UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

O.F.I. IMPORTS INC., a California corporation,	:	
Plaintiff,	:	
-against-	:	15-CV-7231 (VEC)
GENERAL ELECTRIC CAPITAL CORPORATION, a Delaware corporation; and DOES 1-20, inclusive,	:	OPINION AND ORDER
Defendants.	:	

VALERIE CAPRONI, United States District Judge:

O.F.I. Imports, Inc. ("OFI"), alleges that it was fraudulently induced to purchase frozen food and other assets originally owned by Contessa Premium Foods, Inc. ("Contessa"). OFI alleges that the defendants, General Electric Capital Corporation and twenty unnamed individuals acting as its agents (collectively "GE Capital"), provided it with false documentation regarding Contessa's inventories and accounts receivable, thereby causing OFI to overpay for Contessa's assets. On September 26, 2016, the Court granted in full GE Capital's motion to dismiss. *See O.F.I. Imports, Inc. v. Gen. Elec. Capital Corp.*, No. 15-CV-7231 (VEC), 2016 WL 5376208 (S.D.N.Y. Sept. 26, 2016) ("Op."). In a "never say die" move, OFI has moved for leave to amend to cure the defects identified in its original claims and to add new claims for breach of contract and declaratory relief. Pl.'s Mot. for Leave to Amend (Dkt. 63) ("Mot."). For the reasons that follow, OFI's motion for leave to amend is DENIED.

BACKGROUND

The Court assumes familiarity with the background of this case, which is set forth fully in the Court's opinion granting GE Capital's motion to dismiss. *See* Op. at *1-3. In brief, OFI

purchased "virtually all" of Contessa's assets in May 2014. First Amended Complaint (Dkt. 52) ("FAC") ¶ 13. To execute the transaction, OFI entered into two contracts: an asset purchase agreement (the "APA") with Contessa's liquidators, Development Specialists, Inc. ("DSI"), and a credit agreement (the "Credit Agreement") with GE Capital. Pursuant to the Credit Agreement, GE Capital provided OFI with a revolving credit facility intended in part to finance the purchase of Contessa's assets. FAC ¶ 23. OFI alleges that it was misled by "detail reports" of Contessa's accounts, provided by DSI, which allegedly overstated Contessa's accounts receivable and inventories by approximately $5.1 million. Brichacek Decl. (Dkt. 56) Ex. D; FAC ¶¶ 29, 50, 57. Although the APA provides that the purchase was on an "as is, where is" basis, FAC Ex. B ("APA") § 6.1, and although Section 9.20(b) of the Credit Agreement releases GE Capital from "any and all claims . . . at law or in equity in respect of all prior discussions and understandings, oral or written, relating to the subject matter of [the Credit Agreement] and the other Loan Documents," FAC Ex. A ("Credit Agrmt.") § 9.20(b), OFI alleges that GE Capital orally represented that there would be a "post-closing adjustment" of the purchase price to reconcile any discrepancies between the detail reports and the actual value of the underlying Contessa assets. FAC ¶¶ 14, 28-29.[1]

After closing, OFI uncovered the alleged discrepancies in the value of Contessa's assets and demanded that GE Capital adjust the purchase price to account for the lower, true value of the assets. Not surprisingly, GE Capital refused. FAC ¶ 53. Thereafter OFI instituted this action.

GE Capital moved to dismiss relying on the release in the Credit Agreement. Def.'s Mem. in Supp. of Mot. to Dismiss the FAC (Dkt. 55) at 14-16. OFI effectively conceded that the

[1] OFI labors mightily to justify its reliance on these alleged oral representations. As indicated in the Court's opinion on the motion to dismiss, Op. at 4, this case is a poster child for why due diligence should be done prior to signing on the dotted line.

release applies to its claims, but argued that the release is invalid because it was induced by a separate fraud, namely GE Capital's promise of a post-closing purchase price adjustment. Pl.'s Mem. in Opp'n to Mot. to Dismiss the FAC (Dkt. 57) at 5-9; FAC ¶¶ 28-34. The Court disagreed and found that OFI had not alleged any fraud separate from the subject matter of the Credit Agreement's release. Op. at 4-5. Although the Court viewed it as "highly likely" that leave to amend would be futile, the Court dismissed the FAC but permitted OFI to move for leave to amend. *See* Op. at 8.

