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

TURBINE, INC.,

Plaintiff,

- against -

ATARI, INC. and ATARI INTERACTIVE, INC.,

Defendants.

Index No. 602639/09 E
Hon. Bernard J. Fried
(I.A.S. Part 60)

Motion Sequence No. 003

OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COUNTS IV, V, AND VI OF THE AMENDED COMPLAINT

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INTRODUCTION

By this motion to dismiss, Defendants Atari, Inc. and Atari Interactive, Inc. (collectively, "Atari") hope to evade review of their misconduct and breaches of their various contracts with Plaintiff Turbine, Inc. ("Turbine"). For the reasons discussed below, Atari's motion should be denied in its entirety.

This lawsuit involves a business arrangement between the parties that originally provided that Turbine would create and develop an online, massively multiplayer "Dungeons & Dragons®" game ("DDO"), and Atari would market and promote it. Because Atari repeatedly failed to meet its end of the bargain, the parties amended their arrangement several times, permitting Turbine to take on certain of the responsibilities that Atari failed to shoulder. The parties' relationship has most recently come to a head because Atari has decided to abuse its right to audit royalty payments in order to manufacture a false "breach" by Turbine and trump up purported "cause" for prematurely terminating the parties' agreements.

Atari's motion to dismiss Counts IV, V, and VI of the Amended Complaint is baseless. First, Turbine's unjust enrichment claim is proper because New York law plainly permits Plaintiffs to plead causes of action and theories of relief in the alternative. Second, Turbine's fraudulent inducement and negligent misrepresentation claims are more than adequately pled, as they assert that Atari induced Turbine to agree that Atari would promote DDO in Europe by concealing the fact that Atari was curtailing operations in Europe due to financial failure. Similarly, Atari fraudulently induced Turbine to make advance payments of royalties under a new "free to play" model of DDO by concealing the fact that Atari had previously hatched a scheme to terminate the parties' business relationship.

Atari's remaining grab-bag of arguments are without merit for the reasons discussed below, and the motion to dismiss should be denied in all respects.

FACTUAL BACKGROUND

This lawsuit revolves around the parties' joint efforts to develop and market an online "Dungeons & Dragons®" game. AC ¶ 1. The parties' business relationships are memorialized in a series of agreements: a License, Development and Publishing Agreement executed by the parties on or about January 25, 2003 and subsequent Amendments One through Five thereto (the "License Agreement"); a Digital Distribution Agreement executed by the parties on or about April 10, 2006 (the "Distribution Agreement"); and a Letter Agreement executed by the parties on or about May 13, 2009 (the "Letter Agreement") (collectively, the "Agreements"). *Id.* at ¶ 2.

Atari Breaches Its Obligation to Market and Promote DDO

The basic contractual arrangement among the parties was that Turbine would develop and Atari would market and promote a subscription-based "massively multiplayer online role-playing game" service based on intellectual properties relating to "Dungeons & Dragons®" that Atari had licensed from a third party. *Id.* at ¶ 3. The game service was called "Dungeons & Dragons Online®: Stormreach™" ("DDO: Stormreach"). *Id.* As the Complaint alleges, Section 5.3 of the License Agreement requires Atari to "develop all marketing materials and activities" for the service, and that in doing so, it "shall commit marketing resources and expenditures reasonably commensurate with" its sales of products of similar forecasted sales. *Id.* at ¶ 28. Section 5.2 of the License Agreement similarly requires Atari to "serve as the publisher of the retail Client component of the Service throughout the world." *Id.* at ¶ 27. Indeed, the recitals to the License Agreement state that while Turbine will develop the DDO service, "[Atari] shall publish and distribute the retail client component associated with such service." *Id.* at ¶ 24.

Although Turbine spent tens of millions of dollars developing DDO: Stormreach, Atari did not live up to its end of the bargain. *Id.* at ¶ 4. Atari did not support DDO: Stormreach with an appropriate marketing and promotion effort, did not devote the necessary resources or

personnel, and did not treat DDO: Stormreach on par with comparable products. *Id.* at ¶ 30. In fact, Atari limited its advertising of DDO: Stormreach on the Atari website to a small page that was difficult to navigate to, never updated, and never featured any promotions to attract new users. *Id.* at ¶ 31. As the Amended Complaint summarizes: "Atari failed to allocate the resources, either internally or externally, that were even remotely appropriate for the launch of a game like DDO: Stormreach in breach of Section 5.3 of the License Agreement." *Id.*

To protect its multi-million dollar investment in DDO, Turbine agreed to assume some of the necessary marketing and promotional functions that Atari failed to perform. On January 26, 2006—*on the eve of the launch date* of DDO: Stormreach—Turbine agreed that it would market and promote DDO: Stormreach in North America. *Id.* at ¶ 33. Atari, however, insisted that it retain the exclusive right to distribute the service in Europe despite the fact that it had previously defaulted on its publishing and distribution obligations in that territory. *Id.* at ¶ 34.

