New York Supreme Court

Appellate Division—First Department

Case No.: 2020-03727

CIP GP 2018, LLC, a Delaware limited liability company, doing business as Crimson Investment Partners,
Plaintiff-Appellant-Respondent,

- against -

JOSH KOPLEWICZ, THAYER STREET PARTNERS MANAGEMENT, LLC, GARY HOPKINSON and EASTMORE MANAGEMENT, LLC,
Defendants-Respondents-Appellants,

- and -

QC CLB I, LLC, QC CLB II, LLC, QC CLB III, LLC, QC CLB III, INC., QC CLB IV, INC., QC CLB V, INC., QC CLB VI, INC., CLB HOLDINGS INC. and BEDFORD ACQUISITION PARTNERS, LTD.,
Defendants.

RESPONSE AND REPLY BRIEF FOR PLAINTIFF-APPELLANT-RESPONDENT

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Plaintiff-Appellant-Respondent CIP GP 2018 LLC doing business as Crimson Investment Partners ("CIP" or "Plaintiff"), respectfully submits this brief: 1) in opposition to the cross-appeals of Defendants Josh Koplewicz ("Koplewicz") Gary Hopkinson ("Hopkinson"), Thayer Street Partners Management, LLC ("Thayer Street") and Eastmore Management, LLC ("Eastmore"), and collectively, with Koplewicz, Hopkinson and Thayer Street, "Defendants") from that part of the Decision and Order, dated August 19, 2020 (the "Order") of the Supreme Court of the State of New York, New York County (the "Court Below") which denied Defendants' motion to dismiss the CIP's second cause of action in its April 9, 2020 Amended Complaint, and (2) in further support of CIP's appeal from the Order of the Court Below which dismissed CIP's fourth, eleventh, twelfth, thirteenth and fourteenth causes of action in its Amended Complaint.

INTRODUCTION

In seeking to reverse the Court Below's denial of its motion to dismiss Plaintiff's claim for breach of partnership agreement, Defendants do not dispute the core allegations that Plaintiff and Defendants formed a venture to build a business that would invest in and manage cannabis testing labs. Nor do they dispute that when it became clear that the business would become more lucrative than they imagined, Defendants breached the Partnership Agreement to acquire a larger share of the proceeds at CIP's expense. Defendants' theories for dismissal,

however, rely on a premise that is not only expressly rejected by the pleadings, but entirely implausible by any measure of common sense. Indeed, the Amended Complaint alleges that three sophisticated entrepreneurs entered into an agreement to divide equity in a partnership evenly in exchange for mutually complementary services on behalf of the partnership, the proceeds and losses of which they would share in equally. The Amended Complaint outlines the terms of this Partnership in detail as well as the extensive efforts of CIP in reliance upon and in furtherance of the Partnership Agreement. Based on these detailed pleadings, which include citations to an extensive supporting record, Defendants' arguments for dismissal are simply implausible.

As they did in their Motion to Dismiss in the Court Below, Defendants cling to the theory that a rough draft of a Letter of Intent ("LOI") that the parties immediately rejected somehow meets the high standard to dismiss a claim based on documentary evidence under CPLR 3211(a)(1). The Court Below correctly found that this rough-draft LOI and the other documents presented by Defendants fall far short of the exacting standard required to conclusively establish a defense to the asserted claims as a matter of law.

The Court Below did commit reversible error though in summarily dismissing Plaintiff's claims for promissory estoppel, breach of fiduciary duty, minority oppression and misappropriate of trade secrets. As set forth in CIP's

Appellate Brief, these claims are not duplicative of Plaintiff's breach of partnership agreement claim but instead make independent allegations of wrong-doing by Defendants. Furthermore, Plaintiff's quasi-contract claims are pleaded in the alternative and since Defendants dispute the existence of the Partnership Agreement between CIP and Defendants, the Court Below erred in dismissing these alternative claims at the pleading stage. This Court should reinstate those claims.

Finally, the Court Below erred in finding that the Statute of Frauds barred Plaintiff's unjust enrichment claim. While the Statute of Frauds requires a writing for an agreement to broker or negotiate the sale of a business, here, Plaintiff's role, as pled in the extensive allegations of the Amended Complaint, was far more than that of a broker or intermediary. Indeed, Plaintiff's primary role and the damages it seeks here do not relate to the negotiation or sale of a business at all (or commissions paid for those serves); rather, Plaintiff was a principle and founder who should have been given agreed upon equity for this work. The benefit conferred was not merely "'know-how' or 'know-who,'" but went deeper including the decision of "whether to negotiate" at all, among other things. The Court Below's reliance on a single case based on a much narrower set of specific facts regarding the payment of a commission to a broker was error. The Court Below should have relied upon more recent New York case law from this Court

that draws a clear distinction between that case and these other cases with facts far more analogous to those here. This Court should reverse the Court Below and reinstate Plaintiff's claim for unjust enrichment.

COUNTER-STATEMENT OF QUESTIONS PRESENTED ON CROSS-APPEAL

1. Did CIP satisfy its burden of pleading that CIP and Defendants entered into a Partnership Agreement focused on acquiring and managing of cannabis safety testing laboratories across the country ?

   Answer of the Court Below: yes.

2. Did Defendants demonstrate in their motion to dismiss CIP's Amended Complaint that there was irrefutable evidence that clearly and unambiguously precludes the assertion of a Partnership Agreement between CIP and Defendants?

   Answer of the Court Below: no.

COUNTERSTATEMENT OF RELEVANT FACTS

CIP relies on the Statement of the Case in its February 10, 2021 Appellate Brief (NYSCEF Doc. No. 9) and submits this Reply Statement in response to the Counterstatement of Facts in the Defendants' Cross-Appellate Brief ("Cross-Appellate Brief", NYSCEF Doc. No. 13).

Despite Defendants' attempts to muddy the waters in their Cross-Appellate Brief, CIP clearly pleads that Hopkinson, Koplewicz, and Marsh agreed to form

the Partnership, through CIP, Thayer Street and Eastmore, in June 2018, including all material terms, which would later become part of a written agreement (Jt. Rec. at 114, ¶ 138).[1] CIP plainly states that the Partnership consisted of CIP, Thayer Street and Eastmore. CIP spearheaded an initiative with Thayer Street and Eastmore to cultivate the lucrative investments through special purpose limited liability companies created and controlled by each entity. (Jt. Rec. at 88, ¶ 4). Each of the three Partners, through their principals, agreed to contribute its own unique skills in exchange for a one-third ownership interest in the Partnership. (Jt. Rec. at 88-89, ¶ 5). The business focused on acquiring and managing of cannabis safety testing laboratories across the country. (Jt. Rec. at 89, ¶ 6). The equity distribution between the Partners provided that each of the Partners both shared in the profits of the business, through various distribution sources, and in the losses, including the shared obligation to equally fund shortfalls. (Jt. Rec. at 89, ¶ 57).

