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

PRESENT: O. PETER SHERWOOD Justice PART 49

LEKI AVIATION A/S,

Plaintiff,

-against-

B/E AEROSPACE, INC., AIRBUS SAS, and SATAIR A/S,

Defendants.

INDEX NO. 653625/2012

MOTION DATE May 23, 2013

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to dismiss action.

	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 to dismiss action is decided in accordance with the accompanying decision and order.

Dated: June 14, 2013

O. PETER SHERWOOD, J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

----------X

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Plaintiff,

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DECISION AND ORDER
Index No. 653625/2012

Mot. Seq. Nos.: 001 -and- 002

O. PETER SHERWOOD, J.S.C.:

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion sequence 001, defendants, Airbus SAS ("Airbus") and Satair A/S ("Satair") (together "Airbus/Satair"), move pursuant to CPLR 3211 (a) (7), to dismiss the sixth cause of action for tortious interference with contract. In motion sequence 002, defendant B/E Aerospace, Inc. ("BE") moves, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the first (fraud in the inducement), second (anticipatory breach of contract), third (anticipatory breach of contract), fourth (breach of contract) and fifth (breach of the implied covenant of good faith and fair dealing) causes of action.

BACKGROUND

As this is a motion to dismiss, the allegations are taken from the complaint and are assumed to be true (*see Monroe v Monroe*, 50 NY2d 481, 484 [1980]). Plaintiff Leki Aviation A/S ("Leki"), a Denmark corporation, is a distributor and servicing dealer of aircraft parts, interiors, and components to the aviation industry. Defendant BE, a Delaware corporation, is a manufacturer of aircraft passenger cabin interior products for the commercial and business jet aircraft markets. Defendant Airbus is an airplane manufacturer, and is a wholly owned subsidiary of European Aeronautic Defense and Space Company EADS N.V. Defendant Satair is a wholly owned subsidiary of Airbus Denmark Holdings APS, which is a wholly owned subsidiary of Airbus. Satair is a supplier of aircraft parts and service solutions for aircraft maintenance.

Prior to 2007, Leki was a distributor of oxygen system products supplied by Draeger Aerospace GmbH. ("Draeger"), a supplier of components and integrated systems to supply oxygen

systems for civil and military aircraft. BE acquired Draeger in 2006. In July 2006, Leki sought to have BE continue Leki as the distributor of Draeger products, but BE chose Satair, Leki's direct competitor. The BE and Satair distribution agreement expired on December 31, 2012. In that agreement, BE agreed to sell Satair oxygen products at a 10.5% discount from BE's aftermarket product prices.

In September 2011, Airbus acquired Satair. In the fall of 2011, BE executives represented to Leki that because of its concern over the reaction of other aircraft manufacturers about Airbus' acquisition of Satair, BE would not continue distributing oxygen system products with Satair.

In early November 2011, BE sent Leki a request for proposal (RFP). BE stated in the RFP that the proposed agreement was for a five year contract with an additional five year renewal period. BE represented in the RFP that the expected "turnover" for the oxygen systems products ranged from $50.5 million in the first year of the agreement to $66 million in the fifth year. Leki estimates that the value of the agreement to Leki over five years would exceed $250 million in direct sales of BE products. Leki responded to the RFP and was awarded an exclusive distribution contract in January 2012 (the "Distributor Agreement"). The Distributor Agreement was signed in March 2012.

Under the terms of the Distributor Agreement, BE appointed Leki as its exclusive distributor of BE oxygen systems products for a five-year term, commencing on January 1, 2013 and ending December 31, 2017. In Attachment A to the Distributor Agreement, BE agreed to sell Leki the oxygen systems at an 8.75% discount from BE's official aftermarket products price list in effect at the time of shipment for routine purchase orders. Article 15 of the Distributor Agreement contains a restrictive covenant, which provides that "during the term of this Agreement, [Leki] will not market, promote, sell, manufacture, distribute, service or otherwise deal in any products . . . competitive to" BE oxygen products without BE's prior written consent (Distributor Agreement, Art.15).

Regarding the effective date and period of the contract, Article 11 of the Distributor Agreement states,

> "[t]his Agreement shall be effective upon the date first above written, and, unless sooner terminated in accordance with the provisions herein, shall remain in effect through 31 December 2017 provided that this Agreement may be terminated by either party during the term described above for any or no reason by written notice to the other party given at least three hundred and sixty five (365) days in advance of the specified early termination date. As of the date of such notice in accordance with the above, Distributor shall become a non-exclusive distributor."

The first paragraph of the Distributor Agreement states, "THIS AGREEMENT is made and entered into as of the first day of January 2013 . . . ."

On March 20, 2012, Leki informed BE that it planned to publish a press release on March 28, 2012 announcing the agreement. BE responded that Leki could not publish the press release on that date, because BE had not yet informed Satair that Leki was appointed as the new distributor. Leki was advised that BE's leadership planned to meet with Satair on March 28, 2012.

On March 21, 2012, BE and Leki held a "Kickoff Meeting" by teleconference, which was attended by executives from both companies. Mark Oswald, BE's Global Vice President, Life Support Systems Product Line, emphasized the need to keep all communications confidential because BE had not yet informed Satair that BE had already executed a contract with Leki to replace Satair. That day, after the teleconference was complete, Bill Sturm, BE's Project Lead, Life Support Systems, emailed an "Action Item List," which included "elimination of competitor products in Leki portfolio." In accordance with the restrictive covenant in the Distributor Agreement, Leki terminated its supply arrangements with its other suppliers of products that BE believed would compete with the BE products. Following the teleconference, BE emailed Leki its 2012 list price catalog for Life Support System products so that Leki could begin the task of entering the BE product information into its computer systems. Leki alleges that the parties held additional meetings and/or communications during April and early May relating to the transition.

On May 17, 2012, Leki received a letter by fax with the subject line "BE Aerospace, Inc. Notice of Termination and Withdrawal of Consent Re: Distributor Agreement." The letter states:

> "Dear President and Chief Executive Officer:
>
> As you know, Leki . . . and BE . . . signed a document entitled "Distributor Agreement" in February of this year. (A copy is enclosed for your ease of reference.) That "Distributor Agreement" by its terms is not effective, if at all, until January 1,

> 2013. By this letter, BE hereby withdraws its consent to name Leki as of January 1, 2013, as a distributor for the products identified in the enclosed "Distributor Agreement." In addition, BE hereby gives notice that it terminates any document and understanding, to the extent any exist, concerning any kind of distributor relationship with or obligation to Leki."

Plaintiff asserts, upon information and belief, that in April or May 2012, after Airbus learned that BE was not renewing its distribution agreement with Satair and had instead signed a new Distributor Agreement with Leki, Airbus summoned BE's President and COO to Airbus' headquarters in France. As a result of that meeting or meetings, BE sent the termination letter to Leki. Plaintiff avers, upon information and belief, that after the meeting between Airbus and BE, BE and Satair entered into an agreement whereby Satair would continue to distribute the BE products which had been the subject of the Distributor Agreement between BE and Leki, that the terms of the new distribution agreement between BE and Satair were more favorable to BE than those of its existing agreement in that BE would sell its products to Satair at an 8.75% discount from the aftermarket product price, as opposed to the 10.5% discount provided for in the original agreement, and that BE used the terms of its agreement with Leki to cause Satair to meet the price terms of the agreement between BE and Leki which terms were less favorable to Satair.

Leki alleges that it has incurred significant costs and expenses related to the events surrounding the BE Distributor Agreement. Leki also asserts that it has changed its position with respect to its critical business interests by impairing its relationships with suppliers.

There are six causes of action in the complaint, the first five of which are asserted against BE. The sixth is asserted against Satair and Airbus. The causes of action are (1) fraud in the inducement, (2) anticipatory breach of contract, (3) anticipatory breach of contract, (4) breach of contract, (5) breach of the implied covenant of good faith and fair dealing, and (6) tortious interference with contract.

