SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

DANIELLE SHALOV,

Plaintiff,

-against-

BRISBANE ASSOCIATES LIMITED PARTNERSHIP, BRISBANE ASSOCIATES LLC SEWARD BRISBANE LLC, ALICE BRISBANE LLC, ELINOR BRISBANE LLC, SARAH BRISBANE LLC, CHASE MELLEN III, CHARLES A. BRISBANE, ABIGAIL MELLEN, DARCY B. KELLEY, AND ALLAIRE B. STALLSMITH,

Defendants.

Index No. 651188/2021

Mtn. Seq. No. 003

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff Danielle Shalov ("Plaintiff"), by her attorneys, Fox Rothschild LLP, respectfully submits this memorandum of law in opposition to Defendants' motion (Mtn. Seq. No. 003) to dismiss Plaintiff's Verified Amended Complaint, dated April 19, 2021 ("Amended Complaint"), pursuant to New York Civil Practice Law and Rules ("CPLR") §§ 3211(a)(1) and (7).

This action raises a fundamental question of New York law: that is, can the general partners of a New York limited partnership wherein all limited partners possess full limited partner rights—including the right to vote, the right to inspect books and records, the right to attend meetings, and the right to seek an accounting—convert that limited partnership into a Delaware limited liability company where the limited partners are automatically, without their knowledge or consent, turned into members stripped of those rights, as well as their right to object to the conversion and seek an appraisal of the fair value of their limited partner interests?

As set forth in Plaintiff's Amended Complaint, the General Partners of the Partnership in which Plaintiff was a limited partner instigated a plan ("Plan") to convert the Partnership, a family real estate holding company owned by the descendants of its original founder, into a Delaware limited liability company (the "Company"), which would then own the real estate interests formerly owned by the Partnership. Four newly-formed Delaware limited liability companies representing the four different branches of the family (each a "Family LLC") would become the sole voting members of the Company, while each of the Partnership's limited partners (the "Limited Partners" and, together with the General Partners, the "Partners") were given a Hobson's choice of either becoming, a member of his or her Family LLC (with no right to question the activities or expenses of the family real estate business) or a member of the Company (with no rights at all, other than the right to distributions). Each of the General Partners would become the

Company's managers, retaining full control of the family real estate business. In doing so, the General Partners would unburden themselves from, among other duties and obligations, their fiduciary duties to the Limited Partners, at least insofar as those duties relate to the family real estate business ("Fiduciary Duties"), as well as their personal liability to third parties, thereby increasing the value of their own interests at the expense of the Limited Partners.

As laid out in detail in the Amended Complaint, the General Partners achieved execution of the Plan through material misrepresentations, sleight of hand, and outright lies. They misled Plaintiff about the process and about their intention to maliciously, intentionally, and arbitrarily deprive Plaintiff of the interest in the Company to which she was entitled, by causing the Company to issue to her an economic interest only, without the rights accorded to all other members—an interest of substantially less value than the value of her Partnership interest. As a Class B member of the Company, with the "rights of an assignee" only, Plaintiff is not entitled to (i) vote on Company matters, (ii) access any information regarding Company transactions, (iii) inspect the Company's books and records, (iv) attend any meeting of the Members, or (v) participate in any correspondence or discussion of Company matters (Ex. 6, Brisbane Associates LLC Operating Agreement § 7.2).

The reason for this disparate treatment is obvious: the General Partners decided to punish Plaintiff for asking too many questions (like "how does the conversion benefit the Limited Partners?") and for her refusal to submit to their plan before she had even seen the final documents. Perhaps, they thought, if they could disenfranchise Plaintiff, diminish the value of her interest, and embarrass her in front of her family, she would just go away and let them do as they please. Unfortunately for them, they were wrong.

In the days and weeks after the Defendants' fateful decision to severely diminish Plaintiff's interest in the family business, Plaintiff made dozens of phone calls and sent several emails to the General Partners to try to understand what they had done and to resolve this matter amicably. She told them that she hoped that they could come together as a family and work toward the continued success of the family business. However, Plaintiff soon realized that the General Partners had no interest in making things right. Apparently, Defendants would rather burn the whole Company to the ground, no matter the cost, than to simply make Plaintiff whole.

Most importantly, this is a case that Plaintiff never wanted to bring and that could easily have been avoided. All Defendants needed to do was to accept Plaintiff's offer, since withdrawn, to exchange her impotent interest in the Company for the same Class A membership interest in her Family LLC that ***every other Limited Partner ultimately received. This is so even though Plaintiff was entitled to receive a much more valuable full membership interest in the Company***. It would have taken no time and would not have cost anyone any money. Defendants gave Plaintiff no choice, however, but to bring this action to protect her rights.

On April 19, 2021, Plaintiff filed the Amended Complaint, seeking a declaratory judgment that the conversion was null and void, and asserting causes of action for appraisal pursuant to Article 8-A of the New York Partnership Law, breach of fiduciary duty, fraud, negligent misrepresentation, minority oppression, unjust enrichment, and conversion. Defendants now move to dismiss the Amended Complaint pursuant to CPLR §§ 3211(a)(1) and (7). However, for the reasons set forth below, Plaintiff has sufficiently pleaded each of her causes of action and Defendants have failed to submit documentary evidence that conclusively establishes a defense to any of Plaintiff's claims as a matter of law. Accordingly, Defendants' motion to dismiss should be denied in its entirety.

THE RELEVANT FACTS AND CIRCUMSTANCES

Background

On July 30, 2020, the General Partners approved the Plan to convert the Partnership into a Delaware limited liability company (Am. Compl. ¶ 24). Darcy Kelley ("Kelley"), a General Partner and Plaintiff's mother, emailed Plaintiff and five other Limited Partners at the end of August 2020, stating that she was "pushing for having the annual BA [Partnership] meeting in October" to discuss the new structure (*id.*; Ex. 1). On October 4, 2020, Kenneth Frank ("Frank"), Kelley's husband, acting as counsel for or as a representative of Defendants, presented the General Partners with a Power Point presentation on the Partnership (*id.*, ¶ 25). Plaintiff received a version of this presentation on October 5, 2020 (*id.*; Ex. 2). In this initial presentation, Frank, an attorney, outlined the decision to convert the Partnership to a Limited Liability Company (*id.*, ¶ 26; Ex. 2).

Frank's False Representations

Frank explained that the new organization's operating agreement would serve "[e]ssentially the same function as the Partnership Agreement," that there was "[n]o desire to depart substantially from what is currently in place," (*id.*, ¶ 27) and that the Limited Partners in the current Partnership "have no role other then [sic] to receive their distributions" (*id.*). These statements were knowingly false when made.

On October 16, 2020 Kelley forwarded an email chain to Plaintiff and five other Limited Partners, attaching a list of questions posed by Arthur Brisbane, a Limited Partner, in response to Frank's October 4, 2020 Partnership Restructuring presentation and Frank's initial answers to those questions (*id.*, ¶ 33; Ex. 5). In the email chain, Frank, speaking for the General Partners, falsely represented that "[i]n the new structure there are no GPs. All current GPs and LPs in each family group have become 'voting members' in their family llc" (*id.*, ¶ 35). Frank also falsely

represented that the language of the new operating agreement would be, for the most part, exactly the same as the Partnership Agreement (*id.*, ¶ 36).

The General Partners determined that Frank, the spouse of one of the General Partners, Kelley, would draft the conversion documents as counsel for the Partnership despite the obvious conflict of interest (and without any engagement agreement with the Partnership), even after Limited Partners, including Plaintiff, raised concerns about the conflict (*id.*, ¶¶ 39-42). Kelley, Frank's wife, who had a personal interest in the conversion as it would, among other things, eliminate personal liability and Fiduciary Duties, explained:

> [a]s to Kenny's role in drafting the documents, I talked to Chase yesterday who clarified that a legal agreement between Kenny and BA would actually cause rather than solve problems. Each partner may have different goals and objectives and representing everyone would present numerous potential conflicts. Kenny has made it clear to all he is not representing anyone and is simply preparing drafts of documents for review and approval by counsel and the GPs. Frankly, that is no different from downloading a first draft from Legal Zoom" (*id.*, ¶ 42).

This statement, however, was false and seriously misleading. Not only was Frank obviously acting as counsel for the Partnership and the General Partners, but he even admitted this in his Affidavit in this action (Frank Aff. ¶ 1 ["I am an attorney that provides certain legal services to Brisbane Associates LLC (the Company) and previously, when it existed, to Brisbane Associates, a New York Limited Partnership (the Partnership)."]).

December 2020 Meetings

The General Partners met on December 4, 2020 to review the terms of the Plan "to convert BA [the Partnership] to a Delaware LLC" (Am. Compl., ¶ 45; Ex. 8). On December 5, 2020, Kelley invited Plaintiff, and several other Limited Partners to a December 6, 2020 virtual meeting to review the Plan, which was designed to comply with Section 1006 of the New York Limited

Liability Company Law (the "LLC Law") (*id.*). In the December 5, 2020 email, Kelley asked the Limited Partners to waive the LLC Law's twenty-day notice requirement (*id.*, ¶ 46).

At the December 6, 2020 meeting, Frank, acting as counsel for the Partnership and the General Partners and speaking on their behalf, presented the terms of the Plan as approved by the General Partners (*id.*, ¶ 47). Frank stated that the goal was to "convert Brisbane Associates into an LLC" (*id.*, ¶ 48). He explained that the "Governing Agreements for new entities will mirror current documents," and that a "consolidation" had been rejected as it "involves potential government interaction," but that Frank, with assistance from Fried Frank and another attorney, Andrew Falevich, "have an alternative" (*id.*). These statements, however, were false and materially misleading because, among other things: (i) the "Governing Agreements" do not mirror the existing ones, (ii) consolidation invites no "potential government interaction" and (iii) the offered "alternative" does nothing more than deprive the Limited Partners of the statutory protections otherwise afforded them by the LLC Law (*see id.*, ¶¶ 49-50).

