IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

MITSUBISHI POWER SYSTEMS AMERICAS, INC. Plaintiff, v. BABCOCK & BROWN INFRASTRUCTURE GROUP US, LLC, BABCOCK & BROWN, L.P., BABCOCK & BROWN HOLDINGS, INC., BABCOCK & BROWN RENEWABLE HOLDINGS, INC., and BABCOCK & BROWN INTERNATIONAL PTY. LTD. Defendants.	)	C.A. No.: 4499-VCL

MEMORANDUM OPINION

Submitted: November 19, 2009
Decided: January 22, 2010

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LASTER, Vice Chancellor.

Plaintiff Mitsubishi Power Systems Americas, Inc. ("MPSA") has moved pursuant to Rule 12(c) for judgment on the pleadings with respect to five counterclaims and four affirmative defenses asserted by defendant Babcock & Brown Infrastructure Group US, LLC ("BBIG"). I grant the motion in part and enter judgment in favor of MPSA on Counts II, III, V, VI, and part of Count IV. I strike BBIG's Second, Third, and Tenth Affirmative Defenses, which recast in defensive form the counterclaims on which I enter judgment. I strike the Seventh Affirmative Defense to the same degree that I enter judgment on Count IV. In substance, BBIG can maintain only the counterclaim and related defense that are grounded on MPSA's alleged fraud based on intellectual property issues.

I. FACTUAL BACKGROUND

I have assumed the following facts to be true for purposes of this opinion. The facts are drawn solely from the pleadings and the exhibits they incorporate by reference. Because MPSA has moved for judgment on the pleadings, I have assumed that all disputed factual allegations would be resolved in favor of BBIG, and I have given BBIG the benefit of all reasonable factual inferences.

A. The Parties and Related Entities

Plaintiff MPSA is a Delaware corporation that manufactures and sells wind turbine generators. MPSA is a wholly owned subsidiary of non-party Mitsubishi Heavy Industries ("MHI").

The defendants are members of the Babcock & Brown corporate family. The central defendant for purposes of the Rule 12(c) motion is BBIG, a Delaware limited partnership. In the transactions that gave rise to this litigation, BBIG agreed to buy wind turbines from MPSA. BBIG is a lower-tier subsidiary in the Babcock & Brown family and wholly owned by other Babcock & Brown entities. The roles of the other defendants and their inter-relationships are not relevant to the current motion.

B. The Turbine Supply Agreements

This case revolves around two agreements to buy wind turbines. Pursuant to a Wind Turbine Generator Supply Agreement dated June 5, 2007, BBIG agreed to buy 206 Model MWT95 wind turbine generators from MPSA. Because the contract called for delivery by September 30, 2009, the parties refer to this agreement as the "2009 Agreement" or the "2009 TSA." Pursuant to a second Wind Turbine Generator Supply Agreement dated February 28, 2008, BBIG agreed to buy another 250 Model MWT95 wind turbine generators from MPSA. Because the contract called for delivery by November 15, 2010, the parties refer to this agreement as the "2010 Agreement" or the "2010 TSA."

The Model MWT95 wind turbine is big. Its three-bladed rotor has a diameter of 95 meters. The tower supporting the wind turbine stands 80 meters high. To manufacture, deliver, assemble, and install 456 of these electricity-generating windmills was a major commercial undertaking, and the Agreements called for total payments of over $1.4 billion. The Agreements themselves are lengthy and detailed. Each runs over fifty pages. Each attaches and incorporates twenty-two appendices and exhibits running for additional hundreds of pages.

Although not at issue in the case, BBIG relies on a third agreement to provide context for its counterclaims and affirmative defenses. Before entering into the 2009 and 2010 Agreements, BBIG contracted to purchase 118 Model MWT95 wind turbines from MPSA. These turbines were scheduled for delivery in 2008, and the parties refer to this agreement as the "2008 Agreement" or the "2008 TSA." Because there are no claims in this case that relate to the 2008 TSA, general references in this opinion to the "Agreements" or the "TSAs" refer only to the 2009 and 2010 Agreements.

C. Mechanical Problems With The Turbines

At the time BBIG entered into the 2009 and 2010 Agreements, MPSA had not yet delivered any turbines pursuant to the 2008 Agreement. Those deliveries did not begin until August 2008. I am told that when BBIG finally began receiving the turbines, none of them worked properly. All of them failed the acceptance tests, and none met the commissioning standards in the 2008 Agreement. All of them broke down daily. One of the turbines was off-line for 41.4 out of 42 days of operation, another for 37.4 out of 42 days, and another for 35.4 out of 42 days.

BBIG alleges that as of April 7, 2009, the date MPSA filed suit against BBIG, "not a single turbine was able to achieve trouble-free commercial operation." Defendants' Amended Answer, Affirmative Defenses and Counterclaims (the "Counterclaims") ¶ 13. The turbines are said to "continue to be plagued with problems that keep them from meeting their expected capacity factor." *Id.* BBIG asserts that "MPSA's delivery delays and defects in the turbines have caused MPSA to incur in excess of $2.7 million in delivery-delay liquidated damages," presumably under the 2008

Agreement. *Id.* ¶ 14. BBIG also asserts that MPSA has incurred "over $4 million in commissioning-delay liquidated damages." *Id.*

BBIG points out that at the time MPSA was negotiating the 2009 and 2010 Agreements and, later, when MPSA was receiving BBIG's progress payments under those agreements, MPSA was building and supposedly testing the turbines for the 2008 Agreement. BBIG asserts that MPSA knew that the turbines did not work and could not meet the specifications in the 2009 and 2010 Agreements. BBIG asserts that by failing to disclose the mechanical problems, MPSA fraudulently induced BBIG to enter into the 2009 and 2010 Agreements.

D. Intellectual Property Disputes Involving The Turbines

In addition to mechanical problems, MPSA faced intellectual property issues relating to the Model MWT95 wind turbine. BBIG alleges that at the time MPSA and BBIG were negotiating the 2009 and 2010 Agreements, General Electric ("GE") had notified MPSA that the Model MWT95 wind turbine infringed on GE patents for variable-speed wind turbine technology. This technology enables turbines to deliver a consistent level of power despite fluctuating wind speeds.

According to BBIG, GE first raised the infringement issue in 2006. In January 2007, MPSA learned that GE had sent a warning to one of MHI's turbine customers. On March 7, 2007, representatives of MPSA and GE met in Schenectady, New York, to discuss a licensing arrangement, and negotiations continued on throughout the month. On June 1, 2007, just days before the 2009 Agreement was signed, MHI sent GE a letter reiterating its desire to enter into a licensing arrangement that would resolve GE's claims.

BBIG concedes that it knew generally that GE had patents for wind turbine technology, but BBIG stresses that MPSA never mentioned GE's specific claims about the Model MWT95 wind turbine nor disclosed that MPSA and MHI were trying to obtain a patent license from GE. BBIG asserts that by failing to disclose this information, MPSA fraudulently induced BBIG to enter into the 2009 and 2010 Agreements.

