IN THE COURT OF COMMON PLEAS
COUNTY OF PHILADELPHIA
CIVIL TRIAL DIVISION

ANCILE Solutions, Inc.	**:**	**August Term, 2017**
Plaintiff	**:**	**No. 3036**
	:	
v.	**:**	**Commerce Program**
	:	
SAP America, Inc.	**:**	**Control No. 19070525**
Defendant	**:**	

ORDER

And now, this 16th day of December, 2019, upon consideration of Defendant SAP America, Inc.'s Motion for Summary Judgment, and Plaintiff ANCILE Solutions, Inc.'s responses thereto and as explained in the attached Memorandum Opinion, it is hereby **ORDERED** that Defendant's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART as follows:

1. Count I: Breach of Contract is GRANTED IN PART and DENIED IN PART;
   It is GRANTED as to theories relating to 1:1 licensing; equitable distribution and the "at least as protective" provision under Amendment No. 8.
   It is DENIED as to provisions relating to "preferred partner" and "early position in the sales cycle."

2. Count II: Breach of Covenant of Good Faith and Fair Dealing is GRANTED.

3. Count V: Tortious Interference With Existing and Prospective Business is GRANTED; and
4. Count VI: Tortious Interference With Existing or Expected Contract is GRANTED.

BY THE COURT

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RAMY I. DJERASSI, J.

MEMORANDUM OPINION

Plaintiff ANCILE Solutions, Inc. ("ANCILE") makes educational software that helps companies train and educate their employees. Defendant SAP America, Inc. ("SAP") makes and supports enterprise software that automates business processes.[1] In January 2002, RWD Technologies, Inc. ("RWD")[2] and SAP entered into an agreement ("Alliance Agreement") for education services solutions, which includes strategy, planning, development, and support.[3] Under the Alliance Agreement, RWD delivered services and SAP, in turn, delivered products, to customers for "end user training and related tools."[4] Some of these products were designed and manufactured by ANCILE

In August 2017, ANCILE filed a complaint against SAP. Following preliminary objection, remaining counts are: Count I: Breach of Contract, Count II: Breach of Covenant of Good faith and Fair Dealing, Count V: Interference With Existing and Prospective Business, and Count VI: Interference With Existing or Expected Contract.[5]

SAP now moves for summary judgment. We agree in part and deny in part. We see this case as a breach of contract dispute only---with cognizable issues involving the Alliance Agreement's "preferred partner" and "early position in the sales cycle" provisions. These terms include contract enforcement, or lack thereof, involving five sub-issues embedded in ANCILE's breach of contract claim. These are alleged to be: (1) the 1:1 licensing requirement, (2) the equitable distribution requirement, (3) the "at least as protective" provision at Amendment No.8, Paragraph 3, (4) ANCILE's status as preferred partner to SAP and SAP's obligation to position ANCILE early in the sales cycle, and (5) damages.

For reasons explained here, this court finds there are no factual issues in dispute over a so-called 1:1 licensing requirement, an equitable distribution requirement, or an "at least as protective" provision--- because none of these was agreed to by contract. This court, therefore, grants summary judgment to SAP on each of these three proffered breach of contract theories.

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[1] Complaint, at ¶s 1-2.
[2] RWD is the predecessor in interest to ANCILE.
[3] Alliance Agreement, at ¶ 1 at Ex. B to ANCILE's Motion for Summary Judgment ("Alliance Agreement"). There were also several amendments to the Alliance Agreement. We find only one amendment, Amendment No. 8, dated February 20, 2006, to be material to the legal issues under review here.
[4] Alliance Agreement, at ¶ 1.
[5] The complaint also averred Count III: Breach of Fiduciary Duty and Count IV: Breach of Partnership Agreement. Preliminary objection to both counts were sustained. March 14, 2018 Order on Preliminary Objections at Control No. 17110580.

On breach of contract, however, factual disputes exist over the "preferred partner" or "early position in the sales cycle" contract provisions. These are the sole theories available for ANCILE at trial.[6] If ANCILE can prove either, ANCILE may be entitled to damages measured by the value of business it would have signed with third party customers if SAP had honored the Alliance Agreement and its amendments in full.

On the flip side, this court grants summary judgment in favor of defendant SAP on plaintiff's breach of covenant of good faith and fair dealing claim. This is because ANCILE has not shown that this proposed cause of action is factually distinct from its breach of contract count.

ANCILE'S good faith/fair dealing claim does not raise any of the exceptions necessary to pursue a separate count in addition to breach of contract. The basic legal premise is allegations supporting a good faith/fair dealing claim must be different from those ANCILE is alleging for breach of contract. These include whether there is breach of a specific duty expressly stated in the contract---and whether the parties were in a confidential or fiduciary relationship. Neither is shown here.

SAP's motion for summary judgment against ANCILE's claim for breach of the covenant of good faith and fair dealing is therefore granted.

Finally, and following the gist of the action doctrine, this court grants summary judgment in favor of SAP on ANCILE'S claims for tortious inference with existing and prospective business, and tortious interference with an existing or expected contract.

I. <u>Breach of Contract</u>

a. 1:1 Licensing Requirement

ANCILE alleges that a 1:1 licensing requirement exists as viable theory for breach of contract. According to ANCILE, the Alliance Agreement has a 1:1 licensing provision, which states that "SAP must ensure that for every SAP customer who elects to add ANCILE's software to its SAP package, that customer must purchase the same number of ANCILE user licenses as it has for the SAP software."[7]

[6] *See* Alliance Agreement, at ¶s 3, 21.
[7] Complaint, at ¶ 20(a).

However, we find that this alleged 1:1 licensing provision was never contracted. Also, evidence does not support an implied 1:1 licensing agreement through course of conduct.

A plain reading of the Alliance Agreement shows no express 1:1 licensing requirement as averred by ANCILE. Instead, ANCILE relies on deposition testimony to argue that a so called 1:1 licensing requirement was intended.[8] The proffered testimony, however, is speculative and depends on what ANCILE employees *thought* they were agreeing to.

Nor do Alliance Agreement amendments state a 1:1 licensing requirement. This includes Amendment No. 8 which discussed how license revenue shall be divided between the parties. The language at Amendment 8, however, does not support ANCILE. For example, a term in Amendment No. 8 states that during a two month period between November 1, 2005 and December 31, 2005, all revenue SAP obtained from new third party customers would be shared in half with ANCILE. This 50-50 revenue sharing is not the same as a 1:1 agreement under which SAP's new third party customers would be forced to buy the same number of licenses from ANCILE that these third party customers were buying from SAP. Nothing in the Alliance Agreement or its amendments requires this. (See Amendment No. 8 at Section 1, subsection a, Paragraph B, and subparagraph 1.)[9]

ANCILE finally contends that the 1:1 licensing requirement is proven through the parties' course of conduct. The record does not support this. On the one hand, hundreds agreed to license on a 1:1 basis. On the other hand, hundreds did not. [10] Regular reliable course of conduct is not shown and therefore there is no implied 1:1 licensing agreement.

b. Equitable Distribution Requirement

ANCILE alleges in its complaint that an equitable distribution provision exists in the Alliance Agreement which precluded SAP from discounting the price of ANCILE software by an amount that is greater than it discounts its own SAP software products. Understood another way, ANCILE claims the parties had agreed that whenever SAP sells its own software products to a third party customer, SAP's price cannot be discounted more than it was discounting for ANCILE-made products.

[8] *See e.g.*, ANCILE's Response to Motion for Summary Judgment, at ¶'s 31-32, 172.
[9] *See e.g.,* ANCILE's Response to Motion for Summary Judgment, at ¶ 183
[10] SAP Motion for Summary Judgment, at ¶ 273.

There is no supporting language for this in the contract text.[11] ANCILE's deposition witnesses agree that SAP preserved its non-exclusivity, meaning SAP was free to funnel new customers to its own products at discounted prices. [12] SAP was permitted to do this as long as the company obeyed all other provisions of the Agreement including "preferred partner" and early position in the sales cycle."

c. The "at least as protective" provision

ANCILE argues another legal theory in support of its position that both 1:1 licensing and equitable distribution were intended components of the Alliance Agreement. This is the so-called "at least as protective" provision at Section 3 of Amendment No. 8 to the Alliance Agreement.[13]

We find, however, that "at least as protective" is not persuasive. This is because deposition witnesses including RD/ANCILE employees gave inconsistent testimony on the meaning of "at least as protective." [14] Clearly, the catch phrase "at least as protective" does not magically define terms that are otherwise not concrete. And specifically, we do not read Section 3 of Amendment 8 to create a 1:1 licensing requirement or equitable distribution as ANCILE argues.

d. "Preferred Partner" Status Early Positioning in the Sales Cycle

We find disputes of material fact exist on whether SAP has breached the "preferred partner" and/or the "early positioning in the sales cycle" provisions of the Alliance Agreement. The preferred partner provision reads:

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[11] ANCILE's Response to Motion for Summary Judgment, at ¶ 31. ANCILE cannot rely on deposition testimony about what may, or may not, have taken place between the parties before the contract was signed. This is because the Alliance Agreement is meant to be parties' entire understanding of their relationship. See Alliance Agreement, at ¶ 28.

[12] Alliance Agreement, at ¶ 31.

[13] Exhibits to ANCILE's Response to Motion for Summary Judgment, at Exhibit 120. Paragraph 3 reads as follows:

> "All RWD Products licensed by SAP to a customer on an SAP agreement shall contain terms which are *at least as protective* of the RWD Products as the terms SAP provides for its own products with such customer, and shall provide for customer's internal use only, unless RWD provides prior written consent to a license that allows for any other use."(*italics added)*

[14] SAP's Motion for Summary Judgment, at ¶s 179-185, 190-194. *But cf.* ANCILE's Response to Motion for Summary Judgment, at ¶ 179-185, 190-194.

> **21. Non-Exclusive**. This Agreement is expressly intended to be non-exclusive. Notwithstanding the foregoing, SAP agrees to position RWD as a *preferred partner* with prospective customers for end user training services.

The early positioning provision reads:

> **3. Sales Strategy.** SAP and RWD will work together in targeted accounts to procure customer engagements. The partnership will be *positioned early in the sales cycle* to ensure the customer is aware of the SAP education services solution throughout their mySAP.com lifecycle. SAP will contract directly with customer and subcontract delivery of Services to RWD. Both Services as well as Products will be positioned by SAP sales force.

It is clear the parties agreed that ANCILE would be a "preferred partner" who was to be "positioned early in the sales cycle." However, we find the meaning of both italicized phrases is ambiguous. What does a "preferred partner" mean in business practice and when should being "positioned early in the sales cycle" take place?

It is possible that SAP breached both provisions by wrongfully cutting ANCILE out on occasions when SAP signed contracts with third party customers. Short of amicable resolution, it will take a factfinder to decide if SAP indeed failed to treat ANCILE as a preferred partner whose services and products were at all relevant times presented to third party customers early in the sales cycle process.

e. Damages

Contrary to SAP's arguments, if ANCILE successfully proves breach of contract, damages may be proven.

SAP claims damages would be speculative because ANCILE would not be able to show causation. SAP argues ANCILE will not be able to show which specific customers it lost because of SAP. [15] But, as seen in the case of Walmart, ANCILE's lost Walmart business is quantifiable.[16]

[15] SAP's Memorandum of Law to Motion for Summary Judgment, at 66.
[16] SAP's Memorandum of Law to Motion for Summary Judgment, at 67.

As a general matter, compensatory damages are measurable in the form of lost business, not lost profits.[17] These are quantifiable by calculating how much business went to SAP that would otherwise have gone to ANCILE---if SAP had not breached.

Certainly, if there is liability for breach of contract, ANCILE must prove the dollar value of its lost business. We suggest, based on our understanding of the record at this stage, that the damages may have begun by at least January 2017.[18] It is possible, of course that a contractual breach occurred earlier.

II. Breach of Covenant of Good Faith and Fair Dealing

In its complaint, ANCILE states a claim of breach of the duty of good faith and fair dealing. This cause of action is not viable for three reasons. First, ANCILE does not aver additional facts beyond what is stated for its breach of contract claim. Second, no provision of the Alliance Agreement was expressly violated and neither party was in a better negotiating position than the other. Third, the parties were not in a confidential or fiduciary relationship.

