SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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AVNET, INC., Index No.: 653146/2019

Plaintiff, **DECISION & ORDER**

-against-

DELOITTE CONSULTING LLP,

Defendant.

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JENNIFER G. SCHECTER, J.:

Defendant Deloitte Consulting, Inc. (Deloitte) moves to dismiss the complaint pursuant to CPLR 3211. Plaintiff Avnet, Inc. (Avnet) opposes the motion. The motion is granted in part.

Background

The facts are drawn from the complaint (Dkt. 1) and are assumed to be true unless conclusory or refuted by documentary evidence.

In 2008, the parties entered into a Master Services Agreement governing consulting work performed by Deloitte for Avnet (Dkt. 29 [the MSA]). For each consulting matter, the parties would enter into a separate Work Order (*see id.* at 2-3). The MSA provides that all litigation "based on or arising out of" it must be brought in New York and that the MSA "and each Work Order, and all matters **relating** to [the MSA]" are governed by New York law (*id.* at 15 [emphasis added]).

Beginning in 2013, the parties executed Work Orders governing Deloitte's development and implementation of a software platform known as "Project Evolve" (*see* Dkt. 38). That system went live on April 4, 2016. It was riddled with problems. Avnet claims that Deloitte was at fault. However, rather than litigate, on September 7, 2016, the parties executed a settlement agreement in which Avnet released all of its claims against Deloitte – both known and unknown – relating to Project Evolve (Dkt. 28 [the Settlement Agreement]). The Settlement Agreement is governed by New York law (*id.* at 4).

The release is contained in paragraph three, which provides:

> In consideration of the obligations set forth in sections 1 and 2 above, the sufficiency of which the Parties acknowledge, the Parties mutually release, waive and forever discharge one another … **from any and all claims, demands, debts, liabilities, or actions or causes of action of every nature and description, whether known or unknown, that are based upon, relate directly or indirectly to, or arise from or in connection with Project Evolve**, represented by that certain Work Order #EMA-001 titled "EM Customer Master Data Assessment & Governance" dated August 7, 2013, by and between Deloitte Consulting and Avnet and all project change requests issued thereunder, from the beginning of time through the Effective Date (Dkt. 28 at 3 [emphasis added]).

The consideration for the release, set forth in paragraphs one and two, includes an $8 million discount on up to $24 million of future consulting services (*see id.* at 2).

Paragraph seven contains a merger clause and an express disclaimer of reliance on the other's oral or written representations. It provides that the Settlement Agreement:

> constitutes the entire understanding of the Parties hereto with respect to the subject matter hereof and **supersedes any and all prior agreements, promises, representations or inducements, oral or written, concerning its subject matter**. All prior and tentative agreements, **promises**, understandings, negotiations, proposals, offers, acceptances and drafts are

> merged herein and extinguished hereby. No modifications, extensions or waivers of any provision of this Agreement or any release of any right under this Agreement shall be valid unless the same is in writing specifically referencing this Agreement and executed by the Parties' duly authorized officers or representatives. Waiver by a Party of any breach, default, right, remedy or performance of any provision of this Agreement shall not constitute or be construed as a waiver of any subsequent breach, default, right, remedy or performance of the provision or a waiver of the provision itself, unless such waiver is expressly made in writing by such Party. The Parties acknowledge that each of them and their counsel have had an opportunity to review this Agreement, that the terms of this Agreement have been completely read by them and explained to them, that the terms are fully understood and voluntarily accepted by them, and that this Agreement will not be construed against any party merely because such party prepared it. **The Parties represent and acknowledge that in executing this Agreement they did not rely, and have not relied, upon any representation or statement, whether oral or written, made by the other Party or by that other Party's agents, representatives or attorneys with regard to the subject matter, basis or effect of this Agreement or otherwise** (*id.* at 4 [emphasis added]).

Shortly after executing the Settlement Agreement, the parties executed a Work Order governing Deloitte's attempts to fix the system. In March 2017, Avnet terminated Deloitte and decided it would abandon Project Evolve as soon as an alternative system could be implemented.

