SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DEBORA WARNER,	:	
.	:	
	:	Index No.: 654714/2018
Plaintiff,	:	
	:	
-against-	:	
	:	
WILLIAM HEATH, DAVID KUZMANICH, KIM TABET, ROBERT NUELL, DAVID ROBINSON,	:	
	:	
Defendants.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

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Defendants William Heath, David Kuzmanich, Kim Tabet, Robert Nuell, David Robinson (collectively, "Defendants"), by their attorneys Lebowitz Law Office, LLC, respectfully submit this reply memorandum of law in further support of their Motion, pursuant to CPLR §§ 3211(a)(1), (a)(3) and (a)(7), to dismiss Plaintiff's Second Amended Complaint in its entirety and with prejudice.[1]

PRELIMINARY STATEMENT

Plaintiff Debora Warner ("Plaintiff" or "Warner") is a current member of Mile High Run Club, LLC ("MHRC"), and a former member of the Board of Managers of MHRC. Plaintiff, has brought a complaint - twice amended – which asserts, in Plaintiff's individual capacity, the following twelve causes of action against Defendants[2]: (I) judicial dissolution pursuant to LLC Law § 702; (II) breach of fiduciary duty; (III) aiding and abetting breaches of fiduciary duty; (IV) rescission of the operating agreement; (V) rescission of contribution agreement; (VI) breach of contract – Operating Agreement (confidentiality); (VII) breach of contract – Operating Agreement (undertaking); (VIII) breach of contract – Operating Agreement (removal of Member of Board); (IX) defamation; (X) tortious interference with prospective business advantage; (XI) indemnification; and (XII) books and records request.[3]

As set forth in the Motion, each of Plaintiff's claims fail for one or more of the following reasons. First, Plaintiff impermissibly pleads derivative claims in her individual capacity.[4] Second, Plaintiff has not pled and cannot plead essential elements of her causes of action. Third,

[1] Capitalized terms not defined herein have the meaning ascribed to them in Defendants' motion to dismiss (the "Motion"). All emphasis is added in this Memorandum unless otherwise indicated.
[2] Each of the Defendants are Members of the Board of Managers of MHRC
[3] Second Amended Complaint or "SAC".
[4] Claims (II), (III), (VI), (VII) and (X) find Plaintiff impermissibly alleging derivative claims in her individual capacity, and thus, require dismissal. That these Claims may also incorporate direct claims is but one more grounds for dismissal, as Plaintiff may not comingle direct and derivative claims within the same cause of action (Motion at 3-4).

documentary evidence conclusively establishes a defense to Plaintiff's claims.

Plaintiff's memorandum in opposition (the "Opposition") only address the Motion with respect to dismissal of the first three claims and concedes on the balance of the Motion.

For the reasons set forth in the Motion and below, the SAC should be dismissed in its entirety

ARGUMENT

I. Procedural Matters

A. Documentary Evidence Attached to Defendant Heath's Affidavit Is Properly Before the Court Pursuant to a Motion to Dismiss Under CPLR(a)(1)

As shown in the Motion, dismissal pursuant to CPLR 3211(a) (1) is warranted where "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Leon v Martinez, 84 N.Y.2d 83, 88 (1994). Motion at 2-3. In order for evidence submitted under a CPLR 3211(a)(1) motion to qualify as "documentary evidence," it must be "unambiguous, authentic, and undeniable" (Granada Condominium III Assn. v. Palomino, 78 A.D.3d 996, 996–997 (2d Dep't 2010) [internal quotation marks omitted]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (Fontanetta v. John Doe 1, 73 A.D.3d 78, 84–85 (2d Dep't 2010) [internal quotation marks omitted]).

Here, Defendants have submitted unambiguous documentary evidence in the form of the Second Amended Operating Agreement of MHRC (the "Operating Agreement") (Exhibit A)[5]; Written Consent of the Board of Managers of MHRC executed July 10, 2018[6] (Exhibit D); and a

[5] A reference to "Exhibit __" refers to the corresponding Exhibit annexed to the Heath Affidavit dated March 28, 2019 and submitted in support of the Motion (Doc No. 57)
[6] Removal of Debora Warner as Chief Executive Officer of Mile High

Written Consent of the Board of Managers of MHRC executed December 21, 2018[7] (Exhibit I). As discussed below, each of these three documents reflect out-of-court written transactions among members of the board of Mile High, the contents of which are unambiguous in meaning and essentially undeniable, and which together refute the plaintiff's factual allegations, thereby conclusively establishing a defense to Plaintiff's claims as a matter of law.

