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

PARAMOUNT FINANCIAL COMMUNICATIONS, INC., doing business as "PLAN MANAGEMENT CORP.," and JONATHAN MILLER, Plaintiffs,	**CIVIL ACTION**
v.	**NO. 15-405**
BROADRIDGE INVESTOR COMMUNICATION SOLUTIONS, INC., Defendant.	

DuBois, J. **May 23, 2019**

MEMORANDUM

I. INTRODUCTION

This case arises out of two contracts: (1) a Marketing Agreement between plaintiff Paramount Financial Communications, Inc., doing business as "Plan Management Corporation" ("Plan Management"), and defendant, Broadridge Investor Communication Solutions, Inc. ("Broadridge"), and (2) a Stock Purchase Agreement between plaintiff Jonathan Miller, his wife, and a Broadridge affiliate. At this stage in the litigation, two claims remain: (1) that Broadridge breached its contractual duties to Plan Management under the Marketing Agreement and (2) that Broadridge fraudulently induced Miller to enter the Stock Purchase Agreement by falsely promising performance under the Marketing Agreement. Presently before the Court is Broadridge's motion for summary judgment. For the reasons that follow, the motion is denied.

II. BACKGROUND

Defendant Broadridge is a subsidiary of Broadridge Financial Solutions, Inc., a "large company with more than 6,000 employees and more than $2 billion in annual revenues." *See* Pls. Mem. Law Opp. Def. Mot. Summ. J. ("Pls. Resp.") 4. In mid-2009, Broadridge approached

Miller to discuss the potential purchase of Miller's company StockTrans, Inc. ("StockTrans"), by Broadridge Output Solutions, Inc., a Broadridge affiliate.[1] *See* Def. Statement Undisp. Material Facts ("SUMF") ¶ 1. StockTrans provides stock transfer agent services. Miller Aff. ¶ 1. Miller owned 90% of StockTrans, and his wife owned the remaining 10%. SUMF ¶ 2.

Initially, Broadridge and Miller discussed whether Broadridge would also acquire Miller's company, plaintiff Plan Management. *See id.* ¶ 4. Plan Management provides "employee stock benefit plan management and administration services" and software related to those services. Miller Aff. ¶¶ 2–3.

Plaintiffs maintain that in determining whether to acquire Plan Management, Broadridge conducted "extensive due diligence" on Plan Management. *See* Pls. Resp. Opp. SUMF ¶ 31. Those efforts included, *inter alia*, Miller sending information detailing Plan Management's finances and infrastructure and Broadridge hiring an accounting and consulting firm to "perform[] due diligence on Plan Management and StockTrans in late 2009 and/or early 2010." *Id.* Broadridge disputes that it ever conducted "substantive due diligence" on Plan Management, instead claiming it "relied on the representations of Mr. Miller and Plan Management personnel." SUMF ¶¶ 31–32. Broadridge ultimately decided not to acquire Plan Management. *Id.* ¶ 5.

During the same time period, Broadridge and Plan Management were also negotiating an agreement for Broadridge to market Plan Management's services to its clients. *See id.* ¶ 17. After about six months of negotiations, on March 8, 2010, the two agreements were finalized: (1)

[1] Several Broadridge affiliates are involved in this case, including Broadridge Financial Solutions, Inc.; Broadridge Output Solutions, Inc., a party to the Stock Purchase Agreement; and named defendant Broadridge Investor Communication Solutions, Inc., a party to the Marketing Agreement. Throughout their filings, the parties use "Broadridge" to encompass all entities under the Broadridge umbrella. The Court will do likewise in this Memorandum.

the Stock Purchase Agreement between Broadridge and the Millers and (2) the Marketing Agreement between Broadridge and Plan Management. *Id.* ¶¶ 6, 9, 19.

Under the Stock Purchase Agreement, the Millers agreed to sell all of the shares of StockTrans to Broadridge for $9 million with certain additional sums and other consideration to follow. *See* SUMF ¶¶ 10, 11; Pls. Resp. Opp. SUMF ¶ 11. The Stock Purchase Agreement contained an integration clause, which stated that it represented the "complete agreement between the parties" and "supersede[d] any prior understandings, agreements or representations by or between the parties, written or oral, which may have related to the subject matter hereof in any way." SUMF ¶ 12. The Stock Purchase Agreement also stated that "the parties acknowledge that they are not relying upon any statement unless it is expressly set forth in this Agreement." *Id.* ¶ 13. Article III of the Stock Purchase Agreement stated, "The Buyer shall cause its affiliate, Broadridge Investor Communication Solutions, Inc., to execute and deliver the marketing agreement with Plan Management attached to this Agreement as Exhibit E." Pls. Resp. Opp. SUMF ¶ 15.

The Marketing Agreement was a five-year contract meant to make Plan Management's "stock plan management services available to Broadridge's existing and prospective corporate issuer clients" and "to refer certain of [Broadridge's] Clients to Plan Management for such services." *Id.* ¶¶ 19, 20, 38. Specifically, Section 1 stated that Broadridge would use "commercially reasonable efforts" to refer clients to Plan Management each year:

> <u>Referral Obligation</u>. By the date that is twelve (12) months from the Effective Date, Broadridge will use commercially reasonable efforts to refer at least 200 Viable Clients to Plan Management, (as adjusted, the "Referral Target"). During each twelve (12) month period thereafter during the Term, Broadridge will use commercially reasonable efforts to refer such number of Viable Clients as equals

> or exceeds the Referral Target applicable to the previous twelve month period multiplied by one hundred and ten (110%) percent.

Id. ¶ 21. The agreement defined "Viable Client" as "a corporate issuer" that has or "expresses an interest in" "any type of securities or securities-related incentive plan" and "expresses to Plan Management or Broadridge an interest in learning about Plan Management's services and which observes a demonstration of Plan Management's OptionTrax system." *Id.* OptionTrax is a software program Plan Management uses to service its clients. The Marketing Agreement did not guarantee that Broadridge's referrals would become Plan Management clients. *Id.* ¶ 28.

"If and when Plan Management is engaged by a Client after being referred to such Client by Broadridge," Plan Management was to pay Broadridge a $1,000 referral fee. *Id.* ¶ 22. The Marketing Agreement contained a limitation of liability clause, which limited damages to these fees, stating:

> Limitation of Liability; Indemnification. Notwithstanding anything else in this Agreement to the contrary, in the absence of a party's gross negligence or willful misconduct, the aggregate liability of any party in connection with any breach of this Agreement shall be limited to the amount of fees paid or payable to Broadridge by Plan Management during the twelve month period preceding the date of such breach.

Id. ¶ 26.

Section 15 of the Marketing Agreement stated that the agreement "contains the entire agreement and understanding of the parties with respect to its subject matter and supersedes all existing agreements and other oral, written and other communications between them concerning its subject matter." *Id.* ¶ 23.

In April 2010, one month after the Marketing Agreement was executed, Miller and a Plan Management associate gave a presentation to the Broadridge sales force. *Id.* ¶ 45. Broadridge contends that the meeting was held "to introduce the Broadridge sales force to Plan Management and its services, in order [to] assist Broadridge sales personnel with referrals." *Id.* Plaintiffs aver that the meeting was actually about StockTrans but Broadridge had "promised to include substantial information about Plan Management's services." Pls. Resp. Opp. SUMF ¶ 45. Yet when Miller and his associate began to discuss Plan Management, Broadridge Vice President of Strategy and Product Mark Kopelman cut them off and stated Plan Management would be the topic of some other meeting. *Id.*

Plaintiffs contend that referrals were few and far between throughout the term of the Marketing Agreement, and that plaintiff initiated most of Broadridge's contacts. Miller testified that in 2010, he noticed Broadridge was not making the referrals he expected. *Id.* ¶ 39. In mid to late 2010, Miller and Plan Management created a streamlined referral process for Broadridge to make referrals, along with a referral form to assist in that process. Pls. Resp. Opp. SUMF ¶ 54. Broadridge contends that John Weidman, its liaison to Plan Management, assisted in developing this plan, but plaintiffs aver he had "little or nothing to do with" it. SUMF ¶ 52, 55; Pls. Resp. Opp. SUMF ¶ 55. Broadridge distributed the referral process and form to its staff. SUMF ¶ 56–58. Broadridge offered referral bonuses to its sales associates for making referrals to Plan Management. *Id.* ¶ 73.

