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

PERELLA WEINBERG PARTNERS LLC, PWP MC LP, PWP EQUITY I LP, and PERELLA WEINBERG PARTNERS GROUP LP,

Plaintiffs,

- against -

MICHAEL A. KRAMER, DERRON S. SLONECKER, JOSHUA S. SCHERER, ADAM W. VEROST, and DUCERA PARTNERS LLC,

Defendants.

MICHAEL A. KRAMER, DERRON S. SLONECKER, JOSHUA S. SCHERER, and ADAM W. VEROST,

Counterclaim-Plaintiffs,

- against -

PERELLA WEINBERG PARTNERS LLC, PWP MC LP, PWP EQUITY I LP, and PERELLA WEINBERG PARTNERS GROUP LP,

Counterclaim-Defendants.

MICHAEL A. KRAMER, DERRON S. SLONECKER, JOSHUA S. SCHERER, and ADAM W. VEROST,

Cross-claim Plaintiffs,

- against -

JOSEPH R. PERELLA, PETER A. WEINBERG, and KEVIN M. COFSKY,

Third-Party Cross-claim Defendants.

Index No. 653488/2015

Part 49

Hon. O. Peter Sherwood

PLAINTIFFS', COUNTERCLAIM-DEFENDANTS', AND CROSS-CLAIM DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Oral Argument Requested

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

Pursuant to CPLR 3212 and Commercial Division Rule 19-a, Plaintiffs and Counterclaim-Defendants Perella Weinberg Partners LLC, PWP MC LP, PWP Equity I LP, and Perella Weinberg Partners Group LP (collectively, "PWP"), along with Cross-Claim Defendants Joseph R. Perella, Peter A. Weinberg, and Kevin M. Cofsky (collectively, the "Cross-Claim Defendants," and together with PWP, the "PWP Parties"), respectfully submit this Memorandum of Law in support of their Motion for Summary Judgment. For the reasons set forth below, PWP is entitled to judgment as a matter of law on all of its claims and the PWP Parties are entitled to judgment as a matter of law on all of Defendants' counterclaims and cross-claims.

PRELIMINARY STATEMENT

This is a simple case of wrongdoing, betrayal and deceit. In clear violation of their contractual obligations and fiduciary duties to PWP, Defendants Michael Kramer, Derron Slonecker, Joshua Scherer, and Adam Verost (together, the "Individual Defendants"), all former members of PWP's Restructuring Group, plotted over the course of months to leave PWP together and form a competing "NewCo"—Defendant Ducera Partners LLC ("Ducera"). As part of their covert scheme, the Individual Defendants solicited not only each other, but junior members of PWP's Restructuring Group to leave PWP with them. The Individual Defendants plotted their scheme with both detail and precision. From a "To-Do" list of steps to establish a "NewCo," to modeling equity and income interests in "NewCo" down to the decimal, to developing a branding strategy for a "NewCo," the Individual Defendants together planned their new firm while concealing the scheme from other PWP partners.

This scheme is exemplified by a meeting that Kramer admits he hosted on January 11, 2015, over a month before PWP discovered the scheme and terminated the Individual Defendants for Cause. The meeting took place on a Sunday at Kramer's home in Connecticut. There are no calendar invites or email invitations for the meeting. There are no meeting minutes or official

records of the meeting. And none of the Individual Defendants ever disclosed to anyone else at PWP that the meeting took place. That is because at the meeting, Kramer laid out the "Kramer Proposal"—the economics of his NewCo, over which Kramer would have control. The "Kramer Proposal" split equity and income among each attendee at the January 11 meeting, including the Individual Defendants, and one of Kramer's former colleagues and friends. Unsurprisingly, after Ducera was incorporated in May 2015, its initial equity and income splits were virtually identical to the splits Kramer detailed in the "Kramer Proposal."

The Individual Defendants' scheme to leave PWP and start a competing firm almost went undetected by PWP. Less than a week before their terminations, the Individual Defendants each separately resigned to Peter Weinberg despite Weinberg's efforts to retain them. With the senior members of the Restructuring Group resigning, Weinberg and the rest of PWP's leadership attempted to salvage what remained of the Group. In the course of those efforts, PWP's leadership learned from Kevin Cofsky, a Managing Director in the Restructuring Group, about the Individual Defendants' scheme. After determining that the Individual Defendants had breached their contractual obligations and fiduciary duties, PWP's leadership voted to terminate the Individual Defendants for Cause.

Within ten days of the Individual Defendants' terminations, four other members of the Restructuring Group resigned with the intent to join "NewCo" (which they all eventually did). In addition, during their 90-day garden leave period after their terminations, while still employed and paid by PWP, the Individual Defendants continued to work together on the details of NewCo. The Individual Defendants also talked to PWP clients about working with NewCo. On May 18, 2015, the first day after their garden leave period ended, the Individual Defendants' months-long scheme came to fruition when Kramer incorporated Ducera.

The foregoing facts, as well as those set forth below, none of which Defendants can reasonably dispute, demonstrate that PWP is entitled to summary judgment on all of its claims (Counts I-XIV of Complaint) and on each of Defendants' remaining counterclaims and cross-claims (Counts I-VIII of Second Amended Counterclaims).[1]

STATEMENT OF FACTS

I. PWP Acquires Defendant Kramer's Firm to Establish a Financial Restructuring Group and Invests Heavily in the Group.

On June 15, 2006, Joseph Perella and Peter Weinberg started PWP, a leading global financial services firm. (Rule 19-a Statement of Undisputed Material Facts ("19a") ¶ 1.) As Perella emphasized when PWP launched, PWP was going to "successfully build[]" its business "person by person," creating a "team of professionals [that] is second to none." (*Id.* ¶2.) PWP was a firm founded on the principle that its primary assets are its personnel, its reputation, and the goodwill it builds with its clients. (*See id.* (noting that the "first, second, and third most important thing" to PWP is its reputation).)

As part of its efforts to "add top talent," and as an "important element" of its business plan to establish a "preeminent financial restructuring capability," PWP acquired Kramer Capital Partners ("Kramer Capital") in November 2006, only months after PWP's launch. (*Id.* ¶¶3-4.) In 2005, Kramer founded Kramer Capital, an "investment banking firm [that] provid[ed] financial

[1] Justice Kornreich previously granted in-part PWP's motion to dismiss Defendants' counterclaims for (i) breach of contract against non-contracting parties; (ii) breach of Kramer and Slonecker's offer letters; (iii) conspiracy to defraud, fraud, and fraudulent inducement; (iv) equitable estoppel; (v) New York Labor Law violations; (vi) breach of fiduciary duty; (vii) constructive discharge; (viii) an accounting; and (ix) punitive damages. *Perella Weinberg Partners LLC v Kramer*, No. 653488/2015, 2016 WL 3906073, at *18 (N.Y. Sup. Ct. July 19, 2016). On Appeal, the First Department affirmed almost all of the decision, only modifying in part the Supreme Court's dismissal of the fiduciary duty counterclaim, holding that Kramer alone could proceed on this claim, but only against Perella Weinberg Partners LLC and Cross-Claim Defendants Perella and Weinberg. *Perella Weinberg Partners LLC v. Kramer*, 153 A.d.3d 443,444 (1st Dep't 2017).

advisory services to constituents in a broad range of restructuring and corporate finance transactions." (*Id.* ¶¶3, 5.) As part of the acquisition, Kramer, along with Slonecker, Verost and others, all joined PWP. (*Id.* ¶6.) PWP also bought a number of existing client engagements from Kramer Capital, including with the Monsanto Company ("Monsanto"). (*Id.* ¶12 (specifying that "Transferred Contracts" included "Monsanto/Solutia").)

Kramer joined PWP as a Partner, head of PWP's Restructuring Group, and a member of PWP's Management Committee; Slonecker joined as a Partner, was named co-chair of the "fairness opinion committee," and would later become co-chair of the "US restructuring business"; and Verost became a Director. (*Id.* ¶¶8-11.) As PWP Partners, Kramer and Slonecker were granted equity and deferred compensation subject to certain conditions. (*See id.* ¶¶8,33.)

After purchasing Kramer Capital, PWP invested heavily in the Restructuring Group, including by hiring Joshua Scherer, who would eventually be promoted to Partner. (*See id.* ¶¶13-14.) At the time of the Individual Defendants' terminations in February 2015, the Restructuring Group included over 14 people—the four Individual Defendants, and Managing Directors Kevin Cofsky, Agnes Tang, Bradley Meyer, Nikhil Menon, and M.K. Alisdairi; Directors Mark Davis, Cody Leung Kaldenberg, and Jacob Czarnick; Associates Adel El Senoussi and Jakub Mleczko; and various analysts. (*Id*.)

PWP compensated members of the Restructuring Group very well. For example, during his time at PWP, Kramer received over $92 million, including approximately $50 million in cash compensation and $42 million in equity. (*Id.* ¶15.)

II. Upon Joining PWP, the Individual Defendants Each Agree to Restrictive Covenants in Their Partnership and Employee Agreements with PWP.

In order to protect the millions of dollars that PWP invests in its personnel, and the goodwill it develops with clients, PWP's partnership and employment agreements contain restrictive covenants, including provisions prohibiting the solicitation of PWP's partners, employees, and clients. Each Individual Defendant entered into such an agreement with PWP.[2] Specifically, each of the Partner Defendants agreed to the following contractual obligations:

> Non-Solicitation of Employees. Each Limited Partner agrees that, during the period in which such Limited Partner is an Active Limited Partner (including during such Limited Partner's Notice Period) and for a period of one year thereafter, such Limited Partner will not, ***directly or indirectly in any capacity (including through any person, corporation, partnership or other business Entity of any kind), hire or solicit, recruit, induce, entice, influence or encourage any Firm employee (or any Limited Partner) to leave the Firm or become hired or engaged by another firm***.
>
> Non-Solicitation of Clients. Each Limited Partner agrees that, during the period in which such Limited Partner is an Active Limited Partner (including during such Limited Partner's Notice Period) and for a period of 180 days thereafter, such Limited Partner will not, ***directly or indirectly in any capacity (including through any person, corporation, partnership or other business Entity of any kind), solicit or entice away or in any manner attempt to persuade any client or customer, or prospective client or customer, of the Firm (i) to discontinue his, her or its business relationship or prospective relationship with the Firm or (ii) to otherwise provide his, her or its business to any person, corporation, partnership or other business Entity which engages in any line of business in which the Firm is engaged (other than the Firm)***; provided, however, that a Limited Partner who has

[2] The partnership agreements signed by the three Individual Defendants who were partners at the time of their terminations—Kramer, Slonecker and Scherer (the "Partner Defendants")—are referred to collectively as the "PWP Partnership Agreements." (19a ¶¶16-17.) Together, the PWP Partnership Agreements and the employment agreement signed by Verost (the "PWP Employee Agreement") (*id.* ¶18), are referred to as the "PWP Agreements."

> been involuntarily terminated other than for Cause shall not be bound by the provisions of this Section 14.02.[3]

(*Id.* ¶19 (emphases added); *see also id.* ¶20 (nearly identical provisions in the PWP Employee Agreement).) Each Individual Defendant acknowledged that the covenants (respectively, the "Partner and Employee Non-Solicitation Provision" and the "Client Non-Solicitation Provision") "are reasonable and are not more restrictive than necessary to protect the legitimate interests" of PWP. (*Id.* ¶22.)

Under the PWP Agreements, PWP may terminate a partner or employee who breaches a restrictive covenant for Cause. (*Id.* ¶23 ("A Limited Partner's tenure with the Partnership may be Terminated: [. . .] (E) by the General Partner for Cause."); *id.* ¶24 ("Cause, means, with respect to any Limited Partner, the occurrence or existence of any of the following: [. . .] (f) ***violation by such Limited Partner of any non-solicitation, non-competition or similar restrictive covenant of the Firm*** to which such Limited Partner is subject (including, without limitation, those contained herein).") (emphasis added); *see also id.* ¶20 (Employee Agreement Non-Solicitation of Employees); *id.* ¶26 (Employee Agreement Cause definition).)

The PWP Agreements give PWP, the General Partner, "sole and absolute discretion" to determine whether "Cause" exists. (*Id.* ¶25 ("Determination as to whether Cause has occurred shall be made by the General Partner ***in its discretion***.") (emphasis added); *id.* ("[W]henever in this Agreement the General Partner is permitted or required to make a decision in its 'discretion,' or under a grant of similar authority or latitude, ***the General Partner shall be entitled to act 'in its sole and absolute discretion' and to consider only such interests and factors as it desires and, to the fullest extent permitted by law, shall have no duty or obligation to give any consideration to***

[3] Verost agreed to nearly identical provisions in his Employment Agreement, with PWP with the exception that the Non-Solicitation of Clients for Verost was for 90 days, not 180 days. (19a ¶20.)

any interest of or factors affecting the Partnership, the Partners or any other Person.") (emphasis added).)

If PWP terminates a partner for Cause, that partner forfeits any equity they have in PWP and any outstanding deferred compensation. (*Id.* ¶28 ("[I]f a Limited Partner is Terminated: (A) as a result of the removal of such Limited Partner by the General Partner for Cause, 100% of such Limited Partner's Tranche Percentage Interests in each Tranche shall be forfeited[.]"); *id.* ¶34 ("The Compensation shall be forfeited in full upon a termination by the Company for Cause.").) Even absent a termination for Cause, a partner forfeits their equity if they resign and "within the three years thereafter, Compete with [PWP]." (*Id.* ¶29.) The garden leave period (the "Notice Period"), for both PWP partners and employees, runs for 90 days from the date an individual separates from PWP. (*Id.* ¶21.)

III. While Still at PWP, the Individual Defendants Engage in a Secret Scheme to Leave PWP Together and Form a Competing Firm in Breach of Their Non-Solicitation Provisions.

By late 2014, the Individual Defendants had grown dissatisfied with their positions and compensation at PWP. (*See, e.g.*, 19a ¶44 (Slonecker stating that it is "unfortunate" that Kramer is "[n]ot valued here"); *id.* ¶52 (Kramer describes himself as PWP's "[r]edheaded step child"); *id.* ¶38 (Kramer testifying that he thought he deserved more than the nearly $100 million of total compensation he received from PWP during his tenure); *id.* ¶40 (Slonecker stating that he felt "less appreciated by the very top of PWP").) At least Kramer and Scherer had previously discussed the prospect of resigning from PWP together. (*Id.* ¶37; *see also id.* ¶36.)

By October 2014, they and the other Individual Defendants had begun planning to leave PWP to start a competing firm. (*Id.* ¶102 (Feb. 11, 2015 email in which Weinberg notes that Scherer told him that "he [Scherer] ha[d] been in discussions with Mike [Kramer], Derron

[Slonecker], and the team about career options since October [2014]," with Kramer and Slonecker leading the discussions); *id.* ¶42 (October 2014 email exchange in which Kramer and Slonecker discuss a "spinoff" of another financial services company, which Slonecker remarked was "[s]mart").)

On December 8, Kramer and Slonecker met with Managing Director Bradley Meyer, who had joined PWP only four months prior. (*Id.* ¶¶43, 45.) After that meeting, Meyer shared with Kramer a document he drafted entitled "Draft Business Plan Considerations," which outlines "business plan considerations of what a new firm ... would need to consider." (*Id.* ¶46; *see also* Draft Business Plan Considerations, Ex. 175 to Belelieu Aff.)[4] The "Draft Business Plan Considerations" provide a "To Do" list of steps to establish a "NewCo" based on the consideration that "[t]he more polished NewCo and the overall transition looks, it will be easier to convince senior professionals of viability." (*Id.* ¶47.) The document envisions the "Transition of ***initial team to NewCo***," lists "legal items" necessary to effect the transition, and makes clear that "NewCo" would compete with "PWP":

- "Timing? Need to understand gardening leave and non-compete provisions";
- "Need to understand each engagement letter and willingness of client to continue working relationship"; and
- "Structure separation arrangements with ***PWP***[.]"

[4] PWP repeatedly requested this document in discovery; yet neither Defendants nor the former Managing Directors who joined Ducera (Bradley Meyer, Agnes Tang, Mark Davis and Cody Leung Kaldenberg) ever produced it. PWP only has this document because Kevin Cofsky, a remaining member of the Restructuring Group, received a copy of the "Draft Business Plan Considerations" while the Individual Defendants were plotting to leave PWP. Given Defendants' inability to explain why this critical document was never produced in discovery, it begs the question what other documents Defendants never produced. For example, whereas Kramer contends he did not have a piece of paper from which he read at the January 11 meeting, Verost testified that Kramer had "something in his hand" at the meeting. (19a ¶69.)

- "What are the positive/negative attributes of ***PWP***/HL/Lazard/Evercore/Blackstone/Millstein? How can we fill this void?"

- "Should understand vs ***PWP*** and potential discount from gross revenue under NewCo"

(*Id*. (emphases added).)

On December 22, 2014, Verost created a spreadsheet for a "hypothetical firm" titled "Book2.xlsx" with three different proposed income and equity "Split[s]" for the "[f]ounders" of NewCo, along with a list of expenses and proposed profit distributions. (*Id.* ¶¶50-51.) The spreadsheet characterized NewCo as a "[f]ocused advisory business" specializing in "M&A, restructuring, [and] strategic capital raising," with "[o]ffices in NYC and CT." (*Id.* ¶51.) The spreadsheet modeled that this "hypothetical firm" would execute six engagements annually, each generating $5 million in fees, or $30 million in total revenue. (*Id*.) Verost drafted the spreadsheet because he "was increasingly concerned about Perella and [his] future there," so by drafting the spreadsheet, he was considering "what [he] might do other than Perella Weinberg." (*Id.* ¶50.)[5]

The spreadsheet had three charts containing numbers labeled as "Founders' Income Split" and "Founders' Equity," including the following:

[5] During this litigation, the *Financial Times* published an article discussing the spreadsheet. *See* Sujeeet Indap, *The spoils of being a partner at an investment bank*, FINANCIAL TIMES (Aug. 9, 2018), https://ftalphaville.ft.com/2018/08/09/2199748/the-spoils-of-being-a-partner-at-an-investment-bank/. The article notes that the spreadsheet "has three identically structured sheets that each show slightly different business plans for the NewCo," and "the spreadsheet itself is instructive in the simple but potentially lucrative economics of an investment bank[.]" (*Id.*)

"VERSION 2": Founders' Income/Equity

	Income	Equity
MD1	33%	51%
MD2	17.5%	23%
MD3	12%	11.3%
MD4	6.5%	2.5%
MD5	6.5%	2.5%
MD6	6.5%	2.5%
MD7	6.5%	2.5%
MD8	5%	1.75%
MDa	3.25%	1.25%
MDb	3.25%	1.25%
Da	0%	0.25%
Db	0%	0.25%

(*Id.* ¶51.)

The top two equity splits (for "MD1" and "MD2") have an approximately 2 to 1 ratio, while the second and third equity splits (for "MD2" and "MD3") have an approximately 1.5 to 1 ratio. These ratios mirror the ratios that Kramer, Slonecker, and Scherer maintained as "a benchmark" during their careers for allocating compensation, which ratios were "roughly" "two to one" between Kramer and Slonecker, and "one and a half [] to one" between Slonecker and Scherer. (*Id.* ¶49.) For example, on December 15, 2014—just seven days before Verost created the above spreadsheet—Kramer, Slonecker, and Scherer agreed to allocate their PWP 2014 year-end bonus pool of $12.75 million, with Kramer receiving $7.05 million, Slonecker receiving $3.35 million, and Scherer receiving $2.35 million. (*Id.* ¶48.) In other words, the ratios between MD1 and MD2, and MD2 and MD3, are almost identical to Kramer, Slonecker and Scherer's historical ratios.

The Individual Defendants continued to work on the details of their scheme into early 2015. On January 1, 2015, Scherer emailed Kramer names for NewCo, writing, "think of KKR," the global investment firm, and proposed "KSS Capital," "KSS Partners," and "KSS & Co.," each of which incorporates the initials for the last names of Kramer, Slonecker, and Scherer. (*Id.* ¶55.)

On January 5, Kramer met individually with Managing Director Kevin Cofsky and asked him whether he "would be interested" in joining a new firm that the three Individual Defendant partners were starting. (*Id.* ¶56.) Cofsky mentioned Kramer's proposal to several other members of the Restructuring Group, which angered Scherer, who instructed Cofsky to "be more discreet." (*Id.* ¶¶57-58.) Previously, members of the Restructuring Group, including Verost, began communicating with each other by personal email, which they had not previously done. (*Id.* ¶53 (Dec. 29, 2014 email in which Tang asks for Verost's personal email address); *see also id.* ¶54.)

On Sunday morning, January 11, Kramer "hosted a meeting" at his home in New Canaan, Connecticut, attended by the senior members of the Restructuring Group—the four Individual Defendants, as well as Meyer, Cofsky and Tang, the most senior Managing Directors along with Verost. (*Id.* ¶61.)[6] Both Slonecker and Verost requested the meeting. (*Id.* ¶62.) The meeting lasted between one and two hours. (*Id.* ¶65.) Kramer "spoke the most at the meeting" (*id.* ¶66), discussing, along with the others there, "what a theoretic new firm would be" (*id.*; *see also id.* (Verost recalling Kramer "describing how he thought a separate firm might look that he would be a part of")). Kramer admitted that he told the participants that "if [he] was going to participate in any type of firm," then he "would have to have the majority" of equity in the firm, "then Derron [Slonecker] would get … roughly whatever his was, and Josh [Scherer] would get whatever his was." (*Id.* ¶68.) Kramer "sort of calculated roughly" what "was available at the end of the day" for the remaining participants in NewCo. (*Id.*) Kramer and the other participants then "had this same sort of theoretic conversation on what we call, or what was being called income splits at the

[6] Despite the undisputed fact that this meeting occurred, Defendants have not produced ***a single document*** showing how the meeting was organized. None of the Individual Defendants or the Former MDs could testify as to how they knew they were supposed to be at Kramer's home in Connecticut on a Sunday morning for a meeting.

time." (*Id*.) These calculations are reflected in Cofsky's notes of the meeting, which detail the income and equity splits for Kramer ("MAK"); Slonecker ("DSS"); Scherer ("JS"); Cofsky, Tang, Verost, and Meyer ("US 4"); Nikhil Menon ("Nikhil"); MK Alisdairi ("MK"); Davis ("Mark"); Leung Kaldenberg ("Cody"); and one of Kramer's friends and former colleagues, David Skatoff ("Skatoff"). (*Id.* ¶71.) Cofsky's notes also state, "Mike [Kramer] wants more equity bc giving up equity." (*Id*.)

Skatoff was someone Kramer had worked with previously, and who Kramer was aware was "looking for a job, a new job" at the time. (*Id.* ¶¶72-73; *see also id.* ¶72 (Skatoff recalling "I was pursuing other job opportunities during the summer and fall … of 2014 and then the first part of 2015").) At the January 11 meeting, Kramer stated that Skatoff would join this "theoretic new firm." (*Id.* ¶72.) The other attendees at the meeting either were not familiar with Skatoff, had only met him briefly, or had not spoken with Skatoff in years. (*See, e.g*., *id.* ¶73 (Skatoff testifying that he only met Meyer on a "street corner" in 2014 and only met Tang once at Kramer's birthday).) None of the Individual Defendants disclosed the meeting to any other PWP partner.

That same day, at 5:45 p.m., Verost emailed the income and equity proposals that he had drafted in late 2014, "Book2.xlsx," to Tang and Meyer. (*Id.* ¶¶50-51, 75.) At 5:49 p.m., Meyer sent a spreadsheet entitled, "***NewCo Equity Split***.xlsx." to Verost and Tang's personal email addresses. (*Id.* ¶74 (emphasis added).) Meyer's spreadsheet contained two different proposals for equity and income splits for a NewCo: (1) the "Kramer Proposal" and (2) an alternative proposal, the "BM Proposal," or "Brad Meyer Proposal." (*Id*.) The equity and income splits in the "Kramer Proposal" are ***identical*** to the figures in Cofsky's handwritten notes of the January 11 meeting, which reflected Kramer's proposal at the meeting. (*Id.* ¶70 (explaining that he was trying "to keep up with Mike [Kramer] as he was walking through these equity and income splits").) The equity

and income splits in the "Kramer Proposal" are also virtually ***identical*** to the equity and income splits in the proposal that Verost drafted in December 2014, which he circulated to Tang and Meyer after the meeting. (*Compare id.* ¶51, *with id.* ¶74.)

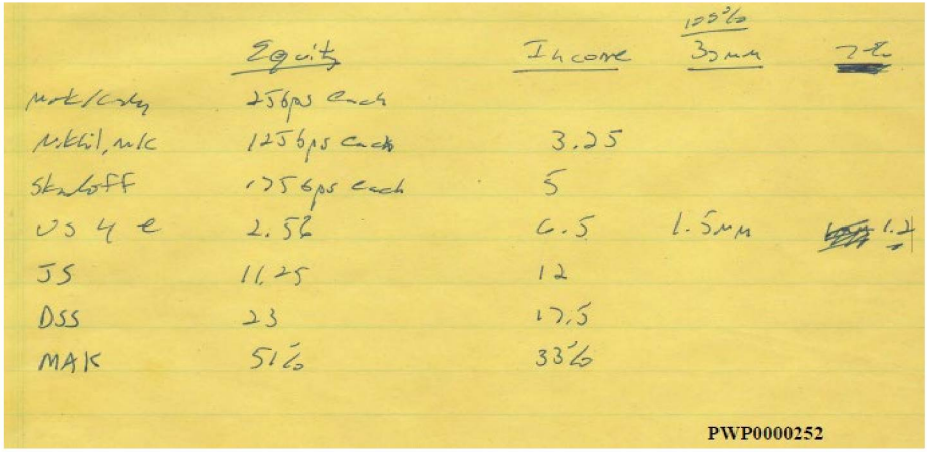
Initial Income Splits				
Founders' Income Split				
MD1	33.0%	**1.9**	**2.8**	**5.1**
MD2	17.5%	**1.0**	**1.5**	**2.7**
MD3	12.0%	0.7	**1.0**	**1.8**
MD4	6.50%	0.4	0.5	**1.0**
MD5	6.50%	0.4	0.5	1.0
MD6	6.50%	0.4	0.5	1.0
MD7	6.50%	0.4	0.5	1.0
MD8	5.00%	0.3	0.4	0.8
MDa	3.25%	0.2	0.3	0.5
MDb	3.25%	0.2	0.3	0.5
Da	0.00%	0.0	0.0	0.0
Db	0.00%	0.0	0.0	0.0
Total	100.0%			

Initial Equity Splits		
Founders' Equity		
MD1	51.0%	25,500
MD2	23.0%	11,500
MD3	11.3%	5,625
MD4	2.50%	1,250
MD5	2.50%	1,250
MD6	2.50%	1,250
MD7	2.50%	1,250
MD8	1.75%	875
MDa	1.25%	625
MDb	1.25%	625
Da	0.25%	125
Db	0.25%	125
Sub-total	100.0%	50,000

(*Id* ¶51 (12/22/14 "Book2.xlsx").)

	Income - Kramer Proposal			Equity - Kramer Proposal		
Kramer	33.00%			51.00%		
Derron	17.50%		50.50%	23.00%		74.00%
Josh	12.00%		62.50%	11.25%		85.25%
4MDs	6.50%	26.0%	88.50%	2.50%	10.0%	95.25%
Skadoff	5.00%		93.50%	1.75%		97.00%
NM/MK	3.25%	6.5%	100.00%	1.25%	2.5%	99.50%
Mark/Cody	NA			0.25%	0.5%	100.00%

(*Id.* ¶74 (1/11/15 "Kramer Proposal").)



(*Id.* ¶71 (Cofsky Notes of 1/11/15 Meeting).)

The similarities are shown in the chart below:

Name	Equity		
	12/22/14 Verost Book.xls	**1/11/15 "Kramer Proposal"**	**Cofsky Notes of 1/11/15 Meeting**
"MD1" / "MAK" / "Kramer"	51.00%	51.00%	51.00%
"MD2" / "DSS" / "Derron"	23.00%	23.00%	23.00%
"MD3" / "JS" / "Josh"	11.30%	11.25%	11.25%
"MD4" "MD5" MD6" "MD7" / "US 4" / "4MDs"	2.50% each	2.50% each	2.50% each
"MD8" / "Skatoff" / "Skadoff"	1.75%	1.75%	1.75%
"MDa" "MDb" / "Nikhil, MK" / "NM/MK"	1.25% each	1.25% each	1.25% each
"Da" "Db" / "Mark/Cody" / "Mark/Cody"	0.25% each	0.25% each	0.25% each

Less than an hour later, at 6:29 p.m., Meyer emailed the same spreadsheet to Verost and Tang, adding Cofsky to the email, and wrote, "for our call in the next few." (*Id.* ¶77.) Six minutes later, Verost circulated a dial-in number for the group. (*Id.*) Two hours later, Verost followed up with a "version [of the spreadsheet] revised to reflect some of my additional thoughts," and asked the group to meet before work the next morning "to discuss this, [Cofsky's] additional thoughts, and anything else[.]" (*Id.* ¶78.)

That night, Slonecker had a call with Cofsky during which he discussed the clients that the Individual Defendants and others from the Restructuring Group could take from PWP to NewCo, including "Caesars," "Codere," and "James River," with potential fees attributable to each client that amounted to a "70mm backlog." (*Id.* ¶79.) Slonecker also told Cofsky that, after the Individual Defendants left, PWP would no longer be in the restructuring business. (*Id.* ¶119 (noting Cofsky stating, "I also am fairly certain that Derron said, 'if we all go, we're not competing because they're not in the restructuring business.'"); *see also id.* ¶120 (PWP's counsel recalling Cofsky

describing an exchange with Slonecker in which Slonecker commented "to the effect that if there's no Restructuring group left, then we wouldn't be competing [with PWP]").)

Eight days after the meeting, Kramer sent a text message to Slonecker, Verost, and Tang, stating, "Have you ever been a part of something that is bigger than yourself? I have, and it's an incredible feeling. Thanks Guys." (*Id.* ¶84.) The group responded approvingly, Slonecker stating, "Much appreciated. I have as well and agree," and Tang replied shortly thereafter, "I am psyched to be a part of it. Never have I respected a group as highly." (*Id*.) On January 30, Verost again emailed Tang, Meyer, and Cofsky, attaching a revised spreadsheet containing three variations of equity splits, and telling the group, "Let me know when you guys would like to speak and I can provide more color." (*Id.* ¶92.) The third equity split "Equity Structure 3" provided as follows (the "January 30 Equity Split"):

	Equity Structure 3
MD1	53%
MD2	21%
MD3	10%
MD4	4%
MD5	4%
MD6	4%
MD7	4%
MD8	0%
MD9	0%

(*Id*.)

Verost continued to act as an intermediary between the other Managing Directors and Kramer, as the Managing Directors attempted to negotiate the economics for NewCo with Kramer. (*See, e.g*., *id.* ¶82 ("Do we need to chat further before Adam [Verost] talks to mike [Kramer]? I think the three of us are on the same page…."); *id.* ¶85 (Verost emails Tang and Meyer, "Spoke with Mike for about an hour. Had a good call. Can provide summary after 8:30 tonight or

tomorrow.").) Verost acted as an intermediary because he was closest to Kramer—he had worked with Kramer "[b]asically his whole career." (*Id.* ¶7.)

In January 2015, Tang was also in contact with Sarah Bellamy, a friend of hers who owned a branding firm called Pluperfect. (*Id.* ¶87.) On January 26, Tang emailed Bellamy, asking whether Bellamy was available to answer "a work related question," and Bellamy agreed to speak on January 27. (*Id.* ¶86.) On the call, Tang told Bellamy that Tang "was considering starting a new entity," and had called Bellamy "to ask [her] about branding, how you go about branding a new entity." (*Id.* ¶88.) On the same date, Bellamy emailed Tang PowerPoint slides discussing "the elements required to create a new brand," while stating, "We'd love to continue to discuss how we might be able to help ***you and your team*** as you strike out and create your own brand." (*Id.* ¶89 (emphasis added).) The next day, Tang forwarded Bellamy's email to Kramer, stating, "FYI. This is the firm." (*Id.* ¶90.)

On February 5, Bellamy emailed a Pluperfect engagement contract to Tang's PWP email address. (*Id.* ¶94.) Tang then forwarded the contract to her personal email address, while directing Bellamy to "only use this email for correspondence" because Tang was "trying to be extra cautious." (*Id.*) Bellamy then apologized, saying she "feel[s] bad, really hope it's not a problem for you." (*Id.*) Bellamy later testified that she felt "bad" because she "didn't want to get [Tang] in any trouble." (*Id.* ¶95.) On February 9, 2015, Tang forwarded the Pluperfect contract to Kramer's personal email, writing, "Mike. Let's discuss when convenient." (*Id.* ¶96.) Tang then forwarded the contract to Verost's personal email address. (*Id.*)

IV. PWP Uncovers the Individual Defendants' Scheme and Terminates Them for Cause.

On February 10, 2015, only a month after Kramer hosted the January 11 meeting, Kramer had dinner with Peter Weinberg to discuss his future at PWP. (19a ¶99.) During dinner, Kramer informed Weinberg that he was resigning from PWP. (*Id.*; *see also id.* ¶104 (outside counsel invoice to PWP with February 11 entry noting "M. Kramer Departure.") Kramer also asked Weinberg for a waiver so that he could retain Proskauer Rose LLP to negotiate his exit from the firm. (*Id.* ¶109.) Immediately after his dinner with Weinberg, Kramer met Slonecker and Scherer for a pre-arranged meeting at a nearby restaurant in Connecticut. (*Id.* ¶100 (Kramer stating that he "went and had a drink with Derron and Josh" in "Greenwich").) The same day, February 10, Tang had another conversation with Bellamy at Pluperfect. (*Id.* ¶98.) The next day, Kramer left a voicemail for Steven Swerdlow of CBRE (*id.* ¶105), a "worldwide leader in real estate services," who would later assist the Individual Defendants to acquire office space (*id.* ¶106).

With the head of PWP's Restructuring Group having resigned, and unaware of the Individual Defendants' scheme to leave together and form a competing firm, Weinberg met the next day with Slonecker and Scherer in an effort to retain them at the firm, first offering Slonecker, then Scherer, the position of head of PWP's Restructuring Group. (*Id.* ¶103.) Both Defendants declined, informing Weinberg that they were leaving PWP with Kramer. (*Id.*) The other soon-to-be Ducera employees stayed abreast of the resignations, with Cody Leung Kalendberg informing her husband (who was also a PWP employee), "It's started ... Peter spoke to mk and Nikhil [Menon] yesterday. I think all he knows is MDs. Sounds like they think it's going to move quickly." (*Id.* ¶108.)

With all three partners of the Restructuring Group having resigned, PWP sought to retain the remaining Restructuring Group members, including Cofsky, who believed that staying at the

firm and rebuilding the Restructuring Group was an opportunity to demonstrate his worth, something he did not believe he had the chance to do while working under Kramer and Slonecker. (*Id.* ¶111.) As Joe Perella told Cofsky, it was time to "walk into [Weinberg]'s office, put [a] spear in the ground, say 'I'm here let's build this together' and don't ask for a penny." (*Id.* ¶112.)

By February 12, PWP began implementing procedures for the departures of all three partners from the Restructuring Group. (*See id.* ¶113.) The next day, Weinberg emailed Slonecker, copying Verost, asking that they "go through the active assignment list and backlog" to compile a list of the Restructuring Group's current and prospective clients. (*Id.* ¶114.) By midday, Slonecker replied that he was "with Adam [Verost] and Agnes [Tang]," who were "putting the detail together[.]" (*Id.*) By evening, Verost circulated to the group a draft "Engagement and Prospect Summary." (*Id.*)

On the evening of Saturday, February 14, during a conversation between Cofsky and PWP's General Counsel, Vladimir Shendelman, about PWP's clients and prospective clients, Cofsky asked Shendelman, "You know all this, right, that they are leaving and starting their own firm?" (*Id.* ¶116.) Shendelman was surprised by Cofsky's comment, and informed Cofsky that they should talk the following morning with PWP's head of Human Resources and outside counsel. (*Id.*) The next morning, Sunday, February 15, Cofsky spoke to Shendelman, Kyle Sugarman (PWP's Head of HR), and PWP's outside counsel. (*Id.* ¶118.) During that call, Cofsky provided details regarding:

- the Individual Defendants' months-long scheme to leave PWP together;
- Cofsky's January 5 conversation with Kramer in his office, where Kramer proposed "le[aving] and start[ing] a new firm," which would be "a real firm .... in New York," and inquired whether Cofsky was interested in joining;

- other Managing Directors' discussions about joining Kramer's new firm, including Meyer, who spoke with Kramer "a few times over the December break" and shared with Cofsky "some of his notes—to do list for starting a firm, business plan considerations, bullet point map and what to do";

- the January 11 meeting at Kramer's home, names of its attendees, and that Kramer "had a spreadsheet, which he had printed out" that "showed income distributions and equity distributions" under which the attendees "would all be partners"; and

- the emails among the Managing Directors after the January 11 meeting, in which they "were discussing what [they] wanted [their] counter to [Kramer] to be."

(*Id.* ¶119.) After the call ended, Cofsky sent Shendelman and PWP's counsel the "NewCo Equity Splits," along with the emails regarding the same. (*Id.* ¶121.)

For the rest of the day on February 15, members of PWP's Executive Committee—Perella, Weinberg, Bob Steel, William Kourakos and Terry Meguid—had a number of calls to discuss the Individual Defendants' scheme. (*Id.* ¶122 (Perella); *id.* (Weinberg); (*id.* (Steel); *id.* (Kourakos); *id.* (Meguid).)

On February 16, a Super Majority of PWP LLC Members—*i.e.*, the members of the Executive Committee—voted to terminate the Individual Defendants for Cause. (*Id.* ¶125 (Weinberg testifying, "We were entitled under the rules to vote the way we did, and we did so, and with a lot of diligence and forethought."); *id.* ¶127.)[7] PWP then notified each Individual Defendant of their for-Cause termination. (*Id.* ¶128.) In their termination letters, PWP informed each Individual Defendant that during their garden leave, they would remain "bound by all

[7] The only procedure that the PWP LLC Agreements require to terminate a limited partner (with or without cause) is "the consent or approval of a Super Majority in Interest" of the members of PWP LLC. (19a ¶35.) PWP may terminate employees such as Verost without any such consent.

responsibilities, fiduciary duties and obligations owed to [PWP]," including "the duty and obligation not to engage in any business or other activities that compete with PWP." (*Id*.)

On February 17, 2015, Weinberg circulated an internal PWP memorandum, informing other PWP members that the Individual Defendants had been terminated:

> as a result of violating their partnership and employment agreements with the Firm. As you know, trust is the foundation of our business and we believe they fundamentally breached both our trust and our agreements. Consequently, we believe our actions are in the best interest of both our clients and the Firm.

(*Id.* ¶129.) After being terminated, the Individual Defendants remained on garden leave and continued receiving income from PWP until May 17, 2015. (*Id.* ¶149.)

V. The Individual Defendants Continue to Violate Their Restrictive Covenants During Their Garden Leave Periods.

On February 17, only a day after being terminated, Verost circulated additional equity and income splits to the other Managing Directors. (*Id.* ¶132.) That same day, Steven Swerdlow of CBRE put Kramer in touch with CBRE Vice Chairman, John Nugent, who emailed Kramer his contact info on February 17, 2015. (*Id.* ¶¶105, 107, 130.) The next day, Kramer met with Nugent, along with "some subset" of Slonecker, Scherer, or Verost, to look for office space. (*Id.* ¶130.) The same day, Tang emailed Bellamy, directing her to news coverage of the departures, and stating she would "call [Bellamy] to provide context and next steps." (*Id.* ¶133.)

Later that week, Meyer and Tang resigned from PWP. (*Id.* ¶134.) The next week, Mark Davis and Cody Leung Kaldenberg, who told her husband that she wanted "people to think that I am part of the core team and that I was in the loop," also resigned. (*Id*.; *id.* ¶108.) All four would join Ducera upon its founding, and all four knew when they resigned in February 2015 they would be joining "NewCo." For example, in a September 2015 letter to JPMorgan seeking a mortgage, Leung Kaldenberg represented to the bank that she "resigned from my previous firm, Perella

Weinberg in March 2015, ***with the intention of joining my current employer, Ducera Partners***." (*Id.* ¶158 (emphasis added).) That same month, Meyer wrote to an acquaintance, "my group is splitting off from Perella so I have to take 3 months off as part of a contract. Will be back at it in mid May." (*Id.* ¶136; *see also id.* ¶144 (Leung Kaldenberg writing, "My boss [Kramer] is started a new firm – hopefully launching in the summer").)

In an attempt to conceal their illicit communications during their garden leave period, on March 1, 2015, Kramer and Slonecker downloaded "Confide" on their phones. (*Id.* ¶135.) Confide is a "confidential messenger" that creates "encrypted, self-destructing, and screenshot-proof messages." (*Id*.) In the following two days, March 2 and March 3, Scherer, Verost, Tang, and Davis all created accounts with "Confide."[8] (*Id*.)

During this garden leave period, the Individual Defendants and former Restructuring Group members they had recruited, met and continued to discuss the tasks required to start a competing firm, with Kramer delegating "due diligence items" to Slonecker, Scherer, Verost, Tang, Meyer, Leung Kaldenberg, and Davis, including the same tasks each had worked on prior to the Individual Defendants' terminations. (*Id.* ¶139.) For example, Kramer assigned "Adam" Verost the task of "Cash Flow Model," "Agnes" Tang the task of "Identity – Name – Logo – Brand," and "Brad" Meyer the task of "Launch Strategy." (*Id.*)

The Individual Defendants also continued to work with Pluperfect. On April 1, Pluperfect held a "last minute kickoff meeting" with the entire group that would join Ducera, including the Individual Defendants. (*Id.* ¶138.) Two weeks later, Slonecker spoke with Bellamy, who noted that, during the conversation, Slonecker stated, "we didn't spin out to be just like the big banks."

[8] Because the messages on Confide are self-destructing, PWP does not have any of them and none were produced in discovery.

(*Id.* ¶141.) The next day, Bellamy spoke with Kramer. (*Id.* ¶143.) On May 7, 2015, Kramer exchanged emails with Pluperfect regarding potential names for the new firm, including "Ducera." (*Id.* ¶146.) The prospective members of the new firm then "voted" on the firm's name, and on May 15, Tang told Pluperfect that "Mike [Kramer] and the team have decided to go with Ducera." (*Id.* ¶¶147-48.) In June and August 2015, Ducera paid Pluperfect for its work, including a $30,000 wire transfer and $19,000 check signed by Kramer. (*Id.* ¶155.)

On April 29, 2015, Ducera had a "new office" at 499 Park Avenue, and thereafter on May 15 took part in a call to discuss the lease. (*Id.* ¶145.)

VI. Ducera Is Formed the Day After the Garden Leave Period Ends.

On May 18, 2015, Kramer registered Ducera LLC as a Delaware limited liability company, listing 499 Park Avenue as its address. (*Id.* ¶150.)

On June 15, 2015, Ducera filed an Amended and Restated Limited Liability Company Agreement (the "Ducera LLC Agreement"), naming as members each Individual Defendant, Tang, Meyer, Davis, Leung Kaldenberg, and Skatoff. (*Id.* ¶152.)

The ownership percentages of Ducera's partners were almost ***identical*** to the equity splits discussed at the January 11 meeting and reflected in the "Kramer Proposal" and the December 2014 spreadsheet drafted by Verost:

Founding Ducera Member	**"Kramer Proposal"** (19a ¶74)	[redacted]
Kramer	51%	
Slonecker	23%	
Scherer	11.25%	
Verost	2.5%	
Meyer	2.5%	

Founding Ducera Member	"Kramer Proposal" (19a ¶74)	[redacted]
Tang	2.5%	
Leung	0.25%	
Davis	0.25%	
Skatoff	1.75%	
Cofsky	2.5%	
Menon	1.25%	
Alisdairi	1.25%	

The total difference between Ducera's initial ownership interests and the "Kramer Proposal" is 4.99% (*i.e.*, the sum of the figures in the "Difference" column of the chart above). That 5% difference is the ***same*** percentage ownership that the "Kramer Proposal" had for Cofsky (2.5%), Nikhil Menon (1.25%), and MK Alisdairi (1.25%), three individuals who did not leave PWP.

