IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

FINCLUSIVE CAPITAL, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N20C-02-016 EMD CCLD
	)	
Q2 SOFTWARE, INC.,	)	
	)	
Defendant.	)	

Submitted: July 7, 2021
Decided: October 28, 2021

Upon Plaintiff's Motion to Amend Complaint of Plaintiff/Counterclaim Defendant FinClusive Capital, Inc.
DENIED in part and GRANTED in part

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DAVIS, J.

I. INTRODUCTION

This is a breach of contract case assigned to the Complex Commercial Litigation Division of the Court. Plaintiff and Counterclaim Defendant FinClusive Capital, Inc. ("FinClusive") alleges that Defendant and Counterclaim Plaintiff Q2 Software, Inc., d/b/a Q2 Open ("Q2") never performed under a license agreement for Q2's software (the "Agreement"). FinClusive filed a motion to amend their complaint to seek (i) damages for breach of contract,

(ii) damages for breach of fiduciary duty, (iii) damages for fraud in the inducement (the "Motion").

For the reasons set forth below, the Motion is **GRANTED in part** and **DENIED in part**.

II. BACKGROUND

A. THE PARTIES

FinClusive is a technology company that develops a financial software platform.[1] FinClusive is a Delaware corporation with its principal place of business in Vermont.[2]

Q2 offers banking-related technology services to financial institutions and financial technology companies ("fin-techs").[3] Q2 is a Delaware corporation with its principal place of business in Texas.[4]

Fin-techs, like FinClusive, keep track of funds held in their deposit accounts through third-party core processing software ("Core").[5] Q2 offers Core as part of its "CorePro" software solution.[6] In June 2018, Q2 and FinClusive began negotiations about FinClusive licensing CorePro technology.[7]

B. MARKETING MATERIAL

FinClusive accessed marketing material, in which Q2 made several claims about its services.[8] In this marketing material,[9] Q2 provided that: "Q2's vast banking experience and deep banking relationships is how we find the perfect match for you."[10] The material also stated: "But

[1] Compl. ¶ 9.
[2] Compl. ¶ 2.
[3] Mot. for Partial Summ. J., Ex. 12 ("Gaskell Aff.") ¶ 3.
[4] Amend. Answer ¶ 3.
[5] Gaskell Aff. ¶ 4.
[6] *Id.* ¶ 5.
[7] *Id.* ¶ 6.
[8] Mot. to Amend Ex. 2 ("First Amended Complaint" or "FAC") ¶ 97.
[9] *Id.* Exs. B-D.
[10] *Id.* Ex. C.

what if the partnership doesn't work out? We can help you switch to a new bank – or become one – without losing any progress."[11]

C. THE AGREEMENT

The Parties entered into the Agreement for Q2 to provide services to FinClusive on June 29, 2018.[12]

i. The Bargained-for Services

Under the Agreement, Q2 granted a license to FinClusive for Q2 Open Services:

> License Grant. Subject to the terms and conditions of this Agreement, including any limitations or restrictions or modifications to this grant that may be set forth in Schedule 2 or any Sales Order, Q2 Open grants to Client a limited, non-sublicensable, revocable, non-exclusive, non-transferable, license to access and use the Q2 Open Services.[13]

"Q2 Open Services" is a defined term:

> **"Q2 Open services"** shall mean the data processing services provided to Client and described in this Agreement, Schedule 2 or any Sales Order.[14]

Schedule 2 describes three Q2 Open Services: (1) SandBox set-up, (2) NACHA processing and (3) Q2 Open Corepro Bank of Record Dependent System-Of-Record Services ("Corepro Services").[15] SandBox is a software environment for testing code.[16] NACHA processing refers to National Automated Clearing House Association which manages the development, administrator and governance of the ACH Network and electronically transferring payments via the ACH Network.[17] As part of the Corepro Services, Q2 submits and accepts NACHA files

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[11] *Id.*
[12] Pl. FinClusive Capital, Inc.'s Answer Br. in Opp. To Def./Countercl. Q2 Software, Inc.'s Mot. for Partial Summ. J. as to Each Count in Pl.'s Compl. and as to Counts One and Two of Q2's Amend. Countercls. ("Answer Br."), Ex. A (the "Agreement").
[13] Agreement General Terms § 1.1.1.
[14] Agreement Definitions.
[15] Agreement Schedule 2.
[16] Answer Br., Ex. B.
[17] Def./Countercl. Q2 Software, Inc.'s Mot. for Partial Summ. J. as to each Count in FinClusive Capital, Inc.'s Compl. and as to Counts One and Two of Q2 Software, Inc.'s Amend. Countercls. ("Mot. for Partial Summ. J) Ex.

from a partner bank for processing.[18] The Corepro Services are the Core software services used to issue and manage End User deposit accounts.[19] The Corepro Services would allow FinClusive to offer and provision to End Users through FinClusive's application, demand deposit accounts, the underlying deposits and to issue debit cards.[20]

Schedule 2 established a payment schedule. There was a one-time $3000 fee for SandBox set-up and a $1000 monthly fee for NACHA processing.[21] Schedule 2 also required a onetime fee of $27,000 for the Corepro Services as well as monthly fees of $30,000 for Months 1-18, $40,000 for Months 19-30 and $50,000 for Month 31 and on.[22]

