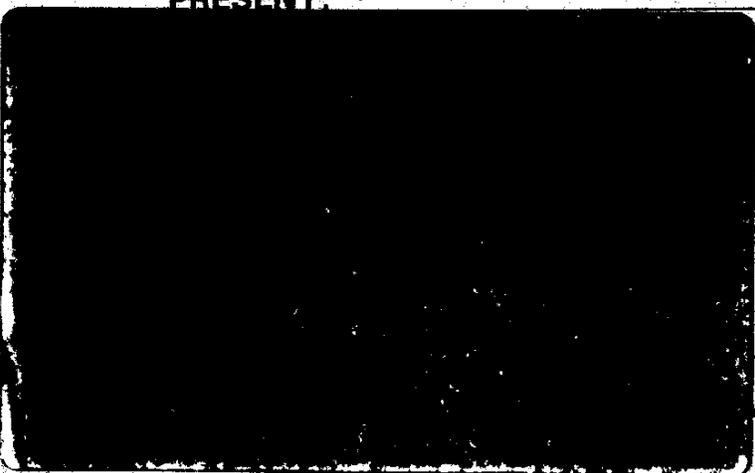


SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. BERNARD J. FRIED**

PART 60



Justice

E-FILE

INDEX NO. 602182-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

PAPERS NUMBERED

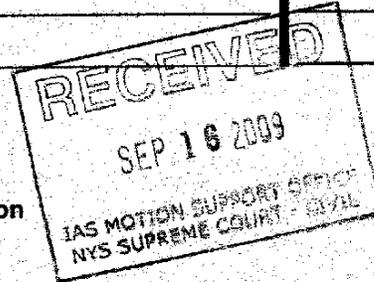
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion



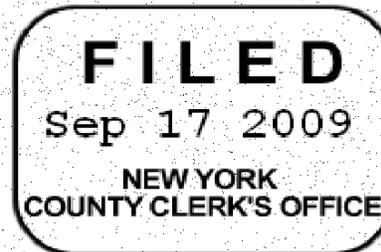
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

This motion is decided in accordance with the accompanying memorandum decision.

A status conference will be held in this action on **October 23, 2009 at 10:30 a.m.**, in Part 60.

SO ORDERED

Handwritten signature/initials



Dated: 9/16/09

Bernard J. Fried
HON. BERNARD J. FRIED J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIV. PART 60

-----X
PACNET NETWORK LTD.,

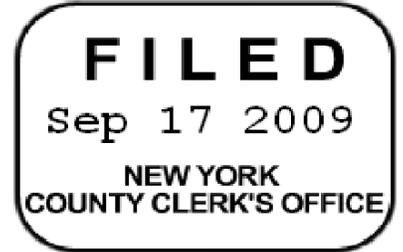
Plaintiff,

- against -

Index No. 602182/08

KDDI CORPORATION,

Defendant.
-----X



APPEARANCES:

For Plaintiff:

For Defendant:

Orrick, Herrington & Sutcliffe LLP
666 Fifth Avenue
New York, NY 10103
(Michael C. Hefter, Linda A.
Rosenthal)

Morrison & Foerster LLP
1290 Avenue of the Americas
New York, NY 10104-0050
(James E. Hough, Daniel Matza-Brown)

FRIED, J.:

Plaintiff Pacnet Network Ltd. (Pacnet) brings this action for damages and declaratory relief against defendant KDDI Corporation (KDDI) for breach of contractual warranties, gross negligence, and negligent and fraudulent misrepresentation in connection with KDDI's design and construction of a submarine fiber optic telecommunications cable system known as the East Asia Crossing Cable System (the System or the EAC 1 System), designed to transmit telecommunications data between Japan, South Korea, Taiwan and Hong Kong. Pacnet owns and operates the System. The dispute arises from the alleged failure of certain components of the System known as "repeaters," and the laser diodes within them, which are used to amplify light signals at various points in the System so that data can be transmitted over long distances with minimal degradation.

