

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

<b>TIMBERLINE TRACTOR &amp; MARINE, INC.,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>XENOTECHNIX, INC.,</b>	:	
	:	
<b>Defendant.</b>	:	
	:	<b>NO. 98-3629</b>

**MEMORANDUM**

**Reed, J.**

**April 27, 1999**

Presently before the Court is the motion of defendant Xenotechnix, Inc. (“Xenotechnix”) to dismiss the amended complaint (Document No. 15) pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6) and the response of plaintiff Timberline Tractor & Marine, Inc. (“Timberline”) thereto. Also before the Court are the motions of Timberline to strike the motion to dismiss of Xenotechnix (Document No. 18) and to strike the response of Xenotechnix to the motion of Timberline to strike the motion to dismiss of Xenotechnix (Document No. 21). Based on the following analysis, the motion of Xenotechnix will be granted in part and denied in part. The motions of Timberline will be denied.

**I. Background**

This dispute arises from the alleged canceling of Purchase Orders by Xenotechnix for work and repairs to be performed by Timberline. (Amended Complaint ¶ 10). According to the amended complaint of Timberline, Xenotechnix had a contract with the U.S. Navy that included

performing work on the U.S. Naval ship the U.S.S. Grapple (“The Repair Project”). In 1997, pursuant to an alleged “agreement,” Xenotechnix issued three purchase orders to Martin Tractor Company (“Martin”) for work and repairs to be performed upon the U.S.S. Grapple by Timberline.<sup>1</sup> (Amended Complaint ¶¶ 6, 7, 12). Timberline alleges that from December 1997 to January 1998, it committed a number of resources to preparing for the Repair Project and turned down another job that would have conflicted with its commitment to the Repair Project. (Amended Complaint ¶ 9). According to Timberline’s amended complaint, on January 16, 1998, Xenotechnix notified Timberline and Martin that it was canceling the Purchase Orders and was hiring another party for the Repair Project. (Amended Complaint ¶ 10). According to Timberline, this action by Xenotechnix caused it to suffer damages. (Amended Complaint ¶¶ 13, 14).

Based on these facts Timberline filed an amended complaint against Xenotechnix for violations of state law.<sup>2</sup> Specifically, Timberline alleges breach of contract (Count I), anticipatory repudiation of contract (Count II), tortious interference with contract (Count III), fraud (Count IV), and promissory estoppel (Count V). Xenotechnix now moves this Court to dismiss Counts III-V and Timberline’s claims for punitive damages, arguing that the claims

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<sup>1</sup> Although not alleged in the amended complaint and not pertinent to a determination of the sufficiency of the complaint, the Court notes that Timberline represented to the District Court for the District of Northern Ohio that Xenotechnix originally solicited a bid from Timberline, but that Navy regulations required that purchase orders for the work could only be sent to authorized Caterpillar dealers. Timberline Tractor & Marine, Inc. v. Xenotechnix, Inc., No. 98-CV-0320, slip op. at 2 (N.D. Ohio Jun. 6, 1998) (Memorandum and Order granting motion to transfer to Eastern District of Pennsylvania). In order to satisfy this regulation Xenotechnix involved Martin, an authorized Caterpillar dealer, to serve as the conduit through which Navy contract funds could flow to Timberline. Id.

<sup>2</sup> In arguing this motion, the parties have applied the substantive law of Pennsylvania. It also appears that the purchase orders contained a choice of law provision and were to be governed by Pennsylvania law. Timberline, No. 98-CV-0320, slip op. at 5 (N.D. Ohio Jun. 6, 1998). Thus, I will join the parties in applying the substantive law of Pennsylvania. The parties apparently agree that they are diverse in citizenship and that subject to establishing an amount in controversy in excess of \$75, 000, 28 U.S.C. § 1332 grants subject matter jurisdiction to this Court.

asserted are not available in breach of contract actions. Xenotechnix further argues that once Counts III-V are dismissed, this Court does not have jurisdiction because the amount in controversy is less than \$75,000.

