IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

TRUST-ED SOLUTIONS, LLC,	)	
	)	
Plaintiff/Counterclaim-Defendant,	)	
	)	
v.	)	
	)	
GILBERT LLP,	)	C.A. No. N20C-06-229 MMJ CCLD
	)	
Defendant/Counterclaim-Plaintiff/Third-Party Plaintiff,	)	
	)	
v.	)	
	)	
RACHEL L. COSGROVE,	)	
	)	
Third-Party Defendant.	)	

Submitted: August 10, 2022
Decided: October 18, 2022
Unsealed: November 3, 2022

On Trust-Ed Solutions, LLC and Rachel Cosgrove's Motion for Partial Summary Judgment
GRANTED IN PART AND DENIED IN PART

On Gilbert LLP's Motion for Partial Summary Judgment
GRANTED IN PART AND DENIED IN PART

OPINION

Adam R. Elgart, Esq., Mattleman, Weinroth & Miller, PC, Newark, DE, Benjamin A. Webster, Esq. (*pro hac vice*) (argued), Christopher H. Lee, Esq. (*pro hac vice*) (argued), Morgan & Morgan, P.A., Orlando, FL, *Attorneys for Plaintiff/Counterclaim-Defendant/Third-Party Defendant*

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JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

This is a dispute about electronic discovery ("e-discovery") services between provider Trust-ED Solutions, LLC ("Trust-ED") and the Gilbert LLP ("Gilbert") law firm. Trust-ED is a single member Florida limited liability company. The member is Rachel Cosgrove ("Cosgrove"). Trust-ED provided e-discovery services to its clients. Trust-ED is no longer an operating business. Gilbert is a law firm based in the District of Columbia that conducts business in Delaware. Gilbert retained Trust-ED to provide e-discovery services, including collecting, processing, and hosting electronically-stored information for Gilbert in connection with the Delaware Opioid Litigation.

The MCS Group, Inc. ("MCS") is a Pennsylvania corporation hired by Trust-ED as a subcontractor for a portion of Trust-ED's contract with Gilbert. MCS has a claim against Trust-ED regarding unpaid invoices. MCS subsequently assigned the rights to its claim against Trust-ED to Gilbert. Jurisdiction and venue are proper in this Court as determined at the Motion to Dismiss hearing on April 6, 2022.

The agreements between the parties consisted of various documents, but the contracts relevant to the parties' partial summary judgment motions are the Consulting Agreement, the Pricing Model, the Addendum, MCS's Non-Disclosure Agreement, and MCS's Statement of Work.

Over the course of performance, disputes arose between the parties concerning amounts owed for e-discovery services. After a series of amendments, Trust-ED alleges three claims against Gilbert, Gilbert alleges seven counterclaims against Trust-ED, and Gilbert alleges one claim against Cosgrove.

Trust-ED alleges the following counts against Gilbert: (Count I) breach of contract for failure to pay Trust-ED amounts owed under the contract; (Count II) quantum meruit for the deficiency in payment pursuant to an alleged quasi-contract; and (Count III) account stated claim based on Gilbert's course of dealing and alleged agreement to pay in full.

Gilbert alleges the following counterclaims against Trust-ED: (Count I) breach of contract regarding improper charges; (Count II) breach of contract regarding improper subcontracting; (Count III) breach of contract regarding confidential information; (Count IV) breach of contract regarding improper suspension of services; (Count V) fraudulent inducement related to representations concerning the scope of work; (Count VI) breach of contract related to hosting

fees; and (Count VII) breach of contract with MCS for failure to pay certain invoices—a claim that Gilbert brings as the assignee of MCS.

After this Court gave Gilbert leave to amend its complaint and add Cosgrove as a Third-Party Defendant, Gilbert alleged a claim against Cosgrove for personally participating in the alleged fraud related to hosting fees.

Gilbert, Trust-ED, and Cosgrove filed motions for partial summary judgment. Trust-ED and Cosgrove moved for summary judgment against Gilbert with respect to Counts I, II, III, IV, VI, and VII of Gilbert's counterclaims, and on Gilbert's third-party claim against Cosgrove. Trust-ED also moved for summary judgment in its favor for its account stated claim. In its motion for summary judgment, Gilbert requested a denial of Trust-ED's account stated claim and a denial of Trust-ED's quantum meruit claim. Gilbert also requested a declaration for each of the following: (1) that the appropriate processing rate be the "all inclusive" $35 per GB rate from the Pricing Model; (2) that Trust-ED breached its contract with MCS by failing to pay MCS for its work, and that Gilbert is entitled to judgment at trial; (3) that Trust-ED is not entitled to any post-termination storage fees; (4) that Trust-ED is not entitled to any additional forensic collection fees beyond those which Gilbert previously paid; and (5) that the maximum amount Trust-ED should have charged Gilbert for hosting was $2,199,712.67.