As early as April 26, 2011, Miller suspected Broadridge did not intend to fulfill the Marketing Agreement. *Id.* ¶ 40. Although Broadridge claims it regularly "made . . . arrangements" and "offered . . . opportunities" for Plan Management to present its software programs to Broadridge staff, plaintiffs assert that such presentations were initiated by plaintiffs "to address Broadridge's failures in performance." *See id.* ¶¶ 49, 51; Pls. Resp. Opp. SUMF

¶¶ 46, 48–49. Plaintiffs contend that these meetings "did not produce an increase in referrals." *Id.* ¶ 48. Broadridge also avers that its employees "worked to streamline the [referral] process" and "shared information with each other" to make more successful referrals. SUMF ¶¶ 55, 63. Plaintiffs assert that Broadridge only produced two internal emails showing employees sharing information and evidence of only four instances in which it used the referral form in four years. Pls. Resp. Opp. SUMF ¶¶ 55, 63. Plaintiffs contend that Plan Management often reminded Broadridge it was not fulfilling its obligations during the period 2011 through 2014. *Id.* ¶ 43.

Broadridge asserts that throughout the term of the Marketing Agreement, it "encounter[ed] problems when attempting to refer clients to Plan Management," both in dealing with Plan Management's personnel and in generating interest among potential clients. *See* SUMF ¶ 82.

Broadridge claims that its employees participated in responding to Requests for Proposals ("RFPs") with potential clients and "repeatedly encouraged" Plan Management to participate in the process, but Plan Management "expressed [its] disinterest in responding to RFPs" and instructed its personnel not to spend time on them. SUMF ¶¶ 83–85. Broadridge also asserts that Plan Management "could not always answer the applicable questions" when participating in an RFP. *Id.* ¶ 88. Plaintiffs contend that Plan Management "routinely submits proposals in response to RFPs" but only where it "believes that its services fit the type of services being sought." Pls. Resp. Opp. SUMF ¶ 84. On this issue, plaintiffs explain that their unwillingness to participate in some RFPs stemmed from the fact that Plan Management did not offer the services sought—not "antipathy to RFPs generally." *Id.* ¶ 86.

In addition, Broadridge asserts that "Plan Management lacked personnel consistently available who could receive referrals" and that, as such, Broadridge employees often "did not know whom to contact in order to make referrals." SUMF ¶ 90. Specifically, Broadridge states that the Plan Management point person "repeatedly changed and/or was nonexistent"—three different employees were responsible for dealing with referrals during the contract, and there were months-long gaps between the termination and hiring of those employees. *Id.* ¶ 92. Broadridge maintains that on at least one occasion, it was not notified of a point person's departure. *Id.* ¶ 104. In the gaps in employment of point persons, Broadridge claims Plan Management was unresponsive. *Id.* ¶ 107. Broadridge also contends that Plan Management employees were often late and unprepared for meetings. *See id.* ¶ 112.

Plaintiffs claim that Plan Management's point people never changed: the referral process developed in 2010 stated that Miller and another executive would be Plan Management's representatives for matters relating to the Marketing Agreement. *See* Pls. Resp. Opp. SUMF ¶¶ 90, 108. If Broadridge ran into issues, plaintiffs argue it was due to its failure to train its personnel about the referral process. *Id.* ¶ 90. Furthermore, plaintiffs refute that Plan Management was ever unresponsive, unprepared, or unable to answer questions. *See id.* ¶¶ 89, 107, 112–13. For example, plaintiffs maintain that one of Broadridge's examples of this issue actually refers to a client that was upset because Broadridge employees misstated the services Plan Management offered—not because of any misstep by Plan Management. *See id.* ¶¶ 89, 113.

Broadridge contends that Plan Management personnel would not allow it to assist with demonstrations of OptionTrax—a step required for a client to qualify as a "Viable Client." *See* SUMF ¶ 111. Plaintiffs assert that this is because Broadridge personnel were not knowledgeable about stock plan management and therefore not qualified to present the software. Pls. Resp.

Opp. SUMF ¶ 111.

In addition to these issues, Broadridge asserts that it struggled to find interested clients to refer, because Plan Management did not have the name recognition or infrastructure necessary to generate interest. *See* SUMF ¶ 128. Plaintiffs refute that any potential client voiced this concern. Pls. Resp. 29.

Broadridge responds that despite these issues, it made referrals through the end of the agreement term. *Id.* ¶¶ 129, 131. Broadridge contends that there is no evidence that it ever instructed its employees to stop making referrals. *See id.* ¶¶ 119–22. On this issue, plaintiffs assert that Broadridge stopped making referrals by the end of the agreement term. Pls. Resp. Opp. SUMF ¶ 131.

In March 2015, at the end of the Marketing Agreement's five-year term, it was terminated. *See id.* ¶ 38. Broadridge asserts that its sales team sent "more than 2,134 communications to more than 1,100 different current or prospective clients inquiring whether the companies had a need for plan administration services." *Id.* ¶ 67. From these communications, Broadridge contends it "identified more than 100 prospective clients with an interest in Plan Management." *Id.* ¶ 68. Of those clients, Broadridge claims that 36 companies viewed demonstrations of OptionTrax, making them Viable Clients. *See id.* ¶ 69. Plaintiffs argue Broadridge's evidence does not support these numbers and that Plan Management "identified only 18 'Viable Clients'" referred by Broadridge, compared to the "at least 1,221 clients" Broadridge was obligated to use commercially reasonable efforts to refer. Pls. Resp. Opp. SUMF ¶ 69; Pls. Resp. 3. When the Marketing Agreement was signed, Plan Management had 26 active clients. SUMF ¶ 134. At the end of the agreement, Plan Management had approximately 68 active clients. *Id.* ¶ 135. At all relevant times, Plan Management was operating at a loss. *Id.* ¶ 136.

Plaintiffs filed the Complaint on January 28, 2015. The Complaint set forth claims of breach of contract, fraudulent inducement, constructive/equitable fraud, and negligent misrepresentation. Broadridge filed a Motion to Dismiss on April 3, 2015, which this Court granted in part and denied in part on July 7, 2015. At this stage of the proceedings, only two claims remain: breach of contract under the Marketing Agreement (Count I) and fraudulent inducement under the Stock Purchase Agreement (Count II). On September 29, 2017, Broadridge filed a motion for summary judgment (Document No. 72). Plaintiffs filed a response to the motion on November 20, 2017 (Document No. 75). On December 11, 2017, Broadridge filed a reply (Document No. 79), and on January 4, 2018, plaintiffs filed a sur-reply (Document No. 85). Broadridge's motion for summary judgment is now ripe for decision.[2]

III. LEGAL STANDARD

The Court will grant a motion for summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A fact is material when it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The Court's role at the summary judgment stage "is not . . . to weigh the evidence and

[2] The delay in ruling on the motion was due, in part, to several interruptions stemming from the parties' efforts to settle the case, including a settlement conference on March 5, 2019. In addition, the Court concluded that it was necessary to decide defendant's *Daubert* motion addressing issues related to the reports and proposed testimony of plaintiff's expert witnesses on damages before deciding the motion for summary judgment.

determine the truth of the matter but to determine whether . . . there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249. However, the existence of a "mere scintilla" of evidence in support of the nonmoving party is insufficient. *Id.* In making this determination, "the court is required to examine the evidence of record in the light most favorable to the party opposing summary judgment, and resolve all reasonable inferences in that party's favor." *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007). The party opposing summary judgment must, however, identify evidence that supports each element on which it has the burden of proof. *Celotex Corp.*, 477 U.S. at 322.

IV. DISCUSSION

In its motion for summary judgment, Broadridge challenges both remaining claims: (1) breach of contract with respect to the Marketing Agreement and (2) fraudulent inducement with respect to the Stock Purchase Agreement. Broadridge's arguments rely in part on its contention that plaintiffs' evidence comes from inadmissible sham affidavits. For the reasons that follow, the Court denies Broadridge's motion.

A. Plaintiffs' Affidavits of Miller and Thomas

As an initial matter, Broadridge argues that affidavits from Miller and Elena Thomas, Miller's daughter and a Plan Management employee, which plaintiffs rely on in their response to the motion, are inadmissible "sham affidavits." *See* Def. Reply Mem. Supp. Mot. Summ. J. ("Def. Reply") 2. "A sham affidavit is a contradictory affidavit that indicates only that the affiant cannot maintain a consistent story or is willing to offer a statement solely for the purpose of defeating summary judgment." *See Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007). However, an affiant can "offer a 'satisfactory explanation' for the conflict between the prior deposition and the affidavit"—such as that the affiant was "mistaken, confused, or not in possession of all the facts during the previous deposition." *Id.* at 254.

Broadridge fails to identify deposition testimony contradictory to the affidavits. As a primary example, Broadridge points to Miller's affidavit testimony that he "knew within a year or so of March, 2010 that Broadridge was underperforming the Marketing Agreement . . . [but] did not know . . . that as of March 7, 2010 (the day before signature), Broadridge had no intention of performing the Marketing Agreement according to its terms." *See* Def. Reply 3–4; Miller Aff. ¶ 105. Broadridge asserts that this statement contradicts Miller's previous deposition testimony that "[a]s of April 26th, 2011, . . . [he] suspect[ed] that Broadridge did not intend to fulfill the marketing agreement." *See* Def. Reply 3–4; SUMF ¶ 40. But these statements are consistent—in both, Miller expresses his early suspicion of Broadridge's breach, and his affidavit further states that he was not yet aware that Broadridge had *never* intended to perform. In addition, Broadridge avers that Miller's affidavit statement that Plan Management did not harbor antipathy toward RFPs contradicted a completely different Plan Management employee's deposition testimony that for "some of the more detailed [RFPs], . . . we would just put . . . our stock answers in and that would be it." Def. Mot. Summ. J. Ex. 192, Klevence Dep. 95:8–17. That a separate person testified to something different than Miller does not make his affidavit a sham; it is the jury's job to evaluate credibility and weigh the evidence accordingly. Broadridge's other arguments are equally unavailing and rely on misleading interpretations of the record evidence. *See, e.g.*, Def. Reply 4–5; Def. Mot. Summ. J., Ex. 48, Interrog. 9, Ex. B.

With respect to Thomas's affidavit, Broadridge's averment that it is not based on her personal knowledge also fails. *See* Def. Reply 6–7. During her deposition, Thomas testified that she did not know how many demonstrations Plan Management performed between March 2010 and February 2011, but in her affidavit, she references demonstrations during this time period. *See id.* at 7; Def. Mot. Summ. J., Ex. 211, Thomas Dep. 109:24–111:10. However, plaintiffs explain that Thomas conducted a document review after her deposition but before her affidavit, enabling her to supply the information related to this time period in her affidavit. *See* Pls. Sur-Reply Opp. Def. Mot. Summ. J. ("Pls. Sur-Reply") 2.

For the foregoing reasons, the Court determines the affidavits of Miller and Thomas are not sham affidavits. Furthermore, even without these affidavits, the evidence, viewed in the light most favorable to plaintiffs, is insufficient to grant Broadridge's motion for summary judgment.

B. Breach of Contract: The Marketing Agreement

A breach of contract claim requires proof of three elements: "(1) the existence of a contract, including its essential terms, (2) a breach of the contract; and (3) resultant damages." *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 137 A.3d 1247, 1258 (Pa. 2016). Broadridge argues (1) it did not breach the contract; (2) plaintiffs failed to establish resultant damages; and (3) it did not act with gross negligence or engage in willful misconduct so plaintiffs' damages are limited under the limitation of liability clause in the Marketing Agreement. In addition, the parties dispute the meaning of two terms in the Marketing Agreement—"commercially reasonable efforts" and whether the referral numbers were a required minimum or a target.

The Court addresses each of the aforementioned issues in turn. For the reasons that follow, the Court denies Broadridge's motion for summary judgment with respect to plaintiff's breach of contract claim.

1. Meaning of the Contractual Terms: Commercially Reasonable Efforts and Referral Numbers

Under a section titled "Referral Obligation," the Marketing Agreement states that "Broadridge will use commercially reasonable efforts to refer at least 200 Viable Clients to Plan Management, (as adjusted, the 'Referral Target')" during the twelve-month period following the effective date of the contract. SUMF ¶ 21. Then, "[d]uring each twelve (12) month period thereafter during the Term, Broadridge will use commercially reasonable efforts to refer such number of Viable Clients as equals or exceeds the Referral Target applicable to the previous twelve month period multiplied by one hundred and ten (110%) percent." *Id.* The parties disagree about the meaning of "commercially reasonable efforts," as well as whether the referral numbers in the contract were a required minimum or a mere target.

"A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." *Trizechahn Gateway LLC v. Titus*, 976 A.2d 474, 483 (Pa. 2009). "[W]hile ambiguous writings are interpreted by the finder of fact, unambiguous ones are construed by the court as a matter of law." *Id.* Summary judgment is appropriate "where a plaintiff's claim is foreclosed by the plain language of the contract." *Allegheny Design Mgmt. v. Travelers Indem. Co. of Am.*, 572 F. App'x 98, 100 (3d Cir. 2014).

The parties agree that whether Broadridge made "commercially reasonable efforts" is determined based on an objective standard, but otherwise dispute what it entails. *See* Pls. Resp. 63; Def. Reply 32. Broadridge contends that the standard permits a party to consider its own economic interests in rendering its performance. Def. Mot. Summ. J. 31. Plaintiffs emphasize that a party is required to act with diligence under the standard. Pls. Resp. 62.

The term "commercially reasonable efforts" does not have one set definition in this jurisdiction but rather is a standard of reasonableness. *See Plexicoat Am. LLC v. PPG Architectural Finishes, Inc.*, No. 13-3887, 2015 WL 171831, at *3 (E.D. Pa. Jan. 14, 2015) ("Courts have not offered a clear definition of what constitutes 'commercially reasonable efforts' . . . ."); *see also Samson Lift Techs., LLC v. Jerr-Dan Corp.*, No. 09-1590, 2011 U.S. Dist. LEXIS 89278, at *12 (M.D. Pa. Aug. 11, 2011) ("'[R]easonable commercial efforts' is an ambiguous term open to multiple interpretations."). Generally speaking, "the determination of reasonableness is a factual one, requiring consideration of all the facts and circumstances." *See Victualic v. Tieman*, 499 F.3d 227, 235 (3d Cir. 2007). Under this precedent, the Court concludes that "commercially reasonable efforts" requires a totality of the circumstances assessment, in which economic interests and diligence, among other factors, may be considered. *See In re Am. Mortg. Holdings, Inc.*, 637 F.3d 246, 259 (3d Cir. 2011) (Rendell, J., concurring) ("[T]he determination of what is 'commercially reasonable' involves a fact-intensive inquiry, dependent on the totality of the circumstances . . . ."). Given the fact-intensive nature of this inquiry, it is typically a question for the jury; however, where the facts allow, it may be decided at the summary judgment stage. *See Samson Lift Techs., LLC*, 2011 U.S. Dist. LEXIS 89278, at *12 (stating "reasonable commercial efforts" is a "factual determination best left for a jury to decide"); *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 635 n.8 (3d Cir. 1996) (reasoning that the fact that a standard is objective suggests it can be resolved at the summary judgment stage). In the section that follows, the Court addresses the question whether defendant used "commercially reasonable efforts" can be decided at the summary judgment stage.

In addition, the parties disagree about whether there was a referral number Broadridge was obligated to reach. Plaintiffs maintain that Broadridge was obligated to refer at least 1,221 clients[3] to Plan Management during the contract, as shown by the title of the section, "Referral *Obligation*," and the term "*at least* 200 Viable Clients." *See* Pls. Resp. 3–4 (emphasis added). Broadridge focuses instead on the term "Referral *Target*," which it claims shows that the numbers were a "target, not a minimum threshold." Def. Reply 35 (emphasis added). The Court concludes that whether 200 Viable Clients, and the referral numbers in the four years thereafter, were a minimum threshold or a target is ambiguous and as such is a term to be interpreted by the jury. *See Trizechahn Gateway*, 976 A.2d at 483.

2. Second Element: Breach of a Contractual Duty

Given the fact-intensive nature of determining whether Broadridge exerted "commercially reasonable efforts" and the remaining contractual ambiguities, summary judgment for Broadridge is only appropriate if no reasonable jury could find that it did not use "commercially reasonable efforts." *See Rosser Int'l, Inc. v. Walter P. Moore & Assocs., Inc.*, No. 11-1028, 2013 WL 3989437, at *16 (W.D. Pa. Aug. 2, 2013) ("Even if certain terms of the contract are deemed ambiguous by the court, summary judgment may still be entered in favor of one of the parties if there are no genuine disputes of material fact and it is clear that one of the parties is entitled to judgment as a matter of law."). The parties spend hundreds of pages debating Broadridge's efforts to perform, telling two very different stories about its work to train its employees, oversee the agreement, and make referrals, and reaching different final numbers of referrals. The Court concludes that viewing the disputed facts in the light most favorable to

[3] This number represents the sum of the number of Viable Clients plaintiffs assert defendant was obligated to refer each year—200 the first year, increased by 110% in each of the four years thereafter.

plaintiffs, Broadridge's motion for summary judgment must be denied.

Broadridge asserts that its employees expended considerable "resources, time, and money" to make referrals, even in the face of several issues, and that its actions therefore constituted "commercially reasonable efforts." *See* Def. Mot. Summ. J. 45. For example, Broadridge states that it trained its staff on the stock plan administration industry, hosting Plan Management to make presentations to the sales force on several occasions. Def. Mot. Summ. J. 32; SUMF ¶¶ 45–49. It asserts that it appointed a liaison to Plan Management, John Weidman, to oversee performance and that Weidman assisted in designing a referral process and uniform referral form. *See id.* ¶¶ 52, 54–57. To incentivize performance, Broadridge offered employees referral bonuses. *Id.* ¶ 73. Broadridge argues its efforts lasted the duration of the Marketing Agreement: Plan Management received a Viable Client as late as November 2014, and Broadridge made inquiries about clients' plan management services needs through at least February 2015. *See* Def. Mot. Summ. J. 34–36.

Plaintiffs tell a different story. They point to substantial record evidence disputing Broadridge's characterization of its performance. Plaintiffs maintain that "virtually all" contact between Plan Management personnel and Broadridge's sales team was at Plan Management's request, not Broadridge's initiative. *Id.* at 17, 27. Regarding training, plaintiffs contend that Plan Management was the topic of only two Broadridge sales meetings during the five-year contract. *See* Pls. Resp. 17–18. Even when meetings *were* held, plaintiffs aver that they were lacking. *See id.* at 18.

Plaintiffs argue the referral process and referral form were wholly developed by Plan Management with no assistance from Weidman and that Broadridge used the referral form only four times. *See id.* at 15–16. Plaintiffs further contend that Broadridge failed to take advantage of other available tools, such as an allegedly mandatory form to record information about the securities incentive plans an existing or prospective client currently maintained. *See id.* at 14–15. In addition, plaintiffs aver, though Broadridge disputes, that Broadridge considered only a small subset of its clients—stock transfer agents—rather than the full scope of its corporate issuer clients. *See id.* at 19; Def. Reply 31–32. Plaintiffs assert that Broadridge had stopped making referrals by the end of the agreement. Pls. Resp. Opp. SUMF ¶ 131.

Furthermore, plaintiffs contend that despite Broadridge's contention that Weidman was acting as liaison to Plan Management, in actuality Broadridge made no effort to oversee the agreement. *See* Pls. Resp. 8–9. This is supported by the testimony of several Broadridge employees. Senior Director of Sales Marlayna Jeanclerc testified that it was not "ever made clear to [her] that there was someone at Broadridge who had ownership of that relationship" with Plan Management. *Id.* at 8. John Dunn, Senior Vice President of Sales, testified that there was no single person in charge. *Id.* at 8–9. Mark Kopelman, Vice President of Strategy and Product, testified similarly and further stated that "it was up to the individual sales representatives and their counterpart at Plan Management to manage the referral process." *Id.* at 8. Some executives even testified that they were unfamiliar with the Marketing Agreement entirely: Peter Breen, General Manager of "the unit that dealt most directly with Plan Management concerning referrals" testified that he did not know the agreement existed until after its termination. *Id.* at 9. Regarding keeping track of referrals, Dunn testified that he was not aware of anyone keeping track and had no idea how many referrals had been made. *See id.* at 10–12.

Broadridge argues that issues with Plan Management impeded its efforts. *See* Def. Mot.

Summ. J. 36. For example, Broadridge claims that Plan Management resisted working with it to respond to RFPs from potential clients. SUMF ¶¶ 83–85. Broadridge describes Plan Management's personnel as "nonresponsive," "late," and "unprepared" and argues its contacts at Plan Management came and went, with gaps between hiring, often without notifying Broadridge. Def. Mot. Summ. J. 36–38. Broadridge also asserts that Plan Management did not have the name recognition or infrastructure necessary to generate interest among potential clients. SUMF ¶ 128.

Plaintiffs dispute each of these contentions. Regarding the RFPs, plaintiffs argue that Plan Management focused only on those RFPs that it concluded sought the services that it actually offered. *See* Pls. Resp. 27; Pls. Resp. Opp. SUMF ¶ 84. Plaintiffs contend that Plan Management's point people for the Marketing Agreement never changed from those named in the referral process developed in 2010. *See* Pls. Resp. Opp. SUMF ¶¶ 90, 108. Plaintiffs also dispute that Plan Management was ever unresponsive or unprepared and point out that Broadridge often described Plan Management positively, calling them "wonderful" and "bright and talented." Pls. Resp. 26–27. Finally, plaintiffs note that Broadridge produced no evidence of a client or prospect that "mentioned, complained about, or questioned Plan Management's name recognition or infrastructure." *Id.* at 29.

Finally, the parties dispute the number of communications sent and referrals made by Broadridge employees. Broadridge contends its employees sent "at least 2,134 individual communications" to "more than 1,100 different current or prospective clients," inquiring whether the clients had a need for plan administration services or stating Broadridge could assist in providing these services. Def. Mot. Summ. J. 34; SUMF ¶¶ 66–67. Broadridge contends that these communications resulted in 110 companies "expressing an interest" in referral to Plan Management, and of those, 36 companies became Viable Clients. Def. Mot. Summ. J. 34. Broadridge's evidence for these numbers is set forth in one large compilation of emails filed as Exhibit 79. Plaintiffs assert at least seven distinct arguments for why Exhibit 79 is inadmissible.[4] *See* Pls. Resp. 32–35. Yet even if Exhibit 79 was admissible, it does not establish as a matter of law that Broadridge used "commercially reasonable efforts" to make referrals. Notably, 521 of the emails collected in Exhibit 79 were sent in a two-day period, from one sales employee, two months after the Marketing Agreement was signed. *Id.* at 35–36. This constitutes almost half of the "more than 1,100 different current or prospective clients" that Broadridge asserts it contacted, and almost one-fourth of its total "2,134 communications" sent.

Furthermore, Broadridge's averment that its communications "informed the companies that Broadridge could provide information regarding the provision of plan administration services; and/or . . . attempted to ascertain the identity of the current or prospective client's plan administration service provider" is misleading at best. *See* SUMF ¶ 67. At least 521 of these communications ask only one relevant question, in a list of twelve: "Do you have any plans (I.E. ESPP, 401K, etc.) that your current transfer agent manages? If so, how many shareholders are in

[4] These arguments include that defendant failed to (1) state its methodology, including what it considered "an interest in Plan Management"; (2) lay a foundation under Federal Rule of Evidence 901(a) by not filing a sworn affidavit describing Exhibit 79; (3) show that Exhibit 79 "accurately reflects the information" contained in the email database under Rule 1001(d) by neglecting to provide the search criteria for extracting and excluding emails; (4) satisfy the rule of completeness under Rule 106, because, for example, no emails state "Failure of Delivery" and some emails are "plainly missing"; (5) supply the original attachments to the emails, thereby "distort[ing] the[ir] evidentiary value"; (6) omit duplicate emails, making the number of emails inaccurate; and (7) comply with the Best Evidence Rule under Rule 1004, because the original email database is no longer directly accessible due to company policy of deleting emails after 45 days. *See* Pls. Resp. 32–35, 40–41. Because the Court concludes that even if Exhibit 79 was admissible, summary judgment would still be inappropriate, the Court does not address these arguments in this Memorandum. The parties may raise these arguments at a later stage of the proceedings by motion in limine.

each plan?" *See* Pls. Resp. 36 n.16. Yet Plan Management was not involved with handling Broadridge's ESPP plans and has never administered 401K plans—Plan Management's "key competence" is *stock option* plans, which are not mentioned. *See id.* at 37–38 & n.18. The email puts the impetus entirely on the client to respond and to ask whether Broadridge had the capability to assist with stock option plans. Exhibit 79 also contains several duplicates and other irrelevant emails, such as those asking to be removed from the list. *Id.* at 39–40. In two emails, a Broadridge employee tells a prospective client to handle its own plan management services, "considering we would charge you and you can do it for yourself." *See id.* at 45.

Moreover, even if the Court accepted Broadridge's numbers, it would not be entitled to summary judgment. Given the remaining ambiguity as to whether 1,221 Viable Clients was a required minimum, or merely a target, the Court cannot conclude as a matter of law that Broadridge's efforts were "commercially reasonable." Furthermore, given that each year the number of communications Broadridge sent decreased,[5] while the referral target increased by 110%, a genuine dispute of material fact also remains with respect to Broadridge's performance *each year*. *See* SUMF ¶ 21.

There are numerous genuine disputes of material fact with respect to whether Broadridge used "commercially reasonable efforts." As such, this question must be submitted to the jury. The Court thus denies Broadridge's motion for summary judgment with respect to the second element of a breach of contract claim: whether Broadridge breached a contractual duty.

3. Third Element: Resultant Damages

As part of the prima facie case for breach of contract, plaintiffs must also show they

[5] Exhibit 79 contains 1,674 emails sent in the first year of the contract, 375 emails the second year, 94 emails the third year, 66 emails the fourth year, and 18 emails the final year of the Marketing Agreement. Pls. Resp. 44–45.

suffered "resultant damages." *See Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 137 A.3d 1247, 1258 (Pa. 2016). "To prove damages, a plaintiff must give a factfinder evidence from which damages may be calculated to a 'reasonable certainty.'" *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225–26 (3d Cir. 2003) (internal quotation omitted). "Reasonable certainty" is a "rough calculation" that must be "not too speculative, vague, or contingent upon some unknown factor." *ATACS Corp. v. Trans World Commc'ns, Inc.*, 155 F.3d 659, 669 (3d Cir. 1998). However, some uncertainty is appropriate, given that damages "are often at best approximate." *Id.* at 670. Where a plaintiff has failed to sufficiently demonstrate damages caused by the Broadridge, summary judgment is appropriate. *See Ware*, 322 F.3d at 227.