Defendants have also submitted a July 15, 2018 email from Heath to a MHRC investor (Exhibit E), and a December 21, 2018 letter from MHRC's corporate counsel to a potential acquirer (Exhibit G); two documents which are central to Plaintiff's defamation claim against Heath (Count IX). Plaintiff vaguely referred to both of these documents in her claim for defamation against Heath (Count IX), but failed to attach either document to her SAC.

Defendants proffered these documents as evidence to establish that Plaintiff cannot state a claim for defamation against Heath and that dismissal is mandated under CPLR 3211(a)(7). See, International Pub. Concepts, LLC v Locatelli, 46 Misc.3d 1213[A], *7 (Sup. Ct., New York County 2015) (Court examined letters and emails which purportedly contained defamatory statements, and determined that the documents contained nonactionable statements of opinion, rather than actionable factual assertions, and dismissed the defamation claim with prejudice).

Plaintiff concedes that the Operating Agreement may be properly considered by the Court (Opposition at 1-2), but argues that Defendant Heath's Affidavit and other documentary evidence (e.g., Exhibits D, E, G and I) should be disregarded and "cannot be received on a motion to dismiss, unless the Court converts the motion into one for summary judgment and gives the parties advance notice of such conversion." (Pl. Op. at 1). In support, Plaintiff purports to cite to Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 635 (1976).

[7] Removal of Debora Warner from the Board of Managers of Mile High

Warner's reliance on Rovello, however, is misplaced because Rovello was concerned with how a court should receive affidavits in those instances where (i) a motion to dismiss is brought under CPLR 3211(a)(7); and (ii) the Court does not convert the motion to one for summary judgment. Rovello, 40 N.Y.2d at 636.

Although a motion to dismiss under CPLR 3211(a)(1) obliges the court "to accept the complaint's factual allegations as true..." (Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 270 (1st Dep't 2004), nevertheless dismissal is warranted if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002). Here, as discussed below, Exhibits A, D, E, G and I to Heath's Affidavit provide documentary evidence which utterly refute a number of Plaintiff's factual allegations, thereby conclusively establishing a defense to those claims, as a matter of law under CPLR § 3201(a)(1). Moreover, Plaintiff's other claims are subject to dismissal under CPLR § 3201(a)(7) because Plaintiff has not – and cannot – allege all of the material elements of her causes of action.

II. Plaintiff's Improper Pleading of Derivative Claims as Direct Claims Mandates Dismissal; as Does Plaintiff's Co-Mingling of Direct and Derivative Claims

As Defendants have shown, Plaintiff has impermissibly plead, in her individual capacity, multiple claims which are derivative in nature (Motion at 3-4). Plaintiff lacks standing to assert these derivative claims because to the extent these claims even exist, they belong toMHRC, and not to Plaintiff individually.

Plaintiff contends that Defendants' argument that Plaintiff "lacks standing" to assert derivative claims in her individual capacity is too "conclusory" to support dismissal as a matter of law, and too "abstract" a concept for Plaintiff to even attempt to disprove (Opposition at 2-3). On the contrary, the legal theory of "direct vs. derivative" claims is not

a difficult concept to understand.[8] Quite simply, an action is direct, as opposed to derivative, if the thrust of the action is to vindicate a plaintiff's personal rights as an individual and not as a member of the company. On the other hand, allegations that the defendant mismanaged the company, or caused a diminution of value of the company, are derivative in nature (Motion at 3-4).

As shown in detail in the Motion, each of Plaintiff's purportedly direct claims asserted in Counts II (Motion at 9-11); III (Motion at 11-12); VI (Motion at 16-17); VII (Motion at 17-19); and X (Motion at 26-27), all assert either purely derivative claims and/or comingle direct and derivative claims, and require dismissal.