## **II. Standard for a Motion to Dismiss**

Rule 12(b) of the Federal Rules of Civil Procedure provides that “the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted.” In deciding a motion to dismiss under Rule 12(b)(6), a court must take all well pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. See Jenkins v. McKeithen, 395 U.S. 411, 421 (1969).

Generally, the Federal Rules of Civil Procedure hold claims to the standard of notice pleading. See Fed. R. Civ. P. 8(a) (stating that pleadings should contain “a short and plain statement of the claim showing that the pleader is entitled to relief”). A motion to dismiss the complaint for insufficiency of the pleadings should be denied “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley v. Gibson, 355 U.S. 41, 45-46 (1957); see also Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984).

## **III. Analysis**

### *1. Tortious Interference with Contract (Count III)*

Under Pennsylvania law, the four elements of tortious interference with contract are: “1) the existence of a contract; 2) that defendants had the purpose or an intent to harm Plaintiffs by

interfering with the contract; 3) absence of justification or privilege for the interference; and 4) damages.” Neish v. Beaver Newspapers, Inc., 581 A.2d 619, 625 (Pa. Super. 1990), allocatur denied, 593 A.2d 421 (1991). In its amended complaint, Timberline alleges that: 1) a contract existed between it and Martin; 2) that actions of Xenotechnix were intended to harm Timberline; 3) that the interference was unjustified; and 4) that Timberline suffered damages.<sup>3</sup> (Amended Complaint ¶¶ 22-26). Thus, Timberline’s tortious interference with contract claim will survive this motion to dismiss.

## 2. *Fraud (Count IV)*

Under Pennsylvania law the elements of fraud are: “1) a misrepresentation; 2) a fraudulent utterance of it; 3) the maker’s intent that the recipient be induced thereby to act; 4) the recipient’s justifiable reliance on that misrepresentation; and 5) damage to the recipient proximately caused.” Sevin v. Kelshaw, 611 A.2d 1232, 1236 (Pa. Super. 1992). In its amended complaint, Timberline alleges that: Xenotechnix misrepresented that they would be entering into the contract with Martin by stating that they would do so and by making very detailed arrangements with Timberline regarding that contract; that Xenotechnix intended for Timberline to act upon that misrepresentation; that Timberline justifiably relied on those misrepresentations and made all arrangements to complete the Repair Project including having its tools calibrated and shipped at defendants request, arranging travel and lodging and turning down a project with another company for the same time period; and that as a result Timberline suffered damages.

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<sup>3</sup> In their motion to dismiss, Xenotechnix argues that under Pennsylvania law a plaintiff may not attach tort claims to a “mere breach of contract” by the Defendant. This concept may be accurate but it is not applicable to a disposition of this count because Timberline is alleging the tort was committed to interfere with a contract between Timberline and Martin and not between Timberline and Xenotechnix.

(Amended Complaint ¶¶ 29-35).

Generally, a cause of action for fraud must allege a misrepresentation of past or present material fact: promises to do future acts do not constitute a valid fraud claim. Krause v. Great Lakes Holdings, Inc., 563 A.2d 1181, 1187 (Pa. Super. 1989). However, courts have held that a statement of present intention which is false when uttered may constitute a fraudulent misrepresentation of fact. Greto v. Radix Sys., Inc., 1994 WL 73762, at \*2 (E.D. Pa. March 10, 1994) (citing Brentwater Homes, Inc. v. Weibley, 369 A.2d 1172, 1175 (1977)); HCBC Contractors v. Rouse & Assocs., Inc., 1992 WL 176142, at \*3 (E.D. Pa. July 13, 1992) (“What is relevant under Pennsylvania law, then, is not that future performance is promised but that the present expression is honest.”). “Statements of intention, . . . which do not, when made, represent one’s true state of mind are misrepresentations known to be such and are fraudulent.” College Watercolor Group, Inc. v. William H. Newbauer, Inc., 360 A.2d 200, 206 (Pa. 1976). Here, Timberline has alleged that the misrepresentations were known to be false when made. (Amended Complaint at ¶ 31). For purposes of Federal Rule of Procedure 12(b)(6), Timberline has adequately pled that Xenotechnix’s expression of intent was not honest when made and thus fraudulent. HCBC Contractors, 1992 WL 176142, at \*3.