OFI's proposed second amended complaint (Dkt. 64-1) ("SAC") presents a revised "separate fraud" theory and asserts two new claims for breach of contract and declaratory relief. SAC ¶¶ 60-63, 107-21. Central to OFI's new theory is that the Credit Agreement had multiple purposes, including financing the Contessa purchase and providing working capital for OFI's ongoing operations.[2] SAC ¶ 60. OFI alleges that, because the revolving credit facility under the Credit Agreement is asset-based, GE Capital's misrepresentation of the value of the Contessa assets "swindled OFI of working capital that should have rightfully been available" and "undercut OFI's ability to rely upon its assets to repay the facility." SAC ¶¶ 62-63. Put differently, OFI alleges that GE Capital's "manipulat[ion of] the value of the assets not only constituted a fraud in negotiating the purchase price, but constituted a separate fraud in . . . the entirely independent purpose of the Credit Agreement of providing working capital." SAC ¶ 61.[3]

---

[2] The opening recitals of the Credit Agreement reflect these multiple purposes, providing that the agreement is meant to "(a) fund a portion of the purchase price . . . of certain assets of Contessa Premium Foods, Inc. . . . (b) provide for working capital, capital expenditures and other general corporate purposes of [OFI], and (c) fund certain fees and expenses associated with the funding of the Loans[.]" Credit Agrmt. at 1.

[3] The SAC also includes allegations relative to GE Capital's intent and whether OFI's reliance on GE Capital's representations was reasonable. SAC ¶¶ 10-11, 20, 25-26, 28-35, 41, 47-48, 59, 68, 86. Because those allegations are not essential to whether OFI has alleged a separate fraud, the Court does not discuss them in detail.

OFI also seeks to add a new breach of contract claim. OFI alleges that GE Capital has refused to release its lien on OFI's assets, despite the fact that OFI has paid all debt owed to GE Capital. SAC ¶ 112. OFI further alleges that it "has performed (except for any act which performance by OFI has been prevented by GE Capital or any act which performance would have been futile) all acts under the Credit Agreement." SAC ¶ 114.

GE Capital opposes leave to amend. It argues that, like the FAC, the SAC fails to allege a separate fraud. Def.'s Mem. in Opp'n to Mot. for Leave to Amend (Dkt. 65) ("Opp'n") at 14-15. As to OFI's new contract claims, GE Capital argues that OFI has not and cannot adequately allege its own performance under the Credit Agreement. Opp'n at 20-21.[4]

DISCUSSION

Rule 15(a) of the Federal Rules of Civil Procedure provides that "[t]he court should freely give leave" to a party to amend its complaint "when justice so requires." Fed. R. Civ. P. 15(a)(2). "Leave may be denied 'for good reason, including futility, bad faith, undue delay, or

---

[4] The relevant portion of the Credit Agreement provides:

> Each Lender and L/C Issuer hereby consents to the release and hereby directs Agent to release . . . any Lien held by Agent for the benefit of the Secured Parties against . . . all of the Collateral and all Credit Parties, upon (A) termination of the Revolving Loan Commitments, (B) payment and satisfaction in full of all Loans, all L/C Reimbursement Obligations and all other Obligations under the Loan Documents and all Obligations arising under Secured Rate Contracts and all Obligations arising under Bank Product Agreements, that Agent has theretofore been notified in writing by the holder of such Obligation are then due and payable, (C) deposit of cash collateral with respect to all contingent Obligations (or, as an alternative to cash collateral in the case of any Letter of Credit Obligation, receipt by Agent of a back-up letter of credit), in amounts and on terms and conditions and with parties satisfactory to Agent and each Indemnitee that is, or may be, owed such Obligations (excluding contingent Obligations (other than L/C Reimbursement Obligations) as to which no claim has been asserted) and (D) to the extent requested by Agent, receipt by Agent and the Secured Parties of liability releases from the Credit Parties each in form and substance acceptable to Agent.

