IN THE SUPERIOR COURT OF GWINNETT COUNTY
STATE OF GEORGIA

FP OMNI TECHNOLOGIES, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Civil Action File No. 22-A-01537-8
	)	
TSYS ACQUIRING SOLUTIONS, L.L.C.,	)	
	)	
Defendant.	)	

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

This case having come before the Court on Defendant TSYS Acquiring Solutions, L.L.C.'s ("Defendant" or "TAS" or "TSYS") Motion to Dismiss Plaintiff FP Omni Technologies, Inc.'s ("Plaintiff" or "FP Omni") Amended Complaint for failure to state a claim upon which relief can be granted under O.C.G.A § 9-11-12(b)(6), the Court finds as follows:

I. Factual and Procedural Background

As required on a Motion to Dismiss under O.C.G.A. § 9-11-12(b)(6), the Court accepts Plaintiff's factual allegations as true in resolving Defendant's Motion unless there are inconsistencies between the allegations and attached exhibits, in which case the exhibits control. *See, e.g., Love v. Fulton Cty. Bd. of Tax Assessors*, 311 Ga. 682, 683-84 (2021). As required at this stage of the case, the facts below are taken from Plaintiff's Complaint and Amended Complaint.

FP Omni assists certain merchants, primarily cannabis dispensaries, in securing debit card processing services. (Compl. ¶ 5.) On October 3, 2019, FP Omni's predecessor (Fortress Payment Technologies, Inc.) and TAS entered into a Processing Services Agreement("PSA") through which TAS agreed to provide certain services to FP Omni's merchants ancillary to the core payment processing function that FP Omni sought from its Sponsoring Bank. (Compl. ¶ 10 & Exhibit 1 thereto.) Through the PSA, TAS agreed to provide "merchant authorization, accounting, and

clearing services," which are more particularly defined in the PSA Exhibits. (PSA § 6.1.1.) Many of those services are broadly categorized as "Point of Sale Processing Services" or "Clearing & Settlement Processing Services." (PSA Exs. A & B.)

According to the Complaint, FP Omni fully disclosed the nature of its business and merchant portfolio to TAS. (*Id.* ¶ 8.) In response, TAS provided express assurances that it had no issue providing payment processing services to cannabis dispensaries. (*Id.* ¶ 9.) FB Omni further claims that TAS represented to FP Omni that it owned and controlled its own "debit gateway," which meant that no third party could disrupt those services due to concerns regarding the cannabis industry or any other reason. (*Id.*) FP Omni alleged that but for TAS's assurances that processing services would not be disrupted and representations that it owned and controlled its own payment gateway, FP Omni would not have engaged TAS for its services. (*Id.* ¶ 12.) However, the parties do not dispute the existence of an enforceable merger clause in the PSA.

On or around August 31, 2021, Visa notified FP Omni's Sponsoring Bank that transactions related to the sale of cannabis were not permitted on VisaNet or Interlink (the "Notice"), the gateway that FP Omni's merchants must access to validly process transactions. (Compl. ¶ 20.) Through the Notice, *Visa* required FP Omni's *Sponsoring Bank* to identify and terminate "any merchant outlet accepting payments that are submitted into VisaNet or Interlink related to cannabis transactions within five business days." (Compl. ¶ 23.) FP Omni does not allege that TAS played any part in this decision or in these communications. FP Omni reached out to TAS to address Visa's demands. On October 26, 2021, FP Omni alleged that it first learned from Visa that Visa controlled the gateway to not only the VisaNet or Interlink but also to all non-interlink transactions. This meant that FP Omni's merchants require the participation of Visa to validly process transactions, even if those transactions do not use a Visa card, because Visa controls a portion of

the gateway that processes all FP Omni's merchant transactions. (*Id.* ¶ 26.) In the August 2021 Notice and the October of 2021 Notice, Visa made clear to FP Omni that it would no longer allow cannabis-related transactions on Visa's gateway. (*Id.*) FP Omni negotiated with Visa to allow FP Omni to continue processing payments over the following months while FP Omni attempted to migrate to a new payment processer and, after requesting (and receiving) several extensions from Visa to complete that migration, FP Omni acquiesced to Visa's February 28, 2022, deadline. FP Omni was unable to migrate the entire merchant processing business by that date. (*Id.* ¶¶ 37-43 & Ex. B thereto.)

