

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

IMMEDIENT CORP.)	
)	
)	
Plaintiff/Counterclaim Defendant)	C.A. No. 01C-08-216 RRC
)	
v.)	
)	
HEALTHTRIO, INC.)	
)	
Defendant/Counterclaim Plaintiff)	
)	

Submitted: April 4, 2005
Decided: June 22, 2005

Decision After Non-Jury Trial
Judgment for Plaintiff/Counterclaim Defendant

MEMORANDUM OPINION

P. Clarkson Collins, Jr. Esquire, Morris, James, Hitchens & Williams LLP, Wilmington, Delaware, Robert V. Campedel, Esquire, Eckert Seamans, Pittsburgh, Pennsylvania, and Bradley A. Plotner, Esquire, DKW Law Group, PC, Pittsburgh, Pennsylvania, Attorneys for Plaintiff/Counterclaim Defendant.

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COOCH, J.

I. INTRODUCTION

This is an claim for breach of contract brought by Immedient Corp. (“Immedient”) and a counterclaim for fraudulent misrepresentation brought by HealthTrio, Inc. (“HealthTrio”). (HealthTrio also claimed fraudulent misrepresentation and failure to perform under the contract as affirmative defenses). In November 2000 HealthTrio entered into a Professional Services Agreement (“PSA”) contract with Immedient in which Immedient was to develop computer software for HealthTrio. Along with the PSA, HealthTrio and Immedient entered into a series of Time and Materials Statements of Work (“T & M SoW”) that further defined the contractual obligations of each party.

Initially, HealthTrio paid Immedient’s invoices without objection or dispute. However, sometime in Spring 2001, HealthTrio decided to stop making payments to Immedient. Subsequently, Immedient filed suit against HealthTrio in August 2001 alleging that HealthTrio had improperly refused to pay the outstanding invoices for services provided under the contract with Immedient. HealthTrio responded by arguing that it is not liable to Immedient because Immedient had misrepresented its ability to perform work under the contract and that Immedient’s alleged failure to properly perform constituted a prior breach. HealthTrio further counterclaims that

inter alia Immedient failed to deliver the completed product, made false representations to induce HealthTrio into entering into the contract, and breached an implied covenant of good faith and fair dealing.

A non-jury trial was held in the Superior Court of the State of Delaware in and for New Castle County. This Court received testimony and evidence over a twelve-day period. The trial dates were April 28 through May 2, 2003, December 1 through December 5, 2003, and March 3 and 4, 2004.¹ After the close of testimony, the parties submitted proposed findings of fact and conclusions of law.²

II. SUMMARY OF OPINION

Immedient argues that HealthTrio breached the PSA by “failing to provide Immedient with full payment of invoices issued for the services provided by Immedient to [HealthTrio] under the Services Agreement.”³

¹ The trial schedule was interrupted, in part, in order to allow the parties to either mediate the case, or to engage directly in further settlement negotiations. The first mediation was held in March 2003, prior to trial. A second mediation was held between the first five days of trial and the next five days of trial. A third mediation was held post-trial with a different mediator. The Court appreciates the efforts of counsel and the parties to have sought voluntary resolution of this case, although such efforts were unsuccessful.

² Present counsel for HealthTrio entered their appearance only on November 2, 2004 after it was determined that former counsel for HealthTrio had developed a conflict that apparently prevented continued representation of HealthTrio.

³ Immedient Corp.’s Complaint at ¶17.

HealthTrio raises two affirmative defenses, in essence, 1) that Immedient had breached the contract first by allegedly fraudulently misrepresenting its ability to perform the work under the PSA and 2) that Immedient failed to perform the work required under the contract “properly.”⁴ HealthTrio also counterclaims *inter alia* that Immedient misrepresented its technical or managerial capabilities thereby fraudulently inducing HealthTrio into contracting with Immedient.

This Court finds that Immedient has proven by a preponderance of the evidence that HealthTrio breached the contract between itself and Immedient when HealthTrio did not pay the outstanding invoices for services that it authorized and when it did not contemporaneously object to the manner or cost of the invoiced work as required under the PSA. HealthTrio did not show that the technical and functional requirements of the so-called October 2000 technical documents were made a part of the contract such that Immedient was obligated to meet those requirements in order to be paid on the disputed invoice. The only requirements of Immedient (or HealthTrio) were those requirements contained in the PSA and the T & M SoWs. Under the requirements of the PSA, Immedient was only required to provide the services outlined in each successive T & M SoW and it was not required to

⁴ HealthTrio’s Answer and Counterclaim at ¶18.

deliver any completed product in order to receive compensation.⁵ Further, HealthTrio waived its right to counterclaim that Immedient fraudulently misrepresented its technical or managerial capabilities by not timely objecting to the invoices and by entering into new T & M SoW s with Immedient.⁶ Because this Court finds that HealthTrio waived any right to claim fraud, the Court need not reach the issues of whether HealthTrio has proven that Immedient fraudulently misrepresented its experience with Java programming or Extreme Programming (“XP”) software development or otherwise mislead HealthTrio. Additionally, under the terms of the PSA, Immedient is entitled to attorney’s fees.

⁵ Obviously, at the completion of the project, Immedient’s services should have resulted in a working version of the software that HealthTrio wanted. That did not happen. There was a great deal of conflicting testimony devoted to whether the software that was prepared by Immedient met certain technical requirements and was functional. There is the broader question of what constitutes completed software. The Courts notes (as did various witnesses at trial) that computer software may be completed but still require tweaking to work out bugs in the software. However, this Court need not reach this issue because Immedient never finished its work on the software because of the breach by HealthTrio.

⁶ HealthTrio made an untimely motion to amend its counterclaim to include a claim for breach of contract, which this Court has denied. HealthTrio in its Proposed Findings of Fact and Conclusions of Law raised, for the first time, a claim for negligent misrepresentation. This Court holds that HealthTrio cannot make a claim of negligent misrepresentation because the claim comes too late.

III. ISSUES PRESENTED⁷

The Court has a number of issue to resolve in the instant case.