In its first cause of action for fraud in the inducement, BE asserts that on November 30, 2011, Ralph Fischer, BE's Managing Director of Life Support Systems, told Kim Kroejby, Leki's President and other Leki personnel that BE would not renew with Satair, and that it would instead

choose Leki or else distribute the products itself. From August 2011 through February 2012, Fischer and other BE executives told Kroejby that BE would not enter into an agreement with Satair because Satair was now a subsidiary of Airbus. To induce him into moving forward with the Distributor Agreement, BE also told Kroejby that BE would not renew with Satair because BE was very concerned about the reaction of large customers such as Boeing and other aircraft manufacturers. Leki asserts that BE made these allegedly false statements knowing at the time they were made that they were untrue. Leki alleged that BE made these statements with the intent to deceive Leki and to induce Leki to enter into an agreement with BE at a lower discount rate so that the Distributor Agreement could be used as a negotiating tool with Satair and Airbus. Leki asserts that it reasonably relied on BE's representations in entering the Distributor Agreement. As a result, Leki expended significant resources, and made changes to its business in accordance with the restrictive covenant contained in the Distributor Agreement.

In its second cause of action for anticipatory breach of contract, Leki asserts that by sending the termination letter on May 17, 2012, BE expressed an intent to forego performance of all of its obligations under the Distributor Agreement, and wrongfully repudiated the agreement.

In its third cause of action for anticipatory breach of contract, Leki asserts that under Article 4 of the Distributor Agreement, BE is obligated to sell products to Leki in accordance with the specific terms and conditions contained in that article. Further, under Article 27 of the agreement, the rights and obligations of the parties under Article 4 "survive any expiration or termination of this Agreement." Thus, under Article 27, regardless of the alleged termination, Leki asserts that BE remains contractually obligated to sell it products in accordance with Article 4. By sending its May 17, 2012 letter, BE anticipatorily repudiated the agreement and expressed its intention not to perform its contractual obligations under Articles 4 and 27.

In its fourth cause of action for breach of contract, Leki asserts that under Article 11(a) of the Distributor Agreement, BE was required to give Leki a minimum of 365 days notice of termination from the date, during the term, January 1, 2013 through December 31, 2017, when the notice was

given. Leki avers that BE breached the Distributor Agreement by failing to provide Leki with the 365 day period during the term thereby allowing Leki to act as BE's worldwide distributor for a year.

In its fifth cause of action for breach of the implied covenant of good faith and fair dealing (pleaded as "violation of implied covenant"), Leki asserts that implicit in the agreement between BE and Leki was an understanding that Leki would have a minimum of 365 days, from January 1, 2013 as the worldwide distributor of BE's products, and that Leki would also have the additional opportunities that flowed from those distribution rights, including enhanced access to BE's customers, the opportunity to sell those customers additional products, and the additional opportunity to sign other product lines not competitive with BE.

In its sixth cause of action for tortious interference with contract, Leki asserts that Airbus and Satair knew that BE had entered into the Distributor Agreement with Leki, and also knew that it contained a saving provision that required BE to sell oxygen products to Leki even after termination of the agreement. Leki asserts, upon information and belief, that Airbus and Satair wrongfully and maliciously informed BE that if it did not (1) terminate its contract with Leki, (2) discontinue selling oxygen products to Leki, and (3) renew or extend its distribution agreement with Satair, Airbus would cause BE to suffer commercial consequences.

In (motion sequence number 002) BE seeks dismissal of the first five causes of action. In motion sequence number 001, Airbus/Satair moves to dismiss the sixth cause of action, which is the only claim asserted against it.

DISCUSSION

I. Motion to Dismiss Standards

A. CPLR 3211 (a) (1) Standard

To succeed on a motion to dismiss, pursuant to CPLR 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.*, 28 AD3d 180 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary

evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law [citation omitted]" (*McCully v Jersey Partners, Inc.*, 60 AD3d 562, 562 [1st Dept 2009]).

CPLR 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means judicial records such as judgments and orders, as well as documents reflecting out-of-court transactions such as contracts, releases, deeds, wills, mortgages and any other papers, "the contents of which are 'essentially undeniable'" (*id.* at 84-85).