III. Plaintiff's Written Opposition to the Motion to Dismiss Claims I-III Does Not Remedy The Defects in the SAC

A. Plaintiff States No Claim for Judicial Dissolution (Count I)

As shown, Plaintiff's claim for judicial dissolution requires dismissal because Plaintiff fails to plead facts to establish that it is not "reasonably practicable" to carry on the business of MHRC in conformity with the Operating Agreement, as is required for judicial dissolution under Section 702 of the New York Limited Liability Company Law ("LLCL") (Motion at 6-9).

Plaintiff argues that to survive dismissal she need "simply 'plead' facts supporting her claim for dissolution under LLCL" and that "nothing in CPLR § 3211 or the case law interpreting it requires Plaintiff to 'establish' her claim in response to a motion to dismiss" (Opposition at 4-5). Plaintiff contends that her SAC "sets forth in detail why 'it is not reasonably practicable to carry on the business in conformity with the … operating agreement' of MHRC as

[8] In fact, it is a straight forward concept that the Court discussed at length and in detail with Plaintiff during a pre-motion conference concerning Plaintiff's First Amended Complaint, and prior to Plaintiff's most recent amendment.

interpreted by New York law" (Opposition at 5).

Plaintiff is mistaken. As shown in the Motion, in 1545 Ocean Ave., LLC, 72 A.D.3d 121, 131 (2nd Dep't 2010), the Court interpreted the "not reasonably practicable" standard in LLCL § 702 to mean that for judicial dissolution of an LLC, a petitioner must "establish, in the context of the terms of the operating agreement or articles of incorporation, that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible." 1545 Ocean Ave., LLC, 72 A.D.3d 121, 131 (2nd Dep't 2010) (emphasis added) (Motion at 6).

Here, Warner does not plead facts which establish - in the context of the terms of the Operating Agreement - either of these two criteria, and has failed to provide this Court with the requisite showing to be afforded the "drastic remedy" of dissolution. 1545 Ocean Ave., 72 A.D.3d at 131.

Plaintiff argues that she "has more than sufficiently plead in excruciating detail facts sufficient to show she has a valid claim for judicial dissolution under" LLCL § 702. (Opposition at 4-5). Plaintiff is mistaken. None of Plaintiff's facts – no matter how detailed she believes them to be – support her claim for dissolution. See Motion at 6-9.

Plaintiff argues that she "has provided extensive factual allegations showing that Defendants have and are carrying on the business of MHRC in violation of material terms of the Operating Agreement and that there is no prospect for the business to operate in conformance with the terms of the operating agreement in the future" (Opposition at 6). It should be noted that Plaintiff then proceeds to refer the Court to a blank citation ("SAC at ¶¶___") and completely fails to identify which "extensive factual allegations" or

"excruciating detail" she purports to refer to in support of her claim for dissolution.

To the extent Plaintiff claims that "she has been completely excluded from the business and improperly removed from the Board of Managers without cause..." (SAC ¶ 139) and that "it is not reasonably practicable to run the business in conformance with the [Operating Agreement]" (Opposition at 6), Plaintiff's claim is directly refuted by documentary evidence in the form of the Operating Agreement (Exhibit A). The business has been running and growing without Plaintiff on the Board.

Section 4 of the Operating Agreement provides for the Management of MHRC by a Board of Managers (the "Board"). Pursuant to Section 4(a)(ii) of the Operating Agreement, each Founding Member of MHRC was initially designated as a "Manager" on the Board of MHRC and would continue to serve as a Manager on the Board until a new Manager is appointed by the Board, subject to requirements of Section 4(a)(iii) of the Operating Agreement.

Section 4(a)(iii) of the Operating Agreement is titled "Term of Managers" and provides that "[e]ach Manager will serve until the earlier of the following events:"

(1) the Manager withdraws from management (by resignation, death or disability);
(2) the Manager is removed from office by a Board Supermajority;
(3) the Manager's successor has been duly elected and qualified.

Here, Warner was properly removed pursuant to Section 4(a)(iii)(2) of the Operating Agreement, by Written Consent of the Board of MHRC[9], representing a Board Supermajority[10]. See Heath Aff., Exhibit I.

