

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

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NORTH TRADE U.S., INC., :  
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 : Plaintiff, :  
 :  
 : v. : Civ. No.: 3:03CV01892 (AWT)  
 :  
 : GUINNESS BASS IMPORT COMPANY d/b/a :  
 : DIAGEO - GUINNESS USA, :  
 :  
 : Defendant. :  
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**RULING ON MOTION TO DISMISS**

Plaintiff North Trade U.S., Inc. ("North Trade") commenced this action against Guinness Bass Import Company d/b/a DIAGEO - Guinness USA ("Diageo") initially setting forth a common law claim for breach of contract and a claim for breach of contract in violation of the N.Y. U.C.C. § 2-610. The plaintiff amended the complaint to add a claim for fraudulent misrepresentation. The defendant has moved to dismiss the claim for fraudulent misrepresentation pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. For the reasons set forth below, the motion is being denied.

**I. FACTUAL BACKGROUND**

On March 21, 2003, North Trade entered into a one-year contract with Diageo, effective on that date. Pursuant to the contract, North Trade agreed to purchase Captain Morgan's Gold

Flavored Malt Beverage ("CMG") from Diageo for \$0.75 per case. Diageo identified approximately 4.8 million cases of CMG available for purchase. North Trade intended to resell the CMG to international distributors who would sell the product to countries approved by Diageo. In reliance on the contract, North Trade procured purchase orders for the resale of CMG to approved countries. However, on May 7, 2003, Diageo notified North Trade of its decision to discontinue offering CMG for sale through North Trade.

The plaintiff alleges that Diageo promised to provide approximately 4.8 million cases of CMG to the plaintiff for a period of one year. In addition, the plaintiff alleges that both Jack Raineault, who signed the contract on behalf of Diageo, and Diageo knew or should have known that Diageo could not provide CMG for a period of one year because it had decided to discontinue and destroy the remaining supplies of CMG before March 21, 2003. Furthermore, the plaintiff alleges that Raineault and Diageo knew or should have known that Diageo could not provide 4.8 million cases of CMG because significant portions of the inventory, identified in the contract, had been destroyed prior to March 21, 2003.

North Trade alleges in its third count that Diageo made false representations when it represented that it could perform the contract for one year and when it represented that

approximately 4.8 million cases of CMG were available for purchase by North Trade. The plaintiff also alleges that Raineault and Diageo made the aforementioned misrepresentations to induce North Trade to enter into the contract and that North Trade relied on Diageo's representations in procuring purchase orders for the resale of CMG. The third count added a claim for punitive damages.

In response to the motion to dismiss,<sup>1</sup> the plaintiff submitted an e-mail dated February 28, 2003 from Marc Langelier at Diageo to Nick Cullen, also of Diageo, which indicated that as of February 26, 2003 Diageo had decided to destroy all of the CMG by June 30, 2003, and that some of the stock had already been destroyed. In addition, an e-mail sent April 15, 2003 from Sean Shannon at Diageo to Cullen confirmed that Diageo was proceeding with the plan for the destruction of the CMG as outlined in the February 28, 2003 e-mail. Finally, an e-mail sent from John Stewart of Diageo to Langelier on April 17, 2003 confirmed that Diageo was no longer offering CMG for sale, effective immediately.

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<sup>1</sup>The defendant argues, in substance, its interpretation of the contract, which is attached to the amended complaint, and in support of that interpretation states that "Schedule B-1 identified that the available product was manufactured between February to June 2002." (Def. Reply at 3 n.2.) The court notes that Schedule B-1 does not state "2002".

## II. LEGAL STANDARD

\_\_\_\_\_ Dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted is not warranted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The task of the court in ruling on a Rule 12(b)(6) motion "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Ryder Energy Distribution Corp. v. Merrill Lynch Commodities Inc., 748 F.2d 774, 779 (2d Cir. 1984) (internal quotes and citations omitted). The court is required to accept as true all factual allegations in the complaint and must draw all reasonable inferences in favor of the plaintiff. See Hernandez v. Coughlin, 18 F.3d 133, 136 (2d Cir. 1994). However, "[w]hile the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice." Leeds v. Meltz, 85 F.3d 51, 53 (2d Cir. 1996). See also DeJesus v. Sears, Roebuck & Co., Inc., 87 F.3d 65, 70 (2d Cir. 1996) ("A complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6)."); Furlong v. Long Island Coll. Hosp., 710 F.2d 922, 927 (2d Cir. 1983) (While "Conley permits a pleader to enjoy all favorable inferences from facts that have been pleaded, [it] does not

permit conclusory statements to substitute for minimally sufficient factual allegations.”).

### **III. DISCUSSION**

\_\_\_\_\_To state a claim for fraudulent misrepresentation under New York law, a plaintiff must show: “(1) the defendant made a material false representation, (2) the defendant intended to defraud the plaintiffs thereby, (3) the plaintiffs reasonably relied upon the representation, and (4) the plaintiffs suffered damage as a result of their reliance.” Swersky v. Dreyer, 643 N.Y.S.2d 33, 36 (1996).

\_\_\_\_\_A fraud claim must be pleaded with particularity. Rule 9(b) of the Federal Rules of Civil Procedure “requires the pleader to specify precisely what statements were made, when, where and by whom they were made, in what manner the plaintiff was misled, and what the defendant obtained as a consequence.” Hotel Constructors, Inc. v. The Seagrave Corp., 574 F. Supp. 384, 388 (S.D.N.Y. 1983). North Trade’s allegations satisfy this standard.

The representations North Trade claims are fraudulent and upon which it claims it relied in entering into the agreement are: (1) the representation that Diageo could perform the contract for one year, and (2) the representation that approximately 4.8 million cases of CMG were available for purchase by North Trade. Based on these allegations, North Trade

has properly pleaded the first element of a fraudulent misrepresentation claim.

As to the remaining elements, North Trade alleges that Diageo made the false representations to induce North Trade to enter into the contract, and that North Trade reasonably relied upon the representations to its detriment by expending time and money in procuring purchase orders for the resale of CMG.

A "plaintiff cannot convert a contract action into one for fraud, 'merely by alleging that the contracting party did not intend to meet its contractual obligations.'" Elma RT v. Landesmann Int'l Mktg. Corp., No. 98 Civ. 3662 (LLM), 2000 U.S. Dist. LEXIS 11925, at \*4 (S.D.N.Y. Aug. 21, 2000) (quoting Rocanova v. Equitable Life Assurance Soc'y, 83 N.Y.2d 603, 614 (1994)) (internal citation and quotation marks omitted). Thus, in order to maintain a fraudulent misrepresentation claim, separate from a breach of contract claim, a plaintiff must either: "(i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages." Bridgestone/Firestone, Inc. v. Recovery Credit Serv., Inc., 98 F.3d 13, 20 (1996) (internal citations omitted). Here, the plaintiff has alleged facts upon which relief may be granted

under the first two bases.<sup>2</sup>

First, the plaintiff's allegations with respect to the fraudulent misrepresentations relate to a duty separate from the duty to perform under the contract. "[A] misrepresentation of present fact is collateral to the contract, (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty." First Bank of the Americas v. Motor Car Funding, Inc., 690 N.Y.S.2d 17, 21 (App. Div. 1999); see also Chase v. Columbia Nat'l Corp., 832 F. Supp. 654, 661 (S.D.N.Y. 1993) (A "contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract.") (internal quotes and citations omitted).

Second, a fraudulent misrepresentation that induces another to enter into the contract is collateral to the contract, and therefore serves as the basis for a cause of action separate from a breach of contract claim. See, e.g., Deerfield Communications Corp. v. Chesebrough-Ponds, Inc., 68 N.Y.2d 954, 956 (App. Div. 1986) (A "representation of present fact, not of future intent . . . which was the inducement for the contract . . . was neither

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<sup>2</sup>A fraud claim is not barred by the contract claim when the plaintiff seeks special damages caused by the misrepresentation that are unrecoverable as contract damages. Bridgestone/Firestone, 98 F.3d at 20. However, punitive damages are not caused by reliance on a party's misrepresentations. Excalibur Sys., Inc. v. Aerotech World Trade, Ltd., No. 98-CV-1931 (JG), 1999 U.S. Dist. LEXIS 20084, at \*8 (E.D.N.Y. Dec. 30, 1999).

duplicative of the second counterclaim [for breach of contract] nor barred by the general merger clause contained in the contract.”) (internal citations omitted); Rosen v. Spanierman, 894 F.3d 28, 35 (2d Cir. 1990) (“A claim for fraudulent inducement is separate and distinct from a claim for breach of contract under New York law . . . .”) (citations omitted); Gizzi v. Hall Design Builders, 754 N.Y.S.2d 373, 376 (App. Div. 2002) (“But where . . . allegations of intentional fraud, though ‘parallel in many respects to the breach of contract claim,’ include claims of fraudulent misrepresentations made by defendants which induced them to enter into the contract and close on the property, they are not ‘merely redundant’ of the breach of contract claim.”) (internal citations omitted).

Based on the foregoing, the third count of the amended complaint states a claim upon which relief can be granted, and the defendant’s motion should be denied.

**IV. CONCLUSION**

\_\_\_\_\_For the reasons set forth above, Defendant’s Motion to Dismiss (Doc. No. 26) is hereby DENIED.

It is so ordered.

Dated at Hartford, Connecticut on this 3rd day of May 2005.

\_\_\_\_\_/s/\_\_\_\_\_  
Alvin W. Thompson  
United States District Judge