B. CPLR 3211 (a) (7) Standard

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see, Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]).

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a CPLR 3212 motion for summary judgment the court will not consider them for the purpose of determining whether there is evidentiary support for properly

pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York,* 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.,* 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 "*unless* they 'establish conclusively that [plaintiff] has no . . . cause of action" (*Lawrence v Graubard Miller,* 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.,* 40 NY2d *supra* at 636). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss. Accordingly, the court will construe the complaint in the generous light to which it is entitled on a motion to dismiss.

II. Fraud in the Inducement (1st Cause of Action)

"In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . ., and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-324 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). Representations of opinion, even as to matters of fact, are not representations and are not actionable unless guaranteed (*see Lanzi v Brooks*, 54 AD2d 1057[1976], *aff'd* 43 NY2d 778 [1977]; *Municipal Metallic Bed Mfg. Corp. v Dobbs*, 253 NY 313 [1930]).

BE argues that Leki's first cause of action for fraud in the inducement must be dismissed because Leki has not alleged an intentional misrepresentation of a fact that existed at the time the parties entered into the Distributor Agreement. BE contends that Leki merely alleges that BE's pre-execution statements became misrepresentations when discussions that occurred between BE and Airbus after the Distributor Agreement was executed resulted in Airbus and Satair's tortious interference with the Leki-BE contract (Complaint 58). The court agrees.

The complaint does not allege misrepresentation of any then-present fact. The complaint alleges that Ralf Fischer ("Fischer") and Rao Tella ("Tella"), both BE executives, expressed BE's concern that as a result of the sale of Satair to Airbus, Satair was no longer a viable option as a distributor for BE products. Tella's alleged representation that BE would not continue to use Satair as its exclusive distributor of oxygen system products is alleged to have induced Leki to incur the expense of responding to a BE RFP and to bid for the distributorship contract. Notably, the complaint does not allege that the RFP contained any misrepresentations. In any event, the misrepresentation is not a present fact and viewed in the context in which it was uttered - - a concern as to the impact of the sale on the validity of the BE/Satair relationship - - the statement was a mere opinion. Moreover, the alleged misrepresentation relates directly to the contract which provides that Leki, not Satair, shall be the exclusive distributor of BE oxygen system products. As such, the alleged misrepresentation cannot serve as grounds for a fraud claim.

Leki argues that it also alleges in the complaint that "B/E made the[] material false and misleading statements, with the intent to deceive Leki and to induce Leki to enter into an agreement with B/E at a lower discount rate so that this Leki agreement could then be used as a negotiating device with Airbus and Satair. B/E further made these material false and untrue representations to Leki with the intent to deceive Leki, and with the intent to cause Leki, a Satair competitor, to change its competitive position in the market place and thereby provide B/E products an additional unfair market advantage" (Complaint 68-69). Leki argues that even though these allegations might be inconsistent with paragraph 58 of the complaint, it is permitted to plead such a theory in the alternative.

CPLR 3014 allows causes of action to be stated in the alternative. "It is well established that a party may plead alternative theories, even on the basis of allegations that contradict each other" (*Raglan Realty Corp. v Tudor Hotel Corp.*, 149 AD2d 373 [1st Dept 1989]). Although the complaint does not state that the fraudulent inducement claim it is pleaded in the alternative, the intention to plead in the alternative is expressed explicitly in plaintiff's opposition papers. The court will not

dismiss the claim at this early stage on the basis of failure to plead in the alternative. Nevertheless, the first cause of action must be dismissed because general allegations that defendants entered into the contract while lacking an intention to perform it are insufficient to support a fraud claim (*see New York University v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]).[1]

III. Breach of Contract Claims (2nd, 3rd and 4th Causes of Action)

To sustain a breach of contract cause of action, plaintiffs must allege facts showing each of the following elements: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages sustained by plaintiff as a result of the breach (*see Kraus v Visa Intl Serv Assn,* 304 AD2d 408 [1st Dept 2003]; *Furia v Furia,* 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous [internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP,* 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Where a contract is unambiguous, the intent of the parties must be found within the four corners of the contract (*see Goldstein v AccuScan, Inc.*, 2 NY3d 811 [2004]).