SUMMARY JUDGMENT STANDARD

Summary judgment is granted only if the moving party establishes that there are no genuine issues of material fact in dispute and judgment may be granted as a matter of law.[1] All facts are viewed in a light most favorable to the non-moving party.[2] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if there is a need to clarify the application of law to the specific circumstances.[3] When the facts permit a reasonable person to draw only one inference, the question becomes one for decision as a matter of law.[4] If the non-moving party bears the burden of proof at trial, yet "fails to make a showing sufficient to establish the existence of an element essential to that party's case," then summary judgment may be granted against that party.[5]

ANALYSIS

Processing Charges

The documents governing the relationship between Trust-ED and Gilbert with respect to the fees Trust-ED charged Gilbert for processing new data are: (1) the Consulting Agreement; (2) the Pricing Model; and (3) the Addendum. The Pricing Model outlines an all-inclusive pricing model for ingesting "all new data"

[1] Super. Ct. Civ. R. 56(c).
[2] *Burkhart v. Davies*, 602 A.2d 56, 58–59 (Del. 1991).
[3] Super. Ct. Civ. R. 56(c).
[4] *Wooten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).
[5] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

at $35 per gigabyte. By email dated March 29, 2019, Cosgrove notified Gilbert that Trust-ED charged $45 per gigabyte for "onsite" processing and $35 per gigabyte for "remote" processing.

After Cosgrove sent the email in March 2019, Trust-ED began charging the $45 per gigabyte rate to Gilbert for onsite processing. Gilbert did not become aware Trust-ED was charging additional fees until almost six months after Cosgrove's March 29, 2019 email. Gilbert argued that it assumed Cosgrove's March 29, 2019 email was summarizing the costs stipulated in the contract—rather than attempting to modify contracted pricing. On September 4, 2019, Gilbert asked Cosgrove via email about any additional costs associated with onsite versus remote processing. Cosgrove responded the same day explaining the increased pricing. Gilbert then compared the pricing Cosgrove listed in her emails to the Pricing Model and realized the pricing was not the same. Gilbert argues that this is the first point at which it discovered the additional charges in the invoices and began to scrutinize the charges.

All Means All

The Pricing Model says: "A one-time fee applies to all new data ingested in a calendar month which requires processing or filtering." The Pricing Model states the one-time fee is $35 per gigabyte. Gilbert argues "all means all," thus the $35 per gigabyte processing fee in the Pricing Model is all-inclusive, and is applicable

regardless of whether the processing was onsite or remote.

Delaware courts repeatedly have concluded that "all means all." In *Hollinger Inc. v. Hollinger International, Inc.*,[6] the Court of Chancery stated: "'All' means 'all;' or if that is not clear, all, when used before a plural noun such as 'assets,' means 'the entire or unabated amount or quantity of; the whole extent, substance, or compass of; the whole.'"[7] In *Eagle Force Holdings v. Campbell*, a party contractually agreed "to contribute all right, title, and interest in and to any and all [i]ntellectual [p]roperty."[8] Despite the contract suggesting that a separate schedule would identify the rights to be transferred, the Delaware Supreme Court concluded that the additional clarification from the separate schedule was unnecessary because the obligation of the party to transfer all rights was sufficiently clear without the schedule.[9]

In the contract at issue in this case, the all-inclusive pricing in the Pricing Model stated it encompassed all new data. There was no contracted distinction between onsite and remotely-processed data.

[6] 858 A.2d 342 (Del. Ch. 2004).
[7] *Id.* at 377 (quoting OXFORD ENGLISH DICTIONARY ONLINE (2d ed. 1989), http://dictionary.oed.com); *see also Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155, 158 (Del. Ch. 2013) ("[T]he only reasonable interpretation of the statute, which is that all means all as to the enumerated categories . . . .").
[8] 187 A.3d 1209, 1233 (Del. 2018) (emphasis in original).
[9] *Id.* at 1233–34.

The Data Processing Services Trust-ED Rendered to Gilbert Were Not Outside the Scope of the Contract

Section 4.1 of the Consulting Agreement contemplates when Gilbert would have to pay additional fees:

> Customer will pay [Trust-ED] the then applicable fees described in the Statement of Work for the Services in accordance with the terms therein (the "Fees"). If Customer's use of the Services exceeds the Service Capacity set forth on the attached Statement of Work or otherwise requires the payment of additional fees (per the terms of this Agreement), Customer shall be billed for such usage and Customer agrees to pay the additional itemized fees in the manner provided herein.

Gilbert's use of data processing services did not exceed the services contemplated by the parties in the Pricing Model, which acts as a Statement of Work in this case.

The Court finds that Section 4.1 of the Consulting Agreement is inapplicable to the data processing fees because the data processing services Trust-ED performed fell within the scope of the Consulting Agreement, the Pricing Model, and the Addendum. Because the data processing services Trust-ED rendered to Gilbert are within the scope of their contract, Section 4.1 does not apply to the data processing services concerning new data. The only possibilities for Trust-ED to have increased the $35 per gigabyte pricing would have been to modify the contract, or to demonstrate that Gilbert waived its contractual rights to the $35 per gigabyte rate.

Gilbert and Trust-ED Did Not Modify the Contract

The Consulting Agreement between the parties provides how the parties could modify the contract. Section 9 of the Consulting Agreement requires that all waivers and modifications be in a writing signed by both Gilbert and Trust-ED. To modify a contract by course of dealing, the asserting party must demonstrate "a clear intention to alter the express terms."[10] The modification "must be of such specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document."[11] The party asserting modification bears the burden of proof.[12] In this case, Trust-ED bears the burden of proof because it asserts that the parties modified the contract to include additional costs for onsite data processing. Thus, Trust-ED must show by clear and convincing evidence that the parties modified the contract.[13] The parties have

