FILED
United States Court of Appeals
Tenth Circuit

October 31, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PREVENTIVE ENERGY SOLUTIONS, L.L.C., a Wyoming limited liability company,

Plaintiff - Counterclaim-Defendant - Appellant,

v.

NCAP VENTURES 5, L.L.C., a Delaware limited liability company; NCAP VENTURES 11, L.L.C., a Delaware limited liability company;

Defendants - Counterclaimants - Appellees,

and

ANTHONY J. SUTERA; RHETT F. SPENCER,

Defendants - Appellees,

No. 21-4099
(D.C. No. 2:16-CV-00809-JCB)
(D. Utah)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **MURPHY**, and **HARTZ**, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Plaintiff-Appellant Preventive Energy Solutions, L.L.C. ("Preventive") sued Defendants-Appellees nCap Ventures 5, L.L.C. ("nCap 5"), nCap Ventures 11, L.L.C. ("nCap 11"), nCap's Chief Executive Officer ("CEO"), Anthony J. Sutera, and nCap's Chief Technology Officer ("CTO"), Rhett F. Spencer,[1] for breach of contract and various tort and equitable claims in connection with a 2015 Manufacture and Supply Agreement ("MSA") between the parties. The MSA provided that nCap 5 would manufacture and supply Preventive with rechargeable battery power storage systems (the "Product") that could be used in Preventive's residential solar panel systems.

Preventive alleged that Mr. Sutera and Mr. Spencer made various misrepresentations about the Product's specifications, capabilities, portability, and readiness for production before the parties entered into the agreement. In essence, Preventive claimed that the nCap parties devised a bait-and-switch scheme to induce Preventive to enter into the MSA and pay nCap 5 a $500,000 advance. The nCap parties responded that Preventive was actually the party that breached the agreement, and counterclaimed for various breach of contract and equitable claims.

During the course of the litigation, the parties stipulated that the MSA was an enforceable contract and therefore both parties would drop their equitable claims. The nCap parties also filed a motion to dismiss Preventive's tort claims as barred by

[1] In the interest of clarity and consistency, absent any particular need to do otherwise, we will refer to nCap 5 and nCap 11 collectively throughout this Order as "nCap," and refer to nCap 5, nCap 11, Mr. Sutera, and Mr. Spencer collectively as "the nCap parties."

Utah's economic loss rule, which the district court granted. Therefore, the only claims left for trial were the parties' breach of contract claims.

At trial, Preventive's managing member and sole witness, Kevin Oleson, was held in contempt of court for repeated non-responsive and otherwise improper testimony. The district court held him in contempt in the presence of the jury, and provided a curative instruction the following day. The jury returned a verdict against Preventive.

Preventive appeals from the final judgment, requesting that this court set aside the jury's verdict and order a new trial for three reasons. First, Preventive argues that the district court erred in accepting the parties' stipulation that the MSA is an enforceable contract. In Preventive's view, the district court should have instead found that the MSA is an unenforceable agreement-to-agree. Based on this argument that the MSA is an unenforceable agreement-to-agree, Preventive argues that the district court both erred in allowing Preventive to voluntarily dismiss its equitable claim for unjust enrichment and in analyzing the viability of Preventive's tort claims under the economic loss rule.

Second, assuming in the alternative that the MSA is an enforceable contract and so Utah's economic loss rule does come into play, Preventive argues that the district court erred by dismissing under the economic loss rule its tort claims for fraud, fraudulent inducement, fraudulent misrepresentation, and negligent misrepresentation. Third, and finally, Preventive argues that it was denied a fair trial because the district court held Preventive's sole witness in contempt of court in the

presence of the jury, which prejudiced Preventive and deprived Preventive of due process.

Exercising jurisdiction under 28 U.S.C. § 1291, we reject each of Preventive's arguments. First, we conclude that Preventive waived its argument that the MSA is an unenforceable agreement-to-agree and accordingly treat the MSA as an enforceable contract. As such, we **affirm** the district court's order dismissing Preventive's equitable claim. Second, we **affirm** the dismissal of Preventive's tort claims under the economic loss rule. And third—discerning no merit in Preventive's challenge to the manner in which the district court imposed the contempt sanction—we, overall, **affirm** the district court's entry of judgment against Preventive.

I

A

Preventive is a Wyoming limited liability company that markets, sells, and installs residential solar panel and photovoltaic systems. nCap 5 and nCap 11 are Delaware companies that develop and manufacture portable solar battery products and recharging systems. Anthony J. Sutera is nCap's CEO and Rhett F. Spencer is nCap's CTO.

In 2015, Preventive and the nCap parties began discussing the possibility of contracting for nCap 5 to manufacture and supply rechargeable battery power storage systems that could be used in Preventive's residential solar panel systems. According to Preventive, the nCap parties represented that "they had invented a proprietary charging system capable of recharging military-grade batteries . . . [that]

would allow homeowners who connected the rechargeable batteries to a solar panel system the ability to operate their home appliances and other systems throughout the night, using only stored battery power." Aplt.'s App. at 30, ¶ 12 (Compl., filed July 19, 2016). Additionally, "the entire rechargeable battery product would easily fit in a portable case which could be attached to the home or taken anywhere[.]" *Id.* at 30, ¶ 13.

