IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

FIN CAP INC. and BLUEACORN PPP, LLC, Plaintiffs, v. PAYNERD LLC, PAYNERDIER LLC, MATTHEW MANDELL, and TAYLOR HENDRICKSEN Defendants. *And* PAYNERD LLC and PAYNERDIER LLC, Counterclaim-Plaintiffs and Third Party Plaintiffs, v. FIN CAP INC., and BLUEACORN PPP, LLC, Counterclaim-Defendants; and NATHAN REIS, NOAH SPIRAKUS, and BARRY CALHOUN, Third-Party Defendants.	)	C.A. No. N21C-12-118 MMJ CCLD

Submitted: June 6, 2023
Decided: August 16, 2023
Unsealed: August 29, 2023

On Plaintiffs' and Third-Party Defendants
Noah Spirakus' and Barry Calhoun's Motion to Dismiss
PayNerd's Counterclaims and Third-Party Claims
GRANTED IN PART AND DENIED IN PART

On Third-Party Defendant Nathan Reis'
Motion to Dismiss and Joinder
DENIED

OPINION

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JOHNSTON, J.

FACTUAL AND PROCEDURAL CONTEXT

This is a contract dispute. Fin Cap Inc. ("Fin Cap") and Blueacorn PPP, LLC ("Blueacorn") are financial technology companies that help small businesses

obtain loans under the Small Business Administration's ("SBA's") Paycheck Protection Program ("PPP").[1] PayNerd LLC ("PayNerd") and PayNerdier LLC ("PayNerdier") were non-exclusive referral partners of Fin Cap and Blueacorn.[2] Fin Cap, Blueacorn, PayNerd, and PayNerdier memorialized their relationship through two contracts: one in February 2021 ("Referral Agreement 1") between Fin Cap and PayNerd, and one in April 2021 ("Referral Agreement 2") between Blueacorn and PayNerdier.[3] PayNerd and PayNerdier were to direct potential loan applicants to Fin Cap and Blueacorn through online advertising campaigns.[4] Fin Cap and Blueacorn were to facilitate the processing of the PPP loans for qualified customers.[5]

PayNerd and PayNerdier allegedly had control over the reporting that led to compensation for referrals to Fin Cap and Blueacorn.[6] In August 2021, Fin Cap and Blueacorn allegedly discovered through a final reconciliation that they had overpaid PayNerd and PayNerdier.[7] Fin Cap and Blueacorn then filed suit against PayNerd, PayNerdier, Matthew Mandell ("Mandell")—Chief Executive Officer

[1] Am. Compl. at ¶ 1.
[2] *Id.* at ¶ 3.
[3] *Id.*
[4] *Id.*
[5] Referral Agreements 1 & 2, Schedule B.
[6] Am. Compl. at ¶ 5, 10, 74–86.
[7] *Id.* at ¶ 7.

and Co-Founder of PayNerd, and Taylor Hendricksen ("Hendricksen")—Co-Founder of PayNerd.[8]

Fin Cap and Blueacorn filed their original complaint on December 23, 2021. On February 25, 2022, PayNerd and PayNerdier filed a Partial Motion to Dismiss, along with their Answer, Counterclaims, and Third-Party Claims. On April 18, 2022, Fin Cap and Blueacorn filed their Amended Complaint.

The Amended Complaint alleges: (Count I) breach of Referral Agreement 1 against PayNerd; (Count II) fraudulent inducement against PayNerd, PayNerdier, Mandell, and Hendricksen; (Count III) negligent misrepresentation against PayNerd, PayNerdier, Mandell, and Hendricksen; (Count IV) breach of Referral Agreement 2 against PayNerdier; (Count V) breach of the implied covenant of good faith and fair dealing against PayNerd; (Count VI) fraud against PayNerd, PayNerdier, Mandell, and Hendricksen; (Count VII) unjust enrichment against PayNerd, PayNerdier, Mandell, and Hendricksen; (Count VIII) promissory estoppel against PayNerd, PayNerdier, Mandell, and Hendricksen; (Count IX) declaratory judgment that "organic loans issued to PPP applicants that arrived at Blueacorn's website from a non-traceable source are subject to the Company Generated fee sharing formula under the [Referral Agreements 1 and 2], not the

[8] *Id.* at ¶ 17–18.

PayNerd Generated formula[]";[9] and (Count X) violation of the Arizona Consumer Fraud Act against PayNerd, PayNerdier, Mandell, and Hendricksen.

