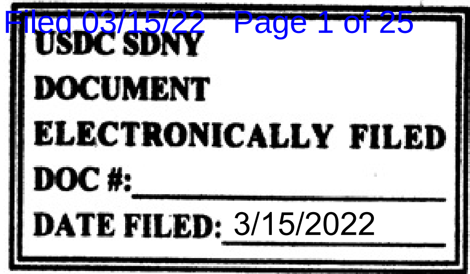
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ORIENT EXPRESS CONTAINER CO., LTD.,

Plaintiff,

- against -

BULB BASICS LLC,
And INAYAT NOORMOHMAD,

Defendants.

21-CV-7752 (GHW) (RWL)

REPORT AND RECOMMENDATION TO HON. GREGORY H. WOODS: MOTION TO DISMISS

ROBERT W. LEHRBURGER, United States Magistrate Judge.

Plaintiff Orient Express Container Co., LTD ("OEC") filed this action for breach of contract and unjust enrichment based on eight bills of lading and a credit agreement issued by OEC to Defendant Bulb Basics LLC ("Bulb") for shipment of cargo. Defendant Inayat Noormohmad personally guaranteed payment under the credit agreement. Defendants, collectively "Bulb," have moved to dismiss the case based on a settlement agreement that they claim contains a release for the bills of lading at issue. Bulb argues that as a result of the settlement agreement, the case should be dismissed for lack of subject matter jurisdiction, lack of personal jurisdiction, improper venue, and failure to state a claim. On the record before it, the Court converts the motion to dismiss to one for summary judgment pursuant to Fed. R. Civ. P. 12(d) and the parties' submission of witness declarations and exhibits. As set forth below, I recommend that the Court enter summary judgment in favor of Bulb and award Bulb its reasonable attorney's fees and costs.

FACTUAL BACKGROUND

The facts are drawn from the Complaint (Dkt. 1, "Compl.") and, where indicated, the declarations and accompanying exhibits of Defendant Noormohmad (Dkt. 14, "Noormohmad Decl.") and OEC's Claims and Insurance Manager, Joseph Klobus (Dkt. 18-1, Klobus Decl.).

A. The Bills of Lading and Credit Agreement

OEC is in the shipping, logistics, and transportation business. As a non-vessel operating common carrier, it issues bills of lading to customers as contracts of carriage. (Compl. ¶ 8.) OEC is organized under the laws of the British Virgin Islands and has its principal place of business in Taiwan. (Compl. ¶ 5.) Bulb is a Texas limited liability corporation based in Kansas. (Compl. ¶ 6.) Noormohmad is Chief Operating Officer of Bulb and resides in Kansas. (Compl. ¶ 7; Noormohmad Decl. ¶ 1.)

On November 10, 2020, OEC entered into a credit agreement with Bulb for a line of credit extended by OEC on Bulb's behalf for shipment of goods. (Compl. ¶ 14.) Noormohmad signed the credit agreement as personal guarantor. (Compl. ¶ 15, Ex. 2 at ECF 5.) The credit agreement requires Bulb to keep its account current and pay each invoice according to its terms. (Compl. ¶ 32, Ex. 2 at ECF 4.) The credit agreement imposes a 1.5% interest rate, compounded daily, for unpaid invoices and provides for payment of OEC's costs of collection, including attorney's fees. (Compl. ¶¶ 36, 44, Ex. 2 at ECF 4.)

Between the months of February and June 2021, OEC issued various bills of lading, eight of which are at issue here, to Bulb as shipper and consignor of Bulb cargo.

(Compl. ¶ 9.) OEC performed its obligations, but Bulb has not paid $65,238.59 invoiced under the eight bills of lading. (Compl. ¶¶ 11, 16-25.)

The parties agreed that all disputes under or in connection with the credit agreement shall be governed by New York law and U.S. General Maritime Law, and they consented to jurisdiction in the Southern District of New York. (Compl., Ex. 2 at ECF 3.) The bills of lading provide that any disputes in connection with them will be determined in the Southern District of New York. (*E.g.*, Compl., Ex. 1 at ECF 17.)

B. The Settlement Agreement

On June 8, 2021, OEC and Bulb entered into a settlement agreement (the "Settlement" or "Settlement Agreement"). (Noormohmad Decl., Ex. A.) The Settlement Agreement explicitly releases OEC's claims with respect to nine bills of lading, including the eight bills of lading at issue. The Complaint makes no mention of the Settlement Agreement.

The Settlement Agreement contains provisions for both payment by Bulb to OEC and a mutual general release of each party by the other for any and all claims arising under the bills of lading. As to payment, the Settlement Agreement provides that:

> A settlement sum has been agreed to by the Parties in the amount of …$36,496.39 …, representing the outstanding balance on the account Bulb Basics has with OEC. The settlement sum shall be paid by Bulb Basics in two parts in accordance with the following:
>
> a. $23,118.89 on June 8, 2021 before OEC releases and delivers [two containers].
> b. $13,377.50 within one day after OEC release and delivers [two additional containers].

