STATE OF NORTH CAROLINA

NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
24 CVS 2020

VIP UNIVERSAL MEDICAL INSURANCE GROUP, LTD and VIP UNIVERSAL MEDICAL INSURANCE GROUP, LLC,

Plaintiffs,

v.

TRINITY COMPUTER SERVICES, INC. d/b/a CHORDLINE HEALTH,

Serve: Capitol Services, Inc., Registered Agent for Trinity Computer Services, Inc., d/b/a Chordline Health, 108 Lakeland Avenue, Dover, Delaware, 19901,

Defendant.

ORDER AND OPINION ON DEFENDANT'S MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS

1. **THIS MATTER** is before the Court on Defendant's Motion for Partial Judgment on the Pleadings (the "Motion"), (ECF No. 20).

2. Having considered the Motion, the related briefing, the arguments of counsel at a hearing on the Motion, and other relevant matters of record, the Court, in the exercise of its discretion, hereby **GRANTS in part** and **DENIES in part** the Motion.

Troutman, Pepper, Hamilton, Sanders LLP by Dennis Deak and William J. Farley, for Plaintiffs.

Ward and Smith, P.A. by Isabelle Chammas and Edward Coyne and Kane, Russel, Coleman, Logan PC by Brian W. Clark (admitted pro hac vice), for Defendant.

Earp, Judge.

I. FACTUAL BACKGROUND

3. The Court does not find facts on a motion for judgment on the pleadings pursuant to Rule 12(c) but rather recites the facts alleged in the pleadings that are relevant to the Court's determination of the motion. *Willard v. Barger*, 2019 NCBC LEXIS 43, at *1-2 (N.C. Super. Ct. July 12, 2019) (citing *Erikson v. Starling*, 235 N.C. 643, 657 (1952)).

4. Plaintiff VIP Universal Medical Insurance Group, LLC ("VIP LLC") is a Texas limited liability company with its principal place of business in Miami, Florida. (Compl. ¶ 1, ECF No. 3; Def.'s Mem. Law Supp. Mot. Partial J. Pleadings at 2 ["Def.'s Memo."], ECF No. 21.)[1]

5. Defendant, a Delaware corporation, develops and licenses software for insurance companies and has its principal place of business in Wilmington, North Carolina. (Compl. ¶ 3; Def.'s Memo. at 2.)

6. On 1 September 2023, Plaintiff and Defendant entered into a contract titled, "Binding Business Associate Agreement and Terms of Service With Exhibits" ("Agreement"), the purpose of which was to "implement and utilize the ACUITYnxt – an on-line clinical workflow system offered by Defendant . . . . to aid in the workflow

[1] There are two named Plaintiffs in the Complaint: VIP Universal Medial Insurance Group, Ltd., and its parent company, VIP Universal Medical Insurance Group, LLC. However, according to the Complaint "[t]he Contract references 'VIP Universal Medical Group, Ltd.' Plaintiffs assert that this is a scrivener's error, and the intended contracting party was 'VIP Universal Medical Group, LLC.'" (Compl. at 1, n.1.) Therefore, the Court will refer to the Plaintiffs together in the singular, "Plaintiff."

and medical management of [Plaintiff's] policyholders and dependents as covered members." (Compl. 2, Ex. A)[2]

7. The parties signed an associated Statement of Work ("SOW #1") on 16 October 2023, to be effective 1 September 2023. (Compl. ¶ 7, Ex. B.) SOW #1 included a "Go Live Date" of "on or before April 30, 2024." (Compl. ¶ 11.)

8. Plaintiff entered into the Agreement and SOW #1 "with the expectation that the software services . . . would enhance Plaintiff's operations and facilitate its business model, particularly in the context of providing medical travel insurance services throughout South America and Central America." (Compl. ¶ 12.) [3]

9. However, as early as November 2023, Plaintiff began noticing inconsistencies between Defendant's offerings and Plaintiff's operational requirements, including processing delays, lack of Spanish and Portuguese language support, and data inconsistencies. (Compl. ¶¶ 17, 22.)

