UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PILKINGTON NORTH AMERICA, INC. Plaintiff, vs. MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA AND AON RISK SERVICES CENTRAL, INC., Defendants. -and- MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA Third-Party Plaintiff, vs. AON UK LIMITED, NIPPON SHEET GLASS CO., LTD., AND MITSUI SUMITOMO INSURANCE CO. LTD., Third-Party Defendants.	Case No. 1:18-CV-08152-JFK

MEMORANDUM OF LAW IN SUPPORT OF THIRD PARTY DEFENDANT NIPPON SHEET GLASS CO., LTD.'S MOTION TO DISMISS MITSUI SUMITOMO INSURANCE COMPANY OF AMERICA'S THIRD PARTY COMPLAINT

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Third-Party Defendant Nippon Sheet Glass Co., Ltd. ("NSG-Japan") hereby moves to dismiss Defendant and Third-Party Plaintiff Mitsui Sumitomo Insurance Company of America's ("MSI-US") Third Party Complaint ("TPC") pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6).

PRELIMINARY STATEMENT

In its TPC, MSI-US brings suit against NSG-Japan – a Japanese based company that is the ultimate corporate parent of plaintiff Pilkington North America, Inc. ("Pilkington") – alleging that NSG-Japan made negligent misrepresentations and seeking a declaratory judgment arising out of a global insurance program memorialized in a "Master Policy," which MSI-US did not even issue.

MSI-US has not brought suit against NSG-Japan to hold it to account for any actual or alleged "misrepresentations," instead contending elsewhere that the representations made by NSG-Japan, if any, were actually *true statements*. Nor does MSI-US truly believe that NSG-Japan is an indispensable party to this lawsuit, given that MSI-US has proceeded against Pilkington on identical legal grounds for some time and has even conceded in correspondence that NSG-Japan need not join this case under certain conditions.

Rather, after nineteen months of litigation, MSI-US has recently decided to sue NSG-Japan as a discovery maneuver. More specifically, MSI-US is apparently concerned that as a non-party, NSG-Japan could take advantage of the discovery protections contemplated by the Federal Rules and so – as a means of circumventing these protections – has brought suit directly against NSG-Japan in the hope that this foreign entity would then be forced to comply with *party* discovery, including the provision of "relevant documents and witnesses available in discovery and at trial." In support of this tactic, MSI-US has cobbled together two claims against NSG-Japan that are both legally deficient and essentially already before this Court, but in different form. And MSI-US

makes these claims even though NSG-Japan does no business in this jurisdiction either specifically or generally.

MSI-US's pleading gamesmanship should not withstand dismissal for at least the following three reasons:

First, MSI-US has failed to proffer any basis for this Court to exercise jurisdiction over a Japanese entity that has no actual, articulable ties to New York at all, let alone any relating to this case. For the Court to exercise jurisdiction in these circumstance would violate not only traditional notions of fair play and substantial justice, but also decades of well-established jurisprudence.

Second, MSI-US fails to state a claim, whether for negligent misrepresentation or for a declaratory judgment. NSG-Japan cannot possibly be held liable for statements MSI-US itself says are true, among a litany of other deficiencies more fully explained herein, nor should it be required to defend against a declaratory judgment claim this Court has already dismissed as duplicative and unnecessary.

Third, even if the TPC were not dismissed outright as against NSG-Japan pursuant to Rule 12(b)(2) and/or 12(b)(6), MSI-US should be compelled to arbitrate its dispute with NSG-Japan, as expressly set forth in the very agreement upon which MSI-US is suing: the Master Policy.

These points are discussed in greater detail below.

RELEVANT PROCEDURAL HISTORY

Pilkington commenced this action on September 6, 2018 against MSI-US and Aon Risk Services Central, Inc. ("Aon-US") by way of Summons and Complaint. Dkt. 1. Following protracted motion practice, on December 2, 2019, Pilkington filed an Amended Complaint. Dkt. 73. On June 1, 2020, MSI-US filed an Answer to the Amended Complaint, along with a crossclaim against Aon-US and counterclaims against Pilkington. Dkt. 110. MSI-US filed an Amended Answer, crossclaim, and counterclaims on June 15, 2020. Dkt. 116. That same day, which was

the deadline to join other parties, and over 21 months after this action was commenced, MSI-US filed the TPC against NSG-Japan and Aon UK Limited ("Aon-UK"). Dkt. 115.

Pilkington moved to dismiss both counterclaims MSI-US asserted against it, namely the claims for declaratory judgment and equitable estoppel. Dkt. 136. On November 10, 2020, this Court granted Pilkington's motion and dismissed both counterclaims. Dkt. 175.

Despite filing the TPC on June 15, 2020, MSI-US did not effect service of process for another 5 months, serving NSG-Japan with the TPC on November 13, 2020. Abrams Decl., ¶ 3.[1] Yet, just days later, on November 19, 2020, MSI-US offered to "dismiss its lawsuit against NSG-Japan" on the condition that NSG-Japan would agree "to make its relevant documents and witnesses available in discovery and at trial" thus making plain that MSI-US's true motive in filing the TPC was to obtain party discovery from NSG-Japan. Abrams Decl., Ex. B at 1.