As to Immedient's Claim

1. What documents constitute the agreement between HealthTrio and Immedient, i.e. are the terms of the Contract encompassed solely by the PSA and the attendant T & M SoWs or should the Court also consider the technical documents from October 2000 as part of the Contract?
2. Has Immedient shown by a preponderance of the evidence that HealthTrio breached the contract between the parties by its failure to pay the outstanding invoices without contemporaneously disputing the invoices as provided for in the PSA?
3. Was HealthTrio's performance under the contract excused by Immedient's alleged failure to properly perform its services under the Contract?
4. Is Immedient entitled to attorney fees related to the collection of the unpaid, then-undisputed invoices?

⁷ The Court was presented with numerous issues, many of which were overlapping or redundant; therefore, this Court has distilled the issues down to what it finds are the major issues.

As to HealthTrio's Claim

5. Has HealthTrio waived its right to counterclaim that it was fraudulently induced into entering into a contract with Immedient through alleged misrepresentation by Immedient of its technical and management capabilities when HealthTrio failed to timely object to the invoiced services and when it continued to authorize new work from Immedient?

IV. THE COURT'S FACTUAL FINDINGS

As a preliminary matter, this Court states the standard under which it has considered the evidence and reached its verdict. The Court finds the facts that follow to be determinative in this case. In doing so, the Court “applies the customary Delaware standard to the trial testimony.”⁸ The Court

must judge the believability of each witness and determine the weight given to all trial testimony. [The Court] considered each witness's means of knowledge; strength of memory and opportunity for observation; the reasonableness or unreasonableness of the testimony; the motives actuating the witness; the fact, if it was a fact the testimony was contradicted; any bias, prejudice, or interest, manner or demeanor upon the witness stand; and all other facts and circumstances shown by the evidence which affect the believability of the testimony.

⁸ *Dionisi v. Di Campli*, 1995 Del. Ch. LEXIS 88.

After finding some testimony conflicting by reason of inconsistencies, [the Court] has reconciled the testimony, as reasonably as possible, so as to make one harmonious story of it all. To the extent [the Court] could not do this, [it] gave credit to that portion of the testimony which, in [its] judgment was most worthy of credit and disregarded any portion of testimony which, in [its] judgment, was unworthy of credit.⁹

1. Immedient Corp. is a Delaware corporation that provides computer software and business solutions development to entities engaged in various industries throughout the United States.¹⁰ HealthTrio is a also a Delaware corporation and is a software service company that makes, markets, sells, and installs computer software.¹¹ HealthTriconnecttm was an “internet-based product, marketed directly to health plans, comprising four types of website portals through which healthcare related entities such as doctors, employers, insurers, brokers, and patients accessed information about the provision of and payment for a patient’s healthcare.”¹² This Court has jurisdiction of the claims because both parties are Delaware corporations.

2. The PSA contains a choice of law clause designating that

⁹ *Dionisi*, 1995 Del. Ch. LEXIS 88.

¹⁰ Immedient’s Proposed Findings of Fact and Conclusion of Law at 1 (hereinafter “Immedient’s Proposed Findings/Conclusions at _.”).

¹¹ Immedient’s Proposed Fact and Law at 1; HealthTrio’s Proposed Findings of Fact and Conclusion of Law at 54 (hereinafter “HealthTrio’s Proposed Findings/Conclusions at _.”).

¹² HealthTrio’s Proposed Findings/Conclusions at ¶ 1.

California law will govern contract disputes between the parties. The Court finds, and the parties do not dispute, that the choice of law clause is valid and that California law governs.

3. In August 2000, Rudy Hilado, vice-president of Technology of HealthTrio, met with David Foley and Donna Nichols, at that time Immedient employees, to discuss the prospect of Immedient developing computer software for a project identified as the HealthTrio*connect*tm Members Initiative (“the Project”).¹³ HealthTrio usually used its own staff and resources to produce its products; however HealthTrio apparently lacked sufficient staff and resources to produce concurrently a new members portal in time to meet client demands, and still continue development of HealthTrio’s other products.

4. In October 2000, HealthTrio and Immedient entered into two T & M SoWs.¹⁴ The first T & M SoW, dated October 16, 2000,¹⁵ was titled “Discovery Phase” and was intended to “determine the vision and scope to

¹³ Immedient’s Proposed Findings/Conclusions at 2; HealthTrio’s Proposed Findings/Conclusions at 5.

¹⁴ Immedient’s Proposed Findings/Conclusions at 6; HealthTrio’s Proposed Findings/Conclusions at 14.

¹⁵ The dates used to refer to the T & M SoWs is the date that the documents were signed, which is not to be confused with the “Authorized Start Dates” that are often not the same date as the signing date.

be completed by January 1, 2002.”¹⁶ The second T & M SoW, dated October 25, 2000, was titled “Design, Development and Stabilization Phase” and was intended to establish the billing rates of Immedient’s services and to set an estimate of the budgeted amount to be spent on the “Design through Stabilization.”¹⁷ The second T & M SoW stated that the “Content Member Initiative effort [was] to be completed by January 2001; however, the “Anticipated End Date . . . [was listed as] 2/1/01.”¹⁸

5. The initial two T & M SoWs, as well as subsequent SoWs, gave HealthTrio the responsibility for “assuming direction of all Immedient Consulting personnel performing services under this Statement of Work.”¹⁹ Hilado was the Client Administrator for the Project and worked in Immedient’s Denver office during the Project.²⁰ The two T & M SoWs also stated that “[t]he work described in this Statement of Work will be done

¹⁶ October 16 T & M SoW at PX 6. Immedient and HealthTrio, by order of the Court, submitted a “Joint Appendix.” Immedient’s exhibits are designated “PX _.” and HealthTrio’s exhibits are designated “DX _.”

¹⁷ October 25 T & M SoW PX 9.

¹⁸ Design, Development and Stabilization Phase T & M SoW at PX 9.

¹⁹ Discovery Phase T & M SoW of October 16, 2000 at PX 6, DX 5.