[9] Section 4(b)(i) provides that "management and control of the business and affairs of [MHRC] will be vested in the Board..."; and 4(b)(ii) provides that each Manager is entitled to one (1) vote and that the Board may take action by vote or by written consent.
[10] Defined in the Operating Agreement (p. 30) to mean "the vote or written consent of Members whose combined votes equal to seventy-five (75%) percent or more of the votes of all of the Managers, with each Manager having one vote.

Moreover, Warner's removal as Chief Executive Officer of Mile High and removal as a Member of the Board, has not, in any way, lead to a situation where it is no longer "reasonably practicable" for Mile High to carry on its business or that the current managers of Mile High are unable to permit or promote the stated purpose of Mile High tobe realized or achieved. Mile High continues to own and operate indoor treadmill studios and has opened a third studio during the pendency of this litigation.This is consistent with the purpose for which Mile High was established.

Plaintiff argues that "she has plead more than sufficient facts to show that the economic purpose of MHRC is not being met" (Opposition at 7). Plaintiff is wrong on multiple levels. First, "economic purpose" as discussed in Plaintiff's cited case Kirksey v. Grohmann, 754 N.W.2d 825, 827 (S.D. 2008) refers to an analysis of judicial dissolution pursuant to a South Dakota statute. In New York, the analysis is whether "continuing the entity is financially unfeasible." 1545 Ocean Ave., LLC, 72 A.D.3d 121, 131 (2nd Dep't 2010). Plaintiff presents no evidence that continuing the operations of MHRC is financially unfeasible. Plaintiff's conclusory and unsubstantiated allegations regarding MHRC's cash flow or debt merely proves that Plaintiff is conflating MHRC's "financial structure" debt with "financial feasibleness" and future profitability and ignores the fact that MHRC – like many start-up businesses – has been using debt to fund its expansion. The 1545 Ocean Court even quoted extensively from a decision by the Delaware Chancery Court in order to provide an explanation for a Court's appropriate inquiry into financial feasibleness and profitability and which circumstances may merit dissolution and which circumstances do not:

> The court will not dissolve an LLC merely because the LLC has not experienced a smooth glide to profitability or because events have not turned out exactly as the LLC's owners originally envisioned; such events are, of course, common in the risk-laden process of birthing new entities in the hope that they will become mature,

> profitable ventures. In part because a hair-trigger dissolution standard would ignore this market reality and thwart the expectations of reasonable investors that entities will not be judicially terminated simply because of some market turbulence, **dissolution is reserved for situations in which the LLC's management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business, such as in the case of a voting deadlock or where the defined purpose of the entity has become impossible to fulfill.** (emphasis added)

See 1545 Ocean, 72 AD3d at 130-31, quoting In re Arrow Inv. Advisors, LLC, 2009 WL 1101682, at *2 (Del Ch 2009).

Clearly, this is not a situation where Plaintiff's removal from the Board caused a voting deadlock or where the purpose of MHRC – which is, to own and operate indoor treadmill studios - has become impossible to fulfill. Particularly, neither the SAC nor Plaintiff's opposition nor Warner's Affidavit shows how MHRC's Managers are actually unable or unwilling to reasonably permit or promote the stated purpose of the Company to be realized or achieved.

For the foregoing reasons and as previously shown (Motion at 6-9), Plaintiff's Claim for judicial dissolution should be dismissed.

B. Plaintiff States No Claim for Breach of Fiduciary Duty (Count II)

As shown in the Motion, Plaintiff's breach of fiduciary duty claim requires dismissal because this claim: (i) improperly seeks derivative relief; (ii) is not plead with the requisite particularity; and (iii) impermissibly duplicates Warner's claims for breach of contract (Motion at 9-11).

