SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION

DEBORA WARNER, individually and derivatively as a member on behalf of Mile High Run Club, LLC, Plaintiff,	:	Index No.: 654714/2018
	:	Action filed: September 21, 2018
– against –	:	Motion #002
WILLIAM HEATH, DAVID KUZMANICH, KIM TABET, ROBERT NUELL, DAVID ROBINSON, and DOES 1-10. Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Plaintiff Debora Warner ("Plaintiff") respectfully submits this Memorandum of Law in opposition to Defendants William Heath, Kim Tabet, Robert Nuell, David Kuzmanich and David Robinson's ("Defendants") Motion to Dismiss pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7) ("Motion") the Second Amended Complaint ("SAC"). For the reasons set forth below, Defendants' Motion should be denied in its entirety.

ARGUMENT

Defendants' entire Motion is based on conclusory arguments that Plaintiff's complaint is insufficient, and ignores the actual and detailed factual allegations in Plaintiff's complaint. Such conclusory arguments are insufficient as a matter of law to support dismissal of any claim. The claims presented in Plaintiff's complaint are straightforward and more than sufficiently stated under the CPLR.

I. Procedural Matters.

A. Defendant Heath's Affidavit And Exhibits B-I Should Be Stricken Or Disregarded.

"Under CPLR 3211(a)(1), a dismissal is warranted only if the 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). Affidavits and alleged evidence by a defendant 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. CPLR § 3211; *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635 (1976). Such conversion would be inappropriate here, because the Defendants have obtained a discovery stay and refused to provide Plaintiff any discovery, not even the books and records this Court ordered them to provide. Having refused to allow discovery to begin, Defendants are not permitted to introduce self-serving documents in support of the Motion. Accordingly, the Court should disregard or strike both the Heath

Affidavit filed at Dkt. 57 and its Exhibits B-I. The Court may properly consider the Second Amended Operating Agreement between Plaintiff and the Defendants ("OA") submitted by Heath as Exhibit A (Dkt. 58), solely to the extent its terms establish the rights of the parties.

B. Defendants' Motion Fails To Identify Any Basis for Dismissing the Complaint Under Section 3211(a)(1) and (3).

Defendants' request dismissal of unspecified claims pursuant to CPLR § 3211(a)(1) and (3), Opp. at 1-2, but fail to provide any argument explaining why dismissal on those grounds would be warranted. Because no explanation is provided for seeking dismissal on those grounds, what remains of Defendants' Motion is their request to dismiss each claim for failure to state a claim under Section 3211(a)(7), which is addressed below.

II. Defendants' Abstract Arguments About Derivative Claims and Business Judgment Are Insufficient As a Matter of Law To Support Dismissal of Any Claim.

Defendants' argue that Counts II-III, VI-VII, and X should be dismissed "for lack of standing" because the claims belong to Mile High Run Club LLC ("Mile-High" or "MHRC"), not to Plaintiffs. Opp. at 3-4. In support, they provide only conclusory arguments, which are insufficient as a matter of law to support dismissal of any claim. Plaintiff is not required to guess Defendants' argument, nor is she required to disprove an argument that Defendants cannot articulate. Defendants' statement that the "SAC makes clear" Plaintiff "could not prevail…without first showing an injury to MHRC" is also unexplained, as well as unfounded. Their request for dismissal of any claim based solely on these conclusory allegations should be rejected.

Defendants' generic arguments about the business judgment are similarly divorced from any claim actually in Plaintiff's SAC; they appear presented more as gratuitous *ad hominem* attacks, rather than in support of their request for dismissal of any particular claim. Opp. at 4-5. Without knowing which claims Defendants believe are barred by the business judgment and

why, it is impossible to present a response. Moreover, even if the business judgment had any bearing to this proceeding, Defendants' recitation of the business judgment rule is wrong, as is their characterization of the SAC. For instance, Defendants contend that Plaintiff has the "burden to plead facts sufficient to overcome the deference to be accorded to the Managers' business judgment" in respect of unspecified claims. Opp. at 5 (citing *Jones v. Surrey Coop. Apts., Inc.*, 263 A.D.2d 33, 36 (1st Dep't 1999)). But *Jones* holds nothing of the sort. *Jones* affirmed the grant of a summary judgment, not dismissal at the pleading stage. *Id.* The *Jones* court found that plaintiff in that case failed to meet her burden to prove that the board breached its fiduciary duty or acted in bad faith. *Id.* at 37. The other authorities Defendants cite (Opp. at 5) are irrelevant to any issue before this Court.

III. Defendants' Request that Plaintiff "Establish" Her Right to Judicial Dissolution or Else Face Dismissal Is Contrary to Section 3211(a)(7) Standards and Unfounded.

Defendants' request for dismissal of Plaintiff's claim for judicial dissolution in Count I is based solely on their assertion that Plaintiff is not permitted to simply "plead" facts supporting her claim for dissolution under LLC Law § 702, but is instead required to "establish" her claim in response to their Motion. Opp. at 6. This contention is wrong. It is directly contrary to CPLR § 3211, which is the only legal basis for Defendants' Motion. Nothing in CPLR § 3211 or the case law interpreting it requires Plaintiff to "establish" her claim in response to a motion to dismiss. CPLR § 3211; *Leon*, 84 N.Y.2d at 87-88. Defendants' reliance on some cases involving "petitions" for dissolution brought as special proceedings, which follow different procedural rules, is inapposite here. Plaintiff has brought her claim for judicial dissolution by civil "action," not special proceeding.[1] CPLR § 103. Nothing in Section 702 of the LLC Law, or in any other

[1] The cases on which Defendants rely (Opp. at 6-8) include special proceedings file on petitions, or civil actions at the summary judgment stage; those cases are also factually different. For instance, *In re Matter of 1545 Ocean Ave., LLC*, 72 A.D.3d 121 (2nd Dep't 2010), did not involve a Rule 3211 dismissal. It involved a special proceeding filed

portion of the LLC Law requires or even authorizes a claim for judicial dissolution to be brought as a "special proceeding." The CPLR is clear that unless such authorization exists "all civil judicial proceedings shall be prosecuted in the form of an action." CPLR § 103(b). Accordingly, Plaintiff is rightfully prosecuting her claim for judicial dissolution in the form of a civil action, and she is not required to "establish" her claim as if this were a "special proceeding," in order to defeat Defendants' Motion under CPLR § 3211.[2]

Plaintiff has more than sufficiently plead in excruciating detail facts sufficient to show she has a valid claim for judicial dissolution under LLC Law § 702, as interpreted by New York law. *See, e.g.,* SAC at ¶¶22, 41, 115-116, 134-161. Defendants do not contend that her pleading is insufficient. Moreover, on this Motion, Plaintiff's "pleading is to be afforded a liberal construction" and this Court "accept[s] the facts alleged in the complaint as true," and must "accord" Plaintiff "the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon*, 84 N.Y.2d at 87-88. Plaintiff's complaint sets forth in detail why "it is not reasonably practicable to carry on the business in conformity with the … operating agreement" of MHRC as interpreted by New York law, including because continuing MHRC is financially unfeasible, as MHRC is insolvent. *See, e.g.,*

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by petition where the sole ground for dissolution cited was a "deadlock between the managing members." *Id.* at 124. Petitioner had made "no allegation of fraud or frustration of purpose." *Id.* In their "answer" to the "petition" the defendants "set forth their claim that they did business in accordance with the operating agreement" and there was no dissension regarding the operation of the business, and that petitioner voluntarily resigned from being a managing member. *Id.* Similarly, *Artigas v. Renewals Arts Realty Corp.*, 22 A.D.3d 327 (1st Dep't 2005), (Opp. at 9), involved a "petition" presented as a request to dissolve a "corporation" instead of an LLC; the court dismissed because "[t]he petition did not plead the requisite grounds for dissolution of a limited liability company." *Id. In re Arrow Inves. Advisors LLC*, 2009 WL 1101682, *2 (Del. Ch. 2009) is to the same effect. The Chancery court held the petition lacked "any factual support" for its dissolution claim, and instead made allegations of breach of contract and fiduciary duty for which a "more appropriate and proportional relief [wa]s available" that needed to be pursued through "arbitration." *Id. Widewaters Herkimer Co. v. Aiello*, 28 A.D.3d 1107 (4th Dep't 2006), (Opp. at 8), involved a motion for summary judgment, not a Rule 3211 motion, and was also factually different.

[2] Indeed, in *Barone v. Sowers*, 128 A.D.3d 484 (1st Dep't 2015) (Opp. at 6) the court affirmed dismissal of a judicial dissolution claim because the complaint contained no allegations supporting a claim for judicial dissolution, not because he failed to "establish" its claim.

SAC at ¶¶22, 41, 115-116, 134-161. Plaintiff has fully stated a sufficient claim for relief under LLC Law § 702. Notably, despite submitting an affidavit, Defendants nowhere deny any of the facts set forth in the SAC in support of Plaintiff's claim for judicial dissolution, and do not and cannot deny that MHRC is insolvent and that carrying on its business is financially unfeasible.

Defendants' mischaracterization of snippets of the SAC, (Opp. at 15-16), while ignoring all of the allegations actually made in support of Plaintiff's claim for judicial dissolution do not make Plaintiff's claim insufficient. For instance, Defendants allege that Plaintiff's allegation that "she has been completely excluded from the business and improperly removed from the Board of Managers" "is unrelated to a dissolution claim" and instead "supports a claim for breach of the Operating Agreement, unrelated to the dissolution standard." Opp. at 6. This analysis is factually and legally wrong. First, the allegation in question is but one of the numerous allegations Plaintiff makes in support of her claim for dissolution. *See, e.g.,* SAC at ¶¶22, 41, 115-116, 134-161. Second, Defendants' own authorities show their legal assertion to be without merit. In *1545 Ocean* the court held that a claim for "the dissolution of a limited liability company… is initially a contract-based analysis." 72 A.D.3d at 128. This makes sense because the statute provides that dissolution is appropriate if "it is not reasonably practicable to carry on the business in conformity with the … operating agreement." LLC Law § 702. Thus, a violation of the operating agreement is absolutely and directly relevant to dissolution. *See 1545 Ocean*, 72 A.D.3d at 129 (finding that there had not been a violation of the operating agreement). Here, among other things, Plaintiff 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. *See, e.g.,* SAC at ¶¶115-116, 134-161. *1545 Ocean*, 72

A.D.3d at 132 (citing with approval *Kirksey v. Grohmann*, 2008 S.D. 76 (S.D. 2008) (holding at summary judgment that were all members of the business were intended to have an equal say in the business, and their relationship had completely broken down, such that only two of the members effectively controlled and had a say in the business, it was no longer reasonably practicable to run the business in conformity with the operating agreement, even though the business was financially feasible). This is not a situation where a plaintiff is seeking dissolution of an LLC for the simple breach of the operating agreement; rather, the issue here is that the material terms of the OA have been ignored, cannot be restored, and it is not reasonably practicable to run the business in conformance with the OA because there has been a complete breakdown between the members of the business. *See, e.g.,* SAC at ¶¶115-116, 134-161. In addition, the business has now become insolvent. SAC at ¶¶22, 41, 115-116, 134-161. Defendants' contention that *Doyle v. Icon LLC*, 103 A.D.3d 440 (1st Dep't 2013) is on point with this case (Opp. at 7) is incorrect. In *Doyle,* unlike in this case, there was no operating agreement and the sole allegation in support of dissolution was exclusion—not any of the recognized grounds for dissolution under LLC Law § 702, *Doyle*, 103 A.D.3d at 440, all of which are stated in Plaintiff's SAC. SAC at ¶¶22, 41, 115-116, 134-161.

In addition, courts have explained that were the "economic purpose of the [LLC] is not met, dissolution is appropriate." *1545 Ocean*, 72 A.D.3d at 130, 132 (citing *PC Tower Ctr., Inc. v Tower Ctr. Dev. Assoc., L.P.*, 1989 Del. Ch. LEXIS 72, *16 (Del. Ch. 1989) (holding after trial that it was "not reasonably practicable" to continue the LLC's business which was operating at a projected annual loss, and whose outstanding debt was far in excess of its value.); *Fisk Ventures, LLC v. Segal*, 2009 Del. Ch. LEXIS 7, at *16-17 (Ch. Jan. 13, 2009) (granting dissolution were company was "in dire financial condition" and "survived up to this point on equity and debt

investments....” had no “further source of funding, and no realistic expectation of additional … infusions of capital.”). Here, there is no dispute that the economic purpose of MHRC is not met, that the company is in dire financial straights, and is insolvent under any definition of that term. SAC at ¶¶22, 41, 115-116, 134-161. Plaintiff has plead more than sufficient facts to show that the economic purpose of MHRC is not being met. Whether Plaintiff will be able to succeed in establishing her right to judicial dissolution after she has the opportunity for discovery is not a question before this Court today on Defendants’ Rule 3211 motion. Indeed, even in the context of a special proceeding, the *1545 Ocean* reversed the dissolution not based on the parties pleadings, but “upon a review of the evidence submitted.” *1545 Ocean*, 72 A.D.3d at 133. Defendants request for dismissal of Count I should be denied.

IV. Defendants’ Request for Dismissal of Count II for Breach of Fiduciary Duty Should Be Denied.

Defendants’ conclusory statement (Opp. at 9) that Plaintiff’s breach of fiduciary duty claim should be dismissed because the allegations Plaintiff makes in her complaint are “all classic derivative claims which assert harm to MHRC, not Warner” is utterly without merit and insufficient as a matter of law to support dismissal. Defendants have the burden to establish why they are entitled to dismissal—simply claiming that certain allegations are “classic” derivative claims is insufficient to meet that burden. Plaintiff has more than sufficiently plead how she was personally harmed by the Defendants’ breaches of fiduciary duty. As Defendants’ own authorities establish, courts have long rejected that “an action cannot be direct … unless the injury is separate and distinct from that suffered by other stockholders.” *Tooley*, 845 A.2d at 1039. Plaintiff 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. *E.g.,* SAC at ¶¶133, 156, 162-195.

Defendants also 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. Opp. at 10. Section 3016(b) applies to claims for fraud, not to claims for breach of fiduciary duty.[3] CPLR § 3016(b). Defendants do not contend that Plaintiff's claim for breach of fiduciary duty is a claim for fraud or based on a claim for fraud. In fact, Defendants do not address any portion of Plaintiff's claim for breach of fiduciary duty, other than to make yet another conclusory statement that the "SAC falls far short of this standard." Opp. at 10. Plaintiff has plead her breach of fiduciary duty claim in excruciating detail, which is more than sufficient to meet the pleading standard of the CPLR, even if this Court were to apply Section 3016(b). Defendants' contention that Plaintiff has impermissibly employed "group pleading" is not a ground for dismissal. *See, e.g., Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 491-92 (2008). Plaintiff's complaint alleges in more than sufficient detail the Defendants' breaches of fiduciary duty to the Plaintiff, which involved joint conduct. *Id.*

Finally, Defendants' contention that Plaintiff has failed to plead specific fiduciary duty owed her, and instead predicates her fiduciary duty claims on breaches of the OA is frivolous. Plaintiff's claim for breach of fiduciary duty arises out of their relationship to Plaintiff as co-members in MHRC. SAC at ¶¶162-195. The law is clear that "[a]bsent provisions in an LLC agreement 'explicitly' disclaiming the application of a fiduciary duty, LLC members ***owe each other*** 'the traditional fiduciary duties that directors a corporation." *Wallkill Med. Dev., LLC v. Catskill Orange Orthopaedics, P.C.*, 2013 N.Y. Misc. LEXIS 6977, *19 (S. Ct. July 25, 2013) (citing *Meinhard v. Salmon*, 249 N.Y. 458, 463-64 (1928) ("Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty."). *Salm v. Feldstein*, 20 A.D.3d 469, 470 (2nd Dep't 2005) (same); *Berman v. Sugo LLC*, 580 F. Supp. 2d

[3] Those cases that apply CPLR 3016 to breach of fiduciary duty claims do so where the breach is based on fraud.

191, 204 (S.D.N.Y. 2008) ("Federal and state courts have recognized that members of a limited liability company, like partners in a partnership, owe a fiduciary duty of loyalty to fellow members." (listing cases)). *See also, e.g., DeBenedictis v. Malta*, 140 A.D.3d 438, 438 (1st Dep't 2016) ("defendant, who was a co-managing member of various LLCs with plaintiff … failed to establish a lack of fiduciary duty as a matter of law.")

Defendants also fail to explain how Plaintiff's claim for breach of fiduciary duty allegedly "sound[s] in breach of contract," and even if true (it is now), how that allegedly bars Plaintiff's claim. Opp. at 11. *See Mandelblatt v. Devon*, 132 A.D.2d 162, 167-68 (1st Dep't 1987) ("It 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."). Plaintiff has no way to respond to Defendants' conclusory arguments divorced from the actual allegations in the SAC. Defendants fail to identify a single allegation that gives rise to a breach of contract claim instead of a breach of fiduciary duty claim, and cite authorities that have no bearing on the facts here. *Id.* Defendants' request for dismissal of Count II should be denied.

V. Defendants' Request For Dismissal of Count III For Aiding and Abetting Should Be Denied.

Defendants' conclusory arguments seeking dismissal of Count III, (Opp. at 11-12), are insufficient as a matter of law to dismiss Plaintiff's claim for aiding and abetting breach of fiduciary duty. First, Defendants nowhere explain why or how Count III is a "derivative" claim or why it should be dismissed under CPLR 3016(b). Neither is true. Plaintiff's claim for aiding and abetting is a direct claim and is more than sufficiently detailed to put the Defendants on notice of the nature of her claim. Second, Defendants' allegation (Opp. at 11-2) that this claim "fails because the SAC does not sufficiently allege an underlying breach of fiduciary duty" is

based on a false premise. The SAC provides more than sufficient detail in support of Plaintiff's claim for aiding and abetting. SAC at ¶¶162-195. Defendants do not identify any element of Plaintiff's cause of action that was insufficiently pleaded. Their request to dismiss Count III should be denied.

VI. Defendants' Request For Dismissal of Count IV Seeking Rescission of the OA Should Be Denied.

Plaintiff's seeks rescission of the OA and the IP Agreement in Count IV for failure of consideration. SAC at ¶¶211, 212, 213, 215, 216. Defendants do not dispute, and cannot dispute on this Motion, that they took Warner's equity and IP under the OA and IP Agreements without consideration. Accordingly, for this reason alone, there is no basis to dismiss Count IV.

Defendants' only basis for dismissal of Count IV relies on a straw man. Opp. at 12-15. They claim that Count IV is based on fraudulent inducement and is not pleaded with specificity. *Id.* Neither is true. As Count IV makes clear, Plaintiff's request for rescission is based on lack of "consideration," SAC at ¶216, a ground, which Defendants do not dispute. Fraudulent inducement is only a secondary ground. *See* SAC at ¶217. Plaintiff has identified with specificity the misrepresentations Defendants made to her. SAC at ¶¶209, 210, 211. Notably, despite submitting an affidavit, Defendants nowhere deny Plaintiff's allegations. Even if the Court were to find the fraudulent inducement allegations insufficient, there is no basis to dismiss Count IV on a Rule 3211 motion, because Defendants have not denied that there was a failure of consideration entitling Plaintiff to rescission, that such failure of consideration has been sufficiently alleged, and that if proven will entitle Plaintiff to rescission.

VII. Plaintiff's Claim For Rescission of the Contribution Agreement in Count V Is Validly Stated.

Defendants' request to dismiss Count V is frivolous. Defendants do not deny that Warner received no consideration in exchange for entering into the Contribution Agreement, and that

while they asked her to agree to the Contribution Agreement, they concealed from her that they were planning to get rid of her. SAC at ¶224. Defendants also do not, and cannot, deny that they never intended to fund and did not fund the guarantee accounts, a material term of the Contribution Agreement. SAC at ¶220-222. Defendants' attempt to keep Plaintiff on the hook as a guarantor for all the debts they incurred, while they refused to comply with a material term of the agreement should be rejected. Plaintiff's claim for rescission more than sufficiently pleads two separate grounds for rescission- lack of consideration and fraudulent inducement. SAC at ¶¶223, 224. There is no basis to dismiss it as a matter of law.

Defendants' argument that rescission should be "invoked" only when there is lacking complete and adequate remedy at law" is also meritless. Opp. at 15. It is undisputed that MHRC is insolvent under any definition of that term—MHRC cannot currently pay its creditors and its value is less than its debt. SAC at ¶¶22, 41, 116. Defendants do not contend in their Opposition that the guarantee accounts have been funded, can be funded, and ever will be funded. Given Mile-High's dire financial straights, no adequate remedy at law exists here, even if one had to be shown (it does not). Defendants' request to dismiss Count V should be denied. There can be little question that the Guarantee Agreement should be rescinded.

VIII. There is No Basis to Dismiss Any of Plaintiff's Claims For Breach of Contract.

A. Counts VI and VII For Breach of The Operating Agreement Are Well Founded and Not Subject to Dismissal.

Defendants' only argument in support of dismissal of Count VI—Plaintiff's breach of contract claim arising out of the Defendants' violations of Sections 3 and 10 of the OA—is a single statement that the claim should be dismissed because it is derivative. Opp. at 17. This is insufficient as a matter of law to support a Rule 3211 motion. Defendants do not explain how Plaintiff's personal breach of contract claim against the Defendants could be derivative. It is not.

The OA grants rights to individual members, such as Plaintiff, the original founder and Co-Founding Member of Mile-High under the OA. *NAF Holdings, LLC v. Li & Fung (Trading) Ltd.*, 118 A.3d 175, 179 (Del. 2015) ("It is a fundamental principle of contract law that the parties to a contract are bound by its term, and have a corresponding right to enforce them.") (rejecting proposition that *Tooley*, on which Defendants rely in parts of their Opposition, applies beyond breach of fiduciary duty claims). Plaintiff's claim is for breach of terms of the OA, to which she is a party; Plaintiff is enforcing her personal contractual rights, and is unquestionably permitted to do so, because she was personally damaged by the breaches at issue. SAC at 46-48. This is a classic direct, ***not*** derivative claim. *NAF Holdings,* 18 A.3d at 179 ("a party to a … contract may sue to enforce its contractual rights directly, without proceeding by way of a derivative action."). The contention that Plaintiff, a party to the contract—the OA—with the Defendants can only sue them for their breaches of contract derivatively cannot be taken seriously. The Defendants' separate contention that Plaintiff's claim in Count VI should be dismissed as allegedly duplicative of Plaintiff's breach of fiduciary duty claim is also unexplained and should be disregarded by the Court. Opp. at 17. It is unfounded.

For the same reasons, there is no basis to dismiss Count VII resulting from the Defendants' breach of the undertaking requirement set forth in the OA. Opp. at 17-19. Defendants' argument in support of dismissal seeks to dispute the facts alleged in the SAC, which is inappropriate on a Rule 3211 motion. Defendants' allegation that they provided an undertaking is also unfounded. What Defendants filed at Dkt. 33 is a worthless piece of paper, not the undertaking required under New York law. The term "undertaking" is defined in New York law at CPLR § 2501. It requires that whenever a contract provides for an "undertaking" the "undertaking" be given in accordance with its provisions. CPLR §§2502-2503. Despite repeated

requests for compliance, Defendants have ignored their obligation to provide the required undertaking. SAC ¶244. Defendants have been using money for their own personal expenses, without the requisite undertaking, exposing Plaintiff to further personal liability. SAC ¶¶247. Plaintiff is entitled to seek to enjoin these violations of the OA; Defendants' request to dismiss Count VI should be denied.

B. Defendants' Request to Dismiss Count VIII, For Breach of The OA's Provisions Prohibiting Plaintiff's Removal From the Board Without Cause, Should Be Denied.

Defendants' request to dismiss Count VIII seeking relief for the Defendants' breaches of Section 3 of the OA is unfounded. Opp. at 19-20. Section 3 of the OA sets forth specific contractual terms applicable to the five "founding members," which include Plaintiff. OA (Dkt. 58) at § 3. Section 3 expressly provides that Plaintiff, as a "Founding Member," could be removed from the Mile-High board, or from any other role, *only* for "cause." OA at § 3(b). It states: "***Removal For Cause of Founding Members.*** The Board…may remove…from membership in the …Board, …as a Manager, as an officer, or as an agent …any Founding Member for Cause if such Member meets any of the conditions for removal for Cause." *Id.* It is undisputed that in violation of this provision, on December 21, 2018, Defendants improperly removed Plaintiff from the Mile-High Board without any cause. SAC at ¶¶43, 127-133, 138-139, 252-259. Defendants' arguments that this provision is superseded by another provision governing the removal of managers is incorrect. Opp. at 19. The provision Defendants point to has nothing to do with Plaintiff's contractual right as a Founding Member to be on the Board of the company she founded and whose IP she owns. Indeed, Section 4(a)(i) of the OA expressly provides that the "Board will be comprised of ***five managers***…***each of which must be a Founding Member***." OA at § 4(a)(i) (emphasis added). The provisions of Section 4 for the removal of managers do not alter the Defendants' obligations under Section 3 of the OA to

Founding Members. The protection against removal of a Founding Member from Mile-High's Board without cause was an essential term of the OA. SAC at ¶¶43, 127-133, 138-139, 252-259. If a Founding Member could be removed by the others without cause, the Founding Member would be left without any protection whatsoever and could be removed arbitrarily, as it has happened here. There is no basis for dismissing Plaintiff's claim for breach of the OA in Count VIII.

IX. Plaintiff's Defamation Claim in Count IX Is Validly Stated.

Defendant Heath ("Heath") argues that Plaintiff's defamation claim against him must be dismissed because "truth is an absolute defense to defamation." Opp. at 20, n.4. While Heath is free to assert such a defense, his purported denials at this stage are not a basis for a Rule 3211 dismissal, because it improperly seeks to dispute facts alleged in the complaint. *See, e.g., Matovicik v. Times Beacon Record Newspapers*, 46 A.D.3 636, 638 (2d Dep't 2007); *Berger v. Temple Beth-El of Great Neck*, 303 A.D.2d 346, 347 (2d Dep't 2003).

The other grounds Heath asserts in support of dismissal of Count IX are also without merit, and simply repeat rote arguments without any connection to Plaintiff's actual complaint. First, Heath argues that the defamation claim has been insufficiently plead. Opp. at 21-22. This allegation is disproven both by a simple review of the complaint, SAC at ¶¶260-284, as well as by Defendant's own argument that "everything stated about Warner, in any of Heath's communications is demonstrably true." Opp. at 20, n.4. If the SAC insufficiently stated a claim for defamation, Heath would have been unable to argue that everything he said about Plaintiff is allegedly "demonstrably true." His argument is an admission that the SAC more than sufficiently states a claim. Whether Heath will be able to establish at trial that the false and defamatory statements he made about Plaintiff are true is an issue for a different day, not a basis for a Rule 3211 dismissal. *Berger*, 303 A.D.2d at 347. Heath's assertions that Plaintiff is required to

provide evidentiary support in response to this Motion, Opp. at 22-23, is contrary to law.

Second, Heath contends that the letter sent on December 21, 2018 is "non-actionable," Opp. at 22-23, but provides no explanation for this allegation. Moreover, in his improperly submitted affidavit, Heath does not deny to be the one who caused the false and defamatory publication to be made to Plaintiff's new employer. Dkt. 58. Even if he were to submit such denial with a reply, at best it would be a question of fact, not a basis to dismiss Plaintiff's claim. Heath caused the false statements to be made to Plaintiff's new employer without any valid reason and for clearly malicious purposes. Plaintiff is entitled to prove her claim, and Heath request for dismissal should be rejected.

Third, Heath's allegations that his false and defamatory statements about Plaintiff in email published to investors are "non-actionable opinion" is contrary to his own admissions in the Motion. Heath has already admitted that the statements at issue here are not opinion, but facts, because he claims he can show that "everything" he "stated about Warner…is demonstrably true." Opp. at 20, n.4. Opinion cannot be proven or disproven as true and false. The statements at issue here are not opinion, but false statements of fact impugning Plaintiff in her profession.

Fourth, Heath's allegation that his statements are protected by "privilege" are both unfounded and insufficient to seek dismissal on a Rule 3211 motion. Opp. at 24-25. Heath nowhere claims that the person to whom he published the false and defamatory statements had any interest, duty or reason to receive them. None of the recipients of the false and defamatory statements (investors and Plaintiff's new employer, as known to date) qualify under any of the allegedly privileged categories Heath identifies. Opp. at 25. In addition, in her complaint, Plaintiff has alleged that Heath made the false and defamatory statements about her with "actual malice." *See, e.g.,* SAC at ¶¶217-276. Thus, even if a privilege existed for any of the

communications (it does not), it can be overcome by a showing of malice. *Colantonio v. Mercy Med. Ctr.*, 115 A.D.3d 902, 903 (2d Dep't 2014). Plaintiff has "no obligation to show evidentiary facts to support [her] allegations of malice on a motion to dismiss pursuant to CPLR 3211(a)(7)." *Id.*

Finally, Heath's contention that Count IX should be dismissed for failure to plead special damages should also be rejected. Plaintiff's defamation claim is based on false and defamatory statements disparaging Plaintiff in her profession, because they malign her competence and fitness for the position she held as Mile-High's CEO. SAC at ¶¶217-276. Accordingly, they are defamatory *per se*. *Pub. Relations Soc'y of Am., Inc. v. Rd. Runner High Speed Online*, 8 Misc. 3d 820, 823 (Sup. Ct. 2005) (statements "maligning" plaintiff "competence and fitness for the positions she holds as … executive director and chief of operation" defamatory per se because they malign plaintiff "in her profession."). "It is well settled that no allegation of special damages is required when the statement complained of is libelous per se." *Id.* (citing cases).

For the foregoing reasons, Heath's request to dismiss Count IX should be rejected in its entirety. To the extent the Court were to find that Plaintiff has insufficiently laid out the false and defamatory statements made about her, or any other aspect of her claim in Count IX, Plaintiff stands ready to amend her complaint and respectfully requests leave to do so.

X. There Is No Basis to Dismiss Plaintiff's Claim for Tortious Interference in Count X.

Defendants' request for dismissal of Count X, setting forth Plaintiff's claim for tortious interference with her prospective business advantage against Defendants Heath and Kuzmanich, should be rejected. It is based solely on an attempt to dispute, through counsel's argument, the facts alleged in the SAC, and other scattershot arguments that have no basis in the law, nor connection to the actual allegations in the SAC.

Defendants' contention that Plaintiff's claim is based on the acquisition of Mile-High and is

therefore derivative is factually and legally meritless. Opp. at 26. Plaintiff alleges in her complaint that she would have entered into an economic relationship with purchaser but for the Defendants' wrongful conduct. SAC at ¶¶285-299. Plaintiff further alleges that as a result of that wrongful conduct she personally lost a substantial sum of money as well as other benefits. *Id.* These allegations are personal to Plaintiff and have nothing to do with any benefit or harm to Mile-High. *Id.* Defendants do not even identified what proposed economic relationship of Mile-High Plaintiff could possibly be seeking to sue on. Opp. at 26. Plaintiff's cause of action is based on her own personal prospective economic relationship, which was wrongfully destroyed by the Defendants. SAC at 55-57. Indeed, in the Heath Affidavit he affirms that on May 15, 2018, he discovered in a document provided to him and others that Plaintiff "had been in side discussions with Xpo about borrowing money from them to own and control the NYC studios herself." Heath Aff. (Dkt. 57) at 5, ¶26. This admission proves the Defendants knew of Plaintiff's prospective economic relationship with a third party, which prospective economic relationship was personal to Plaintiff, and had nothing to do with Mile-High or derivative claims.

Second, Defendants' argument that Plaintiff has "failed to plead that Heath and Kuzmanich engaged in the type of wrongful conduct that would support a claim for tortious interference," Opp. at 27, is untrue. Plaintiff's complaint lays out in substantial detail the intentionally wrongful conduct in which the Heath and Kuzmanich engaged, which was designed to intentionally interfere with Plaintiff's prospective economic relationship. *See* SAC at ¶¶76-89, 110-114, 286-298. Defendants' conclusory argument to the contrary disregards all of the extensive factual allegations made in the complaint in support of Plaintiff's claim. There is no basis whatsoever to dismiss Count X.

XI. Plaintiff Has A Valid Claim for Advancement.

Defendants' arguments in support of dismissal of Count XI, for advancement and ultimately

indemnification, rely solely on distortion and obfuscation, and do not form a proper basis for a Rule 3211 dismissal. Opp at 28-29. Defendants do not deny that they have threatened Plaintiff with various claims and legal action, and even threatened her by writing to her new employer. SAC at ¶¶302, 306. Instead they raise frivolous excuses seeking to justify their refusal to provide Plaintiff the advancement of legal fees she is entitled to defend against the "threatened action, proceeding, or claim," SAC at ¶304-306, and ultimately indemnification, should any claims be actually brought and should she prevail in her defense of the threatened claim. None of their excuses has merit.

Defendants argue that their right to advancement can only be enforced against Mile-High, not them. Opp. at 28. This is circular. The Co-Founding Defendants are all signatories of the OA setting forth Plaintiff's right to advancement; they are also all of the members of the Mile-High Board and the ones who have specifically denied Plaintiff her request for advancement. Plaintiff has contractual right to enforce her right to advancement against the other contracting parties, here the Co-Founding Defendants, who have denied her such right.

Defendants' other arguments that Plaintiff cannot get advancement because she is the one who sued are also meritless. Plaintiff seeks advancement for threats of legal action, claims and proceedings that have been made against her, and requests for payments that have been made on her. SAC at ¶306. Plaintiff is not asking for advancement of fees to prosecute her action against the Defendants, she is asking for advancement of fees to defend herself against the threatened claims, actions and proceeding which the Defendants do not, and cannot on a Rule 3211 Motion deny to have made. Their request for dismissal of Count X should be rejected.

XII. This Court Already Has Found that Plaintiff's Books and Records Is Valid, and Defendants Have Improperly Defied the Court's Order To Provide Plaintiff The Requested Books and Records.

Defendants' request for dismissal of Plaintiff's books and records claim is improper because

the Court already entered several Orders directing the Defendants to provide Plaintiff a detailed list of books and records. These Orders evidence that Plaintiff's books and records claim is well founded, and not subject to dismissal, or else the Court would not have directed the Defendants to provide the requested books and records. Instead of complying with the Court's Orders, Defendants have ignored most of the Court's first Order, and have defied the Court's second Order in its entirety. Instead of producing the requested books and records as they were ordered, Defendants sent an email to Plaintiff claiming they would not produce anything unless Plaintiff paid them costs for the production—a condition not included anywhere in the Court's Order. *See* To date, Defendants have continued to improperly defy the Court's Orders directing them to produce the books and records requested.

In light of this record, there is no valid legal argument for a Rule 3211 dismissal of Plaintiff's request for books and records in Count XII. To the contrary, this Court should enter an Order finding the Defendants in contempt of its prior Orders and directing them to immediately produce to Plaintiff the books and records that were ordered.

XIII. Defendants' Request to Strike Plaintiff's Demand for Punitive Damages Should Be Denied.

Defendants' request that the Court strike from Plaintiff's complaint her demand for punitive damages lacks merit and should be rejected in its entirety. Opp. at 30-32. A motion to strike allegations from a pleading is governed by CPLR § 3024, which requires a party who seeks to strike specific allegations from a pleading to bring such motion ***within 20 days after service of the challenged pleading***, and to meet the standard for striking identified in the Statute. CPLR § 3024.

Defendants' attempt to circumvent the limitations and requirements in CPLR § 3024, by claiming they are filing a motion to strike specific allegations under CPLR 3211 is improper and

should be rejected. CPLR 3211 permits dismissal of claims, not the striking of a demand for "punitive damages" made as a "prayer for relief" for certain claims. None of the authorities Defendants cite supports their request to strike such prayers for damages. Instead, the cases Defendants cite involve dismissal of entire claims. For instance, in *Rose Lee Mfg. Inc. v. Chemical Bank*, 186 A.D.2d 548, 550-51 (2d Dep't 1992), Opp. at 31, the court dismissed the "ninth cause of action seeking to recover punitive damages…***because a demand for punitive damages does not amount to a separate cause of action***." (emphasis added). *Holoness Realty Corp. v. New York Prop. Ins. Underwriting Ass'n*, 75 A.D.2d 569, 570 (1st Dep't 1980) also involved "six causes of action for punitive damages."[4] Plaintiff has not brought any ***separate*** "cause of action" for punitive damages as in *Rose Lee* and *Holoness*. She has properly appended her prayer for relief in customary portions of her complaint; whether she will be entitled to such relief or not is not subject to striking on a Rule 3211 motion, as Defendants request.

Defendants' separate contention that punitive damages are only recoverable where there is a "fraud aimed at the public at large" is irrelevant to any aspect of their Motion, and is also wrong. Opp. at 31-32. That requirement only applies when punitive damages are sought in connection with a breach of contract claim, and in any event is not a basis to strike allegations from a complaint. For instance, in *M.S.R. Associates v. Consolidated Mutual Ins. Co.*, 58 A.D.2d 858, 859 (2d Dep't 1977), on which Defendants rely, Opp. at 31, the court dismissed "a second and separate cause of action" in which "plaintiff seeks punitive damages" because "a demand for punitive damages does not amount to a separate cause of action for pleading purposes." *Id.* *M.S.R.* also explained that the rule for punitive damages sought against insurance companies, as

[4] The other cases Defendants cite, Opp. at 31, are to the same effect or dismiss entire claims, not just requests for punitive damages. *See Tevdorachvili v. Chase Manhattan Bank*, 103 F. Supp. 2d 632, 645 (E.D.N.Y. 2000) (dismissing "claim for punitive damages"); *New York Univ. v. Continental Ins. Co.*, 87 N.Y.2d 308 (1995) (dismissing entire claims, not simply portions within a claim or a prayer for relief praying for punitive damages.)

set forth in *Walker v. Sheldon*, 10 N.Y.2d 401, 405 (1961), another case on which Defendants rely. This case, however, does not involve an insurance company. None of the remaining cases on which Defendants rely support Defendants' request to strike a prayer for punitive damages from a complaint under CPLR 3211. Opp. at 31-32.[5]

XIV. Request for Leave to File A Motion for Leave to Amend.

Contrary to Defendants' representations, the record is clear that this is Defendants' first motion to dismiss. Although Plaintiff has filed prior complaints, only one was amended in response to a pre-motion conference and Defendants never made, in writing or at the conference, any argument identifying deficiencies in Plaintiffs' operative complaint here, the Second Amended Complaint ("SAC"). Instead, during the pre-motion conference only the Court's clerk identified specific issues with Plaintiff's complaint, which Plaintiff believed to have cured. In any event, Defendants are required to make their own written arguments so that Plaintiff can review, evaluate them and provide curative amendments if possible. Accordingly, to the extent the court finds any deficiencies in the SAC, Plaintiff respectfully requests leave to amend her complaint. Plaintiff will be prepared to file a motion for leave to file an amended complaint if necessary.

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CONCLUSION

[5] *Diker v. Cathray Constr. Corp.*, 158 A.D.2d 657, 658 (2d Dep't 1990) involved a motion to file an amended pleading. On appeal the court reversed the lower court's grant of leave to plead count four because "there is no separate cause of action to recover punitive damages." *Maravex Processing & Finishing Corp. v. Allendale Mut. Ins. Co.*, 398 N.Y.S.2d 464, 466 (Sup. Ct. 1977).

For the foregoing reasons this Court should deny Defendants' Motion in its entirety. To the extent the Court grants any portion of it, it should be without prejudice and with leave to Plaintiff to replead any claim that may found to have been insufficiently plead.

CERTIFICATION OF WORD COUNT

I hereby certify that this Opposition includes 7,315 words excluding those portions of the brief which are exempted.

State of New York
County of New York
Sworn before me this 24th day of October 2019 by Debora Warner

Chevalier Jonathan S
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 01CH6362431
Qualified in New York County
Commission Expires Jul. 31, 2021

Respectfully submitted,

By: Debora Warner

Debora Warner
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In propria persona.

Dated: New York, New York
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