To be Argued by:
ORIN SNYDER
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

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-Respondents.

Appellate Case No.: 2020-03727

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

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Defendants-Respondents-Appellants Josh Koplewicz, Thayer Street Partners Management, LLC, and Gary Hopkinson (collectively "Cross-Appellants"), respectfully submit this brief (1) in support of their cross appeal, and (2) 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"),[1] in opposition to the appeal of Plaintiff-Appellant-Respondent CIP GP 2018, LLC ("Plaintiff" or "CIP").

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the IAS Court erred in sustaining an alleged oral-contract claim where Plaintiff, approximately one year after the date of the alleged oral agreement, sent a draft Letter of Intent that disclaimed any oral agreement because it (a) concerned the same business venture that was the subject matter of the alleged oral agreement, (b) made no reference to any existing agreement among the parties concerning that business venture, and (c) instead stated that "[t]he parties will become legally obligated with respect to the transaction only in accordance

[1] Defendant-Respondent-Appellant Eastmore Management, LLC, which is separately represented both below and in connection with the appeals presently before this Court, is referred to herein as "Eastmore."

with the terms contained in [a] Definitive Agreement relating thereto if, as and when such document is executed and delivered by the parties"?

The IAS Court erroneously sustained that claim over Defendants' CPLR 3211(a) motions to dismiss.

2. Whether the IAS Court correctly dismissed Plaintiff's "alternative" claims sounding in promissory estoppel, breach of fiduciary duty, "minority oppression," and misappropriation of trade secrets "either as duplicative of the oral partnership cause of action or because they otherwise fail to state a claim"?

The IAS Court correctly dismissed all of these claims.

3. Whether the IAS Court correctly dismissed Plaintiff's unjust-enrichment claim as "barred by the Statute of Frauds"?

The IAS Court correctly dismissed Plaintiff's unjust-enrichment claim.

NATURE OF THE CASE

These cross appeals arise from the IAS Court's dismissal of thirteen of Plaintiff's fourteen claims below. All fourteen claims were premised on an alleged oral agreement between parties to pursue a business venture. The Court correctly dismissed thirteen claims. It should have dismissed the entire case. The only surviving claim is a breach of oral contract claim that fails as a matter of law under hornbook New York law because Plaintiff's own writing (a draft Letter of Intent) made clear that the parties would not be obligated to one another unless and until

they executed a definitive written agreement. Because such an agreement was never executed, the IAS Court erred in denying Defendants' motion to dismiss the oral contract clam. But the Court correctly dismissed the other thirteen claims as duplicative of the oral contract claim or otherwise fatally deficient. The Amended Complaint should be dismissed in its entirety.

Plaintiff's allegations present a fact pattern that arises every day in the business world: three businessmen—Plaintiff's principal Ashkan Marsh, and Defendants Josh Koplewicz and Gary Hopkinson—got together in mid-2018 to discuss creating a business venture involving the acquisition and corporate "roll-up" of cannabis-related businesses in states where cannabis has been legalized. Plaintiff claims they formed a binding oral partnership agreement concerning that contemplated business in June 2018 (the "Contemplated Business"), and that Plaintiff expended substantial time and effort in the hope of launching a successful joint business. But it is undisputed that the parties never executed a written agreement documenting their alleged contract. Eventually, the relationship soured and Defendants decided to pursue the business opportunity without Plaintiff.

In this suit, Plaintiff now says that the decision to part ways was actually a breach of the alleged oral partnership agreement it claims the parties made in 2018. But Plaintiff's own writing is fatal to this claim. Specifically, during efforts in May 2019 to negotiate a written agreement that would govern the Contemplated

Business, Plaintiff commissioned and tendered to Defendants a draft Letter of Intent (the "LOI"), which expressly declared that the parties were not—and would not be—bound to any agreement absent a signed writing. R.247-50. The LOI made no mention of any existing partnership or agreement, and instead purported to "set forth" terms that the parties "intend to jointly govern" their joint business, while clarifying that the parties would "endeavor to finalize and execute[ ]one or more definitive agreements . . . defining . . . the[ir] respective rights and obligations" regarding the Contemplated Business. R.247. By its terms, the LOI was "subject to execution and delivery of a mutually satisfactory Definitive Agreement," and it confirmed that 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.

Under an unbroken line of New York authority, Plaintiff's statements in the LOI are fatal to any claim that the parties formed an oral agreement concerning the Contemplated Business. As New York courts have long recognized, "if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." *Scheck v. Francis*, 26 N.Y.2d 466, 469-70 (1970). "[T]he concept of freedom of contract includes the '[f]reedom to *avoid*

oral agreements,'" which is "especially important when business entrepreneurs and corporations engage in substantial and complex dealings." *Jordan Panel Sys. Corp. v. Turner Constr. Co.*, 45 A.D.3d 165, 174 (1st Dep't 2007). Thus, "when a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent." *Id.* at 169.

Chief among such signals is a written expression in a draft agreement, "term sheet," or other preliminary document that "'neither party shall be bound until the parties execute a more formal written agreement'"—and courts have consistently dismissed oral-contract claims in the face of such writings "on the ground that no valid and binding contract was ever formed." *Keitel v. E*TRADE Fin. Corp.*, 153 A.D.3d 1181, 1181 (1st Dep't 2017), *lv. denied*, 31 N.Y.3d 903 (2018); *see Amcan Holdings, Inc. v. Can. Imperial Bank of Commerce*, 70 A.D.3d 423, 426-27 (1st Dep't 2010); *Jordan Panel*, 45 A.D.3d at 167-71 & n.4; *Langer v. Dadabhoy*, 44 A.D.3d 425, 426 (1st Dep't 2007), *lv. denied*, 10 N.Y.3d 712 (2008); *Schutty v. Speiser Krause P.C.*, 86 A.D.3d 484, 484-85 (1st Dep't 1992); *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, Inc. v. Simon*, 1999 WL 464979, at *1 (2d Cir. 1999) (summary order). Courts "'need look no further'" when "'there is a writing between the parties showing that [one party] did not intend to be bound.'" *Kaczmarcysk v. Dutton*, 414 F. App'x 354, 355-56 (2d Cir. 2011) (quoting *RKG*

Holdings, 1999 WL 464979, at *1). If such "documentary evidence" reveals that "parties intended to finalize their agreement in a writing, which never materialized," there is "no mutual assent or meeting of the minds," and an oral-agreement claim must be dismissed. *Langer*, 44 A.D.3d at 426; *see Schutty*, 86 A.D.3d at 484-85; *RKG Holdings*, 1999 WL 464979, at *1.

These legal principles preclude any oral-contract claim here because Plaintiff's own LOI clearly evinces Plaintiff's intention that the parties could not and would not be bound absent a definitive executed agreement. There is no dispute here about the existence or content of Plaintiff's LOI. R.247-50. That document, which Plaintiff admits is genuine, unambiguously states that the parties had no agreement, and would not be bound to any agreement, absent execution and delivery of a written "Definitive Agreement." Plaintiff likewise admits, as it must, that no such written agreement was ever executed. R.307, 311. That alone should have brought this case to an end.

Plaintiff sought to avoid the effect of its own writing by arguing below that the LOI should be disregarded because its drafting was not "contemporaneous" to the alleged oral agreement, and because Defendants rejected it. R.309-11. Apparently persuaded by that argument, the IAS Court declined to dismiss the oral-partnership claim, finding that the motion record did not "clearly and unambiguously preclude[] the assertion of an oral agreement of some kind for

some period of time," at least not during the "pre-Answer stage of this litigation." R.13, 54.

This was error.