Broadridge argues plaintiffs cannot prove their damages with "reasonable certainty." *See* Def. Mot. Summ. J. 40. First, Broadridge contends that plaintiffs cannot demonstrate the specific number of clients that they would have received had Broadridge acted differently. *Id.* The Court disagrees and finds the expert report by plaintiffs' expert, Michael J. Molder, informative on this point. Molder estimates the number of clients Plan Management would have retained had Broadridge made more referrals by using the client conversion rate of the clients Broadridge *did* refer and Plan Management's retention rate. Def. Mot. Exclude Expert Testimony, Ex. L, at 13. Molder's report is thus sufficient to estimate plaintiffs' lost profits damages with "reasonable certainty." *See Tristar Cosmetics, Ltd. v. Westinghouse Broad. Co.*, No. 91-4111, 1992 WL 57771, at *2 (E.D. Pa. Mar. 18, 1992) (concluding, at summary judgment stage, that expert report calculating plaintiff's lost profits was sufficient to support plaintiff's claim).

Additionally, Broadridge disputes causation, arguing plaintiffs cannot show that Plan Management's failure to obtain more clients—the source of plaintiffs' alleged damages—was Broadridge's fault, rather than plaintiffs' or the result of something else. *See* Def. Mot. Summ J. 40; Def. Reply 36–37. However, genuine disputes of material fact remain as to whose actions led to the low number of client referrals. Thus, summary judgment is inappropriate on these grounds.

Finally, that plaintiffs were operating a loss during the Marketing Agreement does not prohibit plaintiffs from recovering damages. *See Merion Spring Co. v. Muelles Hnos. Garcia Torres, S.A.*, 462 A.2d 686, 696 (Pa. Super. 1983) ("[N]ew businesses may be able to adduce sufficient evidence to obtain an award for lost profits . . . [although] such proof is often more difficult to obtain and present."). A reasonable jury could determine that had Broadridge made additional efforts to make referrals, Plan Management's profits would have increased dramatically.

For these reasons, the Court denies Broadridge's motion for summary judgment with respect to the damages element of the breach of contract claim.

4. Limitation of Liability Clause: Gross Negligence and Willful Misconduct

Broadridge contends that, at the very least, partial summary judgment is appropriate on the ground that, under the limitation of liability clause in the Marketing Agreement, it did not act with gross negligence or engage in willful misconduct. *See* Def. Mot. Summ. J. 41, 44. The limitation of liability clause provides that, unless a party has acted with "gross negligence or willful misconduct," the "aggregate liability of any party in connection with any breach" is limited to "the amount of fees paid or payable to Broadridge by Plan Management during the twelve month period preceding the date of such breach." SUMF ¶ 26.

a) Raising an Affirmative Defense

Plaintiffs contend that invocation of the limitation of liability clause is an affirmative defense and that Broadridge waived this defense by failing to raise it until this stage of the proceedings. Pls. Resp. 60–61. The Third Circuit has held that "[a]lthough it is true that parties should generally assert affirmative defenses early in the litigation, there is no firm rule." *See Sharp v. Johnson*, 669 F.3d 144, 158 (3d Cir. 2012). "Thus, affirmative defenses may be raised at any time, even after trial, so long as the plaintiff suffers no prejudice." *Id.*

Broadridge argues that a term of the controlling contract in a breach of contract action need not be pled as an affirmative defense when it is "axiomatic that . . . the defendant is entitled to refute the plaintiff's claims by invoking the terms of the contract." Def. Reply 24. Even assuming *arguendo* that invoking the limitation of liability clause constitutes an affirmative defense, plaintiffs have suffered no prejudice from the fact that Broadridge asserted the defense at the summary judgment stage of the proceedings. Moreover, plaintiffs specifically pled, in the Complaint, that Broadridge's failure to refer clients "constituted gross negligence and willful misconduct within the meaning of Section 5 of the Marketing Agreement." Compl. ¶ 23. Broadridge denied those allegations in its Answer. Answer ¶ 23. Plaintiffs cannot now feign surprise over an issue explicitly raised by the Complaint and Answer, much less show they suffered prejudice as a result. The Court thus concludes that Broadridge has not waived this argument, and the Court must now consider whether it can conclude as a matter of law that Broadridge did not act with gross negligence or engage in willful misconduct.

b) <u>Gross Negligence</u>

"There is no universally accepted definition of gross negligence." *Fid. Leasing Corp. v. Dun & Bradstreet, Inc.*, 494 F. Supp. 786, 790 (E.D. Pa. 1980). In general, courts view gross negligence as "want of even scant care, but something less than intentional indifference to consequences of acts." *Id.*; *see Hunter v. Squirrel Hill Assocs., L.P.*, 413 F. Supp. 2d 517, 519 (E.D. Pa. 2005) (defining gross negligence as "a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference"). Whether a party's conduct constitutes gross negligence is generally a question for the jury. *See Albright v. Abington Mem'l Hops.*, 696 A.2d 1159, 1164–65 (Pa. 1997). However, a court can determine there is no gross negligence as a matter of law where the facts "could not possibly support a finding of gross negligence." *Yorty v. PJM Interconnection, L.L.C.*, 79 A.3d 655, 667 (Pa. Super. Ct. 2013).

Broadridge maintains that at worst, even if it "did not try hard enough," its efforts do not constitute gross negligence. Def. Mot. Summ. J. 44–45 (citing *Fid. Leasing Corp.*, 494 F. Supp. at 791 (concluding that where the only allegation plaintiff could make is that the defendant "did not try hard enough," this "states at best a claim for negligence, not gross negligence")). Broadridge contends that it expended numerous "resources, time, and money" to make referrals, even in the face of several challenges with Plan Management. *See* Def. Mot. Summ. J. 45. However, plaintiffs proffer evidence from which a reasonable jury could determine that Broadridge was grossly negligent. For example, Broadridge executives testified that no one was tasked with overseeing or keeping track of performance of the Marketing Agreement, and even at the time of their depositions, they did not know how many referrals had been made. *See* Pls.

Resp. 8–12. At least one Broadridge employee testified that he did not even know the Marketing Agreement existed until after it had terminated. *Id.* at 9. Furthermore, Broadridge failed to gather basic, easily obtainable information that would have assisted in making referrals, such as how many of its clients maintained employee stock ownership plans. *Id.* at 16–17. Even assuming *arguendo* that Broadridge's averments are correct, it successfully referred only 36 Viable Clients in the five years of the contract.

The record is replete with factual disputes, already discussed, which are material not only to whether Broadridge breached the contract by failing to exert "commercially reasonable efforts," but also to whether Broadridge's efforts were so significantly lacking that they constitute gross negligence. Thus, the Court cannot conclude as a matter of law that Broadridge did not act with gross negligence.

c) Willful Misconduct

Broadridge also argues its actions did not amount to willful misconduct. *See* Def. Mot. Summ. J. 44. "Willful misconduct" means that "the actor desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensue." *Evans v. Phila. Transp. Co.*, 212 A.2d 440, 443 (Pa. 1965)). Like gross negligence, willful misconduct is typically a jury question, unless the record could not possibly support such a finding as a matter of law. *See id.*

Broadridge contends that plaintiffs have adduced no evidence that it made a conscious choice not to perform the Marketing Agreement. Def. Mot. Summ. J. 44. In support, Broadridge makes the same averments about its efforts to perform already discussed. *See id.* at 45.

Plaintiffs argue that comments made by Broadridge senior management on an early draft of the Marketing Agreement reveal Broadridge's hostility to the Marketing Agreement. *See* Pls. Resp. 5. These comments include: "would prefer a shorter term – need rationale," "[n]ot sure termination would be such a bad thing," and "I want to have an 'out' of this agreement even if it is based on our 'choosing/inability to sell.'" *See id.* at 5–6. Plaintiffs contend that Broadridge did not share these concerns with plaintiffs before signing the agreement. *Id.* at 6.

Broadridge claims that these statements are inadmissible under the parol evidence rule. *See* Def. Reply 17. The parol evidence rule states, "Once a writing is determined to be the parties' entire contract,"—in other words, that it is fully integrated—"evidence of any previous oral or written negotiations or agreements involving the same subject matter as the contract is almost always inadmissible to explain or vary the terms of the contract." *Yocca v. Pittsburgh Steelers Sports, Inc.*, 854 A.2d 425, 436–37 (Pa. 2004).

The Marketing Agreement is fully integrated.[6] Plaintiffs argue that even so, the parol evidence rule does not apply, because the comments do not "alter, vary, modify, or contradict terms" of the Marketing Agreement. *See* Pls. Resp. 72 (quoting *Kehr Packages, Inc. v. Fid. Bank, N.A.*, 710 A.2d 1169, 1172 (Pa. Super. Ct. 1998)). The Court agrees. Plaintiffs introduce this evidence to show Broadridge's hostile state of mind about the contract—not to "add[] to nor subtract[] from" the "terms and agreements" or the meaning of the final contract. *See Yocca*, 854 A.2d at 436. Thus, these comments are admissible and can be considered in evaluating whether

[6] An "integration clause" is a clear sign that a writing constitutes the entire agreement. *Yocca*, 854 A.2d at 436. The Marketing Agreement contains an integration clause: "This Agreement contains the entire agreement and understanding of the parties with respect to its subject matter and supersedes all existing agreements and other oral, written and other communications between them concerning its subject matter." *See* SUMF ¶ 23. Plaintiffs argue that in spite of this clause, the Marketing Agreement is not fully integrated, because it is connected to the Stock Purchase Agreement. *See* Pls. Resp. 70–71. Yet the Marketing Agreement makes no mention of the Stock Purchase Agreement. The Court thus rejects plaintiffs' argument.

Broadridge engaged in willful misconduct.

Plaintiffs also assert that Broadridge had a motive not to perform: Broadridge hoped to enter the employee stock plan administration business itself, so any referral to Plan Management would foreclose Broadridge's ability to later service that client's needs. *See* Pls. Resp. 20–21. Indeed, within a year of signing the Marketing Agreement, Broadridge entered discussions with Morgan Stanley Smith Barney ("Morgan Stanley") regarding the acquisition of Morgan Stanley's "Global Stock Plan Services" business, which it considered "the market leader in Stock Plan Services Administration" and which was a direct competitor of Plan Management. *See id.* at 22–23. Around that time, one Broadridge employee wrote to another, questioning whether Broadridge might want to "defer these [referrals to Plan Management] to a future point in time when we have a different solution," which plaintiffs argue refers to a "future point" when Broadridge would have its own plan management services. *Id.* at 24. Broadridge bid on Morgan Stanley's business, but Morgan Stanley terminated the negotiations in April 2012. *Id.* at 23–24. Broadridge argues that it had no such motive, as under its potential agreement with Morgan Stanley it would have supplied the *software* but Morgan Stanley would provide the services. *See* Def. Reply 13. Plaintiffs dispute this characterization, arguing that under Broadridge's written bid to Morgan Stanley, a "stock plan services bureau" would be created consisting of 800 of Broadridge's employees and 550 Morgan Stanley employees to be hired by Broadridge—more than just *software*. Pls. Sur-Reply 3.

Viewing the evidence in the light most favorable to plaintiffs, a reasonable jury could find that Broadridge engaged in willful misconduct in making referrals. Further, even if a jury could find that Broadridge did not engage in willful misconduct in the first year of the agreement, it could reasonably conclude that Broadridge did so in subsequent years based on its low referral numbers later in the contract term. Thus, the Court denies the motion for summary judgment with respect to the issue of whether defendant engaged in willful misconduct.

d) Plaintiff's Remaining Expert: Michael Molder

As a final note, when ruling on Broadridge's Motion to Exclude the Expert Testimony and Reports of Joseph Potenza and Michael Molder, the Court stated that if it "concluded, in addressing defendant's Motion for Summary Judgment, that defendant's conduct does not amount to gross negligence or willful misconduct," the opinions of plaintiffs' remaining expert, Michael Molder, on damage calculations, must be excluded. *See Paramount Fin. Commc'ns, Inc. v. Broadridge Inv'r Commc'n Sols., Inc.*, No. 15-405, 2018 WL 7815202, at *11 (E.D. Pa. Dec. 13, 2018). Because a genuine dispute of material fact remains as to whether Broadridge acted with gross negligence or engaged in willful misconduct, the Court does not exclude Molder's report and testimony at this time. If the jury makes such a determination, the verdict would have to be molded in accordance with the limitation of liability clause.

C. Fraudulent Inducement: The Stock Purchase Agreement

In Count II, plaintiffs aver that Broadridge fraudulently promised performance under the Marketing Agreement to induce plaintiff Miller to enter into the Stock Purchase Agreement. *See* Pls. Resp. 70. Under Pennsylvania law, the elements of fraudulent inducement are: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." *Eigen v. Textron Lycoming Reciprocating*

Engine Div., 874 A.2d 1179, 1185 (Pa. Super. Ct. 2005).

Broadridge argues (1) that the fraudulent inducement claim is time barred and (2) that plaintiffs have not established a prima facie case. For the reasons that follow, the Court denies Broadridge's motion for summary judgment with respect to plaintiff's fraudulent inducement claim.

1. Time Bar

Broadridge argues that plaintiffs' fraudulent inducement claim is time barred. Def. Mot. Summ. J. 12. Fraud claims in Pennsylvania have a two-year statute of limitations. 42 Pa. Cons. Stat. § 5524(7). A statute of limitations period typically begins to run when a cause of action accrues. *See Gleason v. Borough of Moosic*, 15 A.3d 479, 484 (Pa. 2011). However, under the discovery rule, the statute of limitations does not begin to run until a plaintiff has actual or inquiry notice of the injury—in other words, "as soon as the plaintiff has discovered or, exercising reasonable diligence, should have discovered the injury and its cause." *Bohus v. Beloff*, 950 F.2d 919, 925 (3d Cir. 1991). "Reasonable diligence" means that a plaintiff has "pursued the cause of his injury with those qualities of attention, knowledge, intelligence and judgment which society requires of its members for the protection of their own interests and the interests of others." *Cochran v. GAF Corp.*, 666 A.2d 245, 250 (Pa. 1995) (citation omitted). In other words, "[t]he question in any given case is not, what did the plaintiff know of the injury done him? but, what might he have known, by the use of the means of information within his reach, with the vigilance the law requires of him?" *See Scranton Gas & Water Co. v. Lackawanna Iron & Coal Co.*, 31 A. 484, 485 (Pa. 1895). "[T]here are few facts which diligence cannot discover, but there must be some reason to awaken inquiry and direct [reasonable] diligence in the channel in which it would be successful." *Deemer v. Weaver*, 187 A. 215, 217 (Pa. 1936). Plaintiff bears the burden of proof in establishing that he acted with reasonable diligence. *See Mest v. Cabot Corp.*, 449 F.3d 502, 511 (3d Cir. 2006).

Whether a plaintiff has exercised reasonable diligence, and therefore whether the discovery rule applies to toll the statute of limitations, is typically a question for the jury. *See Bohus*, 950 F.3d at 925. However, where "reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause," the Court may determine that the discovery rule does not apply as a matter of law. *See Fine v. Checcio*, 870 A.2d 850, 858 (Pa. 2005).

In this case, the alleged fraudulent act occurred in March 2010, when the parties signed both the Stock Purchase Agreement and Marketing Agreement. *See* SUMF ¶¶ 9, 19. Plaintiffs filed this lawsuit on January 28, 2015. Thus, for this claim to be timely, plaintiffs must not have been on notice of this claim until roughly February 2013 at the earliest.

Broadridge argues that plaintiffs were on inquiry notice in April 2011. *See* Def. Mot. Summ. J. 14. Miller testified that "[a]s of April 26th, 2011, . . . [he] suspect[ed] that Broadridge did not intend to fulfill the marketing agreement." *Id.*; SUMF ¶ 40. Broadridge also argues that if plaintiffs' allegations with respect to the breach of contract claim are accurate, then Broadridge referred less than one percent of the referrals required under the Marketing Agreement, which should have pushed Miller to conduct reasonable diligence to discover that Broadridge never intended to perform. *See* Def. Mot. Summ. J. 15.

Plaintiffs respond that notice that Broadridge was not performing the contract differs from notice that Broadridge *never* intended to perform. Pls. Resp. 75. Furthermore, plaintiffs argue that there was not information "within [their] reach" that would have permitted them to discover the injury upon additional diligence. *See* Pls. Sur-Reply 3–4 (citing *Scranton Gas & Water*, 31 A. at 485). For example, plaintiffs contend that had Miller reached out to Broadridge, Broadridge would have insisted, as it does now, that it always intend to perform. *See id.* at 4.

Instead, plaintiffs assert that they did not have any knowledge of Broadridge's fraudulent inducement until June 25, 2014, when they received a letter from Broadridge's counsel, responding to a letter from plaintiffs arguing Broadridge had breached the contract. *See* Pls. Resp. 76. In its letter, Broadridge explained why the referral numbers were low, stating:

> Plan Management has not had a feasible infrastructure to support the types of services required by Broadridge's clients. For example, Plan Management does not have the name recognition in the industry necessary to compete for the type of clients served by Broadridge's transfer agent business. Due in no small part to Plan Management's lack of name recognition, these clients were not interested in being referred to Plan Management and, therefore, were not "Viable Clients."

