EVEMeta, LLC v Siemens Convergence Creators Corp.
2018 NY Slip Op 32530(U)
October 4, 2018
Supreme Court, New York County
Docket Number: 651484/2016
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM: PART 3
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Index No. 651484/2016
Mot. Seq. Nos. 008; 009

EVEMeta, LLC

Plaintiffs,

- against -

SIEMENS CONVERGENCE CREATORS CORP., SIEMENS CONVERGENCE CREATORS HOLDING GmbH, SIEMENS CONVERGENCE CREATORS GmbH, and SYNACOR, INC.

Defendants.
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EILEEN BRANSTEN, J.

Defendants Siemens Convergence Creators Corporation brings motion sequence 008 to dismiss the Second Amended Complaint pursuant to CPLR 3211(a)(7). Defendant Synacor, Inc. brings motions sequence 009 to dismiss the Second Amended Complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7).

Since the initial filing of this motion, the parties have stipulated to a Third Amended Complaint. *NYSCEF Doc. 287.* Pursuant to that stipulation this ruling shall also govern the causes of action stated in the Third Amended Complaint. *NYSCEF Doc. 290.*

I. BACKGROUND

From late December of 2014 to January of 2015, Evemeta, Siemens, and Synacor negotiated the framework of a deal to sell the Siemens OTT platform. *2nd Amen. Comp. ¶35.* Synacor initially perceived Siemens and Evemeta to be operating as a singular "Siemens" team and preferred to contract directly with Siemens because of its financial

stability. *Id at ¶36.* In contrast, Siemens preferred to use Evemeta as an intermediary because Siemens was concerned a direct relationship with Synacor would (1) violate Siemens' policy against taking on potential liability associated with third parties, (2) lead to complications in compensation for Evemeta, or (3) kill, or delay, the approval of a deal. *Id.*

To obviate these concerns, Evemeta did, in fact, act as the intermediary between Siemens and Synacor. *Id at ¶37.* On May 21, 2015 Evemeta executed a Software Distribution Agreement with Siemens (the "Siemens Agreement"), under which Siemens permitted Evemeta to license the OTT platform to Synacor and Evemeta agreed to pay, and guaranteed to pay, a sum of money to Siemens in connection with the Synacor deal. *Id at ¶¶37-38.* On June 1, 2015 Evemeta and Synacor entered a Master Services Agreement (the "Synacor Agreement") which set forth a price, and a guaranty of the price, that Synacor would pay to Evemeta in connection with the deal.[1] *Id at ¶39.*

The practical effect of these back-to-back agreements was that Evemeta would net money only if (1) the OTT solution was successfully sold to Synacor's clients, and (2) the contracts with Synacor's clients brought in revenue which exceeded the guaranteed license fee. *2nd Amen. Comp. ¶42.*

After entering these agreements Evemeta worked to integrate the Siemen's OTT platform with Synacor's systems by performing encoding services, handling mock up demonstrations for clients, consulting on technological issues such as advertising, digital

[1] Around that same time it is alleged that Siemens and Synacor also entered a Side Letter Agreement concerning circumstances under which Siemens would indemnify Synacor should Evemeta default. *2nd Amen. Comp. ¶40.*

rights management, and third-party features of the OTT platform. *2nd Amen. Comp. at ¶44.* The three parties collectively pursued opportunities to sell the OTT platform to CenturyLink, The Blaze, GVTC, Consolidated Communications Inc., and Univision. *See id at ¶46.* Evemeta, along with Siemens Europe[2], also pursued separate sales opportunities with A&E, Scripps, and Irish TV. *Id at ¶47.* This outreach saw fruition in both 2015 and 2016 when clients of Synacor signed up for the OTT platform. *See id at ¶48.*