During the meeting, for at least the second time, Plaintiff requested drafts of the conversion documents from the General Partners so that she could have an opportunity to review them and understand the proposal (*see* Ex. 10). The General Partners arbitrarily denied her request (Am. Comp., ¶ 51). At the close of the meeting, Kelley asked the Limited Partners to waive the twenty-day notice of meeting that was required under the Partnership Agreement and the LLC Law (*id.*, ¶ 52). In response, Alexander Bockman, a Limited Partner and Plaintiff's brother, notified Kelley that he was requesting an annual meeting on behalf of the Limited Partners and was refusing to waive the statutory notice requirement because, among other things, the Limited Partners had not yet received and would need time to review the conversion documents (*id.*, ¶ 54; Ex. 11).

Plaintiff's Transaction Review

Plaintiff had not consented to waive the statutory notice requirement when she learned that the General Partners had determined, without explanation, that notice of meeting and the meeting itself were no longer required to execute the Plan (*id.*, ¶ 55). Plaintiff expressed concern that the Limited Partners would not have enough time to review and understand the Plan unless they were provided with the relevant documents sufficiently in advance of any deadline to execute and deliver conversion documents. Plaintiff made multiple requests of Kelley and Frank to provide her with drafts of the Plan documents for her review (*id.*, ¶ 57; *see e.g.*, Ex. 11 ["Could you please send the draft LLC agreements?"]; Ex. 12 ["Danie also asks . . . when the agreements will be sent for us to read them?"]). Frank, the "architect of the conversion" who was acting as counsel for the Partnership and the General Partners, repeatedly and arbitrarily denied Plaintiff's requests (*id.*, ¶ 58; *see, e.g.*, Ex. 13 ["Sorry, Danielle, but that won't be possible."]).

Instead of being honest and simply sharing the conversion documents, Kelley and Frank offered assurances that the Limited Partners would have plenty of time to complete a review of the conversion documents, stating: "copies will go to everyone to review and you will have plenty of time to digest them before the deadline for signing" (*id.*, ¶ 59; Ex. 13). They told Plaintiff and other Limited Partners to trust that the General Partners were acting in their best interest (*id.*, ¶ 60). This, of course, was false. As Plaintiff later discovered, the General Partners were acting in their own self-interest and were concocting a plan that would diminish the value of Plaintiff's interest in the family business.

Resolutions and Contribution Agreements

On December 15, 2020, Kelley emailed Plaintiff and six other Limited Partners to outline the process the General Partners planned to use to "convert[] Brisbane Associates, currently a New

York limited partnership, into Brisbane Associates LLC, a Delaware limited liability company" (*id.*, ¶ 63; Ex. 15). The Company would be owned by the four Family LLCs, each of which would hold a 25% interest. Plaintiff was to become a member of Elinor Brisbane LLC ("Elinor"). Kelley assured Plaintiff and the other recipients that the General Partners "do not intend to make any meaningful changes to the framework which has served us well since 1978" and that "our partnership may change but the way we operate will not" (*id.*, ¶ 64; Ex. 15). Kelley also indicated that Plaintiff and the other Limited Partners would have new rights in the new organization: "[i]n the new structure you will have a vote on certain major decisions which you did not have before" (*id.*, ¶ 65; Ex. 15).

Attached to the email was a Resolution of the General Partners adopting the Plan, a draft of the Elinor Brisbane LLC Contribution Agreement (the "Contribution Agreement"), and a draft of the Elinor Brisbane LLC Document Package (the "Document Package"), which contained a draft Elinor Brisbane LLC Operating Agreement (the "Elinor Operating Agreement") (Ex. 16). The Contribution Agreement purported to bind the Limited Partners to the provisions of the Elinor Operating Agreement, which did not yet exist in final form (Am. Comp., ¶ 66; Ex. 17). Kelley informed the Limited Partners that the Contribution Agreement had to be executed and returned by the end of the day on Friday December 18, 2020, less than three days after the drafts were sent to the Limited Partners (*id.*).

Subsequently, without explanation or notice, Plaintiff was removed from all communications among the Limited Partners and General Partners concerning corrections and clarifications of, and other issues with, the draft Contribution Agreement, Elinor Operating Agreement, and Document Package (*id.*, ¶ 68-69). From that point on, Plaintiff was not privy to the continued conversation about the Limited Partners' questions and concerns, the responses of

the General Partners, or the corrected versions of the documents that were apparently circulated by the General Partners (*id.*, ¶ 69). Although the other Limited Partners received responses and new drafts of the documents on December 17, 2020, Plaintiff did not receive them until several days later, after the deadline to execute the Contribution Agreement had already expired (*id.*, ¶ 70). In fact, by the close of business on December 18, 2020, Plaintiff had not received any additional information, responses, or updated drafts of the documents (*id.*, ¶ 71). As with the rest of the conversion process, Plaintiff was left in the dark.

On Friday, December 18, 2020 at 6:29 p.m., Kelley emailed Plaintiff and Bockman to ask for their executed Contribution Agreements (*id.*, ¶ 72; Ex. 19). Kelley attached a copy of the Contribution Agreement to the December 18, 2020 email, but did not explain that the document was a new draft based on comments made by the Limited Partners and information exchanged in emails that were never sent to Plaintiff (*id.*, ¶ 73-74). It was apparent to Plaintiff that the documents were still in draft form and Plaintiff believed that additional information and final drafts would be forthcoming, all of which would require her review prior to execution (*id.*, ¶ 75). As such, Plaintiff informed Kelley that she had not been able to complete her review of the conversion documents (*id.*; see Ex. 19; Ex. 20 ["Tim caught a lot of typos and errors. I'd imagine they'd send around a corrected draft for execution but I haven't seen anything."]; *id.* ["apparently there is a new draft of the agreement because of all the typos. I haven't seen that."]).

Purported December 20, 2020 Meeting

On Sunday, December 20, 2020 at 8:51 a.m., Kelley forwarded to Plaintiff, without explanation, a notice of a meeting of the General Partners of Brisbane Associates to be held at 5 p.m. that day (*id.*, ¶ 77). At 1:32 p.m., Plaintiff's husband Gregory Shalov ("Shalov"), sent a text message to Kelley to tell her that Plaintiff still did not have final drafts of documents sent for

execution on December 15, 2020 (*id.*, ¶ 78; Ex. 22). At 3:28 p.m., Kelley emailed what she represented to be a final version of the Contribution Agreement to Plaintiff, instructing that she had to execute it before 5:00 p.m. that evening, even though changes had been made to the draft and Plaintiff still had not received the answers to the Limited Partners' questions from Kelley (*id.*, ¶ 79; Ex. 23). At 3:30 p.m., Bockman emailed Chase Mellen ("Mellen"), Kelley, and other General Partners requesting an extension to execute the Contribution Agreement citing the recent delivery of the final version (*id.*, ¶ 81; Ex. 24).

At 3:31 p.m., Kelley sent a text message to Shalov instructing him to tell Plaintiff that there was a 5:00 p.m. deadline for the Contribution Agreement and that Kelley would send a final copy of the remaining documents to Plaintiff and Shalov by email (*id.*, ¶ 82; Ex. 25). At 3:44 p.m., Kelley emailed Plaintiff and, for the first time, stated that changes had been made to the Contribution Agreement, the Elinor Brisbane Operating Agreement and documents in the Document Package (*id.*, ¶ 83; Ex. 26 ["There were corrections to be made to several documents and these will be reviewed by the GPs at 5 p.m."]).

At 4:00 p.m., Kelley sent a second text message to Shalov stating that all other documents were not in final form (*id.*, ¶ 86; Ex. 25). Kelley indicated that the documents incorporated comments and responses to the Limited Partners' questions (which Kelley provided to Plaintiff days after they were circulated to other Limited Partners), and stated that only the Contribution Agreement was in final form and the deadline for execution had been extended until 5:00 p.m. that evening (*id.*). However, as Shalov stated in an email sent at 4:48 p.m., the Contribution Agreement purported to bind Plaintiff to the Elinor Brisbane Operating Agreement, which, as Kelley acknowledged, did not yet exist in final form and therefore had not yet been fully reviewed (*id.*, ¶ 87). Kelley responded at 5:29 p.m. stating that, as a result of Plaintiff and Bockman's failure to

execute the Contribution Agreement by 5:00 p.m., they would be excluded from Elinor, their Family LLC (*id.*, ¶ 89). Kelley stated that Plaintiff and Bockman's "rights and obligations will remain essentially as they are now" (*id.*; Ex. 26), which, of course, was false.

Plan Explanation

At 6:00 p.m., Kelley sent an email with an outline of a new plan ("Plan Explanation") to Bockman, but not to Plaintiff (*id.*, ¶ 90; Ex. 27). Plaintiff was unaware of the existence of this document until April 2021 (*id.*). The Plan Explanation, which was created by the Partnership and the General Partners through their attorney, Frank, on or about December 19, 2020, departed from the Plan that had been presented to the Limited Partners (*id.*, ¶ 91). In the Plan that was presented to the Limited Partners, all Limited Partners were to receive Class A membership units, with full rights including voting rights, and a second class of interests, called Class B membership units, were to be reserved for future issuance ***after*** the conversion (*id.*, ¶ 92; *see, e.g.*, Ex.16, Operating Agreement at 9). This was the Plan that the Limited Partners thought they were agreeing to.

At no time were the Limited Partners told that a refusal to execute and deliver a contribution agreement by the arbitrary deadline, before the final documents had been distributed, let alone reviewed, would result in a demotion from full Limited Partner with all rights attendant thereto to Class B member of the Company with no rights other than the right to receive distributions (*id.*,¶ 92). That is because the change was made at the eleventh hour for the exclusive purpose of sabotaging Plaintiff.

