

<b>Pharma Consult, Inc. v Nutrition Technologies L.L.C.</b>
2006 NY Slip Op 30024(U)
December 28, 2006
Supreme Court, New York County
Docket Number: 4_30060/1233
Judge: Karla Moskowitz
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ PART 03  
Justice

-----x  
PHARMA CONSULT, INC. (f/k/a J.W.S. DELAVAU CO.),  
PHARMA CONCEPTS, INC. (f/k/a ACCUCORP., INC.), L&R  
REALTY ASSOCIATES, INC., LR PHARMACEUTICALS, L.P.,  
LESLIE J. LEFF, RONNIE H. LEFF, THE RICHARD M. LEFF  
10-YEAR GRANTOR RETAINED ANNUITY TRUST, THE  
RICHARD M. LEFF 12-YEAR GRANTOR RETAINED ANNUITY  
TRUST, THE LORRAINE T. LEFF 10-YEAR GRANTOR  
RETAINED ANNUITY TRUST, THE LORRAINE T. LEFF  
12-YEAR GRANTOR RETAINED ANNUITY TRUST, and JANAK  
V. VYAS,

Plaintiffs/Counterclaim-Defendants,

-against-

NUTRITION TECHNOLOGIES L.L.C. (f/k/a DELAVAU  
HOLDINGS, LLC), KEVIN LANG, TIM TANTILLO, TIMOTHY  
S. COLLINS, GREGORY B. MURPHY, STEPHEN BRYANT,  
MICHAEL C. DURAN, ROBERT L. BERNER III, and PETER E.  
BERGER,

Defendants,

NUTRITION TECHNOLOGIES L.L.C. (f/k/a DELAVAU  
HOLDINGS, LLC),  
Counterclaim-Plaintiff,

-and-

JANAK V. VYAS,  
Additional Counterclaim-Defendant.

**FILED**  
DEC 29 2005  
COUNTY CLERK'S OFFICE  
NEW YORK

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is

ORDERED that this motion is decided in accordance with the accompanying Decision and Order.

Dated: December 28, 2005

KARLA MOSKOWITZ 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: IAS PART 3

-----X  
PHARMA CONSULT, INC. (f/k/a J.W.S. DELAVAU CO.),  
PHARMA CONCEPTS, INC. (f/k/a ACCUCORP., INC.),  
L&R REALTY ASSOCIATES, INC., LR  
PHARMACEUTICALS, L.P., LESLIE J. LEFF, RONNIE  
H. LEFF, THE RICHARD M. LEFF 10-YEAR GRANTOR  
RETAINED ANNUITY TRUST, THE RICHARD M. LEFF  
12-YEAR GRANTOR RETAINED ANNUITY TRUST, THE  
LORRAINE T. LEFF 10-YEAR GRANTOR RETAINED  
ANNUITY TRUST, THE LORRAINE T. LEFF 12-YEAR  
GRANTOR RETAINED ANNUITY TRUST, and JANAK  
V. VYAS,

Index No. 601233/2003

Plaintiffs/Counterclaim-Defendants,

**DECISION and ORDER**

-against-

NUTRITION TECHNOLOGIES L.L.C. (f/k/a DELAVAU  
HOLDINGS, LLC), KEVIN LANG, TIM TANTILLO,  
TIMOTHY S. COLLINS, GREGORY B. MURPHY,  
STEPHEN BRYANT, MICHAEL C. DURAN, ROBERT  
L. BERNER III, and PETER E. BERGER,

Defendants,

NUTRITION TECHNOLOGIES L.L.C. (f/k/a DELAVAU  
HOLDINGS, LLC),

Counterclaim-Plaintiff,

-and-

JANAK V. VYAS,

Additional Counterclaim-Defendant.

-----X  
**KARLA MOSKOWITZ, J.:**

Plaintiffs/counterclaim-defendants originally moved to dismiss defendants' counterclaims and now move to dismiss or strike two of the defendant/counterclaim-plaintiff's five counterclaims (motion sequence number 005). For the following reasons, the court grants this motion in part and denies it in part.

**BACKGROUND**

The court recited the facts of this case at length in its earlier decision and will only briefly

recount them here. Both the plaintiffs/counterclaim-defendants (the Sellers) and defendant/counterclaim-plaintiff Nutrition Technologies L.L.C. (NT) engaged in businesses that provide supplies and services to large pharmaceutical companies. (See Notice of Motion, Exhibit A [complaint], ¶ 16). On July 12, 2002, NT entered into a contract to purchase the Sellers' business assets (the Asset Purchase Agreement). (Id., ¶ 17). The portion of the Asset Purchase Agreement that is relevant to this decision provides as follows:

Article VIII Indemnification ...

Section 8.06. Procedures. ... (c) Other Claims. In the event any indemnified party should have a claim against any indemnifying party under Section 8.02 or 8.03 that does not involve a Third Party Claim ..., the indemnified party shall deliver written notice of such claim with reasonable promptness to the indemnifying party and the Escrow Agent, if applicable, in reasonable detail (a "Claim Notice") prior to the date of termination of the indemnification obligations set forth in Section 8.05. Subject to Section 8.05, the failure by any indemnified party to so notify the indemnifying party shall not relieve the indemnifying party from any liability that it may have to such indemnifying party under Section 8.02 or 8.03, except to the extent that the indemnifying party demonstrates that it has been prejudiced by such failure. ...