On June 16, 2022, PayNerd, PayNerdier, Mandell, and Hendricksen filed their Motion to Dismiss Counts II, III, V–VIII, and X of the Amended Complaint. After briefing, this Court heard oral argument on October 31, 2022. On November 3, 2022, this Court found:

> Defendants' Motion to Dismiss Count II is DENIED. Count II fairly alleges that Defendants' purportedly fraudulent statements regarding the success of the initial marketing efforts induced Plaintiffs to enter into a separate contract, the April contract, which allowed Defendants to earn fees from other lenders. Allegations that fraud directly induced formation of a contract are not barred by the bootstrapping doctrine. Under Rule 9(b), the Amended Complaint specifically alleges the circumstances constituting the fraud, including the allegedly false statements, Plaintiffs' reliance on those statements, and damages. Those damages are distinct from the damages Plaintiffs seek in their breach of contract claims. Whether the Plaintiffs actually relied on the statements, or whether such reliance was reasonable, are issues of fact that cannot be resolved on a pleadings-based motion. The Motion is GRANTED in part as to Count III. It is virtually axiomatic that the Court of Chancery has exclusive jurisdiction over negligent misrepresentation claims. Negligent misrepresentation claims are inherently equitable, and recent caselaw suggests the Delaware courts have abandoned the distinction Plaintiffs seek to draw between negligent misrepresentation and simple negligence claims. Plaintiffs shall have 60 days in which to file a written election to transfer Count III to the Court of Chancery under 10 Del. C. § 1902. If Plaintiffs fail to

[9] *Id.* at ¶ 140.

> transfer within that timeframe, Count III shall be dismissed with prejudice.
>
> The Motion is DENIED as to Count X. Narrow provisions designating a choice of law governing contracts will not bar statutory causes of action arising under the laws of another state. The proper scope of Count X and whether is withstands discovery are issues for another day.
>
> Counts V-VIII are DISMISSED WITHOUT PREJUDICE per Plaintiffs' Answering Brief. IT IS SO ORDERED.[10]

The Court's ruling left Counts I, II, IV, IX, and X of the Amended Complaint remaining. The Court has been cross-designated as Vice Chancellor in the Court of Chancery for the purpose of Fin Cap's and Blueacorn's Count III—negligent misrepresentation against PayNerd, PayNerdier, Mandell, and Hendricksen—and all equitable defenses.

On December 21, 2022, PayNerd, PayNerdier, Hendricksen, and Mandell filed their Answer and Third-Party Complaint. PayNerd and PayNerdier assert various counterclaims. PayNerd alleges: (Counterclaim I) breach of Referral Agreement 1 against Fin Cap; (Counterclaim III) breach of the implied covenant of good faith and fair dealing against Fin Cap; (Counterclaim V) fraud in the inducement against Fin Cap, Nathan Reis ("Reis")—Fin Cap co-founder and executive, and Noah Spirakus ("Spirakus")—Fin Cap's Chief Technology Officer; (Counterclaim VII) unjust enrichment against Fin Cap—pled in the alternative;

[10] Court Order, (D.I. 56).

(Counterclaim IX) quantum meruit as to PayNerd's services rendered to Fin Cap—pled in the alternative; and (Counterclaim XI) declaratory judgment against Fin Cap that Referral Agreement 1 is valid and enforceable.

PayNerdier alleges: (Counterclaim II) breach of Referral Agreement 2 against Blueacorn; (Counterclaim IV) breach of the implied covenant of good faith and fair dealing against Blueacorn; (Counterclaim VI) fraud in the inducement of Referral Agreement 2 against Fin Cap, Blueacorn, and Barry Calhoun ("Calhoun")—Prior Chief Executive Officer of Fin Cap; (Counterclaim VIII) unjust enrichment against Blueacorn—pled in the alternative; (Counterclaim X) quantum meruit as to PayNerdier's services rendered to Blueacorn—pled in the alternative; and (Counterclaim XII) declaratory judgment against Blueacorn that Referral Agreement 2 is valid and enforceable.

On February 27, 2023, Fin Cap, Blueacorn, Spirakus, and Calhoun filed their Motion to Dismiss Paynerd's and PayNerdier's Counterclaims and Third-Party Claims. Third-Party Defendant Reis also filed his Motion to Dismiss and Joinder on February 27, 2023.[11] On April 17, 2023, PayNerd and PayNerdier filed their Answering Brief in Opposition to the Motion to Dismiss. On May 8, 2023, Fin Cap, Blueacorn, Spirakus, and Calhoun filed their Reply Brief. Third-Party

[11] Reis only requests dismissal of Counterclaim V, which is the only claim brought against Reis.

Defendant Reis also filed his Reply Brief on May 8, 2023. The Court heard oral argument on June 6, 2023.

To simplify terms moving forward, the Court will refer to Fin Cap, Blueacorn, Spirakus, Calhoun, and Reis collectively as "Blueacorn," and specify individuals and entities as required. Similarly, the Court will refer to PayNerd, PayNerdier, Mandell, and Hendricksen collectively as "PayNerd," and specify individuals and entities as required.

MOTION TO DISMISS STANDARD

In a Rule 12(b)(6) Motion to Dismiss, the Court must determine whether the claimant "may recover under any reasonably conceivable set of circumstances susceptible of proof."[12] The Court must accept as true all well-pled allegations.[13] Every reasonable factual inference will be drawn in the non-moving party's favor.[14] If the claimant may recover under that standard of review, the Court must deny the Motion to Dismiss.[15]

ANALYSIS

Fraudulent Inducement (Counterclaim Counts V & VI)

[12] *Spence v. Funk*, 396 A.2d 967, 968 (Del. 1978).
[13] *Id.*
[14] *Wilmington Sav. Fund. Soc'v, F.S.B. v. Anderson*, 2009 WL 597268, at *2 (Del. Super.) (citing *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005)).
[15] *Spence*, 396 A.2d at 968.