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[1]In view of this ruling, the court need not decide whether the first cause of action must be dismissed based on the merger clause of the Distributor Agreement. Were the court to reach the issue, it would grant the motion as the disclaimer in the merger clause is sufficiently specific to support its enforcement (*see Caiola v Citibank*, 295 F3d 312, 330 [2d Cir 2002]).

Even if the court did not dismiss the fraud claim, the claim for punitive damages in connection with the first cause of action must be dismissed. "Punitive damages are available only in those limited circumstances where it is necessary to deter defendant and others like it from engaging in conduct that may be characterized as 'gross' and 'morally reprehensible,' and of 'such wanton dishonesty as to imply a criminal indifference to civil obligations'" (*New York Univ.*, 87 NY2d at 315-316). To recover punitive damages in a tort action, plaintiff must establish "aggravation or outrage, such as spite or malice, or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (*Dupree v Giugliano*, 20 NY3d 921, 924 [2012] [citation omitted]). Plaintiff's allegations do not meet this high standard.

In accordance with these principles, a court should interpret a contract "so as to give full meaning and effect to the material provisions" (*Beal Savings Bank v Sommer,* 8 NY3d 318, 324 [2007], quoting *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.,* 3 NY3d 577, 582 [2004]). "A reading of a contract should not render any portion meaningless. . . Further, a contract should be 'read as a whole, and every part will be interpreted with reference to the whole; and if possible it will be so interpreted as to give effect to its general purpose'" (*id.* at 324-325, quoting *Matter of Westmoreland Coal Co. v Entech, Inc.,* 100 NY2d 352, 358 [2003]). When a contract is negotiated between sophisticated business entities negotiating at arm's length, "courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.,* 1 NY3d 470, 475 [2004] [internal quotation omitted]).

The tests to be applied in such cases are common speech and the reasonable expectations and purpose of the ordinary business person in the factual context in which terms of art and understanding are used, often also keyed to the level of business sophistication and acumen of the particular parties (*see BP Air Cond. Corp. v One Beacon Ins. Gp.*, 8 NY3d 708 [2007]). Where a contract contains an unconditional termination clause, a party has an absolute unqualified right to terminate the contract without court inquiry into whether the termination was activated by an ulterior motive (*see A.J. Temple Marble & Tile, Inc. v Long Island Railroad*, 256 AD2d 526 [2d Dept 1998]).

The overarching purposes and terms of the Distributor Agreement are clear and unambiguous. Certain details are less so.

In early 2012, the parties agreed that Leki would become the exclusive distributor within a defined territory of certain products manufactured by BE. The distributorship was to commence upon expiration on December 31, 2012 of an existing exclusive distributor agreement between Satair and BE. Under the terms of the Distributor Agreement, Leki was required to meet several requirements, including duties to maintain an adequate stock of defined classes of BE products, to

meet capacity, quality and performance standards and to provide periodic reports to BE. Leki also agreed not to sell any products that compete with BE products "during the term of this Agreement" (Article 15).

In order to accommodate a smooth transition, the Distributor Agreement provided for Leki to purchase the inventory owed by Satair not later than December 31, 2012 (Article 29). Similarly, BE was obligated to purchase inventory held by Leki upon expiration or termination of the Distributor Agreement (Article 13).

Although the Distributor Agreement provides for a five year term, either party was free to terminate the agreement early without penalty (*see* Article 11 "Duration and Termination"). The contract also contains extensive provisions for unwinding the relationship upon termination (*see* Articles 12 "Rights and Obligations Upon Expiration or Termination" and 13 "Residential Distribution Inventory Upon Expiration or Termination").