During the course of discussions seeking to extend the back-to-back agreements, Siemens is alleged to have breached Article 13, governing confidentiality, in the Siemens Agreement by disclosing the nature of the business relationship Siemens had with Evemeta to Synacor. *See id at ¶57.* As a result of this breach, Synacor attempted to renegotiate the pricing issue with Evemeta. *Id at ¶58.* It is also alleged that around the time this occurred, Siemens and Synacor began discussing a direct deal which would cut Evemeta out. *See id at ¶59.*

On February 19, 2016 Siemens is alleged to have informed Evemeta that it had defaulted on its contractual provisions by failing to pay the $300,000 Beta Phase Fee that had been due on September 30, 2015.[3] *See 2nd Amen. Comp. ¶67.* Around the same time,

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[2] Siemens Europe indicates the parties that were dismissed in motion sequence 11, Siemens Convergence Creators Holding GmbH and Siemens Convergence Creators GmbH.

[3] The Plaintiff states earlier in the complaint that it failed to pay the Beta Phase Fee specifically because the three parties had negotiated to extend the Beta Phase and had adjusted the payment schedule, resulting in Evemeta's conclusion that the $300,000 invoice was mooted by the subsequent agreement. *See 2nd Amen. Comp. ¶¶53-54.* The parties were, again, in the process of negotiating an extension of the Beta Phase in January and February of 2016. *See id at ¶¶60-63.*

Synacor sought an additional extension of the Beta Phase through the end of March 2016. *See id at* ¶*68.* Ultimately, Evemeta agreed to extend the Beta Phase through March 4th, 2016, and requested the three parties join a conference call to discuss the next steps. *See id.* No one joined Evemeta on the conference call, and the following business day Evemeta announced that the Synacor Agreement had moved to the commercial phase, and invoiced Synacor $250,000. *Id at* ¶*70.*

Both Siemens and Synacor responded to this act by blocking Evemeta's continued participation in the project. *Id at* ¶*71.* On March 15, 2016 the parties joined a conference call wherein Siemens and Synacor informed Evemeta that they intended to contract with each other directly. *Id at* ¶*72.* On April 5, 2016 counsel for Synacor terminated the Synacor Agreement. *Id at* ¶*73.* On May 18, 2016 Siemens alleged Evemeta was in default for its failure to pay the $300,000 Beta Phase fee and terminated its agreement with Evemeta. *Id at* ¶*74.*

As a result of these actions, Evemeta states claims against Siemens Convergence Creators Corporation for Breach of Contract (Count 1), Tortious Interference with Contract (Count 2), Tortious Interference with Economic Advantage (Count 3), Fraudulent Misrepresentation (Count 8), Fraudulent Concealment (Count 9), Civil Conspiracy to Commit Fraud (Count 10), and Unfair Competition (Count 17).

Evemeta states claims against Synacor for Breach of Contract (Counts 4 and 5), Tortious Interference with Contract (Count 6), Tortious Interference with Prospective Economic Advantage (Count 7), Fraudulent Misrepresentation (Count 8), Fraudulent Concealment (Count 9), Civil Conspiracy to Commit Fraud (Count 10), and Unfair Competition (Count 17).

II. ANALYSIS

Defendant Siemens Convergence Creators Corporation brings motion sequence 008 to dismiss the Second Amended Complaint pursuant to CPLR 3211(a)(7). Defendant Synacor, Inc. brings motions sequence 009 to dismiss the Second Amended Complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7). The motions are analyzed and decided jointly herein.

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the Complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Under CPLR 3211(a)(1), a dismissal is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *See id.* The Court notes, however, that allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration. *See Caniglia v. Chicago Tribune-New York News Syndicate, Inc.*, 204 A.D.2d 233, 233–34 (1st Dep't 1994).