Based on its conversations with Mr. Sutera and Mr. Spencer regarding nCap 5's ability to supply the Product to Preventive, Preventive paid nCap 5 a $500,000 advance on December 15, 2015. Then, on December 21, 2015, Preventive and nCap entered into the MSA, in which nCap 5 agreed to "manufacture a battery charging system that c[ould] be connected to" Preventive's residential solar power systems. *Id.* at 46 (MSA, dated Dec. 21, 2015). Per the MSA, nCap 5 would be Preventive's exclusive vendor.

Section 1 of the MSA provided that nCap 5 would "manufacture, package, and sell to [Preventive] upon receipt of a purchase order from [Preventive], and [Preventive] [would] agree[] to purchase from [nCap 5], the Product in such kinds and numbers as set forth on [Preventive's] purchase order." *Id.* However, the MSA did not include any further details or specifics about the Product. Instead, the MSA provided in Section 4(a) that "[t]he parties [would] develop mutually agreeable specifications for the Product in writing not less than thirty (30) days after the Effective Date ("***Product Specifications***")." *Id.* at 47. Section 7(b), which sets forth the parties' warranties, then provided that nCap 5 "warrant[ed] and represent[ed] that

the Product w[ould] be manufactured, packaged, and labeled by [nCap 5] in material accordance with the Product Specifications." *Id.* at 49.

After signing the MSA on December 21, 2015, the parties continued discussing the development of the Product. However, on December 23, 2015, Mr. Sutera and Mr. Spencer—in their roles as nCap's officers—informed Preventive that the Product would need to be reconfigured in order to reach the capability expected by Preventive. Preventive contended that, in that conversation, it discovered that several of Mr. Sutera and Mr. Spencer's prior representations about the Product were false.[2] The parties' relationship devolved from there. As such, the parties never ultimately agreed in writing to the "Product Specifications," as provided in Section 4(a) of the MSA.

On March 18, 2016, Preventive demanded the return of its $500,000 advance. Preventive had never ordered nor received any of the Product from nCap 5. The nCap parties refused to return the advance.

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[2] Specifically, Preventive alleged that the nCap parties did not actually develop the charging system that they represented they had invented, but rather purchased "widely available existing battery products" and made alterations to the batteries in an attempt to pass off the modified product as their own invention. Aplt.'s App. at 31, ¶ 17. Additionally, Preventive averred that Mr. Sutera and Mr. Spencer represented that the Product was already being marketed and sold as a portable unit in "third-world countries," *id.* at 34, ¶ 33(f), which was not true. Further, Preventive asserted that the "Defendants [could not] successfully recharge the military-grade batteries, as they had claimed." *Id.* at 31, ¶ 17. In total, Preventive alleged that the nCap parties made 12 inaccurate, incomplete, or false statements between November 1, 2015, and December 23, 2015, regarding the Product's capabilities, size, portability, proven efficacy, cost to consumers, and how it compared to other products on the market.

B

On July 19, 2016, Preventive filed its Complaint in the United States District Court for the District of Utah, bringing eight causes of action under Utah state law against the nCap parties: (1) fraud, (2) fraudulent inducement, (3) fraudulent misrepresentation, (4) negligent misrepresentation, (5) breach of contract, (6) conversion, (7) unjust enrichment, and (8) theft.

The nCap parties moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court granted the motion to dismiss, as it pertained to Preventive's breach of contract and unjust enrichment claims (Counts 5 and 7) against nCap 11, Mr. Sutera, and Mr. Spencer, but denied the motion to dismiss those claims as to nCap 5. As for the remainder of Preventive's claims—all tort claims under Utah state law—the district court analyzed whether Utah's economic loss rule barred any of those claims.[3] The district court found that Preventive's conversion and theft claims (Counts 6 and 8) were duplicative of Preventive's breach of contract claim, and therefore granted the motion to dismiss those counts against all of the nCap parties. However, the district court allowed Preventive to proceed with its other tort claims for fraud, fraudulent inducement, fraudulent misrepresentation, and negligent misrepresentation (Counts 1–4), because it found such claims to be distinguishable from Preventive's breach of contract

[3] "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*, 285 P.3d 1168, 1174 (Utah 2012).

claims. Specifically, the court reasoned that, because the duties underlying Preventive's fraud and negligent misrepresentations claims arose "during the pre-contract negotiation phase," "Preventive's tort claims arise independent of Preventive's contract claims." *Id.* at 79 (Mem. Decision and Order Granting in Part and Den. in Part Defs.' Mot. to Dismiss, filed Jan. 10, 2017).

The nCap parties answered the claims remaining after the partial order of dismissal, and nCap also brought seven counterclaims against Preventive and Mr. Oleson, Preventive's managing member. Specifically, nCap 11 counterclaimed for a declaratory judgment that, per Section 5(a) of the MSA—which required Preventive to convey a 20% interest in Preventive to nCap 11 as part of the agreement—nCap 11 was a 20% member of Preventive with all of the rights afforded it by Wyoming law and Preventive's governing documents (Counterclaim I). nCap 11 also counterclaimed for breach of contract in the alternative, alleging that Preventive breached the MSA by not conveying this 20% interest (Counterclaim III). nCap 11 also claimed that Mr. Oleson had breached his fiduciary duty to nCap 11 as the managing member of the LLC in which nCap 11 held a 20% interest (Counterclaim VI). Lastly, nCap 11 counterclaimed for dissolution of Preventive, asserting that it had the right to dissolve Preventive as a 20% member (Counterclaim VII).

nCap 5 counterclaimed for breach of contract, arguing that Preventive materially breached the MSA by violating its exclusivity provisions while the MSA was still in full force and effect (Counterclaim II). nCap also counterclaimed for breach of the implied covenant of good faith and fair dealing under the MSA

(Counterclaim IV), and promissory estoppel in the event that the MSA was found not to be an enforceable contract (Count V).

