To Be Argued by: ORIN SNYDER
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Supreme Court of the State of New York
Appellate Division—First Department

Appellate Case No. 2020-03727

CIP GP 2018 LLC, a Delaware limited liability company, d/b/a 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-Respondents.

REPLY BRIEF OF DEFENDANTS-RESPONDENTS-APPELLANTS JOSH KOPLEWICZ, THAYER STREET PARTNERS MANAGEMENT, LLC, AND GARY HOPKINSON

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Defendants-Respondents-Appellants Josh Koplewicz, Thayer Street Partners Management, LLC, and Gary Hopkinson ("Cross-Appellants") respectfully submit this reply brief in further support of their cross appeal to the appeal of Plaintiff-Appellant-Respondent CIP GP 2018, LLC ("Plaintiff" or "CIP").[1]

INTRODUCTION

Plaintiff's reply brief only confirms that its oral-contract claim must be dismissed under controlling First Department authority. This Court has long recognized the dangers inherent in oral-contract claims. That is why it has held time and again that an oral-contract claim should be dismissed when the parties make clear in a writing that they will not be contractually bound absent a signed contract. This is where the IAS Court erred. The Letter of Intent Plaintiff prepared

[1] This reply brief addresses Plaintiff's "points of argument in response to the cross appeal," 22 NYCRR § 1250.8(d), and thus does not address the reply arguments Plaintiff made in support of its own appeal seeking reversal of the IAS Court's decision to dismiss all of the other claims in the Amended Complaint. For the reasons explained in their March 22, 2021 principal brief (NYSCEF Doc. 13), Cross-Appellants, together with Defendants-Respondents 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-Respondents" or the "Bedford Respondents" and, together with Cross-Appellants, the "Bedford Defendants" or "Defendants") respectfully submit that the IAS Court's dismissal of Plaintiff's First and Third through Fourteenth Causes of Action should be affirmed in all respects. In further support of their cross appeal, Cross-Appellants join in the arguments submitted by Defendant-Respondent-Appellant Eastmore Management, LLC, which is separately represented both below and before this Court, and which is referred to herein as "Eastmore."

in May 2019 (the "LOI") confirms that Plaintiff itself disclaimed any intent to be bound absent a signed contract, and disclaimed the existence of any prior oral agreement. No contract was ever signed. The LOI is documentary evidence that conclusively refutes the alleged oral contract. That should have ended this case.

The IAS Court ruled, and Plaintiff argues, that the LOI does not the end the case because it was sent in 2019, after the alleged formation of an oral agreement in 2018. But this is wrong—and it makes no sense. An unbroken chain of New York authority holds that writings such as the LOI bar oral-agreement claims when they expressly disclaim a party's intent to be bound absent a signed written agreement. If anything, the fact that the LOI here was written by Plaintiff and sent *after* the alleged formation of an oral agreement signals the strongest possible intent that, in fact, the parties were not bound. The LOI is clear. It expressly states that it "is subject to execution and delivery of a mutually satisfactory Definitive Agreement" and "[t]he parties will become legally obligated with respect to the transaction only in accordance with the terms contained in the Definitive Agreement relating thereto if, as and when such document is executed and delivered by the parties." R.250 (emphasis in original). Plaintiff admits no Definitive Agreement was ever signed.

Plaintiff's oral-partnership claim rests on the trope of the unsubstantiated handshake business deal. It is the refuge of the disgruntled business actor who

feels slighted after it attempts to create a business venture with another party but fails to agree to terms. The parties never execute an agreement regarding their contemplated relationship, but the slighted party sues anyway. New York law recognizes that parties are not bound under such circumstances simply because they expend time and effort in the hope of launching a successful joint business—even if they reach a preliminary "agreement to agree" on some of the terms that will govern their dealings—before things eventually fall apart. Unwilling to accept that reality, litigants in Plaintiff's position often pivot, as Plaintiff has done here, to a dishonest litigation theory of partnership by hindsight, trying to manufacture an enforceable oral agreement after-the-fact.

Consistent with that strategy, the complaint in this case alleges that the parties formed an "oral partnership agreement" in June 2018. But at no time did the parties ever document or even once mention any such agreement in writing during the months that followed. Instead, Plaintiff did the opposite. It prepared and sent the LOI, a document that expressly says there is *no* agreement. Specifically, one year after the parties allegedly formed an oral partnership, Plaintiff commissioned the LOI—a draft letter of intent summarizing proposed terms to govern the parties' investments in cannabis testing labs. It concerns the exact same subject matter as the alleged oral partnership agreement, yet it never even mentions any such agreement. To the contrary, it declares in clear terms that

the parties did not then have an agreement and would not be legally bound until they executed a Definitive Agreement, which they never did. Hornbook New York law recognizes that no rational business actor would prepare such a document if it believed it had already formed an agreement in respect of the same subject matter. This is why oral-contract claims are routinely dismissed at the pleading stage in the face of such written disclaimers or other language confirming the absence of an agreement. *See, e.g.*, *Langer v. Dadabhoy*, 44 A.D.3d 425, 426 (1st Dep't 2007); *Schutty v. Speiser Krause P.C.*, 86 A.D.3d 484, 484-85 (1st Dep't 2011); *RKG Holdings v. Simon*, 1999 WL 464979 (2d Cir. June 23, 1999) (summary order).