(Settlement Agreement § I.)

The release is a broad "Mutual General Release" that releases the parties from:

> "any and all cause of action … known or unknown … arising or which could have arisen from the cargo and shipments covered by the shipping documents: HBL Nos. OERT202740K00019, OERT202740K00015, OERT201740K00001, OERT201740K00002, OERT202715K00052, OERT202715K00055, OERT202715K00056, OERT205715J00466, and OERT215715K00234.

(Settlement Agreement § 2.) Eight of the nine numbered "shipping documents" are the bills of lading at issue in the instant dispute.

The Settlement Agreement contains an integration clause providing that it is the entire agreement between the parties that supersedes any prior negotiations or agreements (§ III(6)); is governed by Kansas law (§ III(8)), and requires that any action to enforce its terms be brought exclusively in Kansas. (§ III(9)).

C. Negotiations Leading To The Settlement Agreement

The Settlement Agreement was the culmination of negotiations that started a few months earlier. In early 2021, OEC issued an invoice to Bulb for $19,068.27, representing delivery of containers under bill of lading OERT202715K00056. (Klobus Decl. ¶¶ 3-4.) Bulb paid that invoice on March 16, 2021. (Klobus Decl. ¶ 4.)

On March 11, 2021, however, OEC issued a second invoice for additional charges in connection with the same delivery totaling $28,462.28. (Klobus Decl. ¶ 5.) Bulb refused to pay the additional amount, and OEC threatened to invoke its lien rights and withhold containers pursuant to other bills of lading, including bills of lading OERT202740K00015 and OERT202740K00019, among others. (Klobus Decl. ¶ 5-6.)

On June 1, 2021, the attorney for Bulb, Shanshan Liang, offered to pay 30% of what she acknowledged to be the disputed $28,462.28 additional charges sought by OEC. (Klobus Decl. ¶¶ 7-8, Ex. D at 20-21.) OEC rejected that offer on June 4, 2021, explaining by email why OEC believed it was entitled to "full payment of outstanding

debts." (Klobus Decl. ¶ 9, Ex. D at 17-18.) Shortly after OEC's email, Ms. Liang raised Bulb's initial offer to 70% as follows:

1. for the past due charges outside the disputed $28k, they will pay in full.
2. for the disputed $28k they will pay 70%
3. they will not be responsible for interest (the 1.5%)
4. they will not be responsible for demurrage, storage, etc. on current containers.
5. they will pay today and you will release the containers today.
6. parties mutually release the other from all claims related to these shipments.

(Klobus Decl., Ex. D at 16-17.) After additional back and forth, Ms. Liang emailed with a modified offer in which Bulb would agree to pay two additional invoices at a reduced amount (item 4 below):

1. for the past due charges outside the disputed $28k, they will pay in full.
2. for the disputed $28k they will pay 80%
3. they will not be responsible for interest (the 1.5%)
4. they will be responsible for the two invoices (#3601810 and 3601868) if you can remove $2000.
5. they will pay today and you will release the containers today.
6. parties mutually release the other from all claims related to these shipments.

(Klobus Decl., Ex. D at 6-7.) The two identified invoices totaled $15,377.50. (Klobus Decl., Ex. F.)

In the late afternoon on June 7, 2021, the parties concluded their negotiations. OEC sent an email to Ms. Liang agreeing to absorb the $2000 off the two invoices that totaled $15,377.50, bringing that amount down to $13,377.50. (Klobus Decl., Ex. D at 5-6.) Ms. Liang replied with an email confirming payment of $13,377.50 for the two containers specifically mentioned. (Klobus Decl., Ex. D at 5.)

Ms. Liang then drafted the Settlement Agreement and sent it by email to "several team members at OEC." (Klobus Decl. ¶ 11.) On June 8, 2021, the parties signed the Settlement Agreement. The amount set forth in the Settlement Agreement to be paid by

Bulb matches the dollar amounts agreed to in the negotiations: $23,118.90 (representing 70% of the "disputed $28k"; i.e, the original $28,462.28 additional charges), and $13,377.50 for the two specifically identified invoices. Bulb fully paid the settlement amount. (Noormohmad Decl. ¶ 4, Ex. B.)

Of the nine bills of lading included within the general release, only three are identified in the emails exchanged between Ms. Liang and Mr. Klobus (specifically, OERT202740K00019, OERT202740K000015, and OERT202715K00056).

THE MOTION TO DISMISS

Bulb seeks dismissal based on the Settlement Agreement and its explicit release of all eight invoices that are the subject of OEC's Complaint. According to Bulb, the Court lacks federal subject matter jurisdiction because the dispute concerns the Settlement Agreement, which is not a maritime contract. For that same reason, Bulb contends that the Court has no personal jurisdiction over the Defendants (which would exist only if the dispute implicates the jurisdictional provisions of the credit agreement) and that venue is improper (because the Settlement Agreement requires litigation in Kansas). As to the merits, should the Court reach them, Bulb again points to the Settlement Agreement and the release as defeating OEC's claims.