STATEMENT OF FACTS

a. The Parties and Policies

NSG-Japan "is a foreign corporation with a principal place of business in Tokyo, Japan." TPC at ¶ 12. Aon-UK is also "a foreign corporation with a principal place of business in London, England." *Id.* at ¶ 11. According to MSI-US, Aon-UK acted as NSG-Japan's "agent with respect to the negotiation, placement, management, and administration of the Global Program." *Id.* at ¶ 33. The "Global Program" is a "comprehensive global risk transfer program [] designed, developed and marketed by [Aon-UK] for [NSG-Japan] and its worldwide subsidiaries and affiliates." *Id*. at ¶ 3. One of its key features is a "Master Policy" entered into between Mitsui

[1] Notably, NSG-Japan actually agreed to accept service of the TPC on the condition that MSI-Japan would similarly accept service. MSI-US declined and proceeded to serve NSG-Japan through formal channels. Abrams Decl., ¶ 4.

Sumitomo Insurance Co. Ltd. ("MSI-Japan") – MSI-US's parent company – and NSG-Japan. *Id.* at ¶ 20. MSI-US is not a party to the Master Policy. Dkt. 144-1.

Pilkington "is a wholly owned subsidiary of NSG-Japan," albeit indirectly owned. *Id.* at ¶ 16; Dkt. 73 at ¶ 17. Aon-US was Pilkington's "broker of record" with respect to local policies issued under the Global Program, in addition to being Aon-UK's "affiliate." TPC at ¶ 37. According to the TPC, MSI-US issued the 2016-2017 U.S. Local Policy to Pilkington as part of the Global Program (*Id.* at ¶ 3, 20), with the intention that the Master Policy would "set the outer boundary of coverage available to" Pilkington and other NSG-Japan subsidiaries and affiliates. *Id.* at ¶ 22.

The Master Policy does not absolve MSI-Japan or any of its subsidiaries and affiliates that may issue local policies under the Global Program from fulfilling any contractual or other duties required by local policies or law, nor does MSI-US make any such allegations. Dkt. 144-1; *see* TPC generally.

b. NSG-Japan's Alleged Misrepresentations

The allegations in the TPC as against NSG-Japan are minimal at best, and have no connection with New York whatsoever. MSI-US alleges that NSG-Japan made two misrepresentations to Aon-UK in London (or possibly Japan), who in turn shared them with Aon-US in Michigan, who then fortuitously sent that information to MSI-US in New York. TPC ¶ ¶ 40, 77; *id.* at Exhibit 3. *First*, MSI-US claims that NSG-Japan requested "that the 2016 Global Program – including the 2016-2017 U.S. Local Policy – be issued with a $15 million sublimit for all windstorm losses in the United States." TPC ¶ 7, citing Exhibit 3.[2] *Second*, MSI-US alleges

[2] Exhibit 3, however, does not involve Aon-UK or NSG-Japan; rather, it concerns Aon-US communicating with MSI-US in Michigan, and an employee of MSI-US in Michigan directing Aon-US to send specific information to an MSI-US employee based in New York. TPC Ex. 3 at p. 4.

that NSG-Japan provided "instructions … to bind coverage under the 2016-2017 U.S. Local Policy with the terms and conditions quoted by MSI-US, including a $15 million sublimit for 'U.S. Windstorm.'" *Id*. However, MSI-US does not allege that the terms and conditions of the 2016-2017 Local Policy quoted by MSI-US were ever sent to NSG-Japan. *See* TPC generally.

Indeed, the TPC is devoid of any allegations that NSG-Japan interacted or communicated with MSI-US in New York or otherwise. Similarly, MSI-US does not allege that NSG-Japan ever directly communicated with Aon-US – the entity through whom MSI-US placed the 2016-2017 U.S. Local Policy at issue in this litigation – or that NSG-Japan was aware that Aon-US was negotiating the underwriting and placement of the 2016-2017 U.S. Local Policy with MSI-US in New York instead of with its employees in Michigan, at MSI-US's headquarters in Warren, New Jersey, or elsewhere. *See, e.g.*, TPC Ex. 3 at p. 4 (communications regarding the 2016-2017 U.S. Local Policy began between an Aon-US employee in Michigan and an MSI-US employee in Michigan); Abrams Decl., Ex. E (map on MSI-US's website showing it underwrites in six locations throughout the United States, including its "HQ" in Warren, New Jersey).

c. Location of NSG-Japan's Alleged Contact

MSI-US pleads "upon information and belief" that NSG-Japan "transacts business in the State of New York, including by directing the negotiation and procurement of the 2016-2017 U.S. Local Policy at issue in this litigation." TPC ¶ 12. Apart from this solitary conclusory allegation, MSI-US does not allege any details about how NSG-Japan "transacts business in the State of New York," or more specifically that NSG-Japan knew the "negotiation and procurement" of the 2016-2017 U.S. Local Policy at issue in this litigation occurred *in any respect* in New York.

Instead, MSI-US acknowledges that "[t]he material terms, conditions, limits, and premium of all policies in the Global Program are negotiated and agreed to each year in the United Kingdom and Japan at the parent company level – *i.e.*, between MSI-Japan and NSG-Japan by and through

its agent, Aon-UK." TPC ¶ 40 (emphasis added). In other words, MSI-US alleges that NSG-Japan's purported misrepresentations occurred either in the United Kingdom or Japan. Even assuming that NSG-Japan transacted business in both Japan and the United Kingdom, this does not amount to transacting business in New York.

MSI-US further alleges that once the terms, conditions, limits, and premium for the Global Program are agreed upon, Aon-UK transmits this information "to its local affiliates in each jurisdiction in which coverage is provided under a Local Policy, including Aon-US in the United States." *Id.* ¶ 40. The referenced Aon-US affiliate is based in Southfield, Michigan, not New York. Dkt. 115 at Ex. 1, p. 2.

MSI-US additionally alleges that Aon-US "prepared and transmitted a Market Submission for the 2016-2017 U.S. Local Policy [] to MSI-US in New York." TPC ¶ 50. Aon-US allegedly did so at the direct request of an MSI-US employee based in Novi, Michigan, to whom Aon-US also sent the Market Submission. *See* Dkt. 115 at Ex. 1, p. 3 (MSI-US employee in Novi, Michigan: "we would like to receive submission for Pilkington's property. It is merely a formality, but we have to have it for compliance reason[s]. Once you make one, please send it to Ewan and cc to me."); *Id.* at p. 2 (Aon-US employee in Southfield, Michigan emails the Market Submission to MSI-US in Novi, Michigan, copying the additional requested MSI-US recipient in New York). The address listed for the insured in the Market Submission is in Toledo, Ohio. *Id.* at p. 8.

There is no allegation tying NSG-Japan's conduct to New York.

d. NSG-Japan Is Not an Indispensable Party

NSG-Japan is not an indispensable party for purposes of MSI-US's declaratory judgment claim involving the Master Policy, to which NSG-Japan is a signatory. TPC ¶ 89. MSI-US has conceded as much in offering to dismiss NSG-Japan from this action only days after it served the

TPC, on the condition that NSG-Japan stipulate to "make its relevant documents and witnesses available in discovery and at trial." Abrams Decl., Ex. B at p. 1. Apparently, according to MSI-US, NSG-Japan is "indispensable" only insofar as party discovery is concerned. If NSG-Japan agrees to comply with party discovery obligations – as opposed to the less onerous non-party discovery mechanisms available to MSI-US under the Federal Rules – NSG-Japan would no longer be "indispensable" to this case and can be dismissed. A party cannot be indispensable only sometimes.

Further, it is notable that MSI-US asserted a *verbatim* declaratory judgment cause of action against Pilkington in its counterclaims as it now pleads against NSG-Japan, without so much as mentioning NSG-Japan (as an "indispensable party" or otherwise):

Compare Dkt. 116 at 90:	To TPC at 90:
"Accordingly, pursuant to 28 U.S.C. §§ 2201 and 2202, and Federal Rule of Civil Procedure 57, MSI-US seeks a declaration that a $15 million sublimit applies to all windstorm losses in the United States under the 2016-2017 Global Program – including the 2016-2017 U.S. Local Policy – and/or any other appropriate declaration to settle the legal relationship, rights, and obligations of the parties."	"Accordingly, pursuant to 28 U.S.C. §§ 2201 and 2202, and Federal Rule of Civil Procedure 57, MSI-US seeks a declaration that a $15 million sublimit applies to all windstorm losses in the United States under the 2016-2017 Global Program – including the 2016-2017 U.S. Local Policy – and/or any other appropriate declaration to settle the legal relationship, rights, and obligations of the parties."

Recognizing that for tactical reasons MSI-US is simply recycling claims that are already before this Court, the Court has already dismissed the above declaratory judgment claim asserted by MSI-US against Pilkington (Dkt. 175 at 16-18). It should do the same here.

e. <u>The Master Policy Mandates Arbitration of Any Dispute</u>

As noted above, MSI-US seeks a declaration "under the 2016-2017 Global Program," which program is governed by the Master Policy. TPC ¶ 90. Since MSI-US has already admitted liability for the Windstorm Loss though (TPC ¶ 61, "MSI-US paid … $15 million in satisfaction

of its coverage obligations…"), its dispute focuses on the amount that must be paid. *See* TPC generally. The Master Policy mandates arbitration in such a scenario:

> If any difference or dispute arises as to the amount to be paid under this Policy (liability being otherwise admitted) such difference or dispute shall be referred to arbitration under ARIAS Arbitration Rules…

Dkt. 144-1 at p. 49.

