

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

Capital Funding, VI, LP,	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
Chase Manhattan Bank USA, N.A.,	:	NO. 01-CV-6093
	:	
Defendant.	:	

**ORDER MEMORANDUM**

And now, this     day of March 2003, upon consideration of (i) Plaintiff’s Complaint; (ii) Defendant Chase Manhattan Bank USA, N.A.’s Motion to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can Be Granted Under Federal Rule of Civil Procedure 12(b)(6) and, in the Alternative, to Strike the Claim For Punitive Damages Under Federal Rule of Civil Procedure 12 (f); (iii) Plaintiff’s Opposition to Defendant’s Motion to Dismiss the Complaint, and; (iv) Defendant’s Reply Memorandum in Support of its Motion to Dismiss the Complaint, it is hereby ORDERED that Defendant’s Motion to Dismiss Pursuant to Fed. R. Civ. P. 12 (b)(6) is GRANTED IN PART and DENIED IN PART. The reasons for the decision are as follows:

Plaintiff, Capital Funding, VI, LP (“Capital Funding”) is a purchaser of ‘charged-off’ credit card debt at discount from credit-card issuers. Buying bad debt at greatly reduced rates, Capital Funding then attempts to collect the high risk delinquent accounts. Capital Funding and Chase Manhattan Bank USA, N.A. (“Chase”) entered into a Credit Card Purchase Agreement

(the “Contract”) on January 11, 2000 under which Capital Funding purchased a portfolio (the “Portfolio”) of charged-off accounts (the “Accounts”) from Chase. The Accounts in the Portfolio were established or maintained by Chase pursuant to a Mastercard, Visa or other revolving credit program. Capital Funding paid Chase approximately \$1.5 million for the Portfolio.

More than fourteen months after entering into the Contract, Capital Funding concluded that the Accounts delivered by Chase did not conform with its understanding of the terms of the parties’ agreement. Capital Funding initially alleges the Accounts delivered were older than provided for under the Contract. Capital Funding also contends the product delivered by Chase did not conform with Chase’s pre-contract representations in two respects: (1) the Accounts were older than represented during negotiations<sup>1</sup>, and; (2) despite pre-contract assurances, “many of the debtors responsible for the Charged-off Accounts had been offered blanket settlement offers of below sixty percent of the unpaid balance by Chase.”<sup>2</sup>

On December 5, 2001, Capital Funding filed this Complaint against Chase alleging breach of contract (Count I), fraudulent inducement/fraud (Count II), and negligent

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<sup>1</sup> In support of its arguments that Chase delivered a product that did not conform with prior representations, Capital Funding points to two sample diskettes sent to Capital Funding which, according to Chase’s agent as stated in the accompanying letter, would give Capital Funding “a good idea of what is available in any given month for newly charged-off accounts.” (Complaint, ¶ 11)

<sup>2</sup> After attempting unsuccessfully to collect the delinquent Accounts for over a year, Capital Funding alleges that it became aware that “many of the debtors responsible for the Charged-off Accounts had been offered blanket settlement offers of below sixty percent of the unpaid balance by Chase.” (Complaint ¶ 18). On an unspecified date prior to the execution of the Contract, a Capital Funding agent inquired of a Chase Vice President regarding “its collection procedures, particularly the issuance of blanket settlement proposals.” (Complaint, ¶ 12). In response, Capital Funding alleges that the Chase VP “assured” the Capital Funding agent that “Chase’s collection protocols precluded blanket settlement authorization below sixty percent except on a case-by-case basis and in no event below fifty percent.” (Complaint, ¶ 13).

misrepresentation (Count III).

A. Fed.R.Civ.P.12(b)(6)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) succeeds only when it clearly appears that a plaintiff can prove no set of facts in support of the claim which would entitle it to relief.<sup>3</sup> See Conley v. Gibson, 355 U.S. 41, 45-46 (1957); Robb v. City of Philadelphia, 733 F.2d 286, 290 (3d Cir. 1984); Straight Arrow Products v. Conversion Concepts, Inc. et al., 2001 U.S. Dist. LEXIS 19859, at 2 (E.D. Pa.).