If any indemnifying party shall be obligated to indemnify an indemnified party pursuant to this Article VIII, such indemnifying party shall pay to such indemnified party the amount to which such indemnified party shall be entitled within 30 calendar days after the day on which such indemnifying party became so obligated to the indemnified party. If the indemnified party shall be the Purchaser [i.e., NT], it shall seek payment of the Losses to which it is entitled as set forth under section 8.02 (c) hereof. ...

Article IX General Provisions ...

Section 9.07. Entire Agreement. This Agreement, the Ancillary Agreements and the Confidentiality Agreement, along with the Schedules and Exhibits thereto, contain the entire agreement and understanding among the parties hereto with respect to the subject matter hereof and supercede all prior agreements and understandings relating to such subject matter. None of the parties shall be liable or bound to any other party in any manner by any representations, warranties or covenants relating to such subject matter except as specifically set forth herein or in the Ancillary Agreements or the Confidentiality Agreement.

(Id., Exhibit B-A, at 76-77, 88).

NT performed extensive due diligence work before it negotiated and executed the Asset

Purchase Agreement. (Id., Exhibit B [answer with counterclaims], ¶ 17). After the closing date, however, NT believed that the Sellers had provided it with inaccurate financial data and demanded that the Sellers agree to adjust the purchase price to a lower amount, in accordance with the procedures set forth in Section 1.04 of Article I in the Asset Purchase Agreement. (Id., ¶ 76). The Sellers declined and instead commenced this action for a declaration that a purchase price adjustment was unwarranted because they had not breached the Asset Purchase Agreement. (Id., Exhibit A [complaint]). NT answered and filed counterclaims for, *inter alia*: 1) fraud/fraudulent inducement; 2) breach of contract; 3) indemnification; 4) negligent misrepresentation or omission; and 5) breach of fiduciary duty. (Id., Exhibit B [answer and counterclaims]). NT then moved to compel arbitration and the Sellers moved to dismiss NT's first through fourth counterclaims (but not the fifth) (motion sequence numbers 001 and 002, respectively).

In a decision dated October 2, 2003, the court granted NT's motion to compel arbitration and held the Sellers' motion to dismiss NT's counterclaims in abeyance pending the court's determination of whether to confirm, deny or modify the arbitration results. On November 1, 2004, the arbitrator issued an award for \$3,500,545.00 in favor of NT and against the Sellers. At the argument of the motion to confirm on January 13, 2005, the court granted NT's motion to confirm the arbitrator's award. (See Transcript of oral argument, at 21). At that hearing, the Sellers argued that Article VIII of the Asset Purchase Agreement, entitled "Indemnification," controlled both the manner and the maximum amount of any payments that they might be obligated to make to NT. (Id. at 17-20). The Sellers based that argument on their position that the arbitrator actually decided breach of warranty claims. (Id.). Consistent with its October 2, 2003 decision, the court, however, rejected that characterization. Instead, the court reiterated that what

the arbitrator decided in relation to NT's counterclaim was equivalent to a request to adjust the purchase price in accordance with the procedures in Article I of the Asset Purchase Agreement. (Id. at 21). Consequently, the court rejected the Sellers' argument that Article VIII of the Asset Purchase Agreement controlled the disposition of the arbitration award. (Id.) The court concluded by directing "that the provisions of payment be complied with as set forth [in the arbitration award] as a matter of law and not as counsel argues in Article [VIII], that is a procedure set forth in Article VIII, the indemnity provision." (Id.)

The Sellers thereafter resubmitted their motion to dismiss the counterclaims (motion sequence number 002) by submitting the original motion and briefs as well as supplemental briefs as motion 005. Although the Sellers initially requested dismissal of four of NT's counterclaims, Sellers modified that request at the time the parties submitted their respective supplemental memoranda of law. Now, the Sellers appear to have limited their request to dismissal of NT's first and fourth counterclaims. Those counterclaims respectively assert fraud and fraudulent inducement (Counterclaim I) and negligent misrepresentation or omission (Counterclaim IV). Because the Sellers' original motion did not seek dismissal of NT's fifth counterclaim for breach of fiduciary duty asserted against Ronnie Leff, Leslie Leff and Janak Vyas, Sellers' current motion does not address NT's fifth counterclaim, either.

NT opposes the motion.

#### DISCUSSION

Before passing on the Sellers' dismissal arguments in this motion, the court revisits that portion of its October 2, 2003 decision in which it recited the Appellate Division, First Department observation that "the determination of issues in arbitration may well dispose of nonarbitrable matters." (Cohen v Ark Asset Holdings, Inc., 268 AD2d 285, 286 [1st Dept 2000]),

citing Marcus v Millwork Trading Co., Ltd., 208 AD2d 448 [1st Dept 1994]). That has, indeed, happened here. However, the Sellers' decision to seek only a partial hearing of their dismissal motion reveals their erroneous belief that the arbitration disposed of both of NT's contract-based counterclaims (i.e., breach of contract and indemnification), but not NT's two tort-based counterclaims (i.e., fraud/fraudulent misrepresentation and negligence). For the following reasons, the court finds that the Sellers are mistaken.