At the time the parties entered into Amendment Number Four to accomplish this, however, Atari was already curtailing its activities and presence in Europe—a fact highly relevant to the role it demanded as exclusive distributor and promoter of DDO: Stormreach in Europe. *Id.* at ¶ 35. Atari was cutting back in Europe because it was experiencing an enormous financial crisis that severely impacted its ability to conduct necessary operations in Europe and elsewhere. *Id.* at ¶ 44. Although these facts cut to the very heart of the logic of Amendment Number Four, Atari *disclosed none of this to Turbine*. *Id.* Because Atari concealed facts that cast serious doubt on its capabilities to discharge its duties under that contract, Turbine was induced to enter into Amendment Number Four based on materially misleading information. *Id.* at ¶¶ 35, 44, 84.

Because of its retreat from Europe and financial crisis, Atari failed to perform its obligations following the execution of Amendment Number Four. Specifically, Atari failed to

devote necessary resources for the successful promotion and distribution of DDO: Stormreach in Europe. *Id.* at ¶¶ 61-62. As the Amended Complaint alleges:

> Atari failed to provide the requisite: (a) marketing and media spending in parity with competitive games in breach of Section 5.3 of the License Agreement; (b) labor and expenses associated with package and logo design, art development, copywriting, print advertisement design, television commercials, and full motion video content in breach of Sections 5.3 and 5.5 of the License Agreement; (c) tradeshow support in breach of Section 5.3 of the License Agreement; (d) public relations support in breach of Section 5.3 of the License Agreement; (e) distribution and co-marketing arrangements with hardware manufacturers and other partners in breach of Sections 5.3 and 5.5 of the License Agreement; (f) labor and expenses associated with web publishing and media planning in breach of Section 5.3 of the License Agreement; (g) retail distribution and channel promotion in breach of Section 5.3 of the License Agreement; and, (h) cross-promotion with other products within Atari's product line in breach of Section 5.3 of the License Agreement.

Id. at ¶ 30. (internal reference omitted).

The consequences of Atari's breaches were both foreseeable and severe. European consumers were unable to locate or obtain the DDO: Stormreach software because Atari failed to make the necessary efforts to make the software available to consumers. *Id.* at ¶ 37. Because players are required to purchase the software in order to play the game, this severely limited the growth of online subscriptions to the service. *Id.*

In addition, as the Amended Complaint alleges, Atari failed to make the required royalty payments to Turbine under the Agreements. By September 2006, Atari owed millions to Turbine. *Id.* at ¶ 39. Atari was put on a "payment plan" in October 2006 but soon defaulted on that payment plan. *Id.* at ¶¶ 39-40. Although the parties intended to net out the amounts owed by Atari against those owed by Turbine, as discussed below, the parties' attempt to enter into a new agreement reconciling the amounts owed by Atari was marred by Atari's fraud. *Id.* at ¶ 41.

The "Free to Play" Model and Amendment Number Five

Earlier this year, Turbine sought to expand revenues from the DDO service by introducing an innovative "free-to-play" model, in which subscribers would make purchases within the game, rather than pay a monthly subscriber fee to access it. *Id.* at ¶¶ 6, 45. This new model, called "Dungeons & Dragons Online®: Eberron Unlimited™" ("DDO: Unlimited") was to be an important new stage in the marketing and development of the DDO franchise and would accrue to the benefit of both parties. *Id.* at ¶ 6.