Similarly, the January 30 Equity Split that Verost sent to Tang, Meyer, and Cofsky has almost the exact same equity splits for the four Individual Defendants as their equity interests set forth in the Ducera LLC Agreement:

	Equity Structure 3 ("January 30 Equity Split") (19a ¶92)		[redacted]
MD1	53%	**Michael Kramer**	
MD2	21%	**Derron Slonecker**	
MD3	10%	**Joshua Scherer**	
MD4	4%	**Adam Verost**	

Accordingly, the "Kramer Proposal" was not a "hypothetical firm"—it was an actual firm Kramer designed, and subsequently created. Simply put, despite Kramer admitting that these figures were similar but not being able to explain the similarities, the "theoretic new firm" or "hypothetical firm" that was discussed on January 11 was Ducera. (*See id.* ¶ 154 [redacted]

[redacted]

[redacted]

VI. PWP Learns of Defendants' Solicitation of PWP Clients After Their Terminations.

Ducera immediately began competing with PWP when the Individual Defendants' garden leave period ended on May 17, 2015. This is due in part to the fact that, unbeknownst to PWP, the Individual Defendants began soliciting PWP's clients before leaving PWP. When discussing the formation of NewCo with Cofsky, Slonecker had a list of the specific clients that he and the other Individual Defendants intended to take with them from PWP. (19a ¶159.) As a specific example, in 2013, Fidelity Management and Research Co. ("Fidelity") hired PWP for advice related to a bankruptcy and potential restructuring. (*Id.* ¶160.) "In approximately December 2014 or January 2015," Kramer "called [Fidelity] and informed [it] that he had decided to leave PWP" and "expressed his expectation that several of his colleagues at PWP would be departing with him." (*Id.* ¶161.) Fidelity's representative understood this to mean that "Mr. Kramer and some of his colleagues were planning to leave PWP and to continue working together at another firm." (*Id.*)

Defendants also pursued Monsanto, whose business PWP purchased when it acquired Kramer Capital. (*See supra* at 4.) Just a week after the Individual Defendants' terminations, on February 23, 2015, Kramer contacted Monsanto to provide his personal cell phone number and email. (*Id.* ¶162.) By February 25, while still on garden leave, Kramer contacted Monsanto about continuing their business together outside of PWP. (*Id.* ¶163.) Weinberg attempted to preserve

PWP's relationship with Monsanto, but his efforts were unavailing. On March 4, 2015, Monsanto informed Weinberg that it was terminating its engagement with PWP. (*Id.* ¶164.) By at least May 2015, Kramer was communicating with Monsanto about working for the company, and Kramer had dinner with two Monsanto representatives on June 16, 2015. (*Id.* ¶¶1165-66.) In July 2015, Ducera and Monsanto executed an engagement letter, with Monsanto agreeing to pay Ducera a retainer of $500,000 per year. (*Id.* ¶167.) Ducera would subsequently receive $35 million in fees for its work on Bayer AG's acquisition of Monsanto the following year. (*Id.* ¶168.)

Another Ducera target was Caesars Entertainment Operating Company ("Caesars"), which originally retained PWP in 2014. (*Id.* ¶¶169-70.) On February 19, 2015, while still on garden leave, Scherer noted that he was receiving calls from Caesars and wished to "collectively find a way to accommodate the clients." (*Id.* ¶172.) Three days later, Caesars forwarded Kramer's communications about its desire for PWP to split its business with Kramer. (*Id.* ¶173.) But on February 27, Caesars terminated its engagement with PWP, after Kramer proposed to PWP that the Individual Defendants should receive 60% of all fees for Caesars work despite the fact that PWP would still be paying their salaries through mid-May. (*Id.* ¶¶174-75.) A Caesars Board Member wrote to Weinberg that "Kramer was less accommodating" in the negotiations. (*Id.* ¶176.) As a result, PWP lost an advisory fee of $150,000 per month, increasing to $400,000 per month once Caesars became a debtor, as well as a restructuring fee of $7 million. (*Id.* ¶177.)

The Individual Defendants also successfully converted Alpha Natural Resources ("Alpha"), a prospective PWP client, into a realized Ducera engagement. While still at PWP, Kramer set up a meeting with Alpha's CEO to pitch PWP's services. (*Id.* ¶178.) Kramer did not secure Alpha's business while at PWP. (*Id.*) Instead, Kramer waited to contact Alpha until he had left PWP and formed Ducera. On June 19, 2015, Kramer reached out to Alpha on Ducera's behalf,

offering to "pitch" Ducera's services. (*Id.* ¶179.) He scheduled a pitch meeting, and immediately informed the rest of the Individual Defendants. (*Id*.) On June 24, Kramer and Meyer pitched Alpha, and two days later, Kramer informed the rest of the Ducera team that they "got Alpha." (*Id.* ¶180.)

VIII. PWP Spends Substantial Resources Rebuilding Its Restructuring Group.

As a result of the Individual Defendants' illicit scheme, PWP lost three partners, three managing directors, and two directors from its Restructuring Group. (*Compare* 19a ¶14, *with id.* ¶153.) All eight of those individuals were founding members of Ducera. The terminations and other departures left PWP with only four members in its Restructuring Group. (*Id*.)

To rebuild the Group, PWP spent millions of dollars in salaries, guaranteed signings and bonuses, deferred buyout payments, and recruiter fees. PWP also suffered millions in lost profits.

LEGAL STANDARD

To prevail on a motion for summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, advancing sufficient evidence to demonstrate the absence of any material issues of fact." *Silverman v. Perlbinder*, 307 A.D.2d 230, 230 (1st Dep't 2003); *see also* CPLR 3212(b). Evidence satisfies this standard if it "would support a reasonable juror's conclusion" that the moving party is entitled to judgment. *Cherry v. Daytop Vil., Inc.*, 41 A.D.3d 130, 131 (1st Dep't 2007). "[C]onclusory statements" by a defendant "are insufficient" to create an issue of fact, *McGahee v. Kennedy*, 48 N.Y.2d 832, 834 (1979), as are self-serving statements contradicted by documentary evidence, *Bank of N.Y. v. 125-127 Allen St. Assoc.*, 59 A.D.3d 220 (1st Dep't 2009).

Not all disputed facts raise a triable issue; "to require a trial such fact issue must be genuine, bona fide and substantial." *Leumi Fin. Corp. v. Richter*, 24 A.D.2d 855, 855 (1st Dep't 1965),

aff'd sub nom. Leumi-Fin. Corp. v. Richter, 17 N.Y.2d 166 (1966). "While generally credibility determinations are left to the trier of the facts," a version of the facts that "is not supported by the other witnesses or evidence submitted on" summary judgment fails to create a genuine issue of fact, as it is "incredible as a matter of law." *Espinal v. Trezechahn 1065 Ave. of Americas, LLC*, 94 A.D.3d 611, 613 (1st Dep't 2012).

ARGUMENT

I. PWP IS ENTITLED TO SUMMARY JUDGMENT ON ITS AFFIRMATIVE CLAIMS (COUNTS I THROUGH IX OF THE COMPLAINT)

1. The Individual Defendants Breached Their Contracts With PWP (Counts II-VII of Complaint).[9]

PWP is entitled to summary judgment on Counts II-VII of the Complaint because the undisputed facts establish that the Individual Defendants violated the Partner/Employee (Counts II-IV) and Client Non-Solicitation Provisions (Counts V-VII). Before most discovery in this case, the First Department held that "the issue of defendants' alleged misconduct by violating the non-solicitation and noncompete provisions of the DCA [deferred compensation agreements] and breaching their duty of loyalty as alleged in the complaint, ... if proven, ***would unquestionably constitute a termination for cause***[.]" *Perella Weinberg Partners LLC v. Kramer*, 153 A.D.3d 443, 445 (1st Dep't 2017) (emphasis added). Now, after full discovery, the Individual Defendants

[9] PWP has sought a declaratory judgment that the PWP restrictive covenants are valid and enforceable and that PWP properly terminated the Individual Defendants for Cause (Count I of Complaint). If the Court holds that the Individual Defendants breached their contractual obligations to PWP and forfeited their equity and deferred compensation, PWP should also prevail on its declaratory judgment claim.

cannot deny that they breached their contracts, and thus PWP properly terminated the Individual Defendants for Cause.[10]

a. The Individual Defendants Were Properly Terminated for Cause for Breaching the Partner and Employee Non-Solicitation Provision.

The PWP Agreements provide that breaching "any non-solicitation, non-competition or similar restrictive covenant of the Firm to which such Limited Partner is subject" is a basis for PWP to terminate a partner for Cause. (19a ¶¶24, 26.) Under the Partner and Employee Non-Solicitation Provisions, the Individual Defendants, while at PWP and for a year thereafter, may not "directly or indirectly in any capacity (including through any person, corporation, partnership or other business Entity of any kind), hire or solicit, recruit, induce, entice, influence, or encourage any Firm employee (or any Limited Partner) to leave the Firm or become hired or engaged by another firm."[11] (*Id.* ¶¶19-20.) Each Individual Defendant violated this clear contractual prohibition and thus, PWP is entitled to summary judgment on Counts II-IV.

[10] Although the PWP Partnership Agreements are governed by Delaware law and the PWP Employee Agreement by New York law, "[t]he elements of a claim for breach of contract are the same" in both jurisdictions. *Cooper v. Gottlieb*, No. 95-cv-10543, 2000 WL 1277593, at *3 (S.D.N.Y. Sept. 8, 2000) (citation omitted).

[11] Restrictive covenants that are "reasonable" and serve a "legitimate economic interest" are enforceable under both Delaware (which governs the PWP Partnership Agreements) and New York law (which governs the PWP Employee Agreement). *Weichert Co. of Pa. v. Young*, No. CIV.A. 2223-VCL, 2007 WL 4372823, at *3 (Del. Ch. Dec. 7, 2007); *Contempo Commc'ns, Inc. v. MJM Creative Servs., Inc.*, 182 A.D.2d 351, 354 (1st Dep't 1992) (enforcing non-solicitation provisions that were "reasonable and necessary to protect the employer"). The covenants at issue here are reasonable because they are of a limited duration and serve PWP's legitimate interest in protecting its investment in its personnel and goodwill with clients. *See Sensus USA, Inc. v. Franklin*, No. 15-cv-742, 2016 WL 1466488, at *7 (D. Del. Apr. 14, 2016) (enforcing restrictive covenants, including two-year non-solicitation provision, against "key employee"); *TBA Global, LLC v. Proscenium Events, LLC*, 114 A.D.3d 571, 571-72 (1st Dep't 2014) (enforcing two-year non-solicitation to protect "legitimate interests," including "client relationships"). Each of the Individual Defendants—all sophisticated investment bankers—agreed when they signed their agreements with PWP that the restrictive covenants "are reasonable and are not more restrictive than necessary to protect the legitimate interests" of PWP. (19a ¶22.) Moreover, the Ducera LLC

i. *Michael Kramer*

Kramer, according to Slonecker, is a "franchise player." (*Id.* ¶151.) He was the "only one" who was "integral to the formation of Ducera." (*Id.*) Kramer began soliciting others to leave PWP and join a new firm no later than late-2014. For example, after meeting with Kramer and Slonecker in December 2014 (*id.* ¶45), Meyer revised his "Draft Business Plan Considerations," and shared that document with Kramer (*id.* ¶46). Kramer "hosted a meeting" at his home, in which the other Individual Defendants participated, as well as then-PWP Managing Directors Meyer, Tang and Cofsky. (*Id.* ¶61.) Kramer "spoke the most" at the meeting, and discussed a "theoretic new firm" that would generate enough revenue to allow each Managing Director to "make about $2 million a year." (*Id.* ¶66.) Kramer also testified that the group began discussing how to "split up equity" at the new firm, and that he "would have to have control" of any new firm, while "Derron [Slonecker] and Josh [Scherer] would get theirs," and the other members of the firm would get "what was available at the end of the day." (*Id.* ¶68). Kramer also discussed "income splits" at the meeting. (*Id.*) Kramer emphasized the potential "growth" at the new firm: "when we were talking about what a theoretic new firm would be, one of the important things that I said is you're going to want it to grow." (*Id.* ¶67.) He said this to entice the meeting attendees, who he believed, "would want to be in a place that was not contracting, not stale, or stagnant but rather growing." (*Id.*)

The equity and income splits circulated after the January 11 meeting confirm that Kramer was the "franchise player" of the scheme. The "NewCo" splits all contain the "Kramer Proposal" (*see id.* ¶¶74, 77-78), and several of the Managing Directors' proposals allocate equity and income

Agreement contains non-solicitation provisions that are almost identical to those found in the PWP Agreements. (*See id.* ¶152.)

to "Skadoff," *i.e.*, David Skatoff, with whom Kramer alone had a close relationship (*id.*), and whom Kramer recommended join the new firm (*id.* ¶72). The equity splits also track the historic compensation ratios that Kramer, Slonecker, and Scherer maintained as a "benchmark" for allocating their compensation (*Id.* ¶49), and which only the Partner Defendants would have known. Tellingly, the equity split that each individual who joined Ducera received are virtually ***identical*** to the "Kramer Proposal." (*See supra* at 23.)

Even after his termination, while still on garden leave, Kramer continued influencing the group. He distributed tasks among his soon-to-be Ducera partners (19a ¶139); worked on branding Ducera (*id.* ¶¶96-97, 138, 147-48, 155); and "actually selected" "Ducera" as the name for NewCo, before incorporating Ducera (*id.* ¶147).

ii. Derron Slonecker

Slonecker also encouraged and enticed the other Individual Defendants and PWP employees to leave PWP and form NewCo. He "asked Mike [Kramer] to have" the January 11 meeting. (*Id.* ¶62.) And after the meeting, Slonecker urged Cofsky to "underst[and] the importance ... of the new business venture" rather than "get hung up ... on the initial income and equity distributions[.]" (*Id.* ¶81.) Slonecker even explained the "$70 million of backlog that [the group] may be able to take with [them]," based on clients that Slonecker believed the Individual Defendants could take from PWP. (*Id.*)

Slonecker continued to participate in the scheme while on garden leave. During an April 2015 discussion with Pluperfect, Slonecker conveyed goals for branding the firm to attract bankers from PWP: Seeking to "creat[e] an environment that will pull bankers in," he wanted the firm to be "a quiet, classy success" instead of "beating our chests like Perella." (*Id.* ¶141.) He also disclosed to Pluperfect NewCo's $30 million revenue target for the "team," stating NewCo would

"only have to do 30MM to pay our team, at Perella [they] had to do 120MM." (*Id.*) In April 2015, Slonecker emailed Kramer and Scherer with words of encouragement, saying NewCo was "going to be awesome," that he was "psyched," and that the three partners would "tell [their] grandchildren about the benefits of true partnership." (*Id.* ¶140.)

iii. *Joshua Scherer*

Scherer also encouraged the Individual Defendants and others to leave PWP for NewCo. On January 1, 2015, Scherer sent Kramer and Slonecker an email proposing "ideas for names of companies," including "KSS Capital[,] KSS Partners[, and] KSS & Co," which initials stood for "Kramer, Slonecker and Scherer." (*Id.* ¶55.) On the day of the January 11 meeting, Scherer drove both Verost and Tang to Kramer's house. (*Id.* ¶63.) At the meeting, Scherer "was focused on selling" NewCo to the attendees, encouraged them to leave PWP because they could "do great things" at NewCo, and said that NewCo was a "great thing for everyone." (*Id.* ¶119.) According to Cofsky, Scherer was "*giddy* after [Kramer] laid out the economic proposition[.]" (*Id.*) And shortly before being terminated, Scherer admitted to Weinberg that he "ha[d] been in discussions with Mike [Kramer], Derron [Slonecker], and the team about career options since October," that Scherer "plan[ned] to leave with the team wherever they go," and "ha[d] thought a lot about it and talked a lot with Mike and Derron." (*Id.* ¶102.)

Scherer also sought to conceal the Individual Defendants' scheme from PWP, expressing frustration at "the potential for leakage." (*Id.* ¶119.) On January 5, 2015, after Kramer asked Cofsky whether he "would be interested" in joining a new firm (*id.* ¶56), Scherer learned that Cofsky had discussed this conversation with other members of the Restructuring Group, and told Cofsky to "be more discreet." (*Id.* ¶58.) After the meeting, w Scherer was "irritated" that Cofsky "had spoken with a lawyer ... about the implications of this new venture," and Scherer scolded

Cofsky, saying that consulting a lawyer did not make Cofsky "sound like a partner" in their efforts. (*Id.* ¶59.) Faced with Cofsky's indecision about leaving PWP, Scherer pressured Cofsky to join the new firm, stating that he was "irritated" by Cofsky's indecision, which he found "off putting." (*Id.*)

Scherer's participation in the scheme continued during his garden leave period. For example, Scherer helped acquire office space for the new firm. (*Id.* ¶137.) In April 2015, Scherer and Slonecker encouraged Kramer to accept an offer for office space. (*Id.* ¶140.)

iv. *Adam Verost*

Verost asked for the January 11 meeting. (*Id.* ¶62.) Given that Kramer worked with Verost "[b]asically his whole career" (*Id.* ¶7), Verost became an intermediary between the Partner Defendants and the other Managing Directors in negotiating the NewCo equity and income splits. Tang, for instance, testified that if she "heard about a meeting that was set up, it would have been through [Verost]." (*Id.* ¶64.)

Verost drafted the equity and income splits for a hypothetical firm in "[l]ate 2014" (*id.* ¶50), which were almost identical to the equity and income splits for Ducera in June 2015. Immediately after the January 11 meeting, Verost was circulated those detailed spreadsheets containing "Initial Income Splits," "Initial Equity Splits," "Distributions," and expenses, to which the other Managing Directors responded with counter-proposals. (*Id.* ¶¶74-75; (Meyer Proposal sent to Verost and Tang, and Verost's December 2014 "Book2.xlsx" to Meyer and Tang).) Four days later, Verost continued to funnel communication from the Managing Directors to Kramer using their personal emails, with Meyer asking Verost and Tang whether the group "need[ed] to chat further before Adam [Verost] talks to [M]ike." (*Id.* ¶82.) Verost also pressured Cofsky to

decide whether he wanted to join NewCo or stay at PWP, asking, "gun to your head, if you had to decide today, are you in or are you out?" (*Id.* ¶80.)

b. PWP Had "Sole and Absolute Discretion" to Terminate the Individual Defendants for Cause.

In addition to the Individual Defendants' clear misconduct, which constitutes Cause, PWP is also entitled to summary judgment because the PWP Partnership Agreements provide that PWP may determine whether to terminate a partner or employee for "Cause" in PWP's "discretion." (*Id.* ¶¶25-26) The Partnership Agreements and the PWP LLC Agreement explain that this discretion "entitle[s]" PWP:

> to act "in its sole and absolute discretion," and ***to consider only such interests and factors as it desires*** and, to the fullest extent permitted by law, ***shall have no duty or obligation to give any consideration to any interest of or factors affecting the Partnership, the Partners, or any other person***.

(*Id.* ¶25 (emphases added)).

PWP exercised that sole and absolute discretion when it determined that the Individual Defendants' misconduct constituted Cause and thereafter terminated the Individual Defendants for Cause. (*See, e.g.*, *id.* ¶128.) For this reason alone, PWP is entitled to summary judgment on Counts II-IV of the Complaint.

c. The Individual Defendants Breached the PWP Agreements By Improperly Soliciting PWP's Clients.

PWP is entitled to summary judgment on Counts V-VII of its Complaint. Each Individual Defendant agreed not to:

> directly or indirectly ... solicit or entice away or in any manner attempt to persuade any client or customer, or prospective client or customer, of" PWP to (i) end "its relationship or prospective relationship" with PWP, or (ii) "to otherwise provide his, her or its business to any person, corporation, partnership or other business Entity which engages in any line of business in which [PWP] is engaged (other than [PWP])[.]

(*Id.* ¶¶19-20.) The Individual Defendants breached this agreement as to at least four clients:

- Fidelity: According to a Fidelity representative, "[i]n approximately December 2014 or January 2015," Kramer "called [Fidelity] and informed [it] that [Kramer] had decided to leave PWP" and "expressed his expectation that several of his colleagues at PWP would be departing with him" in order "to continue working together at another firm." (*Id.* ¶161.)

- Monsanto: Shortly after Kramer's termination, he discussed with Monsanto further representing the company. (*Id.* ¶162.) On May 26, 2015, Kramer and Monsanto "beg[a]n the process of getting an engagement letter in place" (*id.* ¶165), and on July 6, 2015, they formally executed an engagement letter (*id.* ¶167).

- Caesars: Scherer was in touch with Caesars just two days after his termination (*id.* ¶172); although there was a discussion with Caesars about splitting its business with the Individual Defendants, this proved impossible because "Kramer was less accommodating" in the negotiations. (*Id.* ¶176.)

- Alpha: Kramer originally had an opportunity to secure Alpha's business for PWP, but instead waited until June 2015, after forming Ducera, to obtain the engagement. (*Id.* ¶¶115, 178-80.)

These communications alone breached the Client Non-Solicitation Provisions. *See, e.g.*, *USI Ins. Servs. LLC v. Miner*, 801 F. Supp. 2d 175, 192-93 (S.D.N.Y. 2011) (sending email to former employer's clients, announcing termination of employment and beginning work for competitor constituted solicitation under employment contract).

2. The Individual Defendants Breached Their Fiduciary Duties to PWP (Counts VIII-X of Complaint).

Liability for breach of a fiduciary duty requires proof that the defendant owed the plaintiff a fiduciary duty and that the defendant breached it. *Estate of Eller v. Bartron*, 31 A.3d 895, 897 (Del. 2011). [12] Each of the Individual Defendants owed fiduciary duties to PWP. Under Delaware

[12] The Court previously recognized that because the "fiduciary duty claims concern the internal affairs of Delaware companies, the claims are governed by Delaware law." *Kramer*, 2016 WL 3906073, at *12.

law, the Partner Defendants owed PWP statutory fiduciary duties, which prohibited them "from competing with the partnership" and engaging in "intentional misconduct." 6 Del. C. § 15-404(b). Verost, as a PWP employee, also owed fiduciary duties to PWP in light of his "position of trust and confidence" within PWP. *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 8 (Del. Ch. 1949). These duties prohibit the Individual Defendants from "solicit[ing] the employer's customers before cessation of employment," "conspir[ing] to effectuate mass resignation of key employees, or usurp[ing] a business opportunity of the employer." *Wayman Fire Prot., Inc. v. Premium Fire & Sec., LLC*, No. CIV.A. 7866-VCP, 2014 WL 897223, at *20 (Del. Ch. Mar. 5, 2014).

