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 Hon. Bernard J. Fried (I.A.S. Pt. 60)

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS BY DEFENDANTS ATARI, INC. AND ATARI INTERACTIVE, INC.

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Defendants Atari, Inc. ("Atari") and Atari Interactive, Inc. ("Interactive") (collectively, "Atari and Interactive" or "Defendants"), by their attorneys, Olshan Grundman Frome Rosenzweig & Wolosky LLP, submit this Memorandum of Law in support of their motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss all causes of action asserted in the Complaint dated on or around August 24, 2009 (the "Complaint").

Preliminary Statement

Plaintiff Turbine, Inc. ("Plaintiff" or "Turbine") brought this baseless action against Atari and Interactive only after Atari served upon it a "Notice of Breach of Contract" whereby Atari provided Turbine sixty days to cure its own numerous breaches for, *inter alia*, (i) failing to account to Atari for over $14,000,000 in revenues it had received in connection with its development and hosting of an online computer game exploiting the intellectual properties "Dungeons & Dragons" and "Advanced Dungeons & Dragons" ("DDO") it licensed from Atari; (ii) applying $18,000,000 of costs associated with other online computer games developed and hosted by Turbine, but unrelated to DDO, to artificially reduce royalties due Atari and Interactive; and (iii) refusing to cooperate for many months with Atari's audit of its books and records as required by the parties' license agreements. Rather than curing these breaches, and despite Atari's attempts to resolve the parties' disputes amicably, Turbine has brought this baseless anticipatory action, without any prior notice.

Turbine now asserts in the Complaint for the first time many supposed breaches and misconduct by Atari and Interactive. As set forth in detail in this memorandum, Turbine's claims are fatally deficient because they either fail to state causes of actions for which relief may be granted or contradict conclusive documentary evidence that undermine such claims as a matter of law. In summary, Defendants urge the Court to dismiss Turbine's claims for the following reasons:

(a) Turbine's contract claims (Count I) fail to specify any provision of any agreement which Atari or Interactive breached. Such failure is intentional, as the agreements between the parties do not contain the supposed "obligations" Turbine alleges Atari and Interactive breached, and

Turbine's attempts to add terms to the parties' fully-integrated agreements in this manner must be rejected as violative of the parol evidence rule.

(b) Turbine's "repudiation" claim (Count II) is the result of Atari's compliance with an express contract term requiring a sixty-day opportunity for Turbine to cure its own numerous breaches of the parties' agreements (which are not subject of the instant dispute), which Atari provided to Turbine commencing as of June 25, 2009 by formal written notice. Such claim fails as a matter of law and is belied by documentary evidence.

(c) Turbine's claim for breach of the covenant of good faith and fair dealing (Count III) is based upon obligations which Atari and Interactive did not assume pursuant to the parties' agreements.

(d) Express agreements govern the parties' relationship, and thus preclude recovery by Plaintiff based upon unjust enrichment, a *quasi* contract theory (Count IV).

(e) Turbine's fraud claim (Count V) is baseless on multiple grounds. First, Turbine fails to plead the elements of this claim with particularity. Second, Turbine bases its fraud claim on non-actionable statements of future intentions, opinions, or speculative expressions of hope which are not representations of present or past fact. Third, its claim arises from and is nothing more than a contract claim simply masquerading as fraud. Such claims are not actionable in New York. Finally, Turbine could not justifiably rely upon any of the purported statements made by Atari or Interactive due to the express integration clauses, and related provisions, contained in the parties' agreements.

(f) Turbine's negligent misrepresentation claim (Count VI) fails for the same reasons as its fraud claim and for the additional reason that such claim can only be asserted where a defendant is in a special position of trust and confidence with the plaintiff, which is clearly not the case in the parties' arms-length, commercial relationship.

(g) Turbine's request for declaratory relief (Count VIII[1]) is unavailable to Turbine, as the parties' agreements disclaim its availability and specify different, reasonable means for resolving the instant dispute, namely, a claim for money damages.

Statement of Facts

On a motion to dismiss, the facts set forth in the Complaint are presumed to be true subject to the exceptions set forth below. The Court is respectfully referred to the Complaint in this action for the supposed "facts" set forth therein. To the extent it is necessary in connection with this motion for Defendants to conclusively rebut certain misstatements of "facts" contained in the Complaint, Atari and Interactive refer to documentary evidence attached to the affirmation of Kyle C. Bisceglie, dated September 3, 2009 (the "Bisceglie Affirmation.").

As alleged in the Complaint, Plaintiff, on the one hand, and Atari and Interactive, on the other, are parties to three separate, but related, contracts pertaining to the parties' respective rights and obligation with respect to a multiplayer online computer game entitled "Dungeons & Dragons Online: Stormreach" ("DDO"). (Bisceglie Aff. Ex. A ¶ 2, hereinafter cited as "Compl.") These contracts are as follows:

(A) A License, Development and Publishing Agreement dated on or around January 25, 2003, between Atari Interactive, Inc. (as successor-in-interest to Atari, Inc. and Infogrames, Inc.) and Turbine, Inc., and Amendment Numbers One through Five thereto, between Interactive (as successor-in-interest to Atari, Inc. and Infogrames, Inc.) and Turbine, Inc. (collectively, the "License Agreement"), whereby, *inter alia*, Turbine was granted a limited sublicense to utilize and exploit certain intellectual properties in connection with DDO. (*See* Compl. at ¶ 2, *et al.*) The License Agreement, and Amendment Numbers One through Five thereto, are annexed, respectively, to the Bisceglie Affirmation as Exhibits B, C, D, E, F, and G;

[1] The Complaint omits a "Count VII."

(B) A Digital Distribution Agreement dated on or around April 10, 2006 between Atari, Inc. and Turbine, Inc. (the "Distribution Agreement"), whereby, *inter alia*, Turbine was granted a limited license to "distribute the client software portion" of DDO. (*See* Compl. at ¶ 2, *et al.*) The Distribution Agreement is annexed to the Bisceglie Affirmation as Exhibit H); and

(C) A Letter Agreement dated on or around May 13, 2009, between Atari Interactive, Inc. and Turbine, Inc. (the "Letter Agreement"), whereby, *inter alia*, Turbine agreed to make a non-refundable, payment of $500,000. (*See* Compl. at ¶ 2, *et al.*) Although Turbine mischaracterizes the reasons for the payment in its Complaint, the Letter Agreement is annexed to the Bisceglie Affirmation as Exhibit I, and makes clear that $391,558 was for "Current Royalty Amount" and the remainder as "an advance payment *toward* amounts ultimately deemed due . . . based on the results of the Audit." (Emphasis supplied) The License Agreement, Amendment Numbers One through Five thereto, the Distribution Agreement, and the Letter Agreement, are hereinafter collectively referred to as the "Agreements."