As it had before, Atari did not merely wish Turbine well in its efforts to enrich both parties, but demanded compensation. Atari indicated that it would enter into an Amendment Number Five memorializing the free-to-play concept and extending the parties' License Agreement to May 13, 2016, but on the condition that Turbine advance of hundreds of thousands of dollars against Turbine's future royalty obligations to Atari. *Id.* at ¶ 45. In addition, Atari insisted that Turbine pay hundreds of thousands of dollars that Atari claimed that Turbine owed in back royalties, even though Turbine did not owe these payments. *Id.* at ¶¶ 8, 45. Thus, the parties executed Amendment Number Five and a Letter Agreement on May 13, 2009 memorializing these agreements. *Id.*

Turbine was willing to enter into this arrangement in large part because Atari made specific representations that if Turbine would pay Atari the money it demanded, Atari was ready, willing and able to give full support to DDO: Unlimited and would extend the life of the License Agreement to May 13, 2016. In particular, over the course of April and May 2009, Atari's senior executives, including its Chief Executive Officer, James Wilson, told Turbine's executives (including its Chief Executive Officer, James Crowley), that "Atari fully supported the free-to-play concept, that it looked forward to continuing relations with Turbine, and that it would cooperate with Turbine to make the launch of the new free-to-play game a commercial success."

Id. at ¶ 46. Turbine would not have entered into these agreements, made large payments to Atari or devoted enormous resources to the success of DDO: Unlimited if it had known that Atari was unable and unwilling to support the launch of this new service or, as it turned out was the case, that Atari harbored the then-present intent to seek false grounds for termination of the agreements. *Id.* at ¶ 48.

Unbeknownst to Turbine, Atari knew that it could not and would not support DDO: Unlimited and the free-to-play model, despite its representations to the contrary. *Id.* at ¶ 46. First, as discussed above, Atari was cash-strapped and was neither willing nor able to discharge its obligations to promote and market the parties' products outside of North America. *Id.* Again, this was not disclosed to Turbine. *Id.* at ¶¶ 46-48.

The "Audit" and Atari's Continuing Bad Faith

More significantly, Atari knew that its representations to Turbine were false because it had previously hatched a scheme to trump up a false "breach" by Turbine which would enable it to fabricate "cause" to terminate the same License Agreement that Atari indicated it would extend until 2016. In or about November 2008—months prior to the May 13, 2009 Amendment Number Five and the Letter Agreement—Atari developed a scheme to extort additional money from Turbine or, alternately, to free itself from its obligations under the contracts to launch its own competing version of DDO. *Id.* at ¶ 9. Atari did this by purporting to invoke its audit rights under Section 6.7 of the License Agreement which it previously intended would find "breaches" that would enable it to extort payments from Turbine or terminate the agreements. *Id.* at ¶ 49.

Atari's demands for information well exceeded what it was permitted to audit under the Agreements. In particular, although the License Agreement only gave Atari a one-year "look back" period, Atari demanded much more. *Id.* at ¶ 51. In an effort to mollify its contract partner, Turbine granted these requests for information, despite the absence of any contractual

obligation to do so. *Id.*

Turbine then provided Atari with detailed explanations of how Turbine accounted for royalties and provided exhaustive documentary support showing that the correct amount of royalties had been paid. *Id.* Atari responded, however, with complete intransigence and made demands wholly inconsistent with the parties' Agreements and accepted accounting practices for online games such as DDO. *Id.* at ¶ 52.

The conclusion of Atari's "audit" was the one it had preordained in the beginning—a claimed "breach" of the Agreements. *Id.* at ¶ 55. On June 26, 2009, Atari threatened that if it were not paid the millions of dollars it falsely claimed was owing, it "shall hold Turbine in breach of the Agreement and exercise any and all available rights and remedies which may be available to it, including termination of the Agreement for cause." *Id.* at ¶ 55. Atari reaffirmed in subsequent communications its threats to terminate the parties' relationship if its demands for payment were not met. *Id.* at ¶ 56.

It is important to note that at the time Atari and Turbine entered into the May 13, 2009 Amendment Number Five and Letter Agreement, Atari had already launched its scheme to use the audit as a pretext to terminate Turbine's contractual rights and/or demand additional payments. *Id.* at ¶ 9. Thus, Atari accepted hundreds of thousands of dollars of payments from Turbine under Amendment Number Five and the Letter Agreement—including advance payments of royalties—for a multi-year extension of the Agreements that Atari knew was fraudulent. *Id.* at ¶¶ 53-54.

The Current Lawsuit

Facing Atari's improper threats to terminate the parties' agreements if not promptly paid, Turbine brought this lawsuit before this Court. Turbine filed this lawsuit on August 24, 2009 and amended its Complaint on September 22, 2009. The Amended Complaint contains seven

counts: breach of contract (Count I); breach of contract by anticipatory repudiation (Count II); breach of the covenant of good faith and fair dealing (Count III); unjust enrichment (Count IV—pled alternatively); fraud and fraudulent inducement (Count V); negligent misrepresentation (Count VI—pled alternatively); and declaratory judgment (Count VII).

