

**eTel Austria AG v Jordan**

2007 NY Slip Op 30300(U)

March 15, 2007

Supreme Court, New York County

Docket Number: 0603169

Judge: Karla Moskowitz

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SCANNED ON 3/20/2007  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ

PART 03

-----x  
eTEL AUSTRIA AG

Plaintiff,

-against-

JOHN W. JORDAN II; THE JOHN W. JORDAN II REVOCABLE REVOCABLE TRUST; THE JORDAN FAMILY TRUST; DAVID W. ZALAZNICK; JORDAN/ZALAZNICK CAPITAL COMPANY; LEUCADIA INVESTORS, INC.; THOMAS H. QUINN; JONATHAN F. BOUCHER; JOHN R. LOWDEN; JAMES E. JORDAN, JR.; PAUL RODZEVIK; G. ROBERT FISHER REVOCABLE GIFT TRUST; DALY JORDAN O'BRIEN; GEORGE C. JORDAN, JR.; ELIZABETH O'BRIEN JORDAN; BRUCE H. ZALAZNICK; ADAM E. MAX; A. RICHARD CAPUTO, JR.; JZ EQUITY PARTNERS PLC; JII PARTNERS LIMITED PARTNERSHIP; ALAN WALTON; AVI NEIKRUG AND CLIVE POWER,

Defendants.  
-----x

INDEX NO. 603169/2006

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

**FILED**

MAR 20 2007

NEW YORK COUNTY CLERK'S OFFICE

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: March 15, 2007

  
\_\_\_\_\_  
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 : I.A.S. PART 3

-----X  
eTEL AUSTRIA AG

Plaintiff,

-against-

Index No. 603169/2006

JOHN W. JORDAN II; THE JOHN W. JORDAN II  
REVOCABLE TRUST; THE JORDAN FAMILY TRUST;  
DAVID W. ZALAZNICK; JORDAN/ZALAZNICK  
CAPITAL COMPANY; LEUCADIA INVESTORS, INC.;  
THOMAS H. QUINN; JONATHAN F. BOUCHER; JOHN  
R. LOWDEN; JAMES E. JORDAN, JR.; PAUL RODZEVIK;  
G. ROBERT FISHER REVOCABLE GIFT TRUST; DALY  
JORDAN O'BRIEN; GEORGE C. JORDAN, JR.;  
ELIZABETH O'BRIEN JORDAN; BRUCE H. ZALAZNICK;  
ADAM E. MAX; A. RICHARD CAPUTO, JR.; JZ EQUITY  
PARTNERS PLC; JII PARTNERS LIMITED PARTNERSHIP;  
ALAN WALTON; AVI NEIKRUG AND CLIVE POWER,

**DECISION and ORDER**

Defendants.  
-----X

**KARLA MOSKOWITZ, J:**

In an action alleging breach of an "Agreement for Purchase and Sale of All Outstanding and Common Stock of JIR Paging, Inc." ("Agreement"), defendants<sup>1</sup> (collectively referred to as "defendants" or "sellers") move pursuant to CPLR 3211(a)(7) and CPLR 3016(b) to dismiss the complaint.

**COMPLAINT**

The complaint alleges that, pursuant to the March 9, 2006 Agreement, plaintiff purchased JIR Paging, Inc. ("JIRP" or "the company") from the defendants. In the Agreement, the defendants made various representations and warranties to plaintiff concerning, *inter alia*, the

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<sup>1</sup> The defendants are John W. Jordan II; the John W. Jordan Revocable Trust; the Jordan Family Trust; David W. Zalaznick; Jordan/Zalaznick Capital Company; Leucadia Investors, Inc.; Thomas H. Quinn; Jonathan F. Boucher; John R. Lowden; James E. Jordan, Jr.; Paul Rodzevik; G. Robert Fisher Revocable Gift Trust; Daly Jordan O'Brien; George C. Jordan, Jr.; Elizabeth O'Brien Jordan; Bruce H. Zalaznick; Adam E. Max; A. Richard Caputo, Jr.; JZ Equity Partners PLC; JII Partners Limited Partnership; Alan Walton; Avi Neikrug; and Clive Power.

financial condition of JIRP and its subsidiaries (“the Group Companies”) and the accuracy of defendants’ disclosures to plaintiff. (The Agreement is annexed to the complaint as Exhibit A).

