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

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DEBORA WARNER, Plaintiff, – against – WILLIAM HEATH, DAVID KUZMANICH, KIM TABET, ROBERT NUELL, DAVID ROBINSON, and DOEs 1-10, Defendants.	:	Index No.: 654714/2018 Hon. Jennifer Schecter, J.S.C. **SECOND AMENDED COMPLAINT** **1. Judicial Dissolution Pursuant to LLC Law § 702 and Enforcement of Warner's Right to Reversion of Mile High's IP;** **2. Breach of Fiduciary Duty;** **3. Aiding and Abetting Breaches of Fiduciary Duty;** **4. Rescission of Operating Agreement and IP Grant Agreement;** **5. Rescission of Contribution Agreement;** **6. Breach of Contract;** **7. Breach of Contract;** **8. Breach of Contract;** **9. Defamation;** **10. Tortious Interference with Prospective Business Advantage;** **11. Indemnification and Advancement;** **12. Books and Records Request**

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New York, New York
January 25, 2019.

Plaintiff Debora Warner, in support of her application for judicial dissolution of Mile High Run Club LLC and for legal damages and equitable relief against Defendants William Heath, Kim Tabet, Robert Nuell, David Robinson ("Co-Founding Members") and David Kuzmanich ("Member"),[1] respectfully alleges as follows, based upon her personal knowledge as to her own acts, and upon information and belief as to all other acts:

FACTUAL ALLEGATIONS COMMON TO ALL COUNTS

1. Warner founded an innovative fitness business that she organized as a limited liability company and called Mile High Run Club, LLC ("Mile High"). Warner gave Defendants equity in Mile High for which they paid no cash, in return for their promises to help her build the business, principally by helping Mile High obtain funding. Instead of helping Warner as promised, Defendants betrayed her by wresting away control of Mile High and forcing her out.

2. Defendants' misuse of the usurped control of Mile High is destroying the value of Warner's equity. They have refused to follow Warner's recommendation to sell Mile High before larger, better-funded competitors siphon away any more clients. Instead they have caused Mile High to borrow to cover its cash flow deficits. Thus, as Mile High's value declines, an increasing percentage of that value belongs to Mile High's debt-holders – a diversion of value from equity to debt. Those debt-holders include various Defendants and their associates.

3. Defendants have further abused their business relationship with Warner by refusing to release her from guarantees of Mile High's debt that Warner agreed to at a time when she effectively controlled whether and how much Mile High would borrow. By causing Mile High's debt load to increase while Warner's guarantees remain in place, Defendants have

[1] The Co-Founding Member Defendants are sometimes referred herein as "Defendants."

substantially increased the likelihood that Warner's guarantees will be called – a development that would be catastrophic for her.

4. This action is effectively a corporate divorce proceeding. Defendants' misconduct has caused an irreconcilable breakdown in the business relationship between Warner and Defendants that requires dissolution of the relationship and an equitable distribution of the value of the sole 'marital asset' (Mile High). Warner requires the Court's intervention to accomplish the divorce and distribution because Mile High's Operating Agreement does not contain "drag-along" or other mechanisms that would allow her to accomplish the separation unaided.

5. Warner is a managing member of Mile High. She owns a greater percentage of Mile High's equity than anyone else — approximately 24%. Warner also is the sole owner of a reversionary right to the core intellectual property used by Mile High. Warner's bundle of rights in Mile High should entitle her to a substantial distribution of value in this corporate divorce.

6. Defendants Tabet, Nuell, Robinson and Heath are named in Mile High's Operating Agreement (along with Warner) as "co-founding members." Mile High's co-founding members are Mile High's only voting members.

7. Defendants fired Warner from her position as CEO of Mile High on July 3, 2018. After that, Warner repeatedly asked Defendants to buy her out at the same price offered by a prospective purchaser in June 2018 (an offer Defendants rejected). If Defendants believed the price offered in June 2018 was inadequate, Warner's offered buy-out price should be a bargain.

8. Since the commencement of this Action Defendants have continued to refuse to pursue a sale of Mile High to allow the corporate divorce and related equitable distribution to be completed. They have refused to make an offer to buy Warner out. At the same time, they have failed to cooperate in Warner's attempt to arrange financial backing for a buyout of Defendants.

9. For instance, at the beginning of 2019, Warner appeared at a meeting with the Defendants with a financial backer and was ready to (a) make an offer to buy out the Defendants, or (b) hear any offer from the Defendants to buy her out. The Defendants stated in clear terms they were not interested in either buying out Warner, or being bought out by Warner and her financial backer. As a result, they promptly walked out of the meeting, refusing to discuss either option. The Defendants' conduct above, was consistent with their counsel's statement on December 6, 2018 that Defendants would regard a buy-out by Warner and her financial backer as a "personal defeat."

10. The deterioration in the relationship between Warner and the Defendants became acute in early 2018. By then it had become clear that despite their promises to Warner, Defendants were unable to raise meaningful venture capital for Mile High through sales of equity. Between January and April 2018, approximately 40 investors were approached, each of whom declined to make an equity investment in Mile High.

11. This venture capital fundraising failure was critical because Mile High had embarked on a capital-intensive expansion, based on Defendants' assurances as to their collective fundraising prowess. Without the promised influx of venture capital funding, that left Mile High in desperate need of cash.

12. Against this background, Warner concluded that Mile High's window of opportunity to develop and expand its niche market was closing quickly. Without capital Mile High would be left vulnerable to larger, better-funded competitors. Warner began exploring a potential sale of Mile High.

13. Warner's efforts produced an offer from an established, well-funded fitness focused company ("Purchaser") to buy Mile High.

14. In June 2018, Purchaser offered to acquire Mile High on terms that would have returned each Mile High member their original investment plus a significant profit. Under Purchaser's offer, each Mile High equity holder would have received a substantial up-front cash payment, plus equity issued by the Purchaser, plus the right to contingent "earn-out" payments over three years. Even without taking into account the upside provided by the earn-out, under the terms of the offer the return to each Mile High equity holder was substantial.

15. Warner believed that Purchaser's offer was a lifeline that should be accepted gratefully. She had become concerned that Mile High's cash investors would lose some or all of their investment. She found the opportunity to get everyone their money back plus a return to be very attractive. Warner shared these views with Defendants.

16. Defendants Heath and Kuzmanich had reason to oppose the Purchaser's offer, because they had crafted a plan by which each of them stood to receive a brokerage or finder's fee of approximately $30,000 if Mile High remained independent and they helped Mile High raise capital (including debt capital). The scheme was unlawful, because neither Heath nor Kuzmanich holds a broker-dealer license.

17. Heath had other reasons to sabotage the Purchaser's offer. As of June 2018 Heath hadn't held a regular job for over 10 years and appeared to be having financial difficulties. By criticizing Warner's support for Purchaser's offer, Heath expanded the rift between Warner and the other Defendants, thereby creating the opportunity to appropriate for himself Warner's position as CEO.

18. Without authority and in contravention of his contractual and fiduciary duties to Warner, on July 3, 2018 Heath fired Warner as Mile High's CEO and anointed himself her successor. Heath's background made him an improbable candidate for that position. He has no

previous experience in the fitness industry and has never served as a CEO. Defendants nonetheless subsequently ratified Heath's coup d'état by signing a purported "written consent" to Heath serving as the CEO of Mile High.

19. Heath together with Kuzmanich persuaded the other Defendants to vote to reject the Purchaser's offer. In doing so Heath made representations regarding Mile High's financial prospects and access to venture capital that he and the other Defendants knew or should have known were false.

20. Heath's new and undeserved CEO position at Mile High allowed him to personally benefit (by receiving a salary and other benefits and potentially in other ways). But Heath wanted more. He sought to force sweeping amendments to Mile High's Operating Agreement that would strip Warner of her intellectual property reversionary interest, control rights, and equity stake in Mile High, all without consideration.

21. During Heath's tenure as CEO, Mile High's operating performance has declined. Fewer clients attend its classes and it nets less profit per client visit because of discounting.

22. Mile High is insolvent. Its operations do not generate enough cash flow to pay its debts as they come due. To continue in operation it must continuously borrow. If Mile High is not sold quickly, its equity will become worthless and it will be owned instead by its creditors.

23. As if to take advantage of Mile High's business and financial difficulties, Defendants have caused Mile High to issue member hundreds of thousands of dollars in promissory notes to themselves and family, on terms unfavorable to Mile High and its equity holders. This has the effect and apparent purpose of transferring value from Warner to themselves.

24. For the foregoing reasons, and those more fully set forth below, Warner brings this action for judicial dissolution, injunctive relief and other legal and equitable remedies against Defendants, jointly and severally, for their breaches of fiduciary duty and fraudulent conduct.

25. The Co-Founding Member Defendants obtained a controlling equity interest in Mile High in return for their promises to help Mile High raise the equity funding it needed to cover operating shortfalls and to expand. Defendants have failed to keep those promises, having raised almost none of the equity capital Mile High needs. Instead Defendants have arranged and continue to seek to arrange for Mile High to borrow funds it cannot repay, by issuing "convertible notes" and procuring $100,000 in alleged "good faith" money from Defendant Kuzmanich (instead of by written agreement, as required by Mile High's Operating Agreement). More recently the Defendants have arranged for the issuance of another promissory note to Defendant Heath, even though Defendant Heath did not give Mile High any money at the time the promissory note was issued or thereafter.

26. Defendants' broken promises have led to a double crisis. First, the convertible notes they arranged for Mile High to issue have become due and payable and Mile High was in default on its obligation to pay because it lacked (and lacks) the funds to pay off the notes. To procure an extension of the maturity date of the notes, Heath procured a purported "written consent," which misstates Heath's authority to extend the maturity date. In addition, Heath misrepresented to the note holders his role, his authorization to seek an extension of the notes, and the circumstances in which Mile High finds itself. Specifically, Mile High's current circumstances, including Warner's request for judicial dissolution of Mile High, constitute an event of default under the notes, which entitle the note holders to obtain judgments on the notes

and then levy against Mile High's assets at any time, which would immediately put Mile High out of business, force it into bankruptcy proceedings or into a disorderly liquidation.

27. Second, Mile High lacks the funds to pay its debts as they come due and therefore needs to raise new funds just to pay its bills. If Mile High fails to raise new funds, it will face claims by creditors (other than the note holders) that will likely quickly force Mile High to seek bankruptcy protection or go out of business and into a disorderly liquidation.

28. For many months Warner has urged Defendants to address these twin crises by selling Mile High. Instead Defendants have elected to address the crises by misleading current and potential new investors in ways that violate federal and state securities laws, as well as the OA and other legal obligations.

29. To persuade existing note holders to agree to extend the maturity dates of their notes, and to persuade potential new investors to provide new capital to Mile High, Defendants have concealed the true financial condition and prospects of Mile High from both sets of third parties.

30. For example, (1) Defendants have claimed without basis that Mile High is worth $12 million; (2) Defendants have failed to disclose or downplayed this litigation and its potential impact (including their use of Mile High's funds to pay their defense costs and defense costs of David Kuzmanich who is not even a managing member of Mile High). In a prospectus given to investors, Defendants have made numerous materially false and misleading representations and omissions. These include, but are not limited to, lying about the existence of this litigation, and claiming instead that there was only a potential that Warner might sue the company; lying about the claims and parties to this litigation; lying about Warner's role, including concealing that she is a member of Mile High's Board and has filed this suit personally; lying about Heath and the

other Defendants; lying about their use of Mile High's funds to defend themselves in this litigation and defend Kuzmanich, who never had any managing role at Mile High and has no right to payment for his defense from Mile High's funds; (3) Defendants have failed to furnish accurate financial information to current and prospective investors and lenders, and have grossly inflated the valuation expectations, including by failing to disclose the valuations at which prospective investors had considered buying or making an investment in Mile High; and (4) Defendants have failed to disclose that they have no realistically-achievable plan for reaching profitability or consistent positive cash flow.

31. This misconduct demonstrates that Mile High as a company is not viable. It reflects a recognition by Defendants that Mile High's pressing and continuing cash needs can be satisfied, if at all, only by misleading third parties into extending more credit, which in turn exposes Warner to more unwarranted liabilities. A business whose managers have recognized that it can survive only by deceiving its funding sources is not a viable business, and cannot practicably continue in conformity with the requirements of its operating agreement and the law.

BRIEF BACKGROUND OF THE CASE

32. Warner, a career fitness professional and running coach, conceived and founded Mile High. Warner developed the concept of a boutique fitness studio dedicated exclusively to running. Warner believed that she could establish a profitable business by providing a motivating, fun training experience where beginner and competitive runners could train side by side. Warner would provide expert coaching, programs and instruction on running form, all accompanied by music. Warner invested substantial time and effort to develop the intellectual property associated with her idea for this boutique running studio, including its fitness programs and the Mile High brand.

33. While Warner was working on the Mile High venture, she met the Defendants who represented to her that they could bring in funding for Mile High. The Defendants claimed that, with their help in raising funds, Warner could focus on developing and managing Mile High as its CEO and face of the brand and would remain one of its largest shareholders. In reliance on these promises, Warner transferred all of her IP to Mile High, reserving a right of reversion to Mile High's IP upon its dissolution or bankruptcy, as set forth in Mile High's amended operating agreement dated July 1, 2014 ("OA").

34. Warner worked very hard to further develop the Mile High brand and its programs so that she and the other members could receive the business's profits, as provided in the OA, which was one of the primary purposes for which Mile High was formed.

35. A principal purpose of the OA was to give each of the Co-Founding members, who are also managing members, equal say and participation in the management and operation of the business. Without such participation, Warner never would have agreed to join with the Defendants, grant her IP to Mile High, or to any other aspect of the OA or the related transactions effectuated on the basis of her right to co-equal participation and management of the business under the OA.

36. In addition to contributing all of the IP, Warner developed Mile High's business based on her knowledge and personal connections in the fitness industry. Almost everyone she was able to hire to run the business, including the coaches, came to Mile High on referral from her existing network, from her friends and colleagues in the fitness and running world.

37. Once Mile High became successful, Defendant William Heath began conspiring to oust Warner unlawfully and completely destroy her investment in Mile High, so that he could

appropriate for himself both her position as CEO and her investment in Mile High, all without any compensation to Warner.

38. In order to implement his plan, Defendant Heath, aided by the other Defendants, began a pattern of intentional deception, as well as false and fraudulent representations that have left Mile High cash-strapped and in a dire financial situation. After successfully pushing Mile High to the brink of collapse, Defendant Heath falsely represented that Warner and the other Board members needed to agree to sweeping changes to the OA. The supposed reason for these changes was that without them, prospective investors would not agree to provide funding, which Mile High needed in order to keep its doors open. Defendant Heath also falsely represented that he and Kuzmanich had investors ready to provide almost $2 million in funding to Mile High, which he implied would be paid forthwith if the changes were made.

39. In fact, there was no investor at all, let alone one seeking the sweeping changes that Defendants claimed were necessary.

40. As a result of Defendant Heath's and the other Defendants' false representations and other misconduct, Mile High lost a real opportunity by a real business that was ready, willing and able to purchase Mile High at a lucrative price that provided investors a substantial return.

41. Mile High is currently insolvent and has no prospect of carrying on the business for the purpose for which it was formed—namely, making and distributing profits to its members, conducting its business in conformity with the OA and with all applicable laws, including by ensuring that Warner be allowed to participate in all aspects of the management and operation of the business, and ensuring that managing members, who are fiduciaries to all other members, act with the utmost good faith and loyalty to other members. In addition, Warner

continues to be exposed to mounting liabilities as a result of the bad faith and other misconduct of the Defendants, in violation of their various contractual, statutory and common law duties.

42. For instance, in violation of securities and other laws, Defendants are circulating a note purchase agreement that contains false and misleading representations, and material omissions. Defendants are using this deception to attempt to persuade unknowing individuals to invest in Mile High without any disclosure of the true facts and the dire state of affairs in which Mile High finds itself. Mile High's purpose was never to deceive actual or prospective investors and Defendants' conduct makes it impossible for Mile High to carry on its business in conformity with the OA and with the law.

43. More importantly, Warner would never have granted her IP to Mile High had she known the true facts, and her right of reversion preserved under the OA is being completely destroyed by the Defendants unlawful exclusion of Warner from the management and use of her brand and other IP. The Co-Founding Member agreed under the OA that all five of them would equally participate in the management and operation of the business, and for that reason the OA precludes the removal of a Co-Founding Member from the Board of Managers without notice and without cause. Despite that, since terminating her from her CEO position, the Defendants have completely excluded her from any aspect of the business, and on Christmas Eve they even purported to remove her from the Board without any notice or cause. The Defendants' conduct demonstrates that it is not reasonably practicable for the business to continue in accordance with the OA, which does not contemplate that four of the five Co-Founding members could gang up against the original founder to strip her of a lifetime's of her work in fitness, without consideration.

44. Because it is not reasonably practicable to carry on Mile High's business in conformity with the purpose for which it was formed, Warner seeks judicial dissolution of Mile High and a transfer of Mile High's IP rights back to her, as contemplated in the OA.

45. In addition, pending the judicial dissolution proceeding, Warner respectfully prays for equitable and legal remedies to address Defendants' misconduct described in the causes of action brought against each of those parties.

THE PARTIES

46. Plaintiff Debora Warner, a resident of New York, is Mile High's original founder. She has been a managing member and director of Mile High from its creation. Warner is Mile High's largest individual equity holder. Warner was the CEO of Mile High until Defendant Heath fired her on July 3, 2018 and appointed himself CEO.

47. Mile High is a domestic limited liability company organized and existing under the laws of the state of New York, with a principal place of business at 28 East 4th Street in New York City. Mile High was registered by Warner on October 12, 2012 and currently includes approximately 21 members, consisting of "friends and family" investors, and several holders of convertible notes.

48. Defendant William Heath is a resident of the State of New York. Heath joined Mile High as a member and manager pursuant to Mile High's Operating Agreement dated June 2013.

49. Defendant David J. Kuzmanich is a resident of the State of New York. Defendant Kuzmanich became a non-managing member of Mile High by his purchase of a small equity interest.

50. Defendant Robert Nuell is a resident of the State of New York. Nuell joined Mile High as a member and manager pursuant to Mile High's Operating Agreement dated June 2013.

51. Defendant Kim Tabet is a resident of the State of New York. Tabet joined Mile High as a member and manager pursuant to Mile High's Operating Agreement dated June 2013.

52. Defendant David Robinson is a resident of the State of New York; his current address is unknown. His last known address and legal address for purposes of notice and service under the Operating Agreement is in New York. Robinson joined Mile High as a member and manager pursuant to Mile High's Operating Agreement dated June 2013.

53. Warner does not know the true names of the Defendants sued herein as Does 1 through 10 and therefore sues those Defendants by such fictitious names. Warner will amend this complaint to include the true names and capacities of these so named DOE Defendants when their true names and capacities are ascertained.

RELEVANT NONPARTIES

Dibs Technology

54. Nonparty DIBS Technology ("DIBS") is a Delaware corporation and technology start-up. DIBS appears to be headquartered in New York City at 1460 Broadway, and claims to work with boutique fitness studios in New York City.[2]

55. DIBS states on its website that boutique fitness studios have too much competition, and claims that without its help in pricing classes across competing studios, "many studios will not survive the dramatic shift that's happening in the fitness industry."[3]

56. Defendant Heath is an investor in DIBS. In his public profile, Heath identifies himself as a "Partner at Mile High Run Club and DIBS Technology," as well as overseer of

[2] The New York Secretary of State records, however, show no evidence that DIBS is actually licensed to do business in New York.

[3] It is unclear whether DIBS's goal of reducing the effects of competition and helping competing studios with their pricing is consistent with antitrust laws.

"investor relations, strategy, and sales" at DIBS Technology and "investor relations and business development" at Mile High.

57. Defendant Heath used Mile High to provide DIBS improper access to customer contacts and revenue, which DIBS would have had no access to but for Defendant Heath's improper self-dealing. Defendant's Heath dual role in both start-ups is in violation of the OA and his fiduciary obligations to Warner and the other members.

58. To justify DIBS' interference with Mile High's business and unjust appropriation of its revenues, customer contacts, and confidential information, Defendant Heath and DIBS made several misrepresentations.

59. For instance, Defendant Heath and DIBS falsely claimed "DIBS significantly outperforms ClassPass on price per spot basis by close to 20% net of all fees and taxes."

60. Defendant Heath and DIBS falsely claimed that DIBS "crush[es] ClassPass on a spend per customer basis!"

61. Warner challenged these statements by informing Defendant Heath and DIBS that they provided no "data to back up these grandiose claims." In response, DIBS's CEO, Alicia Thomas, claimed DIBS was putting together the data. In fact, DIBS never provided any data to back up those claims.

62. When Warner cancelled the DIBS agreement because it was costing Mile High revenue for no discernible reason, Defendant Heath went into a rage and claimed that the agreement with DIBS could not be cancelled because he had apparently offered investments in Mile High and DIBS as a package deal.

63. In fact, as a result of Defendant Heath's self-dealing and misconduct with DIBS, Mile High lost significant revenue, lost direct customers and its brand was diluted as a result of the discounted pricing DIBS was offering for Mile High's classes.

64. While Mile High was negatively affected by its relationship with DIBS, Defendant Heath was profiting from it. For instance, Defendant Nuell stated to Warner that Defendant Heath was "monetizing his role" with Mile High "by being a paid consultant to DIBS." Defendant Nuell stated further that he was "not sure what [Heath]'s deal [was], but he's figured out a way to leverage his partnership [at Mile High] for cash."