By this motion, KDDI moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss plaintiff's causes of action for gross negligence (fifth), negligent misrepresentation (sixth) and fraudulent inducement (seventh) for failure to state a cause of action and based on documentary evidence. KDDI also moves to strike the complaint's prayer for relief to the extent that it seeks remedies, including attorneys' fees, that KDDI contends are not permitted by law and/or exceed what was agreed to by the parties.

On December 17, 1999, Pacnet and KDDI entered into a Project Development and Construction Contract (Contract), pursuant to which KDDI agreed to construct the System. Due to the significant investment in the construction of the System, and the critical necessity for performance reliability, Pacnet contends that it contracted for, and KDDI agreed to, broad performance warranties. In Article 10 (A) of the Contract, KDDI warranted that "the System . . . , and its spares, shall be free from defects in supplies, workmanship and design for a period of five (5) years from the Date of Provisional Acceptance of the System" In Article 10 (B) of the Contract, KDDI warranted that the "Design Life" of the System would be 25 years. In addition to other warranties, Pacnet alleges that KDDI agreed to repair and replace any defective parts under certain circumstances and pay for repairs, including costs, incurred by Pacnet in the event that it was forced to make the necessary repairs.

The complaint alleges that KDDI selected two types of laser diodes for the System's repeaters: laser diodes manufactured by Mitsubishi Chemical Corporation (MCC) and laser diodes manufactured by Mitsubishi Electric Company (MELCO). In April of 2001, and in connection with the granting of provisional acceptance of Phase 1A of the System, the parties identified certain problems with the performance of the MCC repeaters. These problems led

to a new round of negotiations concerning the scope of KDDI's warranty obligations with respect to those problems. In November 2002, the parties executed an amendment to their contract, known as Contract Variation No. 19 (CV 19). The preamble of CV 19 states, in pertinent part, as follows:

WHEREAS the Parties have identified a higher-than expected FIT rate¹] with respect to the MCC laser diodes that has raised concerns regarding the remaining MCC laser diodes in the System, which was noted as a deficiency at the time of Provisional Acceptance of Phase 1B(II); and

WHEREAS the Parties have further identified an issue relating to the current surge protector circuit of the OSW-3 repeater which may result in MCC laser diode damage and failures upon certain events; and

WHEREAS the Parties wish to address on a prospective basis their concerns regarding the MCC laser diodes' impact on the System's 25-year life, as well as their concerns regarding the current surge protection circuit of the OSW-3 repeater; and

WHEREAS Contractor [KDDI] believes that the MCC LD failure rate will decrease gradually over time and that the expected ship repairs during the System's 25-year life is less than 3; and

WHEREAS Purchaser [Pacnet] considers that it is difficult to estimate the long-term reliability at this moment, thus the agreement should be based on the currently available data; . . .

Hefter Aff., Exh. B, at 1. Attached as Exhibits to CV 19 are various charts containing tabulations and descriptions of the MCC diode failures that had occurred prior to CV 19's execution. The complaint alleges that CV 19 "expressly broadened KDDI's warranty obligations and set forth circumstances under which KDDI would be obligated to repair and replace defective and failed repeaters in the EAC 1 System." Complaint, ¶ 18.

A major earthquake occurred in Taiwan on December 26, 2006, causing the failure

¹FIT means failure in time.

of several repeaters as that term is defined in CV 19. Pacnet alleges that the repeaters that failed were manufactured with MCC diodes. These failures caused Segment C of the System to be rendered completely out of commission until around May 10, 2008.

On January 28, 2007, two repeaters on Segment F were discovered to have failed. On May 28, 2007, an additional 12 repeaters failed as a result of a power surge occurring between Segments A and C, putting Segment A out of commission. Pacnet alleges that all of the repeater failures on Segment A resulting from the power surge were manufactured with the MCC diodes, and that the MELCO diodes were not affected. On April 9, 2008, three more repeaters with MCC diodes failed on Segment K. Pacnet alleges that, since the Taiwan earthquake in December 2006, a total of 29 repeaters on the System failed as that term is defined in CV 19. Prior to the earthquake, the System had experienced 27 failed repeaters.

