UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PARTNERS HEALTHCARE SYSTEM, INC. and
THE GENERAL HOSPITAL CORPORATION,
Plaintiffs,

v. CIVIL ACTION NO. 14-10382-MLW

COPELAND CORPORATION, LLC,
Defendant,

and

COPELAND CORPORATION, LLC,
Third-Party Plaintiff,

v.

FISHER SCIENTIFIC COMPANY, LLC,
Third-Party Defendant.

REPORT AND RECOMMENDATION ON
THIRD-PARTY DEFENDANT FISHER SCIENTIFIC COMPANY, LLC'S MOTION
TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(6) AND/OR 12(c) (#30).

KELLEY, U.S.M.J.

I. Introduction.

In their second amended complaint, Partners Healthcare System, Inc. and The General Hospital Corporation (collectively "Partners") allege that a scientific freezer they purchased from Fisher Scientific Company, LLC stopped working due to a compressor failure causing Partners to lose valuable biological samples. (#7 at 20 ¶¶ 7, 9-10.) It is further alleged that Copeland Corporation, LLC manufactured the component compressor that allegedly failed. (#7 at 20 ¶¶ 5, 8.) Partners brought claims against Copeland and Fisher as co-defendants. (#7 at 20.) Fisher settled the

four claims alleged against it, and on December 4, 2015, Partners dismissed those claims leaving Copeland as the sole remaining defendant. (#26.) Nineteen days later Copeland filed a third-party complaint (#27) against Fisher alleging that it was entitled to indemnification from Fisher for any loss, damage, or injury to third parties caused by products sold by Fisher that incorporated Copeland compressors. (#27 ¶ 16.) Fisher has moved to dismiss that third-party complaint. (#30.)

II. The Facts.

As of February 1, 2011, companies "associated with" Copeland and Fisher[1] entered into an agreement ("the Agreement"), whereby Copeland would sell Fisher compressors for incorporation into products produced by Fisher, including "Ultra Low Temperature Freezers" like the one purchased by Partners. (#30-1 ¶ 5[2]; #27 ¶ 5.) According to the allegations of the third-party

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1 In its memorandum, Fisher states that "[t]he Agreement is signed by representatives of Emerson Climate Technologies, Inc. ("Emerson"), which is associated with Copeland, and Thermo Fisher Scientific (Asheville) LLC, which is associated with Fisher, and neither signatory is a named parties (sic) in this third-party action." (#31 at 3.) Copeland's position is a bit confusing. First, Copeland asserts that "Fisher and Copeland were not signatories to the purchase agreement, rather, their respective wholly owned subsidiaries, Thermo Fisher Scientific (Asheville), LLC, and Emerson Climate Technologies, Inc., were." (#36 at 8.) In the next sentence Copeland contends that "it is self-evident that Copeland and Fisher assumed ***their parents'*** respective obligations under the purchase agreement." (*Id.*) These statements are contradictory regarding which entities are the parents and which are the subsidiaries. In any event, neither of the signatories to the Agreement are named as parties in this action so, for current purposes, the Court will proceed as the parties have done, referring to the parties as Copeland and Fisher.

2 The Agreement is repeatedly referenced in the third-party complaint, but was not attached as an exhibit. (#27.) Fisher has filed a copy of the Agreement in support of its motion to dismiss. (#30-1, Exh. 1) The First Circuit has repeatedly stated that when deciding a motion to dismiss, "'[o]rdinarily, a court may not consider any documents that are outside of the complaint, or not expressly incorporated therein . . . .'" *Graf v. Hospitality Mut. Ins. Co.*, 754 F.3d 74, 76 (1st Cir. 2014) (quoting *Alt. Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001)). With that having been said, the First Circuit has also "noted that when a complaint's factual allegations are expressly linked to — and admittedly dependent upon — a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)." *Trans-Spec Truck Service, Inc. v. Caterpillar Inc.*, 524 F.3d 315, 321 (1st Cir. 2008) (internal citations, quotation marks and alterations omitted), *cert. denied*, 555 U.S. 995 (2008); *Yacubian v. U.S.*, 750 F.3d 100, 102 (1st Cir. 2014); *United Auto., Aerospace, Agr. Implement Workers of America Intern. Union v. Fortuno*, 633 F.3d

complaint, "[g]iven the relative discrepancy between the price that Fisher paid Copeland for each compressor and the potential liability that could arise out of the failure of a compressor in Fisher's applications, Copeland was unwilling to sell its compressors to Fisher unless Fisher agreed to assume all liability that might arise out of the failure of a Copeland compressor." (#27 ¶ 4.) To address Copeland's concerns, attached to the Agreement was an exhibit entitled Emerson Climate Technologies, Inc. OEM/Return/Warranty Guidelines for Copeland Brand Products - Limited Warranty ("the Exhibit"). (#30-1, Exh. 1, Agreement, Exh 1.)

The first relevant provision of the Exhibit states:

> Buyer assumes all other responsibility for any loss, damage, or inquiry to persons or property arising out of, connected with, or resulting from the use of Goods, either alone or in combination with other products/components. Goods repaired or replaced pursuant to this warranty shall be warranted for the unexpired portion of the warranty applying to the original Goods.

Id. The Exhibit further provides, in capitalized, bold print:

> THIS WARRANTY CONSTITUTES SELLER'S SOLE AND EXCLUSIVE WARRANTY WITH RESPECT TO THE GOODS AND ARE IN LIEU OF AND EXCLUDE ALL OTHER WARRANTIES. . . .
>
> LIMITATION OF REMEDY. THE SOLE AND EXCLUSIVE REMEDY FOR BREACH OF ANY WARRANTY HEREUNDER SHALL BE LIMITED TO REPAIR, REPLACEMENT, CREDIT OR REFUND OF THE PURCHASE PRICE.

Id.

When sued by Partners for the alleged failure of a Copeland compressor incorporated in a Fisher freezer, Copeland sought indemnification from Fisher under the terms of the Agreement.

Fisher argues that the Agreement does not provide that it must indemnify Copeland.

37, 39 (1st Cir. 2011). The Agreement readily falls within the exception and so may be considered by the Court.

Conversely, Copeland contends that it has alleged indemnification implied-in-fact based on the Agreement and Exhibit.

III. The Law - Rule 12(b)(6).[3]

A Rule 12(b)(6) motion to dismiss challenges a party's complaint for failing to state a claim. In deciding such a motion, a court must "'accept as true all well-pleaded facts set forth in the complaint and draw all reasonable inferences therefrom in the pleader's favor.'" *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2011) (quoting *Artuso v. Vertex Pharm., Inc.*, 637 F.3d 1, 5 (1st Cir. 2011)). When considering a motion to dismiss, a court "may augment these facts and inferences with data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice." *Haley*, 657 F.3d at 46 (citing *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003)).

In order to survive a motion to dismiss under Rule 12(b)(6), the plaintiff must provide "enough facts to state a claim to relief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The "obligation to provide the grounds of [the plaintiff's] entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (quotation marks and alteration omitted). The "[f]actual allegations

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[3] Alternatively, Fisher moves the Court to dismiss the third-party complaint pursuant to Rule 12(c), Fed. R. Civ. P. "[A] Rule 12(c) motion must be filed at the close of pleadings, and must be based solely on the factual allegations in the complaint and answer." *NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1, 8 (1st Cir. 2002). Because Fisher has yet to file an answer, dismissal pursuant to Rule 12(c) is inapt. *See*, e.g., *Aponte-Torres v. Univ. Of Puerto Rico*, 445 F.3d 50, 54 (1st Cir. 2006) ("Because the defendants previously had answered the amended complaint, the district court appropriately treated their motion to dismiss as one for judgment on the pleadings. *See* Fed. R. Civ. P. 12(c)."); *Hardy v. Whidden Mem'l Hosp.*, No. 14-10726-JGD, 2015 WL 7303530, at *3 (D. Mass. Nov. 19, 2015) ("Since the defendant has filed an answer to the complaint, the motion before the court is properly one for judgment on the pleadings, brought pursuant to Fed. R. Civ. P. 12(c).").

must be enough to raise a right to relief above the speculative level," and to cross the "line from conceivable to plausible." *Id.* at 555, 570.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). However, the court is "'not bound to accept as true a legal conclusion couched as a factual allegation.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 555). Simply put, the court should assume that well-pleaded facts are genuine and then determine whether such facts state a plausible claim for relief. *Id.* at 679.

IV. Discussion.

The parties agree that, pursuant to the terms of the Agreement, North Carolina law governs the dispute. (#30-1, Exh. 1 ¶ 9; #36 at 1 n. 1) Under North Carolina law, a right to indemnity can be premised upon: "(1) an express contract; (2) a contract implied-in-fact; or (3) equitable concepts arising from the tort theory of indemnity, often referred to as a contract implied-in-law." *Kaleel Builders Inc. v. Ashby*, 161 N.C. App. 34, 38, 587 S.E.2d 470, 474 (2003); *Smith v. Waverly Partners, LLC*, No. 3:10-CV-28, 2011 WL 1655592, at *7 (W.D.N.C. Apr. 29, 2011). Here, Copeland claims it has adequately alleged a right to indemnification from Fisher based on a contract implied-in-fact. (#36 at 5.)

The Court of Appeals of North Carolina has explained that "[a] right of indemnity implied-in-fact stems from the existence of a binding contract between two parties that necessarily implies the right. The implication is derived from the relationship between the parties, circumstances of the parties' conduct, and that the creation of the indemnitor/indemnitee relationship is derivative of the contracting parties' intended agreement." *Kaleel Builders*, 161 N.C. App. at 38,

587 S.E.2d at 474 ; *Smith*, No. 3:10-CV-28, 2011 WL 1655592, at *8. When determining whether a contact implied-in-fact exists between two parties, courts examine "their relationship and its surrounding circumstances." *Kaleel Builders,* 161 N.C. App. at 40, 587 S.E.2d at 475. Here, the relevant factors cut both ways.

The facts of this case do not present a situation where "a master-servant or agency-type of relationship" exists between the parties, as was the case in *McDonald v. Scarboro*, 91 N.C. App. 13, 370 S.E.2d 680 (1988). *Id.* Instead, from all that appears, this was an arms-length transaction between sophisticated entities. North Carolina courts view such circumstances as weighing against interpreting a contract to imply more than that which is explicitly provided. *See*, e.g., *Sony Ericsson Mobile Commc'ns USA, Inc. v. Agere Sys., Inc.*, 195 N.C. App. 577, 582, 672, S.E.2d 763, 767-768 (2009) ("Where, as here, the agreement was negotiated by sophisticated and well-counseled parties, courts are extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include, and courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing." (internal citations and quotation marks omitted)); *Schenkel & Shultz, Inc. v. Hermon F. Fox & Associates, P.C.*, 180 N.C. App. 257, 267, 636 S.E.2d 835, 842 (2006), *aff'd*, 362 N.C. 269, 658 S.E.2d 918 (2008) ("[A] right of indemnity under a contract implied-in-fact is inappropriate where, as here, both parties are well equipped to negotiate and bargain for such provisions.").

On the other hand, Copeland has alleged "circumstances tending to show the existence of an indemnification agreement." *Kaleel Builders*, 161 N.C. App. at 40, 587 S.E.2d at 475. Specifically, Copeland alleges there was a "relative discrepancy between the price that Fisher paid Copeland for

each compressor and the potential liability that could arise out of the failure of a compressor in Fisher's applications," (#27 ¶ 4), as well as Copeland's concomitant unwillingness "to sell its compressors to Fisher unless Fisher agreed to assume all liability that might arise out of the failure of a Copeland compressor." (#27 ¶ 4.) Copeland argues that "Fisher's agreement to indemnify Copeland was in recognition of this discrepancy." (#36 at 6.) These facts tend to show more than mere breach of contract or warranty; these allegations support "special circumstances from which such an agreement might be implied." *Id.*, 161 N.C. App. at 38, 587 S.E.2d at 474; *Smith*, No. 3:10-CV-28, 2011 WL 1655592, at *8 ("To recover under a theory of contract implied-in-fact, a party must demonstrate circumstances indicating that the parties intended to establish an indemnitor-indemnitee relationship."); *Carl v. State*, 192 N.C. App. 544, 558, 665 S.E.2d 787, 798 (2008) ("[T]his Court has required a plaintiff to show special circumstances from which such an agreement might be implied.").

Further, Copeland notes that the provision in the Exhibit that Fisher "assumes all other responsibility for any loss, damage, or inquiry to persons or property arising out of, connected with, or resulting from the use of Goods, either alone or in combination with other products/components" is rendered meaningless if indemnification of Copeland by Fisher is not implied.[4] In other words, "the creation of the indemnitor/indemnitee relationship is derivative of the contracting parties' intended agreement." *Kaleel Builders*, 161 N.C. App. at 38, 587 S.E.2d at 474. Fisher responds by noting that "[c]onspicuously absent from this sentence is any affirmative representation by Fisher

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[4] Fisher's sweeping contention that "[u]nder Copeland's proposed scenario, any distributor of a component part would be entitled to implied-in-fact indemnity if its component caused the ultimate product to fail and an end-user suffered damages" (#39 at 3) fails to take this contractual provision into account.

that it will provide Copeland with any particular remedy, including indemnity." (#31 at 8) Query, then, what does the contractual provision mean? The Supreme Court of North Carolina has instructed that:

> In interpreting contracts, we construe them as a whole. *Singleton v. Haywood Elec. Membership Corp.*, 357 N.C. 623, 629, 588 S.E.2d 871, 875 (2003) ('The various terms of the [contract] are to be harmoniously construed....' (alteration in original) (quoting *Gaston Cty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 299, 524 S.E.2d 558, 563 (2000))). Each clause and word is considered with reference to each other and is given effect by reasonable construction. *Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.*, 265 N.C. 86, 93, 143 S.E.2d 270, 275 (1965) ('[A] paragraph or excerpt must be interpreted in context with the rest of the agreement.' (quoting 1 Strong's North Carolina Index: Contracts § 12, at 585 (1957))). We determine the intent of the parties by using 'the plain meaning of the written terms.' *RL Regi N.C., LLC v. Lighthouse Cove, LLC*, 367 N.C. 425, 428, 762 S.E.2d 188, 190 (2014) (citing *Powers v. Travelers' Ins. Co.*, 186 N.C. 336, 338, 119 S.E. 481, 482 (1923)).

Ussery v. Branch Banking & Trust Co., 368 N.C. 325, 335-36, 777 S.E.2d 272, 279 (2015). Copeland's reading of the contractual provision is reasonable[5] in the context of the Agreement as a whole and it gives meaning to the contractual provision. As such, the contractual provision constitutes a "circumstance[] tending to show the existence of an indemnification agreement." *Kaleel Builders*, 161 N.C. App. at 40, 587 S.E.2d at 475.

In sum, weighing all of the factors, Copeland has alleged "sufficient factual matter ... to state a claim to relief that is plausible on its face." *Guadalupe-Baez v. Pesquera*, No. 14-2304, 2016 WL 1592690, at *3 (1st Cir. Apr. 20, 2016) (internal citations and quotation marks omitted).

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[5] The parties clearly diverge on the meaning of the Agreement. Under North Carolina law, "[i]f the contract is ambiguous, however, interpretation is a question of fact and resort to extrinsic evidence is necessary. An ambiguity exists in a contract if the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties. Thus, if there is any uncertainty as to what the agreement is between the parties, a contract is ambiguous." *Crider v. Jones Island Club, Inc.*, 147 N.C. App. 262, 266-67, 554 S.E.2d 863, 866-67 (2001) (internal citations and quotation marks omitted).

V. Recommendation.

For the reasons stated, I RECOMMEND that Third-Party Defendant Fisher Scientific Company, LLC's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) and/or 12(c) (#30) be DENIED to the extent it seeks dismissal on the ground that Copeland is not entitled to implied indemnification from Fisher as a matter of law. I FURTHER RECOMMEND that the Motion to Dismiss be ALLOWED to the extent that it seeks dismissal because the parties to the Agreement are not named as parties in the third-party complaint, with leave being granted to Copeland to file an amended third-party complaint naming the proper parties.[6]

May 16, 2016

/s/ M. Page Kelley
M. Page Kelley
United States Magistrate Judge

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[6] The parties are hereby advised that any party who objects to these recommendations must file specific written objections thereto with the Clerk of this Court within 14 days of the party's receipt of this Report and Recommendation. The written objections must specifically identify the portion of the recommendations, or report to which objection is made and the basis for such objections. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Rule 72(b), Fed. R. Civ. P., shall preclude further appellate review. *See Keating v. Secretary of Health and Human Services*, 848 F.2d 271, 273 (1st Cir. 1988); *United States v. Emiliano Valencia-Copete*, 792 F.2d 4, 6 (1st Cir. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1st Cir. 1982); *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603, 604 (1st Cir. 1980); *see also Thomas v. Arn*, 474 U.S. 140, 148-49 (1985).