The Partners agreed on a structure for the venture. (Jt. Rec. at 100, ¶ 65). As the Partnership acquired each cannabis testing entity, it would hold the ownership interests in a holding company. *Id.* The first company would be CLB I, and each subsequent acquisition would be CLB II, CLB III, CLB IV, CLB V, and CLB VI. *Id.* The Partnership also agreed that it would create a holding company,

[1] "Jt. Rec." refers to the Joint Record on Appeal, filed on February 10, 2021 (NYSCEF Doc. No. 7).

CLB Holdings, that would ultimately be used for an initial public offering. *Id.* In accordance with the Partnership Agreement, in September 2018, Koplewicz formed Bedford, which would manage the operations of the acquired entities. (Jt. Rec. at 101, ¶ 69).

As the business began to take shape and investor interest grew rapidly, the Partners decided to formalize their existing agreement into a more detailed written instrument with additional operational and governance terms. (Jt. Rec. at 114, ¶ 137). This process of updating the Partnership Agreement would not in any way affect the terms of the existing Partnership Agreement, which were to remain the same. *Id.* Rather, when consummated, the terms of this new agreement would supersede the existing Partnership Agreement. (Jt. Rec. at 114, ¶ 138).

In April 2019, however, Koplewicz abruptly attempted to change the terms of the Partnership. (Jt. Rec. at 115, ¶ 141). CIP made very clear that the existing Partnership Agreement and equity structure would remain in place. *Id.* On the night before the first acquisition was to be funded, Koplewicz refused to sign the written agreement memorializing the terms of the Partnership. (Jt. Rec. at 118, ¶ 157). Attempting to salvage the Partnership, Marsh and CIP worked with Hopkinson to reset the negotiations and drafted a term sheet with the six key terms, each consistent with the Partnership Agreement. (Jt. Rec. at 120-121, ¶ 168). At his request, Marsh's attorney drafted a rough draft LOI to attempt to stimulate the

process again, but Hopkinson and Marsh agreed it was too undeveloped to formalize into an agreement. (Jt. Rec. at 292).

Defendants contend that this rough draft of a LOI that the parties immediately rejected and discarded may serve as documentary evidence demonstrating the intent of the Partners over a year after they formed the Partnership. (Cross-Appellate Brief at 3-4). But, the non-binding LOI does not constitute documentary evidence in New York, nor is it unassailable by any stretch. This so-called documentary evidence that was haphazardly assembled does not contradict the prior Partnership Agreement, makes phantom references to key provisions, and was never even considered by any of the Partners. (Jt. Rec. at 247-250). Additionally, the very same attorney who drafted the LOI confirmed in correspondence to Defendants two days before he drafted the LOI that CIP and Defendants "had an oral agreement." (Jt. Rec. at 255).

Plaintiff still labored to reach a written agreement but in June 2019 it learned for the first time of a "side letter" agreement between Thayer Street and Eastmore to cut CIP out of these and future deals. (Jt. Rec. at 121, ¶ 171). As Defendants continued to make fundamental business decisions regarding Partnership assets without consulting or seeking any input from CIP, CIP was forced to file suit in January 2020. (Jt. Rec. at 124-125, ¶¶ 185-90).

Further, the creation of special purpose entities for the investment does not directly refute the allegations that both Eastmore and Thayer Street were behind and next to Hopkinson and Koplewicz in connection with the Partnership. CIP alleges at the outset that of its Amended Complaint that the Partnership would consist of "Thayer Street, CIP, and Eastmore (collectively, the "Partners"), or special purpose limited liability companies created and controlled by each entity." (Jt. Rec. at 88, ¶ 4).

ARGUMENT

I. THE COURT BELOW CORRECTLY UPHELD PLAINTIFF'S BREACH OF PARTNERSHIP CAUSE OF ACTION

The Amended Complaint lays out in extensive detail the nature of the Partnership Agreement between CIP, Thayer Street, and Eastmore. The fact that the Partnership Agreement was oral does nothing to diminish its validity, as New York law undisputedly recognizes oral partnerships. *See Prince v. O'Brien*, 234 A.D.2d 12, 12 (1st Dep't 1996); *Ovsyannikov v. Monkey Broker, LLC*, 2011 N.Y. Misc. LEXIS 6941, *9-10 (Sup. Ct. N.Y. Cty. August 12, 2011). Courts frequently refrained from making an ultimate determination on the validity of an oral agreement before the parties have engaged in discovery. *See GDC Bridgeport Holdings, LLC v. Anderson*, 2017 NY Slip Op 30349(U), ¶ 7 (Sup. Ct. N.Y. Cty. February 24, 2017) ("[W]hile the plaintiff's claim to an interest [ ] based on an alleged oral agreement is somewhat specious, neither the cited letter or any of the

arguments raised compels dismissal of the claim at the pre-answer stage of the litigation."); *Astor Place, LLC v. NYC Venetian Plaster Inc.*, 2016 NY Slip Op 31801(U), ¶ 6 (Sup. Ct. N.Y. Cty. September 28, 2016) ("As issues of fact exist with respect to the nature of any alleged oral agreement and whether valid consideration and mutuality of obligations exist, the Court declines to dismiss the second cause of action."). CIP has pled in extensive detail the terms of the Partnership Agreement, in effect long before the events giving rise to Defendants' breach. Defendants' contentions either fail to materially refute the core allegations of the Amended Complaint, or simply ignore allegations supporting the existence of the Partnership.

A. The Draft LOI Does Not Refute the Existence of the Partnership Agreement

The draft LOI relied upon by Defendants cannot be the basis for dismissal under CPLR 3211(a)(1) because it is not the type of "essentially undeniable" document that "conclusively establishes" a defense as a matter of law. *Gottesman Co. v. A.E.W, Inc.*, 190 A.D.3d 522, 524 (1st Dep't 2021) (internal quotation marks and citations omitted). The draft LOI fails this test for at least two reasons. First, it was a draft only shared with one individual and merely for discussion purposes; it was never held out as an offer to CIP's partners or even circulated to all of the partners. Second, the draft LOI was not, itself, an effort to memorialize the

Partnership Agreement. Therefore, the draft LOI provision Defendants rely upon would not undermine the validity or existence of the Partnership Agreement.

The key fact that Defendants ignore in their Cross-Appellate Brief is that the draft LOI was only considered after Koplewicz had upended the negotiation of the written agreement intended to memorialize in writing the Partnership Agreement. (Jt. Rec. 118-119, ¶¶ 157-161). Koplewicz's act of offering CIP a take-it-or-leave-it contract that contradicted the terms of the Partnership Agreement (and doing so with the support of Hopkinson) was a clear breach of the Partnership Agreement.

