SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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D&S, LTD.,

Plaintiff,

- v -

GE HEALTHCARE TECHNOLOGIES, INC. and GENERAL ELECTRIC CAPITAL CORPORATION,

Defendants.

INDEX NO. 653909/2023

MOTION DATE 10/20/2023, 01/08/2024

MOTION SEQ. NO. (MS) 001, 002

DECISION + ORDER ON MOTION

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (MS 001) 18, 19, 20, 21, 23, 28 were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (MS 002) 24, 25, 26, 27, 30, 37, 38, 39, 40, 41, 42, 46, 47, 48 were read on this motion to/for DISMISS.

Plaintiff D&S, Ltd. (DS) brings this declaratory judgment action against defendants GE HealthCare Technologies, Inc. (GE HealthCare) and General Electric Capital Corporation (GECC, and together with GE HealthCare, defendants) regarding a dispute as to DS's indemnification obligations under a Master Collection Services Agreement (MCSA) between DS and GECC, dated October 1, 2010 (NYSCEF # 1 – compl or Complaint). In response, GE HealthCare counterclaims for breach of contract, negligent misrepresentation/omission, breach of fiduciary duty, and negligence (NYSCEF # 17 – CC or Counterclaims). Now before the court are two motions to dismiss: in MS001, GECC moves pursuant to CPLR 3211(a)(2) and (a)(7) for an order dismissing the Complaint as against it; in MS002, DS moves pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7) for an order dismissing the Counterclaims). For the following reasons, GECC's motion is denied and DS's motion is granted in part and denied in part.

Background

The following facts are drawn from the Complaint, the Counterclaims, and accompanying exhibits to the parties' pleadings. The facts in the Complaint are assumed true solely for purposes of resolving GECC's motion, while the facts in the Counterclaims are assumed true solely for purposes of resolving DS's motion.

The MCSA

On October 1, 2010, DS and GECC, "on behalf of itself and for the benefit of all its subsidiaries and affiliates," executed the MCSA (compl ¶¶ 2, 28; CC ¶¶ 2, 9-10; NYSCEF # 2 – MCSA at preamble). DS agreed to provide GECC with "the Services and Deliverables described in" statements of work (SOWs) that were "in writing and signed" by DS and GECC (through its authorized agent) (*see* CC ¶ 11 [a]; MCSA § 1.1). DS's services could be used by GECC and "for the benefit of its subsidiaries and affiliates" (CC ¶ 11 [b]; MCSA § 1.3).

Under the MCSA, SOWs could be issued by GECC or any of its affiliates or subsidiaries, and they were to "incorporate by reference [the MCSA]" (CC ¶ 11 [b]; MCSA § 1.4). As the parties agreed, each "[SOW] issued by a [subsidiary or affiliate of GECC] will be governed by [the MCSA] in the same manner as if such [subsidiary or affiliate] had executed an identical agreement with [DS]," and "[DS] shall perform such SOW . . . as if [the MCSA] had been executed" between DS and GECC's subsidiary or affiliate (MCSA § 1.4). Furthermore, "all such rights, interests and enforcement" by GECC's subsidiaries and affiliates using the DS's services—"whether the right to use passes directly to that entity or not"—were to be "in connection with specific [SOWs] that such [subsidiary or affiliate] has entered into with" DS (MCSA § 1.3).

Among the various obligations set forth in the MCSA, DS agreed to employ "qualified individuals to perform, manage and administer" its services (CC ¶ 11 [c]; MCSA § 5.2). It also agreed to be "responsible for maintaining satisfactory standards of personnel competency, conduct and integrity" (CC ¶ 11 [c]; MCSA § 15.2). In addition to these obligations, DS represented, warranted, and covenanted that it would "immediately upon [its] knowledge thereof, notify [GECC] of all complaints, counterclaims, actions or suits received by [DS] relating to any Account placed with [DS] by [GECC]," including "complaints, counterclaims, actions or suits received from or filed or made by" any debtor (compl ¶ 32; CC ¶ 11 [d]; MCSA § 7.2[m] [i]). DS further represented, warranted, and covenanted that it would "forward[]" to GECC "all written materials or communications relating to adverse claims," and that it would "immediately [] forward" copies of all correspondence related to "any threatened or filed complaint, action, suit or counterclaim relating to an Account" (CC ¶ 11 [d]; MCSA § 7.2[m]).

Finally, section 10 of the MCSA covered indemnification. Specifically, under section 10.2, DS agreed to

> indemnify, defend, and hold [GECC], its Affiliates, and its and all of their respective officers, directors, employees and agents harmless from and against any Losses, arising out of, connected with or resulting from (a) any act or omission of [DS] or any its officers, directors, shareholders, employees or agents including attorneys

> retained by Service Provider[]; (b) breach by [DS] of [DS's] Obligations hereunder, including, without limitation, its obligation to ensure compliance by its agents with Requirements; and (c) any breach of any agreement or arrangement between [DS] and any other person or entity.

