NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK: PART 57

PRIME 135 NYC, LLC, *Plaintiff*, v. MAJOR CONSTRUCTION CO., INC., and JOSEPH MENDLER *Defendant.*	Index No.: 651966/2017 Hon. Shawn T. Kelley MSQ No.: 005 **REPLY AFFIRMATION IN FURTHER SUPPORT**

ZACHARY G. MEYER, ESQ., an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms the truth of the following under the penalties of perjury pursuant to CPLR § 2106(a):

1. I am a partner of SUTTON SACHS MEYER PLLC, attorneys for plaintiff PRIME 135 NYC, LLC ("Plaintiff") in the above-captioned matter against defendant MAJOR CONSTRUCTION CO., INC. ("Defendant"), and as such, I am fully familiar with the facts and circumstances therein based upon my review of the file and an investigation into the matter.

2. I respectfully submit this reply affirmation in further support of Defendant's MSQ No. 005, for an Order, pursuant to CPLR § 1003, for leave to join non-party JOSEPH MENDLER ("Mendler") as party to this action, pursuant to CPLR § 103(c) and New York Business Corporation Law ("BCL") Art. 10, converting the instant action into a special proceeding for this Court's supervision of Defendant's dissolution and liquidation, pursuant to pursuant to CPLR § 305(c), for leave to serve a supplemental summons, and pursuant to CPLR § 3025(b), for leave to serve a proposed second amended verified complaint upon the following grounds:

a. Contrary to Defendant's contentions, a movant seeking leave to amend is not required to demonstrate the merits of the new allegations, unless such allegations are, *inter alia*, "patently lacking in merit" or "insufficient as a matter of law";

b. Even if, *arguendo*, Defendant's contentions were meritorious, Plaintiff nevertheless meets Defendant's incorrect standard, as MSQ No. 005 is supported by an affirmation of the merits of amendment by counsel with personal knowledge of Defendant's mid-litigation dissolution acquired by securing a **certified copy** of Defendant's certificate of dissolution – which is competent admissible evidence pursuant to CPLR § 4518(c) under the business records exception to the hearsay rule – whereas all other factual allegations are supported by Plaintiff's verified pleading annexed as **"Exhibit A"**, which is entitled to affidavit construction under CPLR § 105(u);

c. Indeed, Defendant's certified certificate of dissolution establishes all facts necessary to secure the proposed amendment insofar as Mendler is Defendant's listed director, shareholder, and officer, rendering Mendler a trustee of Defendant's assets for the benefit of Defendant's contingent and actual creditors;

d. Each of the proposed causes of action are non-duplicative, well-plead, and otherwise viable, as none are "palpably insufficient" or "clearly devoid of merit" by virtue of the foregoing;

e. Notwithstanding, Defendant inappropriately applies CPLR § 3211(a)(1) scrutiny to each of Plaintiff's proposed causes of action in the absence of any documentary evidence, which is, of course, both meritless as lacking a *quantum* of documentary corroboration, and entirely premature on a pre-disclosure record;

f. Lastly, Defendant has conceded the merit of the remaining aspects of Plaintiff's MSQ No. 005 by failing to oppose so much of Plaintiff's motion for CPLR § 1003 leave to join Mendler, CPLR § 305(c) leave to serve a supplemental summons, and CPLR § 103(c) and BCL Art. 10 conversion into a special proceeding judicially supervising Defendant's dissolution; and

g. Upon such other and further grounds as this Court deems just and proper

REPLY ARGUMENT

I. CONTRARY TO DEFENDANT'S MERITLESS ARGUMENT, AMENDMENT WAS PROCEDURALLY PROPERLY SOUGHT.

3. Preliminarily, contrary to Defendant's contentions, a movant seeking leave to amend is not required to demonstrate the merits of the new allegations, provided, however, that leave should be denied where, *inter alia*, the allegations are "patently lacking in merit" or

"insufficient as a matter of law", meaning legally meritless, not factually meritless, as the procedural posture is pre-disclosure, wherefore the parties have not yet had an opportunity to develop the factual record. *Contra* NYSCEF Dkt. 93, at Points I(A)-(B).[1]

A. No "Affidavit of Merit" is Required for Leave to Amend, Notwithstanding Plaintiff's Demonstration of the Merits through Competent Admissible Evidence.