After memorializing yet again the material terms in a term sheet with Hopkinson, Marsh requested that CIP's counsel urgently draft an agreement memorializing these terms. (Jt. Rec. at 121, ¶ 169). Marsh provided the draft LOI to Hopkinson, cautioning him that it is the ROUGH DRAFT as his lawyer had an extremely limited time to draft it. (Jt. Rec. at 290). Hopkinson immediately rejected it though stating "[i]t's not even a real agreement." *Id.* He further stated "that LOI you sent is also wrong, just read it." (Jt. Rec. at 291). Marsh agreed, telling Hopkinson "Don't send the LOI [to Koplewicz]. I agree it's too undeveloped." (Jt. Rec. at 292).

Defendants contend that this unexecuted, rough draft exchanged well over a year after the Partners had originally formed the Partnership Agreement unequivocally expresses the will of the Partnership that they could only be bound

by a written agreement. This draft letter does not meet the high bar set forth under CPLR 3211(a)(1). *Eisner v. Cusumano*, 132 A.D.3d 940, 940 (2d Dep't 2015). The LOI is not unassailable, unambiguous, or undeniable.

The draft LOI only relates to the distribution of assets acquired pursuant to the Partnership's activities. (Jt. Rec. at 247-250). The draft LOI was wholly separate from the Partnership Agreement and the purpose of drafting it was distinct. The agreement that was contemplated by the LOI would have potentially superseded the Partnership Agreement, but it certainly was not an acknowledgement that no Partnership Agreement existed. (Jt. Rec. at 119-121, ¶¶ 165-169). Furthermore, the very same attorney who drafted the LOI confirmed in correspondence to Defendants two days before he drafted the LOI that CIP and Defendants "had an oral agreement." (Jt. Rec. at 255).

On a motion to dismiss under CPLR 3211(a)(1), the court must "accept the complaint's factual allegations as true, according the plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory." *Amsterdam Hosp. Grp., LLC v. Marshall-Alan Assocs., Inc.*, 120 A.D.3d 431, 433 (1st Dep't 2014) (internal quotation marks and citations omitted); *see also Leibowitz v. Impressive Homes, Inc.*, 43 A.D.3d 1003, 1004 (2d Dep't 2007) ("Dismissal pursuant to CPLR 3211(a)(1) based upon

documentary evidence is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.")

In light of the specific focus of the draft LOI and the context in which the draft LOI was created, the language that Defendants now highlight in their brief in no way undermines the Partnership Agreement. CIP was essentially considering (but ultimately did not offer) to agree to an abridged set of terms to salvage its interests in the Partnership—and only did so after Koplewicz had made clear that he and Hopkinson intended to breach the Partnership Agreement to CIP's detriment.

The LOI does not contradict CIP's allegations that the Partnership Agreement existed. Further, the conditional language of the LOI relates only to its terms, not to the terms of the preexisting Partnership Agreement – "The parties to *this* Letter of Intent will endeavor to finalize and execute one or more definitive agreements." (emphasis added). (Jt. Rec. at 247). Finally, the non-binding LOI is not a contract or some indisputable record that would allow dismissal under CPLR 3211(a)(1). *Kalaj v 21 Fountain Place, LLC*, 169 A.D.3d 657, 658 (2d Dep't 2019) (declining to rely upon letter of intent because its "non-binding" nature could not under any circumstances "utterly refute" that a meeting of the minds occurred outside of the letter of intent).

Furthermore, Defendants' supporting case law does nothing to resolve these deficiencies, the majority of which involves instances where a *contemporaneous*, unambiguous writing refutes the contention that the parties had entered into an oral agreement. For example, in *Jordan Panel Sys. Corp. v. Turner Constr. Co.*, 45 A.D.3d 165, 174 (1st Dep't 2007), the defendant explicitly notified the plaintiff that the potential subcontract would not be binding on defendant until defendant executed it. *Id.* Plaintiff alleged that defendant then subsequently awarded it the job just three days later. *Id.* This Court found though that defendant's prior explicit representation that it could only be bound by a writing controlled. In *Keitel v. E*TRADE Fin. Corp.*, 153 A.D.3d 1181, 1181 (1st Dep't 2017), the very term sheet relied upon by plaintiff explicitly stated that "neither party shall be bound until the parties execute a more formal written agreement," directly contradicting plaintiff's attempt to enforce it. Conversely, the Partners agreed to the Partnership Agreement in June 2018. (Jt. Rec. at 98, ¶ 54). After conducting the activities of the Partnership for over a year, the Partners attempted to reach a written agreement that, only when executed, would supersede the original Partnership Agreement from a year earlier. (Jt. Rec. at 114, ¶ 137).

Defendants mischaracterize the Supreme Court's holding in *Langer v. Dadabhoy*, 2006 WL 8085302 (Sup. Ct. N.Y. Cty. Nov. 17, 2006), *aff'd*, 44 A.D.3d 425 (1st Dep't 2007). The alleged oral agreement occurred in February

2005 and there were email messages from the *same month*, not just three months later, indicating that the parties had not in fact reached an agreement. In *Schutty v. Speiser Krause P.C.*, 86 A.D.3d 484, 485 (1st Dep't 2011), this Court considered far more extensive documentary evidence than the unsigned, abandoned LOI. This Court found that "multiple drafts of same [employment agreement], the parties' correspondence, and plaintiff's written letter of resignation…establish that the parties did not intend to be bound until there was a signed written contract…" *Id.* It is nothing like the facts here, where Defendants seek to rely on a draft of one document that both parties to the agreement immediately abandoned.

Unlike the cases cited by Defendants, the facts are more analogous to the court's holding in *Covision Capital Grp., LLC v. Doyle*, 2009 NY Slip Op 30015(U) (Sup. Ct. N.Y. Cty. January 7, 2009). In *Covision*, the court found that, even though the defendants refused to execute the written document the parties had prepared to govern their partnership, plaintiffs alleged "the requisite indicia of a partnership based upon an oral agreement, as evidenced by the parties' conduct." *Id.* at ¶ 7 (citing *Richbell Info. Servs., Inc. v. Jupiter Partners, L.P.*, 309 A.D. 2d 288, 289 (1st Dep't 2003). Similarly, in *GDC Bridgeport Holdings,* 2017 NY Slip Op 30349(U), the court upheld claims based on an oral agreement despite defendants' contention that a letter by plaintiff's representative contradicted the

claimed investment interest because the letter "was ambiguous and cannot be read out of context." *Id.* at ¶¶ 6, 7.

Here, as in these cases, the Partners agreed on all essential terms of the Partnership and CIP alleged an extensive number of specific acts it performed on behalf of the Partnership based on the Partnership Agreement. Defendants' refusal, a year after the Partners formed the Partnership, to execute a written agreement after they had an apparent change of heart has no bearing on whether the Partners formed the Partnership originally.

B. Plaintiff Alleged the Material Elements of the Partnership Agreement

The Court Below correctly found that Plaintiff's allegations sufficiently set forth the material terms of the Partnership Agreement. Defendants continue to press several arguments attacking various terms of the Partnership Agreement, but none of Defendants' arguments accurately describe the Partnership Agreement or the allegations of Plaintiff's Amended Complaint.

Defendants[2] first argue that Plaintiff fails to identify the "Partners" in the Partnership and that the four Defendants cannot possibly all be proper defendants for breach of the Partnership Agreement. (Cross-Appellate Brief at 27). However, this argument misstates the allegations in the Amended Complaint,

[2] In its Cross-Appellate Brief, Defendant Eastmore made largely the same arguments relating to the identity of the Partners in the Partnership. (NYSCEF Doc. No. 13). CIP responds to those arguments here as well.

which clearly allege that Marsh, Hopkinson and Koplewicz agreed to form the Partnership on behalf of their respective investment entities, namely CIP, Eastmore, and Thayer Street. (Jt. Rec. at 98, ¶54). As Thayer Street's and Eastmore's representatives in the Partnership, Koplewicz and Hopkinson were responsible for integrating those entities into the Partnership and Thayer Street and Eastmore did in fact integrate and participate as Partners in the Partnership. (Jt. Rec. at 103-104, ¶¶ 83-88, Jt. Rec. at 110, ¶ 119, Jt. Rec. at 112, ¶¶ 128-130). Indeed, the Amended Complaint makes clear that Eastmore and Thayer Street were funding the Partnership on behalf of Hopkinson and Koplewicz (as principals), in exchange for which, those entities received equity in the Partnership. (Jt. Rec. at 98, ¶54). CIP also understood that Hopkinson and Koplewicz would each own a portion of the Partnership equity assigned to Eastmore and Thayer Street, respectively. (Jt. Rec. at 88, ¶ 4, Jt. Rec. at 98, ¶ 54).

CIP's allegations against Thayer Street, far from conclusory, are based on the specific facts of Thayer Street's extensive involvement in the activities of the Partnership. The Amended Complaint sets forth Thayer Street's role in the Partnership (Jt. Rec. at 99, ¶ 62), the acts and (thousands of) communications by Koplewicz and Perkins on its behalf (Jt. Rec. at 102, ¶ 74), specific meetings and negotiations at Thayer Street's offices (Jt. Rec. at 104, ¶ 89), funding to support the

first acquisition (Jt. Rec. at 109, ¶ 114), and its ownership interest in the first acquisition (Jt. Rec. at 117, ¶ 151).

Defendants cannot credibly assert, at the pleading stage, that senior officers such as Koplewicz, Thayer Street's founder and managing partner, could not bind Thayer Street. *See Cointech, Inc. v. Masaryk Towers Corp.*, 7 A.D.3d 376, 380 (1st Dep't 2004) (an entity's involvement in the execution of an agreement was a disputed issue of fact and not appropriate for a motion to dismiss). Indeed, Defendants' strained citation to *Bank of N.Y. v. UBS Warburg LLC*, 4 A.D.3d 112, 114 (1st Dep't 2004) is not analogous as it involved an assistant vice president of one bank division, with no apparent authority, attempting to bind an entire bank on a motion to stay arbitration. *Id*.

The additional cases cited by Defendants offer little support for their arguments. For example, the court decided the relevant portion of *Weisenfeld v. Iskander*, 2019 WL 1877209, at *5 (Sup. Ct. N.Y. Cty. Apr. 26, 2019) on a motion for summary judgment, after full discovery including depositions, holding that it could not determine the identity of the parties to a contract (noting that the terms of the contract contradicted a previously executed limited partnership agreement). Similarly, in *Elizabeth St. Inc. v. 217 Elizabeth St. Corp.*, 295 A.D.2d 153, 154 (1st Dep't 2002), the plaintiff did not allege that its principal was a party to the

agreement, so this Court did not allow plaintiff to add its principal as a plaintiff. These facts are not analogous to the case here.

Defendants next argue that the Amended Complaint fails to allege a shared undertaking to bear the Partnership's losses. This argument completely disregards specific allegations in the Amended Complaint stating that, "[t]he equity distribution between the partners, as detailed below, provided that each of the Partners both shared in the profits of the business, through various distribution sources, and in the losses, including the shared obligation to equally fund shortfalls encountered by the business." (Jt. Rec. at 98, ¶ 57). Moreover, CIP actually shared in the debts and losses of the Partnership through its funding of a necessary bridge loan (Jt. Rec. at 109, ¶ 114) and funding a Partnership shortfall to fund Partnership activities. (Jt. Rec. at 109-110, ¶ 116).

Once again, upon examination, the cases cited by Defendants to purportedly support their arguments offer little support. In *Slabakis v. Schik*, 164 A.D.3d 454, 455 (1st Dep't 2018), this Court found that the complaint clearly stated that prospective losses would be paid "solely from defendant's share of the proceeds." In *Ramirez v. Goldberg*, 82 A.D.2d 850, 852 (2d Dep't 1981) (rendered following a post-judgment appeal), the plaintiff was expressly not the party that ultimately would have shared in the losses. Here, CIP agreed to share and actually did share in the losses of the Partnership. *See SRL v. Khaledi Oriental Rugs, Inc.*, 2012 NY

Slip Op 33462(U), ¶¶ 10, 11 (Sup. Ct. N.Y. Cty. August 22, 2012) (upholding an oral agreement where plaintiff and defendant each held fifty percent ownership interest, and thus would have shared in any losses). Notably, in *SRL*, allegations that the plaintiff would have suffered losses were sufficient even though plaintiff did not in fact suffer any losses. CIP actually suffered the shared losses of the Partnership.

Defendants also argue that CIP fails to sufficiently allege joint control of the business, relying on the improper expulsion of CIP as evidence of its lack of control. As an initial matter, if the expulsion of a partner could itself represent a pleading deficiency for lack of control, there would be no disputes by ejected partners over partnership agreements. But, more importantly, CIP's allegations make repeated references to its management and control of the business, including its involvement in critical decisions about the businesses and legal structure, target opportunities, operational strategies, among many others. (Jt. Rec. at 98, ¶ 57). And, while CIP repeatedly alleges that the Partners agreed that decision-making authority would be equally apportioned, "the same degree of management control" is not required to find the existence of a partnership. *Richbell Info. Servs.*, 309 A.D.2d at 289 (1st Dep't 2003). Indeed, "[t]he inquiry as to the existence of this factor is limited to whether a member of the venture had *any* measure of control." *Id.* (emphasis added).

Defendants next repeat the same baseless argument rejected by the Court Below that CIP did not plead the material terms of the Partnership Agreement.[3] Defendants' argument ignores the extensive allegations throughout the Amended Complaint. CIP has alleged all of the essential elements of a Partnership. CIP pleads:

> The Partnership Agreement consisted of an equal, complimentary exchange of time and resources devoted to building the cannabis venture and an equal distribution of equity in the business. The equity distribution between the partners, as detailed below, provided that each of the Partners both shared in the profits of the business, through various distribution sources, and in the losses, including the shared obligation to equally fund shortfalls encountered by the business.

(Jt. Rec. at 98, ¶ 57). The Partners received an equal equity distribution of founders' interests. (Jt. Rec. at 98-99, ¶ 58). Each Partner received an equal distribution of voting rights for management of the Partnership. *Id.*

The management and investment functions of the Partnership would generate revenue for the Partnership through distributions and management fees. (Jt. Rec. at 99, ¶ 59). Eastmore, Thayer Street and CIP agreed to share equally in the responsibilities of the Partnership and would each receive an equal, one-third distribution of all Partnership proceeds. *Id.*

[3] Eastmore also makes largely the same arguments as the other Defendants relating to the material terms of the Partnership Agreement. (NYSCEF Doc. No. 13). CIP responds to those arguments here as well.

Each Partner had a defined role in the Partnership. Eastmore would raise capital for potential acquisition targets (Jt. Rec. at 99, ¶ 61), Thayer Street would underwrite and negotiate potential acquisitions, secure terms sheets, perform due diligence, and build financial models (Jt. Rec. at 99, ¶ 62), and CIP would operate the post-closing, specifically to train, install, and oversee an executive team to manage the operations at each of the target acquisitions using the proprietary, institutional grade best practices tools CIP has developed over the last eight years. (Jt. Rec. at 100, ¶ 63).

The Partners also agreed on a structure for the venture. As the Partnership acquired each entity, it would hold the ownership interests in a holding company. (Jt. Rec. at 100, ¶ 65). The first company would be CLB I, and each subsequent acquisition would be CLB II, CLB III, CLB IV, CLB V, and CLB VI. *Id.* The Partnership also agreed that it would create a holding company, defendant CLB Holdings, Inc. that would ultimately be used for an initial public offering. *Id.*

Defendants stretch to cite *Wiscovitch Assocs., Ltd. v. Philip Morris Cos.*, 193 A.D.2d 542, 542 (1st Dep't 1993) which did not even involve a partnership agreement, but rather an employment contract. The case is further distinguishable in that the alleged oral contract at issue did not set forth the specific nature of the services to be provided, whereas here, as just set forth, each Partner had defined roles and the Partnership had a specific purpose.

Finally, the Partnership was not dissolvable at will. Under the New York Partnership law, a partnership for a particular undertaking is not dissolvable at will. *See* New York Partnership Law §62(1)(b. Even if the Defendants' wrongful actions in breach of the Partnership Agreement would have been sufficient to dissolve a partnership-at-will, those actions did not dissolve the Partnership here.

The Court of Appeals has interpreted a "[p]articular undertaking" "to require a specific objective or project that may be accomplished at some future time, although the precise date need not be known or ascertainable at the time the partnership is created." *Gelman v. Buehler*, 20 N.Y.3d 534, 537 (2013). The Supreme Court has held that "[w]hether the relationship is at will or for a fixed term or until the accomplishment of a particular undertaking is a question of fact…[and] [i]n the absence of an express term in a contract fixing duration, courts may inquire into the intent of the parties." *Peters v. Gould*, 2012 NY Slip Op 33913(U), ¶ 16 (Sup. Ct. N.Y. Cty. January 5, 2012).

Courts have routinely held that plaintiffs have sufficiently alleged a particular undertaking based on similar facts. While in *Gelman*, the Court of Appeals found that the alleged goal of establishing a search fund to research and identify a business with growth potential was not sufficiently detailed to establish a particular undertaking for the partnership, the parties in *Gelman* did not even identify what type of business they intended to acquire. *Id*. at 538. In *St.*

Lawrence Factory Stores v. Ogdensburg Bridge & Port Auth., 202 A.D.2d 844, 845 (3d Dep't 1994), the court found that the plaintiff had satisfied the particular undertaking requirement by identifying the specific purpose of the partnership as the development and construction of a retail factory outlet center on an identified parcel of real property. And in *Peters*, the court found that plaintiff met this requirement by alleging that the purpose was to form a hedge fund and to continue the relationship at least until the formation of that fund. 2012 NY Slip Op 33913(U), ¶ 16.

Similarly, the Partnership Agreement identified a very specific area, cannabis safety testing laboratories, starting in California and the moving to other states. (Jt. Rec. at 89, ¶¶ 6-8). The Partners also agreed on a structure for the acquisitions, the interests of which would ultimately be held in a holding company, CLB Holdings. (Jt. Rec. at 100, ¶ 65). And, finally, the Partners agreed that the business venture would be managed privately until an initial public offering – not for some indefinite period. These allegations allege a purpose, a structure, and a specific, event-driven objective, satisfying the particular undertaking requirement. No Partner could simply at-will dissolve the Partnership.

II. PLAINTIFF'S REMAINING CAUSES OF ACTION SHOULD BE REINSTATED

As set forth in CIP's opening brief, the Court Below erred in holding that a number of CIP's other claims were duplicative of the breach of contract claim. (Jt.

Rec. at 14). Plaintiff's claims are stand-alone claims with independent allegations and damages and Plaintiff's quasi-contract claims were pleaded in the alternative to the partnership claim as expressly authorized under the CPLR. Significantly, Defendants dispute the existence of the Partnership Agreement and, therefore, it was error for the Court Below to dismiss those alternative claims at the pleading stage.

A. Plaintiff Sufficiently Alleged a Claim for Promissory Estoppel

Defendants' attempt to portray Plaintiff's argument as a mischaracterization of the Court Below's Order is unavailing. First, during the August 19, 2020 oral argument of Defendants' motions to dismiss, the Court Below ruled from the bench that "[a]ll of the other causes of action asserted in the complaint, other than the unjust enrichment claim [and other than breach of the oral agreement], are duplicative of the oral agreement claim and they're all dismissed." (Jt. Rec. at 54). The Court Below provided no other basis for dismissing these claims, including the promissory estoppel claim, except that they were duplicative of the oral agreement claim. Accordingly, it was not a mischaracterization to identify that as the basis of the Court Below's dismissal of the promissory estoppel claim. Moreover, while the Court Below's Order does state that it is dismissing these other claims as duplicative of the oral partnership cause of action or because they otherwise fail to state a claim, the Court Below provided no indication as to which of these two

bases it dismissed any given claim, including the promissory estoppel claim. (Jt. Rec. at 14). Defendants' presumption that the Court Below must have dismissed the promissory estoppel cause of action for failure to state a claim is entirely inconsistent with the other portions of the Court Below's Order. Either way, the Court Below would have erred in dismissing the promissory estoppel claim whether on the basis that it was duplicative *or* based on some kind of purported pleading deficiency.

As set forth in its Appellate Brief, Plaintiff clearly alleged the required elements to state a claim for promissory estoppel, including the existence of "(1) a clear and unambiguous promise; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) an injury sustained in reliance on the promise." *Rogers v. Town of Islip*, 230 A.D.2d 727, 727 (2d Dep't 1996); *Braddock v. Braddock*, 60 A.D.3d 84, 95 (1st Dep't 2009) (allegations sufficient to make out elements for promissory estoppel in the context of motion pursuant to CPLR 3211). Defendants, however, describe the promissory estoppel claim as a "repackaging" of Plaintiff's partnership allegations, which they claim fail to adequately specify the essential elements of the partnership agreement. Cross-Appellate Brief at 36. They argue that the allegations relating to promissory estoppel "likewise" are not sufficient to identify a "clear and unambiguous promise," so the Court Below properly found that Plaintiff failed to state a claim

for this cause of action. Of course, a critical flaw in this reasoning is that the Court Below refused to dismiss the partnership cause of action, confirming that the Court Below viewed Plaintiff's allegations of the agreement as sufficiently clear to state a claim. It is not logical to assume that the Court Below found that Plaintiff sufficiently pled the Partnership Agreement but did not plead the elements necessary for a promissory estoppel claim.

Like with the Partnership Agreement, CIP pleads that the clear and unambiguous promise was made by Koplewicz, Hopkinson, Eastmore and Thayer Street. (Jt. Rec. at 136, ¶ 290). It is simply untrue that it is not clear from the allegations who the promisors were. Further, the promise made entailed the type of work that CIP would perform for the business, and how CIP would be rewarded for that work. (Jt. Rec. 98-101, ¶¶ 56-71). These details are more than sufficient to plead a clear and unambiguous promise. *See Rogers*, 230 A.D.2d at 727 ("Although the plaintiffs will be required at trial, to prove the specific details of each of the elements . . . no such detailed showing is required to survive a motion to dismiss pursuant to CPLR 3211."); *see also Prospect St. Ventures I, LLC v. Eclipsys Sols. Corp.*, 23 A.D. 3d 213, 214 (1st Dep't 2005) (confirming "the rule that a detailed showing of the elements of promissory estoppel need not be shown

to survive a pre-answer motion to dismiss").[4] Either way, Plaintiff provided granular detail about the promise made by Defendants regarding their intentions of compensating Plaintiff with one third equity for its specifically delineated role in the Partnership.

Plaintiff's allegations of reasonable reliance are similarly supported by the allegations in the Amended Complaint. (Jt. Rec. at 101-107, ¶¶ 72-103). Not only did Plaintiff plead that it relied on the clear promise made by Defendants by diligently performing the agreed-upon work, but it also pled that the reliance was reasonable in light of Defendants' actions which demonstrated that they too were operating according to the clear promise. (Jt. Rec. at 136-137, ¶¶ 291-296). Defendants' citation to *Wiscovitch Assocs.*, 193 A.D.2d at 542 does not advance their argument because in *Wiscovitch,* this Court found that the documentary evidence established that the parties did not intend for the oral agreement to be binding until it was reduced to writing and signed by both parties, and then reached the conclusion that reliance on that kind of alleged oral promise would have been unreasonable. Similarly, in *Schutty*, 86 A.D.3d at 485, this Court upheld the dismissal of the promissory estoppel claim where the documentary evidence

[4] The various terms that the Court noted were missing from the promise in *Wiscovitch Assocs.*, 193 A.D.2d at 542 were clearly not meant to be an exhaustive list of the terms that would be required in any promise; those terms may been relevant to that particular agreement, but items like "exclusivity" duration clearly have no relevance to the promise made in this action.

confirmed that the parties did not intend to be bound until there was a signed contract and therefore there was no clear and unambiguous promise.

Defendants again place undue weight on the draft LOI to argue that reliance was unreasonable where the parties intended to be legally bound only after another agreement was signed. Cross-Appellate Brief at 37. The Court Below considered the LOI and expressly found that at this stage "the Letter of Intent relied on by defendants (NYSCEF Doc. No. 50) . . .[does not] conclusively establish[] a defense to the asserted claims as a matter of law." (Jt. Rec. at 13). In each of the cases cited by Defendants on this point, this Court held that where it was established that a more definitive written agreement was required before the parties would be bound, a claim for promissory estoppel would not lie. *See 511 9th LLC v. Credit Suisse USA, Inc.*, 69 A.D.3d 497, 497 (1st Dep't 2010); *Rhodium Special Opportunity Fund, LLC v. Life Trading Holdco, LLC*, 128 A.D.3d 542, 542 (1st Dep't 2015); *Prospect St.*, 23 A.D. 3d at 214; *Prestige Foods, Inc. v. Whale Secs. Co.*, 243 A.D.2d 281, 281-82 (1st Dep't 1997). In fact, that was the purpose for Defendant citing to these authorities. Here, though, the draft LOI (put together a year after the parties entered into the Partnership Agreement) has no legal significance, was not signed or circulated, did not supplant the already-existing agreement and would certainly not preclude the promissory estoppel claim at the pleading stage. It is also clear that the Court Below did not dismiss the promissory

estoppel claim based on the LOI given its holding that the LOI did not establish a defense to the claims. (Jt. Rec. at 13).

As for the third and final element of promissory estoppel – injury from its reliance, Plaintiff adequately alleged this element by pleading in the form of the extensive amount of time it dedicated to the Partnership and the hundreds of thousands of dollars it provided to the Partnership in reliance on Defendants' promises. (Jt. Rec. at 137, ¶¶ 294-297). The idea that Plaintiff failed to plead this requirement because it is only seeking "due diligence expenses" is wholly inconsistent with the facts of this case as pled or the basis for damages sought. This is not a situation where Plaintiff performed some narrow due diligence during the course of evaluating a prospective deal with Defendants. Rather, Plaintiff spent approximately eighteen months actually working to further the interests of the Partnership as part of the clear promise that it would be compensated for this work. Plaintiff alleged details of how it worked tirelessly on the operations side of the business and well-beyond to generate revenue and make the Partnership profitable and successful. (Jt. Rec. at 101-107, ¶¶ 72-103). Defendants' characterization of Plaintiff's work and reliance as due diligence should, therefore, be dismissed out of hand.

The facts in the cases cited by Defendants regarding due diligence expenses are wholly distinguishable, in any event. In *Prospect Street*, for example, this

Court held that the expenditure of time and money for due diligence was not detrimental reliance "under the circumstances" – with those circumstances being that the contract at issue was only an agreement to agree and not a binding agreement. 23 A.D.3d at 214. Likewise, in *Chatterjee Fund Mgt. v. Dimensional Assocs.*, 260 A.D.2d 159, 159-60 (1st Dep't 1999), this Court also found the parties' agreement was conditioned on a definitive agreement, and that reimbursement of due diligence expenses was not expressly carved out. *Id*. Further, the diligence in that case was a precondition to negotiation of the final contract. *Id*. Here, on the other hand, the work that Plaintiff performed was done *after* the promise was already made and CIP and Defendants entered the Partnership Agreement.

It is apparent that every facet of Defendants' argument regarding promissory estoppel is bound up in its argument that the LOI represented an agreement to agree that precluded the finding of a binding oral agreement. The Court Below, however, considered and properly rejected this argument at this early stage of the proceedings.

Lastly, because Defendants focused the entirety of their argument regarding promissory estoppel on the purported failure to state a claim, they waived any argument regarding the purported duplicative nature of the cause of action in conjunction with the oral partnership agreement. As discussed at length in

Plaintiff's Appellate Brief, courts often allow quasi-contractual claims like promissory estoppel to proceed in tandem with breach of agreement claims, especially where the agreement in question is in dispute as in the case at bar. *See Sabre Intl. Sec., Ltd. v Vulcan Capital Mgt., Inc.*, 95 A.D.3d 434, 438-439 (1st Dep't 2012) ("where there is a bona fide dispute as to the existence of a contract…a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies.") *See also Mayer v. Marron*, 2015 N.Y. Misc. LEXIS 5331, at *20-21 (Sup. Ct. N.Y. Cty. Nov. 12, 2015) (plaintiffs may plead promissory estoppel as an alternative to breach of contract where defendant disputes existence of contract). The Court Below erred in dismissing the promissory estoppel claim, whether it did so on the grounds that it was duplicative or for failure to state a claim, and this Court should reinstate this cause of action.

B. Plaintiff Sufficiently Alleged Claims for Breach of Fiduciary Duty and Minority Oppression

The Court Below erred in dismissing CIP's claims for breach of fiduciary duty and minority oppression. Defendants argue that the breach of fiduciary duty claim is duplicative of CIP's breach of partnership agreement claim. In the primary case cited by Defendants in support of their argument, however, the First Department actually held that the "same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of

the relationship created by contract but which is independent of the contract itself." *William Kaufman Org., Ltd. v. Graham & James LLP*, 269 A.D.2d 171, 173 (1st Dep't 2000) (*quoting Mandelblatt v. Devon Stores*, 132 A.D.2d 162, 168 (1st Dep't 1987). Because the Partnership Agreement created a valid Partnership, the Defendants were "bound by a fiduciary duty requiring the punctilio of an honor the most sensitive." *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 118 (1995). Here, specifically, CIP alleges that the Partners shared trade secrets (Jt. Rec. at 99-100, ¶¶ 62-63), acquisition opportunities (Jt. Rec. at 103, ¶¶ 80-83), financial information, and monies in support of the business venture. Defendants even repeatedly held themselves out as partners with Plaintiff, including to investors. (Jt. Rec. at 108, ¶¶ 106-107). Defendants made extensive use of CIP's confidential, proprietary information and resources in support of the Partnership and breached their duties through their duplicitous conduct in removing CIP from the Partnership.

These allegations also support a claim for minority oppression. Defendants provide no authority for their contention that Delaware law bars a claim for minority oppression. Cross-Appellate Brief at 40. Defendants' argument that the minority oppression claim fails because a New York court cannot order dissolution of a Delaware entity is misplaced. While there is a lack of authority supporting a New York court's power to order dissolution of Delaware partnerships, the case

Defendants cite makes plain that this, "does not bar the award of lesser or alternative relief in this action . . . which will attain substantial justice between the parties." *Sokol v. Ventures Educ. Sys. Corp.*, 2005 NY Slip Op 51963(U), ¶ 4 (Sup. Ct. N.Y. Cty. June 27, 2005).

C. Plaintiff Has Met its Burden of Pleading with Respect to Misappropriation of Trade Secrets.

Plaintiff's allegations adequately describe its trade secrets and their value. The Amended Complaint explains that Plaintiff's trade secret is a process for "corporatization" that is used to professionalize founder-owned companies to perform at greater scale. (Jt. Rec. at 95, ¶¶ 39-40, Jt. Rec. at 96, ¶ 48). The trade secret was maintained as secret and was a key part of Plaintiff's business. (Jt. Rec. at 95, ¶¶ 40-42). The trade secret is described in as much detail as possible without compromising its proprietary nature. (Jt. Rec. at 96, ¶ 48). These types of processes and methods for running a business are trade secrets. *See e.g. Alnwick v. European Micro Holdings, Inc.*, 281 F. Supp. 2d 629, 638 (E.D.N.Y. 2003).

Defendants' argument that the trade secret claim fails merely because Plaintiff shared its trade secret with its Partners is unavailing. A partnership is the type of "confidential relationship" where a trade secret may be shared. Defendants were "surely… aware" of the policy of treating this information as a trade secret and the relationship among the partners "was one of mutual trust and confidence which imposed upon [them] the implied obligation not to subvert that policy."

Timely Prods. Corp. v. Arron, 523 F.2d 288, 303 (2d Cir. 1975) (citing Restatement of Torts § 757).

Defendants fail to cite any binding authority to support their argument that CIP did not propound sufficiently specific allegations. In the one New York State Court case cited by Defendants, the court found that the complaint did not even identify "what information or property comprise trade secrets." *Reva Capital Mkts. LLC v. Northend Energy Ltd.*, 2015 NY Slip Op 51809(U), ¶ 8 (Sup. Ct. N.Y. Cty. December 10, 2015). Here, CIP's Amended Complaint specifically identified its corporatization process as its trade secret.

D. Plaintiff's Unjust Enrichment Claim Is Not Barred Under the Statute of Frauds

With respect to Plaintiff's unjust enrichment claim, Defendants distort the core allegations regarding CIP's role in the Partnership to argue that the Statute of Frauds applies to bar this claim. The Statute of Frauds provides that certain agreements are void if they are not reduced to writing, including agreements "to pay compensation for services rendered in negotiating a loan, or in negotiating the purchase, sale, exchange, renting or leasing of…a business opportunity, business, its good will, inventory, fixtures or an interest therein, including a majority of the voting stock interest in a corporation and including the creating of a partnership interest." *See* N.Y. Gen. Oblig. L. 5-701(a)(10). Both the Statute and the case law make clear that this rule applies where plaintiff alleges it devoted its efforts to

"finding a business to acquire." *Snyder v. Bronfman*, 13 N.Y.3d 504, 509 (2009). In *Snyder*, the Court of Appeals held that the "essence of plaintiff's claim is that he devoted years of work to finding a business to acquire and causing an acquisition to take place", and that he sought compensation for finding and negotiating a particular transaction, precisely the type of claim covered by the Statute of Frauds. *Id.* at 509. Simply finding a business to acquire, though, is not at all what Plaintiff has alleged its role was either intended to be or actually was in this business endeavor, and it has not brought the unjust enrichment claim to reward it for its efforts in finding a business to acquire.

To the contrary, Plaintiff here alleges that it participated in all phases of the Partnership, including assembling business plans, formulating investment structures, soliciting investors, and negotiating legal instruments. Plaintiff's unjust enrichment claim arises from its investments in the business (*see, e.g.*, Jt. Rec. at 109, ¶ 114, Jt. Rec. at 124, ¶ 185) and the work it performed as a principal in the business. (S*ee, e.g.*, Jt. Rec. at 101, ¶¶ 70-71, Jt. Rec. at 103, ¶ 80, Jt. Rec. at 105, ¶ 92, Jt. Rec. at 122, ¶ 178).

Plaintiff alleges specifics of the tasks it performed to enhance the operations of the cannabis testing labs. (*See, e.g.* Jt. Rec. at 113, ¶ 134 (CIP "develop[ed] the infrastructure of Cannalysis" by bringing in individuals, such as CIP's human resources advisor who conducted "extensive work on developing Cannalysis'

hiring requirements, organizational charts, and role descriptions for its work force.")) Plaintiff also "laid out a detailed schedule for how CIP would implement corporatization in each laboratory acquisition through tailored 100-day plans." (Jt. Rec. at 113, ¶ 135).

As the Court of Appeals has explained, and as even Defendants acknowledged, the Statute of Frauds applies to work of an "intermediary" nature, not to "work performed so as to inform defendants whether to partake in certain business opportunities, that is, whether to negotiate." *JF Capital Advisors, LLC v. Lightstone Grp., LLC*, 25 N.Y.3d 759, 766 (2015). Defendants have conspicuously cherry-picked language from the Amended Complaint to paint a picture of Plaintiff's role that is simply at odds with reality and, significantly, is contradicted by the much broader allegations in the Amended Complaint.

The Court Below's decision cannot be squared with the Court of Appeals decision in *JF Capital*. The Court of Appeals made clear that its holding in *Snyder v. Bronfman* required dismissal of the claims there when a plaintiff seeks recovery based on its '"know-how" or "know who," i.e., the 'use [of] "connections"' to arrange for defendants to meet the right people. *JF Capital*, 25 N.Y.3d at 767. Just like in *JF Capital*, Plaintiff here is not seeking compensation only for its connections; that was not CIP's primary role in this business, as alleged, despite any twisting of language that Defendants have done to argue otherwise.

Importantly, and likely overlooked by the Court Below, the determination of whether a plaintiff's work is covered by the Statute of Frauds does not necessarily require an all or nothing decision. That is to say, it is possible that some work may be covered by the Statute of Frauds, while other work is not similarly covered, consistent with the Court of Appeals warning against the "pitfalls" of interpreting the Statute of Frauds too broadly. *See Dorfman v. Reffkin*, 144 A.D.3d 10, 19 (1st Dep't 2016) (plaintiff's claims were "properly sustained…but only insofar as they involved services that went beyond the negotiation or consummation of a business opportunity pursuant to General Obligations Law § 5-701 (a) (10).")). The facts of *Dorfman* closely track the allegations in this case where the plaintiff was involved in both the founding and the initialization of operations for the business, and the case at bar is much more akin to the situation in *Dorfman* than that in *Snyder*. *Id*. at 15. Just like the plaintiff in *Dorfman* whose services "clearly extend[ed] beyond the negotiation of a business opportunity" by developing materials to secure investor backing, recruiting engineers and others to join the new business and developing details of software implementation, CIP performed similar tasks such as bringing on employees to improve the operations of the business and providing detailed information on a corporatization strategy that the business could use as it acquired labs. (Jt. Rec. at 113-114, ¶134-136).

Defendants' purported distinction of this case and *Dorfman* on the basis that Plaintiff could not have performed services after the acquisitions since it was cut out by Defendant falls flat given that the plaintiff in *Dorfman* had likewise alleged that it was never made a part of the new business venture in that case either. 144 A.D.3d at 14. The Court Below broke with New York precedent in dismissing Plaintiff's unjust enrichment claims on Statute of Frauds grounds given the description of Plaintiff's work, which extends well beyond that of negotiating a business opportunity and this Court should reverse this decision.

Finally, Defendants attempt to argue that the Court Below should have dismissed Plaintiff's unjust enrichment claim because "[m]oney expended in preparation for eventually performing under an agreement is not compensable in quasi-contract". Cross-Appellate Brief at 46. Defendants can cite to only one unreported, federal district court case for this proposition. *Aqua Creations USA Inc. v. Hilton Hotels Corp.*, 2011 WL 1239793, at *8 (S.D.N.Y. Mar. 28, 2011), aff'd, 487 F. App'x 627 (2d Cir. 2012).

Defendants' repeated attempts to portray Plaintiff's work as money expended in preparation for eventually performing under a contract should be rejected. Plaintiff has clearly alleged that it was performing pursuant to a present understanding between the parties and not in hopes that there would someday be such an understanding. Moreover, where a plaintiff's work yields a benefit to

defendant even where the parties don't continue their business relationship, the plaintiff may pursue a claim of unjust enrichment. See *Dorfman*, 144 A.D.3d at 14. The overwhelming weight of authority shows that the Court Below committed clear error here and this Court should reinstate CIP's claim for unjust enrichment.

CONCLUSION

For the foregoing reasons, this Court should reverse the portion of the Decision and Order of the Court Below that dismissed CIP's fourth, eleventh, twelfth, thirteenth and fourteenth causes of action and affirm that portion of the Decision and Order of the Court Below which denied defendants' motion to dismiss CIP's second cause of action.

Dated: April 9, 2021

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PRINTING SPECIFICATIONS STATEMENT

I hereby certify pursuant to 22 NYCRR 1250.8(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Pursuant to 22 NYCRR Part 1250.9(h), Plaintiff-Appellant-Respondent requested on received on April 20, 2021 permission from the Court to file an oversized brief. True and correct copies of Plaintiff-Appellant-Respondent's request and the Court's message granting the request are attached immediately following this Statement.