As set forth in Section II, above, Plaintiff conflates direct and derivative claims and improperly purports to plead as a direct claim breaches of fiduciary duty where the harm, if any, was to MHRC; not to Plaintiff. As shown in the Motion, these derivative claims plead as a direct claim for breach of fiduciary duty (e.g., stripping the value of her equity (SAC ¶¶ 165, 184); self-

dealing and damages to Mile High's finances and reputation (SAC ¶¶ 170-172); failure of Defendants to evaluate an offer (SAC ¶¶ 173-177, ¶¶ 178-180, 188) are all classic derivative claims because they assert harm to Mile High; not Warner (Motion at 9).

Plaintiff argues she "has more than sufficiently plead each of the elements required to establish her breach of fiduciary duty claims which have caused her direct and substantial injury" yet fails to cite to any specific allegations in her SAC which could support a direct claim for breach of fiduciary duty (Opposition at 8)[11]. However, even if Plaintiff had asserted allegations in support of a direct claim for breach of fiduciary, her comingling of direct and derivative claims – within the same cause of action – mandates dismissal (Motion at 10-11).

Plaintiff next argues that "Defendants are wrong in claiming that a breach of fiduciary duty claim must be plead with heightened particularity under CPLR § 3016(b), and that Plaintiff has not met that standard" (Opposition at 8). On the contrary, the First Department has held that a cause of action for breach of fiduciary duty is subject to the particularized pleading requirement of CPLR 3016(b), without reference to a separate requirement that such a claim be based on fraud. Berardi v. Berardi, 108 AD3d 406, 407 (1st Dep't 2013)(citing CPLR 3016(b)); Peacock v. Herald Sq. Loft Corp., 67 AD3d 442, 443 (1st Dep't 2009).

Lastly, with regard to Defendants' argument that Plaintiff's breach of fiduciary duty claim impermissibly duplicates her breach of contract claim (Motion at 10-11), Plaintiff responds that "Defendant (sic) fail to identify a single allegation that gives rise to breach of contract claim instead of breach of fiduciary duty claim..." (Opposition at 9). Clearly, this includes every allegation Plaintiff submits in support of her claim for breach of fiduciary duty (e.g., SAC ¶¶ 164-167) and also a breach of the terms of the Operating Agreement (e.g., SAC ¶¶ 253-254; ¶¶

[11] Plaintiff refers to blank citations ("SAC at ¶¶___") in support (Opposition at 8).

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C. Plaintiff States No Claim for Aiding and Abetting Breach of Fiduciary Duty (Count III)

As shown in the Motion, Plaintiff's claim for aiding and abetting a breach of fiduciary duty is a derivative claim, improperly brought by Plaintiff (Motion at 11). Plaintiff argues that "Defendants nowhere explain why or how Count III is a derivative claim or why it should be dismissed under CPLR 3016(b)" (Opposition at 10). On the contrary, Defendants specifically refer to Section I(A)(2); the section in the Motion which discusses Plaintiff's improper pleading of derivative claims as individual claims (Motion at 11). Plaintiff argues "the aiding and abetting claim is a direct claim" (Opposition at 10), but clearly the aiding and abetting claim suffers from the same pleading infirmities as Plaintiff's breach of fiduciary duty claim. If Plaintiff's underlying direct claim for breach of fiduciary duty is derivative in nature and must be dismissed on that basis, then so too must the claim of aiding and abetting the alleged breach.

Accordingly, Warner's aiding and abetting breach of fiduciary duty claim should also be dismissed.

IV. Plaintiff Offers No Written Opposition to the Motion to Dismiss Claims IV-X; Plaintiff Concedes that Dismissal is Required

A. Plaintiff States No Claim For Rescission of the Operating Agreement (Count IV)

As in the Motion, Plaintiff's claim for rescission of the Operating Agreement and IP Agreement requires dismissal because the allegations plead in support of her claim for fraudulent inducement are (i) not plead with the specificity required by CPLR 3016(b); (ii) do not plead scienter; (iii) do not specify which Defendant made what alleged misrepresentation; and (iv) refer to promises contained in the Operating Agreement, which are not actionable as fraud (Motion at 13-15).

Plaintiff presents no argument in opposition and thus concedes that dismissal of Count IV is warranted.

B. Plaintiff States No Claim For Rescission of the Contribution Agreement (Count V)

As shown in the Motion, Plaintiff's claim for rescission of a contribution agreement requires dismissal because the allegations plead in support of a claim for fraudulent inducement are not plead with the specificity and fail to support each element of fraud with an allegation of fact (Motion at 15-16).

