IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRECOM SYSTEMS GROUP, INC., Plaintiff, v. MJ FREEWAY, LLC, and AKERNA CORPORATION, Defendants.	:	Civil Action No. 2:21-cv-01575

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS MJ FREEWAY, LLC AND AKERNA CORPORATION'S MOTION TO DISMISS PURSUANT TO F.R.C.P 12(b)(6)

Defendants MJ Freeway, LLC ("MJF") and Akerna Corporation ("Akerna"), through their counsel of record, hereby submit this Memorandum of Law in support of Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6).

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I. INTRODUCTION

TreCom's Complaint (the "Complaint") is an attempt to adjudicate a fabricated dispute based upon an artificial and unexecuted contract as defined by Pennsylvania law. *Marquess v. Pa. State Emples. Credit Union*, 427 Fed. Appx. 188 *189-90 (3d. Cir. 2011). TreCom's motive is clear. TreCom seeks funds from a woman-founded and woman-run technology business in contradiction to the terms that the parties repeatedly agreed to both before and after TreCom's purported agreement found at Exhibit A. TreCom previously submitted the same artificial agreement, and was subsequently admonished. (Ex. 6.) Precedent dictates that this frivolous lawsuit should be dismissed with prejudice.

TreCom's claims should be dismissed for four distinct reasons. First, TreCom fails to allege a breach of an operative contract. *City of Riviera Beach Gen. Emples. Ret. Sys. v. Mylan N.V.*, No. 15-cv-821; 2016 U.S. Dist. LEXIS 62422 *19-20 (W.D. Pa. May 10, 2016) (plaintiff must allege a breach of a legally binding contract). Indeed, TreCom properly alleges a May 4, 2017 Subcontractor Agreement, though TreCom itself pleads that this agreement was properly terminated well before any alleged harm occurred. (Compl. ¶¶ 4, 27, 39.) TreCom next attempts to allege a breach of Exhibit A, which is unenforceable as a matter of law because MJF never accepted TreCom's modifications to Exhibit A and never executed nor gave consent to execute this agreement. *Richter v. Pfundt*, No. 09-2604; 2009 U.S. Dist. LEXIS 120783 *8 (E.D. Pa. Dec. 24, 2009) ("[Acceptance] is not valid if it materially alters the terms of the contract."). Notably, these modifications were made on May 30, 2017, four days *after* TreCom alleges that MJF accepted Exhibit A. (Ex. A; Compl. ¶ 21.) Thus, TreCom will never be able to properly allege a breach of either the May 4, 2017 Subcontractor Agreement, or the unenforceable Exhibit A. Claim I is therefore "futile" and

should be dismissed with prejudice. See *Rashid v. Monteverde & Hemphill*, No. 95-2449; 1997 U.S. Dist. LEXIS 8870 *6 (E.D. Pa. June 24, 1997).

Second, TreCom's own allegations reveal that Exhibit A is nothing more than a "forgery," as defined by Pennsylvania law. *Marquess*, 427 Fed. Appx. at *189-90 (a forged signature renders a contract void). On May 26, 2017, MJF sought to modify the May 4, 2017 Subcontractor Agreement. (Ex. 2; Compl. ¶ 20.) To do so, MJF provided TreCom with a pre-signed offer (the "Offer"). Four days later, TreCom altered MJF's draft and placed an MJF signature on the altered document without authorization (the "Counteroffer"). (Ex. 3.) This operated as a counteroffer as a matter of law because TreCom changed the Offer's terms. *Foodservice Mktg. Assocs. v. O'Keefe*, No. 3-995; 2004 U.S. Dist. LEXIS 11277 *5 (E.D. Pa. Mar. 1, 2004) ("A reply to an offer which purports to accept it, but instead changes its terms, is not an acceptance but a counter-offer."). TreCom does not allege that MJF accepted the Counteroffer. Instead, TreCom, without authorization from MJF, used MJF's signature to create this agreement, which TreCom now boldly submits to the Court as a legitimate contract. (Compl. Ex. A.) This is "fraud on the court" in its simplest form. *Aoude v. Mobil Corp*, 892 F.2d 1115, 1118 (1st Cir. 1989). As a result of TreCom's improper submission, this court should follow precedent and dismiss this lawsuit with prejudice. *Id.* (dismissal with prejudice is appropriate when a party submits a forged contract to the Court). At the very minimum, this purported Agreement should only be used as a counteroffer, and not a binding contract. Simply put, there was no meeting of the minds and no acceptance.

