections by 161 percent. (*Id.*) By mid-2000, Medtronic had adjusted its annual sales projections for the Atlantis product to over $81 million. (*Id.*) Then in October 2000, Medtronic raised its projections to almost $85 million and projected another $11 million in annual sales of the newer Zephyr and Premier MultiLock products. (*Id.*)

Even though Medtronic's executives were aware of the sales of the Atlantis product, they never informed Michelson of the actual sales, nor did they revise the alleged projections they had made. (*Id.* at 10.) By the time of the execution of the Three-Party Agreement, Medtronic had already sold over $78 million in Atlantis products the previous calendar year and another $3.6 million in Zephyr and Premier products. (*Id.* at 13.) At this time, Medtronic's annual sales projections were over $94 million. (*Id.*) Michelson contends that he was never informed of any of these figures. (*Id.*)

Although it does not dispute that the actual sales of products using MutliLock lock technology were higher than originally

projected, Medtronic contends that the actual sales information is irrelevant for the purposes of its motion and should not be considered as genuine issues of material fact because Michelson did not rely on the sales information or alleged sales projections upon entering the Three-Party Agreement. (*See Id.* at 8.) Medtronic asserts that Michelson's own statements indicate that he did not rely on any of Medtronic's representations. First, Medtronic notes and Michelson does not dispute that in a phone conversation between Michael DeMane and Michelson that took place on May 9, 2001, Michelson made the following point in reference to projections made in 1994 on behalf of one of Medtronic's earlier product launches:[3] "[W]e try to predict these pro formas about what the market looks like. And yet what we're missing is the fact that as these products get bigger, there is more market penetration, and the market grows in ways that you can[not] model." (Medtronic's and SDHI's Statement of Undisputed Material Facts in Supp. of Their Mot. for Partial Summ. J. on Defs.' Fraud and Unjust Enrichment Claims, Ex. H at 6.) In reference to product performance projections in general, Michelson went on to state, "what you [a]re really doing is, you [a]re trying to look at the pie as it is today, and say, okay, can we get a little bit more of this piece of pie." (*Id.* at 6-7.)

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[3] The product launch to which Michelson was referring was Medtronic's Orion plate technology, which was another cervical plate product that did not incorporate MultiLock technology. (*See* Defs.' Statement of Material Facts in Supp. of Defs.' Opp'n to Pl.'s Mot. for Summ. J. on Fraud and Unjust Enrichment Claims and Resp. to Pl.'s Statement of Undisputed Material Facts at 13.)

During a deposition taken on August 5, 2003, Michelson testified again in reference to Medtronic's 1994 projections that he had "never been impressed that [Medtronic] quite get[s] the big picture about the value of technology." (Resp. of Pl./Third-Party Def. To Defs.' Statement of Material Facts in Supp. of Defs.' Opp'n to the Mot. for Partial Summ. J. on Fraud and Related Unjust Enrichment Claims at 7.) Michelson testified that his MultiLock technology "blew [Medtronic's projections] out of the water" because the sales of the "MultiLock product by itself [were] four times greater in just a couple of years than what [Medtronic] said the market would be." (Pls.' Statement of Undisputed Material Facts in Supp. of Their Mot. for Partial Summ. J. on Defs.' Fraud and Unjust Enrichment Claims, Ex. I at 7.) Because Medtronic was selling more of Michelson's MultiLock technology than what it thought the whole world market was, Michelson stated that "there's something wrong with what [Medtronic] modeled, and I'm sure whatever they modeled was mathematically correct." (*Id.* at 8.) Michelson testified that Medtronic's projections "suffered from a lack of vision" because Medtronic "modeled the wrong paradigm" when it failed to take into account that new technology-- like the MultiLock technology--can not only take up a larger share of a market than projected but can also "make[] the market itself immensely larger." (*Id.*)

DISPUTED FACTS

The following facts are disputed by the plaintiffs and would present a genuine issue of material fact if this court determines that they are relevant and material to Michelson's fraud and

related unjust enrichment claims. Michelson claims initially that Rodrick and DeMane represented to him that the market for products based on Michelson's MultiLock technology was limited to only $30 million annually. (Resp. of Pl./Third-Party Def. To Defs.' Statement of Material Facts in Supp. of Defs.' Opp'n to the Mot. for Partial Summ. J. on Fraud and Related Unjust Enrichment Claims at 8.) According to Michelson, they also stated that Medtronic was the best source of information regarding market potential, because it subscribed to all commercially available sources of information and because it was the largest seller of spinal products in the world. (*Id.*) Neither Rodrick nor DeMane can recall making the $30 million projection. (*Id.*)

By August of 1999, Michelson contends that Rodrick was telling him that Medtronic could sell up to $35 million per year of MultiLock products, but only if Medtronic paid extra incentives to salespersons and doctors to promote the product, thereby increasing its costs and requiring a lower three percent (3%) royalty rate to Michleson. (*Id.* at 9.) In his deposition, Rodrick did not recall providing Michelson with the $35 million projection. (*Id.*) In his response to the summary judgment motion, Michelson asserts that in 2000, Rodrick further represented to him that Medtronic had a new anterior cervical plate product in research and development (the "R&D product") that was not based on Michelson's technology and which would obsolete the MultiLock technology if introduced into the market.[4] (*Id.*)

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[4] **When questioned at his deposition, Rodrick did not recall whether Medtronic had a product in research and development**

Michelson also claims in his summary judgment response that in late 2000 Medtronic represented to him that the MultiLock products could achieve annual sales of $40 million, but only if the royalty rate was low enough to create an incentive for Medtronic to hold back the R&D product from introduction into the market. (*Id.* at 11.) In response, Medtronic contends that is unaware of any $40 million projection being made to Michelson and notes that neither Rodrick nor DeMane can recall whether the R&D product existed. (*Id.*)

Michelson further claims in response to the summary judgment motion that in January 2001, DeMane maintained to him that Michelson's MultiLock technology had a limited life-span due to Medtronic's R&D product, and that the R&D product was not based on Michelson's technology, and would "obsolete" that technology. (*Id.* at 12.) Furthermore, Michelson alleges that DeMane recommended that Michelson accept the Three-Party Agreement at the lower three (3) percent royalty rate; otherwise, Michelson would be left with no return at all as a result of the new R&D product. (*Id.*) At that point, Michelson contends he asked to see the R&D product, but DeMane refused to produce it. (*Id.*) As a result, Michelson asserts that the R&D product never existed. (*Id.*) Although neither can recall whether the R&D product existed, Rodrick and DeMane deny making any statement about a Medtronic product

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matching the "R&D product." (Resp. of Pl./Third-Party Def. To Defs.' Statement of Material Facts in Supp. of Defs.' Opp'n to the Mot. for Partial Summ. J. on Fraud and Related Unjust Enrichment Claims at 10.) Nevertheless, he denied stating that a Medtronic product would "obsolete" the MultiLock technology. (*Id.*)

obsoleting Michelson's MultiLock technology. (*Id.*)

ANALYSIS

In this motion, Medtronic and SDHI request summary judgment on the defendants' twelfth and thirteenth counterclaims against Medtronic and on Michelson's second and third claims against SDHI for fraud and unjust enrichment, respectively. In support of their motion for summary judgment, the plaintiffs argue three primary grounds: (1) that Tennessee law governs the defendants' claims and counterclaims; (2) that the alleged misrepresentations fail to satisfy the elements for fraudulent inducement in either Tennessee or California; and (3) the defendants' related unjust enrichment allegations hinge on the same defective fraud allegations.

In response, Michelson and KTI insist that a genuine issue of material fact does exist as to whether Medtronic fraudulently induced Michelson to enter the Three-Party Agreement. The defendants allege that Medtronic made representations to Michelson minimizing the value of and potential market for his MultiLock technology and that Michelson relied on those representations. Specifically, they argue (1) that California law governs their counterclaims and claims; (2) that sales projections can support an action for fraud; and (3) that Medtronic's retention of the benefit from the Three-Party Agreement's reduced royalty rate is unjust.

A. <u>Summary Judgment Standard</u>

Summary judgment "shall be rendered forthwith" if the pleadings, discovery materials, and affidavits on file "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.

R. CIV. P. 56(c). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter, but only to determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. . . . If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). All evidence, facts, and "any inferences that may permissibly be drawn from the facts must be viewed in the light most favorable to the nonmoving party." *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 882 (6th Cir. 1996) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Furthermore, entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

B. Choice of Law Determination

It is undisputed that Paragraph 5.5 of the Three-Party Agreement contains a choice-of-law provision that states "[t]his Agreement shall be interpreted and construed, and the legal relations created herein shall be determined, in accordance with the laws of the State of California (excluding conflicts of laws)." (Pls.' Statement of Undisputed Material Facts in Supp. of Their Mot. for Partial Summ. J. on Defs.'/Third-Party Pls.' Fraud and

Related Unjust Enrichment Claims, Ex. C at 15.) The first issue the court must address to determine whether summary judgment is appropriate in this case is whether Dr. Michelson's fraud claims fall under the umbrella of the Three-Party Agreement's California choice-of-law provision, thereby determining whether the laws of Tennessee or California govern the defendants' state law claims.

Because a federal court exercising diversity jurisdiction over state law claims applies the choice of law rules of the state in which it sits, the court looks to Tennessee's conflict of law jurisprudence to determine the appropriate law to be applied in this case. *Shoney's Inc. v. Morris*, 100 F. Supp. 2d 769, 772 (M.D. Tenn. 1999). Under Tennessee law, "the contracting parties' choice-of-law provision is valid absent contravention of public policy of the forum state or a showing that the selected forum does not bear a reasonable relationship to the transaction." *Carefree Vacations, Inc. v. Brunner*, 615 F. Supp. 211, 215 (W.D. Tenn. 1985); *see also* TENN. CODE ANN. § 47-1-1-5(1) ("When a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."); *Goodwin Bros. Leasing, Inc. v. H&B Inc.*, 597 S.W.2d 303, 308 n.2 (Tenn. 1980). The court next considers Medtronic's and SDHI's challenge to the applicability of the Three-Party Agreement's contractual choice-of-law provision and whether either of the two exceptions set forth above apply.

_____Essentially, Medtronic and SDHI contend that Michelson's fraud claims are "noncontractual or incidental to the contractual

relationship" and do not fall under the Three-Party Agreement. The plaintiffs argue that for tort-based claims, "Tennessee always applies 'the most significant relationship' test," despite a choice-of-law clause. (Reply Mem. in Supp. of Pls.' Mot. for Partial Summ. J. on Defs.'/Third-Party Pl.'s Fraud and Related Unjust Enrichment Claims at 3 (citing *Gregory v. Chem. Waste Mgmt., Inc.*, 38 F. Supp. 2d 598, 619-20 (W.D. Tenn. 1996)).)