Plaintiff's arguments apparently sowed enough confusion below to persuade the IAS Court to sustain the oral-contract claim despite the clear language of the LOI. But none of those arguments finds any support in law or the record, and none provides any justification for Plaintiff to pursue a claim that is contradicted by its own words in the LOI that it produced.

Plaintiff says that the LOI does not count because it was a "draft" and did not result in a deal. That is irrelevant. The point is that the LOI states clearly that there was no agreement without a signed contract.

Plaintiff says the LOI cannot be considered on a motion to dismiss. That is wrong. The LOI flatly contradicts the alleged oral contract and is fully cognizable on a pleading motion under both CPLR 3211(a)(1) and CPLR 3211(a)(7).

Plaintiff says the LOI can be set aside because it wasn't "contemporaneous" to the formation of the alleged oral agreement, and because it was created after the Defendants refused to sign an agreement on terms acceptable to Plaintiff. That too is irrelevant. No case has ever held that either factor undermines the dispositive force of a document like the LOI, and such a rule would make no sense. A rational business actor would be *more* careful about documenting its purported rights, rather than disclaiming them, in cases where they are called into question by the passage of time or a counterparty's objections. It is inexplicable that Plaintiff would have produced and sent the LOI saying there is no agreement if it believed the parties had already formed an enforceable oral agreement one year earlier.

The IAS Court erred in failing to dismiss Plaintiff's oral-partnership claim in light of the LOI. It also erred by not considering the many independent pleading defects discussed in Defendants' briefs to this Court. The decision to sustain Plaintiff's oral-partnership claim must be reversed, and the case must be dismissed.

ARGUMENT

I. THE LOI FATALLY UNDERMINES PLAINTIFF'S CLAIM FOR BREACH OF AN ALLEGED ORAL AGREEMENT

Plaintiff admits that it prepared and tendered the LOI setting forth proposed preliminary terms for an agreement governing their plan to pursue investments in cannabis testing labs (the "Contemplated Business"). It also does not contest the hornbook New York law holding that an oral-contract claim cannot be maintained

if "documentary evidence," such as the LOI here, confirms that the "parties intended to finalize their agreement in a writing, which never materialized." *Langer*, 44 A.D.3d at 426; *accord, e.g.*, *Keitel v. E*TRADE Fin. Corp.*, 153 A.D.3d 1181, 1181 (1st Dep't 2017); *Amcan Holdings, Inc. v. Can. Imperial Bank of Commerce*, 70 A.D.3d 423, 426-27 (1st Dep't 2010); *Jordan Panel Sys. Corp. v. Turner Constr. Co.*, 45 A.D.3d 165, 174 (1st Dep't 2007); *Schutty*, 86 A.D.3d at 484-85; *JTS Trading Ltd. v. Trinity White City Ventures Ltd.*, 2017 WL 1384204, at *4 (Sup. Ct. N.Y. Cnty. Apr. 17, 2017); *see also RKG Holdings*, 1999 WL 464979, at *1-*2. The IAS Court erred in failing to recognize that dismissal is mandated by the LOI under that settled case law. The ruling below should be reversed under this Court's settled precedents evaluating oral-agreement claims in the face of such writings.

Indeed, rather than dispute the core facts and principles that compel dismissal here, Plaintiff offers a series of misguided arguments lacking foundation in fact or law, all of which this Court should reject.

A. The LOI Contradicts and Is Fatal to the Alleged Oral Partnership

Plaintiff says the LOI is not an "'essentially undeniable' document that 'conclusively establishes' a defense as a matter of law" because it was a "draft only shared . . . for discussion purposes." Response and Reply Brief for Plaintiff-Appellant-Respondent (NYSCEF Doc. 15) ("Pl. Rep.") at 9 (quoting *Gottesman*

Co. v. A.E.W., Inc., 190 A.D.3d 522, 524 (1st Dep't 2021)). That claim contradicts Plaintiff's own pleading, which calls the LOI a "full agreement memorializing . . . terms" discussed at a May 31, 2019 meeting. R.119-21. Plaintiff also seeks to dismiss the LOI by claiming that its principal, Ashkan Marsh, disclaimed it by "cautioning" that it was a draft when he presented it (understanding that Defendant Hopkinson would forward it to Defendant Koplewicz). Pl. Rep. at 10; R.290 (Marsh: "You will send to Josh"). This misses the entire point. The LOI makes clear, in unambiguous language prepared by Plaintiff, that there was no agreement and would be no agreement without a signed writing. Marsh never disclaimed the LOI's relevant provisions. When the parties reviewed the substantive deal terms, they decided not to circulate the LOI further, because Hopkinson noted that it did not reflect what had been discussed in the meeting that preceded its drafting. R.291. But the record is clear that nobody on either side disclaimed, or even questioned, the critical disclaimer language in the LOI stating that the parties were not and would not be bound without a signed Definitive Agreement. R.290-92.

Nor can Plaintiff credibly argue that the LOI "was not, itself, an effort to memorialize the" alleged "Partnership Agreement," or that it "only relates to the distribution of assets acquired pursuant to the Partnership's activities." Pl. Rep. at 9-11. The plain language of the LOI squarely refutes those self-serving assertions. The LOI purports to set forth "principal terms" for the parties to "jointly govern

and operate one or more cannabis lab testing businesses," and expressly refers to the initial business activities undertaken by them before the LOI was drafted:

> *This letter of intent (the "Letter of Intent") sets forth the principal terms under which the undersigned parties intend to jointly govern and operate one or more cannabis lab testing businesses (collectively, the "Business").* To date, such business has been conducted by the undersigned through the activities of [QC CLB 1, LLC d/b/a Bedford Acquisition Partners Ltd.], and *it is the desire of the parties hereto to set out the nature of ownership in such entity, as well as any other entity which may succeed to [QC CLB 1, LLC] as ultimate holder of interests in the Business, (all such entities collectively, "HoldCo"), all as set forth below.*

R.247 (emphasis added).

That is precisely the subject matter of the Contemplated Business and the alleged partnership, R.89, 96-101, and the LOI is nowhere limited in scope to concerning only "the distribution of assets acquired pursuant to the [alleged] Partnership's activities," Pl. Rep. at 11. Rather, consistent with its references to "govern[ing] and operat[ing]" the Contemplated Business, and "set[ting] out the nature of ownership" of it, the LOI further explained that it was to serve as a non-binding precursor to an eventual "Definitive Agreement" among the parties:

> The parties to this Letter of Intent will endeavor to finalize and executeone [sic] or more definitive agreements (collectively, the "Definitive Agreement") defining (i) the structure and operation of the Business; (ii) the ownership thereof; (iii) the respective rights and obligations of the parties hereto in respect of same; and (iv) such other provisions as may be mutually agreed upon.

R.247. Accordingly, the LOI further provided in its Section B, "TERMS OF THIS LETTER OF INTENT," that:

> This Letter of Intent is intended to be a statement of the mutual interest of the parties with respect to a possible transaction and is subject to execution and delivery of a mutually satisfactory Definitive Agreement. Nothing herein shall constitute a binding commitment of either party except for the agreements in this Section B. The parties will become legally obligated with respect to the transaction only in accordance with the terms contained in the Definitive Agreement relating thereto if, as and when such document is executed and delivered by the parties.

R.249-50 (emphasis in original). There simply is no way that the subject matter of the LOI could be construed as anything other than the very same Contemplated Business that Plaintiff claims was the subject of an oral partnership agreement formed a year earlier—an "agreement" that is nowhere mentioned in, and in fact is expressly disclaimed by, the LOI that Plaintiff itself prepared.

B. The LOI Is Cognizable and Dispositive Under Both CPLR 3211(a)(1) and CPLR 3211(a)(7)

Plaintiff also tries to evade the LOI by arguing that it cannot be considered "[o]n a motion to dismiss under CPLR 3211(a)(1)." Pl. Rep. at 11-12. That is wrong. Plaintiff does not dispute that the LOI is genuine and says what it says. In this Department, "drafts" of agreements, "letter[s]," and "e-mails" are routinely considered on CPLR 3211(a)(1) motions—including in cases involving alleged oral agreements. *E.g.*, *Seaman v. Schulte Roth & Zabel LLP*, 176 A.D.3d 538, 539 (1st Dep't 2019); *Schutty*, 86 A.D.3d at 484-85; *Langer*, 44 A.D.3d at 426.

Plaintiff's own cited authority, for example, dismissed a case under CPLR 3211(a)(1) where documents "includ[ing] undisputed emails" demonstrated that the plaintiff's claim could not be sustained. *Gottesman Co. v. A.E.W., Inc.*, 190 A.D.3d 522, 524 (1st Dep't 2021), *cited in* Pl. Rep. at 9. And the terms of the LOI are "essentially undeniable," and dispositive here, because Plaintiff both admits the LOI is genuine and cannot dispute its contents. *Seaman*, 176 A.D.3d at 539 (dismissing claim in light of "communications . . . disclaiming" the existence of an attorney-client relationship between the parties).

