UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

METROPOLITAN ENTERPRISE CORP., plaintiff,	:	
v.	:	**NO. 3:03cv1685 (JBA)**
UNITED TECHNOLOGIES INTERNATIONAL, CORP., PRATT & WHITNEY LARGE COMMERCIAL ENGINES DIVISION, defendant.	:	

RULING on DEFENDANT'S MOTION to DISMISS [DOC. #31]

For the reasons set forth below, defendant United Technologies International Corporation's ("UTI") motion to dismiss [Doc. #31] is DENIED.

I. Factual Allegations of Plaintiff's Second Amended Complaint

Plaintiff Metropolitan Enterprise Corporation ("Metropolitan") is a corporation organized and existing under the law of Taiwan, Republic of China, with its principal place of business in Taipei, Taiwan. UTI is a corporation organized and existing under the laws of Delaware, with its principal place of business in East Hartford, Connecticut.

On or about May 16, 2001, Metropolitan entered into a written agreement with UTI, entitled Sales Representation Agreement ("Agreement"), under which UTI employed Metropolitan to represent defendant in marketing, promoting and selling UTI's commercial jet engines to air carriers based in Taiwan for a

period of three years.

Pursuant to the terms of the Agreement, Metropolitan was to receive commissions at the rate of 1.8% of the gross sales price of each of UTI's products sold to one of the airlines identified in the Agreement. Such commissions were payable upon the consummation of the sale by the customer's payment for the product in full, except that, for sales to China Airlines ("CAL"), a portion of the commissions would be paid in advance upon the execution of a sales contract.

At the time the Agreement was entered into between Metropolitan and UTI, UTI had, for several years, lost its competitive edge with CAL to another commercial jet engine manufacturer, General Electric, from whom CAL had been purchasing its supply of commercial jet engines for its fleet of commercial aircrafts. UTI's primary motivation and purpose in hiring Metropolitan under the Agreement was to make use of Metropolitan's reputation and connections within CAL to regain CAL's trust and confidence in UTI and UTI's products and to influence CAL to favor UTI's proposals, over those of other bidders, in purchasing commercial jet engines for CAL's new fleet of commercial aircraft, consisting of Boeing 747s and Airbus 330s.

For more than two years after the Agreement was signed, Metropolitan expended substantial effort and funds in

reestablishing its contacts within CAL, in promoting trust and confidence in UTI and UTI's products to CAL, and in promoting UTI's reputation and commercial jet engines throughout Taiwan. Metropolitan did so at the behest, and for the benefit, of UTI, expending in excess of $1 million in the commitment of its resources and out of pocket costs.

In the first quarter of 2003, Metropolitan was able to successfully solicit an invitation from CAL to UTI for UTI to sell CAL six jet engines of specified type for CAL's fleet of Boeing 747 aircrafts, four spare commercial jet engines of specified types for the Boeing 747 aircrafts, twelve new engines of specified type for CAL's fleet of Airbus 330s, and options for specified spare engines for the Airbus 330 aircrafts. The total commissions that Metropolitan was to earn from this transaction, if consummated, approximated $15 million. In response to CAL's request for proposal, UTI delivered to CAL a proposal dated May 26, 2003, entitled "Engine/Propulsion System Support Term Sheet for China Airlines Limited," which set forth the types and specifications of the commercial jet engines for both CAL's Boeing 747 and Airbus 330 fleets for the quantity required by CAL, the prices for said engines, the dates of delivery, and the usual discounts, credits and concessions to CAL for its consideration. This proposal is alleged to have "emanated" from the State of Connecticut.

On or about June 18, 2003, CAL informed Metropolitan that CAL intended to accept UTI's proposal, that all internal official approvals for the acceptance of UTI's proposal had been secured, and that, due to administrative requirements and for reasons of formality, CAL desired that the acceptance date be further extended to June 30, 2003. At the same time CAL released such information to Metropolitan, Metropolitan received further congratulatory confirmation from an official of the Taiwan government of CAL's forthcoming acceptance of UTI's proposal, and the ensuing contract award. Metropolitan relayed such information to UTI at its Connecticut headquarters on June 19, 2003.