In its October 2, 2003 decision, the court deemed NT's earlier motion to be a request to compel arbitration pursuant to CPLR 7503 (a) and ordered the parties to submit their purchase price dispute to an arbitrator. The court issued that order simply because, in Article I, Section 1.04 of the Asset Purchase Agreement, the parties had agreed to submit any disputes over adjustments to the purchase price to arbitration. Therefore, in order to enforce that provision of the Asset Purchase Agreement, the court directed the arbitrator to determine:

Whether or not, or to what extent, to permit each of the proposed adjustments to the Statement of Net Book Value (annexed to Nutrition Technologies L.L.C.'s December 13, 2002 Notice of Disagreement) on the grounds that it either corrects a mathematical error which had been made in the original calculation of the Net Book Value of the Delavau Companies' assets as of September 20, 2002, or that it corrects a departure from generally accepted accounting principles in the United States, consistently applied, which had been made during the original calculation of the Net Book Value of the Delavau Companies' assets as of September 20, 2002.

The arbitrator subsequently issued an award that adjusted the purchase price in NT's favor and the court granted NT's motion to confirm the arbitrator's award at the argument on January 13, 2005. The question now is the extent, if any, to which that award impacts NT's counterclaims.

“The test on a motion to dismiss for insufficiency of the pleadings is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained’.” (Jones Lang

Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d 168, 176 [1st Dept 1998], quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 [1st Dept 1990]). The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach and resulting damages. (See e.g. Gordon v Dino De Laurentiis Corp., 141 AD2d 435 [1st Dept 1988]). Here, NT's breach of contract counterclaim alleges, in pertinent part, that:

102. [The] Sellers have breached their representations, warranties and covenants under the [Asset Purchase] Agreement. ...
105. [The] Sellers' actions have caused [NT] to acquire Delavau at a grossly inflated price. [NT] has suffered and will continue to suffer substantial and foreseeable damages as a result of those breaches of contract by Sellers.

(See Notice of Motion, Exhibit B [answer and counterclaims], ¶¶ 102-105). The only specific allegation of breach in that counterclaim is the reference in paragraph 105 to the purchase price dispute. The second paragraph, that specifically refers to adjustments to the purchase price, modifies the first, broadly worded paragraph and thus, it is reasonable to infer that that single allegation of breach makes up the entirety of NT's breach of contract counterclaim. Because it appears that the arbitrator's award fully addressed that subject matter, that counterclaim is no longer before the court.

NT's indemnification counterclaim addresses a different subject, however. As with NT's breach of contract counterclaim, NT's indemnification counterclaim begins with the broad allegation that the "Sellers have breached their representations, warranties and covenants under the [Asset Purchase] Agreement." (See Notice of Motion, Exhibit A [complaint], ¶ 108). However, it follows that sentence first with a lengthy quote from the Asset Purchase Agreement's indemnification payment provision (Article VIII, Section 8.02 [c]), that specifically lists breaches

of those warranties that are contained in Articles II, III and IV of the Asset Purchase Agreement among the items against which the parties agreed to indemnify each other. (*Id.*, ¶ 109; Notice of Motion, Exhibit B-A [Asset Purchase Agreement], at 70). NT's indemnification counterclaim concludes with the allegation that:

110. [The] Sellers are obligated to indemnify [NT] for any loss, liability, claim, damage or expense, including consequential damages, suffered as a result of their willful breaches of contract.

(*Id.*, ¶ 110). Thus, just as it did when reviewing NT's breach of contract counterclaim, the court notes that the indemnification payment provision's specific reference to the warranties in Article II, III and IV modifies and limits the broader language that NT employed in the rest of its indemnification counterclaim. Because of that modification, the court also finds that it is reasonable to infer that NT's indemnification counterclaim is a claim for relief only for the Sellers' alleged breaches of those express warranties that are set forth in Articles II, III and IV of the Asset Purchase Agreement. The restrictions of the Asset Purchase Agreement's general merger clause (Article IX, Section 9.07), provide that "[n]one of the parties shall be liable or bound to any other party in any manner by any representations, warranties or covenants relating to such subject matter except as specifically set forth herein bears out this construction." (*Id.* at 88). Accordingly, because the court did not order the arbitrator to determine whether or not the Sellers had breached any of these warranties, the court concludes that the prior arbitration did not dispose of NT's counterclaim for contractual indemnification. It is equally clear that NT's counterclaims for fraud/fraudulent misrepresentation and negligence or omission also survived the arbitration, because the court did not ask the arbitrator to determine whether the Sellers had committed any torts. Therefore, the court must address the sufficiency of all three of those counterclaims in this decision, and not just the two that are grounded in tort, as the Sellers have erroneously assumed.