4. Contrary to Defendant's contention, no affidavit of merit is required to secure leave to amend. *See Cohen v. Saks Inc.*, 169 AD3d 515 (1st Dep't 2019) (citing *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 AD3d 499 (1st Dep't 2010) ("On a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit… **contrary to defendant's argument, the proposed amendment was supported by a sufficient showing of merit through the submission of an affirmation by counsel**") (emphasis added)); *accord Edwards v. 1234 Pac. Mgmt., LLC*, 139 AD3d 658 (2nd Dep't 2016) ("no evidentiary showing of merit is required under CPLR § 3025(b)").

5. Even if, *arguendo*, Defendant's warped CPLR § 3025(b) amendment standard were applicable, Plaintiff nevertheless meets it, as MSQ No. 005 is supported by an affirmation of the merits of amendment by counsel with personal knowledge of Defendant's mid-litigation dissolution acquired by securing a **certified copy** of Defendant's certificate of dissolution annexed as **"Exhibit D"** – which is independently competent admissible evidence pursuant to CPLR § 4518(c)'s hearsay exception for business records – whereas all other factual allegations are supported by Plaintiff's verified pleading annexed as **"Exhibit A"**, which is entitled to affidavit construction under CPLR § 105(u). *Id.*; *compare* CPLR § 105(u), *with* Ex. A; *compare* CPLR §

[1] In the interest of judicial economy, the standard for CPLR § 3025(b) leave to amend set forth in Plaintiff's affirmation in support dated August 3rd, 2021 is respectfully referred to and incorporated by reference herein. *See* NYSCEF Dkt. 85, Point I(B), at ¶¶ 17-19.

4518(c), *with* Ex. D, *and Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 NY2d 1065 (1979) ("To obtain summary judgment, it is necessary that the movant establish his cause of action… by tender of evidentiary proof in admissible form")*; compare Zuckerman v. N.Y.*, 49 NY2d 557 (1980) ("The affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide evidentiary proof in admissible form"), *with* NYSCEF Dkt. 85, *passim*.[2]

6. In support of such meritless contention, Defendant proffers precedent consistent with the foregoing doctrine, which merely recites that amendment should not be granted where the proposed amendment is "palpably insufficient" or "clearly devoid of merit"; Defendant's precedent decidedly does not require the submission of a separate "affidavit of merit", where, as here, an attorney affirmation was already submitted fully briefing the merits of the proposed amendment. *Id*.; *see* NYSCEF Dkt. 93, at Point I (citing: *Zaid Theatre Corp. v. Sona Realty Co*., 18 AD3d 352 (1st Dep't 2005); *Greentech Research LLC v. Wissman*, 104 AD3d 540 (1st Dep't 2013); *Silver v. Equitable Life Assurance Society of the U.S.*, 168 AD2d 367 (1st Dep't 1990); *Non-Linear Trading Co., Inc. v. Braddis Assocs., Inc.*, 243 AD2d 107 (1st Dep't 1998); *et al*.).

7. Conversely, here, Plaintiff's MSQ No. 005 is entirely sufficient and meritorious as a result of counsel's detailed affirmation briefing the salient points of law and proposed amendments arising from the consequences of Defendant's properly introduced August 5th, 2019 **certified** certificate of non-judicial dissolution of Defendant's corporate entity listing Mendler as Defendant's sole director, shareholder, and officer, and thus, sole trustee of Defendant's assets for

[2] *See also Coleman v. Maclas*, 61 AD3d 569 (1st Dep't 2009); *accord Aurora Loan Servs., LLC v. Mercius*, 138 AD3d 650 (2nd Dep't 2016).

the benefit of Defendant's creditors and contingent liabilities, as set forth in Plaintiff's moving papers. *See* Ex. C-D; *see* Ex. E, at ¶¶ 46-49, 88-98; *see* NYSCEF Dkt. 85, at Point I(A).

