SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

KRISTEN L. EIKENBERRY,

Plaintiff,

- against -

RICHARD JOSEPH LAMSON,

Defendant.

Index No. 516653/2020

Mot. Seq. 002

DEFENDANT RICHARD LAMSON'S REPLY MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE COMPLAINT

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PRELIMINARY STATEMENT

For over a half-century, the New York Court of Appeals and the Second Department have repeatedly and unequivocally affirmed that a partnership between parties may not exist where the parties' business is conducted in a corporate form. Plaintiff's opposition papers fail to rebut this well-established black letter law which conclusively precludes her partnership theory. Instead, Plaintiff tries to fit within an exception to the general rule (referenced in a 1995 case from the Fourth Department)—which provides that partners may use a corporation as a conduit to hold title to realty without destroying their partnership. This clumsy attempt to shoehorn a square peg through a round hole should be rejected. The Complaint, and Plaintiff's exhibits, make clear that her case is not about "conduits" or "special purpose entities." In no uncertain terms, Plaintiff asks this Court to be the first court to ever endorse the existence of a blanket oral partnership agreement which envelops independent corporate entities (real companies conducting real business with real documents evidencing ownership) formed *over two decades after* the purported partnership agreement was entered into. There is no authority whatsoever to support such an incredible and far reaching proposition.

While Plaintiff is not without recourse (she may pursue her rights as a *member* or *shareholder* of the entities with which she is associated), her partnership theory is not sound and all of her claims—each of which depend on the existence of a partnership—must fail as a matter of law. Accordingly, the Complaint should be dismissed with prejudice, and discovery should be stayed pending the resolution of this motion.

ARGUMENT

I. A PARTNERSHIP MAY NOT EXIST WHERE THE BUSINESS IS CONDUCTED IN CORPORATE FORM

To the extent the parties were in business together, the documentary evidence in the record demonstrates (and Plaintiff does not contest) that the parties operated their business through independent corporations and LLC's (Compl. ¶¶ 37-42; Pl. Br. 3, 9-10, ECF No. 95) (listing *330 Atlantic Ave Development LLC, Easy Wind L.L.C., Fairmont Industries Supply, LLC, Fairmont Industries Inc., HTHP Leasing LLC, and Two Route 17 South LLC* as "special purpose companies formed between 2007 and 2019").0F[1]

In his moving papers, Mr. Lamson established that it is the law of this State that a partnership may not exist where the business is conducted in corporate form, and parties may not be partners between themselves while using the corporate form. (Lamson Br. pp. 9-11, ECF No. 72). Plaintiff cannot overcome the overwhelming body of law which compels the conclusion that Plaintiff and Mr. Lamson have only the rights, duties and obligations as stockholders and LLC members, but not as "partners."

In 1957, in unequivocal language the Court of Appeals held that partners or joint venturers cannot conduct a joint enterprise "through the instrumentality of a corporation presenting itself to the world as the responsible entity." *Weisman v. Awnair Corp. of Am.*, 3 N.Y.2d 444, 449, 144 N.E.2d 415 (1957) (". . . the rule is well settled that a joint venture may not be carried on by individuals through a corporate form"). The New York Court of Appeals has never reversed or

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[1] Plaintiff's contention that Mr. Lamson "asks the Court to accept his story as true" (Pl. Br. 3, ECF NO. 95) betrays her misunderstanding of the relevant legal issues. The court need not "accept" Mr. Lamson's "story" about anything to conclude that Plaintiff's theory of the case is not viable. The overwhelming documentary evidence that Plaintiff herself put into the record proves that, to the extent the parties conducted construction and real estate development business together, that business was conducted in the form of corporate entities—not as a partnership.

"qualified" the rule it stated in *Weisman*. *See Ingle v. Glamore Motor Sales, Inc.*, 73 N.Y.2d 183, 189, 535 N.E.2d 1311, 1314 (1989) ("No duty of loyalty and good faith akin to that between partners, precluding termination except for cause, arises among those operating a business in the corporate form who "have only the rights, duties and obligations of stockholders" and not those of partners") (*citing Weisman*).

And in the half-century since *Weisman* was decided, the Second Department has repeatedly and consistently reaffirmed *Weisman's* holding.