Michelson and KTI assert that Medtronic's argument is incorrect and that the Three-Party Agreement's choice-of-law provision does apply to their claims of fraud. They assert that Medtronic's statement that Tennessee "always" applies the most significant relationship test to fraud in the inducement claims is an incorrect statement of the law in Tennessee and a mischaracterization of the holding in *Gregory* where the court did in fact use the "most significant relationship" test even though the contract in issue contained a choice of law clause specifying another's state's law. The defendants contend that nowhere in the *Gregory* decision did the court indicate that Tennessee *always* applies the significant relationship test to tort-based claims. *See generally Gregory v. Chem. Waste Mgmt., Inc.*, 38 F. Supp. 2d 598 (W.D. Tenn. 1996). The defendants also direct the court's attention to two other cases that hold to the contrary.

In *Shoney's, Inc. v. Morris*, 100 F. Supp. 2d 769, 774 (M.D. Tenn. 1999), the court found that a defendant's counterclaim for fraudulent inducement in an action for breach of franchise agreement fell under the parties' choice-of-law provision where that provision stated "[t]he terms of this agreement shall be

interpreted and construed in accordance with the laws of the State of Tennessee." In reaching its decision, the court looked to the Restatement (Second) Conflict of Laws (1971) for guidance. The comments to Section 201 state that "questions involving the effect of misrepresentation, duress, undue influence and mistake upon a contract are determined by the law chosen by the parties, if they have made an effective choice." *Id.* at 773. The comments go on to say that "[t]he fact that a contract was entered into by reason of misrepresentation, undue influence or mistake does not necessarily mean that a choice-of-law provision contained therein will be denied effect. This will only be done if the misrepresentation, undue influence or mistake was responsible for the complainant's adherence to the provision." *Id.* Noting that the defendant did not allege that fraud was responsible for his adherence to the choice-of-law provision, the court held that all claims in the *Shoney's* case would be governed by the parties' choice-of-law agreement. *Id.* at 773-74. In reaching its conclusion, the court did not apply the "significant relationship test" to the defendant's fraudulent inducement counterclaim. *See id.*

The second case relied upon by Michelson and KTI is the Sixth Circuit case of *Moses v. Bus. Card Express, Inc.*, 929 F.2d 1131 (6th Cir. 1991), which was also relied upon in the *Shoney's* decision. In *Moses*, the plaintiffs, franchisees, brought an action against franchisor seeking compensatory and punitive damages for statutory fraud and misrepresentation, which included fraudulent inducement. *Id.* at 1133. The parties' franchise agreement contained the following choice-of-law provision: "[t]his Franchise

and License Agreement and the construction thereof shall be governed by the laws of the state of Michigan." *Id.* The plaintiffs asserted, much like Medtronic and SDHI have in this case, that the choice-of-law provision applied only to "construction of the contract itself and not to their claims of fraud and misrepresentation." *Id.* at 1139.

The *Moses* court compared the language in the franchise agreement to the choice-of-law provisions considered in the Fifth Circuit decision of *Caton v. Leach Corp.*, 896 F.2d 939 (5th Cir. 1990). The choice-of-law provision in that case provided that "[t]his agreement shall be construed under the laws of the State of California." *Id.* at 943. The *Caton* court determined that "[t]he parties' narrow choice of law clause d[id] not address the entirety of the parties' relationship," and thus did not apply to the plaintiff's tort claims. *Id.* The court then contrasted the language in that case with an example of language that would encompass more than pure contract claims: "govern, construe and enforce all of the rights and duties of the parties arising from or relating in any way to the subject matter of this contract." *Id.* n.3. The *Moses* court decided that the choice-of-law provision before it fell between the extremes presented in the *Caton* case. *Moses*, 929 F.2d at 1140.

After considering the language of the clause and comparing its broadness to other choice-of-law provisions, the court determined that the plaintiffs were "not asserting a non-contractual claim or one that arose incidentally out of the contractual relationship." *Id.* at 1140. Rather, the plaintiffs were seeking to avoid the

enforcement of the contract itself. *Id.* In light of the relief sought by the plaintiffs, the court determined that the claims of fraud and misrepresentation "would appear to be encompassed by the language" of the choice-of-law provision. *Id.* In reaching its conclusion, the Sixth Circuit relied on comment c to Section 201 of the Restatement (Second) Conflict of Laws, and it did not mention the "significant relationship test" in its analysis. *Id.* at 1139.

Medtronic and SDHI have argued that the case presently before the court is distinguishable from both the *Shoney's* and *Moses* cases and cite to an unpublished decision out of Oregon in support of their argument. They stress that in *Shoney's* and *Moses*, the courts predicated their rulings that the choice-of-law clauses applied to allegations of fraud and misrepresentation, in part, on the conclusion that the allegations were *not* "non-contractual" or incidental" to the contract but, instead, put the validity of the contract itself at issue. (Reply Mem. in Supp. of Pls.' Mot. for Partial Summ. J. on Defs.'/Third-Party Pl.'s Fraud and Related Unjust Enrichment Claims at 4 (citing *Boydstun Metal Works, Inc. v. Parametric Tech. Corp.*, Civil No. 99-480-AS, 1999 U.S. Dist. LEXIS 10226, at *10-11 (D. Or. May 19, 1999).)