²⁰ Hilado Direct at A-0185. The parties have used a uniform method of citing to the trial transcripts. Every 8 ½” by 11” page of the multi-volume trial transcript is stamped with a sequential number in the following form: A-00000000. The parties have shortened the citation to A-0000.

under the general terms and conditions outlined in the Immediant “Professional Services Agreement.” [Citation omitted.] Any exceptions to the Professional Services Agreement are noted in this Statement of Work.”

6. The “Discovery Phase” resulted in several documents, only three of which are in issue. The three documents, titled, “Technical Specification,” “Functional Specification,” and “Vision/Scope,” are collectively referred to as the “October technical documents.”²¹ The “Technical Specification” document was intended to “confirm that the general approaches & recommendations proposed by Immediant are acceptable to [HealthTrio] and . . . to clarify several of those technical positions in an attempt to leverage existing code bases as well as the knowledge of the team.”²² The “Functional Specification” document was intended “to provide an overview of the functional requirements for the HealthTriconnecttm member interface.”²³ The “Vision/Scope” document was intended to cover “the Vision Statement, Architecture Goals, Scope and User Profile for the HealthTrio connect Member Initiative.”²⁴

²¹ Immediant’s Proposed Findings/Conclusions at 12; HealthTrio’s Proposed Findings/Conclusions at 14.

²² The “Technical Specification” document at PX 187; DX 9.

²³ The “Functional Specification” document at PX 189; DX 11.

²⁴ The “Vision/Scope” document at PX 190; DX 12.

7. The “Vision/Scope” document appears to be a consolidation of the “Functional Specification” document and “Technical Specification” document and, in fact, the “Vision/Scope” document incorporates the “Functional Specification” document, along with several other documents.²⁵

8. On November 2, 2000, HealthTrio and Immediant entered into the PSA under which Immediant agreed to develop computer software for the Project.²⁶ Immediant drafted the PSA.²⁷

9. Under “Services,” the PSA provided that “Immediant shall provide the services as described in this PSA and/or services described in the attached Statement of Work. [Citation omitted.] Immediant may also provide services on other Statements of Work that have been signed by both Parties at any time in the future.”²⁸ The PSA provided under “Payment” that “[f]or Time and materials Engagements: Immediant shall invoice [HealthTrio] on a bi-weekly basis for services rendered and approved and

²⁵ The “Vision/Scope” document at PX 190; DX 12.

²⁶ PSA at PX 2.

²⁷ There was testimony at trial that HealthTrio was able to modify the agreement before signing. Korpman Cross at A-0150.

²⁸ PSA at PX 2.

out-of-pocket expenses incurred.”²⁹ The “Payment” clause further provided that “[n]on-disputed invoices shall be payable in full within 30 days from receipt . . . [and] [a]ny and all attorney fees expended to collect unpaid undisputed amounts under this agreement shall be the responsibility of [HealthTrio].”³⁰ Under “Service Estimates and Bids,” the PSA provided that “[f]or Time and Materials Engagements . . . Immedient shall provide in a Statement of Work an estimate of charges for the Services covered by such Statement of Work, but no such estimate, or any other estimate provided by Immedient to [HealthTrio] . . . shall be binding on Immedient.”³¹ The PSA provided under “Term of Agreement” that “[t]his Agreement may be terminated by either Party with or without cause upon 30 business days notice to the other Party . . . [and] [a]ny individual Statement of Work under this Agreement may be terminated, in whole or in part, by [HealthTrio] . . . for any reason.”³²

10. The “Discovery Phase T & M SoW” anticipated that Phase 1

²⁹ PSA at PX 2.

³⁰ *Id.*

³¹ *Id.*

³² PSA at PX 2.

would be completed by January 1, 2001.³³ The “Vision/Scope” document stated that “the HealthTriconnecttm Member Initiative [software] that will be delivered in the first phase . . . must be completed by mid-January 2001 for a rollout to the 500+ employees of PARTNERS National Health Plans of North Carolina.”³⁴ The PARTNERS’ employees were to “serve as the beta test group before the . . . subsystem [the HealthTriconnecttm Member Initiative] [was] rolled out to the 350,000 people served by PARTNERS.”³⁵ The first phase of the Project was to “optimize the ship date in order to satisfy [HealthTrio’s] early to market strategy.”³⁶ The “Vision/Scope” document envisioned that “[c]onstraining the features is to ship the essential set of functionality.”³⁷

11. In mid-January 2001, Immedient and HealthTrio executed a third T & M SoW titled “Addendum – Completion of Release 1” that changed the completion date of Phase 1.³⁸ The purpose of the third T & M

³³ Discovery Phase T & M SoW of October 16, 2000 at PX 6, DX 5.

³⁴ Vision/Scope Document of October 26, 2000 at PX 190, DX 12.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ January 26, 2001 T & M SoW at PX 12.

SoW was to “complete defined scope for Release 1 by February 5th, 2001.”³⁹

This T & M SoW also stated that “[t]he work described in this Statement of Work will be done under the general terms and conditions outlined in the Immedient “Professional Services Agreement.” [Citation omitted.] Any exceptions to the Professional Services Agreement are noted in this Statement of Work.”⁴⁰

12. On January 31, 2001, Immedient and HealthTrio executed a fourth T & M SoW titled “Discovery Phase for Release II of HealthTrioconnecttm member Initiative.”⁴¹ The purpose of the fourth T & M SoW was to “define the scope of features to be completed within this release, estimates to be completed by June, 2001.”⁴² The T & M SoW stated that “[t]he budgeted amount of effort for the Discovery is estimated from \$30,000 to \$45,000. [Citation omitted.] This is a time and materials engagement and the effort is reported weekly. [Citation omitted.] The client is an integral part of the discovery team and is expected to participate in the management effort.” The T & M SoW also stated that “[t]he work described

³⁹ January 26, 2001 T & M SoW at PX 12.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² January 31, 2001 T & M SoW at PX 14.

in this Statement of Work will be done under the general terms and conditions outlined in the Immedient “Professional Services Agreement.” [Citation omitted.] Any exceptions to the Professional Services Agreement are noted in this Statement of Work.”⁴³ Phase II was a new and distinct phase of the Project.

13. On February 5, 2001, Immedient and HealthTrio executed a fifth T & M SoW titled “Completion of Release Member Section/HealthTriconnecttm to accommodate Partner Healthcare Changes.”⁴⁴ The purpose of the fifth T & M SoW was to “complete defined scope for Partner Healthcare changes as determined by requested changes, within an appropriate timeframe.” The T & M SoW stated that “[e]xpenses incurred in the execution of this engagement will be billed at cost.”⁴⁵ This T & M SoW contained the same PSA reference language as all of the proceeding T & M SoWs.

14. On March 21, 2001, Immedient and HealthTrio executed a sixth T & M SoW titled “Content Member Initiative Release 2.0. Finalize Discovery, design, Development, and Stabilization phases for Release 2.0 of

⁴³ February 5, 2001 T & M SoW at PX 13.

⁴⁴ *Id.*

⁴⁵ *Id.*

the Content Member Initiative. Include ongoing production support for Release 1.1.”⁴⁶ The purpose of the sixth T & M SoW was to “execute Release 2.0 of the Content member Initiative effort to be completed June 2001.”⁴⁷ This T & M SoW is similar to the October 25, 2000 in that it sets out the pricing and scope of services to be provided by Immedient as well as HealthTrio’s responsibilities.

15. On April 13, 2001, Immedient and HealthTrio executed a seventh T & M SoW titled “Content Member Initiative Release 2.0. Addendum A. Finalize Discovery, design, Development, and Stabilization phases for Release 2.0 of the Content Member Initiative. Include ongoing production support for Release 1.1.”⁴⁸ The purpose of this T & M SoW was to memorialize that “[t]he project timeframe has been adjusted, based on Discovery Requirements. [Citation omitted.] The new proposed date is June 20, 2001. [Citation omitted.] This is not include CCD’s or application integration, which will be defined at a future date.”⁴⁹

16. On May 15, 2001, Immedient and HealthTrio executed the

⁴⁶ March 21, 2001 T & M SoW at PX 15.

⁴⁷ *Id.*

⁴⁸ April 13, 2001 T & M SoW at PX 16.

⁴⁹ *Id.*

eighth and final T & M SoW titled “Content Member Initiative Release 2.0. Addendum B. Development of requirements (limited sub-set of original requirements to be defined and approved by HealthTrio). Assist in transition of knowledge and development training efforts between Immedient development group and HealthTrio development group. Include ongoing production support for Release 1.1.”⁵⁰ The purpose of this T & M SoW was to memorialize that “[t]he project timeframe has been adjusted, based on new requirements defined by HealthTrio. [Citation omitted.] The new proposed date for development completion will be determined and included within the documentation. [Citation omitted.] This date may adjust, based on the depth of knowledge transfer necessary and the ongoing production support effort.”⁵¹

17. Immedient submitted nineteen invoices to HealthTrio between October 29, 2000 and June 29, 2001. HealthTrio paid in full all of the invoices up to the March 9, 2001 invoice; HealthTrio then made a partial payment of \$18,225 toward the March 27, 2001 invoice. In total, HealthTrio paid Immedient \$968,845.62. Altogether, HealthTrio left six invoices dated 4/10/2001, 4/29/2001, 5/16/2001, 5/25/2001, 6/14/2001 and 6/29/2001 all

⁵⁰ May 15, 2001 T & M SoW at PX 17.

⁵¹ *Id.*

totaling \$721,579 unpaid.

V. THE COURT'S CONCLUSIONS OF LAW

A. Immedient's Complaint.

1. What documents constitute the agreement between HealthTrio and Immedient, i.e. are the terms of the Contract encompassed by solely the PSA and the attendant T & M SoWs or should the Court also consider the technical documents from October 2000 as part of the Contract?

This Court finds that contract between HealthTrio and Immedient consisted of the PSA and the eight executed T & M SoWs, including the two October 2000 T & M SoWs that were signed prior to the execution of the PSA. The Court further finds that the so-called "October technical documents" are not part of the contract. Under California law "[a] contract must be construed from the language used; where the terms of the contract are plain and unambiguous, courts have a duty to enforce the contract as agreed upon by the parties."⁵²

The PSA explicitly states that "[t]his Agreement contains the entire Agreement and understanding of the Parties as to the subject matter hereof

⁵² *Baskin-Robbins, Inc. v. Taj California, Inc.*, 2003 U.S. Dist. LEXIS 19946 *62 (U.S. Dist. Ct. Central Dist. of CA).

and merges and supersedes all prior discussions and agreements.”⁵³ The PSA also provides that “Immedient shall provide the services as described in this PSA and/or services described in the attached Statement of Work. [Citation omitted.] Immedient may also provide services on other Statements of Work that have been signed by both Parties at any time in the future.”⁵⁴ The PSA did not incorporate the “October technical documents.” The Court finds that the parties did agree, by executing the PSA, that the terms of the PSA and the attached T & M SoWs, plus future T & M SoW would be part of the contract.

HealthTrio argues that the PSA is not the entire expression of the contract but rather this Court should find that the “October technical documents” are also part of the contract. HealthTrio asserts that Immedient’s argument that the PSA integrated the two October T & M SoWs is “flatly wrong.”⁵⁵ HealthTrio argues that the two October T & M SoWs were not integrated into the PSA because the PSA stated that the integrated T & M SoWs were to be attached to the PSA and that the two October T & M SoWs were apparently not attached. HealthTrio contends

⁵³ PSA at PX 2.

⁵⁴ *Id.*

⁵⁵ HealthTrio’s Reply to Immedient’s Supp. Response at ¶ 4.

that “[b]ecause the PSA makes no reference whatsoever to the pre-existing October 16 and 25, 2000 SOWs, Immedient’s reliance on the integration clause to exclude the “October Technical Documents” is misplaced.”⁵⁶ HealthTrio appears to be arguing that the integration clause should be construed as including the two October T & M SoW and the “October technical documents” or none of these documents, in which case the PSA makes no sense because the PSA does not specify how or what Immedient is supposed to accomplish.

The PSA is the controlling document in this contract dispute. The evidence presented shows that HealthTrio negotiated with Immedient in the formation of the contract and accepted the time and materials structure of the PSA. It is basic contract law that a Court will not excuse performance by one party because that party has freely and knowingly entered into a contract that ultimately may be shown not in the party’s best interests. This Court holds that HealthTrio is bound by the terms of the contract, including the integration of the T & M SoW s.

⁵⁶ HealthTrio’s Reply to Immedient’s Supp. Response at ¶ 9.

2. Has Immedient shown by a preponderance of the evidence that HealthTrio had breached the contract between the parties by failing to pay the outstanding invoices without contemporaneously disputing the invoices as provided for in the PSA?

Immedient has met its burden of proving by a preponderance of the evidence that HealthTrio breached the Personal Services Agreement. “Under California law, the elements for a claim for breach of contract are 1) the existence of a contract, 2) Plaintiff's performance or excuse for nonperformance, 3) Defendant's breach, and 4) damage to Plaintiff.”⁵⁷ The parties have acknowledged the existence of the contract and the Court has decided above as to the contents of that contract.⁵⁸ The PSA required Immedient to “provide services as described in [the] PSA and/or services described in the attached Statement of Work.”⁵⁹ The service to be provided to HealthTrio by Immedient was the development of certain software to be used by HealthTrio. The PSA did not require Immedient to deliver any product in order to receive compensation.⁶⁰ Immedient was to be paid according to the hourly rates and description of work contained in each T &

⁵⁷ *Baskin-Robbins, Inc.*, 2003 U.S. Dist. LEXIS 19946 *56.

⁵⁸ HealthTrio's Proposed Findings/Conclusions at ¶ 257.

⁵⁹ Personal Services Agreement at “General Terms and Conditions; Services.”

⁶⁰ Personal Services Agreement at “General Terms and Conditions; Compensation.”

M SoWs. HealthTrio signed the PSA and each T & M SoW, thereby authorizing Immedient to begin work.

Immedient invoiced HealthTrio on a biweekly basis for services provided during that time period, which services had been authorized under the applicable T & M SoW. HealthTrio had the right under the PSA to review each invoice and dispute any part of the invoice. HealthTrio was required to notify Immedient within 10 business days of any objections to an invoice. The PSA stated that “[i]f no written objection is made by [HealthTrio] to any portion or charge set forth . . . the accuracy and appropriateness of the Time Report shall be deemed to be accepted.”⁶¹ HealthTrio did not timely object to any of Immedient’s invoices, including the invoices that it did not pay, until after Immedient filed its complaint in this case.

HealthTrio was invoiced for services rendered and not for the completion of a specific task. Immedient did have a duty to provide a finished computer program at the end of the Project; however, Immedient’s claim is not for the total cost of the Project, which was undeterminable under T & M SoW-type contracts, but for services provided to HealthTrio up through June 2001. HealthTrio has not asserted that Immedient failed to

⁶¹ Personal Services Agreement at “General Terms and Conditions.”

provide the services billed, or that HealthTrio had not authorized the work by signing the T & M SoWs. HealthTrio has asserted as its defense that the services rendered were inadequate to the point of relieving HealthTrio of its duty to pay.

HealthTrio does not deny that it, in essence, breached the PSA by failing to pay the outstanding invoices; HealthTrio's defense that Immediant had breached the contract first by not properly performing under the PSA fails. HealthTrio had direct, day-to-day contact with Immediant during the development of the Project through the participation of Hilado and other employees of HealthTrio, as well, and received weekly status reports from Immediant about the Project. HealthTrio had a duty under the PSA to "assum[e] direction of all Immediant Consulting personnel" working on the Project. HealthTrio had the right to dispute any invoice or, if unhappy with the work product, to cancel the Project. There is no evidence in the record to show that HealthTrio made a serious contemporaneous complaint about the Project or that HealthTrio objected to any invoices, except for minor time charges, until the complaint was filed. HealthTrio had adequate remedies in the PSA for it to protect its interests but HealthTrio failed to avail itself of these remedies. Having authorized work to be performed by Immediant

under the T & M SoW, and then not contesting or disputing those invoices, HealthTrio has waived its right to refuse payment. In order to prevail on its defense, HealthTrio needed to show that the PSA, and attendant T & M SoWs, which it signed, was the product of fraud, overreaching or excusable neglect.⁶² HealthTrio has not provided a credible reason to excuse its nonperformance.

3. Was HealthTrio’s performance under the contract excused by Immedient’s alleged failure to properly perform its services under the Contract?

As stated above, HealthTrio has not proven by a preponderance of the evidence that Immedient did not properly perform under the PSA.

Immedient was obligated to provide specific services under the PSA and the T & M SoWs; none of the disputed T & M SoWs required Immedient to provide a completed software program. However, Immedient must be free from substantial default in order not to have been in breach of the contract.⁶³

Under California law, “[i]t [is] incumbent on [a plaintiff] to plead and to prove that it had performed all things on its part to be performed under the

⁶² *Hulsey v. Elsinore Parachute Center*, 168 Cal.App.3rd 333 (Cal. Ct. App. 1985) (holding that “[i]t is well established, in the absence of fraud, overreaching or excusable neglect, that one who signs an instrument may not avoid the impact of its terms”).

⁶³ *Pry Corp. of America v. Leach*, 177 Cal.App.2d 632, 639 (Cal. Ct. App. 1960).

terms of the contract in order to state a cause of action for breach thereof and to recover damages for such breach.”⁶⁴ According to *Williston on Contracts*, “[a]ccompanying every contract is a common-law duty to perform with care, skill, reasonable expediency and faithfulness the thing agreed to be done. [Citation omitted.] A failure to observe any of these conditions is . . . a breach of contract.”⁶⁵ Another secondary source states, specifically addressing “time and materials” contracts, that “time-and-materials and labor-hour contracts only require contractors to try their best to accomplish whatever is specified in the SOW. [Citation omitted.] If they try their best and are unsuccessful, the government is still obligated to make the contractually specified payment.”⁶⁶ Under this analysis of Immediant’s work, this Court finds that Immediant has met its burden and HealthTrio has not. There was no serious contemporaneous complaint from HealthTrio that Immediant was not “try[ing] their best to accomplish” the goal of developing the Members Portal for HealthTrio.