OEC contends that despite the general release identifying the bills of lading at issue, the Settlement Agreement does not encompass the bills of lading that form the basis for its claims. As a result, it argues, maritime jurisdiction exists as the bills of lading are maritime contracts. For the same reason, OEC asserts that the Court has personal jurisdiction over the Defendants and that venue is proper because the credit agreement and bills of lading provide the controlling provisions on those matters. As for the merits,

OEC contends that the Settlement Agreement is ambiguous, and that the negotiation history shows that the Settlement Agreement does not include the bills of lading at issue. Alternatively, OEC argues that the Settlement Agreement is subject to rescission or reform due to unilateral mistake.

PROCEDURAL BACKGROUND

OEC filed its complaint on September 16, 2021. (Dkt. 1.) Bulb filed its motion to dismiss on October 19, 2021; OEC filed responding papers on November 9, 2021; and Defendants replied on November 23, 2021. (Dkts. 12, 18, 21.) The matter has been referred to me for Report and Recommendation. (Dkt. 8.) The Court heard oral argument on March 8, 2022.

OEC requested that the motion be converted to one for summary judgment. (Pl. Mem. at 1[1]; Oral Arg. Tr. at 3.) At oral argument, Bulb requested that it have the opportunity to submit additional information if the motion is converted to one for summary judgment. (Oral Arg. Tr. at 6.) As explained below, however, the Court finds that there is no basis for the Court to consider extrinsic evidence and finds that summary judgment should be entered in favor of Bulb. Accordingly, there is no justification for Bulb to submit additional evidence.

LEGAL STANDARDS

A. Rule 12(b)(1) – Lack Of Subject Matter Jurisdiction

On a motion to dismiss pursuant to Rule 12(b)(1) for lack of subject-matter jurisdiction, a court must dismiss a claim if it "lacks the statutory or constitutional power

[1] "Pl. Mem." refers to Plaintiff's memorandum Of Law In Opposition To Defendants' Motion To Dismiss Plaintiff's Complaint Pursuant To Fed. R. Civ. P. 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6) (Dkt. 18).

to adjudicate it." *Morrison v. National Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008) (internal quotations omitted), *aff'd*, 561 U.S. 247, 130 S. Ct. 2869 (2010). "The Second Circuit has identified two types of Rule 12(b)(1) motions: facial and fact-based." *Lugones v. Pete and Gerry's Organic, LLC*, 440 F. Supp.3d 226, 237 (S.D.N.Y. 2020) (citing *Carter v. HealthPort Technologies*, LLC, 822 F.3d 47, 56-57 (2d Cir. 2016), and *Katz v. Donna Karan Co., L.L.C.*, 872 F.3d 114, 119 (2d Cir. 2017)).

A facial Rule 12(b)(1) motion is "based solely on the allegations of the complaint or the complaint and exhibits attached to it." *Carter*, 822 F.3d at 56. A plaintiff opposing such a motion bears "no evidentiary burden." *Id.* Rather, a district court considering a facial 12(b)(1) motion must "determine whether [the complaint and its exhibits] allege[ ] facts" that establish subject matter jurisdiction. *Id.* (quoting *Amidax Trading Group v. S.W.I.F.T. SCRL*, 671 F.3d 140, 145 (2d Cir. 2011) (per curiam)). For a facial challenge, the Court "must take all facts alleged in the complaint as true and draw all reasonable inferences in favor of plaintiff." *Morrison*, 547 F.3d at 170 (quoting *Natural Resources Defense Council v. Johnson*, 461 F.3d 164, 171 (2d Cir. 2006) (internal quotation omitted)).

In contrast to facial Rule 12(b)(1) motions, fact-based motions allow the movant to rely on evidence beyond the complaint and its exhibits. *Carter,* 822 F.3d at 57; *see also MMA Consultants 1, Inc. v. Rep. of Peru*, 719 F. App'x 47, 49 (2d Cir. 2017) (defining fact-based Rule 12(b)(1) motion as one where "the defendant puts forward evidence to challenge the factual contentions underlying the plaintiff's assertion of subject-matter jurisdiction"). "In opposition to such a motion, [a plaintiff] must come forward with evidence of their own to controvert that presented by the defendant, or may instead rely

on the allegations in the[ir p]leading if the evidence proffered by the defendant is immaterial because it does not contradict plausible allegations that are themselves sufficient to show standing." *Katz*, 872 F.3d at 119 (internal citations and quotations omitted). Where a movant supports its fact-based Rule 12(b)(1) motion with "material and controverted extrinsic evidence, a district court will need to make findings of fact in aid of its decision as to subject matter jurisdiction." *Lugones*, 440 F. Supp.3d at 237 (quoting *Carter*, 822 F.3d at 57) (internal quotation marks omitted). Ultimately, "[t]he plaintiff bears the burden of proving subject matter jurisdiction by a preponderance of the evidence." *Aurecchione v. Schoolman Transportation System, Inc.*, 426 F.3d 635, 638 (2d Cir. 2005).

B. Rule 12(b)(2) – Lack Of Personal Jurisdiction

"On a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of showing that the court has jurisdiction over the defendant." *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 566 (2d Cir. 1996). To carry that burden, "a plaintiff must make a prima facie showing that jurisdiction exists." *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 342 (2d Cir. 2018) (internal quotation marks omitted); *see also A.I. Trade Finance, Inc. v. Petra Bank*, 989 F.2d 76, 79 (2d Cir. 1993) ("To survive the motion to dismiss, [plaintiff] was required to make only a prima facie showing that [defendant] is amenable to personal jurisdiction in New York"). "'Such a showing entails making legally sufficient allegations of jurisdiction, including an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant.'" *Dennis v. JPMorgan Chase & Co.*, 343 F. Supp. 3d 122, 196-97 (S.D.N.Y.

2018) (brackets omitted) (quoting *Charles Schwab Corp. v. Bank of America Corp.*, 883 F.3d 68, 81 (2d Cir. 2018)).

In evaluating whether a plaintiff has surpassed this threshold, the Court may consider the allegations proffered in plaintiff's complaint, along with plaintiff's "own affidavits and supporting materials," construing such materials "in the light most favorable to plaintiffs" and "resolving all doubts in their favor." *Southern New England Telephone Co. v. Global NAPs Inc.*, 624 F.3d 123, 138 (2d Cir. 2010) (internal quotation marks omitted); *see also A.I. Trade Finance, Inc.*, 989 F.2d at 79-80 ("where the issue is addressed on affidavits, all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party"). "Where a court does not hold an evidentiary hearing on the jurisdictional question, it may, nevertheless, consider matters outside the pleadings." *Lugones*, 440 F. Supp.3d at 235 (citing *Dorchester Financial Securities, Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 86 (2d Cir. 2013)).

C. Rule 12(b)(3) – Improper Venue

On a motion to dismiss pursuant to Rule 12(b)(3) for improper venue, "the plaintiff bears the burden of establishing that venue is proper." *Luxexpress 2016 Corp. v. Government of Ukraine*, No. 15 Civ. 4880, 2018 WL 1626143, at *4 (S.D.N.Y. March 30, 2018) (quoting *French Transit, Ltd. v. Modern Coupon Systems, Inc.*, 858 F.Supp. 22, 25 (S.D.N.Y. 1994)). When considering a motion to dismiss for improper venue under Rule 12(b)(3), "the plaintiff need only make a prima facie showing of venue." *Gulf Insurance Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005) (brackets omitted) (quoting *CutCo Industries, Inc. v. Naughton*, 806 F.2d 361, 364-65 (2d Cir. 1986) (citations omitted)). As

with motions to dismiss for lack of subject matter jurisdiction and personal jurisdiction, "in deciding a motion to dismiss for improper venue, the court may examine facts outside the complaint to determine whether venue is proper" and "must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff." *Concesionaria DHM, S.A. v. International Finance Corp.*, 307 F.Supp.2d 553, 555 (S.D.N.Y. 2004) (internal quotation marks omitted) (citing *U.S. Environmental Protection Agency ex rel. McKeown v. Port Authority of New York and New Jersey*, 162 F.Supp.2d 173, 183 (S.D.N.Y. 2001)).

D. Rule 12(b)6) – Failure To State A Claim

To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 1960 (2007). A claim is facially plausible when the factual content pleaded allows a court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). In considering a motion to dismiss, a district court "accept[s] all factual claims in the complaint as true, and draw[s] all reasonable inferences in the plaintiff's favor." *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 403 (2d Cir. 2014) (internal quotation marks omitted). A complaint is properly dismissed where, as a matter of law, "the allegations in [the] complaint, however true, could not raise a claim of entitlement to relief." *Twombly*, 550 U.S. at 558, 127 S. Ct at 1966.

For the purposes of considering a motion to dismiss pursuant to Rule 12(b)(6), a court generally is confined to the facts alleged in the complaint. *Cortec Industries v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir. 1991). A court may, however, consider additional

materials, including documents attached to the complaint, documents incorporated into the complaint by reference, public records, and documents that the plaintiff either possessed or knew about, and relied upon, in bringing the suit. *See Kleinman v. Elan Corp.*, 706 F.3d 145, 152 (2d Cir. 2013) (quoting *ATSI Communications, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)).

E. Rule 56 – Summary Judgment

If, on a motion to dismiss for failure to state a claim under Rule 12(b)(6), the court relies on documents and information that is not within the complaint or otherwise among the limited categories of additional materials that may be considered, the court may convert the motion to one for summary judgment. Fed. R. Civ. P. 12(d). Before doing so, however, the court must give the parties a reasonable opportunity to present all material that is pertinent to the motion. *Id.* The parties have submitted, and the Court has considered, evidence outside the complaint and the materials attached to it, most notably the Settlement Agreement. Accordingly, the Court may, and elects to, convert the motion to one for summary judgment. Here, OEC agrees that the motion should be converted to one for summary judgment and stands on the papers it has submitted. (Oral Arg. Tr. at 3.) And, as noted above, although Bulb expressed a desire to submit additional material, there is no purpose that it can serve given the Court's findings below.

To obtain summary judgment under Rule 56 of the Federal Rules Of Civil Procedure, the movant must show that there is no genuine dispute of material fact. Fed. R. Civ. P. 56(a). A fact is material "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). The moving party bears the initial burden of identifying

"the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The opposing party must then come forward with specific materials establishing the existence of a genuine dispute. *Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *Geyer v. Choinski*, 262 F. App'x 318, 318 (2d Cir. 2008). Where the nonmoving party fails to make "a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment must be granted. *Celotex*, 477 U.S. at 322, 106 S. Ct. at 2552; *accord El-Nahal v. Yassky*, 835 F.3d 248, 252 (2d Cir. 2016).

The moving party may demonstrate the absence of a genuine issue of material fact "'in either of two ways: (1) by submitting evidence that negates an essential element of the non-moving party's claim, or (2) by demonstrating that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim.'" *Nick's Garage, Inc. v. Progressive Casualty Insurance Co.*, 875 F.3d 107, 114 (2d Cir. 2017) (quoting *Farid v. Smith*, 850 F.2d 917, 924 (2d Cir. 1988)). A party asserting that a fact cannot be, or is genuinely, disputed "must support the assertion by" either "citing to particular parts of materials in the record" or "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1); *see also Powell v. National Board Of Medical Examiners*, 364 F.3d 79, 84 (2d Cir. 2004) (if movant demonstrates absence of genuine issue of material fact, nonmovant bears burden of demonstrating "specific facts showing that there is a genuine issue for trial").

In assessing the record to determine whether there is a genuine issue of material fact, a court must resolve all ambiguities and draw all reasonable inferences in favor of

the nonmoving party. *Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513; *Smith v. Barnesandnoble.com, LLC*, 839 F.3d 163, 166 (2d Cir. 2016); *Sutera v. Schering Corp.*, 73 F.3d 13, 16 (2d Cir. 1995) ("The district court must draw all reasonable inferences and resolve all ambiguities in favor of the nonmoving party and grant summary judgment only if no reasonable trier of fact could find in favor of the nonmoving party."). The court must inquire whether "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511. Summary judgment may be granted, however, where the nonmovant's evidence is conclusory, speculative, or not significantly probative. *Id.* at 249-50, 106 S. Ct. at 2511. If there is nothing more than a "metaphysical doubt as to the material facts," summary judgment is proper. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986).

DISCUSSION

A. The Court Has Subject Matter Jurisdiction

The parties agree that subject matter jurisdiction in this case turns on whether the dispute falls under maritime jurisdiction. Federal courts are given exclusive jurisdiction over maritime cases pursuant to 28 U.S.C. § 1333. Absent maritime jurisdiction, there is no federal subject matter to be resolved. That is because OEC's claims are purely state claims for breach of contract and unjust enrichment.[2]

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[2] Neither party has suggested that the Court has diversity jurisdiction over the dispute. That likely is because even though the parties are citizens of different states and therefore jurisdictionally diverse, the amount in controversy is below the $75,000 threshold. *See* 28 U.S.C. § 1332.

As framed by OEC's Complaint, its claims are based on non-payment for invoices due and owing pursuant to bills of lading. Bulb does not dispute that those underlying bills of lading are maritime in nature. (Def. Mem. at 7.[3]) Thus, on its face, the Complaint presents an action falling under the Court's maritime jurisdiction.

The parties agree that the Court may treat the motion as a fact-based Rule 12(b)(1) motion and go behind the Complaint to consider the declarations and exhibits submitted by the parties. (Def. Mem. at 5; Pl. Mem. at 7.) *See Carter,* 822 F.3d at 57. Bulb has submitted the Noormohmad Declaration, Settlement Agreement, and proof of payment by Bulb in compliance with the Settlement Agreement. In response, OEC has submitted the Klobus Declaration and exhibits relevant to negotiation of the Settlement Agreement.

On that record, Bulb argues that the Court lacks maritime jurisdiction because the Settlement Agreement between the parties "has extinguished the bills of lading at issue," and a settlement agreement, even one that resolves a maritime contract dispute, is not a maritime contract. (Def. Mem. at 7.) For example, in *Fednav Ltd. v. Isoramar, S.A.*, the plaintiff Fednav chartered a vessel from the defendant. 925 F.2d 599, 600 (2d Cir. 1991). Cargo on the vessel was damaged, and Fednav entered into a settlement agreement with the subrogated insurer. Fednav then requested contribution from Isoramar, the charterer and boat owner, as a result of which Isoramar agreed to pay for half of the Fednav-insurer settlement. When Isoramar failed to pay its portion, Fednav sued for breach of the contribution agreement. The district court dismissed for lack of subject matter jurisdiction, and the Second Circuit affirmed. *Id*. at 602. As the Second Circuit explained, "The

[3] "Def. Mem." refers to Memorandum Of law In Support Of Defendants Bulb Basics LLC and Inayat Noormohmad's Motion To Dismiss (Dkt. 13).

Fednav-Isromar contribution agreement [was] a separate and distinct contract that is not maritime in nature because it involves neither maritime services nor maritime transactions." *Id.* at 601-02. *Fednav* is distinguishable, however, because the settlement agreement at issue was between one of the parties to the underlying maritime contract and a third-party who had agreed to contribute to the plaintiff's settlement with the subrogated insurer. Here, in contrast, the parties to the Settlement Agreement are the same parties to the underlying maritime contract.

Somewhat closer to the instant case, in *Consolidated Bathurst, Ltd, v. Rederiaktiebolaget Gustaf Erikson* (cited by OEC), a charter party entered into a settlement with a longshoreman who was injured. 645 F. Supp. 884, 885 (S.D. Fla. 1986). The charter party then demanded indemnity from the boat owner based on an indemnity provision in the charter contract. Alleging that the boat owner agreed to the demand but failed to pay, the charter party sued the boat owner for breach of that second agreement. The court dismissed the claim for lack of subject matter jurisdiction, concluding that "[a]n agreement to satisfy an obligation arising from a maritime tort or contract is not a maritime contract, and an action for breach of such a contract is not an admiralty claim." *Id.* at 886; *see also Rice Corp. v. Express Sea Transport Corp.*, No. 14-CV-5671, 2015 WL 3397688, at *2 (S.D.N.Y. May 26, 2015) ("the Second Circuit has consistently suggested that an agreement to settle a claim that arises under a charter agreement is not a maritime contract. Accordingly, lawsuits regarding such agreements are not within the court's admiralty jurisdiction"); *Mulvaney v. Dalzell Towing Co.*, 90 F. Supp.259, 260 (S.D.N.Y. 1950) ("If this is an action for breach of contract to compromise and settle, it is not within the admiralty jurisdiction").

Based on the foregoing authority, it seems apparent that there would be no maritime jurisdiction if OEC had brought an action to enforce the Settlement Agreement or if Bulb filed its action as one to reform or rescind the Settlement Agreement. But neither OEC nor Bulb have done so.[4] Rather, the Settlement Agreement comes into play only because Bulb asserts it as a defense to OEC's claims. The Court is not aware, however, of any case that has found lack of maritime jurisdiction based on the defendant's assertion of a settlement agreement as a defense, and Bulb has not pointed to any.

The Court thus agrees with OEC that maritime jurisdiction is present, and the Court has subject matter jurisdiction over OEC's claims as set forth in the Complaint.

B. The Court Has Personal Jurisdiction Over Defendants

Personal jurisdiction exists over both Defendants by virtue of the credit agreement, in which both Bulb and Noormohmad consented to jurisdiction in the Southern District of New York. (Compl., Ex. 2 at ECF 3.) Bulb argues that personal jurisdiction does not exist because both defendants are non-New York citizens, and the dispute concerns the Settlement Agreement, which has no such provision. At bottom, Bulb's argument is not based on fact questions such as where the injury occurred, where the Defendants do business, or other similar inquiries that affect whether a court has personal jurisdiction over a defendant. Rather, Bulb's argument is premised on the merits of its legal defense – i.e., that the eight bills of lading were released by the Settlement Agreement. The Court thus agrees with OEC that the Court has personal jurisdiction over the defendants.

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[4] OEC does discuss the law of rescission and reform in its opposition brief as a direct response to Bulb's assertion of the Settlement Agreement as a defense. *See* Pl. Mem. at 6; Def. Mem. at 7-8. And, at oral argument, OEC conceded that if its unilateral mistake defense prevailed, the remedy would be rescission or reform. But the only reason that rescission and reform arises at all is in response to OEC's anticipated defense.

C. Venue Is Proper

The bills of lading that are the subject of OEC's claims provide that any disputes in connection with the bills of lading will be determined in the Southern District of New York. (*E.g.*, Compl., Ex. 1 at ECF 17.) Bulb does not argue otherwise. Instead, it asserts that there is no venue in this District because the dispute concerns the Settlement Agreement, which makes Kansas the exclusive forum. (Def. Mem. at 2.) The Settlement Agreement's choice-of-forum provision, however states that Kansas shall be the exclusive forum for "any action to enforce the terms of [the Settlement] Agreement." (Settlement Agreement § III(9).) As OEC's claim is not an action to enforce the Settlement Agreement, the choice-of-venue provision does not apply. The Court therefore agrees with OEC that venue in this District is proper.

D. The Eight Bills Of Lading Were Released By The Settlement Agreement

The Court now turns to the substantive issue and concludes that the release in the Settlement Agreement encompasses the eight bills of lading and that neither OEC's ambiguity argument nor its unilateral mistake argument survive scrutiny. Because the Settlement Agreement "shall be governed by the laws of the State of Kansas," the Court applies Kansas contract law in construing the agreement. (Settlement Agreement § III(8).)

1. No Ambiguity

OEC argues that the Settlement Agreement is ambiguous, and the Court therefore may consider extrinsic evidence, such as the parties' negotiations, to determine the parties' intent. The Court does not agree.