Pls. Resp., Ex. 17, at 2. Plaintiffs assert that Broadridge knew about Plan Management's name recognition and infrastructure before it entered the contract, given the "extensive due diligence" it conducted on Plan Management when deciding whether to acquire Plan Management. Pls. Resp. 74 & n.27, 76. That Broadridge was aware of these issues at that time is evidenced by a Broadridge executive's statement, before the contract was signed, that he did not want to acquire Plan Management because it "may require more incremental investment than we anticipate to drive market adoption" and that Plan Management had a "startup nature." *Id.* at 52, 75. Plaintiffs argue that Plan Management's infrastructure and name recognition in 2014 were "equal to, or better than," its infrastructure and name recognition before the contract was signed. *Id.* at 74. With this, they contend that if Broadridge truly believed the reasons for non-performance stated in its letter, then Broadridge must have known it could not perform before it entered the contract. *See id.* at 76.

Broadridge argues that this letter is inadmissible under Federal Rule of Evidence 408, which states that evidence of compromise negotiations, including settlement demand letters, are inadmissible "either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." *See* Def. Mot. Summ. J. 16 n.3. But Broadridge has failed to establish that plaintiffs are introducing the letter to dispute the "validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction." *See B & B Inv. Club v. Kleinert's, Inc.*, 472 F. Supp. 787, 791 (E.D. Pa. 1979) (rejecting exclusion argument under Fed. R. Evid. 408 and explaining "[i]f the compromise negotiations are used for another purpose they are not inadmissible"). Rather, the letter falls within a clearly outlined exception to Rule 408: evidence offered to "negat[e] a contention of undue delay." *See* Fed. R. Evid. 408(b). To the extent that portions of the letter specifically reference compromise negotiations, those portions can be redacted. *See Bourhill v. Sprint Nextel Corp.*, No. 10-5793, 2013 WL 265972, at *5 (D.N.J. Jan. 23, 2013) (allowing redaction of "only that portion of a letter that implicates Rule 408 rather than striking the letter in its entirety").

Broadridge also argues that this letter could not have been plaintiffs' first notice of this claim, because it was sent in response to a letter from plaintiffs, dated June 5, 2014, that stated, "We have every reason to believe that Broadridge's breach was willful and that Broadridge never intended to perform when the Agreement was executed on Broadridge's behalf in March of 2010." Def. Mot. Summ. J. 16; Def. Mot. Summ. J., Ex. 234, at 2. Although plaintiffs' June 5, 2014 letter reveals that plaintiffs suspected Broadridge's fraud prior to the June 25, 2014 letter, it does not establish as a matter of law that plaintiffs were on notice of fraud any earlier than June 5, 2014, so it still fails to establish as a matter of law that plaintiffs' claim was untimely.

Viewing the record in the light most favorable to plaintiffs, the Court concludes that reasonable minds could differ as to the timing of plaintiffs' discovery of the cause of their injury. If Broadridge's efforts to perform under the contract were as dismal from the start as plaintiffs describe, a reasonable jury could find that plaintiffs were on inquiry notice relatively early in the Marketing Agreement, making this claim untimely. Alternatively, a reasonable jury could find, as plaintiffs contend, that Broadridge's early non-performance put plaintiffs on notice of breach, but not on notice that Broadridge at no point intended to perform. The Court thus defers to the jury for a determination of whether the fraudulent inducement claim was timely filed.

2. Fraudulent Inducement Prima Facie Case

The elements of a claim of fraudulent inducement are: "(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance." *Eigen v. Textron Lycoming Reciprocating Engine Div.*, 874 A.2d 1179, 1185 (Pa. Super. Ct. 2005).

Broadridge does not dispute the first element, that entering the Marketing Agreement constituted a representation. However, Broadridge does dispute that plaintiffs have adduced clear and convincing evidence with respect to all remaining elements. Def. Mot. Summ. J. 20. For the reasons that follow, the Court denies Broadridge's Motion on this ground.

a) <u>Materiality of the Representation</u>

"A misrepresentation is material if the party would not have entered into the agreement but for the misrepresentation." *ESSA Bank & Tr. v. Cerami*, No. 1632-2014, 2015 WL 7355857, at *4 (Pa. Super. Ct. Mar. 24, 2015). Broadridge asserts that "[n]othing in the [Stock Purchase Agreement] states that execution and performance of the Marketing Agreement was material to execution and performance of the [Stock Purchase Agreement]." Def. Mot. Summ. J. 22. However, several contractual terms connect the two agreements. Article III of the Stock Purchase Agreement states, "The Buyer shall cause its affiliate, Broadridge Investor Communication Solutions, Inc., to execute and deliver the marketing agreement with Plan Management." Pls. Resp. Opp. SUMF ¶ 15. The agreement also states, "Sellers shall cause Plan Management to execute and deliver the Marketing Agreement." Pls. Resp. 71; Def. Mot. Summ. J., Ex. 9, at 7. Kopelman testified, "[T]he marketing agreement was part of or related to the stock purchase agreement." *See* Pls. Resp. 71; Def. Mot. Summ. J., Ex. 1., at 157:9–19. Plaintiffs also argue that the importance of the Marketing Agreement to Miller in deciding to enter the Stock Purchase Agreement was clear from the lengthy negotiations between the parties before finalizing the agreements. *See* Pls. Resp. Opp. SUMF ¶ 18.

The Court concludes that a reasonable jury could conclude that the Marketing Agreement was material to the Stock Purchase Agreement.

b) <u>Representation Made Falsely</u>

The material representation must have been false—in other words, a misrepresentation. *See Eigen*, 874 A.2d at 1185. "A statement of present intention which is false when uttered may constitute a fraudulent misrepresentation of a fact." *Mellon Bank Corp. v. First Union Estate*

Equity & Mortg. Invs., 951 F.2d 1399, 1410 (3d Cir. 1991) (quoting *Brentwater Homes, Inc. v. Weibley*, 369 A.2d 1172, 1175 (Pa. 1977)).

Broadridge argues it did not make any false statement to Miller at the time the Stock Purchase Agreement was signed. Def. Mot. Summ. J. 22. However, plaintiffs point to evidence suggesting that Broadridge did not intend to fulfill the Marketing Agreement according to its terms when it entered the agreement. For example, Broadridge senior executives' comments on an early draft of the Marketing Agreement, including "would prefer a shorter term – need rationale" and "I want to have an 'out' of this agreement even if it is based on our choosing/inability to sell," show Broadridge's hostility to the agreement.[7] *See* Pls. Resp. 50–51. These comments were not shared with plaintiffs. *See id.* at 51. Broadridge argues that these comments referred to whether Plan Management—not Broadridge—should have an out, but viewing them in the light most favorable to plaintiffs, the Court cannot reach such a conclusion. *See* Def. Mot. Summ. J. 27 n.5; Def. Reply 20.

Broadridge avers that, at the very least, its "partial performance is evidence that at the time entered into the contract, it intended to perform." *See* Def. Mot. Summ. J. 26 (quoting *KNK Med.-Dental Specialties, Ltd. v. Tamex Corp.*, No. 99-3409, 2000 WL 1470665, at *4 (E.D. Pa. Sept. 28, 2000)). On this issue plaintiffs do not contend that Broadridge did not intend to perform at all, only that they intended to underperform, with "window dressing" to appear as though it was performing. *See* Pls. Resp. 51–52. Plaintiffs assert that Broadridge's inadequate

[7] The Court already concluded that this evidence is not barred by the parol evidence rule with respect to the breach of contract claim. The Court notes that the parol evidence rule likewise does not bar this evidence with respect to the fraudulent inducement claim. This evidence is not being introduced to "alter, vary, modify, or contradict terms" of the Stock Purchase Agreement or Marketing Agreement, but instead to show defendant's state of mind. *See Kehr Packages, Inc. v. Fid. Bank, N.A.*, 710 A.2d 1169, 1172 (Pa. Super. Ct. 1998).

performance from the start of the contract reveals its intent. *See id.* at 51. Given the genuine disputes of material fact as to Broadridge's efforts to perform, the Court determines that a reasonable jury could disagree regarding whether Broadridge falsely promised to perform or merely "broke[a] promise to do something in the future" insufficient to support a fraudulent inducement claim. *See KNK Med.-Dental Specialties*, 2000 WL 1470665, at *4.

Additionally, plaintiffs argue, for the reasons already discussed, that the June 2014 letter[8] from Broadridge, stating that Plan Management lacked the infrastructure and name recognition to refer clients to Plan Management, evinces Broadridge's misrepresentation, because Broadridge knew about Plan Management's name recognition and infrastructure before it entered the contract. *See* Pls. Resp. 49, 52–53. The parties disagree as to the extent of Broadridge's research on Plan Management, with Broadridge claiming it simply "relied on the representations of Mr. Miller and Plan Management personnel" and that it was unaware of these issues until it began to perform. *See* SUMF ¶ 31–33; Pls. Resp. Opp. SUMF ¶¶ 31–33.