Medtronic is correct in its assertion that Michelson and KTI are not trying to avoid the enforcement of the Three-Party Agreement and are not attacking the agreement's validity. This fact would tend to make the defendants' fraudulent inducement claims different from those in *Shoney's* and *Moses* and could arguably make the allegations incidental to the agreement. Nevertheless, this court is unpersuaded that the choice-of-law

provision does not apply to the defendants' fraudulent inducement claims. As Michelson and KTI have indicated to the court, the language of the choice-of-law provision in the Three-Party Agreement is broader than the provisions in either *Shoney's* or *Moses*, which makes the "incidental" and "non-contractual" distinction much less important than it was in those decisions. When that fact is taken in combination with comment c to Section 201 of the Restatement (Second) of Conflict of Laws, this court is compelled to hold that the fraudulent inducement allegations fall within the scope of the parties' agreement.

Accordingly, this court finds that the choice-of-law provision does apply to the defendants' claims of fraud. Furthermore, this court does not find, nor have the parties argued, that the public policy of Tennessee would preclude the application of California law. Both parties agree that the elements of fraud in California are essentially the same as those in Tennessee. (*See* Defs.' Mem. of P. & A. in Opp'n to Pls.' Mot. for Partial Summ. J. on Defs.'/Third-Party Pl.'s Fraud and Related Unjust Enrichment Claims at 11 n.9.) Moreover, this court is satisfied that the selected state law, that of California, bears a reasonable relation to the transaction. California is Michelson's domicile and principal place of business. He negotiated the terms of the agreement from California, and he invented the MultiLock technology that is the subject matter of the Three-Party Agreement in California. Therefore, this court will apply the laws of the state of California to the defendants' counterclaim and Michelson's claim of

fraud.[5]

C. Claims of Fraud under the Three-Party Agreement

The defendants allege that Medtronic made four fraudulent misrepresentations in an effort to induce Michelson to enter the Three-Party Agreement with Medtronic and Wright Medical. Two alleged misrepresentations are based on promised future performances by Medtronic. Another alleged misrepresentation is based on Medtronic's future projection of the market for Michelson's MultiLock technology. The final misrepresentation is based on Medtronic's representation that it had a product in development that would "obsolete" Michelson's MultiLock technology. The court will consider each alleged misrepresentation in turn.

1. Misrepresentations Based on Promised Future Performance

The defendants' amended counterclaims[6] and Michelson's third party complaint allege that Medtronic made two fraudulent representations concerning its future conduct. Essentially, Michelson and KTI assert that they have a claim for promissory fraud because Medtronic allegedly failed to do things it promised to do under the Three-Party Agreement. First, Medtronic promised

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[5] This court notes that neither party briefed the issue of whether the Three-Party Agreement's choice-of-law provision applies to the defendants' related claims of unjust enrichment. In the absence of argument, the court will apply the laws of Tennessee to the claim of unjust enrichment as that is a claim that is quasi-contractual in nature and is a theory of recovery that is available in the absence of a valid contract.

[6] First Am. Supplemental Counterclaims for Damages, Injunctive Relief, Specific Performance and Declaratory Relief, for Patent Infringement, Breach of Contract, Conversion, Unjust Enrichment, Fraud, Misappropriation of Trade Secrets, Unfair Competition, and Violation of the Lanham Act.

to provide patent marking and name recognition on Michelson's products and literature. Second, Medtronic promised to pay royalties on MultiLock product sales.

In the absence of a confidential relationship between the parties, an action for promissory fraud requires a plaintiff to establish that the defendant made a promise "without any intention of performing it." *Rheingans v. Smith*, 119 P. 494, 496 (Cal. 1911); *see also Lazar v. Superior Court*, 909 P.2d 981, 985 (Cal. 1996) (finding that where a promise is made without the intention to perform, "there is an implied misrepresentation of fact that may be actionable fraud). "The mere making of a promise, which the promisor afterwards fails or refuses to perform, does not constitute actionable fraud." *Rheingans*, 119 P. at 496.

In the plaintiffs' motion for partial summary judgment, Medtronic and SDHI challenge the defendants' promissory fraud claims and assert, among other things, that Michelson and KTI have not and cannot offer any "factual or evidentiary support for even an inference that [Medtronic's] promises were either false when made or that [Medtronic] lacked a present intent of performance." Mem. in Supp. of Pls.' Mot. for Partial Sum. J. on Defs.'/Third-Party Pl.'s Fraud and Related Unjust Enrichment Claims at 12.) The plaintiffs have pointed out to the court that Michelson and KTI fail to address their promissory fraud allegations in their opposition to the Plaintiff's motion.

If a moving party meets its initial burden of demonstrating the absence of a genuine issue of material fact, the nonmoving party must present "significant probative evidence" to demonstrate

that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Phillip Morris Co.*, 8 F.3d 335, 339-40 (6th Cir. 1993). At this time, the court finds that Michelson and KTI have failed to carry their burden of demonstrating that a genuine issue of material fact exists as to whether Medtronic's promises for future performance were false when made or that Medtronic did not possess the present intent to keep its promises. Accordingly, this court recommends that the plaintiffs' motion for summary judgment be granted as to the defendants' counterclaims and claims based on promissory fraud.

