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Attorneys for Defendant
ORACLE AMERICA, INC., a Delaware corporation

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE CITY AND COUNTY OF SAN FRANCISCO

BARRETT BUSINESS SERVICES INC., a Maryland Corporation

Plaintiff,

vs.

ORACLE AMERICA, INC., a Delaware Corporation; COGNIZANT WORLDWIDE LIMITED, an England and Wales Corporation; COGNIZANT TECHNOLOGY SOLUTIONS CORPORATION, a Delaware Corporation, independently and as successor-in-interest to KBACE TECHNOLOGIES, INC.; and DOES 1-30, inclusive,

Defendants.

Case No. CGC-19-572474

NOTICE OF DEMURRER, AND DEMURRER TO PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Filed Concurrently With Declaration of Meryl Macklin, Request for Judicial Notice, and [Proposed] Order]

Date: April 12, 2019
Time: 9:30 a.m.
Dept.: 302
Reservation No: 03140412-13

Complaint Filed: January 2, 2019
Trial Date: Not set.

NOTICE OF MOTION

PLEASE TAKE NOTICE that the Demurrer of defendant Oracle America, Inc. ("Oracle") to the Complaint filed by plaintiff Barrett Business Services, Inc. ("BBSI"), will be heard on April 12, 2019, at 9:30 a.m., or as soon thereafter as the matter may be heard in Department 302 of the above-entitled Court.

This Demurrer will be brought pursuant to California Code of Civil Procedure section 430.10 on the grounds that the Complaint fails to state facts sufficient to constitute any cause of action against Oracle. The parties have met and conferred pursuant to Code of Civil Procedure section 430.41 to discuss this Demurrer to Plaintiff's Complaint. *See* Declaration of Meryl Macklin, ¶ 2.

The Demurrer will be based on this Notice of Demurrer and Demurrer, the following Memorandum of Points and Authorities, the concurrently filed Request for Judicial Notice, the Declaration of Meryl Macklin, the pleadings and other documents filed in this action, and upon such other and further matters as the Court deems appropriate.

Dated: March 18, 2019

BRYAN CAVE LEIGHTON PAISNER LLP

By: _____

Meryl Macklin
Joseph J. Poppen
Douglas Alvarez
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ORACLE AMERICA, INC.,

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DEMURRER TO PLAINTIFF'S COMPLAINT

Oracle America, Inc. ("Oracle") demurs, pursuant to Code of Civil Procedure section 430.10, to the following purported causes of action in the Complaint by plaintiff Barrett Business Services, Inc. ("BBSI"):

FIRST CAUSE OF ACTION

The first cause of action for alleged negligent misrepresentation fails to allege facts sufficient to state a claim against Oracle. Code Civ. Proc. § 430.10(e).

SECOND CAUSE OF ACTION

The second cause of action for alleged breach of contract– 2/28/18 CSA, fails to allege facts sufficient to state a claim against Oracle. Code Civ. Proc. § 430.10(e).

THIRD CAUSE OF ACTION

The third cause of action for alleged breach of contract – 3/13/18 Accelerate Agreement, fails to allege facts sufficient to state a claim against Oracle. Code Civ. Proc. § 430.10(e).

FOURTH CAUSE OF ACTION

The fourth cause of action for alleged rescission – 2/28/18 CSA, fails to allege facts sufficient to state a claim against Oracle. Code Civ. Proc. § 430.10(e).

FIFTH CAUSE OF ACTION

The fifth cause of action for alleged rescission – 3/13/18 Accelerate Agreement, fails to allege facts sufficient to state a claim against Oracle. Code Civ. Proc. § 430.10(e).

Dated: March 18, 2019

BRYAN CAVE LEIGHTON PAISNER LLP

By: _____

Meryl Macklin
Joseph J. Poppen
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I. INTRODUCTION

Barrett Business Services, Inc. ("BBSI"), is unhappy that the cost to implement its new software is more than it originally expected, and is looking for someone to blame. BBSI *separately* contracted for cloud software services from Defendant Oracle America, Inc. ("Oracle") and implementation services from Defendant Cognizant Worldwide Limited ("Cognizant"). Nonetheless, ignoring the terms of its written agreement with Oracle that expressly bar claims such as those asserted here, BBSI seeks to hold Oracle responsible for Cognizant's increased implementation estimate by alleging that Oracle and Cognizant engaged in some sort of undefined "joint venture" to sell BBSI a solution that did not "meet its needs." This effort must fail. Oracle is not responsible for anything Cognizant may have said or done (and vice versa), and BBSI must be held to the clear and unambiguous terms of the agreements it signed.