TAS claims to have learned about Visa's decision to stop processing FP Omni merchant transactions through FP Omni. (*Id.* ¶ 31.) FP Omni demanded "a solution" from TAS regarding *Visa's* notice that it would stop processing cannabis-related transactions. (*Id.* ¶ 33.) But TAS informed FP Omni it could not change Visa's policies and that it has no other way to process payments other than through Visa's gateway. (*Id.* ¶¶ 34-35.)

On February 28, 2022, FP filed this lawsuit solely against TAS, asserting the following causes of action: Specific Performance (Count I); Breach Contract (Count II); Fraud (Count III); Negligent Misrepresentation (Count IV); Action for Temporary Restraining Order and Preliminary Injunctive Relief (Count V); and Attorneys' Fees and Expenses of Litigation (Count VI). On May 4, 2022, TAS moved to dismiss that complaint under O.C.G.A. § 12(b)(6). On June 3, 2022, FP Omni amended its complaint, incorporating all allegations from its prior complaint and asserting a single new cause of action for breach of the implied duty of good faith and fair dealing. (Am. Compl., Count VII.) TAS then moved to dismiss the Amended Complaint, incorporating its prior argument to dismiss FP Omni's originally asserted claims.

In its Amended Complaint, FP Omni clarified that TAS has continued to process FP Omni merchant transactions "without interruptions (while invoicing FP Omni accordingly)." (Am. Comp. ¶ 137.)

The briefing on this Motion includes: (i) TAS's Brief in Support of its Motion to Dismiss FP Omni's Original Complaint (filed on May 4, 2022) ("TAS First MTD"); (ii) FP Omni's Response to TAS's Brief in Support of its Motion to Dismiss FP Omni's Original Complaint (filed on June 3, 2022) ("Resp. to First MTD"); (iii) TAS's Brief in Support if its Motion to Dismiss FP Omni's Amended Complaint, expressly incorporating its briefing to dismiss the Original Complaint (filed on June 21, 2022) ("TAS Second MTD"); (iv) FP Omni's Response to TAS's Brief in Support of its Motion to Dismiss FP Omni's Amended Complaint (filed on July 21, 2022) ("Resp. to Second MTD"); and TAS's omnibus Reply Brief (filed on August 5, 2022). Conclusions of Law

II Legal Analysis

On a motion to dismiss, the pleadings must be construed "most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor." *Anderson v. Flake*, 267 Ga. 498 (1997). The grant of a motion to dismiss is not proper unless two conditions are satisfied:

> (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of relief sought.

Depository Tr. & Clearing Corp. v. Jones, 348 Ga. App. 474, 475 (2019); *accord Bd. of Regents of the Univ. Sys. of Ga. v. One Sixty Over Ninety, LLC*, 351 Ga. App. 133, 143 (2019); *Weathers v. Dieniahmar Music, LLC*, 337 Ga. App. 816 (2016).

The Court's analysis first focuses on the terms of the Agreement. (Compl. Ex. 1 § 26.) The Agreement is relevant not only to FP Omni's contract-based claims (Counts I, II, and VII), but also to FP Omni's claim for fraud and negligent misrepresentation (Counts III and IV). This is because the Agreement contains a merger clause. (Compl., Ex. 1 § 28.) A merger clause could potentially bar certain claims for fraud and/or negligent misrepresentation that are contrary to or outside the terms set forth in the Agreement, *Ekeldo v. Amporful*, 281 Ga. 817 (2019), a merger clause "does not prevent a claim of fraud arising from representations in the contract itself," *Conway v. Romarion*, 252 Ga. App. 528, 532 (2001). In addition, a claim for fraud and/or negligent misrepresentation is not precluded by a merger clause where "the particular statement at issue in the contract was . . . a present misrepresentation of fact." *BTL COM, Co. v. Vachon*, 278 Ga. App. 256, 258 (2006).