(compl ¶ 29; CC ¶ 11 [e]; MCSA § 10.2). "Losses" were, in turn, defined as "any losses, damages, costs and expenses, liabilities, settlements, including without limitation, any attorneys' fees and court costs reasonably incurred by an indemnified party" (compl ¶ 30; CC ¶ 11 [e]; MCSA § 10.4).

Assignment of the MCSA

On January 31, 2014, GECC notified DS that the MCSA was being assigned to a third party (compl ¶ 33; NYSCEF # 3 – Assignment). Specifically, GECC indicated that "[e]ffective as of February 15, 2014, GECC assign[ed] to Retail Finance Holdings, Inc [RFHI] . . . all of GECC's rights, obligations, duties, title, and interest in and to" the MCSA, including "any and all associated amendments, addenda, statements of work, task orders, and other relevant documentation" (the February 2014 Assignment) (compl ¶ 34; Assignment at 2).

Prior to the assignment, RFIH operated as a subsidiary of Synchrony Financial, which was a subsidiary of GE Consumer Finance, Inc. (compl ¶ 37). GE Consumer Finance was, in turn, a subsidiary of GECC at the time of the MCSA's assignment (*id.* ¶ 38). However, in 2014, pursuant to a Transitional Services Agreement between GECC, Synchrony was spun-off as a separate entity, and by November 17, 2015, GECC sold its 84.6% interest in Synchrony (*id.* ¶¶ 39-43). As a result, GECC's relationship with RFIH was permanently severed (*see id.* ¶¶ 36, 43)

The Relevant SOWs between DS and Defendants

Pursuant to the MCSA, GECC and its affiliates executed various SOWs for DS to provide debt collection services (*see* compl ¶¶ 46-47; CC ¶ 13). For example, GE HealthCare, as a "division of General Electric,"[1] and DS executed a SOW, dated November 5, 2012, which incorporated by reference the terms of the MCSA (*see* compl ¶ 46; CC ¶ 15). Thereafter, on July 31, 2014, GECC and DS executed a SOW, which amended and restated the SOW between GECC and DS dated October 21, 2013 (compl ¶ 46; CC ¶ 15; NYSCEF # 38 – July 2014 SOW at preamble).[2] The July 2014 SOW covered (1) "pre-legal collection, including amicable actions such as . . . dunning letters, personal contact with the debtor . . . and expert guidance in pre-legal collections," and (2) "the legal collection process as set forth on Exhibit B" (CC ¶ 16 [a]; July 2014 SOW ¶¶ 1-2). Exhibit B, in turn, provided that, if all non-legal efforts "have been exhausted by" DS, DS's legal collector will "make a final attempt

[1] DS alleges that, as of January 4, 2023, GE HealthCare is a stand-alone company (compl ¶¶ 70-72).
[2] The July 2014 SOW also incorporated by reference the terms of the MCSA.

at voluntary resolution with the debtor" (CC ¶ 16 [c]; NYSCEF # 40 at 1). If unsuccessful, DS would then provide its "recommendation on the account" and, upon GECC's approval, "forward the complete file to one of [DS's] attorneys practicing in the local area of the debtor" (CC ¶ 16 [c]; NYSCEF # 40 at 1).

GE HealthCare alleges that, under Exhibit B, DS agreed to "manage and monitor any litigation it referred to" its network attorney (*see* CC ¶ 16 [d]). Among other things, GE HealthCare avers, DS agreed to provide recurring updates on the litigation's process and obtain GECC's consent to incur additional monies on a lawsuit (*id.*). Exhibit B did caveat that DS's network attorneys "do not handle counter-claims on a contingency basis" (*id.* ¶ 16 [e]; NYSCEF # 40 at 2). Nevertheless, as set forth in Exhibit B, "[s]hould a debtor file a counter-claim," GECC would be "immediately notified and will need to either hire said attorney directly to defend or seek outside counsel" (CC ¶ 16 [e]; NYSCEF # 40 at 2).

The July 2014 SOW was amended on November 11, 2017, in an agreement between DS and GE Capital US Holdings, Inc., as successor-in-interest to GECC (CC ¶ 15; NYSCEF # 89). This amendment was again governed by the MCSA and incorporated its terms by reference (*see* NYSCEF # 89 at preamble).

The Belfair Account and South Carolina Litigation

In 2013, certain non-party GECC affiliates entered into agreements with a South Carolina magnetic resonance imaging services company, MRI at Belfair, LLC (Belfair) (CC ¶¶ 3, 17). The next year, GE HealthCare began providing repair and maintenance services to Belfair, and by November 2017, Belfair had accrued approximately $160,000 in debt that it refused to pay (*id.* ¶ 18). Sometime between November 2017 and January 2018, GE HealthCare placed the Belfair account with DS for collection based on Belfair's alleged payment default (*see* compl ¶ 45; CC ¶ 19). Upon receiving the Belfair account, DS attempted to collect on the debt, but its collection efforts were unsuccessful (compl ¶¶ 48-49). DS accordingly recommended in March 2018 that the Belfair account be escalated to an attorney for legal action (compl ¶ 49; CC ¶ 20). DS alleges that GECC approved escalating the account, while GE HealthCare alleges that it was the entity that authorized DS to do so (compl ¶ 51; CC ¶ 20).

