

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**  
**IN AND FOR NEW CASTLE COUNTY**

ENIGMA INFORMATION RETRIEVAL )	
SYSTEMS, INC., )	
)	
Plaintiff, )	
)	
v. )	C.A. No. 04C-06-069-FSS
)	<b>(E-filed)</b>
RADIAN, INC. and PORTAL )	
DYNAMICS, INC., )	
)	
Defendants. )	

Submitted: November 24, 2004  
Decided: February 23, 2005

**MEMORANDUM OPINION**

Upon Defendant, Radian, Inc.’s Motion to Dismiss – ***DENIED***, Without Prejudice  
And  
Upon Defendant, Portal Dynamics, Inc.’s Motion to Dismiss –  
***GRANTED***, Without Prejudice.

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Dynamics, Inc.

SILVERMAN, J.

This is a breach of contract and tortious interference case between military contractors. Defendants, Radian, Inc. and Portal Dynamics, Inc., help supply light armored vehicles to the military. Plaintiff, Enigma, was the subcontractor providing computer software for training manuals and parts catalogs. Defendants terminated Enigma, allegedly for poor performance. That precipitated this litigation.

Enigma claims approximately \$3.1 million in damages. Part of Enigma's damage claim concerns lost contract payments from Defendants. A large majority of the claim, however, concerns a side-deal between Enigma and the Marine Corps. When Defendants terminated Enigma, that killed a long-term contract under which Enigma would have provided software maintenance for the Marines. The side-deal could have run twenty-five years, or more.

Neither Defendant answered the complaint. Instead, through separate pleadings, both Defendants moved to dismiss. Portal's motion focuses on the Complaint's "inflammatory and unsubstantiated allegations" concerning damage to Enigma's "reputation and loss of business." Radian's motion focuses on Enigma's claim for the long-term, prospective income from the side-deal, which Radian argues is too speculative.

### **I.**

When considering a motion to dismiss filed under Superior Court Civil Rules 12 (f) and 12 (b)(6), the court only looks to the Complaint. During oral

argument of Defendants' motions, the parties provided background not alleged in the Complaint. Although the court will incorporate some of that for embellishment, Defendants' motions are procedurally correct and the court is only relying on the Complaint for its decision. Rule 56, which covers summary judgment, has not been triggered, yet.

Radian holds the prime contract to upgrade software for the United States Marine Corps's "Stryker," light armored vehicle. To meet its obligations to the military, Radian called in a corporate affiliate, Portal Dynamics. In turn, Portal Dynamics signed a subcontract with Enigma. Under its subcontract, Enigma was responsible for developing software to computerize training manuals and parts catalogs for the Stryker. Besides its contract with Portal Dynamics, Enigma signed a software license and maintenance agreement with the Marine Corps. Among other things, the license agreement called for Enigma to provide software maintenance for the life of the Stryker weapon system. At the heart of Radian's motion is Enigma's claim that the Stryker's projected life is until 2030.

Enigma's Complaint alleges how and why Defendants breached and terminated Enigma's subcontract. The Complaint also alleges that Radian's wrongful conduct cost Enigma its long-term license agreement with the Marines. Specifically, Enigma alleges: "Absent Radian's tortious interference, Enigma would have received

yearly maintenance fees of \$89,635 until 2030, producing income of \$2,330,510.”

Furthermore, Enigma alleges that Portal’s tortious interference cost Enigma not less than \$397,916.65. Portal also allegedly damaged Enigma’s reputation and cost Enigma business as Portal and Radian continue “to falsely represent to third parties that Enigma’s [software] was technically deficient.”

In their motions, Defendants do not ask for outright dismissal. As they must at this early stage, Defendants accept that the court will take the Complaint at face value. Accordingly, Defendant’s concede for argument’s sake that they breached the subcontract with Enigma and they also are responsible for the Marine Corps’s cancelling its long-term license and maintenance agreement with Enigma. As mentioned, Radian asks for partial dismissal of Enigma’s damage claim relating to the license agreement’s termination, because, as a matter of law, it is too speculative. As also mentioned, Portal Dynamics’ motion concerns Enigma’s claim relating to injury to Enigma’s reputation. Portal wants the Complaint redacted to eliminate any reference to damages, other than the lost side-deal, caused by defamatory conduct.

## **II.**

### **A. Radian’s Motion - - Speculative Damages**

Radian offers three ways that Enigma’s claim is too speculative. First, Enigma points out that government contracts can be canceled for many reasons,

including cancellation for the government's convenience. Radian also argues that Enigma's contract concerns software maintenance and Enigma "has not and can not plead facts supporting the conclusion that its *software* will still be used in twenty-five years from now." (Emphasis in original.)

Finally, Radian argues that Enigma's contract prohibited Enigma from contacting the Marine Corps directly, without Defendant's permission. Defendants allege that they did not give Enigma permission to sign a long-term license agreement and they cannot be held liable for interfering with that deal.

