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1 THE COURT: Good morning, everyone.

2 We're here on the case of *Lin v. Sun*,

3 Index Number 654902 of 2024.

4 Counsel, your appearances, please

5 MR. GAJJAR: Good morning, Your Honor.

6 Rip Gajjar for the petitioner, Yuchen Lin.

7 THE COURT: Good morning, Mr. Gajjar.

8 MR. HERNDON: Good morning, Your Honor.

9 Thomas Herndon for the respondent.

10 THE COURT: Good morning, Mr. Herndon.

11 Okay. We're here today on oral argument with
12 respect to Defendant's Motion Sequence Number 2, which is a
13 motion to dismiss the complaint.

14 Just so we manage our time, Mr. Herndon, how long
15 do you need for your oral argument, sir?

16 MR. HERNDON: Probably five minutes.

17 THE COURT: No problem.

18 Mr. Gajjar?

19 MR. GAJJAR: The same five minutes.

20 THE COURT: Five minutes.

21 And then do you want any time for rebuttal maybe?

22 MR. HERNDON: About two minutes.

23 THE COURT: You got it. Okay. We'll be very
24 efficient today, then.

25 Okay. Mr. Herndon, you're up, sir.

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1 MR. HERNDON: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. HERNDON: I represent the respondent, Xu Sun,
4 also known as Edward Sun.

5 And we're moving today on three different grounds
6 to dismiss the complaint. One under CPLR 32-(a)(1) [sic]
7 based on documentary evidence.

8 And with regards to that -- that argument, we
9 presented the franchise agreement which we believe is
10 abundantly clear that Ms. Lin is not a member of
11 XY Franchise, LLC, or a member of that franchise agreement.

12 The agreement, in particular, sets out different
13 ways that a new member can be admitted. One being a prior
14 written consent of the franchisor, which is not present;
15 certain procedures to effectuate a transfer, all not
16 present; and, you know, her executing a personal guarantee
17 considering she claims that she's more than a 40 percent
18 owner of the company, again, not present.

19 As far as our -- our other argument that
20 we're -- the other provision of the CPLR that we're moving
21 under, it's CPLR 3211(a)(3), based on lack of standing,
22 again, it flows from the fact that there's no basis that
23 Ms. Lin is a member of this company.

24 There -- what -- what I think is occurring is is
25 that the petitioner is trying to somehow circumvent their

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1 franchise agreement, whether it be through the operating
2 agreement, the limited liability company law, which it
3 just -- it just can't happen.

4 And -- and we've gone through -- both in our -- in
5 our initial papers as well as our reply papers to show why
6 that's not possible.

7 THE COURT: So in his papers, Plaintiff argues that
8 the Court should essentially deem the franchise agreement to
9 be irrelevant and focus on that -- I'm going to call it an
10 agreement for the sake of -- for the sake of it, but the
11 document that's between the parties here, I think it's
12 NYSCEF Document Number 4, that the Court should focus on
13 that and determine that that's an agreement.

14 MR. HERNDON: Your Honor, Your Honor, that's
15 not -- not the case. I mean, it's very clear that the
16 franchisor in this case, Stretch Lab, has the authority to
17 determine who's the franchisee.

18 The fact that there is -- we attached an operating
19 agreement, there are certain mechanisms in which a member
20 can be admitted. Again, there's no writing; there's only an
21 unsigned agreement, an unsigned document, a cobble of
22 emails, and a business card that doesn't even reflect the
23 entity that she was supposedly a member of. So our position
24 is that the Court must rely on the agreement.

25 And, again, the limited liability company law is

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1 only a default rules, right? The Court still will focus on
2 the fact that -- they'll look at the written agreement over
3 the limited liability company law and that's only a default
4 rule.

5 As far as -- we moved also under CPLR 3211(a)(7),
6 failure to set a claim which should be granted. We go
7 through each one of the causes of actions, we kind of lumped
8 them together. One being that -- that causes of actions 3,
9 6, 9 -- 3, 6, and 9 should be dismissed because basically
10 they all rely on the basis that Ms. Lin was an owner of the
11 company which, again, we take the position that's
12 not -- that can't be the case.

13 We also moved to dismiss the tort claims which are
14 cause of actions -- actually, nine -- I'm sorry, the other
15 one was 11. I'm sorry.