Credit Agrmt. § 8.10; SAC ¶ 108.

OFI has not alleged (and according to GE Capital cannot allege) that it has posted cash collateral or a letter of credit for any contingent obligations nor has it alleged that it has provided GE Capital with a satisfactory release of liability. Opp'n at 21.

undue prejudice to the opposing party.'" *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 505 (2d Cir. 2014) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007) (additional citations omitted)). In this case, Defendant argues only that the motion should be denied because it is futile. Opp'n at 13. "A proposed amendment to a complaint is futile when it 'could not withstand a motion to dismiss.'" *Balintulo v. Ford Motor Co.*, 796 F.3d 160, 164-65 (2d Cir. 2015) (quoting *Lucente v. IBM Corp.*, 310 F.3d 243, 258 (2d Cir. 2002)). To survive a motion to dismiss for failure to state a claim upon which relief can be granted, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The Court must also accept as true all factual allegations contained within the complaint, however this tenet "is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

1. Separate Fraud

As noted above, OFI concedes that the plain text of the Credit Agreement release bars its common law fraud claims. As it did in the FAC, however, OFI argues that the release is invalid because it is the product of a "separate fraud." Settled New York law allows a party to rescind an otherwise binding release if that release was induced through a "separate fraud from the subject of the release." *Centro Empresarial Cempresa S.A. v. Am. Movil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276 (2011); *Pappas v. Tzolis*, 20 N.Y.3d 228, 233 (2012) ("[A] party that releases a fraud claim may later challenge that release as fraudulently induced if it alleges a fraud separate from any contemplated by the release."). This exception must be narrowly construed, however, to avoid "convert[ing a release] into a starting point for litigation except under circumstances and under rules which would render any other result a grave injustice." *Morefun Co. v. Mario*

Badescu Skin Care Inc., No. 13-CV-9036 (LGS), 2014 WL 2560608, at *5 (S.D.N.Y. June 6, 2014) (internal quotations omitted). In order to allege a separate fraud, a plaintiff must allege some fraudulent act that induced the signing of the release and is "separate from the subject of the release" itself. *JFK Hotel Owner, LLC v. Hilton Hotels Corp.*, 986 N.Y.S.2d 866 (Sup. Ct. 2014) (quoting *Centro*, 17 N.Y.3d at 276).

OFI's revised theory does not allege a separate fraud. The release provision of the Credit Agreement applies to "any and all claims . . . at law or in equity in respect of all prior discussions and understandings, oral or written, *relating to the subject matter of th[e] [Credit] Agreement*." Credit Agrmt. § 9.20(b) (emphasis added). According to OFI, the SAC alleges a separate fraud because the alleged misrepresentation of the value of the Contessa assets had an impact not only on the purchase price but also on the availability of credit for working capital under the Credit Agreement. Mot. at 12. But that distinction does not allege a fraud that is separate from the subject matter of the Credit Agreement. *See Centro*, 17 N.Y.3d at 276; *Pappas*, 20 N.Y.3d at 233; *Morefun Co.*, 2014 WL 2560608 at *5; *JFK Hotel*, 986 N.Y.S.2d 866. Plaintiff's current theory depends on the Court drawing an artificial distinction between two results of GE Capital's alleged manipulation of the value of the Contessa assets: OFI overpaid for Contessa's assets; and OFI had a smaller borrowing base for working capital than it anticipated. Both results derive from GE Capital's alleged misrepresentation of the value of Contessa's assets—a single alleged fraud.