On February 18, 2018, BBSI entered into a Cloud Services Agreement with Oracle (the "CSA"), along with an Ordering Document, for HCM Oracle cloud services. (The CSA and Ordering Document are attached to the accompanying Request for Judicial Notice.) In March 2018, BBSI entered into a separate "Accelerate Agreement" with Cognizant to implement the software.[1] BBSI alleges that Cognizant proposed an implementation price of $5,410,000, and that several months later, after Cognizant had performed initial work, it raised that price to $33,059,274. BBSI does not allege that Oracle was involved in any way in Cognizant's work or the decision to increase the estimate.

BBSI's Complaint fails to state a claim.

First, express contractual provisions in the CSA preclude BBSI's breach of contract claim. Under the CSA, BBSI is "solely responsible for determining" whether the cloud services purchased "meet [its] technical, business or regulatory requirements." Oracle warranted that it would "perform the Services using commercially reasonable care and skill in all material respects as described in [its published] Service Specifications." It expressly represented that it did not

[1] The Complaint refers to Defendants KBACE and Cognizant interchangeably and together because KBACE was acquired and merged into Cognizant during the relevant timeframe and before execution of the Accelerate Agreement.

"warrant … that the services will meet your requirements or expectations," and that it is "not responsible for any issues related to the performance, operation, or security of the services that arise from your content," and disclaimed any express or implied warranties except as stated in the Agreement. The parties agreed that the CSA "is the complete agreement" for the services ordered and "supersedes all prior or contemporaneous agreements or representations, written or oral, regarding such services. There can be no question that these provisions – and others like them – were intended to preclude lawsuits exactly like this one.

No term of the CSA obliged Oracle to provide BBSI with a "good user interface [or software that] could handle time entry, taxes and billing in a manner consistent with BBSI's business architecture," which is BBSI's only alleged basis for breach. Complaint ("Compl.") ¶¶ 64-65. Under the terms of the CSA, on the facts alleged, BBSI can only assert that Oracle has breached its commitment to provide the specified cloud services or has breached its express warranty to perform the services in accordance with published specifications. Because BBSI fails to allege facts showing that any of the software services it purchased did not work as described in their documentation, or that Oracle failed to provide any software service that BBSI ordered under the CSA, Oracle's demurrer to the Second Cause of Action should be sustained.

Second, under black letter law, Oracle is not responsible for any breaches of Cognizant's Accelerate agreement because Oracle is not a party to that agreement. BBSI cannot avoid this result by alleging a joint venture between Oracle and Cognizant, because it has not alleged and cannot allege that Oracle and Cognizant intended to create a joint venture in which they shared profits and ownership. *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 872. Indeed, the CSA expressly disclaims any responsibility or liability for any third party's actions.

Third, BBSI's negligent misrepresentation claim fails as a matter of law under the economic loss rule, as its allegations are not conceptually distinct from those alleged under BBSI's breach of contract cause of action. *See, e.g., Robinson Helicopter Co., Inc. v. Dana Corp.* (2004) 34 Cal.4th 979, 988. The claim fails because each of the alleged misrepresentations are promises of future action, statements that pertain to future states of affairs, or are merely opinions, none of which are false statements about a past or existing fact, as required to state a claim for negligent

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misrepresentation. *See, e.g.*, *Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 309-10.

Fourth, as the negligent misrepresentation claim fails, so too does the rescission claim that is based on it. BBSI's other basis for rescission, its claim of "mutual mistake," fails because parties legally cannot be "mutually mistaken" about something that has not yet happened and because the "mistake" is not one of fact, but one of BBSI's alleged understanding of the contract.

The CSA and the law bar all of BBSI's claims against Oracle. BBSI cannot save its complaint by amendment, and Oracle's demurrer should be sustained without leave to amend.