Pacnet alleges that, despite repeated requests for urgent maintenance and repair of the failed repeaters, KDDI has failed to comply with its contractual warranty obligations to repair and replace the failed repeaters in a commercially-reasonable time frame.

Pacnet commenced this lawsuit on July 25, 2008. Four of the complaint's seven causes of action are based on KDDI's alleged breach of certain contractual warranties, and are not at issue on this motion. In the fifth, sixth and seventh causes of action, Pacnet sues KDDI for gross negligence, negligent misrepresentation, and fraud, alleging that its selection of the MCC diodes was grossly negligent, and that KDDI's then President, Dr. Shigeyuki Akiba, misrepresented their reliability during the negotiations leading up to the execution of CV 19 because of the significant expense of replacing the already installed repeaters with

MCC diodes. Specifically, Mr. Akiba “represented that the MCC repeaters did not represent a threat to the System’s performance and that minimal ‘failures’ with the MCC repeaters would occur over the Design Life of the System (approximately 25 years)” (Complaint, ¶46), and that the repeater problems would become less significant over time (*id.*, ¶¶ 79, 84).

KDDI now moves to dismiss the fraud and negligence claims pursuant to CPLR 3211 (a) (1) and (a) (7), on the ground that Pacnet’s complaint alleges claims and injuries based on KDDI’s failure to meet its contractual obligations and nothing more, and that Pacnet overreaches in seeking relief that exceeds what was specifically agreed to by the parties in the Contract and CV 19.

“The test on a motion directed at the sufficiency of the complaint is not whether a cause of action is artfully drafted but whether, accepting the allegations of the complaint as true and according them the benefit of every favorable inference, a legally cognizable cause of action is made out.” *Banc of America Sec. LLC v Solow Bldg. Co. II, L.L.C.*, 47 AD3d 239, 242 (1st Dept 2007). However, claims of negligent misrepresentation, like fraud, must be pleaded with particularity. CPLR 3016 (b); *ESBE Holdings, Inc. v Vanquish Acquisition Partners, LLC*, 50 AD3d 397, 398 (1st Dept 2008).

Pacnet’s gross negligence claim is nothing more than a claim for breach of KDDI’s contractual obligations, and it is well settled that a claim arising out of an alleged breach of contract may not be converted into a tort action “unless a legal duty independent of the contract itself has been violated.” *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 (1987); *see also Wapnick v Seven Park Ave. Corp.*, 240 AD2d 245, 247 (1st Dept 1997). Because KDDI had no obligation to design, construct or repair the System, separate

and apart from any contractual obligations, the gross negligence claim (fourth cause of action) must be dismissed.

The sixth and seventh causes of action both allege that KDDI represented to Pacnet that the MCC repeaters “would stop failing over the course of the EAC 1 System’s life span, and that the repeater problems would become less significant over time.” Complaint, ¶¶ 79, 84. Allegedly, but for these misrepresentations, Pacnet would have executed a contract variation reflecting the greater risks presented by the actual failure rate of MCC repeaters. Complaint, ¶¶ 81, 86. In the sixth cause of action, Pacnet alleges that “KDDI intended to induce Plaintiff to enter into the parties’ agreement notwithstanding these actual risks,” while the seventh cause of action substitutes the word “defraud” for “induce.” *Id.*

In order to state a claim for negligent misrepresentation, Pacnet must plead facts showing a special relationship of trust and confidence between the parties, which created a duty on the part of KDDI to impart correct information about the MCC repeaters to Pacnet, and that Pacnet reasonably relied on incorrect information about the MCC repeaters to its detriment. *See Hudson River Club v Consolidated Edison Co. of New York*, 275 AD2d 218, 220 (1st Dept 2000).

Generally, the requisite “special relationship” does not exist between sophisticated commercial entities that enter into an agreement through an arm’s-length business transaction. *Parisi v Metroflag Polo, LLC*, 51 AD3d 424 (1st Dept 2008); *Atkins Nutritionals, Inc. v Ernst & Young, LLP*, 301 AD2d 547, 548-49 (2d Dept 2003). Pacnet argues that a special relationship could be found to exist here, because of KDDI’s superior expertise and the inherent public nature of the System, citing *Kimmell v Schaefer* (89 NY2d

257 [1996]). In *Kimmell*, the Court of Appeals recognized that the a duty to speak with care “has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified.” *Id.* at 263.

The complaint does not allege that KDDI has “unique or specialized expertise” (*Kimmell*, 89 NY2d at 263) or even that KDDI’s knowledge and expertise concerning the MCC repeaters was superior to that of Pacnet, only that KDDI represented that it had expertise in installing fiber optic cables (*see* Complaint, ¶¶ 45, 79). Rather, Pacnet admits that both companies are sophisticated commercial entities and that the Contract was “extensively negotiated and then modified on several occasions.” Pls. Mem. of Law in Opp, at 15, 17, citing Complaint, ¶ 17-18, 45-46; *see also* Hough Affirm., Exh. A, at 78: Contract, Art. 40(B) (“This Contract has been fully negotiated between, and jointly drafted by, the Parties hereto”). Even if KDDI did have more expertise about the relevant technology than Pacnet, this alone could not give rise to a special relationship. *See JP Morgan Chase Bank v Winnick*, 350 F Supp 2d 393, 402 (SD NY 2004) (dismissing negligent misrepresentation claim where plaintiff alleged that the defendants were “far more knowledgeable about the fiber optic cable business”). As for Pacnet’s claims regarding the public nature of the System, the complaint does not allege any harm to the public as a result of failures of the MCC repeaters, and specifically states that it used capacity on another submarine fiber optic cable service to service its customers. *See* Complaint, ¶ 50.

In addition, to be actionable as either negligent or fraudulent misrepresentations, KDDI’s alleged statements about the MCC repeaters must have been false when made and

must have concerned present facts, not promises about future actions or performance. Statements of prediction or expectation about future events cannot give rise to a negligent misrepresentation or fraud claim. *ESBE Holdings, Inc. v Vanquish Acquisition Partners*, 50 AD3d at 398; *Dragon Inv. Co. II LLC v Shanahan*, 49 AD3d 403 (1st Dept 2008); *Naturopathic Labs. Intl., Inc. v SSL Americas, Inc.*, 18 AD3d 404, 404-405 (1st Dept 2005); *Thomas v McLaughlin*, 276 AD2d 440, 440-41 (1st Dept 2000); *Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73-74 (1st Dept 2000); *Albert Apt. Corp. v Corbo Co.*, 182 AD2d 500, 500-01 (1st Dept), *lv dismissed* 80 NY2d 924 (1992).

None of KDDI's alleged misrepresentations are actionable, because they all concern the future reliability and performance of the MCC repeaters. *See e.g. Hydro Investors, Inc. v Trafalgar Power Inc.*, 227 F3d 8, 20-21 (2d Cir 2000) (alleged misrepresentations about a hydroelectric plant's expected energy output in connection with the negotiation of a contract to develop and construct the plants were non-actionable promises about future events). The complaint only alleges misrepresentations about the expected failure rate of the MCC repeaters over time. The only misrepresentation that could arguably be considered a present fact is the alleged statement by Dr. Akiba that "the MCC repeaters did not represent a threat to the System's performance" (Complaint, ¶ 46). However, this is merely an expression of his opinion, and is, in reality, a prediction of something which is hoped or expected to occur in the future. *Thomas v McLaughlin*, 276 AD2d at 440-41. The complaint does not allege that Dr. Akiba misrepresented any underlying data about the MCC repeaters or withheld any such incriminating data regarding the MCC diodes, a product that it did not manufacture. In addition, Dr. Akiba's alleged misrepresentations that the MCC repeaters

“did not represent a threat to the System’s performance” is too vague and generalized a statement upon which Pacnet could reasonably claim that it pursued any particular course of conduct in connection with the negotiation of CV 19. *See Ederer v Gursky*, 35 AD3d 166, 167-68 (1st Dept 2006), *aff’d* 9 NY3d 514 (2007).

