SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, IAS PART 3

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Perseus Telecom, LTD.,

Plaintiff,

Index No. 651587/2016
Motion Seq. 001

-against-

Indy Research Labs, LLC,

Defendants.

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Eileen Bransten, J.S.C.:

In an action brought by plaintiff seeking to recover damages for breach of contract, defendant moves to dismiss the complaint pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(7).

I. Factual and Procedural Background

Defendant Indy Research Labs, LLC ("Indy") is a quantitative trading firm that was established in 2015 and began development of its proprietary trading system in September 2015. *Sonies Affid.* ¶2. As a quantitative trading firm, Indy is highly dependent upon high-speed telecommunications networks and computer services to remain in constant contact with electronic trading exchanges, thereby, placing heavy demands on its network and data infrastructure. *Id at* ¶3. Small firms, such as Indy's, often rely on colocation venders to provide and manage this infrastructure. *Id.*

In June 2015, Indy began evaluating defendant Perseus Telecom, Ltd ("Perseus") as a possible provider of colocation services. Indy had hoped to start live trading system development in September 2015, and to begin live trading in mid-2016. *Id at* ¶4.

In August 2015, Indy and Perseus began negotiating a "Service Order Form" agreement, which itemized the colocation services that Perseus was to provide, and the related onetime

expenses and monthly reoccurring fees. *Id at ¶6.* Pursuant to the terms of the Service Order Form, Perseus agreed to provide 36 months of colocation services, and Indy agreed to pay for monthly reoccurring fees for this service. *See Comp. Ex. A.* Indy also agreed to pay for non-reoccurring expenses. *See id.*

Indy and Perseus also began negotiating the terms of a "Master Service Agreement". On August 12, 2015, Perseus sent Indy a draft Service Order, which referenced and incorporated the terms of the proposed Master Services Agreement. *See Sonies Affid. Ex. A.* Specifically, the "Approval" section of the Service Order Form stated that Indy agreed to the terms of the Master Services Agreement, however, if there was a conflict between the Service Order Form and the Master Services Agreement, the terms of the Service Order Form controlled. *See id at §Approval.* Indy informed Perseus that, while it could agree to the Service Order Form, it could not agree to the terms of the Master Services Agreement, as currently drafted, because it believed the terms of the Master Services Agreement were too favorable to Perseus. *See Sonies Affid. ¶¶8-9; see also Sonies Affid. Exs. B-D.*

Since Indy and Perseus wanted to start work on the project, but could not come to an immediate agreement regarding the terms of the Master Services Agreement, Indy and Perseus agreed to add the following language to the Service Order Form:

> "Notwithstanding any contrary provision under "Approval" below, this Service Order Form constitutes only Customer's binding commitment to (a) pay Perseus the non-recurring charge for (i) the Servers (and any related infrastructure) to be procured by Perseus on Customer's behalf and (ii) any Professional Services delivered by Perseus in anticipation of delivery of the Services, in each case as provided in the Service Order Form, and (b) to negotiate in good faith to expeditiously negotiate the final terms and conditions of the [Master Services Agreement], related Service Schedules and Statement of Work referred to above (the "Services Documents"). Upon Customer's execution of the Services

> Documents, this Service Order Form will become its binding commitment to purchase the Services, on the terms provided herein and subject to the Services Documents. Provided, however, that in the event that the Services Documents are not, in good faith, agreed to by the parties within [60 days] of execution of this Service Order Form and the Customer continues to use the Services, this Service Order Form shall automatically become a binding commitment to purchase the Services and shall be governed by the Perseus standard terms and conditions and applicable service schedules.
>
> "The Services shall be provided in accordance to the following documents
>
> -On-Net Service Schedule
> -PrecisionSync Service Schedule
> -Hosting Service Schedule
> -Security Service Schedule
> -Statement of Work Managed Infrastructure v 1
> -Logical Architecture Diagram."
>
> *See Sonies affid. Ex. G.*

On August 31, 2015, Mitch Sonies, Indy's managing member, signed the Service Order Form on behalf of Indy, and returned the Service Order Form to Perseus. *See Sonies Affid. Ex. G.*

According to Sonies, during September and October 2015, it became clear that Perseus could not meet the deadline it had initially promised. *See Sonies Affid. ¶¶15-16.* Therefore, on October 30, 2015, he called Anthony Gerace, Perseus's president of global sales, and told him that Indy no longer had confidence in Perseus, and had decided not to go forward with the colocation services under discussion. *Id.* However, on October 30, 2015, Sonies received an email from Tara Soni, Perseus's assistant general counsel, stating that Perseus was still working on revised language for certain Services Documents, and inquiring about Indy's comments on a revised Master Services Agreement that she had sent for review on October 7, 2015. *See Sonies Affid. ¶17; see also Sonies Affid. Ex. H.*

Further, according to Sonies, despite Indy's October 30 termination of the Service Order Form, Perseus' employees continued to email him asking that a conference call be scheduled to provide a status update. *See Sonies Affid. ¶17; see also Sonies Affid. Ex. I.*

On November 6, 2015, Sonies attended a meeting at Perseus's office, and again informed Gerace that Indy was not going forward with the Service Order Form. *See Gerace Affid. ¶40.* According to Anthony Gerace, Sonies did tell him at that meeting that Indy was not going forward with the Service Order Form, however, Sonies also said that the ultimate decision lies with Indy's member, Vijay Prabhakar. *See id.*

Gerace claims that he spoke with Prabhakar on November 11, 2015 to inform him that Perseus was proceeding with the installation at a circuit-end point location on November 12, 2015, and that the installation of the other circuit-end point location would occur a few days later. *See Gerace Affid. ¶42.* According to Gerace, Prabhakar said okay, and that he would get back to Gerace on November 12 or 13.

On November 12, 2015, in response to receiving an email from a Perseus employee regarding scheduling delivery of certain colocation services, Sonies sent Marselen Spencer, a Perseus employee, an email which stated:

> "This is getting a bit surreal. Looking back at the calendar, I told Tony [Gerace] on Oct 30 that we decided not to [go] forward, confirmed that with you last Thursday and confirmed yet again in person the next day. And then Vijay confirmed for the nth time yesterday with Tony! So it's been almost two weeks and they now seem to have kicked into high gear.
>
> As I promised earlier today, I'll discuss with Vijay one more time tomorrow. But as I said, I really doubt he wants to reopen things at this point.
>
> It's really too bad, because the lack of this kind of effort when it matters is what got us here.

> How things are communicated internally is not really our business. But I still wanted to drop you a note, because it really does make me uncomfortable to see you burning cycles unnecessarily."
>
> *See plaintiff's reply memorandum, exhibit I.*

On November 23, 2015, Sonies emailed Perseus, again indicating that Indy had informed Perseus that it was not moving forward on October 30, 2015. *See Sonies Affid. Ex. J.* Nevertheless, Sonies indicated that Indy was willing to pay Perseus for the work it performed up to that date, and for eight Dell servers that were called for in the implementation plan, if already purchased by Perseus. *Id.*

On November 24, 2015, Perseus sent Indy an invoice, in the amount of $193,036.24, for work performed through November 30, 2015 and for hardware procured. *See Gerace Affid. Ex. I.* Indy did not pay this invoice.

On January 29, 2016, Perseus sent Indy a Notice of Breach that claimed that, pursuant to the terms of section 12.2 of the Master Services Agreement, non-payment was considered a voluntary termination of the contract, and that, pursuant to section 4.3 of the Master Services Agreement, in the event of a voluntary termination, Indy was liable for 100% of the amount due under the agreement, to wit, $1,250,650. *See Gerace Affid. Ex. J* (notice of breach); *see also Comp. Ex. A* (a copy of the Service Order Form and an unexecuted Master Services Agreement) (emphasis added).

On June 22, 2016, Perseus commenced this action against Indy seeking payment of $1,250,650. In its complaint, Perseus alleges that on August 31, 2015, Indy and Perseus entered into the Service Order Form and Master Services Agreement, which constitute a single agreement,

and that Indy agreed to the terms set forth in those documents. *See Comp.* ¶¶*5-11*. Perseus's first cause of action alleges that Indy breached the express terms of the Service Order Form and the Master Services Agreement when it refused to pay Perseus's invoices for the services performed. *See id at* ¶¶*16-35*. Therefore, Perseus is entitled to liquidated damage of $1,250,650, representing 100% of the contract fees to have been paid over the 36-month contract term, pursuant to section 4.3 of the Master Services Agreement. *Id at* ¶*36*. In its second cause of action for breach of contract, Perseus alleges that Indy breached the terms of the Master Services Agreement, when it did not provide the proper written notice of termination, as set forth in the Master Services Agreement. *See id at* ¶¶*37-48*. Therefore, Perseus is entitled to invoke section 4.3 of the Master Services Agreement and seek the amount of $1,250,650. *Id at* ¶*49*. In its third cause of action, Perseus alleges that it remitted invoices to Indy, which Indy did not pay; therefore, Indy's action deprived Perseus of the right to receive benefits under the Service Order Form and the Master Services Agreement. Perseus alleges that Indy breached the covenant of good faith and fair dealing, which resulted in Perseus being damaged in the amount of $167,358.22, the amount of the equipment purchased by Perseus and the third-party services it paid for in performing its obligations under the Service Order Form and Master Services Agreement. *Id at* ¶¶ *50-59*.

II. Motion Sequence 001: Defendant's Motion to Dismiss

Defendant Indy Research Labs moves to dismiss the complaint pursuant to CPLR 3211(a)(1) (documentary evidence) and CPLR 3211(a)(7) (failure to state a claim). "On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the Complaint as true, accord plaintiffs the benefit of every possible

favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994). "A CPLR 3211(a)(1) motion may be granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law". *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). "However, allegations consisting of bare legal conclusions, as well as factual claims inherently incredible or flatly contradicted by documentary evidence are not entitled to such consideration". *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 (1st Dept 1994).

A. First and Second Causes of Action – Breach of Contract

Perseus's first two causes of action allege that Indy breached the terms of the Service Order Form and Master Services Agreement, which it claims is a single agreement. In order to allege a cause of action for breach of contract, the plaintiff must assert the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages. *See Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 (1st Dept 2007).

In its first cause of action, Perseus alleges that Indy is bound by both the Service Order Form and Master Services Agreement, that it performed in good faith and delivered services to Indy, that despite sending Indy invoices, Indy would not pay for the services provided, and, thus, that Indy breached the Service Order Form and Master Services Agreement. Further, pursuant to the terms of the Master Services Agreement, Perseus alleges that it is entitled to liquidated damages in the amount of $1,250,650. In its second cause of action for breach of contract, Perseus alleges that Indy breached the Service Order Form and Master Services Agreement by failing to provide

it with a proper notice of termination, and, therefore, pursuant to the Master Services Agreement, Perseus is entitled to liquidated damages of $1,250,650.

While Perseus has properly alleged two claims for breach of contract, the documentary evidence submitted by Indy contradicts Perseus's claims that the Service Order Form, incorporating the Master Services Agreement, became a binding agreement to purchase 36 months of colocation services. In fact, the documentary evidence conclusively establishes that the Defendant never agreed to the Master Services Agreement and that it was never incorporated into the Service Order Form.

> If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract. This requirement of definiteness assures that courts will not impose contractual obligations when the parties did not intend to conclude a binding agreement. However, while a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable, the terms of a contract do not need to be fixed with absolute certainty to give rise to an enforceable agreement. At the same time, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed. *Kolchins v. Evolution Markets, Inc.*, 31 N.Y.3d 100, 106–07 (2018).

On August 31, 2015, Perseus and Indy entered into the Service Order Form which expressly stated that it constituted "only" Indy's obligation to pay Perseus for non-recurring charges for the servers (and any related infrastructure) to be procured by Perseus on Indy's behalf, and for any professional services performed by Perseus in anticipation of delivery of the Services. *See Comp. Ex. A.* The Service Order Form obligated Indy to negotiate the terms of separate Services Documents, **including the Master Services Agreement**, in good faith. *See id (emphasis added).* In the absence of an agreement regarding the terms of the Services Documents, Indy would be obligated to purchase 36 months of colocation services from Perseus only if: (1) the Services Documents were not agreed to, in good faith, within 60 days of August 31, 2015, and (2) Indy

"continues to use" Perseus' colocation services. *See id (Circuit Description and Special Instructions).*

Perseus did not deliver the colocation services within 60 days of the signing of the Service Order Form. *See Sonies Affid. Ex. I* (invoices for Perseus Services from November 16-November 30, 2015). On November 6, 2015, Sonies informed Gerace that Indy intended to not go forward with the Service Order Form. *See Gerace Affid. ¶40.* In a November 12, 2015 email to Sonies, Rob Valenti of Perseus acknowledged that services had not yet been delivered, however, Valenti stated that Perseus was still on target for a November 16 delivery of certain colocation services. *See Sonies Affid. Ex. I.* Therefore, the documentary evidence conclusively establishes that the conditions set forth in the Service Order Form were not satisfied as Indy declined to continue to use the colocation services prior to their delivery. *See Comp. Ex. A.* Absent fulfillment of this condition precedent, Indy's obligation to purchase Perseus's colocation services, pursuant to Perseus' standards terms and conditions, was not triggered. *See Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690 (1995) (noting that a "condition precedent is an act or event, other than a lapse of time, which, unless the condition is excused **must occur** before a duty to perform a promise in the agreement arises" and that "most conditions precedent describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract") (emphasis added). Therefore, the Service Order never incorporated the terms of the Master Services Agreement.[1]

[1] The Defendant argues that the Master Services Agreement was incorporated in the "Approval" section of the contract. While, at first glance, there appears to be a discrepancy in the contract in that the Circuit Description and Special Instructions section states "notwithstanding any contrary provision under 'Approval' below this Service Order Constitutes only. . .", in

Under the express terms of the Service Order Form, Indy is only responsible for paying the non-recurring charges for the servers (and any related infrastructure) procured by Perseus on Indy's behalf, and for any professional services delivered by Perseus in anticipation of delivery of the Services, the amount of which is to be determined in this litigation. *See Comp. Ex. A.* In fact, in its motion papers, Indy acknowledges this contractual obligation.

Moreover, even if, as Perseus alleges, Indy had agreed to the terms of the Master Services Agreement, the damages clause of the Master Services Agreement is unenforceable. Liquidated damages are "an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement". *Truck Rent-A-Ctr. v Puritan Farms 2nd,* 41 N.Y.2d 420, 424 (1977). In *Truck Rent-A-Center*, the Court of Appeals stated that:

> "A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the **amount of actual loss is incapable or difficult of precise estimation**. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced". *Id.* at 425 (emphasis added).

Here, the liquidated damages clause of the Master Services Agreement is unenforceable because it is a penalty. Since the cost of the colocation services to be provided by Perseus is readily ascertainable from the fee schedule attached to the Service Order Form, Perseus cannot claim that its damages were impossible to determine at the time it and Indy executed the Service Order Form.

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actuality the plain language of the "Approval" section resolves any disputes between the terms of the Service Order Form and the Master Services Agreement in favor of the terms expressed in the Service Order Form. *See Comp. Ex. A; see also Marin v. Constitution Realty, LLC*, 28 N.Y.3d 666, 673 (2017) (stating that a written agreement which is complete must be enforced according to the plain meaning of its terms).

Further, the liquidated damages amount is $1,250,650, when Perseus's actual damages are approximately $170,000. Notably, the liquidated damages amount is more than seven times that of Perseus's actual damages. *See JMD Holding Corp. v Congress Fin. Corp.*, 309 A.D.2d 645, 645-646 (1st Dept 2003) ("Since the liquidated damages clauses upon which appellant lender relies purport to entitle it to sums disproportionate to its potential damages, and the amount of actual principal and interest owed by the borrower under the agreement is precisely ascertainable, the motion court properly found the liquidated damages clauses unenforceable as exacting a penalty"); *see also Truck Rent–A–Ctr.*, 41 N.Y.2d at 423–424; *Vernitron Corp. v CF 48 Assoc.*, 104 A.D.2d 409, 409 (2d Dept 1984).

The first cause of action is dismissed in part. Claims which incorporate the Master Services Agreement are dismissed, however, the Plaintiff has generally pleaded a breach and damages related to "(a) pay Perseus the non-recurring charge for (i) the Servers (and any related infrastructure) to be procured by Perseus on Customer's behalf and (ii) any Professional Services delivered by Perseus in anticipation of delivery of the Services, in each case as provided in the Service Order Form." *See Comp. Ex. A (Service Order Form Circuit Description and Special Instructions).* Given that the Master Services Agreement cannot be enforced against the Defendants, the second cause of action is dismissed in its entirety.

B. Third Cause of Action

Perseus's third cause of action seeks approximately $170,000 in damages for Indy's breach of the covenant of good faith and fair dealing. Perseus claims it is entitled to damages for work it performed, because Indy deprived it of the right to receive benefits under the Service Order Form

by failing to negotiate the terms of the Service Documents in good faith, by failing to tender payment for the work performed by it, and by misleading it in continuing to communicate with it after allegedly terminating the Service Order Form on October 30, 2015. *See Comp.* ¶¶*51-59.* In its motion papers, Perseus also claims that it is also entitled to assert a claim for quantum meruit.

These claims, whether they are stated as a breach of a breach of the covenant of good faith or in quantum meruit, are duplicative of the Plaintiff's breach of contract claims, as the terms of the Service Order Form govern payment for the complained of conduct. *See Sebastian Holdings, Inc. v Deutsche Bank, AG,* 108 AD3d 433, 433 (1st Dept 2013) (dismissing a claim for breach of the implied covenant of good faith and fair dealing as duplicative of a breach of contract claim); *see also Hagman v. Swenson*, 149 A.D.3d 1, 7 (1st Dep't 2017) (dismissing a claim for quantum meruit, and other quasi-contract claims, as duplicative of a claim for breach of contract given that the contract covered the issues at hand).

Accordingly, it is

ORDERED that defendant's motion to dismiss the complaint is granted in part, the first cause of action is dismissed solely to the extent that it alleges that the Service Order Form incorporated the terms of the Master Services Agreement; the second cause of action is dismissed in its entirety; and the third cause of action is dismissed in its entirety; it is further

ORDERED that court has analyzed the claims and determines that absent the liquidated damages provision of the Master Services Agreement the amount of damages likely does not meet the minimum threshold to appear before the commercial division, the Plaintiff is therefore

instructed to submit a revised calculation of its damages, taking into account the current order, within 15 days of entry of this order or have the matter transferred into a general IAS Part; and it is further

ORDERED the Defendant shall have twenty days from the entry of this Order to file an Answer.

DATED:
11-30-18

ENTER

Eileen Bransten, J.

HON. EILEEN BRANSTEN
J.S.C.