On September 3, 2009, Atari filed a motion to dismiss the original Complaint and simultaneously filed a new action against Turbine seeking the payment of the same royalties addressed in Turbine's claims and request for declaratory judgment. On September 18, 2009, Turbine moved, pursuant to CPLR 3211(a)(4), to dismiss Atari's duplicative, later-filed lawsuit or consolidate it into Turbine's lawsuit. On October 6, 2009, the parties stipulated that Turbine would withdraw its motion to dismiss; Atari would withdraw its motion to dismiss the original Complaint; and Atari's lawsuit would be consolidated into the instant lawsuit. On October 22, 2009, Atari filed the instant motion to dismiss Counts IV, V, and VI of Turbine's Amended Complaint, which Turbine opposes for the reasons set forth herein.

ARGUMENT

I. TURBINE'S CLAIMS ARE WELL PLED.

A. The Standard For Deciding This Motion To Dismiss.

In deciding this motion to dismiss, the court must "accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord plaintiffs the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414, 729 N.Y.S.2d 425, 428, 754 N.E.2d 184, 187 (2001). "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 232nd Owners Corp. v. Jennifer Realty Corp.*, 98 N.Y.2d 144, 152, 746 N.Y.S.2d 131, 134, 773 N.E.2d 496, 499 (2002) (quoting *Polonetsky v.*

Better Homes Depot, 97 N.Y.2d 46, 54, 735 N.Y.S.2d 479, 484, 760 N.E.2d 1274, 1278 (2001)). "The complaint must be construed liberally," and the court must "accept as true not only the complaint's material allegations but also whatever can be reasonably inferred therefrom in favor of the pleader." *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 375-76, 754 N.Y.S.2d 245, 250 (1st Dep't 2003) (citations and quotations omitted); *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974 (1994). Atari's motion cannot survive this standard.

B. Atari's Contention That Turbine Cannot Assert An Alternative Claim For Unjust Enrichment Is Meritless.

Atari appears to contend that Turbine cannot assert an alternative claim of unjust enrichment because of the existence of the agreements among the parties. But the New York Civil Law and Practice Rules expressly permit pleading causes of action and theories of relief in the alternative. *See* CPLR 3014 ("Causes of action or defenses may be stated alternatively or hypothetically."); CPLR § 3017 ("Relief in the alternative or of several different types may be demanded."). As the Practice Commentaries explain, CPLR 3014 "recognizes the unpredictability of litigation and permits parties to set forth everything they think they have, leaving it to the fact-trier to make the final determination for them. Thus, a cause of action is not dismissible merely because it 'contradicts the underlying theory' of one already pleaded." And the Amended Complaint makes clear that the unjust enrichment claim is "Pled Alternatively." Amended Complaint ("AC"), Count IV at 22.

In any event, Turbine's unjust enrichment claim is appropriate precisely because Atari asserts a right to terminate the agreements. As the courts have held, "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies. . . . Therefore, plaintiff may properly plead unjust

enrichment and money had and received as alternative claims to the breach of contract claim." *Goldman v. Simon Prop. Group, Inc.*, 58 A.D.3d 208, 220, 869 N.Y.S.2d 125, 135 (2d Dep't 2008) (internal citations omitted). Although Turbine disputes the propriety of Atari's claimed right to terminate, Turbine is plainly entitled to plead that its advancement of funds to Atari unjustly enriched Atari in the event that one or more agreements is found not to apply.

C. <u>Turbine Has Properly Pled a Claim for Fraudulent Inducement</u>.

1. Turbine Has More Than Adequately Stated a Claim For Fraudulent Inducement.

The Amended Complaint sets forth several instances of fraudulent conduct by Atari. First, at the time the parties entered into Amendment Number Four, Atari concealed material facts highly relevant to Turbine's decision to enter into that agreement. For example, while Amendment Number Four provided that Atari, and not Turbine, would retain exclusive rights to market and promote DDO: Stormreach in Europe, Atari concealed from Turbine the fact that Atari was already then curtailing its operations in Europe due to Atari's crushing financial difficulties. AC ¶¶ 35, 44, 84. Atari further misrepresented that it had the capability to support European promotional and marketing activities when Atari knew that this was false. *Id.* at ¶ 44. Thus, Atari misrepresented and concealed from Turbine then-existing facts that would have alerted Turbine to circumstances virtually guaranteeing that Atari would be unable to perform its obligations under the parties' contracts.