The law does not make a distinction between "contemporaneous" and non-contemporaneous writings that disclaim the existence of an agreement absent a signed definitive agreement. And this makes perfect sense. The dispositive issue is whether the parties have expressed or evidenced an intent not to be bound absent a signed writing, not when they did so. This is why courts have repeatedly held that documents "subsequent" to a supposed oral deal are sufficient to extinguish oral-contract claims such as Plaintiff's claim here, *e.g.*, *Langer v. Dadabhoy*, 2006 WL 8085302, at *1 (Sup. Ct. N.Y. Cnty. Nov. 17, 2006), *aff'd*, 44 A.D.3d 425 (1st Dep't 2007)—even documents created years after an oral agreement allegedly arose, *see, e.g.*, *Schutty*, 86 A.D.3d at 484-85 (alleged 2005 agreement precluded by subsequent documents including 2007 letter). In fact, a subsequent writing disclaiming the existence of any prior oral agreement, such as exists here, is arguably even more dispositive confirmation than a contemporaneous one that the alleged prior oral agreement is not binding. No rational business actor would prepare such a document if it believed it had already entered into a binding and enforceable agreement.

The law also does not require Defendants to have "accepted" Plaintiff's LOI in order for it to definitively document Plaintiff's own intention that no agreement would arise among them absent a writing. All that is required to dispose of Plaintiff's claim is confirmation that at least one of the parties lacked the intent to form a binding oral agreement. Plaintiff's own words confirm here that Plaintiff lacked any such intent. *See, e.g.*, *Schutty*, 86 A.D.3d at 484-85 (absence of oral agreement established, *inter alia*, by plaintiff's own "letter").

Separately, Plaintiff's oral-contract claim also suffered from several other fatal defects apparent on the face of the pleading, including that it failed to identify many of the basic material terms required for this sort of alleged oral partnership agreement—which the IAS Court's ruling overlooked. *See infra* at 26-32.

The IAS Court therefore erred in failing to dismiss this claim along with the rest of Plaintiff's case.

In all other respects, however, the ruling below was well-grounded in fact and law, and the IAS Court's dismissal of all of Plaintiff's other claims should summarily be affirmed. Plaintiff does not defend eight of the claims it pleaded below (the First, Third, and Fifth through Tenth Causes of Action), and therefore has abandoned those claims. But it seeks reinstatement of its claims sounding in promissory estoppel, breach of fiduciary duty, "minority oppression," and misappropriation of trade secrets, claiming it was denied the right to press those

claims "in the alternative" to its oral-partnership claim. And it argues that its unjust-enrichment claim was improperly held to be barred by the Statute of Frauds.

None of Plaintiff's arguments justifies reinstatement of these claims. As a threshold matter, Plaintiff mischaracterizes the IAS Court's ruling on promissory estoppel, fiduciary duty, minority oppression, and misappropriation as being premised solely on the "duplicative" nature of Plaintiff's claims. Pl.'s Br. at 2. In reality, the IAS Court correctly dismissed those claims "*either* as duplicative of the oral partnership cause of action *or* because they otherwise fail to state a claim." R.14 (emphasis added). As Defendants explained below, Plaintiff's promissory-estoppel claim fails as a pleading matter because it does not allege a clear and unambiguous promise, reasonable reliance on that promise, or damages deriving from any such reliance. Absent a definitive agreement regarding the parties' joint efforts to launch the Contemplated Business, Plaintiff cannot hold Defendants to account for costs incurred in pursuing that opportunity, simply because it did not ultimately come to fruition. Plaintiff's fiduciary-duty and minority-oppression claims were properly dismissed as duplicative, because they are premised entirely on alleged breaches of "duty" that Plaintiff claimed were also breaches of express contractual obligations (and because Plaintiff cites no authority supporting the existence of the minority oppression claim it purports to assert under "Delaware law"). And Plaintiff's misappropriation claim failed both to identify any

protectible trade secrets or confidential information and to allege that Plaintiff took any steps to protect that information. These claims were all just lawyer makeweight, and the IAS Court appropriately dismissed them.

Finally, the IAS Court correctly dismissed Plaintiff's unjust-enrichment claim as barred by the Statute of Frauds. New York law prohibits enforcement of any express or implied oral "contract to pay compensation for services rendered in negotiating . . . the purchase [or] sale" of "a business opportunity" or "assisting in the . . . consummation of the transaction." Gen. Oblig. Law § 5-701(a)(10). Plaintiff claims it is not subject to that provision because it purports to have acted as a "principal" of the alleged partnership, rather than a "broker" or "intermediary," but that distinction is specious. Application of the Statute of Frauds turns on the nature of the services for which Plaintiff seeks compensation—not whether Plaintiff claims it was acting as a principal rather than an agent for another party. Plaintiff's claim sought compensation for "investment related services, due diligence, operational experience, and deal execution services" through which it allegedly "identified and originated the acquisitions of" two target lab companies for the Contemplated Business. R.135. A claim concerning such services involved in "negotiating a business opportunity . . . by providing know-how in bringing a business enterprise to fruition," *Dorfman v. Reffkin*, 144 A.D.3d

10, 19 (1st Dep't 2016), is "precisely the kind the statute of frauds describes," *Snyder v. Bronfman*, 13 N.Y.3d 504, 509 (2009).

This Court should therefore (1) vacate and reverse the decision below to the limited extent of directing dismissal of Plaintiff's sole surviving oral-partnership claim, (2) affirm the decision below in all other respects, and (3) direct the IAS Court to enter a judgment dismissing this action in its entirety.

COUNTERSTATEMENT OF FACTS

A. Factual Background

Plaintiff "is a Delaware [LLC] headquartered in New York" that allegedly "was formed in 2011" by non-parties "Marsh, Froehling, and others." R.92, 94-95. Koplewicz "resides in New York" and is a "principal" (partial owner) "of Thayer Street," an "investment firm with its . . . principal place of business in New York." R.88, 92. Hopkinson "resides in Los Angeles" and allegedly is "an employee of and/or affiliated with Defendant Eastmore," an "investment firm with its . . . principal place of business in New York." R.92. The remaining defendants allegedly are investment vehicles formed in connection with certain of the business activities alleged by Plaintiff.[2]

[2] 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., and CLB Holdings Inc. (the "CLB Defendants") are alleged to be Delaware LLCs and corporations for whom Plaintiff pleaded no principal place of

Plaintiff alleges that it entered into a "three-way" oral partnership with certain of the Defendants in June 2018 to "develop investment opportunities" focused on "the acquisition and management of cannabis safety testing laboratories." R.88-89, 98. In mid-2018, Marsh, Koplewicz, and Hopkinson allegedly began discussing a potential "corporatized" series of "acquisitions" in the "legal cannabis industry," and "[i]n June 2018," Marsh, Koplewicz, and Hopkinson allegedly agreed to form an oral partnership, "through CIP, Thayer Street, and Eastmore." R.96-98.

The alleged "Agreement consisted of an equal, complimentary exchange of time and resources" and an "equal distribution of equity," with each alleged partner to "receive an equal, one-third distribution of all Partnership proceeds." R.98-99. As alleged, (1) "Eastmore's role in the Partnership, through Hopkinson, would be to raise capital" and "source potential acquisition targets"; (2) "Thayer Street's role" would be "to underwrite and negotiate potential acquisitions, secure terms sheets, perform due diligence, and build financial models"; and (3) Plaintiff's role

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business but averred that "[m]uch of" each such entity's business is "transacted in" New York. R.93-94. Koplewicz and Hopkinson, "or entities they control," allegedly are "members of" or "shareholders of" the CLB Defendants and "collectively control [each] entity." *Id.* The CLB Defendants allegedly were formed "for th[e] purpose" of "pursu[ing] opportunities on behalf of the Partnership." R.117, 122. Bedford Acquisition Partners, Ltd. is alleged to be a British Columbia corporation with its "principal place of business in California." R.94. Koplewicz allegedly "formed Bedford" to "manage the operations of" the Contemplated Business. R.101.