Each Individual Defendant breached his fiduciary duties to PWP by: (i) causing the mass departure of substantially the entire Restructuring Group, and (ii) soliciting PWP's clients while employed by PWP. *See Dweck v. Nasser*, No. CIV.A. 1353-VCL, 2012 WL 161590, at *17 (Del. Ch. Jan. 18, 2012) (executives breached fiduciary duties by "arranging a mass employee departure"); *Schroeder v. Pinterest Inc.*, 133 A.D.3d 12, 25 (1st Dep't 2015) (fiduciary "breaches his fiduciary duty if he [or she] engages in transactions that had their inception *before* the termination of the fiduciary relationship or were founded on information acquired *during* the fiduciary relationship." (quoting *BelCom, Inc. v. Robb*, 1998 WL 229527, *3 (Del. Ch. Apr. 28, 1998)).)[13]

3. Defendants Tortiously Interfered With PWP's Contracts With Its Partners, Employees and/or Business Relationships (Counts XI-XIII of Complaint).

[13] Even if any Individual Defendant did not owe a fiduciary duty to PWP, which they did, they would be liable for aiding and abetting their co-Defendants' fiduciary breaches because of their knowing participation in the scheme. *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 658 (Del. Ch. 2012) (non-fiduciary who "knowingly participate[s] in [fiduciary] breach" liable for aiding and abetting (citation omitted)); *Dweck*, 2012 WL 161590, at *17 (former fiduciary "actively conspired with [fiduciaries], thereby aiding and abetting [their] breaches of fiduciary duty").

PWP is entitled to summary judgment on its claims that (i) the Individual Defendants tortiously interfered with PWP's Partnership and Employment Contracts (Count XI); (ii) Defendants tortiously interfered with PWP's existing and prospective business relationships (Count XII); and (iii) Ducera tortiously interfered with the PWP Agreements that bound the Individual Defendants (Count XIII).

a. Defendants Tortiously Interfered with PWP's Employment and Partnership Agreements (Counts XI and XIII of Complaint).

Tortious interference requires proof "that a valid contract existed which a third party knew about, the third party intentionally and improperly procured the breach of the contract and the breach resulted in damage to the plaintiff." *Ullmannglass v. Oneida, Ltd.*, 86 A.D.3d 827, 829 (1st Dep't 2011) (citation omitted). Here, the undisputed evidence satisfies this standard.

First, the Individual Defendants knew of PWP's contracts with other partners and employees because they were parties to identical agreements. As Ducera's agents, the Individual Defendants imputed this knowledge to Ducera. *Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 465 (2010) (employee's knowledge is "presumptively imputed to" a corporate employer). Further, the Individual Defendants examined the restrictive covenants when devising their scheme. For example, on February 1, 2015, over two weeks before their terminations, Meyer emailed Verost, "Found covenants, will bring Monday." (*Id.* ¶93; *see also id.* ¶47 ("Need to understand gardening leave and non-compete provisions").)

Second, Defendants intentionally and improperly procured the breach of these contracts. The Individual Defendants undertook a months-long scheme to solicit PWP employees and partners (including one another) to leave PWP for "NewCo," thereby intentionally and improperly procuring the breach of the Non-Solicitation Provisions binding their coconspirators. *See, e.g.*, *Barbagallo v. Marcum LLP*, 820 F. Supp. 2d 429, 444-45 (E.D.N.Y. 2011) (sustaining claim

against former employee for tortious interference with non-compete); *Ingenuit, Ltd. v. Harriff*, 33 A.D.3d 589, 589-90 (2d Dep't 2006) (likelihood of success on claim against employee for tortious interference with non-solicitation).

Third, PWP sustained damages. As explained *supra* at 26, PWP lost substantially the entire Restructuring Group because of Defendants' tortious conduct. It cost PWP over a year and millions of dollars in guaranteed salary and incentive payments to rebuild the Restructuring Group. PWP also suffered lost profits.

b. Defendants Tortiously Interfered With PWP's Business Relationships (Count XII of Complaint).

Tortious interference with business relationships requires proof "that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff." *Snyder v. Sony Music Entm't, Inc.*, 252 A.D.2d 294, 299–300 (1st Dep't 1999) (citation omitted). Defendants solicited PWP's clients, using PWP's goodwill with them, in violation of the restrictive covenants binding the Individual Defendants. This plainly constitutes improper means under New York law. *See Access Nursing Servs. v. St. Consulting Grp.*, 137 A.D.3d 678, 679 (1st Dep't 2016) (sustaining tortious interference claim where defendants used information gained while employed by plaintiff to solicit clients). PWP lost at least three clients, including Monsanto, which later paid Ducera over $35 million. (*See, e.g.*, 19a ¶¶167-168, 174, 180.)

5. Defendants' Misconduct Constitutes Unfair Competition (Count XIV).

Unfair competition requires proof of the defendant "misappropriat[ing] the results of the skill, expenditures and labors of a competitor." *ITC Ltd. v. Punchgini, Inc.*, 9 N.Y.3d 467, 477 (2007). The standard covers "any form of commercial immorality, or simply as endeavoring to reap where one has not sown; it is taking the skill, expenditures and labors of a competitor, and

misappropriating for commercial advantage of one person a benefit or property right belonging to another." *Big Vision Private Ltd. v. E.I. du Pont de Nemours & Co.*, 610 F. App'x 69 (2d Cir. 2015) (citation omitted).

Here, Defendants engaged in unfair competition by orchestrating a covert scheme to create a firm that would compete with PWP, composed almost entirely of PWP's former Restructuring Group. Consequently, PWP's restructuring practice was all but eviscerated (19a ¶119 (Slonecker stating that "if we all go, we're not competing because they're not in the restructuring business")), and at least one client, Monsanto, terminated its engagement with PWP and hired Ducera instead. *See Robert I. Gluck, M.D., LLC v. Kenneth M. Kamler, M.D., LLC*, 74 A.D.3d 1166, 1166 (2d Dep't 2010) (unfair competition where defendant "wrongfully divert[ing] the plaintiffs' business to themselves"); *McRoberts Protective Agency, Inc. v. Lansdell Protective Agency, Inc.*, 61 A.D.2d 652, 653-55 (1st Dep't 1978) (former employees and their new firm liable for unfair competition where, while still employed by plaintiff, they "actively set out to divert plaintiff's customers and accounts by soliciting employees to withdraw and to join [the new firm]").

6. Defendant Ducera Is Vicariously Liable for the Individual Defendants' Misconduct.

Beyond Ducera's direct liability for (i) tortiously interfering with PWP's business relationships, (ii) tortiously interfering with PWP's agreements with its partners and employees, and (iii) unfair competition with PWP, Ducera is also vicariously liable for the Individual Defendants' misconduct underlying these claims by accepting the benefits of this misconduct and thereby ratifying the acts of its promoters. *See Hwang v. Grace Rd, Church*, No. 14CV7187, 2016 WL 1060247, at *9 (E.D.N.Y Mar. 14 (2016) (applying New York law). The benefits that accrued to Ducera as a result of this tortious conduct are clear: Ducera itself is a by-product of the

Individual Defendants' illicit solicitation scheme, and Ducera has enjoyed millions of dollars in ill-gotten gains from clients that the Individual Defendants improperly solicited.

II. THE PWP PARTIES ARE ENTITLED TO SUMMARY JUDGMENT ON ALL OF DEFENDANTS' REMAINING COUNTERCLAIMS AND CROSS-CLAIMS.

1. The PWP Parties Are Entitled to Summary Judgment on the Partner Defendants' Remaining Breach of Contract Counterclaims (Counts I-III of Counterclaims).

PWP is entitled to summary judgment on the Partner Defendants' breach of contract counterclaims, which allege a breach of (i) Kramer and Slonecker's Deferred Compensation Agreements (the "DCAs") (Count I);[14] (ii) the Partner Defendants' PWP Agreements (Count II); and (iii) the implied covenant of good faith and fair dealing on behalf of each Individual Defendant (Count III).[15] (Second Amended Counterclaims ("SACC"), ¶¶ 224-59.) For the same reasons that PWP's contractual claims succeed, Defendants' contractual counterclaims and cross-claims fail.[16]

a. The Partner Defendants' Breach of Contract Claims Fail Because PWP Properly Terminated the Partner Defendants For Cause (Counts I-III).

Each of the Partner Defendants' contract counterclaims depend on the allegation that their terminations for Cause were improper. (*See id.* ¶¶ 239, 249, 255.) The evidence is clear, however, that Cause existed to terminate the Individual Defendants. Furthermore, when they joined PWP, the Partner Defendants agreed that PWP had "sole and absolute discretion" to terminate a partner for Cause. (19a ¶25; *see supra* § I.1.b.) PWP satisfied the only condition for such a termination

[14] Count I names Perella Weinberg Partners Group LP as Counterclaim-Defendant.

[15] Counts II and III name PWP as Counterclaim-Defendants, and Joseph Perella and Peter Weinberg as Cross-Claim Defendants.

[16] As discussed *supra* note 9, the restrictive covenants binding each Individual Defendant are valid and enforceable, and PWP complied with the PWP Agreements in terminating each Individual Defendant for Cause. Thus, PWP is also entitled to summary judgment on Defendants' claims for declaratory judgment (Counts V and VI).

by obtaining "the consent or approval of a Super Majority in Interest" of the members of PWP LLC. (*Id.* ¶35.) The Partner Defendants also agreed that if they were terminated by PWP for Cause, they would forfeit their equity in PWP. (*See id.* ¶28 ("[I]f a Limited Partner is terminated ... by the General Partner for cause, 100% of such Limited Partner's Tranche Percentage Interests ... shall be forfeited.").) Similarly, Kramer and Slonecker both agreed that their deferred compensation "shall be forfeited in full upon a termination by [PWP] for Cause," including for "any act or omission which constitutes a material breach of the Partner's obligations to the Firm" or any "violation by the Partner of any non-solicitation, non-competition or similar restrictive covenant of the Firm to which the Partner is subject[.]" (*Id.* ¶34.)[17]

b. The Partner Defendants' Are Not Entitled to Any Equity in PWP Because They Resigned And Competed With PWP (Counts I-III).

Independent of their solicitation scheme (which as discussed above justifies the equity forfeiture), each Partner Defendant forfeited any equity they had in PWP by resigning before competing with PWP, a consequence that was clear on the face of their Partnership Agreements:

> [I]f a Limited Partner is Terminated: ... as a result of the resignation of such Limited Partner where such Limited Partner does, within the three years thereafter, Compete with the Partnership and its Affiliates, 100% of such Limited Partner's [equity] shall be forfeited[.]