10. The parties attended multiple "training sessions" to work through these issues. Specifically, during training sessions on 8 November 2023 and 14 November 2023, the parties discussed how the software could be used for group contract management. (Compl. ¶¶ 23-24.) During a training session on 20 November 2023, the parties discussed adopting Defendant's software for Spanish and Portuguese speaking users. (Compl. ¶ 25.)

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[2] The first few paragraphs of the Complaint are not numbered. Therefore, the Court refers to the content of this part of the Complaint by page number.

[3] The Complaint states that *Defendant* entered into the contracts with this expectation, but this appears to be a typographical error.

11. Among other things, Plaintiff alleges that Defendant had "actual knowledge that Plaintiff sold its services only to customers outside of the United States and particularly in Central and South America. However, Defendant did not disclose that it had no experience or ability to service non-English speaking platforms." (Compl. ¶¶ 26-27.)

12. From 1 November 2023 through 4 March 2024, Plaintiff made monthly payments to Defendant in accordance with the Agreement and its attached Pricing Addendum. In total, Plaintiff paid Defendant $200,309.89. (Compl. ¶ 34; Agreement at 5.)

13. Plaintiff alleges that despite communicating with Defendant regarding continued failures in the software, Defendant failed to implement the software services as specified and required by both the Agreement and SOW #1 by the Go Live Date. (Compl. ¶ 31.)

14. As a result, Plaintiff terminated the Agreement pursuant to Paragraph 28, which provides in relevant part:

> If CHORDLINE commits a material breach of this Agreement, Client may either:
>
> a) terminate this Agreement immediately; or
>
> b) provide CHORDLINE with an opportunity to cure such breach with a stated period which shall be less than 30 days. If we do not cure such breach within the time-period You have stated You may terminate this Agreement immediately.

(Agreement ¶ 28.)

15. On 6 May 2024, Plaintiff sent a letter of termination to Defendant terminating the Agreement for cause and stating that Defendant had materially breached the contract in the following ways:

> (1) failure to implement the software services; (2) severe processing delays; (3) the absence of computed fields in the software restricting [Plaintiff's] ability to perform essential calculations; (4) the lack of Spanish and Portuguese support, especially given Defendant's prior knowledge of [Plaintiff's] primary operations in Central and South America; (5) the ACUITYnxt software's inflexibility regarding workflow; (6) the lack of data fields essential to [Plaintiff's] business process which creates inaccurate and confusing letters and reports; (7) the ACUITYnxt software's tendency to create significant gaps in historical data and accessibility; and (8) the ACUITYnxt software's cripplingly insufficient access control measures which posed a material risk to data integrity and compliance with data protection standards.

(Compl. ¶ 33.)

16. Defendant responded the following day, denying any breach of contract and requesting confirmation that the contract was being terminated. Defendant also demanded payment for invoices and for a Termination Fee referenced in paragraph 28 of the Agreement. (Compl. ¶ 36.)

17. The Termination Fee is described in paragraph 28 as follows:

> Should Client terminate this Agreement prior to the expiration of the Term, and CHORDLINE has not breached the Agreement, Client must notify CHORDLINE in writing sixty (60) days prior to the date of termination and must pay a Termination Fee.
>
> Client agrees to pay a Termination Fee calculated as (X minus Y) ("Termination Fee"), where "X" equals $1,230,000 (the "Base Amount") and "Y" equals all License and Service fees for ACUITYnxt paid as of the effective date of termination.

(Agreement ¶ 28.)

18. Plaintiff replied by letter dated 15 May 2024, confirming that the Agreement was terminated but denying that it was obligated to pay the termination fee because, it contends, Defendant materially breached the contract. (Compl. ¶¶ 36-39.)

II. PROCEDURAL BACKGROUND

19. Plaintiff commenced this action on 21 May 2024, stating claims for (1) material breach of contract, (2) fraudulent inducement, (3) fraudulent concealment, (4) breach of warranty of merchantability, and (5) breach of warranty of fitness for a particular purpose. In addition to the above claims, Plaintiff requests a declaratory judgment that the Termination Fee described in the Agreement is not owed due to both Defendant's material breach of contract and because the Termination Fee is an unenforceable penalty. (*See generally* Compl.) Plaintiff's Complaint includes as attachments the Agreement, as well as the various exhibits and addendums thereto.