The parties then proceeded through discovery and toward trial. After the parties finished their summary judgment briefing, the Utah Supreme Court issued *HealthBanc Int'l, LLC v. Synergy Worldwide, Inc.*, 435 P.3d 193 (Utah 2018). *HealthBanc* explicitly addressed the application of the economic loss rule to tort claims based on a party's pre-contractual misrepresentations. In *HealthBanc*, the Court rejected the argument that "there is an important distinction between failure to perform the contract itself, and the promises that induce a party to enter into a contract in the first place." *Id.* at 197. Instead, the Court held that "there is no fraud exception [to the economic loss rule] that applies where the alleged fraudulent inducement arises out of the very grounds alleged as a basis for a breach of contract action." *Id.* at 194.

Consequently, at the final pretrial conference on June 28, 2021, the nCap parties renewed their argument that Preventive's first four tort claims for fraud, fraudulent inducement, fraudulent misrepresentation, and negligent misrepresentation were barred under Utah's economic loss rule. In light of *HealthBanc*, the court ordered the parties to file supplemental briefing on whether the economic loss rule barred those claims.

After considering the parties' briefing, the district court found that, viewed through *HealthBanc*'s prism, the economic loss rule did bar Preventive's claims for fraud, fraudulent inducement, fraudulent misrepresentation, and negligent

misrepresentation, and therefore dismissed those claims. *See Preventive Energy Sols., L.L.C. v. nCap Ventures 5, L.L.C.*, No. 2:16-CV-00809-JCB, 2021 WL 2810092, at *4 (D. Utah July 6, 2021).

At the same final pretrial conference on June 28, 2021, the district court acknowledged the parties had stipulated that the MSA constituted an enforceable contract, and therefore dismissed Preventive and nCap's equitable causes of action (i.e., Preventive's unjust enrichment claim (Count 7) and nCap's promissory estoppel counterclaim (Counterclaim V)). The court wrote that the equitable claims "should be dismissed because the parties agree that they had entered into a contract, which preclude[d] those claims from consideration at trial." Aplt.'s App. at 322 (Mem. Decision and Order, filed July 6, 2021). As a consequence of the court dismissing all of these claims before trial, the lone claims remaining for trial were Preventive's breach of contract claim against nCap 5, and nCap's breach of contract counterclaims against Preventive and Mr. Oleson.

Preventive requested a hearing to discuss the possibility of reinstating the dismissed equitable claims. As Preventive explained at the hearing, it was concerned that, after the district court's order on the economic loss rule, the nCap parties would argue that the agreement was unenforceable and thereby hamper Preventive's breach of contract claim and ultimately leave Preventive without a remedy. To avoid such a result, Preventive suggested that if "this Court were to rule that as a matter of law this is an enforceable contract, the Preventive parties would be satisfied with that and would proceed, and this would not be, frankly, an issue." *Id.* at 338 (Tr. Mot. Hr'g,

dated July 7, 2021). The district court suggested that the parties stipulate that the MSA was an enforceable contract, and Preventive and the nCap parties did so. The parties further included that stipulation in the jury instructions.

C

A four-day jury trial was held from July 12–15, 2021, on Preventive's breach of contract claim and nCap's counterclaims for breach of contract and breach of the implied covenant of good faith and fair dealing.

Mr. Oleson, Preventive's managing member, testified as Preventive's sole witness. During his testimony, he repeatedly exceeded the scope of the questions presented, offered inadmissible hearsay testimony without a pending question, and ignored the court's directions and admonishments. As a result, the court held Mr. Oleson in contempt of court and summoned the U.S. Marshals—performing both actions in the presence of the jury. Specifically, the following exchange occurred between the court and counsel for Preventive (i.e., Mr. Jones) and the nCap parties (i.e., Mr. Brough):

THE COURT:	Mr. Oleson, you're in contempt of court. Marshals.
MR. JONES:	My apologies, Your Honor.
THE COURT:	Do you have any cross-examination?
MR. BROUGH:	No.
THE COURT:	All right. Jury, I'm going to excuse you until 8:30 tomorrow. . . . Would you please call in

> the United States Marshals when they bring in [the defendant for the next case].

Aplt.'s App. at 1003 (Trial Tr., dated July 14, 2021). The next morning, the court gave an oral curative instruction to the jury regarding its actions relating to Mr. Oleson's misconduct. The court reviewed the proposed curative instruction with the parties in advance, and neither party objected to the instruction. The instruction was as follows:

> Ladies and gentlemen, welcome this morning. It's good to have you back. I want to just before we get started address a topic. Yesterday you witnessed an unfortunate episode. But I do need to instruct you that what happened yesterday in terms of my admonishment of Mr. Oleson is not evidence. It is completely separate from the claims and defenses that are asserted in this case. And so I would ask you not to consider it at all in terms of your decision as to the claims and issues between these two parties. Mr. Oleson appeared today this morning in court. He apologized to the Court, and he is now off with his daughter, as he mentioned yesterday. So his absence in the courtroom today is not at all associated with what happened yesterday, so I don't want you to be thinking, wondering where he's at. But please understand that what happened and the claims they're separate, and so please disregard what you saw there in terms of your evidence.