Under Schedule 2, Q2 agreed to waive the first six months of minimum monthly Fees from the Commencement Date for the Corepro Services.[23] The Commencement Date was defined as "thirty (30) days from the Effective Date of this Sales Order."[24] The Effective Date is the date when Q2 countersigned the Agreement.[25] Schedule 2 was signed by Q2 on June 29, 2018.[26] As such, the Commencement Date was July 29, 2018.

ii. License restrictions

The Agreement restricts FinClusive's license. The Agreement notes:

> Certain uses of the Q2 Open Services require the banking services of a: (a) federally insured commercial bank, thrift, industrial bank, credit union or similar such depository institution or (b) a state or nationally chartered trust company (a

12 ("Gaskell Aff.") ¶ 13. The ACH Network is the nationwide network through which depository institutions send each other batches of electronic credit and debit transfers. *See* AUTOMATED CLEARINGHOUSE SERVICES, https://www.federalreserve.gov/paymentsystems/fedach_about.htm (last updated Sept. 28, 2020).

[18] Agreement at 12, Additional Terms Responsibilities of Q2 Open ("As part of the Q2 Open CorePro Bank of Record Dependent System-Of-Record Services, Q2 Open will submit daily NACHA files to the Certified Bank of Record for processing and accept daily NACHA files from the Certified Bank of Record for processing.").

[19] Agreement Schedule 2 Definitions.

[20] *Id.*

[21] Agreement Schedule 2.

[22] *Id.*

[23] *Id.*

[24] Agreement Schedule 2 Definitions.

[25] Agreement at 1 ("This **Master Agreement** (the **"Agreement"**) is effective upon countersignature by an officer of Q2 Software, Inc., (DBA Q2 Open) below ("**Effective Date**") . . .").

[26] Agreement Schedule 2 Agreed and Accepted.

> ***"Financial Institution"***). If Client is not a Financial Institution, Client hereby acknowledges that it is aware that it's [sic] use of Q2 Open Services may necessitate the banking services of a Financial Institution and that in the event of any such use of Q2 Open Services, which the Parties will identify in the applicable Sales Order therefor [sic], Client's license to use the Q2 Open Services hereunder is contingent upon Client obtaining and maintaining the banking services of a Certified Bank of Record.[27]

The Parties acknowledged that neither Q2 nor FinClusive were banks.[28] Therefore, FinClusive had to obtain the services of a Certified Bank of Record. A Certified Bank of Record was defined:

> **"Certified Bank of Record"** means: (a) federally insured commercial bank, thrift, industrial bank, credit union or similar such depository institution or (b) a state or nationally chartered trust company, qualified and party to a license from Q2 Open for Corepro necessary to provide banking services to Client in support of Client's use of the Q2 Open Services and is: (i) a "Principal Member" with the Visa/Mastercard network so as to be certified on Corepro and to be able to provide banking services to End Users; and (ii) shall have obtained an ABA routing transit number which will be dedicated exclusively to the Client's End User accounts.[29]

Furthermore, under the Agreement:

> Client acknowledges that any Certified Bank of Record must obtain its own license to certain Q2 Open Services in order to provide banking services to Client in support of Client's use of the Q2 Open Services. Q2 Open agrees to use good faith and commercially reasonable efforts to consider, qualify and license any prospective Financial Institutions in order for them to serve as a Certified Bank of Record. Q2 Open reserves the right to suspend Client's right to use the Q2 Open Services hereunder in the event that Client fails to obtain or maintain the services of a Certified Bank of Record if such Certified Bank of Record is required. In the event of any such suspension, Client shall continue to owe Fees hereunder.[30]

Under the Agreement, therefore, FinClusive was responsible for obtaining and maintaining the services of a Certified Bank of Record; and if FinClusive failed to do so it would be liable for fees to Q2. Moreover, Q2 had to approve of the Certified Bank of Record.

[27] Agreement § 1.1.3.
[28] Agreement Schedule 2.
[29] Agreement Definitions.
[30] Agreement § 1.1.3.

iii. Security Provisions

The Agreement also has provisions related to client security:

> Security of Client Data. Q2 Open maintains a comprehensive written information security program which includes physical, technical, and administrative controls and safeguards designed to ensure the security and confidentiality of Client Data and to protect against any anticipated threats or hazards to the security of, or unauthorized access to, Client Data. Q2 Open maintains appropriate administrative, technical and procedural measures designed to: (i) ensure the confidentiality and security of Client Data; (ii) protect against unauthorized access to or use of Client Data that could result in substantial harm or inconvenience to any End User; and (iii) ensure the proper disposal of Client Data. In the event that Q2 Open reasonably believes that Client Data has been disclosed to or accessed by an unauthorized person, Q2 Open shall: (a) immediately initiate response measures designed to identify the nature and scope of the incident, and (b) notify Client's designated security officer (or other contact as designated by Client to Q2 Open) as soon as practicable, subject to any law enforcement investigation. Q2 Open shall act in compliance with the applicable provisions of the GLBA with respect to Q2 Open's use, storage, and disposal of Client Data hereunder. Q2 Open shall obligate, by written agreement, its employees and independent contractors who have access to Client Data to adhere to the Q2 Open policies and practices implementing the foregoing Q2 Open obligations. Neither Q2 Open, nor its employees, agents, or contractors shall communicate with or contact Client's End Users who are not employees of Client to Client's End Users in accordance with applicable law. Client acknowledges that it has reviewed Q2 Open's security processes and procedures. Client acknowledges it is solely responsible for and will take all necessary measures to protect access to all accounts provided through the Q2 Open Services and adhere to reasonable security standards with respect to access to the Q2 Open System including, but not limited to, the implementation of effective security credentials and shall assume responsibility for reviewing at least annually Q2 Open's security processes and procedures.[31]

iv. Termination Provisions

Section 7 of the Agreement provides for termination procedures for the Parties. Section 7.2 provides for FinClusive's right to terminate the Agreement:

> Termination by Client for Cause. Client may terminate this Agreement as set forth in Section 5.2 provided that Client exercises its right to terminate within ninety (90) days of Q2 Open's notification to Client that Q2 Open is unable to re-perform the Q2 Open Services or Q2 Open Professional Services as warranted.[32]

[31] Agreement § 2.2.
[32] Agreement § 7.2.