ARGUMENT

I. This Court Lacks Personal Jurisdiction Over NSG-Japan

"A plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit." *Troma Entm't, Inc. v. Centennial Pictures Inc.*, 729 F.3d 215, 217 (2d Cir. 2013) (internal citation omitted). The TPC must be dismissed against NSG-Japan because MSI-US fails to allege any facts demonstrating that this Court has personal jurisdiction over NSG-Japan.

a. General Jurisdiction

This Court lacks general jurisdiction over NSG-Japan as it is not incorporated or domiciled in New York (*see* TPC ¶ 12), and the TPC fails to allege *any* contacts NSG-Japan had with New York, let alone contacts sufficiently extensive to support the exercise of general jurisdiction. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014)) (a state has general jurisdiction over an entity where that entity is considered to be "at home" – either because that is its place of incorporation or its principal place of business – or because its operations in the forum are "so 'continuous and systematic' as to render them essentially at home in the forum state.")). MSI-US's failure to allege any such facts with regard to New York is fatal to MSI-US's assertion of general jurisdiction over NSG-Japan in New York. *Id.* at 1559 (railroad company that had over 2,000 miles of railroad track and more than 2,000 employees in Montana not subject to general jurisdiction in that state).

b. Specific Jurisdiction

MSI-US has also failed to make a *prima facie* showing that this Court can exercise specific jurisdiction over NSG-Japan. As such, the TPC must be dismissed as to NSG-Japan. *See Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 242 (2d Cir. 2007) (quoting *Thomas v. Aschcroft*, 470 F.3d 491, 495 (2d Cir. 2006) ("'In order to survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists.'").[3]

i. 302(a)(1)

"To determine the existence of jurisdiction under section 302(a)(1), a court must decide (1) whether the defendant 'transacts any business' in New York and, if so, (2) whether this cause of action 'aris[es] from' such a business transaction." *Walker*, 490 F.3d at 246. For three reasons, MSI-US has failed to meet either of those prongs.

First, MSI-US's conclusory allegations concerning NSG-Japan's purported New York contacts are so thin that they cannot support jurisdiction here. Although MSI-US summarily claims "upon information and belief" that NSG-Japan transacts business in New York (*see* TPC ¶ 12), it fails to give any explanation as to what that business *actually is*. It further fails to explain how NSG-Japan "direct[ed] the negotiation and procurement of the 2016-2017 U.S. Local Policy at issue in this litigation" (*id.*) – an assertion MSI-US also makes "upon information and belief." This Court is "not bound to 'accept as true a legal conclusion couched as a factual allegation' in determining whether jurisdiction exists," and thus should reject MSI-US's unfounded and conclusory statements regarding NSG-Japan's purported transaction of business, including any

[3] It does not appear that MSI-US intends to rely on any other bases for jurisdiction as set forth in CPLR 302(a), including 302(a)(2) (concerning jurisdiction over a nondomiciliary who "commits a tortious act within the state") or 302(a)(4) (concerning jurisdiction based on ownership of real property in New York). In any event, none of these provisions of CPLR 302(a) would confer jurisdiction over NSG-Japan.

related to its TPC, in New York. *Simmons v. AMTRAK*, 19 Civ. 6986 (LGS), 2020 U.S. Dist. LEXIS 98600, at *3 (S.D.N.Y. June 2, 2020) (citing *In re Terrorist Attacks on September 11, 2001 (Asat Tr. Reg.)*, 714 F.3d 659, 673 (2d Cir. 2013)); *See also id.* at *4 ("[A]llegations or evidence of activity constituting the basis of jurisdiction must be non-conclusory and fact specific"). Rejection of such conclusory statements is particularly warranted here as those statements are contradicted by plaintiff's own proffered documentary support. Indeed, in MSI-US's own submissions before this Court – including the exhibits annexed to the TPC – not one shows *any* direct involvement by NSG-Japan in the negotiation or procurement of the 2016-2017 U.S. Local Policy, let alone involvement relating to New York.

Second, MSI-US cannot cognizably allege that NSG-Japan "transacts any business" in New York. For purposes of 302(a)(1), MSI-US would need to allege "[NSG-Japan]'s direct and personal involvement on [its] own initiative projected [itself] into New York to engage in a sustained and substantial transaction of business." *Giuliano v. Barch*, No. 16 CV 0859 (NSR), 2017 U.S. Dist. LEXIS 50396, at *25 (S.D.N.Y. Mar. 31, 2017) (quoting *Aquiline Capital Partners LLC v. FinArch LLC*, 861 F. Supp. 2d 378, 386 (S.D.N.Y. 2012)) (internal quotation marks omitted and emphasis added). In other words, "[s]uch purposeful availment occurs when the non-domiciliary seeks out and initiates contact with New York, solicits business in New York, and establishes a continuing relationship." *Richards v. Johnson & Johnson, Inc.*, 5:17-cv-00178 (BKS/ATB), 2018 U.S. Dist. LEXIS 152016, at *11-12 (N.D.N.Y. Mar. 30, 2018) (emphasis added; internal citations omitted). That did not happen here, nor has it been alleged.

As MSI-US's own exhibits to the TPC reveal, MSI-US – not NSG-Japan (or even Aon-UK or Aon-US) – initiated the only apparent New York connection related to this case by directing Aon-US to send documents to MSI-US's employees in New York (in addition to its employees in

Michigan). *See* TPC ¶ 77, citing Exhibit 3. Even assuming that Aon-US's connections to New York could be imputed to Aon-UK, and then imputed from Aon-UK to NSG-Japan – in other words a "broken telephone" theory of personal jurisdiction for which there is no legal support – it is beyond dispute that MSI-US initiated all interactions with Aon-US in New York that are even somewhat related to this case. In other words, Aon-US had contacts with New York relating to the 2016-2017 U.S. Local Policy *solely* because MSI-US had employees there and MSI-US directed Aon-US to engage with those employees. Even under a completely misguided agency theory that could impute Aon-US's actions to NSG-Japan by way of Aon-UK, these Aon-US-specific allegations alone are insufficient to meet the "transacts any business in New York" prong of 302(a)(1). *See Giuliano*, 2017 U.S. Dist. LEXIS 50396, at *25 ("Plaintiff's allegations, when considered separately from the fact that Plaintiff resides in New York, fails to establish that any of the defendants' transacted business in New York in a 'sustained' or 'substantial' manner"). But, in any event, **none of this pertains to NSG-Japan**.

There are simply no allegations in the TPC – nor could any such credible allegations be made – that either NSG-Japan or Aon-UK themselves directed any purposeful actions to New York. Indeed, there are no allegations in the TPC that NSG-Japan or Aon-UK even knew that Aon-US was interacting with employees of MSI-US based in New York as opposed to Michigan or elsewhere. *See, e.g.,* TPC ¶ 77, citing Exhibit 3. To be sure, this falls far short of demonstrating that NSG-Japan's purported misconduct – *i.e.,* purported misrepresentations made in either the UK or Japan – bears a "strong nexus" or "direct relation" to New York. *Talbot v. Johnson Newspaper Corp.*, 123 A.D.2d 147, 149 (3d Dep't 1987), *aff'd*, 71 N.Y.2d 827 (1988) ("A defendant may not be subject to personal jurisdiction under CPLR 302 (a) (1) simply because her contact with New York was a link in the chain of events giving rise to the cause of action"); *Richards*, 2018 U.S.

Dist. LEXIS 152016, at *11-12 ("[I]ndirect chain of contacts" alleged by plaintiff "too tenuous to support transacting-business jurisdiction."). To the contrary, MSI-US concedes that NSG-Japan's alleged misrepresentations occurred in Japan and the United Kingdom. TPC ¶ 40 ("[t]he material terms, conditions, limits, and premium of all policies in the Global Program are negotiated and agreed to each year in the United Kingdom and Japan at the parent company level …").

Third, courts are "generally loath to uphold jurisdiction under the transaction in New York prong of CPLR 302(a)(1) if the contract at issue was negotiated solely by mail, telephone, and fax without any New York presence by the defendant." *Giuliano*, 2017 U.S. Dist. LEXIS 50396, at *23 (quoting *Mortg. Funding Corp. v. Boyer Lake Pointe, LC*, 379 F. Supp. 2d 282, 287 (E.D.N.Y. 2005) (internal quotation marks omitted); *see also Universal Grading Serv. v. eBay, Inc.*, 08-CV-3557 (CPS), 2009 U.S. Dist. LEXIS 49841, at *19 (E.D.N.Y. June 9, 2009) ("a defendant's communication from another locale with a party in New York is generally not sufficient to establish personal jurisdiction."). Indeed, "[c]ourts have consistently held [] that [even repeated emails and calls] with New York does not support the exercise of personal jurisdiction where the undisputed facts demonstrate that the defendant did not seek out a New York forum." *Aquiline Capital Partners LLC*, 861 F. Supp. 2d at 388 (internal citation omitted; collecting cases). That is precisely the case here.

ii. 302(a)(3)(ii)

MSI-US has also failed to adequately allege jurisdiction over NSG-Japan pursuant to CPLR 302(a)(3)(ii), which requires MSI-US to plausibly allege, *inter alia*, that NSG-Japan caused injury to a person or property within the state and expected or reasonably expected the act to have consequences in the state. MSI-US has not sufficiently alleged either prong; we address them in turn.

First, MSI-US has not alleged that it sustained injury within the state. It merely alleges that it sustained injury; at no point does it say where. That is fatal to its assertion of jurisdiction pursuant to 302(a)(3)(ii), as "[i]t is well-settled that 'residence or domicile of the injured party within [New York] is not a sufficient predicate for jurisdiction' under section 302(a)(3)." *Troma Entm't, Inc.*, 729 F.3d at 218 (citing *Fantis Food, Inc. v. Standard Importing Co.*, 49 N.Y.2d 317, 326 (1980)); *Giuliano*, 2017 U.S. Dist. LEXIS 50396, at *27 ("Plaintiff fails to plainly or directly state that New York is the situs of the tort.").

The presumption that MSI-US has been injured in New York is all the more dubious in that MSI-US does not even appear to be registered to do business in New York. Indeed, a search of the New York State Division of Corporation reveals that two other entities related to MSI-US are registered to do business in New York – but not MSI-US. Abrams Decl., Ex. C. Further, MSI-US's principal office and headquarters is actually in New Jersey, casting further doubt on the prospect that the "situs" of MSI-US's injury is in New York (*i.e.*, not in the United Kingdom or Japan where the alleged misrepresentations were made) at one of MSI-US's satellite offices. *Id.* at Ex. D (Georgia Division of Corporation website indicating MSI-US's principal office is in New Jersey); Ex. E (listing Warren, New Jersey as its "HQ"); *see also Cooperstein v. Pan-Oceanic Marine, Inc.*, 124 A.D.2d 632, 633 (2d Dep't 1986) ("[T]here must be a more direct injury within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled here.").

Second, MSI-US fails to allege – plausibly or otherwise – that NSG-Japan expected or reasonably expected MSI-US to suffer injury in New York. MSI-US has presented nothing to even suggest that NSG-Japan knew that MSI-US was underwriting the 2016-2017 U.S. Local Policy out of its New York office as opposed to one of its five other underwriting locations in the

United States, including its headquarters in Warren, New Jersey. Abrams Decl., Ex. E (MSI-US map showing that it underwrites from its following US offices: Warren, New Jersey; Los Angeles; Dallas; Atlanta; Cincinnati; and New York). On this basis alone, the Court should dismiss MSI-US's claim against NSG-Japan for lack of jurisdiction.

c. The Exercise of Jurisdiction Over NSG-Japan Would Offend Traditional Notions of Fair Play and Substantial Justice

Even assuming that MSI-US could meet its burden to demonstrate that NSG-Japan has minimum contacts with New York (and it cannot), the due process requirement for personal jurisdiction still protects entities "without meaningful ties to the forum state from being subjected to binding judgments within its jurisdiction" where haling that defendant into the forum state would offend traditional notions of fair play and substantial justice. *Aquiline* 861 F. Supp. 2d at 388 (internal citation omitted). NSG-Japan is the archetype of the entity such due process considerations were designed to protect.

NSG-Japan has no ties to New York. Beyond a conclusory statement to the contrary – alleged entirely "upon information and belief" – MSI-US has failed to articulate any reason why NSG-Japan should be haled into court in New York. Indeed, the closest New York connection MSI-US has been able to articulate regarding NSG-Japan is that NSG-Japan's insurance broker (Aon-UK) has a domestic U.S. affiliate (Aon-US) in Michigan that sent purported misinformation electronically to New York. That chain of events premise is entirely insufficient to comport with traditional notions of fair play and substantial justice.

Furthermore, MSI-US does not even allege that NSG-Japan is directly responsible for the alleged misrepresentation sent from Aon-UK to Aon-US in Michigan, which was ultimately passed on to MSI-US in New York. MSI-US only alleges that the information transmitted by Aon-UK was "on behalf of NSG-Japan." That, too, is insufficient for jurisdictional purposes. *See Herlihy*

v. Sandals Resorts Int'l, Ltd., 795 F. App'x 27, 29-30 (2d Cir. 2019) (alleged forum-related conduct of resort's agents – for which resort was not "directly responsible" – insufficient to comport with due process).

Finally, that MSI-US fortuitously underwrote the 2016-2017 U.S. Local Policy from New York as opposed to one of its five other underwriting offices in the United States – a fact that MSI-US has not even attempted to tie back to NSG-Japan – cannot possibly serve as a basis for haling NSG-Japan into Court in New York.

II. MSI-US Fails to State a Negligent Misrepresentation Claim Against NSG-Japan

The TPC is also substantively deficient, and fails to state a claim for negligent misrepresentation against NSG-Japan. To state a claim for negligent misrepresentation, a plaintiff must allege "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 490 (2d Cir. 2014) (internal citation omitted). Negligent misrepresentation claims sounding in fraud must be pled with specificity under Rule 9(b). *In re Ultrafem Inc. Sec. Litig.*, 91 F Supp. 2d 678, 691 (S.D.N.Y. 2000). MSI-US has failed to meet *any* pleading standard to sustain a negligent misrepresentation claim, let alone the 9(b) pleading standard.