II. STATEMENT OF FACTS

Oracle is a computer technology company that specializes in developing and marketing database software, enterprise software products, and, relevant to this dispute, software-as-a-service "cloud" products. Compl. ¶ 9. BBSI is a large publicly-traded company that provides business management services, including payroll management and other administrative services. BBSI is headquartered in Washington State, and operates through a network of 60 branch locations in 24 states throughout the United States. It claims to have at least 5,600 clients and more than 110,000 employees. *Id.* at ¶¶ 1 & 12. Defendant Cognizant, which acquired defendant KBACE in 2017, is a consulting and technology services company independent of Oracle that provides, among other services, cloud strategy and implementation services for cloud products purchased from other vendors. *Id.* at ¶ 4. Since at least July 2017, and prior to executing the CSA with Oracle, BBSI admittedly already had a working relationship with Cognizant, as well as an existing Master Services Agreement with Cognizant. *Id.* at ¶ 33.

A. BBSI's Agreements with Oracle and Cognizant

On February 28, 2018, BBSI entered into the CSA, consisting of both the master terms and BBSI's specific order, pursuant to which BBSI purchased certain Human Capital Management, Payroll, Financial, and other related cloud services from Oracle. Compl. ¶ 34; *see also* Request for Judicial Notice ("RJN") at Exhs. A & B. Relevant terms of the CSA include:

- Sections 1 and 17.5: "We will make the Oracle services listed in Your order (the "Services") available to You pursuant to this Agreement and your Order," and "Prior to entering

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into an order governed by this Agreement, You are solely responsible for determining whether the Services meet Your technical, business or regulatory requirements."

- Section 6.1, in which Oracle warrants that it will "perform the Services using commercially reasonable care and skill in all material respects as described in the Service Specifications." The Service Specifications, defined in Section 19.3, include publicly-available documentation of the features and components of the cloud services purchased by BBSI. *See also* Section 1.2.
- Section 6.2, in which Oracle represents: "We do not warrant that the services will be performed error-free or uninterrupted, that we will correct all services errors or that the services will meet your requirements or expectations."
- Section 6.4, which provides: "These warranties are exclusive and there are no other express or implied warranties or conditions including for software, hardware, systems, networks or environments or for merchantability, satisfactory quality and fitness for a particular purpose."
- Section 17.2, which states: "Our business partners and other third parties, including any third parties with which the Services have integrations or that are retained by You to provide consulting services, implementation services or applications that interact with the Services, are independent of Oracle and are not Oracle's agents. We are not liable for, bound by, or responsible for any problems with the Services or your Content arising due to any acts of any such business partner or third party, unless [exception not relevant here]."
- And Section 18.1, which states: "You agree that this Agreement and the information which is incorporated into this Agreement by written reference … together with the applicable order, is the compete agreement for the Services ordered by You and supersedes all prior or contemporaneous agreements or representations, written or oral, regarding such services." RJN, Exh. A.

BBSI alleges no facts suggesting that Oracle failed to make any of the cloud services it ordered available to it pursuant to Section 1 of the CSA. BBSI also alleges no facts suggesting that the cloud services failed to perform as described in the Service Specifications pursuant to Section 6.1. *See* Compl. ¶¶ 1-95.

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On March 13, 2018, BBSI and independent third-party implementer Cognizant entered into the "Accelerate Agreement," which BBSI chose to incorporate into the existing Master Services Agreement between BBSI and Cognizant. Compl. ¶ 35. Under the Accelerate Agreement, to which Oracle was not a party, Cognizant allegedly was to begin implementation of the Oracle services that BBSI had purchased separately, with estimated implementation costs of between $5,410,000 and $5,950,000 and "go-live" by January 7, 2019. *Id.* at ¶¶ 24, 44. BBSI does not allege that Cognizant had a contractual obligation to provide the implementation at any fixed price or by any date certain (and does not reference any substantive terms of the Accelerate Agreement, period). Rather, BBSI accused Cognizant of a "bait and switch" when Cognizant increased its "estimate" to over $33 million and moved its target completed "go-live" to May 10, 2021 after completion of the "Accelerate" phase. *Id.* at ¶ 40, 44.

B. "Joint Venture" Allegations

Despite Section 17.2 of the CSA, and the CSA and Accelerate Agreement being completely separate and distinct, with the Accelerate Agreement being incorporated into the pre-existing Master Services Agreement between BBSI and Cognizant, BBSI alleges that (1) Oracle employees acted as KBACE/Cognizant agents with respect to both agreements, (2) Oracle and KBACE/Cognizant "acted as a single entity," and (3) that the Oracle cloud products and Cognizant's implementation services were a "single undertaking" and a "single bundle of products and services." Compl. ¶¶ 7, 11.

