No. 20170591-SC

IN THE
SUPREME COURT OF THE STATE OF UTAH

HEALTHBANC INTERNATIONAL, LLC AND BERNARD FELDMAN
Plaintiffs and Counterclaim Defendants,

v.

SYNERGY WORLDWIDE, INC. AND NATURE SUNSHINE PRODUCTS, INC.,
Defendants and Counterclaim Plaintiffs.

RESPONSIVE BRIEF OF PLAINTIFFS AND COUNTERCLAIM DEFENDANTS

Certified question from the United States District Court for the District of Utah
District Court No. 2:16-cv-00135-JNP-PMW

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Argument

"The Utah Supreme Court has never recognized an exception [to the economic loss rule] for claims of fraudulent inducement . . . ." *Donner v. Nicklaus*, 778 F.3d 857, 875 (10th Cir. 2015) (rejecting misrepresentation claim "[u]nder the economic loss doctrine" "because the [plaintiff's] claim involves the benefit of their bargain"); *see also Wardley Corp. v. Meredith Corp.*, 93 Fed. Appx. 183, 186 (10th Cir. 2004) (declaring tort claims "are not cognizable under Utah law when they are based on the allegations that are the gravamen of the contract claim"); *Reighard v. Yates*, 2012 UT 45, ¶14, 285 P.3d 1168 ("The economic loss rule prevents recovery of economic damages under a theory of tort liability when a contract covers the subject matter of the dispute."); *Fidelity Nat. Title Ins. Co. v. Worthington*, 2015 UT App 19, ¶6, 344 P.3d 156 (recognizing trial court had applied economic loss rule and dismissed fraud claims because they were "based solely and inextricably on alleged contractual duties"). The Court should not create that exception either in this case or in response to the broader certified question of whether "Utah's economic loss rule apply to a fraudulent inducement claim." [*See* Certification Order].

I. The Economic Loss Rule Applies to Conduct that Precedes a Contract if that Same Conduct is the Subject of the Contract.

Synergy argues that the economic loss rule does not apply when the "alleged wrongful act precedes the contract." [Synergy Brief at 6 (capitalization altered)]. However, Synergy cannot identify any authority from a Utah appellate court that adopts the bright-line test it advocates. Instead, Synergy relies on case law from the United States District Court of the District of Utah. [*See* Synergy Brief at 2]. That authority was decided

before contrary, binding precedent from the Tenth Circuit, and it does not fully analyze the issues and authorities presented in this appeal. *See Donner*, 778 F.3d at 875. [*See also* Order Certifying Question (R.518) (declaring "federal courts are in disagreement" and "[Tenth Circuit] recently held that the economic loss rule applies to fraudulent inducement claims under Utah law.")]. The Court should decline Synergy's invitation to rely on incomplete and dated authority to create the test Synergy urges this Court to adopt for the application of the economic loss rule.

"The economic loss rule prevents recovery of economic damages under a theory of tort liability when a contract covers the subject matter of the dispute." *Reighard*, 2012 UT 45, ¶14.[1] It does not (and should not) depend on the timing of the alleged tort. As the Tenth Circuit has recognized, "Utah courts have not confined the economic loss doctrine to wrongdoing taking place after entry into a contract." *Donner*, 778 F.3d at 873. Synergy's proposed limitation "would make little sense. The doctrine is designed to allow parties 'to allocate risk by contract.' The parties can use a contract to allocate risks that may arise pre- or post-formation. As a result, we must apply the economic loss doctrine to conduct regardless of whether it preceded or post-dated the contract." *Id.; see also Holden Farms, Inc. v. Hog Slat, Inc.*, 347 F.3d 1055, 1063 (8th Cir. 2003) ("We know of no reason why the economic-loss doctrine in Iowa would not cover pre-contract-formation negligent-misrepresentation claims.").

[1] S*ee also In re C.W. Mining Co.*, 574 B.R. 748, 762 (Bankr. D. Utah 2017) (same); *Newport Enters. v. Isys Tech.*, No. 2:11-cv-330, 2015 WL 4715300, at *4 (D. Utah Aug. 7, 2015) (same).