"The primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction." *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011) (citing, *e.g.*, *Anderson v. Dillard's, Inc.*, 283 Kan. 432, 436, 153 P.3d 550 (2007)). "If, on the other hand, the court determines that a written contract's language is ambiguous, extrinsic or parol evidence may be considered to construe it." *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 963, 298 P.3d 250 (2013) (citing, *e.g.*, *Barbara Oil Co. v. Kansas Gas Supply Corp.*, 250 Kan. 438, 452, 827 P.2d 24 (1992)).

"Contract language 'is ambiguous when the words used to express the meaning and intention of the parties are insufficient in a sense the contract may be understood to reach two or more possible meanings.'" *Short v. Blue Cross and Blue Shield of Kansas, Inc.*, 56 Kan.App.2d 914, 919, 441 P.3d 1058 (2019) (citing *Wood v. Hatcher*, 199 Kan. 238, 242, 428 P.2d 799 (1967)). The question of whether the language in a written contract is ambiguous is one of law for the court. *Waste Connections*, 296 Kan. at 964 (citing, *e.g.*, *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 264, 225 P.3d 707 (2010)).

To make its ambiguity argument, OEC dwells on the language of Section I of the Settlement Agreement. Section I addresses payment by Bulb. The relevant language reads: "A settlement sum has been agreed to by the Parties in the amount of … ($36,496.39), representing the outstanding balance on the account Bulb Basics has with OEC." (Settlement Agreement § 1.) According to OEC, the phrases "settlement sum"

and "representing the outstanding balance on the account" are "inconsistent and irreconcilable." (Pl. Mem. at 13-14.)

That contention is dubious.[5] Regardless, OEC ignores the remainder of the Settlement Agreement. The issue is whether the eight bills of lading were released by the Settlement Agreement. The relevant provision is Section 2, which is the release. The release unambiguously releases Bulb from all invoices arising under nine bills of lading, each of which is identified by its number and eight of which are the bills of lading at issue. (Settlement Agreement § 2.) And, considering the release section in the context of the entire Settlement Agreement, nothing about the payment provisions or any other aspect of the Settlement Agreement creates ambiguity as to the bills of lading released.

In support of its ambiguity argument, OEC relies on *Kraft Foods, Inc. v. All These Brand Names, Inc.*, 213 F. Supp.2d 326 (S.D.N.Y. 2002). (Pl. Mem. at 14.) *Kraft* does bear similarity to the instant case, but it does not help OEC with respect to ambiguity. To the contrary, *Kraft* demonstrates that the Settlement Agreement is unambiguous with respect to the claims released.

In *Kraft*, the plaintiff Kraft sought to collect on outstanding debt owed by the defendant. The defendant insisted that Kraft release it from all debts and claims. *Id.* at 328. Before executing the release agreement, a Kraft attorney asked attorneys for each

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[5] As in most any settlement agreement where the parties have compromised on amounts due and owning, Bulb agreed to pay a settlement amount (the "settlement sum") as full payment for an outstanding debt ("representing the outstanding balance on the account"). (Settlement Agreement § 1.) OEC attempts to find ambiguity by suggesting that the "settlement amount" cannot represent the "outstanding balance." But of course it can – the settlement payment was the amount paid to compromise the outstanding balance. The language may be inartful, but that does not make it ambiguous. In any event, the release provision, and the Settlement Agreement in its entirety, are unambiguous as to the claims released.

company division whether they had any outstanding invoices due to be paid by the defendant. Of the six divisions queried, only one identified any amount due. *Id.* at 329.

The parties then executed a release that required the defendant to pay approximately $400,000 in exchange for a general release applicable to "all agreements" between the parties. The check by which the defendant paid identified payment in full for four specific invoices that in total equaled the $400,000 consideration. *Id*. at 328. After execution, a division of Kraft uncovered an additional invoice for $585,500 that had not been paid. *Id*. at 329. Kraft then sued the defendant for payment. As a defense, the defendant asserted the release applied to all agreements between the parties. In response, Kraft claimed ambiguity and unilateral mistake.

As to ambiguity, the court held that the release was "facially clear and unambiguous" and that "the document contains no language expressly or impliedly limiting the scope of the Release to claims arising within [a specific] Division [of Kraft]." *Id.* at 330. Here, the release is no less clear and unambiguous. If anything, it is even clearer than the release in *Kraft* as it specifically identifies the specific bills of lading as to which the parties released "any and all causes of action … arising or which could have arisen from the cargo and shipments covered by the [bills of lading]." (Settlement Agreement § 2.) All eight of the bills of lading on which OEC now sues are among the nine expressly and clearly identified as being the subject of the release.

As it is crystal clear from the Settlement Agreement which bills of lading were the subject of the release, there is no ambiguity and no grounds for introduction of extrinsic evidence.

2. No Unilateral Mistake

OEC argues that even if the Settlement Agreement is unambiguous, it should be rescinded on the basis of unilateral mistake. (Pl. Mem. at 16.) That argument also fails.

First, under Kansas law, "[a]s a general rule, … in the absence of fraud, a unilateral mistake will not excuse nonperformance of a contract." *Albers v. Nelson*, 248 Kan. 575, 580, 809 P.2d 1194 (1991) (citing, *e.g.*, *Triple A Contractors, Inc. v. Rural Water District No. 4*, *Neosho County*, 226 Kan. 626, 628, 603 P.2d 184 (1979). OEC makes no allegation of fraud against Bulb. There thus is no legal foundation for OEC to assert unilateral mistake.

Second, the only authority that OEC cites to support its argument is *Kraft*. In addition to ambiguity, Kraft argued that it made a unilateral mistake in agreeing to the release. The court applied New York law, which requires that (1) the party asserting unilateral mistake "entered into a contract under a mistake of material fact," and (2) "the other contracting party either knew or should have known that such mistake was being made." 213 F. Supp.2d at 330 (quoting *Ludwig v. NYNEX Service Co.*, 838 F. Supp. 769, 795 (S.D.N.Y. 1993)). "The moving party must also establish that it exercised ordinary care and that enforcement would be unconscionable." *Summit Health, Inc. v. APS Healthcare Bethesda, Inc.*, 993 F.Supp.2d 379, 405 (S.D.N.Y. 2014) (citing *VCG Special Opportunities Master Fund Ltd. v. Citibank, N.A.*, 594 F. Supp. 334, 343-44 (S.D.N.Y. 2008)); *see also Kraft*, 213 F.Supp.2d at 331 (a party seeking rescission based on unilateral mistake must demonstrate that it exercised ordinary care).

The *Kraft* court found evidence of a unilateral mistake of fact sufficient to deny summary judgment. Specifically, despite his purportedly diligent efforts to determine the

full amount of unpaid invoices, Kraft's lawyer did not learn of the $585,000 invoice until after execution of the release. *Id.* at 329. The court found that a question of fact existed as to whether or not the additional invoice "should have been uncovered through the exercise of ordinary care." *Id.* at 331. Here, in contrast, OEC does not assert that it overlooked or was unaware of a particular invoice or amount due. Indeed, there is no contention or even suggestion that OEC made a mistake of ***fact***.

To be sure, the negotiation history shows that in discussing the amounts to be paid, the parties specifically identified by number only three bills of lading and focused on amounts under specific invoices. On that basis, OEC argues: "If the 'settlement sum' equaled the exact amount on the exact invoices that the parties had been negotiating on for nearly three weeks leading to the Purported Settlement Agreement, then it begs the question why at the 11th hour OEC would also willingly settle an additional $65,283.59 due from Bulb Basics for nothing." (Pl. Mem. at 16.)

That is not for this Court or a fact-finder to answer. The release could not have been plainer or clearer in identifying the bills of lading being released. It is certainly possible that OEC made a mistake by signing an agreement that included a broader release than it contemplated. But if OEC did make a mistake, it was not one of fact but instead one of negligent review by the "several team members at OEC" who received it. (Klobus Decl. ¶ 11.) *See Summit Health,* 993 at 406-07 (rejecting unilateral mistake claim as futile where party failed to carefully review contract); *VCG Special Opportunities*, 594 F. Supp. at 344 ("it appears that the instant case presents a circumstance where a [sophisticated party] simply failed to review carefully the terms of the parties' agreement. If [plaintiff] was negligent in this regard, this does not justify rescission"); *NCR Corp. v.*

Lemelson Medical, Education and Research Foundation, No. 99-CV-3017, 2001 WL 1911024, at *7 (S.D.N.Y. April 2, 2001) (same), *aff'd*, 33 F. App'x 7 (2d Cir. 2002).

Accordingly, there is no basis for either OEC's ambiguity argument or its unilateral-mistake argument, and Bulb is entitled to summary judgment.

E. Bulb's Request For Attorney's Fees

The Settlement Agreement explicitly entitles the prevailing party to recover its reasonable attorneys' fees and costs "[i]n the event of future litigation in which this Agreement is asserted as the basis for a claim or defense, including claims for breach of this Agreement and/or actions to enforce the terms of the Agreement." (Settlement Agreement § III(4).) Bulb has requested, and is entitled to, an award of reasonable attorney's fees and costs pursuant to Section III(4) of the Settlement Agreement.

CONCLUSION

For the foregoing reasons, I recommend that the Court grant Bulb's motion, enter judgment in favor of Bulb, and award Bulb its reasonable attorney's fees and costs.

DEADLINE FOR OBJECTIONS AND APPELLATE REVIEW

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties have fourteen (14) days to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of Court, with extra copies delivered to the Chambers of the Gregory H. Woods, United States Courthouse, 500 Pearl Street, New York, New York 10007, and to the Chambers of the undersigned, 500 Pearl Street, New York, New York 1007. **Failure to file timely objections will result in waiver of objections and preclude appellate review.**

SO ORDERED.

ROBERT W. LEHRBURGER
UNITED STATES MAGISTRATE JUDGE

Dated: March 15, 2022
New York, New York