[10] *Simon Prop. Grp., L.P. v. Brighton Collectibles, LLC*, 2021 WL 6058522, at *3 (Del. Super.).
[11] *Id.* (quoting *Durig v. Woodbridge Bd. of Educ.*, 1992 WL 423926, at *1 (Del. Super.)).
[12] *Lennox Indus., Inc. v. All. Compressors LLC*, 2021 WL 4958254, at *9 (Del. Super.), *aff'd*, 2022 WL 2920986 (Del.) ("A party claiming modification faces a high evidentiary burden and must prove the terms of the modification are definite, certain, and intentional . . . ." (citing 17A C.J.S. Contracts § 565)); *see also Cont'l Ins. Co. v. Rutledge & Co.*, 750 A.2d 1219, 1230 (Del. Ch. 2000) ("A party asserting an oral modification must prove the intended change with 'specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document.'" (quoting *Reeder v. Sanford School, Inc.*, 397 A.2d 139, 141 (Del. Super. 1979))).
[13] *MDNet, Inc. v. Pharmacia Corp.*, 147 F. App'x 239, 243–44 (3d Cir. 2005) ("An oral waiver or modification of a written contract must be proved by clear, precise and convincing evidence, including conduct by the parties that 'clearly shows the intent to waive the requirement that the amendments be made in writing.'" (quoting *Somerset Community Hospital v. Allan Mitchell & Assocs.*, 685 A.2d 141, 146 (Pa. Super. Ct. 1996))); s*ee also Lennox Indus., Inc.*, 2021 WL 4958254, at *1 ("[T]he plaintiff failed to offer sufficient evidence to show by clear and convincing evidence that the parties waived or modified the agreement's terms . . . ."); *id.* at *9

not presented any evidence of a signed writing modifying the data processing fees from $35 per gigabyte to $45 per gigabyte. Therefore, Trust-ED must rely on the parties' course of dealing as a basis for contract modification.[14]

Gilbert paid monthly invoices from Trust-ED, albeit late, for data processing services. Some invoices included the $45 per gigabyte rate for data processing. The dispute did not arise until after Gilbert noticed the additional charges in September 2019. After discovering the additional charges, Gilbert withheld funds from future invoice payments in the amount it believed Trust-ED overcharged Gilbert.

Trust-ED set forth the $45 per gigabyte processing charges in an email dated March 29, 2019. However, the email did not explicitly state that it was notifying Gilbert of a change to the Pricing Model.

Trust-ED sent an email to Gilbert on April 22, 2019, proposing to amend the Pricing Model. The proposed Pricing Model still included the $35 per gigabyte one-time fee to process all new data. Later the same day, Gilbert sent an email to Trust-ED stating that it declined to enter into any additional agreement and would

("A party claiming modification faces a high evidentiary burden and must prove the terms of the modification are definite, certain, and intentional; indefinite expressions and mere negotiations for a variance cannot constitute a modification." (citing 17A C.J.S. Contracts § 565)); *Reeder v. Sanford Sch., Inc*., 397 A.2d 139, 141 (Del. Super. 1979) ("[A]n oral contract changing the terms of a written contract must be of such specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by formal document." (citing 17A C.J.S. Contracts pp. 434, 436)).

[14] *See* 6 Del. C. § 1-303(f).

continue to rely on the contract in place. On April 29, 2019, Trust-ED sent another email to Gilbert stating that processing costs would only be subject to charges of $35 per gigabyte and would not be subject to any additional processing costs.

The Court's Findings Concerning the Processing Charges

The Court finds that Trust-ED has failed to show by clear and convincing evidence that the course of dealing between the parties modified the contract. The parties' actions do not demonstrate a mutual understood change in pricing.

The Court finds the applicable processing rate is the "All Inclusive" $35 per gigabyte rate included in the Pricing Model. The March 29, 2019, email from Trust-ED to Gilbert is not dispositive. The applicable Pricing Model and the April 29, 2019 email from Trust-ED state the $35 per gigabyte rate. The undisputed evidence demonstrates the scope of services did not change, as contemplated pursuant to Section 4.1 of the Consulting Agreement. The processing services Trust-ED performed fell within the processing services contemplated in the Pricing Model. The Pricing Model left no gap to be filled by Section 4.1 of the Consulting Agreement. The Consulting Agreement explicitly provides that the $35 per gigabyte pricing applies to "all new data," with no distinction made for onsite versus remote processing. Gilbert never affirmatively accepted the additional charges, which would have modified the contract. The undisputed evidence does not rise to the level of demonstrating that Gilbert conducted a knowing and

detailed review of the invoices. Rather, Gilbert paid the invoices that included the $45 per gigabyte rate as a matter of course. The payments Gilbert made as a matter of course do not constitute a knowing agreement to an increased rate. Therefore, the only applicable processing rate is the "All Inclusive" $35 per gigabyte rate included in the Pricing Model.

Waiver

Waivers alleged outside of a formal written waiver "are not favored for a host of pragmatic and public policy reasons."[15] A party alleging waiver by course of dealing must establish waiver by clear and convincing evidence.[16] "[T]hree elements must be demonstrated to invoke the waiver doctrine: (1) that there is a requirement or condition capable of being waived, (2) that the waiving party knows of that requirement or condition, and (3) that the waiving party intends to waive that requirement or condition."[17] "Because waiver is 'redolent of forfeiture,' the standard for waiver is 'quite exacting' and the facts demonstrating waiver must be 'unequivocal.'"[18] The course of dealing of the parties usually will not waive a