On May 28, 2019, Avnet commenced this action against Deloitte. In its complaint, it asserts 13 causes of action. The first six concern Deloitte's work on Project Evolve through August 1, 2016:[1] (1) fraud; (2) constructive fraud; (3) fraudulent inducement; (4) breach of contract and breach of the implied covenant of good faith and

[1] The Settlement Agreement is dated and was made effective as of August 1, 2016, though it was not executed until September 7, 2016 (*see* Dkt. 28 at 2, 5).

fair dealing; (5) professional negligence; and (6) violation of New York General Business Law (GBL) § 349. The remaining seven causes of action, numbered here as in the complaint, concern Deloitte's conduct after August 1, 2016: (7) fraud; (8) constructive fraud; (9) fraudulent inducement of the Settlement Agreement and post-Settlement consulting work; (10) breach of contract (the MSA and Work Orders) and breach of the implied covenant of good faith and fair dealing; (11) professional negligence; (12) violation of GBL § 349; and (13) unjust enrichment.

Deloitte moves to dismiss, arguing that: (1) the first six causes of action are barred by the Settlement Agreement; (2) Avnet does not plead a viable claim for fraudulent inducement of the Settlement Agreement or any post-Settlement Agreement work; (3) none of the claims based on Deloitte's post-Settlement conduct are viable; and (4) in the alternative, all of the post-Settlement Agreement work claims are duplicative of the express breach of contract claim pleaded in the tenth cause of action.

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from those facts (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d

268, 275 [1977]). If the defendant seeks dismissal of the complaint based upon documentary evidence, the motion will succeed only if "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 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

The Release

"It is well established that a valid release constitutes a complete bar to an action on a claim which is the subject of the release" (*Global Minerals & Metals Corp. v Holme*, 35 AD3d 93, 98 [1st Dept 2006]). If "the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties" (*Booth v 3669 Delaware, Inc.*, 92 NY2d 934, 935 [1998]). "A release should never be converted into a starting point for ... litigation except under circumstances and under rules which would render any other result a grave injustice" (*Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 276 [2011]). Significantly, "a release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is 'fairly and knowingly made'" (*id.*, quoting *Mangini v McClurg*, 24 NY2d 556, 568 [1969]).

The Settlement Agreement released Deloitte from "any and all claims . . . or actions or causes of action of every nature and description," including both "known and unknown" claims relating to Project Evolve. This includes all claims for breach of the MSA and the pre-settlement Work Orders and any related tort and statutory claims.

Avnet's contention that alleged fraud committed by Deloitte in conjunction with its pre-settlement work on Project Evolve is beyond the scope of the release is baseless. A release of all unknown claims includes fraud claims whose basis was not yet known to the plaintiff at the time of the release (*see Centro*, 17 NY3d at 277). That is the essence of a release of unknown claims.

The failure to uphold the release, which Avnet admits was not the product of duress (*see* Dkt. 36 at 37), would foment commercial uncertainty by denying Deloitte the benefit of the bargain that these parties struck. Avnet, an extremely sophisticated party that was represented by counsel in connection with the Settlement Agreement, is bound by its explicit decision to release unknown claims. It was well aware of the serious problems with Project Evolve and their devastating effects on its business operations and adamantly believed that Deloitte was at fault. It could have sued or insisted on a more limited release, for instance, that carved out claims for gross negligence, intentional misconduct and fraud (*see, e.g.,* Dkt. 29 at 8). It did not and must live with its own decision and the deal that it chose to make.

Nor can Avnet seek to vitiate the release by claiming fraudulent inducement. While a release may be set aside if it was procured by fraud, to do so, the plaintiff must plead, with specificity, "a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Global Minerals*, 35 AD3d at 98). "Moreover, the fraud that allegedly induced the release must be "a separate fraud

from the subject of the release" (*Centro*, 17 NY3d at 276). "Were this not the case, no party could ever settle a fraud claim with any finality" (*id.*).[2]

Avnet has not pleaded any actionable fraud separate from the subject matter of the release. Virtually all of its complaints about how it was fraudulently induced into executing the release are based on Deloitte's pre-Settlement Agreement conduct, including the alleged negligence and concealment that form the basis of Avnet's underlying fraud claim.[3] In any event, these allegations cannot support a fraud claim

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[2] This rule applies regardless of whether the parties were fiduciaries (*Centro*, 17 NY3d at 278 ["A sophisticated principal is able to release its fiduciary from claims—at least where, as here, the fiduciary relationship is no longer one of unquestioning trust—so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into"], citing *Alleghany Corp. v Kirby*, 333 F2d 327, 333 [2d Cir 1964] ["There is no prerequisite to the settlement of a fraud case that the defendant must come forward and confess to all his wrongful acts in connection with the subject matter of the suit. Usually such settlements are accompanied by vigorous denials of any fraud whatsoever. Yet the entire thrust of appellant's argument on this point is, in effect, directed to a proposition that (defendant) was under some affirmative duty to come forward voluntarily with facts and documents possibly disclosed for the first time in this suit and of which he may or may not have had knowledge"]). Notably, *Centro* abrogated Appellate Division precedent to the contrary (*see id.* at 278).

[3] The only alleged fraudulent misrepresentations that are distinct are Deloitte's promises that "Evolve was fundamentally sound, and that [its] consultants could fix the problems with the Evolve system in short order" (Complaint ¶ 126). These alleged statements are either (1) promises of future performance (*see HSH Nordbank AG v UBS AG*, 95 AD3d 185, 206 [1st Dept 2012] ["A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract"]); or (2) opinions, which cannot support a fraud claim unless they are objectively false, not actually believed by the defendant and proffered with the intent to deceive (*see Israel Discount Bank of N.Y. v Eisneramper LLP*, 137 AD3d 638, 639 [1st Dept 2016]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 37 Misc 3d 1212[A], at *7 [Sup Ct, NY County 2012] ["an opinion may still be actionable if the speaker does not genuinely and reasonably believe it or if it is without a basis in fact"], *affd* 115 AD3d 128 [1st Dept 2014]; *see also Omnicare, Inc. v Laborers District Council Constr. Indus. Pension Fund* (135 S Ct 1318, 1327 [2015]). Avnet does not

because the Settlement Agreement disclaims such collateral oral representations (*DuBow v Century Realty, Inc.*, 172 AD3d 622 [1st Dept 2019]). Avnet's contention that this disclaimer is not specific enough to be enforceable is wrong because the Settlement Agreement does not merely contain a general merger clause. Nor does the Settlement Agreement contain the usual one-line, blanket disclaimer of collateral representations. Rather, paragraph seven of the Settlement Agreement is an extensive, single-spaced clause taking up half of a page (*see* Dkt. 28 at 4). As the Court of Appeals long ago explained:

> Were we dealing solely with a general and vague merger clause, our task would be simple. A reiteration of the fundamental principle that a general merger clause is ineffective to exclude parol evidence to show fraud in inducing the contract would then be dispositive of the issue. To put it another way, where the complaint states a cause of action for fraud, 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. Here, however, plaintiff 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 (*Danann Realty Corp. v Harris*, 5 NY2d 317, 320-21 [1959]).[4]

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allege any facts permitting a reasonable inference that Deloitte, which was terminated less than a year after the Settlement Agreement, did not actually believe it could fix the problems with the system (*see Silver Oak Capital L.L.C. v UBS AG*, 82 AD3d 666, 668 [1st Dept 2011]; *cf. Aozora Bank, Ltd. v J.P. Morgan Secs. LLC*, 144 AD3d 440, 441 [1st Dept 2016]). At most, Avnet has pleaded a claim that Deloitte's work attempting to fix the system was inadequate.

[4] *See also DuBow*, 172 AD3d at 622, which involved a materially indistinguishable provision setting forth that the settling parties "agree that they are not relying on any promises or representations not contained in [the] agreement" (Index No. 656016/2017, Dkt. 70 at 10:12-16).

Paragraph seven, therefore, bars the fraud claim, as it negates any reliance (*see WT Holdings Inc. v Argonaut Group, Inc.*, 127 AD3d 544 [1st Dept 2015] ["The stock purchase agreement contains not only a general merger clause pursuant to which the SPA 'supersedes' all prior oral statements, but also a 'No Additional Representation' clause that disclaims liability and responsibility for any extra-contractual representation, rendering the fraud claim not viable"], accord *Pate v BNY Mellon-Alcentra Mezzanine III, LP*, 163 AD3d 429, 430 [1st Dept 2018] [fraud claims dismissed where "the release contains a 'No Other Representations' clause"]; *see also Natoli v NYC Partnership Hous. Dev. Fund Co., Inc.*, 103 AD3d 611, 612-13 [2d Dept 2013] ["the documentary evidence submitted by the appellants included a Purchase Agreement which contained specific disclaimer provisions by which the plaintiff disavowed reliance upon any representations extrinsic to that agreement"]).[5]

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[5] Avnet urges the court to follow *Citibank, N.A. v Plapinger* (66 NY2d 90 [1985]). But that case, which involved an unconditional guaranty, actually supports Deloitte. In *Citibank*, the Court of Appeals held that in determining whether a reliance disclaimer is sufficiently specific, one must read the agreement as a whole and in context to ascertain if the disclaimer renders reliance unreasonable. There, the Court explained that

> we do not have the generalized boilerplate exclusion referred to by the commentators. Rather, following extended negotiations between sophisticated business people, what has been hammered out is a multimillion dollar personal guarantee proclaimed by defendants to be "absolute and unconditional." It is unrealistic in such circumstances to expect an express stipulation that defendants were not relying on a separate oral agreement to fund an additional multimillion dollar line of credit, when they themselves have denominated their obligation unconditional, ... 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" (*id.* at 95).