A. Breach of Contract (Counts 1 and 4)

To plead a claim for breach of contract, plaintiff must allege the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages. *See Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010).

i. Breach of the Siemens Agreement (Count 1)

Defendant Siemens Convergence Creators Corporation argues that the Plaintiff has failed to plead the damages element of a breach of contract claim. The complaint alleges breaches of Articles 7.1, 7.2, 13, 14.2, 22 of the Siemens agreement, as well as a breach of the implied covenant of good faith. *See 2nd Amen. Comp.* ¶*79.* As a result, the Plaintiff has "suffered and will continue to suffer damages from Siemens U.S.'s multiple breaches of the Siemens Agreement." *Id at* ¶*80.* To adequately plead the damages element, the Plaintiff is not obligated to show that it has actually sustained damages, rather it is "sufficient that the complaint contain allegations from which damages attributable to the defendant's breach might be reasonably inferred." *See CAE Indus. Ltd. v. KPMG Peat Marwick*, 193 A.D.2d 470, 473 (1st Dep't 1993); *see also Harmit Realties LLC v. 835 Ave of the Ams., LP.*, 128 A.D.3d 460, 461 (1st Dep't 2015) (reinstating a claim for breach of contract where the "pleadings state allegations from which damages may be inferred"). Here, the Plaintiff performed under the contract before its termination. Plaintiff has lost the ability to profit from the fruits of that contract and has, therefore, sufficiently stated a basis for damages. *See id.* The precise amount of the damages may properly be determined during discovery.

Plaintiff also alleges that Defendant Siemens breached the implied covenant of good faith and fair dealing when it purportedly attempted to cut Evemeta out of the business arrangement. A breach of the implied covenant of good faith and fair dealing occurs where a party undertakes and action "which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002). While true that a claim for breach of the implied covenant of good faith and fair dealing is duplicative of other breach of contract claims where it "arises from the same

facts and seek the identical damages for another breach of contract," here the Plaintiff alleges that this is an additional breach arising from the Defendants' respective choices to work in concert with each other when breaching the Siemens and Synacor Agreements. *See e.g. Netologic, Inc. v. Goldman Sachs Grp., Inc.*, 110 A.D.3d 433, 433–34 (1st Dep't 2013) (dismissing a separate cause of action for breach of the covenant of good faith and fair dealing where it alleged the same facts and sought the same damages as a breach of contract claim) *citing Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dept. 2010). Evemeta's claim that Siemens breached the covenant of good faith and fair dealing shall remain as a distinct and separate part of the Plaintiff's breach of contract claim. The Plaintiff's first cause of action may remain.

ii. Breach of the Synacor Agreement (Counts 4 and 5)

Defendant Synacor first argues that the Plaintiff has failed to plead facts sufficient to show, or to even infer, that that Plaintiff suffered damages. Evemeta alleges that, once the Beta Phase of the contract terminated, it sent Synacor an invoice for the Continuation Fee, for which it was never paid. *See 2nd Amen. Comp. ¶99.* To adequately plead the damages element, the Plaintiff is not obligated to show that it has actually sustained damages, rather it is "sufficient that the complaint contain allegations from which damages attributable to the defendant's breach might be reasonably inferred." *See CAE Indus. Ltd. v. KPMG Peat Marwick*, 193 A.D.2d 470, 473 (1st Dep't 1993); *see also Harmit Realties LLC v. 835 Ave of the Ams., LP.*, 128 A.D.3d 460, 461 (1st Dep't 2015) (reinstating a claim for breach of contract where the "pleadings state allegations from which damages may be inferred"). Here, the Plaintiff performed under the contract before the contract was terminated by the Defendant and has lost the ability to profit

from that contract. *See id.* The Plaintiff has therefore stated a claim for breach of contract. The precise amount of the damages may properly be determined during discovery.

Plaintiff also alleges that Defendant Synacor breached the implied covenant of good faith and fair dealing when it purportedly attempted to cut Evemeta out of the business arrangement. A breach of the implied covenant of good faith and fair dealing occurs where a party undertakes and action "which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002). While true that a claim for breach of the implied covenant of good faith and fair dealing is duplicative of other breach of contract claims where it "arises from the same facts and seek the identical damages for another breach of contract," here the Plaintiff alleges that this is an additional breach arising from the Defendants' respective choices to work in concert when breaching the Siemens and Synacor Agreements. *See Netologic, Inc. v. Goldman Sachs Grp., Inc.*, 110 A.D.3d 433, 433–34 (1st Dep't 2013) *citing Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dept. 2010). Evemeta's claim that Synacor breached the covenant of good faith and fair dealing shall remain as a distinct and separate part of the Plaintiff's breach of contract claim.

