SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

----------X

US PONY HOLDINGS, LLC,

Plaintiff,

- v -

FASHION FOOTWEAR LLC,

Defendant.

----------X

INDEX NO. 655022/2022

MOTION DATE 05/23/2023

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

FASHION FOOTWEAR LLC

Plaintiff,

-against-

ICON DE HOLDINGS LLC

Defendant.

----------X

Third-Party
Index No. 595052/2023

The following e-filed documents, listed by NYSCEF document number (Motion 003) 66, 67, 68, 69, 70, 71, 103, 104, 105, 107, 115

were read on this motion to/for DISMISSAL.

Plaintiff US Pony Holdings, LLC ("Pony") and Third-Party Defendant Icon DE Holdings LLC ("DE Holdings") have moved to dismiss the third-party complaint against DE Holdings as well as the fourth and sixth counterclaims against Pony filed by Defendant/Third-Party Plaintiff Fashion Footwear LLC ("Fashion") pursuant to CPLR 3211(a)(1) and (a)(7). For the following reasons, the court grants in part and denies in part the motion.

FACTUAL AND PROCEDURAL HISTORY

This dispute arises from the termination and anticipated termination of licensing agreements that Fashion entered into with Pony and DE Holdings in order to sell their branded footwear. Fashion, a manufacturer of footwear products, entered into an exclusive license

agreement with Pony on or about July 1, 2018 to manufacture and sell footwear bearing the Pony trademarks (Third-Party Complaint, NYSCEF Doc. No. 68, ¶ 7; Original Pony License Agreement, NYSCEF Doc. No. 18). Subsequently, Fashion entered into a separate license agreement on or about March 1, 2019 with DE Holdings, an affiliate of Pony, to manufacture and sell footwear bearing the Danskin trademarks (Third-Party Complaint, ¶ 8; Danskin License Agreement, NYSCEF Doc. No. 69). On or about April 14, 2021, Pony and Fashion entered into another license agreement with a term set to commence on August 1, 2021 and set to expire on December 31, 2024 (Third-Party Complaint, ¶ 11; Renewed Pony License Agreement, NYSCEF Doc. No. 20). The execution of the April 2021 license agreement terminated the original license agreement between Pony and Fashion (Renewed Pony License Agreement, p. 1).

Each year under the renewed Pony license agreement, Fashion must pay Pony a guaranteed minimum royalty, a sales royalty based on the amount of wholesale and retail sales, and a minimum advertising royalty (Renewed Pony License Agreement, §§ 7-9). The renewed Pony license agreement also includes a clause stating:

> "In the event that the Licensor [Pony] . . . enters into an agreement that sells fifty percent (50%) or more of the outstanding shares of the Licensor or Iconix Brand Group, Inc,[1] the Licensor shall be permitted but not be obliged to terminate this Agreement . . . provided that, following such termination, Licensee shall have the right to continue to sell Licensed Products, on a non-exclusive basis, for a period of one (1) year . . . provided that Licensee shall not be required to make Minimum Royalty or Minimum Advertising Royalty payments following the date of termination"

(*id.*, § 23.3).

Further, paragraph 20.1 of the renewed Pony license agreement requires that the parties deliver notices personally or "by internationally-recognized overnight courier or mail service, such as UPS, DHL or Federal Express" (*id.*, § 20.1).

[1] Iconix Brand Group, Inc. is the parent company of Pony and DE Holdings.

The Danskin license agreement similarly requires Fashion to pay minimum guaranteed royalty and minimum guaranteed advertising royalty amounts (Danskin License Agreement, § A.12, A.15). Additionally, the Danskin license agreement contains a cross-default clause stating that "any breach or default by Licensee [Fashion] . . . of any other agreement . . . between Licensor (or any affiliate or assignee of Licensor) and Licensee . . . may also be deemed by Licensor to be a breach or default by Licensee . . . under this Agreement" (*id.*, § 17.6).