65. Instead of doing the right thing and agreeing to remove Heath from further involvement with Mile High, Defendant Nuell claimed that since Heath was monetizing his role at Mile High from other companies such as DIBS, he too was entitled to exploit Mile High for his personal benefit. Taking the Heath/DIBS example as a license to engage in conduct contrary to the best interest of Mile High, Defendant Nuell proposed an illegal scheme by which he would be paid "monthly expense distributions" by Mile High to evade payroll taxes. Nuell also proposed that what he could not cover with expense receipts could allegedly be "hidden some other way by [Mile High's] accountant."[4]

ClassPass

66. Nonparty ClassPass is a technology company focused on aggregating fitness classes and offering them to sport enthusiasts for a reduced or package price that gives customers access to a variety of fitness studios.

[4] Over Warner's objections the Co-Founding Member Defendants approved Nuell's proposed scheme and started paying themselves all on this basis. Nuell has never returned the money he improperly caused Mile High to pay him.

67. Mile High established a relationship with ClassPass by allocating it a limited number of spots in certain of its classes pursuant to a Partnership Agreement dated December 19, 2014.

68. ClassPass offers studios a "ClassPass Empowerment Loan" of up to $300,000.

69. On July 31, 2018, Defendants informed Warner that they were working on obtaining a ClassPass loan. As of that time, Mile High had been unable to find any other investor who could provide this money.

70. Warner objected to further encumbering Mile High with another loan because the Company was struggling and the terms of the loan were not beneficial to Mile High. In addition, the loan exposes Warner and all other members to improper liabilities.

71. Warner also requested that ClassPass be notified of Warner's objection. Despite Warner's objections, and despite the absence of Board authorization required under the Operating Agreement before entering into such a loan, Defendants nonetheless procured the loan from ClassPass on or about September 14, 2018.

72. After this action was commenced, on October 5, 2018, Defendants purported to create an authorization for the ClassPass loan they had already improperly procured, by creating a "written consent."

73. In addition, the ClassPass loan provides unfavorable terms for Mile High.

74. Because the loan was improperly authorized the Co-Founding Members Defendants should be solely responsible for any and all liabilities arising under that loan.

Braintrace's President, Jim Ellsworth

75. Nonparty Braintrace is a cybersecurity start-up with a place of business in New York. Jim Ellsworth is the President of Braintrace ("Ellsworth").

76. Defendant Kuzmanich claimed in March 2018 that Ellsworth was "an investor … well versed with private equity deals," with investments in "many private companies" and "experience of scaling businesses." Kuzmanich claimed that Ellsworth and his colleagues were interested in investing in Mile High. Despite having no management role or authorization to share company information with anyone, Kuzmanich claimed that he had shared Mile High's operating agreement with Ellsworth, and that Ellsworth had marked it up and was demanding significant changes.

77. On March 21, 2018, Defendant Heath falsely claimed that "Ellsworth and his group" had made a firm commitment to invest "$300K" if Mile High made "the changes to the OA that "Ellsworth and his group" requested.

78. In addition, in violation of Mile High's OA and contractual terms with the Purchaser, Defendants improperly shared confidential information regarding the Purchaser and its offer for Mile High with Ellsworth.

79. On May 18, 2018, Warner reminded Defendants that she has requested a meeting with Mr. Ellsworth to discuss his alleged offer but was declined such a meeting. Warner expressed concern that Defendants were putting forward Ellsworth's alleged offer as an alternative to Purchaser's real offer, when Warner and the management team had "received no introduction to this potential investor" and could not, consistent with their fiduciary obligations "consider an offer from someone" they had not even met. Warner requested facts about Ellsworth, his offer, his supposed experience with franchising (Defendants claimed Ellsworth wanted to franchise Mile High), and other necessary information.

80. Defendants ignored all of Warner's requests.

81. Instead, on May 29, 2018, Defendant Kuzmanich presented a new proposal on behalf of Ellsworth. Kuzmanich claimed that Ellsworth and his "consortium" will contribute to Mile High approximately "50% of the required funds to fund the balance of Studio 3" —a balance that required approximately $700,000— "create a $500K war chest to secure studio 4" and "offer a cash buyback to any interested existing shareholders that at least matches the [Purchaser]'s offer."

82. Defendant Kuzmanich also represented that Ellsworth "requested exclusivity on this offer while the Board deliberates" and that he supposedly persuaded them to "allow [Purchaser] to counter their original offer."

83. Defendant Kuzmanich claimed that Mile High had to consider this proposal before speaking further to the Purchaser's CEO.

84. On June 20, 2018, Defendant Heath represented that Purchaser's proposal would be put up for a vote against the fabricated "Jim Ellsworth proposal" and "Willy / David K's proposal." Both of these alternatives were nothing more than fiction. This was readily evidence by the clearly unrealistic terms of the purported offers, which made no sense, and were supported by nothing.

85. Acting in violation of their duties and obligations, Defendants used false and fictional offers to turn down Purchaser's offer, even though accepting such offer was in the best interest of all members.

86. On June 25, 2018, Defendant Heath claimed he voted against the Purchaser's proposal "on behalf of his investors having shown them the terms." Defendant Heath representation could not be true because no investor could have reasonable turned down restitution of their investment plus a substantial immediate return, when there were no other

existing alternatives for Mile High, and its prospects of continuing as independent studio had become dim.

87. As of August 3, 2018, Defendant Heath continued to represent and imply that Ellsworth was continuing to demand changes to Mile High's operating agreement.

88. These representations were also false. Not only was Ellsworth not demanding anything, but he had no ability to do so. Ellsworth is an officer of a small cyber security firm. He is not an institutional investor, likely does not qualify even as an accredited individual investor, and lacked both the financial ability and the legal capacity to provide the investments that Defendants attributed to him and his "group" "consortium" "colleagues" (presumably Braintrace).

89. Ellsworth knew nothing about Heath's representations and confirmed in August 2018 that he had long abandoned any interest in Mile High.

JURISDICTION

90. This Court has jurisdiction over this action because the defendants are residents of the State of New York, transact business in the State of New York, have consented to this Court's jurisdiction, and this dispute concerns events that took place in New York.

91. New York County is the proper venue pursuant to Sections 501, 503 and 509 of Article 5 of the CPLR, based on the residence of the parties, the location where the causes of action arose, and the parties' designation of this county as the place for trial.

FACTUAL BACKGROUND

A. Warner Conceives of The First Dedicated Indoor Running Studio Start-Up.

92. Prior to starting Mile High, Warner owned of a fitness training business called The Total Movement, where she primarily trained runners of all levels outdoors. During a group run she was coaching in Central Park, Warner ended up losing someone who couldn't keep up

with the pack. That's when Warner had the first spark about creating a dedicated to indoor running studio. Warner thought it would be much better to have everyone work at their individual effort level on a treadmill, similar to the format of a spin class, with a professional trainer leading the class to optimize individual runners' performance. By bringing her training indoors, Warner believed she could train runners of different levels simultaneously, without losing any of them. Warner also had developed several individual treadmill programs for personal training clients that she thought could be applied to a group fitness format.

93. Warner discussed her idea with an old friend, Defendant Robert Nuell, who she believed was a successful business owner. Nuell worked in films and had no background in fitness. Nonetheless, he liked Warner's idea so much that he told her he would consider investing in it and helping her find funding. Encouraged by Nuell's interest in funding her venture, Warner began putting Mile High together by developing the core intellectual property for the business, including its current brand, training plans, and refining the idea for what the business would look like.

94. On October 12, 2012, Mile High was formed and organized as a New York LLC.

B. Defendants Nuell, Tabet, Robinson, and Heath Join Warner's Venture.

95. While Warner was working to develop her new business, she was approached first by Defendants Tabet and Robinson and then by Defendant Heath. These Defendants, like Nuell claimed they were interested in supporting Warner's venture by both putting their own money into it and helping her find investors.

96. Heath claimed to be an experienced investor with access to capital. Heath claimed he could raise the necessary funding from individual and institutional investors.

97. When Warner began serious discussions with the Co-Founding Member Defendants, Nuell, Tabet, Robinson and Heath, about letting them join her venture, she had

already developed all of the core IP that Mile High uses today, including the name and logo concept. This was the reason why in the current operating agreement Warner reserved the right to reversion to the IP she transferred to Mile High.

98. Warner was led to believe that by allowing the Co-Founding Member Defendants to join her venture, she would be able to access their claimed funding, while she would remain its largest shareholder and would be in charge of the business and her brand. The Co-Founding Member Defendants meanwhile would raise funds and benefit from the business's expected success and profits.

99. The promise that Warner would be the CEO of Mile High, would remain its largest shareholder, and would be primarily involved in the key decisions regarding the business and use of her brand were all material terms of Warner's agreement to allow the Co-Founding Members to join her in Mile High. It was on this basis that Warner agreed to license her IP, including the use of her name and likeness, to Mile High, subject to the right of reversion.

C. Mile High's Operating Agreement and Initial Fundraising.

100. Warner's understanding and agreement with her Co-Founding Members was that they would purchase equity in the business with their own money as well as find other investors, so that Warner could fund the initial operation of her new business.

101. In fact, instead of putting in their own money, during the course of drafting the operating agreement the Co-Founding Members demanded free equity. As a result of their deception of Warner, the Co-Founding Members improperly appropriated for themselves a total of 60% of free equity without consideration.

102. It was only after they already appropriate 60% of Mile High for free, that the Co-Founding Members made a token purchase of additional equity during the first round of fundraising from friends and family. Whether the Co-Founding Members actually paid for the

additional equity is uncertain. By way of example, a review of Mile High's corporate records shows no evidence of the payments Heath and a few others claimed to have made for the additional equity.

D. Mile High's Unsuccessful Attempts to Raise Funds.

103. Before Mile High began operation, Warner believed that if Mile High were able to raise substantial funds quickly, as the Co-Founding Members promised, Mile High would be able to open several studios immediately and leverage its first mover advantage into a significant return to the original investors, as well as profits to its members, despite the low barriers to entry for competitors.

104. In fact, that plan failed because all of the institutional investors Mile High approached declined to make even a token investment. In the first quarter of 2018 alone, Mile High approached roughly 40 institutional investors and family offices, each of which declined to make any investment. They cited Mile High's high costs of operation, inability to scale cost effectively, and increasing competition.

105. Although Mile High received substantial marketing attention, the reality of running a boutique fitness business in New York City was far more expensive than anticipated when the OA was agreed. In early 2018, it became clear that without substantial institutional investor money it was virtually impossible to keep Mile High alive, let alone distribute profits to Mile High's members.

106. Because it was unable to raise funds, Mile High remained nothing more than a brick-and-mortar gym, with extremely high operating costs. In addition, since its opening, several competitors, large and small, entered the field, taking away a substantial portion of Mile High's business.

107. As a result, Mile High's revenues have decreased materially year-over-year, since opening approximately 4 years ago.

E. Mile High Received a Lucrative Acquisition Offer that Would Have Preserved All Investors Money, As Well As Providing a Substantial Return to Each Investor.

108. As Mile High's prospect of finding investors faded, in early 2018 Mile High considered other options. In the course of this effort, Mile High received an offer by a well-established fitness focused company ("Purchaser") to buy Mile High's brand and business.

109. After lengthy negotiations, Purchaser made a lucrative offer for Mile High. Purchaser's offer was in the best interest of Mile High's investors because it would have allowed each investor to receive back their original investment, as well as make a lucrative and immediately payable cash return. In addition to the immediate cash payout, each investor would have received an additional and substantial return in Purchaser's equity. Finally, each investor would have had the potential for additional upside resulting from further payouts based on three earn-outs.

F. Heath and Kuzmanich Sabotage Mile High's Sale By Making Materially False Representations, Including By Making False Representations About the Existence of An Alleged Investor Offering A Better Alternative Than The Sale.

110. In May 2018, Defendants Heath and Kuzmanich, presented Mile High's board and management team an elaborate supposed offer by an alleged investor named Jim Ellsworth. Heath claimed that Ellsworth was interested in investing several hundred thousand dollars in Mile High from his "consortium" of investors at a $10M valuation.

111. It has now been discovered that Jim Ellsworth is not an institutional investor (and likely not even an accredited investor), and never promised to make any investments alone or in a consortium. On August 30, 2018, Mr. Ellsworth stated that he "was approached by someone at

Mile High several months ago about making an investment in the company, but [he] declined as the terms weren't to [his] liking."

112. Defendants Tabet, Nuell, and Robinson knew or should have known that Heath and Kuzmanich's supposed alternative to the Purchaser's offer was false and did not exist and that they were lying. The purported terms of the offer, described more fully above, were not credible, and on their face made no sense. In addition, the supposed valuation at which Ellsworth would invest was a moving target, as was their representation that Ellsworth could sell Mile High in a "fire sale" at $7 million if the business did not pan out.

113. The fact that Heath and Kuzmanich would not even allow a meeting with Ellsworth (as Warner requested to discuss the offer) and would not identify the alleged "consortium" to be brought in by Ellsworth, constituted significant red flags. It should have been readily apparent to people charged with acting in the best interest of Mile High's investors, as Defendants each were, that the supposed offer was not real. Instead of doing their job as Board members and managers the other Defendants closed an eye to Heath and Kuzmanich's false representations, asked no questions and mechanically voted to reject Purchaser's deal as they were asked to do by Heath, in violation of their fiduciary duties to Mile High and its members.

114. It became clear from what happened next, that Defendants planned all along to place Mile High in dire financial straits in order to force sweeping changes to the OA, which they claimed were necessary for Mile High to receive the funds it needed to survive. Indeed, in the midst of crisis regarding Mile High's ability to keep its doors open, Defendants' priority was to strip Warner of her position, equity, and IP rights, while they seized complete control of the business.

G. Mile High's Performance Since Defendants Rejected Sale Opportunity.

115. Since the Co-Founding Member Defendants rejected the purchase offer on June 22, 2018, Mile High's business performance has been abysmal, and its financial situation is dire:

Mile High's Business Performance

- Mile High's monthly expenses as a percent of sales have been consistently above 95%.
- Mile High's third quarter (Q3) utilization (i.e., customers) has been steadily below 46% and is predicted to decrease even further. Such low utilization makes it impossible for a business such as Mile High to survive.
- Mile High's 2018 performance is substantially worse than during the same period in 2017.
- Since 2016, Mile High's revenues, instead of increasing, have ***declined*** year over year by approximately 5% per year.

Mile High's Inability to Cover Its Substantial Liabilities

116. As a result of its declining performance and lack of cash flow, Mile High has been rendered insolvent and has been unable to meet material contractual liabilities:

- In August 2018, Mile High's bank account had less than $5,000 in cash, an amount so low as to make it impossible to operate any business, let alone a business with high monthly expenses, as Mile High is.
- In early September 2018, Mile High defaulted on its promissory notes of approximately $943,000, with interest.
- Mile High has been unable to set aside and maintain the minimum cash reserves to cover its studio leases, in violation of the OA.
- Mile High has been unable to fund segregated bank accounts intended to cover personal guarantees by Warner and others, in breach of both the OA and another agreement.

- Mile High has other outstanding debt that it has not timely paid and it won't be able to pay with its own funds.

H. Defendants Have Been Making Material Misrepresentations and Omissions In An Effort to Raise Money, Which They Know Could Not Be Raised if The True Facts Were Disclosed.

117. Because Mile High has no assets to cover its liabilities, or even to keep its doors open, there is no possible basis for the business to continue.

118. Despite that, instead of orderly winding down the business, so as to preserve as much of the investor money as possible, the Defendants have made material misrepresentations and omissions in an effort to obtain money and loans, including from small investors unaware of Mile High's true state of affairs.

119. Paying off debt by raising more debt is not a feasible way to conduct business, particularly when the debt is raised by making false and/or misleading representations and omissions. Defendants' conduct demonstrates their awareness that if the true facts were disclosed they would not be able to raise any money.

120. For instance, in order to raise money, Defendant Heath revised Mile High's standard promissory note purchase agreement, by making material misrepresentations and omissions regarding Mile High's current business performance, its dire financial situation, the instant litigation, the pending request for dissolution of the company, and the existence of this action. Defendants falsely asserted in the note that Warner may sue the company, even though they knew that statement to be false because when the statement was made, they knew Warner had already sued to dissolve Mile High, and sued them personally for their bad faith breaches and misconduct, as set forth in the Summons with Notice on September 21, 2018. Defendants gave investors the false impression that the suit had nothing to do with Heath or them, made numerous false and disparaging statements about Warner, failed to disclose that Warner is the

largest individual investor and a current Board member, and that she had sued personally and derivatively to protect and not to damage whatever assets remain of the company.

121. Defendants also failed to disclose that they had already been using Mile High's money to pay their personal legal expenses, as well as those of witnesses, even though they have no basis in the law or the OA for such use of funds. Indeed, when Warner asked for payment of her legal expenses, in light of Defendants' generous use of Mile High's funds to pay their own legal expenses as well as those of others, legal expenses, they ignored her request.

122. Defendants falsely claimed in the note that Mile High is valued at $12 million, even though no basis exists for such a representation of Mile High's valuation. Defendants failed to disclose that every investor they approached rejected valuations well under $12 million. Their disclosure that the $12 million valuation was "arbitrary" is false and misleading in light of their omission that actual and lower valuations were rejected by other prospective investors.

123. Defendants also falsely represented that Heath is the CEO of Mile High because he was never duly appointed CEO and is improperly holding himself out as such, in violation of the OA and his fiduciary duties.

124. As a result of the false and misleading representations and omissions that Defendants are making, Defendants are in breach of the OA and their fiduciary duties and are improperly exposing Mile High and its members to legal jeopardy. They also are exposing new investors to a likely total loss of any investment they may make.

125. In addition, Defendants have failed to disclose to potential investors that they stand to gain a fee of $30,000 for funds they raise up to a certain amount. Because none of the Defendants are accredited broker-dealers, payment of such fee places Mile High and the rest of

its members in further potential legal jeopardy, which Mile High and its members who have not participated in this misconduct have not consented to and should not have to face.

126. Defendant Kuzmanich has a pattern and practice of engaging in unlicensed broker-dealer activities with small start-ups. For instance, Defendant Kuzmanich was paid a $75,000 fee by start-up Pypestream to raise capital for them, even though the payment to Kuzmanich of that fee was a violation of broker-dealer laws and regulations, as even Pypestream's lawyer recently recognized during a call. Defendant Kuzmanich has been working with Defendant Heath to profit from Mile High in the same unlawful manner has he has done with Pypestream, and likely many other companies. Indeed, Defendant Kuzmanich is unemployed and appears to make a living from helping companies raise capital in exchange for a fee, even though he is not a licensed broker-dealer.

I. Defendants' Attempt to Remove Warner from the Board without Cause, in Breach of the OA

127. On December 21, 2018, the Co-Founding Member Defendants executed a "Written Consent" purporting to remove Ms. Warner as Director of Mile High without cause.

128. The Defendants' conduct above was unlawful because in violation of the OA, which prohibits the removal of a Founding Member without cause.

129. In addition, the Defendants use of "written consent" was also unlawful under the OA and New York law.

130. Although Mile High has been in existence for several years, up until Warner was unlawfully terminated from her CEO position in July 2018, the Defendants had never previously used "written consents" for any purpose.

131. The Defendants began the practice of using written consents after terminating Warner was a stratagem they devised to exclude Warner from her right under the OA to co-equal participating in the management and operation of the LLC.

132. Even if the use of non-unanimous "written consents" were lawful under New York law, the Defendants' conduct here is a breach of the OA because the Defendants have used that tool as a way to deprive Warner of her rights under the OA.

133. Ms. Warner has a right to participate in management of the company and is being irreparably harmed by having wrongfully terminated from her right to be a member of the Board of Managers.

COUNT I
Judicial Dissolution Pursuant to NY LLC Law § 702 and Enforcement of Warner's Right to Reversion of Mile High's IP

134. Warner repeats and realleges each of the foregoing allegations as if fully set forth herein.

135. Warner is the founding and a managing member of Mile High. She is also the largest single equity holder in Mile High.

136. Warner has the right to seek judicial dissolution of Mile High pursuant to New York's Limited Liability Company law § 702, and has the right to be appointed as Mile High's liquidator pursuant to Section 12(c) of the OA, and supervise the winding up and dissolution of Mile High.

137. Warner seeks judicial dissolution of Mile High on the grounds that, as described throughout this Complaint, it is not reasonably practicable to carry the business for which Mile High was formed in conformity with the OA for at least the following reasons:

a. The Right of All Five Founding Members to Participate in the Management and Operation of the Business, as Contemplated by the OA, Is No Longer Possible.

138. The main asset necessary to operate the business, its IP, belongs to Warner, who licensed it to Mile High subject to a right of reversion set forth in Section 12(l) of the OA. Warner agreed to grant that license with the understanding that she would have a substantial—or at a minimum equal—say in the management and operation of the business as contemplated in the OA. For that reason, the OA requires that all five co-founding members be members of Mile High's Board of Managers, and does not permit their removal except for cause and only after notice and request to cure any alleged conduct that may give rise to cause to remove a founding member.

139. Because Warner has been completely excluded from the business and improperly removed from the Board of Managers without cause, it is no longer possible to carry on the business of as contemplated by the OA, with each Co-Founding Member having a right to serve on the Board and have equal participation in the management and operation of the business.

140. The relationship of confidence between Warner and the Co-Founding Defendants has been destroyed so that they cannot proceed together, as contemplated by the OA, in conducting the business for which Mile High was formed.

141. The OA contains no exit mechanism for Warner, and the Defendants have expressly refused to buy out or be bought out by Warner. Instead, the Defendants contrary to the purpose of the OA improperly excluded Warner from all aspects of the business, and are essentially seeking to appropriate for themselves the entirety of the business and of Warner's IP assets in the business for free, and without payment to Warner.

142. As long as Defendants remain in control they will continue to act in a way that is self-serving to them and exclude Warner from the business, thereby making it not reasonably practicable to carry on the business in accordance with the OA.

143. At bottom, the Defendants want a corporate divorce from Warner, but want to take away all of her assets, rights and investments without paying for it. This is amply demonstrated by the Defendants rejection of any type of buyout, either by Warner of the Defendants or of Warner by the Defendants.

b. Profit Distribution as Contemplated by the OA is No Longer Possible.

144. Mile High was established to develop and operate running studios and distribute profits to its members. That purpose is no longer reasonably practicable because Mile High is currently insolvent, in breach of critical contractual duties, which required it to set aside and maintain hundreds of thousands of dollars in cash reserves to cover liabilities to landlords and personal guarantors, including Warner.

145. Mile High has no prospect of recovery because its business has lost revenue year-over-year and it is currently operating at 95% cost as a percent of its monthly sales. As Heath's own company (DIBS) advertised on its website, it is expected that many fitness studios will fail in light of the current shifts in the fitness industry.

146. The purpose for which the LLC was formed cannot be carried on except at a loss, and its doors have been kept open solely as a result of the Defendants' self-dealing issuance of promissory notes to themselves and their family members, on commercially unreasonable terms, which Defendants have used to maintain the fiction, while this proceeding was pending, that Mile High continues to be a viable operating business, when it is not.

147. Moreover, the Defendants' unauthorized issuance of these self-serving debt also demonstrates that Mile High's business cannot be carried out in conformity with the OA, which

does not contemplate that some of the members be allowed to wipe out Warner by using the stratagem of issuing the debt to themselves that wipes out Warner's equity, and allows the Defendants to buy out what remains of Mile High on the cheap.

c. Compliance With the Law and With Contractual and Fiduciary Obligations as Contemplated by the OA is No Longer Possible.

148. The OA requires Mile High's founding members to be honest and transparent with investors and with other third parties, including lenders, and to operate at all times in conformity with the law and with its OA.

149. That purpose is no longer practicable because the Defendants have undertaken to make material misrepresentations and omissions regarding Mile High's business, financial status, and prospects in order to raise more debt to cover existing debt, and have essentially turned Mile High into nothing more than a Ponzi scheme, by seeking to maintain the fiction that Mile High is a viable business that can keep its doors open, when in fact the only way they have been keeping its doors open is by incurring unreasonable debt that Mile High will never be able to pay back. Mile High was never intended to continually incur debt merely to stay afloat, let alone incur debt in this manner.

150. By way of example, in violation of the OA the Defendants took a $300,000 loan from Class Pass without any proper authorization or approval, and despite the fact that Mile High had no way to repay the loan without compromising its revenue. Indeed, Defendants dissipated virtually the entirety of the ClassPass loan within weeks. In addition, the ClassPass loan imposes extraordinary obligations on Mile High and its affiliates (of which Warner is one), even though Warner was not given the ability to have a say regarding the propriety of signing up for this loan agreement with ClassPass. For instance, the ClassPass loan imposed on Mile High the obligation to not use any competing service for an extensive period of time even after the loan is repaid.

Mile High is already in breach of the terms of the Class Pass loan agreement, because it has had to use a service that competes with Class Pass in order to find customers. Thus, at any moment, ClassPass could sue Mile High and others for breach of the agreement, giving ClassPass unreasonable leverage over its already fragile existence.

151. By way of another example, Mile High entered into a confidentiality agreement with Purchaser in order to maintain confidential all its discussions for the potential acquisition of Mile High. In addition to its contractual obligation to Purchaser, Mile High's OA expressly required Defendants to maintain confidential the terms of all discussions between Mile High and Purchaser.

152. In violation of both of the foregoing obligations, the Defendants, acting through Defendants Heath and Kuzmanich, disclosed highly confidential terms of the proposed transaction to Ellsworth, an officer of Braintrace, and likely to others. Mile High's obligation to act in conformity with its confidentiality obligations under the OA and other contractual obligations with Purchaser are no longer practicable because the Defendants have acted in total disregard of those duties. In addition, Defendants' conduct since they rejected Purchaser's offer, shows they do not intend to act in conformity with those obligations, as they have continued to breach those provisions by disclosing confidential information relating to Warner, Mile High, and Purchasers to others who had no right to know and who did not sign an NDA.

153. Mile High's purpose under the OA was to comply strictly with all applicable legal duties, including of loyalty, of care, and otherwise. These duties required the Defendants to not engage in any conduct adverse or damaging to any member, including Warner or her rights under the OA and her employment agreement. Further, it was Mile High's purpose to have Warner remain its CEO and have a substantial role in managing the company she founded and her brand,

to which she retained a right to reversion. This purpose is no longer practicable because the Defendants have breached their duty to act with the utmost loyalty and care towards Warner and the other members.

154. As a result of their misconduct, Defendants have caused Warner material damage, have wrongfully terminated Warner from her position as CEO, have excluded her from all decisions in violation of the OA, have ignored every request she has made for information and for reasoned deliberation regarding the operation of Mile High, and have acted to strip Warner from all roles in Mile High rendering her unable to manage Mile High and/or the brand and IP in which she retains all interest.

155. In violation of fiduciary duties owed under the OA to Warner as a Founding and Board member, Defendants have conspired to, and have denied her access to key Mile High books and records, and have interposed a "written consent" procedure, never previously used, to unlawfully exclude her from Board activity, including deliberation and voting. Despite repeated request for information available to all other Board members, Defendants have ignored every request for books and records that Warner has made, instead taking affirmative steps to conceal them.

156. The Defendants have exposed Plaintiff to increasing and extraordinary liabilities to third parties as a result of the fact that while she has been excluded from participating in all aspects of the business, she continues to be a personal guarantor for all its liabilities. For instance, Plaintiff is a personal guarantor on several accounts at Chase Bank, from which Mile High obtained a large line of credit and hundreds of thousands of dollars in loans. Plaintiff asked to be removed from these guarantees and her request was rejected.

* * *

157. Because it is no longer reasonably practicable to carry on Mile High's business in conformity with its purpose and operating agreement, judicial dissolution is the only appropriate remedy.

158. Pursuant to the terms of the OA, Warner is entitled to be appointed as the liquidator of Mile High and by this action seeks such appointment.

159. Warner also requests that all of Mile High's IP be transferred back to her for the amount of $1 as provided by the OA.

160. Warner also seeks any other remedy at law or in equity as may be available to her as a result of the foregoing, including the payment of all costs and fees for bringing this action.

161. Warner also seeks, and incorporates by reference herein, any applicable relief set forth in her Prayer for Relief below.

COUNT II
Breach of Fiduciary Duty
(Against Co-Founding Members Defendants)

162. Warner repeats and re-alleges each of the foregoing allegations as if fully set forth herein.

163. Pursuant to the terms of the OA and at common law, the Co-Founding Member Defendants, in their personal capacity, owed Warner fiduciary duties, including a duty of loyalty.

164. In violation of those duties, the Co-Founding Member Defendants have acted against Warner's interest and in a way intended to damage Warner, including, but not limited to, by excluding her from participating in Mile High's management, as she has a right to do in her capacity as a Board member and manager of the company, by implementing a fraudulent "written consent" procedure that was never previously used and whose only purpose was to actually exclude Warner from access to information relating to Mile High and from her right as a founding member, manager and Board member, to deliberate and vote on every action for which

a vote was required, by concealing from her information and ignoring her request to access Mile High's books and records, by making false representations about Warner and Mile High, by defaming her, by improperly terminating her, by conspiring to place Mile High in financially dire situation in order to force sweeping changes to the OA, and by implementing stratagems to completely dilute her equity and steal her IP that she licensed to Mile High without consideration.

165. Defendants' wrongdoing was intended and has had the effect of stripping Warner of the value of her equity, her rights to participate in the management and operation of the business, and is damaging the IP she licensed to Mile High.

166. For instance, after defeating Purchaser's offer to acquire Warner's equity and other member's equity in Mile High by falsely representing alternatives to Purchaser's offer that did not exist, Defendants claimed that the only way to obtain investor funds, which Mile High desperately needed, was to agree to the sweeping changes to the OA, including the waiver of Warner's reversionary rights to Mile High's IP.

167. Defendants' conduct above and as described throughout this Complaint constitutes a breach of their fiduciary duties to Warner in violation of both the OA and New York law.

168. By their breaches, Defendants caused Warner damage, including, but not limited substantial damages as to be determined at trial.

169. Warner also seeks, and incorporates by reference herein, any applicable relief set forth in her Prayer for Relief below.

Additional Allegations Specific to Individual Defendants:

William Heath

170. The sale to the Purchaser that was in the best interest of Mile High's members but ran counter to the interests of Defendant Heath who stood to earn thousands of dollars in finder's fees if he was able to keep Mile High independent, even at the expense of its success and profitability.

171. Defendant Heath engaged in self-dealing by using Mile High to sell investments in another failing business with which he is affiliated, DIBS, and by forcing Mile High to establish a relationship with DIBS whose sole benefit was to Heath personally. As a result of Heath's misconduct involving DIBS, Mile High's finances and reputation were damaged.

172. In addition, Heath used Mile High's confidential information to benefit DIBS in other ways, including by giving them access to Mile High's clients, and by forcing Mile High to even pay DIBS a fee for that access, under the false pretense that it was a revenue sharing feature of DIBS. In truth, DIBS was stealing profits from Mile High by forcing Mile High, through Heath, to redirect its clients to the DIBS website and then buy from DIBS instead of from Mile High access to classes at a discounted price. Mile High lost substantial revenue as a result of Heath and DIBS improper conduct and misuses of Heath's role at Mile High against the interests of Mile High.

David Robinson

173. Defendant David Robinson is a Board member and Founding Member, currently residing in South Africa.

174. Defendant Robinson, as a result of his absence from the United States, is at a remove from Board decisions and cannot attend Board meetings in-person.

175. Because of this, Mr. Robinson has deferred to Mr. Heath for many of the Board votes and has not conducted independent investigation before voting in favor of Mr. Heath's proposals.

176. In particular, with respect to the Purchase Offer vote, Mr. Robinson conducted no investigation or assessment of the offer separate from Mr. Heath's self-interested recommendation.

177. Mr. Kuzmanich also possesses a putative proxy on behalf of Mr. Robinson, such that Mr. Robinson is not independent of parties interested in the transaction.

Robert Nuell

178. Defendant David Robinson is a Board member and Founding Member.

179. In considering the Purchase Officer, Defendant Nuell abdicated his duty to assess the transaction in good faith and instead improperly deferred to Mr. Heath and Mr. Kuzmanich, who were personally interested in denying the Offer.

180. Mr. Nuell did not exercise good faith in simply agreeing with Mr. Heath in his vote on the Offer.

181. Mr. Nuell described himself as a "babe in the woods" and expressed that he would rely on Mr. Kuzmanich and apparently did so.

Co-Founding Member Defendants Collectively

182. Pursuant to the terms of the OA, the Co-Founding Member Defendants, in their personal capacity, owed Warner fiduciary duties, including a duty of loyalty.

183. In violation of those duties, the Co-Founding Member Defendants have acted against Warner's interest and in a way intended to damage Warner, including, but not limited to, by excluding her from actually participating in Mile High's management, as she has a right to do in her capacity as a Board member and manager of the company, by implementing a fraudulent

"written consent" procedure that was never previously used and whose only purpose is to exclude Warner from access to information relating to Mile High and from her right as a founding member, manager and Board member, to deliberate and vote, by concealing from her information and ignoring her request to access Mile High's books and records, by making false representations about Warner and Mile High, by defaming her, by improperly terminating her, and by conspiring to place Mile High in financially dire situation in order to force sweeping changes to the OA.

184. This would have had the effect of stripping Warner of her equity and rights, including her rights into Mile High's IP, without paying her any consideration.

185. After falsely representing that Jim Ellsworth was investing in Mile High, in order to defeat the Purchaser's offer to acquire Mile High, Defendants claimed that the only way to obtain investor funds, which Mile High desperately needed, was to agree to the sweeping changes to the OA, including the waiver of Warner's reversionary rights to Mile High's IP.

186. Defendants' conduct constitutes a breach of their fiduciary duty to Warner and a violation of both the OA and New York law.

187. Defendants Heath, Kuzmanich, and Robinson's conduct was intentional, willful and in bad faith because they knew the true facts. Defendant Robinson claims to have appointed Kuzmanich as his proxy and therefore had constructive knowledge of all facts known by Kuzmanich.

188. Defendants Tabet and Nuell's breaches were also willful and in bad faith, or, at a minimum grossly negligent. It should have been apparent to these Defendants that the alleged alternatives put forward by the other Defendants did not actually exists, and to the extent they did not act intentionally, Tabet and Nuell were grossly negligent in failing to adequately inform

themselves about the subject of the proposed transactions and failing to exercise their business judgment, deferring instead to Mr. Heath and Kuzmanich's unsupported characterization of the Purchase Offer, and deferring to those parties on how to vote on the Purchase Offer.

189. The Co-Founding Member Defendants' other conduct described above, including their conduct in turning down Purchaser's offer based on false representation of the existence of another investor's offer, also constituted intentional, willful, bad faith and grossly negligent conduct causing injury to Warner.

190. By their breaches, Defendants caused Warner damage, including, but not limited to, the loss of money she stood to make from the sale.

191. In addition, Defendants caused Warner irreparable harm by depriving her of the exercise of rights under the OA.

192. Defendants are jointly and severally liable to Warner for the harm their wrongful conduct caused her.

193. Warner seeks all damages available at law, including special damages, fees and costs in an amount to be calculated at trial.

194. Warner is also entitled to punitive damages as a result of Defendants' willfulness, bad faith, gross negligence and other intentional misconduct.

195. Warner also seeks, and incorporates by reference herein, any applicable relief set forth in her Prayer for Relief below.

COUNT III
Aiding and Abetting Breach of Fiduciary Duties
(Against All Defendants)

196. Warner repeats and re-alleges each of the foregoing allegations as if fully set forth herein.

197. For the reasons set forth throughout this Complaint, Defendant Heath breached his fiduciary duties to Warner.

198. Defendant Heath's self-dealing, bad faith, willful and intentional wrongdoing and other breaches harmed Warner. By his breaches, Heath enriched himself and placed his personal interests above any other in violation of his fiduciary duties.

199. Defendant Kuzmanich knowingly induced and participated in Heath's misconduct as he stood to gain a bigger share of Mile that he would not have been able to obtain but for his misconduct with Heath. Kuzmanich worked with Heath to manufacture the Ellsworth and the "Willy/David K" alternatives to the real and firm offer Purchaser had made. Defendant Kuzmanich and Heath represented to the Board these fabricated alternatives and advocated to reject the secure return of the deal with the Purchaser.

200. Defendant Kuzmanich knowingly participated in and facilitated Heath's breaches, by advocating for fabricated alternatives to Purchaser's deal with the knowledge that these alternatives did not exist, that he and Defendant Heath were self-dealing at Warner's expense, and Defendant Heath was working to unlawfully steal from Warner her equity, job, and rights in Mile High.

201. Defendants Tabet, Nuell and Robinson participated in and facilitated Heath's breaches by closing an eye to what was plain and apparent—that the deals Heath and Kuzmanich were putting forward could not be and were not real. Heath trained these Defendants to respond to his every command, and their purported role on the Board and as managing members is meaningless, as they simply sit there to say "yes" or "no" to whatever Heath commands them to do. These Defendants have completely abdicated any responsibility they have as Board members

and their existence on the Board has become simply to provide the votes that Heath requests and not to act in the best interest of Mile High and its members.

202. In exchange for obedience, Heath has promised the Defendants to pay for their legal fees and to defend them, and has given them other benefits. Indeed, Heath has procured as sole counsel to represent each Defendant the companies own attorneys, who Heath controls and pays with Mile High's funds. By way of another example, Defendant Tabet was recently able to obtain a promissory note for her mother on extremely favorable terms to her mother, substantially better than any other note previously issued by Mile High.

203. Defendants' aiding and abetting of Heath's breaches has caused material damage to Warner.

204. As a result of the foregoing misconduct, Defendants should be found liable, jointly and severally, as aiders and abettors, in an amount to be proven at trial.

205. Warner seeks all damages available at law, including special damages, fees and costs in an amount to be calculated at trial.

206. Warner is also entitled to punitive damages as a result of Defendants' willfulness, bad faith, gross negligence and other intentional misconduct.

207. Warner also seeks, and incorporates by reference herein, any applicable relief set forth in her Prayer for Relief below.

COUNT IV
Rescission of the Operating Agreement and IP Agreement
(Against Co-Founding Members Defendants)

208. Warner repeats and re-alleges each of the foregoing allegations as if fully set forth herein.

209. As set forth throughout this Complaint the Co-Founding Member Defendants wrongfully induced Warner by false promises and representations to execute an IP Agreement

and the OA, in which Warner agreed to license her IP to Mile High, dilute her shares and grant the Defendants free shares in exchange for false promises of work to be done for the company that they never did and had no intention of doing.

210. The Co-Founding Member Defendants, who all boasts about their MBAs, wrongfully took advantage of a fitness professional who placed her trust in them and believed the Defendants to be honest and trustworthy people.

211. The Co-Founding Member Defendants were able to misappropriate from Warner 60% of her equity in Mile High ***for free***, by making false promises that they would help her fund her business, while she would remain in charge of the business and her brand, and certainly would always have a substantial and co-equal role in the management and operation of Mile High.

212. The Co-Founding Member Defendants also falsely represented that they would pay for their equity in Mile High, in addition to bringing in investors.

213. In reliance on these misrepresentations, Warner was fraudulently induced into agreeing to give these Defendants approximately 60% of her equity in Mile High, for which these Defendants provided no payment or consideration of any kind.

214. Using false representations and the pretense that they were there to help her, the Defendants improperly manipulated Warner into giving them free equity, and then once Warner transferred her IP rights to Mile High and her idea took off, they worked together to get rid of Warner without consideration.

215. In addition, Defendant Heath claimed to have paid cash to Mile High for additional equity, but no records of his payment can be located, and the Defendants have refused

to provide any such proof. Similarly missing are records of the payments that other of the Defendants claimed to have made in exchange for additional equity.

216. Accordingly, Warner seeks rescission of the OA reflecting the award of equity to the Co-Founding Member Defendants that they appropriated without consideration.

217. Rescission is also appropriate as a result of Defendants' fraudulent inducement of Warner into awarding them 60% of free equity.

COUNT V
Rescission of Contribution Agreement
(Against Co-Founding Members Defendants)

218. Warner repeats and re-alleges each of the foregoing allegations as if fully set forth herein.

219. On August 31, 2017, Warner was fraudulently induced by the Co-Founding Member Defendants into signing a Contribution Agreement by which Warner became a personal guarantor on all guarantees given by the other members for liabilities of Mile High.

220. Under the terms of the agreement, Mile High was required to immediately fund certain accounts that would remain segregated. These funds were intended to protect Warner and others from the personal exposure resulting under the agreement.

221. Funding of these accounts was a material and essential term of this agreement.

222. In breach of the terms of the agreement, the Defendants have failed to fund these accounts. If Warner had known those accounts would not be funded, she would not have agreed to sign the agreement.

223. Because Warner received no consideration of any kind in exchange for signing the Contribution Agreement, the agreement fails for lack of consideration and should be rescinded.

224. In addition, Warner was fraudulently induced into signing the agreement. For instance, at the time the agreement was presented to Warner, she was in charge of Mile High as its CEO and had no knowledge that the Defendants were planning to remove her and completely eliminate her role at Mile High and strip her of her equity. Warner would never have undertaken the risk of providing a personal guarantee had she known she would not be in charge of the business and therefore could ensure the business was running smoothly. If Warner had known the truth, she would never have agreed to give Mile High a personal guarantee.

225. As a result of the foregoing, Warner is entitled to rescission of the Contribution Agreement.

226. In the alternative, Warner seeks any available legal or equitable remedy to which she may be entitled, including specific performance, rescissory damages, costs and fees, or any other relief as may be available at law or in equity.

227. Warner also seeks, and incorporates by reference herein, any applicable relief set forth in her Prayer for Relief below.

COUNT VI
Breach of Contract
(by Breach of Operating Agreement Confidentiality Requirements)
(Against All Defendants)

228. Warner repeats and re-alleges each of the foregoing allegations as if fully set forth herein.

229. Defendant Kuzmanich, as a member of Mile High, owed the utmost loyalty and care to Mile High and each of its members.

230. The Co-Founding Member Defendants also owed Warner fiduciary duties and the obligation to act at all times in the best interest of Mile High as well as to maintain the

confidentiality of offers received by Mile High, and which Mile High agreed to keep confidential under separate agreements with third parties. OA §§ 3(a), 10.

231. In addition, all Defendants were contractually bound not to disclose confidential information absent a confidentiality agreement between the third party and Mile High. OA § 10.

232. In violation of their duties, Defendant Kuzmanich and Heath, acting in their own self-interest, and with the knowledge and approval of the other Defendants, disclosed to Jim Ellsworth, the President of Braintrace, highly confidential details of the Purchaser's offer and of Mile High's business, including matters relating to Warner.

233. Defendants Kuzmanich and Heath, aided and abetted by the other Defendants, committed these breaches in furtherance of their own self-interest. Specifically, these Defendants did not want the Purchaser's acquisition to go through, because if the sale went through, they stood to lose an approximately $30,000 finder's fee that they claimed they were entitled if they successfully raised funds for Mile High.

234. As a result, Defendants Kuzmanich and Heath manufactured Ellsworth's commitment to invest in Mile High and used that as a basis to persuade the other Defendants to reject the Purchaser's offer, even though they knew no such alternative actually existed.

235. The remaining Defendants knew or should have known about the false representations being made by Heath and Kuzmanich. In violation of their duties, the remaining Defendants asked no questions and completely abdicated their responsibilities by blindly voting down Purchaser's offer and closing an eye to the confidentiality breaches committed by Defendants Heath and Kuzmanich.

236. As a result of these breaches, Defendants caused Warner substantial damage, and are liable to Warner, jointly and severally, in an amount to be determined at trial.

237. Warner seeks all damages available at law, including special damages, fees and costs in an amount to be calculated at trial.

238. Warner is also entitled to punitive damages as a result of Defendants' willfulness, bad faith, gross negligence and other intentional misconduct.

239. Warner also seeks, and incorporates by reference herein, any applicable relief set forth in her Prayer for Relief below.

COUNT VII
Breach of Contract
(by Breach of Operating Agreement Undertaking Requirements)
(Against All Defendants)

240. Warner repeats and re-alleges each of the foregoing allegations as if fully set forth herein.

241. The Co-Founding Member Defendants have a fiduciary obligation not to engage in self-dealing or appropriate Mile High's funds for their personal use or expenses.

242. The Co-Founding Member Defendants also have an obligation only to permit advancement in accordance with the specific provisions of the OA, which require Board resolutions and the provision of undertakings in a form consistent with New York law.

243. In violation of their duties and contractual obligations, the Defendants have misappropriated Mile High's already limited funds to pay for their personal legal expenses, as well as those of Defendant Kuzmanich.

244. None of the Defendants has provided the legally required undertaking, despite Warner's repeated requests that the do so.

245. This misconduct was willful and in bad faith.

246. Warner has the right to enforce the contractual provisions of the OA, and seeks an injunction barring the Defendants from further misappropriating funds to pay for their legal expenses in violation of the requirements of the OA and New York law.

247. Warner has been damaged by Defendants' misappropriation and conversion of Mile High's funds for their own personal use and that of Defendant Kuzmanich, leaving Mile High with further debt. In particular, Warner is further exposed to liability for this unlawful debt as a result of the personal guarantees she was induced to sign in the "Contribution Agreement" described in Count VI of this Complaint, as well as other guarantees she was required to sign.

248. Warner seeks to enjoin the Defendants and their agents from further misappropriations of funds in violation of the OA and New York law.

249. In addition, Warner seeks to hold Defendants jointly and severally liable for the damage they caused by their misconduct, including by requiring them to make restitution of all misappropriated funds, plus interest.

250. In addition, Warner is entitled to seek restitution directly from the nonparties who received those fund, knowing the funds were not properly paid to them because they were misappropriated from Mile High, and they were paid out in violation of contractual rights and without due authorization.

251. Warner also seeks, and incorporates by reference herein, any applicable relief set forth in her Prayer for Relief below.

COUNT VIII

Breach of Contract
(by Breach of Operating Agreement Prohibition on Removal of Founding Member from Board Without Cause and Notice, and by Operation of Mile High with A Four Member Board in Breach of Other Provisions in the OA)
(Against Co-Founding Member Defendants)

252. Warner repeats and re-alleges each of the foregoing allegations as if fully set forth herein.

253. The purported removal of Warner as a Member of the Board of Mile High, without cause and without notice and an opportunity to cure, is a breach of the OA, which prohibited Defendants from removing Warner from Mile High's Board without cause and without notice and an opportunity to cure.

254. The OA requires that any removal of a Founding Member Manager be for cause and that specific notice and an opportunity to cure be given a founding member depending on the cause for removal.

255. Warner is entitled to injunctive relief to remedy this violation of her rights, in light of the fact that money damages cannot compensate the loss of her management rights in Mile High, and the loss of her ability to manage and take her of her brand and IP, in which she owns exclusive reversionary rights.

256. Pursuant to the terms of the OA in Section 15(o), titled "Remedies" Defendants have agreed that their breach of Warner's fundamental right to be a member of the Board is not compensable by an award of money damages, and Warner is entitled to immediate specific performance of these provisions.

257. Further, absent an agreement by a unanimous Board, the size of the Board is fixed in the OA at five members. In breach of the OA, the Defendants have purported to act with a four-member Board, rendering all actions they have taken since invalid.

258. As a result of the foregoing breaches, Warner is entitled to immediate specific performance and other equitable relief.

259. Warner also seeks, and incorporates by reference herein, any applicable relief set forth in her Prayer for Relief below.

COUNT IX
Defamation
(Against Defendant Heath)

260. Warner repeats and re-alleges each of the foregoing allegations as if fully set forth herein.

261. Defendant William Heath published to third parties false and defamatory statements about Warner's professional ability and conduct as Mile High's CEO, which statements constitute libel *per se* under New York law.

262. By way of example, on July 15, 2018, Heath sent an email to at least one investor. Likely he sent the email to many more people.

263. In the email, Heath stated that they had fired Warner as CEO of Mile High because of her alleged "lack of alignment and discord with the board." Heath falsely claimed that Warner was "pushing [the members] to sell [Mile High] to Purchaser for a price and terms that did not make sense."

264. Heath falsely described the prospective deal with Purchaser as follows: "The terms would have barely given you your initial invested capital back up front. All upside in the deal was tied up in [Purchaser's] stock and a cash earn-out over several years . . . ."

265. Heath's statement was false and misleading. In fact, the deal would have given each investor a substantial and immediate cash return upfront, as well as an immediate return in equity of the Purchaser upfront.

266. In addition, Heath failed to disclose that Mile High was in a dire financial situation and that without the deal the likelihood that investor could recoup their investment was virtually none.

267. Mr. Heath's statement and implication was that they fired Warner for her support of a "bad deal" with Purchaser was false.

268. As CEO, Warner's profession requires good judgment in business matters and acting in the best interest of Mile High's investors. This includes advocating for good deals and refraining from advocating for bad deals. Warner's paramount duty as CEO of Mile High was to maximize the value of the company for equity holders and ensure that investor money would not be lost.

269. Heath's clear assertion was that Warner was deficient in her duties, professional judgment, and ability as CEO for failing to properly consider the interests of the investors and for allegedly recommending a "bad deal."

270. Stating that Warner "pushed" for Purchaser's "bad deal" impugned Warner's fitness as CEO of Mile High. Disseminating information that she was fired for that reason materially damaged her professional reputation and standing in her community.

271. Although not required to prove Warner's defamation claim, here Heath also acted with actual malice in disseminating these false and defamatory statements about Warner.

272. As a managing member of Mile High, Heath had actual knowledge of the content of Purchaser's offer, including the guaranteed up-front cash payout to equity holders.

273. Heath also had actual knowledge that Warner advocated for this deal because it was the only remaining solution to save Mile High and investors' investments.

274. Heath also had actual knowledge that the reason he fired Warner had nothing to do with what he described in the email but was due solely to his desire to appropriate for himself Warner's job, equity, and IP. While Heath represented that he was a professional investor, in fact he had been in financial difficulties, had been unemployed for many years, and was unable to raise even the most basic funds that Mile High needed. For instance, before Warner brought Purchaser's offer up for consideration, Heath had spent the first three months of 2018 falsely claiming that he had firm commitments from investors in the millions and was getting the money in the bank the following week. After realizing that Heath was lying, as no such money ever came in, Warner promptly acted to ensure that Mile High and its investors' money could be saved.

275. Heath fired Warner solely as a result of his self-dealing and not for any of the reasons he described in his email.

276. Heath is also liable to Warner for other instances of defamation.

277. Specifically, on December 21, 2018, Heath caused to be published a letter containing numerous false statements, including but not limited to the following:

a. Falsely claiming that Warner has extraordinarily extensive noncompetes;

b. Falsely claiming that Warner had discussions with Purchaser in February, and that Mile High knew nothing further of any other discussion with Purchaser;

c. Falsely claiming that Mile High did not know that Warner became employed by Purchaser after she was fired by Heath as Mile High's CEO;

d. Falsely claiming that Warner is subject to extraordinary "restrictive covenants" "as a former employee and manager and as a founding member" of Mile High,

e. Falsely claiming that Warner is bound by restrictive covenants that are unlimited geographically and temporally;

f. Falsely representing the nature and terms of Warner's contractual commitments;

g. Improperly disclosing and casting Warner in a false light with her new employer

h. Falsely claiming that in order for Warner to be able to continue employment with her new employer, Mile High needed to receive "written assurances."

i. Falsely claiming that Ms. Warner and Mile High have "certain on-going issues," and no such thing was true.

278. These false statements were made intentionally and with malice to damage Warner's professional reputation with her new employer.

279. In particular, the Defendants have been aware since July 2018 that Warner found employment at Purchaser following her termination from Mile High. Despite having known for six months, the Defendants waited until Christmas Eve to send this false and defamatory letter, with the specific intent to inflict special injury on Warner during the holiday season.

280. Defendant Heat made other false and defamatory statements relating to Warner. Specifically, in Mile High's disclosures to actual and prospective investors, Heath stated that Warner "there is a risk that Ms. Warner will attempt to damage the brand through words and actions, thus diluting the brand and intellectual property that Ms. Warner has contributed" to Mile High. These statements are false and defamatory and constitute libel per se.

281. Heath's false and defamatory statements caused Warner damage and injured her in her personal and professional reputation.

282. Warner seeks all damages available at law, including special damages, fees and costs in an amount to be calculated at trial.

283. Warner is also entitled to punitive damages as a result of Heath actual malice in defaming her.

284. Warner also seeks, and incorporates by reference herein, any applicable relief set forth in her Prayer for Relief below.

COUNT X
Tortious Interference with Prospective Business Advantage
(Against Defendants Heath and Kuzmanich)

285. Warner repeats and re-alleges each of the foregoing allegations as if fully set forth herein.

286. In June 2018, a prospective purchaser made a firm offer to buy Warner's shares in Mile High, as well as her IP in Mile High, and the shares of all other members.

287. Warner stood to gain millions of dollars from the offer made by the prospective purchaser.

288. Heath and Kuzmanich used unlawful means to interfere with Warner's prospective business advantage created by the offer made by the prospective purchaser. Among other things, Heath and Kuzmanich used the fraudulent misrepresentations and other misconduct described throughout this complaint to vote down the sale of Mile High to the prospective purchaser.

289. Heath and Kuzmanich also engaged in other independently wrongful conduct to interfere with Warner's prospective business advantage and ensure the sale to prospective purchaser would be defeated. For instance, in breach of a confidentiality agreement with prospective purchaser, the Heath and Kuzmanich disclosed to third parties, including Ellsworth, confidential information relating to prospective purchaser's interest in buying Mile High, as well as confidential information regarding Mile High. These wrongful conduct was then used to manufacture alternatives to the offer made by prospective purchaser that did not exist.

290. After they successfully sabotaged the sale to prospective purchaser, Mile High was left with no cash, giving Kuzmanich and Heath the opportunity to take Mile High over on the cheap. Indeed, since they sabotaged the sale, Kuzmanich and Heath have been granting themselves extremely unfavorable promissory notes and have been the primary source of funding of Mile High.

291. Defendants' conduct described above constitute tortious interference with Warner's prospective business advantage.

292. By their wrongful conduct, the Defendants defeated a prospective advantageous deal that would have resulted in significant economic gain to Warner.

293. To prevent such a transaction by misrepresentation (e.g. that there existed another, better deal such that the Purchaser's deal should be rejected, despite actual knowledge that that was false) constitutes wrongful means, and thus is tortious. The Defendants lies and breaches of the confidentiality agreement with purchaser also constitute independently wrongful conduct in furtherance of their attempt to defeat Purchaser's deal.

294. Defendants engaged in this misconduct intentionally and to cause harm to Warner, whose assets and equity stake in Mile High they wanted to take over for free.

295. Defendants Heath and Kuzmanich wrongdoing caused Warner damage, including, but not limited to, the loss of money she stood to make from the sale.

296. Defendants are jointly and severally liable to Warner for the harm their wrongful conduct caused her, including damages from lost sale.

297. Warner seeks all damages available at law, including special damages, fees and costs in an amount to be calculated at trial.

298. Warner is also entitled to punitive damages as a result of Heath actual malice in defaming her.

299. Warner also seeks, and incorporates by reference herein, any applicable relief set forth in her Prayer for Relief below.

COUNT XI
Indemnification and Advancement
(Against the Co-Founding Member Defendants)

300. Warner repeats and re-alleges each of the foregoing allegations as if fully set forth herein.

301. The Co-Founding Member Defendants control Mile High's Board of Managers.

302. The Co-Founding Member Defendants have wrongfully denied Warner's request for advancement and indemnification to defend against threats and demands that have been made against her by reason of her role at Mile High, even though Warner agreed to provide the requisite undertaking to cover any advancement she receives.

303. By contrast the Co-Founding Member Defendants have granted themselves and their co-conspirator, Kuzmanich, liberal advancement, even though no resolution explaining or supporting such advancement was ever passed, and the requisite undertakings under the OA and New York law were never given by any of the Defendants.

304. The Defendants' conduct is a breach of the OA, which contains mandatory advancement and indemnification provisions. Specifically, the OA provides:

> (g) *Indemnification of the Managers and Others.*
>
> (1) The Managers, the officers and agents acting on behalf of the Company, if any (each, an "***Indemnitee***"), are hereby indemnified and held harmless by the Company from and against any manner of claim, demand, proceeding, suit and action (whether civil, criminal, administrative or investigative,) and any liability (joint or several), loss, damage, expense, or injury of any nature suffered or sustained by such party (including any judgment, award, settlement, and any reasonable attorneys' fees and disbursements and other costs

> or expenses incurred in connection with the defense of any actual or threatened action, proceeding, or claim) ("***Loss***"), arising out of or incidental to the business, activities or operations of, or relating to, the Company, regardless of whether or not the Indemnitee continues to be a Manager, agent, officer, or Affiliate thereof at any time any such liability or expense is paid or incurred, to the maximum extent permitted by law, provided, that, such Indemnitee acted or omitted to act in good faith with a view to the best interests of the Company, and in the case of officers and agents, was duly authorized to take such action or omission by the Board and that no Manager, officer or agent may be indemnified by the Company from and against any Loss which result from the gross negligence, willful misconduct or breach of fiduciary duty of such Person. No Manager, agent or officer will have liability (person or otherwise) to the Company or its Members for damages for any breach of duty in such capacity; provided, however, that nothing in this Section 4(g) will eliminate or limit the liability of any Manager, agent or officer if a judgment or other final adjudication adverse to such Manager, agent or officer establishes that his or her acts or omissions constituted gross negligence, willful misconduct or willful and intentional breach of fiduciary duty.
>
> (2) Expenses incurred by an Indemnitee in defending any claim, demand, action, suit or proceeding in this Section 4(g) will, from time to time, upon request by the Indemnitee, be advanced by the Company prior to the final disposition of such claim, demand, action, suit or proceeding upon receipt by the Company of an undertaking by or on behalf of the Indemnitee to repay such amount if it is determined in a judicial proceeding or a binding arbitration that such Indemnitee is not entitled to be indemnified as authorized in this Section 4(g).

305. The foregoing requires the Co-Founding Member Defendants to agree to provide Warner the advancement she requested.

306. Specifically, Debora Warner is currently subject to threatened claims by Defendants whose counsel has represented on December 6, 2018 that Mile High will sue Warner. Warner has a right to advancement to defend against the unfounded claims that Defendants have threatened.

307. In addition, nonparties whose interests were initially represented by Defendants' own counsel, have made demands on Warner for the payment of costs and fees relating to this proceeding arising out of Warner's role at Mile High. Specifically, before this proceeding began, Warner was able to obtain the cooperation of a key witness, Ellsworth who provided critical

information to Warner. At the time Warner contacted Ellsworth, he was represented solely by a counsel, who was Ellsworth wife. However, after the Defendants' learned of Ellsworth's communications with Warner, they began immediately to interfere to obstruct Warner's ability to further investigate the Defendants' wrongdoing. Thereafter, Ellsworth has made a written demand on Warner of $50,000. Similarly, nonparty ClassPass, who has been working closely with the Defendants, has made a demand on Warner of over $20,000. Nonparty Pypestream has made a demand on Warner of approximately $2,500 to produce three useless documents.

308. Warner has a right to advancement and indemnification to defend against these demands for costs and fees being made by nonparties, and which will likely be made by other nonparties in the near future.

309. Warner has requested advancement but the Defendants have ignored her request.

310. Each of these demands arises from Warner's good faith conduct relating to Mile High's business.

311. Warner is entitled to both indemnification and to immediate advancement to defend against these demands and threatened claims.

312. Warner, as a Manager of Mile High, also requests advancement and indemnification of the costs of this action (including for any counterclaim and for demands, claims or proceedings by nonparties for discovery costs).

313. Warner has offered to provide an immediate undertaking to cover any advancement provided, but her requests have been ignored.

314. Warner is additionally entitled to recover fees-on-fees incurred to enforce her rights to advancement and indemnification.

315. Warner seeks to enforce her rights directly against the Defendants who are the only ones with power to ensure that Mile High provide Warner advancement and indemnification.

COUNT XII
Books and Records Request
(Against the Co-Founding Member Defendants)

316. Warner repeats and re-alleges each of the foregoing allegations as if fully set forth herein.

317. As a Manager and a Co-Founding Member, Debora Warner has a right of access to books and records of Mile High. The right is founded in both the OA, Section 1102 of the LLC Law, as well as New York common law.

318. The OA provides

> After giving reasonable advance written notice to the Company stating under oath the purpose thereof in accordance with Section 1102(b) of the Act, any Member may inspect and review the Company's books and records for any proper purpose and may, at the Member's expense, have the Company make copies of any portion or all of such books and records. A proper purpose means a purpose reasonably related to such person's interest as a Member.

319. And LLC Law § 1102 provides that "Any member may, subject to reasonable standards as may be set forth in, or pursuant to, the operating agreement, inspect and copy at his or her own expense, for any purpose reasonably related to the member's interest as a member, . . . information regarding the affairs of the limited liability company as is just and reasonable."

320. In violation of this right of access, the Defendants have prevented the Plaintiff from accessing any of the records of the Company since they began acting to exclude her from management.

321. In addition, the Defendants have caused Mile High to retain two firms to serve as company counsel, Lebowitz Law Office LLC ("Lebowitz") and Berkowitz Trager and Trager ("Berkowitz").

322. Berkowitz represented to Warner's counsel, through attorney Steve Gersh, that his firm was working hand in hand with Lebowitz as Mile High's counsel, and that Berkowitz was providing it corporate advice, while Lebowitz was providing Mile High litigation advice.

323. As a Co-Founding Member of Mile High's Board, Warner is entitled to access to all the legal advice these two law firms provided the rest of Mile High's Board. Warner has requested access and full disclosure by these two firms of the legal advice and other communications had with the rest of the Board, but they refused to provide it.

324. Warner has also demanded, for months, access to numerous other books and records to which she is entitled, all of which requests have been ignored.

325. Warner's loss of access to records and information to which she is entitled under the OA and under New York law is not remediable by money damages and Warner is entitled to seek immediate specific performance and access to all these records.

326. For the foregoing reasons, Warner requests specific performance and equitable relief in order that she can obtain full access to the records from the Lebowitz and Berkowitz law firms, as well as to the other books and records she has requested.

PRAYER FOR RELIEF

WHEREFORE, Warner demands and prays for a judgment granting the following relief:

A. Judicial dissolution of Mile High Run Club, LLC;

B. Appointment of Warner as Mile High's liquidator, as set forth in the Operating Agreement;

C. Transferring Mile High's IP to Warner for $1 pursuant to the terms of Operating Agreement;

D. Enjoining Defendants from further encumbering Mile High with more debt;

E. Enjoining Defendants from using Mile High's funds to pay their personal expenses and liabilities in this action, or any other action that may be commenced in a court of law or in bankruptcy;

F. Enjoining Defendants from making misrepresentations and omissions to actual or prospective investors, customers, and or other third parties in an effort to sell securities or obtain money from third party, including loans, lines of credit, or any other form of credit, based on untrue and misleading statements;

G. Granting rescission as set forth in this Complaint;

H. Awarding rescissory damages;

I. Granting punitive, enhanced, and/or treble damages;

J. Awarding all interests, fees and costs;

K. Finding Defendants liable for $10 million in damages, jointly and severally, or in another amount to be proven at trial;

L. Enjoining Defendants from removing or purporting to remove Plaintiff from the Board of Mile High without compliance with the Operating Agreement;

M. Declaring that Ms. Warner continues as a member of the Board, will all the attendant rights;

N. Granting such other and further relief as available at law or in equity or as this Court may deem just and proper.

Respectfully submitted,

By: 

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