Aplt.'s App. at 1044 (Trial Tr., dated July 15, 2021). The court also included a written curative instruction regarding its admonishment of Mr. Oleson in the Jury Instructions. The Jury Instruction provided:

> Unfortunately, you witnessed me admonish Mr. Oleson yesterday just before the end of the day. That I admonished Mr. Oleson is not evidence as to whether

> Preventive has or has not proven its breach of contract or [sic] claim or whether Preventive is liable for the counterclaims asserted against it. The exchange that led to the admonishment and the admonishment itself are wholly separate and apart from the merits of Preventive's own claim and the counterclaims against it. Recall that I earlier instructed you that as the judges of the facts, you must not decide this case for or against anyone because you feel sorry for or angry at anyone. You must decide this case based on the facts you find and the law as I give you without regard to sympathy, passion, or prejudice.

Id. at 1194–95 (Jury Instruction No. 25).

The jury returned a verdict that nCap 5 did not breach the contract with Preventive, but instead that Preventive had breached the contract with nCap 5, resulting in $0 in damages. The jury further found that Preventive did not materially breach the MSA as to nCap 11. As relevant here, the court entered judgment against Preventive, and Preventive has timely appealed.

II

Preventive raises three arguments on appeal. First, Preventive contends that the MSA is an unenforceable "agreement-to-agree" and not an enforceable contract. Based on this argument, Preventive avers that the district court erred in dismissing its equitable claim and in analyzing the viability of Preventive's tort claims under the economic loss rule. Second, assuming that the MSA is an enforceable contract, Preventive argues in the alternative that the district court erred in its application of Utah's economic loss rule. Preventive argues that it should have been permitted to present its tort claims for fraud, fraudulent inducement, fraudulent misrepresentation, and negligent misrepresentation to the jury because those claims are not duplicative

of its breach of contract claims. Third, and finally, Preventive asserts that the manner in which the district court held Mr. Oleson in contempt of court in the presence of the jury prejudiced the jury against Preventive and violated Preventive's right to due process.

For the reasons discussed below, we reject each of Preventive's arguments and uphold the district court's dismissal of Preventive's first four tort claims and its entry of judgment against Preventive.

A

At the outset, we conclude that Preventive has waived its argument that the MSA is an unenforceable agreement-to-agree. The parties expressly stipulated in the district court—not once, but twice—that the MSA is an enforceable contract. Regardless of these stipulations, Preventive now argues on appeal that the district court erred in accepting the parties' stipulations because the determination of whether the MSA was an enforceable contract is a question of law that must be decided by the court.

It is true that a court is not bound by the parties' stipulations regarding questions of law. *See Koch v. U.S. Dep't of Interior*, 47 F.3d 1015, 1018 (10th Cir. 1995) ("While this court will honor stipulations regarding factual issues . . . '[i]t is well-settled that a court is not bound by stipulations of the parties as to questions of law[.]'" (first alteration in original) (citation omitted) (quoting *Dimidowich v. Bell & Howell,* 803 F.2d 1473, 1477 n.1 (9th Cir. 1986))).

However, that principle does not preclude us from determining that Preventive's litigation conduct—including its stipulations—nonetheless waived the argument that the MSA is an unenforceable agreement-to-agree. *See Johnson v. Unified Gov't of Wyandotte Cnty./Kansas City*, 371 F.3d 723, 728–29 (10th Cir. 2004) (refusing to review de novo a question of law that the parties agreed to submit to the jury because "for us now to make a *de novo* determination . . . would be counter to the doctrine of invited error."). A party waives an argument when it has "intentionally relinquished or abandoned" such argument either in the district court or on appeal. *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011). One specific species of waiver is "invited error." A party may not "invite[]" an error "by suggesting that the court take particular action," and then later seek reversal on the same ground. *United States v. Teague*, 443 F.3d 1310, 1317 (10th Cir. 2006). If they do so, "we can presume that the party has acted voluntarily and with full knowledge of the material consequences." *Id.* A party that has waived an argument "is not entitled to appellate relief" on that argument. *Id.* at 1314.

We hold that, through its litigation conduct before the district court, Preventive waived its argument that the MSA is an unenforceable agreement-to-agree. Stated concisely, Preventive invited the district court to accept its stipulations that the MSA is an enforceable contract, and, accordingly, it has waived its argument before us that the court erred in treating the MSA as an enforceable contract. In other words, Preventive waived the right to claim that the MSA is an unenforceable agreement-to-agree.

More specifically, Preventive stipulated that the MSA was an enforceable contract at the June 28 pretrial conference. Preventive asked the court again at the July 7 pretrial conference to "rule that[,] as a matter of law[,] [the MSA] is an enforceable contract." Aplt.'s App. at 338. The parties then stipulated together that the MSA is an enforceable contract, and Preventive voiced no objection to the court's submission of this stipulation to the jury in the form of an instruction.