8. Thus, here, leave to amend for conversion into a BCL Art. 10 special proceeding is both necessary and required under the BCL, as Mendler is the only remaining party who may be held liable for Defendant's conduct. *Id*.; *see* BCL § 1005(a); *see* BCL 1008.[3]

9. Notably, in opposition, both Defendant and Mendler have failed to proffer a single document or allegation which may establish that Mendler, as a trustee of Defendant's assets for the benefit of Plaintiff, made provisions for the payment of Defendant's known contingent liability to Plaintiff, compromising any futility contention. *Id*.; *see* NYSCEF Dkt., *passim*.

10. Accordingly, contrary to Defendant's contention, there is no contemporaneous "affirmation of merit" submission requirement imposed under CPLR § 3025(b); rather, a counsel affirmation with admissible evidence establishing that the proposed amendments are not palpably insufficient or clearly devoid of merit is entirely sufficient to secure CPLR § 3025(b) leave to

[3] *See In re Baldwin Trading Corp*., 8 NY2d 144 (1960) ("directors in dissolution have been classified as trustees of a trust fund created by operation of law for the benefit of the creditors… the property of a corporation (dissolved) is a trust fund in the hands of its directors for the payment of its debts has long been settled… the trustees could not transfer the funds in their hands in disregard of the rights of their *cestuis*, no matter how honest their motives be… the liability of the directors is predicated upon… violation of a duty"); *see Rodgers v. Logan*, 121 AD2d 250 (1st Dep't 1986) ("after dissolution… the creditor can maintain an action directly against the directors or shareholders, even though no judgment has been obtained"); *see J.F. Tapley Co. v. Keller*, 133 AD 54 (1st Dep't 1909); *see WorldCom, Inc. v. Sandoval*, 182 Misc.2d 1021 (Sup. Ct. N.Y. Cnty., Nov. 24, 1999) ("Under New York law, the individual shareholders and officers of a corporation are legally responsible for contractual obligations… after the corporation was dissolved"); *accord Hatch v. Morosco Holding Co., Inc.*, 50 F.2d 138 (2d Cir. 1931) ("where corporate property is distributed to the shareholders and the corporation is dissolved… a creditor may sue the shareholders without first reducing his claim to a judgment, nor does it matter that the dissolution occurred after the assets were distributed"); *accord In re Hartley*, 479 B.R. 653 (S.D.N.Y. 2012) ("plaintiff may avoid the futility of first proceeding against a dissolved corporation by joining individual officers and directors to whom assets have been distributed"); *accord Flute v. Rubel*, 682 F.Supp. 184 (S.D.N.Y. 1988) ("where it is impossible or futile to obtain a judgment against a defunct corporation, the creditor can maintain an action directly against the directors or shareholders"); *accord Plastic Contact Lens Co. v. Frontier of Northeast, Inc.*, 324 F.Supp. 213 (W.D.N.Y. 1969) *aff'd* 441 F.2d 67 (2d Cir. 1971) ("[BCL §] 1005(a)(3) directs that, upon dissolution of a corporation, provision must be made for the payment of liabilities before the distribution of assets to the shareholders" whom "hold the assets they received in trust for the benefit of creditors"); *see also Pennsylvania Bldg. Co. v. Schaub*, 14 AD3d 365 (1st Dep't 2005); *see also Keystone Mech. Corp. v. Conde*, 309 AD2d 627 (1st Dep't 2003).

amend an operative pleading, wherefore Defendant's opposition contentions should be summarily disregarded, and MSQ No. 005 granted in Plaintiff's favor. *Id*.