With respect to the Plaintiff's fifth cause of action, for breaching Evemeta's audit rights, the Defendant's argument, that the Plaintiff has failed to specify what books and records it requested or how the audit rights were implicated, is unconvincing. The Plaintiff has sufficiently pleaded that it had a contractual right to audit certain records pursuant to section 14 of the Synacor Agreement, and that the contract was breached when the Plaintiff attempted to exercise its audit rights and was denied. *See e.g. Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425,

426 (1st Dep't 2010). To that end, the Plaintiff has sufficiently stated a claim for breach of its audit rights. The fourth and fifth causes of action may remain.

B. Tortious Interference

In both motion sequence 008 and motion sequence 009 the parties have advanced nearly identical arguments as to the Plaintiff's tortious interference claims. The Court will first consider the claims for tortious interference with contract, counts 2 and 6. The Court will then consider the claims for tortious interference with prospective economic advantage, counts 3 and 7.

i. Tortious Interference with Contract (Counts 2 and 6)

A claim of tortious interference with contract requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages. *See Foster v. Churchill*, 87 N.Y.2d 744, 749–50 (1996). Evemeta alleges that Siemens was aware of the Synacor Agreement, that Siemens intentionally procured the breach of that agreement. *See 2nd Amen. Comp.* ¶¶*82-88.* The Defendant argues that Courts have declined to find a defendant to be a "but for" cause of a breach of contract where the Defendants had an alleged conspiracy to breach the contract. *See Sharma v. Skaarup Ship Mgmt. Corp.* 699 F. Supp. 440, 447 (S.D.N.Y. 1988) (declining to find a breach of the contract occurred where parties had acted in concert). As the Defendants are well aware, however, an alleged civil conspiracy is not a viable cause of action in New York. *See Waggoner v. Caruso*, 68 A.D.3d 1, 6 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 874 (2010). The premise advanced by the Defendants, that a purported conspiracy precludes a claim for tortious interference, would effectively deny the Plaintiff its ability to recover against the conspiring,

Plaintiff its ability to recover against the conspiring, non-breaching, parties. The premise serves only to undermine the elements of knowledge of the contract and intentional procurement of a breach inherent in tortious interference claims. *See e.g. Foster v. Churchill*, 87 N.Y.2d 744, 749–50 (1996). The Court finds this argument unpersuasive.

The Synacor Defendant also argues that the premise behind a claim for tortious interference with contract is a third-party's inducement of a breach, whereas the breaching party may be liable under a breach of contract theory. *See Snyder v. Sony Music Enter., Inc.* 252 A.D. 294, 299 (1st Dep't 1999). This assertion is not mutually exclusive of the Plaintiff's claims. The Plaintiff has adequately alleged Siemens, as a non-party to the Synacor Agreement, induced Synacor to breach its agreement by offering to cut out the Plaintiff from the deals. *See 2nd Amen. Comp.* ¶¶*83-87.* Similarly, Synacor, as a non-party to the Siemens Agreement, induced Siemens to breach its agreement by offering to deal directly with Siemens rather than using Evemeta as the intermediary. *See id at* ¶¶*108-112.* The second and sixth causes of action for tortious interference with contract are adequately stated.

ii. Tortious Interference with Prospective Economic Advantage (Counts 3 and 7)

To state a claim for tortious interference with prospective economic advantage, Plaintiff must allege (1) he had business relations with a third party; (2) Defendant interfered with those business relations; (3) defendant acted with the sole purpose of harming plaintiff or by using wrongful means; and (4) there was resulting injury to the business relationship. *Thome v. Alexander & Louisa Calder Foundation*, 70 A.D.3d 88, 108 (1st Dep't 2009).

