

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Eastern District of Kentucky

FILED

MAY 16 2002

AT LEXINGTON
LESLIE G. WHITMER
CLERK, U. S. DISTRICT COURT

CIVIL ACTION NO. 00-261-JMH

HIGHLAND STUD INTERNATIONAL, ET AL.,

PLAINTIFFS,

V.

JUDGEMENT

BOB BAFFERT,

DEFENDANTS.

In accordance with the Memorandum Opinion and Order of even date and entered contemporaneously herewith,

IT IS HEREBY ORDERED:

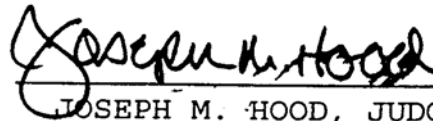
(1) That defendants' motion for summary judgment [Record No. 95] be, and the same hereby is, **GRANTED**;

(2) That defendants Bob Baffert and Mike Pegram be, and the same hereby are, **DISMISSED FROM THIS ACTION**;

(3) That all pending motions -be, and the same hereby are, **DENIED AS MOOT**; and

(4) That this action be, and the same hereby is, **STRICKEN FROM THE ACTIVE DOCKET**.

This the 16th day of May, 2002.



JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

MAY 16 2002

AT LEXINGTON
LESLIE G. WHITMER
CLERK, U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 00-261-JMH

HIGHLAND STUD INTERNATIONAL, ET AL.,

PLAINTIFFS,

V.

MEMORANDUM OPINION AND ORDER

BOB BAFFERT, ET AL.,

DEFENDANTS.

This case is before the Court on a motion by defendants for summary judgment [Record No. 95], and on a motion by plaintiffs for leave to amend Count IV of their complaint [Record No. 107]. Both motions have been fully briefed and are ripe for review.

I. FACTS

The relevant facts are, generally, undisputed. They are as follows.

On March 27, 1998, plaintiffs contracted with defendant Mike Pegram ("Pegram") for the breeding rights to former Kentucky Derby winner Real Quiet ("the 1998 agreeent"). Under the agreement, Pegram retained the stallion's racing rights. The contract left the determination of Real Quiet's retirement to the horse's trainer, defendant Bob Baffert ("Baffert") ; the contract also provided that Baffert's authority notwithstanding, Real Quiet would be retired and delivered to

plaintiffs for breeding no later than December 31, 2000. Though not a party to the agreement, Baffert was a third-party beneficiary insofar as he was to receive one "breeding right" upon the horse's retirement.¹

At some point in 1999, plaintiffs came to believe that Real Quiet had suffered a career-ending injury and, therefore, the horse should be retired for breeding pursuant to the 1998 agreement. Real Quiet was indeed injured and underwent surgery. When the surgery was deemed successful, Baffert began Real Quiet's rehabilitation and training at Santa Anita, in California. Plaintiffs were not convinced of Real Quiet's health, however, and persisted in requesting veterinary access to the horse. Defendants offered reassurances as to the

1-It is ironic that plaintiffs are alleging that defendants fraudulently or via misrepresentation wrongly perpetuated Real Quiet's racing career when it appears as though both Pegram and Baffert may have had more to gain from the horse's retirement than from its continued racing. For example, it is difficult to perceive Pegram's motivation in continuing to pay the horse's significant upkeep, maintenance, and training expenses while entertaining no real hopes of racing success. Baffert, as well, would appear to have no interest in devoting valuable time and energy to the training of a lame or injured horse. Furthermore, not only did Pegram and Baffert have something to lose from continuing to race the horse despite knowledge of its injury, both stood to gain from the horse's retirement: under the 1998 agreement, Pegram received four (4) "breeding rights" and Baffert one (1).

stallion's racing fitness but would not allow plaintiffs' veterinarians to see the horse. Among defendants' representations are Pegram's early-2000 statement that Bob Baffert had assured him of Real Quiet's racing fitness and Pegram's presentation to plaintiffs of certification from Dr. Vincent Baker, Pegram's veterinarian, of the horse's racing fitness.

On February 8, 2000, plaintiffs and Pegram entered into a second agreement ("the 2000 agreement"). This agreement provided for Real Quiet's immediate retirement and delivery to plaintiffs for breeding in exchange for consideration of \$1.1 million and favorable resolution of outstanding earnings disputes. The contract was finalized by February 15.

When Real Quiet arrived in Kentucky, plaintiffs arranged for two veterinary examinations. Both examinations revealed an acute injury to Real Quiet's suspensory ligaments, an injury that all agreed to be career-ending. Claiming that defendants either knew or should have known of Real Quiet's injury prior to the February 8 agreement, and, therefore, they should not have been forced to pay for that to which they were already entitled (the horse's retirement), plaintiffs demanded

recession of the 2000 agreement. When defendants rebuffed their demands, this litigation ensued.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there remains no genuine issue of fact so that the moving party is entitled to judgment as a matter of law. There is no material issue of fact for trial unless, in viewing the evidence in favor of the non-moving party, a reasonable fact finder could return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). "If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (citations omitted).

III. ANALYSIS

The parties' briefs in the instant action are well-reasoned and contain cogent argument. The voluminous record is characterized by incisive point/ counterpoint respecting the delicate nuances of the relevant law. Still, the facts - as applied to newly-clarified and controlling standards - paint a very different picture. The image, while not much for legal panache, is well-defined and unmistakably clear.

Plaintiffs' second amended complaint contains five claims: (I) fraud, (II) negligent misrepresentation, (III)

malpractice (versus trainer Baffert), (IV) rescission, and (V) breach of the 1998 agreement. Plaintiffs' presentation of the case suggests that the gist of this action is an attack on the 2000 agreement; plaintiffs' briefs, for example, address counts I-IV to this latter accord. Such a characterization is misleading, however. In substance, plaintiff's complaint and, for that matter, this case - is not about the 2000 agreement. Rather, plaintiffs' Counts I-IV both logically and as a matter of legal analysis collapse into Count V, the allegation of breach of the 1998 agreement.² Plaintiffs' complaint - reduced to its core - alleges nothing more (nor less) than that in declining to retire Real Quiet the

2-That this case does not turn on the legitimacy of the 2000 agreement is evidenced by the fact that, even if the 2000 contract were invalidated, plaintiffs' problems would not be resolved. Invalidation of the 2000 agreement would entitle plaintiffs to no more than return of the consideration paid under that contract. But this remedy would have no affect on the 1998 accord, under which plaintiffs were not to obtain Real Quiet's breeding rights until the horse was retired, as outlined in the agreement's paragraph 12. For the Court to find what plaintiffs ask it to find - that plaintiffs should not have been forced to contract for that to which they were already entitled - plaintiffs must first show that they were entitled to that which they claim. Specifically, plaintiffs must show that they were entitled to have Real Quiet retired pursuant to the 1998 agreement. In other words, plaintiffs still must show that defendants breached that agreement. This is what plaintiffs allege in Count V.

defendants breached the 1998 agreement, and that, because defendants should have retired Real Quiet pursuant to the 1998 agreement, plaintiffs should not have been compelled to enter into the 2000 agreement (and therefore pay additional consideration) to retire Real Quiet.

The Court's analysis of the instant case has been rendered considerably less difficult by the clarification of Kentucky law on the subject of the "economic loss doctrine." This clarification takes the form of the recent decision of the United States Court of Appeals for the Sixth Circuit in *Mt. Lebanon Pers. Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845 (6th Cir. 2002). This case resolved several outstanding questions regarding the applicability of the economic loss doctrine in Kentucky. Because these questions are of primary relevance to the instant action and because the economic loss doctrine generally controls the Court's holding in this case, a review of the economic loss doctrine - as it exists in Kentucky³ - is helpful.

³ It should be noted that Hoover Universal turns on the Sixth Circuit's prediction of Kentucky law. For this reason, this application is subject to revision by the courts of Kentucky, of course.

A. The Economic Loss Doctrine in Kentucky after *Hoover Universal*

In *Hoover Universal*, plaintiff Mt. Lebanon Personal Home Care, Inc. ("Mt. Lebanon") was a non-profit corporation that hired a contractor and an engineer to build a nursing home facility. Subsequently, a structural failure occurred in the nursing home's cafeteria. A second failure occurred a year later, forcing Mt. Lebanon to abandon the project. Believing the structural failures to have been caused by fire-retardant chemicals used to treat the lumber in the building's trusses, Mt. Lebanon brought suit in the United States District Court for the Western District of Kentucky against the manufacturer of these chemicals, Hoover Industrial. Mt. Lebanon asserted seven counts: (1) strict liability, (2) violation of express warranties, (3) violation of implied warranties, (4) negligent misrepresentation, (5) negligence, (6) gross negligence, and (7) malice. Finding Mt. Lebanon's tort claims barred by the economic loss doctrine (and its warranty claims without merit, on other grounds), the District Court granted Hoover Industrial's motion for summary judgment. *Id.*

On appeal, the Sixth Circuit began its analysis with an articulation and general overview of the economic loss doctrine. Said the Court:

The economic loss rule bars recovery in tort for economic loss. Economic loss is both substantive loss in the value of a product caused by a defect in that product (direct economic loss) and consequential loss flowing from the defect, such as lost profits (consequential economic loss). The economic loss rule marks the border between tort and contract law. Where tort law, primarily out of concern for safety, fixes the responsibility for a defective product directly on the parties responsible for placing the product into the stream of commerce, contract law gives the parties to a venture the freedom to allocate risk as they see fit. Were there no economic loss rule, "contract law [might] drown in a sea of tort."

Id. at 848 (quoting *E. River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986)) (citations omitted).

Next, the court undertook a review of the economic loss doctrine in *Kentucky*. The court first noted that the Kentucky courts have yet to specifically adopt the economic loss doctrine. The court further noted, however, that a majority of jurisdictions have adopted the economic loss rule, that a majority of these apply the doctrine to both business and consumer purchases, and that it was for these reasons that the Sixth Circuit had anticipated, in *Miller's Bottled Gas, Inc.*

v. Borg-Warner Corp., 955 F.2d 1043 (6th Cir. 1992), that the Kentucky Supreme Court would adopt the economic loss rule "in a product liability action based upon negligence." *Id.* (quoting *Miller's Bottled Gas*, 955 F.2d at 1050). The court acknowledged, however, that their decision in *Miller's Bottled Gas* was at least partly overruled in *Real Estate Mktg., Inc. v. Franz*, 855 S.W.2d 921 (Ky. 1994), wherein the Kentucky Supreme Court declined to apply the economic loss rule to a *consumer* purchase.

Having surveyed the doctrine's history, the *Hoover Industrial* court identified the outstanding issue and the very question presented by the facts of that case: given that the Kentucky Supreme Court had rejected that part of the court's holding in *Miller's Bottled Glass* respecting *consumer* purchases, was *Miller's Bottled Glass* still the law respecting *business* purchases?

In answering in the affirmative, the court found *Franz* (economic loss rule *not* applicable to consumer purchases) consistent with *Miller's Bottled Gas* (economic loss rule *applicable* to business purchases). Wrote the court:

[T]here is no reason for us not to follow our earlier decision in *Miller's Bottled Gas* and predict that **the Kentucky Supreme Court will**

apply the economic loss rule to bar a tort claim in a case that involves a business purchase. We recognize that the language used in Miller's *Bottled Gas* makes no distinction between business and consumer purchases. Yet *Miller's Bottled Gas*, if confined to its facts - i.e., a business purchase - is wholly consistent with Franz.

Id. at 849 (emphasis added). The Court buttressed its holding by noting that "[a] majority of jurisdictions . . . have applied the economic loss doctrine to business purchases, as has the Kentucky Court of Appeals," and that "the weight of the academic commentary favors this approach." *Id.* (citing, respectively, *Falcon Coal Co. v. Clark Equip. Co.*, 802 S.W.2d 947 (Ky. Ct. App. 1990) & Louis R. Frumer & Melvin I. Freidman, *Products Liability*, § 13.11[1-3] (2000)).

In sum, the Sixth Circuit predicted that the Kentucky Supreme Court would apply the economic loss rule to business but not consumer - purchases. Because the instant case presents tort claims arising from a business purchase, the economic loss rule governs this case.⁴

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To the extent that plaintiff attempts to distinguish the instant action on the grounds that the underlying transaction involved the purchase not of a "good" per se (i.e., the horse) but only certain rights to that "good," (i.e., breeding rights) the Court is unpersuaded. For one, the language of *Hoover Industrial* is quite plain: the economic loss rule applies to bar torts claims arising not only from purchases of

B. Application of the Economic Loss Rule to Plaintiffs' Fraud, Negligent Representation, Malpractice, and Recission Claims (Counts I-IV)

Notwithstanding the Sixth Circuit's holding in *Hoover industrial*, plaintiffs attempt to rescue their fraud and negligent misrepresentation claims by arguing that, even assuming the applicability of the economic loss rule, fraud and negligent misrepresentation claims are recognized exceptions. These claims are discussed in turn.

First, respecting the availability of a fraud exception, it should be recognized that other jurisdictions have decided this question differently. See *Purizer Corp. v. Battelle Mem'l Inst.*, 2002 WL 22014 (January 7, 2002, N.D. Ill.) at *5 n.7 (comparing New Jersey law, which does not bar parties from recovering fraud damages for purely economic loss, to Michigan law, which does). There is no clear consensus. Also, a

goods themselves, but any transaction that may be characterized a "business purchase." *Hoover Industrial*, 276 F.3d at 849. Second, the economic loss **rule bars** tort claims seeking recovery not only for damage to products themselves but also for consequential economic loss. *Gooch v. E.-T. Du Pont De Nemours & Co.*, 40 F. Supp. 2d 863, 875 (W.D. Ky 1999) (finding plaintiff's claims to be barred by the economic loss rule because the plaintiff was "ultimately seek[ing] to recover for consequential damages resulting from a commercial transaction).

review of the case law reveals that, even when fraud exceptions have been recognized, the exceptions have been narrow and have been limited to "extraneous" fraud - in other words, fraud unrelated to contract performance.⁵ Even assuming the existence of a fraud exception, then, the sort of performance-related fraud alleged in the instant case does not fit into the exception. As well, even if there is a fraud exception to the economic loss rule in Kentucky, and that this fraud exception does extend to the sort of performance-related fraud alleged in the instant action, plaintiffs have failed to proffer evidence sufficient to meet the heightened "clear and convincing" standard for fraud claims. See *Hardin v. Savageau*, 906 S.W.2d 356 (Ky. 1995). In short, assuming - without deciding - the existence of a fraud **exception**, that exception is narrower than plaintiffs perceive and, in any event, cannot be proven based on the record evidence.

Second, respecting the availability of a negligent misrepresentation exception, here too plaintiffs tread on shaky legal ground. As with the fraud exception, in answering

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Extraneous fraud has also been described as "fraud in the inducement." See, e.g., *Dinsmore Instrument Co. v. Bombardier, Inc.*, 999 F. Supp. 968 (E.D. Mich. 1998).

the question whether there exists a negligent representation exception courts have answered inconsistently.⁶ It appears that most courts, however, have answered in the negative. See *Sebago Inc. v Beazer East, Inc.*, 18 F. Supp. 2d 70, 95-96 (D. Mass. 1998) (providing a detailed review of courts' rejection of a negligent misrepresentation exception). Given that a primary underlying rationale for the economic loss doctrine is to ward against tort-based end-runs of contract law, the Court considers this to be the proper view.⁷

6-Because *Hoover Industrial* held that the economic loss rule barred each of plaintiff's tort claims - negligent misrepresentation included - it might plausibly be argued that the question whether a negligent misrepresentation exception exists was resolved in *Hoover Industrial itself*. It is unclear whether the issue was argued, however, and it is for this reason that the Court considers the exception herein.

7-As stated by the United States District Court for the District of Massachusetts:

[P]laintiffs should not be able to circumvent the policies of the economic loss doctrine by recasting a negligence or product liability claim as a claim for negligent misrepresentation. As one commentator notes, "[w]ith increasing frequency, plaintiffs are presenting their negligence claims in the form of claims for negligent misrepresentation in an attempt to circumvent the economic loss rule."

Sebago Inc. v. Beazer East, Inc., 18 F. Supp. 2d 70, 97 (D. Mass. 1998) (quoting Reeder R. Fox & Patrick J. Loftus, *Riding*

This triumvirate of findings - namely, that (1) plaintiffs' fraud and negligent misrepresentation claims are subsumed by plaintiffs' breach of contract claim (Count V), (2) the economic loss doctrine applies to plaintiffs' tort claims (Counts I-IV), and (3) fraud or negligent misrepresentation exceptions are unavailing - imitate the holdings of the United State District Court for the Northern District of Illinois in a recent case presenting facts strikingly similar. See *Purizer Corp. v. Battelle Mem'l Inst.*, 2002 WL 22014 (N.D. Ill. 2002). The *Purizer Corp.* opinion is well-reasoned, and the Court therefore adopts the court's analysis of the economic loss rule and related fraud and negligent representation claims as detailed therein.