Federal Rule of Civil Procedure 9(b), however, requires that fraud be pled with particularity. Rule 9(b) provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” Fed. R. Civ. P. 9(b). Although allegations of date, place and time when the alleged fraud occurred are usually sufficient to satisfy the notice function of the rule, “nothing in the rule requires them.” Seville Indus. Mach

Corp. v. Southmost Mach. Corp., 742 F.2d 786, 791 (3d Cir. 1984). But, without more, bare allegations of date place or time may not satisfy the Rules further purpose of safeguarding defendants against spurious charges. See Craftmatic Sec. Litg. v. Kraftsow, 890 F.2d 628, 646 (3d Cir. 1989) (dismissing complaint that alleged with particularity the dates, speaker and actual representations in question because plaintiffs failed to “accompany their allegations with facts indicating why the charges against defendants are not baseless”).

Charges of fraud do not follow simply from the canceling of a contract, even after negotiations between the parties. See Bash v. Bell, 601 A.2d 825, 832 (Pa. Super. 1992) (a “failure to act according to [one’s] representations . . . , without more, does not rise to the level of fraud.”). Here, the representations lack the inference of fraud. Timberline must plead with particularity just what makes the representations fraudulent. HCB Contractors, 1992 WL 176142, at \*5. The amended complaint does not contain such facts or allegations. Timberline does not identify a fraudulent scheme or motive. Id. No reason for is given for Timberline’s assertion that the Xenotechnix knew its representations to be false when made. Id. Nor is there an explanation why all these facts lie within the exclusive control of the Xenotechnix. Id. Accordingly, Count IV will be dismissed with leave to amend in accordance with this Opinion, the facts, and Federal Rule of Civil Procedure 11.

### *3. Promissory Estoppel (Count V)*

The Pennsylvania Supreme Court has adopted section 90 of the Restatement (Second) of the Law of Contracts as the standard for promissory estoppel. Central Storage & Transfer Co. v. Kaplan, 410 A.2d 292, 294 (1979). Section 90 states:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.

Restatement (Second) of Contracts § 90(1). In C&K Petroleum Products v. Equibank, the Court of Appeals for the Third Circuit held that in order to state a claim for promissory estoppel under Pennsylvania law, one must allege: “(1) a promise to a promisee, (2) which the promisor should reasonably expect will induce action by the promisee, (3) which does induce such action, and (4) which should be enforced to prevent injustice to the promisee.” 839 F.2d 188, 192 (3d Cir. 1988) (citing Central Storage, 410 A.2d at 294). Here, Timberline alleges that Xenotechnix claimed it would go forward with the contract with Martin for the Repair Project and made arrangements with Timberline to that end, that Defendant knew or had reason to know that Timberline would rely on these representations, and that Timberline did expend resources and forgo other opportunities in connection with undertaking its part of the Repair Project. (Amended Complaint ¶¶ 36-40).

Under Pennsylvania law, the existence of a contract precludes recovery on a promissory estoppel theory. Greto, 1994 WL 73762, at \*5. However, the Federal Rules of Civil Procedure specifically provide for pleading in the alternative. Fed. R. Civ. Pro. 8(e)(2). A theory of promissory estoppel is an alternative theory for recovery and not merely a “branch” of Timberline’s contract claim. Id. (citing Cardamone v. Univ. of Pittsburgh, 384 A.2d 1228, 1233 n.9 (Pa. Super 1978)); see also Crouse v. Cyclops Indus., 704 A.2d 1090, 1092 (breach of contract and promissory estoppel claims went to jury with jury granting recovery only on promissory estoppel). Accordingly, the claim for promissory estoppel will not be dismissed.