Here, the Plaintiff alleges that Defendant Siemens interfered with Evemeta's business relationship with Synacor, as well as any potential business relationships which may have resulted from the relationship with Synacor. *See 2nd Amen. Comp. ¶¶89-91.* Further, Siemens is alleged to have used wrongful means when harming the Plaintiff by making misrepresentations and inducing Evemeta to grant extensions of the Synacor Agreement while Siemens and Synacor negotiated their own Agreement. *See id at ¶ 92.*

Insofar as the Plaintiff re-alleges interference with the business relationship with Synacor, the Court finds the claim to be duplicative — alleging the same facts and seeking the same damages — of the cause of action for tortious interference with contract. *Compare 2nd Amen. Comp. ¶¶89-95 with 2nd Amen. Comp. ¶¶82-88.*

Insofar as the claim is intended to extend to parties contemplated by the contract "there needs to be a specific claim that the plaintiff was actually and wrongfully prevented from entering into or continuing in a specific business relationship." *Laine v. Pride*, 30 Misc. 3d 1233(A) (Sup. Ct. N.Y. Cty 2011) (Gische, J.) *citing White v. Ivy*, 63 AD3d 1236 (3rd Dep't. 2009). Here, Evemeta identifies parties for which a specific business relationship was contemplated. *See 2nd Amen. Comp. ¶75; see also 2nd Amen. Comp. Ex. B §12* (contemplating targeted outreach to specific third-party corporations). The Siemens Defendant is alleged to have interfered with those contemplated relationships when it worked with the Synacor Defendant to exclude the Plaintiff from the Synacor Contract. *See 2nd Amen. Comp. ¶92.*

Similarly, Evemeta alleges that Synacor tortiously interfered with prospective business relations by interfering with Evemeta's ability to market the Siemens' OTT platform outside of the United States and by hindering their ability to benefit from Synacor's customers using the OTT platform. *See 2nd Amen. Comp. ¶115.* Synacor is alleged to have intentionally interfered

with these opportunities by misrepresenting to Evemeta that Siemens and Synacor were negotiating a direct agreement, by inducing Evemeta to grant Synacor extensions of the Beta Phase, and by secretly encouraging Siemens to contract with Synacor.

Again, to the extent the Plaintiff re-alleges interference with the business relationship between Evemeta and Siemens, the Court finds the claim to be duplicative — alleging the same facts and seeking the same damages — of the Plaintiff's cause of action for tortious interference with contract. Insofar as the claim extends to parties contemplated by the contract but not yet specifically identified, however, "there needs to be a specific claim that the plaintiff was actually and wrongfully prevented from entering into or continuing in a specific business relationship." *Laine v. Pride*, 30 Misc. 3d 1233(A) (Sup. Ct. N.Y. Cty 2011) (Gische, J.) *citing White v. Ivy*, 63 AD3d 1236 (3rd Dep't. 2009). Here, Evemeta identifies parties for which a specific business relationship was contemplated. *See 2nd Amen. Comp. ¶75; see also 2nd Amen. Comp. Ex. B §12* (contemplating targeted outreach to specific third-party corporations). The Synacor Defendant is alleged to have interfered with those contemplated relationships when terminated the Synacor Agreement. *See 2nd Amen. Comp. ¶117.*

The third and seventh causes of action may remain.

C. Fraudulent Misrepresentation and Fraudulent Concealment

(Counts 8 and 9)

Plaintiff states claims for fraudulent misrepresentation and fraudulent concealment against all Defendants. In order to state a claim for fraudulent misrepresentation, a plaintiff must make a *prima facie* showing of "a misrepresentation of a material omission of fact which was false and known to be false by the Defendant, made for the purpose of inducing the other party to

rely upon it, justifiable reliance of the other party on the misrepresentation or material injury, and injury." *See Lama Holding Co. v. Smith Barney Inc.,* 88 N.Y.2d 413, 421 (1996). The Plaintiff alleges that the Defendants "made continuous misrepresentations of material fact to Evemeta that the defendants were working towards an agreement on a change of control amendment. . . ." *2nd Amen. Comp. ¶122.* The Complaint further alleges that the Defendants made these statements for the purpose of misleading Evemeta to continue to perform under the contract. *See id at ¶124.* The Plaintiff alleges that it did, in fact, rely on these statements to its detriment given that the relationships Evemeta had with Siemens and Synacor were subsequently terminated. *See id at ¶¶125-128.*

