Doctors Allergy Formula, LLC v Valeant Pharm. Intl.
2019 NY Slip Op 32064(U)
July 15, 2019
Supreme Court, New York County
Docket Number: 651597/2018
Judge: O. Peter Sherwood

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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DOCTORS ALLERGY FORMULA, LLC,

Plaintiff,

- against -

VALEANT PHARMACEUTICALS INTERNATIONAL,

Defendant.

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DECISION AND ORDER

Index No.: 651597/2018
Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

Plaintiff Doctors Allergy Formula, LLC (DAF), a company that developed diagnostic products to screen for optical allergies (the DAF Products or the Products), seeks compensation from defendant Valeant Pharmaceuticals International (Valeant), a pharmaceutical company. Valeant is a "subsidiary of a public[ly] traded pharmaceuticals conglomerate" which includes the eye care business segment Bausch + Lomb (complaint, ¶¶ 8, 19). In this motion, sequence no. 001, Valeant moves to dismiss the complaint's first and third causes of action for, respectively, fraudulent inducement and breach of the covenant of good faith and fair dealing, for failure to state a cause of action (CPLR 3211 [a] [7]), and to strike plaintiff's punitive damages request.

I. FACTS AS ALLEGED IN COMPLAINT

Unless indicated otherwise, on this motion to dismiss, the facts are taken from the complaint and such facts, as well as all reasonable inferences that may be gleaned from them, are assumed to be true (*see Morone v Morone*, 50 NY2d 481, 484 [1980]; *Amaro v Gani Realty Corp.*, 60 AD3d 491, 493 [1st Dept 2009]). On October 15, 2015, the parties entered into a sales agreement wherein Valeant purchased plaintiff's assets (Agreement). The sales price that Valeant was to pay for those assets was predicated upon its attainment of certain specified levels of sales of units of the DAF Products (milestones). Thus, payment of the entire purchase consideration, other than $1.00, was contingent upon the post-closing sales performance of the DAF Products, with the achievement of such sales allegedly within Valeant's control.

Plaintiff contends that, prior to executing the Agreement, Valeant represented that in over 40 such deals closed by Valeant involving milestones, or earn-out, payment structures, Valeant

had never missed achieving a milestone payment. Plaintiff further alleges that, prior to the Agreement's execution, Michael Pearson, Valeant's then-CEO, with a senior vice president and general manager of Bausch + Lomb, touted Valeant's significant sales and marketing resources, and ability to take acquired companies to the next level (complaint, ¶¶ 19-21). Pearson represented that the DAF Products would become an integral component of a new ocular surface disease diagnostic division that Valeant was creating (the New Division) consisting of four products, one of which had been recently acquired.

The parties initially negotiated a deal in which Valeant would pay plaintiff $5 million up-front, and make subsequent milestone payments after closing. However, shortly before closing, Valeant backed away from that deal citing purported "'regulatory concerns' that prohibited its existing pharma[ceutical] sales staff selling a diagnostic product" (*id.*, ¶¶ 22, 38). Two months later, Valeant returned with a revised proposal, including changed payment terms, so that DAF would receive "only $1.00 at closing because Valeant . . . needed to hire a separate sales force to promote and sell the [DAF Products] due to . . . 'regulatory concerns'" (*id.*, ¶ 23). Valeant proposed the post-closing payment structure (*id.*, ¶¶ 23, 27[a]-[f], 38). DAF contends that, unbeknownst to it, Valeant had no intention of paying DAF, yet affirmatively represented that the spirit, intent and parties' expectation of the deal was for Valeant to achieve milestone sales levels, and make the first two payments to DAF within a year or two of closing. DAF states that due to its pre-closing sales trajectory, relationships and clients, it would take only a minimal sales and marketing effort by Valeant to reach those milestones.

Furthermore, Valeant touted its status as a multi-billion dollar conglomerate, with extensive sales and marketing experience, and promised to dedicate a robust sales team specifically to market the DAF Products and to integrate them into the New Division (*id.*, ¶ 24). Thus, plaintiff agreed to the sales milestones and associated payments "'based in part on Valeant's position as an industry leader in the eye care industry and extensive sales force abilities'" (*id.*, ¶ 32, quoting Agreement, § 3.4). DAF alleges that there was an agreement between the parties that payment of the first two milestone payments would be within 60 days of achieving the milestone, as opposed to a different time line for other payments under the Agreement, as the first two payments, set at $1 million and $4 million respectively, represented the parties' earlier agreement for Valeant's up-front $5 million payment to DAF.