Third, TreCom no longer provides the services that TreCom repeatedly agreed to provide both before and after TreCom's Counteroffer. (Ex. 6.) TreCom undeniably agreed to provide Tier 1 Support Services. (Ex. 1; Ex. 2; Ex. 4; Ex. 5; Ex. 6.) Indeed, this aligns with the prime contract

between MJF and the Commonwealth of Pennsylvania (the "Prime Contract") and the Commonwealth's understanding. (Ex. 4; Ex. 6.) However, TreCom no longer provides these services. (Ex. 6.) Thus, TreCom is the only party that could be in breach of the May 4, 2017 Subcontractor Agreement – that is, if MJF had not properly terminated the agreement first. This may explain TreCom's remarkable decision to submit the Counteroffer found in Exhibit A to the court as a binding agreement. *Aoude*, 892 F.2d at 1118.

Finally, Claim II should be dismissed because TreCom fails to allege any benefits conferred upon MJF. *King ex. rel. King v. KRG Kings, LLC*, No. 18-233; 2018 U.S. Dist. LEXIS 157259 *16-17 (W.D. Pa. Sept. 13, 2018) (declining to accept an allegation that defendants "received a benefit" as true because the existence of a benefit "is a legal conclusion, not a fact, because it is an element of the cause of action of unjust enrichment."). Indeed, MJF is not the owner of the Prime Contract. TreCom only alleges in a conclusory fashion that "TreCom has conferred . . . substantial benefits upon MJ Freeway and Akerna by providing extensive information technology services and supplying related equipment since April 2017." (Compl. ¶ 59.) This is legally insufficient as a matter of law. *King,* 2018 U.S. Dist. LEXIS 157259 *16-17. Indeed, TreCom's vaguely alleged "technology services" were provided for the benefit of the Prime Contract and the Commonwealth of Pennsylvania, not for MJF. (Compl. ¶ 12.) There is no alleged benefit on MJF. The benefit was to the Commonwealth. Furthermore, TreCom did not provide the hardware procurement services for MJF. (*Id*.) Thus, Claim II also fails to plead an actionable claim for relief.

II. LEGAL STANDARD

A. Motion to Dismiss Standard.

In order to survive a motion to dismiss, a compliant "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). A claim only has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Davis v. Deutsche Bank Nat'l Trust Co.*, No. 16-5382; 2017 U.S. Dist. LEXIS 203886 *7 (E.D. Pa. Dec. 12, 2017) (*citing Ashcroft*, 556 U.S. at 679). "Only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id*.

In deciding a motion to dismiss under Rule 12(b)(6), a court may consider indisputably authentic documents if the complaint's claims are based upon these documents. *See Davis v. Wells Fargo*, 824 F.3d 333, 341 (3d Cir. 2016). When a plaintiff has undisputed actual notice of a particular document and the plaintiff relies upon that information in framing the Complaint, the Court is able to properly consider that document in its analysis. *See Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9.

B. Breach of Contract Standard.

"To state a claim for breach of contract under Pennsylvania law, the plaintiffs are tasked with alleging facts showing that there was a contract, that the defendants breached it, and that the plaintiffs suffered damages from the breach." *City of Riviera*, 2016 U.S. Dist. LEXIS 62422 at *19-20. "The elements of contract formation are offer, acceptance, and consideration or mutual meeting of the minds." *Id.* (internal quotations omitted). "Under Pennsylvania law, to constitute a contract, the acceptance of the offer must be absolute and identical with the terms of the offer." *O'Keefe*, 2004 U.S. Dist. LEXIS 11277 at *5. "A reply to an offer which purports to accept it, but instead changes its terms, is not an acceptance but a counter-offer. *Id.* (internal citations omitted).

III. ARGUMENT

A. TreCom Will Never Be Able to Allege a Breach of Any Agreement.

In order to properly allege a contract, a plaintiff must allege (1) an offer, (2) acceptance, and (3) consideration. *Richter,* 2009 U.S. Dist. LEXIS 120783 at *7. When an offer is not accepted by the counterparty, a contract is not formed. *See, e.g., id.* "[T]he acceptance of the offer must be absolute and identical with the terms of the offer." *O'Keefe*, 2004 U.S. Dist. LEXIS 11277 *5. "[Acceptance] is not valid if it materially alters the terms of the contract." *Richter*, 2009 U.S. Dist. LEXIS 120783 *8. In order to form a contract, there must be "unequivocal acceptance." *United States v. Arreguin-Jimenez*, 60 Fed. Appx. 895, 897 (3d. App. 2003). A contract is not formed unless there is a "meeting of the minds in respect to every detail of the proposed contract." *Id.* (internal quotations omitted). "A reply to an offer which purports to accept it, but instead changes its terms, is not an acceptance but a counter-offer." *O'Keefe*, 2004 U.S. Dist. LEXIS 11277 *5 (internal citations omitted).

To survive a motion to dismiss, a plaintiff must also allege the breach of a properly alleged contract. *City of Riviera*, 2016 U.S. Dist. LEXIS 62422 *19-20. A party cannot breach an unenforceable contract or a contract that was already terminated. *See, e.g.*, *Arreguin-Jimenez*, 60 Fed. Appx. at 897 ("before there can be a breach of contract there must be a contract."); *see also In re Stover*, 127 F. 394, 397 (E.D. Pa. 1904) (a breach for failure to perform "is not possible after the termination of the contract.").

i. The May 4, 2017 Subcontract was Not Breached Because TreCom Admits that MJF Properly Terminated the Subcontract.

On May 4, 2017, the parties agreed to a Subcontractor Agreement ("Agreement #1"). (Compl. ¶ 19.) Specifically, TreCom alleges that "[t]he parties executed the first subcontractor

agreement . . . on May 4, 2017." (*Id.*) Indeed, Exhibit 1 reveals that an offer was made, the other party accepted identical contractual terms, and consideration was present in the form of $3,379,714.11.[1] (Ex. 1; Compl. ¶¶ 17-19.) TreCom therefore properly alleged that Agreement #1 is a legal contract. *Richter*, 2009 U.S. Dist. LEXIS 120783 *7.

TreCom does not, however, allege a breach of Agreement #1. Indeed, each and every allegation of a breach relates to the Counteroffer found in Exhibit A, which TreCom admits is distinctly different from Agreement #1. (Compl. ¶¶ 18-21.) Thus, TreCom has not properly alleged a breach of Agreement #1, because each of TreCom's breach allegations relate to Exhibit A, which should lead to dismissal under Pennsylvania law. *City of Riviera*, 2016 U.S. Dist. LEXIS 62422 *19-20.

Furthermore, TreCom will never be able to allege a breach of Agreement #1 because TreCom admits that MJF properly terminated Agreement #1. Specifically, TreCom alleges that Agreement #1 "authorize[d] MJ Freeway to terminate the contract without TreCom's consent." (*Id.* ¶ 27.) MJF then properly "issued a notice of termination of [Agreement #1] in August 2020." (*Id.* ¶ 4.) "MJF did not rescind the notice of termination." (*Id.* ¶ 39.) TreCom does not allege that any terms survived the termination of Agreement #1. Thus, TreCom could never properly plead a breach of Agreement #1. *See, e.g.*, *Arreguin-Jimenez*, 60 Fed. Appx. at 897 ("before there can be a breach of contract there must be a contract."); *see also Stover*, 127 F. 397 (a breach for failure to perform "is

[1] The Court may properly consider Exhibit 1 because it is an indisputably authentic business record that TreCom uses to frame the Complaint in Paragraphs 2, 17, 18, 19, 35, 36, and 37. *Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9. TreCom even references the title and date of Exhibit 1. (Compl. ¶ 19.) Furthermore, TreCom has undisputed actual notice of all the information in this document because TreCom itself signed Agreement #1. *Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9.

not possible after the termination of the contract."). Any amendment to the Complaint to add a breach of Agreement #1 is therefore futile. *See Rashid,* 1997 U.S. Dist. LEXIS 8870 at *6.

ii. TreCom Fails to Allege a Breach of Exhibit A Because Exhibit A is Unenforceable as a Matter of Law.

As a preliminary matter, the parties never formed any contract after Agreement #1 with inconsistent terms. To illustrate, on May 26, 2017, MJF made the Offer to TreCom to enter into a revised Subcontractor Agreement. TreCom accurately alleges that "on May 26, 2017, Amy Poinsett, the chief executive officer of MJ Freeway, e-mailed Phillip R. Gring, the chief operating officer of TreCom, to request that he execute a new subcontractor agreement in a standard form preferred by the Commonwealth." (Compl. ¶ 20.) As a matter of law, this May 26, 2017 subcontractor agreement constituted an offer by MJF to TreCom. *Fletcher-Harlee Corp. v. Pote Concrete Contrs., Inc.*, 482 F.3d 247, 250 (3d. App. 2007) ("An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it."). Importantly, Ms. Poinsett preemptively applied her signature to this Offer, which was in a Microsoft Word document. (Ex. 2 at P. 17.)[2]

TreCom misrepresents what happened next. According to TreCom, "MJ Freeway and TreCom executed [the Offer] on May 26, 2017." (Compl. ¶ 21.) TreCom's own Exhibit A reveals that this is simply not true. TreCom's Counteroffer, found at Exhibit A, contains materially different

[2] The Court may properly consider Exhibit 2 because it is an indisputably authentic business record that TreCom uses to frame the Complaint as the "May 26, 2017 subcontractor agreement" in Paragraphs 18, 20 – 29, 36 – 38, and 49. *Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9. TreCom specifically references this email with the exact parties, date, and subject matter. (Compl. ¶ 20.) TreCom has undisputed actual notice of all the information in this document as evidenced by TreCom's repeated references to Exhibit 2 in the Complaint. *Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9.

terms from the Offer. TreCom placed its signature, and without authorization MJF's signature, on the Counteroffer on May 30, 2017. (Compl. Ex. A at P. 17.) TreCom, however, fails to plead any acceptance or agreement by MJF after May 26, 2017. The Counteroffer was simply not accepted by MJF.

TreCom did not "accept" MJF's Offer, but instead "made modifications" to the Offer's terms and proceeded to make the Counteroffer to MJF. (Ex. 3.)[3] On May 30, 2017, TreCom sent the materially modified Counteroffer to MJF for its consideration. (*Id*.) Thus, TreCom "purport[ed] to accept [the Offer], but instead chang[ed] its terms." *See O'Keefe*, 2004 U.S. Dist. LEXIS 11277 *5. As a matter of law, TreCom's May 30, 2017 document was a counteroffer. *See id.* ("A reply to an offer which purports to accept it, but instead changes its terms, is not an acceptance but a counter-offer."). Consistent with TreCom's conspicuously absent allegations, MJF did not accept the Counteroffer, nor did MJF approve TreCom's usage of Ms. Poinsett's signature on the Counteroffer. The signature was placed on the Counteroffer by TreCom, not MJF. A party simply may not unilaterally modify a pre-signed offer and proceed to use the other party's signature without that party's approval. *See, e.g.*, *id*; *see also Marquess*, 427 Fed. Appx. at *189-90 (a forged signature renders a contract void). Regardless, TreCom's failure to allege an acceptance after TreCom's May

[3] The Court may properly consider Exhibit 3 because it is an indisputably authentic business record that TreCom uses to frame the Complaint through repeated references to the second executed subcontractor agreement in Paragraphs 18, 20 – 29, 36 – 38, and 49. *Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9. This is a true and correct copy of the transmittal that purportedly operated as "acceptance" of Exhibit A that is attached to the Complaint. (Compl. ¶ 21.) TreCom has undisputed actual notice of all the information in this document as evidenced by TreCom's repeated references to this document in the Complaint. *Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9.

30, 2017 Counteroffer renders Exhibit A unenforceable because a contract was never formed. *Richter*, 2009 U.S. Dist. LEXIS 120783 *7-8.

Thus, for any of these reasons, Exhibit A is unenforceable as a contract as a matter of law. *Marquess*, 427 Fed. Appx. at *189-90. Because a party cannot breach an unenforceable contract, TreCom did not, and will never be able to, allege a breach of Exhibit A as required by law. *Arreguin-Jimenez*, 60 Fed. Appx. at 897 ("before there can be a breach of contract there must be a contract."); *Richter*, 2009 U.S. Dist. LEXIS 120783 *7. Claim I is therefore futile and should be dismissed with prejudice. *See Rashid*, 1997 U.S. Dist. LEXIS 8870 *6.

B. TreCom submitted and misrepresented Exhibit A to the court.

Furthermore, TreCom knew MJF did not authorize the use of its signature on the Counteroffer and its subsequent use of the Counteroffer in this lawsuit constitutes a "near-classic example" of "fraud on the court." *See Aoude*, 892 F.2d at 1118 (a "near-classic example" of fraud on the court is when a plaintiff fabricates the purchase agreement, gives it to his lawyer, reads the complaint before it was filed, realized that counsel, acting on its behalf, proposed to attach the bogus agreement to the complaint, and nevertheless authorized the filing); *see also Midlantic Nat'l Bank v. Kouterick*, 167 B.R. 353, 366 (Bankr. D.N.J. May 24, 1994) ("Misuse of the judicial process through misrepresentations is an improper purpose"; "In appropriate circumstances, a district court may impose a punitive sanction for the filing of a paper that lacks factual foundation and is intended to mislead the Court and opposing parties"). TreCom has presented no evidence that MJF accepted the terms of the Counteroffer and specifically authorized TreCom to place its signature on TreCom's new terms. No such evidence of authorization exists. As such, TreCom's assertions in its Complaint were wrongful.

i. TreCom Applied a Forged Signature to the Counteroffer.

When a party applies an electronic version of a signature to an agreement without permission, "that [] is a forgery, not a genuine signature." *Opals on Ice Lingerie, Designs by Bernadette, Inc. v. Bodylines Inc.* 320 F.3d 362, 370 (2nd Cir. 2002) ("[The parties] agree that the signature . . . on the [Agreement] was 'cut and pasted'--in other words, that it is a forgery, not a genuine signature.")The perpetuation of a forged signature on a contract renders it void. *Marquess*, 427 Fed. Appx. at *189-90. TreCom sent the Counteroffer to MJF with Ms. Poinsett's signature already applied without permission. (Ex. 3.) TreCom did not subsequently receive MJF's approval or permission for the modifications contained within the Counteroffer, nor does TreCom allege as much. Now, TreCom submits this document to the Court as a legitimate contract. As a matter of Pennsylvania law, Exabit A is a forgery and according to the law, TreCom has perpetuated fraud on the court. *Aoude*, 892 F.2d at 1118.

In support of this argument, the evidence submitted by TreCom indicates TreCom's knowledge at the time of contract negotiation. Specifically, in a communication to MJF, Mr. Gring, TreCom's Chief Operating Officer, requested for MJF to "review Section 7 as I made modifications." (Ex. 3.) TreCom acknowledged there were changes to the Offer and acknowledged there was no agreement because MJF needed to review the Counteroffer. Given the admitted need for further review by MJF, it is puzzling that TreCom purposefully placed Ms. Poinsett's signature on its Counteroffer .[4] It is even more troubling that TreCom now asserts that this Counteroffer that

[4] TreCom surely would have included allegations to explain why TreCom's signature date was inconsistent with the Complaint's allegations if the explanation was not fatal to TreCom's credibility and case.

needed more review by MJF is now the operative agreement. Indeed, even if there was confusion about the status of the Counteroffer, the facts as alleged clearly show that the agreement was not fully executed and was under review by MJF. There is no evidence that MJF accepted that agreement. Indeed, the parties agreed to a different form, consistent with the original agreement between the parties, a week later. If TreCom and MJF intended to execute the Counteroffer, there would have been no need for the June agreement between the parties. Based on controlling caselaw, the court can order dismissal with prejudice on these facts alone. *Aoude*, 892 F.2d at 1119.

ii. TreCom Removed the Majority of TreCom's Work from the Counteroffer.

The substance of TreCom's modifications in the Counteroffer indicates an improper motive. In stark contrast to agreements that TreCom signed both before and after the forgery, TreCom sought to eliminate the "majority of work" assigned to it without MJF's permission, approval, or consent. (*Compare* Ex. 2; *with* Ex. 3; Ex. 6.) Remarkably, TreCom did not make a corresponding reduction in the contract value. (*Id*.)

The parties undeniably agreed for TreCom to provide Tier 1 Support Services, a Project Manager, a Business Analyst, and hardware procurement services in exchange for $3,379,714.11.[5] (Ex. 1; Ex. 2; Ex. 4; Ex. 5; Ex. 6.) Indeed, these terms are memorialized in the Prime Contract, which is referenced in the parties' only operative agreement.[6] (Ex. 1, Ex. 4.)[7] The Prime Contract

[5] The Commonwealth of Pennsylvania recently confirmed that TreCom's role in the project included Tier 1 Support Services despite TreCom's presentation of the same allegations from this Complaint. (Ex. 6.)

[6] The Prime Contract, which assigns "Tier 1 Support" to TreCom, "estimated" TreCom's price at $3,384,564.11. (Ex. 4.) Indeed, this estimate is fewer than $5,000, or less than 0.2%, off of the value that TreCom agreed to provide. (*Compare* Ex. 1; *with* Ex. 4.) Any argument (footnote continued)

assigns "Tier 1 Support, Project Manager, Business Analyst, [and] Equipment Provisioning" to TreCom in exchange for 35.09% of the cost of the Prime Contract. (Ex. 4.)

When the parties executed Agreement #1 on May 4, 2017, they defaulted to the Prime Contract and agreed that TreCom would provide "Service Desk, **as described in the Prime Contract**, Key Staff Personnel, **as identified in the Prime Contract**, to include the Project Manager and Business Analyst, [and] Hardware, **as described in the Prime Contract**." (Ex. 1.) Agreement #1, which the parties both executed, established that TreCom would provide these services in exchange for an "estimated" $3,379,714.11. Consistent with the repeated references to the Prime Contract, this sum is less than five thousand dollars from the "estimated" value that TreCom would receive for its assigned services, including Tier 1 Support. Thus, the nearly identical compensation figures, when paired with the repeated references to the Prime Contract, undeniably indicate that TreCom was to provide Tier 1 Support, Project Manager, Business Analyst, [and] Equipment Provisioning" to TreCom in exchange for approximately $3,379,714.11. (Ex. 4.)

Consistent with the Prime Contract and the agreement initially executed between the parties, MJF's Offer to TreCom on May 26, 2017 contained these precise terms. Specifically, TreCom would provide "Service Desk, **as described in the Prime Contract**, Key Staff Personnel, **as**

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that this $5,000 accounted for the reduction in the "vast majority" of TreCom's work is entirely disingenuous, particularly when TreCom has billed millions of dollars for Tier 1 Support Services. (Compl. ¶¶ 31-32.)

[7] The Court may properly consider Exhibit 4 because it is an indisputably authentic business record that TreCom uses to frame the Complaint in Paragraphs 12 – 17. *Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9. TreCom specifically references this document with the specific terms from the Request for Quotation that applied to TreCom. (Compl. ¶ 16.) TreCom has undisputed actual notice of all the information in this document as evidenced by TreCom's repeated references to Exhibit 4 in the Complaint. *Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9.

identified in the Prime Contract, to include the Project Manager and Business Analyst, [and] Hardware, **as described in the Prime Contract**." (Ex. 2.) In exchange, TreCom would receive an "estimated" $3,379,714.11. (*Id*.) Again, this is less than five thousand dollars off of the estimated cost of TreCom's services from the Prime Contract, which explicitly included Tier 1 Support Services. (Ex. 4.) The terms from MJF's May 26, 2017 Offer are therefore identical with Agreement #1 and the Prime Contract.

Despite the consistency between the Prime Contract, the initial agreement executed by the parties, and MJF's subsequent Offer, TreCom's Counteroffer improperly sought to eliminate these services from without a corresponding reduction in compensation or without agreement by MJF. (Ex. 3.) This is particularly inconsistent because "Tier 1 work [was] the majority of work previously performed by TreCom." (Ex. 6.)[8]

Despite the very different statement of work found in the Counteroffer, the parties soon thereafter agreed to terms consistent with the initial agreement between the parties and the Prime Contract. TreCom itself removed any modicum of doubt as to the parties' agreement on the scope of work when it signed a letter of intent (the "Letter of Intent") nearly a week after the Counteroffer was transmitted to MJF. The Letter of Intent explicitly assigned Tier 1 Support services to TreCom.[9]

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[8] The Court may properly consider Exhibit 6 because it is an indisputably authentic business record that TreCom uses to frame the Complaint through direct quotes and references in Paragraph 43. *Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9. TreCom has undisputed actual notice of all the information in this document as evidenced by TreCom's direct quotation from Exhibit 6 in the Complaint. *Id*.

[9] TreCom previously argued to the Commonwealth of Pennsylvania that the Change Orders (Exhibit B to the Complaint) accounted for the Tier 1 Support Services. The Commonwealth rejected these arguments, with good reason. The Letter of Intent reflects TreCom's clear understanding that Tier 1 Support Services were included in the $3,379,714.11 from the (footnote continued)

(Ex. 5.)[10] On June 5, 2017, MJF reached out to TreCom to execute "a Letter of Intent **that matches the subcontractor agreement**." (*Id.*) Three days later, TreCom returned the executed Letter of Intent. Unsurprisingly, the fully executed Letter of Intent provided that "TreCom Systems Group, Inc. shall provide Tier 1 Support, Business Analyst, Project Manager, and required hardware." (*Id.*) In exchange for this bundle of services, TreCom was to receive "an estimated $3,379,714.11." (*Id.*) "These services represent 35.09% of the total cost in the [MJF] cost submittal for the initial term of the contract." (*Id.*) Thus, over a week after TreCom transmitted the Counteroffer to MJF, it unequivocally committed to provide Tier 1 Support Services as part of its service package in exchange for $3,379,714.11.[11] (*Id.*) Surely, if the parties had agreed to remove the "vast majority" of TreCom's duties under the subcontract, this Letter of Intent, which "matches the subcontractor agreement" would have also excluded Tier 1 Support Services. (*Id.*) This further reinforces that the parties did not agree to TreCom's modifications in the Counteroffer, Exhibit A. The pattern of behavior by the parties indicates a consistent statement of work for a consistent amount of compensation, with the only outlier being TreCom's unaccepted Counteroffer.

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subcontractor agreement. The Change Orders were necessary because TreCom's bills "vastly exceeded" TreCom's quoted cost. (Ex. 6.)

[10] The Court may properly consider Exhibit 5 because it is an indisputably authentic business record that TreCom uses to frame the Complaint in Paragraphs 17, 18, and 33. *Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9. TreCom specifically references this document as it constitutes the most recent agreement between the parties with the precise remuneration and associated percentage referenced in the Complaint. (Compl. ¶ 17.) TreCom has undisputed actual notice of all the information in this document as evidenced by TreCom's signature on Exhibit 5. *Deutsche Bank*, 2017 U.S. Dist. LEXIS 203886 *8-9.

[11] At a minimum, TreCom is estopped from an argument that the parties agreed to reduce TreCom's scope of services because TreCom signed the Letter of Intent nearly a week later which conclusively reveals that TreCom understood that Tier 1 Support Services were part of the service package that MJF would pay $3,379,714.11 for. (Ex. 5.)

C. TreCom is the Only Party that Breached a Contract.

At the heart of this lawsuit is the scope of services that TreCom agreed to provide. As discussed *supra*, TreCom agreed both before and after the Counteroffer to provide Tier 1 Support services. (Ex. 1, Ex. 4, Ex. 5, Ex. 6.) The only document that excludes Tier 1 Support services is the unapproved TreCom Counteroffer. (Compl. Ex. A at P. 4.) TreCom's scope of work therefore undeniably included Tier 1 Support. (Ex. 1, 2, 5, 6.) As of August 3, 2020, TreCom no longer provides this service to the Commonwealth. (Ex. 6 – "On approximately August 3, 2020, the [Pennsylvania] Department of Health transferred all of the Tier 1 work – which we understand to be the majority of work previously performed by TreCom – to Unique Source.")[12] Thus, the only party that failed to perform its contractual obligations was TreCom.

Despite this clear breach by TreCom, MJF worked tirelessly with the Commonwealth to find a continued role for TreCom. (*See* Ex. 6.) TreCom rejected each attempt by MJF to create a new role for TreCom after TreCom ceased performance of its contractual duties. (*See, e.g.*, *id*.) Indeed, according to the Pennsylvania Bureau of Diversity, Inclusion and Small Business Opportunities, "MJF has exceeded its contractual commitment to TreCom by $185,746.64 (representing 36.25% of the total contract spend.)" (*Id*. (emphasis present in original letter from the Commonwealth).) MJF has fulfilled its financial duties to TreCom and after the Commonwealth made the choice to use a different vendor for Tier 1 services, MJF continued to make attempts to keep TreCom involved in the project, to no avail.

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[12] "On approximately August 3, 2020, the Department of Health transferred all of the Tier 1 work – which we understand to be the majority of work previously performed by TreCom – to UniqueSource. This was clearly contemplated by section IV.3.E.1 of the RFQ: "At its sole discretion, the Commonwealth or its agent may provide tier 1 support." (Ex. 6 at 1.)

D. Claim II Fails Because TreCom Does Not Allege Any Benefit Conferred Upon MJF.

TreCom's second claim for relief for unjust enrichment (Claim II) suffers a similar fate to the breach of contract claim. In order to properly allege a claim for unjust enrichment, "a plaintiff must allege (1) that the plaintiff conferred a benefit on the defendant; (2) the defendant appreciated the benefit; and (3) the defendant accepted and retained the benefit under circumstances in which it would be inequitable to do so without paying for the benefit." *Banks v. Allstate Fire & Cas. Ins. Co.*, 454 F. Supp. 3d 428, 442 (M.D. Pa. 2020).

TreCom clearly states that any work allegedly performed by TreCom was for the benefit of the owner of the Prime Contract, not MJF. (*See, e.g.*, Compl. ¶¶ 12, 16 – "[A]t least 35.09% of the work under the contract ['to provide information technology services related to implementation of a new medical marijuana program the Pennsylvania Department of Health was to oversee'] would be performed by TreCom.") Indeed, TreCom does not allege how MJF is in any way benefitted by services provided under a contract issued by a third party. TreCom does vaguely allege that TreCom conferred "benefits upon MJ Freeway and Akerna by performing extensive information technology services and supplying related equipment." (Compl. ¶ 59.) There is no evidence that TreCom provided information technology services to MJF or provided MJF any hardware. However, TreCom's own description of the Prime Contract clearly indicates that these services do not benefit MJF, but the end user and the Commonwealth. (*Id.* ¶ 12.)

TreCom does not allege how the hardware supplied by TreCom benefitted MJF. This is because the hardware went to third parties that use the system created under the Prime Contract, not for the benefit of MJF. Furthermore, TreCom does not allege how the information technology services benefited MJF. TreCom does not allege that these services were within the scope of any

operative contract or informal agreement to the benefit of MJF. Nor does the Complaint allege that TreCom provided information technology services to MJF. In fact, these missing details reveal that this is the precise type of conclusory allegation that must be disregarded by the Court during the motion to dismiss stage. *Ashcroft*, 556 U.S. at 663 ("the tenant that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements") ; *see also King*, 2018 U.S. Dist. LEXIS 157259 at *16-17 (declining to accept an allegation that defendants "received a benefit" as true because the existence of a benefit "is a legal conclusion, not a fact, because it is an element of the cause of action of unjust enrichment.").

In a case with a similar structural relationship between the parties, an unjust enrichment claim was dismissed because the plaintiff could only proffer the following allegation: "[Plaintiff] claims that it conferred benefits on [Defendant] by 'funding the financially unsustainable and fraudulent [] Program, while [the third-party owner of the Program] retained most of the [Program] fees and [Defendant] derivatively collected portions therefrom." *Car Sense, Inc. v. Am. Special Risk, LLC*, 56 F. Supp. 3d 686, 698 (E.D. Pa. 2014). Just like the *Car Sense* plaintiff, TreCom alleges that it provided a vague and undefined set of services in support of a program that was owned by a third party. (Compl. ¶¶ 12, 16, 59.) The *Car Sense* defendant, just like MJF, collected payments from the program owned by the third party owner. 56 F. Supp. 3d at 698. *Car Sense* concluded that this strikingly similar statement was a "vague, conclusory allegation" and was "not enough to establish that [Plaintiff] conferred a benefit." *Id*. The court proceeded to dismiss the *Car Sense* unjust enrichment claim. Due to these unavoidable similarities and the conclusory nature of TreCom's

allegation of a "benefit" allegedly conferred upon MJF, this court should follow precedent and dismiss Claim II. *Id*.

Finally, TreCom appears to take the untenable position that a subcontractor may perform any services under a Prime Contract, even without an operative agreement with the prime contractor, and receive compensation from the prime contractor. Indeed, this would create a *carte blache* for all subcontractors to provide whatever services they please at the prime contractor's expense. This is not the nature of the Prime Contract or any contract involved in this dispute and it certainly would not benefit the Commonwealth of Pennsylvania nor its taxpayers. Indeed, just the opposite. In the alternative, TreCom suggests that it can enforce an unagreed upon Counteroffer, perform any set of services it pleases, and still recover its alleged costs from the prime contractor despite the fact the financial committed promised to TreCom under the LOI and the initial subcontract were satisfied. The court should not reward TreCom's disingenuous position.

IV. CONCLUSION

TreCom asks the court to adjudicate a claim based on an unagreed upon Counteroffer that directly contradicts the parties' agreements both before and after the Counteroffer. This is precisely the type of lawsuit that Rule 12(b)(6) seeks to eradicate. TreCom's allegations clearly reveal that MJF properly terminated the only operative contract between the parties. TreCom's own documents further reveal that Exhibit A is undeniably a counteroffer with materially different terms not accepted by MJF. If TreCom had the facts to avoid this issue, it surely would not have resorted to a misrepresentation of the facts to the Court. The Court should dismiss this lawsuit with prejudice and without the right to amend.

Dated: May 6, 2021.

Respectfully Submitted,

By: *s/ Steven D. Urgo*

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2021, a true and correct copy of the **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS MJ FREEWAY, LLC AND AKERNA CORPORATION'S MOTION TO DISMISS PURSUANT TO F.R.C.P 12(b)(6)** was served via CM/ECF system which will send notification of the filing to the following:

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