The same day UTI learned from Metropolitan of the forthcoming contract award from CAL, UTI, from its Connecticut headquarters, directed its general manager for Taiwan to eliminate the engines for the Airbus 330 from the proposal with knowledge that CAL would not accept the proposal with such a change. At the same time, UTI, from its Connecticut headquarters, threatened to discharge its general manager for Taiwan and Metropolitan if CAL should succeed in awarding the contract to UTI without the required change. Pursuant to this directive, UTI's general manager for Taiwan, from UTI's Connecticut headquarters, issued and delivered a letter on June 20, 2003 to CAL. The June 20 letter extended the deadline of

CAL's acceptance to UTI's proposal to June 30, 2003, but subject to the material change of a reduction of the introductory assistance credit for Airbus 330 aircrafts by 11%, thereby increasing the purchase price for the engines of the Airbus 330 aircrafts by approximately $37.5 million. The June 20 letter was written with knowledge that such changed terms would render the transaction impracticable for CAL, and that CAL would not accept UTI's modified proposal.

The sudden increase in purchase price for the Airbus 330 engines in UTI's proposal rendered the transaction impracticable to CAL, who, despite multiple protests and attempts, was unable to compromise with UTI on its last-minute alteration to its bid. Metropolitan learned, through the jet engine business community, that prior to the date UTI altered its bid to CAL, UTI had decided for business reasons to leave the commercial jet engine market. At no time, however, did UTI communicate such intention to Metropolitan. Metropolitan learned in mid-June, prior to the date UTI altered its bid, that UTI had lost a jet engine deal with Egypt Airlines under similar circumstances.

Metropolitan believes UTI deliberately changed its bid at the last minute to discourage CAL from proceeding with the transaction pursuant to UTI's secret plan to divert operating capital to another venture and correspondingly to cease manufacturing and selling commercial jet engines for the Airbus

330 and thereafter to limit, if not to cease completely, its commercial jet engine business. UTI's secret plan was concealed from Metropolitan as early as the time UTI responded to CAL's request for proposal, i.e., late May 2003. Unbeknownst to Metropolitan, UTI's original proposal to CAL was a facade submitted with neither intention nor expectation of a successful transaction with CAL, given the existence of lower bids for the same items from General Electric, from whom CAL had purchased aircraft engines for years.

By reason of UTI's acts, CAL was compelled to, and did, award the purchase contract for the commercial jet engines to others, and Metropolitan was thereby prevented from closing the proposed or contemplated sale transaction for both the engines for CAL's Boeing 747 and Airbus 330 aircrafts.

Metropolitan's Second Amended Complaint alleges three causes of action based on the foregoing: 1) breach of the implied covenant of good faith and fair dealing inherent in the Agreement; 2) violation of Connecticut Unfair Trade Practices Act ("CUTPA"), Conn. Gen. Stat. §§ 42-110a et. seq.; and 3) breach of fiduciary duty owed by principal to agent. UTI moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss only the second and third counts.

II. 12(b)(6) Standard

When deciding a motion to dismiss, the Court must accept all well-pleaded allegations as true and draw all reasonable inferences in favor of the pleader. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). A complaint should not be dismissed for failure to state a claim 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); see also Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)("The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.").[1]

III. Discussion

A. Count II: CUTPA Claim

UTI asserts two independent grounds for dismissal of Metropolitan's CUTPA claim. First, UTI claims Metropolitan has

[1] In determining the sufficiency of a plaintiff's claim for Rule 12(b)(6) purposes, the Court is not limited to the factual allegations in the complaint but may consider "documents attached to the complaint as exhibits or incorporated in it by reference, ... matters of which judicial notice may be taken [under Fed. R. Evid. 201], or ... documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." Brass v. Am. Film. Techs. Inc., 987 F.2d 142, 150 (2d Cir. 1993); see also Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47-48 (2d Cir. 1991); Kramer v. Time Warner Inc., 937 F.2d 767, 773-74 (2d Cir. 1991). Accordingly, the Court may consider the Agreement attached to Metropolitan's Second Amended Complaint.