C. The Alleged Misrepresentations

The Complaint alleges the following supposed "misrepresentations" by Oracle:

- On June 30, 2017, Galen Weaver of BBSI had an alleged conference call with Oracle sales representatives Nick Cary and April Garbusjuk, in which Mr. Cary allegedly stated that "Oracle's Cloud HCM product was capable of meeting BBSI's needs." Compl. ¶ 18.
- On July 20, 2017, Oracle employees are alleged to have stated that "with KBACE as the implementation partner, the Oracle HCM Cloud product would meet all of BBSI's requirements." Compl. ¶ 19.

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- On an August 3, 2017, conference call and at other unidentified times, Oracle allegedly represented that KBACE "was the best payroll implementer," had done more than 300 implementations and was currently deploying a company with payroll needs similar to BBSI. Compl. ¶¶ 20, 29.
- At unidentified times in August 2017, unidentified persons at Oracle allegedly said that "Oracle's Cloud HCM Product as implemented and integrated by KBACE could fulfill BBSI's requirements in its role and business functions as [a Professional Employer Organization]." Compl. ¶ 21.
- At unidentified times between September and October 2017, Mr. Cary allegedly stated that Cognizant/KBACE "would be able to successfully implement HCM Cloud to integrate within BBSI's architecture." Compl. ¶ 23.
- Various Oracle representatives allegedly stated at various times that the HCM Cloud Product would work in a manner consistent with BBSI's requirements for user interface, time entry, billing, and taxes, and that BBSI's complex business structure and specific requirements "would not be a problem." Compl. ¶ 28

III. LEGAL STANDARD FOR DEMURRER

A demurrer should be sustained if "the pleading does not state facts sufficient to constitute a cause of action." Civ. Proc. Code § 430.10(e). To overcome a demurrer, the plaintiff must plead facts to establish every element of its asserted causes of action. *See Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879. "[A] demurrer assumes the truth of the complaint's properly pleaded allegations, but not of mere contentions or assertions contradicted by judicially noticeable facts." *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20. If a complaint's allegations are contradicted by documents subject to judicial notice, the judicially noticed facts control. *See Big Valley Band of Pomo Indians v. Superior Court* (2005) 133 Cal.App.4th 1185, 1191.

Additionally, because the CSA is not only referred to in the Complaint, but forms the basis of BBSI's contract claim against Oracle, the CSA is a proper subject of judicial notice on demurrer. *See, e.g., Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 956, fn. 6 (citations omitted).

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IV. ARGUMENT

A. The Complaint Fails to State a Claim for Breach of the CSA (Second Cause of Action)

BBSI fails to identify any term in the CSA that it claims Oracle breached, period. *See* Compl. ¶¶ 63-69. Instead, it alleges only that Oracle failed to meet a supposed requirement in the CSA that Oracle provide "cloud-based solution software that had a good user interface and could handle time entry, taxes and billing in a manner consistent with BBSI's business architecture." Compl. ¶¶ 64-65. The CSA contains *no such provision*. *See* RJN, Exhs. A & B.

A complaint does not state a cause of action for breach absent specific allegations about the breach. *Levy v. State Farm Mut. Auto Ins. Co.* (2007) 150 Cal.App.4th 1, 5-6. "Facts alleging a breach, like all essential elements of a breach of contract cause of action, must be pleaded with specificity." *Id.* at 5; *see also Bentley v. Mountain* (1942) 51 Cal.App.2d 95, 98. BBSI's vague assertion that Oracle breached the CSA by violating non-existent terms is insufficient to state a claim, and the breach of contract claim should be dismissed for this reason alone. *See, e.g.*, *Levy*, 150 Cal.App.4th at 5-6.