The Delaware Supreme Court stated the elements a plaintiff must allege to establish a fraudulent inducement claim:

> A party claiming fraud must allege:
>
> 1) a false representation, usually one of fact, made by the defendant;
> 2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth;
> 3) an intent to induce the plaintiff to act or to refrain from acting;
> 4) the plaintiff's action or inaction taken in justifiable reliance upon the representation; and
> 5) damage to the plaintiff as a result of such reliance.[16]

"Delaware courts have held that to satisfy particularity under [Superior Court] Rule 9(b) all that is required is that the complaint set forth the 'time, place, and contents of the alleged fraud, as well as the individual accused of committing the fraud.'"[17] A party must allege fraudulent intent at the time the alleged representation was made.[18] Merely alleging "fraud by hindsight" is not sufficient to survive a motion to dismiss.[19]

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[16] *Lord v. Souder*, 748 A.2d 393, 402 (Del. 2000); *see also ITW Glob. Invs. Inc. v. Am. Indus. Partners Cap. Fund IV, L.P.*, 2017 WL 1040711, at *6 (Del. Super.) (stating the elements required to establish a claim for fraudulent inducement).
[17] *TrueBlue, Inc. v. Leeds Equity Partners IV, LP*, 2015 WL 5968726, at *6 (Del. Super.) (quoting *Universal Cap. Mgmt., Inc. v. Micco World, Inc.*, 2012 WL 1413598, at *2 (Del. Super.)).
[18] *Id.*
[19] *Noerr v. Greenwood*, 1997 WL 419633, at *4–6 (Del. Ch.) (dismissing a fraud claim because the claim rested upon hindsight, rather than a "contemporaneous pleaded fact," to support the fraud claim).

PayNerd relies upon *Phage Diagnostics Incorporated v. Corvium Incorporated*;[20] *inVentiv Health Clinical, LLC v. Odonate Therapeutics, Incorporated*;[21] and *Claros Diagnostics, Incorporated Shareholders Representative Committee through Goldberg v. OPKO Health, Incorporated*[22] to support its assertion that misrepresentations concerning then-existing facts about operational capacities are actionable through a fraudulent inducement claim.

In *Phage*, the Court denied a motion to dismiss a fraudulent inducement claim where the plaintiff pled then-existing misrepresentations concerning the commercial readiness of its bacteria testing technology.[23] The plaintiff relied upon specific discussions and representations made by the defendant on separate occasions.[24] The defendant's misrepresentations were of then-existing facts concerning the technology's readiness at the time of negotiations, including: (1) that the technology "was ready for launch";[25] (2) that the technology's "production could be performed at scale";[26] (3) that defendant "had a commercially ready product portfolio";[27] and (4) that the technology was in the process of obtaining

[20] 2020 WL 1816192 (Del. Super.).
[21] 2021 WL 252823 (Del. Super.).
[22] 2020 WL 829361 (Del. Ch.).
[23] 2020 WL 1816192 at *2, *5–6.
[24] *Id.* at *2.
[25] *Id.* at *5.
[26] *Id.* at *6.
[27] *Id.*

certification.[28] The Court concluded that a question of fact existed concerning whether the defendant's statements constituted "mere puffery."[29] The Court also concluded that the plaintiff sufficiently had pled each element of a fraudulent inducement claim.[30]

In *inVentiv,* this Court concluded that the defendant's counterclaim for fraudulent inducement had met the heightened pleading standard by properly addressing the "time, place, and content elements of fraud claims."[31] The fraudulent inducement counterclaim alleged that the plaintiff "knowingly and intelligently: (1) held itself out to be highly qualified and experienced . . . ; (2) assured [the defendant] of its abilities to hit the discussed milestones and timelines; (3) engaged in pre-contractual concealment of its pending merger . . . ; and (4) did all of this to induce [the defendant] into entering into the [agreements]."[32] The Court did not address whether these assertions constituted puffery. Rather, despite properly pleading the "time, place, and content elements" of a fraud claim, the defendant failed to plead separate damages from its breach of contract counterclaim.[33] Thus, this Court granted the motion to dismiss the fraud claim.[34]

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[28] *Id.*
[29] *Id.* at *10.
[30] *Id.*
[31] 2021 WL 252823, at *8.
[32] *Id.*
[33] *Id.*
[34] *Id.* at *9.

In *Claros*, the Court of Chancery primarily focused on whether a counterclaim for fraud was time-barred, rather than on whether then-existing facts about operational capacities constituted an actionable basis for a claim.[35] As such, *Claros* does not control.

PayNerd relies upon *Wal-Mart Stores, Incorporated v. AIG Life Insurance Company*;[36] *Sofregen Medical Incorporated v. Allergan Sales, LLC*;[37] *Aviation West Charters, LLC v. Freer*;[38] and *Mooney v. E.I. du Pont Nemours & Company*[39] to support its position that forward-looking and opinion representations are actionable because the misrepresentations were based on facts known to the speakers.