Plaintiff presents no argument in opposition and thus concedes that dismissal of Count V is warranted.

C. Plaintiff States No Claim for Breach of the Operating Agreement Confidentiality Requirements (Count VI)

As shown in the Motion, Plaintiff's claim for breach of the Operating Agreement confidentiality requirements requires dismissal because such a claim is derivative in that it concerns harm to MHRC; not Plaintiff (Motion at 16-17).

Plaintiff presents no argument in opposition and thus concedes that dismissal of Count VI is warranted.

D. Plaintiff States No Claim For Breach of Operating Agreement Undertaking Requirements (Count VII)

As shown in the Motion, Plaintiff's claim for breach of the Operating Agreement undertaking requirements requires dismissal on the grounds of documentary evidence: the Indemnification Provision found at Section 4(g) of the Operating Agreement (Heath Aff., Exhibit A); and the undertakings filed with the Court (Doc No. 33) (Motion at 17-19).

Additionally, any alleged breach by Defendants of the Operating Agreement undertaking

requirements would cause damage to MHRC; not Plaintiff. Plaintiff has no standing – in her individual capacity - to plead derivative claims, and dismissal of the claim is required.

Plaintiff presents no argument in opposition and thus concedes that dismissal of Count VII is warranted.

E. Plaintiff States No Claim for Breach of the Operating Agreement - Removal of Warner from the Board (Count VIII)

As shown in the Motion, Plaintiff's claim for breach of the Operating Agreement – removal of Warner from the Board of MHRC - requires dismissal on the grounds of documentary evidence: § 4(a)(iii) of the Operating Agreement (Heath Aff., Exhibit A) (Motion 19-20)

Section 4 (a)(ii) of the Operating Agreement provides for management of MHRC by the Board of Managers; to be constituted as follows:

> (ii) *Managers.* Each Founding Member is hereby initially designated as a "***Manager***" (which for all purposes will be deemed a "Manager" under the Act with the responsibilities and duties pursuant to Section 417 of the Act set forth in this Section 4) and will continue to serve as a Manager on the Board until a new Manager is appointed by the Board, subject to Section 4(a)(iii) below.

Section 4(a)(iii) of the Operating Agreement provides for the term of service of each Manager, as follows:

> (iii) *Term of Managers.* Each Manager will serve until the earlier of the following events:
>
> (1) the Manager withdraws from management (by resignation, death or Disability);
> (2) the Manager is removed from office by a Board Supermajority;
> (3) the Manager's successor has been duly elected and qualified.

Here, documentary evidence in the form of a Written Consent of the Board of Managers of MHRC dated December 21, 2018, conclusively establishes that pursuant to section 4(a)(iii)(2)

of the Operating Agreement, Warner was removed from the Board by a Board Supermajority (Exhibit I).

Plaintiff presents no argument in opposition and thus concedes that dismissal of Count VIII is warranted.

F. Plaintiff States No Claim for Defamation (Count IX)

As shown in the Motion, Plaintiff's claim against Defendant Heath for defamation requires dismissal because (i) the pleading requirements - under CPLR 3016(a) - to assert a claim for defamation have not been met; (ii) the July 15, 2018 email (referred to in SAC ¶ 262) was not attached to the SAC; (iii) the December 21, 2018 letter (referred to in SAC ¶ 277) was not attached to the SAC; and (iv) Plaintiff fails to plead special damages (Motion at 20-26).

Moreover, Documentary Evidence conclusively establishes that the July 15, 2018 email from Heath contains non-actionable statement of opinion and was emailed to a single MHRC investor, who was subject to a common interest privilege with Heath (Exhibit E), and that Heath was not the author of the December 21, 2018 letter (Exhibit G) which Plaintiff purports is defamatory.

Plaintiff presents no argument in opposition and thus concedes that dismissal of Count IX is warranted.