The CSA includes two relevant Oracle obligations. First, that Oracle will make available all of the cloud services ordered by BBSI. RJN, Exh. A, Section 1. BBSI does not allege that Oracle did not make the ordered services available. Nor could it, as Oracle did in fact make the services available and indeed that is how BBSI's implementer Cognizant was able to perform its initial "Accelerate" work. And second, that the cloud services will be provided as described in the Service Specifications. RJN, Exh. A, Section 6.1. BBSI does not allege any violation of any Service Specification or even refer to the Service Specifications at all. Besides those two obligations, all other express or implied warranties are disclaimed, and Oracle explicitly did not warrant that the services would meet BBSI's requirements or expectations. RJN, Exh. A, Sections 6.2 & 6.4. To the contrary, BBSI agreed that *prior* to ordering services governed by the CSA master terms, it was "solely responsible for determining whether the Services [met its] technical, business or regulatory requirements." RJN, Exh. A, Section 17.5.

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Further, BBSI is precluded from seeking to add any other contractual terms based on alleged prior understandings by Section 18.1 of the CSA ("You agree that this Agreement and the information which is incorporated into this Agreement by written reference …, together with the applicable order, is the compete agreement for the Services ordered by You and supersedes all prior or contemporaneous agreements or representations, written or oral, regarding such services."). RJN, Exh. A.

Under the circumstances, considering the multiple contractual barriers to BBSI's ability to state a breach of contract claim in good faith, leave to amend would almost certainly be futile. If leave is granted, it should be conditioned on BBSI identifying the specific provision or provisions of the CSA that Oracle allegedly breached, and how Oracle allegedly breached them. *See* Code of Civ. Proc. § 472a(c).

B. BBSI's Claims for Breach of and Rescission of the Accelerate Agreement (Third and Fifth Causes of Action) Fail as Against Oracle Because Oracle is not a Party to the Accelerate Agreement

It is a fundamental principle of contract law that a claim for breach of contract cannot be stated against a person or entity that was not a party to the contract sued upon. *See Universal Bank v. Lawyers Title Ins. Corp.* (1997) 62 Cal.App.4th 1062, 1066 (defendant "was not a party to the contract between Universal Bank and Southland Title and thus cannot be liable based on that contract."). Here, BBSI does not, and cannot, allege facts showing that Oracle is or was a party to the Accelerate Agreement between BBSI and Cognizant. *See* Compl. It follows necessarily that BBSI's breach of contract and rescission claims premised upon the Accelerate Agreement fail as a matter of law as against Oracle. *See Universal Bank*, 62 Cal.App.4th at 1066; *see also Tri-Continent Internat. Corp. v. Paris Savings & Loan Assn.* (1993) 12 Cal.App.4th 1354, 1359.

For two reasons, BBSI cannot avoid this black letter principle by vaguely alleging that Oracle and Cognizant formed a "joint venture" to market cloud software services and implementation services to BBSI.

First, BBSI expressly agreed in the CSA that Cognizant was not an agent of Oracle and that Oracle was not responsible or liable for any Cognizant conduct. RJN, Exh. A, Section 17.2

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("Our business partners and other third parties, including any third parties with which the Services have integrations or that are retained by You to provide consulting services, implementation services or applications that interact with the Services, are independent of Oracle and are not Oracle's agents. We are not liable for, bound by, or responsible for any problems with the Services or your Content arising due to any acts of any such business partner or third party, unless [exception not relevant here]."). BBSI is precluded from now alleging an Oracle-Cognizant "joint venture" for this reason alone.

Second, BBSI cannot allege facts sufficient to meet the legal test for the creation of a joint venture. "There are three basic elements of a joint venture: the members must have joint control over the venture . . . they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise." *Jeld-Wen, Inc.*,131 Cal.App.4th at872. Even an "agreement to 'go into business' does not, of itself, imply a joint venture or any specific type of operation." *Myers v. Gager* (1959) 175 Cal.App.2d 314, 321. "Whether the parties to a contract have thereby created, as between themselves, the relation of joint venturers or some other relation involving cooperative effort, depends upon their actual intention, which is determined in accordance with the ordinary rules governing the interpretation and construction of contracts." *Id.* at 320; *see also Coffman v. Kennedy* (1977) 74 Cal.App.3d 28, 32 (concluding trial court did not err in sustaining demurrer because plaintiff failed to allege "facts sufficient to show the necessary requirements for a joint enterprise contract, common purpose, and equal right of voice and control.").