(*Id.* ¶28.) "Compete" includes "entering into a relationship ... as an employee, officer, member, partner, director, owner, [or] stockholder ... of, or in any similar relationship, or aiding or assisting anyone else, with a Competitive Enterprise[.]" (*Id.* ¶30.) "Competitive Enterprise means a

[17] Kramer and Slonecker elected to further extend their deferred compensation period beyond the timeframe indicated in the initial DCAs by submitting a form to PWP's human resources department. (19a ¶33.) The forms make clear that they do not in any way alter or supplant the terms of the DCA, stating that any election to further extend the deferred compensation period remained "in accordance with the terms of the Deferred Compensation Agreement[.]" (*Id.*)

business enterprise that engages in any activity that ... competes anywhere with any activity or similar function in which [PWP] is engaged, has plans to engage ... or was engaged during the two-year period prior to" the partner's resignation, including "investment banking" or "financial advisory services." (*Id.* ¶31.)

Each Partner Defendant resigned from PWP in February 2015. They thereafter "Compete[d]" with PWP by forming Ducera. Ducera is plainly a "Competitive Enterprise" under the Partnership Agreements: it provides financial services in the same market as PWP, and the companies now directly compete for the same clients. Indeed, Ducera's earliest engagement was with Monsanto, which previously engaged PWP for identical services.

c. The Partner Defendants' Claim For Breach of the Implied Covenant of Good Faith and Fair Dealing Fails Because the Partnership Agreements Authorized PWP to Terminate the Partner Defendants (Count III).

PWP acted within its "sole and absolute discretion" in terminating the Partner Defendants for Cause. Because this determination was "authorized by the terms of the [Partnership] [A]greement[s]," the Partner Defendants cannot claim that it violated the implied covenant. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005) (citations omitted); *see also Peter R. Friedman, Ltd. v. Tishman Speyer Hudson Ltd. P'ship*, 107 A.D.3d 569, 570 (1st Dep't 2013) ("[T]he covenant ... cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights.") (citation omitted).[18] Where a contract permits a party to make a determination in "its sole discretion ... the covenant of good faith and fair dealing cannot serve to negate that provision." *Transit Funding Assocs., LLC v. Capital One Equip. Fin. Corp.*, 149 A.D.3d 23, 29–30 (1st Dep't 2017) (dismissing claims for

[18] Although the PWP Partnership Agreements are governed by Delaware law and the PWP Employee Agreement by New York law, as the Court has recognized, the law in both states is substantially "similar." *Kramer*, 2016 WL 3906073, at *20 n.17.

breach of the implied covenant where "complained-of conduct ... was authorized " in defendant's "sole and absolute discretion"); *see Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 503–04 (Del. 2019) (a party may not "imply new contract terms merely because a contract grants discretion" in decision making).

Moreover, even if there were some contractual limitation on PWP's discretion—and there is not—overwhelming evidence of the Partner Defendants' misconduct supported PWP's decision to terminate the Individual Defendants for Cause.

2. PWP Is Entitled To Summary Judgment on Defendants' Tortious Interference Counterclaim (Count VI of Counterclaims).

Defendants allege that PWP made "defamatory statements" regarding Defendants' "integrity and honesty," "threaten[ed]" PWP employees with a lawsuit if they worked with Ducera in violation of their contractual obligations to PWP, and interfered with "business relationships" with unidentified clients. (SACC ¶¶ 280-85.) Defendants' counterclaim fails for at least three reasons.

First, to the extent this counterclaim is based on statements about the Individual Defendants violating their agreements with PWP, any such statement is true, *see supra* § I.1.A. *Denby v. Pace Univ.*, 294 A.D.2d 156, 157 (1st Dep't 2002) (dismissing tortious interference claim based on statement plaintiff "acknowledged to be true"). Furthermore, there is no evidence that PWP or any of the Cross-Claim Defendants acted solely out of malice. *Pitcock v. Kasowitz, Benson, Torres & Friedman LLP*, 74 A.D.3d 613, 614–15 (1st Dep't 2010) (dismissing terminated law firm partner's tortious interference claim against firm, based on statement that partner was terminated "for cause" because statement was true and not made "solely out of malice").

Second, Defendants cannot maintain this claim based on PWP's statements regarding its legal position that the Individual Defendants' breached their restrictive covenants. PWP's

statement as to what it "believes to be [its] legal rights" is not actionable, even if this Court ultimately determines that PWP may have "misconceive[d] what those rights are[.]" *Thur v. IPCO Corp.*, 173 A.D.2d 344, 345 (1st Dep't 1991) (quoting *Kaplan v. Helenhart Novelty Corp.*, 182 F.2d 311, 314 (2d Cir. 1950) (dismissing tortious interference claim based on defendant-employer's letter to plaintiff-employee's new employer, warning of violations of restrictive covenant).

Third, Defendants cannot establish the requisite "'reasonable certainty' that a contract would have been entered, but for defendant's [alleged] wrongful interference." *Penn Warranty Corp. v. DiGiovanni*, 10 Misc. 3d 998, 1006 (N.Y. Sup. Ct. 2005) (citation omitted).) Even with the benefit of discovery, Defendants cannot identify one client that refused to do business with Ducera because of any acts or statements of the PWP Parties. *See, e.g.*, *Cox v. Prudential Found., Inc.*, 167 A.D.3d 524, 525 (1st Dep't 2018) (tortious interference claim failed where "[p]laintiff failed to identify a specific prospective economic or contractual relationship that was interfered with"); *Learning Annex Holdings, LLC v. Gittelman*, 48 A.D.3d 211, 211 (1st Dep't 2008) (tortious interference claims failed where plaintiff "failed to identify any specific customers it would have obtained but for defendant's actions").

3. PWP Is Entitled to Summary Judgment on Defendants' Defamation Claim (Count VII of Counterclaims).

Defendants' defamation claim (Count VII)[19] alleges that two statements set forth in PWP's February 17, 2015 internal memorandum are defamatory: (1) the Individual Defendants "violat[ed] their partnership and employment agreements"; and (2) "trust is the foundation of our business

[19] Count VII names PWP LLC as Counterclaim-Defendant and Perella, Weinberg, and Cofsky as Cross-Claim Defendants.

and we believe [Individual Defendants] fundamentally breached both our trust and our agreements[.]" (SACC ¶ 294.) Both statements are true, and neither is actionable.

First, because the Individual Defendants violated their non-solicitation provisions, PWP's statement that they did so is not actionable because "truth is an absolute defense" to defamation. *Diaz v. Espada*, 8 A.D.3d 49, 50 (1st Dep't 2004).

Second, the alleged defamatory statements are nonactionable statements of opinion. *Galasso v. Saltzman*, 42 A.D.3d 310, 311 (1st Dep't 2007). PWP terminated the Individual Defendants for violating their agreements with PWP—Defendants cannot dispute that PWP ***believed*** they did so. Nothing in the internal memorandum presents the requisite "provably false factual connotation[.]" *Immuno AG. V. Moor-Jankowski*, 77 N.Y.2d 235, 245 (1991). Indeed, the second sentence of the memorandum, expressly states that it is PWP's belief. (19a ¶129 ("As you know, trust is the foundation of our business and ***we believe*** they fundamentally breached both our trust and our agreements. Consequently, ***we believe*** our actions are in the best interest of both our clients and the Firm.").) Although "believe" is not in the first sentence, when read in context, PWP was merely stating that it terminated the Individual Defendants and its basis for doing so. *See Davis v. Boeheim*, 24 N.Y.3d 262, 270 (2014) (whether statement is fact or opinion depends on "full context of the communication in which the statement appears").

Third, Defendants' defamation counterclaim fails because the statements they identify are merely expressions of PWP's "legal position" regarding their decision to terminate the Individual Defendants. *S.L.C. Consultants/Constructors, Inc. v. Raab*, 177 A.D.2d 965, 965 (4th Dep't 1991) (statement not defamatory where it was "a statement of plaintiff's legal position with regard to its employment agreement with defendant"); *Lombardo v. Dr. Seuss Enterprises, L.P.*, 16 Civ. 9974, 2017 WL 1378413, at *7 (S.D.N.Y. April 7, 2017) (A party's "good faith assertion of its legal

position does not constitute a statement of fact sufficient to establish a defamation claim."). The allegedly defamatory statement—"trust is the foundation of our business and we believe [Individual Defendants] fundamentally breached both our trust and our agreements"—merely provides PWP's legal position regarding the Individual Defendants' breaches.

* * *

Defendants have named Kevin Cofsky as a Cross-Claim Defendant only as to their claims for intentional interference (Count VI) and defamation (Count VII). (SACC, at 44, 46). But Defendants' claims fail to identify any conduct by Cofsky implicating him in either of these claims, nor has discovery produced any such evidence. Accordingly, in addition to the grounds discussed *supra* §§ II.2-II.3, for all of the PWP Parties, the Court should grant summary judgment to Cofsky on these cross-claims. *See Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc.*, 41 A.D.3d 269, 270 (1st Dep't 2007) (awarding summary judgment dismissing claim for tortious interference with prospective business relations where "no evidence" supported essential elements of claim); *Gross v. New York Times Co.*, 281 A.D.2d 299, 300 (1st Dep't 2001) (awarding summary judgment dismissing defamation claim where "no evidence" supported essential elements of claim).

4. PWP Is Entitled to Summary Judgment on Defendant Kramer's Breach of Fiduciary Duty Counterclaim (Count X of Counterclaims).

PWP is entitled to summary judgment on Defendant Kramer's breach of fiduciary duty counterclaim (Count X) because (i) PWP has no fiduciary duties regarding for-Cause terminations under the PWP Agreements; and (ii) independently, PWP's conduct would not violate any such duties.

The terms of a partnership agreement may "expand[]," "restrict[]" or "eliminate[]" fiduciary duties owed between partners and limited partnerships. Del. Code Ann. Tit. 6, § 17-1101. Delaware law thus "gives 'maximum effect to the principle of freedom of contract and to

the enforceability of partnership agreements.'" *Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 360 (Del. 2013) (citations omitted). Accordingly, a partnership cannot breach its fiduciary duties by acting within its "sole discretion" as granted by a partnership agreement. *Sonet v. Timber Co., L.P.*, 722 A.2d 319, 322 (Del. Ch. 1998) (citation omitted).

Here, the PWP Partnership Agreements dispense with any fiduciary duties that PWP may have with respect to a for-Cause termination—in rendering such decision, PWP has "no duty or obligation to give any consideration to any interest of or factors affecting the Partnership, the Partners, or any other person." *See Norton* 67 A.3d at 360 (holding that partnership agreement defining "sole discretion" to consent to transaction with almost identical language at issue eliminated "common law fiduciary duties"); *Sonet*, 722 A.2d at 322 (dismissing claims for breach of fiduciary duty where partnership agreement granted partnership "sole discretion" in transaction).

Even if PWP were subject to fiduciary duties in deciding whether to terminate Kramer for Cause, PWP did not breach its fiduciary duties to Kramer: PWP properly terminated Kramer for Cause based on evidence of clear violations of contractual and common law duties to PWP. (*See supra* §§ I.1.a.i and I.2.)

CONCLUSION

For the reasons set forth above, PWP respectfully requests that the Court grant its motion for summary judgment in its entirety.

Dated: January 24, 2020
New York, New York

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CERTIFICATION OF COUNSEL

I hereby state, pursuant to Rule 17 of the Commercial Division Rules, that the foregoing Brief was prepared on a computer using Microsoft Word. Pursuant to the word count system in Microsoft Word, the total number of words in the Brief, excluding the caption, table of contents, table of authorities, signature block, and this certification is 13,731.

Dated: January 24, 2020
New York, New York

/s/ Christopher D. Belelieu
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