Based upon Valeant's promises and representations, DAF believed that achievement of at least $19 million of sales milestone payments would occur within five years, with the final $5 million milestone payment coming some time thereafter, representing full payment of the fair value of plaintiff's business. Because of the Agreement's payment structure, based upon future sales under Valeant's control, DAF insisted that Valeant agree to use "commercially reasonable efforts to market, promote and sell the Products" (Agreement, § 3.4).

On October 6, 2015, nine days before the DAF Products transaction closing, a pharmacy, R&O Rx Services, LLC (R&O), filed a lawsuit against Valeant, in a California federal district court, in which R&O alleged that Valeant was potentially engaged in a massive fraud. R&O alleged that a Valeant entity's general counsel sent R&O a letter seeking $69,000,000 in payment for products for which the allegedly small plaintiff pharmacy had never previously been invoiced. Plaintiff alleges that, one business day after the Agreement's execution, a story was published alleging that Valeant's publicly-traded parent was engaged in a massive fraud, involving another pharmacy, Philidor RX Services (Philidor), a mail order pharmacy with close ties to Valeant (complaint, ¶ 35). Plaintiff claims that, within hours, Valeant's entire business operations were in immediate, grave danger, and the media and Wall Street reaction was reminiscent of the Enron and WorldCom matters, an onslaught of litigation and an SEC investigation against Valeant's parent company followed, and Valeant's parent-company's stock lost 90% of its value.

Plaintiff alleges that, prior to the Agreement's closing, Valeant knew that public disclosure of the Philidor fraud was inevitable, and that it would severely impact Valeant's ability to comply with its obligations under the Agreement and honor its promises to DAF (*id.*, ¶ 36). Only 24 hours after the disclosure, Valeant halted all pending and future acquisitions indefinitely, including those that were to be a part of the New Division. As the Agreement's contingent payment structure hinged on post-closing sales of the DAF Products, Valeant's business operations and industry prowess were significant to DAF, and had DAF known of the impending danger to Valeant's entire business enterprise, it would not have agreed to the post-closing milestone payment structure (*id.*, ¶¶ 32, 37).

Still, based upon sales to DAF's existing customer base, with no sales involvement or effort from Valeant, the first sales milestone was met shortly after the Agreement's execution and Valeant paid $1 million to DAF (*id.*, ¶ 41). However, Valeant's conduct demonstrated that it had no

intention of performing under the Agreement in that Valeant: (1) failed to invest in basic marketing and advertising to grow sales or to adhere to industry standards with respect to promotional activities; (2) shut down DAF's existing website and never replaced it on Valeant's platform; and (3) failed to establish adequate customer and sales support, or an adequate sales incentive program for its salespersons that was in line with industry standards.

Plaintiff alleges that Valeant also failed to enforce its rights under an exclusive distributor agreement related to a component of the DAF Products line (the Greer Distributorship Agreement). The Greer Distributorship Agreement, which had been secured by DAF prior to entering into the Agreement, was assigned to Valeant as part of the DAF sales transaction, and "granted [DAF] the exclusive right to sell, distribute and supply [certain non-invasive] applicators to ophthalmologists and optometrists in the United Stated" in exchange for DAF making a certain amount of yearly purchases from Greer (*id.*, ¶ 17). Plaintiff contends that Valeant's failure to enforce the Greer Distributorship Agreement allowed customers to bypass Valeant, and to order certain applicators directly from the distributor, and the distributor to solicit and sell applicators directly to Valeant's existing and potential customers. Plaintiff asserts that Valeant's conduct eliminated the DAF Products' most significant competitive advantage, allowed competitors to compete directly against the Products, and put renewal of the Greer Distributorship Agreement at risk, which would likely spell the end of plaintiff's ability to meet the remaining milestones. Plaintiff asserts that this conduct was part of Valeant's scheme to reduce applicator sales reported under the Agreement in order to avoid payment (*id.*, ¶ 42 [i]).

