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

SECOND MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT BY DEFENDANTS

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INTRODUCTION

INTRODUCTION

Brisbane Associates, a New York limited partnership (the Partnership),[1] Brisbane Associates LLC, a Delaware limited liability company (the Company), Seward Brisbane LLC, Alice Brisbane LLC, Elinor Brisbane LLC, Sarah Brisbane LLC (each a Delaware limited liability company, collectively the Family LLCs), Chase Mellen III (Chase), Abigail Mellen (Abigail), Charles A. Brisbane (Chad), Darcy Brisbane Kelley (Darcy), and Allaire B. Stallsmith (Allaire)(collectively, the Individuals)(the Partnership, the Company, the Family LLCs and the Individuals collectively the Defendants) submit this memorandum of law in support of their motion for an order dismissing the Amended Complaint (the Amended Complaint) of Danielle Shalov (Plaintiff) as against them on the grounds that pursuant to (i) CPLR 3211(a)(1) "a defense is founded upon documentary evidence," (ii) CPLR 3211(a)(2) "the court has not jurisdiction of the subject matter of the cause of action," (iii) CPLR 3211(a)(3) "the party asserting the cause of action has not legal capacity to sue," (iv) CPLR 3211(a)(7) "the Complaint fails to state a cause of action," and (v) CPLR 3211(a)(10) "the court should not proceed in the absence of a person who should be a party."

This is Plaintiff's second attempt at stating a cognizable claim and once again she failed to do so. Unable to effectively oppose Defendants' motion to dismiss her initial complaint (the Complaint), Plaintiff proceeded as if the motion were granted with leave to amend. In her Amended Complaint, Plaintiff now paints this case with a broad factual brush to divert attention from its fatal legal defects. Removing two counts[2], adding 44 additional "statements of fact" and

[1] While the Partnership is named here and discussed throughout, the Partnership no longer exists and as discussed in Point Eight, it cannot be sued and cannot be represented by counsel.

[2] The numbered counts in the Amended Complaint skip from the Seventh to the Tenth.

27 exhibits, she camouflages the issues about as effectively as a child makes itself invisible by covering its eyes.

Plaintiff may have hoped to lure Defendants into a factual argument, but Defendants decline to take that bait. Unambiguous principles of law applied the words of the Amended Complaint, the exhibits and uncontroverted documentary evidence including Plaintiff's express admissions, require dismissal with prejudice. Unless expressly stated herein, references to Plaintiff's false allegations do not relate to the merits of this case, but instead are intended to illustrate the lack of substance—and good faith—of this case.

Despite Plaintiff's effort to tell a new story, the absence of jurisdiction and other glaring defects still remain. Plaintiff cannot escape sworn admissions in the initial Complaint establishing the enforceability of documents which preclude her from maintaining this lawsuit. The following narrative is provided only for context to put Plaintiff's allegations in perspective. Only a very few central, undisputed facts are relevant to the issues before this Court and nothing contained herein is intended to suggest otherwise or validate Plaintiff's attempt at distraction.

This is a lawsuit by the owner of a 1% non-voting interest in a family business against all of her family members who own the other 99%—including her mother, four other individual relatives individually, and entities owned by herself, her mother, her brother, her aunt, her three first cousins and 15 other cousins—because she declined opportunities presented to her in connection with a reorganization of the Partnership (Reorganization) and is unhappy that she couldn't reverse her decision after the Reorganization was complete. The Reorganization merely transferred the operations of a limited partnership to a limited liability company and Plaintiff freely admits she was the *only* partner who did not accept an entirely voluntary offer to exchange her limited partnership interest for a membership interest in a Family LLC—having absolutely

no economic impact whatsoever—before the transaction took place. (Am.Compl.¶98.) In fact, every other limited partner accepted that offer and Plaintiff expressly refused to do so knowing it would expire after the deadline. (Am.Compl.¶99.)

Plaintiff continued to own her 1% limited partnership interest, but the partners owning the other 99% accepted the offer and their interests were divided among the four Family LLCs.[3] (Compl.Ex.6.) Ultimately, after its assets and operations were assumed by the Company, the Partnership made an in-kind distribution to each of the partners of their *pro rata* share of the Partnership's only remaining asset, resulting in Plaintiff's ownership of a substantially identical 1% non-voting interest in that entity.

The genesis of this Amended Complaint, asserting eight causes of action—including fraud—is the fact that after Plaintiff knew (i) new entities were formed and operating, (ii) 100% of the Partnership's assets were distributed to the partners, including Plaintiff, (iii) the Partnership was dissolved, and (iv) the Reorganization was complete, Plaintiff changed her mind and wanted to roll back the clock to allow her to retroactively accept the offer and transfer her partnership interest to a Family LLC—an impossibility since the Partnership no longer existed.

The Amended Complaint alleges that Plaintiff, *and the other limited partners,* were victims of fraud, misrepresentation and other intentional violations of their rights by the Individuals. Like so many other false statements, this is expressly refuted by the affidavits attached hereto as Exhibits E and Exhibits F from *100%* of the former limited partners. Plaintiff was the only limited partner to decline to join her Family LLC, none of the other limited partners agree with her allegations of impropriety.

[3] Three of the Family LLCs owned 25%, and Elinor Brisbane LLC (Elinor LLC) owned 24%.

As demonstrated herein, from the face of the Amended Complaint and incontrovertible documentary evidence, none of the causes of action state a justiciable claim for this Court as a matter of law and the Amended Complaint should be dismissed, with prejudice. In summary:

1. Exclusive Jurisdiction is Vested in Delaware Courts. (Causes of Action 1,3-10): Each of these causes of action is based on allegations concerning the Plan documents by which the Reorganization was implemented. On their face, the express language of the very documents Plaintiff sought to enforce in her verified Complaint requires dismissal of these causes of action. Each of those documents contains (i) binding, mandatory forum selection provisions irrevocably conferring exclusive jurisdiction on Delaware courts for all proceedings "relating in any way" to those documents, and (ii) binding and enforceable exculpatory clauses pursuant to which Plaintiff unconditionally and irrevocably waived, released, discharged and covenanted not to sue the Defendants for any and all present or future claims related to or arising from the documents.

2. The Reorganization Was Not a Merger or Consolidation (Causes of Action 1 and 2): As initially stated in ¶24 of the Amended Complaint and repeated multiple times, Plaintiff describes the Reorganization as a "Conversion" governed by "the provisions of the New York conversion statute, Section 1006." In the First Cause of Action Plaintiff alleges the "Conversion" was "done in violation" of the conversion statute and seeks a declaration that the Reorganization is void *ab initio*. (Am.Compl.¶119.) In the Third Cause of Action Plaintiff asserts entitlement to statutory remedies as a dissenting limited partner. (Am.Compl.¶129.)

New York has no "conversion statute." The provision referred to in ¶2 is found in §§121-1101 of the New York Revised Limited Partnership Act (RULPA) expressly governing "Merger and consolidation of limited partnerships" (the Consolidation Statute), in which the term "conversion" is never mentioned. As more fully discussed in Point Two below, those causes

of action must be dismissed because (i) the Reorganization was not a merger or a consolidation, (ii) the Complaint does not allege the Reorganization was a merger or consolidation and therefore fails to state a claim, (iii) Plaintiff cannot qualify as a dissenting limited partner, (iv) Plaintiff's claim is time barred and (v) Plaintiff has no capacity to assert any claim under the Consolidation Statute.

3. Plaintiff Has No Damages (All causes of action): Despite more than ten conclusory allegations that her interest is "worthless," lacks value, or she suffered unspecified damage, documentary evidence proves Plaintiff has no damages whatsoever. The Reorganization changed neither the business nor Plaintiff's interest in any material way—the entity operating the business simply changed from a limited partnership to a limited liability company in which Plaintiff continued to own the same 1% non-voting interest as before.

Plaintiff's allegations that her interest is now worthless or was substantially reduced are completely unsupported in the Complaint and defy reality. Documentary evidence proves in the ten years before the Reorganization, Plaintiff's 1% share of distributions from the Partnership totaled approximately $7,400 per year. As the culmination of two years of hard work by those relatives who manage the business—all of whom Plaintiff has now sued for fraud—her 1% share of distributions *after* the Reorganization from the exact same business increased almost 2½ times, to $18,000 per year. Representations in Plaintiff's Amended Complaint that Defendants' actions caused her 1% interest to lose its value are false. Plaintiff has suffered no compensable damage of any kind.

There are myriad other reasons to dismiss Plaintiff's causes of action, addressed in this memorandum as Points Three through Seven as follows:

4. The Complaint is Legally Deficient (Causes of Action 3-7 and 10): Plaintiff's pleading for tort claims of Breach of Fiduciary Duty, Fraud and Negligent Misrepresentation is woefully inadequate, lacking essential elements and supporting facts. Documentary evidence also proves nothing Plaintiff was told was untrue, she had full knowledge of all the facts, any alleged loss of rights are *de minimis* at best and result from her own actions.

5. No Minority Oppression (Cause of Action 6): Plaintiff cannot state a cause of action for minority oppression because acts merely disappointing a minority shareholder are not oppressive—her change of heart is not oppression.

6. No Conversion or Unjust Enrichment Cause of Action 7 and 10): Defendants have not converted Plaintiff's property or been unjustly enriched at Plaintiff's expense. Plaintiff's 1% interest in the family business remains unchanged, and in fact her distributions increased almost 2½ times since the Reorganization. Plaintiff's benefits continue to be exactly the same as always.

7. The Partnership Does Not Exist (Causes of Action 1-2): The Partnership was dissolved on December 21, 2020, when its assets were distributed and its term expired well before this Complaint was filed. A non-existent partnership it cannot be sued.

For all of those reasons the Complaint should be dismissed in its entirety with prejudice.

FACTS AND ALLEGATIONS

EARLY HISTORY

Arthur Brisbane created trusts in 1913 for each of his four children—Sarah Mellen, Alice Tooker, Seward Brisbane and Elinor Philbin (Elinor), to continue during their lives. (Compl.¶25; MellenAff¶4(attached hereto as exhibit a).) Defendant Brisbane Associates, a New York limited partnership, was formed as of January 1, 1978, by six partners for an initial five-

year term expiring on December 31, 1983.(Compl.¶25;MellenAff¶4,Ex1.) The original partners were Arthur's three surviving children and Sarah's three surviving children: Chase, Abigail and Michael B. McCrary. (MellenAff¶4,Ex1.) Each partner held both general and limited partnership interests. (*Id.*at5.)