OFI appears to argue that it has alleged a "separate" fraud because the financing of the purchase price and the working capital credit facility are "separate" purposes of the Credit Agreement. SAC ¶ 60 (quoting Credit Agrmt. at 1). Assuming that is true, it is irrelevant to whether the SAC alleges a fraud that is "separate" from "the subject matter of [the Credit

Agreement] and the other Loan Documents." Credit Agrmt. § 9.20(b). Financing OFI's working capital is just as much a part of the "subject matter" of the Credit Agreement as is the financing of the purchase of the Contessa assets. If anything, OFI's revised theory simply makes it even more apparent that its entire transaction with GE Capital was integrated into a single document – the Credit Agreement – and that single document contained an extremely broad release. Having released most conceivable claims pertaining to the Credit Agreement, OFI cannot now be heard to assert that one part of the agreement should be arbitrarily treated as "separate" from another.

Having rejected OFI's theory that fraud in connection with the borrowing capacity under the credit facility is separate from the fraudulent valuation of Contessa's assets, OFI is left with the argument that "the decision whether to execute the agreement was not the 'subject matter' of the Credit Agreement." Pl.'s Reply in Supp. of Mot. for Leave to Amend (Dkt. 68) ("Reply") at 4.[5] This last gasp argument fails as a matter of law; representations that influence the decision to enter into a release can be part of the subject of that release. *See, e.g., Pappas*, 20 N.Y.3d at 233-34 (failure to disclose that a property may be worth more than its selling price is not a separate fraud from the subject of the agreement to sell); *JFK Hotel*, 986 N.Y.S.2d 866 (no separate fraud when an omission influenced a party's willingness to enter into an agreement); *Kafa Investments, LLC v. 2170-2178 Broadway, LLC*, 958 N.Y.S.2d 577, 583 (Sup. Ct. 2013) (a misrepresentation as to the value of a property that influenced the decision to enter into an agreement is not a separate fraud from the subject of the release).

For the foregoing reasons, Plaintiff's motion for leave to amend to cure the defects in its original claims is DENIED WITH PREJUDICE.[6]

---

[5] This theory was raised for the first time in OFI's Reply; it does not appear in the SAC itself.

[6] The Court has to assume that OFI has put its best foot forward in the SAC. Because that is insufficient to state a claim, it would be futile to provide Plaintiff with a fourth chance to state a fraud claim.

2. Breach of Contract Claim

OFI also seeks leave to amend in order to add new claims for breach of contract and declaratory relief. OFI alleges that GE Capital's refusal to release its liens is a breach of Section 8.10 of the Credit Agreement because OFI has repaid in full all outstanding loan commitments under the facility. SAC ¶¶ 115 ("Despite full performance by OFI, GE Capital has failed . . . to honor its obligations under the Credit Agreement by failing to release its liens upon OFI'[s] assets"). GE Capital does not dispute that OFI has repaid the loan, but it argues that OFI has not satisfied several other conditions precedent to GE Capital's obligation to release its liens under Section 8.10. *See* Opp'n at 20-21 ("OFI has additional affirmative obligations that it must perform before obtaining [a right to demand a release of liens.]").

In order to adequately plead breach of contract under New York law a plaintiff must allege "(1) the existence of an agreement, (2) adequate performance of the contract by the plaintiff, (3) breach of contract by the defendant, and (4) damages." *Eternity Glob. Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 177 (2d Cir. 2004) (quoting *Harsco Corp. v. Segui*, 91 F.3d 337, 348 (2d Cir. 1996)). "Adequate performance" of the plaintiff's obligations under the contract includes satisfaction of conditions precedent to the Defendant's obligations. *Harbinger F&G, LLC v. OM Grp. (UK) Ltd.*, No. 12-CV-5315 (CRK), 2015 WL 1334039, at *22 (S.D.N.Y. Mar. 18, 2015) ("A party seeking to enforce a contractual obligation subject to a condition precedent to performance must show it has satisfied all its obligations under the contract by a preponderance of the evidence.").