To underscore the seriousness of the patent issues, BBIG cites a document it obtained in discovery in this case. It is an email chain dating from May 2007 that begins with a BBIG technician asking MPSA representatives the following questions about the specifications for the Model MWT95 wind turbine:

> The spec says that the turbine will operate from 0.9 to 0.95 power factor, however, you also say that we can only operate at fixed power factor under normal operating conditions[.]
>
> 1) [I]s this because of the GE patent? Please confirm why this restriction [exists.]
>
> 2) [D]o the current dynamic models (PSSE, PSLF, etc.) reflect a fixed power factor setpoint or full 0.9 – 0.95 range? Or is this restriction something the model user must set manually? What instructions do you give to the utility on this?
>
> 3) [C]onfirm operational restriction on changes in power factor setpoint via SCADA due to GE patent. If this is not a restriction, indicate how fast power factor setpoint change can be effected for the entire wind farm via SCADA.
>
> 4) Also, please advise if there are any possibilities or pending agreements with GE to allow MHI to have this full power factor range of the MWT92/95[.]

The MPSA recipients did not respond immediately; rather, one of them forwarded the BBIG email to what I infer to be eleven higher ups at MPSA and MHI.

In a translated version of the forwarded email, the MPSA representative forwarding the BBIG inquiry described it as "the problem concerning which I consulted with Chief Tagita yesterday . . . and which will require a very difficult decision." He then explained that "in order to avoid infringing the GE patent," the technical specifications "both at the time of bidding and at the time the contract is signed" contained the following language: "Power Factor Control Range: 0.9 – 0.95." His email continues:

> We are intentionally using such expressions that are ambiguous and difficult to determine whether [redacted] that is infringing the patent [redacted] . . . and is actually the last resort used by our company in order to avoid the patent infringement.
>
> In the stages of conducting commercial negotiations and signing the contract, we managed to dodge the issue somehow by using the tactics above. However, now . . . we received the question noted below from the person in charge of design at BB . . . , which is extremely difficult for us to answer.
>
> * * *
>
> When we asked our corporate attorney Sidkoff for his opinion, he said that this is an act that is considered to constitute fraud [(]in the sense that []the act causes the client to purchase the product based on specifications in which the expressions are ambiguous and equivocal, and then says that the machine can be operated only manually), and that such act is legally problematic; thus, he is strongly requesting that the problem be corrected.
>
> * * *
>
> . . . [N]ow that the company made the decision that we will ask GE for licensing no matter what . . . , even though it is before the negotiations, it is impossible for us to continue our business in the U.S. without GE's licensing, so we have to prepare ourselves for the worst. That is the essence.

BBIG understandably embraces this email as affirmative evidence, if not an outright admission, of fraud.

The "Technical Specifications for Wind Turbines" incorporated by reference as Exhibit A to the TSAs describe the Model MWT95 as having "[v]ariable speed operation." 2009 TSA Ex. A at 2. The description of "Power Control" states "Generator power is controlled appropriately based on the measured generator speed." 2009 TSA Ex. A at 7. The specification for "Power Factor Range" states, as referenced in the May 2007 email, "0.9 (inductive) ~ 0.95 (capacitive)*." 2009 TSA Ex. A at 17. The asterisk refers to the following additional language:

> [redacted] regulation is adopted. Target power factor at WTG terminal can be selected from our controller located on the bottom of each tower and/or other external facility such as SCADA. To keep the target power factor, the reactive power produced from WTG is [redacted] when active power of WTG or WTG terminal voltage is changed.

2009 TSA Ex. A at 17. The abbreviation "WTG" refers to the wind turbine generator. "SCADA" stands for "Supervisory Control And Data Acquisition" and refers to the centralized control system that would be used to manage the wind farm where the turbines would operate. In contrast to the references in this description to [redacted] regulation" and [redacted] Section 4.4 of the specifications, entitled "Wind Turbine Control System," describes the "Control method" as "Manual at the site." I presume this means manually in the sense of turning dials, modifying computer controls, or making some other manual change through the SCADA system, but that is not clear at this stage of the case.

E. GE Files Suit.

On February 27, 2008, GE sued MPSA and MHI before the International Trade Commission ("ITC"), claiming that the MWT95 wind turbine infringed GE's patents. On February 28, 2008, MPSA and BBIG executed the 2010 Agreement. On March 7, 2008, MPSA gave BBIG notice of GE's suit.

On August 7, 2009, an administrative law judge ("ALJ") in the ITC proceeding ruled that the MWT95 wind turbine infringed GE's patents and violated Section 337 of Title 19 of the United States Code. The ALJ's ruling was appealed to the ITC. By letter dated January 11, 2009, MPSA advised me that the ITC reversed the ALJ's ruling. I have not been provided with the decision, and the parties have not briefed the impact of this development.

F. BBIG Fails to Make Progress Payments Under the TSAs.

The 2009 and 2010 Agreements called for BBIG to make periodic progress payments to help finance the manufacturing process. Approximately 20% of the total consideration was paid during the manufacturing phase, with the remaining 80% tied to various milestones keyed off the shipping, delivery, and commissioning of turbines. It is clear from the agreements, and undisputed by the parties, that BBIG's failure to make a payment constituted an event of default.

By May 2008, BBIG had paid MPSA $64.3 million under the 2009 Agreement and $22.4 million under the 2010 Agreement. In May 2008, BBIG missed a scheduled payment under the 2009 Agreement. In August 2008, BBIG failed to make a scheduled payment under the 2010 Agreement. By early fall of 2008, BBIG had failed to make more than $86 million in payments. To date, none of the payments have been made.

On February 20, 2009, MPSA sent formal notices of default advising BBIG that it had 30 days to cure the non-payments or else MPSA would have the right to terminate the Agreements. BBIG did not cure the defaults. On March 23, 2009, MPSA gave notice to BBIG that the TSAs were terminated

G. MPSA Files This Action.

On April 9, 2009, MPSA filed this action and asserted claims for both breach of contract and fraudulent transfers. MPSA sought injunctive relief to stop the fraudulent transfers that it alleged were on-going. Vice Chancellor Lamb granted a temporary restraining order to ensure that BBIG and its affiliates did not fraudulently transfer funds beyond the Court's jurisdiction. He later converted the TRO into a preliminary injunction.

On August 6, 2009, the defendants filed their currently operative answer and counterclaims. In paragraphs 38 and 39 of their answer, the defendants admitted that BBIG failed to make the May 2008 progress payment under the 2009 Agreement and the August 2008 progress payment under the 2010 Agreement. The defendants further admitted that BBIG has not made any payments under either Agreement since missing those progress payments.

But the defendants were far from conceding the case. They raised numerous affirmative defenses, including four that are challenged in MPSA's motion: failure of consideration (Second Affirmative Defense), estoppel or waiver (Third Affirmative

Defense), fraud (Seventh Affirmative Defense), and breach of the TSAs by MPSA (Tenth Affirmative Defense). BBIG also asserted six counterclaims: restitution of BBIG's progress payments (Count I); breach of contract (Count II); breach of the implied covenant of good faith and fair dealing (Count III); fraud in the inducement (Count IV); negligent misrepresentation (Count V); and equitable estoppel (Count VI). MPSA replied, closing the pleadings.