### The Sellers' Dismissal Arguments

As previously mentioned, “[t]he test on a motion to dismiss for insufficiency of the pleadings is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained’.” (Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae, 243 AD2d at 176, quoting Stendig, Inc. v Thom Rock Realty Co., 163 AD2d at 48). To this end, the court must accept all of the facts alleged as true, and determine whether they fit within any “cognizable legal theory.” (See Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300, 303 [2001]). However, where the allegations in the complaint consist only of bare legal conclusions, or of factual claims that are inherently incredible or that documentary evidence flatly contradicts, those considerations do not apply. (See e.g. Tectrade Intl. Ltd. v Fertilizer Dev. and Inv., B.V., 258 AD2d 349 [1st Dept 1999]; Caniglia v Chicago Tribune-New York News Syndicate, Inc., 204 AD2d 233 [1st Dept 1994]).

#### A. Indemnification

The Sellers initially argued that the court should dismiss NT’s third counterclaim because NT failed to comply with the notice of claim provision set forth in Article VIII, Section 8.06 (c) of the Asset Purchase Agreement. (See Memorandum of Law in Support of Motion, at 25-26). NT responded that the plain language of that provision did not relieve the Sellers from liability or preclude NT’s counterclaim absent a showing of “prejudice” that the Sellers failed to make. (See Memorandum of Law in Opposition to Motion, at 10-12). In their supplemental reply papers, the Sellers eventually abandoned their lack of notice argument, presumably relying on their erroneous assumption that the earlier arbitration disposed of NT’s indemnification counterclaim.

Nonetheless, because the court has found that the arbitration did not address NT’s indemnification

counterclaim, the court will now consider the Sellers' original argument.

The court finds that the Sellers' dismissal argument is unavailing. The relevant portion of Article VIII, Section 8.06 (c) of the Asset Purchase Agreement provides that:

Subject to Section 8.05, the failure by any indemnified party to ... notify the indemnifying party shall not relieve the indemnifying party from any liability that it may have to such indemnifying party under Section 8.02 or 8.03, except to the extent that the indemnifying party demonstrates that it has been prejudiced by such failure. ...

If any indemnifying party shall be obligated to indemnify an indemnified party pursuant to this Article VIII, such indemnifying party shall pay to such indemnified party the amount to which such indemnified party shall be entitled within 30 calendar days after the day on which such indemnifying party became so obligated to the indemnified party. If the indemnified party shall be the Purchaser [i.e., NT], it shall seek payment of the Losses to which it is entitled as set forth under section 8.02 (c) hereof. ...

(See Notice of Motion, Exhibit B-A [Asset Purchase Agreement], at 76-77 [emphasis supplied].

The plain language quoted above flatly contradicts the Sellers' dismissal argument. Although the parties did agree to provide each other with notices of claim in the event that a dispute over any of the contractual warranties arose between them, they also specifically agreed that "the failure ... to ... notify the indemnifying party shall not relieve the indemnifying party from any liability." Thus, the text of Section 8.06 (c) of the Asset Purchase Agreement clearly does not preclude NT's breach of warranty counterclaim. Further, unlike Article I, Article VIII of the Asset Purchase Agreement does not contain a binding arbitration provision. "An alternate dispute resolution agreement, like an arbitration agreement, 'must be clear, explicit and unequivocal \* \* \* and must not depend upon implication or subtlety.'" (Thomas Crimmins Contracting Co., Inc. v City of New York, 74 NY2d 166, 171 [1989] quoting Matter of Waldron v Goddess, 61 NY2d 181, 183-184 [1984]; see also TMP Worldwide Inc. v Franzino, 269 AD2d 332 [1st Dept 2000])

Therefore, the Sellers are plainly mistaken in arguing that Article VIII contains a "prerequisite

alternative dispute resolution provision[],” or a “contractual condition precedent to suit,” and there is no justification to interpret that Article in the manner that the Sellers advance. (See Reply Memorandum of Law, at 16-18). Instead, Article VIII, Section 8.06 (c) merely provides that “[i]f the indemnified party shall be the Purchaser [i.e., NT], it shall seek payment of the Losses to which it is entitled [i.e., compensation for the Sellers’ alleged breaches of the warranties set forth in Articles II, III and IV].” NT’s indemnification counterclaim is an attempt to seek just that relief. Finally, the court finds that NT is correct in its observation that the language of Article VIII, Section 8.06 (c) might preclude their indemnification counterclaim if the Sellers could demonstrate that they had been “prejudiced” by NT’s failure to submit a notice of a breach of warranty claim. (See Memorandum of Law in Opposition to Motion, at 11). However, the Sellers have not argued that they were “prejudiced” in any of their submissions. Accordingly, the court rejects the Sellers’ argument that NT’s indemnification counterclaim is moot.

#### B. Fraud & Negligence

As previously mentioned, NT’s first and fourth counterclaims allege fraud/fraudulent misrepresentation and negligence or omission, respectively. The proponent of a fraudulent misrepresentation claim must demonstrate that: “(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs, (3) the plaintiffs reasonably relied upon the representation, and (4) the plaintiffs suffered damage as a result of their reliance.” (J.A.O. Acquisition Corp. v Stavitsky, 18 AD3d 389, 390 [1st Dept 2005], citing Swersky v Dreyer and Traub, 219 AD2d 321, 326 [1st Dept 1996]). The proponent of a “traditional common-law negligence” claim must allege the elements of: “duty, breach, damages, causation and foreseeability.” (Hyatt v Metro-North Commuter R.R., 16 AD3d 218 [1<sup>st</sup> Dept 2005]). Here, the Sellers raise three arguments to dismiss these counterclaims.

