each other." This argument finds no support in the counterclaim. Indeed, the counterclaim is devoid of any allegations suggesting that Hayden Construction purchased any good or service from TSA. Rather, the counterclaim makes clear that (1) Hayden Construction was a seller of construction and remodeling services and (2) TSA purchased these services.

As a seller, rather than a purchaser, the UPA does not confer standing on Hayden Construction. Therefore, this counterclaim will be dismissed.

**III. The Implied Covenant of Good Faith and Fair Dealing Counterclaim**

Hayden Construction alleges that "TSA, by its acts described above, violated its contractual duty of good faith and fair dealing." (Counterclaim ¶ 35.) In New Mexico, every contract imposes a duty, whether express or not, of good faith and fair dealing (the "implied covenant") upon all parties in the performance and enforcement of the agreement. *WXI/Z Sw. Malls v. Mueller*, 110 P.3d 1080, 1087 (N.M. App. 2005), *cert. denied*, 112 P.3d 1111. The implied covenant prohibits each party from taking action that would injure the right of the other to receive the benefits of the contract. *Watson Truck & Supply Co. v. Males*, 801 P.2d 639, 642 (N.M. 1990). To establish a breach of the implied covenant, a claimant must show that the defendant wrongfully and intentionally engaged in action to the detriment of the claimant in order to deprive the claimant of contractual benefits. *WXI/Z Sw. Malls*, 110 P.3d at 1087-88.

Hayden Construction's allegation that TSA violated the implied covenant must be considered with respect to two distinct agreements: 1) the Written Contracts for construction and remodeling work at TSA retail stores and 2) the alleged oral contracts for remodeling the private real estate of a TSA officer and the payment of travel and entertainment expenses of a different TSA officer.

The counterclaim does not allege that TSA in any way breached its Written Contracts with Hayden Construction for construction and remodeling work at TSA retail stores. Nor does it allege that TSA in any way injured Hayden Construction's right to receive the benefit of these Written Contracts. Therefore, the counterclaim does not state a claim for breaching the implied covenant with respect to the Written Contracts for remodeling and construction work at TSA retail stores.

The counterclaim does, however, assert that TSA breached the alleged oral contracts for remodeling the private real estate of a TSA officer and the payment of travel and entertainment expenses of a different TSA officer. (Counterclaim ¶ 31.) TSA argues that Hayden Construction cannot assert a claim for breach of the implied covenant because there was no written agreement upon which it could premise a contractual right. However, TSA does not cite any legal support for this argument. Moreover, the Supreme Court of New Mexico has held that a contract may be formed and breached orally. *Romero v. Mervyn's*, 784 P.2d 992, 997 (N.M. 1989) (finding that an oral contract was formed when a store manager promised an injured customer that the store would pay her medical expenses). The Supreme Court also found that such a contract may give rise to a claim for breach of the implied covenant. *Id.* at 257.

Under the Rule 12(b)(6) standard, Hayden Construction's counterclaim adequately alleges the formation and breach of oral contracts for remodeling the private real estate and the payment of travel and entertainment expenses for TSA officers.[1] For a contract to be legally valid and

[1] The Court notes that this counterclaim may be more properly styled as one for promissory estoppel. The elements of promissory estoppel are: "1) an actual promise must have been made which in fact induced the promisee's action or forbearance; 2) the promisee's reliance on the promise must have been reasonable; 3) the promisee's action or forbearance must have amounted to a substantial change in position; 4) the promisee's action or forbearance must have been actually foreseen or reasonably foreseeable to the promisor when making the promise; and 5) enforcement of the promise is required to prevent injustice." *Strata Prod. Co. v. Mercury*

enforceable, it must be supported by an offer, acceptance, consideration, and mutual asset. *Garcia v. Middle Rio Grande Conservancy Dist.*, 918 P.2d 7, 10 (N.M. 1996). Viewed in the light most favorable to Hayden Construction, the counterclaim alleges: 1) TSA offered to compensate Hayden Construction on future construction projects in exchange for Hayden Construction remodeling a TSA officer's private real estate and paying for a different TSA officer's entertainment and travel expenses; 2) Hayden Construction accepted this offer; 3) Hayden Construction provided consideration to TSA for this promise by remodeling the private real estate and paying for the travel and entertainment expenses; and 4) the parties had the same understanding of the agreement. The counterclaim adequately alleges breach of the implied covenant in that it asserts TSA failed to compensate Hayden Construction for the remodeling and travel and entertainment expenses and, in fact, never intended to provide such compensation. (Counterclaim ¶¶ 27, 31.)

Thus, with respect to the Written Contracts for construction and remodeling work at TSA retail stores, TSA's motion to dismiss the claim for breach of the implied covenant is granted. However, with respect to the alleged oral contracts for remodeling private real estate and paying for travel and entertainment expenses, TSA's motion to dismiss the claim for breach of the implied covenant is denied.

## IV. The Economic Duress Counterclaim

The counterclaim alleges that TSA "used its economic advantage to coerce Hayden Construction, Inc. into executing contracts, which resulted in damage to [it]." (Counterclaim ¶ 18.) Preliminarily, the Court notes that New Mexico recognizes economic duress claims arising under both contract and tort law. *Compare Richards v. Allianz Life Ins. Co. of N. Am.*, 62 P.3d 320, 328 (N.M.

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*Exploration Co.*, 916 P.2d 822, 828 (N.M. 1996).

App. 2002) (analyzing economic duress under contract law where the remedy is excusing performance of the contract) *with Elec. Prods. Co. v. Combined Commc'ns Corp.*, 535 F. Supp. 356, 359-60 (D.N.M. 1980) (analyzing economic duress as a tort where remedy is damages). While Hayden Construction has asserted an economic duress claim arising under contract law as an affirmative defense, the economic duress claim alleged in its counterclaim is one for tort.

To assert a tort claim for economic duress under New Mexico law, a claimant must allege the following elements: 1) the defendant had a duty to present the claimant with a choice of reasonable bargaining alternatives; 2) the defendant breached that duty; and 3) the breach caused the claimant to enter into an unfavorable bargain against his will. *Long Island Lighting Co. v. Bokum Res. Corp.*, 40 B.R. 274, 293 (Bankr. D.N.M. 1983).

The duty to present reasonable bargaining alternatives only arises when the defendant "holds the power to deal a fatal, or at least a very severe, economic injury to the" claimant. *Elec. Prods. Co.*, 535 F. Supp at 360. This duty is breached when the defendant coerces the claimant into executing the contract by some wrongful act. *Richards*, 62 P.3d at 327.

As with the counterclaim for breach of the implied covenant, the economic duress counterclaim must be considered with regard to two distinct agreements: 1) the Written Contracts for construction and remodeling work at TSA retail stores and 2) the alleged oral contracts for remodeling the private real estate and the payment of travel and entertainment expenses for TSA officers.

Regarding the Written Contracts, TSA argues that Hayden Construction has not established the first element. In support of this argument it cites *Strickland Tower Maint., Inc. v. AT&T Commc'ns Inc.* for the proposition that the first element of an economic duress claim is not

established by the mere fact that the defendant company provides a high percentage of plaintiff company's revenue. 128 F.3d 1422, 1426-27 (10th Cir. 1997). The Court has considered this argument and finds that it is not controlling on this motion to dismiss for two reasons. First, the Tenth Circuit Court of Appeals did not make this finding in the context of a Rule 12(b)(6) motion to dismiss. Rather, it held, in the context of a post-verdict appeal, that the plaintiff had not established legally sufficient evidence of economic duress. Second, *Strickland* analyzed Oklahoma law, not New Mexico law. *Strickland,* 128 F.3d at 1426.

The counterclaim states that, over the past several years, TSA supplied Hayden Construction with eighty to ninety percent of its projects. (Counterclaim ¶ 8.) Under the Rule 12(b)(6) standard of review, this assertion sufficiently alleges that TSA had the power to deal Hayden Construction a fatal or very severe economic blow. Thus, the counterclaim sufficiently alleges the first element.

The counterclaim does not, however, adequately allege either the second or third element. Hayden Construction's theory appears to be that its agreements to remodel private real estate and pay for travel and entertainment expenses establish that it was coerced into executing the Written Contracts. However, these allegations suggest just the opposite: Hayden Construction was so willing to execute the Written Contracts that it agreed to remodel private real estate and cover expenses for TSA officers. Indeed, the counterclaim is devoid of any allegations that TSA threatened or otherwise acted wrongfully in an effort to coerce Hayden Construction into executing the Written Contracts for construction and remodeling work at TSA's retail store locations. The counterclaim is also devoid of any allegations that the Written Contracts are in any way unfavorable to Hayden Construction or that Hayden Construction entered into the Written Contracts against its will.

Therefore, the counterclaim does not sufficiently allege an economic duress claim regarding the Written Contracts.

However, viewed in the light most favorable to Hayden Construction, the counterclaim does adequately allege a claim for economic duress with respect to the alleged oral contracts to remodel private real estate and pay for travel and entertainment expenses. As set forth above, the counterclaim adequately alleges that TSA had the power to deal Hayden Construction a fatal or, at least, severe economic blow since it supplied Hayden Construction with eighty to ninety percent of its work.

The counterclaim also adequately alleges the second and third elements. Relevantly, the Supreme Court of New Mexico has held, "Fear of an economic loss is a form of duress." *Pecos Constr. Co. v. Mortgage Inv. Co. of El Paso*, 459 P.2d 842, 845 (N.M. 1969). Thus, under the 12(b)(6) standard, the counterclaim can be read to allege that TSA coerced Hayden Construction into agreeing to remodel the private real estate and pay for the travel and entertainment expenses by threatening to cease providing it with construction and remodeling projects at its retail store locations. The counterclaim can also be read to allege that, based on this threat, Hayden Construction agreed to the oral contracts against its will. Therefore, the counterclaim sufficiently alleges an economic duress claim with respect to the oral contracts to remodel the private real estate and pay for the travel and entertainment expenses of the TSA officers.

Thus, with respect to the Written Contracts for construction and remodeling work at TSA retail stores, TSA's motion to dismiss the economic duress claim is granted. However, with respect to the alleged oral contracts for remodeling private real estate and paying for travel and entertainment expenses, TSA's motion to dismiss the economic duress claim is denied.

## Conclusion

Based on the foregoing, the motion to dismiss will be granted in part and denied in part.

## ORDER

Based on the foregoing memorandum opinion, Plaintiff's motion to dismiss (Doc. 10) is hereby GRANTED in part and DENIED in part.

DATED September 27, 2006.

UNITED STATES DISTRICT JUDGE
BRUCE D. BLACK

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