[15] *Symbiont.io, Inc. v. Ipreo Holdings, LLC*, 2021 WL 3575709, at *52 (Del. Ch.) (quoting *Tunney v. Hilliard*, 2008 WL 3975620, at *5 (Del. Ch.)).
[16] *Specialty Dx Holdings, LLC v. Lab'y Corp. of Am. Holdings*, 2020 WL 5088077, at *9 (Del. Super.) ("Delaware courts have found that the parties must evince an intent to waive a contractual provision by clear and convincing evidence."); *Eureka VIII LLC v. Niagara Falls Holdings LLC*, 899 A.2d 95, 109 (Del. Ch. 2006).
[17] *Amirsaleh v. Bd. of Trade of City of New York, Inc.*, 27 A.3d 522, 529 (Del. 2011).
[18] *Lennox Indus., Inc. v. All. Compressors LLC*, 2021 WL 4958254, at *8 (Del. Super.), *aff'd*, 2022 WL 2920986 (Del.) (quoting *Simon-Mills II, LLC v. Kan Am USA XVI Ltd. P'ship*, 2017 WL 1191061, at *34 (Del. Ch.)).

contract provision "if the parties have reduced a modification to writing on a prior occasion."[19]

Section 9 of the Consulting Agreement requires that waivers be in writing. Trust-ED alleged that Gilbert waived its right to hold Trust-ED to the $35 per gigabyte data processing rate from the Pricing Model because Gilbert paid invoices containing $45 per gigabyte data processing charges. In one instance, the parties modified the contract in writing by fully executing the Addendum to the Consulting Agreement on April 22, 2019. Because the parties modified their contract in writing before Trust-ED alleged that Gilbert waived its contractual rights, Trust-ED has a high burden to successfully establish waiver through course of dealing.[20] The fact that Gilbert mistakenly paid invoices with the incorrect charges does not constitute a course of dealing sufficient to show it modified the contract and waived its contractual rights. Because the parties never executed a formal written amendment to the processing rate, the Court finds that Gilbert did not waive its contractual rights.

Assignment of Claim

Trust-ED and MCS entered into two agreements: (1) the Statement of Work ("SOW"); and (2) the Non-Disclosure Agreement ("NDA"). Trust-ED and MCS

[19] *Rexnord Indus., LLC v. RHI Holdings, Inc.*, 2008 WL 4335871, at *8 (Del. Super.).
[20] *See id*. ("[T]he provision usually will not be waived if the parties have reduced a modification to writing on a prior occasion.").

executed both the SOW and the NDA at the same time. The SOW between Trust-ED and MCS set the payment terms for work MCS was to perform for Trust-ED. The NDA governed the handling of confidential information. Trust-ED admits it still owes MCS at least $190,012.55. MCS assigned to Gilbert "all claims, demands, and causes of action of any kind whatsoever which MCS has or may have against Trust-ED or Gilbert arising from services performed by MCS in connection with the Delaware Opioid Litigation." Trust-ED argues the assignment was not valid.

A choice of law provision does not exist within the SOW, but the NDA states that Florida law governs the legal relations between the parties. Because the SOW is silent, the NDA's choice of law provision governs the contractual relationship between MCS and Trust-ED. Therefore, Florida law governs whether MCS may assign its claim to Gilbert.[21] Florida law permits the assignment of contractual rights unless the contract prohibits it.[22] If the document governing the

[21] Whether Delaware or Florida law controls the assignment of contractual rights is immaterial to whether assignment is permitted in this case. Delaware law, like Florida law, supports the proposition that contractual rights are freely assignable absent contractual language to the contrary. *P.C. Connection, Inc. v. Synygy Ltd*., 2021 WL 57016, at *13 (Del. Ch.) (citing *Grynberg v. Burke*, 1981 WL 15118, at *1 (Del. Ch.) ("The general rule is that a contract not involving personal trust and confidence, and not being for personal services, is assignable in the absence of language to the contrary.")); *see also Tracey v. Franklin*, 67 A.2d 56, 58 (Del. 1949) ("An important incident of the ownership of property is its transferability and the proposition is frequently stated in the texts that a general restraint upon alienation is invalid because contrary to public policy.").

[22] *See One Call Prop. Servs. Inc. v. Sec. First Ins. Co*., 165 So. 3d 749, 752 (Fla. Dist. Ct. App. 2015) (explaining the right to bring an action to recover a debt "is assignable and 'may be sued upon and recovered by the assignee in his own name and right'" (quoting *Spears v. W. Coast*

contractual rights is silent as to assignment, then the contract rights still may be assigned.[23]

The SOW Governs Whether MCS May Assign Its Contractual Rights

The SOW, not the NDA, governs whether MCS may assign its contractual rights to payment. The terms of the NDA do not permit assignment without written consent. However, the fact that Trust-ED has not paid MCS arises under the payment terms—not the handling of confidential information. The NDA only covers the subject of handling confidential information and does not govern payment terms. Because the SOW governs the payment terms, and MCS's assigned claim arises from the payment terms, the SOW governs whether MCS may assign its contractual rights to payment. Therefore, the NDA does not control the SOW concerning MCS's right to payment.

The NDA's language limiting assignment rights is not applicable to MCS's ability to assign a claim for breach of contract due to non-payment. The NDA's limiting language concerning assignment would apply only to claims for the mishandling of confidential information. Because the claim here arises under payment terms controlled by the SOW, the terms of the SOW govern MCS's

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Builders' Supply Co., 133 So. 97, 98 (Fla. 1931))); *Kohl v. Blue Cross & Blue Shield of Fla., Inc.*, 988 So. 2d 654, 658 (Fla. Dist. Ct. App. 2008) ("All contractual rights are assignable unless the contract prohibits assignment, the contract involves obligations of a personal nature, or public policy dictates against assignment.").

[23] *See Kohl*, 988 So. 2d at 658 ("Where there is no provision forbidding assignment, an insurance policy may be assigned.").

ability to assign a claim for breach of contract due to non-payment.

The Court finds that the terms of the SOW do not preclude MCS from assigning its rights. Therefore, under Florida law, MCS validly assigned its breach of contract claim to Gilbert.

Champerty Is Not Applicable

Champerty is limited to claims by an unrelated party, or a stranger to the litigation. "An agreement is not champertous where the assignee has some legal or equitable interest in the subject matter of the litigation independent from the terms of the assignment under which the suit was brought."[24] "Delaware permits conveyance of a lawsuit so long as the transferor possesses and conveys a complete interest in the underlying right and makes the litigant the 'bona fide owner of the claim in litigation' and not just the litigation itself."[25]

In this case, Gilbert has an interest in the lawsuit and is not a stranger to the dispute between MCS and Trust-ED. Trust-ED subcontracted MCS to do work on the Delaware Opioid Litigation, in which Gilbert was participating. MCS also conveyed a complete interest in the claim to Gilbert.

The Court finds that champerty is not applicable in this case because: (1)

[24] *Hall v. State*, 655 A.2d 827, 829 (Del. Super. 1994).
[25] *Humanigen, Inc. v. Savant Neglected Diseases, LLC*, 238 A.3d 194, 203 (Del. Super. 2020) (quoting *Drake v. Northwest Natural Gas Co.*, 165 A.2d 452, 454 (Del. Ch. 1960)).

Gilbert is a related party to the breach of contract claim between MCS and Trust-ED; and (2) MCS conveyed a complete interest in its claim to Gilbert. Additionally, MCS validly assigned its breach of contract claim to Gilbert. Trust-ED allegedly breached the MCS contract by failing to pay MCS. Finally, genuine issues of material fact remain as to the total amount owed by Trust-ED to MCS's assignee, Gilbert.

Hosting Fees

Trust-ED subcontracted two companies to host data for Gilbert's litigation project. These two companies billed Trust-ED for hosting data. Trust-ED then billed Gilbert for hosting data. Trust-ED measured and billed the amount of data the subcontractors hosted for Gilbert's litigation differently than the subcontractors measured and billed that same data. Trust-ED's subcontractors billed Trust-ED based on actual amounts of data hosted in the prior month, while Trust-ED billed Gilbert based on estimated aggregate amounts of all data to be hosted in the forthcoming month. Gilbert argued that Trust-ED inflated its hosting fees. Trust-ED responded with an explanation as to why the amount of data being hosted and billed to Gilbert did not match the amount of data being hosted and billed by the subcontractors.

The Court finds there are genuine issues of material fact regarding the total amount that Gilbert should have been charged for hosting data.

Daily Forensic Collection Fees

The Pricing Model states that forensic collection fees would be $2,800 per day for up to 10 hours of onsite forensic document collection. Trust-ED attempted to change forensic collection fees to $3,500 per day via its email sent on March 29, 2019. However, the email did not explicitly state that it was changing the pricing. On April 22, 2019, Trust-ED proposed an increase of the onsite forensic document collection rate to $3,400 per day. Gilbert rejected this proposal via email. Nonetheless, in the invoice dated October 1, 2019, Trust-ED charged Gilbert the $3,400 per day rate. In all but this one invoice, Trust-ED charged the $2,800 rate. Gilbert paid the $2,800 per day rate for the forensic collection fees charged in the October 1, 2019, invoice, but disputes the additional $600 per day Trust-ED charged—amounting to an additional $16,200.

The Court finds that as with the processing fees, the parties did not modify the contract, nor did the scope of services change. The email Trust-ED sent to Gilbert on March 29, 2019 is not dispositive. The applicable Pricing Model provided the rate, and there was no mutual understanding as to any change in the pricing. The $2,800 per day pricing for forensic collection fees in the Pricing Model controls. Trust-ED is not entitled to any additional forensic collection fees beyond those Gilbert previously has paid. Gilbert does not owe Trust-ED the additional $16,200 in dispute for forensic collection fees.

Post-Termination Storage Fees

Trust-ED seeks $1,140,478.60 for two months of post-termination storage fees. Taken together, Sections 5.1, 5.2, and 9 of the Consulting Agreement provide that termination of the contract must be in writing. Section 5.1 allows either party to terminate services within thirty days by written request. Section 5.2 allows for termination with thirty days' notice if a party materially breaches the contract. A party need not provide notice to terminate the contract in the case of non-payment. Section 9 requires that all notices be in writing.

The fact that Section 5.2 removes the notice requirement in the event of non-payment does not mean the contract automatically terminates for non-payment. Rather, the fact that Section 5.2 removes the notice requirement for non-payment is interpreted by the Court to mean that a party is not required to provide notice thirty days before the termination would take effect. The party terminating the contract for non-payment still must terminate the contract through a writing. The parties dispute ***when*** the contract was terminated.

Section 5.2 requires that Trust-ED "make all Customer Data available to Customer for electronic retrieval for a period of thirty (30) days," and that data storage fees would apply after thirty days if the Customer did not request delivery or destruction of the data. If Gilbert did not request delivery or destruction of their data within thirty days of termination, then post-termination storage fees would

apply under the Consulting Agreement. The parties dispute whether Trust-ED ever made the data available to Gilbert.