The parties agree that OFI's obligations pursuant to Section 8.10 of the Credit Agreement are conditions precedent to GE Capital's obligation to release its liens. Reply at 7-8; Opp'n at 20-21. A condition precedent is an "an act or event, other than a lapse of time, which, unless the

condition is excused, must occur before a duty to perform a promise in the agreement arises." *Oppenheimer & Co. v. Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690 (1995) (internal quotations omitted). Here, Section 8.10 preconditions GE Capital's obligation to release its lien "upon (A) termination of the Revolving Loan Commitments, (B) payment and satisfaction in full of all Loans, . . . (C) deposit of cash collateral with respect to all contingent Obligations . . . and (D) to the extent requested by [GE Capital], receipt . . . of liability releases from [OFI] . . . in form and substance acceptable to [GE Capital]." Credit Agrmt. § 8.10(b)(iii). The SAC does not allege that OFI has satisfied each of these conditions; instead it alleges, in conclusory terms, that OFI has "performed (except for any act which performance by OFI has been prevented by GE Capital or any act which performance would have been futile) all acts under the Credit Agreement." SAC ¶ 114.

Rule 9(c) of the Federal Rules of Civil Procedure provides that: "In pleading conditions precedent, it suffices to allege generally that all conditions precedent have occurred or been performed." Fed. R. Civ. P. 9(c). Because OFI's affirmative obligations under Section 8.10 are conditions precedent, the adequacy of the SAC depends on whether OFI has satisfied the pleading standard under Rule 9(c).

Neither the Supreme Court nor the Second Circuit Court of Appeals has considered Rule 9(c) since *Iqbal* and *Twombly* modified the notice pleading standard. Prior to *Iqbal*, a conclusory allegation was generally adequate to plead satisfaction of conditions precedent in accordance with Rule 9(c). Judge Nathan has recently explained, however, that post-*Iqbal*, Rule 9(c)'s command that conditions precedent be alleged "generally" requires plaintiffs to allege *plausibly* that they have satisfied conditions precedent. *See Dervan v. Gordian Grp., LLC*, No. 16-CV-1694 (AJN), 2017 WL 819494, at *6 (S.D.N.Y. Feb. 28, 2017); *see also Uncas Int'l LLC v.*

Crimzon Rose, Inc., No. 16-CV-9610 (JSR), 2017 WL 2839668, at *3 (S.D.N.Y. June 26, 2017) ("pleading of a plaintiff's own performance is subject to the same pleading standard as other allegations, *i.e.*, the plausibility requirement set out in *Iqbal*").

In *Iqbal* the Supreme Court addressed whether pleading intent "generally" under Rule 9(b) requires a plaintiff to satisfy Rule 8(a)'s plausibility standard. The Court explained:

> "[G]enerally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8. . . . And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

Iqbal, 556 U.S. at 686-87.

There is "no principled basis on which to afford Rule 9(c) . . . a divergent reading [from Rule 9(b)]." *Dervan*, 2017 WL 819494 at *5. To do otherwise would mean that the phrase "alleged generally" in Rule 9(b) means something completely different than the phrase "allege generally" in Rule 9(c). If "'generally' is a relative term" serving to highlight the particularity requirement in Rule 9(b), it must serve the same purpose in Rule 9(c). *Iqbal*, 556 U.S. at 686-87. Rule 9(c) does not create a carve-out "from the baseline plausibility requirement of Rule 8(a) but rather only from the 'elevated' standard for denials of such performance established in the second half of the rule." *Dervan*, 2017 WL 819494 at *5.

Those Courts that have continued to permit conclusory pleading of conditions precedent have done so in reliance on an overly narrow reading of *Iqbal*. *See Hildebrand v. Allegheny Cty.*, 757 F.3d 99, 112 (3d Cir. 2014) ("*Iqbal* and *Twombly* interpreted Federal Rule of Civil Procedure 8(a), which governs the standard for pleading a claim for relief. . . . We see no indication that those cases sought to override the plain language of Rule 9(c)."). As Judge

Nathan pointed out in *Dervan*, "this reasoning . . . overlooks a lesser-discussed portion of *Iqbal* that carries critical implications for the instant question." *Dervan*, 2017 WL 819494 at *5. Such a reading is also inconsistent with Second Circuit precedent, which has declined to read *Iqbal* so narrowly. *Biro v. Conde Nast*, 807 F.3d 541, 544–45 (2d Cir. 2015) (Relying on *Iqbal* and holding that "Rule 9(b)'s language notwithstanding, Rule 8's plausibility standard applies to pleading intent.").

Applying the proper standard under Rule 9(c), the Court finds that OFI has failed to plausibly allege satisfaction of the conditions precedent. The plain language of the Credit Agreement requires four conditions to be satisfied before GE Capital is obligated to release its lien. Credit Agrmt. § 8.10(b)(iii). At most, OFI has plausibly alleged the occurrence of the first two conditions: the revolving loan commitments have been terminated (by its terms the revolving credit facility terminated on May 21, 2017), Credit Agrmt. § 11.1; and the loans have been repaid. SAC ¶¶ 109-10, 112, 114. OFI has not, however, alleged that it has deposited any cash collateral with respect to any contingent obligations, Credit Agrmt. § 8.10(b)(iii)(C), or that it has executed a liability release "in form and substance acceptable" to GE Capital, Credit Agrmt. § 8.10(b)(iii)(D). Instead, OFI has provided a conclusory and befuddling averment that it has not performed "any act which performance by OFI has been prevented by GE Capital or any act which performance would have been futile." SAC ¶ 114.[7] This kind of threadbare conclusory statement does not provide the "sufficient factual matter" that would allow the court to "draw the reasonable inference" that all conditions precedent have been satisfied and "that the

[7] Given the nature of the two remaining conditions precedent, it is unclear what OFI means when it asserts that its "performance would have been futile." Further, while it is conceivable that GE Capital could prevent OFI's performance by not cooperating to, for example, agree to the terms of a liability release, it is hard to fathom why it would do so.

defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. In short, Plaintiff's new claim would not survive a motion to dismiss. *Balintulo*, 796 F.3d at 164-65.

OFI argues in its reply brief that it should be given leave to amend its breach of contract allegations even if the Court finds that the satisfaction of conditions precedent has not been adequately alleged because of the potentially "technical nature of this deficiency." Reply at 7 (quoting *Patel v. Baluchi's Indian Rest.*, No. 08-CV-9985 (RJS), 2009 WL 2358620, at *8 (S.D.N.Y. July 30, 2009)). While the deficiencies in the SAC are far from "technical," "[c]omplaints dismissed under Rule 9(b) are 'almost always' dismissed with leave to amend." *Pasternack v. Shrader*, __ F.3d __, 2017 WL 2979158, at *9 (2d Cir. July 13, 2017) (quoting *Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1986)) (additional citations omitted). Considering that OFI's breach of contract claim is before the court for the first time on this motion, that there has been disagreement among courts as to the appropriate pleading standard for the fulfillment of conditions precedent, and that it is not absolutely clear that there is no set of facts that could plausibly allege breach of contract, the Court will permit OFI to file a proposed third amended complaint relative only to the breach of contract and declaratory judgment claims and show cause why leave to amend should be granted. Thus, OFI's motion for leave to amend to add a breach of contract claim is DENIED WITHOUT PREJUDICE. Plaintiff shall have until August 4, 2017, to show cause why leave to file a third amended complaint should be granted. Any proposed third amended complaint must satisfy Rule 9(c) and plausibly allege the satisfaction of the conditions precedent described in Section 8.10.

CONCLUSION

For the foregoing reasons, Plaintiff's motion for leave to amend is DENIED. The Clerk is respectfully requested to close the open motion at docket entry number 63. Plaintiff's deadline

to show good cause why leave to replead its breach of contract claim should be granted is **August 4, 2017**.

SO ORDERED.

Date: July 20, 2017
New York, NY

_____
VALERIE CAPRONI
United States District Judge