Plaintiff's reliance on two Second Department decisions is misguided for several reasons. To the extent that the Second Department takes a narrower view than this Court of the types of documents that may be considered on a CPLR 3211(a)(1) motion, it is this Court's precedents that control. And neither of Plaintiff's cited cases supports exclusion of the LOI here in any event.

Eisner v. Cusamano Construction Inc., 132 A.D.3d 940, 941-42 (2d Dep't 2015), *cited in* Pl. Rep. at 11, merely held that the "affidavits and text messages" submitted in that case "did not conclusively establish that the plaintiff failed to comply with" a contractual notice-and-cure provision before suing. No document could conclusively prove that negative on a motion to dismiss.

And the court in *Kalaj v. 21 Fountain Place, LLC*, 169 A.D.3d 657, 658 (2d Dep't 2019), *cited in* Pl. Rep. at 12, found a non-binding letter of intent insufficient

to "refute" the plaintiff's oral-contract claim, but unlike in the LOI here there was no language at issue in *Kalaj* disclaiming the intent to form a binding agreement absent a signed writing. In fact, *Kalaj* cited with approval, but distinguished on its facts, this Court's decision in *New York Military Academy v. NewOpen Group*, 142 A.D.3d 489, 490 (1st Dep't 2016), which held that dismissal had improperly been *denied* on a CPLR 3211(a)(1) motion where a letter of intent "provided that parties 'shall negotiate to arrive at mutually acceptable Definitive Agreements' regarding [a] potential joint venture" but that "'each reserve[d] the right to withdraw from further negotiations at any time.'" Like the LOI here, that letter of intent "utterly refuted the plaintiff's factual allegations" that an enforceable contract existed. *Id.*

In any event, Plaintiff overlooks the fact that Defendants sought dismissal below under both CPLR 3211(a)(1) and CPLR 3211(a)(7). R.81, 345. A CPLR 3211(a)(7) movant "can rely on any evidence in support of her motion to dismiss." John R. Higgitt, McKinney's Practice Commentaries, CPLR 3211, at C3211:40. The standard of review in that posture is whether plaintiff "has a cause of action, not whether he has stated one," and dismissal is warranted where, as here, the essential facts are "negated beyond substantial question" by movant's evidence. *Biondi v. Beekman Hill House Apartment Corp.*, 257 A.D.2d 76, 81 (1st Dep't 1999). The IAS Court should have dismissed Plaintiff's oral-partnership claim under both of these applicable standards.

C. The LOI Need Not Be "Contemporaneous" to the Alleged Oral Agreement in Order to Preclude Plaintiff's Claim

Plaintiff cites no authority or logical principle supporting its argument (and the IAS Court's erroneous ruling) that the LOI could not bar its oral-partnership claim at this stage of the case because the LOI was not "contemporaneous" to the formation of the alleged oral agreement. Pl. Rep. at 13. No New York case has ever held that such disclaimer language must be created before or at the time of formation of the alleged oral agreement. And Plaintiff fails to explain why any "reasonable actor in its position would ever prepare a document such as the LOI—which disclaims the existence of any agreement between the parties—if it believed it had already entered into an enforceable agreement concerning the same subject matter at an earlier time." Brief of Defendants-Repsondents-Appellants (NYSCEF Doc. 13) ("Ds.' Br.") at 25-26. Put simply, no such reasonable actor ever would.

In fact, the opposite is true. A later document, like the LOI here, that comes after the alleged oral agreement, is even better proof that the parties did not actually intend to form an enforceable oral contract. The language here is clear: "The parties will become legally obligated with respect to the transaction only in accordance with the terms contained in the Definitive Agreement relating thereto if, as and when such document is executed and delivered by the parties." R.250 (emphasis in original). It makes no sense that a party who has already made an oral agreement would send this document afterwards saying there is no agreement.

The case law supports this common-sense conclusion. This Court and others that have repeatedly dismissed oral-agreement claims in the face of later writings, like the LOI here, that disclaim a party's intent to contract orally, and Plaintiff fails to distinguish those authorities in any meaningful respect. Plaintiff notes, for example, that the writings at issue in *Langer v. Dadabhoy* spanned from later in the "same month" as the alleged oral agreement to "three months later." Pl. Rep. at 13-14 (citing *Langer v. Dadabhoy*, 2006 WL 8085302 (Sup. Ct. N.Y. Cnty. Nov. 17, 2006), *aff'd*, 44 A.D.3d 425 (1st Dep't 2007)). But Plaintiff cites nothing in *Langer* or any other case explaining how much time supposedly must pass between an alleged oral agreement and a later written disclaimer to make a difference. There is no logical reason why a document sent one week after the alleged formation of an oral contract should more powerfully refute the existence of the oral contract than a document sent one month—or even one year—later. The point in all such cases is the same: no rational party would prepare a document saying there is no contract if it believed it had already formed an enforceable oral contract.

Similarly, Plaintiff seeks to distinguish *Schutty v. Speiser Krause P.C.*, 86 A.D.3d 484 (1st Dep't 2011), on the ground that it involved consideration of other documents, such as "drafts" of the parties' agreement, in addition to the 2007 letter from the plaintiff reflecting that the parties lacked any intent to be bound orally in 2005. Pl. Rep. at 14. But likewise here, Plaintiff itself alleges that there were

"over a dozen versions of [a] draft" partnership agreement negotiated by the parties over a period of "months," as well as yet another "different document" purportedly governing the alleged partnership that Koplewicz circulated in April 2019. R.115-16, 118-20. Those many drafts, which were negotiated over the course of many months yet never signed, only corroborate what Plaintiff ultimately confirmed in the LOI: that no agreement actually existed among these parties, and "[t]he parties will become legally obligated with respect to the transaction only in accordance with the terms contained in the Definitive Agreement relating thereto if, as and when such document is executed and delivered by the parties." R.250.[2]

Plaintiff only further proves the point when it says the LOI should be disregarded because it was sent only "after" Defendants allegedly refused to "memorialize" the terms of the oral agreement it claims was formed in 2018. Pl. Rep. at 10. Plaintiff says the LOI was merely an effort to "salvage its interests in the Partnership" after a dispute arose. *Id.* at 12. Again, this makes no sense at all. Sending a writing that *disclaims* the existence of any agreement is exactly the *opposite* of how "a party that *wishes* to be bound" would reasonably act, given that it could "very easily protect itself by refusing to accept language that shows an

[2] Plaintiff has no response to *RKG Holdings*, in which the Second Circuit held on summary judgment that an oral contract allegedly formed in "mid-April, 1994" was refuted by a May 17, 1994 letter. *Gottlieb v. Simon*, 1998 WL 684839, at *1 (S.D.N.Y. Sept. 30, 1998), *aff'd*, *RKG Holdings*, 1999 WL 464979, at *1.

intent *not* to be bound." *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir. 1989).[3]

And, to be clear, it is Plaintiff (through its counsel) who wrote the LOI—a document that clearly "contradict[s it]s allegations that the Partnership Agreement existed." Pl. Rep. at 12. Plaintiff cannot seriously claim otherwise now. The LOI unambiguously expressed a then-present intent that "[t]he parties will become legally obligated" (i.e., in the future) "only . . .if" a "Definitive Agreement" was subsequently "executed and delivered by the parties"—which never happened. R.250. It also stated that the parties had undertaken preliminary efforts in furtherance of the Contemplated Business, and that the parties "desire[d]" to "set out the nature of ownership in" that endeavor, yet it still made no mention of any existing agreement among them. R.247 ("To date, such business has been conducted by the undersigned through the activities of [QC CLB 1, LLC d/b/a

[3] Plaintiff also cites a letter, purportedly drafted "two days" before the LOI by the "same attorney who drafted the LOI," noting that the parties "'had an oral agreement.'" Pl. Rep. at 11 (citing R.255). That letter says nothing about the existence of the alleged oral *partnership*, and instead refers to an agreement among "[t]he principals of [Defendant] Bedford" regarding Bedford's "administration." R.255. Bedford is not the alleged partnership; it is a "corporation formed in British Colombia" that is "managed by Hopkinson and Koplewicz" and that "Koplewicz formed" and "controlled." R.94, 101, 120. The letter from Plaintiff's counsel declared that that purported agreement had been "voided." R.255. And, in any case, given the adversarial posture reflected in that letter, no rational business actor would have drafted the terms of the LOI disclaiming the existence of any agreement if it believed it was entitled to hold Defendants to the terms of an oral partnership supposedly formed a year earlier.

Bedford Acquisition Partners Ltd.] . . . ."). It makes no legal or logical sense that a party seeking to "salvage" an existing oral partnership agreement would prepare a writing saying that *no* binding agreement exists. The LOI conclusively refutes the alleged oral agreement and requires dismissal.

II. PLAINTIFF ALSO FAILED TO PLEAD ESSENTIAL ELEMENTS OF ITS ORAL-PARTNERSHIP CLAIM

Plaintiff also fails to explain away the numerous other fatal pleading deficiencies that compel dismissal of its oral-partnership claim. Although the IAS Court overlooked these issues in its ruling below, they nevertheless render Plaintiff's claim unsustainable as a matter of law, and independently justify reversal of the IAS Court's ruling in this limited respect.