16 THE COURT: Yeah. So it's the accounting breach of
17 fiduciary duty, waste, mismanagement, and self-dealing?

18 MR. HERNDON: Yeah. And I'll -- I'll say the names
19 instead of the causes of action.

20 THE COURT: No worries. I was doing the same thing
21 in my notes.

22 MR. HERNDON: For the cause of action for the tort,
23 it's conversion. And in our papers, we argue, again, that
24 conversion shouldn't be applied to business interest. We
25 cite case law to that effect.

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1 The fraud claim should be dismissed because it's
2 basically just -- they're -- they're alleging a breach of
3 contract claim and you can't allege a fraud claim based on
4 that.

5 We also moved to dismiss the contractual claims,
6 breach of contract, unjust enrichment, and promissory
7 estoppel, again, no basis for the membership interest that
8 the petitioner is claiming.

9 And so -- and on the last one, we also seek to
10 dismiss declaratory judgment claims which, again, relies on
11 the fact that they claimed that Ms. Lin is an owner.

12 As far as our other -- so that pretty much wraps up
13 the reason why we want to dismiss the petition. In the
14 alternative, we also set forth that the Court strike -- to
15 the extent the pleading is not dismissed, strike the
16 prejudicial scandalous paragraphs. We list the paragraphs
17 in our papers.

18 THE COURT: But that would be in the alternative,
19 right?

20 MR. HERNDON: In the alternative, yeah.

21 THE COURT: Okay.

22 MR. HERNDON: And the basis for doing so, clearly,
23 they're really inflammatory. They don't really go to the
24 causes of actions that -- to the extent there were causes of
25 action that were granted, that -- that would be needed

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1 to -- to justify or to satisfy our claim.

2 And then lastly, you know, we thought hard about
3 this and, you know, as far as whether to move for, you know,
4 cost and sanctions in the motions, and we -- we
5 intentionally did not bring it against counsel right now
6 because we thought this is -- this was really client-driven
7 and we want to make it very clear that we can't continue to
8 move to dismiss, you know, in this process, it takes a lot
9 of money. And so, yes, we are seeking costs at least for us
10 having to draft the motion, appear and argue this motion.

11 And I might add, you know, this -- our position has
12 not changed since June. It's been very consistent about the
13 way that we saw the law, the way that we saw the facts.

14 We tried really hard to come to a resolution, which
15 we're not going to get into. But we're here now, spent a
16 lot of hours. I'm arguing now, and so, yeah, the
17 client -- the client has spent a lot of money on legal fees
18 and is seeking costs for filing the motion.

19 THE COURT: Thank you.

20 MR. HERNDON: Thank you, Your Honor.

21 THE COURT: Mr. Gajjar?

22 MR. GAJJAR: Good morning, again, Your Honor.

23 On a motion -- on a motion to dismiss, the Court
24 needs to look at the allegations in the complaint, not make
25 credibility determinations, but to see whether there -- a

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1 claim actually exists. Here, Ms. Lin actually put out --

2 THE COURT: Sir, I'm just going to ask you to slow
3 down.

4 MR. GAJJAR: I apologize --

5 THE COURT: No worries.

6 MR. GAJJAR: -- for the court reporter.

7 In the petition here, Ms. Lin sufficiently lays out
8 that there was an agreement between the parties. She was
9 going to work for Mr. Sun. She was going to develop this
10 business -- not work for him, but work with him, develop
11 this business. And in exchange, she was going to get
12 40 percent of the profits, 40 percent of the company.

13 She was not aware of any sign -- any other
14 agreement that Mr. Lin [sic] may have had. She was not a
15 party to that.

16 If Mr. Lin had breached that agreement, that's
17 between Mr. Lin -- I'm sorry, Mr. Sun and the franchisor.

18 Now, it must be noted just with the facts that
19 Ms. Lin did go to owner training. Stretch Lab
20 knows -- they're aware of Ms. Lin. They could have waived
21 any right that they had.

22 This -- this provision in the franchise agreement
23 that says that a new owner has to be approved, that's to
24 protect Stretch Lab and they could have waived that. And
25 for all we know, they may have waived it because she

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1 appeared there for owner training.