"would be to operate 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," and to "serve as the interim leadership team" for the acquired businesses. R.99.

But Plaintiff's "oral partnership" allegations are bizarre, to say the least.

To begin with, Plaintiff fails to specify who the actual members of the alleged "three-way" oral partnership were. It asserts a claim for breach of that alleged agreement against *four* separate defendants—Koplewicz, Thayer Street, Hopkinson, and Eastmore—even though the agreement allegedly included only *three* members (including Plaintiff). And Plaintiff avoids pleading definitively whether its alleged partners were Koplewicz and Hopkinson individually or the Thayer Street and Eastmore entities they allegedly "represent[ed]." R.98. For example, although Plaintiff alleges that it formed a partnership with Thayer Street acting "through" Koplewicz, whose activities were undertaken "on behalf of" Thayer Street, R.88, 126, 128, it does not allege that Thayer Street is a party to any relevant agreement or instrument, holds any of the holding-company interests that it claims "would be issued" "only" to the alleged partners, R.114-15, or owns or controls any constituent entity of the Contemplated Business. The same is true for Hopkinson and Eastmore. R.88, 114-115, 126, 128. Yet Plaintiff's pleading elsewhere *contradicts* those assertions—by alleging that "Hopkinson and

Koplewicz both agreed to share their portion" of the partnership "with Eastmore and Thayer" only months after the partnership was formed, "in exchange" for "support" provided by those firms, R.103-04, 110. Separately, the LOI that Plaintiff admits it prepared in respect of the alleged partnership in May 2019 reflects that two *other* entities—non-parties 37 CFS Holdings LLC and GHCLB I, LLC—were to be Plaintiff's co-venturers in any effort to "operate one or more cannabis lab testing businesses." R.247-50.

Plaintiff further claims that, despite the parties' supposed agreement to form an "equal" partnership, it immediately assumed "a dominant role in nearly every facet of" the venture and committed "resources well in excess of the commitments of" the "other [alleged] Partners," including performing other parties' roles it "had not agreed to perform." R.105-06, 115, 123; *see* R.101-03, 107-09, 113. And even though Plaintiff supposedly did all the work, it alleges that Defendants retained exclusive control over the business. R.88, 90-91, 93, 101, 120, 122.

Plaintiff admits no writing was prepared or signed in June 2018, when its alleged oral partnership was formed. Rather, Plaintiff claims the parties decided only months later "that they should formalize their existing agreement into a more detailed written instrument"—one that allegedly would have "included more specific operational and governance terms" but preserved the "same" terms of the

alleged oral agreement. R.114. Plaintiff admits no such agreement was ever signed either.

In April 2019, as the parties attempted "to solidify the terms" of a proposed agreement, Koplewicz allegedly "introduced a new structure to the Partnership," which Hopkinson "embraced," that included "a new vesting concept" with "performance benchmarks" that "tied" the alleged partners' "voting" and "governance" rights "to raising capital." R.115-16. Plaintiff "rejected" this structure, R.116-17, but Koplewicz "would not sign" an agreement on terms acceptable to Plaintiff, R.118. On May 29, 2019, Plaintiff's counsel declared that the parties' alleged "oral agreement," as "principals of Bedford," regarding the "administration" of Bedford had been "voided" by Koplewicz's "proffer" of a "contrary" written agreement "for signature." R.119, 255.

"On May 31, 2019," Plaintiff's principals "met with Hopkinson" to try to "salvage the Partnership," and "developed six key terms" to "memorialize the current agreement between the parties." R.119-20. Plaintiff's counsel "draft[ed] a full agreement" allegedly "memorializing these six terms"—i.e., the LOI—and "Marsh provided the draft LOI to Hopkinson." R.121, 247-50, 289-90, 309.

The LOI confirms that no partnership concerning the Contemplated Business ever existed. In it, Plaintiff proposed "principal terms under which" the parties would "jointly govern and operate one or more cannabis lab testing businesses"—

i.e., the Contemplated Business—including terms for "the ownership thereof" and the parties' "respective rights and obligations." R.247. Moreover, Plaintiff confirmed in the LOI its intent that the parties would "endeavor to finalize and execute" a "Definitive Agreement," *id.*, that any arrangement would be "subject to execution and delivery of a mutually satisfactory Definitive Agreement," R.250, and that: "*[n]othing herein shall constitute a binding commitment of either party*," because:

> [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.

Id.

B. Procedural History

Plaintiff allegedly "learned" in "June 2019" that Defendants had taken steps to "cut CIP out" of the Contemplated Business, R.121. More than half a year later, Plaintiff commenced this action. After Defendants moved to dismiss the action, Plaintiff filed an Amended Complaint.

The Amended Complaint asserted fourteen claims invoking various legal theories and requests for relief, including declaratory judgment, breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, conversion, aiding and abetting conversion, tortious interference, aiding and abetting tortious interference, fraud, aiding and abetting fraud, unjust enrichment,

promissory estoppel, misappropriation of trade secrets, and "minority oppression." R.125-39.

Defendants moved to dismiss the Amended Complaint. R.66-67, 80-81. As reflected in a so-ordered transcript of proceedings and related Decision and Order, the IAS Court granted Defendants' motions to the extent of dismissing "all causes of action . . . except the Second Cause of Action alleging breach of an oral partnership agreement." R.13.

In sustaining Plaintiff's Second Cause of Action, the IAS Court found that "[n]either the Letter of Intent relied on by defendants (NYSCEF Doc. No. 50), nor the letter from Crimson's counsel (NYSCEF Doc. No. 52), 'conclusively establishes a defense to the asserted claims as a matter of law . . . ' at the pre-Answer stage of this litigation." *Id.* (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994)).

Regarding CIP's thirteen other claims, the IAS Court concluded that CIP's "Eleventh Cause of Action sounding in unjust enrichment . . . is barred by the Statute of Frauds," *id.* (citing *Snyder v. Bronfman*, 13 N.Y.3d 504 (2009)), and that "[t]he remaining causes of action are dismissed either as duplicative of the oral partnership cause of action or because they otherwise fail to state a claim," R.14.

CIP appealed from the IAS Court's rulings seeking reversal of "that part" of the Court's decision "which dismissed all causes of action . . . except the Second

Cause of Action." R.2. In its brief on appeal, however, CIP defends only its claims for promissory estoppel, breach of fiduciary duty, minority oppression, misappropriation of trade secrets, and unjust enrichment, Pl.'s Br. at 15-28, and therefore has waived any appellate rights in respect of its dismissed claims for a declaratory judgment and for damages sounding in breach of the implied covenant of good faith and fair dealing, conversion, aiding and abetting conversion, tortious interference, aiding and abetting tortious interference, fraud, and aiding and abetting fraud, R.13-14, 54-55, 125-39; *see Furlender v. Sichenzia Ross Friedman Ference LLP*, 79 A.D.3d 470, 470 (1st Dep't 2010) (dismissed cause of action deemed abandoned on appeal where plaintiff failed to address the issue).

Cross-Appellants Koplewicz, Thayer Street, and Hopkinson cross-appealed from that portion of the decision below that declined to dismiss Plaintiff's Second Cause of Action for damages sounding in breach of an alleged oral-partnership agreement. (Eastmore, represented by separate counsel, likewise appealed from that portion of the decision below.) The Bedford Defendants now submit this brief in opposition to Plaintiff's appeal and, on behalf of Cross-Appellants, in support of the cross appeal. The Bedford Defendants also join in the arguments submitted by Eastmore in its concurrently filed Brief to this Court.