DS eventually retained Parnell & Parnell, P.A. (Parnell), a South Carolina law firm, to pursue legal action against Belfair (compl ¶ 51; CC ¶ 21). DS's engagement confirmation sent to Parnell referred to DS as GE HealthCare's "agent," explaining that "[f]or convenience, and to expedite handling, [GE HealthCare] prefers that all correspondence be conducted through [DS's] office" (*see* compl ¶ 52; CC ¶ 24; NYSCEF # 9 at 2). The engagement confirmation further stated that Parnell, "as attorney for [GE HealthCare]," was "always free to communicate with the client directly" (*see* compl ¶ 52; CC ¶ 25; NYSCEF # 9 at 2).

In July 2018, GE HealthCare authorized DS to instruct Parnell to proceed with filing a lawsuit, and Parnell then filed the action, captioned *GE Healthcare v. MRI at Belfair, LLC*, Case No. 2018-CP-07-02070, in South Carolina state court on October 19, 2018 (compl ¶¶ 15, 54; CC ¶¶ 29-30). Although GE HealthCare alleges that DS coordinated the payment of filings fees, review and approval of Parnell's draft of the complaint, and execution of an evidentiary affidavit by GE HealthCare (CC ¶ 29), DS conversely avers that it was not tasked by GECC or GE HealthCare to monitor court filings (compl ¶ 55).

The Belfair Counterclaims and the Federal Action

In mid-December 2018, Parnell allegedly informed DS that Belfair had threatened to bring counterclaims against GE HealthCare (CC ¶ 31). Belfair then followed through with this threat on January 2, 2019, and filed counterclaims against GE HealthCare alleging breach of contract, violation of the South Carolina Unfair Trade Practice Act, tortious interference with prospective business relations, and fraudulent inducement (the Belfair Counterclaims) (compl ¶ 56; CC ¶ 32). Parnell neither responded to nor defended against the Belfair Counterclaims (*see* compl ¶ 57; CC ¶ 38). Accordingly, Belfair requested and received an entry of default against GE HealthCare, which was entered on August 16, 2019 (compl ¶ 58; CC ¶ 42). Parnell failed to defend against or seek relief from the entry of default, and on November 11, 2019, Belfair filed a motion for default judgment as to liability on the Belfair Counterclaims and moved to dismiss GE HealthCare's affirmative claims (compl ¶¶ 59-60; CC ¶ 43).

GE HealthCare avers, upon information and belief, that DS was aware, or should have been aware, of the Belfair Counterclaims in early 2019 by virtue of its allegedly frequent communications with Parnell and its purported duty to independently manage and monitor the Belfair litigation (*see* CC ¶¶ 33-34, 53, 56-57). DS, however, neither informed GE HealthCare about the Belfair Counterclaims for over a year after their filing nor otherwise provided any substantive updates about the Belfair litigation (*see id.* ¶¶ 35, 41). GE HealthCare further contends, upon information and belief, that DS knew of the deadline to reply to the Belfair Counterclaims, approved of and/or acquiesced to Parnell's failure to file anything in response, but then failed to inform GE HealthCare of this course of action (*id.* ¶¶ 39-40). Similarly, after Belfair requested an entry of default and then moved for default judgment, DS again failed to apprise GE HealthCare of these litigation developments at the time, only doing so on or around July 2020 (*id.* ¶¶ 42-43).

GE HealthCare also claims that DS purportedly misrepresented the state of the lawsuit in mid-December 2019 to suggest, after conferring with Parnell, that Belfair might file counterclaims, not that the Belfair Counterclaims had been filed (CC ¶¶ 45-47). Around that same time—and at DS's apparent urging and approval—Parnell engaged in a failed and faulty attempt to execute a settlement agreement with Belfair, which then resulted in Belfair filing a motion for sanctions

relating to the botched settlement (*id.* ¶¶ 48-51). Although GE HealthCare was made aware of (but did not approve of) the attempted settlement, it was never informed of the Belfair Counterclaims or even Belfair's motion for sanctions (*id.* ¶¶ 48, 51-52).

DS offers a different account of the events resulting in the Belfair Counterclaims. Specifically, DS claims that Parnell did not notify it of the Belfair Counterclaims when they were filed (compl ¶¶ 57-59). To the contrary, DS alleges, Parnell concealed the truth about the Belfair litigation and related settlement negotiations from both DS and GE HealthCare, and hence DS only learned of the Belfair Counterclaims and the subsequent default in July 2020 when, on its own accord, it obtained a copy of the Belfair litigation docket (*id.* ¶¶ 62-64). DS contends that it then immediately informed GE HealthCare of Parnell's failures and omissions (*id.* ¶ 64; *see also* CC ¶¶ 54-55).

Although the parties ultimately dispute when DS became aware of the Belfair Counterclaims, both agree that on July 29, 2020, after learning about these developments in the Belfair litigation, GE HealthCare fired Parnell (compl ¶ 65; CC ¶ 58). GE HealthCare's new counsel then moved to set aside the default judgment (compl ¶ 66). Although the attempt to set aside the default judgment was initially successful, on October 20, 2021, the court granted Belfair's motion for reconsideration and re-entered default judgment (*id.*). The result of this default judgment is that the allegations in the Belfair Counterclaims are deemed admitted and entitlement to damages is presumed, and Belfair is now arguing that it is entitled to a multi-million-dollar punitive damages award (*id.* ¶ 67).

On February 27, 2023, GE HealthCare commenced a lawsuit in the United States District Court for the District of South Carolina, captioned *GE HealthCare Technologies, Inc. v. Parnell & Parnell, P.A. et al.*, Case No. 3:23-cv-00782-MGL (the Federal Action) (compl ¶ 73) GE HealthCare sued Parnell for various causes of action, including legal malpractice, breach of fiduciary duties, breach of contract, and constructive fraud, and it sued DS for its alleged breach of the MCSA based on DS's purported failure to provide competent third-party administrator services under the MCSA and for its failure to indemnify and hold harmless GE HealthCare (*id.* ¶¶ 74-79). GE HealthCare, however, voluntarily dismissed DS from the Federal Action without prejudice on March 17, 2023 (*id.* ¶ 80).

Procedural History

Defendants are allegedly continuing to demand indemnification from DS under MCSA—a position that DS continues to dispute based on GECC's February 2014 Assignment (*see* compl ¶¶ 80-92). Accordingly, DS commenced this action on August 14, 2023, to seek a declaration that defendants are not entitled to indemnification for the default judgment entered against GE HealthCare in the

Belfair litigation (*id.* ¶¶ 1, 94-100). GECC (but not GE HealthCare) moved to dismiss the complaint on October 20, 2023 (NYSCEF # 18).

Meanwhile, on October 16, 2023, GE HealthCare (but not GECC) answered and interposed the Counterclaims based on DS's alleged failure to adequately manage and monitor the Belfair litigation (CC ¶¶ 1, 62-115). Soon after, on November 11, 2023, DS moved to dismiss the Counterclaims in their entirety (NYSCEF # 24). This Decision and Order followed.

Legal Standards

CPLR 3211(a) provides for various grounds under which a party may move for judgment dismissing one or more causes of action. Pursuant to CPLR 3211(a)(7) a party may move to dismiss when a pleading "fails to state a cause of action" (CPLR 3211 [a] [7]). On such a motion, the court "must accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord [the non-movant] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012] [internal quotation omitted]; *accord Pavich v Pavich*, 189 AD3d 548, 549 [1st Dept 2020]). Whether a plaintiff can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). The court, however, will not accept "conclusory allegations of fact or law not supported by allegations of specific fact" (*Wilson v Tully*, 243 AD2d 229, 234 [1st Dept 1998]).

CPLR 3211(a)(1), in turn, allows for dismissal if a "defense is founded upon documentary evidence" (CPLR 3211 [a] [1]). Dismissal based on documentary evidence under 3211(a)(1) is warranted "only where 'it has been shown that a material fact as claimed by the pleader is not a fact at all and no significant dispute exists regarding it'" (*Acquista v N.Y. Life Ins. Co.*, 285 AD2d 73, 76 [1st Dept 2001] [alterations omitted], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In those circumstances "where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference" (*Morgenthow & Latham v Bank of N.Y. Co., Inc.*, 305 AD2d 74, 78 [1st Dept 2003] [internal quotations omitted]).

Finally, under CPLR 3211(a)(2), a party may move to dismiss on the ground that the court lacks "jurisdiction [over] the subject matter of the cause of action," while under CPLR 3211(a)(3), dismissal is warranted if "the party asserting the cause of action has not legal capacity to sue" (*see* CPLR 3211 [a] [2] & [a] [3]). The concepts capacity to sue and standing are "conceptually distinct" legal doctrines (*see Silver v Pataki*, 96 NY2d 532, 537 [2001]). Standing goes to the "larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is

capable of judicial resolution" (*Sec. Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006]). Capacity, by contrast, "concerns a litigant's power to appear and bring its grievance before the court" (*see Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]). Capacity, or lack thereof, "often depends purely on the litigant's status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or, as in this case, a business corporation" (*Evans*, 31 AD3d at 279).

Discussion

Before the court are two separate motions to dismiss. In MS001, GECC seeks dismissal of DS's claim for declaratory judgment primarily on the grounds that DS has failed to identify any justiciable controversy between DS and GECC (NYSCEF # 20 – GECC MOL at 1; NYSCEF # 28 – GECC Reply at 1-2). And in MS002, DS seeks dismissal of the Counterclaims chiefly on the grounds that GE HealthCare lacks standing to bring claims under the MCSA (NYSCEF # 26 – DS MOL at 1-2; NYSCEF # 47 – DS Reply at 1-3). Below, the court first addresses GECC's motion to dismiss, and then turns to DS's motion to dismiss.

I. GECC's Motion to Dismiss the Complaint (MS001)

The first motion to dismiss before the court is by GECC. To support dismissal of DS's declaratory judgment claim against it, GECC contends that DS's sole objective is to obtain a declaration that DS is not obligated to indemnify GE HealthCare in relation to the Belfair litigation, and that the Complaint is bereft of any well-pleaded allegations that GECC was involved in the operative events set forth in the Complaint (GECC MOL at 4-5; GECC Reply at 2-5). GECC further avers that, to the extent DS is contending that GECC could seek indemnification, its claim would be tantamount to seeking an advisory opinion about a potential future adverse event (GECC MOL at 5; GECC Reply at 5).

In opposition, DS argues that the Complaint sufficiently alleges that GECC was heavily involved in the events leading up to DS's request for declaratory judgment (NYSCEF # 23 – DS Opp at 7-8). Specifically, DS avers, the Complaint alleges that (1) GECC was a party to the MCSA and multiple SOWs, including those giving rise to the Belfair account placement, and (2) both GECC and GE HealthCare demanded indemnification from DS after Parnell's alleged mishandling of the Belfair litigation notwithstanding the fact that GECC allegedly assigned away its rights pursuant to the MCSA (*id.* at 8-9). At most, DS contends, GECC has raised factual disputes regarding the alleged indemnification demand on DS, which cannot be not properly resolved on a motion to dismiss (*id.* at 9).

CPLR 3001 provides that the court may "render a declaratory judgment" as to the "rights and other legal relations of" parties regarding "a justiciable controversy whether or not further relief is or could be claimed." The "general

purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009]). A declaratory judgment action thus requires "an actual controversy between genuine disputants with a stake in the outcome" (*Long Is. Light. Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006]). On a motion to dismiss a declaratory judgment action, "the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to [it]" (*Gen. Ins. v Piquion*, 211 AD3d 634, 634 [1st Dept 2022]).

Here, it is true that the Belfair litigation was a debt collection proceeding initiated on behalf of GE HealthCare, not GECC, that the Belfair Counterclaims were against GE HealthCare, not GECC, and that the Federal Action was filed by GE HealthCare, not GECC (*see* compl ¶¶ 15, 52-54, 56-66, 73-79). Furthermore, as GECC notes, the Complaint largely focuses on GE HealthCare's purported indemnification demand on DS, with any purported demand by GECC being a mere afterthought (*compare id.* ¶¶ 4, 10, 83, 92 *with id.* ¶¶ 1, 20, 22, 44, 75-79, 84, 91). Nevertheless, on a motion to dismiss, the court must accept the allegations in the Complaint as true and provide DS "with the benefit of every favorable inference" (*Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]).

Upon doing so, the court concludes there are sufficient allegations in the Complaint indicating that an actual, non-advisory dispute exists between DS and GECC. For example, the purported contractual basis for DS's debt collection efforts and the resulting Belfair litigation largely arises from agreements executed between DS and GECC and its successor-in-interest, GE Capital US Holdings, Inc., not GE HealthCare (*see* compl ¶¶ 2-3, 5, 28-32, 46-47; MCSA at preamble; July 2014 SOW at preamble; NYSCEF # 89 at preamble). DS further contends that, consistent with this contractual arrangement, it consulted with and obtained approvals from GECC at various key junctures leading up to the Belfair litigation (*see* compl ¶¶ 3, 4, 28-32, 45-51). And although GECC's purported indemnification demand is clearly alleged only once (*id.* ¶ 4), the complaint does establish that there was a corporate relationship between GECC and GE HealthCare at all relevant times (*see id.* ¶¶ 8, 70-72). When coupling these allegations with the fact that it was GECC, not GE HealthCare, that entered MCSA and July 2014 SOW, the Complaint supports pleading stage inference that GECC was involved with the operative events giving rise to DS's declaratory judgment claim.

To avoid this outcome, GECC primarily relies on the trial court decision in *AEA Middle Mkt. Debt Funding LLC v Marblegate Asset Mgt., LLC* (2021 WL 10429158 [Sup Ct, NY County, Nov. 18, 2021]). In *AEA*, plaintiffs asserted, *inter alia*, a claim for declaratory judgment on the grounds that defendants "intend[ed] to seek reimbursement" under the parties' credit agreement, and hence plaintiffs

sought a declaration that "any liabilities relating to [defendants'] conduct . . . aris[ing] from gross negligence and/or willful misconduct" were not subject to indemnification or reimbursement (*id.* at *21). The court ultimately dismissed plaintiffs' claim, explaining that plaintiffs failed to identify a "present, rather than hypothetical" controversy (*id.*). The court reasoned that plaintiffs' claim was premature because it was based on one of defendant's "intent" to seek reimbursement, not an actual request (*id.*) Furthermore, the court noted, any indemnification defendants could seek was reliant upon a final judgment from a "court of competent jurisdiction," which had not yet been rendered (*id.*). Here, by contrast, DS's declaratory judgment claim is not based on a hypothetical issue or reliant upon the occurrence of future events that have not yet come to pass. Instead, DS has alleged a specific demand for indemnification it has already received, and it has plausibly alleged that this demand flows from both GE HealthCare and GECC.