MPSA has now moved for judgment on the pleadings. MPSA challenges the four identified affirmative defenses and Counts II-VI of the counterclaims. MPSA does not seek to dismiss Count I of the counterclaims and recognizes that the payments BBIG made must be factored into any damages calculation.

II. LEGAL ANALYSIS

Court of Chancery Rule 12(c) provides that, "[a]fter the pleadings are closed . . . , any party may move for judgment on the pleadings." Ct. Ch. R. 12(c). A Rule 12(c) motion will be granted when there are no disputed issues of material fact and the movant is entitled to judgment as a matter of law. *OSI Systems, Inc. v. Instrumentarium Corp.*, 892 A.2d 1086, 1090 (Del. Ch. 2006).

The 2009 and 2010 Agreements contain identical choice of law provisions, which state: "[t]his Agreement and all matters arising hereunder or in connection herewith shall be governed by and construed in accordance with the laws of the State of New York, without regard to principles of conflicts of laws." 2009 & 2010 TSAs § 15.5. Because the parties selected New York law to govern not only "[t]he Agreement" but also "all matters arising hereunder or in connection herewith," I apply New York law to all of the counterclaims and affirmative defenses. *Abry Partners V, L.P. v. F & W. Acquisition, LLC*, 891 A.2d 1032, 1046-50 (Del. Ch. 2006).

A. The Claim For Breach Of Contract

BBIG first contends that MPSA breached the 2009 and 2010 Agreements because of the GE patent issues. In the bold version of this claim, BBIG asserts that "MPSA was unable to deliver the 456 wind turbines, ancillary equipment, and related services it agreed to provide under § 3.9 of the 2009 and 2010 Agreements because those turbines are the subject of a patent infringement dispute with GE." Counterclaims ¶ 54. BBIG thus seeks to claim that MPSA committed a material breach of both the 2009 and 2010 Agreements giving rise to a claim for total breach that would cause MPSA to forfeit any rights it has under those agreements. Less boldly, BBIG asserts that MPSA breached a notice provision in Section 11.2 of the 2009 and 2010 Agreements by failing to give timely notice of GE's threatened patent infringement claim.

BBIG's bold claim for total breach fails because MPSA's performance under the 2009 Agreement was not yet due when BBIG itself breached that agreement by failing to make the May 2008 progress payment, and because MPSA's performance under the 2010 Agreement was not yet due when BBIG itself breached that agreement by failing to make the August 2008 progress payment. "One party's material breach of the agreement relieves the other party from any obligation to perform under the contract. For example, one party's failure to tender payment pursuant to the contract excuses the other part[y]'s obligation to further perform." Glen Banks, *New York Contract Law* § 17:11 at 635 (2006 & Supp. 2009) (hereinafter "*New York Contract Law*"); *see* N.Y. U.C.C. § 2-703;

Awards.com, LLC v. Kinko's, Inc., 834 N.Y.S.2d 147, 155 (N.Y. App. Div. 2007); *Johnson v. Phelan*, 721 N.Y.S.2d 378, 379 (N.Y. App. Div. 2001).

> A party who materially breaches a contract may not seek to enforce other provisions of that contract. . . . Since a plaintiff asserting breach must show that it complied with its obligations under the contract in all respects, a party in material breach cannot establish a claim against the other party for breach of contract.

New York Contract Law § 17:12 at 635-36.

The 2009 Agreement obligated MPSA to begin delivering certain turbine components "on or before 11/15/08" and called for delivery of all the turbines to be completed "on or before 9/30/09." 2009 TSA Ex. D. By committing a material breach of the 2009 Agreement in May 2008, BBIG gave MPSA the right to terminate the 2009 Agreement and sue for total breach, which is precisely what MPSA did. Having materially breached the 2009 Agreement, BBIG cannot now sue MPSA for breach based on MPSA's alleged inability to fulfill its subsequent performance obligations under that agreement.

The same is true for the 2010 Agreement, which called for MPSA to begin delivering certain turbine components "on or before 1/31/10" and for delivery of all the turbines to be completed "on or before 11/15/10." 2010 TSA Ex. D. BBIG committed a material breach of the 2010 Agreement in August 2008, giving MPSA the right to terminate the 2009 Agreement and sue for total breach, which is what MPSA did. BBIG cannot now sue MPSA for breach of its subsequent performance obligations under the 2010 Agreement.

BBIG's more limited claim for breach of the notice provisions of the 2009 and 2010 Agreements also fails, but for different reasons. Section 11.2 of both the 2009 and 2010 Agreements provides as follows:

> Indemnity Against Infringement. [MPSA] shall indemnify and keep indemnified and hold harmless [BBIG] from and against all claims, liabilities, losses and damages asserted by any person, together with all costs and expenses relating thereto (including reasonable legal fees), based upon any claim of infringement of any patent or other license or right to intellectual property (whether by way of trademark or otherwise) resulting directly or indirectly from the manufacture, sale, supply, or importation of the Wind Turbines or their use by [BBIG] as designed or contemplated by the Operation Manual. Each party agrees to notify the other as soon as possible of any material matters with respect to which the foregoing indemnity may apply and of which the notifying party has knowledge. If notified in writing of any action or claim of which [MPSA] is to provide an indemnity, [MPSA] shall, without limitation, defend such action or claim at its own expense and pay the cost and damages and attorneys' fees awarded against [BBIG] in such action or claim; provided that [MPSA] shall have the right to control the defense and settlement of all such actions or claims.

2009 & 2010 TSAs § 11.2. The plain language of this provision requires each party to "notify the other as soon as possible of any material matters with respect to which the foregoing indemnity may apply and of which the notifying party has knowledge."

MPSA has argued that the notification requirement is limited to formal lawsuits or arbitral claims. I disagree. It requires notification of "any material matters" to which BBIG's right to indemnification might potentially apply. This language is broad. The term "any material matter" is not synonymous with "any material lawsuit." According to Black's Law Dictionary, the term "matter" refers to the "[s]ubstantial facts forming [the] basis of [a] claim or defense; facts material to an issue." Black's Law Dictionary at 978 (6th ed. 1990). Non-legal dictionaries offer broad definitions like "[a] subject of concern, feeling or action," American Heritage College Dictionary at 838 (3d ed. 1993), or "a subject under consideration" or "a subject of disagreement or litigation," Webster's New Collegiate Dictionary at 703 (1973). These definitions commonly extend to the facts underlying the dispute or litigation, not merely the litigation itself.

The phrase "any material matter" stands in contrast to the language used in the very next sentence of Section 11.2, which obligates MPSA to defend any "action or claim of which [MPSA] is to provide an indemnity" once MPSA has received written notice. This juxtaposition establishes a broader notice requirement extending to "any material matter" of which a notice of any "action or claim" is a part. I therefore reject MPSA's contention that the notification requirement in Section 11.2 is triggered only by the formal initiation of a lawsuit or arbitral claim.

BBIG has pled adequately that MPSA knew about GE's patent claims and took them seriously as early as the first quarter of 2007. But assuming that GE's threatened claims constituted a "material matter" to which the Section 11.2 indemnity might eventually apply, BBIG's allegations still do not give rise to a claim for breach.

