NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MELISSA CAMPBELL individually and on behalf of all others similarly situated , Plaintiffs, v. HEARTLAND PAYMENT SYSTEMS, INC. Defendant.	Civil Action No. 16-cv-01104 (PGS) **MEMORANDUM AND ORDER**

SHERIDAN, U.S.D.J.

This matter comes before the Court on a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) filed by Defendant Heartland Payment Systems, Inc. (hereinafter "HPS") (ECF No. 4).

Facts and Procedural Background

On February 26, 2016, Plaintiff filed a Class Action Complaint alleging: (1) breach of contract; (2) unjust enrichment, promissory estoppel; (3) equitable estoppel; and (4) breach of implied covenant of good faith and fair dealing. This action arises out of Plaintiff's employment with HPS. Beginning in or about January 2008, Plaintiff Melissa Campbell was employed (initially under her maiden name Melissa Jacobsen) by Defendant HPS as a Relationship Manager – a sales person. (ECF No. 1, Compl., ¶ 10). At some point later in 2008, Campbell was promoted to Territory Manager, which is a sales manager position. (*Id.* ¶ 11). In or about November of 2010, Campbell voluntarily returned to the position of Relationship Manager, her original salesperson position. (*Id.* ¶ 12). Plaintiff alleges she was induced to switch back to her original role, which

was a commission-only payment arrangement, in exchange for the ability to attain vested status for residual commission in perpetuity, even after separation from employment. (*Id.* at ¶ 2). Effective March 31, 2011, Campbell achieved "Vested Status." (*Id.* at ¶ 13). Paragraph 3 of the "Vested Relationship Manager Agreement" (Exhibit A) between Campbell and HPS states as follows:

> As a Vested RM, unless RM's employment is terminated for cause as defined herein, and subject to the rights of HPS to purchase portfolio equity pursuant to Section 4 hereof, RM shall continue to receive Residual Commissions so long as merchants signed by RM continue to process bankcard, gift card, check services, or payroll transactions through HPS…."

In addition, HPS states in its 2014 10-K that:

> We pay our salespersons residual commissions based on the gross margin generated from the monthly processing activity of SME, payroll, and loyalty marketing merchant accounts signed by them. We refer to these residual commissions as the 'owned' portion of such commissions, or 'portfolio equity'. The salesperson has no obligation to perform additional services for the merchant for so long as the merchant continues processing with us…"(Emphasis added). "…Vested status entitles the salesperson to his or her residual commissions for as long as the merchant processes with us, even if the salesperson is no longer employed by us.

(Emphasis added).

Campbell established relationships with merchants, and she earned and was paid Residual Commissions in connection with products and/or services (bankcard, gift card, check services and/or payroll transactions, and related products and services) that she sold under the American Express program. (Compl. ¶15). After Campbell voluntarily resigned in or about October 2012, HPS continued to pay Vested Residual Commissions to her. (*Id.* at ¶ 16). However, after January of 2015, HPS stopped paying Campbell her Vested Residual Commissions for the merchants to whom she sold products and/or services under the American Express program. (*Id.* ¶ 17). HPS

did not provide Campbell with a reason, warning, or explanation for discontinuing the Vested Residual Commissions, and did not offer to purchase her "Portfolio Equity" pursuant to Section 4 of the Vested Relationship Manager Agreement. (*Id.* at ¶ 18). Moreover, Plaintiff was not terminated for cause. (*Id.* at ¶ 19). HPS had no contractual or other right to discontinue payment of the subject vested commissions to Campbell, to which she is entitled, even after her separation from employment. (*Id.* at ¶ 20).

Plaintiff alleges that the merchants to whom Plaintiffs and the Class members sold products and services have continued to process transactions through HPS, and HPS has continued to receive revenue from American Express for those merchants' transactions beyond January of 2015. (*Id.* at ¶ 36).

HPS seeks dismissal of the Complaint on several grounds. Initially, HPS contends that the breach of contract claim fails because HPS's Sales Policy Manual ("Sales Policy") is incorporated into the VRMA, and prohibits Plaintiff from being compensated for the American Express transactions. Specifically, HPS asserts that Paragraph 2 of the VRMA provides that:

> RM shall receive compensation in accordance with the provisions of the HPS Sales Policy Manual as such manual may be amended from time to time.