First, MSI-US fails to adequately allege that the representations made by NSG-Japan were false. In fact, in the course of this litigation, MSI-US has alleged that NSG-Japan's statements concerning insurance coverage were accurate. *Cf.* Dkt. 175 at p. 13 (MSI-US alleges that "the 2016-2017 Master Policy contained an identical $15 million sublimit and the parties always intended for the terms and conditions of the Local Policies to mirror those in the Master Policy," which the Court found "cut[] against any inference that Aon's statement [regarding same] was

untrue.")[4] The same rationale applies to NSG-Japan's alleged statements and "instructions" – which MSI-US claims NSG-Japan made through Aon-UK – that the 2016-2017 Global Program, including the 2016-2017 U.S. Local Policy, be issued with a $15 million sublimit for all windstorm losses in the United States. TPC ¶ 77. If these statements and instructions were true, as MSI-US contends they were, they could not possibly be considered "incorrect" for purposes of a negligent misrepresentation claim. *Sogeti USA LLC v. Whirlwind Bldg. Sys.*, 274 F. App'x 105, 108 (2d Cir. 2008) (statements that were "not false" could not form the basis of a negligent misrepresentation claim). This pleading flaw – standing alone – is fatal to MSI-US's claim for negligent misrepresentation against NSG-Japan.

Second, MSI-US does not sufficiently allege a "special relationship" between itself and NSG-Japan, or "actual privity of contract between the parties or a relationship so close as to approach that of privity." *Anschutz Corp. v. Merrill Lynch & Co.*, 690 F.3d 98, 114 (2d Cir. 2012) (internal citations omitted)). The fact that MSI-US has failed to allege a single communication between itself and NSG-Japan puts to rest any such argument. *See Id.* at 115 (Plaintiff failed to state a claim for negligent misrepresentation where there were "no allegations of any direct contact between [plaintiff] and the [defendants].").

Third, MSI-US's negligent misrepresentation claim is barred by the economic loss doctrine. Since MSI-US admittedly seeks only monetary damages from NSG-Japan (TPC, Wherefore (c) seeking "a money judgment against NSG-Japan in an amount exceeding $75,000 …"), and there is no "special relationship" alleged between NSG-Japan and MSI-US, MSI-US

[4] The Court additionally found that "Pilkington's subsequent claim that it mistakenly agreed to a significantly – and, Pilkington alleges, fraudulently – more restrictive sublimit than it originally had does not somehow make any of Aon's statements retroactively false." *Id*.

"cannot recover in tort for purely economic losses" caused by NSG-Japan's purported negligence. *Travelers Cas. & Sur. Co. v. Dormitory Auth.*, 734 F. Supp. 2d 368, 378 (S.D.N.Y. 2010).

III. MSI-US's Declaratory Judgment Claim Must Also Be Dismissed

MSI-US's claim seeking "a declaration that a $15 million sublimit applies to all windstorm losses in the United States under the 2016-2017 Global Program – including under the 2016-2017 U.S. Local Policy – and/or any other appropriate declaration to settle the legal relationship, rights, and obligations of the parties" should be dismissed for several reasons.

First, this Court has already dismissed that *verbatim* claim by MSI-US as against Pilkington *with prejudice*, finding that "Pilkington's nearly identical claim already provides the vehicle for the Court to declare all relevant rights and obligations of the parties with respect to the insurance policy in effect at the time of the Tornado, including the Windstorm Sublimit that is at the center of this dispute," and "MSI[-US] will have a full opportunity to make any counterarguments it wants regarding the Global Program." Dkt. 175 at p. 18. For the same reasons, and since MSI-US does not seek any affirmative relief by way of this claim concerning NSG-Japan, the Court should dismiss this identical claim as against NSG-Japan.

Second, as Pilkington previously argued and this Court already observed, "MSI[-US] is not entitled to seek standalone relief concerning the Global Program because the Master Policy expressly states that '[t]his Policy shall be governed by the Laws of England and except for [arbitration] shall be subject to the exclusive jurisdiction of the English Courts.'" Dkt. 175 at p. 17 citing Dkt. 144-1. This provision forecloses MSI-US's ability to seek declaratory relief concerning the Master Policy before this Court, as any such relief can only be rendered by English Courts or arbitration, as further discussed, *infra*.

Third, MSI-US has essentially conceded that NSG-Japan is not a necessary party regarding this cause of action, and therefore this claim should be dismissed against NSG-Japan. Not only

did MSI-US offer to dismiss NSG-Japan from this action *days after* serving it with the TPC – on the condition that NSG-Japan stipulate to "make its relevant documents and witnesses available in discovery and at trial" (Abrams Decl., Ex. B at 1) – but MSI-US also alleged the same declaratory judgment claim against Pilkington without so much as mentioning NSG-Japan (Dkt. 116 at 44). If NSG-Japan were indeed a necessary and indispensable party concerning MSI-US's declaratory judgment claim, it stands to reason that MSI-US would not be offering to dismiss NSG-Japan before it ever even appeared in the case nor would it assert the *verbatim* counterclaim against Pilkington without ever mentioning that NSG-Japan was necessary and indispensable.