2. <u>Misrepresentations Based on Future Market Projections</u>

Michelson and KTI allege that Medtronic's fraudulent conduct as it relates to market projections is two-fold. First, Medtronic allegedly represented to Michelson that the market for the MultiLock technology was limited to $30-40 million and continued to make the same representations when actual sales and sales projections had exceeded those amounts. Second, Medtronic never disclosed to Michelson that its actual sales and updated sales projections had increased, which Michelson contends rendered its initial $30-40 million representation false.

To establish a cause of action for fraud in California, a litigant must prove five basic elements: (1) that the defendant made a false representation as to a past or existing material fact; (2) that the defendant knew that the representation was false when made; (3) that the defendant made the representation for the purpose of inducing the plaintiff to rely upon it; (4) that the plaintiff was unaware of the falsity of the representation and

justifiably acted in reliance upon its truth; and (5) that the plaintiff sustained damage as a result of the reliance. *See Glovatorium, Inc. v. NCR Corp.*, 684 F.2d 658, 660 (9th Cir. 1982) (interpreting California law); *see also* California Book of Approved Jury Instructions [BAJI] § 12.31. Medtronic and SDHI have only challenged the defendants' ability to establish genuine issues of material fact as to the first and fourth elements of fraud. Therefore, this court will limit its analysis to those elements.

a. <u>False Representations as to Past or Existing Fact</u>

Medtronic asserts that any projections it may have made in connection with the Three-Party Agreement cannot sustain an action for fraud because future sales projections are not *past* or *existing* representations of material fact. Medtronic further contends that because no fraud can be established, the defendants' allegations should be barred by the parol evidence rule.

The general rule in California is that opinions cannot constitute fraud, unless the party stating the opinion does not honestly believe in the opinion or knows it cannot be true. *Daniels v. Oldenburg*, 224 P.2d 472, 474 (Cal. Ct. App. 1950); *Dyke v. Zaiser*, 182 P.2d 344, 350 (Cal. Ct. App. 1947); *see also* California Book of Approved Jury Instructions [BAJI] § 12.32. Furthermore, "predictions as to future events are deemed opinions, and not actionable by fraud." *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999) (citing 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 676-678). "The alleged misrepresentation must also ordinarily be a specific factual assertion; generalized statements are usually not

actionable as fraud." *Id.* However, there are three recognized exceptions to the general rule stated above:

> **(1)where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former's superior knowledge; (2) where the opinion is by a fiduciary or other trusted person; (3) where a party states his opinion as an existing fact or as implying facts which justify a belief in the truth of the opinion.**

***Borba v. Thomas*, 138 Cal. Rptr. 565, 570 (Cal. Ct. App. 1977); *see also Neu-Visions Sports, Inc. v. Soren*, 103 Cal. Rptr. 2d 159, 162 (Cal. Ct. App. 2000).**

Michelson and KTI contend that Medtronic never honestly believed that the projections made to Michelson were correct and have directed the court's attention to a case they assert supports a cause of action for fraud under these circumstances, *Dyke v. Zaiser*, 182 P.2d 344 (Cal. Ct. App. 1947). In *Dyke*, Dyke purchased a business in reliance on Zaiser's representations that it generated approximately $2600 per month in revenue and could potentially generate $5000 per month with proper attention and diligence. *Id.* at 347. But Zaiser knew that the city planned to shutdown a particular portion of the business and that the shutdown would significantly affect the revenue of the business. *Id.* The court found that Zaiser could not have honestly believed that the business' current revenue could generate the amount as represented. *Id.* Therefore, the court found Zaiser's representations to be false and held him liable for fraud. *Id.*

Michelson and KTI claim that Medtronic's representations are comparable to that of Zaiser's. The defendants note that Medtronic

allegedly represented that the market for Michelson's MultiLock products was limited $40 million, when Medtronic knew that the actual sales had exceeded that figure and updated projections were for sales in the $80-90 million range. In response, Medtronic argues that even if it were true that it made limited predictions as to what the sales of MultiLock products would be in the future, those predictions were mot material to the transaction and thus could not constitute fraud. *See Dyke*, 182 P.2d at 350 (holding that a false expression of opinion not honestly entertained "may constitute fraud" if the opinion is "material to the transaction").

This court agrees with Medtronic's argument that the alleged projections were not material to the transaction for the reasons stated *infra* in the court's analysis of Michelson's reliance. Furthermore, several distinctions can be drawn between the facts of *Dyke* and the case presently before the court. In *Dyke*, the court noted that the parties were dealing mainly "with a matter of income and expected income." *Id.* at 350. That is not the case here. Michelson makes no allegations that Medtronic made misrepresentations as to *actual present* sales in addition to its projections. Additionally, Michelson already had experience with the sale of his MultiLock technology under his previous sales agreement with Wright Medical. As part of that agreement, Wright Medical included with its royalty payments "a computer printout showing the sales or rental price, the date, the country, the number of units of each MultiLock Product, component or instrument sold or rented, the applicable [royalty rate] and the total [royalty payment due]." (Defs.' Statement of Material Facts in

Supp. of Defs.' Opp'n to Pl.'s Mot. for Summ. J. on Fraud and Unjust Enrichment Claims at 8-9.) Thus, Michelson was not in the same uninformed position as Dyke because he had experience and knowledge that was unavailable to Dyke, who could only rely on Zaiser's representations alone.