The allegations of the complaint do not satisfy these tests as they do not allege the elements set forth in *Jeld-Wen* – nor can they, in the face of Section 17.2 of the CSA. Not only does BBSI acknowledge that Oracle is not a party to the Accelerate Agreement between BBSI and Cognizant (Compl. ¶ 35), BBSI also does not allege that Oracle could control Cognizant's performance under the Accelerate Agreement, that Oracle shared any profits under the Accelerate Agreement, or that Oracle has any ownership interest in the Accelerate Agreement, or otherwise, under any alleged "joint venture." Again, amendment would be futile, as any such allegations would be contradicted by BBSI's express agreement to the contrary in Section 17.2 of the CSA.

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C. The Complaint Fails to State a Claim for Negligent Misrepresentation Against Oracle

The elements of negligent misrepresentation "consist of (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages." *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962. BBSI's negligent misrepresentation claim against Oracle fails because it is barred by the economic loss rule and because none of the alleged misrepresentations relate to past or existing material facts.

1. The Negligent Misrepresentation Claim is Barred by the Economic Loss Rule

The economic loss rule bars tort claims for contract breaches, thus limiting contracting parties to contract damages only. *See Aas v. Superior Court* (2000) 24 Cal.4th 627, 643 ("A person may not ordinarily recover in tort for the breach of duties that merely restate contractual obligations."). It requires that alleged breaches of a tort duty be "conceptually distinct" from alleged contractual duties. *Net Services v. Eco Safe Systems USA, Inc.* (2012) 209 Cal.App.4th 1118, 1132 (misrepresentation claim barred because the alleged breaches of a tort duty were "not 'conceptually distinct from the contract,' as Food Safety's obligation to perform the tests and report the results arose exclusively from the contract") (citation omitted). The rule prevents "the law of contract and the law of tort from dissolving one into the other." *Robinson Helicopter*, 34 Cal.4th at 988 (internal modification and quotations omitted). By precluding tort claims, and thus tort damages, the rule encourages parties to reach a mutually beneficial private bargain, as it allows parties to "estimate in advance the financial risks of their enterprise." *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 106 (citation omitted). Consequently, the rule is particularly strong when a party alleges "commercial activities that negligently or inadvertently [went] awry." *Robinson Helicopter*, 34 Cal.4th at 991, fn. 7.

Here, BBSI's breach of contract claim against Oracle asserts the parties entered into the CSA, which BBSI (falsely) claims obligated Oracle to "provide cloud-based solution software that had a good user interface and could handle time entry, taxes and billing in a manner consistent with BBSI's business architecture." Compl. ¶¶ 64-65. BBSI alleges that Oracle breached the

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CSA because the cloud services – which BBSI admittedly never attempted to implement beyond whatever was included in the initial "Accelerate" phase with Cognizant – "failed to provide these capabilities," and that BBSI suffered harm as a result. *Id.* at ¶¶ 66-69.

These are the same allegations supporting BBSI's negligent misrepresentation claim. The statements BBSI alleges to be negligent misrepresentations all relate to the cloud services' alleged inability to meet the same BBSI purported business requirements. *See* Compl. ¶ 54 (Oracle "represented … its HCM Cloud product was capable of meeting BBSI's needs") & ¶ 55 (the products BBSI purchased were "not capable of meeting BBSI's needs, particularly with respect to user interface, time entry, taxes, payroll and billing."); *see also* ¶¶ 17-30. And BBSI seeks damages based on these same allegations under both its breach of contract and misrepresentation claims. *Compare* Compl. ¶ 69 with ¶¶ 47-52, 62.

Within this purely commercial context, the economic loss rule applies without exception. BBSI's tort and contract claims are not "conceptually distinct." *Net Services,* 209 Cal.App.4th at 1132. To the contrary, the purported representations and alleged contract terms are the same, the representations are alleged to be false for the same reasons that BBSI claims the CSA was breached, and BBSI seeks damages under both claims solely based upon the same purported shortcomings of the cloud products. The economic loss rule thus bars the negligent misrepresentation claim as a matter of law. *See id.*; *see also Benavides*, 136 Cal.App.4th at 1251; *Goonewardene v. ADP, LLC* (2019) 6 Cal.5th 817, 141.