For all of the above reasons, the declaratory judgment counterclaim as against NSG-Japan should be dismissed.[5]

IV. If the Court Does Not Dismiss NSG-Japan, It Should Compel MSI-US to Arbitrate Instead

To the extent MSI-US's claims against NSG-Japan are not dismissed outright for the reasons set forth above, MSI-US should be compelled to arbitrate its claims against NSG-Japan. All of MSI-US's claims against NSG-Japan arise out of the 2016-2017 Global Program (*see* TPC ¶ 76, alleged duty owed by NSG-Japan related to "the Global Program"; and *Id.* at ¶ 90, seeking "a declaration … under the 2016-2017 Global Program"), which program is governed by the Master Policy and mandates arbitration in this exact scenario:

> If any difference or dispute arises as to the amount to be paid under this Policy (liability being otherwise admitted) such difference or dispute shall be referred to arbitration under ARIAS Arbitration Rules…

[5] Significantly, MSI-US also names MSI-Japan (its parent corporation) as a necessary and indispensable party (TPC at ¶ 89), but did not similarly allege that MSI-Japan was necessary and indispensable when it asserted a claim for declaratory relief against Pilkington (Dkt 116 at 44). Additionally, despite the TPC being filed in June 2020, there is no indication on the docket, six months later, that MSI-US has served MSI-Japan.

Dkt. 144-1 at p. 49. As MSI-US has admitted liability for the Windstorm Loss (TPC ¶ 61, "MSI-US paid … $15 million in satisfaction of its coverage obligations…"), the remaining dispute concerns only the amount to be paid "under the 2016-2017 Global Program – including under the 2016-2017 U.S. Local Policy" (*Id.* at ¶ 90) and thus falls squarely within the parameters of the Master Policy arbitration provision. That MSI-US is not a direct signatory to the Master Policy does not change this result for the following reasons.

First, "federal policy requires [courts] to construe arbitration clauses as broadly as possible," with "any doubts concerning the scope of arbitral issues … resolved in favor of arbitration." *In re Am. Express Fin. Advisors Sec. Litig.*, 672 F.3d 113, 128 (2d Cir. 2011) (internal citations omitted). MSI-US has not offered any explanation as to why this arbitration provision should not be enforced as written, or why this Court should deviate from this well-established presumption of arbitrability.

Second, MSI-US is directly seeking a declaration "to settle the legal relationship, rights, and obligations of the parties" under the Global Program, *i.e.,* the Master Policy. That alone is sufficient to compel this dispute to arbitration. *See, e.g.*, *Deloitte Noraudit A/S v. Deloitte Haskins & Sells*, 9 F.3d 1060, 1064 (2d Cir. 1993) (non-signatory estopped from denying obligation to arbitrate where it, *inter alia*, sought to litigate issues governed by the subject contract and reaped the benefits thereof). The MSI corporate group of companies cannot seek to avoid its contractual obligations in favor of arbitration by having one of its affiliates who did not explicitly sign the Master Policy accomplish what its other corporate members are contractually forbidden from doing. To the contrary, there is agreement that disputes construing the Master Policy belong in arbitration.

Third, MSI-US contends that the 2016-2017 U.S. Local Policy it signed incorporates the Master Policy, and that it even "makes clear that the limits and coverages available" under the 2016-2017 U.S. Local Policy "depend on – and may be restricted by – the limits of the Master Policy." TPC ¶ 26. So, to the extent MSI-US seeks a declaration on a policy that MSI-US contends "depend[s] on" the Master Policy, it must be bound by the provisions of the Master Policy. *See Pagaduan v. Carnival Corp.*, 709 F. App'x 713, 716 (2d Cir. 2017) (signatory to one-page employment contract that did not contain an arbitration provision compelled to arbitrate dispute where agreement "clearly and unambiguously describe[d] the documents whose terms would apply to [the signatories' employment]," including one that mandated arbitration).[6] MSI-US cannot escape the clear and unambiguous terms of the Master Policy, irrespective of whether or not MSI-US itself is a signatory to the policy, given that it seeks to invoke that Master Policy.

V. Conclusion

Based on the foregoing, NSG-Japan respectfully requests that the Court dismiss MSI-US's Third-Party Complaint as against NSG-Japan with prejudice due to lack of personal jurisdiction, or alternatively for failure to state a claim. In the event the Court is unwilling to dismiss the Third-Party Complaint, NSG-Japan respectfully requests that the Court compel MSI-US to arbitrate its claims against NSG-Japan relating to the 2016-2017 Master Policy.

[6] "Whether a document is incorporated by reference is a matter of law, and a trial court is not required to discard a contrary interpretation urged by one party." *Moskalenko v. Carnival PLC*, 17-CV-6947 (NGG) (CLP), 2019 U.S. Dist. LEXIS 56584, at *15 (E.D.N.Y. Mar. 29, 2019).

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