Specifically, the plaintiff contends that the defendants warranted: (1) in Section 3.15 of the Agreement that they prepared certain 2005 financial statements in accordance with Austrian or US “GAAP”<sup>2</sup> (Fitzgerald Aff., Ex. 1, ¶¶ 15-16); (2) in Section 3.17 of the Agreement that to their knowledge, the documents that they made available to plaintiff during due diligence were true and correct in all material respects and that they did not omit any documents that would be material to plaintiff (Fitzgerald Aff., Ex. 1 ¶ 25); and (3) in Section 3.21 of the Agreement that a consolidated balance sheet for the Group Companies as of the closing date, prepared in accordance with US GAAP and other specific rules, would provide that the current liabilities of the Group Companies would not exceed the current assets of the Group Companies by more than EUR 777,699 (Fitzgerald Aff., Ex. 1 ¶ 33).

Plaintiff purchased the Company for EUR 30,000,000 and, pursuant to Section 2.3 of the Agreement, at closing, plaintiff transferred EUR 28,500,000 to Seller, placed an additional EUR 750,000 in a “Deferred Purchase Price” account and delivered EUR 750,000 to the escrow agent. (Fitzgerald Aff., Ex 1, ¶¶ 10-12).

Plaintiff claims that following its purchase of JIRP, plaintiff performed an internal review of the Group Companies and discovered that defendants misrepresented the financial condition of the Group Companies in several respects. First, in violation of Section 3.15, defendants provided non-GAAP compliant financial information that plaintiff relied on when it calculated the Group Companies’ 2005 earnings before interest, taxes, depreciation and amortization (“EBITDA”). Plaintiff further alleges that, because it based the purchase price on a multiple of

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<sup>2</sup> “GAAP” stands for Generally Accepted Accounting Principles.

the erroneous EBITDA, plaintiff paid an inflated price for the Company. (Fitzgerald Aff, Ex. 1, ¶¶ 20-24). Second, by providing non-GAAP compliant financial statements, defendants breached the Section 3.17 warranty to provide disclosure documents that were true and correct in all material respects. (Fitzgerald Aff, Ex. 1, ¶¶ 25-32). Third, in breach of Section 3.21, on the closing date, current liabilities of the Group Companies exceeded their current assets by more than EUR 2,777,000. (Fitzgerald Aff, Ex. 1, ¶¶ 33-37).<sup>3</sup>

Plaintiff alleges that, pursuant to the Notice Provision in Section 8.4 of the Agreement, on June 14, 2006, plaintiff provided defendants with written notice that defendants had breached the Section 3.15, 3.17 and 3.21 warranties. On July 10, 2006, in response to defendants July 7, 2006 letter, plaintiff provided defendants with additional information regarding the alleged breaches. (Fitzgerald Aff. Ex. 1, ¶¶ 42-46 [June 14, 2006 and July 10, 2006 letters annexed to the complaint as Exhibits D and C, respectively]).

The first and second causes of action in the complaint state claims for the breach of the warranties contained in Sections 3.15 and 3.17, and each cause of action seeks EUR 12,632,895 in damages for the difference between what plaintiff paid for the company, based on the allegedly erroneous financial statements, and what plaintiff claims the Company was really worth based on plaintiff's auditor's review. In the third cause of action, based on defendants' alleged breach of Section 3.21 of the Agreement, plaintiff seeks to recover almost EUR 2,000,000 that allegedly

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<sup>3</sup> The complaint also details the terms of defendants' obligation to indemnify plaintiff under the Agreement. Pursuant to Section 8.1, defendants agreed to indemnify plaintiff for damages arising out of defendants' breach of the Agreement or any of the Agreement's representations and warranties. Pursuant to section 8.2(a), defendants provided that, if the Section 8.1 indemnified losses exceeded EUR 500,000, defendants would pay plaintiff for the entire loss. Section 8.2(b) states that defendants have no liability for indemnification claims for amounts above EUR 3,750,000 except where the loss arose from the defendants' fraud or willful misconduct. (Fitzgerald Aff., Ex. 1, paras. 38-40).

represents the difference between the actual and warranted “liability to asset amounts” for the Group Companies. The fourth cause of action states a claim for fraud, and, in the fifth cause of action, plaintiff seeks a declaratory judgment that, pursuant to Section 8.7 of the Agreement, defendants must indemnify plaintiff from the remaining escrow funds for its loss.<sup>4</sup> Plaintiff also seeks punitive damages.