ARGUMENT

Dismissal of a claim is warranted when, *inter alia*, "a defense is founded upon documentary evidence," the complaint "fails to state a cause of action," or the claim is barred by the statute of frauds. CPLR 3211(a)(1), (5), (7). Courts applying CPLR 3211 "accept the facts as alleged," but "bare legal conclusions" are "not entitled to any such consideration," and "factual claims" that are "inherently incredible" or "flatly contradicted by documentary evidence" are "not presumed to be true." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 141 (2017); *O'Donnell, Fox & Gartner, P.C. v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). Courts may consider "documents referenced in a complaint." *Alliance Network, LLC v. Sidley Austin LLP*, 43 Misc. 3d 848, 852 n.1 (Sup. Ct. N.Y. Cnty. 2014). Dismissal "is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery," *Connaughton*, 29 N.Y.3d at 142, or if "essentially undeniable" documentary evidence "conclusively establishes a defense to the asserted claims." *Gottesman Co. v. A.E.W., Inc.*, 190 A.D.3d 522, 524 (1st Dep't 2021).

I. THE IAS COURT ERRED IN FAILING TO DISMISS PLAINTIFF'S CLAIM FOR BREACH OF AN ALLEGED ORAL AGREEMENT

Cross-Appellants demonstrated below that all fourteen claims pleaded in the Amended Complaint were subject to dismissal pursuant to CPLR 3211(a). The

IAS Court correctly dismissed thirteen of those claims—and that aspect of its decision should be affirmed. *See infra* at 34-46. But the IAS Court erred in sustaining Plaintiff's Second Cause of Action, which is premised on breach of an alleged oral partnership agreement, and allowing the case to proceed to discovery on that claim. Plaintiff's oral-partnership claim should have been dismissed because Plaintiff's own pleading and undisputed documents confirm that no oral agreement ever existed between any of these parties, and because Plaintiff failed to plead essential elements of its claim.

A. Plaintiff's Own Undisputed Documents Confirm that No Oral Partnership Agreement Ever Existed

As Cross-Appellants demonstrated in their motion below, Plaintiff's claim that it entered into an oral partnership agreement with one or more of the Defendants fails as a matter of law because Plaintiff's own LOI, which outlined potential terms to govern the parties' relationship, confirms that the parties could have "become legally obligated" to one another "only in accordance with the terms contained in" a written "Definitive Agreement," and only "if" such an agreement was "executed." R.250. Plaintiff admits no agreement was ever executed. R.307. The IAS Court recognized as much, R.21, and also recognized that well-settled New York law bars oral-contract claims when as here, a preliminary writing concerning the alleged agreement provides that the parties will not be bound absent a signed writing. R.54. But the IAS Court apparently found that authority to be

inapplicable here because the alleged oral agreement at issue arose "in June 2018," but the LOI was not drafted until "May 2019." R.21. That was error.

New York courts have long recognized that, "if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed by both of them, they are not bound and may not be held liable until it has been written out and signed." *Scheck*, 26 N.Y.2d at 469-70. "[T]he concept of freedom of contract includes the '[f]reedom to *avoid* oral agreements,'" which is "especially important when business entrepreneurs and corporations engage in substantial and complex dealings." *Jordan Panel*, 45 A.D.3d at 174. "'[W]hen a party gives forthright, reasonable signals that it means to be bound only by a written agreement, courts should not frustrate that intent.'" *Id.* at 169.

Chief among such signals is a written expression in a draft agreement, "term sheet," or other preliminary document that "'neither party shall be bound until the parties execute a more formal written agreement'"—and courts have consistently dismissed oral-contract claims in the face of such writings "on the ground that no valid and binding contract was ever formed." *Keitel*, 153 A.D.3d at 1181, *lv. denied*, 31 N.Y.3d 903 (2018); *see Amcan Holdings*, 70 A.D.3d at 426; *Jordan Panel*, 45 A.D.3d at 167-71 & n.4 (collecting cases); *Langer*, 44 A.D.3d at 426; *Schutty*, 86 A.D.3d at 484-85; *JTS Trading*, 2017 WL 1384204, at *4. Courts "'need look no further'" when "'there is a writing between the parties showing that

[one party] did not intend to be bound.'" *Kaczmarcysk*, 414 F. App'x at 355-56 (quoting *RKG Holdings*, 1999 WL 464979, at *1). If such "documentary evidence" reveals that "parties intended to finalize their agreement in a writing, which never materialized," there is "no mutual assent or meeting of the minds," and an oral-agreement claim must be dismissed. *Langer*, 44 A.D.3d at 426; *see Schutty*, 86 A.D.3d at 484-85; *RKG Holdings*, 1999 WL 464979, at *1.

There is no dispute here about the existence or content of Plaintiff's LOI. R.247-50. That document, which Plaintiff admits is genuine, unambiguously states that the parties had no agreement, and would not be bound to any agreement, absent execution and delivery of a written "Definitive Agreement":

> *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.*
>
> A. DEFINITIVE AGREEMENT
>
> *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.
>
> . . . .

> B. TERMS OF THIS LETTER OF INTENT
>
> . . . .
>
> 7. LEGAL EFFECT
>
> 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.247, 249-50 (italics added); *see* R.119-21.

Plaintiff is a sophisticated party that was represented by counsel in preparing this very document. In Plaintiff's own words, the LOI reflected the "desire of the parties" in May 2019 to "set out the nature of ownership" of the Contemplated Business, and their then-present intention that they "*will* endeavor to finalize and execute[ ]one or more definitive agreements . . . defining" the "structure[,] . . . operation" and "ownership" of the business and their "respective rights and obligations" in it. R.247. It said nothing about any then-existing agreement concerning this business and, instead, merely purported to document the parties' "mutual interest" in a "possible transaction . . . *subject to* execution and delivery of a mutually satisfactory Definitive Agreement," while confirming that the parties "will become legally obligated with respect to the transaction"—i.e., in the

future—"only in accordance . . . with the terms contained in the Definitive Agreement . . . *if, as and when* such document is executed." R.250 (italics added).

Thus, the LOI is fatal to any claim premised on an alleged oral partnership. *See, e.g.*, *Langer*, 44 A.D.3d at 426 (no oral agreement where "documentary evidence" revealed that the parties "intended to finalize their agreement in a writing, which never materialized"); *Schutty*, 86 A.D.3d at 484-85 ("The documentary evidence of the parties' unsuccessful negotiations . . . establish that the parties did not intend to be bound until there was a signed written contract . . . ."); *accord, e.g.*, *Oui Cater, Inc. v. Lantern Grp., Inc.*, 71 A.D.3d 555, 555 (1st Dep't 2010) (communications expressing "parties' intention to enter into a contract at a later date" and "not to be bound until a formal agreement was signed" "conclusively negate" oral-agreement claim); *RKG Holdings*, 1999 WL 464979, at *2 (no oral partnership where plaintiff prepared a "letter . . . 'proposal'" that, "by its express terms, was to have no binding force until and unless it was signed").

Nor is there any merit to Plaintiff's argument—which the IAS Court appears to have credited—that this well-settled principle applies only where a document refuting the existence of an alleged oral agreement is "contemporaneous," unlike the LOI here, which was drafted "over a year after" alleged formation of an oral agreement. R.309-10. Neither Plaintiff nor the IAS Court cited any case law supporting that proposition. That is unsurprising, because the case law actually

refutes any such notion. *See Langer*, 2006 WL 8085302, at *1 & n.1 (e-mails confirming absence of agreement were sent during three months "subsequent" to alleged February 2005 agreement), *aff'd*, 44 A.D.3d at 426 (oral agreement precluded by "documentary evidence in the form of e-mails"); *Schutty*, 86 A.D.3d at 484-85 (alleged March 2005 agreement precluded by later documents, including a July 2007 letter); *RKG Holdings*, 1999 WL 464979, *aff'g Gottlieb v. Simon*, 1998 WL 684839, at *1 (S.D.N.Y. Sept. 30, 1998) (agreement allegedly formed in "mid-April, 1994" was contradicted by May 17, 1994 letter). Courts have repeatedly found oral-agreement claims to be barred by the existence of contradictory writings that arose later in time.