It is unclear whether the parties bargained expressly for the event of a termination that is declared prior to the effective date of the contract. However, it is clear that the notice of termination could be given at any time and that upon such notice, a period of transition would follow (*see* Articles 11, 12 and 13). The contract provides for a period of 365 days from the date of the notice of termination for a closeout of the distributorship (*see* Article 11 [a]). As of the date of notice of termination, Leki would become a non-exclusive distributor (*see* Article 11) and BE would be entitled to refuse to fill orders, except in cases where Leki had existing fixed term contracts to supply BE product (*see* Articles 12 [e] and 13 [a]). Where such contracts existed, BE would be obligated to continue to fill the order until the end of the contract or for six months, whichever period is shorter (*see* Article 13 [a]). Unsold product must be repurchased by BE (*see* Article 13 [b]).

The Distributor Agreement provides that where the contract is terminated, including termination for convenience, BE would not be liable for damages "of any kind or character whatever" (Article 12). Even in the case of breach of the terms and conditions of the Distributor Agreement, BE would not be liable for "any special, indirect, incidental or consequential damages"

(Article 19). Nevertheless, because the obligations of the parties upon a termination prior to commencement of the term of the contract is not clear on the face of the contract, the contract claims may not be disposed of pursuant to the termination clause of Article 11(a) of the Distributor Agreement on a CPLR 3211 (a)(1) motion to dismiss. With these considerations in mind, the court will now examine each of the contract causes of action. I conclude that these claims must be dismissed.

A. Anticipatory Breach of Contract

BE contends that Leki's anticipatory breach claims (2nd and 3rd causes of action) must be dismissed because Leki cannot recover damages. This defense is meritorious.

The complaint alleges that the expected turnover for the oxygen products ranged from $50.5 million in year one to $66 million in year five. Further, BE agreed to sell the products to Leki at a discount and to give Leki sales commissions. The complaint also alleges that on account of the Distributor Agreement, Leki "changed its position with respect to its critical business interests by impairing its relationships with its suppliers." On a motion to dismiss a breach of contract claim, it is sufficient that the complaint contains "allegations from which damages attributable to the defendant's breach might be reasonably inferred" (*CAE Indus. v KPMG Peat Marwick*, 193 AD2d 470, 473 [1st Dept 1993]). The complaint plainly meets this standard.

BE alleges that Article 12 of the Distributor Agreement bars plaintiff's claims. The last sentence of that article provides:

> "BE Aerospace shall not be liable to Distributor for damages of any kind or character whatsoever on account of any expiration or termination of this Agreement, whether such damages may arise from the loss of current or prospective profits on sales or anticipated sales; or compensation for expenditures or commitments made in connection therewith; or investments made in connection with the establishment, development, maintenance or goodwill of Distributor's business."

Moreover, Article 19 bars all of plaintiff's damage claims, except for compensatory damages:

> "Distributor agrees that in no event shall BE Aerospace be liable for any special, indirect, incidental or consequential damages arising from the sale of the Products, any breach of the terms and conditions of this Agreement, any sales order or agreement for the sale of Products or any breach of any direct or indirect or express or implied warranty or representation by BE Aerospace."

Leki asserts that Article 12 is inapplicable because BE did not "terminate" the contract in compliance with the specific requirements of the Distributor Agreement for effecting a termination within the meaning of Article 11. Leki adds that BE breached the contract, a term that appears in Article 19 but not Article 12 and that these causes of action may not be dismissed pursuant to CPLR 3211 because plaintiff has alleged that it suffered compensatory damages.[2]

Pursuant to Article 11 of the Distributor Agreement, both parties retained the right to terminate the contract at any time "during the term" of the agreement provided that written notice is given "at least three hundred and sixty-five (365) days in advance of the specified early termination date." Article 11 also states that "[t]his Agreement shall be [as of January 1, 2013] and, unless sooner terminated . . ., shall remain in effect through 31 December 2017 . . .". As discussed above, it is unclear whether the latter clause permits termination of the contract prior to the effective date or merely allows for early termination upon 365 days notice. In any event, Article 11 also provides that the "Distributor shall become a non-exclusive distributor" as of the date of the notice of termination. Accordingly, upon issuance of a notice of termination, BE was not obligated to continue Leki as an exclusive distributor and had no obligation to fill Leki orders except orders of those existing customers with whom Leki had fixed term supply contracts.