Although contrary authority can be found, the "emerging trend" is to "recogniz[e] a limited exception to the economic loss doctrine for fraud claims, but only where the claims at issue arise independent[ly] of the underlying contract." *See Werwinksi v. Ford Motor Co.*, 286 F.3d 661, 676 (3d Cir. 2002). As the Third Circuit explained,

> [I]f all claims for fraud in the inducement are extraneous or independent of the contract because they occur 'prior to the formation of the contract itself, every breach of warranty claim would be turned into a tort by a simple affidavit stating, in effect, that the warranty was spoken before it was written. . . . [W]ritten disclaimers of warranties could be voided after the fact by the same affidavit, so long as the oral representations preceded the contract, thus causing chaos and uncertainty in commercial transactions.

Id. at 678 (citations, ellipses, and internal quotation marks omitted).

Years ago, this Court expressed a similar concern. The Court recognized that if contact law were eliminated,

> writings would be of very little value. And they would not be of much greater value if the courts permitted the doing away with a definite recordation of the matters on which the minds had met by allowing, under some guise, all other matters discussed or talked about in a preliminary way to come in when that was just what the writing was designed to prevent.

S.W. Bridges & Co. v. Candland, 54 P.2d 842, 845 (Utah 1936); *see also E.A. Strout Western Realty Agency, Inc. v. Broderick*, 522 P.2d 144, 146 (Utah 1974) ("[If the] assurance of the enforceability of a written contract . . . were removed today from our law, general disaster would result, because the consequent destruction of confidence, for the tremendous but closely adjusted machinery of modern business cannot function at all without confidence in the enforceability of contracts."); *SME Indus., Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶42, 28 P.3d 669 ("The preservation of

contract represents the most efficient and fair manner in which to limit liability and govern expectations . . . .”).

In *Louisburg Bldg. & Dev. Co. v. Albright*, 252 P.3d 597 (Kan. Ct. App. 2011), the court addressed a “fraud-in-the-inducement claim [that] merely duplicates the[] claim for breach of contract.” *Id.* at 655. The court recognized the “exceptional inconsistency” that issue has created, and it thoroughly analyzed the various results. Ultimately, the court determined the emerging trend (that pre-contract conduct addressed by the contract is governed by contract law and not by tort law) “makes sense because when a party is merely suing to recover the benefit of its contractual bargain, there is no inherent unfairness in limiting that party to a breach-of-contract claim.” *Id.* at 657. Indeed, any concern “that a party’s recovery might be limited by fraudulently induced contract terms does not come into play where the complaining party is asking for the same relief that would be granted under a contract action.” *Id.* at 658. Accordingly, the court ruled that the economic loss “doctrine prohibits the assertion of such duplicative claims.” *Id.* at 655.

Many other cases have reached the same result. *See, e.g.*, *Donner*, 778 F.3d at 875 (rejecting misrepresentation claim “[u]nder the economic loss doctrine” “because the [plaintiff’s] claim involves the benefit of their bargain”); *Schreiber Foods, Inc. v. Lei Wang*, 651 F.3d 678, 681 (7th Cir. 2011) (declaring fraud claims that are “interwoven” with contract claims are barred by economic loss rule); *AKA Distributing Co. v. Whirlpool Corp.*, 137 F.3d 1083, 1086 (8th Cir. 1998) (“[T]his [fraud] claim is not independent of the contract and its performance, and therefore the economic loss doctrine limits [plaintiff] to its . . . remedies for breach of the contract’s duration terms.”); *Hotels of Key Largo, Inc. v.*