In any event, as noted above, GECC is a named party to both the MCSA and July 2014 SOW, and it was GECC's assignment of the MCSA—and the impact, if any, this assignment had on all past and present agreements between the parties' pursuant to the MCSA—that serves as the primary basis for the alleged contractual dispute as to what, if any indemnification obligations DS owes to GE HealthCare and GECC (*id.* ¶¶ 82-93). Consequently, even assuming DS did not plausibly allege that GECC was involved in the operative events set forth in the Complaint, it has sufficiently established at this juncture that GECC is a necessary party. Indeed, any declaration rendered by the court would inevitably implicate and inequitably affect GECC's rights and obligations under the relevant agreements (*see Jennings v Chase Home Fin., LLC*, 136 AD3d 444, 444 [1st Dept 2016] [concluding that third party feeholder and mortgagor of property was a necessary party in declaratory action as to the rights of the parties with regard to a loan and mortgage]; *Matter of New York State Assn. of Plumbing-Heating-Cooling Contr., Inc. v Egan*, 86 AD2d 100, 105 [3d Dept 1982] [concluding that contractors were necessary parties to action to annul contracts to expand capacity of state correctional facilities]; *see generally* CPLR 1001 [a] [requiring joinder of all entities that "might be inequitably affected by a judgment in the action"]).

In sum, GECC's motion to dismiss the Complaint is denied.

II. DS's Motion to Dismiss the Counterclaims (MS002)

The second motion to dismiss before the court is by DS, who seeks dismissal of the Counterclaims in their entirety. Starting with GE HealthCare's breach of contract claims, DS first argues that GE HealthCare lacks standing to bring claims under the MCSA and July 2014 SOW because GECC conclusively, clearly, and unambiguously assigned away any rights under the MCSA through the February 2014 Assignment (DS MOL at 7-9; DS Reply at 4-5). DS further contends that GE HealthCare cannot claim any third-party beneficiary rights under the MCSA and July 2014 SOW (*id.* at 9). Turning to GE HealthCare tort claims, DS argues that,

among other things, GE HealthCare's tort claims are duplicative of its breach of contract claims (DS MOL at 13-14; DS Reply at 10-12).

GE HealthCare counters that it has standing to bring its breach of contract claim because they are brought under the July 2014 SOW, not the MCSA (NYSCEF # 42 – GEHC Opp at 8-13). Specifically, GE HealthCare contends, although GECC may have assigned its rights under MCSA, the July 2014 SOW and its amendments had independent legal effect when executed (*id.* at 9-10). GE HealthCare further avers that, although GECC executed the MCSA and the July 2014 SOW, the MCSA's terms, which were incorporated by reference into the July 2014 SOW, allowed for GECC's affiliates (including GE HealthCare) to enforce any SOW executed by GECC as if executed in that affiliate's own name (*id.* at 10). As to its tort causes of action, GE HealthCare contends that its tort claims are not duplicative of its breach of contract claims because (1) it has sufficiently alleged that these torts arise from extracontractual duties, and (2) it may plead these torts in the alternative because of DS's challenge to the validity of the MCSA and July 2014 SOW (*id.* at 20-22).

The court addresses these contentions in turn.

A. Breach of Contract Counterclaims (First Through Fifth Counterclaims)

Under New York law, to plead a cause of action for breach of contract, a plaintiff must allege that (1) a contract exists, (2) plaintiff performed under the contract, (3) defendant breached its contractual obligations, and (4) defendant's breach resulted in damages (*34-06-73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022]). Accepting the allegations in the Counterclaims as true and drawing reasonable inferences in GE HealthCare's favor, it is evident the Counterclaims sufficiently plead claims for breach of contract. For example, GE HealthCare has averred that DS and GECC executed the July 2014 SOW, as amended in November 2017, which incorporated by reference the terms of the MCSA (*see* CC ¶¶ 9-16, 63-64, 70-71, 76-77, 82-83, 88-89). Pursuant to that July 2014 SOW, DS purportedly agreed to provide debt collection services to GECC and its affiliates, use qualified individuals in rendering its services, manage any litigation referred to its network of attorneys, notify GECC and its affiliates of any counterclaims filed against GECC and its affiliates, and indemnify GECC for Losses (as defined in the MCSA) (*see id.* ¶¶ 9-16, 65, 72, 78, 84, 90). Although GE HealthCare purportedly performed under the agreement, DS allegedly breached its duties through its retention of Parnell (who mismanaged the Belfair litigation), its failure to adequately monitor the Belfair litigation or take meaningful action in response to the Belfair Counterclaims, its failure to timely notify GE HealthCare of the Belfair Counterclaims, and its refusal to indemnify GE HealthCare for damages incurred upon the South Carolina court's entry of judgment against it in connection with the Belfair Counterclaims (*see id.* ¶¶ 20-61, 66, 73, 79, 85, 91). And because of DS's

alleged wrongful conduct, GE HealthCare alleges it that incurred damages (*see id.* ¶¶ 42-43, 51, 53, 59-61, 67, 74, 80, 86, 92).