Similarly, the law does not require Defendants to have "accepted" Plaintiff's LOI in order for it to definitively confirm Plaintiff's own intent that no agreement would arise among the parties absent a writing. All that is required to dispose of Plaintiff's claim is confirmation that at least one of the parties lacked the intent to form a binding oral agreement. Plaintiff's own words confirm here that Plaintiff lacked any such intent. *See, e.g.*, *Schutty*, 86 A.D.3d at 484-85 (absence of oral agreement established, *inter alia*, by plaintiff's own "letter").

There is no reason in law or logic why any other rule should apply here. Plaintiff is a sophisticated party and was represented by counsel at all relevant times. No 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. In fact, courts have long recognized that the opposite is true: "[A] party that wishes to be bound can very easily protect itself by *refusing to accept language that shows an intent not to be bound*." *Arcadian Phosphates, Inc. v. Arcadian Corp.*, 884 F.2d 69, 73 (2d Cir. 1989) (emphasis added). Thus, the fact that the LOI was prepared a year after the alleged agreement was formed, R.309, and just weeks after Defendants allegedly first sought to renege on it, R.115, *confirms*—rather than undermines—the conclusion that the parties never formed, or intended to form, any oral agreement, *see RKG Holdings*, 1999 WL 464979, at *2 ("[P]laintiff's effort to label the May 17 letter as a mere step in the life of an already existing partnership is belied by his specific description [in the letter] of what that partnership would entail.").

Accordingly, the IAS Court's decision to sustain Plaintiff's oral-contract claim should be reversed.

B. Plaintiff Also Failed to Plead Essential Elements of Its Oral-Partnership Claim

Cross-Appellants identified several other pleading deficiencies that provide independent grounds for dismissing Plaintiff's oral-partnership claim. The IAS Court failed to address those issues in its ruling, and it erred in sustaining

Plaintiff's claim in the face of them—each of which provides an additional basis for reversing the decision below to sustain Plaintiff's oral-partnership claim.

First, Plaintiff failed to meet the most basic element of its pleading burden: identifying the specific "partners" with whom it allegedly formed an oral partnership. Plaintiff could not possibly have had more than two counterparties to its alleged "three-way" partnership, yet it has sued *four* Defendants for breach of that agreement—improperly subjecting at least two of them to frivolous and vexatious claims. For example, Plaintiff strains to assert that Koplewicz and Hopkinson's actions were undertaken "on behalf of" Thayer Street and Eastmore, the supposed real parties to the partnership, *e.g.*, R.88, 125-26, 128, but it elsewhere *contradicts* that assertion—alleging that "Hopkinson and Koplewicz both agreed to share *their* portion" of the alleged partnership interests "with Eastmore and Thayer" only *months after* the partnership was formed, "in exchange" for "support" provided by those firms, R.103-04, 110.

Plaintiff's inability to identify its alleged partners alone warrants dismissal. *See Randall's Island Aquatic Leisure, LLC v. City of New York*, 92 A.D.3d 463, 463 (1st Dep't) ("There can be no breach of contract claim against a non-signatory to the contract."), *lv. denied*, 19 N.Y.3d 804 (2012); *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"); *Weisenfeld v.*

Iskander, 2019 WL 1877209, at *5 (Sup. Ct. N.Y. Cnty. Apr. 26, 2019) (alleged agreement "d[id] not indicate a present intent to be bound" because "[t]here is nothing in [it] to show the parties agreed to the material terms, including *the identity of the party or parties to be bound*") (emphasis added), *aff'd*, 187 A.D.3d 533 (1st Dep't 2020); *see also Elizabeth St. Inc. v. 217 Elizabeth St. Corp.*, 295 A.D.2d 153, 154 (1st Dep't 2002) (refusing to add company's "principal as a party plaintiff" because he "was not a party to the alleged oral agreement"). Plaintiff's position cannot be defended as a matter of legitimate "alternative" pleading; if Plaintiff had ever entered into an oral partnership, it would be able to—and obliged to—identify its partners. *See Drexel Burnham Lambert Grp. v. Vigilant Ins. Co.*, 157 Misc. 2d 198, 207-08 (Sup. Ct. N.Y. Cnty. 1993) ("Theories as to the basis for legal recovery may be inconsistent, but not facts. It cannot be alleged that maybe a fact occurred or maybe it didn't.").

Indeed, Plaintiff's pleading gamesmanship below reflected little more than a strategic ploy to embroil Thayer Street in this litigation (as well as Eastmore), despite its lack of involvement in the Contemplated Business, in order to exert perceived settlement pressure. Thus, Plaintiff's claim should have been dismissed as against Thayer Street because it is premised solely on *conclusory* allegations that Thayer Street acted "through" or "along with" Koplewicz and non-party Dan Perkins, who allegedly acted "on behalf of" Thayer Street. R.88, 92, 98, 102, 104,

125. Thayer Street, like any business firm, is "bound only by the acts and contracts of [its] agents done and made within the scope of their authority." *Bank of N.Y. v. UBS Warburg LLC*, 4 A.D.3d 112, 114 (1st Dep't 2004). Yet Plaintiff's conclusory allegations provide no factual basis for imputing these individuals' actions to Thayer Street. *See Connaughton*, 29 N.Y.3d at 141 ("bare legal conclusions" should be disregarded); *16 Casa Duse, LLC v. Merkin*, 2013 WL 5510770, at *15 (S.D.N.Y. Sept. 27, 2013) (dismissing claims against defendant's wholly owned LLC where plaintiff "offered no evidence that [LLC] was a party to the instant controversy"), *rev'd in part on other grounds*, 791 F.3d 247 (2d Cir. 2015); *Akerblom v. Ezra Holdings Ltd.*, 848 F. Supp. 2d 673, 680 (S.D. Tex. 2012) (rejecting "inferences" that "all acts by [individual] were on behalf of [LLC]" controlled by individual).[3]

[3] Far from supporting an inference that Koplewicz sought to form a partnership "on behalf of" Thayer Street, Plaintiff's allegations refute such a claim. Plaintiff's LOI identifies "37 CFS Holdings LLC" and "GHCLB I, LLC"—not Thayer Street—as Plaintiff's counterparties to the alleged partnership negotiations. R.247. Plaintiff alleges, moreover, that Koplewicz *gifted* Thayer Street an interest in the partnership months *after* it allegedly was formed—which cannot be squared with Plaintiff's claim that Thayer Street was itself a member of the partnership, and that Koplewicz was merely acting on its "behalf" to enter it (rather than himself) into partnership with Plaintiff. R.103-04. And Plaintiff notably does not allege that Thayer Street owns any of the Class B interests that "would be issued to the Partners only." R.114-15.

Second, Plaintiff "failed to plead a mutual promise or undertaking to share the burden of the losses of the alleged enterprise," which is "an indispensable element of a partnership." *Latture v. Smith*, 1 A.D.3d 408, 408-09 (2d Dep't 2003). As alleged, the agreed-upon structure of the alleged "partnership" called for operating assets of the business to be held through *limited liability* entities, R.88, 117—which confirms that Plaintiff "was not personally liable for the expenses of the partnership," and thus never agreed to share in any partnership losses. *Kosower v. Gutowitz*, 2001 WL 1488440, at *6 (S.D.N.Y. Nov. 21, 2001); *see Ramirez v. Goldberg*, 82 A.D.2d 850, 852 (2d Dep't 1981) (no partnership where "enterprise was conducted in the corporate name" and "plaintiff was not personally liable for any of [its] obligations"); *see also Slabakis v. Schik*, 164 A.D.3d 454, 455 (1st Dep't 2018) (rejecting claim where "allegations in the complaint" established absence of loss-sharing).