Given these stipulations, Preventive has affirmatively waived any argument that the MSA is not an enforceable contract. *See Richison*, 634 F.3d at 1127; *United States v. Cornelius*, 696 F.3d 1307, 1319 (10th Cir. 2012) ("Under the invited error doctrine, this Court will not engage in appellate review when a defendant has waived his right to challenge a jury instruction by affirmatively approving it at trial."); *cf. United States v. Cruz-Rodriguez*, 570 F.3d 1179, 1184 (10th Cir. 2009) ("[The defendant] intentionally adopted a litigation position [in the district court] that was fundamentally inconsistent with his constructive-amendment objection [on appeal] to the jury instruction. Viewed as a whole, his litigation position effected a waiver of [the defendant's] constructive-amendment appellate challenge." (footnote omitted)).[4]

[4] Moreover, even if one could conceivably argue (which seems dubious at best) that Preventive had *inadvertently* failed to make its agreement-to-agree argument before the district court, we would conclude that Preventive forfeited this argument. *See, e.g.*, *Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1259 (10th Cir. 2018) ("We ordinarily deem arguments that litigants fail to present before the district court but then subsequently urge on appeal to be forfeited."). As such, Preventive would be eligible for no more than rigorous plain error review. *See, e.g.*, *id.* at 1260. Yet Preventive has not asked for it. As a consequence of that failure, Preventive has effectively waived any review at all. *See Richison*, 634 F.3d at 1131 ("[T]he failure to argue for plain error and its application on appeal . . . surely marks the end of the

Thus, Preventive has waived its argument that the MSA is an unenforceable agreement-to-agree, and we treat the MSA as an enforceable contract.

Because we conclude that Preventive has waived its argument that the MSA is an unenforceable agreement-to-agree, we further conclude that the district court did not err in dismissing Preventive's equitable claim, or in analyzing the viability of Preventive's tort claims under the economic loss rule.

B

The district court did not err in dismissing Preventive's tort claims as barred by Utah's economic loss rule. "Whether the economic-loss rule operates . . . 'is an issue of law that we review *de novo*.'" *Haynes Trane Serv. Agency, Inc. v. Am. Standard, Inc.*, 573 F.3d 947, 962 (10th Cir. 2009) (quoting *Level 3 Commc'ns, LLC v. Liebert Corp.*, 535 F.3d 1146, 1162 (10th Cir. 2008)). Where a lawsuit is predicated on diversity jurisdiction, as here, "the federal courts are required to apply the law of the forum state." *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988). We thus consider de novo the contours of the economic loss rule as formulated by Utah courts.

On appeal, Preventive argues that the district court erred in its interpretation of the Utah Supreme Court's decision in *HealthBanc*, and so erred in dismissing its

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road for an argument for reversal not first presented to the district court."); *see also Havens*, 897 F.3d at 1259 ("We conclude that [the plaintiff] has forfeited the argument that Title II validly abrogates sovereign immunity as to his claim by failing to raise this argument before the district court, and he has effectively waived the argument on appeal by not arguing under the rubric of plain error.").

claims for fraud, fraudulent inducement, fraudulent misrepresentation, and negligent misrepresentation. We disagree. Utah's economic loss rule bars Preventive's tort claims because the tort claims "overlap completely" with Preventive's breach of contract claim. *HealthBanc*, 435 P.3d at 198. That is, the "subject matter" of the alleged misrepresentations—the Product's specifications and production readiness—is the same subject matter that forms the predicate for Preventive's breach of contract claim. As such, the economic loss rule bars Preventive's claims for fraud, fraudulent inducement, fraudulent misrepresentation, and negligent misrepresentation.

1

The economic loss rule is a judicially-created doctrine that "prevents recovery of economic damages under a theory of tort liability when a contract covers the subject matter of the dispute." *Reighard v. Yates*, 285 P.3d 1168, 1174 (Utah 2012). That is, "once there is a contract, . . . [a]ll contract duties, and all breaches of those duties . . . must be enforced pursuant to contract law." *Id.* at 1177 (second omission in original) (quoting *Grynberg v. Questar Pipeline Co.*, 70 P.3d 1, 11 (Utah 2003)). A party may maintain a cause of action in tort only if the "tort claim [is] premised upon an independent duty that exists apart from the contract." *Id.*

"[T]he economic loss rule 'marks the fundamental boundary between contract law, which protects expectancy interests created through agreement between the parties, and tort law, which protects individuals and their property from physical harm by imposing a duty of reasonable care.'" *Sunridge Dev. Corp. v. RB & G Eng'g, Inc.*, 230 P.3d 1000, 1006 (Utah 2010) (quoting *SME Indus., Inc. v.*

Thompson, Ventulett, Stainback, and Assocs., Inc., 28 P.3d 669, 680 (Utah 2001)). In essence, "the economic loss rule prevents parties who have contracted with each other from recovering beyond the bargained-for risks." *Id.*

Therefore, to determine whether the economic loss rule bars a particular tort claim, the "initial inquiry" is "whether a duty exists independent of any contractual obligations between the parties." *Davencourt at Pilgrims Landing Homeowners Ass'n v. Davencourt at Pilgrims Landing, LC*, 221 P.3d 234, 244 (Utah 2009) (quoting *Hermansen v. Tasulis*, 48 P.3d 235, 240 (Utah 2002)). If the duty "emanate[s] from bargains, [it is] within the ambit of contract law." *Reighard*, 285 P.3d at 1176. If the duty "emanate[s] from the 'interdependent nature of human society,' [it is] governed by tort principles." *Id.* (quoting 57A AM. JUR. 2D NEGLIGENCE § 82 (1989)). The "failure to properly perform a duty assigned by the contract is a breach of that contract and nothing more." *Grynberg*, 70 P.3d at 14.

