

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

DECISIVEDGE, LLC,)
)
 Plaintiff,)
)
 v.) C.A. No.: N17C-05-584 WCC CCLD
)
 VNU GROUP, LLC,)
)
 Defendant.)

Submitted: November 6, 2017
Decided: March 19, 2018

Defendant’s Motion to Dismiss - GRANTED IN PART, DENIED IN PART

MEMORANDUM OPINION

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CARPENTER, J.

I. FACTUAL & PROCEDURAL BACKGROUND

In April 2016, Shane Flynn, a consultant for VNU Group, LLC (“VNU” or “Defendant”) contacted DecisivEdge, LLC (“DecisivEdge” or “Plaintiff”) inquiring about their interest in providing technology services “to improve and stabilize VNU’s technology platforms.”¹ The parties entered into a formal agreement composed of a series of agreements including a Master Services Agreement, four Statements of Work, a Master Technology Agreement and two Work Plans.² The Master Services Agreement (“MSA”) and the first Statement of Work (“SOW 1”) were executed on April 15, 2016, while the second Statement of Work (“SOW 2”) was executed on April 22, 2016.³ Several months later, the parties executed two additional Statements of Work on August 11, 2016 (“SOW 3” and “SOW 4”).⁴ Following these new Statements of Work, the parties executed a Master Technology Agreement (“MTA”) on September 29, 2016, and the first Work Plan (“WP 1”) was executed the day after on September 30, 2016.⁵ The second Work Plan (“WP 2”), the final agreement, was not executed until January 10, 2017.⁶ Together these agreements form the parties complete contract (“Agreement”).

¹ Am. Compl. ¶ 9.

² *Id.* at ¶¶ 12–13.

³ *Id.* at ¶¶ 23, 25.

⁴ *Id.* at ¶ 29.

⁵ *Id.* at ¶¶ 48, 62.

⁶ *Id.* at ¶¶ 49.

A. MSA and SOWS

The MSA is a form contract for Plaintiff's services as a general consultant and professional services provider. The MSA outlines the basic terms of the Agreement, such as term and termination, facilities and equipment, payment, fees, insurance, and liability.⁷ The MSA incorporates by reference the SOWs stating that:

[Plaintiff] shall provide to [Defendant] the consulting and professional services . . .described in one or more statements of work...executed by both parties from time to time during the Term (as defined in Section 9.1). Each such Statement of Work shall be subject to the terms and conditions of this [MSA]. In the event of any conflict between the terms of this [MSA] and a Statement of Work, the terms of this [MSA] shall govern, unless the Statement of Work expressly references the conflicting provision in this [MSA] and provides that the provision in the Statement of Work shall govern.⁸

The MSA created a renewable one-year term with a start date of "earlier of the date of this [MSA] or the earliest beginning date of a Statement of Work."⁹ The MSA was subject to automatic renewal unless "either party [gave] notice of termination of this [MSA] to the other party at least sixty (60) days prior to the date on which this [MSA] would otherwise renew."¹⁰ It also limited each party's potential liability for consequential, incidental, punitive, special, exemplary, or indirect damages to situations where a party engaged in willful misconduct or was grossly negligent.¹¹

⁷ Pl.'s Am. Ex. 1 §§ 2–3, 11.2 & 12 [hereinafter "MSA"].

⁸ MSA § 1.1.

⁹ *Id.* at § 9.1.

¹⁰ *Id.*

¹¹ *Id.* at § 12.

It is undisputed that the MSA was intended to be a general agreement establishing the basic provisions, while the SOWs provided the specific details of the agreed-upon projects to help “assess and, ultimately, remodel VNU’s technological platforms and processes.”¹² According to the Complaint, each SOW contained at a minimum the following information: “(i) contact persons for that specific project, (ii) the services to be provided; (iii) deliverables; (iv) schedule; (v) specifications for deliverables; (vi) termination and completion dates; (vii) fees; and (viii) payment terms.”¹³

The parties agree the following duties were outlined in the four SOWs. SOW 1 required Plaintiff to produce “(i) an assessment of VNU’s technology and data platforms; (ii) validation of VNU’s compliance capabilities; (iii) a gap analysis; and (iv) development of a roadmap for remediation of any issues identified.”¹⁴ SOW 2 required Plaintiff to “assess and support the operations and vendor management functions at VNU.”¹⁵ SOW 3 required Plaintiff “to provide quality assurance resources, and to perform manual testing of VNU’s retail website.”¹⁶ Finally, SOW 4 requires the Plaintiff to:

develop an information security plan; develop an application infrastructure plan; develop a release management process document; provide a managed service resource; develop and implement an initial

¹² Am. Compl. ¶ 19.

¹³ *Id.* at ¶ 21.

¹⁴ *Id.* at ¶ 24.

¹⁵ *Id.* at ¶ 25.

¹⁶ *Id.* at ¶ 27.

data warehouse and report to support VNU's lending activities; develop a conceptual design for a data warehouse; determine data warehouse infrastructure requirements; develop the initial data model; evaluate historical data availability; and create a reporting structure.¹⁷

Presently, only SOW 3 and SOW 4 are in dispute.

B. MTA and WPs

In September 2016, the parties executed the MTA which outlined a series of new projects.¹⁸ The MTA continued to utilize Plaintiff's services for technology organization but also required Plaintiff to create and implement a Technology Roadmap Report.¹⁹ The parties hoped to achieve "(i) stability of the current retail platform through the 2016 peak season; and (ii) that the platforms and environment are sufficiently capable, scalable and continue to evolve in order to support the stated business growth."²⁰ The specific services Plaintiff would need to provide in order to reach these goals were outlined in WP 1 and WP 2.²¹

Like the MSA, the MTA includes a limitation of liability provision which modifies and deletes the applicability of the MSA provision. The new limitation of liability provision states "[s]olely with respect to this Statement of Work, the [MSA]

¹⁷ *Id.* at ¶ 30.

¹⁸ It is important to note that, throughout the parties' pleadings, the MTA is referred to as another SOW.

¹⁹ The Technology Roadmap was originally created in June 2016 but was amended in September 2016, however no copy has been provided. Am. Compl. ¶¶ 32–33.

²⁰ Pl.'s Am. Ex. 6 § 1[hereinafter MTA].

²¹ Am. Compl. ¶¶ 35–36. The parties identified 8 specific work plans.

shall be modified to delete Section 12 in its entirety and replace it with the following:²²

EXCEPT WITH RESPECT TO CONSULTANT'S INDEMNITY OBLIGATIONS UNDER SECTION 8.1 (SOLELY AS IT RELATES TO CONSULTANT'S LIABILITY AS A RESULT OF BODILY INJURY TO OR DEATH OF ANY PERSON CAUSED BY THE NEGLIGENCE OF CONSULTANT), 8.2 AND 8.3 OF THE AGREEMENT OR EITHER PARTY'S GROSS NEGLIGENCE OR WILLFUL MISCONDUCT, NEITHER PARTY SHALL BE LIABLE FOR ANY CONSEQUENTIAL, INCIDENTAL, PUNITIVE, SPECIAL, EXEMPLARY OR INDIRECT DAMAGES (INCLUDING LOSS OF PROFITS OR BUSINESS OPPORTUNITY) ARISING OUT OF THIS AGREEMENT, EVEN IF IT IS ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.²³

The MTA also provides for early termination by Defendant and any applicable fees that may follow.²⁴ Section 19 of the MTA states:

In the event VNU desires to terminate this Statement of Work for convenience prior to completion of the Work Plan for Work Period 7, in addition to amounts payable with respect to Services that have already been performed, VNU will pay Consultant a termination fee equal to the fees for one subsequent Work Period calculated based upon the average of the fees paid for each of the previous three Work Periods or, if there have not been three Work Periods completed, the average fees for each of the previous Work Periods which have been completed. In the event such termination occurs prior to completion of Work Period 1, then such termination fee shall be calculated by multiplying the average monthly fees paid during Work Period 1 by three. Such termination fee shall be Consultant's sole and exclusive remedy for such early termination pursuant to this Section 19. For clarity, no

²² MTA § 20.

²³ MTA § 20(a)–(b).

²⁴ “The monthly fees set forth in each Work Plan shall be paid in two equal monthly installments, with the first payment being paid on the 5th of each month and the second on the 20th of each month (or the first bank business day thereafter), provided that Consultant has provided the relevant invoices for such payments to VNU within 10 days prior to each such date.” *Id.* at § 13.

termination fee shall be owed by VNU for any termination for cause or the exercise of any other termination rights set forth in this Statement of Work or any Work Plan.²⁵

WP 1 “covered the initial work period described in the MTA,”²⁶ and was the execution phase in the Roadmap.²⁷ WP 1 required Plaintiff “to complete projects in seven areas: (1) project management; (2) business analysis; (3) manual QA for current retail site; (4) QA for project UXBRIDGE; (5) release management and DevOps; (6) information security; and (7) data warehouse, reporting and business intelligence.”²⁸ A few months later the parties executed WP 2 where Plaintiff “was to develop a database environment, reports and dashboards in close collaboration with VNU, and develop ETL processes to support back office automation.”²⁹ WP 2 was intended to cover a three month period from December 2016 to end of February 2017.

Both WP 1 and WP 2 provided for specific payment dates. WP 1 provided that Plaintiff must invoice Defendant for agreed upon fixed fees on five set dates, the last of which was November 15, 2016.³⁰ WP2 provided that Plaintiff must invoice the Defendant for agreed upon fixed fees on three set dates, the last of which

²⁵ *Id.* at §19.

²⁶ Am. Compl. ¶ 45.

²⁷ *Id.* at ¶ 46.

²⁸ *Id.* at ¶ 48; Pl. Am. Ex. 7 § 2 [hereinafter WP 1].

²⁹ Pl. Am. Ex. 7 § 2 [hereinafter WP 2].

³⁰ WP 1 § 7.

was February 28, 2016.³¹ Payment for all invoices from WP 1 and WP 2 were due within 15 days.³²

C. Performance of Agreement

Plaintiff began its work for Defendant on April 15, 2016, according to SOW 1. Due to the large scope of Defendant's projects, Plaintiff simultaneously began to work on each of the statements of work and work plans as they were executed.³³ Plaintiff alleges "[o]n multiple occasions in early-September 2016, VNU unilaterally altered the scope of work set forth in the Work Plans and Statements of Work."³⁴ During this time, the Plaintiff alleges the Defendant failed to make timely payments for outstanding invoices and execute agreements. Plaintiff cites September 13, 2016 as one of many specific representations made by VNU executives. On this date, Chief Financial Officer Ed Le Feuvre ("Feuvre"), made a written promise to address Plaintiff's outstanding invoices.³⁵

Because of these shortcomings and alterations to the scope of work, Plaintiff did not immediately send Defendant invoices for WP1, WP2, and SOW 3, but continued to timely and satisfactorily complete SOW 1 and SOW 4.³⁶ In order to complete certain projects, Plaintiff invested its own funds and purchased certain

³¹ WP 2 § 7.