B. Amendment is neither "Palpably Insufficient" nor "Clearly Devoid of Merit".

11. Contrary to Defendant's contentions, Plaintiff's proposed amended causes of action are neither "palpably insufficient" nor "clearly devoid of merit", notwithstanding Defendant's improper attempt to apply CPLR § 3211(a)(1) scrutiny thereto in the absence of any cross-motion or documentary evidence refuting the clear merit thereof. *Id.*; *contra* NYSCEF Dkt. 93, at Points I(B)(a)-(f).

12. Situations where proposed amendments are "palpably insufficient" or "clearly devoid of merit" include where claims are legally meritless, rather than factually meritless. *See e.g. Greene v. Esplanade Venture P'ship*, 36 NY3d 513 (2021) (granting leave to amend where Court of Appeals resolved question of law by including grandparent within the "immediate family" requirement of the zone of danger rule); *see e.g. Davis v. S. Nassau Communities Hosp.*, 26 NY3d 563 (2015) (denying leave to amend where Court of Appeals resolved question of law by finding no duty was owed from the defendant).

13. Here, the gravamen of Defendant's opposition contends that the proposed amendments are "legally insufficient" by misplacing reliance upon factual arguments, which decidedly fall beyond the scope of "palpably insufficient" or "clearly devoid of merit". *Id.*; *see* NYSCEF Dkt. 93, *passim*.

14. To the contrary, each of Plaintiff's second through eleventh causes of action are meritorious, non-duplicative, and/or otherwise viable upon the following grounds.

i. Plaintiff's Second Cause of Action is Viable & Non-Duplicative.

15. Contrary to Defendant's contentions, the prior iteration of fraud was against Mendler and Defendant jointly, whereas this Court's MSQ No. 003 Order dismissed Mendler upon

an insufficient showing warranting Defendant's corporate veil pierced. *Contra* NYSCEF Dkt. 93, at Point I(B)(a); *see* Ex. B, at p. 16:13-20 ("Accordingly, it is hereby ordered that the motion to dismiss the amended complaint as and against the individual defendant Joseph Mendler is hereby granted; and, therefore, it is ordered that the clerk is respectfully requested to dismiss the complaint to the extent that it is directed as against the individual defendant Joseph Mendler and to mark his records and files accordingly").

16. As the corporate veil no longer remains in existence, no veil piercing insufficiency concerns remain in existence, precluding Defendant's dismissal argument as to Plaintiff's second cause of action sounding in fraud. *Id*. Indeed, if this Court did additionally dismiss Plaintiff's second cause of action sounding in fraud as against Defendant, it would have so stated. *Id*.

17. Moreover, as to Defendant's reliance contentions, since Defendant was Plaintiff's general contractor, Plaintiff's reliance upon Defendant's professional discretion in the necessary materials, labor, and services was entirely justifiable. *Id*.; *compare* Ex. E, at ¶ 38 ("Defendant engaged in a pattern of overcharges, billing for services and goods not provided, double-charging for materials and labor, and other fraudulent billing practices"), *with Kimmell v. Schaefer*, 89 NY2d 257 (1996) (recognizing reliance in special relationship of confidence and trust upon opinion of learned professionals), *and Ossining Union Free Sch. Dist. v. Anderson LaRocca Anderson*, 73 NY2d 417 (1989) ("[engineer] defendants allegedly rendered reports with the objective of thereby shaping plaintiff's conduct, and thus, owed a duty of diligence").

18. As such, Plaintiff's second cause of action was not precluded by this Court's MSQ No. 003 Order, nor is it duplicative of Plaintiff's first cause of action. *Id*.

ii. Plaintiff's Third Cause of Action is Viable & Non-Duplicative.