Section 5.2 sets out exclusive remedies for a breach of Q2's performance warranty. Under Section 5.1 of the Agreement:

> Q2 Open warrants that the Q2 Open Services will perform without Error and the Q2 Open Professional Services will be performed by qualified personnel in a professional, workmanlike manner consistent with the prevailing standards of the industry.[33]

Section 5.2 provides:

> In the case of a breach of the warranty described above, Q2 Open will re-perform the applicable Q2 Open Services or Q2 Open Professional Services. If Q2 Open is unable to re-perform the applicable Q2 Open Services or Q2 Open Professional Services as warranted within ninety (90) days following Q2 Open's receipt of written notification from Client, Client shall be entitled to terminate this Agreement in accordance with Section 7. The foregoing remedies are available to Client for warranty breaches that Client reports to Q2 Open in writing within thirty (3) days of the date Client became or should have become aware of the alleged breach. This Section sets forth Client's sole and exclusive remedies for any breach of the warranties provided herein.[34]

Thus, FinClusive could terminate the Agreement if (i) Q2 breached its performance warranty, (ii) FinClusive alerted Q2 about the breach of warranty and (iii) Q2 could not perform or re-perform the service.

D. POST-AGREEMENT CONDUCT

After both parties signed the Agreement, FinClusive paid the initial $30,000 required under the Agreement.[35] Q2 delivered the SandBox.[36] FinClusive did not obtain a Certified Bank of Record.[37] The parties disagreed about who was at fault for not obtaining a Certified Bank of Record.[38] FinClusive alleges that Q2 assumed the role of FinClusive's agent and demanded that

[33] Agreement § 5.1
[34] Agreement § 5.2
[35] Gaskell Aff. ¶ 17.
[36] Answer. Br. 12.
[37] Gaskell Aff. ¶ 15.
[38] Answer Br. Exs. 1(a)-1(d) attached to Ex. C (Emails between FinClusive and Q2 Open faulting each other for preventing FinClusive from obtaining the services of a Certified Bank of Record).

Q2 control the efforts to secure a bank of record.[39] Q2 internally discussed how difficult it was to pair FinClusive with a bank because of the services FinClusive wanted to offer.[40] Steve Rotella, associated with FinClusive, expressed that he was worried "a bit that we are all spending inordinate time trying to fit a square peg in a round hole" by trying to find FinClusive a bank that provided crypto and international remittance services.[41]

Without a Certified Bank of Record, Q2 suspended FinClusive's license.[42]

On January 31, 2019, FinClusive sent a letter to Q2 purporting to terminate the Agreement.[43] Q2 continued to invoice FinClusive for NACHA processing and began to invoice FinClusive for the Corepro Services.[44]

E. PROCEDURAL POSTURE

FinClusive filed its complaint against Q2 on February 7, 2020.[45] FinClusive's complaint seeks recission of the Agreement based on failure of consideration (Count One), and three alternative grounds for relief: (i) a declaration that there was a failure of a condition precedent to the formation or a duty to perform under the Agreement (Count Two); (ii) a declaration that FinClusive's duty to perform never commenced (Count Three); or (iii) a declaration that FinClusive effectively terminated the Agreement in January 2019 (Count Four).[46]

Q2 filed an Answer and Counterclaim on April 14, 2020.[47] Q2 then filed an Amended Answer and Counterclaim on May 1, 2020.[48] Q2 counterclaimed for: (i) breach of contract; (ii)

[39] FAC ¶ 90.
[40] *Id.* Ex. F
[41] *Id.*
[42] Gaskell Aff. ¶ 15.
[43] Answer. Br. Ex. D.
[44] Mot. for Partial Summ. J. Ex. 11.
[45] D.I. 1.
[46] Compl. ¶¶ 42-78.
[47] D.I. 20.
[48] D.I. 26.

anticipatory breach of contract/repudiation; (iii) breach of contract based on making performance impossible/wrongful interference with contract performance (in the alternative); and (iv) breach of contract based on violation of license restrictions/confidentiality provisions.[49]

Q2 moved for partial summary judgment on August 18, 2020.[50] The Court deferred Q2's motion for partial summary judgment on January 27, 2021.[51]

FinClusive filed the Motion on April 7, 2021. Through the Motion, FinClusive seeks to amend its complaint to add: (i) breach of contract claims; (ii) breach of fiduciary duty claims and (iii) claims for fraudulent inducement.[52]

III. PARTIES' CONTENTIONS

FinClusive contends that permitting the amendment would not seriously prejudice Q2. FinClusive argues there is no serious prejudice because this civil action is in the early stages of litigation as there have been no depositions, no pre-trial dates have been established and the parties continue to exchange documents about Q2's misappropriation counterclaim. Furthermore, FinClusive argues that its proposed amendments are properly pled and, therefore, are not futile.