2. BBSI Alleges Only Inactionable False Promises and Vague Opinions

"To be actionable, a negligent misrepresentation must ordinarily be as to past or existing material facts. '[P]redictions as to future events, or statements as to future action by some third party, are deemed opinions, and not actionable fraud.'" *Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 158 (citations omitted). A "promise" regarding future action or states of affairs does not "involve a past or existing material fact" and therefore will not support a cause of action for negligent misrepresentation. *Id.* at 158-59 (There is no claim for "negligent false promise."); *see also Stockton Mortgage, Inc. v. Tope* (2014) 233 Cal.App.4th 437, 458 (A false promise to perform in the future "does not support a claim for negligent misrepresentation.");

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Magpali v. Farmers Grp., Inc. (1996) 48 Cal.App.4th 471, 482 (a "negligent false promise" is not actionable).

Furthermore, "the law is quite clear that expressions of opinion are not generally treated as representations of fact, and thus are not grounds for a misrepresentation cause of action." *Gentry v. eBay, Inc.* (2002) 99 Cal.App.4th 816, 835 (citations omitted); *see also Neu–Visions*, 86 Cal.App.4th at 309-310 ("statements regarding future events are merely deemed opinions.").

Under this clear law, nothing that BBSI alleges can support a negligent misrepresentation claim against Oracle. The statements attributed by BBSI to Oracle are all either predictions of the future success of the software for BBSI or statements of Oracle's views about KBACE/Cognizant's capabilities, and are therefore all inactionable opinions.

In the context of a complex software implementation, estimated to cost over $5.4 million, the allegation, made repeatedly and in different forms in the Complaint, that Oracle promised its "Cloud HCM Product was capable of meeting BBSI's needs" (Compl. ¶ 18), and would "meet all of its requirements" (Compl. ¶ 19)[2], is a prediction of the future, not a statement of a present or existing fact. It is akin to the statement in *Gentry* that a positive eBay rating is "worth its weight in gold," which the Court stated could not "support a cause of action for negligent misrepresentation . . . because it amounts to a general statement of opinion, not a positive assertion of fact." 99 Cal.App.4th at 835. *See also Tarmann*, 2 Cal.App.4th at 158 (statement that defendant "would pay for . . . repairs immediately upon completion" is a nonactionable opinion); *Neu–Visions*, 86 Cal.App.4th at 309–310 (representations as to value of property and expectation of clear title nonactionable opinions).

The allegation in paragraphs 20 and 29 (and elsewhere), that Oracle said Cognizant/KBACE "was the best payroll implementer" is the quintessential example of a non-actionable statement of opinion, and therefore nonactionable. *Glen Holly Entertainment, Inc. v.*

[2] Similar allegations appear at ¶ 21 (system "as implemented and integrated by KBACE could fulfill BBSI's requirements in its role and business functions"); ¶ 22 ("could successfully implement the product to fit BBSI's demanding payroll needs"); and ¶ 23 ("would be able to successfully implement HCM Cloud to integrate with BBSI's architecture."); *see also* Section II.C above.

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Tektronix, Inc., 100 F. Supp. 2d 1086, 1093 (C.D. Cal. 1999) (observing "assertions that a particular product is the 'best' . . . are non-actionable opinions" under California law); *see also Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 139 (holding opinion and puffery could not support claim for negligent misrepresentation).

In any event, even if BBSI's allegations were considered representations of fact, statements pertaining to "meet[ing] all of BBSI's requirements" or "needs" or "success," are simply too vague to constitute an actionable misrepresentation of a past or existing material fact. *See Rochlis v. Walt Disney Co.* (1993) 19 Cal.App.4th 201, 216 (statements "too vague to be enforced will not support a fraud claim any more than they will one in contract.").

D. The Complaint Fails to State a Claim for Rescission of the CSA (Fourth Cause of Action)

While BBSI purports to state a claim for rescission, "[r]escission is not a cause of action; it is a remedy." *Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 70. Indeed, a "party to a contract cannot rescind at his pleasure, but only for some one or more of the causes enumerated in section 1689 of the Civil Code." *Nmsbpcsldhb v. County of Fresno* (2007) 152 Cal.App.4th 954, 959. BBSI's rescission "claim" is premised on two purported causes: (1) Oracle's alleged negligent misrepresentations (Compl. ¶¶ 81-83); and (2) "mutual mistake" (Compl. ¶84). Both of these bases fail, and thus so too does the rescission claim.

As explained above, BBSI has failed to state a claim for negligent misrepresentation. Thus, the court should dismiss BBSI's "claim" for rescission to the extent it relies on its failed negligent misrepresentation claim. *See, e.g., Geraghty v. Shalizi* (2017) 8 Cal.App.5th 593, 598 (because fraud cause of action failed, so did request for rescission); *Blackwell v. Ferrari* (1943) 60 Cal.App.2d 13, 20 (affirming judgment denying rescission because plaintiff failed to show misrepresentation).

The court should also dismiss BBSI's rescission "claim" to the extent it relies on the alleged "mutual mistake" that the cloud services "could meet BBSI's needs." Compl. ¶ 84. Mistake of fact justifying relief from a contract is defined in Civil Code section 1577 as "a mistake, not caused by the neglect of a legal duty on the part of the person making the mistake,

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and consisting in: 1. An unconscious ignorance or forgetfulness of a ***fact past or present***, material to the contract; or, 2. Belief in the ***present existence of a thing*** material to the contract, ***which does not exist***, or in the ***past existence of such a thing, which has not existed***." (emphasis supplied). Civil Code section 1577 thus "speaks in terms of mistakes as to *present* or *past* facts; there is no authority for rescission based on a mistake regarding *future* events." *Paramount Petroleum Corp. v. Superior Court* (2014) 227 Cal.App.4th 226, 245 (emphasis original, citation omitted). Thus, where a belief under which a contract is made is rendered mistaken by subsequent events, the mistake will not support rescission of the contract. *See Mosher v. Mayacamas Corp.* (1989) 215 Cal.App.3d 1, 6 (holding that when facts are rendered mistaken by *future events*, they are an "error in judgment" rather than a mistake of fact) (citation omitted).

BBSI's claim of "mutual mistake" fails under Civil Code section 1577 for at least three reasons. First, BBSI's purported mistake does not pertain to a fact existing upon execution of the CSA, but instead pertains to BBSI's alleged belief about the future: *i.e.*, that the cloud services could be implemented to "meet BBSI's needs." Compl. ¶ 84. The purported mistake thus provides no basis for rescission because it pertains only to a belief as to a future state of affairs – *i.e.*, the future result of an implementation that BBSI *chose not pursue* – rather than to a fact in existence on or prior to February 28, 2018. *See Paramount*, 227 Cal.App.4th at 245; *see also Mosher*, 215 Cal.App.3d at 6.

Second, BBSI's purported mistaken belief as to whether the cloud services could ultimately meet its needs is simply not a "fact" under Civil Code section 1577, but is instead BBSI's alleged misunderstanding of the obligations in the CSA. *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1421 (rejecting party's alleged mistake consisting of a "misunderstanding of his contractual duties" as not pertaining to an "objective existing fact"); *see also Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 126-30.

Third, BBSI fails to establish that it did not bear the risk of the mistake. A party bears such a risk "when the agreement so provides or when the party is aware of having only limited knowledge of the facts relating to the mistake but treats this limited knowledge as sufficient." *Grenall v. United of Omaha Life Ins. Co.* (2008) 165 Cal.App.4th 188, 193 (citation omitted).

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BBSI explicitly agreed in the CSA that it assumed the risk of any alleged ordering mistake. Section 17.5 of the CSA states that BBSI was "solely responsible for determining whether the Services meet Your technical, business or regulatory requirements." RJN, Exh. A. Because BBSI agreed that it was responsible for selecting the services that it wished to purchase, and was "solely responsible for determining whether" those services met its requirements, BBSI bore the contractual risk that it could be mistaken as to whether its selection and purchase of those particular services would "meet BBSI's needs." Compl. ¶ 83. The claim for rescission thus fails because, under the contract's terms, BBSI bore the risk of its mistake. *See Grenall*, 165 Cal.App.4th at 193; *see also Richards v. Oliver* (1958) 162 Cal.App.2d 548, 566 (parties may not be relieved from their contracts on the grounds "that they constituted a mistake in business judgment or are improvident").

V. CONCLUSION

For the forgoing reasons, the demurrer should be sustained. Because all of BBSI's claims are precluded by the explicit terms of the CSA, leave to amend should be denied as futile. *See Vaillette v. Fireman's Fund Ins. Co.* (1993) 18 Cal.App.4th 680, 685-91.

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