In determining the legal sufficiency of a claim, a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. Anthony v. Council, 2003 U.S. App. LEXIS 936, at 6 (3d Cir.); Caudill Seed and Warehouse Company, Inc. v. Prophet 21, Inc., 123 F. Supp. 2d 826, 827 (E.D. Pa. 2000). A complaint is subject to dismissal when the facts alleged and the reasonable inferences therefrom are legally insufficient to support the relief sought. Pennsylvania ex rel. Zimmerman v. PepsiCo., Inc., 836 F.2d 173, 179 (3d Cir. 1988); Straight Arrow Products, 2001 U.S. Dist. LEXIS 19859, at 3.

B. The Parol Evidence Rule

The initial question presented is whether this Court may consider the pre-contract discussions and representations in resolving Defendant Chase's Fed.R.Civ.P.12(b)(6) Motion to Dismiss the breach of contract claim. It is firmly established under Pennsylvania law<sup>4</sup> that

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<sup>3</sup> A court may also consider any document appended to and referenced in the complaint on which the plaintiff's claim is based. See Fed. R. Civ. P. 10(c); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410 (3d Cir. 1997); In re Westinghouse Securities Litigation, 90 F.3d 696, 707 (3d Cir. 1996). Accordingly, this Court will consider only the Contract.

<sup>4</sup> A federal court sitting in diversity must apply the substantive law of the state in which it sits, including the choice of law rules. Regent National Bank v. Dealers Choice Automotive Planning, Inc. et al., 1997 U.S. Dist. LEXIS 19219, at 10 (E.D. Pa.). The parties agree that the Contract is governed by Delaware law and that the tort

courts look to the parol evidence rule to determine the scope of an agreement when a party's claims rely on representations and/or statements made prior to the execution of a contract which do not conform the language of the contract. Under Pennsylvania law, the parol evidence provides as follows:

Where the alleged prior or contemporaneous oral representations or agreements concern a subject which is specifically dealt with in the written contract, and the written contract covers or purports to cover the entire agreement of the parties, the law is now clearly and well settled that in the absence of fraud, accident or mistake the alleged oral representations or agreements are merged in or superseded by the subsequent written contract.

Bardwell v. Willis Co., 375 Pa. 503, 100 A.2d 102, 104 (Pa. 1953).

The parol evidence rule applies when prior statements and representations (1) contradict, conflict, add, modify or vary the terms of a contract and (2) fall within the scope of the integrated agreement. Straight Arrow Products, 2001 U.S. Dist. LEXIS, at 15; Mellon Bank Corp. v. First Union Real Estate Equity & Mortg. Inv., 951 F.2d 1399, 1407 (3d Cir. 1991); Quorum Health Resources, Inc. v. Carbon-Schulykill Community Hospital, Inc., 49 F. Supp. 2d 430, 432-33 (E.D. Pa. 1999); Regent National Bank v. Dealers Choice Automotive Planning, Inc. et al., 1997 U.S. Dist. LEXIS 19219, at 14-15 (E.D. Pa.). An exception to the parol evidence rule exists for claims of fraud in the execution of the contract. Horizon Unlimited, Inc. v. Silva, 1998 U.S. Dist. LEXIS 2223, at 11-12 (E.D. Pa.); Regent National Bank, 1997 U.S. Dist. LEXIS 19219, at 15; HCB Contractors v. Liberty Place Hotel Assoc., 539 Pa. 395, 398-400 652 A.2d 1278

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claims are governed by Pennsylvania law. The Contract provides, in relevant part, that the "Agreement shall be governed by and construed in accordance with the laws of the State of Delaware." Contract, ¶ 25, Defendant's Motion to Dismiss, Exh. A. The parol evidence rule is one of substantive and procedural law.

(1995).

Fraud in the execution<sup>5</sup> occurs when a party executes an agreement because it was led to believe that the document being signed contained terms that were in fact omitted from the Straight Arrow Products, 2001 U.S. Dist. LEXIS 19859, at 14. In comparison, fraud in the inducement occurs when “the party proffering evidence of additional prior representations does not contend that the parties agreed that the additional representations would be in the written agreement, but rather claims that the representations were fraudulently made and that but for them, he or she never would have entered into the agreement.” Id. (quoting Cherry Street Partnership v. Bell Atlantic Properties, Inc., 439 Pa. Super. 141, 653 A.2d 663, 666 (Pa. Super. 1995).