Second, Turbine entered into Amendment Number Five in express reliance on representations made in April and May 2009 by Atari's senior executives, including its Chief Executive Officer, that Atari fully backed and supported the "free-to-play" concept of DDO: Unlimited if Turbine would make the hundreds of thousands of dollars of payments demanded in Amendment Number Five and the May 13, 2009 Letter Agreement. AC ¶ 46. In particular,

Atari represented that it "fully supported the free-to-play concept," and it extended the License Agreement term to May 13, 2016, indicating that it was pleased with the relationship with Turbine. *Id.* at ¶ 46. In fact, these assertions were false, and Atari knew they were false when made. Back in *November 2008,* Atari had hatched a scheme to falsely trump up a termination of the License Agreement. AC ¶¶ 9, 42. Atari thus lied when it said it supported the "free-to-play" concept and wanted to extend the parties' relationship—it had already determined that it would find a way to sabotage that relationship. It disclosed none of this to Turbine, of course, which was induced into entering into Amendment Number Five and the Letter Agreement based on Atari's misrepresentations concerning Atari's then-present decision to end the parties' relationship.

These misrepresentations were doubly false because Atari knew but did not disclose to Turbine that its financial crisis prevented Atari from providing the support that it promised for DDO: Unlimited. *Id.* at ¶¶ 63, 84. Thus, Atari not only concealed the material fact that it did not support DDO: Unlimited, but it knew facts that demonstrated that it could not, and concealed those facts from Turbine.

Finally, Atari misrepresented its business to Turbine, by indicating that it had the financial wherewithal to promote the parties' joint efforts, and by indicating that it intended to be an "online company," meaning a publisher of online games such as DDO: Stormreach and DDO: Unlimited. AC ¶¶ 35, 44, 84. Atari further misrepresented that historical delays and problems in its commitment to DDO were "things of the past" and that this was a "new Atari." *Id.* at ¶ 84. In fact, as alleged above, Atari was not committed to DDO, and pursued a previously-hatched scheme to milk the relationship for what it could extort from Turbine, rather than promote the DDO services in good faith.

These allegations are more than sufficient to state a claim for fraudulent inducement. A party pleads a valid claim for fraud or fraudulent inducement when it alleges a "material representation, known to be false, made with the intention of inducing reliance, upon which the victim actually relies, consequentially sustaining a detriment." *Rivera v. JRJ Land Prop. Corp.*, 27 A.D.3d 361, 364, 812 N.Y.S.2d 63, 65 (1st Dep't 2006). Each element is fully supported by the allegations of the Amended Complaint.

2. Atari's Remaining Arguments Are Without Merit.

Atari's attempts to defeat Turbine's well-pled fraud claim are unavailing. First, Atari is incorrect in asserting that Turbine has not pled fraud with sufficient particularity. "While CPLR 3016(b) requires that 'the circumstances constituting the wrong shall be stated in detail', the Court of Appeals has acknowledged that it is virtually impossible to do so where the facts surrounding the fraud are peculiarly within the knowledge of the other party." *Banner Indus., Inc. v. Schwartz*, 181 A.D.2d 479, 480, 581 N.Y.S.2d 184, 185 (1st Dep't 1992) (quoting *Jered Contr. Corp. v. New York City Tr. Auth.*, 22 N.Y.2d 187, 194, 292 N.Y.S.2d 98, 104, 239 N.E.2d 197, 201 (1968)). Accordingly, "[t]he language of 3016(b) merely requires that a claim of misrepresentation be pleaded in sufficient detail to give adequate notice. Indeed, the Court of Appeals has specifically noted that this rule 'is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud.'" *Guggenheimer v. Bernstein Litowitz Berger & Grossmann LLP*, 11 Misc.3d 926, 933, 810 N.Y.S.2d 880, 887 (Sup. Ct. N.Y. Co. 2006) (Fried, J.) (quoting *Lanzi v. Brooks*, 43 N.Y.2d 778, 780, 373 N.E.2d 278, 402 N.Y.S.2d 384, 385 (1977)). Here, the relevant facts lie within the peculiar knowledge of Atari. *See Swersky v. Dreyer and Traub*, 219 A.D.2d 321, 327-28, 643 N.Y.S.2d 33, 37 (1st Dep't 1996) (invoking the "special facts" doctrine, whereby "a duty to disclose arises where one party's superior knowledge of essential

facts renders a transaction without disclosure inherently unfair") (citing *Beneficial Comm'l Corp. v. Murray Glick Datsun, Inc.*, 601 F. Supp. 770, 773 (S.D.N.Y. 1985) (quoting *Chiarella v. U.S.*, 445 U.S. 222, 248, 100 S. Ct. 1108, 1124-25, 63 L.Ed.2d 348 (1980)). Turbine has more than adequately pled fraud given that Atari is in unique possession of certain of the key facts.