20. On 26 July 2024, Defendant filed an Answer and Counterclaim, in which it alleges breach of contract for failure to pay invoices for services rendered and failure to pay the Termination Fee. (*See generally* Def.'s Answer and Countercl., ECF No. 11.) Also on 26 July 2024, Defendant filed a Motion to Partially Dismiss Complaint for Failure to State a Claim, (ECF No. 12).

21. The Court determined that the Motion to Partially Dismiss was untimely and denied it in an Order dated 31 July 2024. (Order on Def.'s Mot. to Partially Dismiss Compl. for Failure to State Claim, ECF No. 15.)

22. Thereafter, on 26 August 2024, Plaintiff filed an Answer to Defendant's Counterclaim, (ECF No. 16). The pleadings having closed, Defendant filed a Motion for Partial Judgment on the Pleadings on 10 September 2024, (ECF No. 20). It is this motion that is currently before the Court.

23. Defendant seeks an order dismissing Plaintiff's claims for fraudulent inducement, fraudulent concealment, breach of the warranty of merchantability, breach of the warranty of fitness for a particular purpose, negligence, punitive damages, attorneys' fees, and declaratory judgment. (*See generally* Def.'s Mot. for Partial J. on the Pleadings.) The parties' cross-claims for breach of contract are not implicated by the Motion.

24. After full briefing, the Court held a hearing on the Motion on 31 October 2024. (*See* Not. of Hearing, ECF No. 36.) All parties were present through counsel and were heard.

25. Following the hearing, Plaintiff filed a Notice of Voluntary Dismissal without Prejudice, voluntarily dismissing its First Cause of Action (material breach of contract) "only to the extent the cause of action relies upon any allegation of the language functionality of Spanish and Portuguese,"[4] the Second Cause of Action

[4] Remaining alleged breaches include: (1) failure to implement the software services; (2) severe processing delays; (3) the absence of computed fields in the software restricting [Plaintiff's] ability to perform essential calculations; (4) the ACUITYnxt software's inflexibility regarding workflow; (5) the lack of data fields essential to [Plaintiff's] business process, which creates inaccurate and confusing letters and reports; (6) the ACUITYnxt software's tendency to create significant gaps in historical data and accessibility; and (7) the ACUITYnxt software's cripplingly insufficient access control measures, which posed a material risk to data integrity and compliance with data protection standards.

(fraudulent inducement), the Third Cause of Action (fraudulent concealment), the Fourth Cause of Action (breach of warranty of merchantability), and the Fifth Cause of Action (breach of warranty of fitness for a particular purpose). (Pl.'s Not. of Voluntary Dismissal Without Prejudice, ECF No. 37.)

26. The balance of the Motion is now ripe for disposition.

III. LEGAL STANDARD

27. "The standard of review for a Rule 12(c) motion is the same as for a motion to dismiss under Rule 12(b)(6)." *Akzo Nobel Coatings, Inc. v. Rogers*, 2011 NCBC LEXIS 42, at **19 (N.C. Super. Ct. Nov. 3, 2011) (citing *A-1 Pavement Marking, LLC v. APMI Corp.*, 2008 NCBC LEXIS 15, at *7 (N.C. Super. Ct. Aug. 4, 2008)).

28. "A motion for judgment on the pleadings is a summary procedure, authorized by Rule 12(c) of the North Carolina Rules of Civil Procedure, which allows a trial court to enter judgment when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *George Shinn Sports, Inc. v. Bahakel Sports, Inc.*, 99 N.C. App. 481, 486 (1990).

29. In reaching its determination, the Court must "view the facts and permissible inferences in the light most favorable to the nonmoving party." *Ragsdale v. Kennedy*, 286 N.C. 130, 137 (1974). "All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false." *Id.*

30. In addition, when ruling on a Rule 12(c) motion, a trial court may consider a contract that is the subject matter of an action. *See, e.g., Davis v. Durham Mental*

Health/Dev. Disabilities/Substance Abuse Area Auth., 165 N.C. App. 100, 104 (2004); *cf. Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001) (citing *Coley v. Bank*, 41 N.C. App. 121, 126 (1979)).

31. The Motion "should not be granted unless the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law." *Carpenter v. Carpenter*, 189 N.C. App. 755, 761 (2008) (citing *Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66 (2005)). Since judgment on the pleadings is final, "each motion under Rule 12(c) must be carefully scrutinized lest the nonmoving party be precluded from a full and fair hearing on the merits." *Ragsdale*, 286 N.C. at 137.

IV. ANALYSIS

A. Negligence, Punitive Damages, and Attorneys' Fees

32. Defendant contends that any negligence claim should be dismissed to the extent it is pleaded in the Introduction to the numbered paragraphs of the Complaint. (Def.'s Memo. at 19.) Defendant further contends that there is no support for the recovery of either attorneys' fees or punitive damages. (Def.'s Memo. at 20-21.)

33. Plaintiff concedes that it did not assert a claim for negligence. (Responsive Br. Opposition Def.'s Mot. Partial J. Pleadings at 4 ["Pl.'s Br."], ECF No. 34.) Accordingly, there is no claim to dismiss, and this aspect of the Motion is **DENIED** as moot.

34. As for damages, given Plaintiff's voluntary dismissal of its tort claims, any demand for punitive damages is without basis. However, Plaintiff argues that

dismissal of its request for attorneys' fees is premature, (Pl.'s Br. at 17), and the Court agrees.

35. Therefore, in its discretion, the Court **DENIES** Defendant's Motion for Partial Judgment on the Pleadings with respect to Plaintiff's request for attorneys' fees. Whether Plaintiff is entitled to any such fees and, if so, in what amount, will be decided at a later date on a more complete record.

B. Declaratory Judgment

36. Next, Defendant argues for dismissal of Plaintiff's claim for a judgment declaring that the Termination Fee is not owed due to (1) Defendant's material breach of the Agreement and, in any event, (2) because the Termination Fee provision is an unenforceable penalty and not a permissible liquidated damages clause. (Compl. ¶¶ 106-112.)

37. In Defendant's view, it did not breach the Agreement, and the Termination Fee provision is neither a liquidated damages clause nor a penalty. (Def.'s Memo. at 24-25.) Instead, Defendant contends that the Termination Fee is the amount Plaintiff agreed to pay to exercise an option to terminate the Agreement early. Because that option can be exercised without the necessity of a material breach, Defendant argues that Plaintiff's argument applying the law regarding liquidated damages is irrelevant. (Def.'s Memo. at 23-24.)

38. Plaintiff sees the Termination Fee provision differently, as one intended to apply in the event Plaintiff is determined to have breached the Agreement by failing to pay Defendant's invoices as they became due.

39. Thus, the parties' contentions raise three possible scenarios: (1) Defendant breached the contract, releasing Plaintiff from its contract obligations, including the Termination Fee; (2) Plaintiff breached the contract and Defendant suffered damages, but the Termination Fee is an unenforceable liquidated damages clause; or (3) neither party breached the contract, but Plaintiff exited early and then failed to pay Defendant the early Termination Fee that was negotiated in the contract.

40. Again, the Termination Fee provision provides in relevant part:

> Should Client terminate this Agreement prior to the expiration of the Term, *and CHORDLINE has not breached the Agreement*, Client must notify CHORDLINE in writing sixty (60) days prior to the date of termination and must pay a Termination Fee.

(Agreement ¶ 28 (emphasis added).) There is no mention of a Termination Fee to be paid in the event of Plaintiff's breach of the Agreement.[5] The plain language of the Agreement establishes that the Termination Fee is triggered only when Defendant has *not* breached the Agreement, but Plaintiff nevertheless wishes to be released from its contractual obligations.