Simply put, no sophisticated party agreeing to the terms of section seven could reasonably rely on collateral representations.[6] Avnet was well aware of the mess that it believed Deloitte created. It chose to keep working with Deloitte and to release it as opposed to cutting ties with Deloitte and holding it to account for the system's problems. Having done so, it cannot reverse course or make a different choice now. Based on the release, the only potentially viable claims it has are those that accrued after the execution of the Settlement Agreement.[7]

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Here, as in *Citibank*, it would be unrealistic to expect the parties to more expressly disclaim reliance on Deloitte's ability to fix the software system given the nature of the Settlement Agreement, which released any unknown claims. Ultimately, Avnet, a sophisticated party agreed that notwithstanding its belief that Deloitte was at fault, it would pay Deloitte millions of additional dollars to fix the system. Under these circumstances, it was clearly understood that Avnet thought that Deloitte could fix the problems. Specifically stating this understanding in the Settlement Agreement would be saying the obvious.

[6] A settlement agreement that releases unknown claims and disclaims oral representations cannot be vitiated by an alleged oral representation based on an unknown claim. To hold otherwise would, as the *Centro* court cautioned, undermine the ability to effectively settle unknown claims (*see id.* at 276). While Avnet has cited cases where an agreement at the outset of a business relationship was held to lack a sufficiently specific disclaimer, it does not cite any case where a settlement agreement releasing unknown claims and disclaiming oral representations was ever rescinded based on a fraudulent oral representation. Were that the law, releases would be unreliable and "a starting point for ... litigation" (*id.*; *see Hallock v State*, 64 NY2d 224, 230 [1984] [settlements "are favored by the courts and not lightly cast aside"]).

[7] Avnet confirmed at oral argument that within months of executing the settlement, it hired other expert consultants who quickly advised that the software was unfixable. If so, while not necessarily a basis for dismissal here, it seems certain that the fraud claim would ultimately be dismissed because Avnet could have become aware of this information in the five months between the software launch and execution of the Settlement Agreement (*see MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 291-92 [1st Dept 2016]).

Post-Settlement Claims

The only potentially viable claim pleaded in the complaint is the portion of the 10th cause of action for breach of the MCA based on post-Settlement Agreement work.

As an initial matter, the unjust enrichment claim must be dismissed because written agreements–the MCA and a post-Settlement Agreement Work Order–govern the subject matter of this dispute. There is no basis to challenge the validity of these written agreements; thus, an unjust enrichment claim may not be maintained (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]; *see Goldin v TAG Virgin Islands, Inc.*, 149 AD3d 467, 468 [1st Dept 2017]).

The constructive fraud claim fails because the parties were not in a fiduciary relationship (*AQ Asset Mgmt. LLC v Levine*, 154 AD3d 430, 431 [1st Dept 2017]; *see Aoki v Aoki*, 27 NY3d 32, 39-40 [2016]). The MSA's express disclaimer of a fiduciary relationship (Dkt. 29 at 13) is binding and enforceable (*Caesars Bahamas Inv. Corp. v Baha Mar Joint Venture Holdings Ltd.*, 75 AD3d 419, 420 [1st Dept 2010]; *see INTL FCStone Markets, LLC v Corrib Oil Co.*, 172 AD3d 492 [1st Dept 2019]).

The professional negligence claim, which is asserted under Arizona law, is barred by the MSA's choice of law clause, which applies to all claims "relating to" the MSA (*Capital Z Fin. Servs. Fund II, L.P. v Health Net, Inc.*, 43 AD3d 100, 109 [1st Dept 2007]; *see Ministers & Missionaries Benefit Bd. v Snow*, 26 NY3d 466, 474-76 [2015]). Allegedly negligent work performed pursuant to the MSA relates to the MSA. Because New York law does not recognize a claim for professional negligence under the

circumstances, the cause of action is dismissed (*Richard A. Rosenblatt & Co. v Davidge Data Sys. Corp.*, 295 AD2d 168, 169 [1st Dept 2002]; *see* Dkt. 36 at 32).

The GBL § 349 claim is dismissed because private contract disputes do not "fall within the ambit of the statute" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, N.A.*, 85 NY2d 20, 25 [1995]). Issues with Avnet's internal software do not "affect the consuming public at large" (*Carlson v Am. Intl. Group, Inc.*, 30 NY3d 288, 309 [2017]).