³² Note, the first payment for WP 1 was due upon receipt.

³³ Am. Compl. ¶ 52.

³⁴ *Id.* at ¶ 53.

³⁵ *Id.* at ¶ 84.

³⁶ *See id.* at ¶ 56.

software and tools, with the belief that Defendant would eventually reimburse the costs.³⁷ While Plaintiff continued to complete the agreed-upon projects and enter into new work plans (specifically WP 1 and WP 2), Defendant was receiving “significant payables to outside vendors and service providers,”³⁸ which hindered Defendant’s ability to pay Plaintiff.

In fact, as of October 19, 2016, Defendant had not paid at least seven past due invoices and the two parties engaged in discussions about payment.³⁹ Plaintiff provided Defendant the Deliverable Progress Report which outlined past and upcoming fees and certain grievances it had with Defendant.⁴⁰ Less than a month after receiving the Deliverable Progress Report, Defendant asked Plaintiff to cease all projects in WP 1 except for the creation of a data warehouse.⁴¹ Plaintiff asserts that Defendant at the same time represented that VNU could meet its payment obligations.⁴²

Soon after Defendant asked the Plaintiff to stop most of WP 1 projects, Defendant’s Chief Executive Officer, Ron Drori (“Drori”), promised DecisivEdge’s Chief Executive Officer, Navroza F. Eduljee (“Eduljee”), if Plaintiff continued to

³⁷ *See id.* at ¶ 58 (Plaintiff “purchased test automation software and a business intelligence tool...”).

³⁸ *Id.* at ¶¶ 57–59, 83.

³⁹ Am. Compl. ¶ 63.

⁴⁰ *Id.* at ¶ 69.

⁴¹ *Id.* at ¶ 70.

⁴² *Id.* at ¶ 71.

complete the projects, Defendant would pay its outstanding debt in “three installments in November and December 2016.”⁴³ Despite Defendant’s prior failures to make timely payments, Plaintiff agreed and began working on WP 1 and SOW 4, and even executed and began to complete WP 2.⁴⁴

It is alleged by Plaintiff that “[i]n late-January 2017, to induce DecisivEdge to continue working, Drori invited VNU’s Chief Financial Officer, [Feuvre] to join a conference call with Eduljee, and purportedly instructed him to make a \$50,000 payment.”⁴⁵ Plaintiff asserts that Defendant never made such payment, but it continued to work on the existing projects. Plaintiff continued to send invoices to Defendant for its work through March 28, 2017.⁴⁶ All of which the Defendant has failed to pay. Plaintiff asserts that Defendant knew it could not timely pay for these services and misrepresented to Plaintiff on multiple occasions it was a financially solvent company.⁴⁷

After repeated, unfulfilled promises to pay outstanding invoices and a total lack of communication after receiving the work under WP 2, Plaintiff asserts that Defendant has voluntarily terminated the MTA within the meaning of Section 19 of the MTA.⁴⁸ As a result, Plaintiff filed the instant action on May 24, 2017. Plaintiff

⁴³ *Id.* at ¶¶ 70–72.

⁴⁴ *Id.* at ¶¶ 71,73.

⁴⁵ *Id.* at ¶ 87.

⁴⁶ Am. Compl. ¶ 75.

⁴⁷ *Id.* at ¶¶ 78–91.

⁴⁸ *Id.* at ¶¶ 105–06.

asserts the Defendant breached the MTA (Count 1), SOW 4 (Count II), WP 1(Count III), WP 2 (Count IV), as well as the implied covenant of good faith and fair dealing (Count VI).⁴⁹ Plaintiff also asserts the Defendant fraudulently induced the Plaintiff to enter into WP 1, WP 2, SOW 3, and SOW 4 (Count V) and is seeking compensatory and consequential damages, punitive damages, lost profits, interest and costs. In response to Plaintiff’s Complaint, Defendant filed a Motion to Dismiss all claims in the Complaint. Plaintiff later amended the Complaint and Defendant filed a subsequent Motion to Dismiss the Amended Complaint to dismiss Count I, Count V, Count VI, and to preclude Plaintiff “from seeking lost profits and consequential and punitive damages.”⁵⁰ This is the Court’s decision on the pending matters.

II. STANDARD OF REVIEW

In considering the Motion to Dismiss for failure to state a claim filed pursuant to Rule 12(b)(6), the Court must assume the truthfulness of the Complaint’s well-pleaded allegations,⁵¹ and afford Plaintiffs “the benefit of all reasonable inferences

⁴⁹ In the original complaint this count was mislabeled Count III but was changed in Amended Complaint.

⁵⁰ Def.’s Mot. to Dismiss at 10.