Thus, according to Defendants, the Plan apparently called for the General Partners, in clear violation of their fiduciary obligations to Limited Partners, to cause the Partnership to (i) transfer its entire real estate business to the Company in exchange for all of the issued and outstanding interests in the Company, none of which had any rights other than the right to distributions; (ii)

distribute those impotent Company interests to the Partners; (iii) name each of the General Partners or their designees as one of the four members of the Company's board of managers (the Company's sole governing body); and (iv) then dissolve. Nevertheless, the last-minute Plan Explanation, which was intentionally not shared with Plaintiff, stated that non-contributing Limited Partners (*i.e.*, specifically, Plaintiff) would be converted, without consent, into holders of Class B units in the Company (*id.*, ¶ 93; Ex. 27).

The well-pleaded factual allegations in the Amended Complaint and the accompanying exhibits can only lead to one inference: the General Partners, frustrated with Plaintiff's questions about the process and requests for time to review the conversion documents, intentionally altered the conversion documents at the last possible minute without informing Plaintiff, knowing that the other Limited Partners would not have an opportunity to notice or understand the implications of the last-minute change, and through this sleight of hand, stripped away Plaintiff's rights and diminished the value of her interest in the family business.

Defendants Falsely Claim Plaintiff Received the Contribution Agreement

At 8:03 p.m., Mellen sent an email to Plaintiff and Bockman. In his email, Mellen stated that Plaintiff and Bockman received the draft Contribution Agreement on December 15, 2020 (*id.*, ¶ 94), which was only partially true because they had only received prior, incomplete drafts but never received the final version for execution. Mellen also falsely claimed that Plaintiff had an opportunity to review the answers to the Limited Partners' questions and to provide input, even though Plaintiff had been intentionally removed from those communications and was provided with this information days after the other Limited Partners and within ninety minutes of the 5 p.m. deadline (*id.*). Mellen attached what he claimed was the final copy of the Elinor Operating Agreement referenced in the Contribution Agreement at 8:03 p.m. (*id.*, ¶ 95; Ex. 28). The only

explanation for the sudden materialization of the Elinor Operating Agreement is that the General Partners finalized the documents at their 5:00 p.m. meeting that day (*id.*, ¶ 96). In other words, Plaintiff could not have executed the final Contribution Agreement prior to 8:03 p.m. because it did not yet exist.

At 8:03 p.m., Mellen informed Plaintiff and Bockman that they now had until 9 p.m. (57 minutes) to execute the Contribution Agreement, and that failure to execute it would result in Plaintiff and Bockman remaining as "limited partners of the Partnership" (*id.*, ¶ 97; Ex. 29). This statement was false and directly contradicted the Plan Explanation, which the General Partners had sent to the Limited Partners (except Plaintiff) at 6:00 p.m. (*id.*). In other words, less than an hour prior to the deadline for execution, the General Partners failed to inform the Limited Partners, and specifically Plaintiff, that they had changed the Plan and that failure to execute the newly-minted final form of Contribution Agreement would now result in the draconian penalty of forfeiture of their Class A membership interests and, with it, their rights as members and a significant portion of the value of their interests.

Based on the deceptive offering materials furnished to the Limited Partners by the General Partners and the deceptive statements made to them, each of the Limited Partners, other than Plaintiff were required to execute the signature page of the Contribution Agreement before that agreement was even finalized and circulated for review (*id.*, ¶ 98).

Plaintiff requested additional time to review the final drafts of the conversion documents and, receiving no response, believed that her request was granted. On December 22, 2020, one day after Plaintiff received the final drafts of the forms of contribution and operating agreements and a copy of the executed operating agreement for the Company, Plaintiff reviewed those documents with counsel and, on the following day, signed the appropriate agreements and

forwarded them to the managing member of Elinor (*id.*, ¶ 102). On December 23, 2020, Plaintiff received an email from Mellen informing her that Elinor's managing member, Kelley (her own mother), refused to accept her offer (*id.*, ¶ 103). As Mellen explained: "Danielle has not executed either agreement. Danielle's present status continues to be that she is a B member of Brisbane Associates LLC with her rights limited to a 1% economic interest and is not a member of Elinor Brisbane LLC" (*id.*, ¶ 104; Ex. 30).

Defendants Unilaterally Change Plaintiff's Interest

On January 12, 2021, Plaintiff received another email from Mellen, stating: "[y]our limited partner interest was converted to a Class B Membership in the new LLC, and although the type of legal entity changes, your rights are essentially the same" (*id.*, ¶ 105; Ex. 31). As alleged in the Amended Complaint, Mellen's statement was false and materially deceptive as Mellen, along with all General Partners, knew that Plaintiff's rights had been substantially diminished, and that as a holder of a Class B unit, Plaintiff would no longer have any voting or inspection rights or any other rights except the right to receive distributions (*id.*, ¶ 106).

Attached to Mellen's email were "a complete set of the executed documents converting Brisbane Associates, a New York limited Partnership, to Brisbane Associates LLC, a Delaware limited liability Company" (*id.*, ¶ 107; Ex. 32). For the first time, Plaintiff learned that several additional terms were mysteriously added to the Company's operating agreement at the last minute, without Plaintiff's knowledge and, upon information and belief, without the other Limited Partners' knowledge (*id.*, ¶ 108).

For example, in the Elinor Operating Agreement, new language was inserted in Section 3.1. *Members and Membership Interests* to include an explanation of the distribution and assignment to Class B Members, whereas the original Elinor Operating Agreement and Company

Operating Agreement that had been circulated and reviewed by all Partners reserved Class B Units for "future issuance" (*id.*, ¶ 109). Specifically, the Company's original "Amended and Restated Operating Agreement" sent to the Limited Partners in December, as well as each subsequent draft prior to the alleged final draft, provided in section 3(2)(1)(b) that "Class B Units are reserved for future issuance on such [terms] as the Managers shall determine" (*id.*, ¶ 110). The December 21, 2020 Company "Amended and Restated Operating Agreement," which the Limited Partners were provided just before the deadline for execution, or after they had been asked to sign only the signature page, for the first time included Plaintiff as a Class B member and provided in Section 3(2)(1)(b): "Pursuant to Section 18-302 of the Act, the Class B Units shall be non-voting Units and the holders thereof shall be Members with the rights and obligations of an Assignee" (*id.*, ¶ 111).

In addition, whereas the December 15 draft "Amended and Restated Operating Agreement" reviewed by the Limited Partners did not contain Section 6(1)(b)(4), *Power of Attorney*, the General Partners slyly added the following into the final draft:

> Power of Attorney. To the extent the consent of the Members or approval of the Members is required for the exercise of any of the foregoing powers by the Managers or the performance of any other action pursuant to the Act or this Agreement, each Class B Member appoints the Manager representing the Brisbane Family Group corresponding to the "initial Partner's Group" with whom such Class B Member was associated as set forth in Section 9.5 of the partnership agreement of the Partnership, as his or her true and lawful attorneys in his or her name, place and stead, to consent to, approve or ratify such act or acts, and to execute, on his or her behalf, any documents signifying such consent, approval or ratification, and the percentage of Membership Interest held by such Class B Member shall be included in the voting percentage of such Brisbane Family Group shown on Exhibit A.

(*id.*, ¶ 113).

Plaintiff's Actions to Mitigate Defendants' Bad Actions

Shocked and dismayed by this unprecedented betrayal by her own family, Plaintiff made every possible effort to communicate with the General Partners to de-escalate the situation and engage in a level-headed discussion about how to move forward. Plaintiff explained that she had been under a significant amount of stress and only wanted an opportunity to review and understand the plan, and she conveyed her sincere hope that they would reinstate her as a Class A member, and that they could work together as a family toward the continued success of the family business. Giving Plaintiff the same interest that all other Limited Partners received was by no means an unreasonable request. It would take very little time and would not have cost anyone a dime. Nonetheless, despite Plaintiff's repeated attempts to resolve this matter without resorting to litigation, Defendants refused to engage in any meaningful dialogue with Plaintiff, leaving her no choice but to commence this suit.

At its core, this is an action about a limited partner's right to be treated fairly and equally rather than arbitrarily and capriciously by the general partners, based not only on their fiduciary duties, but also on fundamental decency. Despite the well-pleaded factual allegations supporting each of Plaintiff's causes of action, and notwithstanding Defendants' lack of any documentary evidence that constitutes a defense to any of Plaintiff's claims as a matter of law, Defendants now move to dismiss the complaint pursuant to CPLR §§ 3211(a)(1) and (7). For the reasons set forth below, their motion should be denied in its entirety.

LEGAL ARGUMENTS

POINT I

LEGAL STANDARD

A party may move to dismiss a complaint under CPLR § 3211(a)(7) on the ground that the pleading fails to state a cause of action on which relief can be granted. "When reviewing a defendant's motion to dismiss a complaint for failure to state a cause of action, a court must give the complaint a liberal construction, accept the allegations as true and provide plaintiffs with the benefit of every favorable inference" (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017] [internal quotation marks omitted]). The relevant inquiry is whether the Plaintiff has set forth sufficient factual allegations to state a cause of action, and "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). "Unlike on a motion for summary judgment where the court searches the record and assesses the sufficiency of the parties' evidence, on a motion to dismiss the court merely examines the adequacy of the pleadings" (*Davis v Boeheim*, 24 NY3d 262, 268 [2014]).

A party may also move to dismiss a complaint under CPLR § 3211(a)(1) on the ground that "a defense is founded upon documentary evidence." A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Affidavits submitted by defendants disputing the accuracy of the plaintiff's allegations are not documentary evidence and may not be considered on a motion to dismiss pursuant to CPLR § 3211(a)(1) (*Serao v Bench-Serao*, 149 AD3d 645, 646 [1st Dept 2017] ["factual affidavits do not constitute documentary

evidence within the meaning of the statute."]; *Tsimerman v Janoff*, 40 AD3d 242, 242 [1st Dept 2007] ["These affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint."]).

POINT II

PLAINTIFF HAS STATED A CAUSE OF ACTION FOR DECLARATORY JUDGMENT

Pursuant to CPLR § 3001, "[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy." Courts have long held that "on a motion to dismiss . . . the only question is whether a proper case is presented for invoking the jurisdiction of the court to make a declaratory judgment, and not whether the plaintiff is entitled to a declaration favorable to him [or her]" (*Law Research Serv., Inc., v Honeywell, Inc.*, 31 AD2d 900, 901 [1st Dept 1969]; *Laundry Place U, Inc. v Nassau County*, 122 NYS3d 911, 912 [2d Dept 2020]). Where a plaintiff has set forth a proper case for declaratory judgment, the merits of the claim are not a relevant factor and the action should proceed to discovery, trial, and judgment (*Law Research*, 31 AD2d at 901).

Here, Plaintiff has sufficiently set forth a proper case to invoke the Court's power to issue a declaratory judgment. As alleged in the Amended Complaint, this case "presents a justiciable case or controversy … regarding a ripe dispute" as to the rights and obligations of the parties in light of the Defendants' fraudulent, vindictive, and manipulative conduct in executing an unlawful conversion plan (*id.*, ¶¶ 119-120). In other words, Plaintiff has alleged that Defendants engaged in a conversion plan that was unlawful and is asking the Court to determine the parties' rights and legal obligations. This is precisely the kind of case that the CPLR has in mind as it relates to

declaratory judgments. Therefore, Plaintiff has met her burden of demonstrating that this is a proper case for a declaratory judgment.

Defendants argue that Plaintiff is not entitled to a declaratory judgment because the Partnership no longer exists, and it would therefore prevent the business from operating. But this is a factual assertion that cannot and should not be determined at this stage in the proceedings. There is no conceivable reason why the Court cannot order the Defendants to restore all parties' interests to the status quo ante if Plaintiff is successful in establishing that the conversion was improper and should be declared void ab initio. Defendants' argument, which essentially boils down to an assertion that they should not be compelled to undo the conversion even if it was improper because it would be inconvenient for them, holds no legal weight whatsoever and is not a basis for dismissal.

POINT III

PLAINTIFF HAS STATED A CAUSE OF ACTION UNDER ARTICLE 8-A OF THE NEW YORK PARTNERSHIP LAW AND SECTION 1006 OF THE NEW YORK LIMITED LIABILITY COMPANY LAW

Plaintiff's second cause of action asserts, in the alternative, that Plaintiff is a dissenting partner of the Partnership and is entitled to a fair value appraisal and buyout of her Partnership interest, which were never offered to her despite Defendants' obligation under the law to do so (Am. Compl. ¶¶ 122-129).

Defendants attempt to dismiss these causes of actions on the following grounds: (1) there is no conversion statute in New York; (2) RULPA §121-1106 is inapplicable to Defendants' "reorganization" of the limited partnership; (3) Plaintiff did not file a written notice of dissent prior to the meeting at which a merger or consolidation was to be voted on; and (4) Plaintiff's claim is

time barred. As demonstrated herein, Defendants' arguments are meritless and its motion to dismiss on these grounds should be denied.

A. Limited Liability Company Law §1006 Governed the Conversion of Brisbane Associates Limited Partnership to Brisbane Associates, LLC

Throughout their moving papers, Defendants erroneously claim that there is no conversion statute in New York (Def.'s Mem. of Law in Support at 4, 27). Contrary to Defendants' assertions, New York Limited Liability Company Law § 1006 governs the conversion of a New York limited partnership into a foreign limited liability company (*see* N.Y. LLC Law § 1006[b]). Section 17-901 of the Delaware LLC Act provides that the organizational and internal affairs of foreign limited partnerships are governed under the law of the jurisdiction where organized (*see* Del. L.L.C.A. § 17-901). Conversion is directly related to a limited partnership's internal affairs, therefore the law of the state in which the partnership is organized governs with respect to the conversion (*Miller v Ross*, 2007 N.Y. Slip Op 52683[U] [Sup. Ct., NY County 2007], *aff'd* 40 AD3d 730 [1st Dept 2007] [affirming trial court's determination that conversion of a New York limited partnership to a Delaware limited liability company was a nullity due to violation of Limited Liability Company Law §1006]).

Defendants' characterization of the conversion of Brisbane Associates Limited Partnership to Brisbane Associates, LLC as a "reorganization" of the company is a feeble attempt to escape the obligations imposed on the limited partnership under Limited Liability Company Law §1006. Notably, in the time leading up to the conversion, the General Partners consistently represented that the creation of Brisbane Associates, LLC in lieu of Brisbane Associates Limited Partnership was a "conversion" of the limited partnership (*see, e.g.*, Am. Comp., Ex. 8, 9, 15, 16, 31 and 33). It is evident that this was a conversion of a limited partnership into a limited liability company, regardless of what Defendants would prefer to call it. But if it was not a conversion, as Defendants

now contend, then the General Partners misled the Limited Partners by calling it a conversion (with all attendant Limited Partner protections) in the first place.

Defendants now deny that it was a conversion, just as they deny that it was a merger or a consolidation. But as they previously acknowledged, "it basically is the equivalent of moving peas under various shells" (Ex. 9 at 16), an admission that this was nothing more than a shell game designed to achieve the conversion while depriving the Limited Partners of their rights by simply calling it something else. What they fail to explain is that, to borrow their metaphor, by taking the shell with all of the peas and moving it into another shell, they affected a merger or consolidation, making the plan subject to the conversion statute. Either way, whether they want to call it a conversion, merger, consolidation, restructuring, or magic trick, Limited Liability Company Law §1006 controls.

B. Plaintiff is Entitled to Dissenting Partner Rights Under Article Eight-A of the Partnership Law.

Limited Liability Company Law §1006(c), in pertinent part, provides:

> The agreement of conversion shall be submitted to the general partners and limited partners of a limited partnership at a regular or special meeting called on twenty days notice or such other notice as the partnership agreement may provide. *A dissenting limited partner shall have the rights provided in article eight-A of the partnership law…*

(NY LLC Law § 1006[c] [emphasis added]).

Article 8-A of the partnership law is comprised of Revised Limited Partnership Act §121-101 *et seq.* ("RLPA"). There are three (3) provisions in the RLPA that address the rights of dissenting limited partners. These are: [1] RLPA §121-1102; [2] RLPA §121-1105; and [3] RLPA §121-1106. RLPA §121-1102(b) provides that in the event of a merger or consolidation, a limited partner may file a written notice of dissent. RLPA §121-1102(c) provides that upon the

effectiveness of the merger or consolidation the dissenting limited partner "shall not become or continue to be a limited partner or the surviving or resulting [entity], but shall be entitled to receiving cash…the fair value of his [or her] interest."

RLPA §121-1106 provides, in its pertinent part, as follows:

> The rights of any dissenting limited partner of any constituent limited partnership shall be as provided in this chapter whether the surviving or resulting entity is a limited partnership or a domestic or foreign other business entity.

(NY Partnership Law § 121-1106).

Defendants' interpretation of RLPA §§121-1102, 121-1105, and 121-1106, is that it only applies to mergers and consolidations. This would render Limited Liability Company Law §1006(c)'s reference to dissenting limited partner rights in the event of a conversion meaningless. Accordingly, their interpretation flies in the face of the statutory language and should be rejected.

Alternatively, the creation of the Company falls under the common law doctrine of a de facto merger. "A de facto merger occurs when a transaction, although not in form a merger, is in substance a consolidation or merger of seller and purchaser. The purpose of the doctrine of de facto merger is to avoid [the] patent injustice which might befall a party simply because a merger has been called something else" (*Washington Mut. Bank, FA v SIB Mtge. Corp.*, 2004 Slip Op. 505594 [Sup. Ct. NY County 2004] (internal citations and quotations omitted).

To find a de facto merger in the corporate world, the transaction must meet the following criteria:

> …[1] a continuity of the selling [entity], evidenced by same management, personnel, assets, and physical location; [2] a continuity of ownership in which the shareholders of the acquired corporation have been compensated with an interest (usually shares of stock) in the acquiring corporation; [3] a dissolution of the selling corporation; and [4] assumption of liabilities of the acquired corporation by the purchaser.

(*id.*; *see Cargo Partner AG v Albatrans, Inc.*, 352 F3d 41, 46 [2nd Cir 2003]; *Fitzgerald v Fahnestock Co.*, 286 AD2d 573, 574 [1st Dept 2001]).

Although it is a factual issue not appropriate for determination on a motion to dismiss, the conversion at issue in this case meets these criteria. Specifically, as alleged in the Amended Complaint, the first element of a de facto merger is satisfied because (1) the General Partners are now managers of the Company; and (2) all of the assets of the Partnership (*i.e.*, the family real estate holdings) are now owned by the Company. The second element of the de facto merger is also met as the general partners of the Partnership wind up with the same economic interest in the family real estate business that they had in the Partnership. The third element of a de facto merger is met as the Partnership was dissolved immediately after it was merged into the Company and stripped of its assets. The fourth element of a de facto merger is also satisfied as the Company assumed the liabilities of the Partnership.

Accordingly, whether the transaction is a conversion under Limited Liability Company Law §1006 or a de facto merger, it is respectfully submitted that RLPA §121-101 *et seq.* (referred to as the "Consolidation Statute" in Defendants' moving papers) applies to this transaction and Defendants' attempt to dismiss the first and second cause of action on these grounds must be denied.

C. Plaintiff Filed Written Dissent.

Defendants argue that Plaintiff's claim fails because she never filed a formal written dissent. The argument is without merit. RLPA §121-1102(b) provides, "[a]ny limited partner of a limited partnership which is a party to a proposed merger or consolidation may, prior to that time of the meeting at which such merger or consolidation is to be voted on, file with the limited partnership written notice of dissent from the proposed merger or consolidation." As alleged in

the Amended Complaint, and as demonstrated by the exhibits submitted therewith, Plaintiff objected in writing to the proposed conversion (*see, e.g.*, Ex. 23, 24, and 26), and Defendants acknowledged Plaintiff's objections to the conversion by stating that they understood her written objections to reflect her dissent from the conversion plan (*see* Ex. 24, 26, 33 ("From all the circumstances, including the two emails from you and Greg, we could only conclude you intended to challenge what we were doing."). As such, Defendants' motion to dismiss the second cause of action on these grounds must be denied.