The claim for breach under the 2010 Agreement fails because of timing. The 2010 Agreement became effective on February 28, 2008. MPSA did not have any notification obligation under the 2010 Agreement until then. MPSA provided notice of the ITC proceeding on March 7, 2008. That notice was sufficiently prompt that I will enter judgment for MPSA on BBIG's claim for breach of the 2010 Agreement.

I reach a different conclusion regarding the timing of notice for purposes of the 2009 Agreement. That agreement became effective on June 5, 2007. At that point, MPSA had a contractual obligation to notify BBIG about GE's threats. Because MPSA did not provide notice until March 7, 2008, I am satisfied for purposes of pleading that MPSA did not notify BBIG "as soon as possible," as required by 2009 Agreement. Because MPSA's failure to give notice under the 2009 Agreement predated BBIG's breach of that agreement via non-payment in May 2008, BBIG is not foreclosed from asserting a breach of Section 11.2.

But the claim for breach under Section 11.2 the 2009 Agreement fails because of the purpose of the notice provision. New York law recognizes that the purpose of a notice provision in an indemnification clause is to ensure that the indemnification obligation is fulfilled. *New York Contract Law* § 26:22 at 1167 ("The importance of notice is based on the objective of giving the indemnitor the opportunity to defend or settle a claim."); *accord Combustion Eng'g, Inc. v. Imetal*, 235 F. Supp. 2d 265, 276 (S.D.N.Y. 2002). Outside of the insurance context, a plaintiff must show actual prejudice to state a claim for breach of a notice provision. *Am. Home Ins. Co. v. Int'l Ins. Co.*, 684 N.E.2d 14, 16 (N.Y. 1997).

These principles are fatal to BBIG's claim for breach of Section 11.2 of the 2009 Agreement because BBIG has never suffered any "claims, liabilities, losses and damages" or any "costs and expenses relating thereto (including reasonable legal fees)" that were "based upon any claim of infringement of any patent or other license or right to intellectual property" that MPSA has failed to indemnify. Indeed, BBIG has not suffered harm of any kind "based upon any claim of infringement of any patent or other license or right to intellectual property." Thus assuming there was a technical failure of notice under Section 11.2, it did not give rise to prejudice to BBIG and cannot support a claim for breach of the 2009 Agreement.

BBIG therefore has no claim for breach of either the 2009 or 2010 Agreements. I enter judgment on the pleadings in favor of MPSA on Count II of the counterclaims.

The same analysis applies to BBIG's Tenth Affirmative Defense, which asserts that "Plaintiff's Third and Fourth Causes of Action are barred and Defendants are excused from any alleged nonperformance due to Plaintiff's breach of the agreements." I strike this defense.

I also strike BBIG's Second Affirmative Defense, which asserts that "Plaintiff's First, Second, Third, and Fourth Causes of Action are barred, in whole or in part, due to Plaintiff's inability and failure to provide the consideration called for by the agreements." "A failure of consideration occurs whenever the promisor fails, without his or her fault, to receive the *quid pro quo* for its performance." *New York Contract Law* § 20:29 at 763. BBIG did not receive the consideration it bargained for under the 2009 and 2010 Agreements because BBIG breached those agreements by failing to make the required progress payments. A failure of consideration defense would be available to MPSA if BBIG sued MPSA for breach of contract. It is not available to BBIG as a defense to MPSA's suit.

B. The Claim For Breach Of The Implied Covenant of Good Faith and Fair Dealing

BBIG next contends that MPSA breached the implied covenant of good faith and fair dealing imposed by New York common law and N.Y. U.C.C. § 1-203. BBIG claims that by failing to inform BBIG about the turbines' mechanical difficulties and the threat of patent claims by GE, MPSA breached the implied convenant.

New York law permits an implied covenant claim "only where one party's conduct, though not breaching the terms of the contract in a technical sense, nonetheless deprived the other party of the benefit of its bargain." *Sauer v. Xerox Corp.*, 95 F. Supp. 2d 125, 132 (W.D.N.Y. 2000); *accord 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 773 N.E.2d 496, 500-01 (N.Y. Ct. App. 2002). "To state a cause of action alleging breach of the implied covenant of good faith and fair dealing, the plaintiff must allege facts that tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff." *New York Contract Law* § 18:18 at 680.

MPSA did not do any of these things. BBIG failed to pay, thereby losing any rights to performance under the Agreements. As previously discussed, nonpayment constitutes a material breach that discharges the other party from its contractual obligations. *See supra* Part II.A. There is no basis for an implied covenant claim.

Additionally, the implied covenant cannot be used to add new provisions to an agreement that a party failed to obtain at the bargaining table. *See Broder v. Cablevision Sys. Corp.*, 418 F.3d 187, 198 (2d Cir. 2005) (noting that the implied covenant "does not add[] to the contract a substantive provision not included by the parties"); *Nat'l Westminster Bank USA v. Ross,* 130 B.R. 656, 679 (S.D.N.Y. 1991) ("[The] covenant of good faith . . . cannot frustrate the operation of an express term of an agreement bargained for at arms length."), *aff'd* 962 F.2d 1 (2d Cir. 1992); *ARI and Co. v. Regent Int'l Corp.*, 273 F. Supp. 2d 518, 523 (S.D.N.Y. 2003) ("[B]reach of the covenant of good faith claim must be dismissed [where] it seeks to recover for obligations that were not explicitly part of the Agreement.").

The TSAs are lengthy, detailed, and fully negotiated agreements governing multi-year transactions for the delivery of some 456 wind turbines at a price of over $1.4 billion. The TSAs contain detailed sections addressing production and delivery of the turbines, including sections on Delivery Schedules (§ 5.3), Site Storage (§ 5.5), Packing (§ 5.6), Change Orders (§ 9.6), and Site Access (§ 12.5). They set forth criteria for the acceptability and operability of the turbines in exacting detail. *See* 2009 & 2010 TSAs § 9 ("Mechanical Completion, Commissioning, Substantial Completion and Final Completion."). These provisions establish a complex acceptance process (§ 9.1) with detailed commissioning criteria (§ 9.2) and standards for Substantial Completion (§ 9.3 (e)) and Final Completion (§ 9.4). The TSAs also gave MPSA the right of cure (§ 13), and provided for payments to offset any damages sustained by defendants in the event of delay (§ 5.5.1; § 9.2(B)). There is even a mechanism to resolve engineering disputes (§ 14.2). Each Agreement attaches and incorporates by reference twenty-two appendices and exhibits running for hundreds of pages and providing additional details on matters such Technical Specifications for Wind Turbines, Site Conditions, Permitting Requirements, Pricing for Optional Items, Road Requirements for Delivery, Commissioning Procedures and Check Sheet, Project Acceptance Test Procedures, and the forms of the certifications to be completed for Mechanical Completion, Substantial Completion, and Final Completion.

The TSAs similarly provide for instances of patent infringement. As previously noted, MPSA undertook to indemnify BBIG and the TSAs provided that MPSA would indemnify BBIG:

> [F]rom and against all claims, liabilities, losses and damages asserted by any person, together with all costs and expenses relating thereto (including reasonable legal fees), based upon any claim of infringement of any patent or other license or right to intellectual property (whether by way of trademark or otherwise) resulting directly or indirectly from the manufacture, sale, supply, or importation of the Wind Turbines or their use by [BBIG] as designed or contemplated by the Operation Manual.

2009 & 2010 TSAs § 11.2. In addition, in the event of a final order finding patent infringement, MPSA could elect to:

> (i) modify the Wind Turbines so that they become non-infringing;
>
> (ii) procure for Owner the unrestricted right to continue the use of the Wind Turbines for their entire useful life; or
>
> (iii) substitute for any infringing equipment, other non-infringing equipment having the capabilities equivalent to the infringing equipment or which otherwise satisfied Owner's needs.

2009 & 2010 TSAs § 11.3.

These specific contractual provisions leave no room for the implied covenant. BBIG is attempting impermissibly to use the implied covenant to add provisions to the Agreements. New York law does not permit this. I therefore will enter judgment on the pleadings in favor of MPSA on Count III of the counterclaims.

C. The Claim For Fraud

BBIG contends it was fraudulently induced to enter into the 2009 and 2010 Agreements because MPSA misrepresented that it could supply wind turbines and failed to disclose either the mechanical problems that plagued the MWT95 or the GE patent claims. I will analyze the fraud claims under two headings: contractual misrepresentations and extra-contractual misrepresentations.

1. Contractual Misrepresentations

The first category of fraud addresses potential misrepresentations arising out of the contract itself. According to BBIG, MPSA falsely represented in the 2009 and 2010 Agreements that MPSA could supply fully operating wind turbines free of performance problems. *See* Counterclaims ¶ 41. As the source of that representation, BBIG contends that:

> MPSA represented and warranted, among other things, that (1) "all of the Wind Turbine Work shall conform to and will be carried out in accordance with the Specifications, Applicable Laws, the specific items … which are based upon requirements in [BBIG's] Owners' Permit (§ 3.3); (2) "[MPSA] shall deliver each Wind Turbine only at the times set forth on and in accordance with the Delivery Schedule (§ 5.4); and (3) "[MPSA] shall observe, monitor, and provide technical assistance to [BBIG] and its designees during the assembly, installation, and erection by [BBIG] . . . through Mechanical Completion of each Wind Turbine in compliance with the Specifications, and the Instruction Manual (§ 8.2).

Id. ¶ 17 (describing 2009 TSA); *accord id.* ¶ 18 (describing 2010 TSA).

The Agreements in fact do not contain representations on these points. The provisions BBIG cites are the contractual undertakings through which MPSA agreed to perform the identified tasks. Section 3.3, on which BBIG relies, is entitled "Standards of Performance." Through that provision, MPSA "covenant[ed]" to BBIG regarding the manner in which it would complete all "Wind Turbine Work." Section 5.4, on which BBIG also relies, establishes the delivery schedule for wind turbines and the allocation of responsibility for assorted tasks relating to delivery. Section 8.2, entitled "Technical

Assistance," establishes MPSA's obligation to "observe, monitor and provide technical assistance (the 'Technical Assistance') to [BBIG] and its designees during the assembly, installation and erection by [BBIG]" of the wind turbines.

Contractual provisions governing what a party commits to do under a contract are not representations that can give rise to a fraud claim. *See Bridgestone/Firestone, Inc. v. Recovery Credit Svcs., Inc.*, 98 F.3d 13, 19-20 (2d Cir. 1996) (holding that New York courts will not entertain fraud claims that are merely incidental to claims for breach of contract); *Tiffany at Westbury Condominium by Its Bd. of Mgrs. v. Marelli Dev. Corp.*, 840 N.Y.S.2d 74, 77 (N.Y. App. Div. 2007) (explaining that a "cause of action alleging fraud does not lie where the only fraud claim relates to a breach of contract"). There is no contractual basis for a fraud or fraudulent inducement based on the alleged mechanical problems with the Model MWT95 turbine.

BBIG also asserts that MPSA misrepresented "that there were no legal impediments, namely GE's potential patent infringement claims, to its performance under [the] Agreements." Counterclaims ¶ 64. BBIG does not cite any contractual provision in support of this assertion, and I cannot locate any representation in the Agreements regarding intellectual property ownership or the absence of legal impediments to performance. It simply does not exist. There is thus no contractual basis for a fraud or fraudulent inducement based on the GE patent issues.

2. Extra-Contractual Misrepresentations

The second category of fraud addresses potential misrepresentations falling outside the contract. In an effort to cut off any claim of this type, MPSA argues that the integration clauses in the 2009 and 2010 Agreements bar allegations of extra-contractual fraud. Both integration clauses state:

> 15.8 Entire Agreement. The terms and conditions set forth herein, together with those set forth on all Exhibits attached hereto and in the Contract Documents, constitute the complete statement of the agreement between Owner and Seller relating to the subject matter hereof. . . . Prior representations, promises, warranties or statements by any agent of employee of Seller or Owner that differ in any way from the terms and conditions hereof or thereof shall be given no effect.

2009 & 2010 TSAs § 15.8. The Agreements also contain additional provisions barring extra-contractual warranties. Both provisions read as follows:

> 15.16 NO IMPLIED WARRANTIES. (I) THE WARRANTIES OF [MPSA] SET FORTH IN, THE SECOND SENTENCE OF SECTION 3.6.1, SECTION 3.5, SECTION 5.6, ARTICLE 10, AND SECTION 11.2 OF THIS AGREEMENT AND (II) THE WARRANTIES SET FORTH IN SECTION 5.1, SECTION 5.8, SECTION 5.10, AND THE GUARANTEES SET FORTH UNDER SECTION 3.2, AND ARTICLE 6 OF THE WARRANTY AGREEMENT ARE [MPSA'S] SOLE WARRANTIES AND PERFORMANCE GUARANTEES WITH RESPECT TO THE WIND TURBINES AND THE WIND TURBINE WORK AND ARE MADE IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED. [MPSA] MAKES NO OTHER WARRANTIES TO [BBIG] OR ANY OTHER PERSON WITH RESPECT TO THE DESIGN, MATERIALS, WORKMANSHIP, OR PERFORMANCE OF THE WIND TURBINES OR THE WIND TURBINE WORK, EITHER EXPRESS OR IMPLIED, INCLUDING ANY IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE NOTWITHSTANDING ANYTHING TO THE CONTRARY, NOTHING IN THIS SECTION IS INTENDED TO (A) OPERATE AS A WAIVER OF [BBIG'S] RIGHT TO ENFORCE ANY OF THE OBLIGATIONS OR COVENANTS OF [MPSA] UNDER OTHER PROVISIONS OF THE SUPPLY AGREEMENT AND WARRANTY AGREEMENT, OR (B) NEGATE ANY WARRANTY PROVIDED UNDER THE SERVICE AGREEMENT.

2009 & 2010 TSAs § 15.16 (all capitals in original). I do not believe that these provisions are sufficiently specific to bar BBIG's extra-contractual fraud claims under New York law.

Two seminal decisions by New York's highest court address the ability of contractual provisions to limit or bar claims for extra-contractual fraud: *Danann Realty Corp. v. Harris*, 157 N.E.2d 597 (N.Y. 1959) and *Citibank, N.A. v. Plapinger*, 485 N.E.2d 974 (N.Y. 1985). In the twenty-four years since *Plapinger* was decided, numerous opinions by federal courts applying New York law and by lower New York state courts have interpreted these seminal decisions. *See, e.g., Aetna Casualty and Surety Co. v. Aniero Concrete Co., Inc.*, 404 F.3d 566 (2d Cir. 2005); *Manufacturer's Hanover Trust Co. v. Yanakas*, 7 F.3d 310 (2d Cir. 1993); *Zaro Bake Shop, Inc. v. David*, 574 N.Y.S.2d 803 (N.Y. App. Div. 1991); *DiFilippo v. Hidden Ponds Assocs.*, 537 N.Y.S.2d 222 (N.Y. App. Div. 1989).

In *Danann*, the New York Court of Appeals held that a party cannot specifically disclaim reliance on a particular representation at the time of contracting, then later claim to have relied on that representation to prove fraud. 157 N.E.2d at 600. The case involved the purchase of a real estate lease that the purchaser contended was induced by fraudulent misrepresentations about the amount of rents and expenses the lease would generate. *Id.* at 598. The sale contract, however, included specific anti-reliance language, which provided:

> The Purchaser has examined the premises agreed to be sold and is familiar with the physical condition thereof. The Seller has not made and does not make any representations as to the physical condition, rents, leases,

> expenses, operation or any other matter or thing affecting or related to the aforesaid premises, except as herein specifically set forth, and the Purchaser hereby expressly acknowledges that no such representations have been made, and the Purchaser further acknowledges that it has inspected the premises and agrees to take the premises "as is." . . . It is understood and agreed that all understandings and agreements heretofore had between the parties hereto are merged in this contract, which alone fully and completely expresses their agreement, and that the same is entered into after full investigation, neither party relying upon any statement or representation, not embodied in this contract, made by the other. The Purchaser has inspected the buildings standing on said premises and is thoroughly acquainted with their condition.

Id. After acknowledging that "the parol evidence rule is not a bar to showing the fraud either in the inducement or in the execution despite an omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made," the Court of Appeals held that when a contract specifically identifies representations that were not relied upon, a party cannot claim he was defrauded based on reliance on statements that he disclaimed. *Id.* at 598-99. The court stated:

> [P]laintiff has in the plainest language announced and stipulated that it is not relying on any representations as to the very matter as to which it now claims it was defrauded. Such a specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral representations.

Id.

Twenty-five years later in *Plapinger*, the New York Court of Appeals returned to the same legal issues. *Plapinger* involved an agreement by corporate officers to guarantee debts of the corporation. The corporation declared bankruptcy, and the bank sued the officers on the guarantee. The officers claimed that they were fraudulently induced to enter into the guarantee by the bank's promise to fund a new line of credit for the corporation, which the bank never did. 485 N.E.2d at 975. The Court of Appeals found the following issue critical:

> [The officers] themselves have denominated their obligation unconditional, and have reinforced that declaration by their agreement that the "absolute and unconditional" nature of their guarantee was "irrespective of (i) any lack of validity . . . of the . . . Restated Loan Agreement . . . or any other agreement or instrument relating thereto," or "(vii) any other circumstance which might otherwise constitute a defense" to the guarantee.

Id. at 977. As a result, the Court of Appeals held that the fraud claim was barred and stated:

> Though not the explicit disclaimer present in *Danann*, the substance of defendants' guarantee forecloses their reliance on the claim that they were fraudulently induced to sign the guarantee by the banks' oral promise of an additional line of credit. To permit that would in effect condone defendants' own fraud in "deliberately misrepresenting [their] true intention" when putting their signatures to their "absolute and unconditional" guarantee.

Id. (*quoting Danann*, 157 N.E.2d at 597).

In *Yanakas*, the United States Court of Appeals for the Second Circuit surveyed and summarized New York law in this area. 7 F.3d at 316. The court explained that *Danann* and *Plapinger* both depend on the conflict between a specific contractual provision and an alleged extra-contractual representation. In *Danaan*, the alleged extra-contractual representation conflicted with what the contractual disclaimer specifically disclaimed. In *Plapinger*, the alleged extra-contractual representation conflicted with the specific agreement in the contract to waive any challenge to the validity of the guarantee and to provide a guarantee that was "absolute and unconditional." *Yanakas*, 7 F.3d at 316. Other cases interpreting New York law reach the same conclusion. *See, e.g.*, *JP Morgan Chase Bank v. Liberty Mutual Insurance Co.*, 189 F. Supp. 2d 24, 27 (S.D.N.Y.

2002) (requiring a "clear indication that the disclaiming party has knowingly disclaimed reliance on the specific representations that form the basis of the fraud claim"); *Zaro Bake Shop*, 574 N.Y.S.2d at 804 (holding that "absolute and unconditional" contract language, in and of itself, does not bar fraud in the inducement); *GTE Automatic Electric Inc. v. Martin's Inc.*, 512 N.Y.S.2d 107, 108 (N.Y. App. Div. 1987) (holding that provision in notes stating that they were absolute and unconditional did not bar fraud in the inducement because there was not "a specific disclaimer, as in both *Plapinger* and *Danann*").

The specificity requirement is relaxed for transactions involving sophisticated parties. *Aetna Cas. & Sur. Co. v. Aniero Concrete Co.*, 404 F.3d 566, 576 (2d Cir. 2005). Although some degree of specificity is required, "a merger clause may disclaim reliance on certain representations without identifying those representations in language that is identical to the language used by a party claiming reliance." *Katz v. Image Innovations Holdings, Inc.*, 2008 WL 4840880, at *6 (S.D.N.Y. Nov. 4, 2008). *See, e.g.*, *Wells Fargo Bank Northwest, N.A. v. Taca Int'l Airlines, S.A.*, 247 F. Supp. 2d 352, 368-69 (S.D.N.Y.2002) (noting that "the exact words 'maintenance costs' need not appear in the disclaimer in order for representations about maintenance to have been disclaimed."). Courts applying New York law look to "the extent to which a merger clause was expressly negotiated by sophisticated parties using specific language or whether it was merely a general or standard clause." *Superior Technical Res., Inc. v. Lawson Software, Inc.*, 851 N.Y.S.2d 74 (N.Y. Sup. Ct. 2007); *see also Benjamin Goldstein Productions, Ltd. v. Fish*, 603 N.Y.S.2d 849, 850 (N.Y. App. Div. 1993) ("[P]arol evidence was barred by the merger clause, negotiated at arm's length and inserted by the sophisticated parties in their Settlement Agreement, in which plaintiffs specifically acknowledged that they were not relying upon any oral representations.").

To bar a claim of extra-contractual fraud, New York law thus requires a contract provision that is sufficiently specific to put the parties on notice that reliance would not be justified under the circumstances. A disclaimer of reliance must address the substance of the alleged extra-contractual misrepresentation, or there must be a sufficiently specific contractual representation that contradicts the substance of the alleged extra-contractual representation. "[W]here parties have expressly allocated risks, the judiciary shall not intrude into their contractual relationship." *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 735 (2d Cir. 1984).

The integration clauses in the 2009 and 2010 Agreements do not contain language disclaiming reliance. The provisions establish that the Agreements are integrated contracts that contain all of their operative terms, but the parties did not disclaim reliance on matters outside of the Agreements. The sole reference to "[p]rior representations" in the integration clauses says generally that they will not be given effect if they differ "from the terms and conditions" of the Agreements. These provisions amount to a general statement that "no representations have been made," which *Danaan* holds is insufficient to bar extra-contractual fraud. Such a provision addresses what the contract says. It does not address extra-contractual reliance.

The disclaimer of warranties in Section 15.16 similarly addresses MPSA's obligations under the Agreements. Of all the provisions cross-referenced in Section

15.16, only one – Article 10 – actually sets out representations. The others cross-reference MPSA's substantive contractual undertakings, such as its obligation to indemnify BBIG against patent claims under Section 11.2. As with the integration clause, the disclaimer of warranties addresses the scope of MPSA's contractual undertakings. It limits the warranties that MPSA otherwise would provide in a sale of goods under the New York Uniform Commercial Code, including the implied warranty of fitness for a particular purpose. *See* N.Y. U.C.C. § 2-316. It does not address extra-contractual factual representations or information on which BBIG may have relied.

I therefore conclude that Sections 15.8 and 15.16 are insufficient under New York law to eliminate a claim for fraudulent inducement based on extra-contractual fraud. My reading of these sections finds additional support in Section 15.17 of the Agreements, entitled "Limitation of Liability." This provision generally provides that neither party "shall be liable for any indirect, special, incidental, or consequential damages . . . whether or not such liability is claimed in contract, tort (including negligence and strict liability), warranty, or any other legal or equitable theory." 2009 & 2010 TSAs § 15.17. The provision then states that this limitation "shall not . . . be construed to limit recovery . . . with respect to a party's fraud or willful misconduct." *Id.* The express preservation of a remedy for fraud reinforces my conclusion that the Agreements did not insulate the parties from fraud claims based on extra-contractual statements. If the negotiators of the Agreements intended in Section 15.17 to preserve solely claims of fraud based on contractual representations, they should have used specific language to that effect.

Although the TSAs leave open the possibility of extra-contractual fraud, BBIG has not adequately pled an affirmative, extra-contractual misrepresentation. BBIG does not identify any representative of MPSA who made any specific extra-contractual statement on any particular occasion. BBIG instead contends that MPSA fraudulently induced BBIG to enter into the TSAs because of material *omissions*.

Fraudulent inducement through a material omission is a species of extra-contractual misrepresentation. Under New York law, "a party commits fraud by failing to make a disclosure only when it had a duty to speak." *New York Contract Law* § 5:12 at 187. "Absent such a duty, nondisclosure does not ordinarily constitute fraud." *Id.* at 187-88.

The duty to speak does not typically arise when parties sit on opposite sides of the bargaining table negotiating a contract at arm's length. The ancient rule of *caveat emptor* remains alive and well in New York. *Id.* A party generally has a duty to speak in three situations: (1) where disclosure is necessary to complete or clarify the party's prior disclosure; (2) where a party with superior knowledge knows the other party is operating on the basis of a mistaken belief; and (3) when the parties stand in a fiduciary or confidential relationship. "Where there is a duty to disclose information, a failure to disclose is tantamount to an affirmative representation that the undisclosed facts known to the duty bound party do not exist." *Id. See generally Restatement (Second) of Contracts* § 161 (describing in similar terms the limited situations where "[a] person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist").

BBIG and MPSA did not stand in a fiduciary or confidential relationship. "Regular business relations, do not, without more, rise to [this] level." *New York Contract Law* § 21:19 at 800.

In light of both parties' sophistication, the "superior knowledge" avenue is also unavailable. "[C]ourts may disregard a fraudulent inducement claim and give effect to a contract when the parties have negotiated at arms lengths and they are sufficiently sophisticated that they could have easily protected themselves either through obtaining readily available information or alternatively including a protective clause in the agreement." *Primedia Enthusiast Publication Inc. v. Ashton Int'l Media, Inc.*, 2003 WL 22220375, at *6 (S.D.N.Y. Sept. 25, 2003); *see also Emergent Capital Inv. Mgmt., L.L.C. v. Stonepath Group, Inc.*, 343 F.3d 189, 195 (2d Cir. 2003) ("In assessing the reasonableness of a plaintiff's alleged reliance, we consider the entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them."); *United Artists Theatre Circuit v. Sun Plaza*, 352 F. Supp. 2d 342, 351 (E.D.N.Y. 2005) ("Based on the integration clause, Plaintiff, a sophisticated corporation, has not alleged, nor can it, that it reasonably relied on any oral representations made by Defendants prior to the execution of the lease, which constitute the sole basis for the fraud claim.").

This leaves only the possibility that disclosure was necessary to complete or clarify a party's prior disclosure. I will discuss this theory when addressing each of BBIG's allegedly material omissions. BBIG cites two: first, MPSA's alleged failure to disclose mechanical problems; second, MPSA's alleged failure to disclose the GE patent claims.

a. The Failure To Disclose Mechanical Issues

BBIG contends that based on MPSA's experience building and testing turbines under the 2008 Agreement, MPSA knew that it could not meet BBIG's specifications for the 2009 and 2010 Agreements, but failed to disclose that information to BBIG. Counterclaims ¶ 23. I do not believe MPSA had a duty to speak on this issue or that this theory can support a fraud claim under New York law.

BBIG has failed to plead problems with the Model MWT95 turbines sufficient for me to infer, even at the pleadings stage, that MPSA knew it could not perform. MPSA could not have a theoretical duty to speak absent such knowledge. BBIG has alleged that the turbines initially delivered under the 2008 Agreement failed repeatedly and extensively during the initial 42 days of operation. Given the complexity of the machinery and the magnitude of the engineering tasks involved, this allegation does not plausibly suggest fraud. BBIG further alleges that as of April 7, 2009, the date MPSA filed suit against BBIG, "not a single turbine was able to achieve trouble-free commercial operation" and all continued to experience "problems that keep them from meeting their expected capacity factor." Counterclaims ¶ 13. "Trouble-free commercial operation" is an aspirational ideal. To fail to achieve perfection, or even to fall short of one's "expected capacity factor," does not imply fraud. It could imply a breach of contract, but BBIG has conspicuously avoided asserting any breach of the 2008 Agreement. BBIG also noted that MPSA has incurred $6.7 million in liquidated damages for delivery and commissioning delays, indicating that the problems suffered by the turbines were contemplated by the parties and addressed by the 2008 Agreement.

These allegations are not sufficient to support a claim for fraud in the inducement under a theory that MPSA knew it could not perform under the 2009 and 2010 Agreements and should have informed BBIG of this fact. BBIG's allegations in fact plead the opposite: Despite initial difficulties, MPSA performed under the 2008 Agreement, and therefore MPSA similarly could perform under the 2009 and 2010 Agreements.

BBIG's claim also fails as a variant on the theory, rejected by New York law, that a party commits fraud when it enters into a contract without intending to perform. According to BBIG, MPSA may have intended subjectively to perform, but it committed fraud by failing to disclose information that would have led BBIG to realize that MPSA did not have the capacity to perform. New York law does not permit a plaintiff to claim fraud "merely by alleging that the breaching party never intended to perform." *C3 Media & Mktg. Group LLC v. Firstgate Internet, Inc.*, 419 F. Supp. 2d 419, 430 (S.D.N.Y. 2005) (citations omitted). MPSA's alleged inability to perform might have given rise to a breach of contract claim by BBIG had events transpired differently. It cannot be recast as a claim for fraud in the inducement.

b. The Failure To Disclose The Patent Claims

BBIG also contends that MPSA failed to disclose any of the material information it knew about GE's patent claims when the parties were negotiating the Agreements. *Id.* ¶¶ 36-40. BBIG understandably cites the May 2007 email as evidence of fraud.

With some misgivings, I allow BBIG to proceed on this theory. But for the May 2007 email and the ambiguous and seemingly conflicting specifications for the wind turbine control system that appear in the exhibits to the 2008 and 2009 Agreements, I would enter judgment on this claim as well. The TSAs are quintessential examples of highly negotiated, detailed, and specific agreements where sophisticated parties can and should protect themselves through due diligence, representations, and specific contractual undertakings. During the negotiation of the 2009 and 2010 Agreements, BBIG easily could have asked MPSA whether it faced any intellectual property issues. MPSA would have been obligated to answer that question honestly, and MPSA could not have provided a misleading partial disclosure. Or BBIG could have protected itself with a contractual representation addressing MPSA's ownership of the intellectual property required to manufacture and deliver the wind turbines. BBIG also could have insisted on a representation addressing any intellectual property disputes. What BBIG instead obtained was broad indemnification against any "claims, liabilities, losses and damages" arising out of any intellectual property issues.

But for the May 2007 email and wind turbine specifications, I would reject any argument that MPSA had a common law duty to speak. The plain language of the TSAs indicates that the risk of intellectual property disputes was known at the time of contracting and addressed via indemnification. A sophisticated party like BBIG that bargained at arms' length over two deals worth $1.4 billion should not be able to reallocate risk after the fact by arguing that its counterparty had a duty to speak about a standard risk like intellectual property claims.

But the May 2007 email, together with the seemingly contradictory turbine specifications, supports a different inference. They suggest that MPSA made an intentionally vague and misleading partial disclosure about the power range for the MWT95 wind turbine to conceal the intellectual property issues MPSA faced. "Action intended … to prevent another from learning a fact is equivalent to an assertion that the fact does not exist." *Restatement (Second) of Contracts* § 160. MPSA's odd disclosures similarly support a duty to speak, at least for pleading purposes. BBIG can plausibly allege at this stage that it relied on a misleading combination of half-truths and omissions, believed MPS did not face any intellectual property claims, agreed as a result to enter into the TSAs, and now has suffered a range of damages.

It is also possible that the notice provision in the 2008 Agreement imposed on MPSA a contractual duty to speak during the negotiation of the 2009 Agreement, and that the 2008 and 2009 Agreements imposed a similar contractual duty during the negotiation of the 2010 Agreement. BBIG has alleged that the notice provision in Section 11.2 of the TSAs imposed on MPSA a contractual duty to disclose GE's patent claims. BBIG has also alleged that if MPSA had complied with its duty to speak, BBIG would not have entered into the subsequent agreements.

I will therefore deny MPSA's motion for judgment on the pleadings as to Count IV to the limited extent that it asserts a claim for fraudulent inducement based on non-disclosure of the GE patent claims *and* couples the non-disclosure to an act of active concealment or an alleged duty to speak, either under the 2008 or 2009 Agreements or as a result of partial disclosure.

The Seventh Affirmative Defense raises fraud in the inducement defensively. I address that defense in the same manner by striking it, except to the extent it parallels defensively the fraud in the inducement claim that I have allowed to go forward.

D. The Negligent Misrepresentation Claim

In Count V, BBIG repackages its allegations of fraud as a claim for negligent misrepresentation. New York limits the situations where a party can bring a claim for negligent representation to those involving a special relationship, such as a fiduciary relationship or a position of trust or confidence. *Murphy v. Kuhn,* 682 N.E.2d 972, 974 (N.Y. 1997); *accord Krahmer v. Christie's Inc.*, 903 A.2d 773, 784-85 & n.63 (Del. Ch. 2006) (applying New York law). "The special relationship requirement arises from the Court of Appeals' concern for the indeterminate nature of the risk of being subjected to a negligent misrepresentation claim and to provide fair and manageable bounds to what otherwise could prove to be a limitless liability." *New York Contract Law* § 21:27 at 809-810.

Commercial parties acting at arms' length in negotiating a contract are not in a special relationship. *H & R Project Assocs. v. City of Syracuse*, 737 N.Y.S.2d 712, 715 (N.Y. App. Div. 2001); *Fleet Bank v. Pine Knoll Corp.*, 736 N.Y.S.2d 737, 741 (N.Y. App. Div. 2002). BBIG and MPSA were arms' length counterparties. I therefore enter judgment for MPSA on Count V.

E. Equitable Estoppel

BBIG raises equitable estoppel both as an affirmative claim and as a defense. This is another reframing of the same allegations regarding manufacturing difficulties and intellectual property disputes. In this version, BBIG asserts that MPSA claimed it could deliver working turbines and now should be estopped from avoiding its obligations. Among this theory's many difficulties is the fact that the TSAs already govern the obligations that BBIG would re-impose via equitable estoppel. New York law rejects attempts to repackage breach of contract claims in equitable estoppel guise. *See Guerrero v. West 23rd Street Realty, LLC*, 846 N.Y.S.2d 41, 42 (N.Y. App. Div. 2007) ("The claim for equitable estoppel was also properly dismissed. . . . [I]t is duplicative of the breach of contract causes of action."); *City of New York v. 611 W. 152nd St.*, 710 N.Y.S.2d 36, 38 (N.Y. App. Div. 2000) ("[E]quitable estoppel . . . is legally insufficient because it is duplicative of the breach of contract [allegations]."); *Kopelowitz & Co. v. Mann, No. 2544/08*, No. 2544/08, 2009 WL 1037734, at *11 (N.Y. Sup. Ct. Apr.17, 2009) ("Claims for equitable estoppel that are duplicative of dismissed breach of contract claims are properly dismissed."). I therefore enter judgment for MPSA on Count VI and strike the Third Affirmative Defense.

III. CONCLUSION

For the foregoing reasons, I grant MPSA's motion for judgment on the pleadings in all but one respect. I allow BBIG to proceed on Count IV and with its corresponding affirmative defense to the degree explained above.

IT IS SO ORDERED.