To state a claim for fraudulent concealment, a plaintiff must allege that the defendant had a duty to disclose material information and failed to do so, that the omission was intentional so as to defraud or mislead the plaintiff, that the plaintiff relied on the omission and that the plaintiff suffered damages. *See Gottbetter v. Crone Kline Rinde, LLP*, 162 A.D.3d 579, 579 (1st Dep't 2018). Here the Plaintiff has alleged that the Defendants failed to disclose the nature of the negotiations between them to the Plaintiff, and that this failure to disclose was done so as to mislead the Plaintiff into believing the parties intended to continue operating under the contract. *See 2nd Amen. Comp ¶¶129-136.*

Siemens first argues that the Plaintiff has failed to meet CPLR 3016's heightened pleading requirement for either the fraudulent misrepresentation or the fraudulent concealment claims. To meet the heightened pleading standard for fraud, however, the Plaintiff must merely allege facts sufficient to permit a reasonable inference of the alleged misconduct to each Defendant. *See Goldin v. TAG Virgin Islands, Inc.*, 149 A.D.3d 467, 467 (1st Dep't 2017) (holding that under CPLR 3016's heightened pleading requirement the Defendants must be able

to reasonably infer what the misconduct was from the pleadings). Here, the Defendants can easily infer the purported fraud was the misrepresentation and concealment of the negotiations between Siemens and Synacor to contract with each other directly rather than continue to use Evemeta as a middle man. Thus, the claims for fraud meet the heightened pleading requirement.

Defendants also argue that the Plaintiff continued to grant an extension of the Beta Phase even after learning that that the Defendants planned to cut Evemeta out of the business arrangement. *See 2nd Amen. Comp. ¶68.* In fact, the complaint alleges that the Defendants cut off all communication with the Plaintiff, and that its attempts to determine whether the business relationship should continue were met with silence. *Id at ¶¶55-68.* When the Defendants attempted to perpetuate the fraud by requesting additional extensions of time, the Plaintiff responded by granting only a very short extension of time so as to be able to meet and confer with the Defendants. *See id at ¶68.* However, only Evemeta appeared at the agreed upon meeting time and it was at that point that the Plaintiff moved the contract to the Commercial Phase. *See id at ¶¶69, 70.* Defendants then terminated their respective contracts as the Plaintiff suspected. *See id at ¶¶71-75.* Given these facts, the Court concludes the Plaintiff had no meaningful opportunity to discuss the fraud and determine whether it would continue to operate under the contract after having been put on notice. *See e.g. Ittleson v. Lombardi*, 193 A.D.2d 375, 376 (1st Dep't 1993) (dismissing a fraud claim where the Plaintiff continued to operate after having the opportunity to discover the nature of the transaction by using "ordinary intelligence").

The fraud claims, however, are duplicative of the Plaintiff's claims for breach of contract. "A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract. By contrast, a cause of action for fraud may be maintained where a

plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract." *First Bank of Americas v. Motor Car Funding, Inc.*, 257 A.D.2d 287, 291 (1st Dep't 1999). Here, the Plaintiff alleges that the Defendants misrepresented the nature of the negotiations between Defendants Siemens and Synacor such that it induced the Plaintiff to continue to grant extensions of the contract itself.