In late 2016 or early 2017, plaintiff believes that something happened at Valeant, causing it to become determined to avoid making any further milestone payments and to attempt to renegotiate the Agreement. Among other things, plaintiff states that Valeant informed plaintiff that it had implemented a company-wide edict that all of the individual product programs be profitable and that, as the DAF Products program had incurred a loss of $1.5 million in 2016, Valeant would not be able to continue with the Product unless the Agreement was renegotiated to

restructure the sales milestones (*id.*, ¶ 45 [b]).[1] Plaintiff believes that such a policy did not exist and reminded Valeant that it was required to support the Products for 10 years.

In mid-2017, after plaintiff refused to accept Valeant's request to reduce the purchase price in the Agreement, Valeant reduced the already trained sales force assigned to promote the DAF Products from 93 representatives to 3, imposed sales limits on customer purchases, and significantly increased the price of applicators for the Products. Defendant then contacted plaintiff stating that because plaintiff had been unwilling to negotiate significantly better terms for Valeant, and was in jeopardy of not reaching any future milestone payments, Valeant wanted to do the right thing and permit plaintiff to take back the company. At that time, Valeant knew that it was all but certain that the second milestone would be reached by year-end, requiring Valeant to make a $4 million payment. Plaintiff believes that it met the second milestone requirements, in spite of Valeant's performance failures,[2] but that Valeant refused to make the milestone payment, breaching the Agreement (*id.*, ¶ 70). DAF also contends that defendant has refused to comply with its obligations under the Agreement, or to abide by the representations it made to DAF, concerning investing in even basic marketing and advertising, or establishing a sales incentive program in line with industry standards (*id.*, ¶ 42). Plaintiff contends that Valeant's conduct has frustrated the Agreement's purpose and deprived plaintiff of the benefit of the bargain, as Valeant has all but shut down the DAF Products line.

II. DISCUSSION

A. Standard

On a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, the court accepts the facts in the complaint as true and affords plaintiff the benefit of every reasonable favorable inference (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's role is to

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[1] The complaint does not state that there was any provision about profitability of the DAF Products in the Agreement.

[2] The breach of contract claim, unchallenged in this motion, also alleges that defendant breached the Agreement by failing to provide sales reports and Agreement § 3.4 by: (1) failing to provide marketing support; (2) cancelling scheduled engagements for doctors to speak at industry trade shows; (3) failing to set up a website to promote the Products; (3) failing to establish a reasonable sales incentive program or to provide sales and customer service; and (4) reducing the sales force from 93 sales representatives to 3 by mid-2017.

determine "whether the facts as alleged fit within any cognizable legal theory" (*id.*). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [citation omitted]).

B. Fraud in the Inducement

The complaint alleges fraud in the inducement by both affirmative misrepresentation and failure to disclose. Each is discussed in turn.

1. **Misrepresentations**

"The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014]). "The circumstances constituting the wrong [must] be stated in detail" (CPLR 3016 [b]).

As a threshold issue, Valeant argues that plaintiff's fraud claims are repackaged contract claims barred by the Agreement's merger clause. As is well known, although inadmissible to construe an unambiguous contract, parole evidence of representations outside of the text of the contract may be admissible when a party alleges fraud (*Sabo v Delman*, 3 NY2d 155, 161 [1957]; *Rosenblum v Glogoff*, 96 AD3d 514, 515 [1st Dept 2012]). However, an exception to this rule is made where parties include in their contract a specific disclaimer of reliance on a particular prior outside representation (*Danann Realty Corp. v Harris*, 5 NY2d 317, 323 [1959]; *Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 169 [1st Dept 2015]; *LibertyPointe Bank v 75 E. 125th St., LLC*, 95 AD3d 706, 706 [1st Dept 2012]).

In arguing that the merger clause bars plaintiff's fraud claim, defendant relies on *PSW NYC LLC v Bank of Am., N.A.* (150 AD3d 601, 601 [1st Dept 2017]). However, as discussed by the First Department, in addition to the merger clause in the agreement in *PSW NYC LLC*, the parties also executed a mutual, unconditional, release and discharge of "'[c]laims of every name and nature, known or unknown, suspected or unsuspected'" (*PSW NYC LLC v Bank of Am., N.A.*, 2016 NY Slip Op 32219[U] [Sup Ct, NY County 2016], *affd* 150 AD3d 601, 601 [1st Dept 2017]). There is no such release here. The facts of another case upon which defendant relies, *HSH Nordbank AG v UBS AG* (95 AD3d 185 [1st Dept 2012]), involve documents with more extensive anti-reliance language than the merger clause here, concern a sophisticated financial investment

by a bank, in which there were disclosure documents about the risks involved, and the court determined that the submissions demonstrated that the plaintiff had essentially accepted the risk of the investment, or had the means to conduct an independent appraisal of the risks, but simply did not do so. In certain transactions and situations, courts may find that the nature and language of the involved agreement reflects the parties' intentions not to permit later claims of reliance upon representations to derail the transaction (*see e.g. Citibank, N.A. v Plapinger*, 66 NY2d 90, 95 [1985] [merger clause barred fraud claim where nature of obligation was *unconditional*, plaintiff represented that it was "not relying on any representations as to the very matter" of the alleged fraud, and the extensively negotiated merger clause went beyond "generalized boilerplate"]; *see SFR Holding Ltd. v Rice* (2017 NY Slip Op 31974(U), **5-6 [Sup Ct, NY County, 2017, index No. 652367/2012], *affd as mod* 170 AD3d 531 [1st Dept 2019] [anti-reliance language included no representation "not expressed in this Agreement shall affect or be deemed to interpret, change or restrict the express provisions thereof" and "that plaintiffs 'acknowledge[] that he or she has received no representation or warranties from the Partnership or its respective employees . . . in making this investment decision other than as set forth in the Disclosure Materials'"]).

In this case, the merger clause is a general one, which does not track the alleged misrepresentations or contain a specific disclaimer of reliance on a particular representation, and does not bar the fraud claim (*compare Danann Realty Corp,* 5 NY2d at 320 ["plaintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded"]; *Pate v BNY Mellon-Alcentra Mezzanine III, LP*, 163 AD3d 429, 430 [1st Dept 2018] [stating that merger clause stated that it "supersedes 'any prior term sheet or correspondence,' which is the basis for plaintiff's claims"]).

Plaintiff alleges that defendant misrepresented that it: (1) intended to achieve and pay the first two milestone payments as quickly as possible, within a year or two of the Agreement's execution; (2) could not make an up-front payment due to regulatory concerns related to its sales force and needed to make all payments on a contingent basis; (3) had not missed any milestone payment in any prior company acquisition; (4) would establish and maintain marketing efforts to promote the Products; (5) would establish and maintain a robust sales force specific to the Products; and (6) was in the process of creating a four-product ocular surface disease diagnostic division of which the Products would be an integral component (complaint, ¶ 56). Defendant

contends that the alleged misrepresentations are no more than promises to perform under the Agreement, or about the manner in which Valeant would perform the Agreement, or predictions, legal opinions, or are duplicative and do not involve representations collateral to the Agreement. Defendant also argues that plaintiff does not allege facts that demonstrate that any representation was false when made or distinctive fraud damages. Plaintiff disputes these contentions.

The first and third alleged misrepresentations, listed above, are not actionable as predictions and promises of future performance that are not collateral to the Agreement (*Pate*, 163 AD3d at 430). The gravamen of the third alleged misrepresentation is that because Valeant performed in a similar manner in the past, plaintiff could rely on Valeant to do the same in the future (see *Adelaide Productions, Inc. v BKN Intern. AG*, 38 AD3d 221, 225 [1st Dept 2007] [statement in letter "'will not renege on any portion of any promises on any documents for which it is signatory'" and oral statements "'he had always paid his bills, no one had ever gone unpaid'" not actionable as "statements of general intent to perform one's contractual obligations [that] are too vague to support a fraud claim"]). The complaint also lacks any allegation that Valeant had missed a milestone payment on another transaction, to demonstrate the statement's falsity. The fourth and fifth representations are future promises that are not collateral to the contract (Agreement, ¶ 3.4), which specifies Valeant's obligations (*HSH Nordbank AG*, 95 AD3d at 206).

The second alleged misrepresentation is not actionable because it is too vague and lacks specificity. Furthermore, this transaction was a pharmaceutical product line asset sale, where a negotiating issue was whether or not plaintiff was to be paid up-front for its assets, or was to depend on contingent post-closing payments, which plaintiff alleges are dependent on defendants' sales efforts. Yet plaintiff did not itself investigate legal concerns about regulatory issues concerning the Valeant sales force's ability to sell DAF Products, to ascertain the validity and truthfulness of the statement about the law (*Basis Yield Alpha Fund Master*, 136 AD3d at 141 [noting "'the well-established principle that a plaintiff suing for fraud . . . must establish that it "has taken reasonable steps to protect itself against deception'" (citation omitted); *Graham Packaging Co., L.P. v Owens-Illinois, Inc.*, 67 AD3d 465 [1st Dept 2009] [dismissal of a fraud claim based on the alleged concealment affirmed where sophisticated entities represented by counsel should have inquired about a valuation]; *Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 [1st Dept 1995] [affirming dismissal of fraud claim where plaintiff purchased law practice "rely(ing) solely upon

the alleged oral representations without any effort to verify that information via financial statements"]).

Concerning all of the alleged misrepresentations, the complaint lacks allegations from which an inference reasonably may be drawn that the statements were not true when made. For example, the complaint lacks factual allegations to demonstrate that defendant did not have any regulatory concerns about the sales force when the alleged statement was made. Plaintiff only speculates that this was part of defendant's scheme to steal plaintiff's assets. Regarding the alleged representation of a current or planned creation of the New Division, plaintiff alleges that defendant had already made one of the acquisitions when the Agreement was executed, but, other than allegations that defendant did not perform the Agreement, plaintiff does not provide facts to show that defendant's alleged pre-closing statement was untrue.

2. Omissions

The elements for a cause of action of fraudulent concealment are: (1) an omission of a material fact; (2) intent to defraud; (3) duty to disclose; (4) reasonable reliance on the omission; and (5) damages suffered due to the fraud (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). Plaintiff alleges that Valeant, purposely, failed to disclose that: (1) defendant's business operations were in immediate danger; (2) defendant's parent company was about to be accused of a massive fraud, which would significantly change Valeant's operations and leadership; and (3) disclosure of the fraud allegations would have a material negative effect on achieving the milestone payments (complaint, ¶ 59). Plaintiff alleges that when Valeant was negotiating and finalizing the Agreement, it knew or should have known that its business operations were in immediate substantial danger due to the R&O suit and the soon to be published Philidor story, and the negative impact that disclosure of these items would have on Valeant's ability to perform under the Agreement (*id.*, ¶ 35-37). Plaintiff claims that it would not have entered into the Agreement, or agreed to sell its business to Valeant for $1.00 at closing, and only get paid later, based upon on Valeant's future sales and marketing efforts, had Valeant disclosed what was about to happen. Plaintiff states that Valeant's failure to disclose was a misrepresentation of the state of its business operations and ability to achieve the milestones, that Valeant had no intention of honoring its obligations, and that, as a direct and proximate result of the fraudulent inducement, plaintiff has suffered monetary damages.

In moving to dismiss, defendant argues that plaintiff has not alleged circumstances under which defendant had a duty to disclose, as the sales transaction was arms' length, and there was no fiduciary or special relationship between the parties. Defendant argues that the R&O lawsuit, which the complaint alleges "allud[ed] to a massive fraud at Valeant" and provided notice that Valeant's business operations "were in immediate and substantial danger," is publicly filed, and that DAF does not demonstrate how the purported statements were material. Defendants point out that the complaint alleges that defendant is a subsidiary of a pharmaceutical conglomerate with $37 billion in assets and over $8.5 billion in annual consolidated revenue, but alleges no facts to support its conclusory statements that Valeant's business operations were in danger, or that any fraud allegations could, would, or did affect the milestone payments.

In opposition, plaintiff argues that defendants have not addressed the "special facts" doctrine, and characterize the complaint as alleging that Valeant had been engaging in a massive fraud for years, knew in the final weeks of negotiation leading up to execution of the Agreement that it had been "caught red-handed," yet failed to disclose the impending consequences of disclosure of the fraud (opp mem at 16). Plaintiff points out that the complaint in the R&O lawsuit does not mention Philador, and that, assuming that the R&O complaint contained sufficient allegations to raise an inference that Valeant's relationship with Philador was part of a fraudulent scheme, the contentions would merely be unproven allegations. Plaintiff argues that when the R&O lawsuit was filed, Valeant knew that once the nature of the fraud became public, which took investigative reporters several weeks to unravel, that there would be a massive fallout that would have a significant and material impact on Valeant's sales and operations, and ability to reach payment milestones. Plaintiff argues that the timing of filing of the R&O suit, of the Agreement, and the massive public fallout that followed, support an inference that Valeant intentionally concealed this information from DAF.