19. Contrary to Defendant's contention, the third cause of action sounding in unjust enrichment is not duplicative of the breach of contract cause of action insofar as the unjust

enrichment cause of action seeks recovery in tort of funds paid to Defendant for unnecessary build-out services imposed upon Plaintiff in Defendant's capacity as general contractor. *Compare* Ex. E, at ¶¶ 38-43, 65-68, *with Scarola Ellis LLP v. Padeh*, 116 AD3d 609 (1st Dep't 2014) ("where there is a *bona fide* dispute as to the application of a contract in the dispute at issue, a plaintiff may proceed upon a theory of quasi-contract and breach of contract and will not be required to elect his or her remedies"), *and Sabre Int'l Sec., Ltd. v. Vulcan Cap. Mgmt., Inc.*, 95 AD3d 434 (1st Dep't 2012) (same); *see Kimmell v. Schaefer*, 89 NY2d 257 (1996) (recognizing reliance in special relationship of confidence and trust upon opinion of learned professionals); *see Ossining Union Free Sch. Dist. v. Anderson LaRocca Anderson*, 73 NY2d 417 (1989) ("[engineer] defendants allegedly rendered reports with the objective of thereby shaping plaintiff's conduct, and thus, owed a duty of diligence").

20. Thus, contrary to Defendant's contention, Plaintiff's third cause of action alleges conduct which was neither alleged nor applicable to Plaintiff's first cause of action: damages not for non-performance of some aspect of the relevant agreement, but for inclusion of unnecessary items for which Plaintiff paid under the agreement which would not have been there but for Defendant's capacity as Plaintiff's general contractor, of which there is a special relationship of trust imposed. *Id*. Accordingly, Plaintiff's third cause of action is viable and non-duplicative. *Id*.

iii. Plaintiff's Fifth Cause of Action is Viable & Non-Duplicative.

21. While Defendant contends that no allegations support Plaintiff's fifth cause of action sounding in a breach of the implied covenant of good faith and fair dealing, Defendant conveniently disregards the fifth cause of action's allegation incorporating all prior allegations; specifically, Defendant disregards Plaintiff's allegation that, *inter alia*, "Defendant engaged in a pattern of overcharges, billing for services and goods not provided, double-charging for materials and labor, and other fraudulent billing practices" and "provided a kitchen exhaust extractor" which

was not consistent with New York City building code, which was nevertheless a veritable lemon. *See* Ex. E, at ¶¶ 38, 41-43; *see Jaffe v. Paramount Comm'ms, Inc.*, 222 AD2d 17 (1st Dep't 1996) ("Implied in every contract is a covenant of good faith and fair dealing which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under the agreement").

22. Thus, while the foregoing allegations are not preempted by the terms of the subject agreement, rendering Defendant's conduct distinct from a breach of contract cause of action – thus, breach of the implied covenant of good faith and fair dealing – as the damages are not tied to any breach of the subject agreement, but rather, Defendant's conduct in perverting the subject agreement. *Id*. Accordingly, Plaintiff's fifth cause of action is viable and non-duplicative. *Id*.

iv. Plaintiff's Sixth Cause of Action is Viable & Non-Duplicative.

23. As Defendant concedes, with respect to Plaintiff's sixth cause of action sounding careless contractual work, a cause of action is viable where there is a duty violated independent of the subject contract. *Compare* NYSCEF Dkt. 93, Point I(B)(iii), at p. 10, *with* Ex. E, at ¶¶ 38, 79-81, *and Int'l Fid. Ins. Co. v. Gaco W., Inc.*, 229 AD2d 471 (2nd Dep't 1996) (citing *Milau Assocs. V. N. Ave. Dev. Corp.*, 42 NY2d 482 (1977)) ("A person charged with performing contractual work must exercise reasonable skill and care in performing the work and **negligent performance of the work may give rise to actions in tort and for breach of contract**") (emphasis added).

24. Here, Plaintiff has alleged that, *inter alia*, Defendant's discharge of performance with respect to the kitchen exhaust extractor was, at the bare minimum, careless, if not reckless or intentional, thereby rendering Defendant's sixth cause of action neither duplicative nor non-viable. *Id*.; *see* Ex. E, at ¶¶ 41-43. Accordingly, Plaintiff's sixth cause of action is viable and non-duplicative. *Id*.

v. Plaintiff's Seventh Cause of Action is Viable.