In the 1977 case, *Judelson v. Weintraub*, the parties conceded that a partnership existed between them, but at some point they adopted the corporate form. 55 A.D.2d 906, 907 (2d Dep't 1977). In dismissing plaintiff's action for a partnership accounting, the Second Department applied *Weisman* and held that once the parties adopted the corporate form, "they cease[d] to be partners and ha[d] only the rights, duties and obligations of stockholders. They cannot be partners *Inter sese* and a corporation as to the rest of the world." *Id*.

In the 1989 case, *Notar-Francesco v. Furci*, two doctors entered into an oral partnership agreement to practice medicine. 149 A.D.2d 490, 491–92 (2d Dep't 1989). Three years later, they formed a corporation to transact their business. *Id*. In plaintiff's action for a partition of alleged partnership property, the Second Department applied *Weisman* and held that "[o]nce the doctors formed a professional corporation, the partnership was no longer in existence, and the partnership agreement was a nullity . . . [because a] partnership and a corporation are mutually exclusive, each governed by a separate body of law." *Id*. The court further reasoned that "[o]nce they adopted the corporate form, they ceased to be partners, and had only the rights, duties and obligations of stockholders." *Id*.

In the 1993 case, *Roberts v. Rubio*, the Second Department again affirmed that carrying on a partnership business through corporate form was not possible as a matter of law. 189 A.D.2d 867, 867–68 (2d Dep't 1993) (rejecting plaintiff's position that the parties agreed to continue their partnership business despite adopting the corporate form in 1964, because "[a]s a matter of law, the parties ceased to be partners in 1964" when they adopted the corporate form).

In 2001, and again in 2002, the Second Department twice more reaffirmed the "well-established" law of *Weisman*. In *Berke v. Hamby*, 279 A.D.2d 491 (2d Dep't 2001), a former employee of a corporation alleged that he had entered into an oral partnership agreement with the corporation's owner. Affirming dismissal of his complaint, the Second Department reiterated that "a partnership may not exist where the business is conducted in a corporate form, as each is governed by a separate body of law." *Id.* at 492.

A year later, in *Weiner v. Hoffinger, Friedland, Dobrish & Stern, P.C.*, 298 A.D.2d 453 (2d Dep't 2002), an ex-member of a law firm structured as a professional corporation, sought an accounting of the firm. Just as Plaintiff does here, the ex-member alleged that he was a partner in a partnership which existed concurrently with the professional corporation. The Second Department held that "[i]t is well established that a partnership may not exist where the business is conducted in corporate form, and parties may not be partners between themselves while using the corporate shield to protect themselves against personal liability [citation omitted]." *Id.* at 455. Accordingly, the ex-member was "not entitled to an accounting" and the complaint for an accounting had to be dismissed. *Id.* 1F[2]

[2] Ignoring the substance of the decision, Plaintiff claims *Weiner* is inapposite on its facts because there, unlike here, the partnership in question was reorganized as a corporation. (Pl. Br. 10, ECF No. 95). But the salient legal point in *Weiner* is that "a partnership may not exist where the business is conducted in corporate form, and parties may not be partners between themselves while using the corporate shield . . ." *Weiner*, 298 A.D.2d at 455. The reason that the parties could not

As recently as 2019, the Second Department's consistent application of the *Weisman* rule was recognized as controlling authority in this Court.

> However, here, contrary to counsel's misconception, there is no joint venture. There is only a limited liability company which put the words 'joint venture' in its name. There is also no partnership. A joint venture may not be carried on by the parties to it in the form of a corporation, a partnership, or a limited liability company, which is a statutory hybrid of the two, because it is none of these

Deblasie v. E.E. Cruz & Co., Inc., No. 505147/2016, 2019 WL 2995780, at *4 (N.Y. Sup. Ct. Kings Co. July 9, 2019) (Silber, J.) (emphasis added).