ECF No. 4-1, p. 2.

Meanwhile, the Sales Policy defines "Residual Commissions" as a "monthly recurring commission". For Primary Services, Residual Commissions are equal to a percentage (the "Residual Percentage") of the actual Margin generated by an Account each month plus or minus any True-Up Amounts. For Ancillary Services, Residual Commissions are calculate[d] as described in the respective sections of the applicable Sales Policy.

The Sales Policy also distinguishes between "Primary Services" and "Ancillary Services" for purposes of payment of Residual Commissions. The Sales Policy defines "Ancillary Products and Services" as "Products and services provided by HPS to Clients in addition to Primary Services." Section 3 of the Sales Policy defines the scope of those Ancillary services and includes "American Express Card Processing Services" as an Ancillary Service. HPS' obligation to pay Residual Commissions for American Express Card Processing Services is set forth as follows:

> HPS maintains two compensation programs in partnership with American Express ("AXP"): one point and ESA. Subject to the published rules and policies of AXP and HPS in effect at the time of signing, RM shall receive compensation for selling AXP card processing services in accordance with the table below. In no case shall an RM receive compensation unless HPS receives payment from AXP.

Therefore, HPS argues that pursuant to the terms of the Sales Policy, HPS agreed to pay residual commissions for American Express Ancillary Services for only two specific American Express Programs: (1) OnePoint; and (2) ESA, for up to 60 months. Defendants also note that it is a matter of public record that in May 2014, American Express announced that it was implementing a new program for small merchants to replace OnePoint and ESA. Specifically, AmEx announced that OptBlue would replace these programs, which was widely reported in the press. Accordingly, Defendant asserts that, as a matter of public record, AmEx discontinued OnePoint and ESA and implemented OptBlue. Therefore, by the end of 2014, HPS's merchants have migrated to OneBlue, the new AmEx Program.

Legal Standards and Analysis:

12(b)(6) Motion to Dismiss

On a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6), the Court is required to accept as true all allegations in the Complaint and all reasonable inferences

that can be drawn therefrom, and to view them in the light most favorable to the non-moving party. *See Oshiver v. Levin, Fishbein, Sedran & Berman,* 38 F.3d 1380, 1384 (3d Cir. 1994). "To survive a motion to dismiss, a complaint 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, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). While a court will accept well-pleaded allegations as true for the purposes of the motion, it will not accept bald assertions, unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations. *Iqbal*, 556 U.S. at 678-79; *see also Morse v. Lower Merion School District*, 132 F.3d 902, 906 (3d Cir. 1997). The question is whether the claimant can prove any set of facts consistent with his or her allegations that will entitle him or her to relief, not whether that person will ultimately prevail. *Semerenko v. Cendant Corp.*, 223 F.3d 165, 173 (3d Cir.), *cert. denied, Forbes v. Semerenko*, 531 U.S. 1149, 121 S. Ct. 1091 (2001).

While courts generally consider only the allegations contained in the complaint, "exhibits attached to the complaint and matters of public record" are also considered. *See Taylor v. New Jersey*, No. CIV. A. 13-6594 PGS, 2014 WL 4215440, at *3 (D.N.J. Aug. 25, 2014) (quoting *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.,* 998 F.2d 1192, 1196 (3d Cir.1993). The court may consider "undisputedly authentic document[s] that…[are] attached[d] as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] document[s]." *Id.* Thus, "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may [also] be considered." *Pryor v. Nat'l Collegiate Athletic Ass'n*, 288 F.3d 548, 560 (3d Cir.2002) (internal citation omitted). "Although a district court may not consider matters extraneous to the pleadings, 'a document integral to or explicitly relied upon in the complaint may be considered without converting the

motion to dismiss into one for summary judgment.'"). *U.S. Express Lines, Ltd. V. Higgins*, 281 F.3d 383, 388 (3d Cir.2002). (citing *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir.1997).

