

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CRYOLIFE, INC.,)

Plaintiff,)

vs.)

MEDAFOR, INC.,)

Defendant.)

CIVIL ACTION NO.
1:09-CV-1150-CAP

**Reply Brief in Support of Plaintiff's
Motion for Partial Reconsideration**

Medafor's Response studiously ignores the heart of CryoLife's Motion. It instead urges the Court to ignore the Motion by mislabeling CryoLife's argument as a reiteration of arguments that have already been fully briefed. It ducks the fact that the Court dismissed CryoLife's fraud claims in their entirety despite the fact that **Medafor only sought dismissal of those claims in part.** It also side-steps any discussion of the fundamental basis for CryoLife's Motion—*i.e.*, that the fraud and negligent misrepresentation claims do not hinge on a novel or unrecognized theory of fraud. In short, Medafor's Response misses the point.

First, despite Medafor's assertions to the contrary, CryoLife's Motion falls squarely within one of the three valid grounds for such a motion: the presence of a "clear error of law or fact." *See, e.g., Reid v. BMW of North America*, 464 F. Supp. 2d 1267, 1271 (N.D. Ga. 2006) (Shoob, J.) (granting reconsideration of an order based on a clear error of law); *Frascona v. Minnesota Mut. Life Ins. Co.*, 53 F. Supp. 2d 1282, 1283 (N.D. Ga. 1998) (Thrash, J.) (same); *see also Furukawa Electric N.A., Inc. v. Sterlite Optical Technologies, et. al.*, Civil Action No. 1:02-CV-2149-CAP (N.D. Ga. Nov. 18, 2008) (Pannell, J.) (granting a motion for reconsideration). To put it plainly, CryoLife respectfully maintains that, in light of clear precedent, the dismissal of CryoLife's fraud claims *in toto* constituted a clear error of law.

CryoLife does not seek reconsideration simply to rehash old arguments or to "show this Court how it could have done better," as Medafor argues throughout its response. In fact, Medafor's assertion that CryoLife's Motion is simply a "reiteration" of arguments that have been "fully briefed" by both parties is demonstrably false. The grounds for the Court's dismissal—that the claims were based on an unrecognized theory of fraud—was something Medafor **never** raised in either of its motions to dismiss. As a result, the issue was never briefed.

Second, Medafor once again acknowledges that CryoLife's fraud claims for misrepresentations in the parties' Exclusive Distribution Agreement ("EDA") are based on the well-recognized theory of fraudulent inducement by alleged misrepresentations **in** a contract. *See* Def.'s Resp. Br. [51] at 8. As Medafor put it, "CryoLife's claim based upon alleged misrepresentations in the EDA *is* a claim for fraudulent inducement." *Id.* (emphasis in original). Medafor's position is thus directly at odds with the Court's holding that the fraud claims based on misrepresentations in the EDA should be dismissed because CryoLife alleged a non-existent cause of action. (Order [43] at 18.)

Of course, in addition to fraudulent inducement claims based on misrepresentations in the EDA, CryoLife also has properly asserted fraud claims based on misrepresentations made by Medafor to CryoLife *after* execution of the EDA. Medafor implicitly concedes that CryoLife is not asserting those claims based on some novel, unrecognized theory of liability, as it fails to make **any** mention of that argument in its responsive papers. In fact, Medafor never even sought the dismissal of that particular aspect of CryoLife's fraud claims in the first instance.

Ultimately, the labels applied to CryoLife's fraud claims make little difference. Whether they are styled as claims for fraudulent inducement, ordinary fraud, or some other sub-category of fraud, their viability rests not

on the label they are given, but on whether each necessary element of a fraud claim was adequately pled. As CryoLife explained in its motion for reconsideration—and, critically, as Medafor has failed to address or rebut—CryoLife has properly alleged its fraud and negligent misrepresentation claims for two distinct subcategories of misrepresentations. And that is precisely why reconsideration is appropriate in this case.

CONCLUSION

In sum, CryoLife respectfully submits that its motion for partial reconsideration should be granted. The Order was in clear error to dismiss CryoLife's claims for fraud and negligent misrepresentation to the extent that those claims were based on misrepresentations made by Medafor to CryoLife (i) **in** the EDA itself, or (ii) **after** the EDA was executed.

Respectfully submitted this 6th day of January 2010.¹

/s/ Henry R. Chalmers
Henry R. Chalmers
Georgia Bar No. 118715
henry.chalmers@agg.com
Scott A. Wandstrat
Georgia Bar No. 736514
scott.wandstrat@agg.com
Jared M. Lina
Georgia Bar No. 191099
jared.lina@agg.com

¹ Counsel hereby certifies that this document has been prepared in Century Schoolbook font (13 point), in accordance with Local Rule 5.1C.

ARNALL GOLDEN GREGORY LLP
171 17th Street, N.W., Suite 2100
Atlanta, GA 30363
Telephone: 404.873.8646
Facsimile: 404.873.8647

Counsel for Plaintiff CryoLife, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing **Reply Brief in Support of Plaintiff's Motion for Partial Reconsideration** with the Court using the CM/ECF system, which will send notification of such filing to the following:

Lisa L. Heller
V. Robert Denham, Jr.
ROBINS, KAPLAN, MILLER & CIRSEI L.L.P.
2600 One Atlanta Plaza
950 East Paces Ferry Road, N.E.
Atlanta, Georgia 30326-1386

This 6th day of January 2010.

/s/ Henry R. Chalmers
Henry R. Chalmers
Georgia Bar No. 118715