25. Preliminarily, it appears that Defendant, in the absence of a cross-motion or documentary evidence, has puzzlingly attempted to apply CPLR § 3211(a)(1) scrutiny to Plaintiff's seventh cause of action sounding in duress. *Compare* NYSCEF Dkt. 93, Point I(B)(c), at p. 12 ("[Plaintiff] has not shown that it was forced to agree to the commission by means of a wrongful threat which precluded exercise of free will"), *with Fortis Fin. Serv. v. Filmat Futures USA*, 290 A.D.2d 383 (1st Dep't 2002) (the movant "has the burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of plaintiff's claim"), *and* Ex. E, at ¶¶ 18-21, 82-84.[4]

26. Indeed, as MSQ No. 005 is a motion for CPLR § 3025(b) leave to amend, rather than dismissal, Plaintiff carries no burden of establishing any factual matters in the absence of documentary evidence refuting Plaintiff's allegations, save for establishing that the proposed amended causes of action are neither "palpably insufficient" nor "devoid of merit". *Id.*; *see* Point I(A), *supra*.

27. Here, Defendant has failed to introduce any documents which could disprove Plaintiff's seventh cause of action sounding in duress, whereas Plaintiff has properly recited all requisite elements of a cause of action sounding in duress, whereupon Plaintiff's seventh cause of action is viable, of which the parties are entitled to disclosure to prove or disprove at trial of the instant matter. *Id.*; *compare* Ex. E, at ¶¶ 18-21, 82-84, *with 805 Third Ave. Co. v. M.W. Realty Assocs.*, 58 NY2d 447 (1983) ("economic duress is demonstrated by proof that one party to a

[4] Rather, if anything, the more deferential CPLR § 3211(a)(7) standard should be applied where, as here, no documentary evidence was proffered. *See Leon v. Martinez*, 84 NY2d 83 (1994) (the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within a cognizable legal theory"); *see 511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 (2002) (on a CPLR § 3211(a)(7) motion, "factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail").

contract has threatened to breach the agreement by withholding performance unless the other party agrees to some further demand"), *and Gersten v. 532 Broad Hollow Rd. Co.*, 75 AD2d 292 (1st Dep't 1980) (duress "exists when one is compelled to perform an act which he has the legal right to abstain from performing… the compulsion must be such as to overcome the exercise of free will"). Accordingly, Plaintiff's seventh cause of action is viable. *Id*.

vi. Plaintiff's Eighth Cause of Action is Viable.

28. Defendant's baseless contention that Plaintiff's eighth cause of action sounding in intentional interference with a prospective economic advantage purportedly "failed to identify a prospective economic advantage", "failed to allege wrongful conduct directed at third parties", and "failed to allege intent to harm Plaintiff' can only result from Defendant's own failure to review the proposed amended pleading at best, or a willful misrepresentation to this Court at worst, as Plaintiff directly makes each allegation. *Compare* NYSCEF Dkt. 93, at Points I(B)(d), *with* Ex. E, at ¶¶ 18-21, 85-87 ("[Defendant] and [Mendler] wrongfully interfered in the [restaurant build-out] contract, and advised and exerted unfair and unreasonable influence upon the Landlord, to [Plaintiff's] detriment… [Mendler] stated to Plaintiff that if he did not use [Defendant] to do the buildout of the restaurant… [Mendler] would influence [the Landlord] to be uncooperative with [Plaintiff] and any contractor [Plaintiff] might choose, which would cause [Plainitff's] buildout to take years instead of months… In addition, [Mendler] prevented other contractors from gaining access to the [leasehold], and did so for the purpose of guaranteeing that only [Defendant], and no other contractor, would be able to perform the build-out of the [leasehold] as a restaurant"); *see Guard-Life Corp. v. Parker Hardware Mfg. Corp.*, 50 NY2d 183 (198); *see Williams & Co. v. Collins Tuttle & Co.*, 6 AD2d 302 (1st Dep't 1958) ("a cause of action has also been recognized where a party would have received a contract but for the malicious, fraudulent, and deceitful acts

of a third party"); *accord Strapex Corp. v. Metaverpa N.V.*, 607 F.Supp. 1047 (S.D.N.Y. 1985) (same).

29. Accordingly, this Court should disregard Defendant's deficient pleading contentions in light of the fact that Plaintiff's allegations have recited all requisite elements for a cause action sounding in intentional interference with prospective economic advantage, rendering Plaintiff's eighth cause of action viable. *Id*.

vii. Plaintiff's Ninth Cause of Action is Viable.

30. With respect to Plaintiff's ninth cause of action sounding in an accounting, while Defendant contends that "despite the general language of BCL § 1008, courts are not free to make any order it deems proper", BCL § 1008 directly provides that this Court "may continue the liquidation of the corporation under the supervision of the Court and **may make all such Orders as it may deem proper** in all matters in connection with the dissolution". *Compare* BCL § 1008(a) (emphasis added), *with* NYSCEF Dkt. 93, at Point I(B)(e), *and* Ex. E, at ¶¶ 88-90.

31. Indeed, here, without an accounting, it would be impossible to determine whether Mendler has commingled Defendant's assets held in trust for the benefit of contingent creditors and/or determine the adequacy of provisions made for payment of the liabilities of the corporation as required by BCL § 1008(a)(6). *Id*.; *see* BCL § 1008(a)(6).

32. To wit, that Defendant chastises Plaintiff for not citing precedent supporting an action in accounting authorized by BCL § 1008 speaks volumes louder about Defendant's asininity in performing a mid-litigation dissolution, rather than any error committed by Plaintiff, as a dearth of precedent exists for mid-litigation dissolutions because it is so rarely done. *Compare* NYSCEF Dkt. 93, at p. 17 ("Plaintiff has not cited to any holding which provides for an accounting"), *with* Ex. D. Nevertheless, the consequences of Mendler's mid-litigation dissolution of Defendant are briefed in Plaintff's opening motion papers. *Id*.; *see* NYSCEF Dkt. 85, at Point I(A).

33. Thus, contrary to Defendant's contentions, BCL § 1008(a) impliedly authorizes an accounting, as judicial supervision over dissolution would be impossible to fulfill without an accounting and disclosure of financial statements of the dissolved entity, rendering Plaintiff's ninth cause of action entirely viable. *Id.*; *see* BCL § 1008(a).

viii. Plaintiff's Tenth & Eleventh Causes of Action are Viable.

34. Again, just as deconstructed in Point I(B)(v), it appears that Defendant, in the absence of a cross-motion or documentary evidence, has puzzlingly attempted to apply CPLR § 3211(a)(1) factual scrutiny to Plaintiff's tenth and eleventh causes of action respectively sounding in trustee conversion and trustee waste. *Compare* NYSCEF Dkt. 93, Point I(B)(f), at p. 17 (Plaintiff "has not proven [the tenth and eleventh causes of action] by submission of evidence"), *with* Point I(B)(v), *supra*, *and* Ex. E, at ¶¶ 91-98; *see* nn.3-4, *supra*.

35. Indeed, Defendant makes arguments concerning, *inter alia*, a failure to prove that Mendler has become a trustee of Defendant's assets, and a failure to prove that a distribution was actually made to Mendler, which are grossly inappropriate on a pre-discovery record. *Id.*; *compare* NYSCEF Dkt. 93, at Point I(B)(f), *with* Ex. E, at ¶¶ 91-98.

36. Rather, as set forth in Point I(A), Plaintiff need only plead the requisite elements and establish that the proposed amendments are neither palpably insufficient nor clearly devoid of merit, which Plaintiff has done for all the reasons set forth in Point I(A) and in Plaintiff's moving papers. *Id.*; *see* Ex. D; *see* NYSCEF Dkt. 85, at Point I(A), *supra*; *see* Point I(A), *supra*.

37. Likewise, while Plaintiff will stop just short of utilizing the word perjury, Defendant's counsel dances dangerously close to the line by contending that "absent from the proposed complaint is an allegation that [Defendant] made a distribution or that Mendler received any asset from [Defendant]", whereas Plaintiff's proposed amended pleading states just that,

rendering Plaintiff's proposed tenth cause of action sounding in trustee conversion sufficiently plead. *Compare* NYSCEF Dkt. 93, Point I(B)(f), at p. 18, *with* Ex. E, at ¶¶ 47, 49.

38. Similarly, as to Plaintiff's proposed eleventh cause of action sounding in trustee waste, such cause of action is plead with specificity, as Plaintiff specifically alleges that Mendler engaged in the specific act of taking the trust assets for himself without retaining so much of Defendant's assets as to provide for Defendant's contingent liabilities to Plaintiff, rendering entirely sufficient Plaintiff's proposed eleventh cause of action sounding in trustee waste. *Compare* NYSCEF Dkt. 93, Point I(B)(f), at pp. 20-21, *with* Ex. E, at ¶¶ 47-49, 96-97.

C. No Statute of Limitations Issues Preclude the Proposed Amendment.

39. Finally, no statute of limitations issue exists sufficient to preclude leave to amend, as CPLR § 203(f) instructs that a claim in an amended pleading "relates back" or is deemed to have been interposed at the time the claims in the original pleading were interposed, if the original pleading gives notice of the claim in the amended pleading, as all causes of action are predicated on the very same transactions, occurrences, or series of transactions or occurrences. *See* CPLR § 203(f); *see e.g. Caffaro v. Trayna*, 35 NY2d 245 (1974); *see e.g. O'Halloran v. Metro. Transp. Auth.*, 154 AD3d 83 (1st Dep't 2017); *accord Carlino v. Shapiro*, 180 AD3d 989 (2nd Dep't 2020)

40. Here, Plaintiff's proposed first through eighth causes of action are all based upon the preexisting and untouched allegations from the currently operative pleading, whereas Plaintiff's proposed ninth through eleventh causes of action concern the supplemental allegations resulting from Mendler's mid-litigation dissolution of Defendant. *See* Ex. D; *compare* Ex. F, at ¶¶ 1-45, *with* Ex F, at ¶¶ 46-49.[5]

[5] For the avoidance of doubt, with respect to proposed co-defendant Mendler, all claims arose out of the same conduct, transactions, or occurrences, and Mendler is united in interest with Defendant as Defendant's former shareholder, director, and chief executive officer, as well as united in interest as a trustee of Defendant's assets for the benefit of Defendant's actual and contingent creditors, for all the reasons set forth in Plaintiff's opening papers. *See Buran v. Coupal*, 87 NY2d 173 (1995); *see Ramirez v. Elias-Tejada*, 168 AD3d 401 (1st Dep't 2019); *see* NYSCEF Dkt. 85, at Point I(A); *see* Ex. D.

41. As such, no statute of limitations issues exist sufficient to preclude Plaintiff's proposed amended pleading. *Id*.

CONCLUSION

WHEREFORE, Plaintiff respectfully submits this Court should grant Plaintiff's MSQ No. 005, converting this matter to a special proceeding, granting leave to join Mendler as a defendant, as well as leave to serve the supplemental summons and second amended verified complaint, as well as for such other and further relief as this Court deems just and proper.

Dated: New York, New York
September 29th, 2021

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22 NYCRR § 202.8-b CERTIFICATION

ZACHARY G. MEYER, ESQ.. hereby certifies in reliance upon the word count function of the word processing system used to prepare this document, that this document complies with the word count limitations set forth in 22 NYCRR § 202.8-b insofar as it contains four thousand eight hundred seventy-three (4,873) words, inclusive of footnotes.

/s/ Zachary G, Meyer, Esq.