Q2 counters, arguing that the Motion should be denied because the proposed amendment would be futile. According to Q2, the Agreement forecloses the alleged breaches of contract. Q2 also claims that Q2 does not owe FinClusive any fiduciary duties as a matter of law. Finally, Q2 Open contends that FinClusive's proposed fraud claim is legally insufficient and fails to meet Delaware's heightened pleading standard for fraud claims. Q2 further argues that FinClusive unduly delayed seeking leave to amend the complaint.

[49] Amend. Countercl. ¶¶ 23-48.
[50] D.I. 36.
[51] D.I. 58.
[52] D.I. 71.

IV. STANDARD OF REVIEW

Delaware Superior Court Civil Rule 15(a) controls whether a party may amend their pleadings. Rule 15(a) provides:

> Amendments. -- A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the Court otherwise orders.

Leave to amend pleadings "should be freely given unless there is evidence of undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, prejudice, futility, or the like."[53] A motion for leave to amend is futile "where the amended complaint would be subject to dismissal under Rule 12(b)(6) for failure to state a claim"[54] and where a claim "could not survive a Rule 12(b)(1) motion to dismiss."[55] "The Court may also consider the proposed amendment's impact on a scheduled trial date."[56]

Upon a motion to dismiss, the Court (i) accepts all well-pled factual allegations as true, (ii) accepts even vague allegations as well-pled if they give the opposing party notice of the claim, (iii) draws all reasonable inferences in favor of the non-moving party, and (iv) only dismisses a case where the plaintiff would not be entitled to recover under any reasonably

[53] *Pettit v. Counter Life Homes, Inc.*, 2006 WL 2811707, at *1 (Del. Super. Oct. 3, 2006).
[54] *Clark v. State Farm Mut. Auto. Ins. Co.*, 131 A.3d 806, 811 (Del. 2016).
[55] *Cummings v. Estate of Lewis*, 2013 WL 979417, at *9 (Del. Ch. Mar. 14, 2013).
[56] *CNH Indus. Am. LLC v. Am. Cas. Co. of Reading*, 149 A.3d 242, 246 (Del. Super. 2016).

conceivable set of circumstances.[57] However, the Court must "ignore conclusory allegations that lack specific supporting factual allegations."[58]

In considering a motion to dismiss under Rule 12(b)(6), the Court generally may not consider matters outside the complaint.[59] However, documents that are integral to or incorporated by reference in the complaint may be considered.[60] "If . . . matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."[61]

Additionally, Superior Court Civil Rule 9(b) requires that if a complaint asserts a claim of fraud that the circumstances constituting a fraud claim be stated with particularity.[62] In order to meet the particularity requirement, a complaint "must state the time, place, and contents of the alleged fraud, as well as the individual accused of committing the fraud."[63]

V. DISCUSSION

A. TEXAS LAW APPLIES TO THE AGREEMENT.

Delaware courts "are bound to respect the chosen law of contracting parties, so long as that law has a material relationship to the transaction."[64] A state has a material relationship to the transaction if a party's principal place of business is in the state.[65] The Agreement chose

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[57] *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 227 A.3d 531, 536 (Del. 2011); *Doe v. Cedars Academy*, No. 09C-09-136, 2010 WL 5825353, at *3 (Del. Super. Oct. 27, 2010).
[58] *Ramunno v. Crawley*, 705 A.2d 1029, 1034 (Del. 1998).
[59] Super. Ct. Civ. R. 12(b).
[60] *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 70 (Del. 1995).
[61] Super. Ct. Civ. R. 12(b).
[62] *See Sammons v. Hartford Underwriters Ins. Co.*, 2010 WL 1267222, at *1 (Del. Super. Apr. 1, 2010) (citing *Latesco, L.P. v. Wayport, Inc.*, 2009 WL 2246793, at *5 (Del. Ch. Jul. 24, 2009)).
[63] *Northpointe Holdings v. Nationwide Emerging Managers, LLC*, 2010 WL 370677, at *8 (Del. Super. Sept. 14, 2010).
[64] *Abry Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032, 1048 (Del. Ch. 2006).
[65] *See Maloney-Refaie v. Bridge at School, Inc.*, 958 A.2d 871, 879 n.16 (Del. Ch. 2008) (Honoring a choice of law provision choosing Maryland law to govern a contract when one of the defendants was a corporation with its principal place of business in Maryland).

Texas law.[66] Q2's principal place of business is in Texas.[67] The Court will, therefore, apply Texas law to this dispute.

Texas contract law is straightforward. A contractual relationship "may create duties under both contract and tort law, and the party may breach either or both duties."[68] "Contractual duties are those that arise solely from the agreement between the parties."[69] A Texas court's primary objective when interpreting a contract "is to give effect to the written expression of the parties' intent."[70] Texas courts determine the parties' intent by "examining and considering the entire writing."[71]

Generally, Texas courts "give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense."[72] Defined terms, however, "control the interpretation of the agreement."[73] Texas courts avoid construing contracts "in a manner which makes performance impossible."[74] Courts also "strive to construe a contract to promote mutuality and to avoid a construction that makes promises illusory."[75]

Texas recognizes that sophisticated parties have broad latitude in defining contractual terms and that Texas courts "are obliged to enforce the parties' bargain according to its terms."[76] Courts "may not rewrite a contract under the guise of interpretation."[77] "Courts do not 'rewrite