Trust-ED asserts that the contract automatically terminated under Section 5.2 of the Consulting Agreement on March 4, 2020, after Gilbert refused to make a full payment on the outstanding invoice balance. Trust-ED argues that post-termination storage fees began to accrue thirty days later—making April and May of 2020 the two months of disputed post-termination charges. Gilbert counters that Trust-ED could not charge Gilbert post-termination storage fees until after meeting the following criteria: (1) the contract had been terminated; (2) Trust-ED affirmatively made the data available to Gilbert; and (3) Gilbert failed to request delivery or destruction of data within thirty days. Gilbert contends it gave thirty days' written notice to terminate the contract on May 22, 2020. Gilbert contends that Trust-ED never made the data available and therefore is not entitled to post-termination storage fees.

The Court finds that Gilbert's failure to pay in full did not constitute a termination of the contract under Section 5.2 of the Consulting Agreement. The question as to whether Trust-ED is entitled to post-termination storage fees involves genuine issues of material fact.

Account Stated Claim

Account stated claims generally are disfavored in Delaware.[26] "Delaware state courts have defined the requirements of an account stated as follows: '(1) an account existed between the parties; (2) the defendant stated or admitted to owing a specific sum on the account to the plaintiff; and (3) the defendant made this admission after the original account or debt was created.'"[27] A specific sum on the account means "that an exact and definite balance [was] struck as to which both the creditor and debtor assent[ed]."[28] To survive a motion to dismiss, an account stated claim must establish "that the purported account debtor expressly agreed to pay a certain sum at issue."[29]

Trust-ED alleges two bases for its account stated claim. The first basis involves a group of invoices that Gilbert paid, but later refuted. Concerning this group of invoices, Trust-ED asserts that Gilbert's course of dealing from paying prior invoices establishes an account stated claim. The second basis involves a group of invoices that Gilbert allegedly promised to pay "in full." Trust-ED

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[26] *See Outbox Sys., Inc. v. Trimble Inc*., 2022 WL 3696773, at *7–8 (Del. Super.) (dismissing plaintiff's account stated claim); *CP Printing Ltd. v. Glitterati Inc*., 2021 WL 212690, at *1–2 (D. Del.) (denying summary judgment on plaintiff's account stated claim); *Sparebank 1 SR-Bank ASA v. Wilhelm Maass GMBH*, 2019 WL 6033950, at *7 (Del. Super.) (dismissing plaintiff's account stated claim); *Citibank (S. Dakota) N.A. v. Santiago*, 2012 WL 592873, at *2 (Del. Com. Pl.); *Chrysler Corp. v. Airtemp Corp*., 426 A.2d 845, 849, 856 (Del. Super. 1980) (denying motion for partial summary judgment involving an account stated claim).
[27] *Outbox Sys.*, 2022 WL 3696773, at *7 (quoting *Sparebank*, 2019 WL 6033950, at *6).
[28] *Id.* at *4 (quoting 29 Williston on Contracts § 73:55 (4th ed. 2021)).
[29] *Id.* (citing 2 Woolley on Delaware Practice § 1460).

asserts that Gilbert's promise to pay "in full" establishes an account stated claim. Both bases fail.

The Course of Dealing Cannot Establish an Account Stated Claim

In *Baliezewski v. Putzcus*, this Court explained that an account stated claim cannot rely on the original agreement between the parties, but instead must involve a new agreement between the parties as to a definite balance due.[30] *Baliezewski* suggested the possibility that parties may impliedly make this new agreement,[31] but *Outbox Systems, Inc. v. Trimble Inc.* later dismissed this notion.[32] The *Outbox Systems* Court stated: "*Baliezewski* cites no authority to support its implied-agreement proposition[;] [n]or did *Baliezewski* actually adjudicate the merits of an account stated claim."[33] *Outbox Systems* further clarified that to establish an account stated claim, parties must expressly agree to payment, not impliedly agree to payment.[34]

Trust-ED asserts that by paying invoices, Gilbert made a new agreement as to a definite balance due. In *Outbox Systems*, this Court concluded that the plaintiff's summary judgment motion must fail because plaintiff "wholly relied on

[30] 132 A. 217, 219 (Del. Super. 1926) ("An account stated alters the character of the original indebtedness, and is itself in the nature of a new promise or undertaking, and raises a new cause of action between the parties." (quoting Corpus Juris, vol. 1, p. 706)).
[31] *Id.* at 218 ("[T]he party against whom the balance is found either expressly or impliedly agreed to pay such balance found to be due.").
[32] 2022 WL 3696773, at *7.
[33] *Id.*
[34] *Id.* at *8.

an implied assent principle to devise its account stated claim."[35] Trust-ED primarily relies on the fact that Gilbert paid prior invoices and subsequently stopped paying its invoices as the basis for its account stated claim. This is reliance on an implied agreement based on the course of dealing of the parties. Trust-ED cannot use the parties' course of dealing to establish an account stated claim because it constitutes reliance on an agreement through implied assent. Therefore, Trust-ED's first assertion that the course of dealing established an account stated agreement fails. Because relying on implied assent is inappropriate under this Court's finding in *Outbox Systems*, the Court will turn to Trust-ED's assertion that Gilbert expressly agreed to pay the unpaid invoices "in full."

An Agreement to Pay Invoices "In Full" is Not Sufficiently Definite to Establish an Account Stated Claim

Trust-ED also asserts that the parties entered into an express agreement when Gilbert said it would pay the unpaid invoices in full. Even if this were taken as true, the account stated claim on this basis fails because the agreement was neither final nor definite. Trust-ED confirmed that reconciliation after termination of the contract would likely change the amounts allegedly owed on the invoices. The fact that Gilbert stated it would pay the invoices "in full" does not mean Gilbert expressly agreed to a "specific sum" or "definite balance" because all

[35] *Id.* at *11.

invoices remained subject to change through a final reconciliation process after termination of the contract. Therefore, the agreement to pay invoices "in full" was not sufficiently definite to establish an account stated claim.

Because Trust-ED's account stated claim is largely based on an implied agreement and does not satisfy the "specific sum" requirement, the Court finds that Trust-ED's account stated claim must be dismissed.

Fraud

Under the personal participation doctrine, "[a] corporate officer is individually liable for the torts [s]he personally commits and cannot shield h[er]self behind a corporation when [s]he is an actual participant in the tort."[36] "[T]he relevant question when examining a tortious fraud claim is whether or not the defendant personally participated in the tortious conduct."[37] The doctrine is "triggered if an agent actively participates, consents, or ratifies a tortious scheme."[38] Establishing that a corporate officer personally participated in a tort obviates the need to prove the corporation was the *alter ego* of the corporate officer.[39]

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[36] *Donsco, Inc. v. Casper Corp*., 587 F.2d 602, 606 (3d Cir. 1978).
[37] *Sens Mech., Inc v. Dewey Beach Enterprises, Inc*., 2015 WL 4498900, at *3 (Del. Super.) (citing *Donsco*, 587 F.2d at 606).
[38] *Id.*
[39] *See, e.g.*, *August v. Hernandez*, 2020 WL 95658, at *3 (Del. Super.) (rejecting that the plaintiff must allege facts to support an *alter ego* theory when the personal participation doctrine applies); *Hailey v. Race Proven Motorsports*, 2017 WL 5665161, at *7 (Del. Com. Pl.) ("[P]iercing the corporate veil is not required 'if the officer "directed, ordered, ratified, approved or consented to

The Court finds that there are genuine issues of material fact concerning the alleged fraud. The finder of fact will be tasked with determining whether the evidence demonstrates a personal participation claim, whether Cosgrove was the *alter ego* of Trust-ED, and whether there was a fraudulent inflation of hosting services bills.

Damages for Breach of Contract Counterclaim Counts I, II, III, and IV

Counts I–IV of Gilbert's breach of contract counterclaims all seek damages that are not supported by the evidence on record. Count I alleges Trust-ED breached its contract by improperly charging Gilbert, but Gilbert has already discounted any potential damages associated with this claim. Count II alleges Trust-ED breached its contract regarding improper subcontracting, but Gilbert has failed to support its claim with any evidence of damages. Count III alleges Trust-ED breached the contract by disclosing confidential information, but Gilbert failed to support its claim with any evidence of damages. Count IV alleges Trust-ED breached its contract by improperly suspending services, but Gilbert failed to support its claim with any evidence of damages.

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the tort."'" (quoting *Eden v. Ohlates of St. Francis de Sales*, 2006 WL 3512482, at *8 (Del. Super.))); *Brandt v. Rokeby Realty Co*., 2004 WL 2050519, at *9 (Del. Super.) ("Whether or not Brandt can sue Copeland is not a question of piercing the corporate veil, but rather is one of Copeland's personal participation in a tort.").

Trust-ED correctly argues that Gilbert has failed to articulate or quantify any direct damages. The Court grants summary judgment in favor of Trust-ED because the Court finds no record evidence to support a breach of contract damages claim as to Counts I–IV.

Quantum Meruit

In *Avantix Laboratories, Inc. v. Pharmion, LLC*, the Court provided a helpful background on quantum meruit claims:

> As a general rule, recovery under a quasi-contract theory is unavailable where an express contract governs the subject matter at issue. . . . Quantum meruit is a principle of restitution arising from a cause of action in quasi-contract. This doctrine, which literally means, "as much as he deserves," is a basis for recovery to prevent unjust enrichment. In order to recover in quantum meruit, "the performing party under a contract must establish that it performed services with an expectation that the receiving party would pay for them, and that the services were performed under circumstances that should have put the recipient on notice that the performing party expected the recipient to pay for those services." Recovery under quantum meruit is limited to the reasonable value of the services provided, not the value of the benefit received.[40]

In prior cases, this Court has found that the Delaware Superior Court lacks jurisdiction in equitable causes of action, such as a stand-alone quantum meruit claim. However, these claims may remain in the complaint as a potential measure

[40] 2012 WL 2309981, at *9–10 (Del. Super.) (internal citations omitted).

of damages.[41] The parties tend to agree that contracts cover the services at issue in this case.[42] To the extent that the contracts do not govern all the services Trust-ED rendered to Gilbert, Trust-ED's quantum meruit claim may proceed as a measure of damages for the finder of fact to consider.

Rule 14(a) Third-Party Complaint

The Court need not address the Rule 14(a) argument concerning the Third-Party Complaint. The issue already was resolved at the Motion to Dismiss stage. The Court found the Third-Party Complaint—naming Cosgrove as a Third Party—permissible under Rule 14(a).