<u>Second</u>, Turbine's fraud claim is not duplicative of its contract claim because Turbine has not merely pled breach of contract as a tort, but has pled that Atari misrepresented and/or concealed then-present collateral facts that were critical to Turbine's decision to enter into the agreements in the first place. As this Court has held, "where a plaintiff alleges misrepresentations of present facts, rather than merely of future intent, that were collateral to the contract and which induced the allegedly defrauded party to enter into the contract, a fraudulent inducement claim is not duplicative of a breach of contract claim." *L & L Auto Distribs. and Suppliers, Inc. v. Auto Collection, Inc.*, No. 18728/08, 2009 WL 1652852, at *8 (NY Sup. Ct. Kings Co. June 12, 2009); *see also First Bank of the Ams. v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 292, 690 N.Y.S.2d 17, 21 (1st Dep't 1999) ("[A] fraud claim can be based on a breach of contractual warranties notwithstanding the existence of a breach of contract claim.").

<u>Third</u>, although Turbine has alleged more than merely a fraudulent concealment of an intent not to perform, concealment of such an intent also supports the fraud claim. "[W]here the plaintiff pleads that it was induced to enter into a contract based on the defendant's promise to perform and that the defendant, at the time it made the promise, had a preconceived and undisclosed intention of not performing' the contract, such a promise constitutes a representation of present fact collateral to the terms of the contract and is actionable in fraud" *L & L Auto Distribs.*, 2009 WL 1652852, at *8 (quoting *Manas v. VMS Assoc., LLC*, 53 A.D.3d 451, 453-54, 863 N.Y.S.2d 4, 7 (1st Dep't 2008)). Here, the Amended Complaint specifically alleges that Atari hatched a scheme as early as November 2008 to find a way to terminate its relationship

with Turbine but was silent as Turbine entered into two agreements with Atari on May 13, 2009 and paid hundreds of thousands of dollars including an advance against future royalties. This is the epitome of fraud.

Fourth, Atari's attempt to evade responsibility for its fraudulent conduct based on a boilerplate merger clause is frivolous, in light of the unbroken line of authority holding to the contrary. New York law is crystal clear that such clauses are "ineffective to exclude parol evidence to show fraud in inducing the contract." *Superior Technical Res., Inc. v. Lawson Software, Inc.*, No. 2003-10104, 2007 WL 4291575, at *10 (N.Y. Sup. Ct. Erie Co. Dec. 7, 2007) (citing *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 320, 184 N.Y.S.2d 599, 601-02 (1959)); *Sabo v. Delman*, 3 N.Y.2d 155, 161, 164 N.Y.S.2d 714, 718 (1957).[1]

Indeed, even if there had been a clause disclaiming reliance on extraneous representations—and the agreements here do not contain any such clause—such clauses are *still* ineffective unless they specifically set forth the matters being disclaimed. *Joseph v. NRT Inc.*, 43 A.D.3d 312, 313, 841 N.Y.S.2d 38, 39 (1st Dep't 2007) ("The general disclaimer clause in the contract of sale would not bar parol evidence. . . ."); *Benson v. White,* 72 A.D.2d 627, 420 N.Y.S.2d 785 (3d Dep't 1979) (holding, in an action for fraud brought by purchasers of an apartment building against the sellers based on alleged misrepresentations as to the compliance of the building with existing zoning laws, that a separate contract term reciting that the premises were to be transferred "subject to all . . . zoning laws" was not sufficient to convert the otherwise general language of the merger clause into a specific disclaimer.). And *even then*, the courts of New York uniformly hold that a party "may not be precluded from claiming reliance on misrepresentations of facts peculiarly within the seller's knowledge, notwithstanding the