⁵¹ See *Solomon v. Pathe Commc’ns Corp.*, 672 A.2d 35, 38–39 (Del. 1996). See also *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003) (noting that the complaint is to be liberally construed and under “Delaware’s judicial system of notice pleading, a plaintiff need not plead evidence” but must “only allege facts that, if true, state a claim upon which relief can be granted”).

that can be drawn from [their] pleading.”⁵² Certain documents that are “integral to a plaintiff’s claims... may be incorporated by reference without converting the motion to a summary judgment.”⁵³ At this preliminary stage, dismissal will be granted only when the Court is able to determine with “reasonable certainty” that Plaintiffs would not be entitled to relief “under any set of facts that could be proven to support the claims asserted” in the Complaint.⁵⁴

III. DISCUSSION

Defendant seeks to dismiss Counts I, V, and VI of Plaintiff’s Amended Complaint for failure to state a claim and failure to plead fraud with particularity.⁵⁵ Defendant also urges the Court to find that Plaintiff is contractually foreclosed from seeking lost profits as well as consequential and punitive damages.⁵⁶ At the hearing for Defendant’s Motion to Dismiss, the Court partially resolved Count V fraudulent inducement in regards to SOW 3 and SOW 4.⁵⁷ The Plaintiff conceded that the alleged misrepresentations made by the Defendant postdated both SOW 3 and 4.⁵⁸ Specifically, both SOW 3 and SOW 4 were executed on August 11, 2016 while the

⁵² See *In re USACafes, L.P. Litig.*, 600 A.2d 43, 47 (Del. Ch. 1991) (noting, however, that the Court is not required to blindly accept all allegations or draw all inferences in a plaintiff’s favor).

⁵³ See *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *3–4 (Del. Super. Ct. Apr. 16, 2014).

⁵⁴ See *id.* (citing *Clinton v. Enter. Rent–A–Car Co.*, 977 A.2d 892, 895 (Del. 2009)).

⁵⁵ Def.’s Mot. to Dismiss at 2.

⁵⁶ *Id.*

⁵⁷ Motion to Dismiss Hearing, Nov. 6, 2017.

⁵⁸ *Id.*

Defendant's first alleged misrepresentation did not occur until September 13, 2016.⁵⁹

Because the misrepresentation occurred after the contract had been executed, Plaintiff's fraudulent inducement claims as to SOW 3 and 4 fail as a matter of law.

The Court will now turn to the remaining claims.

A. Count I Breach of Contract

To survive a motion to dismiss for failure to state a breach of contract claim, a plaintiff must allege (1) the existence of a contract; (2) the breach of an obligation imposed by that contract; and (3) resulting damage.⁶⁰ The parties do not dispute the existence of the MTA, rather the parties disagree if the early termination provision of the MTA is enforceable and entitles Plaintiff to early termination fees.⁶¹ Section 19 of the MTA outlines the disputed early termination fees and states:

[i]n the event VNU desires to terminate this Statement of Work for convenience prior to completion of the Work Plan for Work Period 7, in addition to amounts payable with respect to Services that have already been performed, VNU will pay Consultant a termination fee equal to the fees for one subsequent Work Period calculated based upon the average of the fees paid for each of the previous three Work Periods or, if there have not been three Work Periods completed, the average fees for each of the previous Work Periods which have been completed. In the event such termination occurs prior to completion of Work Period 1, then such termination fee shall be calculated by multiplying the average monthly fees paid during Work Period 1 by three. Such termination fee shall be Consultant's sole and exclusive remedy for such early termination pursuant to this Section 19. For clarity, no termination fee shall be owed by VNU for any termination for cause or

⁵⁹ *Id.*

⁶⁰ See *VLIW Tech., LLC*, 840 A.2d at 612.

⁶¹ Def.'s Mot. to Dismiss at 10; Pl.'s Answ. Br. in Opp. to Def. Mot. to Dismiss at 15.

the exercise of any other termination rights set forth in this Statement of Work or any Work Plan.⁶²

Plaintiff argues that the Defendant voluntarily terminated the MTA by ceasing all communications with Plaintiff, breaching Section 5 of the MTA, which required them to try to work things out, therefore triggering early termination fees outlined in Section 19 of the MTA.⁶³ Defendant, on the other hand, refutes any obligation to pay early termination fees because Delaware “contract law [only] allows parties to establish only a good faith estimation of actual damages sustained as a result of a contract’s termination.”⁶⁴ In fact, “[i]f the damages are easily ascertainable or the amount fixed is excessive, that is, not a reasonable estimate of damages, [and] the provision is void.”⁶⁵

For the Court to determine the validity of Section 19, it must review what appears to be the intent of the parties to the contract.⁶⁶ If their communications reflect an intent that the Section 19 payments would be a penalty for early termination, it is legally unenforceable because contract law does not allow parties to impose a penalty for such event. However, if the parties sought to establish a good faith estimation of damages which would be otherwise difficult to ascertain, such a

⁶² MTA § 19.

⁶³ Am. Compl. ¶¶ 111–121.

⁶⁴ Def.’s Mot. to Dismiss at 11.

⁶⁵ *See id.* at 12.