2 Again, Mr. Sun did present Ms. Lin as an owner, as
3 his partner in several documents. So, you know, again, they
4 could have waived it.

5 But the fact or -- the facts that are alleged in
6 the petition is that he did transfer this interest. So
7 regardless of his side agreement or any agreement that he
8 has with the franchisor, he did transfer it. And she worked
9 for eight months for -- without compensation.

10 THE COURT: Again, what are those acts alleged in
11 the complaint that he, in fact, did effectuate a transfer?

12 MR. GAJJAR: There was an agreement where he said
13 "Please work for me and I will give you 40 percent
14 interest."

15 THE COURT: Anything other than that unsigned
16 agreement?

17 MR. GAJJAR: There was a memorandum, a note that
18 Mr. Lin [sic] had sent over as part of -- it was supposed to
19 memorialize what they were talking about, of course it
20 wasn't signed, but there was a --

21 THE COURT: I'm sorry, isn't that the same thing?

22 MR. GAJJAR: I'm talking about there's allegations
23 in the petition where Mr. Sun had verbally said, "Please
24 work for me and I will give you" --

25 THE COURT: Okay.

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1 MR. GAJJAR: And then --

2 THE COURT: Got it.

3 MR. GAJJAR: All right. Again, it's a factual
4 issue that needs to be determined by a finder of fact at a
5 hearing.

6 Again, we're not -- the agreement that Mr. -- that
7 my colleague here presents, including the operating
8 agreement which shouldn't be considered by the Court because
9 it was provided on reply for the same reason,
10 it's -- respectfully, it's a bad faith argument saying
11 "Here's something, please take it. Please work for me. Oh,
12 by the way, I don't have" -- "I don't have the authority to
13 give that to you." It's not exactly a good-faith argument.

14 By way of analogy, it's like if I give -- if I sell
15 my car to my colleague here, and I never sign over the
16 registration and then I say, "Well, I never gave you the car
17 but I took your money," it's not exactly the best argument,
18 not a good-faith argument.

19 The fact of the matter is she worked for eight
20 months under this belief.

21 Now, when it comes to the second part of the
22 motion, under scandalous statements, I don't believe
23 attorneys' fees are warranted. Again, we -- as we outlined
24 in our paper, facts that can be presented in front of a jury
25 are not scandalous or prejudicial. There's nothing in

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1 the -- in the -- in the petition that's untrue.

2 There was a breakdown in the relationship. She was
3 pushed out physically of the business. And all of these
4 facts, if it came to a trial in front of a jury or a fact
5 finder, would be presentable.

6 And I just want to note that after the last -- the
7 last couple of court appearances, my colleague here never
8 came to me and said I need you to strike this, this, and
9 this.

10 THE COURT: So the Court's directive wasn't enough?

11 MR. GAJJAR: The Court -- the Court did not order
12 us to do anything. And -- the Court asked us to work
13 together.

14 Now, as we say in the business, I'm not going to
15 negotiate against myself. If my colleague here wanted some
16 statements stricken, he should have at least written to me.
17 We kept the dialogue open and that just never came up. We
18 don't feel that attorneys' fees are warranted here. It's a
19 good faith argument.

20 And we believe these should be -- these facts --
21 the majority of these facts should be presented to a jury to
22 show the context of what was happening in this business and
23 how Ms. Lin was pushed out. The case law certainly supports
24 our position here.

25 As to the other -- the claims -- the breach of

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1 contract, the breach of fiduciary duty, again, those are
2 sufficiently pled in the petition. Factual disputes will be
3 resolved when it comes to discovery and a hearing in this
4 matter.

5 Thank you very much, Your Honor.

6 THE COURT: Thank you, counsel.

7 Mr. Herndon, any response?

8 MR. HERNDON: Yeah. Just quickly, Your Honor. It
9 really doesn't address anything that we had argued in our
10 papers.

11 At the end of the day, we went through each of the
12 reasons that we believe that this complaint should be
13 dismissed under (a)(1), (a)(3), (a)(7), right?

14 And while the courts will liberally construe a
15 pleading, it doesn't mean that you get to move
16 just -- forward just on anything. And so our position is
17 very clear that in this situation, we've -- we've set forth
18 the basis for why this complaint should be dismissed.