Breach of Contract

A breach of contract claim "will withstand a motion to dismiss only if plaintiff 'alleges the essential terms of the parties purported to contract in nonconclusory language, including the specific provisions of the contract upon which liability is predicated.'" *Reckitt Benckiser Inc. v. Tris Pharma, Inc.*, No. CIV. A. 09-3125 FLW, 2011 WL 773034, at *6 (D.N.J. Feb. 28, 2011) (quoting *Sirohi v. Trs. Of Columbia Univ.*, No. 97-7912, 1998 WL 642463, at *2 (2d. Cir. Apr. 16, 1998). "Contract interpretation is a matter of law that is properly considered on a motion to dismiss." (*Hofman v. Time Warner Cable Inc.*, No. 12-00978 (ES), 2013 WL 2460121, at *7 (D.N.J. June 6, 2013).

Campbell does not dispute that the Sales Policy is part of her contract with HPS and plainly states that sales compensation would be paid on only two specific American Express Programs, One Point and ESA. Furthermore, Campbell admits that American Express discontinued these programs and created a "new program called OptBlue..."

Here, the Complaint alleges that "HPS had no contractual or other right to discontinue payment of the subject vested commissions to Campbell – to which she is entitled..." (Compl. ¶ 20). Although there appears to be no actual contractual provision that requires HPS to pay sales commissions after One Point and ESA were discontinued by American Express; and Plaintiff has not alleged what the Commission would be, or how it would be calculated. Instead, Plaintiff offers is the assumption that some inculpatory contract language may exist, arguing that "*Presumably*, the Sales Policy was revised...." and "*Surely* HPS modified the compensation table to reflect new

commission rates." (ECF No. 6, p. 3). Plaintiff's generalized conclusory allegations are insufficient to show any breach of contract. As such, Plaintiff has failed to state a claim for breach of contract. However, Plaintiff may amend the Complaint in order to allege specific facts giving rise to Defendant's obligation to continue paying commissions.

As to defendant's argument that contract language bars Plaintiff's claim, this may require factual determinations and is not ripe for resolution at the pleading stage. Accordingly, Defendant's Motion to Dismiss is granted, and Plaintiff may amend the Complaint within 30 days.

Unjust Enrichment

Where a plaintiff "concedes that its relationship is governed – in its entirety – by a valid and binding contract, Plaintiff has failed to state a facially plausible claim for unjust enrichment under New Jersey law." *MZL Capital Holdings, Inc. v. TD Bank N.A.*, No. 14-CV-05772 RMB/AMD, 2015 WL 4914695, at *9 (D.N.J. Aug. 18, 2015) (citing *RD Legal Funding, LLC*, at *24). "Recovery under unjust enrichment may not be had [under New Jersey law] when a valid, unrescinded contract governs the rights of the parties." *Van Orman v. Am. Ins. Co.*, 680 F.2d 301, 310 (3rd Cir. 1982). "Quasi-contract liability will not be imposed, however, if an express contract exists concerning the identical subject matter. The parties are bound by their agreement, and there is no ground for implying a promise as long as a valid unrescinded contract governs the rights of the parties." *Suburban Transfer Serv., Inc. v. Beech holdings, Inc.*, 716 F.2d 220, 227 (3rd Cir. 1983). "While it is generally true that a plaintiff may allege alternative claims for breach of contract and unjust enrichment, despite the legal impossibility of recovery under both, a plaintiff may plead breach of contract and unjust enrichment claims in the alternative only where an express contract cannot be proven." *Gallo v. PHH Mortg. Corp.*, 916 F. Supp. 2d 537, 553 (D.N.J. 2012.

"A cause of action for unjust enrichment requires proof that 'defendant[s] received a benefit and that retention of that benefit without payment would be unjust." Id. at 382. Moreover, "[u]njust enrichment is not an independent theory of liability, but is the basis for a claim of quasi-contractual liability." Id. at 382. However, "A quasi-contract claim cannot exist when there is an enforceable agreement between parties." *MK Strategies, LLC v. Ann Taylor Stores Corp.*, 567 F.Supp.2d 729, 733-34 (D.N.J. 2008) (citing *Callano v. Oakwood Park Homes Corp.*, 91 N.J. Super. 105 (App. Div. 1966)).

Here, the parties do not dispute that the contract in question was a valid agreement, and Defendant argues that because there was a valid and enforceable contract, a separate claim for unjust enrichment should not be allowed. (ECF No. 41). However, at the pleading stage it would be unnecessary to dismiss a claim that might be pled in the alternative. See *Palmeri v. LG Electronics USA, Inc.* 2008 WL 294585 (D.N.J. July 30, 2008) (declined to dismiss claim of unjust enrichment under New Jersey law where plaintiff pled in the alternative to recover on a contract); see also, *CDK Global, LLC. v. Tulley Automotive Grp., Inc.*, 2016 WL 1718100 at *7 (D.N.J. April 29, 2016) ("[A]t the pleading stage, dismissal of an unjust enrichment claim because it might turn out to be superfluous would be premature"). Thus, the Court will allow the claim for unjust enrichment to proceed, since it is just the pleading stage.

However, looking at the facts alleged, the change to American Express' OptBlue program may terminate the agreement; and a change may unjustly enrich Defendant if the OptBlue program is substantively the same as One Point and/or ESA. However, such facts are not clearly pled. Thus, Plaintiff's unjust enrichment claim is dismissed. Plaintiff may amend the Complaint within 30 days to allege more facts.

Promissory Estoppel and Equitable Estoppel

In New Jersey, the elements of a claim for promissory estoppel are: (1) a clear and definite promise; (2) made with the expectation that the promissee will rely on it; (3) reasonable reliance and (4) definite and substantial detriment. *Darush L.L.C. v. Macy's Inc.*, No. CIV. 2:12-02167-WHW, 2012 WL 2576358, at *3 (D.N.J. July 3, 2012) (citing *Cotter v. Newark Hous. Auth.*, 422 F. App'x 95, 99 (3d Cir. 2011); *Toll Bros., Inc. v. Bd. Of Chosen Freeholders of County of Burlington*, 194 N.J. 223 (N.J. 2008)). A promissory estoppel claim also requires the pleading of a clear and definite promise "of future performance." *See coastal Grp., Inc. v. Westholme Partners*, No. CIV. A. 94-3010 (MTB), 1996 WL 33545605, at *6 (D.N.J. Oct. 3, 1996). Secondly, a promissory estoppel claim is not cognizable where "the detriment is a result of Defendant's alleged breach of the Supply Agreement." *Fuller v. PepsiCo, Inc.*, No. CIV.A. 11-4989 PGS, 2012 WL 3990635, at *4 (D.N.J. Sept. 11, 2012). Furthermore, under "New Jersey law, if a valid contract exists, a claim for promissory estoppel must fail." *Brock & Co. v. Kings Row Associates*, No. CIV. A. 04-CV-2096, 2004 WL 2624864, at *4 (E.D. Pa. Nov. 17, 2004). A promissory estoppel claim must be dismissed "absent a claim that the Agreement is invalid or that it performed work beyond that covered by the Agreement." *Freightmaster USA, LLC v. Fedex, Inc.*, No. CIV. 14-3229 KSH CLW, 2015 WL 1472665 at *6 (D.N.J. Mar. 31, 2015.

Here, the Complaint only alleges that HPS promised to pay Residual Commissions to vested relationship managers and that "Defendant made common statements, representations and declarations which constitute a clear and definite promise to pay all sums due and owing to Plaintiff and the Class members..." The Complaint fails to allege any facts showing a "clear and definite" promise. Moreover, the detriment that Plaintiff suffered stems from HPS' alleged terms of the

agreement. Because the agreement on its face appears to control, Plaintiff cannot proceed under a theory of promissory estoppel.

To state a claim for equitable estoppel under New Jersey law, "a plaintiff must allege (1) a misrepresentation of material fact, known to the party sought to be estopped but unknown to the plaintiff, (2) made with the intention or expectation that it will be relied upon, (3) and upon which the plaintiff reasonably relied, (4) to its detriment." *Coastal Group, Inc. v. Westholme Partners*, at *6. In contrast to a claim for promissory estoppel, which "requires a plaintiff allege a promise of future performance, equitable estoppel requires a plaintiff to allege a misrepresentation of a material fact currently existing or having existed in the past." *Id.* at 6.