Third, Plaintiff failed to plead "joint control and management of" the business. *Ardis Health, LLC v. Nankivell*, 2012 WL 5290326, at *5 (S.D.N.Y. Oct. 23, 2012); *see also Slabakis*, 164 A.D.3d at 455 (no joint venture absent "a measure of joint proprietorship and control over the enterprise"). Rather, it has affirmatively alleged its own *lack of control* over the Contemplated Business, claiming that Defendants shut Plaintiff out of virtually all control functions. *See* R.88 (Defendants "excluded Plaintiff from the Business" and "withheld funds"),

R.90-91 (Defendants "stated that they would not comply with the Partners' original Partnership Agreement, and would cut CIP out entirely"), 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). Thus, Plaintiff's own allegations negate the formation of any oral partnership.

Fourth, given the complex nature of the Contemplated Business—which would have involved complicated equity-financing arrangements, uncertain scope of acquisition prospects, and a novel "corporatize[d]" business structure, R.101, 114—Plaintiff's allegations fall far short of describing all of the "material terms" that would have been needed to govern the parties' relationship. This Court has found such amorphous allegations inadequate to support an oral-agreement claim where, for example, "essential terms" such as "the specific nature of the services to be provided, the manner in which the [parties] would be compensated, the method and means of termination, indemnification, confidentiality and the length of time required for . . . exclusivity" remained "to be negotiated." *Wiscovitch Assocs. v. Philip Morris Cos.*, 193 A.D.2d 542, 542 (1st Dep't 1993).

Plaintiff's alleged "oral partnership agreement" leaves these and many other terms unspecified—including terms regarding the alleged partners' respective governance rights and role in the day-to-day management of the partnership, rules and restrictions concerning their respective partnership interests, provisions for resolution of disputes among them, and treatment of tax issues arising in respect of the partnership's profits and losses. As such, it likewise fails to support a claim for breach of contract. *See id.*; *N. Stamping Inc. v. Monomoy Capital Partners, L.P.*, 2012 WL 8700420 (Sup. Ct. N.Y. Cnty. June 1, 2012) (agreements "contain so many open material terms that they could not be deemed a binding contract"), *aff'd in pertinent part*, 107 A.D.3d 427 (1st Dep't 2013); *see also Rosenshein v. Rose*, 2008 WL 2676798, at *5 (Sup. Ct. N.Y. Cnty. July 7, 2008) (failure to establish, *inter alia*, partners' "personal liability, the[ir] rights, powers, [and] limitations[,]" or "capitalization of the partnership").

Fifth, Plaintiff failed to plead a demand for the "sole remedy" that would arise even if its allegations sufficed to describe an enforceable oral partnership: an accounting of the partnership's assets and liabilities "as of the date of dissolution." *220-52 Assoc. v. Edelman*, 241 A.D.2d 365, 367 (1st Dep't 1997). "[A]n oral agreement to form a partnership" for an "indefinite period" creates a partnership "at will." *Foster v. Kovner*, 44 A.D.3d 23, 27 (1st Dep't 2007). "[Any] partner [can] dissolve [an at-will partnership] at any time by expressing an intent that the

partnership [i]s not to continue," *Briscoe v. White*, 34 A.D.3d 712, 713 (2d Dep't 2006), or "repudiat[ing]" it through "actions" contrary to the partnership's terms, *Mashihi v. 166-25 Hillside Partners*, 51 A.D.3d 738, 738-39 (2d Dep't 2008); *Staines Assocs. v. Adler*, 266 A.D.2d 52, 52 (1st Dep't 1999).

Plaintiff has alleged a host of statements and actions by the parties that necessarily would have repudiated any partnership here—not least of all Defendants' alleged "demand[s]" for Plaintiff to accept terms that were "materially contradictory" to the alleged oral partnership agreement, and Plaintiff's counsel's own express declaration in May 2019 that any oral agreement among them had been "voided." R.118-21. 255-56; *see* R.98, 105-06 (Defendants' failure to commit "equal time and resources" allegedly forced Plaintiff to take on roles it "had not agreed to perform," including things that were "plainly within" Defendants' "Partnership responsibilities"), R.121 (Defendants allegedly executed a side-letter that "cut CIP out" of the project). Plaintiff's claim for breach of the alleged oral partnership, like "[a]ny legal claim asserted prior to the accounting process," must therefore "be dismissed." *Kitty Walk Sys., Inc. v. Midnight Pass Inc.*, 431 F. Supp. 2d 306, 311 (E.D.N.Y. 2006); *accord Wynne v. Gruber*, 237 A.D.2d 284, 284 (2d Dep't 1997); *Stratavest Ltd. v. Rogers*, 888 F. Supp. 35, 37 (S.D.N.Y. 1995).

Each of these independent grounds provides a further basis for this Court's intervention to direct the dismissal of Plaintiff's Second Cause of Action.

II. THE IAS COURT CORRECTLY DISMISSED ALL OF PLAINTIFF'S OTHER CLAIMS

Although the IAS Court erred in the limited respect described above, the balance of its decision—which dismissed thirteen of Plaintiff's fourteen "kitchen sink" claims—was entirely founded in settled law and, as such, should be summarily affirmed. The principal thrust of Plaintiff's appeal is that the IAS Court improperly dismissed all of Plaintiff's other claims as "duplicative" of the sustained oral-contract claim, which supposedly trod upon Plaintiff's right to plead different theories "in the alternative." Pl.'s Br. at 16. As explained below, Plaintiff is wrong for two reasons. *First*, Plaintiff's argument mischaracterizes the IAS Court's ruling, which expressly provided that Plaintiff's claims were being dismissed "*either* as duplicative of the oral partnership cause of action *or* because they otherwise fail to state a claim," R.14 (emphasis added), which all of them clearly do. *Second*, "alternative" pleading does not permit Plaintiff to invoke other claims that depend fundamentally on the existence of the alleged contract to supply a basis for relief.

Separately, Plaintiff argues that the IAS Court erred in dismissing its unjust-enrichment claim pursuant to the Statute of Frauds, Gen. Oblig. Law § 5-701(a)(10). That argument is equally unfounded and supplies no basis for reversal.

A. Promissory Estoppel

Plaintiff argues on appeal that its promissory-estoppel claim was "not duplicative" of its primary oral-partnership claim and, thus, that the IAS Court erred in not permitting Plaintiff to plead that claim "in the alternative." Pl.'s Br. at 19 & n.4. That argument misconstrues both the decision below and the arguments Defendants raised in support of their motion—including that Plaintiff failed to plead either a "sufficiently clear promise" or the sort of "reasonable reliance" necessary to allege promissory estoppel. R.286-87, 355-56. The IAS Court's dismissal of Plaintiff's promissory estoppel claim should therefore be affirmed.

A claim for promissory estoppel must be dismissed absent well-pleaded factual allegations demonstrating the existence of "(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise"; and "(3) injury caused by the reliance." *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 841-42 (1st Dep't 2011), *lv. denied*, 21 N.Y.3d 853 (2013). New York courts have consistently dismissed promissory-estoppel claims premised on allegations that fail to meet one or more of these required elements. *See, e.g.*, *511 9th LLC v. Credit Suisse USA, Inc.*, 69 A.D.3d 497, 497 (1st Dep't 2010) ("The documentary evidence conclusively refutes plaintiff's allegations that it reasonably and detrimentally relied on oral assurances by defendants" (internal quotation omitted)); *Schutty*, 86 A.D.3d at 484-85 ("documentary evidence" of

parties' "fruitless negotiations" established "as a matter of law that there was no clear and unambiguous promise on which plaintiff reasonably could have relied"); *Pullman Grp. v. Prudential Ins. Co. of Am.*, 288 A.D.2d 2, 4 (1st Dep't 2001) ("The promissory estoppel claim against Prudential is not supported by the allegation of a clear and unambiguous promise." (internal quotation omitted)), *lv. denied*, 98 N.Y.2d 602 (2002).