Claims for fraudulent inducement, fraud and negligent misrepresentation do not surmount the bar to consideration of prior representations concerning matters covered in the written contract under Pennsylvania law. Dayhoff, Inc. v. H.J. Heinz Co., et. al., 86 F.3d 1287, 1300 (3d Cir. 1996)(If the court were to create exceptions to the parol evidence rule, the rule “would become a mockery” and integrated contract could be avoided or modified by claims of differing

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<sup>5</sup> Capital Funding presently contends it brought a claim for fraudulent inducement which included a claim for fraud in the execution. The Complaint contains a clear allegation of fraudulent inducement. (Complaint, ¶ 39). For the first time in its Opposition, Capital Funding claims to plead fraud in the execution. (Opposition, page 4). Capital Funding reiterates that its claim is focused on misrepresentations made by Chase “in order to induce Capital Funding to pay an exorbitant price for that product.” Id. Yet, this statement is the classic case of fraud in the inducement. Capital Funding alleges that “Chase promised it that the delinquency of the Accounts in the Portfolio was measured by the cardholders’ contract with Chase . . .” Id. Capital Funding does not plead, however, that Chase promised and/or the parties agreed, that such a criterion would be included in the Contract and that it was omitted from the final document. Nor does Capital Funding argue that it bargained for the terms to be included or that it did not understand the language of the Contract it read and signed. Rather, Capital Funding writes “nor does Capital Funding allege that any term is missing from or added to the Agreement”. (Opposition, page 3). Despite its denial of the elements of fraud in the execution, Capital Funding concludes that “there was fraud in the execution in that Capital Funding was misled as to the contents of the Agreement.” Id. at 4. The Court finds that Capital Funding’s allegations describe a claim for fraudulent inducement and not for fraud in the execution.

prior representations.” (quoting HCB Contractors v. Liberty Place Hotel Assoc., 539 Pa. 395, 652 A.2d 1278 (Pa. 1995)).

This written contract purports to cover the entire agreement of the parties. The Contract contains an integration clause which provides:

This agreement, including exhibits, constitutes the entire understanding between the parties with respect to the subject matter hereof and supersedes all prior written and oral proposals, understandings, agreements and representations, all of which are merged and incorporated herein. No representations, warranties, and/or covenants have been made by either party to the other except as expressly set forth herein. Purchaser [Capital Funding] acknowledges and agrees that it is not relying on any representations of Seller [Chase] in executing this agreement except as set forth herein. No amendment of this agreement shall be effective unless in writing and executed by each of the parties hereto.

(Contract, ¶ 11, “Entire Agreement/Amendment”). Thus, the Contract states without ambiguity that the contractual language is the entire agreement and supersedes all prior statements or representations and is therefore fully integrated. Straight Arrow Products, 2001 U.S. Dist. LEXIS 19859, at 16 (“A written contract is integrated if it represents a final and complete expression of the parties’ agreement.”); Kehr Packages, Inc. v. Fidelity Bank, Nat. Ass’n, 710 A.2d 1169, 1174 (Pa. Super. 1998). As this Court stated in Straight Arrow Products, when a cause of action is based upon an oral understanding alleged by the plaintiff “concerning a subject dealt with in a written contract, it is presumed that the writing was intended to embody the entire understanding of the parties regarding that subject . . . because when a party executes a written agreement in reliance upon an oral representation, it is only natural that he would insist that such a representation be incorporated into the writing.” Id. at 16.

By entering into the Contract, Capital Funding agreed that it was relying exclusively on the Contract and not on any representations of Chase in executing the Contract. The Contract, therefore, is subject to the parol evidence rule. Coram Healthcare Corp. v. Aetna U.S. Healthcare Inc., 94 F. Supp. 2d 589, 595 (E.D. Pa. 1999) (For the Pennsylvania parol evidence rule to bar a claim, the contract must be written, unambiguous, and fully integrated.). The parol evidence rule, when applied to the Contract at issue, bars the Court from considering any prior statements or representations made by Chase.

With these considerations in mind, we turn to Defendant's Motion to Dismiss the breach of contract claim pursuant to Fed.R.Civ.P. 12(b)(6).

### C. Count I

In Count I, Capital Funding brings a breach of contract claim against Chase for "failing to provide accounts in the Portfolio that were of sufficient quality so as to make the accounts collectible."<sup>6</sup> (Complaint, ¶ 31). Specifically, Capital Funding alleges that (1) the Accounts were older than permissible under the parameters established in the Contract and (2) many of the debtors had been offered blanket settlement offers of below sixty percent of the unpaid balance by Chase. As a result of Chase's breach, Capital Funding's efforts to collect any significant portion of the unpaid balance were impeded. (Complaint ¶ 18).

#### (i) Age of Accounts

Because the parol evidence rule bars consideration of prior representations in support of Capital Funding's breach of contract claim, the Contract standing alone must provide sufficient

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<sup>6</sup> When no fiduciary relationship exists, the party alleging a breach of contract bears the burden of proving the elements of a breach of contract. Bohler-Uddeholm, 257 F.3d 79 (3d Cir. 2001).

support to the breach of contract claim for Capital Funding to survive Chase's Motion to Dismiss. The age of Ineligible Accounts, as agreed by the parties in the Contract was defined as "(iii) the Seller charged-off the account prior to the calendar month preceding the Closing Date... the fourth (4<sup>th</sup>) business day following delivery by the Seller to Purchaser of the diskette. . . ."<sup>7</sup> Plaintiff contends the accounts delivered were older than permissible under the Contract. (Complaint, ¶ 18, 24 and 25). In making these allegations, Plaintiff articulates a valid cause of action completely independent of the irrelevant and inadmissible pre-contract discussions and representations.

Defendant Chase asserts that the Contract provides the exclusive remedy for Plaintiff's contention that the Accounts in the Portfolio were older than the parameters established in the Contract. The "Reimbursement of Accounts" section of the Contract provides that *if* Capital Funding advised Chase within 180 days following the closing date that ineligible accounts were included in the Portfolio, upon notification, Chase would reimburse Capital Funding. By its own admission, Capital Funding waited approximately 14 months to seek reimbursement. (Complaint ¶ 24).

In including this section of the Contract, it is notable that the parties did not articulate an express intent to limit Capital Funding's right to seek relief for violation of the terms of the Contract to a period of 180 days. The Contract articulates an agreement as to one manner in which the Plaintiff may seek relief on or before the expiration of 180 days. It does not in any way address the Plaintiff's right to seek redress for the inclusion of Ineligible Accounts

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<sup>7</sup>The plain application of the parol evidence rule precludes consideration of the letter which accompanied the sample diskettes (Complaint ¶ 11, Exhibit B) The Contract, standing alone, must provide sufficient support to the breach of contract claim for Capital Funding to survive Chase's Motion to Dismiss.

discovered after the expiration of six months. The Contract is also devoid of language manifesting an intention to make the “Reimbursement of Accounts” procedure the exclusive remedy for delivery of ineligible accounts. Under Delaware law, contractual actions must be brought within three years; Plaintiff filed this complaint within the appropriate period. 10 Del. Code § 8106; Aronow Roofing Co. v. Gilbane Bldg., 902 F.2d 1127, 1128 (3d Cir. 1990) (Delaware law provides a three-year statute of limitation for causes of action based on contract).

In effect, Defendant asks this Court to interpret the Contract to impose a term which the parties did not include in their mutual agreement, the inclusion of which would materially rewrite the contract and substantially alter the parties’ rights under the law. The Court is without authority to do so. As this section of the Contract articulates a partial, and not exclusive remedy, Plaintiff’s right to seek redress is not precluded. Plaintiff has plead a valid cause of action for breach of contract.

(ii) Blanket Settlement Offers

The second basis of the Plaintiff’s breach of contract claim is that the Defendant offered blanket settlement proposals to many of the debtors. The Contract provides the criteria for charged-off accounts and lists the factors which render a charged off account ‘ineligible’; that the debtors had not been offered blanket settlement proposals below 60 per cent of the value of the account is not among them. The Contract only provides that the Accounts had not been forwarded to a collection agency or an attorney for collection. Thus, on the face of the Contract there is no evidence that the parties agreed to the criterion which Capital Funding states gives rise to Chase’s contractual obligation. Citadel Holding Corp. v. Roven, 603 A.2d 818, 822 (Del. 1992)(It is an elementary canon of contract construction that the intent of the parties must be

ascertained from the language of the contract.). Accordingly, the Contract also did not give rise to a contractual obligation which could be breached by Chase and result in the damages for which Capital Funding demands relief. Gale v. Bershad, 1998 Del. Ch. LEXIS 37, at 13 (Court of Chancery of Delaware)(“To survive a motion to dismiss, a complaint stating a claim for breach of contract must identify a contractual obligation, whether or implied, a breach of that obligation by the defendant, and resulting damage to the plaintiff.”).

In conclusion, the Complaint contains insufficient allegations to support this aspect of Plaintiff’s breach of contract claim. Defendant’s Motion to Dismiss pursuant to Fed.R.Civ.P.(12)(b)(6) is granted as to allegations relating to blanket settlement proposals.

#### D. Count II

In Count II of the Complaint, Plaintiff seeks to articulate a cause of action for “Fraudulent Inducement/Fraud. Under Pennsylvania law, tort claims, including fraud, predicated entirely upon the contractual relationship of the parties are not viable causes of action. Werwinski v. Ford Motor Co., 286 F.3d 661, 680 (3d Cir. 2002); Caudill Seed and Warehouse Co., Inc. v. Prophet 21, Inc., 123 F. Supp. 2d 826 (E. D. Pa. 2000). This court must initially determine whether this count is based entirely upon the contractual relationship of the parties.

To determine if the alleged tort committed in the course of carrying out a contractual agreement is merely a “breach of contract claim in disguise”, and thus not-actionable, courts examine the claim to assess whether the “gist of the claims sounds in contract or tort.” Caudill Seed and Warehouse Co., Inc., 123 F. Supp. 2d at 833. As articulated by this Court, “a tort claim is maintainable only if the contract is ‘collateral’ to conduct that is primarily tortuous.” Id. (citations omitted); Quorum Health Resources, Inc., 49 F. Supp. 2d at 432. The test adopted by

Pennsylvania courts to characterize the ‘gist’ of a claim looks to the source of the duty imposed on the parties. Id. Mutual consensus imposes a duty on the parties in a contract claim while a party’s duty in a tort action is imposed as a matter of social policy. Bohler-Uddeholm America, Inc. v. Ellwood Group, Inc., 247 F.3d 79, 103 (3d Cir. 2001) (adopting Pennsylvania state courts’ interpretation that the important difference between contract and tort actions is that the latter stems from the breach of duties imposed as a matter of social policy, while the former stems from the breach of duties imposed by mutual consensus).

Capital Funding alleges that “[a]s to the Agreement . . . Chase and Capital Funding owed each other duties of care with respect to all statements and representations made in connection with the purchase of charged-off accounts.” (Complaint, ¶ 44). Capital Funding points to the Contract and nowhere else, as the alleged source of Chase’s duty. If the duty which Capital Funding claims was breached by Chase arose out of their contractual relationship, then under the “gist of the action” doctrine it was imposed “by mutual consensus.” Plaintiff’s tort claim is a “breach of contract claim in disguise.” As such, it is not actionable under Pennsylvania law.<sup>8</sup> Defendant’s Fed.R.Civ.P 12(b)(6) Motion to Dismiss is granted as to Count II of the Complaint.

Count II of the Complaint is also legally deficient in that Plaintiff has failed to plead all necessary elements of a valid cause of action for fraud. To succeed on a claim for fraud under Pennsylvania law, a plaintiff must plead the following allegations by clear and convincing evidence: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely,

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<sup>8</sup>As this contract is clear, unambiguous and contains an integration clause, this court cannot consider the prior statements or representations made by Chase which allegedly support Capital Funding’s claims for fraud, fraudulent inducement and negligent misrepresentation. Dayhoff Inc., 86 F.3d at 1300 (discussing Pennsylvania’s parol evidence rule); Sunquest Information Systems, Inc. v. Dean Witter Reynolds, Inc., 40 F. Supp. 2d 644, 653.

with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) resulting injury proximately caused by the reliance. Mellon Bank Corp., 951 F.2d at 1408 (discussing the elements of fraudulent misrepresentation under Pennsylvania law); Gibbs v. Ernst, 538 Pa. 193, 207-208, 647 A.2d 882, 889 (1994). Linda Coal and Supply Company v. Tasa Coal Company, 416 Pa. 97, 102, 204 A.2d 451, 454 (The basic prerequisite of an action in deceit for fraudulent misrepresentations is that the deceiver shall *knowingly* make a false statement, *intending* the act to rely upon it to its detriment.) Moreover, Pennsylvania's parol evidence rule, as interpreted by this Court, bars tort claims of fraud where the allegedly fraudulent statements are specifically contradicted by the language of an integrated contract. Regent National Bank, 1997 U.S. Dist. LEXIS 19219, at 16-18.

Capital Funding alleges that Chase's agents inaccurately stated that the charged-off account debtors had not been offered blanket settlements of below 60 per cent. (Complaint, ¶ 13). Capital Funding does not, however, claim that the Chase agents knew that the information they were providing was inaccurate and intended to defraud Capital Funding or that Capital Funding's reliance was justified. The failure to include these allegations is fatal to Count II. Defendant's Motion to Dismiss Count II pursuant to Fed.R.Civ.P. 12(b)(6) is granted.

#### E. Count III

In Count III, Plaintiff alleges negligent misrepresentation. As discussed previously, in Pennsylvania, tort claims derived exclusively from a contractual relationship are not actionable. See Discussion, *supra*, at pages 10-11. Accordingly, Defendant's Motion to Dismiss Count III pursuant to Fed.R.Civ.P. 12(b)(6) is granted.

Moreover, Plaintiff has also failed to plead all of the allegations necessary to proceed on a claim for negligent representation. To succeed on a claim of negligent misrepresentation, a plaintiff must show: (1) a misrepresentation of a material fact; (2) that the representor either knew of the misrepresentation, made the misrepresentation without knowledge as to its truth or falsity or made the representation under circumstances in which he ought to have known of its falsity; (3) that injury resulted to the party acting in justifiable reliance on the misrepresentation. Borough of Lansdowne v. Severson Envtl. Servs., 2000 U.S. Dist. LEXIS 18732, at 15 (E.D. Pa.); Gibbs, 538 Pa. 193, 207.

Thus, to survive Chase's Motion as to negligent misrepresentation Capital Funding must allege that Chase's agents failed to make a reasonable investigation of the truth of their statements. Capital Funding's Complaint lacks this necessary allegation. Accordingly, Defendant's Motion to Dismiss Count III pursuant to Fed.R.Civ.P.12(b)(6) is granted.

#### F. Punitive Damages

The single viable cause of action is premised in contract: the Accounts delivered were aged beyond permitted under the contract. Punitive damages are not recoverable under contract law. Galdieri v. Monsanto Co., 2002 U.S. Dist. LEXIS 11391, at 39 (E.D. Pa.) (punitive damages for breach of contract claims unavailable under Pennsylvania law and "generally" unavailable under Delaware law) citing E.I. DuPont de Nemours & Co. v. Pressman, 679 A.2d 436, 445 (Del. 1996); Littleton v. Young, 608 A.2d 728, at 6 (Del. 1992) (The standard which governs the award of punitive damages in Delaware is well-settled. "In actions arising ex contractu, punitive damages may be assessed if the breach of contract is characterized by willfulness or malice."). Accordingly, pursuant to Fed.R.Civ.P.12(f), Plaintiff's claim for

punitive damages is stricken.

#### G. Conclusion

For the foregoing reasons, the Court finds that Capital Funding's claim for breach of contract partially survives Defendant's Fed.R.Civ.P.(12)(b)(6) motion. Plaintiff's claims of fraudulent inducement/fraud, and negligent misrepresentation do not survive Defendant's Motion to Dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

Accordingly, this     day of March, 2003, IT IS HEREBY ORDERED AND DECREED that Defendant's Motion to Dismiss Count I of the Complaint for Failure to State a Claim Upon Which Relief Can be Granted under Federal Rule of Civil Procedure 12(b)(6) is GRANTED IN PART and DENIED IN PART. Defendant's Motion to Dismiss Count II and Count III of the Complaint for Failure to State a Claim Upon Which Relief Can be Granted under Federal Rule of Civil Procedure 12(b)(6) is GRANTED. Defendant's Motion to Strike Plaintiff's Claim for Punitive Damages pursuant to Federal Rule of Civil Procedure 12(f) is GRANTED.

The Clerk of Court is directed to mark Docket Entry 5 as resolved.

BY THE COURT:

Legrome D. Davis, Judge