Confronted with these allegations, DS does not seriously challenge the sufficiency of GE HealthCare's pleadings. Rather, DS primarily argues that the February 2014 Assignment constitutes documentary evidence that GE HealthCare lacks standing to sue or otherwise seek indemnification from DS (DS MOL at 4, 6-9; DS Reply at 4-5). The court disagrees. To be sure, an assignment of rights under a contract generally can deprive a party of its ability to sue under that contract (*see Natl. Fin. Co. v Uh*, 279 AD2d 374, 375 [1st Dept 2001] ["Having assigned the note, [plaintiff] was no longer the real party in interest with respect to an action upon the instrument and retained no right to pursue a claim against defendant"]). But here, the February 2014 Assignment does not definitively indicate that GE HealthCare's contractual rights, as sufficiently alleged in the Counterclaims, have been extinguished.

As an initial matter, DS incorrectly attempts to frame GE HealthCare's breach of contract claims as arising under the MCSA. GE HealthCare, however, plainly alleges that the contractual obligations DS's purportedly breached arise, if at all, under the July 2014 SOW (*see* CC ¶¶ 63, 70, 76, 82, 88). And both this agreement and its 2017 amendment were executed *after* the February 2014 Assignment (*see* Assignment at 2 [assignment "[e]ffective as of February 15, 2014"]; July 2014 SOW at 1 [dated as of July 31, 2014]; NYSCEF # 39 [dated as of November 11, 2017). These facts, as alleged, suggest that the parties were agreeing to binding obligations notwithstanding any legal impact of the February 2014 Assignment. At any rate, although the July 2014 SOW incorporated-by-reference the terms of an already-assigned agreement, parties to a contract "may incorporate contractual terms by reference to a separate, noncontemporaneous document, including a separate agreement to which they are not parties, and including a separate document which is unsigned" (*see Revis v Schwartz*, 192 AD3d 127, 138 [2d Dept 2020], quoting 11 Richard A. Lord, Williston on Contracts § 30:25 [4th ed]). DS, in contrast, cites to no authority indicating that if an agreement that was assigned to a third-party, the original parties to that agreement cannot thereafter incorporate by reference its terms into a subsequent binding contract.

To be sure, DS's documentary evidence does indicate that GECC, through the February 2014 Assignment, assigned "all" of its "rights, obligations, duties, title, and interest in" the MCSA, and that this assignment included "any and all associated . . . statements of work" (Assignment at 2). This language, however, does not alter the court's conclusion. Although the terms of the February 2014 assignment are not necessarily ambiguous on their face, they do appear to present a case of ambiguity with respect to the parties' intent as to their rights and obligations (if any) in the event of, for example, subsequent SOWs that post-date the February 2014 Assignment. Accordingly, DS has, at most, presented questions of fact that cannot be resolved on a motion to dismiss (*see Lazar v Nico Indus., Inc.*,

164 AD2d 788, 789 [1st Dept 1990] ["Such latent ambiguity, arising from events taking place post the modification agreement, presents issues of fact which only the receipt of parol evidence at a trial can resolve"]).

DS separately argues that GE HealthCare fails to allege how it retained any rights under the MCSA as a former division of GECC, and that GE HealthCare cannot claim any third-party beneficiary rights (DS MOL at 8-10). These contentions are belied by the Counterclaims. As alleged, GE HealthCare was GECC's affiliate during the operative events giving rise to the Belfair Counterclaims (*see* CC ¶ 2). And the MCSA, whose terms are incorporated by reference into the July 2014 SOW, was executed "on behalf of [GECC] and for the benefit of all its subsidiaries and affiliates," and it allowed for GECC and its affiliates to directly use any services provided for in the July 2014 SOW (CC ¶ 11[b]; MCSA § 1.3 & preamble]). Thus, the Counterclaims sufficiently allege, and documentary evidence supports, that GE HealthCare had direct rights to, among other things, pursue claims under the July 2014 SOW.[3] The fact that GE HealthCare is, as of January 4, 2023, no longer a division of GECC does not change this outcome. Indeed, the operative events giving rise to GE HealthCare's claims under the July 2014 SOW occurred between January 2018 and July 2020, at which time it was still allegedly division of GECC (*see* CC ¶¶ 28-61; *see generally R.V.R. Realty, LLC v Tenants Alliance*, 305 AD2d 289, 290 [1st Dept 2003] ["A cause of action for breach of contract accrues when the breach occurs"]).

In conclusion, DS's motion to dismiss GE HealthCare's breach of contract claims is denied.[4]

B. Tort Counterclaims (Sixth through Ninth Counterclaims)

GE HealthCare argues that it has sufficiently alleged that its tort claims arise from extracontractual duties (*see* GEHC Opp at 21-22). The court disagrees. It is, of course, well settled that for a plaintiff to maintain both a tort and contract claim arising out of the same allegedly wrongful conduct, it must identify a "legal duty independent of the contract itself [that] has been violated" (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]). This duty "must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" (*id.*).

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[3] Even if GE HealthCare did not have a direct contractual right under the July 2014 SOW, the Counterclaims sufficiently establish that GE HealthCare was an intended third-party beneficiary of that agreement (*see generally Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 368 [1st Dept 2006] ["One is an intended beneficiary if one's right to performance is 'appropriate to effectuate the intention of the parties' to the contract and either the performance will satisfy a money debt obligation of the promisee to the beneficiary or 'the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance'"]).