"Unlike a misrepresentation of future intent to perform, a misrepresentation of present facts is collateral to the contract (though it may have induced the plaintiff to sign the contract) and therefore involves a separate breach of duty." *See id* at 292. Ultimately, Siemens and Synacor's discussions amount to an insincere promise of continued, or future, performance on the Siemens and Synacor Agreements. *See id* (noting a misrepresentation of future intent to perform would be duplicative of the breach of contract). There are no facts separate or apart from these negotiations which create a separate element of fraud; at most, the Defendants are alleged to have discussed how they would breach their respective agreements with Evemeta in order to work together directly. *See 2nd Amen. Comp.* ¶¶*57-59, 122, 123, 130.* These acts merely duplicate the Plaintiff's claims for breach of contract (counts 1 and 4) and the claims for tortious interference with contract (counts 2, 3, 6, and 7). *See Bank of Americas v. Motor Car Funding, Inc.*, 257 A.D.2d at 291 *citing Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dep't 1988) (dismissing fraud claims as both duplicative and having failed to allege specific damages which were independent of the breach of contract claims).

The eighth cause of action, for fraudulent misrepresentation, and ninth cause of action, for fraudulent concealment, are dismissed.

D. Civil Conspiracy to Commit Fraud (Count 10)

The State of New York does not recognize an independent cause of action in tort for conspiracy. *Waggoner v. Caruso*, 68 A.D.3d 1, 6 (1st Dep't 2009), *aff'd*, 14 N.Y.3d 874 (2010). Accordingly, the Court need not address the elements and dismisses the tenth cause of action, for civil conspiracy.

E. Unfair Competition (Count 17)

"[T]he primary concern in unfair competition is the protection of a business from another's misappropriation of the business' organization or its expenditure of labor, skill, and money. Indeed, the principle of misappropriation of another's commercial advantage is a cornerstone of the tort. Allegations of a bad faith misappropriation of a commercial advantage belonging to another by exploitation of proprietary information can give rise to a cause of action for unfair competition." *Macy's Inc. v. Martha Stewart Living Omnimedia, Inc.*, 127 A.D.3d 48, 56 (1st Dep't 2015). The Plaintiff alleges that the Defendants acted to misappropriate Evemeta's labors, skill, business judgment, know-how, and expenditures. *See 2nd Amen. Comp. ¶180.* Specifically, Evemeta is alleged to have used its proprietary encoding technology to permit Siemens' OTT product to operate on Synacor's, and Synacor's clients's, systems. *See id at ¶¶21, 30*. The inference from these statements in the complaint is clearly that absent Evemeta's know-how, Siemens and Synacor would not have been able to conduct business. *See id; see also Leon v. Martinez*, 84 NY2d 83, 87-88 (1994) (granting the Plaintiff the benefit of every possible favorable inference). The Plaintiff's seventeenth cause of action has, therefore, stated a claim for unfair competition.

F. Punitive Damages and Attorney's Fees

As part of this motion to dismiss, the Defendants request the court dismiss the Plaintiff's request for punitive damages and attorney's fees for failure to plead facts sufficient to justify either. "Punitive damages are available in a tort action where the wrongdoing is intentional or deliberate, has circumstances of aggravation or outrage, has a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton." *Swersky v. Dreyer & Traub*, 219 A.D.2d 321, 328 (1st Dep't 1996). Here, several of the Plaintiff's tort claims remain, thus it is properly left to a jury to decide the issue of punitive damages. *See id.*

Similarly, with regard to attorney's fees, a fact finder may properly determine whether attorney's fees should be part of a punitive damages award. *See Jeffries Avlon, Inc. v. Gallagher*, 149 Misc. 2d 552, 553 (Sup. Ct. NY Cty. 1991) (Saxe , J). Therefore, dismissal of the request for attorney's fees is premature at this time.

III. CONCLUSION

Upon the foregoing, it is hereby

ORDERED the motions to dismiss (sequences 008 and 009) are GRANTED IN PART as to the Plaintiff's claims for fraudulent misrepresentation (count 8), fraudulent concealment (count 9), and civil conspiracy (count 10) and those claims are hereby dismissed without prejudice.

Dated: 10-4-18

HON. EILEEN BRANSTEN