## ARGUMENTS

In support of dismissal, defendants argue that the court should dismiss the entire complaint because it fails to satisfy the requirements articulated in Section 8.2(a)<sup>5</sup> of the Agreement for stating a claim under the Agreement in that plaintiff has not alleged that it has a claim that exceeds the deductible or that the claim otherwise meets the requirements of Section

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<sup>4</sup> Section 8.7 of the Agreement provides, “[a]ny claims that have been. . . finally and definitively determined by court of competent authority for breach of Sellers’ representations or warranties under this Agreement shall be settled in the first case by reducing the Deferred Purchase Price and then by reducing the outstanding balance on the Escrow Account . . . .” Pursuant to Section 8.1, plaintiff’s sole remedy is the indemnification specified in the Agreement.

<sup>5</sup> Section 8.2(a) provides in pertinent part:

Deductible. Save as provided for in Section 8.8, the Sellers shall have no liability under Section 8.1 after the Execution Date unless and until the aggregate amount of all Indemnified Losses of the Buyer for which the Sellers would, but for this Section 8.2(a), be liable under Section 8.1 exceeds UR 500,000 (the “**Deductible**”) (except that only Indemnified Losses arising out of individual claims in excess of EUR 35,000 shall be taken into account in determining the Deductible,) in which event the Sellers shall be liable for the amount of all Indemnified Losses under Section 8.1 and not simply the amount in excess of the Deductible, however under no circumstances will Sellers be liable for individual claims below EUR 35,000. In no event shall the Deductible apply to any Indemnified Loss arising out of . . . (ii) any of Sellers’ fraud or willful misconduct, in which case, any such Seller shall be fully liable for such Indemnified Losses.

8.2(b)'s indemnity cap.<sup>6</sup> Alternatively, defendants argue that the court should dismiss each of plaintiff's causes of action for failure to plead loss causation.

Defendants contend that the third cause of action based on Section 3.21 is dismissible because plaintiff has not alleged that the claim is based on a GAAP compliant balance sheet that shows that the difference between the current assets and the current liabilities of the Group Companies exceeds EUR 777,699.

As to the fourth cause of action, defendants contend that it fails to plead fraud with particularity.

Regarding damages, defendants claim that the Agreement bars plaintiff's demand for damages in an amount greater than plaintiff's indemnified loss and that the allegations in the complaint do not support plaintiff's claim for punitive damages.

In opposition, plaintiff argues that it has pleaded all of the necessary elements of each of its causes of action with sufficient particularity to inform the defendants of its claims and that the complaint adequately alleges loss causation. In addition, plaintiff argues that the agreement does not bar it from seeking full recovery for its losses and that the complaint adequately supports its claim for punitive damages.

## **DISCUSSION**

On a motion addressed to the sufficiency of the pleadings, the court must accept every factual allegation as true and liberally construe the allegations in a light most favorable to the pleading party. (*Guggenheimer v Ginzburg*, 43 N.Y.2d 268 [1977]; see CPLR 3211[a][7]). "We

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<sup>6</sup> Section 8.2(b), entitled Indemnity Caps, states that, except where plaintiff is claiming fraud or intentional misconduct, the aggregate liability of all the sellers shall not exceed 12.5% of the purchase price and that the aggregate liability of each individual seller shall not exceed 12.5% of the purchase price multiplied by his/her pro rata share.

. . . determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 N.Y.2d 83, 87-88 [1994]). “The motion must be denied if from the pleadings’ four corners ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” (*511 West 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144, 151-152 [2002][internal citations omitted]).

**A. First and Second Causes of Action for Breach of Contract and the Fifth Cause of Action for a Declaratory Judgment**

(1) To state a claim for breach of a contract warranty, plaintiff must allege existence of a warranty in the contract, defendant’s breach of the warranty, damages resulting from the breach and justifiable reliance on the warranty. (*See Merrill Lynch Co., Inc. v Allegheny Energy Inc.*, 2005 WL 1663265 [S.D.N.Y.]). In this case, the first and second causes of action adequately allege the essential elements of the breach of contract claim.

In the first and second causes of action, plaintiff identifies two warranties in the contract, Section 3.15 and Section 3.17, that the Sellers allegedly breached. Plaintiff claims that it justifiably relied on those warranties when it calculated the purchase price for JIRP and that defendants’ breach was the proximate cause of its paying an inflated price for JIRP that resulted in damages that exceed the Section 8.2 deductible.

Defendants’ argument that plaintiff has not provided details of how plaintiff calculated the damages is unavailing. On a motion to dismiss, unlike a motion for summary judgment, the plaintiff has no obligation to demonstrate evidentiary facts to support the allegations in the complaint. (*Aurora Loan Services, LLC v Cambridge Home Capital, LLC*, 2006 WL 1320741 [N.Y. Sup. Ct. Jan. 31, 2006]). If “the complaint sufficiently gives notice of the events out of which the grievances arise and pleads the necessary elements of the cause of action, the pleadings

should be deemed adequate.” (*Cohn v Rothman-Goodman Mgmt. Corp.*, 155 A.D.2d 579, 580-581 [2nd Dept. 1989]).

(2) Moreover, plaintiff has adequately pled loss causation because it does not merely complain that it purchased the Company at an inflated price, but rather plaintiff identifies the inaccurate information that defendant allegedly provided and explains how that misinformation proximately caused the alleged loss. (*See Suez Equity Investors, L.P. v Toronto Dominion Bank*, 250 F.3d 87,94 [2nd Cir. 2001]).

“Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by plaintiff.” (*Lentell v Merrill Lynch & Co.*, 396 F.3d 161, 175 [2nd Cir. 2005]). Loss causation is related to the concept of proximate cause. (*Dura Pharm., Inc. v Broudo*, 544 U.S. 336, 346 [2005]). In *Dura*, a securities fraud class action case under the Securities Exchange Act, the Supreme Court rejected the theory that artificial inflation of a security’s purchase price, is, without more, sufficient to establish loss causation. The Court dismissed the complaint because it did not inform defendant of the causal connection between the alleged loss and the alleged misstatement. However, the Court went on to observe that “ordinary pleading rules are not meant to impose a great burden upon a plaintiff, [b]ut it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind.” (*Id.* at 347; *see also Lentell, supra* at 175 [plaintiff can, inter alia, plead loss causation by alleging that the defendant misstated or omitted risks that led to the loss]).

The complaint in this case alleges that defendants’ noncompliance with the GAAP procedures decreased the profit and loss account, and, as a result, the EBITDA of the Group Companies decreased. Plaintiff claims it used the allegedly erroneous EBITDA to calculate the

purchase price, and thus, defendants' breach resulted in plaintiff's overpayment for JIRP of more than EUR 12,000,000. (Complaint ¶¶ 20-24). Moreover, Exhibit C to the complaint, a July 10, 2006 letter from plaintiff to the defendants, provides a detailed accounting of the costs of defendants' alleged misrepresentations. Thus, plaintiff has adequately "explain[ed] why it lost money on the purchase, the very question that the loss causation allegation must answer." (*Emergent Capital Inv. Mgmt., LLC v Stonepath Group, Inc.*, 343 F.3d 189, 198 [2nd Cir. 2003]).<sup>7</sup>

Defendants reliance on *Merrill Lynch & Co., Inc. v Allegheny Energy, Inc.*, (2005 WL 1663265 [S.D.N.Y. 2005]) is misplaced. In that case, during negotiations for Allegheny to buy one of Merrill Lynch's subsidiaries, Merrill provided Allegheny with the subsidiary's financial information. However, during this time, the head of the subsidiary allegedly embezzled money and entered into fraudulent transactions with Enron that inflated the subsidiary's operating revenues. Some of the documents that Allegheny received during due diligence contained this inflated information. But, by the time the parties had concluded the sale, Merrill Lynch had provided Allegheny with the correct information. Merrill Lynch commenced the action alleging a single breach of contract claim, and Allegheny counterclaimed for rescission alleging fraudulent inducement, breach of contract and breach of fiduciary duty.

After a bench trial, the court found that Allegheny failed to prove that "the subject of the fraudulent statement or omission was the cause of the actual loss suffered." (*Id* at \*6). The court

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<sup>7</sup> Moreover, several courts have found that loss causation is a factual issue that the court should not decide at the pleading stage. (*See Compudyne Corp. v Shane*, 2006 WL 2792206 at \*15 [S.D.N.Y. Sept. 29, 2006] ["The Second Circuit also reaffirmed that (the loss causation) analysis is ordinarily a 'fact based inquiry' that ordinarily 'is a matter of proof at trial and not to be decided on a 12(b)(6) motion to dismiss.']) [quoting *Lentell v Merrill Lynch & Co.*, *supra* at 174]).

held that Allegheny's alleged damages were speculative because they were not based on the actual agreement between the parties. Moreover, the court found that Allegheny could not identify any actual injury, because it received the correct financial information from Merrill Lynch before the deal closed .

Here, the pleading and the attached Exhibits allege that plaintiff's damages are based on verifiable data that show the difference between what the purchase price would have been if the defendants had not breached the warranties in the agreement and the price that plaintiff paid because of the breach. Thus, the complaint in this matter adequately pleads loss causation.

(3) As to plaintiff's damage claim, nothing in the agreement limits plaintiff's right to demand the full measure of damages it allegedly suffered as a result of defendants' alleged breach of Sections 3.15 and 3.17 of the agreement. Plaintiff has not asserted that its damage estimate is based on a promise outside of the agreement.<sup>8</sup> Rather, it contends that it has requested the actual damages it suffered as a result of defendants' breach and the July 10, 2006 letter attached to the complaint details how plaintiff calculated its alleged loss.

Accordingly, the court denies that branch of the motion seeking to dismiss the first, second and fifth causes of action.

**B. Third Cause of Action for Breach of the Representation in Section 3.21**

Section 3.21 of the agreement states that a consolidated balance sheet for the Group Companies, prepared as of the closing date in accordance with GAAP and other specific accounting rules, shall provide that the difference between the current liabilities and the current assets of the Group Companies do not exceed EUR 777,699.

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<sup>8</sup> See Section 3.11 (any representation or warranty not specifically set forth in the agreement is disclaimed) or Section 10.11 (there are no representations or warranties other than those specifically set forth in the agreement and the agreement supersedes all prior agreements).

It appears that the parties intended Section 3.21 to be a warranty of the value of the Group Companies on the closing date, and, pursuant to the warranty, if the current liabilities of the Group Companies exceeded the current assets of those companies by more than 777,699 on the closing date, then defendants would have breached that warranty. In the complaint, plaintiff states that because “the current liabilities of the Group Companies exceeded their current assets by approximately EUR 2,777,412, Sellers have breached the representation and warranty contained in Section 3.21 of the agreement” and that, as a result of the breach, plaintiff has been damaged. These allegations are sufficient to state a claim for breach of the Section 3.21 warranty.

Defendants’ argument that plaintiff must plead that a consolidated balance sheet prepared in accordance with GAAP and other specified accounting rules showed that the current liabilities exceeded the current assets by more than 777,699 is without merit. The agreement states that it was the defendants’ burden to present plaintiff with the balance sheet showing that the liabilities did not exceed assets by more than 777,699. Plaintiff is not required to plead or prove its damages with a balance sheet prepared in accordance with Section 3.21. In the July 10, 2006 letter, annexed to the complaint as Exhibit C, plaintiff contends that it bases its claim on an internal investigation in which it discovered that the current liabilities of the Group Companies exceeded the current assets by more than EUR 2,777,000.<sup>9</sup>

Accordingly, the court denies that branch of the motion seeking to dismiss the third cause

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<sup>9</sup> Section 8.4 of the Agreement states in pertinent part:

A party entitled to indemnification hereunder . . . shall give written notice to the other party . . . stating specifically the basis of the claim in reasonable detail (to the extent available at the time), including the nature and amount thereof . . ., and shall tender defense thereof to the Indemnifying party.

of action.