D. Plaintiff's Claim is Not Time-Barred.

Defendants' calculation of the timeframe in which plaintiff was required to institute a proceeding is simply incorrect. Limited Liability Company Law § 1006(g) provides that the conversion takes effect when the certificate of limited partnership is canceled.

RLPA §121-1105(a) provides that "[w]ithin ten days after the occurrence of an event described in section 121-1102 of this article, the surviving or resulting limited partnership shall send to each dissenting former limited partner a written offer to pay in cash the fair value of such former partner's interest" (RLPA § 121-1105[a]). If the offer is accepted, payment must be made within 10 days (*id.*). If there is no agreement as to price to buy out the dissenting partner's interest within 90 days after the offer, or if the resulting entity fails to make the offer within the 10-day period after the conversion, the procedure set forth in Business Corporation Law §623(h)-(k) applies (*id.*; §121-1105[b]).

Business Corporation Law §623(h) provides as follows:

> (1) The Company shall, within 20 days after the expiration of the 90 day period (if an offer was made) or the 10 day period (if no offer was made), institute a special proceeding in Supreme Court to determine the rights of the dissenting partner and fix the value of their shares.
> (2) If the Company fails to institute such proceeding, the dissenting shareholder may do so within 30 days after the expiration of the 20 day period above.

(NY BCL § 623[h][1]-[h][2]).

Here, the conversion occurred on or about December 21, 2020. The time for Defendants to submit a written buy out expired 10 days after December 21, 2020, *i.e.*, December 31, 2020 (RLPA §121-1105[a]). It is undisputed that Defendants did not submit a written buyout offer. Therefore, according to BCL § 623(h)(1), Defendants had 20 days from December 31, 2020, *i.e.*, January 20, 2021, to institute a special proceeding in Supreme Court to determine the rights of the dissenting partners. Defendants did not institute such a proceeding. Accordingly, pursuant to BCL § 623(h)(2), Plaintiff, as a dissenting partner, had 30 days from January 20, 2021, *i.e.*, February 19, 2021, to institute an appraisal proceeding. Plaintiff commenced this action on February 19, 2021 by filing a Summons and Complaint. Accordingly, Plaintiff's action was commenced timely and Defendant's motion to dismiss on these grounds must be denied. Significantly, however, even if Plaintiff did not commence the appraisal proceeding in time (she did), BCL § 623(h)(2) provides that the Court may still hear the proceeding for good cause shown.

POINT IV

DEFENDANTS BREACHED THEIR FIDUCIARY DUTY TO PLAINTIFF

To state a cause of action for breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). Partners owe fiduciary duties to each other (*Le Bel v Donovan*, 96 AD3d 415, 417 [1st Dept 2012]), and in a limited partnership, general partners owe fiduciary duties to limited partners (*Appleton Acquisition, LLC v National Hous. Partnership*, 10 NY3d 250, 258 [2008]).

Here, Plaintiff has set forth sufficient allegations in the Amended Complaint to state a cause of action for breach of fiduciary duty against the General Partners. First, Plaintiff alleges that she was a limited partner in the Partnership in which the individual Defendants were general partners and therefore owed the Limited Partners, including Plaintiff, fiduciary duties (Am. Compl. ¶¶ 1, 15-19, 24, 28). Plaintiff specifically alleges that "[t]he General Partners owed duties of loyalty, honesty, care, and good faith, among others, to the Limited Partners, including to Plaintiff" (*id.* ¶ 131). Therefore, Plaintiff has pleaded the existence of a fiduciary relationship.

Second, the Amended Complaint is replete with allegations of the Defendants' misconduct against the Limited Partners and specifically against Plaintiff. Plaintiff alleges that the General Partners achieved the conversion "through material misrepresentations, sleight of hand, and outright lies, and misled Plaintiff and all of the Limited Partners, who are members of their own family, about the process and their true intentions" (*id.* ¶ 2). Plaintiff has set forth dozens of allegations concerning the Defendants' misconduct (*see, e.g., id.* ¶¶ 1-3, 28-29, 37, 43-44, 50, 55, 58, 60, 62, 69, 80, 91-100, 102-106, 114-115). As set forth in the Amended Complaint, Plaintiff alleges that, "[b]y adopting the Plan and by then attempting to deprive Plaintiff of her Partnership interest or a comparable interest in the Company to which she was entitled, the General Partners breached those duties" (*id.,* ¶ 132). In addition, Plaintiff alleges that "by taking membership interests in the Company and the designated Family LLCs with no attaching personal liability in exchange for their general partner interests in the Partnership, exposing them to unlimited personal liability … Defendants were in fact usurping substantial value for themselves at the expense of the Limited Partners, including Plaintiff" (*id.,* ¶ 133).

Plaintiff has also sufficiently alleged that she was harmed by the General Partners' actions. Specifically, Plaintiff alleges that "the result [of the foregoing conduct] was that the General

Partners arbitrarily deprived Plaintiff of the valuable Class A voting membership interest in the Company to which she was entitled, and instead relegated Plaintiff to a Class-B, non-voting membership in interest in the Company (*id.*, ¶ 3). Plaintiff alleges that "the Plan as ultimately executed stripped value from Plaintiff without her knowledge or consent," leaving her with an interest of substantially diminished value compared to the interest that she had in the Partnership and the interest she was entitled to receive in the Company (*id.*, ¶¶ 115, 156, 158). As a Class B member of the Company, with the "rights of an assignee" only, Plaintiff is not entitled to (i) vote on Company matters, (ii) access any information regarding Company transactions, (iii) inspect the Company's books and records, (iv) attend any meeting of the Members, or (v) participate in any correspondence or discussion of Company matters (Ex. 6, Brisbane Associates LLC Operating Agreement § 7.2). Plaintiff further alleges that "[t]he General Partners, as controlling members of the Company, disproportionately reduced the economic value of Plaintiff's interest in the Partnership" and "impinged upon Plaintiff's voting rights and right to access the books and records of the family business" (Am. Compl., ¶¶ 164-165). Therefore, Plaintiff has sufficiently pleaded the element of damages.

Defendants attempt to obscure the obvious misconduct of the General Partners in violation of their fiduciary duties alleged in the Amended Complaint behind vast piles of affidavits and an over-sized brief with lots of words and little substance. Ultimately, however, Defendants have provided nothing to refute the well-pleaded allegations in the Amended Complaint that the General Partners robbed Plaintiff of her valuable interest in the Partnership and exchanged it with an interest in the Company of substantially less value. They have failed to offer any evidence to conclusively disprove the allegations that Defendants singled out Plaintiff, a Limited Partner in

the Partnership, for disparate, unfair, and malicious treatment, as Plaintiff received an economic interest in the Company with no rights other than the right to receive distributions.

Nor have they conclusively established a defense to the allegations that the General Partners abused their authority and acted deceitfully and maliciously in structuring a plan through which they exchanged their partnership interests, which exposed them to unlimited personal liability to third parties and liability to the Limited Partners for breach of fiduciary duties, for membership interests in the Company and ultimately in the Family LLCs with no personal liability and with no such fiduciary duties to the Limited Partners. By doing so, the General Partners provided themselves with substantial additional value at the expense of the Limited Partners, including Plaintiff. The damages suffered by Plaintiff include, among other things, the amount by which the fair value of her full Partnership interest exceeds the fair value of her impotent Company interest.

To the extent that Defendants attempt to hide behind the business judgment rule to evade liability for their misconduct, they are sorely misguided. On a pre-discovery motion to dismiss, a well-pleaded cause of action for breach of fiduciary duty is not subject to dismissal pursuant to the business judgment rule, as any such dismissal would be premature (*Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665 [1st Dept 1993]; ["Pre-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where those pleadings suggest that the directors did not act in good faith"]). The issue of "[w]hether or not the business judgment rule applies at bar is a question of fact, involving the condition or state of the defendants' minds, which can be proved or judged only through evidence" (*Bryan v West 81 Street Owners Corp.*, 186 AD2d 514, 515 [1st Dept 1992] [internal citations and quotation marks omitted]). In addition, allegations that the General Partners deliberately singled out certain individuals, or in this case, one individual, for

disparate harmful treatment, permit judicial review of the business judgment rule's applicability (*Pokoik*, 115 AD3d at 428).

Here, based on well-established precedent in New York, Plaintiffs' allegations of deliberate misconduct and disparate treatment of Limited Partners by the General Partners mandate judicial inquiry to determine whether the business judgment rule provides a defense to Plaintiff's cause of action for breach of fiduciary duty. This inquiry necessarily implicates questions of fact concerning the General Partners' states of mind and intentions that can only be determined after discovery on a motion for summary judgment or at trial. Accordingly, the motion to dismiss should be denied with respect to the cause of action for breach of fiduciary duty.

POINT V

PLAINTIFF HAS STATED A CAUSE OF ACTION FOR FRAUD

To state cause of action for fraud, a plaintiff must allege (1) a material misrepresentation of fact, (2) knowledge of its falsity, (3) intent to induce reliance, (4) justifiable reliance by the plaintiff, and (5) damages (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Here, Plaintiff easily meets this standard.

As alleged in the Amended Complaint, the General Partners, acting through their counsel, represented to the Limited Partners, including Plaintiff, that the new entity's operating agreement would be essentially the same as the Partnership Agreement, that the new structure would not "depart substantially from what is currently in place," and that "[a]ll current GPs and LPs in each family group [will] become 'voting members' in their family llc," which statements were materially false, misleading, and deceptive (Am. Compl., ¶¶ 27-28, 35-37). In reality, the operating agreement was not essentially the same and the new structure was completely different from the old structure (*id.*, ¶¶ 27-28). Plaintiff further alleges that the General Partners represented

that "[a]ll current GPs and LPs in each family group [will] become 'voting members' in their family llc," which representation was false and deceptive as the voting rights of Class A members are illusory at best and Plaintiff, as a Class B member, has no voting rights at all (*id.*, ¶¶ 35-37).

Further, Plaintiff alleges that the General Partners falsely stated that Kenneth Frank was "not representing anyone and is simply preparing drafts for review and approval," whereas in reality, as Frank himself has acknowledged, despite his conflict of interest as the spouse of a General Partner, he is counsel to Brisbane Associates LLC and was previously counsel to Brisbane Associates Limited Partnership with respect to the conversion (*id.*, ¶¶ 42-43; *see* Frank Aff. ¶ 1).

Those allegations would be more than sufficient to plead the existence of misrepresentations of material fact, but there are many more. The Amended Complaint sets forth allegations that on December 6, 2020, at a meeting of the General and Limited Partners, Frank, speaking for and acting on behalf of the General Partners, once again falsely represented that the "Governing Agreements for [the] new entities will mirror current documents" (*id.*, ¶¶ 47-48, 61). Frank also stated that a "consolidation" had been rejected because it "involves potential government interaction," which is also false and misleading (*id.*, ¶ 48). In addition, Plaintiff alleges that the General Partners assured the Limited Partners that "copies [of the conversion documents] will go to everyone to review and you will have plenty of time to digest them before the deadline for signing," and that the General Partners were acting in their best interest and would do nothing to harm them (*id.*, ¶¶ 59-60).

These statements were, of course, false. The General Partners provided an incomplete set of conversion documents just 57 minutes before the deadline to sign and ultimately, the General Partners were not acting in Plaintiff's best interests; they were attempting to silence her, deny her the rights to which she is entitled, and diminish the value of her interest in the family business.

Critically, as set forth above, Kelley, a General Partner, falsely informed Limited Partners, including Plaintiff, that "in the new structure you will have a vote on certain major decisions which you did not have before" (*id.*, ¶ 65). This statement was false because the General Partners knew that following the conversion, Plaintiff would not have the right to vote on anything, and even the ostensible right of Class A members of the Family LLCs to vote is virtually meaningless as the managing members have the ultimate say on all Family LLC matters.

The remaining allegations in the Amended Complaint of false statements, misrepresentations, and omissions of material fact made by the General Partners are too numerous to list here, but a recitation of the allegations set forth in paragraphs 137-140 drives the point home:

> 137. Defendants misrepresented or in representing omitted a material fact that noncontributing Limited Partners would lose their Partnership interests and would not receive an interest in the Company comparable to that Partnership interest.
>
> 138. Defendants misrepresented or in representing, omitted a material fact that all Partners were to receive pro rata membership interests in their respective Family LLCs rights, powers and privileges with respect to the family real estate business comparable to their Partnership interests.
>
> 139. Defendants falsely misrepresented or in representing, omitted a material fact that all members, even those who previously held limited partnership interests in the Partnership, would not have a voice in the major decisions taken, or to be taken, by the Company.
>
> 140. Defendants falsely misrepresented or in representing, omitted a material fact that by taking membership interests in the pertinent Family LLCs, with no attendant personal liability in exchange for their general partnership interests in the Partnership, which exposed them to unlimited personal liability, and in eliminating the fiduciary duties owed by them to the Limited Partners, the General Partners were in fact acting in their own self-interests and usurping substantial value for themselves at the expense of the Limited Partners, including Plaintiff (*id.*, ¶¶ 137-140).

Accordingly, Plaintiff has sufficiently pleaded misrepresentations of material fact.

Plaintiff also alleges that "Defendants made the foregoing misrepresentations and omissions knowing and believing that they were false when made or with reckless

indifference to the truth thereof" (*id.*, ¶ 141), and that such misrepresentations were made with the intent to induce Plaintiff to believe that the General Partners were acting in her best interest and to acquiesce to their plan (*id.*, ¶¶ 142-144). The allegations in the Amended Complaint support the inference that the General Partners intended to induce such reliance so that Plaintiff and the other Limited Partners would simply trust them without availing themselves of all opportunities that were available to challenge the conversion plan, including, but not limited to, taking legal action.

Moreover, Plaintiff sufficiently pleads that she relied on the Defendants' material misrepresentations in her review of the various conversion documents to her detriment (*id.*, ¶ 144). The allegations in the Amended Complaint support the inference that such reliance was justified, as Plaintiff was reasonable in her belief that members of her own family (*id.* ¶ 2), who are twice her age and have significantly more real estate experience, would only act in her best interest as they had assured her they would, and that they would not lie to her or hide their true intentions.

Defendants attempt to avoid the consequences of their actions by asserting that Plaintiff could not have justifiably relied on their false representations because she is a lawyer. The argument fails. Initially, the element of justifiable reliance requires a fact-intensive inquiry and is rarely amenable to determination on a motion to dismiss (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1045 [2015], citing *DJ Mgmt., LLC v. Rhone Grp, LLC*, 15 NY3d 147, 155-156 [2010] ["[T]he question of what constitutes reasonable reliance is not generally a question to be resolved as a matter of law on a motion to dismiss."]). Accordingly, it is sufficient at this stage that Plaintiff has alleged that she relied on the representations of the General Partners and their representatives, and affording the allegations the benefit of every favorable inference, such

reliance was justified because the General Partners were members of Plaintiff's own family (*id.*, ¶ 2), and they assured Plaintiff that she would have "plenty of time to digest" the final conversion documents before the being asked to sign them (*id.*, ¶ 59), and that she and the other Limited Partners should trust that the General Partners were acting in their best interests (*id.*, ¶ 60).

At one point, the General Partners communicated to Plaintiff that the new organization would operate in the same way as the Partnership, and that the final conversion agreements would "mirror the current partnership agreement as much as possible and will not contain any surprises" (*id.*, ¶ 61). Further, each of the General Partners is older than Plaintiff and highly sophisticated, with many more years—and in some cases decades—of experience than Plaintiff in complex real estate transactions. As a group they are comprised of distinguished college professors and multiple attorneys who have been practicing law longer than Plaintiff has been alive. As alleged in the Amended Complaint, "[t]he General Partners possess unique and specialized expertise with respect to the business dealings or the Partnership and are in a special position of confidence and trust with the Limited Partners, including Plaintiff" (*id.*, ¶ 148). Under the circumstances alleged, there can be no doubt that Plaintiff's reliance was justified.

As to the element of damages, this is clearly pleaded as well. Specifically, Plaintiff alleges that the General Partners "caused her to lose her rightful interest in the family's real estate holdings and wrongfully caused her to receive a non-voting interest in the Company, which was significantly less valuable than the Partnership interest which she had held prior to the alleged conversion" (*id.* ¶ 145). Plaintiff further alleges that the General Partners fraudulent actions were spiteful, malicious, "and done with such deliberate disregard of Plaintiff's rights as to be called willful and wanton" (*id.*).

Defendants' reference to increased distributions is irrelevant. All partners now receive higher distributions as a result, among other things, of a new lease for one of the properties. This has nothing to do with the Plaintiff's loss of voting and other rights and the diminished value of her interest. Based on the foregoing, Plaintiff has adequately pleaded each of the elements of the cause of action sounding in fraud, supported by detailed factual allegations, and Defendants' motion to dismiss this cause of action should be denied.

POINT VI

DEFENDANTS MADE NEGLIGENT MISREPRESENTATIONS

To prevail on a cause of action for negligent misrepresentation, a plaintiff must demonstrate: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*Mandaring Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Here, Plaintiff has alleged each element with particularity.

Initially, Plaintiff has adequately alleged the existence of a special or privity-like relationship. "A special relationship may be established by 'persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified'" (*Mandarin Trading Ltd.*, 16 NY3d at 180, quoting *Kimmell v Schaefer*, 89 NY2d 257 [1996]). Here, Plaintiff alleges that the General Partners owed fiduciary duties to Plaintiff and had a special relationship of trust and confidence with Plaintiff due to their status as family members, General Partners, and experienced real estate investors with unique and specialized expertise (Am. Comp., ¶¶ 147-148). Accordingly,

Plaintiff has pleaded the element of a special or privity-like relationship that imposes a duty on the General Partners to impart correct information.

Additionally, Plaintiff has satisfied the element that the information imparted by the General Partners was incorrect. To wit, Plaintiff alleges that "[t]he General Partners made materially false and misleading statements to the Limited Partners, including Plaintiff, regarding the benefits of the conversion, the propriety of the Plan, the membership interests that each Partner was to receive, and the rights to which they would be entitled" (*id.*, ¶ 149). But Plaintiff goes further than that by alleging specific examples, including that "Kelley stated in her December 15, 2020 email to Limited Partners, including Plaintiff, that '[i]n the new structure you have a vote on certain major decisions which you did not have before,'" which, as alleged throughout the Amended Complaint, was not true because Plaintiff does not have the right to vote on anything (*id.*, ¶ 150).

In another example, Plaintiff alleges that Kelley represented to Plaintiff what "[y]ou may be assured I have not and will not take any action which might be to [Plaintiff's] detriment," which, of course, was not true because Kelley and the rest of the General Partners decided to relegate Plaintiff to receive a non-voting membership interest with a significantly lower value compared to her interest in the Partnership and compared to the Class A membership interests that ***every other member*** received (*id.*, ¶ 151). Plaintiff further alleges that "[t]he General Partners also made false and misleading statements in the draft agreements and other documents that were circulated to Plaintiff that Plaintiff would have both voting rights and the right to seek inspection of the Company's books and records," but "these statements," like all of the foregoing statements, "were false and materially misleading," (*id.*, ¶ 153) as Plaintiff has no rights whatsoever, save for the

right to receive distributions. Thus, Plaintiff has adequately pleaded the that the statements made by the General Partners were incorrect.

Further, Plaintiff has sufficiently alleged the element of justifiable reliance. The Amended Complaint contains numerous factual allegations that demonstrate that Plaintiff's reliance on the General Partners' false and misleading statements was justified (*see, e.g.*, *id.*, ¶ 148 ["The General Partners possess unique and specialized expertise with respect to the business dealings of the partnership and are in a special position of confidence and trust with the Limited Partners, including Plaintiff, as family members who have led the Limited Partners to believe that they are acting in [their] best interests."]). As set forth above, it is simply irrelevant that Plaintiff is an attorney. Defendants cite no authority, nor does any authority exist, for the proposition that a license to practice law automatically disqualifies someone from relying on anyone else, no matter the circumstances.

Plaintiff was unequivocally justified in relying on her family members, who assured her that they would act in her best interest. Defendants fail to point to any documentary evidence to the contrary. And, in any event, the element of justifiable reliance necessarily requires a fact-specific inquiry and is generally not appropriate for determination on a motion to dismiss (*ACA Fin. Guar. Corp.*, 25 NY3d at 1045). Accordingly, Defendants' motion to dismiss Plaintiff's cause of action for negligent misrepresentation should be denied.

POINT VII

PLAINTIFF HAS STATED A CAUSE OF ACTION FOR MINORITY OPPRESSION

Defendants spend less than a page arguing that Plaintiff's minority oppression claim should be dismissed. As an initial matter, the case law, including cases cited by Defendants, provides that minority oppression conduct is a fact-specific inquiry most often inappropriate for dismissal on a

motion to dismiss (*Kassab v Kasab*, 56 Misc. 3d 1213(A), 65 N.Y.S.3d 492 [Sup. Ct., Queens County 2017] ["A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise."]; *see also Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 73 [1984] ["much will depend on the circumstances in the individual case."]).

Next, Defendants incorrectly argue that Plaintiff's claim should be dismissed because "her 1% interest in the family business has not changed." (Def.'s Mem. of Law in Support at 38). However, that statement is plainly erroneous as Defendants deprived Plaintiff of her valuable interest in the Partnership and secretly, and without Plaintiff's consent, converted her interest to "a non-voting Class B Unit" in a Delaware LLC "with no rights other than the right to distributions" (Am. Compl., ¶100). As pleaded in the Amended Complaint, at no point did Defendants disclose to Plaintiff that "a refusal to contribute [her] Partnership interest[] would result in a forfeiture of that interest and the receipt of a Class B unit in the Company" and a full deprivation "of all rights other than the right to receive distributions" (*id.*, ¶ 92). In fact, they made affirmative false representations to the contrary (*id.*, ¶ 97; Ex. 29). To wit, after Plaintiff was given 57 minutes to execute the Contribution Agreement, Defendant Mellen falsely informed Plaintiff that if she failed to execute the Contribution Agreement, she would remain "as [a] limited partner[] of the Partnership" (*id.*).

The Amended Complaint further provides that "[w]hile the Resolution required each Partner to exchange his or her Partnership interest for a comparable economic interest in his or her designated Family LLC, it did not inform a dissenting Limited Partner that a refusal to exchange would result in a forced inclusion in the Company as a holder of a non-voting Class B Unit with no rights other than the right to distributions" (*id.*, ¶100). However, after Plaintiff signed the

appropriate agreements, which Defendants refused to accept, "Plaintiff was informed that she had somehow forfeited her Partnership interest without her consent, that the Defendants had stripped the Partnership of all of its assets in any event, and that she now owned an impotent interest in the Company" (*id.*, ¶ 104). As pleaded in the Amended Complaint, contrary to Defendants' claims, "Plaintiff's rights were not the same, and that as a holder of a Class B unit, Plaintiff would no longer have any voting or inspection rights or other rights" (*id.*, ¶ 106).

Defendants' wrongful actions alleged in the Amended Complaint, including misrepresentations about the proposed transaction (*see id.*, ¶¶ 42-51); intentionally keeping Plaintiff in the dark about the proposed transaction; providing Plaintiff with no time to review and execute the "final" drafts of the agreements (*id.*, ¶¶ 57-58, 70-97), refusing to accept her signed agreements (*id.*, ¶¶ 101-103); and secretly converting her valuable Partnership interest into a non-voting economic interest in the Company (*id.*, ¶ 104), easily satisfy the pleading requirements to defeat Defendants' Motion to Dismiss. General Partners, who are "held to the extreme measure of candor, unselfishness and good faith … may not act for the aggrandizement or undue advantage of the fiduciar[ies] to the exclusion or detriment of the shareholders" (*Rusyniak v Gensini*, 629 F. Supp. 2d 203, 224–25 [N.D. N.Y. 2009] [citing New York cases]). But that is exactly what they have done here as alleged in the Amended Complaint.

Further, under well-established New York law and under the facts alleged in the Amended Complaint, Plaintiff could not have reasonably expected to be forced by the General Partners to join the Company as a Class B Unit member (*Matter of Imperatore*, 128 AD2d 707, 708 [2d Dept 1987] ["A minority shareholder is oppressed when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the shareholder's decision to join the venture"]; *Matter of Wiedy's Furniture Clearance*

Ctr. Co., Inc., 108 AD2d 81, 84 [3d Dept 1985] ["Applying this standard, we easily conclude that respondents' conduct in discharging petitioner from participation in all the family corporations was oppressive."]). The General Partners refused to accept Plaintiff's signed agreements and, as set forth above, although they have treated her as a dissenting partner, they failed to follow the law concerning a dissenting partner. The General Partners' wrongful conduct described above and in the Amended Complaint defeated any expectations that Plaintiff had with respect to the partnership and its conversion into an LLC.

As a result, Defendants' motion to dismiss the Sixth Cause of Action in the Amended Complaint should be denied.

POINT VIII

PLAINTIFF HAS STATED A CAUSE OF ACTION FOR UNJUST ENRICHMENT

The theory of unjust enrichment "is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). It is "rooted in 'the equitable principle that a person shall not be allowed to enrich himself [or herself] unjustly at the expense of another'" (*Georgia Malone & Co., Inc. v. Reider*, 19 NY3d 511, 516 [2012], quoting *Miller v. Schloss*, 218 NY 400, 407 [1916]). To state a cause of action for unjust enrichment, a plaintiff must allege "that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Mandarin Trading Ltd.*, 16 NY3d at 182). The plaintiff must allege at least some "connection between the parties that was not too attenuated," (*Georgia Malone & Co., Inc.*, 19 NY3d at 517) amounting to, at a minimum, "an awareness by [the defendant] of [the plaintiff's] existence" (*Mandarin Trading Ltd.*, 16 NY3d at 182).

Here, Plaintiff easily satisfies each element of the claim. Plaintiff alleges that "[a]s a result of Defendants' purported allocation of a non-voting membership interest in the Company to Plaintiff, Defendants have been unjustly enriched as they have created and received additional value to which they are not entitled" (*id.*, ¶ 170). In addition, Plaintiff alleges that the Defendants' "enrichment was to the detriment of and at the expense of Plaintiff, who was the only one to receive a non-voting membership interest and therefore suffered a loss of economic value, voting rights, and the right to access books and records of the family business as well as an accounting from the Company" (*id.*, ¶ 171). As Plaintiff explained, "Defendants' self-enrichment was unjustified and served no legitimate business purpose," and their enrichment at Plaintiff's expense is therefore "unconscionable" (*id.*, ¶ 172). Further, Plaintiff has alleged a sufficiently close relationship between the parties, as Plaintiff alleges, and Defendants cannot deny, that they are family members and fiduciaries on whom Plaintiff reasonably relied for information concerning the family business and the conversion transaction (*see, e.g., id.*, ¶¶ 147-148).

To the extent that Defendants argue that Plaintiff's unjust enrichment claim should be dismissed because there is an agreement between the parties, the argument is without merit. Defendants' entire theory of this case is that Plaintiff never signed the conversion agreements or that they never accepted them and that no agreement with Plaintiff ever took effect. But as Defendants concede over and over again, Plaintiff does not assert a cause of action for breach of contract in the Amended Complaint. It is therefore disingenuous at best to rely on contracts that Plaintiff does not rely on in the Amended Complaint and that Defendants deny exist to try to defeat Plaintiff's claims. Accordingly, Defendants' motion to dismiss Plaintiff's unjust enrichment claim should be denied.

POINT IX

PLAINTIFF HAS STATED A CAUSE OF ACTION FOR CONVERSION

The tort of conversion "takes place when someone, intentionally and without authority, assumes or exercised control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). Section 121-701 of the New York Partnership Law provides that "[a]n interest in a limited partnership is personal property."

Here, Plaintiff alleges that Plaintiff's interest in the Partnership was her personal property pursuant to Section 121-701 of the New York Property Law, and that Defendants deprived Plaintiff of her personal property by wrongfully dissolving the Partnership and leaving Plaintiff with an interest in an entity that is of comparatively less value (Am. Comp., ¶¶ 175-176). Plaintiff further alleges that Defendants converted all other identical Limited Partnership interests into voting membership interests in the surviving Family LLCs, but singled out Plaintiff, whose Partnership interest was of equal value to those of the other Limited Partners, to receive a new class of non-voting membership interests that she alone received, thereby taking away Plaintiff's personal property and replacing it with something of substantially less value. (*id.*, ¶¶ 177).

As set forth in the Amended Complaint, "Defendants have effectively usurped Plaintiff's valuable property and taken it for themselves to the exclusion of Plaintiff and for Defendants' sole benefit," and such taking was "inconsistent with and contrary to Plaintiff's rights of ownership of her property interest in the Partnership" (*id.*, ¶¶ 178-179). Therefore, based on the foregoing allegations, Plaintiff has sufficiently pleaded a cause of action for conversion and Defendants' motion to dismiss should be denied.

POINT X

DEFENDANTS FAIL TO COME FORWARD WITH DOCUMENTARY EVIDENCE SUFFICIENT TO ESTABLISH A DEFENSE TO ANY OF PLAINTIFF'S CLAIMS

Defendants move to dismiss pursuant to CPLR § 3211(a)(1), arguing that the documentary evidence submitted with their opposition papers provides a defense to Plaintiff's claims as a matter of law. In support of their motion, undermining the very point that they are attempting to make, Defendants submit ***hundreds of pages*** of self-serving Affidavits. The problem with Defendants' argument is that their own conclusory affidavits do little more than baldly deny Plaintiff's allegations and are not documentary evidence as a matter of law.

Time and time again the First Department has instructed that affidavits submitted by defendants disputing the accuracy of a plaintiff's allegations are not documentary evidence and may not be considered on a motion to dismiss pursuant to CPLR § 3211(a)(1) (*Serao*, 149 AD3d at 646 [1st Dept 2017] ["factual affidavits do not constitute documentary evidence within the meaning of the statute."]; *Tsimerman*, 40 AD3d at 242 ["These affidavits, which do no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint."]).

Therefore, putting aside that Defendants have transparently attempted to submit an extraordinary volume of papers to circumvent the already-generous word limit that they requested from the Court, the law could not be more clear that the mountain of affidavits are of no value on this motion to dismiss and should not be considered. But even if the Court considers the affidavits, the Court will see that each is essentially nothing more than the author's opinion (influenced by the General Partners' misrepresentations) about his or her own lack of damages. None of this has anything to do with Plaintiff's claims.

Simply put, at most, the affidavits establish that there are issues of fact in dispute that cannot be determined at this stage in the proceedings. Stated otherwise, the very "evidence" that Defendants hang their hats on demonstrates why dismissal is ***inappropriate*** and why their motion should be ***denied***.

POINT XI

THIS COURT HAS JURISDICTION OVER THIS ACTION BECAUSE THE ALLEGED FORUM SELECTION CLAUSES IN THE REORGANIZATION DOCUMENTS DO NOT APPLY TO ANY OF PLAINTIFF'S CLAIMS

Relying entirely on a prior pleading that has been superseded by the Amended Complaint, Defendants argue that forum selection and exculpation clauses allegedly contained in certain conversion documents are binding on Plaintiff and are a complete bar to this action. The argument is, of course, without merit.

A. Plaintiff's Allegations in the Prior Complaint Have no Bearing on the Instant Motion.

Initially, Defendants argue that Plaintiff is bound by allegations made in the original complaint concerning the enforceability of the conversion documents. Their position is confounding because their entire defense is premised on the theory that ***Plaintiff did not execute the conversion documents*** and there was never a binding agreement. Putting that aside, the argument fails as a matter of law. A plaintiff may amend his or her complaint once as of right or by leave of court (CPLR §§ 3011, 30259[a]-[b]). "An amended complaint supersedes all former complaints ***in all respects***" (*Vanyo v Buffalo Police Benevolent Association, Inc.*, 34 NY3d 1104, 1108 [2019] [emphasis added]). Once the amended complaint has been served, it "becomes the only complaint in the case" (*id.* at 1108-1109). Statements in earlier pleadings "do not . . .

constitute determinative judicial admissions which [Plaintiff] may never escape" (*Strategic Marketing and Comm., Inc. v Kmart Corp.*, 41 F. Supp. 2d 268, 271 [S.D. N.Y. 1998]).

Here, Plaintiff filed the Amended Complaint, which supersedes the original complaint in all respects. The Amended Complaint does not rely on the conversion documents and does not assert causes of action for breach of contract or any other causes of action based on the existence of any agreement. Plaintiff's claims neither arise from nor relate to the conversion documents, and they have no application here.

Incredibly, Defendants refuse to admit Plaintiff as a Class A member of her Family LLC on the ground that she never signed the conversion documents and they never took effect. Their entire defense is premised on the theory that there is no agreement between Plaintiff and Defendants concerning the conversion, the Company, or the Elinor LLC. Now, they attempt to rely on the forum selection and exculpation clauses in those very same documents, while denying that the documents exist in all other respects. Defendants should not be permitted to use the conversion documents as both a sword and a shield in this underhanded manner. Accordingly, Plaintiff's allegations in the original Complaint are not a bar to the claims asserted in the Amended Complaint and Defendants cannot rely on the very same agreements that they deny exist.

B. <u>This Court Has Jurisdiction Over Plaintiff's Claims</u>.

Defendants, apparently unwilling to remove arguments from their memorandum of law that no longer apply to the Amended Complaint, argue that Delaware courts have exclusive jurisdiction over this action based on a forum selection clause contained in the conversion documents, even though it is undisputed that Plaintiff's offer to be bound by those documents was unceremoniously rejected. Their argument fails for several reasons.

As a general rule, and as a matter of common sense, a party who is not a signatory to a contract is not bound to its terms (*see Kopelowitz & Co. v Mann*, 83 AD3d 793, 797 [2d Dept 2011]). In particular, a forum selection clause contained in an agreement generally cannot be enforced against a non-signatory to that agreement (*see Diesel Props S.r.L. v. Greystone Bus. Credit II LLC*, No. 07-civ-9580, 2008 WL 4833001, *12 [S.D. N.Y. 2008]; *News Ltd. v Australis Holdings Pty, Ltd.*, 293 AD2d 276, 277 [1st Dept 2002]; *L-3 Comms. Corp. v. Channel Tech., Inc.*, 291 AD2d 276, 277 [2d Dept 2002]).

Here, it is undisputed that Plaintiff did not execute the conversion documents (*see, e.g.*, Def.'s Mem. in Support at 14 ["Plaintiff elected not to execute the four-page Contribution Agreement"]; *id.* at 43 ["She did not sign the documents she was requested to sign nor did she do so when she had the opportunity…Plaintiff is neither a signatory nor listed as a member."]). In fact, as stated above, Defendants' entire defense rests on the foundational premise that ***Plaintiff is not a party*** to the conversion documents. Nevertheless, Defendants attempt to avail themselves of the forum selection clause by arguing that Plaintiff is a party to the agreements for that limited purpose while denying Plaintiff the benefits of those same agreements.

Astoundingly, Defendants ask the Court to disregard the undisputed fact that Plaintiff is not bound by any agreements and to enforce the forum selection clause on Plaintiff. Defendants' argument should be rejected. In sum, the forum selection clause does not apply and this Court has jurisdiction over all of Plaintiff's claims.

C. <u>The Contribution Agreement Does Not Bar Recovery</u>.

Next, Defendants argue that a certain exculpation clause in the Contribution Agreements bars Plaintiff's claims. This argument, however, fails. As alleged in the Amended Complaint and

as set forth herein, Defendants rejected Plaintiff's executed conversion documents, including the Contribution Agreement, and it therefore never took effect.

Putting that aside, as Defendants concede, limitations on liability may be set aside for grossly negligent conduct, which may be established where a party's conduct "smacks of intentional wrongdoing" or "evidences a reckless indifference to the rights of others" (*Matter of Part 60 v Morgan Stanley Mortgage*, 36 NY3d 342, 354 [2020] [internal quotation marks and citations omitted]). Plaintiff has set forth numerous detailed allegations of Defendants' intentional wrongdoing and reckless indifference to Plaintiff's rights (*see, e.g.*, Am. Compl., ¶ 120 ["[Defendants] actively and deliberately misled Limited Partners, including Plaintiff, regarding the benefits of the Plan and the rights that they would have in the Company after the Plan was executed, [and] achieved execution of the Plan by fraudulent and manipulative means"]; *id.*, ¶ 135 ["Defendants' conduct was spiteful, malicious, and fraudulent, and done with such conscious and deliberate disregard of Plaintiff's rights as to be called willful and wanton."]).

These allegations are by no means conclusory as Defendants contend; rather, they are supported by detailed factual allegations of Defendants' conduct throughout the Amended Complaint. Indeed, the entire basis for the Amended Complaint is that Defendants singled out Plaintiff to receive a non-voting membership interest of diminished value in reckless disregard of her rights. Therefore, even if the Exculpation Clause applied (it does not), Plaintiff has set forth sufficient allegations of intentional wrongdoing and disregard of Plaintiff's rights to establish that the clause should be set aside.

POINT XII

PLAINTIFF CAN BRING AN ACTION AGAINST THE PARTNERSHIP IN CONNECTION WITH THE WINDING UP OF ITS AFFAIRS

Defendants argue that the Partnership cannot be sued because it has been dissolved. Defendants are incorrect.

Partnerships continue following dissolution for the purpose of winding up their affairs (Partnership Law § 61), and courts have consistently held that a recently-dissolved partnership is amenable to suit with respect to its actions and liabilities incurred prior to dissolution as part of the winding up of its affairs (*see Larroca v Royal Assocs., LLC*, 289 AD2d 191, 192 [2d Dept 2001]; *Emerson Radio & Phonograph Corp. v Eskind*, 228 NYS2d 841, 843 [Sup. Ct., NY County, Sp. Term 1957]). In addition, Partnership Law § 69(2)(a)(ii) provides that "[w]hen dissolution is caused in contravention of the partnership agreement…[e]ach partner who has not caused dissolution wrongfully shall have…[t]he right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement" (*see Congel v Malfitano*, 31 NY3d 272, 290 [2018]).

Accordingly, the Partnership cannot hide behind its purported dissolution to escape liability for its tortious conduct that occurred while it was still in existence. A contrary result would be untenable; under Defendants' theory, any partnership could avoid the consequences of its harmful actions and escape liability for its obligations by simply dissolving. That is not the law. Therefore, this action, which challenges the dissolution itself, is part of the winding up of the partnership's affairs and the Partnership is therefore a proper defendant.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants' motion to dismiss in its entirety.

Respectfully submitted,

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WORD COUNT CERTIFICATION

I, Ernest E. Badway, in accordance with 22 NYCRR § 202.8-b, certify that the foregoing memorandum of law in opposition to defendants' motion to dismiss contains 14,756 words, as counted by Microsoft Word's word-processing system, excluding the caption, date, and signature.

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New York, New York

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