In *Wal-Mart*, the Court concluded that an opinion may form the basis for an equitable fraud claim.[40] A broker "allegedly [had] advised Wal-Mart that its maximum exposure under a "worst case" scenario would be $283,000."[41] While assurances of a worst case scenario constitute an opinion, it was "the type of opinion that suggest[ed] the reasonable belief that it was based on facts known to the maker" at the time of the representation.[42]

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[35] 2020 WL 829361, at *13.
[36] 901 A.2d 106 (Del. 2006).
[37] 2021 WL 1400071 (Del. Super.).
[38] 2015 WL 5138285 (Del. Super.).
[39] 2017 WL 5713308 (Del. Super.), *aff'd*, 192 A.3d 557 (Del. 2018).
[40] 901 A.2d at 116.
[41] *Id.*
[42] *Id.*

In *Sofregen*, this Court denied a motion to dismiss a fraud claim where a plaintiff alleged that the defendant made forward-looking projections that it "did not genuinely believe to be true."[43] The defendant allegedly had made optimistic revenue forecast projections, while simultaneously ceasing to promote the product and intending to discontinue the product.[44] "'Forward-looking statements of opinion are actionable as fraudulent only if they were known to be false when made or were made with a lack of good faith.'"[45]

In *Mooney*, the plaintiff based "his fraud claim entirely on forward-looking, nonactionable statements."[46] All of the plaintiff's alleged misrepresentations "refer[red] to what management 'believe[d]' or [thought would] happen[,] or refer[red] to vague goals of increased growth and value."[47] Because these alleged misrepresentations were purely forward-looking statements without allegations of management's knowledge or lack of good faith, the Court granted the defendant's motion to dismiss.[48]

PayNerd alleges that: (1) Blueacorn had the back-end technical sophistication to process over 10,000 PPP loan applications per day for a total of

[43] 2021 WL 1400071, at *4.
[44] *Id.*
[45] *Id.* (quoting *Mooney v. E.I. du Pont de Nemours and Co.*, 2017 WL 5713308, at *6 (Del. Super.)).
[46] 2017 WL 5713308, at *6.
[47] *Id.*
[48] *Id.* at *8.

one million PPP loan applications;[49] (2) Blueacorn claimed to have a "competent management team in place . . . that . . . could competently scale its personnel numbers . . . to handle over 10,000 PPP loan applications originating from PayNerd per day";[50] (3) Calhoun assured PayNerd that Blueacorn had obviated prior mismanagement failures, fixed technical deficiencies, contracted with a new lender to support applications, corrected reporting procedures, and equipped itself to conduct PPP loan processing;[51] (4) Blueacorn had manipulated Salesforce data to avoid payments to PayNerd;[52] (5) Blueacorn knew or should have known their representations were false;[53] and (6) Blueacorn intended for Paynerd to rely upon the misrepresentations.[54] PayNerd alleges that if it had known Blueacorn could not handle the required number of applications, then PayNerd would not have entered into Referral Agreements 1 and 2, nor would PayNerd have used its resources to build a front-end sales funnel for Blueacorn.[55]

"Under Delaware law, a company's optimistic statements praising its own 'skills, experience, and resources' are 'mere puffery and cannot form the basis for a fraud claim.'"[56] Representations of future performance "'are mere puffery and

[49] PayNerd's Countercl. at ¶¶ 3–4, 19, 239–44, 256–63.
[50] *Id.* at ¶¶ 242, 259.
[51] *Id.* at ¶ 259(A)–(E).
[52] *Id.* at ¶¶ 12, 14, 176, 177.
[53] *Id.* at ¶¶ 247, 263.
[54] *Id.* at ¶¶ 248, 264.
[55] *Id.* at ¶¶ 251, 268
[56] *Airborne Health, Inc. v. Squid Soap, LP*, 2010 WL 2836391, at *8 (Del. Ch.).

cannot form the basis for a fraud claim.'"[57] "[A] promise of future conduct can be actionable in fraud if the plaintiff 'plead[s] specific facts that lead to a reasonable inference that the promisor had no intention of performing at the time the promise was made.'"[58]

The alleged damages from the fraud claim must be more than duplicative of breach of contract damages.[59] The alleged damages must be cognizable.[60] The alleged damages from a fraud claim must seek different relief from the alleged damages from a breach of contract claim.[61]

PayNerd alleges millions of dollars in out-of-pocket costs and lost opportunity damages stemming from alleged inducement into entering Referral Contracts 1 and 2.[62] PayNerd alleges that it spent millions of dollars in upfront advertising and marketing in vain because many of the applications generated from those campaigns went unprocessed.[63] PayNerd also alleges that it lost out on other