19 As far as these other things about her doing the
20 training, obviously, we -- we claim that that didn't occur.
21 But even if it did, she still didn't basically satisfy the
22 other remaining items that were set forth in the franchise
23 agreement.

24 As far as saying that we -- we should somehow only
25 rely on either the statute or the operating agreement,

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1 again, it doesn't help their position because under the
2 statute, there still has to be a writing. Under the
3 operating agreement, there still has to be a writing. And
4 that's the crux of the problem here, that -- that they're
5 trying to work around the fact that there isn't a writing
6 and they can't.

7 And -- and I think that's the reason for the fact
8 that our motion to dismiss the petition should be granted.

9 As far -- and then as far as the -- striking the
10 petition, your court has already noted that -- the Court
11 already had raised the issue of the petition about the
12 scandalous statements.

13 We -- per our case law, that we shouldn't be
14 time-barred even in that case. And it's ultimately in the
15 discretion of the Court.

16 But I do take issue that at a trial it would not
17 be -- it would likely not be marked into evidence because it
18 would be highly prejudicial. But, obviously, we're not at
19 trial. I can't say what would occur.

20 But at the end of the day, like I said, we request
21 that the Court dismiss the petition and grant costs for us
22 having to file a motion.

23 Thank you, Your Honor.

24 THE COURT: Mr. Herndon, I have a question for you.

25 So -- so coming back to this separate agreement

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1 between the parties, let's put aside the franchise
2 agreement, put aside the operating agreement.

3 If I were to focus on that purported agreement, why
4 is it invalid here, in terms of conferring or representing
5 any sort of offer exchanged between the parties?

6 MR. HERNDON: Yeah. There's no -- there's no offer
7 and acceptance. There's not -- there's no
8 contractual -- there's no contract. It's -- it's a proposal
9 at most that -- that the parties had exchanged. But there's
10 nothing that in -- there's nothing in it that goes through
11 what a contract would need, offer, acceptance,
12 consideration.

13 And even if you would consider the fact that
14 they're arguing that she did this work, that would arguably
15 be past consideration, not -- not consideration for the
16 contract.

17 So -- so even then, I -- like I said,
18 we're -- we're constantly going in circles. And the fact of
19 the matter is there's no writing and that's the reason why I
20 think the petition has to be dismissed.

21 THE COURT: Thanks.

22 MR. GAJJAR: May I respond, Your Honor?

23 THE COURT: Sure. Go ahead.

24 MR. GAJJAR: Thank you very much.

25 The consideration, as set forth in the petition, is

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1 that she would work and help develop this business. The
2 offer was, "Please help me develop this business, in
3 exchange you will get 40 percent of the company, 40 percent
4 of the profits, LLC interest."

5 She said, "Yes."

6 She worked eight months for free. That's
7 the -- okay, not for free, but expecting compensation as a
8 partner, as a member of this LLC.

9 I'll rest with that.

10 Thank you very much.

11 THE COURT: Thank you, sir.

12 Bear with me just one moment.

13 Okay. The Court is prepared to issue a decision
14 and ruling.

15 Respondent Sun moves to dismiss the petition
16 pursuant to CPLR 3211(a)(1), (3), and (7) with prejudice.

17 Respondent further moves to strike various portions
18 of the pleadings deemed as scandalous and/or prejudicial
19 pursuant to CPLR 3024(b).

20 And Respondent further moves for an award of
21 attorneys' fees and costs in its favor pursuant to NYCRR
22 Section 1301-1.

23 For the following reasons and based upon the
24 documents submitted in connection with this motion and oral
25 argument held today, Respondent's motion to dismiss is

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1 granted and the petition is dismissed in its entirety with
2 prejudice.

3 Accordingly, the Court need not address
4 Respondent's motion to strike portions of the pleadings
5 pursuant to CPLR 3224(b).

6 Petitioner asserts 11 causes of action, each of
7 which hinge on the Court's determination that Petitioner has
8 alleged a membership interest in the XS Franchise LLC,
9 otherwise called the company.

10 Count 1, declaratory relief, Petitioner remains to
11 have a 40 percent interest in the company.

12 2, dissolution, liquidation, and appointment of a
13 receiver pursuant to LLC Law Sections 702 and 703.