The operative question under Utah Supreme Court precedent is "whether the contract covers the subject of the tort claims—or in other words whether the basis for the plaintiff's tort claims is distinct and separable from the basis for the contract claims." *HealthBanc*, 435 P.3d at 196. "'[W]hen [the] conflict [that] arises between parties to a contract [is] regarding the subject matter of that contract'. . .'the contractual relationship controls, and parties are not permitted to assert actions in tort.'" *Id.* at 197 (second, third, and fourth alterations in original) (quoting *Reighard*, 285 P.3d at 1176).

"[T]here is no fraud exception that applies where the alleged fraudulent inducement arises out of the very grounds alleged as a basis for a breach of contract action." *Id.* at 194. That is, when "alleged fraudulent inducement overlaps completely with a claim for breach of contract," the economic loss rule applies to bar a tort claim based on such inducement. *Id.* at 197. Put simply, "where the party's tort claim is a mere duplication of its breach of contract claim, there is no exception to the economic loss rule. The tort claim is barred." *Id.* at 196.

2

The district court concluded that Utah's economic loss rule bars Preventive's tort claims because they overlap completely with the subject matter of the MSA. We agree.

Preventive's breach of contract claim against nCap 5 arises from nCap 5's alleged failure to meet the requirements of the parties' signed MSA to produce the battery power storage systems. Specifically, Preventive alleged that nCap 5 breached the contract by (i) "failing to deliver the promised Products to [Preventive] to be marketed and sold"; (ii) "failing to provide information, schematics, or plans for a product that would satisfy the purpose of the MSA, continuing up to nearly ninety (90) [days] after the MSA was executed"; (iii) "failing to produce even a prototype that could satisfy the terms of the MSA"; and (iv) "failing to provide specifications as required by § 4(a) of the MSA." Aplt.'s App. at 206 (Preventive's Br. in Opp'n to the Appl. of the Economic Loss Doctrine, filed July 2, 2021); *see id.* at 651 (Trial. Tr. dated July 13, 2021) (Test. of Kevin Oleson) (saying that it was "an accurate

statement" that nCap "failed to provide information, schematics or plans . . . nearly 90 days after the signing of the agreement").

Preventive's tort claims arise from the alleged misrepresentations made by Mr. Sutera and Mr. Spencer before the MSA was executed, including misrepresentations regarding the Product's capabilities, portability, proven efficacy, and how it compared to other products on the market. The district court grouped these misrepresentations into two general categories: statements regarding the Product's specifications, and statements regarding the Product's production readiness.[5]

Preventive argues that "[i]n a literal sense, none of the fraudulent representations alleged by Preventive are representations made in the MSA" because "the parties [] never mutually agreed on [the] 'Product Specifications,'" as required by Section 4(a). Aplt.'s Opening Br. at 17, 20. That is, "the MSA does not cover (i) the specifications of the product, (ii) the portability of the product, (iii) its presence in other markets, (iv) its capabilities (meaning its ability to provide sufficient power overnight for essential home appliances—furnace, refrigerator, and lighting—and to be rechargeable in a novel way), (v) its price point, (vi) the timing of its availability to the public for sale, (vii) the timing of a protype being completed, etc.[,]" so "the MSA terms in this case do not 'contain the grounds for the tort claim[.]'" *Id.* at 20–21.

[5] We agree that these categories are an appropriate characterization of Preventive's tort claims, and thus adopt this formulation.

However, Utah law makes clear that it is not necessary that the language in the contract *literally* cover the statements underlying the claims for fraud and negligent misrepresentation, so long as the language in the contract covers the same *subject matter* as the alleged misrepresentations. *See HealthBanc*, 435 P.3d at 197 ("[W]hen 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." (quoting *Reighard*, 285 P.3d at 1176)). Here, the two general categories that the district court identified—the Product's specifications and the Product's production readiness—are the subject matter of *both* the alleged misrepresentations underlying Preventive's tort claims and the alleged failures to perform underlying Preventive's breach of contract claims.

The fact that the parties did not ultimately agree on the "Product Specifications" as required under Section 4(a) does not change this analysis. More specifically, it does not render the nCap parties' role in that failure to agree the proper basis for tort claims against them under the economic loss rule. As the district court correctly noted, the MSA expressly "contemplated Preventive and the nCap Defendants jointly determining those specifications," and "Exhibit A to the agreement [wa]s supposed to contain a description of the product." *Preventive Energy Sols.*, 2021 WL 2810092, at *3. Therefore, the nCap parties' role in failing to reach an agreement on such matters properly could be—as it was—the subject of Preventive's contractual claims. And, as such, the economic loss rule bars tort claims based on the nCap parties' same failure to agree.

Stated otherwise, the failure to agree on the "Product Specifications" is itself covered by the contract. Section 4(a) of the MSA provides that "[t]he parties hereto shall develop mutually agreeable specifications for the Product in writing not less than thirty (30) days after" the agreement's effective date. Aplt.'s App. at 47. Section 7(b) warrants that "the Product will be manufactured, packaged, and labeled . . . in material accordance with the Product Specifications" agreed to under section 4(a). *Id.* at 49. Therefore, the nCap parties' failure to engage in those negotiations and agree to the Product specifications, despite promises to do so—which constituted a predicate for Preventive's tort claims—is itself a potential basis for claims of breach of contract (i.e., the MSA).[6] Indeed, one of Preventive's grounds for breach of contract is exactly that—"failing to provide specifications as required by § 4(a) of the MSA." *Id.* at 206. Therefore, Preventive's tort claims "overlap completely" with Preventive's breach of contract claims. *HealthBanc*, 435 P.3d at 198.