⁶⁶ *Delaware Bay Surgical Services, P.A. v. Swier*, 900 A.2d 646, 650 (Del. 2006).

provision is valid and enforceable.⁶⁷ To make this determination, the Court must apply the following two-part test:

a stipulated sum is for liquidated damages when (1) the damages which the parties might reasonably anticipate are difficult to ascertain (at the time of contracting) because of their indefiniteness or uncertainty, and (2) the amount stipulated is either a reasonable estimate of the damages which would probably be caused by the breach or is reasonably proportionate to the damages which have actually been caused by the breach.⁶⁸

“It matters not whether actual damages are proven, or that the liquidated damages are substantially larger than the actual damages, so long as the liquidated damages were a reasonable estimate of the damages which would be caused.”⁶⁹

As stated above, Defendant asserts that Section 19 is void because Plaintiff’s damages for early termination are easily ascertainable and the amounts to be paid for each work period could not be clearer, as it is laid out in Section 12 of the MTA.⁷⁰

⁶⁷ In *Delaware Bay Surgical Services, P.A. v. Swier*, the Delaware Supreme Court differentiated a penalty from a liquidated damages claim. “Liquidated damages are a sum to which the parties to a contract have agreed, at the time of entering into the contract, as being payable to satisfy any loss or injury flowing from a breach of their contract. It is, in effect, the parties' best guess of the amount of injury that would be sustained in a contractual breach, a way of rendering certain and definite damages which would otherwise be uncertain or not easily susceptible of proof. By contrast, a “penalty” is a sum inserted into a contract that serves as a punishment for default, rather than a measure of compensation for its breach. In other words, it is an agreement to pay a stipulated sum upon breach, irrespective of the damage sustained. The distinction between a penalty and a liquidated damages clause is significant—if a provision is considered a penalty, it is void as against public policy and recovery is limited to actual damages; if the provision is a true liquidated damages provision, it will be enforced according to its terms.” *Id.*

⁶⁸ *S.H. Deliveries, Inc. TriState Courier & Carriage, Inc.*, 1997 WL 817883, at *2 (Del. Super. Ct. May 21, 1997).

⁶⁹ *Piccotti's Restaurant, Inc. v. Gracie's, Inc.*, Del. Super. Ct., C.A. No. 86C-MR-115, Babiarz, J. (Feb. 23, 1988).

⁷⁰ MTA §12.

Defendant relies on Delaware contract law as support and states that Section 19 does not seek to make “a good faith estimation of actual damages” but attempts to punish the Defendant for early termination.⁷¹

While citing the same good faith language as Defendant, Plaintiff argues that the fees imposed in Section 19 are enforceable because the fee itself is reasonable as losses and damages are not easily ascertainable.⁷² This is because the amount of services and work Plaintiff initially believed that the Defendant would require as a tech-savvy company was underestimated.⁷³ Plaintiff claims the Defendant’s “data and technology platforms were in disarray”⁷⁴ and the course of action to help improve Defendant’s platform would require “the parties ‘to work together to determine an appropriate baseline staffing...’”⁷⁵ Plaintiff argues the inherent uncertainty in the Defendant’s needs makes it difficult to ascertain damages for early termination. Plaintiff also suggests Section 19 is rather common in Delaware contracts “to reimburse the non-terminating party for expenditures and for lost opportunities.”⁷⁶ Plaintiff argues that the termination fee is *prima facie* reasonable as the fees from Section 19 are a fraction of the total amount Defendant owes

⁷¹ Def.’s Mot. to Dismiss at 11.

⁷² Pl.’s Answ. Br. in Opp. to Def. Mot. to Dismiss at 16.

⁷³ *See id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 15.

Plaintiff.⁷⁷ Finally, Plaintiff argues that a determination of the validity of Section 19 is a fact-sensitive inquiry that is “not appropriate for determination on a motion to dismiss.”⁷⁸

Here the Court agrees with Plaintiff. At the moment, the Court has nothing more than arguments of counsel to support a finding that either the early termination fee is reasonable based on the alleged difficulty of ascertaining damages or whether that provision is more accurately characterized as a penalty unrelated to the damages actually sustained by Plaintiff. Counsel will need to explore this issue further in discovery and gather facts to support their positions. While it is the Court’s impression that the amounts due under the contracts are clear and the relevance of the arguments made by Plaintiff regarding their underestimation of the state of Defendant’s technology is suspect, the Court will not at this time dismiss this provision of the Contract. It simply is not in a position to find the termination fee unenforceable without additional discovery by the parties. Therefore, Defendant’s Motion to Dismiss Count I is Denied.

B. Count V Fraudulent Inducement

Defendant asserts that Plaintiff’s fraud claim must fail because it (1) does not satisfy the particularity requirements of Superior Court Civil Rule 9(b), (2) Plaintiff

⁷⁷ *See id.* at 17.

⁷⁸ *Id.*

cannot establish there was justifiable reliance on Defendant's representations, and (3) Plaintiff is simply bootstrapping a breach of contract claim into a fraud claim.⁷⁹ As Plaintiff agreed at oral arguments that there were no alleged fraudulent representations made to induce them to enter into SOW 3 and SOW 4, the Court will focus on the viability of Plaintiff's fraudulent inducement claims for WP 1 and WP 2.

In order to survive a motion to dismiss a fraudulent inducement claim, the Plaintiff is required to plead facts supporting the inference that (1) Defendant made "a false representation, usually one of fact;" (2) Defendant knew its "representation was false, or was made with reckless indifference to the truth;" (3) Defendant intended to induce Plaintiff "to act or to refrain from acting;" (4) Plaintiff's action or inaction was "taken in justifiable reliance upon the representation;" and (5) Defendant caused damage to Plaintiff as a result of such reliance.⁸⁰

Superior Court Civil Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."⁸¹ The particularity pleading standard requires a plaintiff to plead "the time, place and contents of the false representations."⁸² However, "[m]alice, intent,

⁷⁹ Def.'s Mot. to Dismiss at 1–2.