[1] As aptly put by the Court of Appeals, if this were not the law, "a defendant would have it in his power to perpetrate a fraud with immunity, depriving the victim of all redress, if he simply has the foresight to include a merger clause in the agreement." *Sabo*, 3 N.Y.2d at 161, 164 N.Y.S.2d at 718.

execution of a specific disclaimer." *Steinhardt Group Inc. v. Citicorp*, 272 A.D.2d 255, 257, 708 N.Y.S.2d 91, 93 (1st Dep't 2000); *see also Yurish v. Sportini*, 123 A.D.2d 760, 761-62, 507 N.Y.S.2d 234, 235 (2d Dep't 1986) ("allegedly fraudulent sellers may not invoke *even specific disclaimer* clauses in order to preclude evidence of oral misrepresentations 'if the facts allegedly misrepresented are peculiarly within the seller's knowledge.'") (emphasis added) (quoting *Tahini Invs. v. Bobrowsky*, 99 A.D.2d 489, 490, 470 N.Y.S.2d 431, 433 (2d Dep't 1984)).

Finally, Atari's argument that Turbine's request for punitive damages must be dismissed is incorrect and relies on inapposite case law. As stated above, Turbine has adequately stated a cause of action for fraudulent inducement such that this case is not merely for breach of contract. Under applicable New York law, "[p]unitive damages are available in a tort action where the wrongdoing is intentional or deliberate, has circumstances of aggravation or outrage, has a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton." *Swersky*, 219 A.D.2d at 328. Furthermore, the question of whether the Plaintiff is entitled to punitive damages is for the factfinder. *Dobroshi v. Bank of Am., N.A.*, -- N.Y.S.2d --, 2009 WL 2852063, at *1 (1st Dep't Sept. 8, 2009) ("[i]t is for the jury to decide whether [defendant's actions] were so reprehensible as to warrant punitive damages") (quoting *Swersky*, 219 A.D.2d at 38).

In sum, Turbine has more than adequately alleged fraudulent inducement and Atari's attempts to evade responsibility and the attendant consequences are meritless.

D. Turbine Has Validly Pled An Alternative Claim For Negligent Misrepresentation.

Atari's contention that Turbine has not pled a "special relationship of trust of confidence" and thus cannot maintain an action for negligent misrepresentation is incorrect. Turbine specifically alleges that the parties' complex business arrangement "created a relationship of

interdependence, such that Turbine was forced to rely on Atari with respect to key aspects of the parties' relationship." AC ¶ 96. Because Atari and Turbine apportioned among them critical aspects of the development, marketing and promotion of the DDO services, Turbine relied heavily on Atari and was, in important respects, its co-venturer. Additionally, Turbine alleges that Atari had "unique and specialized expertise with respect to the D&D intellectual properties" and therefore "was in a position of special confidence vis-à-vis Turbine" which made large investments with respect to those properties. *Id.* at ¶ 95. Atari further had special and unique knowledge with respect to the matters that it misrepresented to Turbine, including facts concerning its financial problems and operational capabilities. *Id.* at ¶ 97.

The facts alleged in the Amended Complaint attest to a "special relationship of trust or confidence, which creates a duty for one party to impart correct information to another, the information given was false, and there was reasonable reliance upon the information that was given." *Hudson River Club v. Consol. Edison Co. of N.Y., Inc.*, 275 A.D.2d 218, 220, 712 N.Y.S.2d 104, 106 (1st Dep't 2000); *see also Swersky*, 219 A.D.2d at 328 (invoking the "special facts" doctrine, whereby "a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair") (internal citations omitted). At a minimum, "whether there was a special relationship between the parties at bar is a factual issue" and should not be decided on a motion to dismiss *Knight Secs. L.P. v. Fiduciary Trust Co.*, 5 A.D.3d 172, 174, 774 N.Y.S.2d 488, 489 (1st Dep't 2004) (denying summary judgment as to negligent misrepresentation claim); *see also Swersky*, 219 A.D.2d at 328 (concluding that "the disparity in the level of information available to [defendant], but not to [plaintiff]" was a question of fact for the factfinder with respect to a fraudulent misrepresentation claim).

CONCLUSION

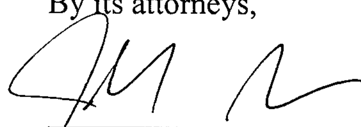
For the foregoing reasons, Atari's motion to dismiss should be denied in its entirety.

Dated: November 5, 2009
New York, New York

Respectfully submitted,

TURBINE, INC.

By its attorneys,



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