The PSA requires that "the rights and obligations of the Parties under this Agreement will be governed by and construed in accordance with the laws of the State of Delaware [.]" (PSA § 26).

After careful review of the Agreement and the factual allegations in the Complaint and Amended Complaint, the Court finds that Plaintiff has stated a claim under each theory of recovery asserted by Plaintiff.

A. Breach of the PSA. (Counts II, III, IV and VII)

Each of Plaintiff's substantive claims—those being Breach of Contract (Count II), Negligent Misrepresentation (Count III), Fraud (Count IV), and Breach of the Implied Covenant of Good Faith and Fair Dealing (Count VII)—require a breach (or misrepresentation) under the PSA.

1. **Breach of Contract; Anticipatory Repudiation**

To state a claim for breach of contract under Delaware law, the plaintiff must allege facts showing: (1) "the existence of [a] contract, whether express or implied;" (2) a "breach of an obligation imposed by that contract;" and (3) "the resultant damage to the plaintiff." *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003). TAS again argues that all the substantive claims fail because Defendant has continued to process transactions under the PSA, and therefore Plaintiff has not alleged a breach of contract ripe for adjudication.

The parties agree that Plaintiff's substantive claims necessarily turn on Plaintiff identifying a breach of a contractual obligation existing under the PSA. Also as conceded in the briefing, Defendant continues to process transactions for FP Omni merchants and thereby provide the services contracted for in the PSA at this time. The parties dispute the cause for this result, but Plaintiff concedes that Defendant continues to process transactions as it has since execution of the PSA.

The Court notes that Plaintiff has not asserted a claim for declaratory judgment. Plaintiff limits its claims to those that require a breach to have already occurred. Nor has Plaintiff expressly asserted a claim for anticipatory repudiation of the PSA. At hearing, however, Plaintiff's counsel claimed that Defendant's notice—as reflected in an email exchange attached to Plaintiff's Complaint—amounts to an anticipatory repudiation of its obligations under the PSA. To assert a claim based on anticipatory repudiation under Delaware law, there must be "an outright refusal by a party to perform a contract or its conditions" or "an unequivocal statement of an intent not to perform,". *Neurvana Med., LLC v. Balt USA, LLC*, No. CV 2019-0034-KSJM, 2020 WL 949917, at *21 (Del. Ch. Feb. 27, 2020) (internal citations omitted) In an email to TAS dated February 27, 2022, counsel for FP Omni again reiterated its position that it was up to TAS to mitigate any fallout with Visa and demanded that TAS "honor its agreement" with FP Omni. (*Id.*, Ex. 2 at 3.) In

response, counsel for TAS repeated the assertion that "TAS simply cannot process transactions that Visa prohibits." (*Id.*, Ex. 3 at 1.) Counsel for TAS did not allow for any extension of the February 28, 2022, deadline for FP Omni to cease use of the gateway, stating that FP Omni has "unequivocally committed to discontinue submitting transactions;" "waived . . . the ability to continue to submit transactions," and further that "[a]ny transaction submitted to TAS in violation of Visa's rules and regulations will constitute a breach of our agreement." (*Id.*, Ex. 3 at 1-2.) The Court cannot find as a matter of law at the pleading stage that FP Omni can not establish a claim for anticipatory reputation of the PSA.