#### *4. Punitive Damages*

Pennsylvania has adopted Section 908(2) of the Restatement (Second) of Torts, which specifies the conditions under which punitive damages may be awarded. Rizzo v. Haines, 555 A.2d 58, 69 (Pa. 1989). That provision permits punitive damages for conduct that is “outrageous because of the defendant’s evil motives or his reckless indifference to the rights of others.” Id. (citations omitted). Punitive damages may be awarded only if the act or omission in question is malicious, wanton, reckless, willful or oppressive. Id. In Pennsylvania, punitive damages are available for the tortious interference with contractual relationships and fraud. See Western Essex Corp. v. Casio, Inc., 674 F. Supp. 8, 9 (W.D. Pa. 1987) (tortious interference with contractual relations); Motorola v. Electronic Laboratory Supply Co., 1991 WL 12437, at \*7 n.8 (E.D. Pa. Jan. 31, 1999) (fraud).

Under Pennsylvania law, however, punitive damages are not available for a “breach of mere contractual duties.” Daniel Adams Assoc. v. Rimbach Publishing Inc., 429 A.2d 726, 728 (Pa. Super. 1981) (affirming a dismissal of a claim for punitive damages in breach of contract action); see also Iron Mountain Sec. Storage Corp. v. Am. Specialty Foods, Inc., 457 F. Supp. 1158, 1165 n.7 (E.D. Pa. 1978) (noting that the rule that punitive damages are not available for breach of contract actions “has been followed in Pennsylvania for some time”). “It is only where the defendant’s conduct gives rise to an independent tort claim that punitive damages may be available.” Western Essex, 674 F. Supp. at 9 (citing Daniel, 429 A.2d at 728). Thus, Timberline can seek punitive damages only in connection with its tort claims and not in connection with its

claims for anticipatory repudiation or promissory estoppel.<sup>4</sup>

Xenotechnix nevertheless argues that Timberline has not alleged the type of outrageous behavior to warrant the award of punitive damages in connection with any claim. It may appear, upon further development of the record, that Timberline will be unable to adduce sufficient evidence of defendant's outrageous or reckless conduct to justify an award of punitive damages under the tort claims asserted. However, at this early stage, the Court cannot conclude that Timberline can prove no set of facts to support its claim for punitive damages.

#### *5. Amount in Controversy*

The amount in controversy claimed by the plaintiff, if made in good faith, must be accepted unless it appears "to a legal certainty" that the claim is really for less than the jurisdictional amount. Spector Management Group v. Brown, 131 F.3d, 120, 122 (3d Cir. 1997) (citing St. Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289 (1938)). In its complaint, Timberline asserted a claim for compensatory damages in excess of seventy-five thousand dollars.<sup>5</sup> (Amended Complaint ¶ 42). Thus, even without considering the possible punitive damages that may be available, the Court is unable to conclude to a legal certainty that

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<sup>4</sup> The analysis for whether punitive damages are available in promissory estoppel claims is the same as for contract actions generally. Cf. Iron Mountain, 457 F. Supp. at 1165-1169 (E.D. Pa. 1978); Crouse, 704 A.2d at 1093 (court concluded that "promissory estoppel falls under the umbrella of contract law"); Daniel Adams, 429 A.2d at 728. As mentioned above, Pennsylvania has adopted section 90 of the Restatement (Second) of Contracts with respect to promissory estoppel. Comment d to section 90 clearly states that a "promise binding under this section is a contract . . ." The comment further states that "[u]nless there is unjust enrichment of the promisor, damages should not put the promisee in a better position than performance of the promise would have put him."

<sup>5</sup> Xenotechnix argues that the self executing disclosures reveal that Timberline can only recover \$58,000. In response, Timberline asserts that the disclosures demonstrate that it can recover compensatory damages of \$114,000. The disclosures have not been made available to the Court.