Here, there is nothing in the Complaint to suggest that Defendant made any present or past misrepresentation of material fact. Moreover, Plaintiff only alleges in a conclusory manner that "Plaintiff and the Class members expected to receive repayment pursuant to the contracts and/or agreements executed by [sic] agreed upon by the parties." The allegations, in addition to being conclusory, allege future performance which does not establish a claim for equitable estoppel.

In sum, the claims for promissory and/or equitable estoppel are dismissed with prejudice. It would be futile to allow an amendment to the Complaint because there is no alleged misrepresentation or any promise beyond those set forth in the contract.

<u>Good Faith and Fair Dealing</u>

To state a claim for a breach of the duty of good faith and fair dealing, a plaintiff must allege that the defendant acted "in bad faith or with a malicious motive…to deny the plaintiff some benefit of the bargain originally intended by the parties, even if that benefit was not an express provision of the contract." *Yapak, LLC v. Massachusetts Bay Ins. Co.*, No. 3:09-cv-3370, 2009 WL 3366464, at *2 (D.N.J. Oct. 16, 2009) (citing *Brunswick Hills Racquet club, Inc. v. Route 18*

Shopping Ctr. Assocs., 182 N.J. 210, 225 (2005); *Wilson v. Amerada Hess Corp.*, 168 N.J. 236, 251 (2001)). Bad motive or intention is essential, and an allegation of bad faith or unfair dealing should not be permitted to be advanced in the abstract…." *Angel Jet Servs., LLC v. Borough of Woodland Park*, No. 10-cv-6459, 2012 WL 5335830, at *4 (D.N.J. Oct. 26, 2012) (citing *Elliot & Frantz, Inc. v. Ingersoll-Rand Co.*, 457 F.3d 312, 329 (3d Cir. 2006)). "A plaintiff cannot satisfy the 'improper motive' element of a claim…by alleging, without more, that the defendant's discretionary decisions benefited the defendant and disadvantaged the plaintiff." *Hassler v. Sovereign Bank*, 644 F. Supp. 2d 509, 518 (D.N.J. 2009), *aff'd*, 374 F. App'x 341 (3d Cir. 2010) (citing *Wilson*, 168 N.J. at 246). "[T]he fact that a discretion-exercising party causes the dependent party to lose some or all of its anticipated benefit from the contract…is insufficient to establish a breach of contract by failing to perform in good faith." *Angel Jet*, 2012 WL 5335830, at *4 (quoting *Wilson*, 168 N.J. at 245-46). "An allegation of bad faith or unfair dealing should not be permitted to be advanced in the abstract…"

Here, the Complaint alleges that "HPS has wrongfully and intentionally breached the duty of good faith and fair dealing by denying Plaintiff and the Class members the compensation to which they are entitled under their employment agreements." (ECF no. 1 P61). The Complaint further alleges that HPS "acted in bad faith by not giving equal consideration to the interests of Plaintiff and the Class members as they have their own interests." (ECF No. 1 P61). However, these conclusory allegations are insufficient, as a matter of law, to state a claim. Campbell has not proffered evidence that HPS acted wrongfully and intentionally by denying her compensation. Furthermore, following the doctrine set forth in *Angel Jet*, Campbell's allegations are unsupported conclusions to show a plausible claim of breach of duty of good faith and fair dealing. This Count is dismissed. Plaintiff may amend the Complaint within 30 days.

ORDER

IT IS on this 26th day of September, 2016;

ORDERED that Defendant, Heartland Payment Systems, Inc.'s motion to dismiss the Complaint (ECF No. 4) is granted; and it is further

ORDERED that Plaintiff may amend Counts 1, 2 and 5 of the Complaint within thirty (30) days of this Order; and it is further

ORDERED that Counts 3 and 4 of the Complaint are dismissed with prejudice.

PETER G. SHERIDAN, U.S.D.J.