Fashion alleges that Iconix Brand Group, Inc. ("Iconix"), the parent company of Pony, **emailed** Fashion a termination notice on December 9, 2021 (Third-Party Complaint, ¶ 13). The December 9, 2021 letter provides "notice of immediate termination of the [renewed Pony license agreement]" (December 9, 2021 Letter, NYSCEF Doc. No. 21). The December 9, 2021 letter indicates that "[o]n June 11, 2021, as part of a merger agreement, Iconix Brand Group, Inc ('IBG') entered into an agreement to sell fifty percent (50%) or more of the outstanding shares of IBG" and that therefore, under section 23.3 of the renewed Pony license agreement, Pony is "entitled to terminate the Agreement upon notice to [Fashion]" (*id.*, ¶ 1). The December 9, 2021 letter states that the renewed Pony license agreement will formally terminate on December 13, 2021 and that Fashion "shall not be required to make Minimum Royalty or Minimum Advertising Royalty payments following the Termination Date" (*id.*, ¶¶ 2, 5). Fashion allegedly "relied on Pony's claims that the Exclusive Pony License Agreement had been properly terminated" and attempted to sell its inventory of Pony shoes during the sell-off period specified under section 23.3 of the Agreement (Third-Party Complaint, ¶¶ 15-16).

However, Fashion eventually concluded that the December 9, 2021 termination was ineffective because Iconix allegedly did not serve the notice in accordance with section 20.1's service requirements and because the transaction referenced within the termination notice was not

an agreement to sell 50% of the shares of Iconix (Third-Party Complaint, ¶ 21). In particular, Fashion sent Pony and Iconix a letter on December 6, 2022, approximately a year after the date of the termination notice, stating that the notice was "null and void *ab initio*" because Iconix improperly sent the notice by electronic mail only (December 6, 2022 Letter, NYSCEF Doc. No. 8).[2] Fashion also asserted in the December 6, 2022 letter that even if service were proper, section 23.3 of the renewed Pony license agreement did not provide a basis for termination because section 23.3 refers to a sale of shares and the transaction at issue was a tender offer and merger (*id.*).

Pony then sent a new termination letter on December 8, 2022, claiming as a basis for termination of the renewed Pony license agreement that Fashion had failed to pay Pony $280,000 in minimum royalty and minimum advertising royalty amounts (December 8, 2022 Pony Letter, NYSCEF Doc. No. 9, ¶¶ 1-2). Under section 17.2(h) of the renewed Pony license agreement, Pony shall be "entitled to terminate [the] Agreement . . . [i]f [Fashion], at any time during the Term, owes [Pony] any sums in excess of sixty (60) days" (Renewed Pony License Agreement, § 17.2[h]). Pony stated in the December 8, 2022 letter that the agreement would be terminated as of December 9, 2022 (December 8, 2022 Pony Letter, ¶ 3). Pony additionally stated that pursuant to section 18.2 of the renewed Pony license agreement, because of the termination under section 17.2(h), Fashion would not be entitled to a sell-off period (*id.*, ¶ 8). The December 8, 2022 letter indicates that any "sale, shipment or distribution of Licensed Products after the Termination Date will constitute a breach of contract and infringement of [Pony's] intellectual property rights," and that Fashion must "destroy any and all outstanding Inventory and Materials" by 5:00 PM on December 12, 2022 (*id.*).

[2] The court notes that Iconix's general counsel, Marcel Apfel, claims to have sent the December 9, 2021 notice by both email **and** FedEx (February 15, 2023 Hearing Transcript, NYSCEF Doc. No. 109, p. 14).

In addition to the December 8, 2022 letter related to the renewed Pony license agreement, DE Holdings sent a separate December 8, 2022 letter regarding the Danskin license agreement (December 8, 2022 DE Holdings Letter, NYSCEF Doc. No. 70). DE Holdings referred to the renewed Pony license agreement and stated that "as a direct result of [Fashion's] breach of the Pony Agreement," Fashion was in breach of the Danskin license agreement pursuant to section 17.6's cross-default provision (*id.*). However, this letter does not state that the Danskin license agreement is actually terminated.

Fashion responded by a December 9, 2022 letter, asserting that the second Pony termination letter "nullifie[d] the earlier and defective December [9], 2021 termination notice" (December 9, 2022 Fashion Letter, NYSCEF Doc. No. 10). Fashion also asserted that the 2021 termination notice "waived payment of Minimum Royalties," but that, in any event, Fashion had paid Pony a total of $437,444.80 by checks dated May 9, 2022 and August 25, 2022, that eclipsed the $280,000 amount that Pony claimed they were owed (*id.*). According to Fashion's letter, because they were not in default under the renewed Pony license agreement, they also were not in default under the Danskin license agreement (*id.*).

Pony commenced this action by filing a verified complaint on December 28, 2022 (Verified Complaint, NYSCEF Doc. No. 2). The verified complaint alleges that Fashion is continuing to sell products in violation of the renewed Pony license agreement because either (a) the sell-off period under the first termination letter has expired or (b) Fashion was not entitled to any sell-off period pursuant to the second termination notice (Verified Complaint, ¶¶ 33-35). The verified complaint alleges causes of action for breach of contract based on failure to make minimum royalty payments, unauthorized sale of products, and failure to destroy inventory, as well as trademark infringement and unfair competition. Pony also seeks an injunction enjoining Fashion from using the trademarks

and selling Pony products (Verified Complaint, ¶¶ 62-69), and a judgment of specific performance directing Fashion to destroy its remaining inventory (Verified Complaint, ¶¶ 81-86).

In response, Fashion filed the pleading at issue in this motion on January 18, 2023. Within that pleading, Fashion alleges both counterclaims against Pony and third-party claims against DE Holdings. Fashion seeks a declaratory judgment that the purported termination and default letters of Pony and DE Holdings are void ab initio. Fashion also asserts claims for breach of contract as to both license agreements, breach of implied covenant of good faith and fair dealing as to both license agreements and seeks attorneys' fees and costs.

Earlier in this case, Fashion filed an order to show cause seeking a preliminary injunction enjoining Pony from obstructing Fashion's ability to sell Pony products and enjoining DE Holdings from terminating the Danskin license agreement (January 18, 2023 Order to Show Cause, NYSCEF Doc. No. 16). In response, Pony filed its own motion for a preliminary injunction restraining Fashion from using the Pony trademarks or manufacturing, marketing, or selling Pony-trademarked products (January 26, 2023 Order to Show Cause, NYSCEF Doc. No. 46). On February 16, 2023, the court issued an order denying both motions for preliminary injunctions (February 16, 2023 Order, NYSCEF Doc. No. 100; February 15, 2023 Hearing Transcript, p. 32). During the hearing on the motions for preliminary injunctions, Iconix's general counsel, Marc Apfel, agreed with Fashion's interpretation of section 23.3 of the renewed Pony license agreement (*see* February 15, 2023 Hearing Transcript, pp. 13-14 [testifying that section 23.3 of the renewed Pony license agreement applied "[i]n case we decided to sell the [] business, Iconix, completely" and that it did not apply to "anything else"]).

While the motions for preliminary injunctions were pending, Pony and DE Holdings filed this motion to dismiss the fourth (breach of implied covenant of good faith and fair dealing) and

sixth (attorneys' fees, costs, and expenses) counterclaims against Pony, and to dismiss all of Fashion's third-party claims against DE Holdings pursuant to CPLR 3211(a)(1) and (a)(7). For the following reasons, the court grants in part and denies in part the motion.

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, accord [plaintiff] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]; *Alden Global Value Recovery Master Fund, L.P. v KeyBank National Association*, 159 AD3d 618, 621-22 [1st Dept 2018]). On a motion to dismiss under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon,* 84 NY2d at 88; *Chen v Romona Keveza Collection LLC*, 208 AD3d 152, 157 [1st Dept 2022]).

1. Declaratory Judgment – DE Holdings

The court denies DE Holdings' motion to dismiss the first cause of action for a declaratory judgment that "DE Holdings' Notice of Breach letter is void and the Exclusive Danskin License Agreement remains in full force and effect and Fashion Footwear is in good standing thereunder" (Third-Party Complaint, ¶ 46).

Under CPLR 3001, the court may "render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." The court may not issue a declaratory judgment where there is not a justiciable controversy or "present prejudice" to the seeking party, but rather "hypothetical, contingent[,] or remote" prejudice (*Belli v New York City Dept. of*

Transp., 200 AD3d 402, 403 [1st Dept 2021] [internal citations and quotation marks omitted]; *Touro Coll. v Novus Univ. Corp.*, 146 AD3d 679, 679-80 [1st Dept 2017] [explaining that the "general purpose" of a declaratory judgment is to "quiet[] or stabiliz[e] an uncertain or disputed jural relation" [internal citation and quotation marks omitted]). However, declaratory relief may be appropriate where the declaration "will have the immediate and practical effect of influencing the parties' current conduct" (*Buller v Goldberg*, 40 AD3d 333, 333 [1st Dept 2007]; *see also Stile v C–Air Customhouse Brokers–Forwards, Inc.*, 204 AD3d 429, 433 [1st Dept 2022] [denying motion to dismiss declaratory judgment cause of action where "[n]one of the other causes of action would give plaintiff the relief she seeks in her declaratory judgment claim" and the declaratory judgment would "presumably influence defendants' conduct"]).

Fashion has stated a cause of action for declaratory judgment as to DE Holdings' notice of breach and the status of the Danskin license agreement. Rather than hypothetical, the controversy over DE Holdings' potential termination of the Danskin license agreement is a live, ongoing area of dispute. While DE Holdings has not formally terminated the agreement—at least not yet—the third-party complaint alleges that the notice of breach states that Fashion is in breach of the Danskin license agreement and that DE Holdings "reserves all rights in respect of this breach" (Third-Party Complaint, ¶ 28). The notice of breach letter states, in no uncertain terms, that DE Holdings is "entitled to exercise any and all of its rights including but not limited to **immediate termination** of the Danskin Agreement" (December 8, 2022 DE Holdings Letter [emphasis added]).

Thus, because DE Holdings is asserting that Fashion is in breach and that DE Holdings has the right to **immediately** terminate the Danskin license agreement—something that Fashion adamantly disputes—there is a justiciable controversy (*see 21/23 Ave. B Realty LLC v 21&23 Ave*

B, LLC, 191 AD3d 456, 457 [1st Dept 2021] [denying dismissal of cause of action for declaration that defendant lacked right to purchase property where the defendant "continues to assert rights to acquire the property"]). A declaration either for or against Fashion will have the "immediate and practical effect of influencing the parties' current conduct" (*see Buller*, 40 AD3d at 333), either by forcing DE Holdings to continue to work with Fashion under the Danskin license agreement or by permitting DE Holdings to terminate the agreement immediately. At this pleading stage, and on this record, it would be premature to grant this portion of the motion to dismiss (*see General Ins. v Piquion*, 211 AD3d 634, 634-35 [1st Dept 2022] [holding that "[o]n a motion to dismiss a declaratory judgment action for failure to state a cause of action, the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him"] [citation and internal quotation marks omitted]).

DE Holdings' arguments to the contrary are unavailing. DE Holdings argues that the cases involving declaratory judgments as to the validity of default notices on which Fashion relies are primarily inapposite *Yellowstone* injunction cases. While it may be true that those cases involved requests for *Yellowstone* injunctions, the analysis in those cases is not limited to situations involving *Yellowstone* injunctions (*see e.g., 150 E. 57th St. Assoc. v Fletcher*, 35 AD2d 947, 948-49 [1st Dept 1970] [finding that declaratory judgment action raised justiciable questions, including the "validity, clarity, and specificity of the notice of default"]). Similarly, the court rejects DE Holdings' argument that the declaratory relief will not purportedly have any immediate or practical effect on the parties' conduct. On the contrary, Fashion has alleged specifically that without being prevented from invoking the "false basis for the alleged breach" in the notice of breach, "DE

Holdings will, at any moment, attempt to unlawfully terminate the Exclusive Danskin License Agreement" (Third-Party Complaint, ¶ 29).

Therefore, the court denies DE Holdings' motion to dismiss the first cause of action for declaratory judgment.

2. Breach of Contract – DE Holdings

However, the court grants the motion to dismiss the cause of action for breach of contract against DE Holdings. In order to state a cause of action for breach of contract, a plaintiff must allege the "existence of a contract, the plaintiff's performance thereunder, the defendant[']s breach thereof, and resulting damages" (*Fawer v Shipkevich PLLC*, 213 AD3d 408, 408 [1st Dept 2023], *citing Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). A complaint fails to state a cause of action for breach of contract where it "fails to identify a single contractual provision that [the opposing party] allegedly breached" (*see Hotel 71 Mezz Lender LLC v Mitchell*, 63 AD3d 447, 448 [1st Dept 2009]; *Gap, Inc. v 170 Broadway Retail Owner, LLC*, 195 AD3d 575, 576-77 [1st Dept 2021] [same]; *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 [1st Dept 2004] [same]). Here, the cause of action against DE Holdings for breach of contract is dismissed because Fashion has failed to identify what provision of the Danskin license agreement DE Holdings has breached.

Contrary to Fashion's argument, DE Holdings' allegedly improper notice of default did not amount to a breach of contract. The Danskin license agreement does not contain any provision governing improper notice of default. Further, the federal cases that Fashion cites for the proposition that an improper notice of default constitutes a breach of contract are inapposite. In *11 East 36th LLC v First Cent. Sav. Bank* (2014 Bankr. LEXIS 2789 [SDNY Bankr. June 26, 2014]), the court denied a motion to dismiss a breach of contract cause of action within a bankruptcy

adverse proceeding based on the defendants' failure to release a lien allowing for the debtor to sell property (*id.* at *7). However, a provision of the relevant mortgage agreement specifically indicated that a condition precedent to a partial release of the lien was that the mortgagor not be in default—which defendants claimed the mortgagor was (*id.* at *10). Therefore, rather than a simple breach of contract claim based on improper declaration of default, *11 East 36th LLC* involved a breach of contract claim based on an allegedly incorrect declaration of default **as a condition precedent** to a discharge of a lien. The actual "breach" was the defendants' failure to grant a partial release of the lien. On the contrary, here, Fashion claims that an improper notice of default is a breach in and of itself, despite the contract's silence on that issue—something that *11 East 36th LLC* does not support.

Further, in *Morea v Saywitz* (2010 U.S. Dist. LEXIS 10595 [EDNY Feb 8, 2010]), the court denied a motion to dismiss a breach of contract claim based on an improper declaration that plaintiffs had defaulted on a loan (*id.* at **9-10). However, the bank in *Morea* had declared the default prior to initiating a foreclosure action, entering the property, and changing the locks (*id.* at *3). Therefore, like in *11 East 36th LLC*, the allegedly improper declaration of default in *Morea* did not cause any damages. Rather, the foreclosure action that the defendant initiated based on the allegedly improper declaration of default did. However, unlike in *Morea*, here, DE Holdings has not allegedly taken any action on the basis of the notice of default that has damaged Fashion.

Therefore, the court grants DE Holdings' motion to dismiss the third cause of action for breach of contract.

3. Breach of Implied Covenant of Good Faith and Fair Dealing – Pony and DE Holdings

However, the court denies Pony and DE Holdings' motion to dismiss the causes of action

for breach of implied covenant of good faith and fair dealing. All contracts "contain an implied covenant of good faith and fair dealing" which provides that "no party to a contract shall take any actions to spoil the rights of another party to receive the fruits of the contract" (*AEA Middle Market Debt Funding LLC v Marblegate Asset Management, LLC*, 214 AD3d 111, 132 [1st Dept 2023]; *Demetre v HMS Holdings Corp.*, 127 AD3d 493, 494 [1st Dept 2015] [finding that plaintiffs had "sufficiently pleaded a claim for breach of the implied covenant, as the allegations show that HMS, in bad faith, engaged in acts that had the effect of destroying or injuring plaintiffs' right to receive the fruits of the contract" [citation and internal quotation marks omitted]). A cause of action for breach of implied covenant of good faith and fair dealing cannot succeed "[a]bsent the existence of a contract" (*Keefe v New York Law School*, 71 AD3d 569, 570 [1st Dept 2010]). However, a cause of action for breach of implied covenant of good faith and fair dealing will not lie where the claim "arise[s] from the same set of facts as the breach of contract claims" or where the implied covenant "contradicts the provisions of the contract" (*see AEA Middle Market*, 214 AD3d at 134; *see also Veneto Hotel & Casino, S.A. v German American Capital Corporation*, 160 AD3d 451, 452 [1st Dept 2018] [affirming dismissal of breach of implied covenant of good faith and fair dealing cause of action, stating that an implied covenant of good faith and fair dealing "cannot negate express provisions of the agreement"] [citation and internal quotation marks omitted]).

Here, Fashion has sufficiently alleged its cause of action for breach of implied covenant of good faith and fair dealing against Pony. Even if Pony's terminations of the renewed Pony license agreement did not amount to a breach of contract,[3] Fashion alleges that the terminations were part of a "scheme to illicitly replace Fashion Footwear as Pony's licensee, in violation of the [Pony] Exclusive License Agreement" (Third-Party Complaint, ¶ 10; *see also* ¶¶ 23-24 [describing Pony's

[3] Pony did not move to dismiss the third-party complaint's second cause of action for breach of contract against Pony.

"False Replacement Termination Notice" based on Fashion's alleged failure to pay minimum royalty payments which Fashion asserts were not due]). Pony's allegedly shifting explanations for the termination of the renewed Pony license agreement, from the first notice of termination (based on a purported sale of Iconix stock) to the second (based on a purported failure to pay minimum royalties), supports the theory that the terminations were an effort to "deprive [Fashion] of the benefit of their bargain" (*see Credit Agricole Corporate v BDC Fin., LLC*, 135 AD3d 561, 561 [1st Dept 2016]).

Similarly, while Fashion's allegation that DE Holdings served Fashion with an improper notice of default is insufficient to sustain a breach of contract cause of action, it is sufficient for the cause of action for breach of the implied covenant of good faith and fair dealing. Fashion alleges that DE Holdings, an affiliate of Pony, issued the December 8, 2022 notice of breach letter specifically to "ensure that Fashion Footwear would capitulate to giving up the two remaining years on the Exclusive Pony License Agreement" (Third-Party Complaint, ¶ 27). Fashion also alleges that "[u]nless prevented from invoking the false basis for the alleged breach contained in the [Pony termination notices], DE Holdings will, at any moment, attempt to unlawfully terminate the Exclusive Danskin License Agreement" (*id.*, ¶ 29). Further, DE Holdings' basis for the notice of breach letter was section 17.6 of the Danskin license agreement, that DE Holdings argued rendered Fashion's purported breach of the renewed Pony license agreement a breach of the Danskin license agreement as well (*id.*, ¶ 28). Thus, the third-party complaint adequately alleges that, even if the Danskin license agreement technically permitted the Danskin notice of breach, it was part of the same bad-faith scheme to deprive Fashion of the benefit of its bargain as to both the renewed Pony license agreement and the Danskin license agreement.

Pony's and DE Holdings' arguments to the contrary are unavailing. They primarily argue that the causes of action should be dismissed as duplicative of the breach of contract causes of action. First, the court rejects this argument as to the cause of action for breach of the implied covenant of good faith and fair dealing against DE Holdings because the court has already dismissed the breach of contract cause of action against DE Holdings. However, the court also rejects this argument as to the cause of action against Pony. At this early stage of litigation, it is still unclear whether Pony's purported terminations of the Pony license agreement actually constituted a breach of contract, as Fashion alleges. As such, Fashion is permitted to plead this claim against Pony in the alternative (*see Demetre v HMS Holdings Corp.*, 127 AD3d 493, 493-94 [1st Dept 2015] [finding dismissal of the claim for breach of implied covenant of good faith and fair dealing as duplicative of breach of contract claim "premature," holding that "[b]ecause the issues are still undeveloped at this stage of the proceeding, both claims should be permitted to stand."]; *Citi Mgt. Group, Ltd. v Highbridge House Ogden, LLC*, 45AD3d 487, 487 [1st Dept 2007] [holding that "[a]t this stage of the litigation, defendant is permitted to plead in the alternative" and that the "claims for breach of the implied covenant of good faith and fair dealing, and for fraud, should not be dismissed as duplicative of the breach-of-contract cause of action at this juncture"]).

Therefore, the court denies Pony's and DE Holdings' motion to dismiss the fourth and fifth causes of action for breach of implied covenant of good faith and fair dealing.

4. Attorneys' Fees, Costs, and Expenses

The court dismisses the causes of action for attorneys' fees, costs, and expenses against Pony and DE Holdings. While the court may ultimately award Fashion attorneys' fees if it succeeds in its claims (*see* Renewed Pony License Agreement, § 22.4 [providing for the prevailing party to

recover reasonable attorneys' fees in the event of litigation under the agreement]; Danskin License Agreement, § 22.3 [same]), Fashion may not maintain a claim for attorney's fees "as a separate cause of action" (*La Porta v Alacra, Inc.*, 142 AD3d 851, 853 [1st Dept 2016]; *Jones v McDonald's Corporation*, 202 AD3d 476, 478 [1st Dept 2022] ["Plaintiff's claim for attorneys' fees under the City HRL is not a separate, free-standing cause of action."]).

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED that Pony's and DE Holdings' motion to dismiss pursuant to CPLR 3211(a)(1) and (a)(7) is granted to the extent the third cause of action (breach of contract) is dismissed against DE Holdings, the sixth cause of action (attorneys' fees, costs, and expenses) is dismissed against Pony, and the seventh cause of action (attorneys' fees, costs, and expenses) is dismissed against DE Holdings; and it is further

ORDERED that the motion to dismiss is otherwise denied; and it is further

ORDERED that Pony and DE Holdings must file an answer to the counterclaims/third-party claims within 20 days of the date of this decision and order.

08/23/2023
DATE

MELISSA CRANE, 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