Plaintiff's Complaint must be dismissed because—despite Plaintiff's countless exhibits—there is zero evidence of the parties ever holding themselves out as a partnership. Indeed, Plaintiff does not even allege that the parties engaged in any commercial development projects, entered into any contracts, or conducted any business in the capacity of "partners." (*See* Complaint, generally). Conversely, Plaintiff's own plethora of evidence proves that the parties consistently held themselves out to the world at large (including to contractual counterparties and governmental agencies) as corporate entities. *See*, *e.g.*,

- Eikenberry Aff., Ex. D – Construction permit for 330 Atlantic Avenue project issued to "Fairmont Industries Corp."
- Eikenberry Aff., Exs. I-J – HTHP Leasing LLC formed for the business purpose of "construction: remodel existing residential properties."
- Eikenberry Aff., Ex. K at p.5 – Eikenberry signed as partner of "KE Pacific & FM Pacific LLC"
- Eikenberry Aff., Exs. M-O – work permits issued to Kristen Eikenberry of "Fairmont Industries Corp."

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call themselves partners is that the "firm held itself out as a single entity, operating as a professional corporation." (*Id*. at 454). It did not matter that the parties once held themselves out as a partnership. *Weiner* applies to this case with full force and mandates dismissal.

- Eikenberry Aff., Ex. Q – Insurance Summary and Affirmation signed by Eikenberry as on behalf of "Fairmont Industries Inc."
- Eikenberry Aff., Ex. R – joint development agreement entered into by Eikenberry and Lamson on behalf of "KE Pacific, LLC"
- Eikenberry Aff., Ex. S – Eikenberry assigned membership interest to FM Pacific, LLC on behalf of "KE Pacific, LLC"

For example, in arguing that she was involved with the Pacific Street project, Plaintiff alleges that "our venture shared and is to share in the benefits and burdens of developing both the Pacific Street Townhouses and 330 Atlantic." (Eikenberry Aff. ¶ 19) (emphasis added). In support, Plaintiff submits a March 2013 agreement governing the parties' rights and obligations with respect to those projects. But that agreement proves that the "our venture" Plaintiff references was an entity called "KE Pacific, LLC." (Eikenberry Aff., Ex. R). A year later KE Pacific, LLC transferred its interest in the project to Mr. Mendlow by entering into an "Assignment and Assumption of Membership Interests." (Eikenberry Aff., Ex. S). During both transactions, Plaintiff and Mr. Lamson did not hold themselves out to Mr. Mendlow *as partners*, but as *members of KE Pacific, LLC*. Under *Weisman* and its progeny, Plaintiff and Mr. Lamson cannot hold themselves out as KE Pacific, LLC to Mr. Mendlow while being partners between themselves. Accordingly, as a matter of law, Plaintiff's rights to share in the benefits and burdens of the Pacific Street project are governed by the operating agreement of KE Pacific, LLC (and the agreements that KE Pacific, LLC entered into with counterparties like Mr. Mendlow), not some fantasy partnership agreement between Plaintiff and Mr. Lamson.2F[3] *Deblasie*, 2019 WL 2995780, at *4 ("There is [] no partnership. A joint venture may not be carried on by the parties to it in the form

[3] Although Plaintiff failed to include the operating agreement as part of the record, Ex. R to her Affidavit confirms the existence of an operating agreement for KE Pacific, LLC. (Eikenberry Aff., Ex. R at p. 1).

of a corporation, a partnership, or a limited liability company [] because it is none of these"). The same goes for Plaintiff's rights with respect to 330 Atlantic Ave Development LLC, Easy Wind L.L.C., Fairmont Industries Supply, LLC, Fairmont Industries Inc., HTHP Leasing LLC, and Two Route 17 South LLC.3F[4]

Plaintiff does not cite to <u>a single controlling New York Court of Appeals or Second Department case</u> to support her proposition that "numerous courts have rejected Lamson's argument" that a partnership may not be carried on by the parties to it in the form of a corporation or LLC (Pl. Br. 9, ECF No. 95). Instead, in a feeble attempt to save her Complaint from dismissal, Plaintiff claims that the law set forth in *Weisman* and its progeny was "qualified" by the Fourth Department decision in *Blank v. Blank*, 222 A.D.2d 851 (4th Dep't 1995) (Pl. Br. 10 n.6, ECF No. 95). But to the extent that a 1995 Fourth Department case has any impact on the controlling authority of *Weisman* (and the five decades of Second Department case law unequivocally upholding *Weisman*), the qualification discussed in *Blank* is irrelevant. The *Blank* qualification says that parties may concurrently "form[] a corporation <u>as a conduit to hold title to realty</u> . . ." without destroying the partnership. *Blank*, 222 A.D.2d at 852–53 (emphasis added) (*citing Macklem v. Marine Park Homes, Inc*., 17 Misc. 2d 439, 441, 191 N.Y.S.2d 374, 376 (N.Y. Sup.