⁸⁰ See *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 472 (Del. 1992).

⁸¹ Super. Ct. Civ. R. 9(b).

⁸² *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5966726, at *6 (Del. Super. Ct. Sept. 25, 2015) (citing *Universal Capital Mgmt., Inc. v. Micco World, Inc.*, 2012 WL 1413598, at *2 (Del. Super. Ct. Feb. 1, 2012) (internal quotation omitted)).

knowledge, and other condition of mind of a person may be averred generally.”⁸³

Having reviewed the Complaint and the briefs in this matter, the Court is convinced that Plaintiff has sufficiently alleged facts that if proven would meet a claim for fraudulent inducement. The allegations are made with sufficient particularity, are ones of material fact not statements of future performance, and certainly, Plaintiff relied upon the statements of Defendant in continuing to perform its contractual obligations.⁸⁴ The critical issue for the Court at this juncture is whether this is simply a contract dispute which Plaintiff is attempting to cast in a fraudulent light and thus is an impermissible bootstrapping of its breach of contract claim.

A fraud claim can be based on representations found in a contract; however, “where an action is based entirely on a breach of the terms of a contract between the parties, and not on a violation of an independent duty imposed by law, a plaintiff must sue in contract and not in tort.”⁸⁵ Under Delaware law, a plaintiff “cannot ‘bootstrap’ a claim of breach of contract into a claim of fraud merely by alleging that

⁸³ *See id.* (quoting Super. Ct. Civ. R. 9(b)).

⁸⁴ The Court has doubts whether Plaintiff’s reliance upon Defendant’s statements would be considered reasonable in light of Defendant’s continued failure to timely pay invoices in spite of the statements of their intent to do so. However, at this juncture in the litigation the Court will not dismiss Count V on this basis. This issue is normally a question of fact for the jury and not the Court to decide and it finds that the assertions in the Complaint are sufficient.

⁸⁵ *Ameristar Casinos v. Resorts Int’l Holdings, LLC*, 2010 WL 1875631, at *11 (Del. Ch. May 11, 2010); *Midland Red Oak Realty, Inc. v. Friedman, Billings & Ramsey & Co.*, 2005 WL 445710, at *3 (Del. Super. Feb. 23, 2005).

a contracting party never intended to *perform* its obligations.”⁸⁶ In other words, “a plaintiff cannot state a claim for fraud simply by adding the term ‘fraudulently induced’ to a complaint.”⁸⁷ “Essentially, a fraud claim alleged contemporaneously with a breach of contract claim may survive, so long as the claim is based on conduct that is separate and distinct from the conduct constituting breach.”⁸⁸ Allegations that are focused on *inducement* to contract are not barred by the bootstrapping doctrine.⁸⁹ However, allegations “...focused on inducement of continued performance are generally impermissible.”⁹⁰

Unfortunately, the Court has seen a continuing line of litigation that attempts to smear the line of when a fraudulent inducement claim is appropriate. Whether intentional or not, this creates a sinister overtone to the contract dispute and has the effect of placing Defendant in a dishonest or untrustworthy light, which moves the litigation beyond a contract dispute between business entities. This clearly creates a litigation advantage for Plaintiff which is often unfair and inappropriately prejudicial to Defendant. As such, while there are facts under which a fraud allegation is

⁸⁶ *Furnari v. Wallpang, Inc.*, 2014 WL 1678419, at *8 (Del. Super. Ct. Apr. 16, 2014) (quoting *Narrowstep Inc. v. Onstream Media Corp.*, 2010 WL 5422405, at *15 (Del. Ch. Dec. 22, 2010)) (emphasis added).

⁸⁷ *MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455, at *17 (Del. Ch. Dec. 30, 2010).

⁸⁸ *Furnari*, 2014 WL 1678419, at *8 (internal quotations omitted).

⁸⁹ *See Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554, at *16–17 (Del. Ch. Nov. 19, 2013); *Brasby v. Morris*, 2007 WL 949485, at *6–7 (Del. Super. Ct. Mar. 29, 2007).

⁹⁰ *Hiller & Arban*, 2016 WL 3678544, at *4 (Del. Super. Ct. July 1, 2016).

appropriate, the above effects make it important that the Court act as a critical gatekeeper to review the allegations set forth in the Complaint to ensure they clearly reflect that the fraud was perpetrated to induce Plaintiff to enter into the contract and not simply ones to induce their continued performance.

When the Court here carefully reviews Plaintiff's Complaint, it finds there is at most a general assertion that Defendant induced Plaintiff to enter into WP 1 and WP 2 knowing they could not pay for the services being provided by Plaintiff.⁹¹ However, a closer review reveals that the only specific allegations of inducement all relate to conversations that occurred in November of 2016,⁹² or between November of 2016 and March of 2017.⁹³ The only alleged representation in close proximity to the execution of WP 1 is the statement found in paragraph 84 of the Complaint that simply states:

84. On September 13, 2016 Feuvre made a written promise that VNU would address DecisivEdge's outstanding invoices.⁹⁴

Defendant's vague "promise" of payment, when the outstanding amount was significant and had not been paid promptly for some time is simply not sufficient to support that it would have induced Plaintiff to enter into WP 1. Accordingly, the Court will grant Defendant's Motion to Dismiss Count V as it relates to WP 1. The

⁹¹ Am. Compl. ¶ 60.

⁹² *Id.* at ¶¶ 71–72.

⁹³ *Id.* at ¶¶ 85–88.

⁹⁴ *Id.* at ¶ 84.

allegations around WP 2 which was executed on January 10, 2017 are not as clear to the Court. Plaintiff alleges on eleven separate occasions between November 22, 2016 and March 14, 2017 that Defendant promised to pay the outstanding invoices.⁹⁵ While the Court has continued concerns that these statements were simply made to induce continued performance, the litigation is in its early stages and discovery may place these communications in a different light. Since it appears that some of the statements may have occurred before the execution of WP 2 on January 10, 2017, the Court will allow Count V to remain as it relates to WP 2. Thus, Defendant's Motion to Dismiss Count V, consistent with the above limitation, is Denied.

C. Count VI Implied Covenant of Good Faith and Fair Dealing

Defendant next urges the Court to dismiss Plaintiffs' breach of the implied covenant claim because the implied covenant of good faith and fair dealing is inapplicable as there is "no gap" in the Agreement for an implied obligation to fill.⁹⁶ Defendant asserts that Section 3.3 of the MSA, already imposes a good faith obligation on the Defendant in regards to withholding payments.⁹⁷ Section 3.3 of the MSA states:

Unless otherwise set forth in a Statement of Work, Consultant shall prepare and submit invoices to Client on a monthly basis covering those Services performed during the previous month. Such invoices shall be in such form and with such supporting documentation as Client may

⁹⁵ *Id.* at ¶ 85.

⁹⁶ Def.'s Mot. to Dismiss at 25.

⁹⁷ *Id.* at 24.

reasonably require. If a Statement of Work provides that Client shall reimburse Consultant for expenses, then such monthly invoice shall also include an itemized list of all authorized expenses incurred during such month and, whenever possible, include copies of bills, receipts, or other evidence of expenditures. Client may withhold payment of any amounts it disputes in good faith. Consultant agrees to submit its invoices in a timely fashion.⁹⁸

Defendant argues this express term “addresses the instant matter directly”⁹⁹ and alleviates any need for the implied covenant.

The Plaintiff does not dispute the good faith obligation in Section 3.3 of the MSA but instead argues that the implied covenant of good faith and fair dealing can be pled in the alternative, even if the party can prevail on another claim.¹⁰⁰ Plaintiff also contends that “[t]he implied covenant is particularly important in contracts that endow one party with discretion in performance.”¹⁰¹

In Delaware, the implied covenant of good faith and fair dealing inheres in every contract, including those governing employment.¹⁰² The covenant requires parties to a contract “to refrain from arbitrary or unreasonable conduct” which deprives a party “from receiving the fruits of the bargain.”¹⁰³ To state a claim for

⁹⁸ MSA § 3.3.

⁹⁹ Def.’s Mot. to Dismiss at 24.

¹⁰⁰ Pl.’s Answ. Br. in Opp. to Def. Mot. to Dismiss at 29.

¹⁰¹ *Amirsaleh v. Bd. Of Trade City of N.Y., Inc.*, 2008 WL 4182998, at *1 (Del. Ch. Sept. 11, 2008).

¹⁰² *See Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 830 (Del. 2005).

¹⁰³ *See Narrowstep, Inc.*, 2010 WL 5422405, at *10 (quoting *Kurdova v. SPJS Hldgs., L.L.C.*, 971 A.2d 872, 888–89 (Del. Ch. 2009)).

breach of the implied covenant, a plaintiff must allege: (1) a specific implied contractual obligation; (2) a breach of that obligation; and (3) resulting damage.¹⁰⁴ Importantly, the covenant “seeks to enforce the parties’ contractual bargain by implying only those terms that the parties would have agreed to during their original negotiations if they had thought to address them.”¹⁰⁵ It will not be utilized to create “free-floating dut[ies] ... unattached to the underlying legal document” and is traditionally invoked only where the contract is silent with respect to the issue in dispute.¹⁰⁶ More recent case law reflects a willingness to allow implied covenant claims to survive, despite the presence of relevant contractual language, where a defendant failed to “uphold the plaintiff’s reasonable expectations under that provision”¹⁰⁷ or failed to exercise discretion under the contract *reasonably*.¹⁰⁸

¹⁰⁴ See *Wiggs v. Summit Midstream P’rs, LLC*, 2013 WL 1286180, at *9 (Del. Ch. Mar. 28, 2013) (citing *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998)). “General allegations of bad faith conduct are not sufficient.” *Kurdova*, 971 A.2d at 888.

¹⁰⁵ See *Gerber v. Enter. Prods. Hldgs., LLC*, 67 A.3d 400, 418 (Del. 2013) (quoting with approval *ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC*, 50 A.3d 434, 440–42 (Del. Ch. 2012), *rev’d in part on other grounds*, 68 A.3d 665 (Del. 2013)). See also *Winshall v. Viacom Int’l, Inc.*, 76 A.3d 808, 816 (Del. 2013) (“[A] party may only invoke the protections of the covenant when it is clear from the underlying contract that the contracting parties would have agreed to proscribe the act later complained of had they thought to negotiate with respect to that matter.”) (internal quotation omitted).

¹⁰⁶ See *Charlotte Broad., LLC v. Davis Broad. of Atlanta L.L.C.*, 2015 WL 3863245, at *6 (Del. Super. Ct. June 10, 2015) (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005)).

¹⁰⁷ See *Renco Grp., Inc.*, 2015 WL 394011, at *6 (citing *Gerber*, 67 A.3d at 422 (holding an implied covenant claim sufficient where plaintiff possessed “a reasonable contractual expectation that the [d]efendants would properly follow the [contract’s] substitute standards”)).

¹⁰⁸ See *Black Horse Capital, LP v. Xstelos Hldgs, Inc.*, 2014 WL 5025926, at *30 (Del. Ch. Sept. 30, 2014) (quoting *Gerber*, 67 A.3d at 419)).

The Court finds there is no contractual gap which requires the covenant of good faith and fair dealing to be applied. Section 3.3 of the MSA clearly imposes an obligation on the Defendant to act in good faith if and when it determines to withhold payment.¹⁰⁹ The implied covenant of good faith is simply duplicative and mimics the language of the MSA. It is true that the implied covenant has great importance when one party is given significant discretion in a contract.¹¹⁰ However, the MSA already requires the discretion-exercising party, the Defendant, to act in good faith.

Superior Court Rule (8)(e)(2) permits a party to plead “two or more statements of a claim or defense alternately or hypothetically.”¹¹¹ However, “[a] right to plead alternative theories does not obviate the obligation to provide factual support for each theory.”¹¹² Plaintiff cites two Chancery Court decisions for support but in both cases,¹¹³ the plaintiffs identified an ambiguity or potential gap in a contract that could be filled by the implied covenant.¹¹⁴ That simply is not true here. There is a clear contractual obligation by Defendant to pay invoices in a timely manner and to only

¹⁰⁹ MSA § 3.3.

¹¹⁰ *Amirsaleh v. Bd. Of Trade City of N.Y., Inc.*, 2008 WL 4182998, at *30 (Del. Ch. Sept. 11, 2008).

¹¹¹ Del. Super. Ct. Civ. R. 8()(2).

¹¹² *BAE Sys. Info. and Elec. Sys. Integration, Inc. v. Lockheed Martin Corp.*, 2009 WL 264088, at * (Del. Ch. Feb. 3, 2009).

¹¹³ *Bay Ctr. Apts. Owner, LLC v. Emery Bay PKI, LLC*, 2009 WL 1124451, at *7–8 (Del. Ch. Apr. 20, 2009); *eCommerce Indus., Inc. v. MWA Intelligence, Inc.*, 2013 WL 5621678, at *53 (Del. Ch. Sept. 30, 2013).

¹¹⁴ *Fortis Advisors LLC v. Dialog Semiconductor PLC*, 2015 WL 401371, at *5 (Del. Ch. Jan. 30, 2015).

withhold payment in good faith. The Court rejects Plaintiff's argument that its implied covenant claim should survive despite its failure to identify any gap, simply because it has pled in the alternative. Therefore, Defendant's Motion to Dismiss Count VI is Granted.

D. DAMAGES

Finally, Defendant argues that the Plaintiff is not entitled to consequential damages, punitive damages, or any lost profits—as such remedies are only permitted if a party acts with gross, willful, and reckless conduct.¹¹⁵ Defendant argues its conduct does not rise to the level of gross negligence and is therefore protected by the MSA and MTA limitation of liability clauses.¹¹⁶ Plaintiff asserts, however, that the Defendant acted with willfulness and/or gross negligence when “VNU misrepresented its willingness to pay invoices, failed to pay invoices, and owed money to other vendors.”¹¹⁷ Plaintiff also asserts that under Delaware law a claim for willful misconduct or gross negligence can only be dismissed in rare circumstances if there is no doubt that a jury could find gross negligence.¹¹⁸ Plaintiff contends that the alleged misrepresentations it asserts in the Amended Complaint

¹¹⁵ Def.'s Mot. to Dismiss at 16.

¹¹⁶ *See id.*

¹¹⁷ *Id.*; *See also* Pl.'s Answ. Br. in Opp. to Def. Mot. to Dismiss at 32.

¹¹⁸ Pl.'s Answ. Br. in Opp. to Def. Mot. to Dismiss at 32 (citing *Eustice v. Rupert*, 460 A.2d 507, 509 (Del. Super. Ct. 1983)).

and in its Reply Answer could lead a reasonable jury to find Defendant exhibited willful misconduct and gross negligence.¹¹⁹

“Generally, the issue of whether facts and circumstances amount to willful conduct or gross negligence is a fact question for the jury.”¹²⁰ It may become a matter of law when the “conduct in question falls short of gross negligence, the case is entirely free from doubt, and no reasonable jury could find gross negligence.”¹²¹ However, that issue is for another day either when the jury makes that determination or the Court finds no evidentiary basis to support gross negligence or willful misconduct. At the moment, the Court has no basis to make such a finding and therefore Defendant’s Motion as to damages is Denied.

IV. CONCLUSION

Consistent with the decisions above, Defendant’s Motion to Dismiss is **GRANTED IN PART** and **DENIED IN PART**.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

¹¹⁹ *Id.*

¹²⁰ *Midland Red Oak Realty, Inc. v. Friedman, Billings & Ramsey & Co., Inc.*, 2005 WL 445710, at *4 (Del. Super. Ct. Feb. 23, 2005).

¹²¹ *Id.* (citing *Albright v. Abington Mem’l Hosp.*, 696 A.2d 1159, 1165 (Pa. 1997)).