As set forth below, many of Turbine's allegations in the Complaint are to be accorded no weight because they are flatly contradicted by the Agreements.

Argument

Legal Standards Applicable to this Motion

While the pleaded facts are presumed to be true and accorded the most favorable inference on a motion to dismiss, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence," will not be given such consideration. *Biondi v. Beekman Hill House Apartment Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304, 308 (1st Dep't 1999). Bare and conclusory allegations are legally insufficient. *See Cooper v. Van Cortlandt Associates*, 54 A.D.2d 545, 547, 387 N.Y.S.2d 127, 129 (1st Dep't 1976).

Pursuant to CPLR 3211(a)(1), a party may seek dismissal of a complaint on the ground that "a defense is founded upon documentary evidence." *See* CPLR 3211(a)(1). It has been observed that "[i]n order to prevail on a motion to dismiss based on documentary evidence pursuant to CPLR

3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim." *See, e.g.*, *Bronxville Knolls, Inc. v. Webster Town Center Partnership*, 221 A.D.2d 248, 248, 634 N.Y.S.2d 62, 63 (1st Dep't 1995).

I

PLAINTIFF'S BREACH OF CONTRACT CLAIM MUST BE DISMISSED

Plaintiff asserts as the basis of its claim for breach of contract that: (i) Atari and/or Interactive have "acted commercially unreasonably in its efforts to promote and distribute DDO" (Compl. at ¶ 52.); (ii) Atari and/or Interactive have "failed to devote the necessary internal and external resources to the success of DDO" (*Id.* at ¶ 52); (iii) Atari and/or Interactive have "accept[ed] payments . . . in return for extending the parties' relationship . . . but doing so at a time when Atari knew it would not perform its obligations under" the Agreements (*Id.* at ¶ 53).[2]

The elements of a breach of contract claim are (1) the making of an agreement; (2) performance of the agreement by one party; (3) breach by the other party; and (4) damages. *J & L American Enterprises, Ltd. v. DSA Direct, LLC*, 2006 WL 216680, *5, 10 Misc.3d 1076(A) (Sup. Ct. N.Y. Co. Jan. 27, 2006).

Even assuming for purposes of this motion the truth of Plaintiff's speculative and fantastical assertions, the Complaint nevertheless fails to plead a claim for breach of contract because it fails to allege a specific provision of the applicable agreements which has been allegedly breached by Atari or Interactive.[3] Plaintiff's allegations represent a desperate attempt to inappropriately add terms and obligations to the parties' fully integrated Agreements, in violation of the parol evidence rule. For these reasons, the cause of action for breach of contract must be dismissed.

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[2] Plaintiff, in its Complaint, collectively defines both Atari, Inc. and Atari Interactive, Inc. as ("Atari"), and brings all causes of action, including this "Breach of Contract" action, against both defendants. Plaintiff, however, nowhere alleges which defendant is counter-party to which of the Agreements, or alleges how Atari, which is not party to Amendment Number Five to the License Agreement or Letter Agreement, or Interactive, which is not party to the Distribution Agreement, can be held to account for any breach of those Agreements.

[3] Such assertions of breach by Turbine are belied by, among other things, the fact that Turbine never sent Atari or Interactive a notice of breach or other demand prior to commencement of the instant action.

A. No Specific Provisions of the Agreements Are Alleged to Have Been Breached

It is black letter law that "[a] cause of action for breach of contract will be dismissed if it fails to allege the breach of a specific contractual provision." *J & L American Enterprises, Ltd.*, 2006 WL 216680 at *6. *See also 767 Third Avenue LLC v. Greble & Finger, LLP*, 8 A.D.3d 75, 75, 778 N.Y.S.2d 157, 158 (1st Dep't 2004) ("Plaintiff's failure to identify any portion of the lease allegedly breached was fatal to its cause of action for breach of contract."); *Kraus v. Visa International Service Assoc.*, 304 A.D.2d 408, 408, 756 N.Y.S.2d 853, 854 (1st Dep't 2003) (affirming dismissal of breach of contract claim "since plaintiff failed to allege the breach of any particular contractual provision").

Instead of specifying a single provision of the Agreements which it believes was breached by Atari or Interactive, Plaintiff relies on vague and conclusory assertions regarding fictional obligations by Defendants purportedly contained in the Agreements, but not identified. (Compl. at ¶ 52, 53, *supra.*) This is fatal to Plaintiff's breach of contract claim. *See, e.g., Clifden Futures, LLC v. Man Financial, Inc.*, 20 Misc.3d 638, 641, 858 N.Y.S.2d 580, 583 (Sup. Ct. N.Y. Co. 2008) (dismissing breach of contract action, noting "the complaint must allege the essential terms of the contract, including the specific provisions upon which liability is predicated").

B. Plaintiff's Claim is Barred by the Parol Evidence Rule

The reason for Plaintiff's failure to allege a specific provision of the Agreements upon which it bases its breach of contract claim is simple: No such provision of the Agreements exists. (*See generally*, Bisceglie Aff. Exs. B through I.) Rather, the obligations Plaintiff imputes to Defendants are found nowhere in the parties' fully-integrated Agreements or are belied by the Agreements.

As set forth above, Plaintiff's claim for breach of contract is based upon various allegations pertaining to Defendants' alleged failure to "promote and distribute" or otherwise "support" DDO. (Compl. at ¶ 52.) The agreements subject to Plaintiff's breach of contract claims are the (1) License Agreement, (2) Letter Agreement, and (3) Distribution Agreement. (Compl. at ¶ 50-51.) Significantly, each contains a binding integration clause, a "no extra-contractual representations clause," as well as a

"no oral modifications" clause. Since these allegations are not grounded in the Agreements, Atari and Interactive are at a loss.

Section 12 of the License Agreement contains the merger and "entire agreement" provisions of that agreement. Section 12.12 makes clear the agreement "constitutes the entire agreement between the parties with respect to the subject matter hereof and merges all prior and contemporaneous documents and communications." (Bisceglie Aff. Ex. B at § 12.12.) Furthermore, Section 12.3 of the License Agreement states that its terms "cannot be changed or terminated orally," cannot be "waived or modified, except by an express agreement in writing signed by both parties," and that both parties agree

> "[t]here are no representations, promises, warranties, covenants or undertakings other than those contained [the agreement], which represents the entire understanding of the parties, and which supersedes any and all previous arrangements, understandings or agreements between the parties."

(*Id.* Ex. B at § 12.3.) The Letter Agreement expressly incorporates these provisions from the License Agreement. (*Id.* Ex. I at ¶ 5.)

Section 11(e) of the Distribution Agreement similarly provides:

> This [Distribution] Agreement constitutes the entire agreement between the parties with respect to the Digital Sales and supersedes all previous proposals, both oral and written, negotiations, representations, commitments, writings, and all other communications between the parties. This [Distribution] Agreement may not be modified except by a writing signed by a duly authorized representative of each of the parties.

(*Id.* Ex. H.)

A cursory review of the Agreements establishes that none obligate Atari or Interactive to "devote the necessary internal and external resources to the success of DDO." (Compl. at ¶ 52.) These issues are simply not Defendants' obligations under the Agreements. In fact, Amendment Number Four to the License Agreement *contradicts* Plaintiff's allegation, specifically providing that Atari

"shall have the non-exclusive *worldwide* right to conduct marketing and promotion programs for the Service *as it sees fit*." (Bisceglie Aff. Ex. F § 3 (emphasis supplied).)

Similarly, with respect to the Letter Agreement and the Distribution Agreement, these agreements contain no provisions which obligate Atari or Interactive to conduct marketing efforts at all. (*See* Bisceglie Aff. Exs. H, I.) The Letter Agreement in no way addresses marketing of any product and the Distribution Agreement only references Turbine's promotional efforts. (Bisceglie Aff. Ex. H ¶ 1.) Of course, if there is no contractual obligation to perform an act, the failure to perform that act cannot form the basis of a claim for breach of contract.

Plaintiff's attempt to impose obligations upon Atari and Interactive which are not present in, or are explicitly contradicted by, the terms of the parties' unambiguous, fully-integrated Agreements is barred by New York's parol evidence rule, pursuant to which "[a] court may not, under the guise of interpretation, fashion a new contract for the parties by adding or excising terms and conditions if to do so would contradict the clearly expressed language of the contract." *Evans v. Famous Music Corp.*, 302 A.D.2d 216, 217, 754 N.Y.S.2d 259, 260 (1st Dep't 2003). In addition, since the Agreements specifically *disclaim the existence* of any representations or understandings not included within their four corners, no action for breach of contract can be maintained based upon those extra-contractual representations or understandings. *See Bedowitz v. Farrell Dev. Co., Inc.*, 289 A.D.2d 432, 432, 735 N.Y.S.2d 150, 151 (2d Dep't 2001).

Accordingly, as Plaintiff has not pleaded which specific contract provisions it relies upon, and since that which has been pleaded is not viable under the parol evidence rule, Plaintiff's cause of action for breach of contract should be dismissed.

II

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR ANTICIPATORY REPUDIATION AND IS CONTRADICTED BY DOCUMENTARY EVIDENCE

Count II of the Complaint is labeled "Breach of Contract/Repudiation." (Compl. at p.17.) The pleading is vague. There is no cause of action called "Repudiation" under New York law. For purposes of this motion, Atari and Interactive shall assume Turbine asserts a claim for anticipatory repudiation.

A claim for anticipatory breach of contract requires an "*unequivocal* repudiation of the contract is necessary." *R.I. Island House, LLC v. North Town Phase II Houses, Inc.*, 51 A.D.3d 890, 896, 858 N.Y.S.2d 372, 377 (2d Dep't 2008) (emphasis supplied). Such "repudiation can be either a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach or a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach." *Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp.*, 92 N.Y.2d 458, 463 (1998).

Turbine appears to argue that Atari's prior actions in express compliance with Section 11.4 of the License Agreement, which require sixty-days notice to cure in connection with providing notice to Plaintiff of its own material breaches of the Agreements (which breaches are not subject of the instant dispute), is actionable conduct. Plaintiff supports its allegation of anticipatory repudiation only by the bald and conclusory allegation that Atari and Interactive, "by its conduct and the statements of its agents, unequivocally indicated that it refuses to perform its obligations under the License Agreement." (Compl. at ¶ 59.) The Complaint otherwise fails to suggest what "conduct" or "statements" by Atari or Interactive Plaintiff purportedly relies upon in support of its claim. (*See* Compl. at ¶ 59.) Such conclusory allegations are insufficient to satisfy Plaintiff's pleading obligations (*see, e.g., Fowler v. American Lawyer Media, Inc.*, 306 A.D.2d 113, 113, 761 N.Y.S.2d 176, 176-77

(1st Dep't 2003)), and set a dangerous precedent that compliance with express contract provisions engender "repudiation" claims.

Turbine's reference to Defendants' "purported termination" is belied by documentary evidence. As alluded to above, this "purported termination" is merely a reference to the "Notice of Breach of Contract" referred to in the Complaint. (Compl. at ¶ 44.) However, a simple reading of the "Notice of Breach of Contract" shows that it does not terminate the License Agreement or in any way advise Plaintiff that Atari or Interactive does not intend to abide by their obligations under that agreement. (Bisceglie Aff. Ex. J.) Instead, pursuant to Section 11.4 of the License Agreement, the "Notice of Breach of Contract" identifies several material breaches by Plaintiff and extends a period of sixty days to cure these breaches. (*Id.*) Significantly, there is no indication in this document that Atari has denied the existence or enforceability of the License Agreement or that Atari refuses or is unable to perform the agreement, one of which is necessary for an anticipatory breach of contract claim. *See Norcon Power Partners, L.P.*, 92 N.Y.2d at 463.

Accordingly, the cause of action for anticipatory breach of contract must be dismissed.

