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

RAYMOND G. SALEEBY, Plaintiff -against- REMCO MAINTENANCE, LLC, PATRIARCH PARTNERS, LLC, and LYNN TILTON, Defendants.	Index No. 650371/2016 (Singh, J.) IAS Part 45 Motion Seq. No. 001 **ORAL ARGUMENT REQUESTED**

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO THE MOTION TO DISMISS THE COMPLAINT OF DEFENDANT REMCO MAINTENANCE, LLC

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Plaintiff Raymond G. Saleeby ("Plaintiff" or "Saleeby") respectfully submits this memorandum of law in opposition to the motion to dismiss the complaint ("Complaint" or "Cmplt.") of defendant Remco ("Remco," and with its co-defendants, Patriarch Partners, LLC ("Patriarch Partners") and Lynn Tilton ("Tilton"), "Defendants") pursuant to CPLR 3211(a)(1) and/or (7).[1]

PRELIMINARY STATEMENT

In January 2016, Saleeby commenced this action to recover the value of a vested 7.5 percent ownership interest (the "Class B Membership Interest") in Remco Maintenance, LLC ("Remco") — a New York-based cleaning, maintenance and restoration company — that he had earned, received and possessed as part of his compensations for his many years as CEO of Remco. As the Complaint explains in detail, long after Saleeby was terminated as Remco's CEO in February 2012, Remco and the other Defendants stripped Saleeby of his Class B Membership Interest without any remuneration, notice or explanation.

In responding to the Complaint, Remco and the other Defendants concede that they took the Class B Membership Interest, although they plead a "defense:" supposedly the Class B Membership Interest was redeemed for zero value pursuant to a contract redemption clause in the agreement which formed Remco (the "Operating Agreement"). Of course, Remco is not allowed to plead defenses on a CPLR 3211 motion. Further, as the allegations of the Complaint

[1] Submitted herewith is the Affirmation of Michael M. Fay, sworn to on April 28, 2016 ("Fay Aff."). Initially capitalized terms not defined herein shall have the same meaning as those used in the Complaint. Remco's Notice of Motion only refers to CPLR 3211(a)(1), but its Memorandum of Law only refers to CPLR 3211(a)(7).

demonstrate, this "defense" is impossible (*i.e.*, there is no way (a) Remco exercised its redemption rights within the required 60 days after Saleeby's termination, or (b) the Class B Membership Interest was worth nothing), and Remco submits no documentary evidence even suggesting that it complied with any redemption provision.

Nonetheless, on its motion, Remco would have this Court believe that the laws of New York are so rigid that even where a civil theft occurs, parties like Saleeby are without recourse. Not surprisingly, Remco is wrong. First and foremost, Defendants' taking of the Class B Membership Interest was a conversion, and Defendants, including Remco, are liable for their willful participation in that conversion. Although Remco contends that Saleeby's conversion claim is duplicative of his breach of contract claim, Remco bases this contention on its own impermissible characterization of the facts: *i.e.*, that Defendants somehow properly redeemed Saleeby's shares. As demonstrated below: (a) a CPLR 3211 movant cannot use its own "defenses" to support a motion to dismiss, (b) the allegations of the Complaint demonstrate that Remco made no effort to comply with the Operating Agreement's redemption provisions, and (c) Remco owed duties to, and committed wrongs against, Saleeby separate and distinct from any contract considerations. Indeed, Remco's arguments are a self-serving loop that utterly ignores the allegations of the Complaint.

Remco then contends that it somehow cannot be liable for any breach of contract under the Employment or Operating Agreement. However, once again, Remco's entire argument is based on its unfounded assertion that it complied with the terms of those Agreements. CPLR 3211 motions do not work like that. Indeed, Remco's unsubstantiated contentions are wholly at odds with the allegations of the Complaint, which are assumed to be true on a Rule 3211 motion. Remco's assertions also defy common sense: for example, Remco tries to avoid the 60 day

limitation on its redemption rights by claiming that Saleeby's employment was in "dispute." This contention is an insulting and a blatant misrepresentation: is being told you are fired, kicked out of your office, deprived of your pay and benefits, attacked over a claim for unemployment benefits, and denied any severance a job in "dispute"? Clearly not.