Timberline cannot recover compensatory damages in excess of \$75,000. See Ardrey v. Federal Kemper Ins. Co., 798 F. Supp. 1147, 1149 (E.D. Pa. 1992) (“[T]he plaintiff need only present allegations or proof that it is not clear to a legal certainty that it will not recover less than the jurisdictional amount.”) (citations omitted). The defendant’s Rule 12(b)(1) challenge will thus be denied.

#### *6. The Motions of Timberline to Strike*

The motion of Timberline to strike the motion to dismiss of Xenotechnix appears to be a reply brief and will be treated as such. The motion of Timberline to strike the response of Xenotechnix to the motion of Timberline to strike the motion to dismiss of Xenotechnix will be dismissed. Timberline argues that the response of Xenotechnix was untimely and, therefore, the Court should strike the response and grant its motion as unopposed.

First, Xenotechnix has demonstrated good cause and excusable neglect the delay in filing a response to Timberline’s first motion to strike. Dominic v. Hess Oil V.I. Corp., 841 F.2d 513 (3d Cir. 1988). Xenotechnix, as did the Court, interpreted Timberline’s motion to strike as a substantive reply to Xenotechnix’s motion to dismiss. It was only after a telephone conversation with plaintiff’s counsel that Xenotechnix understood the motion to be an independent motion requiring a response. Xenotechnix then promptly filed its response. Second, Timberline will not suffer any harm or prejudice by the Court considering the response of Xenotechnix to Timberline’s motion to strike. Third, the interests of justice and judicial economy demand that the motion to dismiss be decided on the merits rather than simply “stricken” on a procedural defect in connection with a subsequent motion raising additional arguments concerning whether the motion to dismiss should be granted. Accordingly, the motions of Timberline will be denied.

#### **IV. Conclusion**

Based on the forgoing the motion of Xenotechnix will be granted in part and denied in part. The motions of Timberline will be denied. An appropriate Order follows.

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

<b>TIMBERLINE TRACTOR &amp; MARINE, INC.,</b>	:	<b>CIVIL ACTION</b>
	:	
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	
	:	
<b>XENOTECHNIX, INC.,</b>	:	
	:	
<b>Defendant.</b>	:	
	:	<b>NO. 98-3629</b>

**ORDER**

**AND NOW** this \_\_\_\_th day of April, 1999, upon consideration of the motion to dismiss of defendant Xenotechnix, Inc. (Document No. 15) and the response of plaintiff Timberline Tractor & Marine, Inc. (“Timberline”) thereto, and the motions of Timberline to strike the motion to dismiss of Xenotechnix (Document No. 18) and to strike the response of Xenotechnix to the motion of Timberline to strike the motion to dismiss of Xenotechnix (Document No. 21), and based upon the foregoing memorandum, it is hereby **ORDERED** that:

1. The motion of defendant to dismiss Counts III and V is **DENIED**.
2. The motion of defendant to dismiss Count IV is **GRANTED** and the First Amended Complaint is hereby **DISMISSED WITHOUT PREJUDICE**. Timberline shall file a second amended complaint, if appropriate, repleading exactly the entire First Amended Complaint without any changes except for amending Count IV (and only Count IV) as instructed in the foregoing memorandum. If it does not file a second amended complaint amending Count IV by **May 17, 1999**, the First Amended Complaint (Document No.

14) shall be reinstated and will govern this action with the understanding that Count IV has been dismissed.

3. The motion of defendant to dismiss punitive damages is **GRANTED** with respect to Counts II and V, the claims for punitive damages therein are hereby **DISMISSED** and the motion is otherwise **DENIED**.
4. The motion of plaintiff to strike defendant's motion to dismiss (Document No. 18) and the motion of plaintiff to strike the response of defendant to plaintiff's motion to strike defendant's motion to dismiss (Document No. 21) are **DENIED**.

**IT IS FURTHER ORDERED** that defendant shall answer or otherwise respond to the second amended complaint, or if none is filed, answer the first amended complaint (with the exception of Count IV), no later than **June 7, 1999**.

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**LOWELL A. REED, JR., J.**