Next, Michelson and KTI argue that even if Medtronic's initial representations to Michelson were not false when made, Medtronic failed to disclose to Michelson before the execution of the Three-Party Agreement that the actual sales and increased projections for the MultiLock products exceeded that amount. In support of their argument, the defendants direct the court's attention to the California decision of *Stevens v. Marco*, 305 P.2d 669 (Cal. Ct. App. 1956). In *Stevens*, an inventor assigned rights to his invention to the defendant, who agreed to develop and sell a product based on that invention in exchange for royalties. *Id.* at 672. Several years later, the defendant informed Stevens of a potential conflicting patent and that the conflicting patent's owner may likely file an infringement suit. *Id.* at 674. At the time of his representation, the defendant truly believed there was a patent conflict. *Id.* at 677. In reliance on the defendant's statements, Stevens signed a release discharging the defendant from any further obligation under their contract. *Id.* at 676. However, by the time Stevens signed the release allowing the defendant to sell its product royalty-free, the defendant had learned that there was no patent conflict or a threat of litigation. *Id.* at 677. The defendant failed to disclose those new facts to Stevens.

As a result of the defendant's failure to disclose the new

information, the court held that Stevens had established a prima facie case of actionable fraud. The court noted: "[i]t is the prevailing law that one who learns that his or her statements, even if thought to be true when made, have become false through a change in circumstances, has a duty, before his statements are acted upon, to disclose the new conditions to the party relying on the original representations." *Id.* at 683. Michelson contends that Medtronic's actions were similar to that of the defendant in *Stevens* in that Medtronic failed to disclose a change in its projections and actual sales after its initial representations proved to be inaccurate. Michelson asserts that by failing to disclose this material information to him, Medtronic is in the same position as if it knew the statements to be false when made.

In response, Medtronic argues that it had no duty to disclose its actual sales and sales projections to Michelson after it made its initial representation. Medtronic argues that the Restatement of Torts upon which the court in *Stevens* expressly relies, only imposes liability for non-disclosure where "[o]ne . . . fails to disclose to another a *fact*." RESTATEMENT OF TORTS § 551(1) (1977) (emphasis added); *see also Stevens*, 305 P.2d at 683 (quoting RESTATEMENT OF TORTS § 551(2) and comment (f)). Furthermore, Medtronic asserts that the duty to correct a misleading representation only applies to previous *factual* statements. *See Nibbi Bros., Inc. v. Home Fed. Sav. & Loan*, 253 Cal. Rptr. 289, 295 (Cal. Ct. App. 1988) ("A duty of disclosure arises when a statement of fact is misleading without additional or qualifying information.") (citing RESTATEMENT (SECOND) OF TORTS § 529 (1977)).

This court finds that Medtronic had no duty to disclose its actual sales or sales projections after its initial representation. Although the facts in *Stevens* appear to be analogous to the instant case, those facts also vary in material aspects. The primary difference is that the defendant in *Stevens* asserted a *fact* upon which an inexperienced inventor relied. Here, Medtronic never made any representation of fact. For instance, as Medtronic illustrates in its reply, Michelson states that Medtronic executives "represented . . . that Medtronic *projected* that [MultiLock products] would generate no more than $30 million in sales per year." (Michelson Decl. ¶ 8 (emphasis added). Michelson then states that Medtronic represented in August 1999 that "it was *possible* for Medtronic to sell up to $35 million per year." *Id.* ¶ 9 (emphasis added). Michelson further states in late 2000, Medtronic "represented . . . it could *potentially achieve* sales of $40 million per year." *Id.* ¶ 11 (emphasis added). Finally, Michelson states that in early January 2001, Medtronic executive DeMane discussed a way "*to achieve* $40 million in annual sales." *Id.* ¶ 12 (emphasis added). These representations are completely different from the statements made by the defendant in *Stevens*.[7]

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[7] **In a letter the defendant wrote to Stevens regarding royalties, he stated in part as follows:**

> **Another matter of great importance is that our patent attorneys have reported that conflicting patents exist between our panel light patents and a patent obtained and filed on January 25, 2938, and granted on March 5, 1940, Number 2192345. This patent has been assigned to one of the large light companies in 1940, who retained the property rights of the same. It might be that you have some views on this matter as no doubt this conflict will**

Additionally, in *Stevens* the court found that the parties shared a confidential and fiduciary relationship that arose in part out of Stevens' trust and confidence in the defendants' representation. *Stevens*, 305 P.2d at 678-81 ("When the parties are so circumstanced or associated in a business transaction that one party must rely on the good faith and integrity of the other, the fiduciary character of the relationship may exist despite the absence of a blood relationship."). "Against this background," the court held that when the defendant learned of the facts – that is, that none of the patents conflicted and the threat of litigation had disappeared – he "ha[d] the duty, before his statements [were] acted upon, to disclose the new conditions to the party relying on his original representations." *Id.* at 681. In contrast to Michelson, Stevens had no experience with patents or patent applications and completely entrusted the defendant with his confidential invention. *Id.* at 672.

In the instant case, no evidence exists of a previous confidential relationship, that the defendants expressly reposed a trust or confidence in Medtronic, or that the transaction at issue was intrinsically fiduciary. As Medtronic has indicated, the parties have a significant history of arms-length negotiations. In fact, prior to entering the Three-Party Agreement, Michelson had threatened to join Medtronic to a lawsuit that he was litigating with Wright Medical concerning whether Medtronic was a permissible

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end in litigation very soon.