Leki has alleged loss of profits and consequential damages. Leki has not alleged that BE failed to fill any orders or that it suffered any compensatory damages which, pursuant to Article 19, are the only damages Leki may claim. The second and third causes of action must be dismissed.

B. Breach of Contract

BE argues that the fourth cause of action for breach of contract must be dismissed because Leki fails to plead the existence of a contract. Specifically, BE contends that since the Distributor Agreement was by its terms not effective until January 1, 2013, there was no contract to be breached prior to that date. BE relies heavily on *Local Union 813, Inter. Broth. of Teamsters v Waste Mgmt.*

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[2]Although an exculpatory agreement will not exempt willful or grossly negligent acts (*see Kalish-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384-85 [1983]), the complaint does not allege facts that could amount to willful conduct or gross negligence.

of N.Y., LLC (469 F Supp 2d 80 [EDNY 2007]) to support its argument. *Local 813* does not stand for the proposition that a contract that is to take effect in the future does not exist prior to the effective date. An executory contract, *i.e.* a contract in which a party binds itself to perform at a future time (*see First Int's Bank of Israel v L. Bernstein & Sons, Inc.*, 59 NY2d 436, 443 [1983]) is no less binding than a bilateral contract (*see Am List Corp. v U.S. News & World Reports, Inc.*, 75 NY2d 38, 44 [1989]; *American Capital Access Service Corp. v Muessel,* 28 AD3d 395, 396 [1st Dept 2006] [affirming summary judgment finding of anticipatory breach of contract where employee was terminated prior to effective date of agreement]). In any event, the fourth cause of action must be dismissed for failure to allege compensatory damages.

IV. Breach of the Implied Covenant of Good Faith and Fair Dealing (5th Cause of Action)

The fifth cause of action is for breach of the implied covenant of good faith and fair dealing. "A cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract" (*Hawthorne Group*, 7 AD3d at 323 [citation and internal quotation marks omitted]). As pleaded, the allegations in this cause of action essentially mimic those of the second, third and fourth causes of action for breach of contract and must be dismissed as duplicative of those breach of contract claims (*see Havell Capital Enhanced Mun. Income Fund, L.P. v Citibank*, 84 AD3d 588 [1st Dept 2011]; *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010], *lv denied* 15 NY3d 704 [2010]).

V. Tortuous Interference With Contract (6th Cause of Action) (Motion Sequence Number 001)

In their motion to dismiss the sixth cause of action for tortuous interference with contract (motion sequence 001), Airbus/Satair argue that Leki has failed to plead the existence of a contract. As such, it could not have tortuously interfered with the Distribution Agreement. Airbus/Satair concede however, that if the Court finds that Leki has adequately pleaded the existence of a contract, Leki has adequately pleaded its claim for tortuous interference with contract, in part. In such a case,

Airbus/Satair contend that the tortuous interference claim should be dismissed in part, because Leki's exclusive distributorship with BE was terminable at will and the agreement in its entirety was terminable at will on 365 days notice (*see* Article 11 [a]).

The First Department has held that "the case law is clear that agreements that are terminable at will are classified as only prospective contractual relations, and thus cannot support a claim for tortuous interference with existing contracts" (*Snyder v Sony Music Enter., Inc.*, 252 AD2d 294, 299 [1st Dept 1999]). This is because "there can be no breach of a contract, a necessary element for tortuous interference with contract, when the contract may be terminated at will" (*Discover Group v Lexmark Inter.*, 333 F Supp 2d 78, 83-84 [EDNY 2004]). Accordingly, the claim is construed as a claim for tortuous interference with prospective contractual relations. The court has found that plaintiff failed to state a cause of action for breach of contract. Accordingly, the sixth cause of action must be dismissed.

Accordingly, it is hereby

ORDERED that the motions to dismiss are GRANTED and the complaint is hereby DISMISSED in its entirety with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: June 14, 2013

ENTER,

O. PETER SHERWOOD
J.S.C.