Limitation of Damages

Trust-ED argues that damages are limited by the Consulting Agreement. Section 8 of the Consulting Agreement addresses limitation of liability and states:

> [TRUST-ED] SHALL NOT BE RESPONSIBLE OR LIABLE WITH RESPECT TO ANY SUBJECT MATTER OF THIS AGREEMENT OR TERMS AND CONDITIONS RELATED THERETO UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR

[41] The issue of whether a quantum meruit claim can stand alone as a legal claim in the Delaware Superior Court is on appeal and is not entirely clear in Delaware. *See State ex rel. Jennings v. Monsanto Co.*, 2022 WL 2663220, at *6 (Del. Super.) ("[T]he Supreme Court did not specifically find that unjust enrichment can survive as a stand-alone claim in Superior Court. Rather, the Court held that unjust enrichment can be a measure of damages, or form of relief, in a contract claim in the court of law." (citing *Crosse v. BCBSD*, 836 A.2d 492, 496–97 (Del. 2003))).

[42] The governing contractual documents here are the Consulting Agreement, the Addendum, and the Pricing Model. Trust-ED also argued that the Proposal was a contractual document in dispute, but this argument was unavailing and does not prevent the quantum meruit claim from proceeding as a measure of damages.

> OTHER THEORY: (A) FOR ERROR OR INTERRUPTION OF USE OR FOR LOSS OR INACCURACY OR CORRUPTION OF DATA OR COST OF PROCUREMENT OF SUBSTITUTE GOODS, SERVICES OR TECHNOLOGY OR LOSS OF BUSINESS; (B) FOR ANY INDIRECT, EXEMPLARY, INCIDENTAL, SPECIAL OR CONSEQUENTIAL DAMAGES; (C) FOR ANY MATTER BEYOND [TRUST-ED'S] REASONABLE CONTROL; OR (D) FOR ANY AMOUNTS THAT, TOGETHER WITH AMOUNTS ASSOCIATED WITH ALL OTHER CLAIMS, EXCEED THE FEES PAID BY CUSTOMER TO [TRUST-ED] FOR THE SERVICES UNDER THIS AGREEMENT THAT GAVE RISE TO THE LIABILITY, IN EACH CASE, WHETHER OR NOT [TRUST-ED] HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

Section 9 of the Consulting Agreement addresses attorneys' fees. "In any action or proceeding to enforce rights under this Agreement, the prevailing party will be entitled to recover costs and attorneys' fees." Gilbert relies on the Consulting Agreement's contract terms to support most of its claims.

The Court finds that the Consulting Agreement limits incidental and consequential damages for breach of contract claims. Therefore, Gilbert may not recover recissory, indirect, incidental, or consequential damages. Gilbert's contractual damages are limited to direct damages. Attorneys' fees are contemplated by Section 9 of the Consulting Agreement. This finding is not intended to limit potential recovery for fraud.

CONCLUSION

The Court finds: (1) that the only applicable processing rate is the "All-Inclusive" $35 per gigabyte rate included in the Pricing Model; (2) that Gilbert did not waive its contractual rights; (3) that MCS validly assigned the breach of contract claim to Gilbert and champerty does not apply; (4) that there are genuine issues of material fact concerning the total amount that Gilbert should have been charged for hosting data; (5) that Trust-ED is not entitled to any additional forensic collection fees; (6) that Gilbert's failure to pay in full was not a termination of the contract and a genuine issues of material fact exist as to whether Trust-ED is entitled to post-termination storage fees; (7) that Trust-ED's account stated claim is dismissed; (8) that there are genuine issues of material fact concerning the alleged fraud; (9) that summary judgment is granted in favor of Trust-ED regarding Counts I–IV of Gilbert's counterclaims for lack of record evidence of damages; (10) that quantum meruit may proceed as a potential measure of damages; (11) that the Third-Party Complaint adding Cosgrove as a party is appropriate; and (12) that the Consulting Agreement limits incidental damages for breach of contract claims.

Gilbert's Motion for Partial Summary Judgment

Gilbert's request for a declaration that the only applicable processing rate be the "all-inclusive" $35 per gigabyte rate included in the Pricing Model is hereby **GRANTED**.

Gilbert's request for a declaration that Trust-ED breached its contract with MCS by failing to pay MCS for its work, and that Gilbert, as a valid assignee of MCS's breach of contract claim is hereby **GRANTED**. The amount of damages will be determined at trial.

Gilbert's request for a declaration that Trust-ED is not entitled to any post-termination storage fees is hereby **DENIED**.

Trust-ED's account stated claim is hereby **DISMISSED**.

Gilbert's request for summary judgment in its favor on Trust-ED's quantum meruit claim is hereby **DENIED**.

Gilbert's request for a declaration that it does not owe Trust-ED additional forensic collection fees is hereby **GRANTED**.

Gilbert's request for a declaration of the maximum amount Gilbert should have been charged for hosting is hereby **DENIED**.

Trust-ED's Motion for Partial Summary Judgment

Trust-Ed's account stated claim (Count III) is hereby **DISMISSED**.

Trust-ED's request for summary judgment in its favor for the breach of contract counterclaim Counts VI (Hosting Fees) and VII (Gilbert as assignee of MCS) is hereby **DENIED**.

Cosgrove's request for summary judgment in her favor for Gilbert's Third-Party Complaint against her is hereby **DENIED**.

Trust-ED's request for summary judgment in its favor for Gilbert's breach of contract counterclaim Counts I–IV is **GRANTED** and Counts I–IV are hereby **DISMISSED**.

The damages for the remaining breach of contract counterclaim counts are limited by the Consulting Agreement to direct damages.

IT IS SO ORDERED.

/s/ Mary M. Johnston
The Honorable Mary M. Johnston