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[66] Agreement § 9.3.
[67] Q2 Software, Inc's Amend. Answer, Affirm. Defs., and Countercls. (hereafter "Amend. Answer") ¶ 3.
[68] *Sanders v. Wood*, 348 S.W.3d 254, 260 (Tex. App. 2011).
[69] *Dixie Carpet Installations, Inc. v. Residences at Riverdale, LP*, 599 S.W.3d 618, 635 (Tex. App. 2020).
[70] *Spicer, Trustee for Estate of Brady v. Maxus Healthcare Partners, LLC*, 616 S.W.3d 59, 108 (Tex. App. 2020).
[71] *EJ Madison, LLC v. Pro-Tech Diesel, Inc.*, 594 S.W.3d 632, 640 (Tex. App. 2019) (citing *Skinner Custom Homes, Inc. v. Smith*, 397 S.W.3d 841, 845 (Tex. App. 2013)).
[72] *Farmers Group, Inc. v. Geter*, 620 S.W.3d 702, 709 (Tex. 2021).
[73] *Slone v. Goldberg B'Nai B'Rith Towers*, 577 S.W.3d 608, 618 (Tex. App. 2019).
[74] *Wade Oil & Gas, Inc. v. Telesis Operating Co., Inc.*, 417 S.W.3d 531, 538 (Tex. App. 2013).
[75] *Avasthi & Assocs., Inc. v. Banik*, 343 S.W.3d 260, 264 (Tex. App. 2011).
[76] *Sundown Energy LP v. HJSA No. 3, Ltd. Partnership*, 622 S.W.3d 884, 889 (Tex. 2021).
[77] *Id.*

contracts to insert provisions that the parties could have included, nor do courts imply restraints for which the parties did not bargain.'"[78] Essentially, Texas courts "cannot make new contracts between the parties, but must enforce the contracts as written."[79] "Thus courts "enforce an unambiguous contract as written and will not receive parol evidence" to create ambiguity or give the contract a different meaning.[80] Contracts are unambiguous if they are worded in such a way that they "can be given a definite or certain legal meaning."[81] Courts will enforce unambiguous contract language "even if the parties' agreement yields an inequitable or improvident result."[82]

An unsigned paper may be incorporated by reference into a signed agreement so long as the signed document "plainly refers to the other writing."[83] A contract must do more than merely mention a document but its language "must show that the parties intended for" that document to become a part of the contract.[84]

Finally, under Texas law, "contracting parties owe a good-faith duty only if they expressly agree to act in good faith, a statute imposes the duty, or the parties have a 'special relationship' like that between an insurer and insured."[85] Other special relationships include "principal and agent, joint venturers, and partners."[86] In Texas, an agent's duty of good faith and fair dealing arises from the agent's fiduciary duty.[87] Under Texas law, therefore, a claim of breach of duty of good faith and fair dealing involving an agent is a breach of fiduciary duty claim.

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[78] *Robinson v. Home Owners M'gmt Enters., Inc.*, 549 S.W.3d 226, 240 (Tex. App. 2018).
[79] *In re Allstate Vehicle and Prop. Ins. Co.*, 542 S.W.3d 815, 820 (Tex. App. 2018).
[80] *Maxey v. Maxey*, 617 S.W.3d 207, 219 (Tex. App. 2020).
[81] *Id.*
[82] *Fairfield Indus., Inc. v. EP Energy E&P Co., L.P.*, 531 S.W.3d 234, 250 (Tex. App. 2017).
[83] *Truly Nolen of Am., Inc. v. Martinez*, 597 S.W.3d 15, 21 (Tex. App. 2020).
[84] *Apache Corp. v. Wagner*, 621 S.W.3d 285, 296 n.9 (Tex. App. 2018).
[85] *Dallas/Fort Worth Int'l Airport Board v. Vizant Techs., LLC*, 576 S.W.3d 362, 369 n. 13 (Tex. 2019).
[86] *Id.* (internal citations omitted).
[87] *See Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513 (Tex. 1942) ("It is the duty of a fiduciary to deal openly, and to make full disclosure to the party with whom he stands in such relationship.").

B. FINCLUSIVE'S BREACH OF CONTRACT CLAIM IS NOT FUTILE WITH RESPECT TO ITS SECURITY FLAWS CLAIMS BUT IS OTHERWISE FUTILE.

FinClusive claims that Q2 breached the contract in three ways. First, FinClusive states that Q2 failed to provide CorePro Bank System-of-Record Dependent services including allowing FinClusive to issue debit cards.[88] Second, FinClusive alleges that Q2 Open's software did not support direct routing of inbound funds and had security flaws that would have prevented FinClusive from going live with clients.[89] Third, FinClusive argues that Q2 Open breached the duty of good faith and fair dealing by (i) misrepresenting the scope of services it could provide and refusing to answer FinClusive's questions about functionality and security and (ii) taking control over the search for a Bank of Record and, when a Bank of Record could not be obtained, taking the position that FinClusive had the sole responsibility of obtaining a bank.[90]

i. FinClusive's CorePro Bank of Record Dependent System -of-Record Services claim is futile because the Agreement requires FinClusive to obtain the services of a Certified Bank of Record as a condition precedent to Q2 Open providing services.

For the Court to grant the Motion, FinClusive must allege that: (i) a valid contract exists; (ii) plaintiff performed or tendered performance; (iii) defendant breached the contract; and (iv) plaintiff was damaged as a result of the breach.[91] "In a contract with a condition precedent, performance of that condition precedent is an essential element of a plaintiff's breach of contract case."[92] "A condition precedent must either be met or excused before the other party's obligation may be enforced."[93] Conditional language "reflects the parties intent to create a

[88] FAC ¶¶ 71-74.
[89] FAC ¶¶ 75-78.
[90] FAC ¶¶ 79-81.
[91] *See Brooks v. Excellence Mortg., Ltd.*, 486 S.W.3d 29, 36 (Tex. App. 2015) (citing *McLaughlin, Inc. v. Northstar Drilling Techs., Inc.*, 138 S.W.3d 24, 27 (Tex. App. 2004)).
[92] *Abrams v. Salinas*, 467 S.W.3d 606, 614 (Tex. App. 2015).
[93] *Arbor Windsor Court, Ltd. v. Weekley Homes, LP*, 463 S.W.3d 131, 135 (Tex. App. 2015).

condition precedent."[94] "[C]onditional language must connect the condition precedent to the conditioned obligation."[95]

Under the Agreement, FinClusive must obtain a Certified Bank of Record's services as a condition precedent to Q2's obligations to provide Q2 Open Services, including any CorePro Bank of Record Dependent System-of-Record Services. The Agreement uses unambiguous language that connects the condition precedent to the conditioned obligation.[96] The parties do not dispute that FinClusive did not obtain a Certified Bank of Record. Under the plain and unambiguous terms of the Agreement, Q2 did not have an obligation to provide any services. The Court therefore finds that FinClusive's Breach of Contract claim based on Q2's inability to provide Bank of Record Dependent System-of-Record services is futile.

ii. FinClusive's claim based on direct routing is futile; however, its claim based on security flaws is not because the Court may imply a term requiring Q2 to contain security flaws.

"Generally, a court looks only to the written agreement to determine the obligations of contracting parties."[97] To imply a term into an agreement, it must appear necessary "to effectuate the purposes of the contract as a whole as gathered from the written instrument."[98] "[I]mplied provisions in agreements are not favored by the law."[99] "Thus, a covenant will not be implied simply to make a contract fair, wise, or just."[100] Rather, it "must arise from the presumed intention of the parties as gathered from the instrument as a whole."[101]

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[94] *C&C Road Constr., Inc. v. SAAB Site Contractors, L.P.*, 574 S.W.3d 576, 588 (Tex. Ct. App. 2019).
[95] *Arbor Windsor Ct., Ltd.*, 463 S.W.3d at 137 (Tex. Ct. App. 2015).
[96] Agreement § 1.1.3 ("Client's license to use the Q2 Open Services hereunder is **contingent** upon Client obtaining and maintaining the banking services of a Certified Bank of Record") (emphasis added).
[97] *Univ. Health Servs., Inc. v. Renaissance Women's Grp., P.A.*, 1121 S.W.3d 742, 747 (Tex. 2003).
[98] *Shawn Ibrahim, Inc. v. Houston-Galveston Area Local Dev. Corp.*, 582 S.W.3d 753, 771 (Tex. App. 2019).
[99] *Ashcraft v. Lookadoo*, 952 S.W.2d 907, 911 (Tex. App. 1997).
[100] *Univ. Health Servs., Inc.*, 1121 S.W.3d at 748 (Tex. 2003).
[101] *In re Bass*, 113 S.W.3D 735, 743 (Tex. 2003).

The Court cannot find any provisions in the Agreement that explicitly obligate Q2 to provide direct routing of inbound funds to business clients. Moreover, the Agreement does not appear to have any provisions from which the Court could imply such a covenant.

By contrast, Section 2.2 of the Agreement concerns security features. Section 2.2 provides that Q2 would maintain "appropriate administrative, technical and procedural measures" related to Client Data.[102] The Agreement also obligates Q2 to respond to any unauthorized access to Client Data. Under the Agreement, FinClusive was responsible for notifying End Users, protecting access to accounts through the Q2 Open Services and reviewing Q2 Open's security processes and procedures. FinClusive was also solely responsible for taking necessary measures to protect access to all accounts. From the Agreement, it appears that the parties intended for Q2 to maintain security processes and for FinClusive to ensure that these processes were sufficient. Therefore, the Court will imply a term for Q2 to contain security flaws when FinClusive brings them to Q2's attention. The Court finds that FinClusive's breach of contract claim with respect to security flaws is not futile.

iii. FinClusive's breach of duty of good faith and fair dealing claim is futile because the Court lacks subject-matter jurisdiction.

As discussed above, "Texas law does not recognize an implied duty of good faith and fair dealing in every contract or business transaction."[103] "Texas courts have carved out exceptions for certain 'special relationships,' such as those between insurers and insureds, principal and agent, joint venturers, and partners."[104] In Texas, an agent's duty of good faith and fair dealing

[102] Agreement § 2.2.
[103] *Cole v. Hall*, 864 S.W.2d 563, 568 (Tex. Appl. 1993).
[104] *Id.*(internal citations omitted).

arises from the agent's fiduciary duty.[105] Under Texas law, therefore, a claim of breach of duty of good faith and fair dealing involving an agent is a breach of fiduciary duty claim.

The only alleged special relationship between FinClusive and Q2 is that of principal-agent.[106] The Court, applying Texas law, notes that any breach of duty of good faith and fair dealing claim would arise from an alleged breach of fiduciary duty. The Court does not have subject-matter jurisdiction over breach of fiduciary duty claims.[107] Without jurisdiction, the Court cannot preside over FinClusive's breach of duty of good faith and fair dealing claim. Accordingly, the Court cannot allow amendment as it would be futile.

C. FINCLUSIVE'S BREACH OF FIDUCIARY DUTY CLAIMS ARE FUTILE BECAUSE THE COURT LACKS SUBJECT-MATTER JURISDICTION.

FinClusive alleges that Q2 breached fiduciaries duties arising when Q2 purportedly assumed the role of FinClusive's agent.[108] "Chancery takes jurisdiction over 'fiduciary' relationships because equity, not law, is the source of the right asserted."[109] Thus, the Court cannot not exercise jurisdiction over a fiduciary duty claim, even if FinClusive seeks only money damages.[110] The Court, however, could exercise jurisdiction "[w]here the relationship is a straightforward commercial relationship arising from a contract and involves no element of confidentiality."[111] This is because the Court of Chancery will not exercise jurisdiction over such a claim "even if the parties use the standard language used to articulate an equitable cause of action."[112] The essential inquiry is "whether a special relationship of trust existed between the

[105] *See Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 513 (Tex. 1942) ("It is the duty of a fiduciary to deal openly, and to make full disclosure to the party with whom he stands in such relationship.").
[106] FAC ¶ 90.
[107] *See infra* Section V(C).
[108] FAC ¶ 90-91.
[109] *McMahon v. New Castle Assocs.*, 532 A.2d 601, 604 (Del. Ch. 1987).
[110] *See Reybold Venture Grp. XI-A, LLC v. Atl. Meridian Crossing, LLC*, 2009 WL 143107, at *3 (Del. Super. Jan. 20, 2009).
[111] *Grace v. Morgan*, 2004 WL 26858, at *2 (Del. Super. Jan. 6, 2004).
[112] *Id.*

parties sufficient to establish the fiduciary duty."[113] Such a special relationship can arise between a principal and agent.[114] As discussed above, Texas law provides that a claim of breach of duty of good faith and fair dealing involving an agent is a breach of fiduciary duty claim.

Here, FinClusive alleges that Q2 Open "assumed the role of FinClusive's agent."[115] Even assuming this were true,[116] the Court does not have jurisdiction over a claim that Texas law characterizes as a breach of fiduciary duty claims. Therefore, FinClusive's claim is futile.

D. FINCLUSIVE'S FRAUDULENT INDUCEMENT CLAIMS ARE FUTILE BECAUSE FINCLUSIVE DID NOT JUSTIFIABLY RELY UPON MATERIAL MISREPRESENTATIONS TO ENTER INTO THE AGREEMENT.

To grant the Motion, FinClusive must allege that there was "(1) a material misrepresentation, (2) made with knowledge of its falsity or asserted without knowledge of its truth, (3) made with the intention that it should be acted on by the other party, (4) which the other partied relied on and (5) which caused injury."[117] "[T]he elements of fraud must be established as they related to an inducement to enter into a contract between the parties."[118]

FinClusive alleges three material misrepresentations: (i) within the Agreement, that Q2 Open could unilaterally provide the full scope of Corepro Bank of Record Dependent System-of-Record Services, including providing debit cards, when that service was contingent upon a certified bank of record approving that service, (ii) that Q2 Open would easily match FinClusive with a bank and (iii) that FinClusive could obtain a bank that would provide the full

[113] *Id.*
[114] *See Sci. Accessories Corp. v. Summagraphics Corp.*, 425 A.2d 957, 962-64 (Del. 1980) (upholding a Chancery decision in which the Court of Chancery exercised jurisdiction over a claim that a principal's agents had secretly diverted a corporate opportunity from the principal).
[115] FAC ¶ 90.
[116] FinClusive does not appear to plead facts that support FinClusive's conclusory allegation that Q2 Open acted as FinClusive's agent.
[117] *Anderson v. Durant*, 550 S.W.3d 605, 614 (Tex. 2018).
[118] *Weizhong Zheng v. Vacation Network, Inc.*, 468 S.W.3d 180, 185 (Tex. App. 2015).

scope of services when pairing FinClusive with a bank was like "fitting a square peg in a round hole."[119]

i. FinClusive's claim based on statements within the Agreement is futile because FinClusive could not justifiably rely upon a representation that contradicts the terms of the contract, or that FinClusive knew to be false.

"[T]he plaintiff must show that it actually relied on the defendant's representation and that such reliance was justifiable" to support a fraudulent inducement claim.[120] Although ordinarily a fact question, justifiable reliance may be "negated as a matter of law when circumstances exist under which reliance cannot be justified."[121] For example, there is no justifiable reliance when a party "has actual knowledge before its reliance of that representation's falsity."[122] Also, "a party to a written contract cannot justifiably rely on oral misrepresentations regarding the contract's unambiguous terms."[123] This is because "it is not the courts' role to protect parties from their own agreements."[124] Nonetheless, a claim for fraudulent inducement "is not precluded when the same facts also support a claim for breach of contract."[125]

FinClusive could not reasonably rely upon a representation that Q2 could unilaterally provide the full scope of Corepro Bank of Record Dependent System-of-Record Services, even if it were true that Q2 made that representation. Q2 represented that "[c]ertain uses of the Q2 Open Services require the banking services of a: (a) federally insured commercial bank, thrift, industrial bank, credit union or similar such depository institution or (b) a state or national

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[119] FAC ¶¶ 97-99.
[120] *Fuller v. Le Brun*, 616 S.W.3d 31, 41 (Tex. App. 2020).
[121] *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 583 S.W.3d 553, 558 (Tex. 2020).
[122] *JSC Neftegas-Impex v. Citibank, N.A.*, 365 S.W.3d 387, 408 (Tex. App. 2011).
[123] *Nat'l Prop. Holdings, L.P. v. Westergren*, 453 S.W.3d 419, 424 (Tex. 2015).
[124] *Id.* (citing *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 s.w.3D 801, 810-11 (Tex. 2012)).
[125] *Aminian v. Woodward-Clyde Consultants, Inc.*, 2001 WL 493174, at *4 (Tex. App. May 10, 2001); *see also DeWitt County Elec. Co-op., Inc. v. Parks*, 1 .S.W.3d 96, 105 (Tex. 1999) ("Our unremarkable holding in *Formosa* was that a contract may be induced by fraud when a party promises to perform the contract while knowing that it has no intention of carrying out that promise").

chartered trust company (a ***"Financial Institution"***)."[126] FinClusive represented that it was "aware that it's [sic] use of Q2 Open Services may necessitate the banking services of a Financial Institution."[127] Even assuming that Q2 represented that it could unilaterally provide a full scope of services, that representation contradicts the Agreement's unambiguous terms and FinClusive had actual knowledge that representation was false. Therefore, FinClusive's fraudulent inducement claim based on Q2 Open's purported unilateral service promise is futile.

ii. FinClusive's claim based on Q2 Open's representations that it would use its vast banking experience to easily match FinClusive with a bank is futile because the advertisements were not material misrepresentations.

A misrepresentation is "(1) a false statement of fact; (2) a promise of future performance made with intent not to perform; (3) a statement of opinion based on a false statement of fact; or (4) an expression of opinion that is false, made by one claiming or implying to have special knowledge of the subject matter of the opinion."[128] A misrepresentation is material when a reasonable person would attach importance to and be induced to act on the information.[129] "Pure expressions of opinion . . . cannot provide a basis for a fraud claim."[130] However, opinions based on special knowledge may be considered material misrepresentations.[131] Furthermore, advertisements that make specific promises are not "puffery."[132]

The alleged misrepresentation is that Q2 marketing materials say that "Q2's vast banking experience and deep banking relationships is how [Q2 Open] find[s] the perfect match for

[126] Agreement § 1.1.3.
[127] *Id.*
[128] *Bus. Staffing, Inc. v. Jackson Hot Oil Serv.*, 401 S.W.3d 224, 238 (Tex. App. 2012).
[129] *See Spencers & Assocs., P.C. v. Harper*, 612 S.W.3d 338, 347 (Tex. App. 2019).
[130] *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337-38 (Tex. 2011).
[131] *See Matis v. Golden*, 228 S.W.3d 301, 307 (Tex. App. 2007) ("When a speaker purports to have special knowledge of the facts, or does have superior knowledge of the facts – for example, when the facts underlying the opinion are not equally available to both parties – a party may maintain a fraud action").
[132] *Dowling v. NADW Marketing, Inc.*, 631 2.D.2d 726, 729 (Tex. 1982).

you."[133] This assertion that Q2 can use its experience to find a perfect match for its clients is not the type of specific promise of performance that elevate the statement beyond puffery. The statement is broad and could relate to anyone and not a specific entity. The statement is about experience and how that experience will be used and not a guarantee of a qualified bank. The Court therefore finds that FinClusive's claim based on Q2's marketing materials is futile.

iii. FinClusive's claim based on Q2 Open's representation that FinClusive could obtain a bank that would provide the full scope of services is futile because FinClusive does not plead facts that show that Q2 Open did not intend to perform when it made the promise.

"A misrepresentation is a falsehood or untruth made with the intent to deceive."[134] A failure to perform a promise "by itself, however, is not evidence of the promisor's intent not to perform when the promise was made."[135]

FinClusive alleges that Q2 represented that FinClusive could obtain a bank that would provide for the full scope of services when Q2 actually felt that "pairing FinClusive with a bank to perform those services was like 'fitting a square peg in a round hole.' [Exhibit F]."[136] FinClusive draws that language from an October 16, 2018 email.[137] FinClusive signed the Agreement on May 27, 2018.[138] This language appears to shows that Q2 intended to perform under the Agreement but found it difficult. The fact that Q2 could not find a suitable Bank of Record for FinClusive – which was not Q2 Open's contractual obligation – does not show that Q2 Open never intended to provide services for FinClusive. Therefore, FinClusive's claim based

[133] Mot. to Amend. Ex. C.
[134] *Collins v. Smith*, 53 S.2.3d 832, 839 (Tex. App. 2001).
[135] *Id.*
[136] FAC ¶ 99.
[137] Mot. to Amend Ex. F ("I also worry a bit that we are all spending inordinate time on trying to fit a square peg in a round hole. . .").
[138] Agreement at 15.

on Q2 Open's belief that it could not find a bank that could provide crypto and international remittances is futile.

VI. CONCLUSION

FinClusive's proposed amended claims are futile, except for its breach of contract claim alleging that Q2 Open did not respond to FinClusive's security concerns. The Court will allow that claim to proceed. Therefore, the Court **GRANTS in part** and **DENIES in part** the Motion.

Dated: October 28, 2021
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis, Judge

cc: File&ServeXpress