Remco also claims that Saleeby has not pleaded a breach of contract claim with sufficient particularity. However, no particularly requirement applies to breach of contract claims, and New York case law makes it clear that Saleeby has provided Remco sufficient notice of the claim against it.

Last, Remco move to dismiss Plaintiff's claim for judicial dissolution based on the First Department's recent decision in *Raharney Capital, LLC v. Capital Stack LLC*, 25 N.Y.S.3d 217 (1st Dep't 2016). Plaintiff agrees that the First Department has now clarified that such dissolution actions must be commenced in the state of incorporation (here, Delaware), but the point is moot anyway. Remco has conceded that it and the other Defendants stripped Saleeby of his ownership interest; this is now an action about compensating Saleeby for that civil theft.

As demonstrated, in more detail below, Remco's motion to dismiss is meritless and should be denied. Plaintiff agrees that its judicial dissolution claim should be dismissed as moot.

ALLEGED FACTS

I. Background

This is an action for conversion and breach of contract arising out of Defendants' willful, malicious and unlawful conduct in depriving Saleeby of his ownership interest in Remco. Saleeby served as the CEO of Remco for seven years, and during his tenure, the Company experienced positive earnings and grew significantly in value. However, in 2012, Saleeby was

fired by Tilton, who, with Patriarch, exercises complete dominion and control over Remco. Saleeby's termination was sudden, entirely unexpected and without cause. (Cmplt. ¶¶ 1-2, 22)

Nonetheless, under the terms of the agreements which governed Saleeby's employment, he owned and was entitled to the Class B Membership Interest, *i.e.*, 7.5 percent of the membership interests which comprise the ownership of Remco as a limited liability company ("LLC"). Indeed, after terminating Saleeby, Defendants quickly confirmed Saleeby's ownership of this membership interest: Remco spent months contesting Saleeby's application for unemployment benefits on the ground that Saleeby was an owner of Remco. However, once Remco prevailed in Saleeby's unemployment proceeding, it and the other Defendants stripped Saleeby of his Class B Membership Interest. (Cmplt. ¶¶ 23-26)

II. Saleeby's Agreements

Section 4(c) of Saleeby's employment agreement (the "Employment Agreement") provided that Saleeby was to receive a 7.5 percent membership interest in Remco as of April 1, 2005, his employment date, (*i.e.*, the Class B Membership Interest) half of which vested immediately and half of which vested over two years:

> [E]ffective as of the date hereof, [Saleeby] will receive such number of membership interests in the Company equal to 3.75% of the outstanding membership interests of the Company, on a fully diluted basis, as of the date hereof (the "Initial Membership Interest"). In addition, [Saleeby] shall participate in a management equity incentive plan to be established by the Company for senior executive officers of the Company as in effect during the Employment Term (the "Management Incentive Plan"). . . . [P]ursuant to the Management Incentive Plan, [Saleeby] will be entitled to receive such number of membership interests in the Company equal to 3.75% of the outstanding membership interests as of the date hereof (the "Additional Membership Interests"), which Additional Membership Interests shall vest in eight equal installments at the end of each calendar quarter beginning with the first quarter of 2005 and ending with the fourth quarter of 2006.

(Cmplt. Exh. A (Employment Agreement, § 4(c)) After vesting, Saleeby received K-1 tax reports from Remco which confirmed his ownership of the Class B Membership Interest. (*See* Fay Aff. Exhs. A and B) For Saleeby, the Class B Membership Interest was an important part of his compensation package – and a customary and expected component of executive compensation – and Saleeby would not have accepted the position of CEO of Remco without it. (Cmplt. ¶¶ 16-17)

Also on April 1, 2005, Saleeby's employment date, the Operating Agreement was amended to reflect Saleeby's Class B Membership Interest. The First Amendment to the Operating Agreement shows the ownership of Remco as follows:

Member[2]	Percentage	Class
Zohar CDO 2003-1, Limited	67.25342%	A
AIP-ES, Inc.	25.24658%	A
Raymond G. Saleeby	7.5%	B
Total	100%	

(Cmplt. Exh. B, First Amendment)

Section 6.05(a) of the Operating Agreement gave Remco the right to repurchase Saleeby's Class B Membership Interest upon his termination (the "Repurchase Rights"). Because Saleeby was not terminated for cause, Section 6.05(a)(ii) provided that Remco could

[2] Under the Delaware Limited Liability Company Act, "'Member'" means a person who is admitted to [an LLC] as a member as provided in § 18-301[.]" Del. Code Ann. tit. 6, § 18-101(11). A Member may be admitted to an LLC at the time of "formation of the LLC; or" at "the time provided in and upon compliance with the [LLC] agreement[.] After formation of an LLC, a Member is admitted "upon compliance with the [LLC] agreement, or if the [LLC] agreement does not so provide, upon the consent of all members and when the person's admission is reflected in the records of the limited liability company[.]" Del. Code Ann. tit. 6, § 18-301.

repurchase the Class B Membership interest within 60 days of Saleeby's termination for "an amount equal to the Fair Market Value of the Class B Interests as of the date of such termination." Remco failed to exercise this right within the allowed 60 day period. (Cmplt. ¶¶ 25-26)[3]

III. Saleeby's Termination

In February 2012, Saleeby was informed by Emil Giliotti ("Giliotti"), an employee of Patriarch, that he was terminated. When Saleeby asked Giliotti why he was being terminated, he was told "this is just what she [Tilton] does." (Cmplt. ¶ 22)

Saleeby was promised four weeks' severance and was asked to sign a separation agreement (the "Separation Agreement"). However, the Separation Agreement made no mention of Saleeby's Class B Membership Interest, so Saleeby, through counsel, inquired as to why. Defendants' responses were in bad faith and meant to facilitate their unlawful taking of the Class B Membership Interest. (Cmplt. ¶ 23)

IV. Defendants' Intentional And Malicious Conversion Of Saleeby's Class B Membership Interest

Remco and the other Defendants, through counsel, informed Saleeby's counsel that Tilton had supposedly exercised Remco's Repurchase Rights by valuing the Class B Membership Interest at zero, and then repurchasing that Interest for nothing. This position was absurd. First, in early 2012 – when Remco was required to exercise its Repurchase Right – Remco had a value of approximately $30 million. It defies common sense that a 7.5 percent

[3] Tilton signed both the Employment and Operating Agreements as the General Manager of Remco (Cmplt. Exh. A at 10; Exh. B at 30 (first signature page)), and also signed the Operating Agreement as the "President" of the majority members ("Members") in Remco. Indeed, Tilton was the only signatory to the original Operating Agreement. (Cmplt. Exh. B at 30-31)

interest in a $30 million company would be worth nothing. Not surprisingly, Defendants failed to provide Saleeby with any analysis supporting this zero valuation. (Cmplt. ¶¶ 25-26)

Further, under the express terms of Section 6.05(a) of the Operating Agreement, Remco had 60 days to repurchase the Class B Membership Interest. Remco failed to abide by this time period and, in fact, fought Saleeby for over seven months with respect to Saleeby's application for unemployment *on the ground that Saleeby was, and remained, an owner of Remco.* Indeed, Remco's argument was successful: Saleeby's unemployment application was ultimately denied because of his Remco ownership status. (Cmplt. ¶ 26)

Remco and the other Defendants, through counsel, then told Saleeby's counsel a different story: Tilton and Patriarch had supposedly amended the Operating Agreement to eliminate all Class B shares or, more exactly, the Class B Membership Interest. (Cmplt. ¶ 27) Of course, the Operating Agreement expressly precludes such an amendment without the consent of the Class B Members (*i.e.*, Saleeby):

> [A]ny modification or amendment of this Agreement which materially and adversely affects the Class B Members in a manner which is materially worse than the [e]ffect on any other Member shall not be effective without the consent of such Class B Members . . . .

(Cmplt. Exh. B (Operating Agreement, § 10.03)) Remco now concedes that it did not "amend" away Saleeby's Class B Membership Interest. (Remco Mem. at 11)

In late 2013, Remco provided Saleeby with tax information (*i.e.*, a K-1 report) regarding his Class B Membership Interest for the calendar year of 2012. However, since then, Saleeby has not received another K-1. Indeed, when, in 2014, Saleeby's accountant contacted Remco and inquired as to why Saleeby was no longer receiving K-1s, he was told that Saleeby no longer had any membership interest in Remco. (Cmplt. ¶ 31)

On September 18, 2014, Saleeby sent the following email to Tilton, the Manager of Remco:[4]

> I am very perplexed. I never got one penny of severance after 7 years with you leading Remco. Now I learned from my accountant that I did not get the necessary Partnership K1 information for my 7.5% ownership.
> Over the last couple of years, despite (1) sending you three opportunities from groups wanting to buy Remco for considerable amounts of money and (2) always speaking about you and Remco with both respect and praise (I even nominated you as a Most a Powerful Women at Fortune Magazine last year and spoke glowingly about you to a major Fox Newscaster not too long ago), and (3) successfully serving as the witness to the potentially costly Clifford lawsuit trial resulting in its dismissal immediately after and because of my testimony, I expected to be treated decently. Why would you allow me to be treated in this way. . . Zero severance and begging for my rightful vested ownership information and rights?

Saleeby never received a response from Tilton and did not receive a K-1 in 2015 for the calendar year 2014. (Cmplt. ¶ 32)

Remco now concedes that: (a) no amendment was made to the Operating Agreement to eliminate the Class B Membership Interest, and (b) Saleeby was nonetheless stripped of his Class B Membership Interest, although Remco contends it was pursuant to Section 6.05(a) of the Operating Agreement. (Remco Mem. at 7-11) Of course, the allegations of the Complaint demonstrate that this "defense" is impossible: Remco fought Saleeby over his unemployment claim for far longer than sixty days and stripped him of the Class B Membership Interest only after it had prevailed in the unemployment dispute. (Cmplt. ¶¶ 3-4, 24, 26)

Saleeby received no consideration for his Class B Membership Interest. Remco and the other Defendants simply, and unlawfully, misappropriated it.

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[4] Under the Delaware Limited Liability Company Act, "'Manager' means a person who is named as a manager of a limited liability company in, or designated as a manager of a limited liability company pursuant to, a limited liability company agreement or similar instrument under which the limited liability company is formed" Del. Code Ann. tit. 6, § 18-101.

ARGUMENT

"In a pre-answer motion to dismiss under CPLR 3211(a)(1) and (7), this Court is obliged to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory." *Lezama v. Cedano*, 119 A.D.3d 479, 480 (1st Dep't 2014) (quotation and citation omitted). A motion to dismiss "must be denied where the complaint adequately alleges, for pleading survival purposes, [a] viable cause of action." *Harris v. IG Greenpoint Corp.*, 72 A.D.3d 608, 609 (1st Dep't 2010). "The sole criterion…is whether the pleading states a cause of action, and if, from its four corners, factual allegations are discerned which taken together manifest any cognizable action at law," the motion to dismiss "will fail." *Id*. (citation omitted); *see also 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002). Further, dismissal under CPLR 3211(a)(1) is "warranted only if the documentary evidence submitted *utterly refutes* plaintiff's factual allegations and conclusively establishes a defense to the asserted claims as a matter of law." *Lezama*, 119 A.D.3d at 480 (quotations omitted; emphasis added).

I. Plaintiff's Conversion Claim Is Not Duplicative Of His Breach Of Contract Claim

Remco offers nothing to suggest that its taking of Saleeby's ownership interest in Remco was anything other than a simple civil theft. Indeed, on this CPLR 3211 motion, three facts demonstrate that this action is first and foremost about a conversion: (a) Remco's admission that Saleeby was stripped of his Class B Membership Interest, (b) the Complaint's unrefuted allegation that this civil theft occurred far more than 60 days after Saleeby's termination (and thus was not possibly accomplished pursuant to the Operating Agreement's redemption

provisions), and (c) Remco's failure to submit any "documentary evidence" even suggesting that it abided by Section 6.05 of the Operating Agreement.

Nonetheless, defying the fundamental concept of a CPLR 3211 motion, Remco asserts the "defense" that Saleeby's Class B Membership Interests were somehow redeemed under the terms of the Operating Agreement for nothing, and then relies on this self-serving declaration to argue that Saleeby's conversion claim is duplicative of his breach of contract claim and therefore should be dismissed. (Remco Mem. at 5, 7-11)[5]

First, Remco cannot rely on defenses on a CPLR 3211 motion. *See*, *e.g.*, *Wilt v. Brunswick Plaza, LLC*, 281 A.D.2d 840, 841 (3d Dep't 2001) (defendant's asserted "defenses" immaterial to CPLR 3211(a)(7) motion). Second, Remco is just plain wrong: Plaintiff's conversion claim is based on duties owed, and wrongs inflicted, by Remco that are separate from any contractual considerations.

Indeed, "[i]t is well settled that the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself." *Mandelblatt v. Devon Stores, Inc.*, 132 A.D.2d 162, 167-168 (1st Dep't 1987); *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 55 (1st Dep't 1988). As the First Department held in *Apple Records*, such an extra-contractual duty arises from the "legal duty which is due from every man to his fellow,

[5] Remco does not, because it cannot, argue that Plaintiff has failed to allege facts sufficient as to each of the elements of a conversion claim. "Conversion is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights." *Lemle v. Lemle*, 92 A.D.3d 494, 497 (1st Dep't 2012) (citing *Thyroff v. Nationwide Mut. Ins. Co*, 8 N.Y.3d 283, 288-289 (2007). Saleeby adequately pled conversion here. Specifically, Saleeby alleged that Remco, without authority, took and exercised ownership over his Class B Membership Interest, to which he had an irrefutable possessory right, and used it for its own benefit. (Cmplt. ¶¶ 1-6, 23-40)

to respect his rights of property and person, and refrain from invading them by force or fraud" *Id.* (citations omitted).

The Operating Agreement did not create the Class B Membership Interest; instead, it reaffirmed Saleeby's ownership of that Membership Interest and provided a limited avenue for Remco to purchase the Class B Membership Interest immediately after Saleeby's termination. Remco failed to exercise that limited right, because it did not serve their purpose of defeating Saleeby's unemployment benefits claim. Indeed, Remco and the other Defendants' seizure of Saleeby's Class B Membership Interest – outside the terms of the Operating Agreement, unauthorized and in blatant derivation of Saleeby's property rights – was exactly the kind of violation of another's property rights to which the First Department was referring in *Apple Records. See also Wildenstein v. 5H&Co., Inc.*, 97 A.D.3d 488, 492 (1st Dep't 2012) (conversion claim upheld where "allegations set forth a wrong separate and distinct from the breach of contract claim").

The decision in *Ball v. Cook*, 2012 WL 4841735 (S.D.N.Y. Oct. 9, 2012) is instructive here. In that case, the court found that defendant had sold, without authorization, numerous artworks that plaintiff had entrusted with him, and that plaintiff's demands for the return of the artwork had gone unanswered. The court held:

> The Court also agrees with Plaintiff that his conversion claim is not duplicative of his breach of contract claim. New York courts have long held that a defendant's "extraneous conduct may support an independent tort claim" where he "engages in conduct outside the contract but intended to defeat the contract" itself. *N.Y. Univ. v. Cont'l Ins. Co.*, 87 N.Y.2d 308, 316 (1995). Indeed, where:
>
> > the same conduct which constitutes a breach of a contractual obligation ... constitute[s] the breach of a duty arising out of the contract relationship which is independent of the contract itself[,] . . . a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract.

> *Hamlet at Willow Creek Dev. Co., LLC v. Ne. Land Dev. Corp.*, [64 A.D.3d 85,] 878 N.Y.S.2d 97, 117–18 (App.Div.2009) (citations and internal quotation marks omitted) (finding that a claim for conversion was not duplicative of a breach of contract claim because the two causes of action "rest[ed] on separate duties owed").

Id. at *7.[6]

Indeed, as the Court of Appeals has held, Remco's willful conversion of Saleeby's Class B Membership Interest *deprives defendants of the protections they might seek under any contractual provisions. I.C.C. Metals, Inc. v. Mun. Warehouse Co.*, 50 N.Y.2d 657, 663-665

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[6] The decision in *Hamlet at Willow,* 64 A.D.3d 85, is also instructive. In that action, plaintiff, a developer, contracted with defendant for, among other things, the removal of soil from a development site. Although the contract expressly stated that defendant could not "over-excavate," the Second Department found that defendant had committed an extra-contractual wrong when it removed excess soil from the site:

> Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights . . . Here, the excavation agreement required that Northeast haul away "all excess material pursuant to the approved plan," and provided that Northeast "shall not over excavate." The approved plan established that the extent of the excavation and removal would be "1.65 million cubic yards." The excavation agreement thus does more than establish Northeast's contractual duty to refrain from over-excavating. It not only gives rise to a breach of contract claim to the extent that Northeast has done so but, in addition, it defines Northeast's rights in the excavated material as being limited to the amount of excavation provided for in the approved plan. As a result, Northeast has no rights in any material taken in excess of those limitations and, consequently, it is subject to a conversion claim, based upon its alleged unauthorized assumption of the right of ownership with respect to that material. Since the two causes of action thus rest on separate duties owed by Northeast to The Hamlet, they are not duplicative.

Id. at 113 (citations omitted). Here, the Operating Agreement defined each Member's rights in the interests of Remco, as a limited liability company, and Defendants' unauthorized assumption of the right of ownership to Saleeby's Class B Membership Interest was a violation of a duty separate from any set forth in that Agreement. Accordingly, Saleeby's conversion cause of action should be sustained.

(1980) (where defendant-warehouse converted bailed property, it was no longer entitled to rely upon a limitation of liability provision in the agreement of storage). Although Remco engages in a futile effort to justify, as "good faith," a zero value for a 7.5 percent interest in a $30 million company under the terms of the Operating Agreement (Remco Mem. at 8-11), the protection of those terms – whatever they may be – is no longer available to it.

Here, Remco acted just as the defendant in *Ball*: Plaintiff entrusted Remco with the preservation and maintenance of a significant part of his employment compensation, his Class B Membership Interest. After Remco had successfully defeated his unemployment claim, Remco and the other Defendants intentionally and maliciously stripped him of that Class B Membership Interest, violating that trust obligation. Indeed, Remco stripped its own former employee, Saleeby, of earned compensation; in New York, "there is a long-standing policy against forfeiture of earned wages," *Gruber v. J.W.E. Silk, Inc.*, 52 A.D.3d 339, 340 (1st Dep't 2008), and depriving Saleeby of his Class B Membership Interest was a separate and independent violation of New York's labor laws. *See Ryan v. Kellogg Partners Institutional Servs*., 19 N.Y.3d 1, 16 (2012) (plaintiff's bonus was "earned" and "vested before he left his job[;]" accordingly, "its payment was [therefore] guaranteed and non-discretionary as a term and condition of his employment") (citation omitted); *Giuntoli v. Garvin Guybutler Corp.,* 726 F. Supp. 494, 509 (S.D.N.Y. 1989) ("[B]onus payments, already due and vested ... fall within the definition of wages in [Labor Law § 190"]). Saleeby has pleaded a viable conversion claim.

II. Should Discovery Reveal An Actual Attempt To Redeem Saleeby's Shares Under The Operating Agreement, Remco Is Liable Under Plaintiff's Breach of Contract Claim

Remco begins its arguments against Plaintiff's breach of contract cause of action by contending that Saleeby's Class B Membership Interest was legitimately redeemed under the

terms of the Operating Agreement. Of course, Remco submits nothing to substantiate this contention,[7] the allegations of the Complaint are to the contrary, and, as noted, it is axiomatic that Defendants cannot assume a set of facts as the basis for their CPLR 3211 motion. (*See supra* p. 10)

Nonetheless, should discovery somehow demonstrate that an actual effort was made to redeem Saleeby's Class B Membership Interest under operative contractual terms – a possible but very unlikely scenario at this point – Remco is clearly liable for breach of contract.

To state a breach of contract cause of action, a plaintiff need only allege: "(1) the existence of a valid contract; (2) non-performance by the defendant; (3) performance by the plaintiff; and (4) damage to the plaintiff as a result of defendant's non-performance." *First Games Pub. Network, Inc. v. Afonin*, 2011 WL 4357673, at *3 (Sup. Ct. N.Y. Cnty. Aug. 12, 2011) (Bransten, J.) (citation omitted).

Saleeby clearly meets all of these criteria in his Complaint. Under Section 7 of the Employment Agreement, Saleeby forfeited his Class B Membership Interest only if: (a) he voluntarily terminated his employment with Remco, or (b) he was terminated for "cause." Neither of these events ever occurred. Defendants had 60 days after terminating Saleeby to repurchase the Class B Membership Interest for a sum determined in "good faith" – and failed to do so. (Cmplt. ¶¶ 21, 26) Defendants stripped Saleeby of the Class B Membership for a bad faith amount, *nothing*. The Complaint clearly alleges that Saleeby performed his obligations

[7] It should be noted that as part of this supposed "redemption," Remco valued 7.5 percent of a $30 million company at, conveniently, the price of zero and provided no notice whatsoever to Saleeby of the valuation or redemption. (Cmplt. ¶¶ 4, 15, 24-25)

under the Operating Agreement and the Employment Agreement, and that Saleeby was damaged by Defendants' conduct. (Cmplt. ¶¶ 4, 6, 15, 17-18, 26, 30-34)

Amazingly, Remco asks this Court to nullify the 60 day period, and simply accept its unfounded representation – made on a CPLR 3211 motion – that it acted properly under the terms of the Operating Agreement. Indeed, as to the 60 day period, it contends that Saleeby's employment was in "dispute." (Remco Mem. at 7-11) This is an insulting and blatant misrepresentation. As the Complaint alleges – allegations which are deemed true on Remco's CPLR 3211 motion – Saleeby was terminated in February 2012, and the only things in "dispute" were the terms of his severance and whether he would receive unemployment benefits. (Cmplt. ¶¶ 23-29 and Exh. C) In any event, "[t]here is no requirement that a complaint anticipate and overcome every defense that might be raised in opposition to a cause of action" in order to survive a motion to dismiss. *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Mgmt. Inc.*, 80 A.D.3d 293, 305 (1st Dep't 2010) (citation and quotations omitted); *Gordon v. Credno*, 102 A.D.3d 584, 585 (1st Dep't 2013) (same).

Remco's next contention – that Saleeby somehow does not cite to or describe the specific contractual provision that were breached – is incredulous. The Complaint clearly cites to, describes and sets forth breaches of the Employment and Operating Agreements. (Cmplt. ¶¶ 13-34) Defendants seem to imply that these allegations needed to be specifically re-alleged in the "Second Cause of Action" section of the Complaint. Remco cites no authority for this preposterous contention, and Paragraph 41 of the Complaint incorporates all of the allegations previously set forth – including the Complaint's discussion of relevant and breached contractual provisions. *See also Shilkoff, Inc. v. 885 Third Ave. Corp.*, 299 A.D.2d 253, 254 (1st Dep't 2002) (defendant's "contention that the breach of contract cause of action is insufficiently

pleaded would hold plaintiff to particularity in a contract pleading that is not required" by the CPLR); *CIFG Assur. N. Am., Inc. v. Bank of Am., N.A.*, 2013 WL 5380385, at *7 (Sup. Ct. N.Y. Cnty. Sept. 23, 2013) (Ramos, J.) ("Under CPLR 3013, a party asserting a claim for breach of contract need only provide notice of the transactions or occurrences underlying the claim. Particular[it]y in a contract action is not required") (citation omitted); *MBIA Ins. Corp. v. Credit Suisse Secs. (USA) LLC*, 32 Misc. 3d 758, 778 (Sup. Ct. N.Y. Cnty. 2011) (Kornreich, J.) (same).

III. Given Defendants' Concessions, Plaintiff's Corporate Dissolution Claim is Moot

In light of the First Department's recent decision in *Raharney Capital, LLC*, 25 N.Y.S.3d at 217, any corporate dissolution claim related to this action would need to be refiled in the State of Delaware. In any event, Remco's concession that it has taken the Class B Membership Interest from Saleeby renders this claim moot, and Plaintiff agrees that it should be dismissed without prejudice.

IV. Leave To Replead Should Be Granted If The Court Finds Any Pleading Deficiencies

If the Court determines that any of the Complaint's claims are insufficiently pleaded against Remco, Plaintiff should be granted leave to replead. CPLR 3025(b).

CONCLUSION

Based on the foregoing, Remco's motion to dismiss the Complaint should be denied as to Plaintiff's conversion and breach of contract causes of action.

Dated: New York, New York
April 28, 2016

Respectfully submitted,

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