[57] *Edinburgh Holdings, Inc. v. Educ. Affiliates, Inc.*, 2018 WL 2727542, at *12 (Del. Ch.).
[58] *Id.*
[59] *Cornell Glasgow, LLC v. La Grange Properties, LLC*, 2012 WL 2106945, at *8 (Del. Super.) ("'[T]o successfully plead a fraud claim, the allegedly defrauded plaintiff must have sustained damages as a result of a defendant's actions.' And the damages allegations may not simply 'rehash' the damages allegedly caused by the breach of contract." (internal citations omitted)).
[60] *Abbott Lab'ys v. Owens*, 2014 WL 8407613, at *12 (Del. Super.) (stating a plaintiff must allege legally cognizable damages to survive a motion to dismiss); *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *5 (Del. Ch.), *aff'd*, 825 A.2d 239 (Del. 2003).
[61] *ITW Glob. Invs. Inc. v. Am. Indus. Partners Cap. Fund IV, L.P.*, 2015 WL 3970908, at *5 (Del. Super.) ("[The fraud claim] must be dismissed because it pleads damages that are simply a 'rehash' of the breach of contract damages.").
[62] PayNerd's Countercl. at ¶¶ 250, 252, 267–69.
[63] *Id.* at ¶¶ 156, 251.

"highly lucrative PPP loan referral contracts" because it entered into Referral Agreements 1 and 2 with Blueacorn.[64]

Damages based upon lost opportunity and speculative alternatives are difficult to prove, and as a general matter, do not constitute a cognizable injury.[65] However, costs incurred by PayNerd for marketing and advertising are cognizable. Additionally, costs associated with marketing and advertising may not be recoverable under PayNerd's breach of contract counterclaims, but potentially may be recoverable under PayNerd's fraudulent inducement counterclaims.

The Court finds that PayNerd sufficiently pled the elements of its fraudulent inducement counterclaims—misrepresentation, knowledge of the falsity, intent, reliance, and damages. PayNerd sufficiently alleged that Blueacorn made misrepresentations of then-existing operational capacities that were based on facts known to the speakers at the time the misrepresentations were made. Under these case-specific factual allegations, whether or not fraudulent inducement ultimately is determined to be beyond mere puffery or fraud in hindsight will be determined in the context of evidence produced in discovery. This is especially true because

[64] *Id.* at ¶¶ 252, 269.
[65] *Manzo v. Rite Aid Corp.*, 2002 WL 31926606, at *5 (Del. Ch.), *aff'd*, 825 A.2d 239 (Del. 2003) ("[A]warding money damages to compensate plaintiff for the return she could have earned had she invested elsewhere . . . amounts to speculation founded upon uncertainty. . . . [P]laintiff's assertion of 'investment opportunity losses' does not, in my opinion, state a cognizable injury.").

the alleged misrepresentations are oral, making credibility and context of greater importance.

Group Pleading

PayNerd alleges fraudulent inducement against Fin Cap, Reis, and Spirakus. Reis contends that PayNerd failed to put Reis on notice of the allegations against him due to improper group pleading.

"There is nothing in [Superior Court] Rule 9 that *per se* prohibits group pleading. A plain reading of the rule suggests that group pleading may be permitted so long as individual defendants are on notice of the claim against them."[66] However, group pleading "'is generally disfavored.'"[67]

In *River Valley Ingredients, LLC v. American Proteins, Inc.*,[68] the Court found that the specific allegations of wrongful actions were "sufficiently particularized to put" the defendants on notice.[69] It was "reasonably conceivable that [the plaintiff] *could* show that the [individual executives] [were] connected to,

[66] *River Valley Ingredients, LLC v. Am. Proteins, Inc.*, 2021 WL 598539, at *3 (Del. Super.).
[67] *In re Swervepay Acquisition, LLC*, 2022 WL 3701723, at *9 (Del. Ch.) (quoting *In re WeWork Litig.*, 2020 WL 7343021, at *11 (Del. Ch.)).
[68] 2021 WL 598539 (Del. Super.).
[69] *Id.* at *4.

and liable for, the representations . . . ."[70] The Court denied the motion to dismiss the fraudulent inducement claim.[71]

In *In re WeWork Litigation*,[72] the Court of Chancery denied a similar motion to dismiss.[73] The plaintiff had referred to two affiliated entities together in its pleading, rather than distinguishing between them.[74] The Court of Chancery determined that discovery was warranted to assist the plaintiff in making distinctions between the closely related parties in developing the factual record.[75]

In *In re Swervepay Acquisition, LLC*,[76] the Court of Chancery granted a motion to dismiss as to specific group-pled buyers.[77] The basis for the fraud claims was a vice president's email with payment volume projections.[78] The Court of Chancery considered whether it was fair to impute the alleged fraudulent representations to parties other than the vice president and his company.[79] The Court of Chancery concluded that it was not fair to impute the alleged fraudulent misrepresentations to parties other than the vice president and his company.[80] No

[70] *Id.* (emphasis in original).
[71] *Id.* at *8.
[72] 2020 WL 7343021 (Del. Ch.).
[73] *Id.* at *11.
[74] *Id.*
[75] *Id.*
[76] 2022 WL 3701723 (Del. Ch.).
[77] *Id.* at *11.
[78] *Id.* at *4
[79] *Id.* at *9.
[80] *Id.* at *10.