Here, Plaintiff's promissory estoppel claim fails because it is premised entirely on a repackaging of Plaintiff's principal oral-partnership allegations, R.136, which—as explained previously, *see supra* at 26-32—fail to specify the essential elements of a partnership agreement. Such vague allegations likewise fail to identify a "clear and unambiguous promise" sufficient to support promissory estoppel. It is not even clear from Plaintiff's allegations *who* the alleged promisors were—let alone what the material terms of their purported promises would have entailed, such as "the manner in which the [parties] would be compensated, the method and means of termination" of their relationship, provisions governing "indemnification" and "confidentiality," the parties' respective "rights, powers, [and] limitations" within the venture, the nature and extent of their "personal liability," and the duration of any "exclusivity" obligations. *See Wiscovitch Assocs.*, 193 A.D.2d at 542; *N. Stamping*, 2012 WL 8700420, *aff'd in pertinent part*, 107 A.D.3d 427; *Rosenshein*, 2008 WL 2676798, at *5. Those allegations do

not begin to describe a "clear and unambiguous promise" sufficient to support a promissory-estoppel claim. *Schutty*, 86 A.D.3d at 484-85.

For similar reasons, "any reliance by the plaintiff upon this alleged oral promise was, therefore, unreasonable and unwarranted," which further renders "plaintiff's claim of promissory estoppel . . . unavailing." *Wiscovitch Assocs.*, 193 A.D.2d at 542; *see Schutty*, 86 A.D.3d at 484-85 (no estoppel where "documentary evidence" of the parties' "lengthy and fruitless negotiations establishe[d] as a matter of law that there was no clear and unambiguous promise on which plaintiff reasonably could have relied"). That conclusion is only reinforced by Plaintiff's own statements in the LOI confirming that the parties intended to become "legally obligated" to one another "only in accordance with the terms contained" in a written "Definitive Agreement" that was never drafted or signed. R.250; *see Rhodium Special Opportunity Fund, LLC v. Life Trading Holdco, LLC*, 128 A.D.3d 542, 542 (1st Dep't 2015) ("requirement of an executed, definitive written agreement" was "fatal to plaintiff's claim[]" for "promissory estoppel"); *511 9th LLC*, 69 A.D.3d at 497-98 (same); *Prospect St. Ventures I, LLC v. Eclipsys Solutions Corp.*, 23 A.D.3d 213, 213-14 (1st Dep't 2005) (same); *Prestige Foods, Inc. v. Whale Secs. Co.*, 243 A.D.2d 281, 281-82 (1st Dep't 1997) (same).

Moreover, Plaintiff's promissory estoppel claim fails because "[t]he expenditure of time and [money] for due diligence is not detrimental reliance under

the circumstances." *Prospect Street*, 23 A.D.3d at 214 (rejecting claim premised on "expenditure of time and $25,000 for due diligence"). When parties confirm their intent to be bound only upon execution of a written agreement, they cannot later invoke promissory estoppel in an effort to recoup "due diligence expenses" incurred in connection with "a failed negotiation." *Chatterjee Fund Mgt. v. Dimensional Media Assocs.*, 260 A.D.2d 159, 159-60 (1st Dep't 1999).

Thus, the IAS Court properly found that Plaintiff "fail[ed] to state a claim" for promissory estoppel, and its decision to dismiss that claim should be affirmed.

B. Breach of Fiduciary Duty and Minority Oppression

The IAS Court also correctly dismissed Plaintiff's claims for breach of fiduciary duty and "minority oppression." Both of those claims are entirely duplicative of Plaintiff's core oral-partnership claim, and the latter is not even a claim recognized under these circumstances.

"A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." *William Kaufman Org. v. Graham & James LLP*, 269 A.D.2d 171, 173 (1st Dep't 2000). Here, Plaintiff's sole basis for claiming that Defendants breached any fiduciary duties they owed to it is the existence of the alleged oral partnership agreement. R.128-29 (Defendants "owed CIP fiduciary duties" as "CIP's Partners in the Partnership"). The fiduciary breaches it alleges all duplicate the express contractual breaches it asserts in

respect of the alleged partnership agreement. R.129 (Defendants conspired to "defeat any protections" Plaintiff would "enjoy as a one-third Partner," "to pursue [partnership opportunities] unilaterally," and "refusing to . . . memorializ[e] the one-third ownership plan . . . pursuant to the [alleged] Partnership Agreement"); *compare* R.127 (describing identical alleged contractual breaches).

Thus, there is no substantive daylight between the allegations underlying these two claims, and Plaintiff's fiduciary-duty claim was properly dismissed. *See William Kaufman Org.*, 269 A.D.2d at 173 (holding that "the IAS Court properly dismissed the breach of fiduciary duty claim as duplicative" where "the cause of action for breach of contract refers . . . to the [same] unethical conduct . . . which constitute[s] the allegations of breach of fiduciary duty"); *Perl v. Smith Barney, Inc.*, 230 A.D.2d 664, 666 (1st Dep't) (dismissing fiduciary-duty claim as "duplicat[iv]e" of invalid claim for breach of contract), *lv. denied*, 89 N.Y.2d 803 (1996); *JTS Trading*, 2017 WL 1384204, at *5 (same); *E-Global Alliances, LLC v. Anderson*, 2011 WL 8879268, at *9 (S.D.N.Y. May 11, 2011) (same). Plaintiff's claim cannot be saved by reference to cases in which, unlike here, a fiduciary-duty claim was premised on "breach of a duty . . . which is independent of the contract itself." Pl.'s Br. at 21 (internal quotation). No such "independent" fiduciary duties are alleged here.

The same is true of Plaintiff's claim sounding in "minority oppression." It too is premised solely on Defendants' alleged "disregard[]" for Plaintiff's rights as an "interest holder of the Partnership," arising from the same acts that also purportedly constitute breaches of the alleged oral partnership agreement and Defendants' duplicative "fiduciary duties" to Plaintiff. R.138-39; *compare* R.126-29. Insofar as such a claim is cognizable at all, the IAS Court therefore properly dismissed it. *See 3P-733, LLC v. Davis*, 2019 WL 1517732, at *2 (Sup. Ct. N.Y. Cnty. Apr. 2, 2019) (dismissing minority-oppression claim against Delaware entity as "duplicative and superfluous" of fiduciary-duty claim).

Plaintiff's "minority oppression" claim also fails for an independent reason. Plaintiff asserts this claim under "Delaware law," yet it cites—and Defendants have identified—no authority supporting the proposition that Delaware law recognizes any such claim applicable here. Plaintiff's sole cited authority concerns a statutory claim for dissolution of a *New York corporation* pursuant to section 1104-a of the Business Corporation Law. *Gimpel v. Bolstein*, 125 Misc. 2d 45, 50 (Sup. Ct. Queens Cnty. 1984). That case is irrelevant here given that none of the entities relevant to this case is a New York corporation—and, in any case, that Plaintiff is not a shareholder of any of them. At most, Plaintiff alleges that it *should have been* issued interests in one or more Delaware LLCs. Section 1104-a of the Business Corporation Law applies only to actual shareholdings in a New

York corporation, not the imagined interests in a Delaware LLC that a party claims it should have received. *See* BCL § 1104-a(a) (dissolution may be sought by "holders of shares representing twenty percent or more of the votes of all outstanding shares of a corporation"). In fact, New York courts lack jurisdiction to order "dissolution" of foreign entities. *Sokol v. Venture Educ. Sys. Corp.*, 2005 WL 3249447, at *3 (Sup. Ct. N.Y. Cnty. June 27, 2005).

C. Misappropriation of Trade Secrets

Plaintiff's claim alleging misappropriation of "trade secrets" was also properly dismissed because Plaintiff failed to allege several required elements of such a claim. In particular, Plaintiff failed to propound any "specific allegations as to the information owned and its value," rather than merely "[a]lleging the existence of general categories of 'confidential information[]' without providing any details." *Elsevier Inc. v. Doctor Evidence, LLC*, 2018 WL 557906, at *4-*6 (S.D.N.Y. Jan. 23, 2018); *Reva Capital Markets LLC v. Northend Energy Ltd.*, 2015 WL 8543567, at *1, *6 (Sup. Ct. N.Y. Cnty. Dec. 10, 2015). Plaintiff's vague, conclusory allegations concerning its purportedly "proprietary corporatization strategies," such as "talent recruitment tools, personnel management systems, training strategies, and inventory and operations management optimization processes," R.96, do not suffice, *see, e.g.*, *LinkCo, Inc. v. Fujitsu Ltd.*, 230 F. Supp. 2d 492, 499, 500 (S.D.N.Y. 2002).

Plaintiff also failed to "allege that it took steps to guard the secrecy of any material it disclosed." *Reva*, 2015 WL 8543567, at *6. Plaintiff's alleged "understanding" that its information "would be used solely for the benefit of the Partnership," R.96—the basis for which is not alleged—only confirms that Plaintiff failed to secure *any* actual confidentiality protections before disclosing its "proprietary" information to Defendants, or otherwise take any "reasonable measures" to guard against improper disclosure. That failure likewise compels dismissal of Plaintiff's claim. *Reva*, 2015 WL 8543567, at *6; *Charles Ramsey Co. v. Fabtech-NY LLC*, 2020 WL 352614, at *15-*16, *23-*24 (N.D.N.Y. Jan. 21, 2020) (plaintiff "failed to sufficiently allege that it took precautionary measures to keep its purported trade secrets safe").

Moreover, because the sole pleaded basis for the alleged "misappropriation" of Plaintiff's information is "breach" of the alleged "Partnership Agreement" and its corresponding "confidential relationship," R.137-38, this claim also fails given the absence of any enforceable oral-partnership agreement. *See supra* at 19-32.

The IAS Court's dismissal of Plaintiff's "trade secrets" claim should therefore be affirmed.

D. Unjust Enrichment

Finally, the IAS Court correctly held that Plaintiff's unjust-enrichment claim is barred by the statute of frauds. R.13. Section 5-701(a)(10) of the General

Obligations Law prohibits enforcement of any oral "contract to pay compensation for services rendered in negotiating . . . the purchase [or] sale" of "a business opportunity" or "an interest therein"—including services such as "procuring an introduction to a party to the transaction or assisting in the negotiation or consummation of the transaction." Gen. Oblig. Law § 5-701(a)(10). That prohibition extends to any "contract implied in fact or in law to pay reasonable compensation," *id.*, and therefore precludes unjust-enrichment claims seeking "reasonable compensation" for "services rendered in finding and negotiating a business opportunity," *Snyder v. Bronfman*, 13 N.Y.3d 504, 508-09 (2009). That is precisely what Plaintiff's unjust-enrichment claim here seeks: "payment" for "investment related services, due diligence, operational experience, and deal execution services" through which it "identified and originated the acquisitions of" certain lab testing businesses targeted by the Contemplated Business. R.135. Accordingly, the IAS Court correctly dismissed that claim "under the holding of the Snyder versus Bronfman case." R.54-55.

Plaintiff seeks to overturn that ruling by arguing that "*Snyder* does not apply to principles [*sic*] or founders" of a business, "particularly those that participate in other facets of a business's formation and operation." Pl.'s Br. at 26. But that strained interpretation of *Snyder* and its progeny cannot be squared with the applicable precedents, and thus provides no basis for disturbing the IAS Court's

ruling dismissing Plaintiff's claim. Application of the Statute of Frauds does not depend upon whether the plaintiff styles itself as one of the principals of a business venture—the plaintiff in *Snyder v. Bronfman* himself claimed that he had formed a "joint venture" with the defendant. 13 N.Y.3d at 506-07, 509.

Rather, it is the nature of the services for which Plaintiff seeks compensation that determines whether its claim is barred. As the Court of Appeals explained in *JF Capital Advisors, LLC v. Lighthouse Group, LLC*, the statute bars recovery for "services rendered with respect to the *negotiation* of the purchase . . . of a business opportunity," but does not bar recovery of services rendered "to inform defendants whether to partake in certain business opportunities" in the first instance. 25 N.Y.3d 759, 766 (2015). The services for which Plaintiff seeks compensation here fall squarely within the former category, and Plaintiff's claim is therefore barred. Plaintiff concedes that its work as a member of the alleged oral partnership was undertaken to "develop investment opportunities in the legal cannabis industry," R.88—not to decide "*whether to*" pursue such investments, *JF Capital*, 25 N.Y.3d at 766. It seeks compensation for "investment related services, due diligence, operational experience, and deal execution services" through which it allegedly "identified and originated the acquisitions of Cannalysis and CW Analytical." R.135. Such a claim concerning "services rendered in finding and negotiating a

business opportunity" is "precisely the kind the statute of frauds describes." *Snyder*, 13 N.Y.3d at 509.

This Court's decision in *Dorfman v. Reffkin*, 144 A.D.3d 10 (1st Dep't 2016), *cited in* Pl.'s Br. at 27, does not alter that conclusion with respect to any portion of Plaintiff's claim here. The *Dorfman* Court found that the plaintiff's role in the business venture at issue there extended far beyond "the negotiation or consummation of the business opportunity," and included "a wide variety of services, which presumably took place after the company came to fruition, making these services related to a purpose other than 'assisting in the negotiation or consummation' of a business opportunity, so as to escape the strictures of General Obligations Law § 5-701(a)(10)." *Id.* at 19. Although those *post-consummation* services—such as "recruiting engineers and others to join" the company and "developing the details of how [the company]'s software product, web, and mobile applications would be 'architected'"—were found not to implicate the statute of frauds, the plaintiff's effort to recover compensation for having "negotiat[ed] a business opportunity for defendants by providing know-how in bringing a business enterprise to fruition . . . clearly f[e]ll under the statute of frauds and should have been dismissed." *Id.* at 16, 19. Here, Plaintiff claims Defendants terminated the "partnership" before any of the targeted businesses were acquired, R.90-91, 118-19, so its claims by definition do not concern services undertaken after those

opportunities "came to fruition." *Dorfman* thus supplies no basis for reinstating any portion of Plaintiff's claim on appeal.

Plaintiff's unjust-enrichment claim was also properly dismissed because "[m]oney expended in preparation for eventually performing under an agreement is not compensable in quasi-contract," and because a party that "expends labor and money" to "facilitate a successful contract negotiation" is "not entitled to compensation" simply "because the contract negotiations proved unsuccessful." *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). Plaintiff cannot claim unjust enrichment for efforts expended "to facilitate a successful contract negotiation . . . based upon the hope that it would be awarded" a stake in the Contemplated Business. *Id.* Because Plaintiff's unjust-enrichment claim is pleaded "in the alternative" to Plaintiff's core oral-partnership claim, it by definition is premised on the concession that no such partnership existed. Absent the existence of such an agreement, Plaintiff assumed the risk that its efforts toward forming a potential business with the Defendants might not bear fruit, and it cannot now demand reimbursement of costs incurred in pursuing that inherently speculative endeavor.

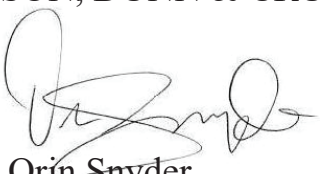
Accordingly, the IAS Court's dismissal of Plaintiff's unjust-enrichment claim should be affirmed.

CONCLUSION

For all of the foregoing reasons, 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.

Dated: March 22, 2021
New York, NY

Respectfully submitted,
GIBSON, DUNN & CRUTCHER LLP

By: 
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