RHI Hotels, Inc., 694 So.2d 74, 76-77 (Fla. Ct. App. 1997) ("[W]here the only alleged misrepresentations concerns the heart of the parties' agreement, simply applying the label of 'fraudulent inducement' to a cause of action will not suffice to subvert the sound policy rationales underlying the economic loss doctrine."); *Gorman v. First Consolidated Mortg. Co.*, No. 4:12-cv-98, 2017 WL 515158, at *8 (E.D. Texas Feb. 7, 2017) (dismissing fraud in the inducement claim because the "tort claims flow solely from the" contract); *Phoenix Packaging, Operations, LLC v. M&O Agencies, Inc.*, No. 7:15-cv-569, 2016 WL 3181172, at *6 (W.D. Va. June 3, 2016) (dismissing fraud in the inducement claim that arose "out of a contractual relationship"); *Arce-Mendez v. Eagle Produce Partnership, Inc.*, No. CV-05-3857-PHX-JAT, 2008 WL 659812, at *4 (D. Ariz. March 6, 2008) ("These losses are identical to losses Plaintiffs seek to recover under their breach-of-contract claim. Consequently, the claim for fraudulent inducement is barred by the economic loss doctrine."); *Garrett Const., Inc. v. Ashbritt, Inc.*, No. 1:09cv379, 2010 WL 583921, at *3 (S.D. Miss. Feb. 16, 2010) ("[T]o survive, the [fraud] claim must be based on conduct which is separate and distinct from the conduct constituting the breach of contract.").

This Court should reaffirm that "when parties' difficulties arise directly from a contractual relationship, the resulting litigation concerning those difficulties is one in contract no matter what words the plaintiff may wish to use in describing it." *Grynberg v. Quester Pipeline Co.*, 2003 UT 8, ¶45, 70 P.3d 1 (emphasis added).

II. Synergy's Independent Duty Analysis Would Render the Economic Loss Rule Superfluous.

Synergy's "independent duty" argument ignores the scenario presented to this Court, i.e., where the alleged tort duty overlaps completely with the contractual terms.

"The economic loss rule prevents recovery of economic damages under a theory of tort liability when a contract covers the subject matter of the dispute." *Reighard v. Yates*, 2012 UT 45, ¶14, 285 P.3d 1168. "This result is compelled because a contract may alter or eliminate common law tort duties." *Id.* ¶20. "When a duty exists that does not overlap with those contemplated in contract, the economic loss rule does not bar a tort claim because the claim is based on a recognized independent duty of care . . . ." *Id.* But when the tort claim and the contract claim overlap – i.e., "when a conflict arises between parties to a contract regarding the subject matter of that contract" – "the contractual relationship controls, and parties are not permitted to assert actions in tort." *Id.* ¶20. At times this Court has simplified this issue by asking "whether a duty exists independent of any contractual obligations between the parties." *Id.* ¶21.

Synergy's argument concerning "independent duty" fails to analyze whether the current "conflict arises between parties to a contract regarding the subject matter of that contract." *Id.* ¶20. Instead, Synergy simply asserts that tort law generally imposes a duty to avoid misrepresenting material facts. [*See* Synergy Brief at 10–13 ("HealthBanc had an independent common law duty to disclose[.]")]. Synergy's invitation to focus on general tort duties, while ignoring the overlap between the tort and the contract would, if accepted, render the economic loss rule a nullity.

"As every first-year law student learns, duty is one of four essential elements of a cause of action in tort." *B.R. v. West*, 2012 UT 11, ¶5, 275 P.3d 228. Thus, regardless of the economic loss rule, a plaintiff must establish a common-law tort duty to proceed with a tort claim. If that same question is then repeated as the entirety of economic loss rule analysis, then the economic loss rule adds nothing to the law. *See Werwinksi v. Ford Motor Co.*, 286 F.3d 661, 678 (3d Cir. 2002) ("[I]f [all] fraudulent inducement claims are exempted from the economic loss doctrine because, as [Synergy] asserted, they always arise independently of a contract, then the economic loss doctrine would be rendered a nullity, and tort law would swallow contract law."). Indeed, the following illustrates and compares the parties' positions:

For purposes of this appeal, HealthBanc does not dispute the proposition that the common law includes a duty to avoid fraudulent conduct.[2] However, the fact that a potential tort claim exists should trigger an analysis under the economic loss rule, not end it. Faced with a potentially cognizable tort claim, a court should then proceed to the next question: Does that tort claim seek an adjudication "regarding the subject matter of th[e] contract?" *Reighard*, 2012 UT 45, ¶20. If so, the economic loss rule applies. In such a case, "the contractual relationship controls, and parties are not permitted to assert actions in tort," even though the tort claim might otherwise be viable. *Id.* ¶20.