G. Plaintiff States No Claim For Tortious Interference With Prospective Business Advantage (Count X)

As shown in the Motion, Plaintiff's claim for tortious interference with prospective business advantage – namely, the acquisition of MHRC by third party purchaser Xponential Fitness – belongs to MHRC and should be dismissed as an improperly plead derivative claim (Motion 26-27).

Plaintiff presents no argument in opposition and thus concedes that dismissal of Count X is warranted.

H. Plaintiff States No Claim For Indemnification and Advancement (Count XI)

The indemnification provision is found at Section 4 (g) of the Operating Agreement (Exhibit A). As shown in the Motion, Warner's claim for indemnification requires dismissal for two reasons. First, Warner asserts this claim for indemnification against the individual Defendants; not against the Company – MHRC – who is the only indemnitor under § 4{g)(1) of the Operating Agreement. Second, even if Warner had named MHRC as a defendant in this action, she would not be entitled to indemnification and advancement of funds because she does not fit the definition of an "Indemnitee" as that term is defined in § 4(g)(1) of the Operating Agreement. (Motion at 28-29).

Here, Warner is the plaintiff in an action she commenced against the Defendants. Warner is not incurring any legal expenses in connection with the defense of any actual, or even threatened, action. Any expenses Warner has to date are a direct result of her role as plaintiff, her retention of counsel, and her counsel's chosen course of litigation.

Plaintiff presents no argument in opposition and thus concedes that dismissal of Count XI is warranted.

I. Plaintiff States No Claim for Production of Books and Records (Count XII)

As shown in the Motion, Warner's claim for Production of Books and Records requires dismissal because Warner failed to allege that she followed the rules for requesting books and records from MHRC, as set forth in Section 2(g) of the Operating Agreement (Motion at 29-30). Plaintiff presents no argument in opposition and thus concedes that dismissal of Count XII is warranted.

Furthermore, Plaintiff's claim for production of Books and Records should be dismissed as moot. As directed by Court Order dated April 8, 2019 (Doc No. 68), Defendants collected and produced to Plaintiff the various categories of documents requested by Plaintiff and approved by the Court (Doc No. 70). Thereafter, pursuant to Court Order dated August 6, 2019 (Doc No. 72), Defendants prepared Mile High's Books and Records to be re-produced to Plaintiff; but now, in electronic form with bates stamps. The costs to Defendants for this production was $225.00. Plaintiff, through her counsel, refused to reimburse Defendants for this minor expense and refused to take possession of the Books and Records. See Getz Affidavit; Exhibit A.

As such, for this additional reason, Plaintiff's Count XII should be dismissed.

V. Warner's Request For Leave to File A Motion to Amend Should Be Denied

Plaintiff states that "to the extent the court finds any deficiencies in the SAC" then Plaintiff "is prepared to file a motion for leave to file an amended complaint if necessary" (Pl. Op. at 10). This request is both improper and inappropriate and should be denied. The Court has given Plaintiff ample opportunities (and direction) to plead appropriate, sustainable claims. Plaintiff filed her initial Summons with Notice and then an Amended Complaint in her individual capacity and derivatively on behalf of Mile High. Thereafter, at a pre-trial conference, the Court examined Plaintiff's First Amended Complaint and finding it deficient (e.g., commingled direct and derivative claims), offered Plaintiff specific feedback - on a claim-by-claim basis – on what Plaintiff would need to plead in order to attempt to remedy the defects in her pleading. The Court then gave Plaintiff time and an opportunity to file her SAC; which pleading is now the subject of this Motion. Plaintiff used that time and opportunity to file a SAC which continues to conflate direct and derivative claims, along with the other pleading infirmities referenced in the

Motion.

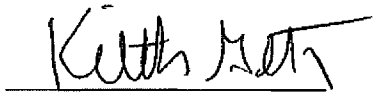
Enough is enough. The Court should no longer be tasked with identifying pleading deficiencies for Plaintiff. Plaintiff's request for leave to file a motion for leave to amend should be denied.

CONCLUSION

For the all of the foregoing reasons, Defendants respectfully request the Court grant their motion in its entirety, together with such other and further relief that the Court may deem just, proper and equitable.

Dated: New York, New York
November 21, 2019

LEBOWITZ LAW OFFICE, LLC

By: 

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