SUPREME COURT OF NEW YORK
COUNTY OF NEW YORK

ELISABETH MORSE, Plaintiff, -against- LOVELIVE TV US, INC., et ano., Defendants	Index No. 650110 /2017

MEMORANDUM OF LAW IN SUPPORT OF
MOTION TO DISMISS AMENDED COMPLAINT

June 22, 2020

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Defendants LoveLive TV US, Inc. ("LoveLive US") and Richard Cohen ("Cohen") specially appear in this matter under CPLR 320(c)(2) without conceding personal jurisdiction or waiving any jurisdictional defenses, and respectfully submit this Memorandum of Law, along with the Affirmation of Wallace Neel executed June 22, 2020 with all exhibits thereto ("Neel Aff."), in support of their Motion (the "Motion") pursuant to CPLR 3211(a)(7) and (a)(8) dismissing the Amended Complaint ("Am. Compl.") and all claims therein.

PRELIMINARY STATEMENT

The Amended Complaint should be dismissed for multiple independently-sufficient reasons:

First, Plaintiff has failed to establish personal jurisdiction over either Defendant in this matter because Plaintiff failed to file or serve a Supplemental Summons in this action within 30 days of March 5, 2020. On that date, the Court dismissed this action but ruled that that if Plaintiff wanted to re-file upon an amended pleading, she could utilize this Index Number. However, the Court noted, "[i]f that's not done within those 30 days, then the Plaintiff will need to purchase a new index number." (March 5 Transcript, at 17:24-18:4 (Neel Aff Ex. 2.))

Plaintiff waited 41 days to file—and to avoid any doubt, that tabulation of days *does not count* the approximately 64 days during which COVID-19 caused the Courts to ban non-essential e-filing. When Plaintiff finally filed a Supplemental Summons via NYSCEF on June 18, 2020 (Neel Aff. Ex. 3), she wrote the Court a contemporaneous

letter admitting the "fail[ure] to file the Supplemental Summons" and "blame[d]" the failure on "my ignorance" of the process. (Neel Aff. Ex. 4.)

But that was 11 days too late—after the passage of 30 days, Plaintiff no longer had leave of Court to issue a Supplemental Summons under this Index Number, as required by CPLR 305. The amended pleading is therefore a nullity under New York law. No process has been served nor proved, and personal jurisdiction has not been established. The action must be dismissed.

Secondly, and independently, Plaintiff's second pleading again fails to state a claim for relief against Richard Cohen under any reading of New York law—and for the same reason that the first Complaint failed and was dismissed. Nothing in the Amended Complaint alleges that LoveLive US transferred *anything* to any Shareholder or Director (and certainly not to Cohen).

Plaintiff's case against Cohen continues to urge a theory of law that does not exist anywhere in New York's statutes, rules, or jurisprudence. New York law does *not* provide that a director is liable for any company debt, simply because he was a director of the company and the company failed. It does *not* provide that in the absence of a formal bankruptcy, directors are liable for all corporate debts. To the contrary, as the New York cases below (which were addressed at length in the Motion to Reconsider and during argument on March 5, 2020) uniformly hold and make abundantly clear, the *sine qua non* of director liability is the non-ordinary-course transfer of some corporate asset to the director or the shareholder, such that a constructive trust should be imposed upon that

property in the hands of that recipient (the director or shareholder) for the benefit of the creditor.

Despite being allowed a chance to amend the pleading, the Plaintiff has still failed to allege any transfer to a shareholder or director. To the contrary, the Amended Complaint concedes that "LoveLive US disbursed cash assets to select employees as payroll compensation," including Morse. (Am. Compl. ¶ 45 (Ex. 1 to Neel Aff.)). It goes on to state in conclusory manner that "office equipment" and "kitchen equipment" were "liquidated," but there is not a single allegation that any such item was transferred to a director or shareholder.

The absence of such an allegation ends the claim as against Cohen. As with the initial Complaint, the absence of such an allegation ends the case: New York law does not impose any "guarantor"-style liability on a corporate director, but instead can (under certain circumstances) hold a director personally liable for the claw-back of corporate funds that were distributed *to shareholders or directors*. Where no such non-ordinary-course distribution is alleged (as here), the analysis ends: no personal liability exists for the director.

Third, and equally independently, the Amended Complaint again fails to allege a breach of contract by LoveLive US. While the Amended Complaint does, at long last, allege that the contract obligation that Plaintiff invokes has a condition precedent in the meeting of "targets," the Amended Complaint still makes no effort to explain what those

targets were, nor how they were met. Instead, there is merely a conclusory allegation that they were met—but that is not sufficient under New York law.

For the reasons set forth below, the Court should grant the Motion and dismiss this matter with prejudice.

ALLEGATIONS OF THE AMENDED COMPLAINT

The Amended Complaint is blunt in stating its alleged basis for suing Cohen: it consists of nothing more than the mere fact that Cohen was a Director, *viz.*:

> This is a breach of contract action in which Plaintiff alleges that … as the Chief Executive Officer and sole Director of LoveLive US, Defendant Cohen remains personally liable to Plaintiff for the failure to account to creditors pursuant to New York Business Corporation Law ("BCL") § 1006 due to the informal dissolution of LoveLive US.

(Am. Compl. ¶ 1 (Ex. 1 to Neel Aff.))

There is not any fact alleged—nor even a conclusory allegation—that any Director nor shareholder of LoveLive US received any non-ordinary-course transfer of any corporate asset of LoveLive US. Indeed, there is not a single allegation anywhere that Cohen, nor any shareholder, nor any other Director, received even a penny's worth of value from LoveLive US.

Furthermore, the entirety of the Amended Complaint contains nothing new as compared to the initial (now dismissed) Complaint, other than allegations that (1) a liquidation was planned (*id.* ¶ 47) and (2) some kitchen and IT equipment was sold. (*id.* ¶ 49) (Notably, LoveLive US was not an IT-based nor a food-related company.) And the Amended Complaint openly recognizes that the all cash assets that remained were

disbursed "to select employees as payroll compensation," including to Plaintiff herself. (*Id.* at 45.)

ARGUMENT

I. Because Plaintiff Did Not Re-File Within the 30-Day Period that the Court Allocated Post-Dismissal, There is No Personal Jurisdiction Over Any Defendant,

Cohen and LoveLive US are specially appearing for the purposes of contesting this motion, and do not in any way concede the service of process nor the Court's exercise of personal jurisdiction over them.

To the contrary, Plaintiff's failure to file and issue a Supplemental Summons during the 30-day period allocated by the Court on March 5 at argument eliminates all basis for the exercise of personal jurisdiction over either Defendant based upon Plaintiff's filings in this action.

A. The Court Dismissed the Case and Gave Plaintiff 30 Days From March 5 to Re-File Under the Instant Index Number

During oral argument on March 5, 2020, the Court dismissed this action from the bench for failure to state a claim. (Ex. 2 to Neel Aff., at 17-18.) At that time, the Court gave Plaintiff the courtesy of allowing the case to be re-filed under the instant Index Number if—and only if—Plaintiff filed the action within 30 days "of today's date" of March 5:

> [T]he Court is giving plaintiff leave to refile an amended complaint on this index number within 30 days of today's

> date. If that's not done within those 30 days, then the Plaintiff will need to purchase a new index number.

(March 5 Transcript, at 17:24-18:4 (Neel Aff. Ex. 2.))

B. Plaintiff Waits 41 Days to File the Supplemental Summons, and Blames the Error on Her Misunderstanding of the Rules

However, the Supplemental Summons was not filed until June 18, 2020. Plaintiff wrote the Court a contemporaneous letter stating:

> On May 19, 2020, as the plaintiff pro se, I filed an Amended Complaint in the above matter. At that time, I failed to file the Supplemental Summons; I blame my ignorance as a transactional attorney. I have now filed the Supplemental Summons backdated to May 19, 2020.

(Letter from Plaintiff to Court dated June 18, 2020, NYSCEF Doc No 103 (Ex. 3 to Neel Aff.))

Plaintiff thus failed to re-file within the Court's 30-day deadline, missing it by 11 days. Obviously, the 64-odd days of COVID-19 Court restrictions[1] are excluded from the calculation, but even with those days excluded, the Plaintiff was weeks late with the re-filing. Plaintiff waited 17 days pre-lockdown, and 24 days after the May 25 re-start of all filing activity, before filing the Supplemental Summons—meaning that a period of 41 Court-working days had elapsed after the March 5 start-date. Three business days later

[1] On March 22, 2020—seventeen (17) days after the Court's March 5 directive—Chief Administrative Judge Lawrence K. Marks issued an Administrative Order (AO/78/20) directing that "effective immediately … no papers shall be accepted for filing by a county clerk or a court in any matter of a type," with limited enumerated exceptions.

On May 20, 2020, Chief Administrative Judge Marks issued a Memorandum ("Filing of New Cases") which ordered that e-filing through the NYSCEF system… will be restored" in several counties, including the five New York City counties" as of May 25.

on June 22, 2020, Defendants rejected the filing as untimely under the Court's 30-day window. (Neel Aff. Ex. 5).

Thus, even when the COVID-restriction days are dis-counted, Plaintiff still failed to file the Supplemental Summons until 41 Court-available-days after March 5, far beyond the 30 days from March 5, 2020 that the Court made available. The Court's explained the effect of missing that window on the record: "If that's not done within those 30 days, then the Plaintiff will need to purchase a new index number." (March 5 Transcript, at 17:24-18:4 (Neel Aff Ex. 2.))

Having failed to file within the 30-day period, and having admitted that she was required to file (and, indeed back-dating the Supplemental Summons to May 19 despite filing it on June 18), the Plaintiff lacked leave of Court to re-file under the instant Index Number.

C. The Late Filing is A Nullity Unless Brought in a New Action

If Plaintiff desires to re-file these claims, she is obligated to proceed in regular order, and she is free to do so. What she cannot do is what she did: file outside of the 30-day window under this Index Number and in this action. Because there was no leave of Court to file beyond the 30-day period, the filing is a nullity: there has been no service of process on any party, no proof of service filed upon on any party, and no acquisition of personal jurisdiction over any party, all of which mandates dismissal under CPLR 3211(a)(8).

This analysis and result have been upheld in similar cases in which a plaintiff was ordered to file an Amended Complaint by a given date, but neglected to file the

Supplemental Summons until after that date. In *Weiss v. Superior Jamestown Corp.,* 18 Misc. 3d 1139(A), 1139A, 859 N.Y.S.2d 900, 900, 2004 N.Y. Misc. LEXIS 3142, *2-4, 2004 NY Slip Op 51923(U), 2-3 (Sup. Ct. Chautauqua County Jul. 26, 2004), the Court resolved the issue by enforcing its Order and refusing to consider the Amended Pleading:

> [I]t is necessary to address this Court's prior rulings and the resultant conduct of counsel. Following in-Chambers argument on the defendant's pending motion conducted on April 22, 2004, **this Court issued various rulings, all of which were contingent on the service of an amended summons and complaint**. Plaintiff's counsel was directed to **serve an amended complaint by April 29, 2004** ….
>
> **Plaintiff's counsel *failed to serve an amended summons and complaint* until some time on or after May 21, 2004** … The amended pleading was immediately rejected as untimely pursuant to the previous Order of this Court.

Id. at *2-3. The defendants argued that because the leave-of-court had only existed until the Court-ordered deadline, and that deadline had been missed, the Amended Complaint had never been served. The Court heartily agreed ("This Court is in accord," *id.* at *3-4), and explained why:

> "[W]hen a party fails to comply with a Court Order and frustrates the disclosure scheme set forth in the CPLR, dismissal of a pleading is warranted." The Court went on to note "If the credibility of Court Orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore Court Orders with impunity" (*Kihl v. Pfeffer,* supra at 123). See also *Leone v. Esposito,*299 AD2d 930, 749 N.Y.S.2d 924 [4th Dept.2002].

Id. at 3-4 (citations omitted). The Court thus treated the amended pleading as a nullity and dismissed the case. *Id.*

In a similar case, the Appellate Division, Second Department held that the late-service of an Amended Summons was "a nullity" because it was done without leave of

Court. *Nikolic v. Federation Empl. & Guidance Serv., Inc.,* 18 A.D.3d 522, 524 (2d Dep't 2017) (holding that service of "amended summons and complaint" after "the 20-day period had expired " required "plaintiff … to seek leave of court …. Accordingly, the plaintiff's service of the amended summons and complaint was a nullity…").

This case is on all-fours. Here, as in *Weiss,* the Plaintiff was ordered to re-file by a given date, but failed to file the Supplemental Summons until weeks later. Here, as in *Weiss,* the Defendants rejected the attempted Supplemental Summons as being untimely under the Court-mandated timeline. And here, as in both *Weiss* and *Nikolic,* the Plaintiff had no leave of Court to file the Supplemental Summons when she did. Thus, the same result should obtain, in that the attempt to re-file beyond the 30-day window is treated as a nullity.

If the Plaintiff wants to renew the case, there is a way: proceed in regular order. At present, however, there is no filing, no service, no proof of service, and thus no personal jurisdiction over any Defendant. The case should be dismissed under CPLR 3211(a)(8).

II. ALL CLAIMS AGAINST COHEN SHOULD BE DISMISSED BECAUSE NEW YORK LAW DOES NOT DEEM DIRECTORS TO BE *DE FACTO* GUARANTORS OF COMPANY LIABILITIES

Separate and apart from the lack of personal jurisdiction is the fact that the Amended Complaint fails to state a claim against Cohen in the same manner that the initial Complaint failed: *Rodgers v. Logan* and its progeny hold only that a corporate director or shareholder *who receives company assets* at the time that the company is

insolvent may be liable—and even then, any liability can only be for the *return*, or claw-back, of those company assets which are held by the insiders "in trust" for the creditors. Neither *Rogers* nor any case applying it holds what the Plaintiff insists upon, which is that a director becomes liable for company debts when he or she signs up as the director and the company then goes under. That theory has been tried and rejected in the guise of the "deepening insolvency" theory, which has been rejected both in New York and Delaware (the home state of LoveLive US). (*See* discussion *infra.*)

Because the Amended Complaint is devoid of any allegation that Cohen (or any other Director or shareholder) received any LoveLive US asset *at all* (never mind outside of ordinary-course or in other than in satisfaction of antecedent debt), the Amended Complaint must fail.

The key component of *Rodgers* et al. is missing in this case: the Complaint contains *no allegation at all* concerning Cohen's receipt of anything. Absent a non-conclusory allegation of a wrongful transfer of company assets to Cohen, there is no basis to hold him liable for any claims against the company, and he must be dismissed.

A. Absent an Allegation of Improper Transfer of Company Assets, No Director or Shareholder Liability Exists for Company Debts

Plaintiff's Business Corporation Law § 1006 theory can never work, because the threshold requirement is that the company have made some transfer of assets to the individual charged. "[A]ny *distribution to shareholders* made before satisfaction of the corporation's debts is illegal, and corporate creditors can bring claims against the shareholders *possessing the corporate assets*." 16A FLETCHER CYCLOPEDIA, CORPORATIONS, § 8224 (perm. ed. 1999)(emphasis added).

New York's jurisprudence agrees. There is no New York case that stands for the proposition that a director *qua* director is liable post-insolvency for corporate debts. A director can only be subjected to personal liability for unpaid corporate debts if that director has received a wrongful transfer of corporate assets during the time of insolvency—and even then, his or her liability would be limited to the amount of that transfer. Every New York case on this topic agrees.

In *Rodgers v. Logan*, the First Department held that "shareholders to whom are distributed the remaining assets of the corporation" are said to "hold *the assets which they received* in trust for the benefit of creditors."[2]

In *Sosinsky, Rodis & Stein v. Ravens*,[3] the Appellate Term held that the fact that the individual shareholder "admits that *the proceeds of the sale of the corporations were transferred* to his father and *that they both received payments*" was the key. "Absent a showing that all of the corporate liabilities had been satisfied*, a* ***distribution*** *on account of the equity interest Irving Ravens had as the sole shareholder* of said corporations *could not have been made* to him, and he continues to *hold said funds in trust* for the benefit of creditors of the corporation."[4]

The holding of *Parent v. Amity Autoworld, Ltd.*[5]—which Plaintiff cites in the Amended Complaint itself—proves that there is no case against Cohen. In *Parent,* the director whom the Court reached for corporate debts admitted that he "received in excess

[2] 121 A.D.2d 250, 503 36, 39 (1st Dep't 1986) (emphasis added).
[3] *Sosinsky, Rodis & Stein v. Ravens,* 6 Misc. 3d 130(A); 800 N.Y.S.2d 357; 2005 N.Y. Misc. LEXIS 108; 2005 NY Slip Op 50077(U) (App. Term, 2d Dep't, 2005) (emphasis added).
[4] *Id.* (emphasis added)
[5] *Parent v. Amity Autoworld, Ltd* , 15 Misc. 3d 633; 832 N.Y.S.2d 775; 2007 N.Y. Misc. LEXIS 494; 2007 NY Slip Op 27082 (Dist. Ct., Suffolk Cty. 2007)

of $ 4,000,000 personally" in company assets, which was the reason the Suffolk County court denied dismissal of the claims against him to the extent they sought to claw-back that $4,000,000. *Id.* at 640.

In *Wells v. Ronning*,[6] , the Third Department *reversed* the IAS Court's ruling that a shareholder was personally liable for corporate debts, and did so precisely because there had been no allegation that the individual had received any corporate asset

> [The IAS Court] ignores the distinction between personal liability and liability as the sole shareholder of a dissolved corporation. **Plaintiff's complaint seeks to assess personal liability against Leach for a corporate debt** on a "successor in interest" theory. **According to plaintiff, this theory of liability arises because Gull Bay was voluntarily dissolved and Leach, as the sole shareholder and *recipient of the corporate assets*, became personally responsible for the debts of the corporation.** Upon dissolution of the corporation, after the payment of or provision for all liabilities the remaining assets may be distributed to the shareholders (*see*, Business Corporations Law § 1005 Bus. Corp.[a][3][A]). A corporation continues to exist, while undergoing dissolution, for so long as is necessary to satisfy its debts and it may sue or be sued until its business affairs are fully adjusted (*see, Matter of Rodgers v. Logan*, 121 A.D.2d 250, 253). Until dissolution is complete, the corporation continues to hold title to the assets (*see*, Business Corporation Law § 1006 Bus. Corp.[a][1]). After dissolution, **shareholders *who have received distribution of remaining assets* of the corporation hold these assets in trust for the benefit of creditors**. Normally, a creditor must exhaust his or her remedies against the corporation by obtaining a judgment against it and having it returned unsatisfied. Where this is impossible or futile, an action may be maintained directly against the directors or shareholders **to the extent that *they received* from or**

[6] 269 A.D.2d 690, 700 N.Y.S.2d 718 (3d Dept. 2000).

> **continue to hold assets which were the corporation's** (*see, Matter of Rodgers v. Logan,* supra, at 253).

Id. at 692-93. But the Third Department reversed because there was nothing in the record whatsoever to indicate that the individual (Leach) had received any corporate assets. *Id.*

And in *Eng v. Battery City Car & Limo. Svc., Inc.*,[7] the Southern District rejected precisely the sort of end-run of limited liability that Plaintiff attempts here:

> New York cases consistently hold that under this statute, as under various predecessor statutes, "shareholders **who have received distribution of remaining assets of the corporation hold these assets in trust** for the benefit of creditors." [citing ***Wells v. Ronning***.] *** Both the federal procedural rule and the **New York substantive law thus lead to the conclusion that there is no need to add or substitute Shaw as a party defendant.** … **Before discretionary action under Rule 25(c) can even be contemplated, *it must be established that Shaw is a transferee of corporate proceeds.*** *See Chalasani [v. Chalasani],* 92 F.3d [1300] at 1312 [2d Cir. 1996] (**allowing substitution in the absence of a transfer of interest is *abuse of discretion*).**

Id. at *21-23 (emphasis added). The *Eng* court refused to allow a claim against the individual (Shaw) unless and until it could be proved that (1) there was some company liability, and (2) if the company was liable, that Shaw had actually received some company asset which could be clawed-back. "**[I]t is far more efficient to resolve the merits of the dispute [between the plaintiff and Battery City] first,** and then consider whether any judgment against Battery City can be enforced **against Shaw, rather than to embark now on a sideshow dispute about the nature of Shaw's receipts from Battery City."** *Id. at 23-34* (emphasis added).

[7] *Eng v. Battery City Car & Limo. Svc., Inc.*, 2001 U.S. Dist. LEXIS 20919 *; 2001 WL 1622262 (SDNY 2001) (applying New York Law).

In *Hartley v Esposito*,[8] the United States Bankruptcy Court for the Southern District of New York concurred with those precedents and held that a corporate shareholder cannot be liable unless he or she received some corporate asset that should have been available for creditors. As the *Hartley* court stated, "as relevant to the instant case, shareholders *who received distributions of assets from a corporation* could be liable for claims against the dissolved corporation. " 479 B.R. at 640:

> Contrary to Appellants' assertion, New York law is clear that "shareholders can be held liable for claims against dissolved corporations." *New York v. Longboat, Inc.,* 140 F.Supp.2d 174, 177 (N.D.N.Y.2001). For example, and **as relevant to the instant case, *shareholders who received distributions of assets* from a corporation could be liable** for claims against the dissolved corporation. *Hatch v. Morosco Holding Co.,* 50 F.2d 138, 140 (2d Cir.1931); ***see also Wells v. Ronning,*** 269 A.D.2d 690, 692, 702 N.Y.S.2d 718, 721 (2000) ("After dissolution, shareholders **who have received distribution of remaining assets of the corporation hold these assets in trust** for the benefit of creditors."). And, "where it is impossible or futile to obtain [a] judgment [against a defunct corporation], the creditor can maintain an action directly against the directors or shareholders." ***Rodgers,*** 121 A.D.2d at 253, 503 N.Y.S.2d at 39;*see also Flute, Inc. v. Rubel,* 682 F.Supp. 184, 187 (S.D.N.Y.1988) (same); *Damato v. Wallbank Realty Corp.,* 33 Misc.2d 993, 995, 230 N.Y.S.2d 275, 278(N.Y.Sup.Ct.1962) (plaintiff may avoid the futility of first proceeding against a dissolved corporation by joining individual officers and directors ***to whom* assets have been distributed**).

(Emphasis added). The requirement that the shareholders have actually received corporate assets is also made clear in the first case cited in the above excerpt from *Hartley*. In *New York v. Longboat, Inc.,* 140 F.Supp.2d 174, 177 (N.D.N.Y.2001), the court wrote,

> [S]hareholders can be held liable for claims against dissolved corporations. *See Hatch v. Morosco Holding*

[8] 479 B.R 365 (S.D.N.Y. 2012).

> *Co.,* 50 F.2d 138, 140 (2d Cir. 1931) (finding that **shareholders who received distributions of assets from a corporation could be liable for claims against the dissolved corporation**).")

Id. (emphasis added). In another case cited in the *Harley* excerpt, the same point is explicated:

> [**W**]**here corporate property is distributed to shareholders** and the corporation is dissolved or its charter has expired, a creditor may sue the shareholders without first reducing his claim to judgment.

Hatch v. Morosco Holding Co., 50 F.2d 138, 140 (2d Cir.1931).

In three years and several rounds of briefing, Plaintiff has failed to find a single New York case in which a director is held liable for simply because he is a director, and not because he or she (or a shareholder) received some distribution of corporate assets. To the contrary, those cases uniformly hold that such personal liability can only exist where there has been a distribution of corporate assets that should have been available to corporate creditors. In other words, in circumstances that are still not alleged to exist even in the now-Amended Complaint.

That point cannot be overstated: Nothing in the Amended Complaint, nor in any of the briefing in this matter, contains any assertion that Cohen (nor, indeed, any shareholder or insider) received such a distribution from LoveLive US. Cohen therefore

asks the Court to dismiss all claims against him under the precedents set forth above, and with prejudice to their refiling.

B. The Court's Ruling Would Reverse The Law of Both New York and Delaware by Recognizing "Deepening Insolvency" as a Tort

If the Court were to allow the claims against Cohen in the Amended Complaint to proceed in spite of *Rodgers, Wells*, and the other precedents catalogued above, it would work a substantive change to the longstanding law of both New York and Delaware (which is LoveLive US's state of incorporation, and which is the law that governs the conduct of LoveLive US's directors.[9]) Both states have rejected the theory of "deepening insolvency", whereby creditors of a corporation seek to hold directors liable for "deepening" the insolvency of the company to the detriment of creditors.

Delaware's Court of Chancery rejected the theory in *Trenwick America Litigation Trust v. Ernst & Young, LLP*, 906 A.2d 168, 204-205 (Del. Ch. 2006), *aff'd on opinion below*, 931 A.2d 438 (Del. 2007), in stark terms:

> Refusal to embrace deepening insolvency as a cause of action is required by settled principles of Delaware law. So, too, is a refusal to extend to creditors a solicitude not given to equityholders. … The incantation of the word insolvency, or even more amorphously, the words "zone of insolvency" **should not declare open season on corporate fiduciaries.** Directors are expected to seek profit for stockholders, even

[9] *See Venturetek, L.P. v Rand Publishing Co., Inc.*, 39 AD3d 317 (1st Dept 2007) ("the law of the state in which an entity was incorporated is controlling as to matters relating to its internal affairs"); *Hart v General Motors Corp.*, 129 AD2d 179, 182 (1st Dept 1987) (the issue of corporate governance is governed by the law of the state of incorporation), *lv denied* 70 NY2d 608 (1987).

> at risk of failure. With the prospect of profit often comes the potential for defeat. The general rule embraced by Delaware is the sound one.

Id. at 174-75 (emphasis added).

New York also rejects the idea that a director can be held liable simply for working to salvage the company while it spirals downward. *See In re Hydrogen, L.L.C.,* 431 B.R. 337, 357 (Bankr. S.D. N.Y. 2010) ("New York does not recognize deepening insolvency as an independent cause of action. *See Interstate Foods v. Lehmann*, 2008 WL 4443850, No. 06 Civ. 13469, *3 (S.D.N.Y. Sept. 30, 2008); *In re Global Serv. Group LLC*, 316 B.R. at 458.")

Thus, a director cannot be held liable simply for the misfortune of having been at the helm as the ship took on water and ultimately sank. To the contrary, the public policy of Delaware and New York agree that directors in that situation are to be guided by—and accountable for—their duties to the stockholders. If the Court now holds that a corporate director who is not alleged to have taken any asset of the company into his personal possession can be *personally* liable to a creditor of the company, it will reverse that public policy and introduce a fundamental change to the New York and Delaware models of corporate governance.

III. All Claims Against LoveLive US Should Be Dismissed

Plaintiff—a licensed New York attorney—has filed a breach of contract action against now-defunct New York company LoveLive TV US Inc. ("LoveLive US") while selectively concealing the fact that (i) the contract term she has sued to enforce was *conditional*, and (ii) her Complaint *does not allege* that the condition was satisfied.

The contract provision that Plaintiff sues upon reads in full:

> If by end of 2016, either you or the Company decide not to extend to 2017, *and assuming targets are met,* you will be granted a lump sum payment equivalent to 20% of annual 2016 salary (to be paid early 2017).

(Ex. C to Am. Compl. (Ex. 1 to Neel Aff.) (emphasis added).

However, the Amended Complaint merely states in conclusory manner, "Plaintiff met all the prerequisite targets." However, nothing in the Amended Complaint attempts to identify what those targets were. In fact, the Amended Complaint annexes a letter from LoveLive US's then-attorneys at Reed Smith LLP to Plaintiff, in which the attorney explains that:

> No bonus or incentive compensation was earned since no benchmarks were ever articulated or recorded in writing. Therefore, as no such benchmarks could have been reached, Ms. Morse has no grounds to assert that she is entitled to a payment of 20% of her annual salary (especially considering that she only worked for 6 months of 2016). It is the position of her employer that she has been paid in full for her services.

(Morse Complaint, Ex H (included in Neel Aff. Ex. 1.)) Even with the benefit of that explanation from counsel, Plaintiff's second pleading still cannot articulate what the benchmarks were.

It is axiomatic that where a condition precedent to an obligation is not satisfied, no obligation arises. Absent some articulation of the "targets" that she references, Plaintiff cannot (and does not) even allege that the contract with LoveLive US was breached. For that reason, the Complaint fails to state a claim and should be dismissed pursuant to CPLR 3211(a)(7).

CONCLUSION

For the foregoing reasons, the Motion should be granted in its entirety, along with such other and further relief as the Court deems just and proper.

Dated: June 22, 2020

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