The Partnership Agreement allocated equal 25% interests and equal votes as general partners to the families of each of Arthur's four children. (*Id.*) Four family "Groups" were established to include each of the four children or their descendants and their future transferees or assigns admitted as partners. (*Id.*at12-14.) The sole function of those Groups was to identify partners entitled to vote to elect a successor general partner for each Group. (*Id.*)

Partners had the absolute right to assign their interests to spouses, descendants of spouses, partners in other Groups, and anyone else approved by a majority of the general partners. (MellenAff;Ex10,14-19.) In fact, Seward Brisbane assigned a 3% limited partnership interest to his wife Doris who was admitted as a successor general partner when he died.[4] (MellenAff¶5Ex2.)

The Partnership Agreement

The Partnership's stated purpose was to hold, manage and/or liquidate real estate located in Carle Place, Town of North Hempstead, Nassau County, New York. (Mellen Aff¶6,Ex3.) Various transactions involving that property resulted in the Partnership's beneficial ownership of three separate parcels of real estate, each subject to a ground lease expected to provide a long-term, stable source of income for the partners. Between 2004 and 2008, title to each of those

[4] When Alice Tooker died on June 20, 1983, Allaire succeeded her as general partner and Chad became a general partner when Doris Brisbane died in 2006. At that time Elinor was the only living child of Arthur Brisbane.

properties was conveyed to single purpose LLCs, of which the Partnership was the sole member (collectively, the Subsidiaries). (MellenAff¶6.)

The Partnership Agreement leaves no doubt of the general partners' sole and absolute authority to take any lawful action with respect to the Partnership. That broad delegation of authority is set forth in §9.1:

> ….The General Partners, in *their absolute discretion*, *without notice to or the consent of any of the Limited Partners*, shall have the power on behalf of the Partnership to manage its affairs and conduct its business…

(MellenAff¶4Ex1at8.) That authority was reinforced by a broad power of attorney from the limited partners set forth in §9.2:

> To the extent that the exercise of any of the foregoing powers by the General Partners requires the consent of the Limited Partners, each of the Limited Partners hereby constitutes the General Partners acting hereunder from time to time…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.

(*Id*at10.) The role of limited partners described in §9.6 provides a stark contrast:

> None of the Limited Partners *shall take any part in, or interfere in any manner with*, the conduct or control of the Partnership's business, except for the exercise of the voting rights set forth in Section 9.5 hereof [election of successor general partners], and the Limited Partners shall have *no right or authority to act for or bind the partnership*. The foregoing limitation shall not apply to a Limited Partner who is also a General Partner.

(*Id*at14.)

Of particular relevance to this case, §13.1 of the Partnership Agreement authorized the general partners to dissolve the Partnership. Pursuant to §13.4, the general partners could, in their *sole discretion*, make an in-kind distribution of the Partnership's assets to the partners, upon

the completion of which, as stated in §13.8, "…the limited partners shall cease to be such…." (*Id*at23-24.)

Furthermore, in addition to the general power of attorney in §9.2, the limited partners granted the general partners another power of attorney in §14.1 of the Partnership Agreement, specifically related to the dissolution or termination of the Partnership:

> Each of the Limited Partners hereby constitutes and appoints the General Partners acting hereunder from time to time his or her true and lawful attorneys, with full power of substitution and resubstitution, in his or her name, place and stead, to make, execute, acknowledge and file:
> …
> (c) *any certificates and* <u>*other instruments*</u> which may be required *to effectuate the dissolution and termination of the Partnership*….

(*Id*at25.)

Any doubt that all limited partners are bound by those provisions is erased by §11.2, which states that any assignee of a limited partner's interest who wishes to be admitted as a substitute limited partner must execute a document satisfactory to the general partners agreeing to be bound by *all* provisions of the Partnership, expressly including the powers of attorney described above. (*Id*at18-19.)

<u>The Elinor Philbin Group</u>

In the first four years after the Partnership was formed Elinor transferred 3% limited partnership interests to each of her two daughters, Darcy and Harriet Kelley Staffa (Mandy) and in December 2008, she gave 1% limited partnership interests to each of her five grandchildren: Mandy's three children, Almendra Staffa, Aloisia Staffa, and Timothy Staffa (Timothy), and Darcy's two children, Alex C. Bockman (Alex) and Plaintiff Danielle Shalov. (Mellen Aff¶5,Ex2; KelleyAff(attached hereto as Exhibit B)¶4Ex1at2.) Each recipient executed a

document described in §11.2 of the Partnership Agreement, expressly agreeing to be bound by all provisions thereof.

When Elinor died on February 27, 2009, Darcy and Mandy inherited her remaining 14%, divided equally between them and Darcy was admitted as her successor general partner. (Kelley Aff ¶4, Exhibit 1 at 3.) From that point until December 21, 2020, Darcy and Mandy collectively owned 20% of the partnership interests, and their five children owned 1% each. (*Id.*) The final Amendment to the Partnership Agreement confirmed all of the above and extended the Partnership's term to December 31, 2020. (Kelley Aff ¶5 Ex 2 at 9-10.)

The Reorganization Plan

By 2020 the number of partners had grown to 21 (*Id.*), and the stability of some of their properties was in doubt. (Mellen Aff ¶7.) A limited partnership may have been appropriate for a small family partnership more than 40 years ago, but far better alternatives were available in 2020 to accommodate the financial, tax and management issues the Partnership now faced. (*Id.*)

In mid-2019 the Partnership initiated an evaluation of potential organizational changes. After 18 months of study, consultation with outside counsel, and extensive discussions among all partners, there appeared to be universal support for the Reorganization in which the Partnership's operations would be assumed by the Company, a newly formed Delaware LLC. (*Id*, Complaint Exhibit 1.) Reflecting the growing and diversified nature of the partners and their families, the Reorganization also allowed partners wishing to do so to transfer their individual partnership interests to one of four newly formed Delaware limited liability companies (collectively, the Family LLCs) each of which would be admitted as a substitute general partner owning the aggregate partnership interests of the participating family members. As one of the final steps in

the Reorganization, the Partnership would make an in-kind distribution to each partner of their *pro rata* share of that ownership. (MellenAff¶7.)

In December 5, 2020, Kenneth Frank (Frank), Darcy's husband and a lawyer, made a PowerPoint presentation to the members of the Elinor Group, including Plaintiff, describing exactly how the Reorganization was to be accomplished, including the sequence of specific actions the general partners proposed to take (the Plan). (Frank Aff (attached hereto as Exhibit C) ¶4,Ex1.) Mr. Frank drew particular attention to the statements in one of the initial slides that on the advice of outside counsel, the Consolidation Statute did *not* apply. (*Id*.) That presentation described the different approach to be utilized by the Reorganization Plan and informed everyone final approval by the general partners would take place between December 10-14, after which the documents to effectuate the Reorganization would be circulated for review, comment and signature. (*Id*¶5.)

Joining a Family LLC was strictly voluntary, and all limited partners including Plaintiff were advised the interests of partners choosing not to do so would be unaffected—they would continue to own their individual partnership interests as they always had and, like all other partners, would receive their *pro rata* distribution of the ownership interests in the Company. (MellenAff¶¶7-8.)

By resolution dated December 13, 2020 (the Resolution), the general partners approved the Reorganization Plan and the initial forms of the documents (the Reorganization Documents)[5] were attached. (Compl.Ex1; MellenAff¶7; KelleyAff¶6.) Paragraph 3 of the Resolution

[5] The Reorganization Documents consist of an Initial Operating Agreement of the Company, a Contribution Agreement whereby partners transferred their partnership interests to a Family LLC, a Company Contribution Agreement pursuant to which the Partnership exchanged its membership interests in the Subsidiaries for 100% of the membership interests in the Company, an Amended and Restated Company Operating Agreement and a Distribution Agreement in which the Partnership makes an in-kind *pro rata* distribution of the membership interests in the Company to the partners.

authorized the partners to transfer their interests to a Family LLC and ¶6 expressly confirmed the status of partners electing not to do so:

> ….to the extent any consent or approval of any matter described herein may be required by a Limited Partner whose partnership interest was not transferred to their respective Family LLC, the General Partners have full power and authority to act on their behalf and consent to, approve or ratify all acts contemplated by this Resolution, and to execute, on behalf of such Limited Partner any documents signifying such consent, approval or ratification.

(Compl.Ex1at3.)

On Tuesday, December 15 a complete package of Reorganization Documents was sent to each limited partner advising them the deadline for returning executed Contribution Agreements was the end of Friday, December 18. (Kelley Aff¶6Ex3.) Plaintiff, herself a lawyer, forwarded the package to her attorney that day. (Bockman Aff (attached hereto as Exhibit D)¶3 Ex1.) By December 18 every partner returned a signed Contribution Agreement—except Plaintiff and her brother Alex. All told, Plaintiff received and thoroughly reviewed *six* copies of the Contribution Agreement before the deadline. (Kelley Aff¶¶6-11Ex3-8.)

The Process was Fair, Lawful and Conducted in Good Faith

The Complaint is rife with conclusory allegations that Defendants violated the Partnership Agreement, but nowhere does Plaintiff cite any specific provision. In ¶¶30 and 76 Plaintiff asserts the Partnership Agreement requires a meeting for which advance notice is required but refers to no section of the Partnership Agreement because there is none. The *only* meeting mentioned at all in the Partnership Agreement relates to the exercise of rights of first refusal of an offer to buy a partnership interest. (Mellen Aff¶4Ex1.) In any event, Plaintiff was expressly informed in a detailed PowerPoint presentation on December 5, 2020, of exactly what the Plan would consist of, and was expressly told it was *not* being implemented pursuant to the Consolidation Statute. (Frank Aff¶4Ex1.)

Plaintiff wants this Court to believe Defendants unreasonably imposed a deadline to sign documents no one had any chance to review and merely wanted time to go over them with her lawyer. (Compl.¶48.) That bears absolutely no relationship to the truth whatsoever. The full package of Reorganization Documents was provided on December 15 (Compl.¶39;KelleyAff¶6 exhibit 3) and Plaintiff sent them to her attorney that day. (BockmanAff¶3Ex1.) On December 16 the members of the Elinor Philbin group, including Plaintiff, collaborated on a detailed set of questions and comments, to which they received a written response in the morning of December 17. (FrankAff¶6Ex2-3.) A final version of the Contribution Agreement was attached in which corrections of the spelling of two names were the *only* changes from the original. (*Id* at exhibit 3.) That response also included the precise language of three or four substantive changes to the Family LLC Operating Agreement made in response to their questions. (*Id*.) When all partners had returned their executed Contribution Agreements on December 18 except Plaintiff and Alex, Darcy emailed them that evening reminding them their signatures were due, transmitting yet another copy of the Contribution Agreement. (KelleyAff¶8 exhibit 5.) Plaintiff simply replied she had not "been able to complete review." (*Id* ¶12Ex9.)