1) Breach of Contract is Already Pled

Generally, a breach of the duty of good faith and fair dealing is interpreted under contract law.[19] And in so doing, courts do not hold that good faith/fair dealing must stand as a separate cause in all circumstances. Instead, the duty of good faith and fair dealing is applied as a separate cause of action in limited situations.[20]

In *Agrecycle v. City of Pittsburgh*, the Court articulated situations when a duty of good faith and fair dealing cannot be implied. [21] These include when:

(1) A plaintiff already has a separate independent cause of cause of action to vindicate the same rights invoked in a duty of good faith and fair dealing; or

(2) An implied duty would result in defeating a party's express contractual rights by imposing obligations that a party had contracted to avoid; or

[17] We also note that lost business as a type of damage is not subject to limitations under paragraph 14 of the Alliance Agreement. See cf. SAP's Memorandum of Law to Motion for Summary Judgment, at 66.
[18] SAP's Motion for Summary Judgment, at ¶ 258. See also, ANCILE's Response to SAP's Motion for Summary Judgment, at Ex. 213. *See also e.g.,* ANCILE's Response to SAP's Motion for Summary Judgment, at ¶ 268.
[19] *Ash v. Continental Ins. Co.*, 932 A.2d 877, 883 (Pa. 2007).
[20] *Slamon v. Carrizo (Marcellus) LLC*, 3:16 – CV-2187, 2017 WL 3877856, at *7 (M.D. Pa. Sept 5, 2017).
[21] 783 A.2d 863, 867 (Pa. Commw. Ct. 2001).

(3) There is no confidential or fiduciary relationship between the parties."[22]

Absent one of these enumerated exceptions under *Agrecycle*, a party who is claiming breach of contract cannot maintain a separate cause of action for breach of the duty of good faith and fair dealing.

Contracting with each other, ANCILE and SAP implicitly agreed to treat each other with good faith in carrying out the terms of their contract. As nothing more has been shown, none of the necessary exceptions apply.[23]

2) No Evidence of Difference in Negotiating Power

There is no evidence that either party had overbearing power over the other when the Alliance Agreement was negotiated. [24] This was an agreement between very large sophisticated software players in the international arena and nothing suggests otherwise.[25]

3) No Fiduciary or Confidential Relationship.

Nothing on the record shows that ANCILE and SAP were in a fiduciary or confidential relationship when negotiating the Alliance Agreement or implementing it. Although SAP is a bigger company than ANCILE, the parties are each highly capitalized. They dealt with each other freely and openly in the marketplace for mutual benefit.

In summary, ANCILE does not establish facts meeting any of the exceptions that would justify a separate breach of good faith and fair dealing claim in this case.

III. TORTIOUS INTERFERENCE CLAIMS

The dispute in this case is strictly contractual. Nothing presented here suggests public policy is at stake. This is a business dispute between large corporations who have extensive market and contractual relationships. Their contract dispute is a private one involving whether SAP violated a promise to treat ANCILE as a "preferential partner" entitled to "early position in the sales

[22] *Id.* at 867. *See also Northview Motors, Inc. v. Chrysler Motors Corp.*, 227 F.3d 78, 91-92 (3d. Cir. 2000) noting ("a party is not entitled to maintain an implied duty of good faith claim where the allegations of bad faith are 'identical to' a claim for 'relief under an established cause of action'").

[23] For its part ANCILE writes in its complaint at ¶s. 63, "SAP's actions not only violate the express provisions of the Alliance Agreement, they also run counter to the very purpose of the Alliance Agreement and the parties' joint venture---to cooperate in offering an educational software solution that includes ANCILE software" This is essentially the parties implicit bargain to work with each other in good faith under the Alliance Agreement itself and is the core reason why there is no reason to send a separate count of good faith/good conduct count to a jury.

[24] *See Agrecycle*, 783 A.2d at 867-68.

[25] *See* Alliance Agreement, at ¶ 1.

cycle". There is no fiduciary claim and no higher duty in tort. Applying the gist of the action doctrine, all tort counts in this case are dismissed.[26]

IV. CONCLUSION

Therefore, this court grants summary judgment to SAP with the exception of ANCILE's breach of contract claim relating only to the "preferred partner" and "early positioning in the sales cycle" provisions.

DECEMBER 16, 2019 **BY THE COURT**

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RAMY I. DJERASSI, J.

[26] *Bruno v. Erie Ins. Co.*, 106 A.3d 46, 65 (Pa. 2014) (internal citations omitted) ("the substance of the allegations comprising a claim in a plaintiff's complaint are of paramount importance, and, thus, the mere labeling by the plaintiff of a claim as being in tort, e.g., for negligence, is not controlling. If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—i.e., a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort").