SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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PLAYBOY ENTERPRISES INTERNATIONAL, INC.,

Plaintiff,

- v -

MEREDITH CORP., PUBWORX SERVICES, LLC, SPECIALISTS MARKETING SERVICES INC.

Defendants.

INDEX NO.	651903/2020
MOTION DATE	11/02/2020, N/A, 09/08/2020
MOTION SEQ. NO.	002 003 009

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 88, 91
were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 89, 90
were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 92, 93, 94, 106
were read on this motion to DISMISS.

This action arises out of a putative class action, *Kokoszki v Playboy Enters., Inc.*, Case No. 19-CV-10302 (ED Mich), brought by the plaintiff Mark Kokoszki (Kokoszki), in the Eastern District of Michigan, alleging violations of Michigan's Preservation of Personal Privacy Act (Mich. Comp. Laws § 445.1711 *et seq.*) (the PPPA) (hereinafter, the *Kokoszki* action). Plaintiff Playboy Enterprises International, Inc. (Playboy) seeks to recover from certain of its vendors amounts it paid to settle the *Kokoszki* action and its attorneys' fees.

Defendant Specialists Marketing Services, Inc. (SMS) moves, pursuant to CPLR 3211, to dismiss the complaint as against it (motion sequence number 002). For the reasons set forth below, the motion is granted in part and denied in part.

Defendant Meredith Corp. (Meredith) moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint as against it (motion sequence number 003). For the reasons discussed below, the motion is granted.

Defendant PubWorx Services, LLC (PubWorx) also moves, pursuant to CPLR 3211 (a) (1) and (a) (7), to dismiss the complaint as against it (motion sequence number 009). For the reasons set forth below, the motion is denied.

BACKGROUND

Kokoszki Action

Kokoszki alleged that, between January 30, 2016 and July 30, 2016, Playboy "rented, exchanged, and/or otherwise disclosed personal information about Plaintiff's *Playboy* magazine subscription to data aggregators, data appenders, data cooperatives, and list brokers, among others, which in turn, disclosed his information to aggressive advertisers, political organizations, and non-profit companies" (NY St Cts Elec Filing [NYSCEF] Doc No. 31, *Kokoszki* complaint, ¶ 1). Kokoszki further alleged that, as a result, he "received a barrage of unwanted junk mail" (*id.*). Kokoszki alleged that Playboy, by disclosing his personal reading information between January 30, 2016 and July 30, 2016, violated Michigan's PPPA (*id.*).

The *Kokoszki* complaint alleged that Playboy violated the PPPA in three ways. First, Playboy allegedly disclosed mailing lists containing Kokoszki's personal reading information to data aggregators and data appenders, who then supplemented the mailing lists with additional sensitive information from their own databases, before sending the mailing lists back to Playboy

(*id.*, ¶ 63). Second, Playboy allegedly disclosed mailing lists containing Kokoszki's personal reading information to data cooperatives, who, in turn, gave Playboy access to their own mailing list databases (*id.*, ¶ 64). Third, Kokoszki alleged that Playboy rented and/or exchanged its mailing lists containing Kokoszki's personal reading information – enhanced with additional information from data aggregators and appenders – to third parties, including other consumer-facing companies, direct-mail advertisers, and organizations soliciting monetary contributions, volunteer work, and votes (*id.*, ¶ 65). On January 29, 2020, Playboy settled the *Kokoszki* action for $3.85 million (NYSCEF Doc No. 1, complaint, ¶¶ 3, 21).

This Action

Playboy brought this action against Meredith, PubWorx, and SMS, alleging that they are contractually obligated to indemnify Playboy for all liabilities and losses that Playboy incurred as a result of Defendants' actions under their respective agreements with Playboy (*id.*, ¶ 4). Each Defendant provided a distinct set of services to Playboy relating to its subscriber information.

Meredith

Playboy alleges that Meredith is the successor-in-interest to Time Customer Service, Inc. (TCS), and that TCS provided fulfillment services, including mail processing, order and payment service, customer service, and distribution services, to Playboy during the calendar year 2016 pursuant to an agreement for fulfillment services (*id.*, ¶¶ 22-23). Playboy alleges that the term of the TCS contract was from January 1, 2015 through December 31, 2019, and that TCS represented and warranted that "TCS shall comply with all applicable laws with respect to the use and storage of Subscriber Data" (*id.*, ¶¶ 24, 26). TCS allegedly "maintained subscriber lists, including updated information on subscribers' changes of address, subscription renewals, and billing status" (*id.*, ¶ 57). Playboy alleges, upon information and belief, that TCS misused

Playboy subscriber data and disclosed data on Michigan *Playboy* subscribers in violation of Michigan law between January 30, 2016 and July 30, 2016, while TCS was providing services to Playboy under its contract (*id.*, ¶¶ 32, 33). More specifically, Playboy alleges that TCS disclosed subscriber data for Michigan subscribers to SMS, which then offered the details of Michigan *Playboy* subscribers for rent in violation of Michigan law (*id.*, ¶ 58).

PubWorx

According to Playboy, PubWorx is the successor-in-interest to ProCirc, LLC (ProCirc), which provided circulation services, including marketing, promotion, order and payment service, list management, and newsstand management to Playboy during the calendar year 2016, pursuant to a circulation services agreement (*id.*, ¶¶ 35, 36). The term of ProCirc's contract was from November 1, 2014 through October 31, 2017 (*id.*, ¶ 37). Playboy alleges that ProCirc's contract required it to "comply with all applicable foreign, federal, state and local laws and regulations in the performance of its obligations under this Agreement" (*id.*, ¶ 38). ProCirc allegedly "maintained subscriber lists, including updated information on subscribers' changes of address, subscription renewals, and billing status" (*id.*, ¶ 57). The complaint alleges, upon information and belief, that ProCirc misused *Playboy* subscriber data and disclosed data on Michigan *Playboy* subscribers in violation of Michigan law between January 30, 2016 and July 30, 2016, while ProCirc was providing services to Playboy under its contract (*id.*, ¶¶ 48, 49). Playboy alleges that ProCirc disclosed subscriber data for Michigan subscribers to SMS, which then offered the details of Michigan *Playboy* subscribers for rent in violation of Michigan law (*id.*, ¶ 58).

SMS

Playboy further alleges that SMS provided services to Playboy, including the management and rental of Playboy's subscriber list, during the calendar year 2016 pursuant to a circulation services agreement (*id.*, ¶ 51). According to Playboy, the *Kokoszki* complaint alleged that SMS rented the contact information of *Playboy* subscribers in Michigan between January 30, 2016 and July 30, 2016, in violation of Michigan law (*id.*, ¶ 53). Playboy further alleges, upon information and belief, that SMS misused *Playboy* subscriber data and disclosed data on Michigan *Playboy* subscribers in violation of Michigan law between January 30, 2016 and July 30, 2016, while SMS was providing services to Playboy under its contract (*id.*, ¶¶ 54, 55). The complaint alleges that SMS offered the details of Michigan *Playboy* subscribers for rent after TCS and ProCirc disclosed the subscriber data to SMS (*id.*, ¶ 58).

* * * *

The complaint asserts the following six causes of action: (1) indemnification against Meredith (*id.*, ¶¶ 67-73); (2) breach of contract against Meredith (*id.*, ¶¶ 74-84); (3) indemnification against PubWorx (*id.*, ¶¶ 85-91); (4) breach of contract against PubWorx (*id.*, ¶¶ 92-102); (5) indemnification against SMS (*id.*, ¶¶ 103-108); and (6) breach of contract against SMS (*id.*, ¶¶ 109-118).

The Indemnification Provisions

TCS agreed to indemnify Playboy as follows:

> "TCS agrees at all times to indemnify, save harmless and defend Customer and its affiliated companies and their officers, agents, directors and employees from and against any and all expenses, loss or damages as a result of any third party (including from any governmental authority) claims, suits, complaints, actions or legal proceedings including threatened proceedings, directly or indirectly related to or arising from or in connection with (i) any distribution or other use of the Publications not permitted hereunder by TCS or any subcontractor of TCS, (ii) any alleged action or failure to act relating to the provision of the Services by TCS or any subcontractor of TCS in accordance with the terms of this Agreement, except to the extent arising from any materials, data or information supplied by Customer

> to TCS or any subcontractor of TCS, which is used by TCS or any subcontractor of TCS as permitted hereunder, (iii) any breach, loss or misuse of Subscriber Data collected or held by TCS hereunder, or (iv) any material breach or alleged material breach by TCS of this Agreement"

(NYSCEF Doc No. 41, Baker affirmation, exhibit B, agreement for fulfillment services § 6 [b], at 9).

The ProCirc agreement contains the following indemnification provision in paragraph 13 (a):

> "a. Indemnification: . . . ProCirc agrees to indemnify CLIENT from all Claims incurred by CLIENT arising from (i) any alleged breach of any of the representations or covenants made by ProCirc in this Agreement; (ii) any alleged omission or malfeasance of ProCirc arising under this Agreement; (iii) the Basic Services, Additional Services, and/or any work product of ProCirc, to the extent that such Claims are not the result of any action or omission by CLIENT or any intellectual property of CLIENT used as authorized hereunder by ProCirc; or (iv) any use, distribution or exploitation by ProCirc of any intellectual property of CLIENT in any way inconsistent with this Agreement"

(NYSCEF Doc No. 4, complaint, exhibit C, circulation services agreement § 13 [a], at 5).

The SMS agreement contains an indemnification and defense provision that provides as follows:

> "17. Indemnities
>
> A. Manager shall obtain a signed agreement at least once annually from each Mailer in a form agreed to by Owner.
>
> B. Manager will indemnify, defend and hold harmless Owner, its subsidiaries and affiliates and its and their shareholders, officers, directors, employees and agents, against any and all claims, lawsuits or proceedings, including reasonable attorneys' fees, arising out of or resulting from Manager's breach of any of its obligations under this Agreement or out of its performance hereunder"

(NYSCEF Doc No. 33, Sanchez affirmation, exhibit D, list management agreement § 17, at 14).

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, [and] accord plaintiff[] the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit within any cognizable legal theory" (*Maddicks v Big City Props., LLC*, 34 NY3d 116, 123 [2019] [internal quotation marks and citation omitted]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration'" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). "Whether a plaintiff can ultimately prove its allegations is not a consideration in determining a motion to dismiss" (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018] [internal quotation marks and citation omitted]).

"Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Carlson v American Intl. Group, Inc.*, 30 NY3d 288, 298 [2017] [internal quotation marks and citation omitted]). Stated differently, "[o]n a motion to dismiss pursuant to CPLR 3211 (a) (1), the defendant has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010], citing Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3211:10, at 21-22).

A. SMS's Motion to Dismiss (Motion Sequence Number 002)

The fifth cause of action alleges that SMS is required to indemnify Playboy for the costs that Playboy has incurred in the *Kokoszki* action, including the $3,850,000 settlement, more than $145,000 incurred in attorneys' fees, and other fees, costs and interest related to the improper disclosure of *Playboy* subscriber data between January 30, 2016 and June 30, 2016 (NYSCEF Doc No. 1, complaint, ¶¶ 103-108). The sixth cause of action asserts that SMS materially breached its contract by failing to indemnify Playboy, and seeks damages of no less than $3,995,000, plus interest (*id.*, ¶¶ 109-118).

1. Contractual Indemnification (Fifth Cause of Action)

SMS argues that the complaint fails to state a cause of action for contractual indemnification against it, because the unequivocal language of the contractual indemnification provision contained within its contract requires indemnification only for SMS's failure to perform a duty under its contract, and Playboy fails to allege that SMS had any duties in connection with the conduct at issue in the *Kokoszki* complaint. According to SMS, it was not required to monitor compliance with Michigan law, nor was it obligated to stop the dissemination of customer information once Playboy gave its approval of the customer lists. Further, Playboy has not identified a breach of its contract.

Playboy counters that the indemnification provision requires SMS to indemnify Playboy for claims and suits arising out of or resulting from SMS's performance under its contract. In addition, Playboy contends that there is no serious dispute that the claims in the *Kokoszki* action arose from SMS's performance. The *Kokoszki* complaint included a page from an SMS catalogue offering to rent lists of Playboy subscribers, and alleged that SMS offered information

on Playboy subscribers for rent. Thus, as argued by Playboy, the *Kokoszki* claims arose out of, and were connected with SMS's rental services for Playboy.

"The right to contractual indemnification depends upon the specific language of the contract" (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 929 [2d Dept 2009]). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). "The promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*id.* at 491-492).

In *Niagara Frontier Transp. Auth. v Tri-Delta Constr. Corp.* (107 AD3d 450, 453 [4th Dept 1985] *affd* 65 NY2d 1038 [1985]), the Fourth Department explained the principles of construction of indemnification provisions as follows:

> "The language of an indemnity provision should be construed so as to encompass only that loss and damage which reasonably appear to have been within the intent of the parties. It should not be extended to include damages which are neither expressly within its terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract."

Here, the indemnification provision in SMS's agreement states that SMS "will indemnify [Playboy] . . . against any and all claims, lawsuits or proceedings, including reasonable attorneys' fees, arising out of or resulting from [SMS's] breach of any of its obligations under this Agreement *or* out of its performance hereunder" (NYSCEF Doc No. 33, Sanchez affirmation, exhibit D, list management agreement § 17, at 14 [emphasis added]). Thus, even if SMS did not breach its contract or fail to perform a duty under its contract, it would still be required to indemnify Playboy for claims that arise out of its performance under the list management agreement.

Moreover, the indemnification provision provides for indemnification arising out of SMS's work even if it was not negligent (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]). Pursuant to the list management agreement, Playboy appointed SMS as "its exclusive representative for the management and rental of: [Playboy's] lists of active subscribers to PLAYBOY Magazine, "expires" (i.e., names of former subscribers to PLAYBOY Magazine), Playboy Products, Critics' Choice Video, Sarah Coventry, Playboy Products Package Inserts Program, (collectively, the 'Lists')" (NYSCEF Doc No. 33 § 1, at 1). The complaint alleges that SMS disclosed Michigan *Playboy* subscribers' data in violation of Michigan law, while it was providing services to Playboy (NYSCEF Doc No. 1, complaint, ¶¶ 32-33, 58). The *Kokoszki* complaint included a page from an SMS catalogue offering to rent lists of *Playboy* subscribers, including demographic information such as marital status, income, age, gender, and zip code (NYSCEF Doc No. 31, *Kokoszki* complaint, ¶¶ 2, 3, 4). The *Kokoszki* complaint alleged that SMS offered information on *Playboy* subscribers for rent (*id.*, ¶ 2). Accepting these allegations as true, the claims in the *Kokoszki* action arose out of SMS's performance under the list management agreement.[1] Accordingly, Playboy has stated a cause of action for contractual indemnification against SMS.

[1] SMS argues that Playboy maintained ownership of the lists and should have directed SMS to remove Michigan customers from the lists. In addition, SMS contends that it was not responsible for any misconduct or improper use by any mailer, provided that, prior to rental, it had no actual notice of any misconduct by the mailer. Nevertheless, the complaint adequately alleges that SMS rented subscriber lists. Thus, Playboy's allegations fall within the broad scope of the indemnification provision.

2. Breach of Contract (Sixth Cause of Action)

SMS argues that Playboy's breach of contract cause of action should be dismissed because it merely duplicates its indemnification claim. Playboy, however, contends that it has stated a cause of action for breach of contract because SMS breached its duty to indemnify it for claims arising out of SMS's performance under the list management agreement. Playboy asserts that it may plead causes of action in the alternative.

A cause of action is duplicative of another when they both arise out of the same facts and allege the same damages (*see Town of Wallkill v Rosenstein*, 40 AD3d 972, 974 [2d Dept 2007]). Here, as argued by SMS, the breach of contract claim is duplicative of the contractual indemnification claim against it. Both claims are based upon SMS's refusal to indemnify Playboy pursuant to the list management agreement, and seek the same damages, i.e., indemnification for the $3,850,000 settlement and attorneys' fees incurred in the *Kokoszki* action (NYSCEF Doc No. 1, complaint, ¶¶ 105, 107, 112, 115). Therefore, the breach of contract claim against SMS is dismissed.

B. Meredith's Motion to Dismiss (Motion Sequence Number 003)

The first cause of action alleges that Meredith, as the successor-in-interest to TCS, is required to indemnify Playboy for the costs that Playboy has incurred in the *Kokoszki* action, including the $3,850,000 settlement, about $145,000 incurred in attorneys' fees, and other fees, costs and interest related to the improper disclosure of *Playboy* subscriber data between January 30, 2016 and June 30, 2016 (NYSCEF Doc No. 1, complaint, ¶¶ 67-73). The second cause of action alleges that Meredith materially breached its contract by failing to indemnify Playboy, and seeks damages of no less than $3,995,000, plus interest (*id.*, ¶¶ 74-84).

Meredith's motion to dismiss is granted. When the parties' contract terminated on December 31, 2018, so too did Meredith's contractual obligation to indemnify Playboy. Because Playboy's underlying claim and its indemnification demand arose only after the contract with TCS terminated, Meredith is not bound by the indemnification provision.

In interpreting a contract, "the aim is a practical interpretation of the expressions of the parties to the end that there be a 'realization of [their] reasonable expectations'" (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977], quoting 1 Corbin, Contracts, § 1). Moreover, it is well established that "when parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms. Evidence outside the four corners the document as to what was really intended but unstated or misstated is generally inadmissible to add to or vary the writing" (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). Therefore, "[c]ourts 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'" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398, 404 [2009], quoting *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]). "[W]hether or not a writing is ambiguous is a question of law to be resolved by the courts" (*W.W.W. Assoc.*, 77 NY2d at 162).

The plain language of the fulfillment services agreement and "Amendment No. 1" extinguished TCS's indemnification obligations as of the contract termination date. Specifically, the parties chose to enumerate the provisions in the contract that would survive termination, and chose not to include the indemnification obligation among them. The only provision in the initial contract addressing survival was Section D.3, which concerns confidentiality (NYSCEF Doc No. 41, agreement for fulfillment services, at 6 [providing that "[t]he provisions of this

paragraph 3 shall survive the expiration or termination of this Agreement"]). Then, "Amendment No. 1", dated August 3, 2018, modified the contract's duration such that "[t]he term of this Agreement . . . shall continue until the Customer notifies TCS in writing that the transition of all Services to another fulfillment has been completed (the 'Term') but no later than December 31, 2018" (NYSCEF Doc No. 42, amendment no. 1, at 1).

Amendment No. 1 also added the following survival clause:

> "3. Survival:
>
> The payment and reimbursement obligations in this Section C (solely with respect to obligations in connection with undisputed amounts that are incurred but not fully settled as of the date of expiration or early termination) shall survive the termination of this Agreement, including without limitation termination as the result of a Force Majeure Event as set forth in Section D.5(a) below and the expiration of the Term of this Agreement as set forth in Section A.2 above. For the avoidance of doubt, Customer will only pay for services rendered up to the date of expiration or early termination. Any disputes related to invoices shall be handled as set forth in Section C.(1)(a). Within fourteen (14) days of the expiration or early termination of this Agreement for any reason, TCS will refund any deposit amount held by TCS pursuant to the terms of Section C.2"

(*id.* at 2).

Amendment No. 1 further provided that, "except as specifically amended hereby, all other terms and provisions of this Agreement, including all exhibits and schedules thereto, shall remain in full force and effect" (*id.* at 3).

Thus, Playboy and TCS provided for survival of certain provisions, including confidentiality and payment and reimbursement obligations, without including TCS's indemnification obligations (NYSCEF Doc Nos. 41 § D.3, 42 § C.3). If the parties wished to provide for survival of TCS's indemnification obligations, they could have said so. As written, however, TCS's indemnification obligations "continue[d] . . . no later than December 31, 2018."

Kokoszki filed his putative class action against Playboy in January 2019 (NYSCEF Doc No. 1, complaint, ¶ 19; NYSCEF Doc No. 31).

The complaint alleges that Playboy demanded indemnification from TCS on November 13, 2019, after the contract had already been terminated (NYSCEF Doc No. 1, complaint, ¶ 66). Because the underlying claim and Playboy's indemnification demand arose after termination, TCS was no longer under a duty to indemnify Playboy (*see Pierson v Empire State Land Assoc., LLC*, 65 AD3d 1114, 1115 [2d Dept 2009] ["the subject lease cancellation agreement extinguished the respondents' obligation under the lease to indemnify the appellants, as the parties agreed to have certain specific obligations survive the termination, without including the obligation to indemnify of which they were aware"]).

Playboy contends, in opposition to Meredith's motion, that Meredith's indemnification obligations are still in effect because the *Kokoszki* liability arose out of an occurrence during the indemnification period. Playboy asserts that because the agreement between Playboy and TCS was an "occurrence-based" indemnification agreement, it may be enforced years after termination of the underlying contract. Furthermore, Playboy maintains that the parties had no need to expressly provide for survival of the indemnification obligations because they survived on their own terms.

None of the cases relied on by Playboy, however, appear to permit survival of an indemnification provision in the face of a survival clause that excludes such provision (*e.g.*, *Louis Dreyfus Energy Corp. v MG Ref. and Mktg., Inc.*, 2 NY3d 495, 500 [2004] [looking beyond words of indemnification provision to "discern the parties' intention from the circumstances in which the MG Capital Guaranty was issued"]; *Consol. Edison Co. of New York, Inc. v Allstate Ins. Co.*, 98 NY2d 208, 218 [2002] [survival not at issue with insurance policy

expressly promising "to pay Con Edison's liability 'for damage to or destruction of property of others * * * caused by accident occurring during the period * * *'"] [asterisks in original]). Nor does Playboy point to authority suggesting that "occurrence-based" indemnification provisions override the usual canons of contract construction, which counsel against reading additional duties into a clear, complete document. Here, the survival clause would be rendered largely superfluous if other contractual terms survived independently (*see, e.g.*, *By Design LLC v Samsung Fire & Mar. Ins. Co. Ltd. (U.S.Branch)*, 173 AD3d 590, 591-92 [1st Dept 2019] ["[T]he terms of a contract must be read in context . . . and no contractual clause is to be construed as being superfluous"] [internal citations omitted]). Read Playboy's way, the contract exposes Meredith to indemnification liability for many years into the future, potentially until all applicable statute of limitations periods are exhausted with respect to conduct that took place during the contractual term but for which no claim for indemnification was made. If the parties meant to leave such a long tail of liability to this fulfillment services contract, they could have said so.

Accordingly, Meredith is entitled to dismissal of the complaint. The court need not reach Meredith's remaining arguments in support of dismissal.

C. PubWorx's Motion to Dismiss (Motion Sequence Number 009)

The third cause of action alleges that PubWorx, as the successor-in-interest to ProCirc, is required to indemnify Playboy for the costs that Playboy has incurred in the *Kokoszki* action, including the $3,850,000 settlement, over $145,000 incurred in attorneys' fees, and other fees, costs and interest related to the improper disclosure of *Playboy* subscriber data between January 30, 2016 and June 30, 2016 (NYSCEF Doc No. 1, complaint, ¶¶ 85-91). Similarly, the fourth

cause of action alleges that PubWorx materially breached its contract by failing to indemnify Playboy, and seeks damages of no less than $3,995,000, plus interest (*id.*, ¶¶ 92-102).

1. Whether PubWorx Is Liable for ProCirc's Liabilities

As a threshold matter, PubWorx argues that the complaint should be dismissed because it did not assume the liability that Playboy alleges. Although PubWorx purchased ProCirc's assets, including ProCirc's name, pursuant to an asset purchase agreement dated effective March 17, 2017, it asserts that it did not acquire liabilities relating to ProCirc's contractual performance before the purchase. Playboy, meanwhile, contends that PubWorx, as the successor and assign to the circulation services agreement, is liable for omissions and malfeasance relating to the agreement because its unincorporated division, ProCirc, assumed that agreement in 2018.

"In general, a corporation that acquires another corporation's assets is not liable for the predecessor's contract liabilities" (*Eastern Concrete Materials, Inc./NYC Concrete Materials v DeRosa Tennis Contrs., Inc.*, 139 AD3d 510, 512 [1st Dept 2016]; *see also Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]). "However, there are four exceptions to this rule. Generally, the buyer is not liable for the liabilities of the seller unless: '(1) [the buyer] expressly or impliedly assumed the predecessor's [contract] liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape [such] obligations'" (*Matter of AT&S Transp., LLC v Odyssey Logistics & Tech. Corp.*, 22 AD3d 750, 752 [2d Dept 2005], quoting *Klumpp v Bandit Indus., Inc.*, 113 F Supp 2d 567, 571 [WD NY 2000]). The second and third exceptions are "based on the concept that a successor that effectively takes over a company in its entirety should carry the predecessor's

liabilities as a concomitant to the benefits it derives from the good will purchased" (*Grant–Howard Assoc. v General Housewares Corp.*, 63 NY2d 291, 296 [1984]).

With respect to the first exception, courts have held that "an assignee or successor will not be bound to the terms of a contract absent an affirmative assumption of the duties under the contract" (*Amalgamated Tr. Union Local 1181, AFL-CIO v City of New York*, 45 AD3d 788, 790 [2d Dept 2007]). PubWorx argues that it did not assume liability for the settlement and other costs incurred in the *Kokoszki* action pursuant to the asset purchase agreement dated March 17, 2017. Section 2.03 of the asset purchase agreement, entitled "Assumption of Liabilities," provides that:

> "As part of the consideration for the Purchased Assets, at the Closing, Purchaser shall assume (a) the current liabilities of Seller reflected in the Working Capital, and (b) the executory obligations of Seller to be performed after the Closing under the Assumed Contracts, but excluding any liabilities and obligations of Seller (i) arising from or related to (A) any default, breach or violation of such Assumed Contract by Seller prior to the Closing or (B) any Legal Proceeding relating to the performance of services under any of the Assumed Contracts prior to the Closing, or (ii) for payment of amounts due in respect of Seller's ownership and operation of the Business or the Purchased Assets prior to the Closing . . . ."

(NYSCEF Doc No. 72, Petraitis aff, exhibit A, asset purchase agreement, at 11).

However, even if PubWorx did not expressly assume ProCirc's liabilities, the asset purchase agreement does not resolve all factual issues as a matter of law with respect to whether it impliedly assumed the duties under the circulation services agreement, including ProCirc's contractual indemnification obligations (*see Fortis Fin. Servs.*, 290 AD2d at 383). "While no precise rule governs the finding of implied liability, the authorities suggest that the conduct or representations relied upon by the party asserting liability must indicate an intention on the part of the buyer to pay the debts of the seller" (*Ladjevardian v Laidlaw-Coggeshall, Inc.*, 431 F

Supp 834, 839 [SD NY 1977]). "The presence of such an intention depends on the facts and circumstances of each case" (*id.*).