Over the course of the December19-20 weekend three additional copies of the Contribution Agreement and final Operating Agreement were emailed to Plaintiff. (KelleyAff¶¶9-11Ex6-8.) Darcy told them if they chose not join the Family LLC they would still retain their limited partnership interests, their economic interests would remain unchanged and they would ultimately have non-voting interests in the Company virtually identical to their non-voting limited partnership interests in the Partnership. (KelleyAff¶10Ex10.) The general partners met on Sunday, December 20, 2020, and extended the deadline until 9PM that night but because of a prior history of adversarial and/or hostile interactions with Plaintiff regarding

various Partnership matters, Chase informed Alex and Plaintiff such behavior would not be tolerated, the deadline was firm and upon its expiration they would remain as limited partners. (MellenAff¶9Ex4.)

Alex executed and delivered the Contribution Agreement and the Elinor LLC Operating Agreement by the extended deadline, but Plaintiff did not. (KelleyAff¶14Ex11;Compl.¶48.) Her husband Gregory Shalov (Gregory) sent an email claiming among other things adoption of the Plan violated the Partnership Agreement. (KelleyAff¶15Ex12.) Plaintiff emailed Chase refusing to sign the documents *and* refusing to accept a continuation of her limited partnership status. She concluded by saying, "I am represented by counsel. Please direct all future communications to him." (MellenAff¶10Ex5.)

Implementation of the Plan required a series of actions to be taken in a specific order, each dependent upon completion of the one before. (MellenAff¶11.) The general partners had full authority to execute the Plan, but a deadline for execution of all Contribution Agreements was necessary for unquestionably valid, good-faith business reasons. (*Id.*) Outside counsel advised the Partnership for tax reasons the transfers of partnership interests to the Family LLCs should be completed before the remaining steps of the Plan, and the *pro rata* in-kind distribution of the Partnership's assets to each partner obviously could not occur without knowing the percentage interest owned by each partner—whether a Family LLC or an individual. (*Id*.)

When Plaintiff elected not to execute the four-page Contribution Agreement, the ownership percentage of each partner was established enabling the remaining steps of the Plan to proceed in an orderly fashion. Three of the Family LLCs each owned 25% of the partnership interests, Elinor LLC owned 24%, and Plaintiff owned a 1% limited partnership interest individually. (Complaint Exhibit 3 at 6; MellenAff¶12.)

Final Operating Agreements for the Company and all of the Family LLCs were signed on December 21, and pursuant to the Distribution Agreement the Partnership made an in-kind distribution of its only remaining asset—the 100% ownership interest in the Company—*pro rata* to each partner in accordance with those percentages. (*Id*.) As set forth in §13.8 of the Partnership Agreement, having distributed all of its assets on December 21, the Partnership no longer had any limited partners and therefore ceased to be a limited partnership and was dissolved as a matter of law. (MellenAff¶12 exhibit 1 at 25.)

Plaintiff seeks to create the impression that this lawsuit is necessary because she is a victim of arbitrary and unreasonable hostility and suing her family where she has suffered no loss whatsoever is the only alternative, as stated in ¶8, that she "attempted on numerous occasions to diffuse this already toxic situation amicably, but each of her attempts were met with nothing but hostility." Nothing could be further from the truth.

Multiple people attempted to help Plaintiff avoid this train wreck beforehand, and expressed willingness to find a solution after the Reorganization was completed. (Mellen Aff¶14; Kelley aff¶¶16-17.) Unfortunately, despite lip service to a desire to solve the problem, efforts by Chase and her mother were met with silence, accusations, totally inappropriate demands, insults and even threats. In mid-January, Plaintiff's husband, Gregory, not only demanded Darcy unilaterally sign documents amending two operating agreements, which of course she had no authority to do, he instructed her to do so without disclosing her actions to anyone in the family, expressly seeking to circumvent Chase. When she said she could not do that he said the following in a text exchange:

> I can't be more clear. There is no legal reason for your objection
> you are choosing not to do it. I will not engage in a legal argument.
> I have hired and paid attorneys for this and there is no dispute.

Darcy replied by saying "I am so sorry. I am happy to advocate for Danie," to which Gregory responded, "Not good enough. Period." (Kelley Aff¶17Ex13.)

Shortly thereafter Gregory's father, Barry Shalov, an attorney called Mr. Frank and demanded he prevail on Darcy to "fix" the problem. (Frank Aff¶18.) When Mr. Frank tried to explain the situation, Mr. Shalov began to scream at him, saying he was going to pay lawyers to "undo everything, including the Amazon deal [one source of the increased revenue]." (*Id*.) He was yelling so loudly, although Mr. Frank was holding his telephone to his ear, Mr. Shalov could be heard by people on the other side of the room. (*Id*.) Plaintiff refused to communicate with Darcy about this matter, implying the future of Darcy's relationship with her daughter and grandchildren was in jeopardy. (KelleyAff¶18.)

Chase, an attorney, wrote to Plaintiff several times, expressing a willingness to discuss the situation, while expressing concern about the effects of Plaintiff's retention of counsel. On January 27, 2021, he said the following:

> I'm sorry this seems so difficult. I know you are unhappy about and wish to change your Class B membership in our new LLC. I thought my earlier emails were clear that revisiting your self-imposed status will require generating a sense of confidence that the kinds of difficulties we've been experiencing won't continue.
>
> Only you can provide that reassurance and as I've said multiple times, if you want to discuss the situation with me I am happy to do so. But that is up to you.
>
> …I have been told by you and numerous other people that you've retained counsel to bring a major legal action against members of your family and/or one or more entities in which they have an interest. By asking for clarification I was trying to help move this along for your benefit, so I'm puzzled by your response suggesting we can ignore all that if we talk in one "capacity" versus another.
>
> I am a manager of the LLC, a holder of a substantial personal interest, the designated representative of other substantial interest holders and a lawyer. Regardless of which hat we put on

> my head, I can't pretend I don't know what I've been told. Without knowing what's going on it's impossible for me to have the kind of open and uninhibited discussion that's needed before there can be any meaningful consideration about changing the current status quo.
>
> If this is as important to you as it sure seems to be, this is a perfect opportunity to demonstrate a new and less defensive approach to communications about Brisbane Associates.

(MellenAff¶14Ex6.) Chase never received a reply. On February 11, counsel for Plaintiff sent a copy of the draft Complaint to all general partners. Throughout this process, Plaintiff's approach has been the same—everyone must either accommodate her or she will do whatever is necessary to force them to, whether it makes sense or not.

Jurisdiction and Venue

The causes of action in this case rely on documents irrevocably vest exclusive jurisdiction in Delaware. Therefore, pursuant to CPLR 3211(a)(1)&(2), documentary evidence conclusively demonstrates this Court "has not jurisdiction of the subject matter" of causes of action 2 and 4-10.

ARGUMENT

This is Plaintiff's second try at stating a cognizable claim, and she failed again. Although courts considering a motion to dismiss pursuant to CPLR 3211(a)(7) must afford the complaint a liberal construction, generally accepting the facts alleged within it as true, "bare legal conclusions… [and] factual claims flatly contradicted by the record are not entitled to any such consideration." *Webster v. Sherman*, 85 NY3d 457,460 (2d Dept 2018). Furthermore, the Complaint "must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *MatlinPatterson v. FedEx*, 87 AD3d 836,839 (1st Dept 2011). Where "documentary evidence… conclusively establishes a defense to the

asserted claims as a matter of law," dismissal is warranted under CPLR 3211(a)(1). *Leon v. Martinez*, 84 NY2d 83,88 (1994); *Scott v. BellAtlantic*, 282 AD2d 180,183 (1st Dept 2001).

POINT ONE
PLAINTIFF'S DELETION OF THE CONTROLLING DOCUMENTS FROM HER AMENDED COMPLAINT DOES NOT SAVE HER CLAIMS

(Third, Fourth, Fifth, Sixth, Seventh and Tenth[6] Causes of Action)

In ¶¶80-81 of the initial Verified Complaint, Plaintiff admits she executed and delivered the the Reorganization Documents and they are valid and binding. Those valid and binding documents contain valid and binding forum selection and exculpation clauses that Plaintiff wishes were not there. By filing an amended Complaint without attaching them and without making claims for breach of contract Plaintiff cannot sweep these Reorganization Documents under the rug. They are still the cornerstone of this litigation, referenced repeatedly in the amended Complaint, whether Plaintiff attached them or not.

A. Plaintiff's statements in her verified Complaint are sworn statements under oath that should be treated as an affidavit

Plaintiff has admitted that the Reorganization Documents are valid and binding. (Compl.¶¶ 81,83,90.) She filed a verified Complaint. A verification is a statement under oath that the pleading is true to the knowledge of the deponent. CPLR § 3020(a). A verification makes the pleading sworn and, therefore, is the equivalent of an affidavit and may be used for the same purposes. CPLR § 105(u). It is well settled that CPLR 105(u) permits the use of verified pleadings in lieu of affidavits. *Yoon Jung v. Gahee*, 150 AD3d 590,59 (1st Dept 2017); *see also JPMorgan, v. Clancy*, 117 AD3d 472,472 (1st Dept 2014) (a verified pleading may be used anytime an affidavit is called for).

[6] Plaintiff incorrectly numbered her Causes of Action and jumps from the Seventh Cause of Action to the Tenth Cause of Action on page 31. (Am. Compl. ¶¶ 169-174). Defendants will not address the Eighth or Ninth Causes of Action because they do not exist.

Moreover, statements made in a pleading verified by a person with personal knowledge of the content of the statements are formal judicial admissions. *Roxborough v. Kalish*, 2010N.Y.SlipOp.20402 (1st Dept 2010). A statement in a pleading constitutes a formal judicial admission which, even though subject to a subsequent, valid amendment, remains evidence of the facts admitted. *Bogoni v. Friedlander*, 197 AD2d 281,291-92 (1st Dept 1994). Even if it is subsequently amended, "[t]he prior complaint remains admissible as an informal judicial admission." *Id*. at 292-93; *Kwiecinski v. Chung*, 65 AD3d 1443,1444 (3d Dept 2009) (an admission of fact in an original pleading remains "evidence of the facts admitted" after the pleading is amended). While leave to amend a pleading is freely granted, the First Department has consistently held that, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted." *Non-Linear v. Braddis*, 243 AD2d 107,116 (1st Dept 1998).

As a result, the underlying statements in Plaintiff's verified Complaint may be used as an affidavit and are admissible as judicial admissions.

B. Delaware Courts Have Exclusive Jurisdiction Over These Claims

1. The Reorganization Documents Contain Enforceable Forum Selection Clauses

Plaintiff deleting her breach of contract claims and removed the Reorganization Documents as exhibits does not mean that her claims are not subject to exclusive jurisdiction in the State of Delaware. The Reorganization Documents contain the following provision:

> **Governing Law**. This Agreement shall be governed by, and interpreted in accordance with, the laws of the State of Delaware. . . *Any action or proceeding against the parties relating in any way to this Agreement* may be brought and enforced *exclusively in the courts of the State of Delaware* or (to the extent subject matter jurisdiction exists therefore) the U.S. District Court for the District of Delaware, and *the parties irrevocably submit to*

> *the jurisdiction of both such courts in respect of any such action or proceeding.*

The Third through Tenth causes of action are all inextricably related to these Reorganization Documents. Thus, despite Plaintiff's conclusory representations of jurisdiction and venue in the Complaint, Plaintiff cannot enforce documents or assert claims based on them against parties to those documents in this Court when jurisdiction is exclusively and irrevocably vested only in Delaware courts.

Courts of this state apply New York law to determine whether a forum selection clause should be enforced.[7] *Amazing Home v. Applied Underwriters*, No. 2019-05452,2021 WL559601,at*2 (1st Dept Feb. 16, 2021). *See also Boss v. Am. Express*., 6 NY3d 242,244 (2006) (New York law used to uphold validity of clause conferring jurisdiction on Minnesota court). *British W. Indies v. Banque*, 172 AD2d 234 (1st Dept 1991) (New York law used to uphold validity of forum selection clause for Luxembourg court).

Ever since the Supreme Court decided *M/S Bremen v. Zapata Off-Shore*, 407 US 1,15 (1972), saying "…in the light of present-day commercial realities… we conclude that the forum clause should control absent a strong showing that it should be set aside," New York courts and the overwhelming majority of other jurisdictions have treated forum selection clauses as *prima facie* valid. *See British West Indies*, 172 AD2d at 234.

In the words of the Court of Appeals, such clauses are enforced because they provide certainty and predictability in the resolution of disputes. *Brooke Grp. v. JCH Syndicate*, 87

[7] Delaware law would demand dismissal for the same reasons as New York law. Even if venue is proper where suit is filed and a court of competent jurisdiction exists, the court should decline to proceed with the cause when the parties have freely agreed litigation shall be conducted in another forum and where such agreement is not unreasonable at the time of litigation. *Elia Corp. v. Paul N. Howard*, 391 A.2d¶ 214, 216 (Del. Super. Ct. 1978).

NY2d 530,534 (1996). Absent a strong showing that it should be set aside, a forum selection agreement will control. *DiRuocco v. Flamingo Beach*, 163 AD2d 270,272 (2d Dept 1990).

Where a forum selection clause contains mandatory language, such as *shall* and *exclusive*, dismissal is required. *See Spirits of St. Louis v. Denver Nuggets*, 84 AD3d 454 (1st Dept 2011) (the term *shall* rendered the forum selection clause mandatory); *Alvogen Group Holdings v. Bayer Pharma*, 176 AD3d 551 (1st Dept 2019) (dismissing a claim in which the forum selection clause specified *exclusive* jurisdiction in Berlin). Without question, the forum selection clauses in these agreements are mandatory. They all say: "[this] agreement *shall* be governed by… [and] Any action or proceeding… relating in any way to this Agreement may be brought *exclusively* in… Delaware."

In *Somerset Fine Home v. Simplex*, 185 AD3d 752,753 (2d Dept 2020), the Court summarized the burden a challenging party must meet to overturn such a clause as repeatedly stated by numerous New York courts:

> A contractual forum selection clause is *prima facie* valid and enforceable unless it is shown by the challenging party to be unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or it is shown that a trial in the selected forum would be *so gravely difficult* that the challenging party would, for all practical purposes, be deprived of its day in court."

British West Indies, 172 AD2d at 234.

In the amended Complaint, while Plaintiff deleted her contract claims, she still asks for the same relief: order the Company (the LLC, which was formed pursuant to the Reorganization Documents) to change Plaintiff's status to a Class A membership "with all rights, powers and privileges otherwise attendant thereto." (Am.Compl.¶116.) This is the same as her original prayer for relief, in which she Plaintiff requested that the Conversion Agreement signed by Plaintiff and returned to the General Partners after the completion of the transaction should

confer on her an interest in Elinor LLC, with the same value, rights and privileges accorded to the other Elinor Partners. (Compl¶(b).) Plaintiff deleted the claims, and removed the documents as exhibits, because she knew that they were fatal to her claims. This action draws attention to the fact that she *knows* that the forum selection clauses must be enforced. Yet, Plaintiff still wrongly represents that jurisdiction and venue is proper in this Court. Her efforts to cherry pick those portions of the Agreements she wishes to enforce while ignoring those which dispose of her case should not be countenanced.

2. The non-contractual claims related to the Reorganization Documents are subject to the exclusive forum selection clauses

Plaintiff's blind eye toward the Reorganization Documents do not revive her non-contractual claims. Causes of Action 3-10 of the amended Complaint assert a variety of claims relating to the Reorganization Documents, arising from the same set of facts. *See*, *Hirschman v. National*, 184 AD2d 494 (2d Dept 1992) (dismissing fraud claims due to forum selection clause); *Union Estates v. Pillar*, No. 651796-2013, 2014WL1997166*6 (Sup Ct, NY County May 15, 2014) (dismissing negligent misrepresentation claims due to valid forum selection clause); *Madison Industries v. Garden Ridge*, No. 111640-2010,2011WL2746542 (Sup Ct, NY County July 3, 2011) (dismissing unjust enrichment, conversion and fraud claims due to valid forum selection clause).

Causes of Action 3-10 are non-contractual claims are either based on the Reorganization Documents themselves or allege tortious conduct by Defendants based on Plaintiff's interpretation of them. These claims involve the Reorganization Documents and unquestionably relate to and arise from the same set of facts as the contractual claims. The scope of the forum selection provision in the applicable Reorganization Documents extends to "[a] action or proceeding …relating *in any way* to this Agreement…." Therefore, those causes of action must

be dismissed under the exclusive jurisdiction clauses in the Reorganization Documents. Each of causes of action 3 through 10 relate to the Reorganization Documents as follows:

- Count 3 alleges breach of fiduciary duty against the Individual Defendants because the Contribution Agreement deprived Plaintiff of her Partnership interest and improperly provided the Individual Defendants with substantial value in Elinor LLC and other family LLCs at Plaintiff's expense. (Am.Compl.¶¶136-160.)

- Causes of Action 4 and 5 allege fraud[8] and negligent misrepresentation against the Individual Defendants based on their purported statements or omissions concerning the Plan and the Reorganization Documents. (Am.Compl.¶¶136-160.)

- Count 6 alleges minority oppression against the Individual Defendants based on their purported reduction of Plaintiff's interest in the Company pursuant to the Distribution Agreement because the former partners, except Plaintiff, elected to sign Contribution Agreements and join Elinor LLC and other family LLCs. (Am. Compl.¶¶161-168.)

- Count 7 alleges unjust enrichment against the Company, Elinor LLC and the Individual Defendants, claiming they received additional value as a result of the Distribution Agreement because they executed Contribution Agreements and Plaintiff did not. (Am.Compl.¶¶169-173.)

- Count 10 alleges conversion against the Company, Elinor LLC and the Individual Defendants, claiming the Distribution Agreement and resulting dissolution of the Partnership wrongfully deprived Plaintiff of certain assets and usurped them for their own benefit. (Am.Compl.¶¶174-181.)

No matter how Plaintiff dresses up her amended Complaint, she is still attempting to turn an invalid breach of contract claim into more. Plaintiff—herself a lawyer—reviewed all the Reorganization Documents with her attorney and asks this Court to enforce the Contribution Agreement she signed. (Am.Compl.¶¶116.) Whether or not she actually has any rights thereunder remains to be seen, but Plaintiff conceded the Reorganization Documents are "valid and binding" and that must include *all* of their provisions. Therefore, if Plaintiff wishes to assert

[8] Plaintiff cannot bootstrap an objection with her bare conclusory allegations of fraud because general allegations of fraud not related to the forum selection clause are unavailing. *Harry Casper v. Pines Assocs.*, 53 AD3d 764 (3d Dept 2008). Plaintiff did not allege anything about the forum selection clauses, let alone that they were procured by fraud. Any such allegation would be foreclosed by Plaintiff's statement that she executed the documents "after *reviewing the final draft* of *those documents and agreements with her counsel*…." (Complaint¶¶ 4,48.)

claims related in any way to the Reorganization Documents she must do so in Delaware, because those claims cannot be heard in New York. Therefore, for the reasons set forth in this Point One, each of causes of action 3-8 (all centered around the Reorganization Documents) should be dismissed pursuant to CPLR 3211(a)(1)(2)&(7), based on documentary evidence, this Court's lack of subject matter jurisdiction and failure to state a claim.

C. Other Express Provisions of the Agreements Bar Recovery

Although the forum selection provisions are dispositive and further construction of the contents of the Reorganization Documents must be undertaken by a Delaware court, other express language of the Reorganization Documents precludes Plaintiff's claims in these same causes of action.

Pursuant to ¶3 in both the Contribution Agreement and Company Contribution Agreement, Plaintiff expressly waived, released and discharged the Defendants from all claims, and agreed not to sue or otherwise attempt to enforce any personal obligation against Defendants for any matter related *in any way* to either Contribution Agreement:

> Exculpation. ….*no party shall have and no party will have any claims or causes of action against* any disclosed or undisclosed officer, director, employee, trustee, shareholder, partner, principal, parent, subsidiary or other affiliate of any other party or any officer, director, employee, trustee, shareholder, member or partner of any such parent, subsidiary or other affiliate (collectively, the "***Exculpated Parties***"), arising out of or in connection with this Contribution Agreement; each party shall look solely to the interest of any other party in the Assigned Interests or Contributee Interest, as applicable (or the proceeds thereof), for the satisfaction of any liability or obligation arising under this Contribution Agreement, and further *shall not sue or otherwise seek to enforce any personal obligation against any of the Exculpated Parties with respect to any matters arising out of or in connection with this Contribution Agreement.* Without limiting the generality of the foregoing provisions of this paragraph, each party hereby *unconditionally and irrevocably waives any and all claims and causes of action of any nature whatsoever* which it may now or hereafter have against the Exculpated Parties and hereby *unconditionally and irrevocably*

> *releases and discharges the Exculpated Parties from any and all liability whatsoever* which may now orhereafter accrue in favor of such party against the Exculpated Parties, in connection with or arising out of this Contribution Agreement.

(Complaint exhibits 2&4.)

It is well settled that contractual limitations on liability are generally enforceable.[9] *S.A. De Obras v. Bank of Nova Scotia*, 170 AD3d 468,472 (1st Dept 2019). Courts must honor contractual provisions limiting liability or damages because those provisions represent the parties' agreement on the allocation of the risk of economic loss in certain eventualities. *Nomura Home Equity v. Nomura Credit*, 30 NY3d 572,582 (2017); *see also L.K. Sta. Grp. v. Quantek Media*, 62 AD3d 487,490 (1st Dept 2009) (affirming dismissal where contract stated no indemnified party shall have any liability in contract, tort or otherwise); *Glatzer v. Grossman*, 47 AD3d 676,677 (2d Dept 2008) (defendant shareholders were shielded from liability by exculpatory provision in certificate of incorporation).

Limitations on liability may be set aside only for grossly negligent conduct. *Matter of Part 60 v. Morgan Stanley Mortgage*, 36 NY3d 342 (2020). To constitute gross negligence,[10] a party's conduct must "smack[ ] of intentional wrongdoing" or "evince[ ] a reckless indifference to the rights of others." *Id. quoting Sommer v. Fed. Signal Corp*., 79 NY2d 540, 554 (1992); *see also Premier-NY, Inc. v. Travelers Property Cas.*, 20 Misc 3d 1115(A) (Sup Ct, NY County 2008) (granting dismissal where valid exculpatory clause existed, and plaintiff provided only

[9] Exculpatory provisions in Delaware are similarly enforceable. *See Malpiede v. Townson*, 780 A.2d 1075 (Del 2001).

[10] The Supreme Court of Delaware has defined gross negligence as, "a higher level of negligence representing an extreme departure from the ordinary standard of care. Gross negligence refers to a decision so grossly off-the-mark as to amount to reckless indifference or a gross abuse of discretion. Under the law of entitles, gross negligence involves a devil-may-care attitude or indifference to a duty amounting to recklessness. To prevail on a claim of gross negligence, a plaintiff must plead and prove that the defendant was recklessly uninformed or acted outside the bounds of reason." *Metropolitan Life Ins. Co. v. Tremont Grp. Holdings, Inc*., No. CIV.A.7092-VCP, 2012 WL 6632681, at *7 (Del. Ch. Dec. 20, 2012).

conclusory allegations without concrete evidence to establish malice or willful misconduct). Here, Plaintiff has not alleged a claim of gross negligence. Instead, Plaintiff makes conclusory accusations of "malicious" conduct lacking any factual support whatsoever. Consequently, the gross negligence exception does not apply and the Exculpatory clause in the Contribution Agreements should be enforced.

If this Court reaches this issue, Plaintiff has irrevocably waived these claims, released the Defendants from all liability therefor, and agreed not to sue in New York, Delaware or anywhere else. Therefore causes of action 3-10 should be dismissed pursuant to CPLR 3211(a)(1)&(7), based on documentary evidence and because they fail to state a claim.

D. The Individual Defendants are improperly joined.

Finally, as explained in n. **Error! Bookmark not defined.** above, the Individual Defendants were *not* the "General Partners" who are named Defendants in these causes of action. The general partners were the Family LLCs and these causes of action should be dismissed as against the Individual Defendants.

POINT TWO
THE CONSOLIDATION STATUTE DOES NOT APPLY AND PLAINTIFF FAILS TO STATE ANY OTHER CLAIM IN CAUSES OF ACTION ONE AND THREE

(First and Second Causes of Action)

The first and second causes of action (both asserted against all Defendants) are grounded in whole or in part on alleged violations of or rights derived from the Consolidation Statute. Although the following discussion demonstrates the Consolidation Statute is entirely inapplicable to the Reorganization and Plaintiff has no viable cause of action with respect thereto, the First and Second Causes of Action should be dismissed in any event because under no circumstances is there any basis in law or fact to declare the Reorganization void and there is *no* mechanism to revive a now-dissolved partnership.

A. The Reorganization Was Not a Merger or Consolidation

Plaintiff may claim that she has "no idea" what was meant by the term "consolidation" when the Partnership decided to reject is as a transaction form, it is, quite simply, a simple form of transaction. It is a form of transaction that Plaintiff was informed was not taking place and, in fact, did not take place. As stated above on p. 4, there is no "conversion" statute in New York. The provision cited by Plaintiff is RULPA §121-1106, entitled "*Mergers* and *consolidations* involving other business entities" and is one of multiple provisions of the Consolidation Statute, pursuant to which a New York limited partnership may

> "*merge with*, or *consolidate into*, one or more other business entities formed under the law of this state or the law of any other state, in each case with the *surviving or resulting* entity being a limited partnership or a domestic or foreign other business entity…." (*Id.)*

Limited partnerships are creatures of statute in derogation of the common law, requiring strict compliance with statutory requirements. *See, e.g., Ruzicka v Rager*, 305 NY 191 (1953); *Lynn v Cohen*, 359 F Supp 565 (SDNY 1973). *See also, Bay Shore Family Partners v. Found. of Jewish Philanthropies*, 239 AD2d 373, 374 [2d Dept 1997], *app. denied*, 91 N.Y.2d 803, 668 N.Y.S.2d 558 (1997). The reach of the Consolidation Statute is clearly confined to mergers and consolidations as defined in RULPA §121-1101. Paraphrased to include participation by an out of state entity as permitted by §121-1106 and reflecting the actual context of the Plan, those terms are defined as follows:

> "Whenever used in this article, *'merger'* shall mean a procedure in which [the Partnership] and [the Company] *merge into a single [entity]* which shall be one of the [two of them] and '*consolidation'* shall mean a procedure in which a [the Partnership *and* a second entity*] consolidate into* [the Company] which shall be a new limited [liability company] to be formed pursuant to the consolidation."

RULPA § 121-1104 further provides that:

> "(a) all the property, real and personal, tangible and intangible, of [the Partnership] shall vest in the [Company as the] surviving or resulting [entity];
>
> (c) the *surviving or resulting* limited [liability company] shall be liable for all debts, obligations, liabilities and penalties of [the Partnership] as though each such debt, obligation, liability or penalty had been originally incurred by [the Company as] such surviving or resulting [entity]."

By its express terms, the Consolidation Statute contemplates a combination of two or more entities into a single "surviving" or "resulting" entity having responsibility for their collective liabilities, debts and other obligations. The Reorganization satisfies none of those essential requirements: (i) the Partnership and the Company retained their independent existence throughout the process, (ii) at no time did the Partnership become part of the Company, and (iii) under no circumstances did the Company assume any of the Partnership's liabilities.

The purpose of the Consolidation Statute is to protect creditors and limited partners of a New York limited partnership which either absorbs or is absorbed by another entity. Appraisal rights are appropriate for a merger or consolidation because the new entity is fundamentally different from the prior limited partnership and affords a remedy for a limited partner who believes their interest in the new entity is worth more than they were offered. In contrast, the Reorganization is not the type of event contemplated as a merger or consolidation; it is substantively equivalent to a name change—the Partnership merely transferred its operations to the Company, which owns the exact same assets as the Partnership and each partner owns the same percentage as before.

The Consolidation Statute certainly does not apply to transactions between separate entities, and unquestionably not to distributions to partners or the dissolution and winding up of a limited partnership, both of which are specifically dealt with by other provisions of the RULPA. For the same reason it confirms Plaintiff suffered no damage, the definition of "Partnership

interest" in RULPA § 121-101(m)—"(i) a partner's share of the profits and losses of a limited partnership; and (ii) a partner's right to receive distributions"—confirms the Reorganization does not have any of the characteristics of transactions the Consolidation Statute is intended to address. Plaintiff was entitled to receive distributions of a 1% share of the Partnership's profits and losses and is now entitled to receive distributions of a 1% share of profits and losses from the Company.

Not only does the Reorganization lack all of the essential requirements of the Consolidation Statue, nowhere does the Complaint allege the Reorganization was a merger or consolidation. In fact, by naming both the Company and the Partnership as Defendants, Plaintiff admits their separate existence and is estopped from claiming they constitute a single surviving entity—the most basic statutory characteristic of a merger or consolidation. Plaintiff also admits that she was informed that a consolidation had been expressly rejected as the form of transaction. (Am. Compl. ¶¶ 47-48.) Most importantly, Plaintiff admits the Partnership was dissolved after the Plan was completed (Am. Compl. ¶ 125), proving that nothing was merged or consolidated.

The Consolidation Statute does not apply as a matter of law and the first and second causes of action must be dismissed accordingly.

B. Plaintiff Is Not Entitled to Relief as a Dissenting Limited Partner

As stated above, because it is an entirely statutory entity, strict compliance with all applicable provisions is mandatory and only those remedies expressly provided by the legislature may be pursued. *See Appleton Acquisition v Natl. Hous. Partnership,* 10 NY3d 250 (2008).

Only a "dissenting limited partner" is entitled to payment for their interest under RULPA § 121-1105. In order to become a dissenting limited partner, RULPA § 121-1102(b) requires a limited partner to file a written notice of dissent prior to the meeting at which a merger or consolidation is to be voted on. Plaintiff never did so. Although she was told on December 5 the

general partners were scheduled to approve the Reorganization Plain between December 10-14, she never expressed any dissent orally or in writing, and in fact asked a number of questions about the Plan during that period, telling her cousin Timothy if there were "no surprises" she would sign the documents.[11] (FrankAff¶6Ex4.) The Court of Appeals left no doubt that failure to do so is fatal to any claim for the statutory remedy of payment as a dissenting limited partner. *Appleton*, 10 NY3d at 256. Not having filed such a notice, Plaintiff may not obtain the relief sought in the third cause of action, and it must therefore be dismissed.

C. Plaintiff's Claim is Time Barred

Because Defendants believed the Consolidation Statute did not apply and informed Plaintiff of that decision, no agreements of merger or consolidation were prepared, and no purchase offer was submitted to Plaintiff. Putting aside that the Consolidation Statute does not apply and Plaintiff never filed a notice as a dissenting limited partner, the Consolidation Statute requires the institution of a proceeding within a specific timeframe. The Plan was adopted on December 13 (Complaint exhibit 1), and pursuant to § 121-1105(a) the Partnership would have been required to make a written offer to Plaintiff within ten days, or by December 23. Since that did not occur, then pursuant to the provisions of § 623(h)-(k) the Partnership was required to institute a judicial proceeding 20 days later, or by January 13, 2021, and if it did not do so the Plaintiff had 30 days, or to February 12, 2021 to institute such a proceeding. The Complaint was not filed until February 19, however, by which time any hypothetical appraisal and buy-out rights had expired.

[11] Note that RULPA § 121-1102(c) provides that from the date the merger or consolidation is effective, a dissenting limited partner ceases to have any right to distributions from the resulting entity and shall rely on the statutory payment for their interest. In this case, however, Plaintiff accepted substantial distributions from the Company every month. (Mellen aff¶13)

Therefore, together with the other reasons set forth in this Point Two, causes of action 1 and 3 must be dismissed. Coupled with Point One, this disposes of all of Plaintiff's claims.

POINT THREE
PLAINTIFF'S TORT CLAIMS SUFFER PLEADING FAILURES AND ARE BELIED BY CLEAR DOCUMENTARY EVIDENCE

(Third, Fourth and Fifth Causes of Action)

These causes of action are asserted against the Individual Defendants. The Complaint, however, is devoid of any factual matter, let alone facts meeting heightened pleading standards, to support these tort claims.

A. Plaintiff Fails to Adequately Allege a Breach of Fiduciary Duty

1. The business judgment rule protects the Defendants' decisions

Restructuring a partnership into a limited liability company is hardly a controversial undertaking. *See Gebhardt Family v. Nations Title*, 132 Md. App 457 (2000) ("It is widely recognized that the allure of the limited liability company is its unique ability to bring together in a single business organization the best features of all other business forms.") Under the business judgment rule, a fiduciary's business decisions "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of the principals' purposes" are beyond the scope of judiciary scrutiny. *Levine v. Levine*, 184 AD2d 53,59 (1st Dept 1992).

Defendants exercised appropriate business judgment in restructuring the business—an LLC is a better vehicle for the business. *Elf Atochem North America v. Jaffari*, 727 A2d 286 (Del. 1999). "The limited liability company ("LLC") . . . is designed to achieve what is seemingly a simple concept—to permit persons or entities ("members") to join together in an environment of private ordering to form and operate the enterprise under an LLC agreement with tax benefits akin to a partnership and limited liability akin to the corporate form.").

Plaintiff argues, "by taking membership interests in the Company and the designated Family LLCs with no attaching personal liability in exchange for their general partner interest in the Partnership, exposing them to unlimited personal liability, and by the fiduciary duties owed by them to all Limited Partners, General Partner Defendants were in fact usurping substantial value for themselves at the expense of the Limited Partners." (Am.Compl.¶133.) However, Defendants good faith business decision to restructure the business as an LLC without personal liability, does not come close to overcoming the protection of the business judgment rule. When the partnership was formed, the only vehicle to provide favorable tax treatment and limited liability for the Limited Partners was to require the General Partners to accept unlimited personal liability. As such, the General Partners assumed this liability so that the Limited Partners could realize the benefits. By forming an LLC, Defendants made a good faith decision to better their business. Thus, Plaintiff has not met her burden.

2. Plaintiff inadequately pleads misconduct

To state a claim for breach of fiduciary duty, plaintiff must allege that (i) defendant owed them a fiduciary duty, (ii) defendant committed misconduct and (iii) they suffered damages caused by that misconduct.[12] *Burry v. Madison*, 84 AD3d 699,700 (1st Dept 2011). A plaintiff bringing a cause of action for breach of fiduciary duty must establish that the alleged misconduct was the direct and proximate cause of the losses claimed. *RNK Capital v. Natsource*, 76 AD3d 840,842 (1st Dept 2010). Under CPLR 3016(b), where a cause of action is based on breach of trust, the circumstances constituting the wrong shall be stated in detail. *See Beradi v. Beradi*, 108 AD3d 406 (1st Dept 2013) (dismissing breach of fiduciary duty where plaintiff's allegations

[12] Under Delaware law, breach of fiduciary duty requires proof of two elements: (1) the existence of a fiduciary duty; and (2) breach of that duty by the defendant. *Beard Research, Inc. v. Kates*, 8 A3d 573, 601 (Del. Ch. 2010).

that defendant tried to push her out of company operations, were vague, conclusory, and made without specificity).

Plaintiff failed to show Defendants committed misconduct that was the direct cause of any harm. The Complaint states in conclusory fashion "by attempting to deprive Plaintiff of her Partnership interest and her comparable interest in Elinor that she was entitled to receive, the General Partners breached their fiduciary duties to Plaintiff." (Am.Compl. ¶ 132.)[13] Yet, Plaintiff's own allegations establish that there was no misconduct by any of the Defendants—they offered her the opportunity to join her family LLC, they proceeded with the reorganization when she refused to sign and they distributed to her, in-kind, a 1% interest in the Company just as she had in the Partnership. (Am.Compl. ¶ 104.) Plaintiff has not pleaded a claim, in detail or otherwise.

B. Plaintiff Fails to Plead Any Recognizable Fraud with Particularity

Plaintiff's fraud claim is similarly deficient as the breach of fiduciary duty claim. In order to state a claim of fraud, the Plaintiff must allege: (i) a material misrepresentation of fact, (ii) made with knowledge of its falsity, (iii) with the intent to deceive, (iv) justifiable reliance and (v) damages.[14] *Desideri v. D.M.F.R. Group*, 230 AD2d 503,507 (1st Dept 1997). A fraud claim must also comply with CPLR 3016(b)'s requirement that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence,

[13] This allegation of breach is nearly identical to the contractual allegations in the underlying Complaint, stating "defendants have breached the agreements by failing and refusing to convey to Plaintiff the interest in Elinor to which she is entitled to under those agreements." (Complaint¶94.) An action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand. *Sayles v. Ferone*, 137 AD3d 486,528 (1st Dept 2016); *see also Courtney v. McDonald*, 176 AD3d 645,646 (1st Dept 2019) (dismissing breach of fiduciary duty claim where it was duplicative of the breach of contract claim since they arise out of the same set of facts).

[14] Under Delaware law, in order to state a claim of common law fraud, the complaint must allege: (1) a false representation of fact (or material omission) by the defendant; (2) with the knowledge or belief that the representation is false or with reckless indifference to its truth or falsity; (3) intent to induce the plaintiff's reliance; (4) actual and justifiable reliance; which results in (5) harm to the plaintiff. *Anglo American v. S.R. Global Intern*, 829 A2d 143, 158 (Del. Ch. 2003).

the circumstances constituting the wrong shall be stated in detail." *See Jebran v. LaSalle Business Credit*, 33 AD3d 424,424 (1st Dep't 2006); *High Tides v. DeMichele*, 88 AD3d 954,960 (2d Dep't 2011); *Zanette Lombardier v. Maslow*, 29 AD3d 495 (1st Dept 2006). Scienter cannot be supported by conclusory allegations. *See Giant Group v. Arthur Andersen*, 2 AD3d 189,190 (1st Dept 2003) (dismissing fraud after plaintiff's allegations of scienter were not pled with particularity and instead conclusory).

Plaintiff's only efforts to allege actionable false statements fail. She alleges false statements by people who are not defendants. (*See* Am.Compl.¶¶36-37,43 (alleging statements made by non-party Kenneth Frank).) She alleges statements that are not false. (*See* Am.Compl. ¶¶38-42,45) (alleging statements by Darcy Kelley and other unspecified Defendants about *members* of Family LLCs having voting rights, which they do as demonstrated by the Elinor Operating Agreement and ¶ 109-110 of the Am.Compl.); Am.Compl.¶138 (alleging unspecified Defendants misrepresented that all partners would receive *pro rata* membership interest, which was true—all who elected to become members did receive such interest).) She alleges omissions that are plainly in the documents she admits she had. (*See* Am.Compl.¶140 (alleging that unspecified Defendants misrepresented or omitted the change in personal liability that would occur when the business was run through an LLC rather than a partnership).)[15] These weak efforts at cobbling together material misrepresentations do not clear the high hurdle that the law requires for pleading fraud. At bottom, Plaintiff has only alleged a conclusion that someone committed a fraud against her.

[15] Like the breach of fiduciary duty claim, these allegations are duplicative of the contractual allegations, which is fatal to the fraud claim. *See Financial Structures v. UBS AG*, 77 AD3d 417,419 (1st Dept 2010) (dismissing fraud claim as duplicative of a breach of contract claim where it was based on the same facts); *Rivas v. Amerimed USA*, 34 AD3d 250 (1st Dept 2006) (dismissing fraud claims against the corporate defendants as duplicative of their breach of contract claims); *Gordon v. Dino De Laurentiis*, 141 A.D.2d 435, 436 (1st Dep't 1988) ("It is well settled that a cause of action for fraud will not arise when the only fraud charged relates to a breach of contract").

Moreover, sophisticated parties cannot claim justifiable reliance, where they have the means to verify the alleged misrepresentations. *See MP Cool Investments v. Forkosh*, 142 AD3d 286 (1st Dept 2016) (plaintiff cannot plead justifiable reliance as a sophisticated investor and had the means to learn the true nature and real quality of the investment); *Valassis Communications v. Weimer*, 304 AD2d 448 (1st Dept 2003) (sophisticated plaintiff cannot establish justifiable reliance if they failed to make use of the means of verification that were available). Plaintiff is a lawyer,[16] making her a sophisticated party. Plaintiff even admits to consulting her personal attorney to review the Reorganization Documents—she sent them to her lawyer on December 15, the day she received them and five days before her signature was due. (Compl.¶94-95; BockmanAff ¶3Ex1.) Therefore, Plaintiff had the means to learn the true nature and real quality of the transaction and cannot claim justifiable reliance.

Plaintiff's new allegations in the amended Complaint center around her being "omitted" from certain communications and not be provided with final-form documents. (Am.Compl.¶¶ 69-70.) For example, Plaintiff argues, she was "intentionally removed from the Staffa Email chain without her knowledge and was not privy to the continued conversations about the questions asked of Frank, the responses provided by Frank, or the corrected versions of the documents circulated by Frank or Kelley. (Am.Compl.¶69.) Moreover, she goes on to allege, "defendants made the foregoing misrepresentations and omissions with the intent of inducing Plaintiff to agree to the Plan and to execute the Contribution Agreement. (Am.Compl.¶143.) Yet, Plaintiff *demanded* that Mr. Frank stop emailing her. [CITE] So he did, and relied on Timothy to relay information to and from Plaintiff. Timothy did so. (Am.Compl.¶¶73-74.)

[16] Plaintiff graduated *magna cum laude* from Benjamin N. Cardozo School of Law. She is currently an adjunct professor at the Elisabeth Haub School of Law at Pace University.

C. Plaintiff's Negligent Misrepresentation Claim Is Similarly Deficient

A claim for negligent misrepresentation requires (i) the existence of a special or privity-like relationship between parties; (ii) a misrepresentation; and (iii) reasonable reliance on the information.[17] *Mandarin Trading v. Wildenstein*, 16 NY3d 173,180 (2011). Liability will be imposed only on those who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party, such that reliance is justified. *Kimmell v. Schaefer*, 89 NY2d 257,264 (1996). An arm's length business relationship does not present a situation supporting a cause of action for negligent misrepresentation. *Greentech Research v. Wissman*, 104 AD3d 540 (1st Dept 2013).

All of the parties here are sophisticated individuals involved in an arm's length transaction in which the partners of the Partnership could choose to become members of a Family LLC, or they could choose not to do so. Plaintiff is an attorney, a law professor, and was represented by one or more attorneys in reviewing the Reorganization Documents. She was not in a position where she needed to rely on the expertise of any of the Defendants and expressly did not do so.

In reality, Plaintiff was *encouraged* to sign the documents and become a member of Elinor LLC—not lied to in order to deprive her of the benefits of membership. The documentary evidence demonstrates that Plaintiff was well informed about the Plan, was asked multiple times to sign a Contribution Agreement and knew what her status would be if she did not.

[17] Similarly, in Delaware, to plead negligent misrepresentation, a plaintiff must show: (i) the defendant had a pecuniary duty to provide accurate information, (ii) the defendant supplied false information, (iii) the defendant failed to exercise reasonable care in obtaining or communicating the information, and (iv) the plaintiff suffered a pecuniary loss caused by justifiable reliance upon the false information. *PR Acquisitions v. Midland Funding*, No. 2017-0465-TMR, 2018 WL 2041521 at *13 (Del. Ch. April 30, 2018).

(KelleyAff¶¶6-13Ex3-10.) Her name was on the signature page (Complaint exhibit 4)—she was welcome to sign it.

The sequence of communications between December 15 and December 20 attached to Darcy's affidavit shows Plaintiff received *three* complete copies of the final four-page Contribution Agreement before the initial December 18 deadline expired, and a total of *six* copies before the extended deadline. (*Id.*) These documents, along with the Resolution, explained to Plaintiff what her interest would be and what rights she would have *if she signed* the Contribution Agreement and *if she did not*. Nothing was misrepresented and having offered nothing but conclusory statements to the contrary, Plaintiff's pleading is insufficient.

For all these reasons stated in this Point Four, these tort claims should be dismissed pursuant to CPLR 3211(a)(1)&(7).

POINT FOUR
NO ACTS TOOK PLACE CONSTITUTING MINORITY OPPRESSION

(Sixth Cause of Action)

Oppression—which Plaintiff asserts against the Individual Defendants—will arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture.[18] *Matter of Kemp & Beatley*, 64 NY2d 63,73 (1984). Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. *Kassab v. Kasab*, 565 NYS3d 492 (Sup Ct, Queens County 2017). Disappointment should not be equated with oppression. *Id. See also Burack v. I. Burack*, 137 AD2d 523 (1988) (finding no oppression where plaintiff was still an officer and director); *Orloff*

18 *See Gagliardi v. TriFoods Intern., Inc*., 683 A2d 1049 (Del. Ch. 1996) (dismissing claim for minority oppression because the one cannot convert a series of permissible acts into a cause of action by the single expedient of alleging that they were done for the purpose of entrenching the defendants).

v. Weinstein, 247 AD2d 63 (1st Dept 1998) (excluding a minority shareholder from board meetings and denying her access to corporate books was not oppressive conduct).

Plaintiff has not adequately plead minority oppression because her 1% interest in the family business has not changed. Plaintiff argues that she had a reasonable expectation that the General Partners would act in her best interest. (Am.Compl.¶¶163-164.) Yet, Plaintiff is the one who refused to sign the contract that would grant her interest in Elinor LLC. (Am.Compl.¶101.) She is now disappointed that she did not sign and wants the business to completely undo the transaction for her. Her own conduct—not that of the majority—defeated Plaintiff's expectations and decision to join the business. This should be dismissed pursuant to CPLR 3211(a)(1)&(7)

POINT FIVE
PLAINTIFF WAS NOT DEPRIVED OF ANYTHING GIVING RISE TO CLAIMS FOR CONVERSION OR UNJUST ENRICHMENT

(Seventh and Tenth Causes of Action)

Plaintiff brings these claims, one in tort and one at equity, against the Individual Defendants, Elinor LLC and the Company. Both claims should be dismissed pursuant to CPLR 3211(a)(1)&(7) for the reasons stated below.

A. Plaintiff Cannot Sustain Either Claim Because Her Allegations Stem From the Contractual Reorganization Documents

The theory of unjust enrichment is a quasi-contract claim. *Goldman v. Metropolitan Life Ins.*, 5 NY3d 561,572 (2005). It is well settled that where parties execute a valid and enforceable written contract, recovery on a theory of unjust enrichment for events arising out of a contract is ordinarily precluded.[19] *IDT Corp. v. Morgan Stanley*, 12 NY3d 132,142 (2009); *see Basis Yield*

[19] Under Delaware law, a claim for unjust enrichment is not available if there is a contract that governs the relationship between parties that gives rise to the unjust enrichment claim. Thus, when the complaint alleges an express,

Alpha Fund v. Goldman Sachs, 115 AD3d 128,141 (1st Dept 2014) (dismissing unjust enrichment where the underlying transaction was governed by written agreements); *Donenfeld v. Brilliant Tech.*, 96 AD3d 616,617 (1st Dept 2012) (dismissing unjust enrichment "because such a claim can only exist when there is no contract, and there is a contract").

Similarly, an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract.[20] *Peters Griffin*, at 884; *see also Johnson v. Cestone*, 162 AD3d 526,528 (1st Dept 2018) (dismissing a claim of conversion where it was predicated on a breach of contract claim and alleged no facts that would give rise to tort liability).

Once again, Plaintiff has gotten "cute" by removing her contract claims and the Reorganization Documents as exhibits. The Court will see that tactic for what it is. Her gamesmanship has not changed the contractual nature of this litigation. The conversion and unjust enrichment claims are based on the underlying Reorganization Documents. For example, the Complaint states, "as a result of Defendants' purported allocation of a non-voting membership interest in the Company to plaintiff, Defendants have been unjustly enriched." (Am.Compl.¶170.) The cause of action for conversion states, "by wrongfully dissolving the Partnership and leaving Plaintiff with an interest in a non-existent entity, Defendants have deprived Plaintiff of her valuable property interest." (Am.Compl.¶176.) These purported wrongs were effectuated by the contractual Reorganization Documents, that Plaintiff admitted in her first verified Complaint were valid and binding. Even without the breach of contract claim, the conversion and unjust enrichment allegations rely on the underlying contract.

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enforceable contract that controls the parties' relationship, a claim for unjust enrichment will be dismissed. *Kuoda v. SPKS Holdings, L.L.C.*, 971 A2d 872 (Del. Ch. 2009).

[20] *Kuoda v. SPKS Holdings, L.L.C.*, 971 A2d 872 (Del. Ch. 2009) (dismissing a claim of conversion where it was duplicative of a breach of contract claim).

B. Plaintiff Pleads No Credible Allegation of Deprivation of Property

Plaintiff also not-so-cleverly omitted another allegation from her first verified Complaint: the absurd falsity that her 1% interest in the Company was "worthless." Throughout the Complaint, Plaintiff glosses over a very important point—her 1% interest has never changed. Both claims of unjust enrichment and conversion require some deprivation, which cannot be pleaded because her interest in the business has *increased* since the transaction. (MellenAff¶13.)

A claim for unjust enrichment requires pleading (i) the defendant was enriched, (ii) at the plaintiff's expense, and (iii) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered.[21] *GFRE, Inc. v. U.S. Bank*, 130 AD3d 569,570 (2d Dept 2015); *see also Alpert v. M.R. Beal*, 162 AD3d 481,492 (1st Dept 2018). The elements of conversion are (i) plaintiff's possessory right or interest in property and (ii) defendant's dominion over the property or interference with it in derogation of plaintiff's rights.[22] *Colavito NY Organ Donor Network*, 8 NY3d 43, 48 (2006). A defendant must engage in some affirmative act that deprives the plaintiff of lawful access to property. *Lopez v. Fenn*, 90 AD3d 569,572 (1st Dept 2011). Dismissal is proper where a plaintiff fails to adequately identify the property allegedly converted. *Art and Fashion Grp. v. Cyclops*, 120 AD3d 436, 440 (1st Dept 2014); *Messiah's Covenant Community. v. Weinbaum*, 74 AD3d 916,919 (2d Dept 2010).

While Plaintiff feebly alleges that her interest, which is exactly the same percentage, somehow became worthless, she contradicts her own assertions. In Am.Compl.¶102, Plaintiff

[21] Under Delaware law, the elements of unjust enrichment are: (1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law. *Nemec v. Shrader*, 991 A2d 1120, 1130 (Del 2010). Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience." *Id*.

[22] The necessary elements for a conversion under Delaware law are (i) a plaintiff had a property interest in the converted goods; (ii) that the plaintiff had a right to possession of the good; and (iii) that the plaintiff sustained damages. *Goodrich v. E.F. Hutton Group*, 542 A2d 1200, 1203 (Del Ch. 1988).

confirmed the documents were executed and delivered by her on December 22—*after* the Reorganization was already complete. In Am.Compl.¶176 Plaintiff said dissolution of the Partnership left her with "an interest in a non-existent entity" thereby depriving her of a valuable property interest. Plaintiff knows as a 1% limited partner she received a corresponding 1% interest in the Company pursuant to the Distribution Agreement. (Complaint exhibit 3.) She also knows her statement in Am.Compl.¶177 that her 1% interest in the Company is "valueless" is utterly false—she receives approximately $18,000 per year, almost 2½ times the $7,500 per year she received prior to the Reorganization. (MellenAff¶13.) Plaintiff still has her 1% interest in the family business, no one has taken it from her, and it is worth considerably more than it was before. She has been deprived of nothing. Her claims for unjust enrichment and conversion both fail for this reason.

POINT SIX
PLAINTIFF CANNOT BRING A CLAIM AGAINST A NON-EXISTENT ENTITY

(First and Second Causes of Action)

The Partnership no longer exists. One of the required elements of a "Limited partnership" as defined in RULPA § 121-101(h) is "having one or more general partners and one or more limited partners." Pursuant to ¶13.8 of the Partnership Agreement, upon completion of the distribution of its assets "the Limited Partners shall cease to be such…." Prior to the in-kind distribution, Plaintiff was the sole limited partner and when that distribution was effectuated on December 21, 2020, the Partnership had none. As a matter of law, that constitutes a dissolution of the Partnership. *See, Tofel v Hubbard,* 2017 NY Slip Op 31405[U] (Sup Ct, NY County 2017). Furthermore, ¶13.1 of the Partnership Agreement provides that dissolution occurs on the earliest of expiration of the Partnership's term, the decision of the general partners to dissolve the Partnership, or the disposition of all of its property. The in-kind distribution disposed of all of

the Partnership's assets and in the Resolution the general partners agreed the partnership would be dissolved at that time. Moreover, RULPA § 121-801 provides that a partnership is dissolved at the time provided in the partnership agreement. By disposing of all of its assets, the affairs of the Partnership were wound up at that time and, in any event, its term has long since expired.

Only an existing partnership may sue or be sued. *See Zartone Development Co. v. Tedone*, 221 A.D.2d 525 (2d Dept 1995) (holding that where the partnership was dissolved prior to the commencement of the action, it was not capable of being named as a defendant). Furthermore, unlike other jurisdictions, New York has no provision pursuant to which the existence of a limited partnership may be revived. That not only requires dismissal of the Partnership as a Defendant, it mandates dismissal of other Causes of Action as well.

In the First Cause of Action Plaintiff seeks a declaration the Reorganization is "void *ab initio*." If granted, everything would theoretically revert to the status on December 20, 2020, at which time the Partnership still owned the Subsidiaries and all partnership interests were owned individually. Aside from the fact that the Reorganization was entirely proper and Plaintiff has neither grounds nor standing to set it aside, such relief is impossible for a number of reasons: the Partnership does not exist, the Company now owns the Subsidiaries and the membership interests in the Company are owned by Plaintiff and the four Family LLCs. Any such declaration would orphan the Subsidiaries and the business would have no way to operate.

Furthermore, ignoring the fact that any proceeding involving the Reorganization Documents must be brought in Delaware, what Plaintiff requests would not and cannot transform her Class B Membership in the Company to a membership interest in Elinor LLC.

Plaintiff admits in ¶ 102 of the Am. Compl. she did not sign any of the Reorganization Documents until December 22, but nevertheless alleges she executed the documents she was

"requested to sign" and therefore should have acquired an interest in Elinor LLC. That is incorrect. She did not sign the documents she was requested to sign nor did she do so when she had the opportunity. The version of the Operating Agreement Plaintiff signed is dated December 22, listing Plaintiff as having a 4% membership interest on Exhibit A. (Complaint exhibit 5). In fact, however, the other limited partners executed a different Operating Agreement on December 21, allocating 100% of the membership interests among themselves; Plaintiff is neither a signatory nor listed as a member.

That Operating Agreement expressly states issuance of new membership interests is a major decision requiring approval of the membership (*Id* at §§6.1B.3(e)&(h).) More significantly, at that point Elinor LLC owned a 24% Class A membership interest in the Company and Plaintiff held a 1% Class B membership interest. Adding Plaintiff to Elinor LLC would give her a share of the membership percentages held by the other members but she would continue to own her 1% Class B membership interest in the Company. Because adding her would reduce the interests of the other members, pursuant to Section 10.2 of the Elinor LLC Operating agreement unanimous consent is required but five of the six members of Elinor LLC are not parties to this case. Similarly, pursuant to §§ 6.1B.3(e) & (h) of the Company Operating Agreement, any change in Plaintiff's Class B interest requires unanimous consent of the Board of Managers. (Compl.Ex.6at18-19.)

Plaintiff claims she can unilaterally sign an operating agreement allocating an interest to herself. If that were the case, everyone would sign operating agreements to obtain whatever membership interest they wished in any LLC. That is clearly not how it works.

Because the Partnership ceased to exist prior to the filing of this Complaint it should be dismissed as a Defendant. Furthermore, Plaintiff cannot state a claim to the extent the relief requested in any cause of action involves the Partnership.

POINT SEVEN
PLAINTIFF HAS SUFFERED NO DAMAGE

Damages are the cornerstone of any claim, whether contractual, statutory, in tort or at equity. The existence of at least *some* damage is an essential element to causes of action. All of the claims Plaintiff brings fail because she has not suffered any harm. Again, Plaintiff has backed off of her original pleading that her substantial interest in the Company is somehow "worthless." It is not—with the increase in her income, she has experienced the *opposite* of damage.

Damages are an essential element to all of Plaintiff's non-contractual claims. In an action to recover damage for a prima facie tort, damage is a necessary element for such a cause of action. *Brandt v. Winchell*, 283 AD 338,342 (1st Dept 1954). *see also Spitzer v. Schussel*, 7 Misc3d 171 (Sup Ct, NY County 2005) (dismissing action with demand for equitable remedies because no damages were alleged); *Bennett v. Towers*, 43 Misc3d 661 (Sup Ct, Nassau County 2014) (dismissing statutory claim for compensatory damages where the record is devoid of losses suffered). Compensatory damages aim to place the injured party in the same position as they would have been had the harm not occurred. *Bibeau v. Ward*, 228 AD2d 943,945 (3d Dept 1996).

Plaintiff's damage claims arise from alleged deprivation or diminution in value of her Partnership interest but the express words of the RULPA confirm the absence of any damages in this case. Pursuant to RULPA § 121-701, "An interest in a limited partnership is personal property and a partner has no interest in specific partnership property." RULPA § 121-101)(m)

defines" Partnership interest" as "(i) a partner's *share of the profits and* losses of a limited partnership; and (ii) a partner's *right to receive distributions*."

Plaintiff has suffered no damages in this case because the value of her partnership interest has not been diminished; as the allegedly "injured party" she remains in the exact same position as before the supposed "harm." Prior to the Reorganization Plaintiff was entitled to distributions of 1% of the profits and losses of the Partnership and as a Class B Member of the Company she is entitled to distributions of 1% of the profits and losses of the Company. In fact, as stated above, those distributions have *grown* by almost 2 ½ times since the Reorganization (Mellen aff¶13)—Plaintiff has suffered the opposite of damage: she has benefited. Moreover, although voting rights are not elements of a partnership interest, Plaintiff had no voting rights before and has no voting rights now.

Punitive damages are even more remote. Punitive damages are not recoverable in ordinary commercial disputes because their purpose is not to remedy private wrongs but to vindicate public rights. *Mulder v. Donaldson, Lufkin & Jenrette*, 208 AD2d 301, 308 (1st Dept 1995). Punitive damages are limited to when the defendant has been shown either to have been motivated by actual malice or to have acted in such a reckless, wanton or criminal manner that it can fairly be said that his conduct evidences a conscious disregard of the rights of others. *Moran v. Orth,* 36 AD3d 771, 773 (2d Dept 2007); *Miller v. Cattabiani*, 119 AD2d 846 (3d Dept 1986).

The wrongful acts pleaded by Plaintiff are that Defendants refused to accept her late papers which she signed *after* the transaction when she regretted not having participated. There is no malice there. Plaintiff had the opportunity to become a member of Elinor LLC and she declined. Defendants then did exactly what was required under the law and the Partnership Agreement—they distributed a 1% non-voting interest in the Company to Plaintiff, leaving her

with exactly the same interest as she had previously. Plaintiff expressly authorized the general partners to act as her agent and execute all documents necessary to effectuate the dissolution of the Partnership on her behalf. Their actions were entirely proper, and is the diametric opposite of malice. It is entirely fair treatment. Plaintiff has the same economic interest in the Company and all partners rights to distributions remain in the same proportions as they had always been, There is no damage in that, compensatory, punitive or otherwise.

If that were not enough, however, in §13.4 of the Partnership Agreement (Mellen aff exhibit 1), Plaintiff expressly agreed as follows:

> The General Partners in making any distribution in kind *shall incur no liability to the Limited Partners by reason of such distribution*, including, without limitation, for *any diminution in the value* of any such assets of the Partnership so determined to be distributed in kind after the date of such determination.

Plaintiff specifically agreed she would not hold the general partners responsible for any losses resulting from the distribution of Partnership assets—precisely what occurred in the Reorganization. Plaintiff's only remaining allegations of damage are specious. She advances a ridiculous claim that relieving general partners of liability is to the detriment of the limited partners. There is no authority for such a position. Reality is the reverse. When the Partnership was formed it was the only vehicle providing favorable tax treatment and limited liability for the limited partners, but it required the general partners to accept unlimited personal liability. In other words, the general partners assumed that liability so the limited partners could realize the benefits. Following the exchange of partnership interests for membership interests in the Family LLCs—which every other limited partner voluntarily did—the Family LLCs were substituted as general partners of the Partnership. A comparison between the Partnership Agreement and the Company Operating Agreement show that the Company's members remain liable for bad acts. Again, Plaintiff has lost or suffered *nothing*.

POINT EIGHT
DISMISSAL SHOULD BE WITH PREJUDICE

Where any possible amendment would be futile, denial of leave to amend a complaint is warranted. *Hornstein v. Wolf*, 67 NY2d 721, 723 (1986); *Altman v. NY Bd. of Trade,* 52 A.D.3d 396, 397 (1st Dept 2008). There are no causes of action that can be brought under the facts and circumstances of this case, particularly considering the valid and binding Delaware forum selection and exculpation clauses, the inapplicability of the Conversion Statute to the type of transaction that took place and the complete absence of damages. No amount of re-pleading can cure these fatal deficiencies. Thus, any amendment would be futile.

CONCLUSION

For the foregoing reasons, Plaintiff's Amended Complaint must be dismissed with prejudice.

Dated: New York, New York
May 19, 2021

Respectfully submitted,

VEDDER PRICE P.C.

By: *s/ Nicole J. Wing*

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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

CERTIFICATION OF COUNSEL
PURSUANT TO COMMERCIAL DIVISION RULE 17

NICOLE J. WING hereby affirms under penalty of perjury, pursuant to N.Y. CPLR 2106, that the foregoing Memorandum of Law is 14,858 words in length, exclusive of its caption, table of contents, table of authorities and signature block for which we have sought leave to file a brief in excess of that which complies with Rule 17 of the Commercial Division because this is a combined brief of 11 Defendants that is more streamlined to present to the court in a single oversized document.

Dated: May 19, 2021

s/ *Nicole J. Wing*
Nicole J. Wing