failed to state a claim because it both is not a resident of Connecticut and does not allege to have suffered any injury in Connecticut. UTI's argument is based on its statutory analysis of Conn. Gen. Stat. §§ 42-110b and 42-110g and the issue is said to be a matter of first impression, see Mem. in Supp. [Doc. #32] at 4; see also Reply [Doc. #38] at 5. Second, UTI believes Metropolitan's allegation in Count II legally deficient because it does not allege that UTI was engaged in trade or commerce in the State of Connecticut. UTI characterizes Metropolitan's complaint as alleging "an offer made in Taiwan to sell jet engines to China Airlines in Taiwan," Def. Mem. in Supp. [Doc. #32] at 8, and maintains that such activity does not state sufficient conduct within the borders of Connecticut to maintain a CUTPA action.

Metropolitan first vigorously disagrees with UTI's stautory interpretation. Second, relying on USGI, Inc. v. Michele Ltd. P'ship, et. al., Civ. No. B-88-229, 1991 WL 152445, at *3-4 (D. Conn. Jan. 6, 1991)(Cabranes, J.) and progeny, Metropolitan argues that the Connecticut choice of law provision contained in the Agreement as a matter of law permits its CUTPA claim. Third, Metropolitan points to the numerous allegations of Connecticut-based conduct contained in its second amended complaint and, by reference to progeny of H & D Wireless Limited P'ship v. Sunspot, Civil No. H-86-1026 (D. Conn. Feb. 24, 1987)(13 Conn. L. Trib.

No. 17, 22), concludes that it has fully satisfied any nexus pleading requirement that may exist where parties have already contractually bound themselves to Connecticut law. These arguments are addressed in turn.

1. CUTPA Standing: Connecticut Residency or Injury Required?

Conn. Gen. Stat. § 42-110b(a) states that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Conn. Gen. Stat. § 42-110g(a) and (b) provide:

> (a) Any person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment of a method, act or practice prohibited by section 42-110b, may bring an action in the judicial district in which the plaintiff or defendant resides or has his principal place of business or is doing business, to recover actual damages. Proof of public interest or public injury shall not be required in any action brought under this section. The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper.
>
> (b) Persons entitled to bring an action under subsection (a) of this section may, pursuant to rules established by the judges of the Superior Court, bring a class action on behalf of themselves and other persons similarly situated who are residents of this state or injured in this state to recover damages.

UTI's limited view of the scope of CUTPA is based on its reasoning that, in subsection (b), the phrase "who are residents of this state or injured in this state" is modified by the phrase "other persons similarly situated" which in turn refers to

"[p]ersons entitled to bring an action under subsection (a)."

UTI then reasons:

> It is illogical to propose that the legislature only intended for class members to be Connecticut residents or persons injured in Connecticut, and did not intend to require the same of the party initiating the suit. A contrary interpretation would mean that an out-of-state plaintiff can represent a class of Connecticut residents in a class action. Our General Assembly could not reasonably have harbored such an intent. Hence, the only logical statutory analysis of CUTPA requires that parties seeking relief under CUTPA need to be either residents of Connecticut, or persons injured in Connecticut.

Mem. in Supp. [Doc. #32] at 6.[2] The Court disagrees.

UTI's construction, although artful, conflicts with the plain language of Conn. Gen. Stat. § 42-110g(a), the statute creating a private action for CUTPA violations. That statute makes no distinction between residents and non-residents of Connecticut but permits "any person" suffering ascertainable loss resulting from a CUTPA violation to maintain an action in the judicial district in which the defendant resides or has his principal place of business or is doing business. Conn. Gen. Stat. § 42-110b(a) in turn does not require injury inside Connecticut borders but, via Conn. Gen. Stat. § 42-110a(4)(discussed infra), focuses on the locus of the offending conduct, that is, whether it occurs "in" Connecticut. Thus, the statutory scheme permits out of state residents to bring a CUTPA

[2] Both parties assured the Court at a status conference on May 3, 2004, that their dispute over legislative intent cannot be aided by reference to any published legislative history because their exhaustive research had disclosed nothing.

action against a defendant located in Connecticut notwithstanding the locus of injury. Read in conjunction with the class action-authorizing portion of CUTPA, Conn. Gen. Stat. § 42-110g(b), a foreign person suffering ascertainable loss outside of Connecticut from unlawful conduct occurring inside the state may initiate an individual action in Connecticut, but may not bring a class action because such plaintiff could not be representative of class members with the statutorily required in-state residency or injury characteristics. See also Robert M. Langer, John T. Morgan & David L. Belt, Unfair Trade Practices, § 3.7, at 95-96 (Connecticut Practice Series, Volume 12)(2003)("Unfair Trade Practices")(discussing statutory language "who are residents of this state or injured in this state..." and concluding "... the limitation of potential class members in section 42-110g(b) is not necessarily inconsistent with CUTPA being applicable only to trade or commerce in Connecticut. It can be read as denying class status to nonresidents who are injured outside of Connecticut by a violation taking place in Connecticut."). Therefore, Metropolitan's failure to plead residency or injury in Connecticut does not warrant dismissal under Fed. R. Civ. P. 12(b)(6).

2. Parties' Choice of Law Agreement

Article 8 of the Agreement provides in pertinent part,

> This Agreement shall be deemed to have been made under, and shall be governed by and construed in accordance with, the laws of the State of Connecticut, United States of America.

UTI agrees that this provision requires application of Connecticut law to the factual assertions supporting Metropolitan's CUTPA claim, see Reply [Doc. #38] at 1-2,[3] but maintains that it has no bearing on the viability of Metropolitan's claim under CUTPA because choice of law and satisfaction of the threshold elements of CUTPA are separate and distinct issues. Metropolitan, by contrast, argues that the two inquiries are the same, and that UTI waived challenges to CUTPA's applicability when agreeing to have Connecticut law govern the Agreement. The case law on which Metropolitan relies is USGI, Inc. v. Michele Ltd. P'ship, et. al., 1991 WL 152445 and progeny.

Treatise commentary identifies problems with the reasoning undergirding the USGI decision and its progeny, including Titan

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[3] The Court thus need not make any determination about the merits of Metropolitan's assertion that "Connecticut courts will give effect to an express choice of law provision, and in doing so, will not only apply Connecticut law to the parties' contractual claims, but also to tort claims arising out of or relating to the contract," Opp'n [Doc. #33] at 3, but notes that the case cited for support of that proposition, Travel Services Network, Inc. v. Presidential Financial Corp. of Massachusetts, 959 F. Supp. 135, 146 (D. Conn. 1997) explicitly cabined applicability of the principle to "broadly-worded choice-of-law provision[s]," citing the contract provision in Turtur v. Rothschild Registry Int'l Inc., 26 F.3d 304, 309-10 (2d Cir. 1994), which provided,

> "[t]his note shall be governed by, and interpreted under, the laws of the State of New York applicable to contracts made and to be performed therein without giving effect to the principles of conflict of laws. The parties hereto consent to the exclusive jurisdiction of the courts of the State of New York to resolve any controversy or claim arising out of or relating to this contract or breach thereof."

Id. at 309 (emphasis in original). The critical language emphasized in Turtur and cited by Travel Services is not present in the Agreement.

Sports, Inc. v. Turner Broadcasting Systems, Inc., 981 F. Supp. 65, 72 n.5 (D. Conn. 1997); Valtec International, Inc. v. Allied Signal Aerospace Co., No 3:93CV01171, 1997 WL 288627, at *7 (D. Conn. Mar. 7, 1997); Uniroyal Chemical Co. v. Drexel Chemical Co., 931 F. Supp. 132, 140 (D. Conn. 1996). See Unfair Trade Practices, § 3.7, at 97-99. One problem is that those cases appear to assume that general choice of law principles can broaden the otherwise applicable range of a statute's intended scope, an assumption that contradicts guidance set forth in Restatement (Second) of Conflict of Laws § 6(1) cmt. b (1971) - a section that is authoritative in choice of law analysis for contracts in Connecticut, see Reichhold Chemicals, Inc. v. Hartford Accident and Indemnity Co., 243 Conn. 401, 408-14 (1997):

> b. Intended range of application of statute. A court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue. On the other hand, the court will constantly be faced with the question whether the issue before it falls within the intended range of application of a particular statute. The court should give a local statute the range of application intended by the legislature when these intentions can be ascertained and can constitutionally be given effect. If the legislature intended that the statute should be applied to the out-of-state facts involved, the court should so apply it unless constitutional considerations forbid. On the other hand, if the legislature intended that the statute should be applied only to acts taking place within the state, the statute should not be given a wider range of application. Sometimes a statute's intended range of application will be apparent on its face, as when it expressly applies to all

> citizens of a state including those who are living abroad. When the statute is silent as to its range of application, the intentions of the legislature on the subject can sometimes be ascertained by a process of interpretation and construction. Provided that it is constitutional to do so, the court will apply a local statute in the manner intended by the legislature even when the local law of another state would be applicable under usual choice-of-law principles.

Restatement (Second) of Conflict of Laws § 6(1) cmt. b (1971)(emphasis added). While the Court recognizes that this section and its comment are most directly applicable to contract choice of law analysis where the parties have failed to make an effective choice of law, see id. at § 188(1), the principle may be applicable even where the parties have made an effective choice, especially if the contractual language chosen fails to indicate an intent to expand the scope of a state law tort related to or arising out of a contractual relationship but merely has as its purpose exclusion of application of the laws of other jurisdictions. In addition, USGI and progeny rely (directly or ultimately) on the Second Circuit's decision in Bailey Employment System, Inc. v. Hahn, 655 F.2d 473, 476 (2d Cir. 1981), a case that did not explicitly discuss the geographical reach of CUTPA in Conn. Gen. Stat. § 42-110a(4). This latter observation accounts for Judge Cabranes' qualified language. See USGI, 1991 WL 152445 at *4 ("... it appears that courts when confronted with this issue have applied CUTPA when choice of law principles indicated applicability of Connecticut law. See Bailey...."))(emphasis added). However, the Court need

not decide this complex issue today as it concludes infra that Metropolitan has pled sufficient factual nexus with the State of Connecticut to satisfy any nexus requirement remaining for a CUTPA action where choice of law principles direct application of Connecticut law.

3. Connecticut Nexus

Metropolitan takes issue with UTI's characterization of the factual allegations in its second amended complaint, pointing to the following Connecticut-related allegations as showing more than a mere offer made in Taiwan to sell jet engines to CAL in Taiwan: the critical May 26, 2003 UTI proposal to CAL "emanated" from Connecticut; Metropolitan relayed CAL's acceptance of UTI's bid to UTI's Connecticut headquarters; UTI directed from its Connecticut headquarters its general manager for Taiwan to eliminate the engines for the Airbus 330 from the proposal after learning from Metropolitan of CAL's acceptance of UTI's proposal; UTI threatened from its Connecticut headquarters to discharge its general manager for Taiwan and Metropolitan if CAL succeeded in awarding the purchase contract to UTI; UTI's general manager for Taiwan issued from UTI's Connecticut headquarters a letter with a material change regarding the bid (the letter having been written with knowledge that the changed terms would preclude CAL from accepting UTI's modified proposal); and generally that UTI's

conduct respecting the CAL deal, including its plan to divert operating capital, occurred in whole or substantially in Connecticut. Metropolitan argues that these allegations constitute "trade or commerce" under Conn. Gen. Stat. § 42-110b(a) as that term is defined in Conn. Gen. Stat. § 42-110a(4), pointing to cases applying the standard first annunciated in H & D Wireless Limited P'ship v. Sunspot, Civil No. H-86-1026 (D. Conn. Feb. 24, 1987)(13 Conn. L. Trib. No. 17, 22), namely, "CUTPA does not necessarily require that the violation occur within the state, only that it be tied to a form of trade or commerce intimately associated with Connecticut." See Diesel Injection Service v. Jacobs Vehicle Equipment, No. CV 980582400S, 1998 WL 950986, at *7 (Conn. Super. Dec. 4, 1998); Titan Sports, 981 F. Supp. at 72; Richmond Fredericksburg & Potomac Railroad Corp. v. Aetna Casualty and Surety Co., No. 3:96cv1054, 1997 WL 205783, at *2 (D. Conn. Apr. 11, 1997); Uniroyal Chemical, 931 F. Supp. at 140. Without total endorsement of the H & D Wireless standard, the Court agrees with Metropolitan that it has alleged a sufficient nexus.

Under Conn. Gen. Stat. § 42-110b(a), "trade or commerce" is defined as

> "Trade" and "commerce" means the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value in this state.

Conn. Gen. Stat. § 42-110a(4)(emphasis added). Examination of the statutory language and interpretive case law reveals no reason why a straightforward application of the phrase "in this State" would exclude the conduct alleged here: a Connecticut seller, in connection with the sale or the offering for sale of its jet engines, hatching and implementing a plan inside the borders of Connecticut the deceptive or unfair effect of which is felt outside those borders. The prepositional phrase "in this state" refers to the totality of the definition of "trade" and "commerce" ("the advertising, the sale or rent or lease, the offering for sale or rent or lease, or the distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value") and not merely to the prepositional objects following the first use of the preposition "of" ("any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value"), and focuses on the locus of the unfair or deceptive conduct in Connecticut.[4] See Richmond Fredericksburg, 1997 WL 205783 at *2 (although appearing to rely on H & D Wireless, finding sufficient nexus with Connecticut where defendant Connecticut insurer was alleged to have refused

[4] Reading "in this state" as modifying only the prepositional objects following the first use of the preposition "of" would lead to absurd results, for example, CUTPA would not reach a Connecticut LLC's fraudulent sale of gold mines to Connecticut residents because such gold mines were located in a foreign country or did not exist.

to pay plaintiff's and others' claims for environmental liabilities, failed to conduct reasonable investigation of such liabilities, and refused to effect good faith settlement of such claims).[5]

B. Fiduciary Duty

Metropolitan's breach of fiduciary duty claim is based on the allegation that it acted as UTI's agent under the Agreement and that UTI, as its principal, breached its fiduciary duty to Metropolitan, as agent, by failing to act with sufficient care to prevent harm to Metropolitan, including failing to disclose material facts regarding its intentions with respect to the Agreement, failing to disclose its intent not to act in good faith in the commercial jet engine market, and otherwise failing to conduct itself in accord with the fiduciary duties of trust and confidence inherent in Metropolitan's and UTI's legal relationship. See Sec. Am. Compl. [Doc. #21] ¶¶ 34-39. UTI asserts that Metropolitan has failed to state a claim for breach of fiduciary duty because the alleged facts, even if true, do not establish the existence of an agency relationship between UTI, as principal, and Metropolitan, as agent. Evaluating Metropolitan's

[5] Commentators have perceived tension between the statutory language and the H&D Wireless test on the grounds that, among other things, the plain language of the statute, legislative history, and judicial interpretation of parallel federal and state statutes suggests that conduct wholly outside or originating outside of Connecticut does not fall within the scope of CUTPA. See Unfair Trade Practices, § 3.7, at 96-105.

claim under the three part test for the existence of an agency relationship set forth in Beckenstein v. Potter & Carrier, Inc., 191 Conn. 120, 132-33 (1983)("(1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking")(quotation omitted), UTI references the Agreement's characterization of Metropolitan as an independent contractor, the Agreement's disavowal of Metropolitan as UTI's agent, and the lack of control UTI exercised over Metropolitan's accomplishment of its objectives under the Agreement.[6]