First, Plaintiff utterly fails to explain how there can be five parties to an alleged "three-way Partnership," R.88, or how it can simultaneously sue four parties for allegedly breaching it. Unwilling to commit to a position on whether its alleged co-partners were Hopkinson and Koplewicz individually, or the entities Eastmore and Thayer Street, Plaintiff resorts to literal and logical gibberish. First it claims to have "clearly allege[d]" that Hopkinson and Koplewicz "agreed to form the Partnership *on behalf of* their respective investment entities, namely . . . Eastmore and Thayer Street." Pl. Rep. at 16 (emphasis added). It goes on to allege that those individuals supposedly were their entities' respective "representatives in the Partnership"—which would mean that Eastmore and Thayer Street are the

proper defendants to this claim, not the individuals who merely "represent[ed]" them "in the Partnership." *Id.*

But in the very next sentence, it reverses course and claims 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." *Id.* (emphasis added). Plaintiff also alleges that "Hopkinson and Koplewicz both agreed to share their portion of the Partnership . . . interests . . . with Eastmore and Thayer [Street]" in October 2018, months *after* the alleged partnership supposedly was formed, "[i]n exchange for" certain "support" those entities allegedly gave toward developing the Contemplated Business. R.103-04.

These allegations are a pile of irreconcilable nonsense. Whatever they mean, they fail to explain how a three-way partnership can exist among five partners—it cannot—or why Plaintiff sued four Defendants on this claim when it repeatedly says there were only "three Partners" in the alleged agreement. Pl. Rep. at 5; Brief for Plaintiff-Appellant-Respondent (NYSCEF Doc. 9) at 4, 11. There is no good answer to either question, because Plaintiff must decide who its two alleged co-partners were, and it can sue only those parties for breach of the alleged oral agreement. In its reply, Plaintiff selectively snipes at a few of the cases cited in Defendants' prior brief, but it has no answer to this Court's controlling case law holding that "[t]here can be no breach of contract claim against a non-signatory to

the contract." *Randall's Island Aquatic Leisure, LLC v. City of New York*, 92 A.D.3d 463, 463 (1st Dep't 2012); *accord, e.g.*, *Black Car & Livery Ins., Inc. v. H&W Brokerage, Inc.*, 28 A.D.3d 595, 595 (2d Dep't 2006) (dismissing contract claim against defendant that "was not a party to the agreement"). Plaintiff's claim must be dismissed either as against Hopkinson and Koplewicz or as against Eastmore and Thayer Street—and because Plaintiff refuses to say who the proper defendants are, its claim should be dismissed as against all of them. End of story.[4]

Second, Plaintiff cannot remedy its failure to plead that the alleged partnership included an agreement by the "partners" to share in the losses of the Contemplated Business, which is required to state any oral-partnership claim. Ds.'

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[4] Plaintiff's attempt to justify its allegations embroiling Thayer Street in this claim misses the point. The question is not whether "senior officers such as Koplewicz" could or "could not bind Thayer Street." Pl. Rep. at 17. It is whether Plaintiff propounded any non-conclusory allegations sufficient to demonstrate that Koplewicz's purported actions here *in fact were* undertaken on Thayer Street's behalf, rather than on his own behalf. Plaintiff alleged no facts supporting such a contention, and instead merely pleaded in conclusory fashion that, for example, Koplewicz was acting on "behalf" of Thayer Street, or that Thayer Street was acting "through" Koplewicz. R.88, 125-126. As explained in Defendants' principal brief on appeal, that does not suffice to impute Koplewicz's (or Perkins') alleged conduct to Thayer Street here. Ds.' Br. at 28-29 & n.3. *Cointech, Inc. v. Masaryk Towers Corp.*, 7 A.D.3d 376 (1st Dep't 2004), *cited in* Pl. Rep. at 17, is no aid to Plaintiff here. There was no dispute in *Cointech* about whether the acts of the defendant's president bound the defendant entity, because the president expressly signed a contract "in her official capacity" on the defendant's behalf. *Id.* at 380. Rather, the disputed issue in *Cointech* concerned whether the plaintiff could be charged with knowledge that defendant was not authorized to enter into the contract without government approval. *Id.* That case is utterly inapposite here.

Br. at 30. Again, Plaintiff resorts to reliance on conclusory allegations, and selective distinguishing of Defendants' case law, in an effort to avoid its pleading failures. But Plaintiff has no response, for example, to *Kosower v. Gutowitz*, 2001 WL 1488440 (S.D.N.Y. Nov. 21, 2001), *cited in* Ds.' Br. at 30, in which Judge Koeltl of the Southern District of New York dismissed an oral-partnership claim on the pleadings, citing the Appellate Division's decision in *Ramirez v. Goldberg*, 82 A.D.2d 850 (2d Dep't 1981). Dismissal was required there because the plaintiff's own allegations confirmed—as Plaintiff's allegations confirm here—that the plaintiff "was not personally liable for the expenses of the partnership," *Kosower*, 2001 WL 1488440, at *6. Plaintiff admits that the "structure" of the alleged partnership here involved a series of "holding compan[ies]" that were "limited liability companies," R.88, 93-94, 100-01—which means that Plaintiff would *not have been personally liable* for any partnership losses. That is fatal to Plaintiff's oral-partnership claim. *See Ramirez*, 82 A.D.2d at 852.[5] Plaintiff's purported funding of a "bridge loan," Pl. Rep. at 18, changes nothing, because making "loans" to a partnership business is "the very antithesis of a partnership relationship." *Cleland v. Thirion*, 268 A.D.2d 842, 844 (3d Dep't 2000).

[5] *SRL v. Khaledi Oriental Rugs, Inc.*, 2012 WL 10008212 (Sup. Ct. N.Y. Cnty. Aug. 24, 2012), *cited in* Pl. Rep. at 18-19, is inapposite here; *Khaledi* involved an alleged oral partnership "concerning the purchase of an antique carpet" and there was no allegation that the alleged partners formed a business using limited liability holding companies that shielded them from personal liability.

Third, Plaintiff misses the point about its failure to plead joint control of the alleged partnership's business. Its own allegations demonstrate that, although Plaintiff purportedly performed *work* in connection with the alleged partnership business, it never wielded any *control* over that business, which it claims was held entirely by the Defendants. *See, e.g.*, R.93 (Hopkinson and Koplewicz "collectively control" CLB I), R.101 ("Koplewicz formed Bedford" as "the holding company for the Partnership's investment assets" and to "manage the[ir] operations"), R.120 (investor funds "sat in a bank account under Koplewicz's control"); *id.* (Koplewicz "controlled Bedford"), R.122 (Defendants "refused to issue" interests allegedly due to Plaintiff).

Plaintiff's additional allegations regarding Defendants' eventual, purportedly "improper[,] expulsion" of Plaintiff from the business, *see, e.g.*, R.88, 90-91, are not the "evidence" of Plaintiff's "lack of control," Pl. Rep. at 19, that are relevant here. They only reconfirm what Plaintiff has elsewhere pleaded at length in its Amended Complaint: that all of the incidents of control of the alleged partnership business, and the constituent entities that comprised it, were held and wielded exclusively by Defendants. Indeed, Plaintiff admits that it never received any of the "Class B Interests" that allegedly "provided" the partners with "management and voting rights over the major decisions of the Partnership." R.98; *see* R.122 (alleging that Defendants have "refused to issue . . . Class B interests" to Plaintiff).

Fourth, Plaintiff offers no real response regarding the many material terms that would be necessary to any functioning partnership of the nature it claims was formed, but that it does not allege were ever addressed or agreed upon by the alleged partners here. It seeks to wave away this Court's decision in *Wiscovitch Associates v. Philip Morris Cos.*, 193 A.D.2d 542 (1st Dep't 1993), on the ground that that case involved an "employment agreement" rather than a "partnership agreement." Pl. Rep. at 21. But it cites no authority holding—and cannot seriously argue—that partnership agreements are subject to any lesser standard regarding material terms than other types of contracts are. That is not the law.[6]

Plaintiff also claims *Wiscovitch* is distinguishable because the Amended Complaint supposedly sets forth the "specific nature of the services to be provided" by Plaintiff. Pl. Rep. at 21. But it tacitly concedes that it has alleged no agreement here regarding other terms, such as "the manner in which the [parties] would be compensated, the method and means of termination [of the agreement], indemnification, confidentiality and the length of time required for . . .

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[6] *See, e.g.*, *Murray v. Murray*, 2011 WL 3631310, at *2 (Sup. Ct. Rockland Cnty. 2011) ("Partnership agreements are subject to all the rules of construction and interpretation applicable to any contract . . . ."); *Napoli v. Domnitch*, 34 Misc. 2d 237, 241 (Sup. Ct. Queens Cnty. 1962) (applying settled contractual "rules of construction" to partnership agreement because "there are no 'special rules of law applicable to covenants contained in partnership articles'" (quoting *Bagley v. Smith*, 10 N.Y. 489, 495 (1853))); 4D N.Y. Practice, *Commercial Litigation in New York State Courts* § 103:6 (5th ed. 2010) ("As a contract, the partnership agreement is subject to all the rules of construction that apply to any contract.").

exclusivity," that remained "to be negotiated." *Wiscovitch*, 193 A.D.2d at 542. Those terms (and others) would be equally important, if not more important, to the complex alleged partnership at issue here as they were to the employment agreement at issue in *Wiscovitch*. Plaintiff did not come close to alleging that the parties reached agreement on all of the terms material to the alleged partnership.

Fifth, Plaintiff does not dispute the many facts alleged in its Amended Complaint confirming that the parties, by their conduct, necessarily terminated any alleged partnership long ago. Nor does it dispute that the sole remedy for an alleged breach of an at-will oral partnership is an accounting claim that it has not pleaded—and that the contract claim it *has* pleaded is barred. *See* Ds.' Br. at 32-33. Instead, Plaintiff seeks to dodge that settled principle by claiming that the alleged partnership here was not "dissolvable at will" because it concerned a "particular undertaking." Pl. Rep. at 22. That argument borders on the absurd.

Plaintiff's position runs headlong into the very Court of Appeals authority Plaintiff cites. *Gelman v. Buehler*, 20 N.Y.3d 534, 537-38 (2013), *cited in* Pl. Rep. at 22, dictates that a "particular undertaking" sufficient to "preclud[e] unilateral dissolution of a partnership" requires a "specific objective or project that may be accomplished at some future time," and "[b]usiness activities which may continue indefinitely"—like those of the alleged partnership here—"do not constitute particular undertakings." In fact, *Gelman* held that there was no "particular

undertaking" for a partnership that was formed to (1) "identify a business to buy," (2) "raise money" to purchase that business, (3) "operate the business to increase its value," and then (4) "sell the business" in a "liquidity event." *Id.* at 538. That is precisely what Plaintiff alleges here—a partnership dedicated to identifying business opportunities in the cannabis sector, raising capital to acquire and operate them, and eventually selling the combined businesses through an "initial public offering," R.89, 98-101—and therefore its alleged partnership does not involve a particular undertaking. *Gelman*, 20 N.Y.3d at 537-38; *Sanley Co. v. Louis*, 197 A.D.2d 412, 413 (1st Dep't 1993) (partnerships formed for "purposes of acquiring, managing and reselling residential real estate" were "at will").

The mere fact that the alleged partnership contemplated investments in "cannabis safety testing laboratories" in California and "other states," Pl. Rep. at 23, does not change the "amorphous" nature of that alleged endeavor, the "objectives" of which were "fraught with uncertainty," *Gelman*, 20 N.Y.3d at 538. Merely "referring to specific industries" does not suffice to establish a particular undertaking. *Id.* at 538-39. The alleged partnership's "exclusivity requirement" obliging the partners, in perpetuity, to pursue cannabis investments only "within the Partnership" R.100, further confirms that the endeavor was not limited to a "specific objective or project," *Gelman*, 20 N.Y.3d at 538; *see Harshman v. Pantaleoni*, 294 A.D.2d 687, 688 (3d Dep't 2002) (no particular undertaking for

partnership that, "absent a unanimous decision of the partners," would "continue forever"). And Plaintiff's argument contradicts its own pleading—which claims Plaintiff "zeroed in on" the strategy to acquire testing labs only *after* the alleged partnership was formed. R.98, 100-01. A "particular undertaking" could not be grafted onto the alleged partnership months after it allegedly was formed.

The other cases Plaintiff cites offer no further support for the claim that this alleged partnership concerned a particular undertaking. Plaintiff's allegations fall far short of the degree of specificity—and potential for completing the endeavor—inherent in the purpose of the partnership at issue in *St. Lawrence Factory Stores v. Ogdensburg Bridge & Port Authority*, 202 A.D.2d 844, 845 (3d Dep't 1994), *cited in* Pl. Rep. at 23. In Plaintiff's own words, that case involved a partnership for the "development and construction" of a single specific "retail factory outlet" on an "identified parcel of real property." Pl. Rep. at 23. In contrast, Plaintiff cannot even identify the *states* in which the alleged partnership potentially was to conduct business—let alone the specific locations or projects it would involve. Plaintiff's reliance on *Peters v. Gould*, 2012 WL 9518031 (Sup. Ct. N.Y. Cnty. Jan. 9, 2012), cited in Pl. Rep. at 22-23, is similarly misplaced. *Peters* pre-dates *Gelman* and contravenes the Court of Appeals' admonition that businesses which "may continue indefinitely" are not particular undertakings—but even so, the purpose of Plaintiff's alleged partnership here is far more "amorphous" than the singular

purpose at issue in *Peters*: "launching" a single "hedge fund that invested solely in clean technology." 2012 WL 9518031, at *1.

CONCLUSION

For all of the foregoing reasons, and as explained in Defendants' prior brief, this Court should (1) reverse that portion of the IAS Court's ruling below that declined to dismiss Plaintiff's Second Cause of Action, and instead enter an order dismissing the Second Cause of Action; (2) affirm the balance of the IAS Court's rulings in the Orders on Appeal, which correctly dismissed Plaintiff's First and Third through Fourteenth Causes of Action; and (3) direct the IAS Court to enter a judgment dismissing this action in its entirety with prejudice.

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New York, NY

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