14 Count 3, judicial accounting.

15 4, breach of contract.

16 5, unjust enrichment.

17 6, breach of fiduciary duty.

18 7, breach of the implied covenant of good faith and
19 fair dealing.

20 8, promissory estoppel.

21 9, conversion.

22 10, fraud.

23 11, waste, mismanagement and self-dealing.

24 Based upon the allegations in the petition,

25 Petitioner does not and cannot allege that any membership

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1 interest in the company was transferred to her at any point
2 in time.

3 The franchise agreement, submitted at NYSCEF
4 Document Number 15, was entered on November 18, 2022,
5 between Stretch Lab Franchise, LLC, as franchisor and
6 Respondent, Mr. Sun, as franchisee.

7 It is undisputed that pursuant to the franchise
8 agreement, Respondent operates a Stretch Lab franchise, and
9 pursuant to Article 14.3 of that agreement was permitted to
10 assign his franchise rights to an entity that he wholly
11 owns.

12 Pursuant to CPLR 3211(a)(1), dismissal is warranted
13 where, quote, Documentary evidence submitted conclusively
14 establishes a defense to the asserted claims as a matter of
15 law, end quote. See *Leon v. Martinez*, 84 N.Y.2d 83, 88, of
16 1994. See also *150 Broadway N.Y. Associates, L.P. versus*
17 *Bodner*, 14 A.D.3d 1, 5, First Department of 2004.

18 Whereas here, Respondent has presented documentary
19 evidence, the Court is required to determine, quote, Whether
20 the proponent of the pleading has a cause of action, not
21 whether she has stated one, end quote. See *Ark Bryant Park*
22 *Corp. v. Bryant Park Restoration Corp.*, 285 A.D.2d 143, 150,
23 First Department 2001.

24 Here, the franchise agreement conclusively
25 establishes based on the application of Articles 14.1 and

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1 14.2 that Respondent could only have transferred or signed
2 his equity interest in whole or in part to a third party
3 provided that he had provided written consent -- excuse me,
4 provided that he had prior written consent of the
5 franchisor.

6 Article 14.1 states that franchisor approval is
7 required. In absence of such approval, any purported sale,
8 assignment, or transfer of rights and interests are null and
9 void.

10 Article 14.2 prescribes the procedure for the
11 approval of any transfer. Nothing in the agreement
12 references or would otherwise permit Petitioner to be
13 assigned or retain any interest in the company.

14 Likewise, the operating agreement submitted at
15 NYSCEF Document Number 36 sets forth the procedure for
16 adopting new members at Section E2, including, quote,
17 Partial transfer. If a member transfers only a portion of
18 its membership interest, the transferee shall be admitted to
19 the company as an additional member upon its execution of an
20 instrument signifying its agreement to be bound by the terms
21 and conditions of this agreement, end quote.

22 Petitioner has likewise not alleged compliance with
23 the aforementioned provision, nor does Petitioner proffer
24 any allegation or evidence to the contrary.

25 Petitioner concedes that no prior approval was

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1 effectuated that might form the basis for her contention of
2 holding a membership interest.

3 Petitioner's argument that she entered into a
4 separate purported agreement with Respondent, filed at
5 NYSCEF -- that purported agreement is filed at NYSCEF Docket
6 Number 4, that she made a contribution of \$10,000 to the
7 company, or that she held herself out to be a putative owner
8 do not salvage her causes of action, as does her argument
9 that the franchise agreement is irrelevant.

10 The purported partnership agreement, which is
11 undated and unsigned, makes no reference to the franchise
12 agreement and is null and void to the extent it seeks to
13 transfer any ownership interest to Petitioner pursuant to
14 Article 14.1 of the franchise agreement to which Respondent
15 is a party.

16 At bottom, Respondent could not have transferred
17 any ownership interest to Petitioner because he did not have
18 authority, let alone approval of the franchise to do so.
19 Even then, if the Court were to ignore the franchise
20 agreement in its entirety and rely upon the purported
21 agreement between the parties, the agreement does not set
22 forth material terms of any such contract as claimed by
23 Petitioner. Further, as previously noted, it is undated and
24 unsigned.