[4] GE HealthCare separately argues that it has sufficiently pleaded an implied-in-fact contract with DS (GEHC Opp at 11). Because this is purported claim is not asserted in the Counterclaims, the court declines to address GE HealthCare's contention.

Without such an independent legal duty, "a tort cause of action that is based upon the same facts underlying a contract claim will be dismissed as a mere duplication of the contract cause of action" (*see Duane Reade v SL Green Operating Partnership, LP*, 30 AD3d 189, 190 [1st Dept 2006]; *see also Bayerische Landesbank, N.Y. Branch v Aladdin Capital Mgt. LLC*, 692 F3d 42, 58 [2d Cir 2012] ["If, however, the basis of a party's claim is a breach of solely contractual obligations, such that the plaintiff is merely seeking to obtain the benefit of the contractual bargain through an action in tort, the claim is precluded as duplicative"]).

Here, a review of the Counterclaims indicates that GE HealthCare's tort causes of action ultimately flow from DS's breach of its alleged contractual obligations under the July 2014 SOW. For example, GE HealthCare's negligent misrepresentation and omission claims are both premised on DS's "performance of its legal duties arising under the MCSA," and thus the alleged misrepresentations and omissions largely mirror the conduct giving rise GE HealthCare's alleged contractual breaches (*compare* CC ¶¶ 75-80, 90-91 *with id.* ¶¶ 95-97, 103-105). Likewise, although GE HealthCare alleges that its breach of fiduciary duty and negligence claims arise based on purported "fiduciary duties" and "a duty of care" owed to GE HealthCare in relation to the Belfair Litigation, those purportedly breached "duties" are the largely the same as the breached contractual obligations flowing from the July 2014 SOW and the MCSA (as incorporated by reference in the July 2014 SOW) (*compare id.* ¶¶ 9-16, 61 *with id.* ¶¶ 109, 114). Put simply, nothing in the Counterclaims suggests that, in the absence of the rights and obligations set forth in the July 2014 SOW and the MCSA, DS would have had an independent legal duty to GE HealthCare (*cf. 100 & 130 Biscayne, LLC v EE NWT OM, LLC*, 211 AD3d 451, 453 [1st Dept 2022] ["without the LLC agreement, [defendant] would have had no duty to plaintiff"]). Rather, this appears to be a situation where, at least as currently alleged, DS is "merely seeking to enforce its bargain" through tort claims (*see N.Y. Univ. v Continental Ins. Co.*, 87 NY2d 308, 316 [1995]).

GE HealthCare separately contends that it should be permitted pursue its tort causes of action in the alternative to its contract claims because DS is challenging the existence of the parties' agreement (*see* GEHC Opp at 20). In so arguing, GE HealthCare primarily relies on the First Department's decision *Kramer v Greene* (142 AD3d 438 [1st Dept 2016]) for the proposition that "[i]t is settled law that a party may bring tort claims in the alternative 'where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute'" (*id.*). But this contention misconstrues (by selectively, and consequently inaccurately, quoting) the *Kramer* opinion. In *Kramer*, the First Department specifically held that "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed ***upon a theory of quasi contract*** as well as breach of contract and will not be required to elect his or her remedies" (*Kramer*, 142 AD3d at 441-442 [emphasis added]). It reached that holding because the causes of action at issue

Kramer were the "quasi-contractual remedies" of unjust enrichment and quantum meruit, not independent torts such as those alleged by GE HealthCare (*see id.* at 441). *Kramer* therefore does not support GE HealthCare's position. And GE HealthCare otherwise fails to cite to any authority that stands for the proposition that a party may plead otherwise duplicative causes of action sounding in pure tort, rather than quasi-contract, without identifying a legally independent duty underlying the tort claims (*cf. Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 AD3d 434, 438 [1st Dept 2012] [allowing plaintiff to plead unjust enrichment as an alternative to breach of contract]; *Henry Loheac, P.C. v Children's Corner Learning Ctr.*, 51 AD3d 476, 476 [1st Dept 2008] [allowing plaintiff to plead quantum meruit and unjust enrichment as alternative theories to breach of contract]).

Accordingly, DS's motion to dismiss GE HealthCare's tort claims is granted, and the Sixth through Ninth Counterclaims are dismissed without prejudice.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that defendant General Electric Capital Corporation's motion to dismiss plaintiff/counterclaim defendant DS Ltd.'s Complaint is denied; and it is further

ORDERED that plaintiff D&S, Ltd.'s motion to dismiss defendant GE HealthCare Technologies, Inc.'s Counterclaims is granted insofar as dismissing the Sixth through Ninth Counterclaims, and denied with respect to the First through Fifth Counterclaims; and it is further

ORDERED that within 30 days of the e-filing of this order, defendant General Electric Capital Corporation shall file an answer to the D&S Ltd.'s Complaint, and D&S, Ltd shall file an answer to defendant GE HealthCare Technologies, Inc.'s Counterclaims.

04/09/2024
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE