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

FREEDOM HOLDING, INC., ELITE WORLD GROUP, LLC, E1972 INC., and SILVIO SCAGLIA,

Plaintiffs,

v.

JULIA HAART A/K/A JULIA HENDLER and HAART DYNASTY LLC,

Defendants.

Index No. 650661/2022

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Freedom Holding, Inc. ("Freedom") and Silvio Scaglia ("Scaglia," together "Plaintiffs") respectfully submit this memorandum in opposition to Defendants Julia Haart and Haart Dynasty LLC's ("Haart Dynasty," together "Defendants" or "Haart") motion to dismiss.

PRELIMINARY STATEMENT

This case is simple. A day after learning she was being terminated as CEO of EWG, Julia Haart retaliated by stealing $850,000 from EWG's corporate parent, Freedom Holding. She surreptitiously withdrew those funds from Freedom's JP Morgan bank account and transferred them to her company, Haart Dynasty. Ms. Haart's theft was tortious, multiple times over—the latest in a brazen, years-long campaign of self-aggrandizement. It also violated the terms of a separate agreement with Mr. Scaglia.

As a consequence of these events, Freedom and Mr. Scaglia now pursue a five-count complaint against Julia Haart and Haart Dynasty for conversion, breach of fiduciary duty, breach of contract, unjust enrichment, and constructive trust. Despite insisting in the context of the transfer dispute from the Commercial Division that this case is related to the matrimonial action between Mr. Scaglia and Ms. Haart, Defendants now claim the matter is not about Mr. Scaglia at all. They argue he has no standing to pursue *any* of the claims. This bait and switch is not surprising. It aligns perfectly with Ms. Haart's "fake it till you make it" mantra.

Plaintiffs do not disagree that this case is primarily a dispute between a corporation and its former CEO,[1] but there is one claim—breach of contract—that Mr. Scaglia has standing to assert. In contemplation of their upcoming divorce, Ms. Haart and Mr. Scaglia agreed they would both limit withdrawals from the Freedom account to $250,000 each. And true to form,

[1] For that reason, as explained below, Mr. Scaglia does not contest Defendants' standing arguments as to four of the five claims.

Ms. Haart's promise only had meaning as long as it served her purposes. This one apparently no longer did. So, in February 2022, after already withdrawing $250,000, Ms. Haart took out another $850,000 and thereby breached the terms of the parties' agreement.

In so doing, she also stole from Freedom. Her misappropriation constituted conversion, breach of fiduciary duty, and unjust enrichment, and warrants a constructive trust. Ms. Haart does not dispute that Freedom has stated cognizable claims of breach of fiduciary duty and constructive trust. However, she contests each of the other claims as well as the breach claim advanced by Mr. Scaglia. Ms. Haart is wrong on each front.

Conversion. As to conversion, Ms. Haart contends that Freedom has no claim under Delaware law. Contrary to Ms. Haart's contention, New York, not Delaware, law applies under New York's choice of law rules because the only connection to Delaware is Freedom's place of incorporation. More important under New York's "interest analysis" is the location where the tortious acts occurred and the parties reside. That is New York. Under New York law, Plaintiffs have pled a cognizable conversion claim by identifying a sum certain, namely $850,000, from a particular account, the JP Morgan account.

Unjust Enrichment. Ms. Haart asserts the unjust enrichment claim should be dismissed as duplicative of the breach of fiduciary duty and conversion claims. Ms. Haart is wrong there too. Each requires a showing the others do not. Ms. Haart cites no legal authority that prohibits Plaintiffs from pursuing non-overlapping, alternative theories.

Breach of Contract. Ms. Haart also asserts that any oral agreement between her and Mr. Scaglia is void in contravention of the statute of frauds by extending beyond a year. But the agreement stated no time period at all, much less one longer than a year. And it certainly could

have been performed within a year, as the terms were part of a broader discussion concerning division and control of assets, all of which were to occur in contemplation of an *imminent* divorce.

Ms. Haart's motion should therefore be denied. If it is granted in any respect, Plaintiffs should be afforded an opportunity to replead and file an amended complaint.

LEGAL STANDARD

On a motion to dismiss pursuant to either CPLR 3211(a)(5) or (a)(7), the complaint is afforded a liberal construction, the allegations are presumed true, all inferences are drawn in plaintiffs' favor, and the court's task is to determine whether the allegations fit within any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83, 87–88 (1994); *AAA Viza, Inc. v. Business Payment Sys., LLC*, 38 A.D.3d 802, 803 (2d Dep't 2007). "To succeed on a CPLR 3211(a)(7) motion to dismiss, the moving party 'must convince the court that nothing the plaintiff can reasonably be expected to prove would help; that the plaintiff just doesn't have a claim[.]'" *Natixis Real Estate Cap. Tr. 2007-HE2 v. Natixis Real Estate Holdings, LLC*, 149 A.D.3d 127, 136 (1st Dep't 2017); *511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (defendants' motion to dismiss "must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law").

As regards Defendants' CPLR 3211(a)(3) arguments, "the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law." *Wilmington Sav. Fund Soc'y, FSB v. Matamoro*, 156 N.Y.S.3d 323, 333 (2021). "The burden is not on the plaintiff to affirmatively establish its standing for the dismissal motion to be denied." *Id.* Rather, the plaintiff need only "raise a question of fact as to the issue." *Id.* "The

presentation of prima facie evidence is a concept more frequently associated with motions for summary judgment…." *Id.*

BACKGROUND

This case is but the latest manifestation of a years-long course of chicanery by Julia Haart. Ms. Haart, who at the time was a self-proclaimed "unknown entity," surreptitiously plotted her way into Silvio Scaglia's life. She then seduced him into marriage, all the while eyeing her own personal and professional advancement. Those dreams were realized as a consequence of her marriage. Over the course of the next couple of years, Ms. Haart covertly spent millions of dollars of corporate funds to maintain her long-desired celebrity lifestyle. *See* First Amended Complaint, NYSCEF Doc. No. 4 ("Am. Compl.") ¶ 20. When corporate directors and executives began to discover the unauthorized spending, they informed Ms. Haart she would be fired. Ms. Haart's response was to grab hold of that to which she still had access. That included the JP Morgan bank account. Though Mr. Scaglia and Ms. Haart agreed on January 19, 2022 to withdraw only $250,000 each from that account, Ms. Haart took out another $850,000 and immediately transferred it to her company, Haart Dynasty. Am. Compl. ¶ 3.

Freedom and Mr. Scaglia then brought this lawsuit, seeking the return of those ill-gotten funds. In the meantime, with Ms. Haart no longer positioned to hide expenditures, the depth of her depravity slowly began to rear its head. It soon became apparent that she had spent millions on unauthorized transactions. Am. Compl. ¶ 19. On February 22, 2022, Freedom and Mr. Scaglia filed an amended complaint. Am. Compl. As relevant here, the operative complaint includes claims for conversion, breach of fiduciary duty, breach of contract, unjust enrichment, and constructive trust. Am. Compl. ¶¶ 36-66. In the meantime, the parties adjudicated a separate action initiated by Ms. Haart in Delaware, wherein she proclaimed to be a co-owner and

director of Freedom. Following a two-day trial, during which the Chancery Court observed the testimony of Ms. Haart and Mr. Scaglia, Judge Morgan Zurn issued a decision on May 26, 2022, rejecting each of Ms. Haart's claims. *See Haart v. Scaglia*, 2022 WL 1715001 (Del.Ch. May 26, 2022).[2] A detailed memorandum opinion in that action is forthcoming. *Id.*

On May 27, 2022, Plaintiffs voluntarily dismissed those claims unrelated to Ms. Haart's theft of the $850,000 from the JP Morgan account. *See* Notice of Voluntary Discontinuance of Certain Claims, NYSCEF Doc. No. 25 ("Discontinuance Notice"). On May 31, 2022, Defendants filed their motion to dismiss. *See* Order to Show Cause, NYSCEF Doc. No. 32. Pursuant to this Court's June 1, 2022 Order, Plaintiffs Freedom and Mr. Scaglia now submit this opposition to the motion to dismiss.

ARGUMENT

I. NEW YORK LAW GOVERNS THE CAUSES OF ACTION MAINTAINED BY FREEDOM AND SCAGLIA.

Notwithstanding Ms. Haart's prior insistence that this case does not present "complex commercial questions" (*see* April 26, 2022 Ltr. re: Transfer from Commercial Division, NYSCEF Doc. No. 18), she now posits that "Delaware, the state of incorporation of Freedom Holding, determines the applicable law for substantive claims asserted by Freedom and by Mr. Scaglia as a shareholder." Defendants' Memorandum in Support of Motion to Dismiss, NYSCEF Doc. No. 30 ("Haart Mem.") at 8. And, under Delaware law, she claims, "the internal affairs of a corporate entity are governed by the laws of the state of incorporation." *Id.* at 9. Thus, she

[2] "[T]his court may take judicial notice of the ruling of a court in another jurisdiction." *People ex rel. Rosenberg v. Rosenberg*, 160 A.D.2d 327, 329 (1st Dep't 1990).

argues, "Delaware law governs the causes of action" here. *Id.* at 8 (initial caps eliminated). Ms. Haart is wrong.

As the forum state, New York's choice of law rules govern this dispute. *Klaxon Co. v Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). And the New York Court of Appeals has rejected "any automatic application of the so-called 'internal affairs' choice-of-law rule." *Greenspun v. Lindley*, 36 N.Y.2d 473, 478 (1975). The operative law is determined by application of New York's "interest analysis." *Schultz v. Boy Scouts of Am., Inc.*, 65 N.Y.2d 189, 197 (1985). The interest analysis is a "flexible approach intended to give controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993). Under this analysis, "the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort." *Elson v. Defren*, 283 A.D.2d 109, 115 (1st Dep't 2001).

New York does however draw a distinction, for choice of law purposes, between standards of conduct and standards for allocating loss. "[W]hen the conflicting rules involve the appropriate standards of conduct, rules of the road, for example, the law of the place of the tort 'will usually have a predominant, if not exclusive, concern.'" *Schultz*, 65 N.Y.2d at 198. If the issue pertains to allocating loss (such as damages or vicarious liability), the place of the tort is of less concern. *Id.* Ms. Haart's motion to dismiss challenges the underlying claims and thus pertains to the standard of conduct, not allocation of loss. The place of the tort therefore dictates the applicable law. *See UBS Sec. LLC v. Highland Capital Mgmt., L.P.*, 2011 WL 781481, at *3 (Sup.Ct. N.Y. Cty. Mar. 1, 2011) (rejecting argument that law of the place of incorporation is applicable to veil piercing claim and applying New York law because "[o]ther than

being incorporated in the Cayman Islands, SOHC has no obvious ties to that jurisdiction"); *Elson*, 283 A.D.2d at 116 ("While Avis is a Delaware corporation, it maintains its principal place of business in New York and is therefore considered a New York domiciliary for choice of law purposes."). Here, as the Amended Complaint alleges and this Court is fully aware, Ms. Haart is a New York resident. Am. Compl. ¶ 10.[3] So too is Mr. Scaglia. Freedom operates out of New York. And, critically, Ms. Haart's misappropriation and her agreement with Mr. Scaglia both occurred in New York. Am. Compl. ¶ 28. Therefore, under New York's choice of law rules, the claims in this case are governed by New York law.

To the extent Ms. Haart attempts to invoke New York's internal affairs doctrine, her categorical approach is misguided. The very Restatement upon which Ms. Haart relies explains why. Haart Mem. at 9 (citing Restatement, Second, Conflict of Laws, § 302, comment e, at 309). As the comments state, "[i]nternal affairs" encompasses "matters of organic structure or internal administration" such as "steps taken in the course of the original incorporation, the election or appointment of directors and officers, the adoption of by-laws, charter amendments, and the holding of directors' and shareholders' meetings." Restatement (Second) of Conflict of Laws § 302, comments a, b, e (1971). Freedom and Mr. Scaglia's tort and contract claims against Ms. Haart go well beyond corporate structure and internal administration. The doctrine therefore has no application.

[3] At the motion to dismiss stage, courts rely on the allegations in the complaint in making a choice of law analysis. *See, e.g., Meserole v. Sony Corp. of Am.*, 2009 WL 1403933, at *5 n.6 (S.D.N.Y. May 19, 2009); *see also Smith v. Railworks Corp.*, 2011 WL 2016293, at *6 n.12 (S.D.N.Y. May 17, 2011) ("Because a choice of law analysis is fact intensive, courts often decline to make a choice of law determination at the motion to dismiss stage").

II. PLAINTIFFS PLEAD A COGNIZABLE CLAIM FOR CONVERSION.

Plaintiffs allege that on February 8, 2022, Ms. Haart converted $850,000 by unlawfully withdrawing that amount from Freedom Holding's bank account at J.P. Morgan. Am. Compl. ¶ 40. Ms. Haart contends the claim is not viable because "'under Delaware law,' an action will not lie to enforce a claim for the payment of money." Haart Mem. at 9. Ms. Haart misunderstands and misapplies the governing law.

To begin, as explained, Ms. Haart's choice of law analysis is flawed. *See supra* § I. Because Ms. Haart's theft of property occurred in the State of New York, New York (not Delaware) law applies. *Id.* New York recognizes "[a]n action for conversion *of money*." *Thys v. Fortis Sec. LLC*, 74 A.D.3d 546, 547 (1st Dep't 2010) (emphasis added). Such a claim "may be made out where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question." *Id.*; *Republic of Haiti v. Duvalier*, 211 A.D.2d 379, 384 (1st Dep't 1995). Here, Plaintiffs have identified a specific fund from a particular bank account (namely $850,000 from the JP Morgan bank account), have alleged legal ownership of the funds at issue, and pled that Ms. Haart exercised "unauthorized dominion" over the funds in violation of Plaintiffs' property rights. *See* Am. Compl. ¶¶ 36-42, 93.A.; *Peters Griffin Woodward, Inc. v. WCSC Inc.*, 88 A.D.2d 883, 883-84 (1st Dep't 1982) (conversion claim lies for money "if specifically identifiable").

This is precisely the type of theft for which New York courts recognize a cognizable claim for conversion.[4] In *Sperrazza v. Kail*, 267 A.D.2d 692, 693 (3d Dep't 1999), for example,

[4] Ms. Haart's contention that Delaware law applies is a transparent attempt to evade New York conversion law. Haart Mem. at 9. But even the Delaware law she cites does not foreclose Plaintiffs' claim. *First*, Ms. Haart's contention appears predicated on the notion that Delaware does not recognize conversion for money taken (as opposed to chattel). Yet, the very authority upon which Ms. Haart relies (*Anschutz Corp. v. Broan Robin Cap., LLC*, 2020 WL 3096744, at *18 n.245 (Del. Ch. June 11, 2020)) principally cites to *Kuroda v. SPJS Holdings, L.L.C.*, 971

two siblings jointly owned two bank accounts. Where one sibling closed the accounts and deposited all of the funds into a separate account for her own children, the court held the other sibling "made a prima facie showing [of] … the tort of conversion." *Id.* Likewise, in *Brennan's Bus Serv., Inc. v. Brennan*, 107 A.D.2d 858, 859-60 (3d Dep't 1985), the court found conversion occurred where $80,000 was taken from a corporate account by the wife of the sole owner of the company and expended for personal use. *See also, e.g.*, *Lenczycki v. Shearson Lehman Hutton, Inc.*, 238 A.D.2d 248, 248 (1st Dep't 1997) (theft of funds from specific bank account held jointly by husband and his former spouse were sufficiently identifiable to support conversion claim against spouse); *Duvalier*, 211 A.D.2d at 381 (prima facie case of conversion established where state funds embezzled and transferred by Haitian dictator and wife to New York bank account).

III. SCAGLIA PLEADS A COGNIZABLE CLAIM FOR BREACH OF CONTRACT.

To state a breach of contract claim, a plaintiff must allege "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Second Source Funding, LLC v. Yellowstone Capital, LLC*, 144 A.D.3d 445, 445-46 (1st Dep't 2016). Ms. Haart does not dispute Mr. Scaglia has adequately pled each of these elements. She claims however the agreement "is barred by the statute of frauds … as an agreement of indefinite duration." Haart Mem. at 11. Ms. Haart misunderstands the statute of frauds and, in any event, even under her misguided reading, factual resolution would be required to apply the doctrine.

A.2d 872 (Del. Ch. 2009), which entertained the exception Ms. Haart seeks to avoid, explaining, "an action for conversion of money *will lie* … where there is an 'obligation to return the identical money' delivered by the plaintiff to the defendant," (quoting *Goodrich v. E.F. Hutton Grp., Inc.*, 542 A.2d 1200, 1203 (Del. Ch. 1988)) (emphasis added). That is precisely the claim here: Plaintiffs seek the return of the $850,000 taken from the JP Morgan account. *Second*, contrary to Ms. Haart's contention, Plaintiffs do not argue there was a preexisting financial obligation owed by Ms. Haart such that they seek to "enforce a claim for the payment of money." Haart Mem. at 9. Rather, Plaintiffs' claim is that Ms. Haart embezzled funds.

In New York, an oral agreement is unenforceable that "[b]y its terms is not to be performed within one year from the making thereof." N.Y. GOL § 5-701(a)(1). It follows that where "neither party has contended that the alleged agreement contained any provision which directly or indirectly regulated the time for performance, the agreement is not within the bar of subdivision 1." *Freedman v. Chem. Const. Corp.*, 43 N.Y.2d 260, 265 (1977). Here, Ms. Haart does not contend (nor can she) that by "its terms" her and Mr. Scaglia's agreement was "not to be performed within one year." Ms. Haart's actual contention then looks beyond the precise terms of the agreement and posits that it violates the statute of frauds because the agreement could not possibly have been performed within a year. On that score, Ms. Haart's own cases describe the relevant inquiry: whether "according to the parties' terms, there might be *any possible means of performance within one year*." *D & N Boening, Inc. v. Kirsch Beverages, Inc.*, 63 N.Y.2d 449, 455 (1984) (emphasis added). "Wherever an agreement has been found to be susceptible of fulfillment within that time, *in whatever manner and however impractical*, this court has held the one-year provision of the Statute to be inapplicable, a writing unnecessary, and the agreement not barred." *Id.* (emphasis added); *id.* at 454 (courts "have limited [the statute of frauds] to those contracts only which by their very terms have absolutely no possibility in fact and law of full performance within one year").

Here, the agreement not only could, but most certainly would, have been completed within a year.[5] "Mr. Scaglia and Haart entered into a contract pursuant to which each committed that the only withdrawals from the Freedom Holding account would be $250,000 to Haart and $250,000 to Mr. Scaglia." Am. Compl. ¶ 50. As the Amended Complaint explains, "[s]hortly

[5] Outside the statute of frauds context, courts look to the realities of the situation to determine the agreement's duration, if any. *See, e.g.*, *Rooney v. Tyson*, 91 N.Y.2d 685, 692 (1998) ("New York's jurisprudence is supple and realistic, and surely not so rigid as to require that a definite duration can be found only in a determinable calendar date.").

after the contract was entered, Haart withdrew at least $250,000 from that account." Am. Compl. ¶ 51. As Ms. Haart well knows and discovery will bear out, the agreement was negotiated as part of a broader set of terms being discussed by Ms. Haart and Mr. Scaglia in contemplation of an imminent divorce. The couple was also discussing, for example, what they would do with an apartment and how the businesses would be addressed. The prospect of divorce, and the corresponding division of assets, was not some far-flung hypothetical. On the contrary, at the time of the $250,000 discussion in January 2022, Mr. Scaglia and Ms. Haart had retained or were actively retaining divorce lawyers. The imminence of the separation is perhaps best evidenced by the fact that Ms. Haart *did* file for divorce just a couple of weeks after the $250,000 agreement was reached on January 19, 2022.

Simply put, far "from hav[ing] absolutely no possibility … of full performance within one year," *D & N Boening, Inc.*, 63 N.Y.2d at 454, the contract at issue was slated for completion within a year. This places it squarely within the body of caselaw for which New York courts have concluded the doctrine is inapplicable. *See Hydro Invs., Inc. v. Trafalgar Power, Inc.*, 6 A.D.3d 882, 885 (3d Dep't 2004) (statute of frauds inapplicable where oral agreement provided for distribution of "25% interest in the joint venture" but did not "regulat[e] the time of performance and, thus, was capable of being performed within one year"); *Mann v. Helmsley-Spear, Inc.*, 177 A.D.2d 147, 149-50 (1st Dep't 1992) ("Even if the defendants were able to establish on their motion the unlikelihood or near impossibility of the project's completion within one year, … the oral agreement sought to be enforced herein would still be outside the ambit of the Statute of Frauds because the agreement, *by its terms*, was not incapable of performance within one year.") (emphasis in original); *W.L. Christopher, Inc. v. Seamen's Bank for Sav.*, 144 A.D.2d 809, 811 (3d Dep't 1988) ("Inasmuch as the terms of the oral

agreement, as attested to by plaintiff, merely call for distribution of profits upon sale *without regulating the time of sale*, that Statute of Frauds provision does not come into play") (emphasis added).

At a minimum, "[d]rawing all inferences in [Mr. Scaglia's] favor, it is plausible that [the parties'] performance … could have ceased within one year of the making of the agreement." *Carbonyx License & Lease LLC v. Carbonyx Inc.*, 2019 WL 2867022, at *4 (S.D.N.Y. July 1, 2019). Accordingly, it would be improper, at the pleading stage, to resolve the factual question as to when the contract was to be completed.

IV. PLAINTIFFS PLEAD A COGNIZABLE CLAIM FOR UNJUST ENRICHMENT.

Ms. Haart does not dispute that Plaintiffs have pled adequately a claim of unjust enrichment. Haart Mem. at 12. Instead, she argues the claim is foreclosed because "it duplicates … a conventional contract or tort claim," namely the breach of fiduciary duty and conversion claims. Haart Mem. at 12 (quoting *Corsello v. Verizon NY, Inc.*, 18 N.Y.3d 777, 790-91 (2012)). Contrary to Ms. Haart's contention, the claims are not duplicative.

The breach of fiduciary duty claim requires a fiduciary relationship, which the unjust enrichment claim does not. *Compare Varveris v. Zacharakos*, 110 A.D.3d 1059, 1059 (2d Dep't 2013) (breach of fiduciary duty requires "'(1) *the existence of a fiduciary relationship*, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct'") (emphasis added) *with Mobarak v. Mowad*, 117 A.D.3d 998, 1001 (2d Dep't 2014) (unjust enrichment requires "that (1) the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'"). Likewise, the unjust enrichment claim requires an equitable/good conscience inquiry that the conversion claim does not. *See Core Dev. Grp. LLC v. Spaho*, 157 N.Y.S.3d

416, 419 (1st Dep't 2021) (conversion requires "(1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights"). It remains to be seen whether Ms. Haart will contest these non-overlapping elements. And a party should not be "required to guess whether it will be successful on its contract, tort, or quasi-contract claims" and, thereby, prematurely foreclose meritorious claims. *St. John's Univ., New York v. Bolton*, 757 F. Supp. 2d 144, 183 (E.D.N.Y. 2010). Nor, at this preliminary juncture, would it suffice for Ms. Haart to disavow a challenge to particular elements. *See, e.g., Nat'l City Com. Cap. Co., LLC v. Glob. Golf, Inc.*, 2009 WL 1437620, at *1 (E.D.N.Y. May 20, 2009) (even where "defendants assert that they will not dispute" particular elements of a claim, there is no basis to dismiss claims at the pleading stage where "defendants have not even filed an answer yet").

Simply because Ms. Haart has elected not to pursue dismissal of the breach of fiduciary duty claim does not confer upon her the right to decide for herself which other claims are viable. On the contrary, New York recognizes that "[c]auses of action or defenses may be stated alternatively or hypothetically." CPLR 3014; *see also IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 45 A.D.3d 419, 420 (1st Dep't 2007) (refusing to dismiss "breach of fiduciary duty claim" at the pleading stage "as 'duplicative' of the unjust enrichment claim, when it properly serves as an alternative theory for the relief sought"), *rev'd on other grounds*, 12 N.Y.3d 132 (2009). Even contradictory theories are "proper in our courts where pleading alternative theories of relief is acceptable." *Farash v. Sykes Datatronics, Inc.*, 59 N.Y.2d 500, 504 (1983). It necessarily follows that claims such as those pled here, which are not duplicative on their face, should not be dismissed. Accordingly, Plaintiffs' unjust enrichment claim is cognizable at this early stage of the litigation.

V. SCAGLIA HAS STANDING TO ASSERT BREACH OF CONTRACT.

Defendants do not contest Freedom's standing to pursue the claims at issue. Because they do not otherwise challenge the fiduciary duty and constructive trust claims, Defendants concede those are viable as alleged by Freedom. As to Mr. Scaglia, Defendants contend he lacks standing to assert claims of conversion, breach of contract, unjust enrichment and constructive trust. Though Mr. Scaglia does not contest the assertion as to the conversion, unjust enrichment, and constructive trust claims, Defendants are wrong as to the breach of contract claim.

Defendants do not dispute that Mr. Scaglia and Ms. Haart negotiated terms of an agreement. But she claims Mr. Scaglia lacks standing to enforce it. That contention defies black letter law. "A contracting party generally has a right to maintain an action in its own name." 22A N.Y. Jur. 2d Contracts § 417; *Airlines Reporting Corp. v. Pro Travel, Inc.*, 239 A.D.2d 233, 234 (1st Dep't 1997) (citing CPLR 1004). That is particularly true in the context of agreements among shareholders. "[C]ourts must enforce shareholder agreements according to their terms." *In re Dissolution of Penepent Corp., Inc.*, 96 N.Y.2d 186, 192 (2001).

In the face of this settled law, Defendants argue that, at this pleading stage, Plaintiffs must make a "clear demonstration" of damages. Haart Mem. at 11 (quoting *Milan Music, Inc. v. Emmel Commc'ns Booking, Inc.*, 37 A.D.3d 206, 206 (1st Dep't. 2007)). That too defies black letter law. "[P]laintiffs are not obligated to show, at this stage of the pleadings, that they actually sustained damages. They need only plead allegations from which damages attributable to the defendant's [conduct] might be reasonably inferred." *Kempf v. Magida*, 37 A.D.3d 763, 765 (2d Dep't 2007). Indeed, even in the sole case upon which Ms. Haart relies, the Court dismissed the plaintiff's claim because his "alleged damages amount[ed] to nothing more than conjecture." *Milan Music, Inc.*, 37 A.D.3d at 206. Here, Plaintiffs have specifically pled that Mr. Scaglia and

Ms. Haart were the two owners of Freedom (Am. Compl. ¶ 6) and, as a consequence of Ms. Haart withdrawing $850,000 more than the two agreed, he was damaged (Am. Compl. ¶ 53). There is nothing conjectural about the impact of this contractual breach. "[W]here a defendant owes an independent duty to the shareholder and the shareholder and the defendant are in privity, the shareholder may sue for damages." *Lawrence Ins. Grp., Inc. v. KPMG Peat Marwick L.L.P.*, 5 A.D.3d 918, 919 (3d Dep't 2004); *see also Matter of Schulman*, 165 A.D.2d 499, 504 (3d Dep't, 1991) ("Where a plaintiff is asserting that he has been damaged individually as a result of [the defendant's] breach of contractual and fiduciary duties, [the plaintiff] is not required to bring an action as a stockholder") (citation omitted and brackets omitted). Privity exists where there is a "contractual relationship between plaintiff and defendant." *Lawrence Ins. Grp., Inc.*, 5 A.D.3d at 919. Because a contractual relationship exists between Mr. Scaglia and Ms. Haart, Ms. Haart had an independent duty to Mr. Scaglia as her fellow stockholder. She breached her agreement with Mr. Scaglia. Mr. Scaglia is entitled to pursue recovery for that breach.

CONCLUSION

The Court should deny Defendants' motion to dismiss in its totality as to Freedom and deny their motion to dismiss as to Mr. Scaglia's breach of contract claim. In the event the Court does grant Defendants' motion, it should grant Plaintiffs an opportunity to replead and file an amended complaint.

Dated: New York, New York
June 22, 2022

Respectfully submitted,

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WORD COUNT CERTIFICATION

Pursuant to 22 N.Y.C.R.R. Section 202.8-b, I hereby certify that the above Memorandum of Law in Opposition to Defendants' Motion to Dismiss contains 5,264 words, exclusive of the caption, table of contents, table of authorities and signature block.

Dated: June 22, 2022

By: */s/ Marc R. Shapiro*
Marc R. Shapiro