Finally, Broadridge asserts that there is "no credible motive" as to why it "would intend to not perform under the Marketing Agreement." Def. Mot. Summ. J. 28. One employee testified that it was in Broadridge's best interests to offer Plan Management's services, saying, "As a salesperson, the more tools in your toolbox the better . . . . So if you can go to a company and say, 'We've got proxy, we've got plan management services and we've got stock transfer

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[8] As discussed earlier, defendant argues that this letter is inadmissible under Federal Rule of Evidence 408, which bars evidence of compromise negotiations "to prove or disprove the validity or amount of a disputed claim." *See* Def. Mot. Summ. J. 16 n.3. However, "there is ample authority to support the proposition that Rule 408 only bars evidence of settlement discussions concerning the compromise claim." *Herman v. City of Allentown*, No. 96-6942, 1998 WL 13295, at *2 (E.D. Pa. Jan. 15, 1998) (citation omitted). This letter discusses only the breach of contract claim—not the fraudulent inducement claim. Further, to the extent that the letter discusses compromise, it can be redacted. *See Bourhill v. Sprint Nextel Corp.*, No. 10-5793, 2013 WL 265972, at *5 (D.N.J. Jan. 23, 2013).

services that we could help you out with; I'd like to ask you about all three,' you would do better with every opportunity you had." *Id.*; SUMF ¶ 74. But plaintiffs cite several motives Broadridge may have had for not wanting to perform, including concerns about a relationship with Plan Management hurting Broadridge's relationships with clients that were competitors of Plan Management and Broadridge's desire to enter the stock plan administration business itself. *See* Pls. Resp. 20–24, 67.

Viewing the facts in the light most favorable to plaintiffs, evidence of Broadridge's intent, coupled with evidence of Broadridge's alleged nonperformance from the start of the contract, is sufficient to create a genuine dispute of material fact as to whether the contractual undertaking itself constituted a misrepresentation. *Cf. De Lage Landen Fin. Servs., Inc. v. Rasa Floors, LP*, 792 F. Supp. 2d 812, 838–39 (E.D. Pa. 2011) (granting summary judgment where the *only* evidence of misrepresentation was failure to perform). A reasonable jury could conclude, at the very least, that Broadridge did not intend to perform according to the contract's terms at the time that it entered the Marketing Agreement.

c) <u>Intent to Mislead</u>

Next, to prevail on a fraudulent inducement claim, plaintiffs must show Broadridge had the intent of misleading them to rely on its misrepresentation. *See Eigen*, 874 A.2d at 1185. In other words, in this case, Broadridge must have intended to fraudulently induce Miller to sign the Stock Purchase Agreement.

Broadridge first contends that plaintiff cannot show a credible motive for Broadridge to fraudulently induce Miller into signing the Stock Purchase Agreement, whereas Miller had every reason to enter the Stock Purchase Agreement to receive millions of dollars. Def. Mot. Summ. J.

23. Plaintiffs contend that Broadridge's motive was that purchasing all of the shares of StockTrans was "sufficiently important to Broadridge's business plan." *See* Pls. Resp. 49. In support, plaintiffs cite a statement from Broadridge's negotiator for the Stock Purchase Agreement that StockTrans "is the only viable acquisition candidate currently available to [Broadridge]." *Id.* Further, plaintiffs argue that Broadridge must have understood that the Marketing Agreement was a "material inducement" for Miller to enter the Stock Purchase Agreement "by reason of extensive negotiations making the fact clear." *Id.* at 3.

Viewing the facts in the light most favorable to the nonmoving party, and given the disputes remaining regarding the connection between the two agreements, the Court cannot conclude that no reasonable jury could find that the Broadridge had the intent to mislead Miller.

d) <u>Justifiable Reliance on the Misrepresentation</u>

Next, Miller must have justifiably relied on Broadridge's misrepresentation. *See Eigen*, 874 A.2d at 1185. Broadridge disputes that Miller signed the Stock Purchase Agreement solely because of the Marketing Agreement, arguing plaintiffs fail to "eliminate all other motives which may have caused [Miller] to enter" the contract. *See* Def. Mot. Summ. J. 28 (quoting *Harrison v. Cabot Oil & Gas Corp.*, 887 F. Supp. 2d 588, 594 (M.D. Pa. 2012), *aff'd*, 608 F. App'x 128 (3d Cir. 2015) ("The circular argument that because Plaintiff signed the lease, he must have done so in reliance on [defendant's] statement does not show a genuine issue of fact on this point, nor does it eliminate all other motives which may have caused Plaintiff to enter the lease at issue.")). Plaintiffs aver that Miller relied on Broadridge's promise to perform in deciding to sell his shares of StockTrans to Broadridge. *See* Pls. Resp. 68. Given the genuine disputes of material fact that remain with respect to the materiality of the Marketing Agreement to the Stock Purchase

Agreement, discussed *supra*, the Court cannot conclude as a matter of law that plaintiffs did not rely on signing the Marketing Agreement in entering the Stock Purchase Agreement or that such reliance would not have been justifiable. Thus, the Court denies Broadridge's motion for summary judgment with respect to the justifiable reliance on the misrepresentation element of plaintiff's fraudulent inducement claim.

e) <u>Proximate Causation of Injury</u>

Finally, plaintiffs must have suffered an injury proximately caused by their reliance on defendant's misrepresentation. *See Eigen*, 874 A.2d at 1185. Broadridge argues that no evidence in the record shows Broadridge's alleged misrepresentation "proximately caused" Miller damages. *See* Def. Mot. Summ. J. 25. In support, Broadridge avers that Miller failed to timely supply a damages calculation for this claim pursuant to Federal Rule of Civil Procedure 26 and thus, the claim should be dismissed. *See id.* at 24. Further, Miller testified that "no one has done any formalized projection of damages [for the fraudulent inducement claim], to my knowledge." *Id.* at 24–25.

However, Broadridge mischaracterizes what this element requires. Nowhere does Broadridge cite to authority requiring that plaintiffs prove damages for a fraudulent inducement claim with the reasonable certainty required for a breach of contract claim, and the Court is unaware of any authority imposing such a stringent requirement. Instead, plaintiffs need only establish that they suffered some injury and that it was proximately caused by their reliance on Broadridge's misrepresentation. *Cf. Kilbride Investments Ltd. v. Cushman & Wakefield of Pa., Inc.*, 294 F. Supp. 3d 369, 381 (E.D. Pa. 2018) (focusing on "proximate causation" aspect of this element, rather than establishing damages with reasonable certainty). Plaintiffs assert an injury—that Miller lost profits "that he would have earned as sole owner of Plan Management, had Broadridge's false statements concerning its intention to perform under the Marketing Agreement been true,"[9] and that these damages are estimated in Molder's report and proffered testimony. Pls. Sur-Reply 6. A genuine dispute of material fact thus remains with respect to whether defendant's alleged misrepresentation proximately caused plaintiff injury.

V. CONCLUSION

For the foregoing reasons, Broadridge's motion for summary judgment is denied. An appropriate Order follows.

[9] This assertion differs from the injury plaintiffs assert in the Complaint: that "the price [Miller] accepted for his shares in StockTrans, Inc., was more than $75,000 lower than it would have been had he known that Broadridge had no intention of performing under the Marketing Agreement." Compl. ¶ 49.

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

PARAMOUNT FINANCIAL COMMUNICATIONS, INC., doing business as "PLAN MANAGEMENT CORP.," and JONATHAN MILLER, **Plaintiffs,** **v.** **BROADRIDGE INVESTOR COMMUNICATION SOLUTIONS, INC.,** **Defendant.**	**CIVIL ACTION** **NO. 15-405**

O R D E R

AND NOW, this 23rd day of May, 2019, upon consideration of Motion for Summary Judgment by Defendant Broadridge Investor Communication Solutions, Inc. (Document No. 72, filed Sept. 29, 2017), Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment (Document No. 75, filed Nov. 20, 2017), Reply Memorandum of Law in Further Support of the Motion for Summary Judgment By Defendant Broadridge Investor Communication Solutions, Inc. (Document No. 79, filed Dec. 11, 2017), and Plaintiffs' Sur-Reply in Opposition to Defendant's Motion for Summary Judgment (Document No. 85, filed Jan. 4, 2018), for the reasons stated in the accompanying Memorandum dated May 23, 2019, **IT IS ORDERED** that defendant's Motion for Summary Judgment is **DENIED**.

Because the motions and exhibits and related submissions were filed under seal, **IT IS FURTHER ORDERED** that this Order and the accompanying Memorandum shall also be **SEALED**. The Court will revisit the sealing of these documents with the parties and discuss the scheduling of further proceedings in a telephone conference to be conducted in due course.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.