HealthTrio has not alleged that Immediant did not do the work that it

⁶⁴ *Acostics, Inc. v. Treppe Construction Co. Inc.*, 14 Cal.App.3d 889, 913 (Cal. Ct. App. 1971).

⁶⁵ *Williston on Contracts* (4th ed. §63.25 (2002) quoting *Lincoln Grain, Inc. v. Coopers & Lybrand*, 345 N.W.2d 300 (Neb. 1984).

⁶⁶ Major Gregg Sharp, CONTRACT AND FISCAL LAW DEVELOPMENTS OF 2003--THE YEAR IN REVIEW: Contract Formation: Contract Types, 2004 Army Law. 20, 21 (2004).

said it did. HealthTrio has based its defense/counterclaim, in part, on allegations that Immedient's work was inadequate, but in fact, HealthTrio on several occasions complimented Immedient on its work. For example, Hilado, who was the Client Administrator for HealthTrio on the Project stated late in the process that "the members piece has added significant value to our offerings."⁶⁷ When asked if Immedient could use its work on the HealthTrioconnecttm project in marketing Immedient, HealthTrio declined, apparently only on the grounds that it did not want its competitors to know that HealthTrio had not done the work itself and not because of Immedient's alleged breach or poor performance.⁶⁸ In response to Immedient's request to use the Project as a marketing tool, Dr. Ralph A. Korpman, one of the founders of HealthTrio and its then-president, stated in an April 5, 2001 email that, "I like Immedient and I think they've done an OK, albeit expensive, job for us."⁶⁹ Cindy Post, HealthTrio's vice-president of development, also testified that as late as April 27, 2001, the project was going well.⁷⁰ HealthTrio's evidence of Immedient's alleged incompetence is

⁶⁷ Hilado Email of May 1 at PX 147.

⁶⁸ Nancy Levine Email of April 5 at PX 132.

⁶⁹ Korpman Email of April 5 at PX 132.

⁷⁰ Post Cross at A-0516.

contradictory at best and did not rise to the requisite level of preponderance of the evidence in order to find for HealthTrio.

4. Is Immedient entitled to attorney fees related to the collection of the unpaid, undisputed invoices?

The terms of the PSA explicitly state that “[a]ny and all attorney fees expended to collect unpaid undisputed amounts under this agreement shall be the responsibility of [HealthTrio].”⁷¹ Under California Civil Code

§1717(a)

(a) In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs.⁷²

This Court has found that HealthTrio breached the PSA and the related T & M SoWs by not paying the invoices for the work authorized by HealthTrio and performed by Immedient. Immedient has had to expend attorney fees to collect the unpaid sums and consequently, HealthTrio, by the terms of the PSA, must reimburse Immedient.⁷³

⁷¹ PSA at PX 2.

⁷² Cal. Civ. Code §1717(a).

⁷³ The parties shall attempt to resolve the amount of attorney's fees owed to Immedient. The Court asks that Immedient advise the Court by July 11 whether the parties have reached any such agreement (subject, of course, to HealthTrio's position that Immedient has not proven its entitlement to any attorney's fees).

B. HealthTrio's Affirmative Defense/Counterclaim

1. Has HealthTrio waived its right to state the affirmative defense/counterclaim that Immedient fraudulently induced HealthTrio into entering into the PSA by misrepresenting Immedient's technical and management capabilities when HealthTrio entered into new T & M SoWs with Immedient that authorized additional work to be performed by Immedient?

HealthTrio's affirmative defense/counterclaim, that "Immedient made [false] representations . . . for the purpose of inducing HealthTrio to enter into the [PSA]," fails because HealthTrio has waived any affirmative defense or counterclaim for fraud by entering as it did into subsequent agreements (i.e., the post-PSA and T & M SoWs) with Immedient.⁷⁴ There was no sufficient evidence presented to show that HealthTrio was unsatisfied with Immedient's work or felt defrauded by Immedient contemporaneously with the events. It was only after Immedient filed suit to receive payment that HealthTrio for the first time raised the issues of fraud and misrepresentation. The record shows, through the T & M SoWs, that HealthTrio in fact continued to request more work from Immedient after the alleged breach on February 5 up through May 2001.

In response to Immedient's claim that HealthTrio waived its right to

⁷⁴ This Court does not reach the issue of whether Immedient's actions prior to the execution of the PSA constituted fraud because the Court finds that HealthTrio had waived any right to make such a claim through its actions.

assert a fraud claim, HealthTrio argues that

Immedient's waiver argument fails on two counts. First, the record is devoid of evidence that HealthTrio knew of Immedient's [alleged] fraud, or even that the full extent of Immedient's [alleged] fraud was discoverable when it executed the supplemental Statements of Work. Second, those Statements of Work granted no concessions, let alone significant concessions, that might be inferred as compensation for Immedient's [alleged] fraud.⁷⁵

HealthTrio contends that if Immedient defrauded it, HealthTrio had the option of either rescinding the contract or to stand on the contract and sue for damages.⁷⁶

HealthTrio's first argument, that there was no evidence that HealthTrio knew of Immedient's [alleged] fraud, or even that the full extent of Immedient's [alleged] fraud was discoverable, is unconvincing. HealthTrio had a responsibility under the contract to "assum[e] direction of all Immedient Consulting personnel." HealthTrio dispatched Hilado, its vice-president of Technology, to oversee the project for HealthTrio. According to Hilado, at the beginning of the Project he spent "almost every day" at Immedient's Denver office and then less frequently starting in Spring 2001 as the Project progressed.⁷⁷ While both parties acknowledge

⁷⁵ HealthTrio's Response to Immedient's Proposed Findings/Conclusions at ¶ 86.

⁷⁶ HealthTrio's Response to Immedient's Proposed Findings/Conclusions at ¶ 87.

⁷⁷ Hilado Direct at A-0185.

that Hilado was not an expert in the use of XP methodology or Java technology, he did have extensive computer and software experience.⁷⁸ Hilado further testified that he “reviewed the function of the product” while at Immedient and that he “believe[d] if there was something wrong . . . [he] had the ability . . . to tell [Immedient] there was something wrong.” Hilado was HealthTrio’s eyes and ears at Immedient and he was in a position to see and review the work being done contemporaneously by Immedient.

Further, HealthTrio was a sophisticated buyer that had the experience to understand and follow the progress of the software it was contracting to have developed. Cindy Post, HealthTrio’s vice-president of product strategy and management, described HealthTrio as “a software vendor . . . [that] make[s] software and . . . market[s] it . . . sell[s] it and install[s] it.”⁷⁹

HealthTrio had already developed a software product called HealthTrio*express*TM that is marketed to healthcare plans.⁸⁰ HealthTrio’s first incarnation, which was as Medical Data Corporation, designed software

⁷⁸ Hilado has been working in the computer field since 1983, first as an application developer and then managing application development. Hilado direct at A-0184. Immedient, however, gave Hilado a book on the XP methodology. Immedient’s Proposed Findings of Fact and Conclusions of Law at ¶ 55.

⁷⁹ Cindy Post Direct at A-0493.

⁸⁰ *Id.*

to help healthcare providers supply services to their clients.⁸¹ In its second incarnation, called Health Data Sciences, it “did all the automation of public healthcare in New York City amongst all their hospitals and physicians.”⁸² Prior to HealthTrio hiring Immedient for the HeatHealthTrioriocconnecttm project, HealthTrio had handled its software development needs in-house.⁸³

This Court finds it difficult to accept HealthTrio’s argument that it could not know of any alleged fraud by Immedient assuming same existed. If Immedient had mislead HealthTrio in the inducement in order to obtain the HealthTriocconnectTM contract, HealthTrio had the necessary background and experience to recognize the problem once the project was underway. Not only did HealthTrio have experience in developing software but also it had one of its executive on the ground at Immedient to make sure that the project, which was on a very fast track at HealthTrio’s insistence, ran smoothly.

HealthTrio’s second argument that it did not waive its right to claim fraud and misrepresentation because it had the option to stand on the contract and sue for damages also fails. The California Court of Appeals in

⁸¹ Dr. Ralph A Korpman Direct at A-0138.

⁸² *Id.*

⁸³ *Id.*

Schied v. Bodinson Mfg. Co. held that

it is well settled that when a party has been induced by fraud to enter into a contract, he may elect either to rescind the contract by restoring whatever he has received under it, or he may affirm the contract, retaining whatever advantage he may have acquired, and still have his action for damages for deceit practiced upon him in making the contract. This rule is, however, subject to limitations which apply whether the contract, to which the charge of fraud is addressed, is an executed or executory contract. One of these limitations is that *when a party claiming to have been defrauded, enters, after discovery of the fraud, into new arrangements or engagements concerning the subject-matter of the contract to which the fraud applies, he is deemed to have waived any claim for damages on account of the fraud.*⁸⁴

The California Court of Appeals further explained that

[i]f, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages, he must stand toward the other party at arm's length; he must on his part comply with the terms of the contract; *he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud.*⁸⁵

While the general rule on waiver is helpful, the facts of the instant can require this Court to modify the application of the waiver rule to this factually specific case.

Unlike the cases cited by the parties, the instant case does not involve just one contract but several contracts. HealthTrio and Immedient entered into an initial contract, the two October T & M SoWs, which were for the

⁸⁴ *Schied v. Bodinson Mfg. Co.*, 179 P.2d 380, 385 (Cal. App. 1947) quoting *Burne v. Lee*, 104 P. 438, 441 (Cal. 1909).

⁸⁵ *Schied*, 179 P.2d at 385.

discovery, design, development and stabilization of the “Content Member Initiative.” The PSA, which became the controlling document and incorporated the two October T & M SoWs, followed. In mid-January 2001, a third T & M SoW was executed, which set February 5, 2001 as the deadline. On January 31, 2001, HealthTrio executed a fourth T & M SoW with Immedient for a discovery phase for Release 2.0.

HealthTrio claims that Immedient breached the contract as of February 5 by not providing complete and functional software. However, HealthTrio did not contemporaneously claim that Immedient was in breach by allegedly failing to provide complete and functional software. Under HealthTrio’s theory of waiver, it could have rescinded the contract, which it claims was not a feasible option, or it could have stood on the contract and sued for damages.⁸⁶ Instead, on February 5, HealthTrio executed a fifth T & M SoW with Immedient in which Immedient was to “complete defined scope for Partner Healthcare changes as determined by requested changes, within an appropriate timeframe.” It appears to the Court that the February 5 deadline was extended to implement the changes that resulted from the PARTNERS beta test.

⁸⁶ HealthTrio also could have, but did not, cancel the January 31 T & M SoW, which the PSA allowed.

Although HealthTrio now alleges that Immedient was in breach of the contract on February 5, HealthTrio not only executed the February 5 T & M SoW, it also executed a sixth T & M SoW with Immedient on March 21, 2001 related to the Release 2.0, a separate component of the Project. It is not logical that HealthTrio would engage Immedient to begin work on the second phase of the project if HealthTrio felt that Immedient had breached the first part of the project.

HealthTrio had also been paying on the invoices presented by Immedient through to the sixth T & M SoW. The last invoice paid in full by HealthTrio was the March 9, 2001 invoice, which was presented a little over a month after the alleged breach by Immedient. The first invoice post February 5 was invoiced on February 12; this invoice was paid in full. There were two invoices on February 25 and an invoice on March 9, all three were paid in full. The last invoice upon which a partial payment was made was March 27. At no time during this period did HealthTrio communicate to Immedient that it was in breach of the contract, and more tellingly, HealthTrio never notified Immedient that payments were going to stop.⁸⁷ HealthTrio just never made another payment.