### 1. Duplicate Claims

The Scllers first argue that “to the extent they [the counterclaims] allege false representations and warranties included in the Asset Purchase Agreement,” the court must dismiss NT’s fraud and negligence counterclaims as duplicative of NT’s breach of contract counterclaim (emphasis in original). (See Memorandum of Law in Support of Motion, at 20). In doing so, however, the Scllers again merely advance an argument that the court has repeatedly rejected as meritless. In its October 2, 2003 decision, again at the January 13, 2005 hearing, and again in this decision, the court reiterated that NT’s breach of contract claim centered on the purchase price adjustment procedures set forth in Article I of the Asset Purchase Agreement and not on the warranty provisions set forth in Articles II, III, and IV of the Asset Purchase Agreement. The court did not refer the question of whether those warranty provisions had been breached to the arbitrator. Consequently, even if it were fair to characterize NT’s tort-based counterclaims as breach of warranty claims, it would be incorrect to imply that they were among the matters that the arbitrator had considered. They were not. This does not end the present inquiry, however.

In their reply brief, the Sellers recast their argument slightly to assert that NT’s tort-based counterclaims are duplicative of, and hence redundant of, NT’s still viable third counterclaim for contractual indemnification. (See Reply Memorandum of Law in Support of Motion, at 7-9). NT respond that “[w]hile [NT]’s fraud and negligence claims may arise from misstatements and omissions that also give rise to [NT]’s breach of contract claims, these claims constitute separate and independently cognizable causes of action.” (See Supplemental Memorandum of Law in Opposition to Motion, at 5). For the following reasons, the court finds that NT has failed to adequately support its argument.

In First Bank of Americas v Motor Car Funding, Inc. (257 AD2d 287 [1<sup>st</sup> Dept 1999]), the

Appellate Division, First Department, observed that:

A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. By contrast, a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract. For example, if a plaintiff alleges that it was induced to enter into a transaction because a defendant misrepresented material facts, the plaintiff has stated a claim for fraud even though the same circumstances also give rise to the plaintiff's breach of contract claim. Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty.

Id. at 291-292 (internal citations and quotations omitted). NT asserts that its counterclaims “clearly allege that [NT] was fraudulently induced to enter into the Assct Purchase Agreement (and various ancillary agreements), and then induced to close, through numerous misstatements and omissions about such material facts as the financial state of the Company and its business dealings with customers and suppliers.” (See Memorandum of Law in Opposition to Motion, at 14). It is true that both NT's fraudulent inducement and negligence counterclaims specifically allege that “oral and written representations of material facts were made” and “material facts ... were deliberately withheld” regarding:

the financial attributes and condition of Delavau, the business relationship between Delavau and its customers, particularly Wyeth, the quality of the calcium supply from GAT, and the expected revenues for the third and fourth quarter of 2002 and the year 2003.

(See Notice of Motion, Exhibit B (answer and counterclaims), ¶¶ 91, 92, 112, 113). However, it is also clear that these allegations correspond directly to warranties and covenants in Articles III, IV and V of the Assct Purchase Agreement. Specifically, “the financial attributes and condition of Delavau” are the subject of warranties in Article III, Sections 3.01 and 3.02 and Article IV,

Section 4.05 of the Asset Purchase Agreement; “the business relationship between Delavau and its customers, particularly Wycth” and “the quality of the calcium supply from GAT” are the subject of warranties in Article III, Sections 3.24, 3.25, 3.27 and 3.28 of the Asset Purchase Agreement; and “the expected revenues for the third and fourth quarter of 2002 and the year 2003” are the subject of a warranty in Article III, Section 3.05 and of covenants in Article V, Sections 5.10 and 5.11 of the Asset Purchase Agreement. *Id.*, Exhibit B-A (Asset Purchase Agreement), at 18-19, 21, 40-42, 45. Because all of NT’s allegations of misrepresentation relate to promises that the parties specifically memorialized in separate contractual warranties, none of those allegations plead a “breach of duty separate from, or in addition to, a breach of the contract.” To the contrary, even granting NT’s counterclaims the benefit of the most lenient construction, NT has pled nothing more than “that the defendant was not sincere when it promised to perform under the contract.” Pursuant to the holding of First Bank of Americas v Motor Car Funding, Inc., *supra*, these pleadings are insufficient to sustain independent causes of action for fraudulent or negligent misrepresentation. (See also Duane Thomas LLC v 62 Thomas Partners, LLC, 300 AD2d 52 (1<sup>st</sup> Dept 2002); Varo, Inc. v Alvis PLC, 261 AD2d 262 [1st Dept 1999]; J.E. Morgan Knitting Mills, Inc. v Reeves Bros., Inc., 243 AD2d 422 [1<sup>st</sup> Dept 1997]). Accordingly, NT has inadequately pled both its fraud and negligence counterclaims and the court dismisses those counterclaims as redundant of its breach of warranty counterclaim.

## 2. Justifiable Reliance and Disclaimer

The Sellers also raise arguments that NT’s fraud and negligence counterclaims must fail because NT has not sufficiently pled the element of “justifiable reliance.” (See Memorandum of Law in Support of Motion, at 12-20). The court finds the Sellers’ arguments persuasive.

Although “justifiable reliance” is not an element of a “traditional common-law negligence” claim, (See e.g. Hyatt v Metro-North Commuter R.R., 16 AD3d at 218), “justifiable reliance” is an element of a “negligent misrepresentation” claim in a commercial context. (See e.g. Parrott v Coopers & Lybrand L.L.P., 95 NY2d 479 [2000]; 164 Mulberry Street Corp. v Columbia University, 4 AD3d 49 [1st Dept 2004]).

The Sellers first assert that Section 9.07 of the Asset Purchase Agreement constitutes a specific disclaimer clause whose binding legal effect precludes NT from asserting tort-based counterclaims based on “extra-contractual representations.” (See Memorandum of Law in Support of Motion, at 16-20). NT responds that Section 9.07 of the Asset Purchase Agreement is actually only a general merger clause that does not have preclusive effect. (See Memorandum of Law in Opposition to Motion, at 18-25). The clause provides that:

Entire Agreement. This Agreement, the Ancillary Agreements and the Confidentiality Agreement, along with the Schedules and Exhibits thereto, contain the entire agreement and understanding among the parties hereto with respect to the subject matter hereof and supercede all prior agreements and understandings relating to such subject matter. None of the parties shall be liable or bound to any other party in any manner by any representations, warranties or covenants relating to such subject matter except as specifically set forth herein or in the Ancillary Agreements or the Confidentiality Agreement (emphasis supplied).

(See Notice of Motion, Exhibit B-A, at 88). Well-settled New York State law holds that “a general merger clause ... does not operate to bar parol evidence of fraud in the inducement; only where the parties expressly disclaim reliance on the particular misrepresentations is extrinsic evidence barred.” (Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, L.L.C., 19 AD3d 273, 275 [1st Dept 2005], citing Citibank, N.A. v Plapinger, 66 NY2d 90, 95-96 [1985]). Here, the plain language of Section 9.07 incorporates by reference all of the “representations, warranties and covenants” in the Asset Purchase Agreement and in its two companion

agreements. Section 9.07 then provides that neither of the parties shall be liable for any “representations, warranties or covenants relating to such subject matter except as specifically set forth” therein (emphasis added). The “representations, warranties and covenants” are clearly labeled and easily ascertainable by anyone who reads the contracts. Thus, the court finds that that text clearly expresses the parties’ intent to limit their potential liability to each other in tort for any misrepresentations that relate to the subject matter of those specific “representations, warranties and covenants” contained in those contracts. NT’s argues that “[t]he second sentence ... merely states the converse proposition, that promises not contained in the written agreement are without force and effect.” This interpretation gives Section 9.07 an unreasonably vague reading and ignores the clear expression of intent in that clause. (See Memorandum of Law in Opposition to Motion, at 19). Therefore, the court rejects NT’s opposition argument. Instead, the court finds that Section 9.07 of Asset Purchase Agreement is a specific disclaimer that bars NT’s tort-based counterclaims as a matter of law, because Section 9.07 precludes NT from alleging the element of justifiable reliance.

The Sellers also raise the alternative argument that, even if Section 9.07 were only a boilerplate merger clause, the “substance,” i.e. sophistication, of the overall transaction requires the court to reject NT’s allegations of justifiable reliance as unreasonable. (See Memorandum of Law in Support of Motion, at 12-16). This argument is drawn from the Court of Appeals’ analysis in Citibank, N.A. v Plapinger, in which it reviewed a merger clause that was neither a specific disclaimer nor a “generalized boilerplate exclusion.” (66 NY2d at 95). The Court analyzed the nature of the overall transaction and reasoned that:

following extended negotiations between sophisticated business people, what has been hammered out is a multimillion dollar personal guarantee proclaimed by

defendants to be “absolute and unconditional.” It is unrealistic in such circumstances to expect an express stipulation that defendants were not relying on a separate oral agreement ... when they themselves have denominated their obligation unconditional, and have reinforced that declaration by their agreement that the “absolute and unconditional” nature of their guarantee was “irrespective of any lack of validity \* \* \* of the \* \* \* Restated Loan Agreement \* \* \* or any other agreement or instrument relating thereto”, or “(vii) any other circumstance which might otherwise constitute a defense” to the guarantee.

Though not the explicit disclaimer present in Danann, the substance of defendants’ guarantee forecloses their reliance on the claim that they were fraudulently induced to sign the guarantee by the banks’ oral promise ... . To permit that would in effect condone defendants’ own fraud in “deliberately misrepresenting [their] true intention” (Danann Realty Corp. v Harris, 5 NY2d, at p 323) when putting their signatures to their “absolute and unconditional” guarantee.

(Id.) NT responds by citing the court’s observation in JPMorgan Chase Bank v Liberty Mut. Ins. Co. (189 F Supp 2d 24, 27 [SD NY 2002]) that “Plapinger ... does not stand for the extraordinary proposition ... that a general sweeping disclaimer can serve to disclaim any and all extrinsic fraud between sophisticated parties.” (See Memorandum of Law in Opposition to Motion, at 22). NT then asserts that “[n]othing in the Asset Purchase Agreement remotely suggests any ... knowing disclaimer of reliance upon the oral misrepresentations and misleading omissions alleged in the counterclaims.” (Id. at 23). NT concludes that “as a matter of law and logic, [it] could not disclaim reliance on subjects that were uniquely within the Sellers’ knowledge,” i.e., the fraudulent nature of the alleged misrepresentations. (See Memorandum of Law in Opposition to Motion, at 24-25). The court finds that all three points of NT’s argument are unavailing.

First, NT is incorrect to suggest that the J.P. Morgan Chase Bank decision has in any way limited the application of the Plapinger holding. In Wells Fargo Bank Northwest, N.A. v Taca Intl. Airlines, S.A. (247 F Supp 2d 352 [SD NY 2002]), decided several months after JPMorgan Chase Bank, the federal court observed that:

In Citibank v Plapinger, 66 NY2d 90 (1985), New York extended the Danann rule,

finding that fraud in the inducement was blocked as a defense, ... although the disclaimer in question did not explicitly mention the contested issue, but merely stated that the guarantee at issue was “absolute and unconditional” irrespective of defenses. Further, New York courts have recognized that “no particular words are needed to transform a general disclaimer into a specific one, and have excluded parol evidence even when the contract did not contain an express disavowal of reliance on oral representations.” Finally, when applying the Danann rule, we are advised that courts should consider the text of the agreement compared to the representations claimed to be fraudulent or negligent, while also considering the arm’s-length nature of the negotiation and the sophistication of the parties, in order to determine whether reliance was reasonable [internal citations and quotations omitted].

(247 F Supp 2d at 368). The Court of Appeals’ Plapinger holding still controls and precludes a party from claiming fraudulent inducement where that party has knowingly disclaimed reliance on any oral representations that defendant made outside of the contract.

Second, NT is incorrect to state that “[n]othing in the Asset Purchase Agreement remotely suggests any ... knowing disclaimer of reliance.” The court has already determined that Section 9.07 of the Asset Purchase Agreement clearly expresses the parties’ intent to limit their potential liability to each other in tort for any misrepresentations that relate to the subject matter of those specific “representations, warranties and covenants” in Articles II, III, IV and V of the Asset Purchase Agreement. That the disclaimer only incorporates those Articles by reference is of no moment. In Fargo Bank Northwest, N.A. v Taca Intl. Airlines, S.A., *supra*, the federal court found that “the exact words ‘maintenance costs’ need not appear in the disclaimer in order for representations about maintenance to have been disclaimed” and dismissed the defendant’s counterclaim that the plaintiff had fraudulently induced it to sign an aircraft lease by making oral misrepresentations about those maintenance costs. (247 F Supp 2d at 368). This court similarly finds that, although Section 9.07 does not directly cite to Articles II, III, IV and V of the Asset Purchase Agreement, its unambiguous reference to the warranties in those Articles makes that

citation unnecessary. It is, thus, clear that NT “knowingly” disclaimed any reliance on oral representations as to matters governed by those warranties.

Third, the court discounts NT’s assertion that “as a matter of law and logic, [it] could not disclaim reliance on subjects that were uniquely within the Sellers’ knowledge.” NT has pled no facts from which it would be reasonable to infer that any of the allegedly fraudulent misrepresentations were “uniquely within the Sellers’ knowledge.” Indeed, NT asserts that it performed due diligence work before it negotiated and executed the Asset Purchase Agreement. (See Notice of Motion, Exhibit B [answer with counterclaims], ¶ 17). Among other things, the Asset Purchase Agreement recites that NT received and reviewed the contracts and relevant correspondence between the Sellers and two of their principal suppliers - Wyatt and Industrias GAT, S.A. (*Id.*, Exhibit B-A, at 41-42).

Nonetheless, in its opposition papers, NT now unaccountably claims that it was unaware of the terms or status of those suppliers’ contracts. (See Memorandum of Law in Opposition to Motion, at 21 and 24). As the Sellers correctly note, in Valassis Communications, Inc. v Weimer (304 AD2d 448 [1st Dept 2003]) the Appellate Division, First Department, held that “[a]s 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.” (304 AD2d at 449, quoting UST Private Equity Investors Fund, Inc. v Salomon Smith Barney, 288 AD2d 87, 88 [1st Dept 2001]). Here, the pleadings do not allege any facts from which the court might reasonably infer that NT did not possess any “means of verification available to it” with respect to those contracts. By contrast, the plaintiff in Steinhardt Group Inc. v Citicorp (272 AD2d 255 [1st Dept 2000]), that NT cites to

support its argument, truly did not possess any means and was not a party to the contract that contained the disclaimer. Because NT was a party to the Asset Purchase Agreement and had ample opportunity to investigate the Sellers' business dealings before it executed that Agreement, its reliance on Steinhardt is misplaced. Much more factually on point is Societe Nationale D'Exploitation Industrielle des Tabacs et Allumettes v Salomon Bros. Intl. Ltd. (268 AD2d 373 [1st Dept 2000]):

Plaintiff, a sophisticated institutional investor, cannot under the subject circumstances viably claim to have justifiably relied on defendants' allegedly materially incomplete disclosure. Plaintiff's contention in this connection, that it was unable itself to acquire the information needed independently to assess the risks and benefits of the transactions at issue, is without support in the record.