III

THE CLAIM FOR BREACH OF THE IMPLIED COVENANT
OF GOOD FAITH AND FAIR DEALING FAILS AS A MATTER OF LAW

Every contract contains an implied covenant of good faith and fair dealing. *See Silvester v. Time Warner, Inc.*, 1 Misc.3d 250, 258, 763 N.Y.S.2d 912, 918 (Sup. Ct. N.Y. Co. 2003). However, "such covenant does not impose any obligation upon a party to the contract beyond what the explicit terms of the contract provide." *Id.* Where, as here, Defendants have not acted in a way to prevent the performance of rights under the contract, or breached any of their obligations, the claim must fail. *Id.*

To support its claim, Plaintiff relies on the following allegations:

(a) Atari and Interactive concealed their "preconceived decision to threaten to terminate and/or terminate its contractual relationship with Turbine" when it entered into the Letter Agreement and Amendment Number Five to the License Agreement (Compl. at ¶ 63);

(b) Atari and Interactive "improperly us[ed] its leverage . . . to extract additional consideration from Turbine (*Id.*);

(c) Atari and Interactive "exercise[ed] its audit and termination rights in a bad faith manner" (*Id.*); and

(d) Atari "conduct[ed] itself in a manner intended to unfairly advantage its launch of a competing product at the expense of Turbine" (*Id.*).[4]

Noticeably, the Complaint fails to allege that any of these alleged actions breached any covenant of good faith and fair dealing with regard to any specified obligation of Defendants under any specific Agreement. Such an allegation is required to plead a cause of action for breach of the covenant of good faith and fair dealing. *See Silvester*, 1 Misc.3d at 258, 763 N.Y.S.2d at 918. *See Sutton Assocs. v. Lexis-Nexis*, 196 Misc.2d 30, 34, 761 N.Y.S.2d 800, 804 (Sup. Ct. N.Y. Co. 2003) (the implied covenant of good faith and fair dealing "cannot be used to create independent obligations *beyond those agreed upon and stated in the express language of the contract*") (emphasis supplied). *See also Cushman & Wakefield, Inc. v. American Management Ass'n Intern., Inc.*, 8 A.D.3d 67, 68, 777 N.Y.S.2d 911, 911 (1st Dep't 2004) (affirming dismissal of claim for breach of implied covenant of good faith and fair dealing).

In addition, nowhere has Plaintiff pleaded how Defendants' conduct has prevented Plaintiff's "performance of or [] rights under the contract," a specific requirement for Plaintiff's claim. *Silvester*, 1 Misc.3d at 258, 763 N.Y.S.2d at 918 (dismissing claim for breach of covenant of good faith and fair dealing). For example, Plaintiff has accused Atari of "improperly exercising its audit and termination rights in a bad faith manner intended to force Turbine to pay more money to Atari." (Compl. at ¶ 63.) Likewise, Plaintiff alleges that Atari "conduct[ed] itself in a manner intended to unfairly advantage its launch of a competing product at the expense of Turbine." (Compl. at ¶ 63.) Not only is such a "competing product" years from launch, but nowhere does Plaintiff explain how this conduct, or the

[4] Turbine's allegations are insufficient as a matter of law to support its causes of action. They also defy common sense. Turbine's success with DDO would increase Atari's and Interactive's revenues and increase the value of any competing DDO product by Atari or Interactive. In addition, it was only after Atari was completely frustrated with Turbine's unwillingness to deal honestly with Atari that Atari sent Turbine a "Notice of Default of Contract," which is a notice to cure. To date neither Atari nor Interactive have terminated any of the Agreements.

other alleged conduct in support of this claim, has prevented its own performance, or precluded its own rights, under the Agreements or even damaged Plaintiff in any way[5]. *Silvester*, 1 Misc.3d at 258, 763 N.Y.S.2d at 918.

Plaintiff's cause of action fails not only because it represents a transparent attempt to impose terms and obligations on Atari and Interactive found nowhere in the Agreements, but because what Plaintiff asserts as breaches are expressly contradicted by the terms of the Agreements. For example, with respect to allegation (d) above, Plaintiff specifically granted Atari the right to develop, promote, and fully exploit products that directly competed with DDO. Specifically, Amendment Number Four provides that

> Atari shall be free to develop, have developed, and fully exploit, and/or have exploited, directly or indirectly, including, without limitation, producing, hosting, servicing, operating, reproducing, performing, advertising, exporting, importing, licensing, sublicensing, modifying, updating, translating, localizing, marketing, distributing, displaying, ,and selling Massively Multiplayer Online game(s) based on the D&D Licensed Property, including all components thereof.

(Bisceglie Aff. Ex. F § 2(b).) If Plaintiff wanted to prevent Atari from developing and promoting products that could compete with DDO, it had the opportunity to protect itself by simply not agreeing to specifically permit Atari to do so. The express terms of the License Agreement, as amended, preclude this cause of action. *See Maxon Int'l, Inc. v. Inter. Harvester Co.*, 82 A.D.2d 1006, 442 N.Y.S.2d 588 (3d Dep't 1981), *aff'd*, 56 N.Y.2d 879 (1982) (where defendant did what the contract expressly permitted, there is no evidence of bad faith).

As a result, Turbine's allegation regarding the covenant of good faith and fair dealing is even more far-fetched than its breach of contract claim. There, Turbine asserted rights it does not have and, in many instances, that the Agreements expressly reject. Here, Turbine asserts the same imaginary rights and claims that Atari and Interactive failed to abide by these imaginary rights in good faith.

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[5] Plaintiff merely alleges that "[a]s a result of Atari's misconduct, Turbine has been damaged." (Compl. at ¶ 64.). This bald and conclusory allegation in no way supports any theory or basis upon which Plaintiff has, in fact, been damaged.

IV

PLAINTIFF'S CLAIM FOR UNJUST ENRICHMENT FAILS AS A MATTER OF LAW

To prevail on a claim for unjust enrichment in New York, a plaintiff must establish (1) that the defendant benefited; (2) at the plaintiff's expense; and (3) that equity and good conscience require restitution. *See Paramount Film Distributing Corp. v. State of New York*, 30 N.Y.2d 415, 421 (1972).

"The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v. Long Island Rail Road Co.*, 70 N.Y.2d 382, 388 (1987) (affirming dismissal of unjust enrichment claim on account of existence of valid and binding contract between the parties). "[A] 'quasi contract' only applies in the *absence* of an express agreement, and is not really a contract at all but rather a legal obligation imposed in order to prevent a party's unjust enrichment. *Id.* Simply put, "[i]t is impermissible . . . to seek damages in an action sounding in quasi contract where the suing party has fully performed on a valid written agreement, the existence of which is undisputed, and the scope of which clearly covers the dispute between the parties." *Id.* at 389. This black-letter principle applies in the instant dispute and requires dismissal of Plaintiff's claim for unjust enrichment.

Plaintiff's unjust enrichment claim boils down to the theory that "*in connection with the May 13, 2009 execution of the Letter Agreement and Amendment Number Four of the License Agreement*, Atari and Interactive accepted hundreds of thousands of dollars in good-faith advances against future royalties," and thereafter "sought to terminate its relationship with Turbine." (Compl. at ¶ 66) (emphasis supplied). As alleged in the Complaint, "the License Agreement, Letter Agreement, and Distribution Agreement are binding and valid contracts, supported by adequate consideration" (Compl. at ¶¶ 2, 4, 50), under which, according to the Complaint, Plaintiff has "fully performed its obligations" (Compl. at ¶ 54). As conceded by Plaintiff, it is these Agreements which specifically govern the terms of the parties relationship—including royalties owed to Defendants pursuant to this relationship—with respect to DDO. (Compl. at ¶ 3, *et seq.*) Indeed, the alleged payment by Plaintiff of the "advances

against future royalties" at the heart of Plaintiff's unjust enrichment claim (Compl. at ¶ 66) are explicit, bargained-for terms of the Agreements. (*See* Bisceglie Aff. Ex. B § 6.2; Ex. H § 2(a); Ex. I § 1.) Plaintiff concedes this fact. (Compl. at ¶¶ 37, 38.) In short, the same royalty payments which Plaintiff claims Atari and Interactive were "unjustly enriched" by are precisely the same royalty payments Plaintiff agreed to pay pursuant to the Agreements. However, "bargained-for benefits cannot be deemed to unjustly enrich a contracting party." *Harris Trust & Sav. Bank v. John Hancock Mut. Life Ins. Co.*, 767 F. Supp. 1269, 1284 (S.D.N.Y. 1991), *aff'd in part, rev'd in part on other grounds*, 970 F.2d 1138 (2d Cir. 1992); *Granite Partners, L.P. v. Bear, Stearns & Co. Inc.*, 17 F. Supp. 2d 275, 311 (S.D.N.Y. 1998) (dismissing unjust enrichment claim, where action forming basis of unjust enrichment claim "were done pursuant to contracts"). In accordance with New York precedent, this fact is fatal to Plaintiff's claim.

Accordingly, Plaintiff's unjust enrichment cause of action must be dismissed.

V

THE COMPLAINT DOES NOT PLEAD FRAUD

In Count V, Plaintiff alleges that Atari and Interactive are liable for fraud in connection with certain alleged misrepresentations made "when Turbine and Atari were negotiating the terms of the Letter Agreement and Amendment Number Five to the License Agreement." (Compl. at ¶ 72.) For several independent reasons, Plaintiff's fraud claim is fatally defective.

Elements of Fraud Claim

To state a claim for fraud, a plaintiff must allege misrepresentation or concealment of a present or pre-existing material fact, falsity, intent to deceive, justifiable reliance on the deception, and resulting injury. *See Roney v. Janis*, 77 A.D.2d 555, 556-57, 430 N.Y.S.2d 333, 335 (1st Dep't 1980); *Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495, 815 N.Y.S.2d 547, 548. General and conclusory allegations are insufficient to support a claim for fraud. *See Zanett Lombardier*, 29 A.D.3d at 495, 815 N.Y.S.2d at 54 (dismissing fraud claim where "the conclusory statement of intent did not

adequately plead sufficient details of scienter"). Additionally, CPLR 3016(b) provides that "[w]here the cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong *shall be stated in detail.*" (Emphasis supplied).

A. Plaintiff's Allegations Do Not Satisfy CPLR 3016(b)

Plaintiff's cause of action for fraud is not pleaded with sufficient specificity required to survive this motion. *See* CPLR 3016(b). *See also New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, 318 (1995) ("General allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim" sounding in fraud); *see also Zanett Lombardier*, 29 A.D.3d at 495-96 ("conclusory allegations of intent [do not] adequately plead sufficient details of scienter"). Although Plaintiff's claim is seemingly premised upon the fantasy that Atari and Interactive misrepresented their future intentions to perform their obligations under the Agreements (Compl. at ¶ 73), the Complaint does not contain any factual allegations that Atari or Interactive *actually* misrepresented their future intentions to perform at the time the Agreements were executed or that they even actually intended to mislead Plaintiff. Rather, Plaintiff instead alleges that "[o]n information and *belief*, Atari [] knew of the falsity of each of these statements when made" (Compl. at ¶ 74, emphasis supplied) and "[o]n information and *belief*, Atari made these statements and omissions for the purpose of inducing [Plaintiff]'s reliance" (Compl. at ¶ 75, emphasis supplied; *see also* ¶¶ 35, 41, 45, 47, 48.) However, the First Department has held in similar circumstances that "a statement of 'belief' as to the defendant's intention at the time of execution of the contract does not, under the above stated law, make out a cause of action for fraud." *Sandra Greer Real Estate, Inc. v. Johansen Org.*, 182 A.D.2d 468, 469, 581 N.Y.S.2d 792, 793 (1st Dep't 1992). *See also Angel v. Bank of Tokyo-Mitsubishi, Ltd.*, 39 A.D.3d 368, 369, 835 N.Y.S.2d 57, 60 (1st Dep't 2007) (affirming dismissal where fraudulent inducement claim made "upon information and belief"). Plaintiff's failure to plead the facts constituting the fraud with sufficient detail requires dismissal of its cause of action.

B. Fraud Cannot Be Based Upon a Parties' Intent to Breach a Contract

Furthermore, it is clear that where "the wrongful *act* alleged in support of the fraud claim does not differ from the purely contract-related allegation that defendant did not intend to perform at the time it entered into the agreement," no cause of action for fraud can exist. *Tannehill v. Paul Stuart, Inc.*, 226 A.D.2d 117, 118, 640 N.Y.S.2d 505, 506 (1st Dep't 1996) (affirming dismissal) (emphasis in original). *See also 767 Third Ave. LLC*, 8 A.D.3d at 76, 778 N.Y.S.2d at 158 ("It is well settled that a cause of action for fraud does not arise where the only fraud alleged merely relates to a party's alleged intent to breach a contractual obligation."). This fundamental principle is applicable here.

As alleged in the Complaint, the statements and omissions relied upon by Plaintiff for its fraud and fraudulent inducement claims "concerned material information that went directly to whether Atari intended, at the time it entered into the [Letter Agreement] and Amendment Number Five to the License Agreement, to perform the contract." (Compl. at ¶ 73, 75, 76.) As Plaintiff's fraud claim relates directly to Defendants' alleged intent to breach their obligations under the parties' agreements (Compl. at ¶ 75), this claim must fail. *See Caniglia v. Chicago Tribune-New York News Synd., Inc.*, 204 A.D.2d 233, 234, 612 N.Y.S.2d 146, 147 (1st Dep't 1994) ("It is well settled that a cause of action for fraud does not arise, where, as here, the only fraud alleged merely relates to a contracting party's alleged intent to breach a contractual obligation.").

C. Plaintiff's Fraud Claim Is a Dressed-Up Breach of Contract Cause of Action and Must be Dismissed

"It is well settled that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract." *Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436, 529 N.Y.S.2d 777, 779 (1st Dep't). That Plaintiff's fraud claim relates to its breach of contract claim is conclusively established by Plaintiff's allegation in Paragraph 78 of the fraud cause of action of its "verified" Complaint, which asserts that "as a direct and proximate result of Atari's breach of the Agreements, Turbine has been damaged in an amount to be proved at trial." To properly plead fraud,

a plaintiff must establish damages which are separate and apart from those which arise from an alleged breach of contract. *See Rivas v. Amerimed USA, Inc.*, 34 A.D.3d 250, 250, 824 N.Y.S.2d 41, 42 (1st Dep't 2006). In addition, the Complaint makes clear that "Atari's conduct as described herein not only constitutes a breach of its obligations under the Agreements, but also constitutes actionable fraud." (Compl. at ¶ 11.) That Plaintiff concedes its damages under its "fraud" theory are exactly the same as those under its "breach of contract" theory, and that its breach of contract conduct is also fraud, makes clear that Plaintiff's fraud claim is simply a dressed-up contract claim and must therefore be dismissed. *See, e.g., The River Glen Assocs., Ltd. v. Merrill Lynch Credit Corp.*, 295 A.D.2d 274, 275, 743 N.Y.S.2d 870, 871 (1st Dep't 2002); *Salvador v. Uncle Sam's Auctions & Realty, Inc.*, 307 A.D.2d 609, 611, 763 N.Y.S.2d 360, 362 (3d Dep't 2003).

In addition, an examination of the alleged fraudulent misrepresentations here (Compl. at ¶ 71) reveals that such misrepresentations are a mere restatement of Plaintiff's breach of contract allegations. For example, in support of its fraud claim, Turbine alleges that Atari and Interactive stated that they (i) "would in fact promote the game," (ii) "was ready, willing and able to support and (*sic*) DDO: Unlimited," (iii) "would schedule regular review meetings to further plan how to maximize the value of the game," and (iv) "has to be an 'online company.'" Likewise, in support of its contract claim, Plaintiff asserts that (i) "Atari acted unreasonably in its efforts to promote and distribute DDO" (Compl. at ¶ 52); (ii) Atari and Interactive accepted payments for advance royalties "at a time when it knew it would not perform its obligations" under the Agreements (Compl. at ¶ 53); and (iii) "Atari knew that it would not support [DDO] as promised" (Compl. at ¶ 53). These allegations, however, encompass the alleged "fraudulent" statements alleged in the Complaint, which all relate to vague promises by Atari to "support," "promote," and otherwise "explore" opportunities for DDO. (Compl. at ¶ 71.)

D. The Merger Clauses in the Agreements Defeat Any Claim of Justifiable Reliance

Plaintiff's fraud claim is additionally precluded by the very documents which it purports to base its breach of contract claims on, namely, the License Agreement and the Letter Agreement. "[W]here the parties expressly disclaim reliance on the representations alleged to be fraudulent, parol evidence as to those representations will not be admitted" to support a claim of fraud in the inducement. *Bando v. Achenbaum*, 234 A.D.2d 242, 244, 651 N.Y.S.2d 74, 76 (2d Dep't 1996) (affirming dismissal of fraudulent misrepresentation). *See also Stan Winston Creatures, Inc. v. Toys 'R' Us, Inc.*, 4 Misc.3d 1019(A), 2004 WL 1949071 (Sup. Ct. N.Y. Co. 2004) (dismissing fraud claim).

As set forth in detail above, the License Agreement (including Amendment Number Five thereto) and the Letter Agreement each expressly and unambiguously set forth the parties' obligations with respect to the subject matter of the Agreements and state that such constitutes "the entire agreement" of the parties, and disclaims the existence of *extra contractu* representations such as those alleged by Plaintiff in support of its fraud claim. (Bisceglie Aff. Ex. B §§ 12.3, 12.12; Ex. I § 5.) "Plaintiff's assertions of pre-contractual representations, forming the foundation of the fraud claims, are not actionable because to recognize them would be to impermissibly add to the parties' written agreement[s]." *Stan Winston Creatures, Inc.*, 2004 WL 1949071 at *4. "In addition, any possible reliance upon such representations would have to be unjustified due to the fact that the [A]greement[s are] clear and unambiguous as [they are] fully integrated, and permit[] no other terms which are not expressed therein." *Id.* Defendants' alleged fraudulent representations, made before the parties entered into the Letter Agreement and Amendment Number Five to the License Agreement, are all promises which Turbine could have insisted be incorporated as obligations of Atari and Interactive in such agreements, but did not.

Here, the very instruments at the base of the parties' relationship expressly disclaim the existence of representations, statements or agreements not contained in the Agreements, and,

accordingly, no cause of action based on alleged fraudulent statements or promises allegedly made prior to the Agreements were executed can be maintained.

E. The Fraud Claims are Based upon Future Promises and Intents

Finally, Plaintiff's fraud claims are legally deficient to the extent they claim Atari and Interactive made misrepresentations about their *future* intentions with respect to their business dealings with Plaintiff and intentions to perform under Agreements. *See, e.g.*, *Roney*, 77 A.D.2d at 556-57, 430 N.Y.S.2d at 335 (a "cause of action for fraud and deceit cannot be maintained unless it alleges misrepresentation of a present or pre-existing fact"). *See also Elghanian v. Harvey*, 249 A.D.2d 206, 206, 671 N.Y.S.2d 266, 266 (1st Dep't 1998) (affirming dismissal of fraud claim where "statements complained of amount[ed] to essentially little more than mere puffery, opinions of value, or future expectations that do not constitute actionable fraud).