**C. Fraud**

Under New York Law, to state a claim for fraudulent misrepresentation, plaintiff must allege that defendants made a knowing misrepresentation of a material fact for the purpose of inducing plaintiff to act or refrain from acting in reliance thereon and that plaintiff was damaged by such reliance. (*See Swersky v Dreyer & Traub*, 219 A.D. 2d 321 [1st Dept 1996]). Moreover, CPLR 3016(b) requires the pleader to state the circumstances constituting the fraud in detail.

Plaintiff claims that the sellers warranted (1) that the financial statements were prepared in accordance with GAAP; (2) that all the disclosure documents were true and correct; (3) that no documents were omitted or withheld; and (4) that the current liabilities of the Group Companies did not exceed the current assets of the group companies by more than EUR 777,699. Plaintiff states that these representations were material to its decision to enter into the agreement and pay EUR 30,000,000 for the Company. Plaintiff further states that defendants were aware that the financial statements were not prepared in accordance with GAAP and that they were aware that plaintiff did not receive certain documents that would accurately reflect the Company's financial state. Plaintiff also claims that defendants knew, on the closing date, that the Group Companies' current assets exceeded the current liabilities by more than 777,699. Plaintiff contends that it reasonably relied on defendants' representations and that defendants intended to defraud plaintiff by inducing it to buy the company at an inflated price.

These allegations contain sufficient detail to put the defendants on notice of the acts that allegedly constitute the fraud. (*See Black v Chittenden*, 69 N.Y.2d 665 [1986]). Even without further elaboration, defendants would know that plaintiff is alleging that defendants misled plaintiff into paying an inflated price by presenting financial statements and disclosure

documents that were false and misleading. Keeping in mind that one should not interpret the statute so strictly as to defeat what might otherwise be a valid claim where some information might be peculiarly within the defendant's knowledge, the present claim is stated in sufficient detail to satisfy CPLR 3016(b)'s specificity requirement. (*See Oxford Health Plans [N.Y.], Inc. v Bettercare Health Care Pain Management & Rehab PC*, 305 A.D.2d 233 [1st Dept 2003]).

Accordingly, the court denies that branch of the motion seeking to dismiss the fourth cause of action.<sup>10</sup>

#### **D. Punitive Damages**

The court grants that branch of the motion seeking to dismiss the claim for punitive damages. It is well-settled law that damages arising from a breach of contract will "ordinarily be limited to the contract damages necessary to redress the private wrong, but that punitive damages may be recoverable if necessary to vindicate a public right." (*Rocanova v Equitable Life Assurance Society of the United States*, 83 N.Y.2d 603 [1994]). In *Rocanova*, the Court of Appeals set forth the pleading requirements for a punitive damages claim arising from a breach of contract: (1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be egregious or reprehensible; and (3) the defendant's conduct must be directed at both the plaintiff and the public at large.

In this case, plaintiff has failed to allege that defendants engaged in egregious or reprehensible conduct that was directed at the public at large, and, accordingly, the demand for

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<sup>10</sup> Although the allegations in the fraud cause of action mirror the allegations in the breach of contract causes of action, Section 8.2 of the Agreement places limits on plaintiff's ability to recover for breach of contract, but, "in the case of Seller's fraud or willful misconduct," seller shall be fully liable for the indemnified losses. Thus, because the damages for fraud are not recoverable for breach of contract, the fraud cause of action is not merely redundant. (*See Tesoro Petroleum Corp. v Holborn Oil Co., Ltd.*, 108 A.D.2d 607 [1st Dept. 1985]).

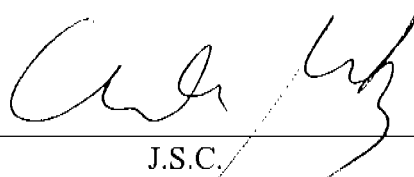
punitive damages fails.

Accordingly, it is ORDERED that defendants' motion to dismiss the complaint is granted to the extent that plaintiff's claim for punitive damages is dismissed, and the motion is otherwise denied.

The parties are directed to appear for a conference on April 17, 2007 at 10:30 a.m. in Part 3, Room 248, 60 Centre Street, New York, NY 10007.

This decision constitutes the order of the court.

Date: March 15, 2007

  
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J.S.C.