Moreover, the contract, together with several exhibits, is 80 pages long. (Compl., Ex. 1 (the "Agreement").) In the Scope of Work (Section 6), the Agreement states that TSYS "**will** provide . . . merchant, authorization, accounting, and clearing services identified in the Exhibits attached to this Agreement." (*Id.*, Ex. 1 § 6.1) (emphasis added). Exhibit A to the Agreement outlines the point-of-sale processing services to be provided, including pricing for use of the "Debit/EBT Gateway" for both Interlink (Visa) and Non-Interlink (non-Visa) transactions. (*Id.*, ¶ 10; Ex. 1 at A-1.) Further as part of the Scope of Work, TAS agreed that it "**will** provide modifications to the Services so that the Services permit [FP Omni] to comply with mandatory changes in the Services imposed by changes in Laws & Regulations (the 'Mandatory Changes')." (*Id.*, Ex. 1 § 6.1) (emphasis added). The term "Mandatory Changes" is further defined in the Agreement as "Modifications to the Services that permit [FP Omni] to comply with mandatory changes in the Services imposed by changes in laws, regulations, or Card Brand Rules." (*Id.*, Ex. 1 at 29.)

In addition to TAS's alleged oral assurances to FP Omni, the Agreement contained the following warranty regarding TSYS's authorization to perform the services for FP Omni:

> **10.1.2 Authorization.** TSYS represents and warrants that: (a) it is not a party to any other agreement which would hinder its ability to perform its obligations hereunder; (b) the entering into and carrying out of the terms and conditions of this Agreement will not violate or constitute a breach of any obligation binding upon TSYS; and (c) TSYS has full power and authority to grant the rights granted by this Agreement to [FP Omni] with respect to the Services and related work product without consent of any other Entity.

(*Id.*, Ex. 1 § 10.1.2.) Further, while the Agreement allowed for the use of third-party subcontractors, TSYS agreed it would be "responsible and liable" for such third party and for ensuring that the third party "complies with all applicable terms of this Agreement." (*Id.*, Ex. 1 § 6.6.) In the event TSYS subcontracted with a third party to perform services, TSYS was required to "provide advanced written notice to [FP Omni] of any subcontracting of any material obligations of the Agreement." (*Id.*) The Agreement did not contain any express qualification that there was any "agreement" or other relationship with Visa which could prohibit TSYS from carrying out its promised Services to FP Omni, or that Visa could prohibit TSYS from carrying out Services to FP Omni because Visa—not TSYS—owned the sole "debit gateway."

Plaintiff argues that the facts as it currently understands them—particularly the importance of certain technology controlled by Visa—are inconsistent with Defendant's representations under the PSA. In that regard, Plaintiff relies on representations contained in Section 6.6 (permitting TAS to use third parties for subcontracted work), Section 10.1.2 (warranting that TAS has authority to enter into the PSA without consent of another entity), and Section 32 (disclaiming any third-party beneficiaries to the PSA).

In Section 10.1.2, TAS represented to FP Omni that it is not a party to any agreement that would hinder its performance of the contract terms; that its performance would not breach any obligation binding upon TAS; and further that TAS had full power and authority to grant the rights to FP Omni under the Agreement "without consent of any other Entity." In its briefs and

correspondence, however, TAS has taken the position that "TASA simply cannot process transactions that Visa prohibits" and TSYS "cannot process transactions from FP Omni's merchants through Visa's gateway if Visa does not permit it." (Compl., Ex. 3; Def.'s Br. (5/4/2022) at 7.) FP Omni argues that TAS's arguments suggest the existence of an agreement between TAS and Visa that would hinder its performance of services and would require TAS to obtain Visa's consent. These factual issues are the subject of pending discovery that would be inappropriate to resolve at the pleadings stage. Accordingly, the Court cannot state as a matter of law that the representations by TAS in Section 10.1.2 were accurate. FB Omni has alleged that as a result of this alleged breach/misrepresentation they have had to attempt to migrate to an alternate payment processing system at great commitment of time and expense. Therefore, Accordingly, TAS's motion to dismiss the claim for Breach of Contract must be denied.

2. <u>Fraud (Count III) and Negligent Misrepresentation (Count IV)</u>

"The tort of fraud has five elements: a false representation by a defendant, scienter, intention to induce the plaintiff to act or refrain from acting, justifiable reliance by plaintiff, and damage to plaintiff." *Bowden v. Med. Ctr., Inc.*, 309 Ga. 188, 199 n.10 (2020). "Liability for negligent misrepresentation attaches when a defendant makes a false representation upon which the plaintiff relies." *Id.* at 199 n.11 (alteration omitted) (quoting *Glob. Payments, Inc. v. InComm Fin. Servs., Inc.*, 308 Ga. 842, 845 (2020). "The same principles apply to both fraud and negligent misrepresentation cases and the only real distinction between negligent misrepresentation and fraud is the absence of the element of knowledge of the falsity of the information disclosed." *Id.* (alteration and internal quotation marks omitted) (quoting *Holmes v. Grubman*, 286 Ga. 636, 640–41 (2010)).

As a threshold matter, the presence of a merger clause in the Agreement does not bar FP Omni's claims for fraud and negligent misrepresentation, so long as the claims are based on statements contained in the contract itself. *Conway v. Romarion*, 252 Ga. App. 528, 532 (2001) (holding that merger clause "does not prevent a claim of fraud arising from representations in the contract itself"); *Authentic Architectural Millworks, Inc. v. SCM Group USA, Inc.*, 262 Ga. App. 826, 828 (2003) (holding that a merger clause did not bar fraud claim because the record showed plaintiff "relied upon misrepresentations in the contract itself"); *Gaines v. Crompton & Knowles Corp.*, 190 Ga. App. 863, 866 (1989) (holding that a merger clause did not bar fraud claim where a "claim of fraud is based on alleged misrepresentations by appellant in the contract itself").

Further, under Georgia law, FP Omni states a claim for fraud (and/or negligent misrepresentation) that is separate and independent from its claim for breach of contract "where a promise as to future events is made with a present intent not to perform" or where "the particular statement at issue in the contract was . . . a present misrepresentation of fact." *BTL COM, Co. v. Vachon*, 278 Ga. App. 256, 258 (2006).

Because FP Omni's claim for fraud and negligent misrepresentation are based on statements made in the contract itself and TAS's present intent not to perform, FP Omni has stated such claims notwithstanding the merger clause in the Agreement. In the Complaint, FP Omni alleges that TAS falsely represented that it owned and had exclusive control over the payment gateway through which FP Omni's transactions would be processed. (Compl. ¶¶ 78-80.) FP alleges that this representation was memorialized in the PSA, which warranted that TSYS had "full power and authority" to provide the payment processing services to FP Omni "without the consent of any other Entity." (*Id.* ¶¶ 14, 85; Ex. 1 § 10.1.2.) FP Omni further alleges that TAS knew (or should have known) those representations to be false, but that TAS nonetheless made the

representations to FP Omni to induce FP Omni to enter into the PSA, knowing that FP Omni required reliable payment processing services for its merchants, many of whom are cannabis dispensaries. (*Id.* ¶¶ 84, 91.) The PSA itself provided pricing for a non-Interlink (non-Visa) debit payment gateway, which allegedly supports FP Omni's claim that TSYS was assuring FP Omni that TAS was not dependent on Visa's gateway. Contrary to TAS's representations to FP Omni, TAS now claims that "Visa controls the technology" and that TSYS "cannot process transactions from FP Omni's merchants through Visa's gateway if Visa does not permit it." (Def.'s Br. 5/4/2022 at 7.) These allegations are sufficient to state a claim for fraud and negligent misrepresentation, notwithstanding the inclusion of a merger clause. Accordingly, TAS's motion to dismiss the claims for fraud and negligent misrepresentation must be denied.