25 Because Petitioner -- excuse me.

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1 The indicia of purported ownership cannot defeat
2 the terms of the franchise agreement, and allowing such a
3 finding that a franchisee can assign and/or transfer his or
4 her ownership interest in a franchise absent approval of the
5 franchisor will lead to absurd results.

6 Because Petitioner cannot establish that she is a
7 member of the company or holds any ownership interest in the
8 company, she is precluded from seeking judicial resolution
9 pursuant to LLC Law Section 702. See *Matter of Cline v.*
10 *Donovan*, 72 A.D.3d 471, 472, First Department of 2010,
11 dissolution should not have been granted due to question of
12 fact as to whether Petitioner was a member of LLC.

13 In addition to the grounds for dismissal under
14 3211(a)(1) and (a)(3), with respect to the causes of action
15 that require standing, dismissal of Petitioner's claims are
16 independently warranted for failure to state a claim
17 pursuant to CPLR 3211(a)(7).

18 Because Petitioner has not alleged that she holds
19 an ownership interest in the company, she cannot assert
20 claims for an accounting, breach of fiduciary duty, or
21 waste, mismanagement, and self-dealing.

22 Petitioner has not pled that she was a party to any
23 fiduciary relationship with Respondent and with respect to
24 the ownership interest at issue, accordingly, she cannot
25 seek an accounting. See *Palazzo v. Palazzo* 121 A.D.2d 261,

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1 264 of 1986. That Court stated, quote, The right to an
2 accounting is premised upon the existence of a confidential
3 or fiduciary relationship and a breach of the duty imposed
4 by that relationship respecting property in which the party
5 seeking the accounting has an interest, end quote. Nor can
6 Petitioner claim self-dealing where she is not a shareholder
7 in the company.

8 Petitioner's contract-related claims, which are
9 breach of contract, unjust enrichment, covenant of
10 good -- breach of covenant of good faith and good dealing,
11 and promissory estoppel also fail based upon the Court's
12 determination that Petitioner does not hold an equity
13 interest in the company pursuant to any contract, or has
14 otherwise sufficiently alleged terms of any agreement.

15 Plaintiff cannot allege claims to enforce contract
16 rights to which she is not entitled or that Respondent has
17 breached any terms of a purported contract.

18 As to Petitioner's tort-based claims, the claim for
19 conversion, Count 9, fails for the property at issue is a
20 business interest and distribution of profits, not personal
21 property.

22 With respect to the fraud claim, which is Count 10,
23 Petitioner fails to allege that the fraud claim is distinct
24 from the breach of contract claim. See *Carle Place Union*
25 *Free School District versus Bat-Jac Construction,*

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1 *Incorporated*, 28 A.D.3d 596, 598 through -99 of 2006. See
2 also *Soames, S-o-a-m-e-s, versus 2LS Consulting Engineering*
3 *DPC* 133 NYS3d 599, 561. That's from the First Department of
4 2020.

5 Here, Petitioner has not alleged any material
6 misrepresentation concerning an intention to perform a duty
7 which is collateral or extraneous to the purported contract
8 between the parties. Petitioner also does not address this
9 argument in its moving or reply papers.

10 Finally, turning to the count for declaratory
11 judgment, again, here Petitioner fails to allege that she
12 holds any ownership interest in the company that would merit
13 that the Court adjudicate the relationship between the
14 parties vis-à-vis the ownership and the company.

15 Finally, with respect to Respondent's request for
16 attorneys' fees and costs pursuant to Rule 1301-1 in its
17 discretion, the Court denies such application.

18 (The transcript continues on the following page.)
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1 THE COURT: The foregoing constitutes the decision
2 and order of the Court.

3 Gentlemen, we'll file a short-form order today
4 setting forth the Court's decision, and also direct that the
5 parties obtain a copy of today's transcript and file it on
6 NYSCEF within 30 days. Okay?

7 Thanks very much.

8 MR. HERNDON: Thank you, Your Honor.

9 MR. GAJJAR: Thank you.

10 * * * *

11 The foregoing is hereby certified to be a true and
12 accurate transcript of the proceedings as transcribed from
13 the stenographic notes.

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KAREN PERLMAN, RMR, CRR
SENIOR COURT REPORTER