III. Public Policy Does Not Support Weakening Contract Law.

Synergy's brief tersely addresses one of the potential policy interests at issue in this appeal. [Synergy Brief at 13-14]. However, Synergy fails to fairly analyze that policy interest, and it entirely ignores other important policy concerns.

A. The Economic Loss Rule Does Not Leave Innocent Parties Unprotected.

Synergy argues that if the economic loss rule bars fraudulent inducement claims, it "would effectively reward a party for its own fraudulent conduct." [Synergy Brief at 13]. Synergy has attempted to present the economic loss rule as a public policy crisis. However, Synergy's underlying assumption is invalid, and its argument is inaccurate. Indeed, this case presents a clear example of the flaw in Synergy's conclusory argument. In this case, Synergy seeks to assert a tort claim that mirrors its breach of contract claim:

[2] HealthBanc does dispute that any fraudulent conduct actually occurred.

Synergy's Contract Claim	**Synergy's Tort Claim**
"HealthBanc has breached this [contract] because it has no intellectual property rights of any kind in the Specified Greens Formula." [Complaint (R.326) at ¶54].	"Synergy's fraud claim . . . is based upon HealthBanc's affirmative misrepresentations regarding its alleged ownership of the Greens Formula and associated intellectual property." [MSJ Opp. (R.388) at ii].

Application of the economic loss rule does not reward HealthBanc, nor does it leave Synergy without a remedy. Rather, it replaces an otherwise redundant tort theory with the negotiated, written contract warranty. *See Saratoga Fishing Co. v. J.M. Martinac & Co.*, 520 U.S. 875, 880 (1997) ("[G]iven the availability of warranties, the courts should not task tort law to perform a job that contract law might perform better . . . ."); *Schreiber Foods, Inc. v. Lei Wang*, 651 F.3d 678, 681 (7th Cir. 2011) (J. Posner) ("[T]ort law is a superfluous and inapt tool for resolving purely commercial disputes. We have a body of law designed for such disputes. It is called contract law[.]"); *Dannix Painting, LLC v. Sherwin-Williams. Co.*, 732 F.3d 902, 909 (8th Cir. 2013) ("[I]n cases where the only misrepresentation . . . concerns the quality or character of the goods sold, the economic loss doctrine bars the fraud claims because the fraud claims are substantially redundant with warranty claims." (internal quotation marks omitted)); *Louisburg Bldg. & Dev. Co. v. Albright*, 252 P.3d 597, 621 (Kan. Ct. App. 2011) (dismissing fraud in the inducement claim because it "merely duplicates their claim for breach of contract"); *All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 865 (7th Cir. 1999) ("[T]he provision of these duplicative tort remedies would undermine contract law."); 74 Am. Jur. 2d Torts

Economic-Loss Doctrine—Effect of Doctrine § 24 ("The economic-loss doctrine bars tort liability when the plaintiff has a contract with the defendant, and contract law provides an adequate remedy for the type of injury alleged.").

More broadly, Synergy cannot substantiate its conclusion that continuing to apply the economic loss rule would "reward a party for its own fraudulent conduct." [Synergy Brief at 13]. Synergy fails to demonstrate that the specifics of this case demonstrate such a result. Looking broader, Synergy fails to explain why contract law is insufficient to address instances where one party to a contract allegedly is misled through no fault of its own.