3. Breach of the Implied Duty of Good Faith and Fair Dealing (Count VII of Amended Complaint).

Under Delaware law, "[t]he implied covenant of good faith and fair dealing 'attaches to every contract by operation of law.'" *Pacira BioSciences, Inc. v. Fortis Advisors LLC*, No. CV 2020-0694-PAF, 2021 WL 4949179, at *12 (Del. Ch. Oct. 25, 2021) (quoting *Metro. Life Ins. Co. v. Tremont Grp. Hldgs, Inc.*, 2012 WL 6632681, at *15 (Del. Ch. Dec. 12, 2012)). In general, it "requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain." *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (internal quotation marks omitted).

Furthermore, the Delaware courts have recognized the availability of a claim for breach of the implied covenant of good faith and fair dealing where "the contract is truly silent concerning the matter at hand." *Golden Rule Fin. Corp. v. S'holder Representative Servs. LLC*, 267 A.3d 382 (Del. 2021) (citation, alteration, and internal quotation marks omitted). In other words, it "is best

understood as a way of implying terms in the agreement, whether employed to analyze unanticipated developments or to fill gaps in the contract's provisions." *Dunlap*, 878 A.2d at 441; *see also Nationwide Emerging Managers, LLC v. Northpointe Holdings, LLC*, 112 A.3d 878, 896 (Del.) (explaining that covenant is gap filler to be used to "infer [] contractual terms to handle developments or contractual gaps that neither party anticipated" (internal quotation marks omitted)), *as revised* (Mar. 27, 2015).

"In order to plead successfully a breach of an implied covenant of good faith and fair dealing, the plaintiff must allege a specific implied contractual obligation, a breach of that obligation by the defendant, and resulting damage to the plaintiff." *Pacira BioSciences*, 2021 WL 4949179, at *13 (quoting *Fitzgerald v. Cantor*, 1998 WL 842316, at *1 (Del. Ch. Nov. 10, 1998)); *Anderson v. Wachovia Mortg. Corp.*, 497 F. Supp. 2d 572, 581–82 (D. Del. 2007) (same). Parties may be held "liable for breaching the covenant when their conduct frustrates the 'overarching purpose' of the contract by taking advantage of their position to control implementation of the agreement's terms." *Dunlap*, 878 A.2d at 442.

Accordingly, TAS's motion to dismiss the claims for implied duty of good faith and fair dealings must be denied.

C Plaintiff's Derivative Claims Turn on Plaintiff's Substantive Claims.

Plaintiff's remaining claims, for Specific Performance (Count I); Temporary Restraining Order and Preliminary Injunctive Relief (Count V); and Attorneys' Fes and Expenses of Litigation (Count VI), each depend on the viability of an underlying claim for substantive relief. Specific performance and injunctive relief are simply remedies for the other claims. *See, e.g., PMS Const. Co. v. DeKalb Cty.*, 243 Ga. 870, 872 (1979) ("Restitution, damages and *specific performance* are

the three remedies for breach of contract." (Emphasis added); *City of Waycross v. Pierce Cty. Bd. Of Commissioners*, 300 Ga. 109, 110, 793 S.E.2d 389, 391 (2016) ("An interlocutory injunction is an extraordinary remedy[.]"). And claims for attorneys' fees and litigation expenses are derivative of the breach of contract and misrepresentation claims. *See, e.g., Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC.,* 312 Ga. 350, 359 (2021) ("O.C.G.A. § 13-6-11 . . . does not create an independent cause of action but rather merely establishes the circumstances in which a plaintiff may recover the expenses of litigation as an additional element of his damages." (Internal quotation marks omitted).). Since the Court has denied the Motion to dismiss on the substantive claims, the Motion to dismiss Plaintiff's derivative claims are also dismissed.

III Conclusion

Having considered the Parties' submissions and heard oral argument on same, the Court hereby **DENIES** Defendant's Motion to Dismiss Plaintiff's Amended Complaint.

SO ORDERED this 29 day of September, 2023.

Hon. Laura Tate
Judge, Gwinnett County Superior Court
By Designation