Metropolitan argues that it has fully complied with the pleading requirements of Fed. R. Civ. P. 8(a)(2), to give notice to UTI of Metropolitan's fiduciary duty claim and the grounds on which it rests. Agreeing that Beckenstein is the standard for determining whether it acted as UTI's agent, Metropolitan points to its factual allegations regarding the Agreement and CAL, the Agreement's reference to Metropolitan as representing UTI, and

[6] In its reply brief, UTI also argues that, even if Metropolitan has sufficiently alleged an agency relationship with UTI, Connecticut law does not recognize fiduciary duties running from principal to agent and therefore UTI's claim must be dismissed. Reply [Doc. #38] at 7-8. While Connecticut case law suggests that it is the agent who is the fiduciary in whom the principal reposes trust or confidence and who exercises superior skill on behalf of the principal, see e.g. Taylor v. Hamden Hall School, 149 Conn. 545, 552 (1962); see generally Cadle Co. v. D'Addario, 268 Conn. 441, 455-57 (2004), plaintiff has had no opportunity to respond, which is why reply briefs are required to address only matters raised in the opposition, see D. Conn. L. Civ. R. 9(g)("[a] reply brief ... must be strictly confined to a discussion of matters raised by the responsive brief ...."); Knipe v. Skinner, 999 F.2d 708, 711 (2d Cir. 1993)("Arguments may not be made for the first time in a reply brief."). Accordingly, the Court will not reach this argument at this time.

the Agreement's enumeration of services and obligations Metropolitan was required to perform for UTI, including, for example, submitting reports, assisting in collection of accounts receivable, and maintaining communications with potential purchasers, and claims that the labels used by contracting parties are not legally determinative of whether or not such parties are principal and agent.

Dismissing Metropolitan's fiduciary duty claim at this stage would be premature. Fed. R. Civ. P. 8(a)(2)

> provides that a complaint must include only a short and plain statement of the claim showing that the pleader is entitled to relief. Such statement must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.
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> ...
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> These requirements are exemplified by the Federal Rules of Civil Procedure Forms, which are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate. For example, Form 9 sets forth a complaint for negligence in which plaintiff simply states in relevant part: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512, 513 n.4 (2002)(quotations). While Metropolitan's factual allegations could be characterized as weak especially with respect to the control requirement, see Beckenstein, 191 Conn. at 134-36, 139, on a motion to dismiss, strength of allegations is not the test.

Metropolitan's allegations fairly give UTI notice of its breach of fiduciary duty claim as arising from the relationship formed by execution of the Agreement, the actions of UTI generally said to manifest intent and control, and Metropolitan's acceptance of the undertaking. Given that the existence of an agency relationship is a highly factual inquiry, see id. 134-40, and that it may be based on circumstantial evidence, see id. at 140, dismissal would contravene Fed. R. Civ. P. 8(a)(2)'s goal that litigation be based on the merits and that discovery and summary judgment be utilized to weed out unmeritorious claims.[7]

III. Conclusion

For the reasons set forth above, UTI's motion [Doc. #31] is DENIED.

IT IS SO ORDERED.

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Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 28th day of June, 2004.

[7] While UTI correctly notes that two cases cited by Metropolitan for the proposition that contractual labels do not as a matter of law control the determination of whether a principal-agent relationship exists both involve plaintiffs who were not parties to the contract challenging the accuracy of labels disclaiming agency, see Beckenstein, 191 Conn. at 133-34; Dollar Rent A Car Systems, Inc. v. Special Olympics Intern'l, Inc., No. CV 980062565S, 1999 WL 130346, at *4 (Conn. Super. Mar. 4, 1999), and not, as here, a plaintiff challenging the disclaimer of the contract it signed, UTI cites to no case in which this distinction warranted dismissal without review of a fuller record. See Beckenstein, 191 Conn. at 137 (in the context of a full trial record giving credence to provisions disclaiming agency where consistent with the provisions in the rest of the contract).