For example, Plaintiff alleges, *inter alia,* that "Atari *wanted* to resume selling the service in retail channels" (Compl. at ¶ 71(a) (emphasis supplied)); "Atari *would* in fact promote the game on its websites" (Compl. at ¶ 71(c) (emphasis supplied)); Atari "*would* schedule regular review meetings" (Compl. at ¶ 71(d) (emphasis supplied)); and "Atari *planned* to take unfair advantage of Turbine and extort additional benefits" (Compl. at ¶ 71(f) (emphasis supplied)). Every single one of these statements, however, at most allege future intentions, opinions, or speculative expressions of hope which are not representations of present of past fact and which thus cannot form the basis of Plaintiff's fraud claim. *See Roney*, 77 A.D.2d at 556-57, 430 N.Y.S.2d at 335. Restated, the basis of Plaintiff's fraud claim is that in the time period leading up to the consummation of the Letter Agreement and Amendment Number Five to the License Agreement, Atari and Interactive misrepresented their *future intentions* about what they planned to do *in the future*. However, "a broken promise cannot constitute fraud as a matter of law, because a fraud claim must be based upon a misrepresentation of present or past fact, *not a false expression of future intent*," *Egnotovich v. Katten Muchin Zavis & Roseman LLP*, 18 Misc.3d 1120(A), 856 N.Y.S.2d 497 (Table), 2008 WL 199757, *10 (Sup. Ct. N.Y. Co. 2008)

(Fried, J.) (emphasis supplied), and cannot be based upon an allegations that a party did not intend to perform an agreement. *Martian Entertainment, LLC v. Harris*, 12 Misc.3d 1190(A), 824 N.Y.S.2d 769 (Table), 2006 WL 2167178, *5 (Sup. Ct. N.Y. Co. 2006) ("Allegations that defendant entered into an agreement without the intent to perform it, do not state a fraud claim."). Plaintiff concedes that these statements and omissions (alleged in Paragraph 71 of the Complaint) merely "went directly to whether Atari *intended* . . . to perform the contract, which it did not." (Compl. at ¶ 73.) (emphasis supplied.)

Accordingly, Plaintiff's fraud claim must be dismissed.

VI

THE COMPLAINT DOES NOT PLEAD NEGLIGENT MISREPRESENTATION

Plaintiff's negligent misrepresentation claim (Count VI) is based on the same misrepresentations as its fraud claim (Compl. at ¶ 81) and fails for precisely the same reasons. In addition, a claim for negligent misrepresentation requires that a special relationship of trust or confidence exist between the parties, which is not found here.

A claim for negligent misrepresentation requires: (1) a special relationship of trust or confidence, thereby creating a strict duty for the defendant to impart correct information to the plaintiff; (2) the information given was false; and (3) there was reasonable reliance upon the information given. *See, e.g., Stan Winston Creatures, Inc.*, 2004 WL 1949071, *5 (dismissing claim for negligent misrepresentation). CPLR 3016(b) requires negligent misrepresentation claims, like fraud claims, to be pleaded in sufficient detail. *Id.* Most importantly, "the tort of negligent misrepresentation cannot be independently asserted within the context of a breach of contract action unless a special relationship exists between the parties, and the alleged misrepresentation concerns a matter which is extraneous to the contract itself." *Alamo Contract Builders, Inc. v. CTF Hotel Company*, 242 A.D.2d 643, 644, 663 N.Y.S.2d 42, 43 (2d Dep't 1997) (reversing lower court and dismissing claim for negligent misrepresentation).

A. No Reliance Can Be Alleged Here Due to the Integration Clauses

Like Plaintiff's fraud claim, the negligent misrepresentation claim fails because Plaintiff specifically disclaimed the existence of the very *extra contractual* representations at the heart of its claim. Plaintiff's allegation of reliance is undermined by the integration clauses contained in the Agreements, which each contain "a specific disclaimer which defeats any allegation that the contract was executed in reliance upon contrary oral representations." *Bedowitz*, 289 A.D. 2d at 433, 735 N.Y.S.2d at 151 (reversing lower court and dismissing claim for misrepresentation).

As with Plaintiff's fraud claims, the misrepresentation claims must be dismissed because Plaintiff specifically agreed that the License Agreement and the Letter Agreement each "constitutes the entire agreement between the parties with respect to the subject matter [t]hereof and merges all prior and contemporaneous documents and communications" and that "[t]here are no representations, promises, warranties, covenants or undertakings other than those contained [the agreement], which represents the entire understanding of the parties, and which supersedes any and all previous arrangements, understandings or agreements between the parties." (Bisceglie Aff. Ex. B § 12.12; Ex. I ¶ 5.) Likewise, the Distribution Agreement makes clear that it "constitutes the entire agreement between the parties with respect to the Digital Sales and supersedes all previous proposals, both oral and written, negotiations, representations, commitments, writings, and all other communications between the parties. . . ." (Bisceglie Aff. Ex. H § 11(e).)

Plaintiff's allegation of reliance in support of its negligent misrepresentation claim is undermined by these integration clauses which contain "a specific disclaimer which defeats any allegation that the contract was executed in reliance upon contrary oral representations." *Bedowitz*, 289 A.D. 2d at 433, 735 N.Y.S.2d at 151 (reversing lower court and dismissing claim for misrepresentation). In other words, since Plaintiff has specifically disclaimed the existence of the very *extra contractual* representations at the heart of its negligent misrepresentation claim, its claim must

fail. *Chase Manhattan Bank, N.A. v. Edwards*, 87 A.D.2d 935, 935, 450 N.Y.S.2d 76, 78 (3d Dep't 1982).

B. The Negligent Misrepresentation Claims are Based upon Future Intentions

Also like the fraud claim, Plaintiff's negligent misrepresentation claims, which are based upon the exact same statements as those of the fraud claim, are insufficient representations of present or pre-existing facts to support a cause of action for fraud. *DaCosta v. Trade-Winds Environmental Restoration, Inc.*, 61 A.D.3d 627, 628, 877 N.Y.S.2d 373, 374 (2d Dep't 2009). *See* Point V(D), *supra.*

C. No Special Relationship Exists to Support the Negligent Misrepresentation Claim

A breach of contract claim cannot be considered a tort claim sounding in misrepresentation unless there is a legal duty independent of the contract that has been violated by the defendant. *Clark-Fitzpatrick, Inc.*, 70 N.Y.2d at 389. The lack of a separate and independent duty owed to a plaintiff distinct from the contract precludes a claim for negligent misrepresentation. *See Greenman-Pedersen, Inc. v. Levine*, 37 A.D.3d 250, 250, 829 N.Y.S.2d 107, 108 (1st Dep't 2007) (affirming dismissal of negligent misrepresentation claim); *Stan Winston Creatures, Inc.*, 2004 WL 1949071 at *5 (negligent misrepresentation claim "cannot be predicated on a duty arising out of a contract; the duty must arise independent of contract"). To establish liability for negligent misrepresentation arising out of a commercial transaction, a defendant must possess "unique or specialized expertise, or be in a special position of trust and confidence with the plaintiff." *Mandarin Trading Ltd. v. Wildenstein*, 17 Misc.3d 1118(A), 851 N.Y.S.2d 71 (Table), 2007 WL 3101235, *5 (Sup. Ct. N.Y. Co. 2007). It is a "confidential or fiduciary relationship" between the parties which is required to support a claim for negligent misrepresentation. *See Tradewinds Fin. Corp. v. Refco Secs. Inc.*, 5 A.D.3d 229, 230, 773 N.Y.S.2d 395, 397 (1st Dep't 2004) (negligent misrepresentation claim was "not viable in the absence of a fiduciary or confidential relationship between the parties"); *Korea First Bank of N.Y. v. Noah Enterprises, Ltd.*, 12 A.D.3d 321, 323, 787 N.Y.S.2d 2, 4 (1st Dep't 2004) ("The negligent

misrepresentation claim was also deficient, absent a confidential or fiduciary relationship giving rise to a duty to speak with care.")

The Complaint falls woefully short of meeting this standard. First, far from pleading the existence of such a relationship with "sufficient detail," as required by CPLR 3016(b), Plaintiff's Complaint is lacking any mention or suggestion whatsoever of a special relationship, fiduciary or otherwise, between Plaintiff and Atari or Interactive sufficient to form the basis of a negligent misrepresentation claim. *See Gaidon v. Guardian Life Ins. Co.*, 255 A.D.2d 101, 101-02, 679 N.Y.S.2d 611, 612 (1st Dep't 1998) (affirming dismissal of negligent misrepresentation claim where there were not "sufficient allegations" of a fiduciary or confidential relationship); *see also Stan Winston Creatures, Inc.*, 2004 WL 1949071 at *5 (CPLR 3016(b) requires negligent misrepresentation claims to be pleaded in "sufficient detail."). This absence is in itself fatal to Plaintiff's claim.

Second, Plaintiff has not alleged "in sufficient detail," or otherwise, the existence of a "confidential or fiduciary relationship" between itself and Atari or Interactive because they *cannot* allege such a relationship. The relationship alleged in the Complaint is nothing more than one between two sophisticated corporations dealing in a commercial setting at arms' length. Section 12.10 of the License Agreement makes clear the "Relationship of the Parties" is not an "association, partnership or joint venture." (Bisceglie Aff. Ex. B § 12.10.) New York courts uniformly hold as a matter of law that, in a commercial, arms-length transaction such as the one here, no "confidential or fiduciary relationship" sufficient to support a negligent misrepresentation claim is present. *See United Safety of America, Inc. v. Cons. Edison Co. of N.Y., Inc.*, 213 A.D.2d 293, 286, 623 N.Y.S.2d 591, 593 (1st Dep't 1995) (to properly allege a negligent misrepresentation claim, "[a] simple arm's length business relationship is not enough"); *Sheridan v. Trustees of Columbia Univ. in the City of New York*, 296 A.D.2d 314, 316, 745 N.Y.S.2d 18, 19 (1st Dep't 2002) (affirming dismissal of negligent misrepresentation claim where "the parties were clearly acting at arm's length"); *Tradewinds Fin.*

Corp., 5 A.D.3d at 230, 773 N.Y.S.2d at 397 (affirming dismissal of negligent misrepresentation claim where relationship between the parties was "at arm's length"); *Stan Winston Creatures, Inc.*, 2004 WL 1949071 at *5 (dismissal appropriate where "Plaintiffs fail to show anything more than arms' length dealing between separate business entities"); *Plaza Penthouse LLP v. CPS 1 Realty LP*, No. 100084/09, 2009 WL 2568734, *4 (Sup. Ct. N.Y. Co. August 10, 2009) (dismissing negligent misrepresentation claim in context of "ordinary business relationship between a buyer and seller who negotiated a contract at arm's length, both being represented by counsel").

Where, as here, the parties' relationship is strictly commercial in nature, and the relationship is at arm's length, no duty sufficient to form the basis of a negligent misrepresentation claim may lie. Accordingly, Plaintiff's negligent misrepresentation claim must be dismissed.

VII

DECLARATORY RELIEF IS EXPRESSLY PRECLUDED BY THE LICENSE AGREEMENT

Count VIII[6] of the Complaint seeks a declaratory judgment that "Turbine has paid Atari all royalty fees owing under the Agreements and that Atari's purported grounds for termination of the parties' Agreements is entirely unfounded." (Compl. at ¶ 86.)

It is well-established that "a cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as a breach of contract." *Main Evaluations, Inc. v. State of N.Y.*, 296 A.D.2d 852, 853, 745 N.Y.S.2d 355, 356 (4th Dep't 2002). Furthermore, even if a declaratory judgment action would otherwise be appropriate, "parties to an agreement may not seek a declaration of their contract rights when their agreement specifies a different, reasonable means for resolving such disputes." *Main Evaluations, Inc.*, 296 A.D.2d at 853, 745 N.Y.S.2d at 356-57, *quoting Kalisch-Jarcho, Inc. v. City of New York*, 72 N.Y.2d 727, 732 (1988).

[6] Although this cause of action is denominated "Count VIII," it is noted the Complaint contains no "Count VII."

Plaintiff's declaratory judgment action asks the Court to determine that (1) no royalties are due Atari or Interactive under the License Agreement, and (2) Atari's "purported grounds for termination" of the License Agreement is "unfounded." (Compl. at ¶¶ 84, 86.)

The License Agreement, however, expressly limits Plaintiff's remedy for disputes over royalties to "a claim for money damages," and specifically disclaims the availability of the equitable relief Plaintiff now seeks. (Bisceglie Aff. Ex. B § 12.8(e).) Specifically, section 12.8 of the License Agreement provides:

> In the event of any good faith dispute over royalties payable hereunder, the parties agree that, notwithstanding anything to the contrary contained herein and notwithstanding any right either party may have under applicable law, *the sole remedy hereunder shall be a claim for money damages*, and *each party hereby waives any and all right to equitable relief*, including, but not limited to, injunctive relief, in such circumstances

(*Id.*) (emphasis supplied).)

If, as alleged in the Complaint, Atari or Interactive has wrongfully "terminated" the License Agreement, Plaintiff's recourse is an action for breach of contract. The availability of this "adequate, alternative remedy" in contract plainly bars Plaintiff's equitable action for declaratory judgment. *See Main Evaluations, Inc.*, 296 A.D.2d at 853, 745 N.Y.S.2d at 356.

Accordingly, declaratory relief is unavailable to Plaintiff in these circumstance, and the cause of action for declaratory relief must be dismissed.

Conclusion

For the foregoing reasons, the Affirmation of Kyle C. Bisceglie, sworn to September 3, 2009, and the exhibits annexed thereto, and all prior pleadings and proceedings had herein, it is respectfully submitted that the motion by defendants Atari, Inc. and Atari Interactive, Inc. to dismiss the Complaint should be granted, along with any other relief the Court deems just and proper.

Dated: New York, New York
September 3, 2009

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