The claim for breach of the implied covenant of good faith and fair dealing contained in the 10th cause of action is dismissed as duplicative (*see Sebastian Holdings, Inc. v Deutsche Bank, AG*, 108 AD3d 433, 434 [1st Dept 2013]). Avnet has not identified any conduct not expressly governed by the MSA that defeats its purpose or a gap in the MSA that could be filled by resort to the implied covenant (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]).[8]

The fraud claim based on post-settlement conduct is also duplicative. At most, Deloitte may be held liable for damages caused by post-settlement conduct. Contract damages recoverable due to deficient work would be the same as (if not more expansive than) the out-of-pocket damages recoverable on a fraud claim (*Empire Outlet Builders LLC v Constr. Res. Corp. of N.Y.*, 170 AD3d 582, 583 [1st Dept 2019]; *see Connaughton*

[8] Indeed, the MSA expressly requires Deloitte to perform its work in good faith (Dkt. 29 at 7; *see Capone v Castleton Commodities Intl. LLC*, 2016 WL 1222163, at *6 [Sup Ct, NY County Mar. 29, 2016], *affd* 148 AD3d 506 [1st Dept 2017]).

*v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).[9] Since the fraud arises from the same facts as the breach of contract claim and the damages are duplicative, the fraud claim is dismissed (*see MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 165 AD3d 108, 114 [1st Dept 2018], accord *Carling v Peters*, 170 AD3d 482, 483 [1st Dept 2019]).[10]

Deloitte's contention that the complaint lacks sufficient specificity to state a claim for breach of contract is rejected. CPLR 3013 is satisfied here. As Deloitte itself admits, the complaint alleges, for instance, that after the date of the Settlement Agreement Deloitte "breached the MSA and Project Evolve work orders by staffing the project with unskilled and inexperienced consultants" that "included many 'offshore' consultants who worked at lower wages and were unfamiliar with Avnet or the Evolve system," and that they "failed to follow standard software development, testing, and implementation practices" (Dkt. 25 at 30; *see* Complaint ¶ 140). Avnet further alleges deficient implementation of software code (*see* Complaint ¶ 48). Avnet also alleges breaches of Deloitte's express obligations to perform its work in good faith using due care and in accordance with generally recognized consulting practices (¶ 134; *see* Dkt. 29 at 7). The

[9] Under paragraph nine of the MSA, fraud vitiates the limitation on Avnet's recovery being the fees paid under the applicable Work Order (*see* Dkt. 29 at 8). But that does not mean an independent fraud claim is required. Nonetheless, under that same paragraph, liability for consequential damages is always precluded (*see id.*). Moreover, even if the fraud claim were allowed, it would not give rise to damages based on the alleged fraud that predated the Settlement Agreement (the millions of dollars allegedly spent on remediation prior to August 1, 2016).

[10] As with its professional negligence claim, Avnet's argument that its fraud claim is governed by Arizona law is barred by the MSA's broad choice of law clause because the alleged fraud relates to the MSA.

laundry list of additional detail that Deloitte argues ought to be included in the complaint is not legally necessary. Breach of contract claims are governed by CPLR 3013, not the heightened pleading standard of CPLR 3016 (*Board of Mgrs. of 150 E. 72nd St. Condominium v Vitruvius Estates, LLC*, 173 AD3d 589, 590 [1st Dept 2019]). While the information sought by Deloitte is fair game for discovery, its absence from the complaint is not a pleading deficiency. Moreover, the failure to plead specific damages is not fatal because, aside from the fact that "nominal damages are always available" on a breach of contract claim (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]), the complaint permits a reasonable inference of damages (*see DB Mansfield LLC v BNY Capital Funding LLC*, 116 AD3d 636, 638 [1st Dept 2014], citing *CAE Indus. Ltd. v KPMG Peat Marwick*, 193 AD2d 470, 472-73 [1st Dept 1993] ["Obviously, plaintiffs, in order to defeat the defendant's motion to dismiss, were not obliged ... to show that they had actually sustained damages. It was sufficient that the complaint contained allegations from which damages attributable to the defendant's breach might be reasonably inferred"]).

Accordingly, it is ORDERED that Deloitte's motion to dismiss the complaint is granted to the extent that all of the causes of action in the complaint are dismissed except the portion of the tenth cause of action seeking recovery for breach of contract.

Dated: October 11, 2019

ENTER:

Jennifer G. Schecter, J.S.C.