Playboy originally entered into the circulation services agreement with ProCirc in August 2014 (NYSCEF Doc No. 4, complaint, exhibit C). The agreement provides that it is "binding on the parties' successors and permitted assigns" (*id.*, § 13 [e]). After the asset purchase, in November 2018, Playboy and "ProCirc, an unincorporated division of PubWorx Services, LLC," amended the circulation services agreement (NYSCEF Doc No. 6, complaint, exhibit E). The amendment provided that "[a]ll provisions of the [2014 circulation services agreement] shall remain in full force and effect" (*id.*). Thus, there is a question as to whether PubWorx thereby assumed the indemnification obligations of the circulation services agreement. Moreover, an unincorporated division is not amenable to suit in its own right (*Sheldon v Kimberly-Clark Corp.*, 111 AD2d 912, 912 [2d Dept 1985]).

Because Playboy's allegations (taken as true for purposes of this motion) raise fact questions about whether PubWorx implicitly assumed ProCirc's contractual indemnification obligations, the Court will not dismiss the complaint against PubWorx on the basis of the general rule barring successor contract liability.[2]

2. Whether the Complaint States a Cause of Action for Contractual Indemnification Against PubWorx

PubWorx next contends that it is not required to indemnify Playboy because Playboy has failed to plead a breach of ProCirc's representations and warranties. Specifically, PubWorx

[2] Accordingly, for purposes of the instant motion, the Court need not reach the question whether Playboy's factual allegations (taken as true) are sufficient to support a finding that PubWorx's acquisition of ProCirc's assets constituted a de facto merger (*Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd.*, 184 AD3d 116, 126 [1st Dept 2020] [describing "[t]he hallmarks of a de facto merger", including "continuity of ownership"]).

asserts, like Meredith, that: (1) Playboy fails to allege what subscriber data it disclosed to SMS; (2) ProCirc's disclosure of subscriber information to SMS did not violate the PPPA; (3) ProCirc's disclosure of subscriber information for marketing purposes did not violate the PPPA; and (4) Playboy ordered the disclosures.

For its part, Playboy argues that it has sufficiently alleged that ProCirc disclosed subscriber information in violation of Michigan law. Playboy contends that SMS did not act as its agent. In addition, Playboy maintains that PubWorx has failed to demonstrate that the PPPA's marketing exception applies.

Section 2[3] of the PPPA provides that:

> "[e]xcept as provided in section 3 or as otherwise provided by law, a person, or an employee or agent of the person, engaged in the business of selling at retail . . . written materials . . . shall not disclose to any person, other than the customer, a record or information concerning the purchase, lease, rental, or borrowing of these materials by a customer that indicates the identity of the customer"

(former Mich. Comp. Laws § 445.1712).

Section 3 provides the enumerated exceptions:

> "A record or information described in section 2 may be disclosed only in 1 or more of the following circumstances:
>
> (a) With the written permission of the customer.
>
> (b) Pursuant to a court order.
>
> (c) To the extent reasonably necessary to collect payment for the materials or the rental of the materials, if the customer has received written notice that the payment is due and has failed to pay or arrange for payment within a reasonable time after notice.
>
> (d) If the disclosure is for the exclusive purpose of marketing goods and services directly to the consumer. The person disclosing the information shall inform the

[3] Sections 1, 2, and 3 of the PPPA were subsequently amended, which became effective on July 31, 2016.

> customer by written notice that the customer may remove his or her name at any time by written notice to the person disclosing the information.
>
> (e) Pursuant to a search warrant issued by a state or federal court or grand jury subpoena"

(former Mich. Comp. Laws § 445.1713). Pursuant to section 1 of the PPPA, a "customer" is defined as "a person who purchases, rents, or borrows a book, or other written material, or a sound recording, or a video recording" (former Mich. Comp. Laws § 445.1711 [a]).

Viewing the allegations in the light most favorable to Playboy, the complaint states a cause of action for contractual indemnification against PubWorx. The circulation services agreement states that ProCirc "agree[d] to indemnify [Playboy] from all Claims incurred by [Playboy] arising from (i) any *alleged* breach of any of the representations or covenants made by ProCirc in this Agreement" (NYSCEF Doc No. 4 at 5 [emphasis added]). Pursuant to paragraph 11 of the agreement, ProCirc agreed to "comply with all applicable . . . state . . . laws in the performance of its obligations under this Agreement" (*id.* at 4). The complaint alleges that ProCirc maintained subscriber lists, including updated information on subscribers' changes of address, subscription renewals and billing status, and that ProCirc disclosed subscriber data on Michigan subscribers to SMS, which, in turn, offered this data for rent in violation of Michigan law (NYSCEF Doc No. 1, complaint, ¶¶ 57, 58). The *Kokoszki* complaint alleges that marketers who paid for the subscriber data could access details on each subscriber, including their full names, ages, and home addresses (NYSCEF Doc No. 31, *Kokoszki* complaint, ¶¶ 1-4, 7). Furthermore, the *Kokoszki* complaint alleges that the plaintiff did not consent to the disclosure of his customer information, and that he did not receive written notice that he could opt-out (*id.*, ¶ 11). Thus, Kokoszki alleged the unlawful disclosure of personal reading information without notice or consent (*see* former Mich. Comp. Laws § 445.1712; *see also Horton v GameStop*

Corp., 380 F Supp 3d 679, 682 [WD Mich 2018] [magazine subscriber stated a claim for violation of the PPPA based on allegations that a retailer sold his personal reading information to third-party marketing, list-rental, and data-mining companies, and that the retailer's unauthorized disclosure of personal information caused an influx of print advertisements to his home]).

While PubWorx argues that the PPPA does not prohibit disclosure for marketing purposes, the court finds this argument to be premature. Whether ProCirc disclosed the information to SMS exclusively for marketing purposes is more suitable for a motion for summary judgment (*see Halaburda v Bauer Pub. Co., LP*, 2013 WL 4012827, *8, 2013 US Dist LEXIS 109954, *24 [ED Mich, Aug. 6, 2013, Nos. 12–CV–12831, 12–CV–14221, 12–CV–14390 (GCS)] [finding defendants' arguments concerning their compliance with section 445.1713, including its marketing exception, to be premature and better suited for a motion for summary judgment]). In any event, at this stage on a motion to dismiss, it is sufficient that Kokoszki alleged that he did not consent to the disclosure of his subscriber information, and that he did not receive written notice that he could remove his name at any time (*see* former Mich. Comp. Laws § 445.1713 [d]; *see also Ruppel v Consumers Union of U.S., Inc.*, 2017 WL 3085365, *1, 2017 US Dist LEXIS 90985, *5 [SD NY, June 12, 2017, No. 16-CV-2444 (KMK)]).

PubWorx also argues that the complaint should be dismissed because SMS was Playboy's agent. In *Boelter v Hearst Communications, Inc.* (269 F Supp 3d 172, 191-195 [SD NY 2017]), the court held that the PPPA contains an implied exception for disclosure to bona fide agents or employees. However, whether SMS was acting as Playboy's agent is a factual issue that cannot be resolved on a motion to dismiss (*see Cain v Redbox Auto. Retail, LLC*, 981 F Supp 2d 674, 684 [ED Mich 2013] [holding that whether third-party vendors were agents within

the PPPA's statutory definition were questions of fact that could not be determined on a motion to dismiss]; *see also State of New York v Schenectady Chems.*, 103 AD2d 33, 37 [3d Dept 1984]).

Finally, the court cannot determine on this motion to dismiss whether Playboy ordered ProCirc to disclose subscriber information.

Therefore, PubWorx's motion to dismiss is denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 002) of defendant Specialists Marketing Services, Inc. to dismiss the complaint herein is granted to the extent of dismissing the breach of contract claim against it, and is otherwise denied; and it is further

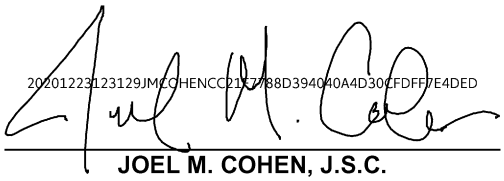
ORDERED that the motion (sequence number 003) of defendant Meredith Corp. to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion (sequence number 009) of PubWorx Services, LLC to dismiss the complaint herein is denied; and it is further

ORDERED that defendants Specialists Marketing Services, Inc. and PubWorx Services, LLC shall answer the complaint within twenty (20) days of the date of this decision and order; and it is further

ORDERED that the remaining parties shall appear for a virtual or telephone Preliminary Conference on **January 12, 2021 at 11:30 a.m.**

This constitutes the decision and order of the Court.



12/23/2020
DATE

JOEL M. COHEN, J.S.C.

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