(268 AD2d at 374-375 [internal citations omitted]). NT is clearly a sophisticated business entity.

It avers that it:

was formed by, and is an investment of, Ripplewood Holdings, L.L.C. ..., a Delaware limited liability company which, with its affiliates, specializes in private equity investment in food manufacturing, automotive retail, industrial manufacturing, banking, entertainment and technology businesses.

(See Notice of Motion, Exhibit B [answer and counterclaims], ¶ 15). Such an entity is familiar with the contracts that it executes and responsible for its actions. To permit a contrary result “would in effect condone defendants' own fraud in ‘deliberately misrepresenting [their] true intention’ when putting their signatures to their ‘absolute and unconditional’ guarantee.”

(Citibank, N.A. v Plapinger, 66 NY2d at 95; see also Marine Midland Bank, N.A. v CES/Compu-Tech, Inc., 147 AD2d 396, 397 [1st Dept 1989]). Therefore, the court agrees that the overall “substance” of the transaction between the Sellers and NT dictates dismissal of NT's tort-based counterclaims.

### 3. No Special Relationship

The Sellers finally argue that NT's negligent misrepresentation counterclaim fails as a matter of law because NT has inadequately pled the existence of any "special relationship" between itself and the Sellers to support that counterclaim. (See Memorandum of Law in Support of Motion, at 24). The Court of Appeals has held that, because this "special relationship" usually only runs from professionals to their clients:

In the commercial context, a duty to speak with care exists when "the relationship of the parties, arising out of contract or otherwise, [is] such that in morals and good conscience the one has the right to rely upon the other for information."

(Kimmell v Schaefer, 89 NY2d 257, 263 [1996] [citation omitted]).

NT argues that a "special relationship" existed between it and the Sellers because they were in privity of contract. (See Memorandum of Law in Opposition to Motion, at 25-26). The Sellers reply that there was no privity of contract between themselves and NT until after they signed the Asset Purchase Agreement. (See Reply Memorandum of Law in Support of Motion, at 15). NT responds that privity did exist before the parties signed the Asset Purchase Agreement because they had previously signed a letter of intent in March of 2002. (See Supplemental Memorandum of Law in Opposition to Motion, at 9-10). NT also responds that a "special relationship" existed between themselves and the Sellers because they were actually "co-investors" and the Asset Purchase Agreement was actually a "joint-venture agreement." (Id. at 10). Under these circumstances whether there was privity of contract between the parties giving rise to a special relationship presents an issue of fact, particularly given the early phase of this litigation. (See e.g. Kimmell v Schaefer, 89 NY2d at 264 ["Whether the nature and caliber of the relationship between the parties is such that the injured party's reliance on a negligent misrepresentation is justified generally raises an issue of fact"]; Knight Securities L.P. v Fiduciary

Trust Co., 5 AD3d 172, 174 [1st Dept 2004] [whether there was a special relationship between the parties ... is a factual issue inappropriate for summary adjudication]).

Nonetheless, the court dismisses that NT's negligent misrepresentation counterclaim because one of the elements of this claim is "justifiable reliance," and the court has already determined that NT disclaimed any reliance on the alleged misrepresentations in this action. (See e.g. Kimmell v Schaefer, 89 NY2d at 264 ["The existence of such a special relationship may give rise to an exceptional duty regarding commercial speech and justifiable reliance on such speech."]; Gaidon v Guardian Life Ins. Co. of America, 255 AD2d 101, 102 [1st Dept 1998], aff'd as mod 94 NY2d 330 [1999] ["In any event, even if such a (special) relationship had arisen and given rise to a duty to speak accurately, plaintiffs' reliance still had to be reasonable"]).

Accordingly, although the court holds that it would be inappropriate to resolve the "special relationship" issue in the context of this motion, the court dismisses NT's negligence counterclaim because NT cannot plead the element of "justifiable reliance."

#### DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 3211, of plaintiffs/counterclaim defendants Pharma Consult, Inc. (f/k/a J.W.S. Delavau Co.), Pharma Concepts, Inc. (f/k/a Accucorp., Inc.), L&R Realty Associates, Inc., LR Pharmaceuticals, L.P., Leslie J. Leff, Ronnie H. Leff, the Richard M. Leff 10-year Grantor Retained Annuity Trust, the Richard M. Leff 12-year Grantor Retained Annuity Trust, the Lorraine T. Leff 10-year Grantor Retained Annuity Trust, the Lorraine T. Leff 12-year Grantor Retained Annuity Trust, and Janak V. Vyas is granted solely to the extent that the first and fourth counterclaims are dismissed, but is denied with respect to the


third counterclaim for indemnification; and it is further

ORDERED that the Clerk is directed to enter dismissal of the first and fourth counterclaims accordingly; and it is further

ORDERED that the remainder of this action, including the third counterclaim, is severed and shall, in all other respects, continue.

Dated: December 28, 2005

ENTER:

  
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J.S.C.

**FILED**  
DEC 29 2005  
COUNTY CLERK'S OFFICE  
NEW YORK