Preventive cites *Ennis v. Alder Prot. Holdings, LLC*, No. 2:19-CV-00512, 2021 WL 409785 (D. Utah Feb. 5, 2021), to argue that the nCap parties had an independent duty in tort to "speak the whole truth." Aplt.'s Opening Br. at 13–14.

[6] The district court noted as much: "The parties' failure to decide upon the all-important product specifications cannot take the alleged misrepresentations outside of the reach of the contract because the failure to engage in those negotiations is a potential breach of contract claim itself by either party. Indeed, holding otherwise could potentially incentivize breaching the agreement." *Preventive Energy Sols.*, 2021 WL 2810092, at *4.

Putting aside the obvious fact that the trial court's ruling in *Ennis* is not binding on us, that case does not support a conclusion that "speaking the whole truth" is an *independent* duty—supporting a tort claim—where, as here, the subject matter that the nCap parties allegedly failed to "speak the whole truth" about is the same subject matter addressed in the contract. That is, the court in *Ennis* wrote that "[s]uch a duty is independent of the promises already included in the contract *unless* the express promise is included in the contract itself." *Ennis*, 2021 WL 409785, at *10 (emphasis added). Here, the "promises" the nCap parties allegedly made to Preventive regarding the Product's specifications and production readiness—which form the foundation for their tort claims—are the same promises contemplated by the MSA.[7]

[7] *Ennis* also involved two separate contracts—a compensation agreement that governed how the plaintiffs would be compensated, and a "Notes and Confessions of Judgment" that the plaintiffs alleged reflected fictional loans that they were fraudulently induced to sign. *See Ennis*, 2021 WL 409785, at *5, n.5. The District of Utah found that the economic loss rule did not bar the plaintiffs' fraudulent inducement tort claim because "Plaintiffs' common law fraudulent inducement claim relate[d] to the Notes and Confessions of Judgment" whereas "Plaintiffs' breach of contract claim [wa]s based on the theory that Defendants owe[d] them money under the compensation Agreements" and "d[id] not appear to relate to the Notes and Confessions of Judgment that they signed." *Id.* at *5–7. As to the plaintiffs' common law fraud claims where they alleged that both the Notes and Confessions of Judgment and the compensation agreements were fraudulent, the court found that the economic loss rule did not bar the tort claims because "the misrepresentations were not duplicated in any contract between Plaintiffs and Defendants." *Id.* at *11.

Here, however, Preventive's tort claims, and its breach of contract claims both entirely relate to the same agreement—the MSA. That is, Preventive's tort argument is that it was fraudulently induced to execute the MSA based on promises about the Product that nCap 5 could not fulfill. And that is also the subject of Preventive's breach of contract claims—that nCap 5 breached the MSA by failing to fulfill

Indeed, Utah courts have repeatedly found that the economic loss rule bars tort claims based on a party's pre-contract misrepresentations or failure to perform where the subject of such tort claims overlaps with the terms of a contract. *See, e.g.*, *Reighard*, 285 P.3d at 1178 (concluding that the plaintiffs' tort claims for negligent misrepresentation and negligence relating to mold issues in a purchased property were barred by the economic loss rule because "[t]he subject of the contract is the house, and the contract itself expressly addresses moisture-related damage to the house [so] [a]ny tort duties that [the defendant general contractor of the house] owed the [plaintiffs] regarding the house therefore overlap[ped] with [the defendant's] contract duties to the [plaintiffs]"); *Grynberg*, 70 P.3d at 12, 14 (holding that the economic loss rule barred the plaintiff's fraud-based claims, which "also allege[d] mismeasurement and/or wrongful analysis of the heating content, the same conduct that is asserted in the contract claim[,]" because "[t]he fact that the exact same conduct is described in both the contract and tort claims, and the exact same facts and circumstances are at play, is indicative of the overlapping duties in this case."); *Thorp v. Charlwood*, 501 P.3d 1166, 1173–74 (Utah App. 2021) (holding that the duty of sellers of real property to disclose material, known defects was not independent of the duties provided in the parties' real estate purchase agreement because the agreement expressly incorporated the "Seller's Disclosures," which

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promises about the Product contained in or contemplated by the MSA. Therefore, *Ennis* is also inapposite for these reasons.

imposed a duty to "disclose to buyers defects in the property known to seller"), *cert. denied*, 509 P.3d 198 (Utah 2022).

Thus, we uphold the district court's dismissal of Preventive's claims for fraud, fraudulent inducement, fraudulent misrepresentation, and negligent misrepresentation, because the subject matter of those claims overlaps completely with the subject matter of Preventive's breach of contract claims.[8]

C

Finally, we turn to Preventive's argument that the manner in which the district court held Mr. Oleson in contempt of court prejudiced Preventive and violated

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[8] The district court also noted that the merger or integration clause in section 18(g) of the MSA provides that "[t]here are no representations, warranties, undertakings, or arguments between the parties hereto with respect to the subject matter hereof except as set forth herein." *Preventive Energy Sols.*, 2021 WL 2810092, at *3 (alteration in original). The district court found that "the merger clause shows that the parties intended their agreement to supersede any prior warranties including those dealing with product specifications and production readiness, among others." *Id.* On appeal, Preventive takes issue with the district court's mention of the merger clause, arguing that "the most significant error with [the district court's] legal conclusion [that the economic loss rule applies] is that under Utah law integration clauses are not enforceable where fraud is alleged." Aplt.'s Opening Br. at 16 (citing *Lamb v. Bangart*, 525 P.2d 602, 607 (Utah 1974); *Rainford v. Rytting*, 451 P.2d 769, 770 (Utah 1969)).