In *Purizer Corp.*, plaintiff entered into a contract with defendant pursuant to which ,defendant was to perform scientific research on plaintiff's trade product. Defendant conducted its research and informed plaintiff of the product's chemical composition and effectiveness. In reliance on defendant's representations, plaintiff developed a business

the Choppy Waters of East River: The *Economic Loss* Doctrine Ten Years Later, 64 Def. Couns. J. 260, 268 (1997)) (second alteration in original).

plan, marketed the product, and secured investors. Subsequently, however, it was revealed that defendant's representations had been erroneous. Plaintiff was ultimately forced to abandon the commercialization of its product. Plaintiff then sued defendant alleging fraud, negligent misrepresentation, breach of contract, and unjust enrichment.⁸

The court, however, found that, because plaintiff's negligent misrepresentation claim and fraud claims were "intertwined" with its breach of contract claim, the economic loss rule barred recovery in tort. Instead, said the court, "[t]he relationship between plaintiff and defendant is contractual, and is not based on some independent legal source. Plaintiff therefore cannot maintain its negligent misrepresentation and fraud claims independent of its breach of contract claim." *Id.* at *4.

Perhaps more than any other case, the Purizer Corp. decision illustrates the proper application of the economic

8-The Court notes that there is little difference - if any between an action for recession and one for unjust enrichment. In the instant case, for example, in seeking recession of the 2000 agreement plaintiff is really seeking return of the \$1.1 million paid pursuant to that contract; in other words, plaintiff is claiming that defendants have been "unjustly enriched" to the tune of \$1.1 million.

loss rule in cases such as the instant one. As in Purizer Corp., in the instant case the nature of the relationship between plaintiffs and defendants was exclusively contractual; unlike in those cases where courts have declined to apply the economic loss rule, there was in the instant case no "independent legal source" of the parties' relations. As in Purizer Corp., in the instant case the alleged fraud and ,misrepresentation occurred in the course of the defendants' contractual performance.

Unlike in Purizer Corp., however, plaintiffs' alleged ;damages take the form of consideration paid pursuant to a second contract (the 2000 agreement), an agreement entered into in order to obtain precisely that to which plaintiffs were allegedly entitled pursuant to the original contract (the 1998 agreement). In the instant case, this second contract (the 2000 agreement) is a red herring: although plaintiffs claim that defendants' alleged fraud and misrepresentations amounted to fraud in the inducement of the second contract (the 2000 agreement), in substance defendants' purported fraud and misrepresentations relate to the original contract's performance. This is so because the thrust of plaintiffs' case is that defendants knew or should have know that Real

Quiet was injured, and therefore should have retired him pursuant to the 1998 agreement. Thus, in alleging that defendants fraudulently and by misrepresentation hid or failed to identify the horse's injury, plaintiffs allege fraud and misrepresentation *in the performance* of the 1998 agreement. As outlined above, however, because these fraud and misrepresentation claims are intertwined with plaintiffs' breach claim, the economic rule bars them.

To summarize, then, the Sixth Circuit's recent clarification/prediction of Kentucky's version of the economic loss rule (in *Hoover industrial*) renders plaintiffs' Counts IIV untenable. The rule does not admit of any fraud, misrepresentation, or any other form of exception.⁹

8-Because plaintiffs do not press the issue, the Court addresses plaintiffs' assertion that the economic rule does not bar plaintiffs' Count IV "recession" claim only briefly. Plaintiffs argument in support of this proposition relies not on affirmative and cited authority, but rather on the absence of authority for the opposite proposition (that the rule *does* bar recession claims). The Court finds that, although the Sixth Circuit had no occasion to address the issue in *Hoover industrial*, recession claims logically fall within the holding of that case. This conclusion is supported by other authority from sister jurisdictions. *See, e.g., Snyder v. Boston Whaler, Inc.*, 892 F.Supp. 955 (W.D. Mich. 1994); *Merchants Publ'g Co. v. Maruka Mach. Corp. of America*, 800 F.Supp. 1490 (W.D. Mich. 1992) (holding that actions for fraud, negligent misrepresentation, and recession cannot be maintained in tort

Plaintiffs' Counts I-IV collapse into Count V, plaintiffs breach of contract claim (relating to the 1998 agreement), which remains outstanding.

C. Plaintiffs' Count V - Breach of the 1998 Agreement

As noted above, the entire thrust of plaintiffs' case is that defendants knew or should have known about Real Quiet's career-ending injury before the injury was discovered through veterinary examination in the wake of the parties' 2000 agreement. Plaintiffs allege that because this injury was or should have been detected, defendants were obligated under the 1998 agreement to retire the horse, and in failing to do so breached their agreement. Plaintiffs' allegations that defendants misrepresented Real Quiet's health or fraudulently concealed the horse's true condition are, while quite sensational, legally irrelevant.,

That plaintiffs' conspiracy theories and allegations of duplicity are of no legal force is made evident by the 1998 agreement itself. That agreement, while murky in other areas, is perfectly clear on the issue of Real Quiet's retirement. Specifically, paragraph 12 of the agreement states that "Bob

under Michigan law because plaintiffs' claims derived from the parties' contract).

Baffert, as trainer, will determine when to retire the Colt from active racing and training In all events, the Colt shall retire from active racing and training no later than December 1, 2000." The language is unmistakable; Baffert's discretion is unqualified. Yet, despite the unambiguous language, plaintiffs ask the Court to read in a different standard.¹⁰ Because the language is so unambiguous, the Court declines plaintiffs' invitation. In the absence of any contractual limitations, Baffert's actions are reviewed only for abuse of discretion or bad faith.

10-Plaintiffs' response to defendants' motion for summary judgment seems to interpret the contract's retirement provision inconsistently, interpreting the language differently in the context of its various claims, presumably to suit the needs of its various allegations. For example, in the introduction to plaintiffs' response, plaintiffs' state that "Pegram was obligated to deliver Real Quiet to Plaintiffs under the parties' March, 1998 **agreement when the horse** could no longer race." [Plaintiffs' Response to Defendants' Motion for Summary Judgment, Record No. 96, at 1] . (The problem with this interpretation, of course, is that it is patently at odds with the contract's paragraph 12.) Later, however, in attempting to assert - for the first time - a claim for breach of fiduciary duty (a claim that, because it was not pleaded, the Court does not formally consider and, in any event, is wholly without merit), plaintiffs take a different view. There, plaintiffs cite paragraph 12 as authority for the proposition that "[a]ny decision to retire Real Quiet earlier [than December 31, 2000] was entrusted to Baffert." In this sense, plaintiffs' brief is internally inconsistent.

In this way, plaintiffs' case reduces to basic principles of common law contract interpretation. The 1998 agreement -the validity of which is not challenged - says that Bob Baffert decides. Bob Baffert, however, never decided. Accordingly, the defendants' were not obligated to retire the horse. The contractual language is straightforward, and the Court will not permit plaintiffs to render a simple matter complex.

IV. CONCLUSION

The Sixth Circuit's recent decision in *Hoover Industrial* clarifies its perception of Kentucky's economic loss rule and applies to bar plaintiffs' Counts I-IV. Plaintiffs' contentions notwithstanding, exceptions to the rule - if extant - are not implicated. Plaintiffs' complaint collapses into its Count V breach of contract claim, and the application of basic common law principles of contract construction compels the Court to look to the contract's unmistakable language. Under paragraph 12 of the 1998 agreement, Bob Baffert - and *Bob Baffert alone* - possessed the authority to retire Real Quiet, and his authority was unqualified. Bob Baffert never exercised this power. Consequently, injury or no injury, it cannot be said that defendants were somehow

"obligated" to retire Real Quiet. Because the defendants were not obliged to retire the horse, in failing to do so defendants did not breach the 1998 agreement. Count V fails.

Accordingly,

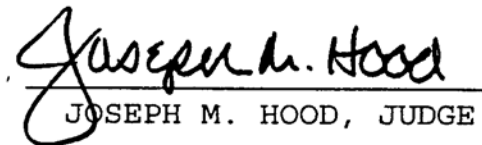
IT IS ORDERED

(1) That plaintiffs' motion to amend Count IV [Record No. 107] be, and the same hereby is, **GRANTED**;

(2) That defendants' motion for summary judgment [Record No. 95] be, and the same hereby is, **GRANTED**; and

(3) That this action be, and the same hereby is, **STRICKEN** from the active docket.

This the 16th day of May, 2002.


JOSEPH M. HOOD, JUDGE

Date of Entry and Service: