UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GEBBS HEALTHCARE SOLUTIONS, INC.,	:	
Plaintiff,	:	
-against-	:	1:16-cv-2206-GHW
ORION HEALTHCORP, INC.	:	MEMORANDUM OPINION AND ORDER
Defendant.	:	

GREGORY H. WOODS, United States District Judge:

The parties in this case each provide services such as billing, revenue cycle management, and collections to healthcare providers. Their dispute arises from an agreement executed in 2006, under which Plaintiff GeBBS Healthcare Solutions, Inc. ("GeBBS") was to provide certain outsourcing services to RMI Physician Services Corporation. In 2008, RMI became a wholly owned subsidiary of Defendant Orion Healthcorp, Inc. ("Orion"). GeBBS alleges in its complaint that Orion breached the agreement by failing to pay for services that GeBBS had rendered. Orion, in turn, asserts counterclaims against GeBBS for breach of the agreement and for fraud. GeBBS has moved to dismiss Orion's counterclaims pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons described below, GeBBS's motion to dismiss is GRANTED IN PART and DENIED IN PART.

I. BACKGROUND[1]

A. Facts Alleged

Orion provides billing, collections, and management services to physicians and medical

[1] Unless otherwise noted, the facts are taken from the amended counterclaims, and are accepted as true for the purposes of this motion. *See, e.g.*, *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

practices both directly and through a network of subsidiaries. ECF No. 32, Am. Answer & Countercls. ("Countercls."), ¶ 6. GeBBS also provides medical billing and collection services. Countercls. ¶ 8. Among other things, GeBBS provides support to U.S.-based medical billing companies through a foreign labor force. *Id.*

On approximately June 22, 2006, an affiliate of GeBBS entered into a Master Services Agreement (the "MSA") with a medical billing company by the name of RMI Physician Services Corporation ("RMI"). Countercl. ¶ 9. Pursuant to the MSA, GeBBS was to provide "business process outsourcing services" to RMI. Countercls. ¶ 10. "In effect, the MSA contemplated that GeBBS would act like a subcontractor and use its foreign labor force to complete work for RMI's customers." *Id.*

In 2008, RMI became a wholly owned subsidiary of Orion. Countercls. ¶ 11. On October 11, 2011, the parties signed an addendum to the MSA that, among other things, designated GeBBS as the exclusive provider of outsourcing services for Orion and its subsidiaries ("Addendum 1"). Countercls. ¶ 12. The parties signed a second addendum to the MSA on July 8, 2012 ("Addendum 2"). Countercls. ¶ 13. Addendum 2 provided that GeBBS would continue to be Orion's exclusive outsourcing provider; it also reduced the amount of GeBBS's fees and provided that, if GeBBS failed to meet certain performance benchmarks, the parties would "discuss an additional rate adjustment." *Id.*

In its counterclaims, Orion alleges that the quality of GeBBS's work began to decline after Addendum 2 was signed. Countercls. ¶ 14. "In or around the summer of 2013," Orion "started carefully scrutinizing GeBBS'[s] monthly invoices and reducing the amount of its payments to account for unauthorized charges and poor performance." Countercls. ¶ 15. Orion alleges that GeBBS "accepted the reduced payments and did not declare Orion in default under the MSA" at that time. Countercls. ¶ 16.

In an attempt to "resolve their differences," the parties signed a third addendum to the MSA ("Addendum 3"), which took effect on April 1, 2014. Countercls. ¶ 17. It is Addendum 3 that is primarily at issue in this action. Addendum 3 provided that, in exchange for providing services to Orion, GeBBS would receive a fixed percentage of the money that Orion was paid by its customers. Countercls. ¶ 17.

Pursuant to Paragraph 3 of Addendum 3, GeBBS was required to

> provide and complete the Services (i) in full conformity with this Addendum 3 and any applicable [Orion] contract for which it is working on and undertaken; and (ii) using competent and qualified personnel in a professional and workmanlike manner, in accordance with the highest prevailing industry standards and practices for the performance of similar services.

Countercls. ¶ 20 (alteration in original). Addendum 3 also provided three ways in which GeBBS could terminate the MSA. Countercls. ¶ 24. First, Paragraph 5(a) provided that GeBBS could terminate the MSA "for convenience upon no less than 365 days prior written notice." Countercls. ¶ 25. Second, Paragraph 5(b) permitted GeBBS to terminate the MSA in the event of a "material breach" by Orion, after providing Orion with at least 90 days to cure the defect. Countercls. ¶ 26. If GeBBS elected to do so, Paragraph 5(b) provided that GeBBS would "continue its work on the existing Client accounts" until Orion was able to find a replacement for GeBBS. *Id.* Third, Paragraph 5(c) provided:

> If [Orion] defaults in the payment when due of any undisputed amounts under this Addendum 3 and does not cure the default within ten (10) days after receiving written notice of the default, then GeBBS may, by giving written notice to [Orion], terminate this Addendum 3, and cease providing Services, as of a date specified in the notice of termination.

Countercls. ¶ 27 (alterations in original).

In this action, Orion brings three counterclaims. In Count 1, Orion alleges that GeBBS breached its obligations under Paragraph 3 of Addendum 3 "in numerous respects, including by failing to (a) devote sufficient personnel and resources to its performance of the Services; (b) process

new charges in a timely manner; (c) promptly pursue unpaid balances; and (d) maintain accurate records." Countercls. ¶ 21.

In Count 2, Orion alleges that GeBBS breached the MSA by improperly terminating it. Countercls. ¶ 28. Specifically, Orion alleges that, in December 2015, GeBBS "purported to terminate the MSA pursuant to Paragraph 5(c) of Addendum 3 based on Orion's supposed failure to pay amounts GeBBS claimed as due," but that "at the time GeBBS canceled the Agreement, there were no undisputed amounts due and owing to GeBBS from Orion." *Id.*

In Count III, Orion alleges that GeBBS committed fraud against it. Countercls. ¶ 32. According to Orion, a dispute had arisen between the parties in December 2015 over the amount of fees that Orion owed to GeBBS. Countercls. ¶ 32. The parties agreed that, if Orion made a partial payment against the balance purportedly due to GeBBS, then GeBBS would continue to perform its services for a reasonable time while Orion sought a replacement for GeBBS. *Id.* However, "almost immediately after it received the agreed-upon payment, GeBBS completely stopped working." Countercls. ¶ 33. Orion alleges that "GeBBS had no intention of continuing to perform the Services for Orion" at the time it entered into the agreement, and that its promise to do so was a "material misrepresentation" on which it relied to its detriment. Countercls. ¶¶ 33-36.

B. Procedural History

GeBBS initiated this action on March 24, 2016. ECF No. 1. In the complaint, GeBBS alleges that, although it "complied with and fully performed all obligations and requirements set forth in Addendum 3" to the MSA, Orion has not paid it in full for its services. ECF No. 1, Compl. ¶¶ 31-32. On September 6, 2016, Orion filed an answer with counterclaims. ECF No. 22. Orion filed its amended answer with counterclaims, which is the pleading being challenged here, on October 11, 2016. ECF No. 32. GeBBS filed its motion to dismiss Orion's counterclaims on December 12, 2016, ECF Nos. 44-46; Orion filed an opposition on December 13, 2016, ECF No. 47; and GeBBS

filed a reply on December 19, 2016, ECF No. 48.

II. LEGAL STANDARD

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Rule 8 "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A motion to dismiss a counterclaim for failure to state a claim is evaluated using the same standard as a motion to dismiss a complaint." *A.V.E.L.A., Inc. v. Estate of Marilyn Monroe, LLC*, 131 F. Supp. 3d 196, 203 (S.D.N.Y. 2015). To survive a motion to dismiss pursuant to Rule 12(b)(6), a pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Id.* (citing *Twombly*, 550 U.S. at 556).

Determining whether a pleading states a plausible claim is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. The court must accept all facts alleged in the pleading as true and draw all reasonable inferences in the plaintiff's favor. *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 124 (2d Cir. 2008) (per curiam). However, a pleading that offers "labels and conclusions" or "naked assertion[s]" without "further factual enhancement" will not survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555, 557).

In addition to this facial plausibility standard, a claim for fraud filed in federal court must satisfy the heightened pleading requirement of Federal Rule Civil Procedure 9(b), which requires that a party "state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b); *see Loreley*

Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 171 (2d Cir. 2015). Although "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally," Fed. R. Civ. P. 9(b), a fraud claim must be supported by allegations "that give rise to a strong inference of fraudulent intent." *S.Q.K.F.C., Inc. v. Bell Atl. Tricon Leasing Corp.*, 84 F.3d 629, 634 (2d Cir. 1996).

"In considering a motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6), a district court may consider the facts alleged in the [pleading], documents attached to the [pleading] as exhibits, and documents incorporated by reference in the [pleading]." *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (citations omitted). "Where a document is not incorporated by reference, the court may never[the]less consider it where the [pleading] 'relies heavily upon its terms and effect,' thereby rendering the document 'integral' to the [pleading]." *Id.* (quoting *Mangiafico v. Blumenthal,* 471 F.3d 391, 398 (2d Cir. 2006)). Finally, the Court may also consider "matters of which judicial notice may be taken." *Goel v. Bunge, Ltd.*, 820 F.3d 554, 559 (2d Cir. 2016) (citation omitted).

III. DISCUSSION

A. Materials Attached to, and Facts Alleged in, GeBBS's Motion to Dismiss

GeBBS attached the following documents to the brief in support of its motion to dismiss Orion's counterclaims: (1) the original MSA, (2) Addendum 3 to the MSA, (3) a Notice of Default sent by GeBBS to Orion on December 9, 2015, and (4) a Notice of Termination sent by GeBBS to Orion on December 21, 2015. *See* ECF No. 45, Affirmation of Pl.'s Counsel in Supp. of Pl.'s Mot. to Dismiss Def.'s Countercl. ("Pl.'s Affirmation"), Exs. A-D. As explained above, courts may consider only a limited universe of matters when deciding a Rule 12(b)(6) motion. In addition to the facts alleged in the pleading itself and documents attached as exhibits to the pleading, a court may consider documents that are not attached to the pleading but are nevertheless "integral to" it. To be integral to a pleading, the plaintiff (or, as here, the counterclaim-plaintiff) must have (1) "actual

notice" of the extraneous information and (2) "relied upon the[ ] documents in framing the [pleading]." *Chambers*, 282 F.3d at 153 (internal quotation marks and citation omitted). "[M]ere notice or possession is not enough" for a court to treat an extraneous document as integral to a pleading; the pleading must "rel[y] heavily upon [the document's] terms and effect" for that document to be integral." *Id.* (internal quotation marks and citation omitted). The exception permitting a court to consider extraneous documents that are integral to a pleading is most commonly applied to "a contract or other legal document containing obligations upon which the plaintiff's complaint stands or falls, but which for some reason—usually because the document, read in its entirety, would undermine the legitimacy of the plaintiff's claim—was not attached to the [pleading]." *Global Network Commc'ns, Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006).

Here, it is clear that Orion had actual notice of the MSA and Addendum 3 and that it relied heavily on the terms and effects of those documents in bringing its counterclaims; indeed, those documents form the entire basis of its counterclaims and are heavily quoted in Orion's pleading. Therefore, the Court may consider them in deciding GeBBS's motion to dismiss. That said, they add nothing to GeBBS's arguments. To the extent that Orion's claims depend upon any portions of the MSA or Addendum 3 at this stage of the proceeding, those portions are already quoted in the counterclaims as pleaded, and GeBBS has pointed to nothing in the documents that undermines the legitimacy of Orion's counterclaims.

GeBBS has provided the Court with no basis to consider the Notice of Default or Notice of Termination in deciding this motion. In any event, those documents are not relevant to this motion and would not change the Court's decision in any respect.

Separate and apart from the attached documents, counsel for GeBBS has submitted an affirmation attesting to certain facts, and GeBBS also makes a large number of factual contentions in its briefs. For example, the affirmation states that "Plaintiff performed the services in accordance

with the Addendum but did not receive any notice of dispute regarding the same from the Defendant." Pl.'s Affirmation, ¶ 6. Similarly, GeBBS's opening brief states: "Plaintiff reiterates that it devoted the best of its personnel and resources toward the fulfillment of services of their obligations under the Addendum . . . to the Defendant." ECF No. 46, Mem. of Law in Supp. of Mot. to Dismiss Def.'s Countercls. ("Pl.'s Mem.") at 5.

The Court appreciates that every story has two sides, but a motion to dismiss is not the proper vehicle for GeBBS to tell its side of this story. *See Global Network Commc'ns, Inc.*, 458 F.3d at 155 ("[A summary judgment motion] is the proper procedural device to consider matters outside the pleadings, such as facts unearthed in discovery, depositions, affidavits, statements, and any other relevant form of evidence."); *Reyes v. Cty. of Suffolk*, 995 F. Supp. 2d 215, 220 (E.D.N.Y. 2014) ("Generally, when a defendant attempts to counter a plaintiff's [c]omplaint with its own factual allegation and exhibits, such allegations and exhibits are inappropriate for consideration by the Court at the motion to dismiss stage."); *Dual Groupe, LLC v. Gans-Mex LLC*, 932 F. Supp. 2d 569, 572 (S.D.N.Y. 2013) ("Defendants dispute many of the complaint's factual allegations, which the court cannot adjudicate at the motion to dismiss stage."). Because a motion pursuant to Rule 12(b)(6) tests the "facial sufficiency" of the counterclaims, *see Bilal v. Westchester Community Coll.*, No. 13-cv-3161 (CS), 2014 WL 2881217, at *3 (S.D.N.Y. June 25, 2014), the Court will not consider any of GeBBS's factual averments in deciding this motion.

The Court also declines to convert this motion into one for summary judgment, since discovery has not yet been completed. *See* Chambers, 282 F.3d at 154 (stating that a district court has discretion, when presented with matters outside the pleadings, to exclude them or to convert the motion to one for summary judgment). Accordingly, the Court will resolve GeBBS's motion to dismiss Orion's counterclaims by reference only to the pleaded counterclaims themselves.

B. The Breach of Contract Counterclaims

"Under New York law, a breach of contract claim requires proof of (1) an agreement, (2) adequate performance by the plaintiff, (3) breach by the defendant, and (4) damages." *Fischer & Mandell, LLP v. Citibank, N.A.*, 632 F.3d 793, 799 (2d Cir. 2011) (citation omitted). Orion asserts two counterclaims for breach of contract—one for nonperformance, and the other for improper termination. GeBBS moves to dismiss both of those claims.

1. Count 1: Nonperformance (Counts I & II)

In its first breach of contract counterclaim, Orion alleges that GeBBS breached its performance obligations under Addendum 3 by, among other things, "failing to (a) devote sufficient personnel and resources to its performance of the Services; (b) process new charges in a timely manner; (c) promptly pursue unpaid balances; and (d) maintain accurate records." Countercls. ¶ 21. Much of GeBBS's argument for dismissal of this and Orion's other counterclaims rests on factual averments or absence-of-evidence arguments that are improper on a Rule 12(b)(6) motion. *See, e.g.*, ECF No. 48, Br. in Reply to Def.'s Opp'n to Pl.'s Mot. to Dismiss ("Pl.'s Reply Mem.") at 2 ("While Plaintiff claims that it abided by the terms of the Addendum between the parties, Defendant provides no evidence of either providing the Plaintiff any written notice of dispute related to the Plaintiff's services or proof of any non-performance issues raised at <u>any time</u> prior to the Complaint being filed.").

Putting aside those out-of-place arguments, GeBBS's only remaining argument is that the nonperformance counterclaim fails to satisfy the *Twombly/Iqbal* plausibility standard. GeBBS argues that the allegations that it breached Addendum 3 are insufficient because they are "mere duplication of certain phrases" that appear in the Addendum and "do not provide specifics of the alleged non-performance." Pl.'s Mem. at 4-5. As a result, GeBBS contends, the allegations "do[ ] not fall within the pleading standards as they are mere conclusions without sufficient factual matter." Pl.'s Reply

Mem. at 2. The Court does not agree.

Claims for breach of contract need not satisfy the particularity requirement of Rule 9(b). *See, e.g.*, *U.S. Bank Nat'l Ass'n v. PHL Variable Ins. Co.*, No. 12-cv-6811 (CM), 2015 WL 4610894, at *2 (S.D.N.Y. July 30, 2015). Indeed, "[c]ourts have generally recognized that relatively simple allegations will suffice to plead a breach of contract claim even post-*Twombly* and *Iqbal*." *OneWest Bank N.A. v. Lehman Bros. Holding Inc.*, No. 14-cv-8916 (JMF), 2015 WL 1808947, at *4 (S.D.N.Y. Apr. 20, 2015) (citation omitted); *Speedfit LLC v. Woodway USA, Inc.*, 53 F. Supp. 3d 561, 579 (E.D.N.Y. 2014) (citation omitted). Orion does allege specific breaches of the Addendum and, although it could certainly have provided more detail regarding precisely how GeBBS failed to devote adequate resources, process new charges in a timely manner, promptly pursue unpaid balances, and maintain accurate records, it was not required to do so at this stage of the litigation. *See OneWest Bank*, 2015 WL 1808947, at *4 (holding that, while allegation that "no justification or excuse existed to account for the delay" was "not particularly detailed," it was sufficient, because "[d]efendants are not required, at this stage of the litigation, to specify with respect to each of the Loans why the delay occurred and the particular circumstances that made the delay unjustified."); *Boart Longyear Ltd. v. Alliance Indus., Inc.*, 869 F. Supp. 2d 407, 413 (S.D.N.Y. 2012) ("A plaintiff alleging a breach of contract claim is required only to provide a defendant with a 'short, plain notice' of the claims against it pursuant to Rule 8."); *Comfort Inn Oceanside v. Hertz Corp.*, No. 11-cv-1534 (JG), 2011 WL 5238658, at *6-7 (E.D.N.Y. Nov. 1, 2011) ("While the amended complaint is devoid of specifics, . . . specifics are not required in pleading a breach of contract action."). Thus, the Court finds that Orion's allegations are sufficient to state a plausible counterclaim for breach of contract, and GeBBS's motion to dismiss Count 1 is denied.

2. Count 2: Improper Termination

In its second breach of contract counterclaim, Orion alleges that GeBBS breached the MSA

by terminating it, contrary to the relevant contractual termination provision, when Orion owed no undisputed amounts to GeBBS. Countercls. ¶¶ 27-29. Although GeBBS again makes numerous factual arguments, *see, e.g.*, Pl.'s Reply Mem. at 3 ("Plaintiff was well within its right to invoke the termination clause in paragraph 5(c) of Addendum 3."), GeBBS provides no cognizable ground for dismissal of this claim at this stage of the litigation, either in its opening brief or its reply brief. Accordingly, GeBBS's motion to dismiss Count II is denied.

C. The Fraud Counterclaim (Count III)

In its counterclaim for fraud, Orion alleges that, after a dispute had arisen between the parties over the amount of payment due, "the parties agreed that if Orion made a partial payment against the balance purportedly due, GeBBS would continue to perform the Services for a reasonable time while Orion sought to find a replacement for GeBBS." Countercls. ¶ 32. Orion alleges that GeBBS "had no intention of continuing to perform the Services for Orion" when it entered into that agreement, and GeBBS stopped working completely almost immediately after Orion made the partial payment. Countercls. ¶ 33. "Under New York law, fraud requires proof of (1) a material misrepresentation or omission of a fact, (2) knowledge of that fact's falsity, (3) an intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages." *Loreley*, 797 F.3d at 170 (citing *Eurycleaia Partners, LP v. Seward & Kissel, LLP*, 910 N.E.2d 976, 979 (2009)). Unlike the breach of contract claims, a fraud claim must satisfy the particularly requirement of Rule 9(b). *Id.* at 171. To do so, the pleading must "(1) detail the statements (or omissions) that the plaintiff contends are fraudulent, (2) identify the speaker, (3) state where and when the statements (or omissions) were made, and (4) explain why the statements (or omissions) are fraudulent." *Id.* (quoting *Eternity Global Master Fund Ltd. v. Morgan Guar. Tr. Co. of N.Y.*, 375 F.3d 168, 187 (2d Cir. 2004)); *see also Am. Federated Title Corp. v. CFI Mgmt. Servs., Inc.*, 39 F. Supp. 3d 516, 520 (S.D.N.Y. 2014) (describing Rule 9(b) as requiring "the who, what, when, where, and how: the first paragraph of any newspaper story" (quoting *DiLeo v. Ernst & Young*,

901 F.2d 624, 627 (7th Cir. 1990))).

GeBBS once again raises numerous factual arguments that the Court may not adjudicate at this time, but the Court agrees with GeBBS that Orion's fraud claim does not satisfy the particularity requirements of Rule 9(b). At the very least, Orion fails to identify the speaker of the alleged material misrepresentation, as well as where and when that misrepresentation was made. As a result, its counterclaim for fraud fails to meet the applicable pleading requirement, and GeBBS's motion to dismiss Count III is granted.

IV. LEAVE TO AMEND

In this circuit, "[i]t is the usual practice upon granting a motion to dismiss to allow leave to replead." *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991); *see also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend] when justice so requires."). Dismissals made pursuant to Fed. R. Civ. P. 9(b) are "almost always" accompanied by a grant of leave to amend, unless the nonmovant has had a prior opportunity to amend its pleading to correct the defects, or the defective allegations were made after full discovery in a related case. *Luce v. Edelstein*, 802 F.2d 49, 56 (2d Cir. 1986). Orion has not had a prior opportunity to amend its fraud counterclaim in response to an opinion from the Court. Accordingly, the Court cannot conclude that allowing Orion to amend its fraud counterclaim would be futile, and the Court grants Orion leave to do so. *See Loreley*, 797 F.3d at 191. Any amended counterclaim must be filed no later than 30 days after the date of this order.

V. CONCLUSION

For the foregoing reasons, GeBBS's motion to dismiss Orion's amended counterclaims is GRANTED IN PART and DENIED IN PART. The motion is denied with respect to both of Orion's breach of contract counterclaims (Counts I & II). The motion is granted with respect to Orion's fraud counterclaim (Count III). Orion may amend its fraud counterclaim to cure the

deficiencies identified in this order within 30 days.

The Clerk of Court is directed to terminate the motion pending at ECF No. 44.

SO ORDERED.

Dated: April 4, 2017
New York, New York

GREGORY H. WOODS
United States District Judge