other party made statements related to the payment projections from the email that either expressly or impliedly endorsed or affirmed any aspect of the payment volume projection.[81]

PayNerd alleges Reis, Spirakus, and Fin Cap: (1) "[a]pproached PayNerd in late January 2021 regarding entering into a business relationship based on soliciting and processing PPP applications and loans";[82] (2) "[R]epeatedly assured PayNerd LLC that Fin Cap could competently process high volumes of PPP loan applications, including during the January 31 meeting";[83] (3) "[a]ssured PayNerd that Fin Cap could process up to thousands of new PPP loan applications per day";[84] (4) "claimed to have a competent management team in place to run Fin Cap and that Fin Cap could competently scale its personnel numbers, . . . to handle over 10,000 PPP loan applications originating from PayNerd per day"[85] —totaling approximately one million PPP loan applications over ten weeks;[86] and (5) told PayNerd that Fin Cap was only deficient in marketing, advertising, and "development of a front end sales funnel."[87]

[81] *Id.* at *9–10.
[82] PayNerd's Answering Br. at 37; PayNerd's Countercl. at ¶ 238.
[83] PayNerd's Countercl. at ¶ 239.
[84] PayNerd's Answering Br. at 37; PayNerd's Countercl. at ¶ 240–41.
[85] PayNerd's Countercl. at ¶¶ 240–41.
[86] *Id.* at ¶ 242.
[87] *Id.* at ¶ 243.

The Court finds that imputation is not required in this case because the counterclaim does not allege that another's statements should be imputed to Reis. Rather, PayNerd alleges that Reis himself made misrepresentations. Therefore, the instant case is more akin to *River Valley* and *WeWork*. The Court finds that the allegations are sufficiently particularized to put Reis on notice. It is reasonably conceivable that Reis is liable for the alleged misrepresentations. PayNerd should have the opportunity to develop the factual record through discovery to make the appropriate distinctions between allegations attributable to closely related parties: Reis, Spirakus, and Fin Cap.

Therefore, the Court hereby **DENIES** Blueacorn's and Reis' Motions to Dismiss with respect to Counterclaim V. The Court hereby **DENIES** Blueacorn's Motion to Dismiss with respect to Counterclaim VI.

Breach of Contract
(Counterclaim Counts I & II)

PayNerd alleges that Blueacorn breached Referral Contracts 1 and 2 by failing: (1) to provide customers with Blueacorn services;[88] (2) to make timely payment;[89] (3) to make complete payment;[90] (4) to process loan applications in a competent and timely manner;[91] (5) to process PayNerd-generated loan

[88] *Id.* at ¶¶ 204, 214.
[89] *Id.* at ¶¶ 201, 211.
[90] *Id.* at ¶¶ 12–17, 202, 205–06, 212, 215–16.
[91] *Id.* at ¶¶ 149–50.

applications—instead choosing to process Womply-generated loans;[92] (6) to submit for funding loans that were processed and approved;[93] (7) to provide accounting backup;[94] and (8) to process up to one million applications and loans—many of which already had received SBA approval.[95]

Blueacorn argues there was no breach of contract as a matter of law because Blueacorn did not have a duty to process every single loan application.

The Court finds that PayNerd's breach of contract claims go beyond the alleged failure to process every single PPP loan application. The breach of contract claims include other alleged breaches. The Court finds that genuine issues of material fact exist that prevent dismissal of Counterclaims I and II. For example, a genuine issue of fact exists as to whether the SBA would have declined to pay a fee to Blueacorn on a loan it approved. Therefore, the Court hereby **DENIES** Blueacorn's Motion to Dismiss with respect to Counterclaims I and II.

Implied Covenant of Good Faith and Fair Dealing
(Counterclaim Counts III & IV)

[92] *Id.* at ¶¶ 17, 202–03, 213.
[93] *Id.* at ¶¶ 204, 213–14.
[94] *Id.* at ¶¶ 13, 200, 210.
[95] *Compare* Am. Compl. ¶ 55 ("From February through July 2021, Blueacorn assisted the Lenders in making approximately 700,000 completed PPP loans."), *with* PayNerd's Countercl. at ¶ 102 ("Ultimately, the combination of PayNerd's extensive sales and marketing campaign and its front-end sales funnel generated over 1.7 million applications and over 700,000 loans for Blueacorn to process."). S*ee also* PayNerd's Countercl. at ¶ 157 ("Blueacorn failed to complete the processing of approximately 130,000 applications *that had already received SBA-approval*." (emphasis in original)).