***Stevens*, 305 P.2d at 674.**

licensee of the MultiLock technology. In light of this comparison, the court is unpersuaded that Medtronic had any duty to disclose the actual sales and sales projection information that developed after its initial representations to Michelson. Medtronic's projections were nothing more than guesses or estimates as to what kind of sales MulitLock products would have in the future. Even if Medtronic's internal sales projections increased from its initial representations, those internal sales projections were merely guesses or estimates as well. Accordingly, this court finds that Michelson cannot establish the first element of a claim for fraud under California law. In light of that finding, the court also finds Michelson's and KTI's argument concerning the applicability of the fraud exception to the parol evidence rule to be without merit.[8] Therefore, this court finds that the defendants should be barred from presenting evidence at trial regarding Medtronic's alleged misrepresentations and recommends that the plaintiffs's motion for summary judgment be granted as to the defendants' twelfth counterclaim and Michelson's second claim for fraud in the inducement.

b. Michelson's Reliance Upon False Representations

Michelson argues that he was fraudulently induced to rely on Medtronic's representations because of its superior knowledge regarding the MultiLock Sales, its position in the industry as the preeminent manufacturer and seller of spinal products, and its

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[8] Under California law, the parol evidence rule "has no application to a case involving a fraudulent misrepresentation which induces the execution of a contract." CAL. CODE CIV. P. § 1856(g).

experience in the marketplace. In response, Medtronic asserts that even if future sales projections can support an action for fraud, Michelson cannot prove reasonable reliance on such representations.

First, Medtronic asserts that Michelson expressly disclaimed any and all reliance on representations that might otherwise serve as inducements to contract, agreeing that "no representations of any kind or character have been made to it by the other Parties, or by any of the other Parties' agents, representative or attorneys, to induce the execution of this Agreement." (Pls.' Statement of Undisputed Material Facts in Supp. of Their Mot. for Partial Summ. J. on Defs.'/Third-Party Pl.'s Fraud and Related Unjust Enrichment Claims, Ex. C § 4.6.) The defendants assert that the integration clause in Section 4.6 of the Three-Party Agreement cannot bar a claim for fraudulent inducement. They argue that in *Ron Greenspan Volkswagen, Inc. v. Ford Motor Land Dev. Corp.* 38 Cal. Rptr. 2d 783, 785 (Cal. Ct. App. 1995), the California Court of Appeals held that an integration clause providing that "[n]o express or implied representations, warranties, or inducements have been made by any party to any other party except as set forth in this agreement" did not preclude plaintiffs from proving fraud. *Id.* at 996. Medtronic has cited no authority in support of its argument to the contrary; therefore, this court finds that the *Ron Greenspan Volkswagen* case controls and that the integration clause alone will not bar the defendants' proof of reasonable reliance.

Next, Medtronic argues that the court should reject Michelson's argument of reasonable reliance based on his assertion that Medtronic had superior knowledge and held a preeminent

position and experience in the market. Medtronic contends that the Three-Party Agreement was an arm's length transaction between two sophisticated parties represented by counsel and that Michelson's reliance on any alleged representations was not reasonable. Moreover, Medtronic contends that Michelson's own statements indicate that he did not rely on the market projections at all. This court tends to agree.

As this court noted under its analysis of the first element of fraud, California does recognize an exception to the rule that predictions as to future events are deemed opinions, but only "where a party holds himself out to be specially qualified and the other party is so situated that he may reasonably rely upon the former's superior knowledge." *Borba v. Thomas*, 138 Cal. Rptr. 565, 570 (Cal. Ct. App. 1977). Additionally, California applies the "superior knowledge" exception where the assumed knowledge possessed by the party expressing the fraudulent opinion actually motivates the other party to enter the transaction. *See Pacesetter Homes, Inc. v. Brodkin*, 85 Cal. Rptr. 39, 43 (Cal. Ct. App. 1970). "In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education, and experience of the person claiming reliance must be considered." *Guido v. Koopman*, 2 Cal. Rptr. 2d 437, 441 (Cal. Ct. App. 1992) (citing *Gray v. Don Miller & Assoc., Inc*, 674 P.2d 253 (Cal. Ct. App. 1984; *Seeger v. Odell*, 115 P.2d 977 (Cal. 1941)).

In the instant case, Michelson has presented no evidence to establish that he was actually motivated to enter the Three-Party Agreement by Medtronic's future sales projections. In fact, this

court finds no evidence to support a finding that Michelson actually or justifiably relied on Medtronic's projections at all. It is undisputed that Michelson is in the business of licensing his technology. Michelson had previously licensed his MultiLock technology to Wright Medical and had obtained market projections from that company as a result. In a letter from Michelson to Tom Patton of Wright Medical, Michelson was informed enough to know that Wright Medical's projections of its own anticipated market share was "very conservative" compared to that of an unidentified product marketed by Medtronic. (Defs.' Statement of Material Facts in Supp. of Defs.' Opp'n to Pls.' Mot. for Summ. J. on Fraud and Unjust Enrichment Claims at 10.) Furthermore, Michelson also had knowledge of sales reports from Wright Medical on MultiLock product sales. As a result, the court finds that Michelson's knowledge, education, and experience refute a finding of reasonable reliance.

Moreover, Michelson's own statements regarding the accuracy of market projections indicate that he did not rely on Medtronic's market projections. For instance, four months after signing the Three-Party Agreement, Michelson admitted to Medtronic's Michael DeMane that in Michelson's opinion, markets cannot be reliably modeled. (*Id.* at 12-13.) During that same conversation, Michelson stated that he disagreed with the "paradigm' chosen by Medtronic and believed that Medtronic's projections "lacked vision." (*Id.* at 13.) More importantly, Michelson went on to explain in reference to market projections that "what you're really doing is, you're trying to look at the pie as it is today, and say, okay, can we get a little bit more of this piece of pie . . . . And they're the

kind of things - those kinds of paradigm shifts that make it impossible to predict in a meaningful way." (*Id.*) Michelson claims that these statements are irrelevant and cannot be used to counter his reliance because the statements were made four months after the Three-Party Agreement. This court disagrees. Michelson's statements reflect his beliefs and philosophy on the predictability of market projections and are highly relevant to a determination of his reliance.

Furthermore, Michelson's deposition testimony is relevant and reflects his philosophy regarding market projections. On August 5, 2003, Michelson stated in reference to the cervical plate market generally that, "I have never been impressed that Medtronic quite get[s] the big picture about the value of technology." (*Id.* at 14.) In reference to the MulitLock technology specifically, Michelson testified that "there's something wrong with what Medtronic modeled" but went on to say that, "I'm sure whatever they modeled was mathematically correct." (*Id.* at 14-15.) When these statements are coupled with the statements Michelson made to DeMane just four months after the Three-Party Agreement, this court must conclude that Michelson cannot establish that he reasonably relied on Medtronic's market projections. In fact, the undisputed facts indicate that Medtronic's market projections were not material to his decision to enter the contract because he finds market projections inherently unreliable. Accordingly, this court finds that Michelson and KTI cannot establish reasonable reliance as a matter of law and recommend that the plaintiffs' motion for partial summary judgment be granted as to the defendants' twelfth

counterclaim and Michelson's second claim for fraudulent inducement.

D. Misrepresentations Based on Development of R&D Product

Michelson's and KTI's remaining allegation of fraud concerns Medtronic's alleged representations that it had a product in development that would "obsolete" Michelson's MultiLock technology. First, the court notes that the existence or non-existence of this product is disputed by the parties, as well as whether Medtronic's executives did in fact represent to Michelson that his technology would become obsolete. This factual dispute, however, is irrelevant because Medtronic has directed this court's attention to the fact that Michelson and KTI raised this allegation of fraudulent representation for the first time in their opposition to the plaintiffs' motion for partial summary judgment. Rule 9(b) of the Federal Rules of Civil Procedure provides in pertinent part: "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." FED. R. CIV. P. 9(b); *see also Glen Holly*, 100 F. Supp. 2d at 1093-94. After a careful review of the defendants' counterclaims and amended counterclaims and Michelson's third party complaint, this court finds that the defendants have failed to plead this allegation of fraud with the particularity required by the Federal Rules. As such, this court recommends that Medtronic's and SDHI's motion for partial summary judgment be granted as to the defendants' allegations of fraud based on alleged representations regarding the development of the R&D product.

d. Related Claims of Unjust Enrichment

Finally, Medtronic contends that partial summary judgment necessarily should be granted for the defendants' thirteenth counterclaim and Michelson's third claim for unjust enrichment because those claims "hinge[] on the same defective fraud allegation." (Mem. in Supp. of Pls.' Mot. for Partial Summ. J. on Defs.'/Third Party Pls.' Fraud and Related Unjust Enrichment Claims at 1.) This court agrees. In Tennessee, "[u]njust enrichment is a quasi-contractual theory or is a contract implied-in-law in which a court may impose a contractual obligation *where one does not exist*." *Whitehaven Cmty. Baptist Church v. Holloway*, 973 S.W.2d 592, 596 (Tenn. 1998) (emphasis added). Essentially, Michelson and KTI cannot have it both ways. They cannot argue for choice-of-law purposes that this dispute is contractual and governed by the Three-Party Agreement's contractual choice-of-law provision and then claim in the next breath that they are entitled to relief based on a theory of law that is quasi-contractual in its very nature. Nevertheless, the defendants have argued that Medtronic and SDHI have been unjustly enriched as a result of their efforts to fraudulently induce Michelson to enter the Three-Party Agreement. Because the court finds that summary judgment is appropriate for the defendants' and Michelson's claims of fraud, the court also finds that summary judgment is warranted for their related claims of unjust enrichment arising out of the fraud. Accordingly, this court recommends that the plaintiffs's motion for summary judgment be granted as to the defendants' thirteenth counterclaim and Michelson's third claim for unjust enrichment.

CONCLUSION

It is recommended that Medtronic's and SDHI's motion for partial summary judgment on Michelson's and KTI's fraud and related unjust enrichment counterclaims be granted.

Respectfully submitted this 20th day of May, 2004.

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DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

NOTICE

ANY OBJECTIONS OR EXCEPTIONS TO THIS REPORT MUST BE FILED WITHIN TEN (10) DAYS AFTER BEING SERVED WITH A COPY OF THE REPORT. 28 U.S.C. § 636(b)(1)(C). FAILURE TO FILE THEM WITHIN TEN (10) DAYS MAY CONSTITUTE A WAIVER OF OBJECTIONS, EXCEPTIONS, AND FURTHER APPEAL.