⁸⁷ At oral arguments the Court asked counsel for HealthTrio what were the reasons in the record that HealthTrio stopped paying the invoices; counsel replied that the record is not clear as to why HealthTrio stopped paying the invoices.

However, even though HealthTrio stopped paying on the invoices, it continued to enter into new T & M SoWs with Immedient. HealthTrio executed four T & M SoWs after February 5.⁸⁸ One of the T & M SoWs was entered into on March 21 and two of those T & M SoW were entered into after March 27 (one on April 13 and one on May 15). In order for HealthTrio to not be in breach for its failure to pay the invoices for services rendered, HealthTrio must have had a legal reason not to have been obligated to pay. HealthTrio argued that it was relieved from its duty to pay Immedient because of Immedient's own breach of the contract that occurred on February 5. However, if HealthTrio stopped paying the invoices after March 27 because of Immedient's alleged breach of February 5, then HealthTrio, at the very least, acted in bad faith if it entered into two more T & M SoWs that it had no intention of paying.

Dr. Korpman testified that in early 2001 he "started to ask questions" about the HealthTrio*connect*tm project and that he decided HealthTrio "better stop and reassess" what was going on with the project.⁸⁹ Dr. Korpman acknowledged that he "was not a great fan of sending this project out to

⁸⁸ This count includes the February 5 T & M SoW that was executed in the knowledge that the February 5 deadline would not be met.

⁸⁹ Korpman Direct at A-0147.

begin with.”⁹⁰ Dr. Korpman testified that he “discover[ed] [that HealthTrio] spent a lot more money than [he] thought.”⁹¹ Dr. Korpman stated that he had “never had an intention of paying \$650,000 and one dollar” for the project,⁹² even though the \$650,000 was an estimate of charges and was not binding on Immedient.⁹³

On May 1, Hilado sent an email to Jan Ticich, HealthTrio’s vice president of administration, in response to an email from Ticich. The Ticich email complains about the cost associated with Phase II of the project, which HealthTrio had initiated through the two April 2nd T & M SoW s.⁹⁴ Ticich stated that Dr. Korpman “became ‘livid’ at the thought” of Phase II’s estimate of \$500,000 to \$750,000 (revised to \$650,000 to \$850,000).⁹⁵ Ticich questioned “who gave [Hilado] permission to sign the agreement.”⁹⁶

Hilado acknowledged that Dr. Korpman told him not to sign anything until after a management meeting in which the project’s future would

⁹⁰ *Id* at A-0151.

⁹¹ *Id* at A-0148.

⁹² *Id* at A-0148.

⁹³ PSA at PX 2.

⁹⁴ Ticich Email of April 30 at PX 147.

⁹⁵ *Id* at PX 147.

⁹⁶ *Id* at PX 147.

presumably be discussed.⁹⁷ Hilado responded that “based on [Cindy Post’s] discussion with [Dr. Korpman] he “underst[ood] that the statement of work could be signed and [HealthTrio] could continue development on the members piece.”⁹⁸ Hilado responded that “[i]f we are unable or unwilling to continue the member portal development with Immedient at this time, I can terminate the project with Immedient and take possession of all the documentation that has been created so far for Phase II.”⁹⁹ Hilado further stated that there was an immediacy to signing the T & M SoW s because HealthTrio “risked losing the dev[elopment] team (and its experience).”¹⁰⁰

There was also testimony suggesting that HealthTrio may have been experiencing cash flow problems at the time it stopped paying on the invoices. Dr. Korpman wrote to Hilado on March 21 that he was not “feeling real warm” about entering into Phase II with Immedient “until [HealthTrio] raise[d] some money.”¹⁰¹ Ticich in her email to Hilado on

⁹⁷ Hilado Email of May 1 at PX 147. There is no evidence in the record as to when the management meeting was held and what was discussed, other than the reference to the meeting by Hilado. Presumably, the meeting would have been sometime between March 21, 2001, when Dr. Korpman told Hilado not to sign the Phase II agreement and April 2, 2001, when Hilado signed the two T & M SoW s.

⁹⁸ *Id* at PX 147.

⁹⁹ *Id*.

¹⁰⁰ Hilado Email of May 1 at PA 147.

¹⁰¹ Korpman Email of March 21 at PX 120.

April 30 alludes to some type of financial problem when she says “[HealthTrio] cannot commit company funds in that price range at this time.”¹⁰² Hilado in his response stated that one option for HealthTrio was to delay further work on the project “until we are in a position to continue work with Immedient.”¹⁰³

This Court does not find that HealthTrio’s defense/counterclaims are meritorious. Given the undisputed language in the PSA and the T & M SoWs and the actions of HealthTrio after the alleged breach, the Court can only harmonize the evidence by finding that HealthTrio did not contemporaneously believe that Immedient had mislead them into executing the contract or that Immedient had breached the contract first. It appears to this Court that HealthTrio, through the possible prodding of Dr. Korpman, decided to terminate the contract with Immedient due to the rising cost of the HealthTriconnecttm project and/or to an apparent cash flow problem at HealthTrio. The Court finds that under the PSA and the T & M SoWs, HealthTrio could have terminated the contract (with proper notice) under either or both scenarios; however, HealthTrio still had a duty to pay for any work that it authorized Immedient to provide and that was not disputed in a

¹⁰² Ticich Email of April 30 at PX 147.

¹⁰³ Hilado Email of May 1 at PX 147.

timely manner. HealthTrio could not unilaterally decide that it would no longer honor the contract and refuse to pay for the work it had authorized.

For the foregoing reasons, this Court finds in favor of the plaintiff/counterclaim defendants Immedient Corp. in the amount of \$721,579, plus interest at the legal rate and costs.¹⁰⁴

IT IS SO ORDERED.

Richard R. Cooch

cc: Prothonotary

¹⁰⁴ HealthTrio much earlier filed a motion for sanctions against Immedient alleging spoliation of evidence. The matter was referred to a Commissioner for decision; however, the parties requested that a decision be deferred pending mediation. HealthTrio has not asked the Court to revisit this issue in the post-trial briefing or at oral argument on the post-trial briefing. The Court understands that motion has been withdrawn.