"To state a claim for breach of an implied covenant, a claimant must allege: (1) a specific implied contractual obligation; (2) a breach of that obligation; and (3) resulting damage."[96] "The implied covenant only applies to developments that could not be anticipated, not developments that the parties simply failed to consider[.]"[97] The implied covenant comes into play "when the court finds that the expectations of the parties were so fundamental that it is clear that they did not feel a need to negotiate about them."[98]

> [T]he implied covenant is not a license to rewrite contractual language just because the plaintiff failed to negotiate for protections that, in hindsight, would have made the contract a better deal. Rather, 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."[99]

PayNerd argues that Blueacorn breached the implied covenant of good faith and fair dealing by "engaging in *post hoc* data manipulation."[100] PayNerd pled in

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[96] *Brightstar Corp. v. PCS Wireless, LLC*, 2019 WL 3714917, at *11 (Del. Super.); *see also Am. Healthcare Admin. Servs., Inc. v. Aizen*, 285 A.3d 461, 478 (Del. Ch.), *judgment entered*, (Del. Ch. 2022) ("To prevail on an implied covenant claim, a plaintiff must prove 'a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff.'" (quoting *Cantor Fitzgerald, L.P. v. Cantor*, 1998 WL 842316, at *1 (Del. Ch.))).
[97] *Nemec v. Shrader*, 991 A.2d 1120, 1126 (Del. 2010).
[98] *Allied Cap. Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1032–33 (Del. Ch. 2006).
[99] *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 816 (Del. 2013), *as corrected* (Oct. 8, 2013) (quoting *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005)).
[100] PayNerd's Countercl. at ¶¶ 221, 231.

its counterclaims that Blueacorn had specific implied contractual obligations: (1) "to accurately record loan application data in Salesforce";[101] (2) "to timely and accurately process applications";[102] (3) "to process applications generated by PayNerd, including those already approved by the SBA for funding";[103] and (4) "not [to] mismanage internal operations such that Blueacorn's performance was paralyzed, including to the point that approximately 130,000 [SBA] approved loans were not submitted for funding."[104] PayNerd contends that if this conduct does not breach Referral Agreements 1 and 2, then the conduct does violate the implied covenant of good faith and fair dealing.[105]

"The implied covenant of good faith and fair dealing involves . . . inferring contractual terms to handle developments or contractual gaps that the asserting party pleads neither party anticipated."[106] Either Referral Agreements 1 and 2 govern the Salesforce data integrity, or, if there is a contractual gap, then the implied covenant of good faith and fair dealing will fill that gap.[107]

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[101] PayNerd's Answering Br. at 33; PayNerd's Countercl. at ¶¶ 221, 231.
[102] PayNerd's Answering Br. at 33; PayNerd's Countercl. at ¶¶ 222, 232.
[103] PayNerd's Answering Br. at 33; PayNerd's Countercl. at ¶¶ 223–24, 233–34.
[104] PayNerd's Answering Br. at 33; PayNerd's Countercl. at ¶ 225(A)–(E).
[105] PayNerd's Answering Br. at 33–34.
[106] *Nemec v. Shrader*, 991 A.2d 1120, 1125 (Del. 2010).
[107] *See Brightstar Corp. v. PCS Wireless, LLC*, 2019 WL 3714917, at *11 (Del. Super.) ("The Court will resort to implying a covenant only when 'the contract is truly silent with respect to the matter at hand, and . . . when . . . the expectations of the parties were so fundamental that it is clear that they did not feel a need to negotiate about them.'" (quoting *Allied Cap. Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1032 (Del. Ch. 2006))).

The Court finds that Blueacorn had an implied duty to maintain accurate Salesforce records. Even though Referral Agreements 1 and 2 do not explicitly state that "accuracy" is a requirement of "manag[ing] and operat[ing]" Salesforce, it reasonably can be implied from Blueacorn's responsibility to "manage and operate" Salesforce, that the data should be accurate.[108] Thus, a gap exists that the implied covenant of good faith and fair dealing may fill. The alleged damage from false reporting in Salesforce is a discrepancy in the referral fees paid to PayNerd. The Court finds that data accuracy is an expectation that is "so fundamental that it is clear that [Blueacorn and PayNerd] did not feel a need to negotiate about [it]."[109] Thus, with respect to the allegations concerning the integrity of the Salesforce data, the implied covenant claim may remain.

The contract provides that Blueacorn has a duty to "provide underwriting, application processing for business loans and timely submission for qualified customers."[110] Thus, the Court finds that no gap exists for the implied covenant to fill with respect to timely and accurately submitting applications. Therefore, PayNerd's breach of contract claims govern this allegation.

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[108] *See* Referral Agreements 1 & 2, Schedule B (stating that it is Blueacorn's and Fin Cap's responsibility to manage and operate all backend technology—*e.g.*, Salesforce—required for providing services).
[109] *Allied Cap. Corp.*, 910 A.2d at 1032–33.
[110] Referral Agreements 1 & 2, Schedule B.

The Court finds that an implied covenant does not apply to Blueacorn's alleged duty to process all loan applications generated by PayNerd. Referral Agreements 1 and 2 explicitly state that the agreements are "non-exclusive," which permitted Blueacorn also to process applications from other referral partners. However, Referral Agreements 1 and 2 are silent with respect to whether Blueacorn was required to process all loan applications generated by PayNerd. Therefore, a gap does exist. However, the Court finds that this is a contractual development that could have been anticipated at contracting.[111] Whether Blueacorn was obligated to process every loan application generated by PayNerd is not "so fundamental that it is clear that [Blueacorn and Paynerd] did not feel a need to negotiate about [it]."[112] Rather, it appears this is an attempt to rewrite the contract for more favorable terms.

The Court finds that Blueacorn did not have an implied duty not to mismanage internal operations by: (1) not locking personnel out of the company's email and financial systems;[113] and (2) paying buyouts of over $180 million to its founders and other executives.[114] These actions by Blueacorn were matters of internal corporate business that impacted operations and available funding. Duties

[111] *Nemec*, 991 A.2d at 1126.
[112] *Allied Cap. Corp.*, 910 A.2d at 1032–33.
[113] PayNerd's Countercl. at ¶ 225(A).
[114] *Id.* at ¶ 225(B)–(C).

not to mismanage internal operations cannot be implied from the parties' agreements. The alleged duties not to mismanage internal operations are not "so fundamental that it is clear that [Blueacorn and Paynerd] did not feel a need to negotiate about them."[115] Rather, it appears these allegations are an attempt to "rewrite contractual language just because the plaintiff failed to negotiate for protections that, in hindsight, would have made the contract a better deal."[116]

Therefore, Blueacorn's Motion to Dismiss is hereby **GRANTED IN PART AND DENIED IN PART** with respect to Counterclaims III and IV.

Quasi-Contract

PayNerd alleges unjust enrichment and quantum meruit claims in the alternative to its contract-based claims. The parties do not dispute that Referral Agreements 1 and 2 are valid and enforceable contracts. This Court previously dismissed Blueacorn's quasi-contractual claims. The only argument raised by PayNerd to prevent dismissal of Counterclaims VII–XII[117] was that Blueacorn sought rescission of Referral Agreement 2.[118] Blueacorn stated in reply that it does

[115] *Allied Cap. Corp.*, 910 A.2d at 1032–33.
[116] *Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 816 (Del. 2013), *as corrected* (Oct. 8, 2013).
[117] The briefing only seeks dismissal of Counterclaims VII–XI. However, Counterclaim XII is essentially the same as Counterclaim XI. Counterclaim XI is for declaratory judgment that Referral Agreement 1 is valid, while Counterclaim XII is for declaratory judgment that Referral Agreement 2 is valid. Therefore, the Court will treat Counterclaim XII in the same manner as Counterclaim XI.
[118] PayNerd's Answering Br. at 35–36.

not seek rescission of Referral agreement 2, and only seeks ordinary tort damages.[119]

The Court finds that PayNerd's Counterclaims VII–XII are unnecessarily duplicative of its contractual claims. Therefore, PayNerd's Counterclaims VII–XII are hereby **DISMISSED**.

CONCLUSION

The Court finds that PayNerd sufficiently pled its fraudulent inducement counterclaims by alleging that Blueacorn made misrepresentations of then-existing operational capacities that were based on facts known to the speakers at the time the misrepresentations were made. Under these case-specific factual allegations, whether or not fraudulent inducement ultimately is determined to be beyond mere puffery or fraud in hindsight will be determined in the context of evidence, including facts relating to credibility and context.

The Court finds PayNerd has alleged that Reis himself made misrepresentations. The Court finds that the allegations are sufficiently particularized to put Reis on notice. PayNerd may develop the factual record through discovery to make the appropriate distinctions between allegations attributable to closely related parties: Reis, Spirakus, and Fin Cap.

[119] Blueacorn's Reply Br. at 22.

Therefore, the Court hereby **DENIES** Blueacorn's and Reis' Motions to Dismiss with respect to Counterclaim V. The Court hereby **DENIES** Blueacorn's Motion to Dismiss with respect to Counterclaim VI.

The Court finds that PayNerd's breach of contract claims go beyond the alleged failure to process every single PPP loan application. The breach of contract claims include other alleged breaches. The Court finds that genuine issues of material fact exist that prevent dismissal of Counterclaims I and II. Therefore, the Court hereby **DENIES** Blueacorn's Motion to Dismiss with respect to Counterclaims I and II.

The Court finds that Blueacorn had an implied duty to maintain accurate Salesforce records. With respect to Blueacorn's alleged duties to provide application processing, to process all applications from PayNerd, and not to mismanage internal operations, the Court finds the implied duty of good faith and fair dealing does not apply. Therefore, Blueacorn's Motion to Dismiss is hereby **GRANTED IN PART AND DENIED IN PART** with respect to Counterclaims III and IV. Counterclaims III and IV only may continue as to the alleged Salesforce data integrity.

The Court finds that PayNerd's Counterclaims VII–XII are unnecessarily duplicative of its contractual claims. Therefore, PayNerd's Counterclaims VII–XII are hereby **DISMISSED**.

Plaintiffs' and Third-Party Defendants Noah Spirakus' and Barry Calhoun's Motion to Dismiss PayNerd's Counterclaims and Third-Party Claims is hereby **GRANTED IN PART AND DENIED IN PART**. Third-Party Defendant Nathan Reis' Motion to Dismiss and Joinder is hereby **DENIED**.

IT IS SO ORDERED.

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