Contracting parties innocently[3] misled by intentional misrepresentations should be protected. Contract law already provides those protections. In addition to a breach of contract claim, contract law includes a number of doctrines that, depending on the specifics of a case, can protect a party innocently injured by a misrepresentation. For example,

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[3] Utah law strongly declares that contracting parties have a responsibility to understand the terms of the contracts they sign. *See, e.g.*, *McBroom v. Child*, 2016 UT 38, ¶¶21-22, 392 P.3d 835 (finding party bound by agreement despite not receiving entire agreement and signing based on misrepresentations from grandmother). If a contract is incomplete or inconsistent with a party's understanding of the transaction, a party's first and best protection is to refuse to sign the contract. *See All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 866 (7th Cir. 1999) ("If the seller makes an oral representation that is important to the buyer, the latter has only to insist that the seller embody that representation in a written warranty."); *Bardwell v. Willis Co.*, 100 A.2d 102 (Pa. 1953) ("If plaintiffs relied on any understanding, promises, representations or agreements made prior to the execution of the written contract or lease, they should have protected themselves by incorporating in the written agreement the promises or representations upon which they now rely, and they should have omitted the provisions which they now desire to repudiate and nullify."); *All-Tech Telecom, Inc.*, 174 F.3d at 866 ("It is true that, in principle, the cheapest way to prevent fraud is to punish the fraudfeasor; but in practice, owing to the ever-present possibility of legal error, the really cheapest way in some cases may be to place a burden of taking precautions on the potential victim.").

unilateral mistake can make a contract voidable, particularly when one party's "fault caused the mistake."[4] The doctrine of good faith and fair dealing "requires a party in a contract to perform 'consistent with the agreed common purpose and the justified expectations of the other party.'"[5] Unconscionability ensures the "prevention of oppression and unfair surprise."[6] Frustration of purpose applies when "a party's performance under [the contract] is impractical without his fault because of a fact of which he has no reason to know."[7] "Both waiver and estoppel can operate to prevent a party from demanding strict compliance with a contract."[8] Protections against undue influence include situations of "unfair persuasion."[9] And, "meeting of the minds" standards ensure that each contracting party understood all of "the essential portions of the agreement."[10]

Certainly in this case – where Synergy concedes "[t]he parties' discussions were ultimately memorialized into a written Royalty Agreement" – Synergy cannot identify why contract law is insufficient to protect its alleged interests. Moreover, if a circumstance ultimately arises where contract law does prove inadequate, the better course is to adjust the contours of a specific branch of contract law in that context – not effectively bypass the entire subject matter now based on a speculative concern expressed as an unripe

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[4] Restatement (Second) of Contracts § 153 (1981).
[5] *Cheney v. Hinton Burdick Hall & Spilker, PLLC*, 2015 UT App 242, ¶17, 366 P.3d 1220.
[6] *Ryan v. Dan's Food Stores, Inc.*, 972 P.2d 395, 402 (Utah 1998).
[7] Restatement (Second) of Contracts § 266 (1981).
[8] *Lone Mountain Production Co. v. Natural Gas Pipeline Co. of Am.*, 710 F. Supp. 305, 310 (D. Utah 1989).
[9] Restatement (Second) Contracts § 177 cmt. b.
[10] *Terry v. Bacon*, 2011 UT App 432, ¶21, 269 P.3d 188.

conclusion. *Cf.* Restatement (Third) of Torts: Liab. for Econ. Harm. § 3 TD No. 1 (2012) ("[A] better response is to reconsider the application of the parol evidence rule or the other doctrines of contract law that are responsible for the result. Using tort law to bypass those doctrines weakens them and retards their development. It also interferes with the ability of others to make reliable agreements in the future.").

In summary, any concern about the need to protect innocently misled parties is adequately addressed – in general as well as specifically in this case – by the application of existing contract doctrines. This policy concern does not support creating a new exception to the economic loss rule in Utah.

B. The Economic Loss Rule Protects Contract Law as a Guarantee of Certainty for Both Parties.

"[I]t is not the prerogative of this court to prevent the enforcement of contracts that a party subsequently regrets." *Tolman v. Winchester Hills Water Co.*, 912 P.2d 457, 462 n.6 (Utah Ct. App. 1996). "A contract is a contract. From it flow rights and obligations. Anxiety, nervousness, or 'buyer's remorse' about the wisdom of the contract does not absolve one from complying with all of the terms of that contract." *Eastman Kodak Co. v. Collins Ink Corp.*, 821 F. Supp. 2d 582, 589 (W.D.N.Y. 2011).

Allowing a party to rely on tort law to introduce oral statements allegedly made during the negotiation of an integrated contract would be an invitation for parties to litigate the deal they hoped to obtain instead of the agreement they actually executed. Case law illustrates this concern. [*See also* HealthBanc Opening Brief at 18-21 (addressing same)].

For example, in *E.A. Strout Western Realty Agency, Inc. v. Broderick*, 522 P.2d 144 (Utah 1974), the defendant signed a real estate commission agreement that obligated defendant to pay a 6% commission if a buyer for the property was "procured by [plaintiff] or by anyone else, including [defendant]." *Id.* at 144. Defendant then located a buyer without the plaintiff's assistance. Defendant "persuaded the trial court that the [contract] language . . . was not correct and that he agreed to pay a commission only in the case plaintiff sold the home." *Id.* This Court reversed. "To permit" defendant's argument "would be to cast doubt upon the integrity of all contracts and to leave a party to a solemn agreement at the mercy of the uncertainties of oral testimony given by one who in the subsequent light of events discovers that he has made a bad bargain."[11] *Id.* at 145-46.

If the law were contrary, parties "could essentially sidestep contractual duties by bringing a cause of action in tort to recover the very benefits they were unable to obtain in contractual negotiations." *SME Industries, Inc. v. Thompson, Ventulett, Stainback & Assocs., Inc.*, 2001 UT 54, ¶44, 28 P.3d 669. Indeed, parties would be encouraged to challenge contracts they regret by alleging they were fraudulently induced with statements excluded from or contrary to integrated contracts. *See generally All-Tech Telecom, Inc. v. Amway Corp.*, 174 F.3d 862, 865-66 (7th Cir. 1999) ("Many doctrines of contract law, such as the parol evidence and 'four corners' rules, are designed to limit the scope of jury trial of contract disputes . . . . Tort law does not have these screens against the vagaries of the jury."); *Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, 694 So. 2d 74, 77 (Fla. Dist. Ct. App.

[11] Although the Court relied on the parol evidence rule to reach its conclusion, the analysis does not change because of the label accompanying the proffer of the extrinsic evidence.

1997) ("[A]lmost any contract claim can be framed as a fraud in the inducement action. . . . Therefore it seems more appropriate, if the economic loss rule has any real substance, to look not at the label placed on the claim by the attorney but rather on the substance of the claim."); *Diodato v. Wells Fargo Ins. Servs., USA, Inc.*, 44 F. Supp. 3d 541, 567 (M.D. Pa. 2014) ("To hold otherwise would allow the parol evidence rule [to] become a mockery, because all a party to the written contract would have to avoid, modify or nullify it would be to aver (and prove) that the false representations were fraudulently made." (internal quotations omitted)).

The concern that, if allowed, parties will resort to misrepresentation claims to try and vary contracts they later regret is supported by more than just common sense. In 2010, Judge Posner and other researchers analyzed "461 state court appellate decisions" from "1970 to 2005" to "trace the evolution of" the economic loss rule, specifically in the context of construction disputes. *See* Anthony Niblett, Richard A. Posner, Andrei Shleifer, *The Evolution of a Legal Rule*, 39 J. Legal Stud. 325, 326 (2010). They found that since the widespread adoption of the economic loss rule, "[t]he proportion of cases in which the plaintiff alleges negligence has been falling." *Id.* at 346. On the other hand, claims for fraud and negligent misrepresentation have increased. *Id.*; *see also Dannix Painting, LLC v. Sherwin-Williams Co.*, 732 F.3d 902, 906 n.4 (8th Cir. 2013) (recognizing the same). In simple terms, "plaintiffs claim fraud and courts are receptive." Niblett *et al.*, *supra* at 346. As another scholar explained, when many courts see the word fraud, they engage in "judicial knee jerking" and "superficial rather than careful judicial thinking" about whether the alleged fraud overlaps with the subject of the contract. *See* Morris G. Shanker, *Judicial*

Misuses of the Word Fraud to Defeat the Parol Evidence Rule and the Statute of Frauds, 23 Akron L. Rev. 1, 4 (Summer 1989); *see also Louisburg Bldg & Dev. Co.*, 252 P.3d at 622 (recognizing this issue "has produced exceptional inconsistency"). *But see Schreiber Foods, Inc. v. Lei Wang*, 651 F.3d 678, 681 (7th Cir. 2011) (J. Posner) (rejecting claim for fraudulent inducement).[12]

Moreover, when a party freely declares that the contract "constitute[s] ***the entire agreement***," that party has made a promise of its own. [*See* Royalty Agreement (Ex. A to HealthBanc Brief) at §11(A)]. "[T]he purpose and effect of including a merger clause is to preclude subsequent introduction of evidence of preliminary negotiations or of side agreements in a proceeding in which a court interprets the document." *Ford v. Am. Exp. Advisors, Inc.*, 2004 UT 70, ¶28, 98 P.3d 15. It is hypocritical to allow a party to promise and agree in writing that the contract forms the entirety of the parties' agreement, but then allow that same party to introduce extrinsic terms by arguing another party breached an alleged oral statement excluded from the written contract. *See Garrett Const., Inc. v. Ashbritt, Inc.*, 1:09cv379WJG-JMR, 2010 WL 583921, at *3 (S.D. Miss. Feb. 16, 2010)

[12] This knee-jerking is also illustrated by remembering that the harm alleged suffered by an intentional misstatement is no different than the harm suffered by an alleged negligent misstatement. *See Werwinski*, 286 F.3d at 679-80 ("[T]he mental state of the wrongdoer is irrelevant from the buyer's perspective: a plaintiff suffers the same harm—i.e., economic losses—regardless of whether the misrepresentation is innocent, negligent, or intentional."). This Court has declared that "a tort for negligent misrepresentation alleging damages based purely on economic loss is not available." *SME Industries, Inc.*, 2001 UT 54, ¶42. Synergy has failed to explain why the same alleged statement and the same alleged harm should be treated differently based solely on a preliminary allegation of intent, which is often asserted in the alternative and alleged on the basis of information and belief.

("Each of the allegedly fraudulent representations which induced [plaintiff] to enter the contract are foreclosed by the contract, which contains a merger clause . . . .").

Tort claims, including "fraud[,] . . . are not cognizable under Utah law when they are based on the allegations that are the gravamen of the contract claim." *See Wardley Corp. v. Meredith Corp*., 93 F. App'x 183, 186 (10th Cir. 2004). Continuing to apply the economic loss rule in this matter protects the needed certainty contracts are intended to provide.

Conclusion

"The economic-loss doctrine bars tort liability when the plaintiff has a contract with the defendant, and contract law provides an adequate remedy for the type of injury alleged." 74 Am. Jur. 2d Torts § 24. This case manifests the wisdom of that rule. Synergy has asserted redundant tort and contract claims based on the very same alleged conduct. Even looking at the broader question, Utah contract law is sufficient to address an alleged tort claim that overlaps with the subject of a contract. Likewise, public policy does not support a new and broad exception to the economic loss rule. Accordingly, the Court should reaffirm that "[t]he economic loss rule prevents recovery of economic damages under a theory of tort liability when a contract covers the subject matter of the dispute." *Reighard*, 2012 UT 45, ¶14. The certified question should be answered by declaring that Utah law does not allow parties to assert tort law claims that address the same subjects and obligations as an express contract, "no matter what words the plaintiff may wish to use" when drafting its complaint. *See Grynberg*, 2003 UT 8, ¶45.

Dated this 16th day of March, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1- This brief complies with the type-volume limitation of Utah R. App. P. 24 because the brief contains 4652 words, excluding the parts of the brief exempted by Utah R. App. P. 24(g)(2).

2- This brief complies with Utah R. App. P. 21, governing public and private records.

3- This brief complies with the typeface requirements of Utah R. App. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 13-point Times New Roman.

Dated this 16th day of March, 2018

*/s/ Mitchell A. Stephens*_____

CERTIFICATE OF SERVICE

This is to certify that on the 16th day of March, 2018, I caused two true and correct copies of the Brief of Plaintiff and Counterclaim Defendants to be served on the following via hand-delivery:

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