Plaintiff challenges Valeant's contention that a claim is not stated because basic due diligence would have revealed the implications of the R&O lawsuit, and argues that Valeant's business operations were not adversely affected by the lawsuit until the Philidor story broke, which was after the Agreement was executed. Plaintiff contends that Valeant was the only party to the Agreement with the knowledge to appreciate the implications of the R&O action, that Valeant's massive fraud was about to unravel, and that a fallout would ensue and impact payments under the

Agreement. Plaintiff contends that it is unreasonable to determine that it's counsel should have reviewed all lawsuits filed against Valeant entities, conducted an independent investigation and formed an understanding of the suit's implications during the nine days between the date the R&O lawsuit was filed and the closing, while also finalizing the deal.

DAF argues that questions of the materiality of facts are generally for the jury, and points to Section 3.4 of the Agreement, in which the parties acknowledged that DAF was agreeing to the post-closing milestone payment structure, based in part on Valeant's position as an industry leader in the eye care industry and its extensive sales force abilities. DAF also points out that the complaint pleads significant reliance on Valeant's status and expansive resources, as instrumental to DAF's decision to enter the Agreement, as these factors were important to achievement of the milestones, and payment to DAF. DAF contends that any suggestion that Valeant's industry status would immediately, drastically, change for the worse would have materially affected DAF's decision to enter into the Agreement and to assent to decrease the up-front payment amount.

In reply, Valeant notes that because plaintiff contends in its opposition brief that the alleged Philidor massive fraud does not involve the Agreement, but is unrelated, that the allegations cannot form the basis for plaintiff's fraudulent omission claim, as the omission is unrelated to the Agreement, and, therefore, immaterial. Valeant further reasons that, there is no duty to disclose under the "special facts" doctrine because the existence of an unrelated matter could not have been an essential fact, in terms of the DAF sales transaction, so as to make nondisclosure of the matter unfair.

A fraud by omission claim is not sustainable where information allegedly withheld is ascertainable through publicly available sources (*Northern Group Inc. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 135 AD3d 414 [1st Dept 2016]). However, whether the R&O suit gave sufficient notice to plaintiff of an actual impending massive fraud must be viewed in a manner that affords plaintiff the benefit of all reasonable inferences.

Under the "special facts" doctrine, a duty to disclose arises "when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 99, [1st Dept 2010]). In *Jana L. v. West 129th Street Realty Corp.* (22 AD3d 274 [1st Dept 2005]), the court ruled that invocation of the special facts doctrine

> "requires satisfaction of a two-prong test: that the material fact was information 'peculiarly within [the] knowledge' of West Realty, and that the information was not such that could have been discovered by Associates through the 'exercise of ordinary intelligence.'"

(*id.* at 278 [citations omitted]). Plaintiff argues that only defendant had knowledge of its own fraud and that, through the R&O suit public disclosure of the fraud was imminent. Defendant has not demonstrated that plaintiff could have reasonably discovered whether there was an actual fraud situation and the nature of it.[3] In light of the Agreement's payment terms, which plaintiff alleges are dependent upon the buyer's business efforts, and the parties' acknowledgment of plaintiff's reliance on Valeant's position in the industry and the ability of its sales force, on this motion, an inference of materiality, generally a fact issue, and reliance must be drawn in favor of plaintiff.

The allegations about damages in the complaint do not distinguish between the fraud and the breach of contract damages, stating only that damages will be proven at trial. In its memorandum of law plaintiff addresses a measure of damages, as the loss of the fair value of its business and, without elaboration, states that this amount could exceed the contract damages. However, where plaintiff provides no factual underpinnings to support its assertions, an assessment of whether or not plaintiff is alleging that it suffered fraud damages that are distinguishable from its contract damages, or whether there are any actual damages, a necessary element of the claim, is not discernable (*see A.S. Rampell, Inc. v Hyster Co.*, 3 NY2d 369, 383 [1957] holding that "[t]here is no requirement that the measure of damages be stated in the complaint *so long as facts are alleged from which damages may properly be inferred.*"] [emphasis added]). Here, the complaint alleges that plaintiff sold its assets for fair value, as reflected by the contract price.

In addition, plaintiff's claim that Valeant "stole" plaintiff's business may fairly be restated as that Valeant had no intention of paying plaintiff in full for its assets or business, which does not constitute fraud (*see e.g. Gedula 26, LLC v Lightstone Acquisitions III LLC*, 150 AD3d 583, 584

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3 Even if DAF were to be charged with knowledge of the R&O and other litigation, that knowledge would have been no more than that there were allegations. Whether knowledge of the allegations triggered a duty of inquiry is a question of fact to be considered at trial.

[1st Dept 2017]). For the aforementioned reasons, the fraudulent inducement claim is dismissed, and plaintiff's request for punitive damages is moot.

C. Punitive Damages

Plaintiff's demand for punitive damages is also dismissed because such a demand:

> "is properly made in a breach of contract action if all of the following elements are sufficiently pleaded: '(1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of [an] egregious nature ...; (3) the egregious conduct [was] directed to plaintiff; and (4) it must be part of a pleaded pattern directed at the public generally'"

(*Matter of Part 60 Put-Back Litig.*, 169 AD3d 217, 225 [1st Dept 2019] [citation omitted]). In this breach of contract action, there is neither a claim of egregious conduct directed at the public nor allegations that speak to moral turpitude sufficient to state the claim (*see Mountain Cr. Acquisition LLC v IntraWest U.S. Holdings, Inc.*, 96 AD3d 633, 635 [1st Dept 2012] [involving private transaction where conduct did not rise to high degree of moral turpitude]; *Segal v Cooper*, 49 AD3d 467, 468 [1st Dept 2008]).

D. Breach of the Implied Covenant of Good Faith and Fair Dealing

Implicit in all contracts is a covenant of good faith and fair dealing in the course of performance (the Implied Covenant) (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). Encompassed within the obligation to exercise good faith are "'any promises which a reasonable person in the position of the promisee would be justified in understanding were included'" and that "'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*id.* at 389 [citation omitted]).

DAF alleges that Valeant breached the Implied Covenant by: (1) failing to enforce the Greer Distributorship Agreement; (2) failing to register trademarks assigned to it under the Agreement; (3) implementing a 100 patient-pack monthly cap on applicator purchases; and (4) unjustifiably increasing the applicator prices (complaint, ¶ 77).

Section 3.4 of the Agreement provides that "[Valeant] agrees to use commercially reasonable efforts to market, promote and sell the Products." The reasonable interpretation of this is that the parties intended that Valeant provide efforts that would not fall below an industry-level floor, or, conversely, be required to invest its resources above and beyond those that would

be commercially reasonable in the industry. Where payment of the consideration to plaintiff under the Agreement was predicated upon Valeant achieving unit sales goals, the record lacks a basis from which to determine that placing a cap upon the amount of a product that a customer can purchase, which must be presumed to prevent sales, falls into the category of a requirement to use reasonable efforts to sell, promote and market the Products. Indeed, defendant's discretion concerning sales strategies could not be used "in such a way as to frustrate plaintiff's rights under the agreement . . . or benefit itself at plaintiff's expense in such a way as to frustrate plaintiff's rights under the agreement" (*Pleiades Publ., Inc. v Springer Science + Bus. Media LLC*, 117 AD3d 636, 637 [1st Dept 2014]).

In addition, while Valeant seeks to make Section 3.4 of the Agreement a catch-all, which covers any conduct in which it engaged, defendant has not demonstrated that the failure to enforce the Greer Distributorship Agreement falls within the category of marketing, promotion and sales of the Products. As only excerpts of the Agreement were provided, a determination that plaintiff is seeking to impose obligations outside of the contract may not be made here. Plaintiff sufficiently distinguishes the breach of contract allegations from those for the Implied Covenant (*compare* complaint, ¶ 68 and ¶ 77). Consequently, defendant's motion to dismiss the Implied Covenant claim is denied.

In light of the foregoing, it is

ORDERED that defendant's motion to dismiss the first and third causes of action and to strike the complaint's request for an award of punitive damages is granted to the extent that the first cause of action of the complaint for and plaintiff's punitive damages request are dismissed and is otherwise denied; and it is further

ORDERED that defendant shall answer the complaint within 20 days of service of the Decision and Order with Notice of Entry; and it is further

ORDERED that all counsel shall appear for a status conference at 9:30 a.m. on September 10, 2019, Part 49, Room 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: **July 15, 2019**

ENTER,

O. PETER SHERWOOD J.S.C.