Finally, there can be no reasonable reliance by Pacnet on any of KDDI’s alleged misrepresentations about the expected failure rate of the MCC repeaters as a matter of law. The preamble to CV 19 makes clear that Pacnet did not agree with, or rely on, KDDI’s representations about the expected future failure rate of the MCC repeaters: “[Pacnet] considers that it is difficult to estimate the long-term reliability at this moment, thus the agreement should be based on the currently available data; . . .” There is no claim that KDDI misrepresented what the “currently available data” was, and the preamble specifically states that, despite KDDI’s assurances that “the MCC LD failure rate will decrease gradually over time,” Pacnet was not comfortable accepting this prediction, and thus negotiated additional warranties and protections in CV 19. While the issue of a plaintiff’s reasonable reliance on an allegedly false statement is normally a question of fact (*Brunetti v Musallam*, 11 AD3d 280, 281 [1st Dept 2004]), where claims of reasonable reliance on the statements are “flatly contradicted by documentary evidence,” summary disposition of the issue of reasonable reliance is appropriate (*KSW Mech. Servs., Inc. v Willis of New York, Inc.*, 63 AD3d 411 [1st Dept 2009]).

Furthermore, the Contract gave Pacnet access to any information it sought relating to the System’s performance and capabilities. Article 9 (A) (1) provided Pacnet access to the tests and test results KDDI was required to conduct for the “Acceptance Testing”:

The Purchaser [Pacnet] and its designated representatives (including the Independent Engineer [²]) may observe, at their own expense, the Contractors test and review the test results. Purchaser may request the Contractor to conduct and/or may itself conduct any additional tests that are commercially reasonable under the circumstances to demonstrate compliance with the provisions of this Contract and the specifications in the Technical Volume.

Hough Aff., Exh. A: Contract, ¶ 9 (A) (1), at 38. Article 29 of the Contract gives Pacnet a right of access to KDDI's facilities. Pacnet does not allege that KDDI denied it access to any test results or to any other information.³ "As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties." *UST Private Equity Invs. Fund, Inc. v Salomon Smith Barney*, 288 AD2d 87, 88 (1st Dept 2001).

KDDI further contends that the negligent misrepresentation and fraud claims must be dismissed, because the Contract provides that KDDI makes no representations other than those "expressly provided," and specifically, that KDDI "makes no representations of merchantability or fitness for a particular purpose," citing Article 18 (E) of the Contract. In response, Pacnet argues that it did not disclaim reliance on KDDI's misrepresentations about the MCC repeaters, and that by only quoting a portion of Article 18 (E) and failing to inform

²Defined as Conexart Technologies, Inc. See Contract, Art. 3, at 8.

³

At oral argument, Pacnet's counsel stated that, even though his client performed its own due diligence about the MCC diode problem, the two parties did not have equal access to the underlying data on the MCC diodes, and that, in actuality, Pacnet "asked for access" and did not receive it. See Jan. 22, 2009 Transcript, at 28-30. Pacnet's counsel admits that this claim has not been pled, and has not asked for leave to replead.

the court that it deals exclusively with "Intellectual Property," KDDI is attempting to foist a totally implausible argument on the court.