41. Defendant relies on *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207 (1981). In *Brenner*, the plaintiff contracted with Little Red School House to pay tuition for the entire school year in advance of the first day of school in exchange for the defendant's promise to hold a place for the plaintiff's child. *Id.* at 211-12. The

[5] Defendant's counterclaim does not seek payment of the Termination Fee as a form of liquidated damages for Plaintiff's alleged failure to pay invoices when they came due. Instead, Defendant's theory of the case is that Plaintiff exercised its option to terminate the contract early and then breached the Agreement by refusing to pay the early Termination Fee.

contract provided in pertinent part: "[w]e understand that the tuition is $ 1,080.00 per year, payable in advance on the first day of school, no portion refundable." *Id.* at 210.

42. When the child dropped out before the school year ended and the school refused to return the tuition, our Supreme Court determined that "[t]he non-refundable tuition provision was simply one term of the contract, not a measure of recovery in the event of a breach, thus the law of damages has no bearing upon the case." *Id.* at 214.

43. Central to the Supreme Court's decision in *Brenner* was the fact that no breach of contract existed in the case. Neither party had promised that the child would actually attend the school, and both had fully performed their obligations to the extent possible without the presence of the child in the school. The Court observed:

> [P]laintiff contracted to pay the tuition for the entire school year in advance of the first day of school. In consideration therefor, defendant promised to hold a place in the school for plaintiff's child, to make all preparations necessary to educate the child for the school year, and to actually teach the child during that period. Both parties received valuable consideration under the terms of the contract. After receiving plaintiff's tuition payment, defendant reserved a space for plaintiff's child, made preparations to teach the child, and at all times during the school year kept a place open for the child. This performance by defendant was sufficient consideration for plaintiff's tuition payment. A school such as defendant must make arrangements for the education of its pupils on a yearly basis, prior to the commencement of the school year.

Id. at 211-12. In this context, the Court determined that the language of the contract established that the non-refundable tuition provision was simply one term of the

contract to be performed and not a measure of recovery in the event of a breach. *Id.* at 214.

44. Here, Plaintiff's request for a declaration is two-fold. First, unlike *Brenner*, Plaintiff seeks a declaration that the Termination Fee is not owed due to Defendant's material breach of contract. Plaintiff alleges that it was Defendant's breaches of the contract that caused it to end, not Plaintiff's exercise of an agreed-upon option for early termination. To that extent, Plaintiff states a claim for declaratory judgment, and the Motion shall be **DENIED**.

45. Alternatively, Plaintiff requests a declaration that the Termination Fee is not an enforceable liquidated damages provision but rather is an impermissible and unenforceable penalty that bears no relationship to the damages Defendant would suffer in the event Plaintiff breached the contract. (Compl. ¶¶ 106-112.)[6] As in *Brenner*, the language of the Agreement belies Plaintiff's contention that it was intended to be a liquidated damages provision at all, much less an unenforceable one. Accordingly, the Motion with respect to this aspect of Plaintiff's declaratory judgment claim shall be **GRANTED**.[7]

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[6] As an aside, Defendant challenges this characterization but nevertheless contends that it is irrelevant to the Court's determination.

[7] Plaintiff contends that Defendant's argument improperly asks the Court to expand the scope of its review with respect to the Motion. In essence, Plaintiff argues that Defendant is asking the Court, not to rule that Plaintiff's claim is subject to dismissal, but rather to go one step farther and rule that Defendant is entitled to summary judgment with respect to Defendant's breach of contract counterclaim. (Pl.'s Br. at 18-19.) In ruling on the Motion, the Court does not determine either party's breach of contract claim. To the contrary, the Court holds only that, based on the plain language of the Agreement, the Termination Fee provision is not a liquidated damages clause.

V. CONCLUSION

46. **WHEREFORE**, Defendant's Motion for Partial Judgment on the Pleadings is **GRANTED in part** and **DENIED in part**, as follows:

a. The Motion is **GRANTED** with respect to Plaintiff's demand for punitive damages.

b. The Motion is **GRANTED** with respect to Plaintiff's Declaratory Judgment Claim, but only to the extent Plaintiff demands a judgment declaring that the Termination Fee provision is an unenforceable liquidated damages clause.

c. Except as herein specified, the Motion is **DENIED**.

SO ORDERED, this the 5th day of December, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases