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

ANTONIA NOBLE LUDWIG, as Administrator of the ESTATE OF AVRAM LUDWIG, deceased and individually and on behalf of BULL-POET, LLC, Plaintiff, v. WILLIAM A. SAHLMAN, DOUGLAS LIMAN, BULL-POET, LLC, DOUG LIMAN INC. and HYPNOTIC INC., Defendants.	Index No. 152866/2022 Motion Sequence No. 1

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

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Defendants William A. Sahlman, Douglas Liman, Bull-Poet, LLC, Doug Liman Inc., and Hypnotic Inc. respectfully submit this memorandum of law in support of their motion to dismiss the complaint filed by Plaintiff Antonia Noble Ludwig on April 4, 2022, pursuant to New York Civil Practice Law and Rules ("CPLR") 3211 (a)(1), (a)(7), and (a)(8).

PRELIMINARY STATEMENT

Plaintiff's lawsuit is only the latest in a series of shameless tactics designed to extract money from Defendants, based on wholly pretextual and imagined grievances. Plaintiff's skeletal, ten-page complaint—lean on facts and even leaner on law—literally fails to spell out a single cause of action by name. Even reading between the lines, Plaintiff's allegations come nowhere close to stating a viable legal claim. Her complaint should be dismissed in its entirety, and with prejudice.

The events leading up to this misguided lawsuit are simple: Eight years ago, three friends with a passion for sailing decided to buy a boat together. They owned the boat through a limited liability company, called Bull-Poet, LLC ("Bull-Poet"), which was formed for that sole purpose. The three friends shared the boat for years, often sailing it together, until March 2019, when one member of the group—Plaintiff's brother, Avram Ludwig—passed away.

Since Mr. Ludwig's death, Plaintiff, who purports to have inherited Mr. Ludwig's one-third stake in Bull-Poet, has sought to parlay that stake into an exorbitant payout for herself, out of the pockets of the two surviving members, Defendants Will Sahlman and Doug Liman. To that end, Plaintiff has conjured up a grab-bag of trivial grievances against Defendants, accusing them of allegedly mismanaging Bull-Poet—an entity that has no business and no income, and exists only for the purpose of owning a recreational sailboat—and of supposed lapses in recordkeeping.

Each of Plaintiff's purported "claims" could be easily disproven if this case were to proceed to trial. There is no need, however, to waste this Court's time in reaching that conclusion. It is

already clear, even assuming Plaintiff's allegations to be true, that her complaint should be dismissed, for multiple reasons.

First, the complaint should be dismissed in its entirety because Plaintiff fails to plead any cognizable injury or damages. This is a necessary prerequisite to any lawsuit—both as a threshold matter of standing, and as an essential element of almost all legal claims—and Plaintiff's failure to identify a single actual harm resulting from Defendants' conduct is fatal to her entire complaint.

Second, the complaint should be dismissed for the separate and independent reason that Plaintiff fails to adequately plead *any* legal claim. While it is difficult to tell what claims, exactly, Plaintiff purports to be asserting, her allegations gesture in the direction of claims for breach of contract and for breach of fiduciary duty. Plaintiff fails, however, to make out either of those claims. In addition to her failure to allege any damages, Plaintiff also neglects to identify a single contractual provision that has been breached, or any conduct that would rise to the level of a breach of fiduciary duty. Nor does she articulate any claim that is not squarely barred by the terms of Bull-Poet's operating agreement.

Third, Plaintiff's complaint should be dismissed because she is not entitled to any of the relief she seeks. Not only does she fail to allege any cognizable damages, Plaintiff is also unable to plead an entitlement to any of the other extraordinary remedies—including an accounting of profits, an order of dissolution, and an injunction compelling the filing of unnecessary tax returns—that she purports to seek.

Fourth, and finally, the foregoing defects require dismissal of Plaintiff's claims as to each and every Defendant. Plaintiff's failure to allege damages, to plead the elements of any legal claim, or to establish an entitlement to any of her requested relief means that none of her purported causes of action can survive as to any of the Defendants. Her claims against Hypnotic Inc., a

foreign corporation, fail for the additional reason that she does not allege any facts supporting the exercise of personal jurisdiction over that entity.

For these reasons, Defendants respectfully request that the Court dismiss Plaintiff's complaint with prejudice.

FACTUAL BACKGROUND

The following facts are drawn from Plaintiff's complaint (the "Complaint") and the documents properly incorporated therein:[1]

I. The Formation of Bull-Poet

In 2014, Avram Ludwig, Will Sahlman, and Doug Liman—three friends who shared a love for sailing—decided to buy a 42-foot Catalina sailboat, called "Nite Cap." (Compl. ¶¶ 7–8, 44.) To that end, the three friends formed Bull-Poet, a New York limited liability company ("LLC"). (*Id*. ¶ 7.) Bull-Poet's sole purpose was to allow the friends to jointly own and maintain Nite Cap. (*Id*. ¶ 8.)

Bull-Poet's affairs are governed by an operating agreement dated August 26, 2014 (the "Operating Agreement"). (*Id*. ¶ 10; Ex. B.) The Operating Agreement names Mr. Ludwig, Mr. Sahlman, and Mr. Liman as Bull-Poet's three members, each with an equal one-third stake in the LLC. (Compl. ¶ 9; Ex. B at Schedule A.) The agreement further provides that the members shall elect a "Manager" from among them—initially, Mr. Sahlman—who is responsible for the day-to-day management of the LLC. (Compl. ¶¶ 23–24; Ex. B at Art. II, § 2.) The Operating Agreement is governed by New York law. (Ex. B at Art. X, § 6.)

[1] Citations to "Compl." are to Plaintiff's Complaint, attached as Exhibit A to the Affirmation of Maia Usui in Support of Defendants' Motion to Dismiss Plaintiff's Complaint, filed herewith. Citations to "Ex. B." are to the Operating Agreement of Bull-Poet, LLC, attached as Exhibit B to the same affirmation.

Consistent with the limited purpose of the LLC, the Operating Agreement sets forth only modest recordkeeping requirements. Article III, Section 4 provides that "the Manager/Member shall cause the Company to keep" only four categories of documents: (i) a current list of the LLC's members, (ii) the LLC's certificate of formation and Operating Agreement, (iii) the LLC's tax returns, "if any, for the three (3) most recent years," and (iv) copies of "any financial statements . . . for the three (3) most recent years." (Ex. B at Art. III, § 4.)

Among its key terms, the Operating Agreement sets forth provisions limiting the liability of its individual members: Article II, Section 1 provides that "[n]o Member shall be personally liable for any debt, losses or obligations of the Company by virtue of being a Member, except to the extent of its capital contribution." (Ex. B at Art. II, § 1.) Similarly, Article III, Section 2 provides as follows:

> Limitation of Liability. Any act or omission of the Manager/Member, the effect of which may cause or result in loss or damage to the Company or the Members if done in good faith to promote the best interests of the Company, shall not subject the Manager/Member to any liability of the Members.

(*Id*. Art. III, § 2.)

The only exception to this broad limitation on liability is for "gross negligence." (*Id*.)

The Operating Agreement also includes provisions governing dissolution of the LLC. Article VIII provides that the LLC may be dissolved upon the occurrence of several specified events, including "[t]he written consent of a majority of the Members in interest," and "[t]he . . . death . . . of a Member." (Compl. ¶ 11; Ex. B at Art. VIII, § 1.) Article VIII further provides, however, that none of those specified events shall result in the dissolution of the LLC "unless within ninety (90) days of the occurrence of [such] event, a majority in Capital Interests of the

remaining Members elect to discontinue the business of the Company." (Compl. ¶ 11; Ex. B. at Art. VIII, § 2.)

Lastly, the Operating Agreement obligates any member who "desires to transfer his interest" in the LLC to "first offer to sell that interest to the other Members . . . at the then fair market value of 'Nite Cap' . . . multiplied by the Member's percentage interest therein." (Ex. B at Art. X, § 11.) The other members shall then have thirty days to exercise their option to purchase that interest. (*Id*.) "If the members are unable to agree on a value as to the interest being sold, 'Nite Cap' . . . shall be sold and the net proceeds therefrom shall be distributed to the members in proportion to their ownership interest." (*Id*.)

II. Plaintiff's Opportunistic Cash-Grab

Following Bull-Poet's formation, the three members shared use of Nite Cap, often sailing it together, until March 2019, when Mr. Ludwig passed away from a serious illness. (Compl. ¶¶ 12, 57.) Consistent with Article VIII of the Operating Agreement, the two surviving members—Mr. Sahlman and Mr. Liman, who together represent a majority interest—did not elect to dissolve the LLC. (*Id*. ¶ 19; Ex. B. at Art. VIII.)

Not long after Mr. Ludwig's death, Plaintiff—sensing the opportunity to squeeze some cash out of the situation—began harassing her late brother's friends. (Compl. ¶¶ 15–19.) Plaintiff claimed that she had inherited Mr. Ludwig's one-third stake in Bull-Poet. (*Id*. ¶¶ 12–13.) But, rather than divest her stake in the manner specifically permitted by the Operating Agreement—that is, by offering to sell it to the other two members at fair market value—Plaintiff decided instead to hold out for a more lucrative pay-out. (Ex. B at Art. X, § 11.) To that end, Plaintiff repeatedly demanded a wide range of records from Bull-Poet that simply do not exist, because they are not required to be prepared under Bull-Poet's Operating Agreement, including tax returns and fully audited financial statements. (Compl. ¶¶ 15–19; Ex. B at Art. III, § 4.) When Defendants

proved unable to produce these nonexistent records, Plaintiff threatened to sue over their supposed recordkeeping lapses—a threat which has now materialized in the form of this lawsuit.

III. The Complaint

In her Complaint, Plaintiff asserts six separate "causes of action," none of which expressly name the legal claim being asserted, and four of which appear to be based on almost entirely duplicative allegations.

Plaintiff's first cause of action appears to be alleging a breach of fiduciary duty, or possibly—reading between the lines somewhat—a breach of the Operating Agreement, by Mr. Sahlman and Mr. Liman. (Compl. ¶¶ 21–29.) Plaintiff alleges that those two members "failed to act in the interest of Bull-Poet and properly operate the business or otherwise timely dissolve . . . Bull-Poet." (*Id*. ¶ 27.) Plaintiff alleges that these supposed failures entitle her to a money judgment of at least $2 million. (*Id*. ¶ 29.)

Plaintiff's second cause of action alleges that Mr. Sahlman and Mr. Liman "failed to handle the overall activities of Bull-Poet as well as maintain the financial records and prepare[] financial reports including tax returns for Bull-Poet." (*Id*. ¶ 33.) While it is not entirely clear whether these alleged failures are based on any different facts than the first cause of action, Plaintiff alleges that they entitle her to a separate and additional money judgment of at least $500,000. (*Id*. ¶ 35.)

Plaintiff's third, fourth, and fifth causes of action do not appear to assert separate legal claims, but instead purport to seek a wide range of remedies for the same conduct alleged in the first and second causes of action, namely: (i) an "account . . . of all monies received and disbursed" by Bull-Poet and a "judgment in the amount of one third of the profits" (*id*. ¶ 41); (ii) the dissolution of Bull-Poet, "which should include selling the sailboat" (*id*. ¶ 46); and (iii) an injunction compelling Mr. Sahlman and Mr. Liman to file tax returns for Bull-Poet. (*Id*. ¶ 51.)

Finally, Plaintiff's sixth cause of action alleges that Mr. Liman, along with two of his affiliated entities—Doug Liman Inc. and Hypnotic Inc.—"exposed" Mr. Ludwig's estate to "substantial income tax" by paying for Mr. Ludwig's medical expenses and "issuing false [Form] 1099's" to him prior to his death, allegedly to assist Mr. Ludwig in perpetrating some kind of Medicaid "fraud." (*Id*. ¶¶ 58–59.) Plaintiff asserts that this alleged "exposure" entitles her to another money judgment of at least $100,000, for a total claimed monetary award of no less than $2.6 million. (*Id*. ¶ 60.)

LEGAL STANDARD

On a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), a plaintiff's allegations are accepted as true and accorded every favorable inference. *See Nonnon* v. *City of New York*, 9 N.Y.3d 825, 827 (2007). However, "[a]llegations consisting of bare legal conclusions, as well as factual claims [that are] either inherently incredible or flatly contradicted by documentary evidence" are not entitled to any such deference. *Biondi* v. *Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81 (1st Dep't 1999) (citation omitted). Courts may also consider documentary evidence outside the pleadings where it is referred to in the complaint. *See Alliance Network, LLC* v. *Sidley Austin LLP*, 43 Misc.3d 848, 852 n.1 (Sup. Ct. N.Y. County 2014).

A motion to dismiss can also be granted under CPLR 3211(a)(1) "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen* v. *Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002). "Materials that clearly qualify as 'documentary evidence' include 'documents reflecting out-of-court transactions such as . . . contracts.'" *Midorimatsu, Inc*. v. *Hui Fat Co*., 99 A.D.3d 680, 682 (2d Dep't 2012) (citation omitted).

ARGUMENT

I. The Complaint Should Be Dismissed in Its Entirety Because Plaintiff Fails to Plead Any Cognizable Injury or Damages

It is a fundamental prerequisite to all lawsuits that the plaintiff have suffered an actual injury, not only as a threshold matter of standing, *see Soc'y of Plastics Indus., Inc*. v. *Cty. of Suffolk*, 77 N.Y.2d 761, 772–73 (1991), but also as a necessary element for almost all legal claims. While Plaintiff's Complaint does not spell out the precise causes of action she is asserting, the existence of damages is an essential element—whether her claims sound in contract, or under a theory of fiduciary duties—that she simply fails to plead. *See Second Source Funding, LLC* v. *Yellowstone Cap., LLC*, 144 A.D.3d 445, 445–46 (1st Dep't 2016) ("To plead breach of contract, the proponent must allege . . . damages."); *see also Litvinoff* v. *Wright*, 150 A.D.3d 714, 715 (2d Dep't 2017) ("The elements of a cause of action . . . for breach of fiduciary duty [include] . . . damages directly caused by the defendant's misconduct." (citation omitted)). This failure is fatal to all of Plaintiff's claims, and the Complaint should be dismissed in its entirety for this reason alone.

Sifting through the duplicative allegations in her six separate "causes of action," Plaintiff's grievances against Defendants boil down to the following: (i) a supposed failure to "properly operate the business or otherwise timely dissolve . . . Bull-Poet" (Compl. ¶ 27); (ii) a supposed failure to maintain financial records, including tax returns, for Bull-Poet (*id*. ¶ 33); and (iii) the alleged issuance of "false [Form] 1099's" to Mr. Ludwig prior to his death. (*Id*. ¶ 59.) What is missing from these allegations is any intelligible explanation as to how any of this alleged conduct could have had any impact—much less any *harmful* impact—on Plaintiff. To take each instance of challenged conduct separately:

First, Plaintiff fails to allege how Defendants' "operation" of Bull-Poet has injured her. Setting aside the utter lack of any specific allegations as to how Defendants have failed to "properly

operate the business" of a single-purpose LLC formed only to own a recreational sailboat—what "business"?—Plaintiff also neglects to explain how the decision not to dissolve Bull-Poet following Mr. Ludwig's death harmed Plaintiff (or anyone else, for that matter). (*Id*. ¶ 27.) The Operating Agreement clearly permitted the two surviving members, Mr. Sahlman and Mr. Liman, to elect not to dissolve the LLC. (Compl. ¶ 11; Ex. B. at Art. VIII, § 2.) If Plaintiff is dissatisfied with that result (and again, there is no hint in the Complaint as to why that might be), she has the option under the Operating Agreement to offer to sell her interest to Defendants at fair market value and, if no such deal can be reached, to thereby trigger the sale of the sailboat. (Ex. B at Art. X, § 11.) She has chosen not to do so. Plaintiff's claim that Defendants have caused her no less than *$2 million in damages* as a result of this conduct—which, incidentally, is more than fifteen times the assessed value of the sailboat—is inconceivable on its face. (Compl. ¶ 29.)

Plaintiff's allegations regarding Bull-Poet's recordkeeping likewise fail to make out any cognizable injury. Plaintiff's theory is apparently that, because Defendants failed to prepare extensive financial records for an LLC that has no actual business, no income, and no assets to speak of other than a single sailboat, Bull-Poet faces the risk of "annual penalties which, upon information and belief, could be $70,000 alone." (*Id*. ¶ 34.) Plaintiff's logic is missing several crucial links: What penalties? Imposed by whom? On what grounds? Plaintiff's Complaint has no answers to any of these questions. Plaintiff does not identify any provision of the Operating Agreement that requires the preparation of these specific records (because, as discussed below, no such provision exists (*infra* Section II.A)), nor does she cite any rule or regulation to that effect. Not to mention, even *if* any "penalties" were in fact assessed against Bull-Poet (which Plaintiff does not allege), it is still not clear how that would harm Plaintiff herself: in fact, the terms of the Operating Agreement plainly state that Plaintiff, as a purported member of Bull-Poet, bears no

personal liability for "any debt, losses or obligations" of the LLC. (Ex. B. at Art. II, § 1.)[2] Plaintiff's allegation that these supposed defects in Bull-Poet's recordkeeping caused her damage of at least half a million dollars, based on purely hypothetical "penalties" that no one has even tried to assess (*id*. ¶¶ 34–35), is thus "entirely speculative" and cannot support any kind of claim. *Argyle Farm & Props., LLC* v. *Watershed Agric. Council*, 135 A.D.3d 1262, 1265 (3d Dep't 2016).

Plaintiff's final allegations—which appear to have nothing to do with Bull-Poet, but instead vaguely assert some kind of Medicaid "fraud" perpetrated by Mr. Ludwig before his death—are just as deficient, especially with respect to alleged harm. (*Id*. ¶¶ 53–60.) Plaintiff appears to allege that, prior to Mr. Ludwig's death, Mr. Liman paid a portion of his friend's medical expenses "to prevent Medicaid from making a claim against" Mr. Ludwig, and to that end also issued, through his affiliated entities, "false" Form 1099's to Mr. Ludwig. (*Id*. ¶¶ 54–55, 59.) Plaintiff further alleges that Mr. Liman and those entities thus "exposed" Mr. Ludwig's estate "to substantial income tax that would not [otherwise] be due and owing," and that this somehow entitles Plaintiff to another $100,000 at least. (*Id*. ¶¶ 59–60.) Here, again, Plaintiff's allegations of damages abandon even any pretense of fact and veer straight into speculative fiction. Even assuming her allegations of attempted "fraud" are true (they are not), Plaintiff does not allege that any tax authority has, in fact, sought to collect any amount from Mr. Ludwig's estate, much less any

[2] To the extent Plaintiff purports to be asserting any claims derivatively on behalf of Bull-Poet, based on some harm to the entity rather than herself, those claims are a mere charade. This is evident from the relief that Plaintiff seeks, which includes (i) money judgments totaling at least $2.6 million, to be paid to Plaintiff herself, and (ii) an accounting for one-third of Bull-Poet's supposed "profits," again to be paid to herself. (Compl. ¶ 60.) The only requested relief that could conceivably be for Bull-Poet's benefit—an order of dissolution and an injunction compelling the filing of tax returns—is in any event unwarranted, as explained further below. (*Infra* Section III.)

amount that Mr. Ludwig would not have owed in the absence of Mr. Liman's alleged conduct. The "damage" here is purely hypothetical.

Thus, without exception, every single one of Plaintiff's allegations regarding a purported injury or damages is exactly the kind of speculation and conjecture—"predicated upon hypothetical, future events that may or may not come to pass"—that New York courts will reject on a motion to dismiss. *Argyle Farm & Props., LLC*, 135 A.D.3d at 1265; *see Matter of Assoc. for a Better Long Is., Inc*. v. *N.Y. State Dep't of Env'tal Conservation*, 23 N.Y.3d 1, 9 (2014); *Lotaj* v. *City of New York*, 127 A.D.3d 605, 605–06 (1st Dep't 2015). Without any allegation that Plaintiff has, in fact, incurred any financial penalties, tax liabilities, or any other harm, there is simply no basis on which her claims can proceed.

For this reason, Plaintiff's Complaint should be dismissed in full.

II. The Complaint Should Be Dismissed in Its Entirety Because Plaintiff Fails to State Any Claim

The Complaint should be dismissed, in its entirety, for the separate and independent reason that Plaintiff fails to state any kind of legal claim. Again, while it is impossible to tell without some guesswork what claims, exactly, Plaintiff is asserting here, her allegations appear to gesture toward claims for (i) a breach of contract based on the terms of the Operating Agreement, and/or (ii) a breach of fiduciary duty to Bull-Poet. Neither claim is sufficiently pleaded here.[3]

[3] To the extent that Plaintiff's sixth cause of action might be asserting some kind of claim for fraud (and it is not at all clear how that could be), that claim is also inadequately pleaded. Under New York law, a claim for fraud must be pled with particularity and "in detail." CPLR 3016(b). Plaintiff's failure to "allege specific facts with respect to the time, place, or manner" in which Defendants made any supposed misrepresentation, or to "allege that the purportedly false representations were made . . . with the intent to deceive or to induce plaintiff's reliance," are among the many reasons why such a claim would fail. *See Riverbay Corp*. v. *Thyssenkrupp N. Elevator Corp*., 116 A.D.3d 487, 488 (1st Dep't 2014) (dismissing fraud claim as inadequately pled).

A. Plaintiff Fails to Plead a Breach of Contract

Under New York law, a plaintiff asserting a claim for breach of contract must allege "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris* v. *Seward Park Hous. Corp*., 79 A.D.3d 425, 425 (1st Dep't 2010). Plaintiff fails to do so.

To start, any claim for breach of contract is flatly contradicted by the terms of the Operating Agreement itself, which constitutes "documentary evidence" under CPLR 3211(a)(1), and was also referenced multiple times in Plaintiff's own Complaint (*e.g*., Compl. ¶¶ 10–11, 14, 23, 32, 48), such that the Court can properly consider it on a motion to dismiss under CPLR 3211(a)(7) as well. *See Midorimatsu, Inc*., 99 A.D.3d at 682; *see also Alliance Network, LLC*, 43 Misc.3d at 852 n.1. Fatal for her claims, Plaintiff is unable to identify a single provision of the Operating Agreement that was breached. While Plaintiff complains that Defendants failed to "timely dissolve and wind up the affairs of Bull-Poet" upon Mr. Ludwig's death (Compl. ¶ 27), that decision was entirely lawful under the terms of the Operating Agreement. As noted, Article VIII of the Operating Agreement (quoted in Plaintiff's own Complaint) states explicitly that the death of a member will not result in dissolution, "unless . . . a majority in Capital Interests of the remaining Members elect to discontinue the business of the Company." (*Id*. ¶ 11; Ex. B at Art. VIII.) Mr. Sahlman and Mr. Ludwig, the two surviving members who together represent a majority of the membership interests, did not so elect, and were fully within their contractual rights to do so.

Plaintiff also complains that Defendants failed to "maintain . . . financial records" or "prepare[] . . . financial reports including tax returns" for Bull-Poet, and "refused to provide" the nonexistent records demanded by Plaintiff. (Compl. ¶¶ 33, 39.) But again, Plaintiff fails to identify any actual provision of the Operating Agreement that was breached. As stated, the Operating

Agreement imposes only modest recordkeeping obligations on its members, consistent with its narrow purpose, which is simply to own a single sailboat. (Ex. B at Art. III, § 4.) And while Plaintiff cites to several recordkeeping-related provisions of the Operating Agreement in her Complaint, not one of them actually requires the LLC's members to maintain financial statements in any particular form, or to file any tax returns (unless they are required by law). To be specific:

- Article II, Section 3 states only that "the Manager shall supply to any member information regarding the Company or its activities" upon such member's request, and that "[e]ach member . . . shall have access to . . . all books, records and materials in the Manager's possession." (*Id*. Art. II, § 3.) Nowhere does this provision require that the members prepare the wide-ranging records demanded by Plaintiff, such as "a valuation of the assets owned by Bull-Poet" or audited financial statements. (Compl. ¶ 16.)

- Article III, Section 5 provides that the member designated as "Treasurer" shall be responsible simply for "[m]aintaining the financial records of the Company" and "[p]reparing and presenting financial reports to the Company and its Members." (Ex. B at Art. III, § 5.) Again, this provision does not require any records or reports to be prepared or maintained in the form that Plaintiff demands.

- Article IX, Section 3 states that the members "shall cause to [be] prepare[d] all *necessary* tax returns for the Company." (*Id*. at Art. IX, § 3 (emphasis added).) Nowhere does Plaintiff allege that the tax returns she has repeatedly demanded are, in fact, necessary or required by law.[4] Moreover, that same provision goes on to state that the members "shall make appropriate elections concerning the tax year, the manner of accounting and any other election that the Members deem to be in the best interest of the Company"—making even clearer that the form and method of the LLC's financial recordkeeping was to be left to the discretion of its members. (*Id*.)

In short, this is a situation where the very terms of the agreement that Plaintiff relies upon—the Operating Agreement—"unambiguously contradicts the allegations supporting [Plaintiff's] cause of action for breach of contract." *150 Broadway N.Y. Assocs., L.P*. v. *Bodner*, 14 A.D.3d 1, 5 (1st Dep't 2004). Accordingly, the terms of that agreement "warrant[] the dismissal of the

[4] In fact, not every LLC is required to file a tax return. *See, e.g.*, 26 C.F.R. § 1.6031(a)-1(a)(3)(i) (2020); N.Y. State Dep't of Taxation & Finance, Publication 16: New York Tax Status of Limited Liability Companies and Limited Liability Partnerships 6 (2014). Certainly, Plaintiff fails to cite to any federal or state law or regulation establishing that Bull-Poet is required to do so.

complaint pursuant to CPLR 3211(a)(1), regardless of . . . [Plaintiff's] self-serving allegations." *Id*.; *see Midorimatsu, Inc*., 99 A.D.3d at 682 (granting motion to dismiss under CPLR 3211(a)(1) where the parties' contract "constitute[d] documentary evidence establishing a defense as a matter of law").

Plaintiff's contract claim fails for the additional reason that, as discussed above, she neglects to plead another "material element that cannot be supplied even through the liberal construction required on a motion to dismiss": damages. *McCormick* v. *Favreau*, 82 A.D.3d 1537, 1541 (3d Dep't 2011). Plaintiff's "boilerplate allegations of damage," unsupported by any facts demonstrating how any breach (even if it existed) could have harmed her, thus also warrant dismissal. *Gordon* v. *Dino De Laurentiis Corp*., 141 A.D.2d 435, 436 (1st Dep't 1988) (dismissing breach of contract claim as "fatally deficient because it does not demonstrate how the defendant's alleged breach . . . caused plaintiffs any injury"); *see Edelman* v. *Emigrant Bank Fine Art Fin., LLC*, 89 A.D.3d 632, 633 (1st Dep't 2011) (dismissing contract claim where, even assuming breach, "complaint's conclusory allegation of damages [was] insufficient").

B. Plaintiff Fails to Plead a Breach of Fiduciary Duty

A plaintiff asserting a claim for breach of fiduciary duty must plead "(1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." *Litvinoff* v. *Wright*, 150 A.D.3d at 715 (citation omitted). Not only that, a claim for breach of fiduciary duty "must be pleaded with particularity under CPLR 3016(b)." *Id*. (citation omitted). Here, Plaintiff fails to allege any claim for breach of fiduciary duty, for several reasons.

As a threshold matter, any claim for breach of fiduciary duty is barred by the terms of the Operating Agreement. That agreement clearly exempts Mr. Sahlman and Mr. Liman from liability for "[a]ny act or omission" taken in their capacity as a member of the LLC, even if it "result[s] in

loss or damage to the Company or the Members," as long as it is "done in good faith to promote the best interests of the Company." (Ex. B at Art. III, § 2.) The sole exception to this broad limitation on liability is if a member acted with "gross negligence." (*Id.*) Here, Plaintiff fails to allege with the requisite particularity that Defendants did not act in good faith, much less that they acted with anything remotely approaching "gross negligence." *See J. Petrocelli Contracting, Inc*. v. *Morganti Grp., Inc*., 137 A.D.3d 1082, 1083 (2d Dep't 2016) ("To constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others." (citation omitted)).

In this regard, the First Department's decision in *Aris Multi-Strategy Fund, L.P.* v. *Accipiter Life Sciences Fund II (QP), L.P.*, 89 A.D.3d 454 (1st Dep't 2011), is instructive. In that case, a group of disgruntled investors sued certain fund managers for breach of fiduciary duty based on the alleged mismanagement of their investments. *Id*. at 454. There, as here, the parties' relationship was governed by an agreement that "limited defendants' liability to losses caused by 'gross negligence'" and intentional misconduct. *Id*. at 455. The First Department affirmed dismissal of the breach of fiduciary duty claims, holding that the allegations of mismanagement—while more specific than the allegations here—were insufficient to allege the gross negligence or intentional misconduct required under the agreement. *Id*. So too here. Plaintiff's claim for breach of fiduciary duty is squarely precluded by the Operating Agreement and should be dismissed. *See also Pappas* v. *Tzolis*, 20 N.Y.3d 228, 232–33 (2012) (dismissing breach of fiduciary duty claim against LLC member based on operating agreement provision limiting liability).

Equally fatal to her fiduciary duty claim, Plaintiff also fails to allege any actual misconduct by any of the Defendants. Plaintiff's vague and conclusory allegations that Mr. Sahlman and Mr. Liman "failed to act in the interest of Bull-Poet and properly operate the business" and thus

"breached the duties of loyalty and good faith to Plaintiff and Bull-Poet" do not suffice. (Compl. ¶¶ 27–28.) The only specific actions that Plaintiff challenges are, again, (i) the decision not to dissolve Bull-Poet upon Mr. Ludwig's death, and (ii) supposed issues with recordkeeping. (*Id*. ¶¶ 27, 33.) But neither of these can serve as the basis for a breach of fiduciary duty claim because, as discussed above (*supra* Section II.A), they were entirely consistent with the terms of the Operating Agreement. As courts have recognized, a fiduciary who acts in full compliance with the terms of the agreement establishing the fiduciary relationship—here, the Operating Agreement—cannot be said to have breached any duty. *See Sveaas* v. *Christie's, Inc*., 452 F. App'x 63, 66–67 (2d Cir. 2011) (applying New York law) (affirming dismissal of breach of fiduciary duty claim, where defendant acted in compliance with parties' agreement). Not to mention, Plaintiff also fails to allege any facts that would rebut the presumptive application of the business judgment rule, which protects any action taken by a fiduciary "in good faith and in the exercise of honest judgment." *Zuckerbrod* v. *355 Co., LLC*, 113 A.D.3d 675, 676 (2d Dep't 2014) (citation omitted).

In another blow to her purported fiduciary duty claim, Plaintiff also, as discussed (*supra* Section I), fails to plead the necessary element of damages. *See Litvinoff*, 150 A.D.3d at 715.

And finally, any claim for breach of fiduciary duty must be dismissed because the allegations underlying that claim are entirely duplicative of Plaintiff's breach of contract claim. Under New York law, "causes of action for breach of fiduciary duty that merely restate contract claims must be dismissed." *Bullmore* v. *Ernst & Young Cayman Islands*, 45 A.D.3d 461, 465 (1st Dep't 2007); *see LaSalle Hotel Lessee, Inc*. v. *Marriott Hotel Servs., Inc*., 29 A.D.3d 464, 465 (1st Dep't 2006). That is exactly the case here.

For all these reasons, Plaintiff fails to plead any claim—whether for breach of contract or for breach of fiduciary duty—and her Complaint should be dismissed in its entirety on that basis as well.

III. The Complaint Should Be Dismissed in Its Entirety Because Plaintiff Is Not Entitled to Any of the Relief She Seeks

As a separate basis for dismissal, each of Plaintiff's claims fails because she is not entitled to any of the relief she seeks. As already discussed, Plaintiff fails to plead damages with the requisite specificity, instead claiming amounts that are wholly speculative. (*Supra* Section I.) Plaintiff is equally unable to allege why she is entitled to any of the other relief she seeks.

First, Plaintiff is not entitled to an accounting for "one third of the profits" of Bull-Poet. (Compl. ¶ 41.) Setting aside the fact that Bull-Poet does not even have any "profits," Plaintiff's claim fails because she cannot plead the prerequisites for this equitable remedy. Under New York law, a plaintiff seeking an accounting must establish that she has "no other remedy." *Fuller Landau Advisory Servs., Inc*. v. *Gerber Fin. Inc*., 333 F. Supp. 3d 307, 315 (S.D.N.Y. 2018) (citation omitted); *see In re Guardianship of Kent*, 188 Misc.2d 509, 510 (Sup. Ct. Dutchess County 2001). Here, there is no basis for an accounting because the allocation of Bull-Poet's nonexistent "profits" is already fully governed by the Operating Agreement, which provides that "[t]he net profits or net losses of the Company shall be distributable or chargeable . . . to each of the Members based on the Capital Interest of each Member." (Ex. B at Art. V, § 1.) Thus, even if there were any profits owing to Plaintiff under the Operating Agreement (and there are none), Plaintiff's first recourse should be under the terms of that contract, not through an accounting. And yet, Plaintiff does not—because she cannot—allege any breach of the Operating Agreement in this regard. Her attempt to repackage what is in fact an untenable contract claim as an equitable claim for an "accounting" should be rejected.

Second, Plaintiff is not entitled to an order dissolving Bull-Poet. (Compl. ¶ 46.) Under New York's Limited Liability Company Law, judicial dissolution is "a drastic remedy" that should be ordered only in the most extraordinary of circumstances—that is, when "it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement." *Matter of 1545 Ocean Ave., LLC*, 72 A.D.3d 121, 126, 131 (2d Dep't 2010) (citing N.Y. Limited Liability Company Law § 702). In order to meet this exacting standard, a member seeking dissolution "must establish . . . that (1) the management of the entity is unable or unwilling to reasonably permit or promote the stated purpose of the entity to be realized or achieved, or (2) continuing the entity is financially unfeasible." *Id*. at 131. Plaintiff falls far short. She neglects to allege any way in which Mr. Sahlman and Mr. Liman are "unable or unwilling" to carry on operating Bull-Poet for its limited purpose of owning Nite Cap. In fact, she alleges the opposite, acknowledging that the LLC continues to own the sailboat. (Compl. ¶ 44.) Nor does she allege that continuing the LLC is "financially unfeasible"—if anything, her misguided claim for a third of Bull-Poet's "profits" points in the opposite direction. (*Id*. ¶ 41.) *See Doyle* v. *Icon, LLC*, 103 A.D.3d 440, 440 (1st Dep't 2013) (dismissing claim for dissolution of LLC where plaintiff's allegations "show[ed] that the company has been able to carry on its business" and plaintiff claimed a share of LLC's "profits," showing that the LLC was "financially feasible"). Plaintiff's bid for dissolution thus fails.

Third, Plaintiff is not entitled to "an injunction compelling [Defendants] to prepare and file . . . tax returns for Bull-Poet and to pay for all penalties and interest imposed." (Compl. ¶ 51.) "To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a 'violation of a right presently occurring, or threatened and imminent,' that . . . she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and

that the equities are balanced in . . . her favor.'" *Hogue* v. *Village of Dering Harbor*, 199 A.D.3d 900, 902–03 (2d Dep't 2021) (citation omitted). Plaintiff's claim for an injunction founders on the very first requirement: Plaintiff cannot allege any "violation of a right" that would support an injunction, because, as already discussed (*supra* Section II.A), she has pointed to *no requirement* that Bull-Poet was, in fact, required to file tax returns, whether under the Operating Agreement or under any law or regulation. As also discussed (*supra* Section I), she identifies no harm resulting from these unfiled returns, much less "irreparable" harm.

Plaintiff's failure to allege an entitlement to *any* of the relief she seeks is yet another reason the Complaint should be dismissed in full.

IV. The Complaint Should Be Dismissed in Its Entirety as to All Defendants

The reasons set forth above support the dismissal of the Complaint in its entirety, and as to *all* Defendants. While it is not entirely clear from Plaintiff's Complaint which causes of action are being asserted against which defendants, what *is* clear is that Plaintiff has no claims against any of them:

- With respect to Mr. Sahlman, Plaintiff's claims against him appear to be limited to her first, second, third, fourth, and fifth causes of action. These causes of action all fail because Plaintiff fails to allege any injury or damages, to plead the necessary elements of any claim—whether for breach of contract or for breach of fiduciary duty—or to make out an entitlement to the relief she seeks. (*Supra* Sections I–III.) All claims against Mr. Sahlman should be dismissed.

- With respect to Mr. Liman, Plaintiff's claims against him appear to correspond to the same causes of action that are brought against Mr. Sahlman—which all fail for the reasons just stated—as well as the sixth cause of action, relating to Mr. Ludwig's alleged Medicaid "fraud." That cause of action, in addition to being barely comprehensible, fails for lack of any alleged injury or damages (*supra* Section I), and should also be dismissed.

- With respect to Bull-Poet, Plaintiff's only claim against this entity appears to be her fourth cause of action seeking dissolution. Because Plaintiff fails to demonstrate her entitlement to this remedy (*supra* Section III), this cause of action should be dismissed.

- With respect to Doug Liman Inc. and Hypnotic Inc., Plaintiff's only claims against these entities appear to be her sixth cause of action. Plaintiff alleges that these entities are liable to her for issuing "false [Form] 1099's." (Compl. ¶ 59.) While it is not clear what kind of substantive legal claim, exactly, is being asserted against these entities, this cause of action fails in any event for failure to allege any injury or damages. (*Supra* Section I.) In addition, Hypnotic Inc. is a foreign corporation (Compl. ¶ 6), and Plaintiff alleges no facts that would support the exercise of personal jurisdiction over that entity, providing additional grounds for dismissal under CPLR 3211(a)(8). *See Teplin* v. *Manafort*, 81 A.D.2d 531, 531 (1st Dep't 1981) ("[A] plaintiff . . . must expressly allege in the complaint facts bringing the nonresident within [the court's jurisdiction].").

Accordingly, Plaintiff's claims should be dismissed as to all Defendants.

CONCLUSION

For the foregoing reasons, Plaintiff's Complaint should be dismissed in its entirety, and with prejudice.

Dated: New York, New York
July 11, 2022

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

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Certification of Compliance with Word Count

Pursuant to Section 202.8-b of the New York Codes, Rules and Regulations, I certify that this affirmation complies with that rule because it contains 6,745 words. In making this certification, I relied on Microsoft Word's "Word Count" tool.

Dated: New York, New York
July 11, 2022

By: /s/ Brad S. Karp
Brad S. Karp

Attorney for Defendants