Article 18 is entitled "Intellectual Property," and sub-article (E) is entitled "DISCLAIMER, LIMITATION OF LIABILITY." It provides, in pertinent part:

CONTRACTOR REPRESENTS THAT ANY INFORMATION OR INTELLECTUAL PROPERTY FURNISHED IN CONNECTION WITH THIS CONTRACT SHALL BE TRUE AND ACCURATE TO THE BEST OF ITS KNOWLEDGE AND BELIEF, BUT CONTRACTOR SHALL NOT BE HELD TO ANY LIABILITY FOR UNINTENTIONAL ERRORS OR OMISSIONS THEREIN. EXCEPT AS EXPRESSLY PROVIDED, CONTRACTOR MAKES NO REPRESENTATIONS OR WARRANTIES, EXPRESSLY OR IMPLIEDLY. BY WAY OF EXAMPLE, BUT NOT OF LIMITATION, CONTRACTOR . . . MAKES NO REPRESENTATIONS OR WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, OR THAT THE USE OF INFORMATION OR INTELLECTUAL PROPERTY DISCLOSED OR PROVIDED HEREUNDER WILL NOT INFRINGE ANY PATENT OR OTHER INTELLECTUAL PROPERTY RIGHT OF A THIRD PARTY. EXCEPT AS OTHERWISE PROVIDED IN THIS CONTRACT, CONTRACTOR . . . SHALL NOT BE HELD TO ANY LIABILITY WITH RESPECT TO ANY CLAIM BY PURCHASER OR ANY THIRD PARTY CLAIM AGAINST PURCHASER ON ACCOUNT OF, OR ARISING FROM, PURCHASER'S USE OF INFORMATION OR INTELLECTUAL PROPERTY DISCLOSED OR PROVIDED BY CONTRACTOR.

Hough Affirm., Exh. A, at 59.

Pacnet's argument that Article 18 (E) is limited to intellectual property developed by KDDI is not persuasive. First, the Contract provides in Article 40 that the "[t]he captions of the Articles do not form part of this Contract and shall not have any effect on the interpretation thereof." Second, the language employed in Article 18 (E) is in the disjunctive, and thus it applies to "any information or intellectual property furnished in connection with this contract," which clearly includes information on key components of the

System. However, the language employed only limits KDDI's liability for "unintentional errors or omissions" and thus, while it does preclude a negligent misrepresentation claim, it would not preclude a fraud claim if Pacnet could prove intentional conduct on the part of KDDI. *See Mitschele v Schultz*, 36 AD3d 249, 254-55 (1st Dept 2006) (fraud claim cannot be based on errors of judgment, but is predicated on the proof of the commission of an intentional tort).

In sum, the complaint does not allege facts that would support a finding that the relationship between Pacnet and KDDI was one of special trust or confidence to support a negligent misrepresentation claim and Article 18 (E) of the Contract limits KDDI's liability for "unintentional errors or omissions." In addition, the complaint fails to allege that KDDI made any misrepresentations about presently existing facts and the unequivocal language in CV 19 negates any claim by Pacnet that it relied on KDDI's alleged misstatements about the MCC diodes. For these reasons, the sixth and seventh causes of action purporting to state claims for negligent and fraudulent misrepresentation must be dismissed.

Turning to the complaint's prayer for relief, KDDI argues that it should be stricken, because it requests damages that Pacnet explicitly agreed to forego in the Contract and CV 19. KDDI also seeks to strike Pacnet's claim for attorneys' fees. KDDI relies on the following sub-sections of section 2 of CV 19 which state, in full:

11. For the five-year period ending on February 18, 2007, the provisions of paragraphs 5 and 6 of this sub-Article 10(B) represent the sole and exclusive remedy with respect to the MCC laser diode issue under this sub-Article 10(B) of the Contract, as amended hereby.

12. If the provisions of paragraphs 8 and 9 of this sub-Article 10(B) come into force [certain numbers of MCC diode failure occur], then said

paragraphs shall be the sole and exclusive remedy with respect to the MCC laser diode issue under this sub-Article 10(B) of the Contract, as amended hereby.

Pacnet also relies on Article 23 (A) of the Contract, which states, in full:

NOTWITHSTANDING ANY OTHER PROVISION IN THIS CONTRACT, AND IRRESPECTIVE OF ANY FAULT, NEGLIGENCE OR GROSS NEGLIGENCE OF ANY KIND, IN NO EVENT SHALL EITHER PARTY . . . BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, INDIRECT, RELIANCE OR SPECIAL (INCLUDING PUNITIVE) DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOSS OF REVENUE, LOSS OF BUSINESS OPPORTUNITY OR THE COSTS ASSOCIATED WITH THE USE OF RESTORATION FACILITIES RESULTING FROM ITS FAILURE TO PERFORM PURSUANT TO THE TERMS AND CONDITIONS OF THIS CONTRACT.

Irrespective of Article 23 (A) of the Contract, the dismissal of all of three of Pacnet's tort claims disposes of any right to collect punitive damages. "Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights." *Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 (1st Dept 2005), quoting *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 (1994).

However, nothing in the Contract precludes Pacnet from seeking direct compensatory damages for KDDI's breach of its warranties to repair and replace defective parts of the System, maintain spare parts and take appropriate measures to meet the Contract's System Performance Requirements. Indeed, Article 23 (B) limits KDDI's liability for contract damages to 100% of the Contract price. The "sole and exclusive remedy" language of CV 19 merely limits the contractual warranties available to Pacnet under Article 10 (B) of the Contract in the event of MCC repeater problems. Nevertheless, the limitation of liability

language of Article 23 (A) clearly and unambiguously precludes the recovery of certain types of special or consequential damages sought in the Complaint. In paragraph 50 of the Complaint, Pacnet alleges that it incurred damages resulting from “obtaining alternative capacity for the transmission of data to location points on the EAC 1 System.” In paragraph 51, Pacnet alleges that it incurred “costs to procure restoration services, costs to interconnect to other cable systems in order to provide restored services to its network customers, and costs to dispel [sic] additional guard boats because of an increased risk to the network due to the unavailability of the System.” Pacnet clearly and unambiguously waived its right to seek these types of consequential damages in Article 23 (A) of the Contract. Contractual limitations on liability are enforceable, except that a party cannot avoid liability for damages caused by “conduct that evinces a reckless disregard for the rights of others or ‘smacks’ of intentional wrongdoing.” *Obremski v Image Bank, Inc.*, 30 AD3d 1141, 1141-42 (1st Dept 2006) (citations omitted). The complaint does not allege any basis not to enforce this limitation of liability provision.

“It is well settled in New York that a prevailing party may not recover attorneys’ fees from the losing party except where authorized by statute, agreement or court rule.” *U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 (2004). Pacnet does not allege that the Contract permits fee-shifting, and thus, this claim for relief is also stricken.

For the foregoing reasons, it is hereby

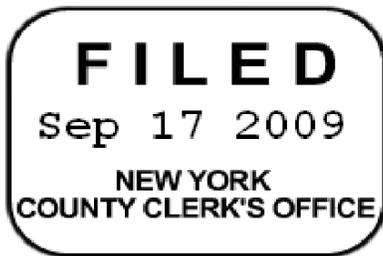
ORDERED that defendant’s motion to dismiss the fifth, sixth and seventh causes of action is granted, and those causes of action are hereby dismissed; and it is further

ORDERED that defendant’s motion to strike the complaint’s prayer for relief is

granted to the extent of striking all claims for consequential damages (including, but not limited to, the damages described in paragraphs 50 and 51 of the complaint), punitive damages and attorneys' fees; and it is further

ORDERED that defendant shall serve and file an answer to the remaining causes of action within 20 days of service of a copy of this order with notice of entry.

Dated: September 16, 2009



ENTER:

A handwritten signature in cursive script, appearing to read "Bernard J. Fried".

J.S.C.

HON. BERNARD J. FRIED