However, we do not believe that the district court assigned a significant or meaningful role in its analysis supporting its determination that Preventive's tort claims were barred by the economic loss rule to its observation regarding the merger clause. Rather, in arriving at that determination, the court relied on Sections 4(a) and 7(b) of the MSA. *See Preventive Energy Sols.*, 2021 WL 2810092, at *4. And we do not consider the merger clause in our de novo analysis. Because Sections 4(a) and 7(b) of the MSA overlap completely with the subject matter of the alleged misrepresentations, we conclude that Preventive's tort claims are subsumed by the parties' contractual duties under the MSA and therefore the district court correctly dismissed Preventive's tort claims.

Preventive's right to due process. We find no plain error in the manner in which the court held Mr. Oleson in contempt and therefore reject this argument.

Preventive does not object to the determination of contempt itself or Mr. Oleson's sanction, but only with the allegedly prejudicial language used in the presence of the jury. Notably, Preventive did not raise this concern to the district court at the time Mr. Oleson was held in contempt. Preventive also declined to object to the district court's curative instructions given the following day.

Typically, alleged errors not timely raised before the trial court are forfeited; they are eligible for no more than our rigorous plain error review. *See, e.g.*, *Havens v. Colo. Dep't of Corr.*, 897 F.3d 1250, 1259 (10th Cir. 2018) ("We ordinarily deem arguments that litigants fail to present before the district court but then subsequently urge on appeal to be forfeited."); *United States v. Anaya*, 727 F.3d 1043, 1053 (10th Cir. 2013) (applying plain error review for a claim related to the prosecutor's misconduct at trial). Preventive has requested plain error review before us, and we proceed to consider its challenge under that standard. *See United States v. Jereb*, 882 F.3d 1325, 1335 (10th Cir. 2018) ("Where a particular objection to a jury instruction was not raised below, we review only for plain error."); *see also Anaya*, 727 F.3d at 1052 ("[W]hen the defendant objects at trial based on . . . [an attorney's] misconduct, the district court sustains the objection and takes curative action such as giving a jury instruction, and the defendant fails to object to the adequacy of the curative action or ask for a mistrial, we review for plain error."); *accord Johnson v. Helmerich & Payne, Inc.*, 892 F.2d 422, 425 (5th Cir. 1990) (stating that "[w]hen no objection [to

a trial judge's comments] is made at trial, . . . appellate review is limited to plain error." (quoting *Dixon v. Int'l Harvester Co*., 754 F.2d 573, 585 (5th Cir. 1985))).

"Plain error occurs when there is (1) error, (2) that is plain, which (3) affects the defendant's substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Taylor*, 514 F.3d 1092, 1100 (10th Cir. 2008). For error to be "plain," it must be "clear or obvious under current law." *United States v. McGehee*, 672 F.3d 860, 876 (10th Cir. 2012) (quoting *United States v. Cooper*, 654 F.3d 1104, 1117 (10th Cir. 2011)). In other words, the error must be "contrary to well-settled law." *United States v. Duran*, 133 F.3d 1324, 1330 (10th Cir. 1998).

Under a plain error analysis, Preventive cannot prevail. Preventive fails to show that the district court's actions were clearly or obviously erroneous under current law, or that its substantial rights were affected in light of the court's curative instruction. Indeed, Preventive has not identified any law in support of its argument that the district court's language used before the jury was clearly or obviously erroneous.

Moreover, Preventive fails to show any effect on its substantial rights given the court's curative instruction. *See United States v. Poole*, 545 F.3d 916, 921 (10th Cir. 2008) ("As a matter of law, jurors are presumed to understand and follow instructions given to them . . . ."); *cf. United States v. Morgan*, 376 F.3d 1002, 1008–09 (9th Cir. 2004) (concluding that, even though "the trial judge's participation in the examination of [the witness] was, in our view, inappropriately extensive and

suggestive of the court's own conclusion about [the witness's] credibility, it does not warrant reversal for plain error," because the defendant failed to show how his substantial rights were affected given the court's curative instructions); *United States v. Parker*, 241 F.3d 1114, 1119 (9th Cir. 2001) (determining that there was no need for reversal even though a judge's participation in trial was "extreme," as a later curative instruction was given); *United States v. Sanchez-Lopez*, 879 F.2d 541, 553 (9th Cir. 1989) (when reviewing a trial judge's remarks for plain error, concluding that "any possible adverse impact was obviated by the [curative] instruction given by the court"). Therefore, we hold that the district court did not plainly err in the manner in which it held Mr. Oleson in contempt, nor, relatedly, did it plainly deprive Preventive of due process. As such, Preventive's requested remedy of a new trial is not warranted.

III

For the foregoing reasons, we **AFFIRM** the district court's dismissal of Preventive's equitable claim, **AFFIRM** the district court's dismissal of Preventive's tort claims as barred by the economic loss rule, and, overall, **AFFIRM** the district court's judgment against Preventive.

Entered for the Court

Jerome A. Holmes
Chief Judge