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[4] Plaintiff's rights and obligations with respect to 330 Atlantic Ave Development LLC, Easy Wind L.L.C., Fairmont Industries Supply, LLC, Fairmont Industries Inc., HTHP Leasing LLC, or Two Route 17 South LLC (e.g., profit, distributions, ownership of assets, etc.) would necessarily flow from the nature of her association with each specific corporate entity—not from a blanket partnership agreement with vague and unspecified terms allegedly covering "all projects" for eternity (Compl. ¶ 93). In particular, limited liability companies are governed by the companies' operating agreements and the LLC Acts enacted by the States where the entities were formed. *See Union St. Tower, LLC v. First Am. Title Co.*, 161 A.D.3d 919, 921 (2d Dep't 2018) (title insurance policy containing entirety of terms between parties barred the plaintiff's claim of an oral agreement); *Cobalt Partners, L.P. v. GSC Capital Corp.*, 97 A.D.3d 35, 41–42 (1st Dep't 2012) (". . . it was also proper to dismiss the claim alleging breach of oral contract because the alleged oral agreement contradicts terms in the written [subscription agreement]").

Ct. Nassau Co. 1955) (joint venturers formed corporation "merely as a conduit of title and that there never was any intention on the part of [the parties] to carry on their venture as stockholders in a corporation").4F[5]

The *Blank* qualification, to the extent it is applicable in the Second Department, is inapplicable to this case. The Complaint does not allege that any of 330 Atlantic Ave Development LLC, Easy Wind L.L.C., Fairmont Industries Supply, LLC, Fairmont Industries Inc., HTHP Leasing LLC, or Two Route 17 South LLC were "conduits" created at the time of the partnership's formation to hold title to real property of the fictitious EL Partnership. Indeed, Plaintiff acknowledges that the entities are real companies (created many years after the formation of the alleged partnership) to carry on the parties' business activities.

- 330 Atlantic formed in 2019 (*twenty-three years* after the alleged formation of the "EL Partnership") is not alleged to have been formed as a conduit to hold title to any realty—but was formed to "hold and *manage the Partnership's investment in a development project* that is presently under construction . . ." (Compl. ¶ 33)

[5] In addition to *Blank v. Blank*, Plaintiff cites several other cases which similarly hold that a corporate entity may be used as a shell "conduit to hold title to the [partnership's] underlying property." (Pl. Br. at 9, ECF No. 95) (*quoting Rinaldi v. Casale*, 13 A.D.3d 603, 604-05 (2d Dep't 2004) (plaintiff and decedent entered into an oral agreement to purchase and develop real estate together and contemporaneously formed a shell conduit Country Estates, Inc. to transfer the property to it.); *Sherpaco, LLC v. Kossi*, 2010 N.Y. Misc. LEXIS 1322, *23, 2010 NY Slip Op 30072(U) (N.Y. Sup. Ct. N.Y. Co. Jan. 15, 2010) (plaintiff alleged that her former romantic partner promised she would be a partner in the ownership of real property held by a conduit, Sherpaco LLC, if she contributed toward its purchase price and monthly toward the property's expenses and that, if they ever decided to sell, she would get a proportionate share of the profits). *Patycki v. Slaski*, cites *Blank* and *Rinaldi*, among other cases, for the proposition that partners may act as a corporation "as long as the rights of third-parties are not affected or the partnership's rights do not conflict with the functioning of the corporation." 42 Misc. 3d 1213(A), at *5, 984 N.Y.S.2d 633 (N.Y. Sup. Ct. Kings Co. 2014). *Patycki* is inapposite because there the parties formed a corporate entity concurrently with the formation of the partnership. *Id*. at *3 (noting that the parties "entered into a partnership in which they agreed to work, under the name PMC"). The court held that "the allegation that PMC is a corporate entity does not preclude finding the existence of a partnership, since a corporate entity *may be a party to a partnership*." *Id*. at *5 (emphasis added).