Radian's dispositive motion is premature. The court appreciates Radian's points. For example, the court understands that government contracts can be cancelled for many reasons, including failure to fund the weapon systems. Furthermore, weapon systems can be cancelled for the government's convenience.<sup>1</sup>

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<sup>1</sup> See, e.g., *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320 (Fed. Cir. 2003)(holding profits associated with future contracts that contractor alleged it would have been awarded absent government's breach were too remote and uncertain to be recoverable); *McDonnell Douglas Corp. v. United States*, 323 F.3d 1006 (Fed. Cir. 2003); *Krygoski Construction Co. v. United States*, 94 F.3d 1537 (Fed. Cir. 1996); *Municipal Leasing Corp. v. United States*, 7 Cl. Ct. 43 (1984); *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982)(explaining termination for convenience); *G.L. Christian and Associates v. United States*, 312 F.2d 418, 423 (Ct. Cl. 1963)(discussing recovery for anticipated profits when Government breaches); William E. Connor, *From Torncello to Krygoski: 25 Years of the Government's Termination for Convenience Power*, 7 FED. CIRCUIT B. J. 337, 341

(continued...)

And the court is immediately troubled by Enigma's claim for lost "payments" from the Marine Corps. The court cannot see how Enigma is entitled to twenty-five years of payments without having to provide anything in return. At most, Enigma may have a claim for lost profits.

Similarly, the court understands that some weapon systems can last for decades. The Browning M2 machine gun was introduced in the 1930's, over 80 years ago. The Boeing B-52 bomber entered service 50 years ago. Armor can last, too. The General Dynamics M1 Abrams battle tank entered service 30 years ago. The Stryker is a relatively new asset. Enigma may be able to prove that the Stryker probably will be in service twenty-five years from now. Even so, it is difficult to see how Enigma will prove that its software will also be in service then.

The B-52 and the Abrams, for example, have undergone many upgrades to keep them serviceable. It is hard to imagine that the Stryker and its software will not be constantly upgraded during the weapon system's life. Perhaps Enigma can demonstrate there is something special about military software. But civilian software seems to become outdated very quickly. (In its experience, the court's software

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<sup>1</sup>(...continued)

(discussing limitations on government's ability to terminate for convenience); Marc A. Pederson, *Rethinking the Termination for Convenience Clause in Federal Contracts*, 31 PUB. CONT. L. J. 83 (Fall 2001).

seems to become dated almost immediately after the court learns how to use it.) The contract in this case, itself, is an upgrade. Nevertheless, the court cannot declare, as Radian argues it should, that Enigma's expectations are "patently unreasonable."

Radian relies primarily on *Rumsfeld v. Freedom NY, Inc.*, noted above, to support its position that Enigma's damages claim is too speculative. *Rumsfeld* may yet carry the day, but not now. *Rumsfeld* not only came after all the evidence was in, it followed formal fact-finding by an administrative agency. Today, the court is considering a dispositive motion to a complaint. So, at the moment, *Rumsfeld* is not helpful.

The court must assume that Enigma will present experts to testify about reasonable expectations relating to government contracts and the Stryker in general, as well as the Stryker's software in particular. The court anticipates that license agreements like Enigma's have some reasonably ascertainable value, albeit a discounted one. Moreover, time has passed since the alleged breach. The intervening time and events may form a concrete basis for lost profits caused by the alleged breach and tortious interference. All of this also assumes, however, that Enigma can prove that Defendants breached the subcontract without justification, which remains to be seen. If, after discovery, Radian continues to believe that Enigma cannot prove its damages with specificity, Radian will have leave to raise its claims again through

a summary judgment motion. The court also is willing to reconsider Radian's claim that Radian was entitled to interfere with Enigma's side-deal because Enigma failed to seek Radian's permission before Enigma approached the Marines.

### **B. Portal Dynamics' Contentions – Damage to Enigma's Reputation**

Despite the Complaint's loose talk about damage to Enigma's reputation, the Complaint does not allege nor establish a case in defamation. Enigma conceded as much at oral argument. Enigma's allegations concerning its reputation relate to damages flowing from Portal's interference with the license and maintenance agreement between Enigma and the Marine Corps.

The court is satisfied that, as the Complaint is drafted, Enigma's allegations concerning lost business other than with the Marine Corps do not pass muster under Rule 12. Enigma lays out a potential case, albeit fraught with potential shortcomings, concerning the demise of Enigma's business relationship with the Marine Corps. If Defendants interfered with other business relationships, Enigma will have to restructure its Complaint to make it plain. As it stands, any broader implication is conclusory and merely make-weight.

### **III.**

For the foregoing reasons, Radian's Motion to Dismiss is ***DENIED***, without prejudice. Radian has leave to renew the motion under Rule 56 when