- Easy Wind L.L.C. formed in 2015 (*nineteen years* after the alleged formation of the "EL Partnership") is not alleged to have been formed as a conduit to hold title to any realty (Compl. ¶ 35)
- Fairmont Industries Supply, LLC is not alleged to have been formed as a conduit to hold title to any realty—but is alleged to be "used for various EL Partnership business ventures . . ." (Compl. ¶ 37)
- Fairmont Industries Inc. formed in 2007 (*eleven years* after the alleged formation of the "EL Partnership") is not alleged to have been formed as a conduit to hold title to any realty—but is alleged to be "used in [the EL Partnership's] various business ventures . . ." (Compl. ¶ 38)
- HTHP Leasing LLC formed in 2010 (*fourteen years* after the alleged formation of the "EL Partnership") is not alleged to have been formed as a conduit to hold title to any realty—but "owns and controls three large trucks . . ." (Compl. ¶ 39)
- Two Route 17 South LLC formed in 2013 (*seventeen years* after the alleged formation of the "EL Partnership") is a company which owns real property. But it is the property of a separate entity, HTHP Leasing LLC, not property of the alleged EL Partnership. (Compl. ¶ 42)

Plaintiff further argues that "[p]artnerships often operate through special purpose companies to protect the partners from liability, manage a discrete project, or allow for investors, among other reasons." (Pl. Br. 9, ECF No. 95). But Plaintiff does not cite a single case to support the far-fetched proposition that *330 Atlantic Ave Development LLC, Easy Wind L.L.C., Fairmont Industries Supply, LLC, Fairmont Industries Inc., HTHP Leasing LLC, and Two Route 17 South LLC* (formed between 2007 and 2019) can be characterized as "special purpose companies" formed pursuant to an alleged oral partnership agreement entered into in 1996. (Pl. Br. 3, ECF No. 95). Plaintiff's leading case for the proposition that partnerships often operate through special purpose companies is *dicta* from a New York County Supreme case, *Kaye v Levine Prospect, LLC*, where the court noted that plaintiff and defendant "together engaged in real estate business endeavors through various jointly-formed special purpose entities." 2019 N.Y. Misc. LEXIS 2261, *1, (N.Y. Sup. Ct. N.Y. Co. May 6, 2019) (Pl. Br. 9, ECF No. 95).

Putting aside the fact that *Kaye's* holding had nothing to do with whether a partnership can operate through a corporation (much less one formed two decades later), *Kaye* actually

demonstrates why Plaintiff's theory of recovery must be rejected. In *Kaye*, plaintiff claimed that the defendant "threatened to breach the *'operating agreements' of the parties' numerous entities formed for each business venture property they purchased*" by refusing to contribute additional funds for two of the parties' properties. *Kaye*, 2019 N.Y. Misc. LEXIS 2261, at *9 (emphasis added). That is precisely what Plaintiff failed to do here. Instead of suing Mr. Lamson for breaches of the operating agreements of the various entities that the parties have in common, Plaintiff advances an unprecedented cockamamie blanket partnership theory that encompasses (a) every business Mr. Lamson has ever touched (even entities and assets not bearing Plaintiff's name), (b) every dollar that Mr. Lamson ever made (including assets acquired and monies earned before the parties started dating), and (c) Mr. Lamson's personal homes, which are owned solely by Mr. Lamson and have no business purpose whatsoever.

Because Plaintiff cannot overcome the overwhelming authority which defeats the viability of her "partnership" theory, her Complaint must be dismissed. But importantly, Plaintiff is not without recourse. While this Complaint must be dismissed because Plaintiff chose to pursue a theory that is unsupported as a matter of law,5F[6] Plaintiff may still be able to pursue her rights as a member or shareholder with respect to each of the entities with which she is associated. *See Notar-Francesco*, 149 A.D.2d at 492 (partners who adopted the corporate form had the rights,

[6] Plaintiff misunderstands the applicable standard for CPLR 3211(a)(1) dismissal. (Pl. Br. 8-9, ECF No. 95). A CPLR 3211(a)(1) motion to dismiss should be granted where the documentary evidence that forms the basis of the defense conclusively disposes of the plaintiff's claims *as a matter of law*. *3615-15 Realty I, LLC v. Bedford Ave. Assocs. I, LLC*, 120 A.D.3d 487, 489 (2d Dep't 2014). Despite the rule allowing a plaintiff's complaint "all favorable inferences" (Pl. Br. 1, ECF No. 95), "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or *legal conclusions that are unsupportable based upon the undisputed facts*." *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003). Plaintiff's Complaint must be dismissed because the undisputed facts that the parties held themselves out through corporate entities render her partnership theory as legally unsupportable.

duties and obligations of stockholders); *Judelson*, 55 A.D.2d at 906 (action for "partnership" accounting dismissed where remedy was a suit based on plaintiff's rights as a stockholder, not partner).6F[7]

II. PLAINTIFF FAILS TO ALLEGE BREACH OF CONTRACT

In his moving papers, Mr. Lamson established that the Court cannot enforce Plaintiff's alleged oral contract unless it is able to determine what in fact the parties have agreed to. (Lamson Br. p. 18, ECF No. 72). In addition to the authorities cited in Mr. Lamson's moving papers, *Kaye v Levine Prospect*, further demonstrates that the Complaint must be dismissed. Here, just as in *Kaye*, Plaintiff's allegations of an oral agreement are devoid of the sort of necessary detail as to what the parties agreed to, including scope, duration, the parties' precise obligations, and other necessary terms. The *Kaye* court dismissed plaintiff's complaint because plaintiff failed to support that defendant had any contractual obligation under any agreement to cooperate in a sale or refinancing of two of the properties. *Kaye*, 2019 N.Y. Misc. LEXIS 2261 at *11 (plaintiff's

[7] For example, Plaintiff's claim based on her being a member of 330 Atlantic Avenue Development LLC (Compl. ¶ 33) should be addressed (applying Wyoming law) in an action to which 330 Atlantic Ave Development would have to be a party—not in an action filed against Mr. Lamson individually under NY Partnership law. Among the issues to be decided will be whether Plaintiff has a "transferable interest" in 330 Atlantic Avenue Development, defined as the right "to receive distributions from a limited liability company in accordance with the operating agreement . . ." Wyo. Stat. Ann. § 17-29-102 (a) (xxii) (West). Further, to the extent Plaintiff believes she is entitled to distributions, or return of a capital contribution (if any) she made to 330 Atlantic Avenue Development, she may pursue a claim for conversion. *See Lieberman v. Mossbrook*, 2009 WY 65, ¶ 45, 208 P.3d 1296, 1310 (Wyo. 2009). Plaintiff may have other recourse under Wyoming's LLC Act, which creates a statutory right to bring a derivative action on behalf of an LLC by a person who is a member. *Mantle v. N. Star Energy & Constr. LLC*, 2019 WY 29, ¶ 142, 437 P.3d 758, 803–04 (Wyo. 2019). What Plaintiff cannot do, however, is override the Wyoming LLC Act and 330 Atlantic Avenue Development's operating agreement by baldly alleging a right to an equal "share in the profits and losses of the 330 Atlantic project" pursuant to a nebulous oral partnership agreement allegedly covering "all projects" and that was supposedly entered into twenty-three years prior to the formation of the LLC. (Compl. ¶ 93); *see Berke*, 279 A.D.2d at 492 (rights arising out of being a "partner" or a member of a corporate entity are governed by separate bodies of law).

generalized allegations about the parties' respective responsibilities under the alleged agreement were "far too vague to state a claim [and] devoid of necessary detail as to any alleged agreement" where "plaintiff [did] not state the actual parties to, the scope or duration of, or other necessary terms of any agreements . . . let alone defendants' obligations under such agreements").

Because Plaintiff's alleged bare bones allegations fail to articulate the parties' agreement on the contract's most basic terms—including defining the parties' obligations, or providing a methodology, objective extrinsic event, condition, or standard for determining whether such obligation was provided—the contract cannot be enforceable. *166 Mamaroneck Ave. Corp. v. 151 E. Post Rd. Corp.*, 78 N.Y.2d 88, 91, 575 N.E.2d 104, 105 (1991); *Total Telcom Grp. Corp. v. Kendal on Hudson*, 157 A.D.3d 746, 747 (2d Dep't 2018); *Carione v. Hickey*, 133 A.D.3d 811, 811 (2d Dep't 2015).7F[8]

III. THE COMPLAINT FAILS TO ALLEGE BREACH OF FIDUCIARY DUTY

As Mr. Lamson demonstrated in his moving papers, Plaintiff's claim for breach of fiduciary duty rests upon the supposed existence of an oral agreement to make Plaintiff "a partner in the EL

[8] *Art & Fashion Grp. Corp. v. Cyclops Prod., Inc.*, 120 A.D.3d 436, 437 (1st Dep't 2014) is inapposite. Offering far more than Plaintiff's flimsy allegations of an agreement to "provide "conceptual, exterior and interior design services" in return for an equal share in the profits and losses of "our business," (Compl. ¶ 21), the plaintiff in *Art & Fashion Grp. Corp*, alleged in great detail an oral joint venture agreement to operate a joint venture on a 50/50 basis "to produce defendants' photo shoots and advertising campaigns." *Id*. The alleged agreement included concrete terms negating any doubt as to what the parties agreed to—including a term stating that "all of defendants' campaigns would be produced through 359 Productions and shot exclusively at Pier 59's studios," and express terms that the parties would share profits and losses of the venture equally, and would pay their respective share of all the expenses of the venture, including rents and salaries. *Id*.; *Marshall Granger & Co., CPA's, P.C. v. Sanossian & Sardis, LLP*, 15 A.D.3d 631 (2d Dep't 2005) is also inapposite. There, the court made clear that a contract should not be rejected as indefinite "[w]here it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term . . ." *Id*. at 632. Here, aside from Plaintiff's self-serving unsupported allegation, there is no allegation (much less evidence) of clear language indicating Mr. Lamson's intent to be bound under Plaintiff's imaginary partnership agreement.

Partnership." (Lamson Br. p. 20, ECF No. 72; Compl. ¶ 134). The only duties alleged to have been owed by Mr. Lamson are his "duties owed to the EL Partnership and to [Plaintiff]" which derive from the alleged existence of this supposed oral agreement to form the EL Partnership. (Lamson Br. p. 20, ECF No. 72; Compl. ¶¶ 134-37). As such, this claim is duplicative of the breach of contract claim. *RNK Capital LLC v. Natsource LLC*, 76 A.D.3d 840, 842 (1st Dep't 2010) (breach of fiduciary duty duplicative of breach of contract claim); *See Fallon v. McKeon*, 230 A.D.2d 629, 630 (1st Dep't 1996) ("[T]he IAS court properly dismissed the fourth and fifth causes of action for breach of fiduciary trust and breach of partnership, since they both were clearly based on the unenforceable partnership agreement . . .").

Here again, Plaintiff is not without recourse. To the extent the parties had a business relationship, they used LLC's and corporations to conduct business. (Compl. ¶¶ 37-42). Plaintiff may be owed fiduciary duties by virtue of her being a member of a particular LLC, or a shareholder of a particular corporation. Each corporate relationship needs to be assessed on its individual merits by looking at the governing agreements and applicable laws.8F[9] But in its present form, this action must be dismissed because there are no claims for breaches of duties owed by Mr. Lamson in his capacity as an LLC member or shareholder. *See Hoeg Corp. v. Peebles Corp.*, 153 A.D.3d 607, 610 (2d Dep't 2017) (written agreement belied the existence of a fiduciary relationship between the plaintiff and the defendant); *First Keystone Consultants, Inc. v. DDR Const. Servs.*, 74 A.D.3d 1135, 1137 (2d Dep't 2010) (complaint failed to plead facts evincing the

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[9] *See*, *e.g.*, *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dep't 2014) ("As the managing member of the LLCs, Gary owed plaintiff—a nonmanaging member—a fiduciary duty"); *Cortes v. 3A N. Park Ave Rest Corp.*, 46 Misc. 3d 670, 694, 998 N.Y.S.2d 797, 815 (N.Y. Sup. Ct. Kings Co. 2014) ("A minority shareholder in a close corporation is owed a fiduciary duty by the majority shareholders.").

existence of a relationship involving "a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions").

IV. THE COMPLAINT FAILS TO ALLEGE A FRAUDULENT CONVEYANCE

Plaintiff makes no real attempt to argue that she pleaded fraudulent intent with the particularity required by CPLR 3016(b). (Pl. Br. p. 21, ECF No. 95).9F[10] Further, Plaintiff fails to rebut that her claims of intentional fraud fail to state the claim with particularity as a matter of law because they are based on "*information and belief*." (Compl. ¶¶ 164-66); *Carlyle, LLC*, 160 A.D.3d at 477; *RTN Networks, LLC v. Telco Grp., Inc.*, 126 A.D.3d 477, 478 (1st Dep't 2015) (key allegations regarding the allegedly fraudulent conveyance based on information and belief were inadequate under CPLR 3016(b)). Thus, under any circumstances, this claim must be dismissed.

V. THERE IS NO CLAIM FOR CONSTRUCTIVE TRUST IN THIS CASE

Plaintiff argues that this is not a case where the imposition of a constructive trust would violate New York's well-established prohibition on common law marriage. (Pl. Br. p. 20, ECF No. 95). But attempts by unwed lovers like Plaintiff to assert ownership rights over the monied-partner's assets are not a matter of first impression—and Plaintiff's case is indeed the classic example. There have been countless cases like Plaintiff's where a partner, after years together, attempts to characterize an intimate relationship as a business relationship to circumvent New York's long-standing prohibition on common law marriage and palimony. For this reason,

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[10] Plaintiff's reliance on *JDI Display Am., Inc. v Jaco Electronics, Inc.*, 2020 N.Y. App. Div. LEXIS 6677, *2 (2d Dep't 2020) is misplaced. There, the complaint included very specific factual assertions and badges of fraud, pleaded with particularity—including allegations of an August 2017 asset purchase followed by a transfer of the $1 million purchase price from the corporate defendant to the individual director/shareholder defendant for the purpose of leaving the corporate defendant insolvent so it would not be able to pay its debts to plaintiff. Plaintiff's allegations of fund transfers from one account to another do not come close to such "badges of fraud."

constructive trusts have been rejected in the context of unmarried relationship claims unless there is a clear distinction between doing something out of love and doing something as an isolated business transaction. *See*, *e.g.*, *Sylvester v. Sbarra*, 268 A.D.2d 424 (2d Dep't 2000) (plaintiff's contributions were not "over and above that which could be attributed to the give and take of the relationship" and did not qualify as "expenditure[s] of funds … made in reliance on the defendant's alleged promise that the house would be jointly owned"); *Jennings v. Hurt*, 160 A.D.2d 576, 578 (1st Dep't 1990) (constructive trust claim on apartment owned by defendant dismissed where plaintiff failed to establish that she had a property interest in the apartment); *Tompkins v. Jackson*, 22 Misc. 3d 1128(A), at **16-17, 880 N.Y.S.2d 876 (N.Y. Sup. Ct. N.Y. Co. 2009) (constructive trust claim failed where plaintiff made no transfer in reliance of a promise; never owned the subject home or contributed money to its upkeep). Although Plaintiff dresses up her claims under various labels, the gravamen is the same – she should be equitably allocated half of Mr. Lamson's assets, including his personal homes, for being his girlfriend and the mother of his children.10F[11]

"While unmarried parties may contract with each other as to the distribution of assets in the event that their relationship ends, such a contract <u>must be explicit and specific</u>, not inferred." *Farre v. Lours*, 2020 WL 7041785, at *4 (N.Y. Sup. Ct. N.Y. Co. Nov. 30, 2020) (citing *Morone v Morone*, 50 NY2d 481 (1980) (constructive trust may not be based on implied contract between unmarried people living together); *Potter v Davie*, 275 A.D. 2d 961 (4th Dept 2000) (rejecting claim of agreement in quasi-marital relationship). No such contract has been alleged in Plaintiff's Complaint or any of her several motions, and her claim for a constructive trust must be dismissed.

[11] *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382 (1987) (courts look to gravamen not label of a claim, and will not treat claims that are "merely a restatement, albeit in slight different language" as separate).

CONCLUSION

For the foregoing reasons, Mr. Lamson's motion to dismiss should be granted and the complaint should be dismissed in its entirety with prejudice.

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Respectfully submitted,

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