

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

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

Index No. 653488/2015

Plaintiffs, :

Hon. O. Peter Sherwood

- against - :

Part 49

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

Mot. Seq. 10

**ORAL ARGUMENT
REQUESTED**

Defendants. :

-----X

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. :

-----X

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. :

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**MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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Defendants respectfully submit this Memorandum of Law in opposition to Plaintiffs' Motion for Summary Judgment, pursuant to CPLR 3212.¹

PRELIMINARY STATEMENT

PWP's Motion for Summary Judgment should be denied. It declares "undisputed" facts that its own witnesses have conceded to be untrue. PWP further:

- fails to identify any lawful basis to enforce its employee non-solicitation provisions;
- advances arguments *contrary to controlling law* (without mention of First Department precedent);
- manipulates the plain language of its own contracts, including when it is entitled to act in its "discretion" and what that means;
- cites an *inapplicable Delaware statute* to support a claim that the Individual Defendants owe fiduciary duties; and
- advances common law claims for damages based on the same alleged misconduct that supports its contract claims, thereby seeking *double or even triple recovery* despite its seizure of some \$60 million.

PWP's papers also spend considerable time on alleged "facts" that have nothing to do with its fictional "resignations *en masse*" narrative. No one disputes, for example, that Kramer was openly considering his career options after his abrupt demotion by Weinberg. Even assuming he (or others) contemplated competing with PWP at some future point, this would breach no duty to PWP. PWP and its lawyers have known this from the outset, which is why they rammed the Individual Defendants' terminations through a handpicked group of PWP LLC members who simply assumed (but never assessed) that acts constituting "Cause" had occurred, and now proffer to this Court two bodies of "evidence": (i) emails where colleagues are expressing dissatisfaction with PWP, praising one another, or commenting on the market – but

¹ "PWP" refers to Plaintiffs Perella Weinberg Partners LLC ("PWP LLC"), PWP MC LP, PWP Equity I LP, and Perella Weinberg Partners Group LP. The "Individual Defendants" refers to Defendants Michael A. Kramer, Derron S. Slonecker, Joshua S. Scherer, and Adam W. Verost.

engage in no solicitation; and (ii) spreadsheets and other documents created by or exchanged among Kevin Cofsky, Bradley Meyer, and Agnes Tang – *none of whom were ever accused by PWP of any wrongdoing*. PWP hopes to draw unsupported nefarious inferences that distract from Weinberg’s misconduct and PWP’s own breaches of contract. These efforts should be rejected, and this Court should deny PWP’s motion.

COUNTERSTATEMENT OF FACTS

Defendants set forth below their Counterstatement of Facts, and incorporate the Undisputed Facts set forth in the Memorandum of Law in Support of Defendants’ Motion for Partial Summary Judgment dated January 24, 2020 (“Defendants’ Mov. Br.”).

A. PWP Did Not “Acquire” Kramer Capital

PWP’s claim that it “acquired” Kramer Capital is false.² The transaction document, drafted by PWP’s own lawyers,³ reflects that PWP paid \$1,000 to purchase only specifically identified assets, not including goodwill or client relationships.⁴ Kramer Capital continues to operate today and is owned 100% by Kramer and Slonecker.⁵

B. PWP’s Misrepresentations About Defendants’ Compensation

In an effort to suggest his avarice, PWP falsely claims that Kramer “*received* over \$92 million, including approximately \$50 million in cash compensation and \$42 million in equity,” from PWP.⁶ PWP’s sole purported support for this misstatement is an email drafted by Peter Weinberg, indicating that Kramer “*accumulated* \$92mm of value [over] the last 8 years (\$50 of comp and \$42 of equity)” – *which Weinberg admits was “fair value” for Kramer’s*

² See, e.g., Plaintiffs, Counterclaim-Defendants, and Cross-Claim Defendants’ Memorandum of Law in Support of their Motion for Summary Judgment dated January 24, 2020 (“PWP Mov. Br.”) at 4.

³ Affirmation of Deana Davidian dated February 21, 2020 (“Davidian 2/21/20 Aff.”), Ex. 1.

⁴ Affidavit of Michael A. Kramer sworn to January 22, 2020 (“Kramer Aff.”) ¶ 6 & Ex. 2, Sched. 1.2 & 1.3.

⁵ Kramer Aff. ¶ 6.

⁶ PWP Mov. Br. at 4.

*“contributions” to PWP during his tenure.*⁷ Moreover, Kramer did not actually receive this “fair value”; indeed, *PWP’s seizure of Kramer’s \$42 million in equity* is at the heart of this action.

Similarly, to the extent relevant, PWP’s opinion that it compensated the Restructuring Group well and “heavily invested” in it is not supported by actual evidence.⁸ PWP’s own documents confirm that PWP vested its most valuable equity in “founding/early partners” like Perella and Weinberg – who would receive such value “irrespective of how well they do and how long they stay.”⁹ Moreover, PWP’s “lack of long-term wealth creation” made “becoming a partner[] [at PWP] economically less attractive” to PWP’s Managing Directors.¹⁰ It is undisputed that the Managing Directors of the Restructuring Group were independently considering resigning for this and other reasons.¹¹

C. The Relevant Contract Provisions

PWP foregoes a faithful recitation of its own contractual obligations. Among these is PWP’s obligation to determine “whether an event, act, or omission of Cause has [actually] occurred.”¹² Moreover, contrary to PWP’s claims,¹³ a “Cause” event does not trigger an automatic forfeiture of 100% of a terminated partner’s equity. Instead, PWP can impose a forfeiture of none, some, or all of a departing partner’s equity interests.¹⁴

PWP similarly mischaracterizes the provisions of its agreements governing competition.

⁷ See Affirmation of Christopher D. Belelieu dated January 24, 2020 (“Belelieu Aff.”), Ex. 42 (emphasis added).

⁸ PWP Mov. Br. at 4.

⁹ See, e.g., Davidian 2/21/20 Aff., Ex. 2; *id.*, Ex. 3 at PWP0022069.

¹⁰ See, e.g., Davidian 2/21/20 Aff., Ex. 3 at PWP0022069.

¹¹ Defendants’ Rule 19-A Statement (“Defendants’ 19-A Stm.”) ¶¶ 48-69; PWP Mov. Br. at 7.

¹² Defendants’ 19-A Stm. ¶ 24.

¹³ PWP Mov. Br. at 7.

¹⁴ Defendants’ 19-A Stm. ¶ 28.

A terminated partner who thereafter competes with PWP is not in breach of any contract.¹⁵

Rather, PWP's contracts permit such partner to make an informed decision either to: (i) compete within three years and forfeit any retained equity; *or* (ii) sit on the bench for three years and receive the value of that equity.¹⁶

D. PWP Relies on Assertions It Knows to be Disputed or Refuted

PWP makes still other assertions of fact that are disputed or refuted by the record. For example, Defendants deny PWP's claim that they "had begun planning to leave PWP to start a new firm [by October 2014]."¹⁷ PWP's support for this purported fact is a February 11, 2015 email by *Weinberg*, which states: "Met with Josh—he has been in discussions with Mike, Derron, and the team about *career options* since October. He plans to leave with the team wherever they go."¹⁸ Scherer testified that Weinberg's email (which notably did not copy him) was "a misrepresentation of [this] conversation,"¹⁹ and *PWP's CEO Robert Steel later admitted that Scherer "never indicated [he] had decided to leave."*²⁰

Similarly, PWP references an email from Slonecker commenting favorably on an approved spin-off of a division of The Blackstone Group.²¹ This has no probative value at all as

¹⁵ Davidian 2/21/20 Aff., Ex. 18 [Shendelman Tr.] at 289:11-290:6.

¹⁶ Kramer Aff., Ex. 4 § 5.02(c)(i)(D); Affidavit of Derron S. Slonecker sworn to January 23, 2020 ("Slonecker Aff."), Ex. 2 § 5.02(c)(i)(D); *see also* Davidian 2/21/20 Aff., Ex. 17 [Sugarman Tr.] at 81:24-82:24, 149:20-150:4 (PWP's head of HR testifying that partners could choose to leave and compete with PWP and forfeit their equity).

¹⁷ PWP Mov. Br. at 7.

¹⁸ Belelieu Aff., Ex. 100 (emphasis added).

¹⁹ Davidian 2/21/20 Aff., Ex. 16 [Scherer Tr.] at 126:4-23; *see also id.* at 81:4-82:19 (testifying as to his efforts to keep Kramer at the firm after Kramer's demotion); Belelieu Aff., Ex. 16 [Scherer Tr.] at 94:9-96:12 (testifying that he "loved the firm," believed "this was going to be the last firm that I worked at," and that "never at any point did [he] consider leaving [PWP]"); Davidian 2/21/20 Aff., Ex. 16 [Scherer Tr.] at 111:7-112:8 (testifying that he "had no expectation that anyone was leaving the firm").

²⁰ Affirmation of Deana Davidian dated January 24, 2020 ("Davidian 1/24/20 Aff."), Ex. 62 at 53779 (emphasis added).

²¹ Belelieu Aff., Ex. 34.

to PWP's claim the Individual Defendants engaged in a "deceptive scheme" to "lift out" from PWP.²²

PWP also cites an email from Scherer to Kramer, dated January 1, 2015, in which Scherer lists names that his wife proposed for a hypothetical new firm.²³ Scherer testified that this email was prompted by "a very rough year-end process with respect to compensation,"²⁴ which initially included a 40% cut in compensation.²⁵ His wife, who "had to bear the brunt of that process," took it upon herself to suggest names for a hypothetical alternative firm.²⁶ Kramer never responded to this email and the two never discussed it.²⁷ Moreover, it may hardly be said that this was an act of improper solicitation: By this time Kramer had been demoted and was openly discussing with PWP whether he would leave the firm.²⁸

As for the Kramer/Cofsky meeting purportedly held on January 5, 2015, Kramer has denied under oath that any such conversation took place – rendering this assertion a disputed issue of fact.²⁹ In all events, the import of this "meeting" has been refuted by Cofsky himself, who admitted that he sought out Kramer on multiple occasions after this date to discuss the idea of a hypothetical new firm, but that Kramer ignored his overtures.³⁰

²² PWP Mov. Br. at 8.

²³ Belelieu Aff., Ex. 41; Belelieu Aff., Ex. 16 [Scherer Tr.] at 141:3-14.

²⁴ Belelieu Aff., Ex. 16 [Scherer Tr.] at 141:12-142:13.

²⁵ *See, e.g.*, Belelieu Aff., Ex. 16 [Scherer Tr.] at 94:20-95:8. Kramer and Slonecker ultimately shifted funds from their own compensation to make up the shortfall to Scherer. Davidian 2/21/20 Aff., Ex. 16 [Scherer Tr.] at 156:2-157:3.

²⁶ Belelieu Aff., Ex. 16 [Scherer Tr.] at 141:3-14.

²⁷ Belelieu Aff., Ex. 16 [Scherer Tr.] at 142:15-16.

²⁸ Defendants' 19-A Stm. ¶¶ 42-57, 87-93, 100.

²⁹ Davidian 2/21/20 Aff., Ex. 24 [Kramer Tr.] at 287:14-288:8, 376:2-13.

³⁰ Defendants' 19-A Stm. ¶ 105.

E. PWP Rewrites Testimony Regarding the January 11, 2015 Meeting

PWP next claims Kramer convened a meeting at his home on January 11, 2015, to extend job offers and invite colleagues to join a new firm he had decided to form.³¹ This is refuted by the meeting's participants,³² with non-party Managing Directors Agnes Tang and Bradley Meyer testifying that they requested the meeting to address their professional concerns.³³ Indeed, participants uniformly confirm that Kramer stated at the outset: “[Y]ou guys wanted *this meeting. What do you want to talk about?*”³⁴

There is no dispute that, at this meeting, the group discussed (i) how their compensation was determined (including the step-downs among partners); (ii) how Managing Directors might reach compensation numbers they felt they deserved; and (iii) what Kramer was planning to do given his demotion.³⁵ Kramer, who was already engaged in conversations with PWP regarding his future,³⁶ testified (and others confirmed) that he made clear PWP was a good place for them no matter what he did:

I was very clear, and I wanted to make sure ... that everybody there knew that *regardless of what I did, that there [were] great opportunities for them at Perella, and they shouldn't think about what I do as a driver in what they do.* They should make their own decisions on that.³⁷

³¹ PWP Mov. Br. at 29.

³² Defendants' 19-A Stm. ¶¶ 74-75, 80.

³³ Defendants' 19-A Stm. ¶ 69. Even Cofsky admitted that he did not know who asked for the meeting and that Kramer noted up front that he was responding to overtures from the attendees. Belelieu Aff., Ex. 27 [Cofsky Tr.] at 111:13-112:19; Davidian 1/24/20 Aff., Ex. 59 at WGM0000628.

³⁴ Defendants' 19-A Stm. ¶ 72.

³⁵ Defendants' 19-A Stm. ¶¶ 73-74, 76.

³⁶ Defendants' 19-A Stm. ¶ 74.

³⁷ Defendants' 19-A Stm. ¶ 75.

Before the meeting concluded, either Verost or Cofsky asked whether a hypothetical smaller firm, without the overhead of a large firm like PWP, would allow for higher compensation.³⁸ Kramer acknowledged this possibility but cautioned the group not to “underestimate” the benefits of being “part of a bigger firm.”³⁹ When asked if he would consider starting a new firm, Kramer demurred, noting he would consider it only if his control and influence were secured by a majority interest.⁴⁰ All agree that no such firm existed at this time, and that discussions about this *non-existent firm* were hypothetical only⁴¹ – which PWP admits does not constitute solicitation.⁴²

Even Kevin Cofsky – the sole individual who claimed that Kramer made any job offer at this meeting – confirmed that:

- Kramer “chose his words very carefully” and “never sent [Cofsky] anything on ... economics, or anything else, frankly.”⁴³
- The only words he recalls Slonecker saying were about “the importance of transparency.”⁴⁴
- Scherer *did not solicit him* at this or any other time.⁴⁵
- *He “can’t say” that Verost engaged in any solicitation.*⁴⁶

³⁸ Defendants’ 19-A Stm. ¶ 76.

³⁹ Defendants’ 19-A Stm. ¶ 77.

⁴⁰ Defendants’ 19-A Stm. ¶ 78.

⁴¹ Defendants’ 19-A Stm. ¶¶ 76, 79-80.

⁴² Davidian 2/21/20 Aff., Ex. 22 [Ward Tr.] at 20:8-19.

⁴³ Defendants’ 19-A Stm. ¶ 79.

⁴⁴ Defendants’ 19-A Stm. ¶ 81.

⁴⁵ Defendants’ 19-A Stm. ¶ 82.

⁴⁶ Defendants’ 19-A Stm. ¶ 83.

Cofsky also *recanted* the claim that Kramer read from a spreadsheet containing equity and income splits during this meeting.⁴⁷ At deposition, Cofsky admitted he had no idea what the paper that Kramer purportedly had in front of him was – that he “d[id] not know” if it “was a document that Kramer drafted or that someone else drafted,” whether it “had words or numbers on it,” or even whether it “was handwritten or typed.”⁴⁸ PWP’s claim that Defendants failed to produce this alleged spreadsheet⁴⁹ ignores the more obvious point: The document was not produced because it does not exist.

F. The Managing Directors’ Proposed Equity Split Spreadsheets

Following the January 11, 2015 meeting, Managing Directors Verost, Cofsky, Tang, and Meyer circulated amongst themselves (*but not the partner Defendants*) spreadsheets showing possible equity and income splits for a hypothetical new firm.⁵⁰ Verost sent Tang and Meyer a spreadsheet, titled “Book2.xlsx,” which modified⁵¹ a document he initially drafted in December 2014, because he was “increasingly concerned about Perella and [his] future there” and was “thinking about what a hypothetical firm could be.”⁵²

Subsequently, Meyer sent Cofsky, Verost, and Tang a spreadsheet titled “NewCo Equity Split.xlsx,” reflecting his view of “income potential within [PWP] ... under what [he] believed to be the relative step-downs in compensation between the various senior members of the team”

⁴⁷ Davidian 1/24/20 Aff., Ex. 59 at WGM0000628 (claiming Kramer “had a spreadsheet, which he had printed out” and which “showed income distributions and equity distributions”).

⁴⁸ Belelieu Aff., Ex. 27 [Cofsky Tr.] at 159:15-161:4.

⁴⁹ PWP Mov. Br. at 8 n.4.

⁵⁰ Defendants’ 19-A Stm. ¶ 84.

⁵¹ Davidian 2/21/20 Aff., Ex. 5.

⁵² Belelieu Aff., Ex. 46; Belelieu Aff., Ex. 17 [Verost Tr.] at 207:7-208:6.

and a potential “alternative sharing of the pie.”⁵³ Meyer testified that his spreadsheet did not reflect any “proposal” from Kramer; rather, Meyer sought to account for what he believed Kramer’s equity and income expectations would be.⁵⁴ Verost then circulated a revised spreadsheet, titled “NewCo Equity Split – AV.xlsx,” which added “Proposal 3,”⁵⁵ and Cofsky followed with his own revisions, “NewCo Equity Split – kc.xlsx,” which added “Proposal 4.”⁵⁶

Kramer, Slonecker, and Scherer did not request nor (until this litigation) even know about these spreadsheets.⁵⁷ Of the Managing Directors who drafted and exchanged these spreadsheets, only Verost was terminated. PWP never accused Meyer, Tang, and Cofsky of wrongdoing based on these spreadsheets or their participation in the January 11 meeting. To the contrary, just before Cofsky first raised his accusations against Defendants, Weinberg (i) unilaterally guaranteed Cofsky a \$500,000 increase in compensation, available immediately; (ii) assured Cofsky that he could finally “move the needle” on his long-frustrated partnership ambitions; and (iii) promoted Cofsky to interim Head of Restructuring.⁵⁸

G. Kramer’s Morale-Boosting Text Following the January 11 Meeting

As additional purported evidence of Kramer’s “deceptive scheme,” PWP quotes a text Kramer sent his colleagues, stating: “Have you ever been a part of something that is bigger than yourself ... Thanks Guys.”⁵⁹ It is undisputed, however, that Kramer sent similar morale-boosting emails to members of the Restructuring Group at the start of each year. The previous

⁵³ Belelieu Aff., Ex. 45; Davidian 2/21/20 Aff., Ex. 26 [Meyer Tr.] at 315:24-14, 319:4-24; Belelieu Aff., Ex. 26 [Meyer Tr.] at 327:7-328:6.

⁵⁴ Davidian 1/24/20 Aff., Ex. 29 [Meyer Aff.] ¶ 23.

⁵⁵ Belelieu Aff., Ex. 49.

⁵⁶ Davidian 2/21/20 Aff., Ex. 6; Davidian 1/24/20 Aff., Ex. 59 at WGM0000628-29.

⁵⁷ Defendants’ 19-A Stm. ¶ 85.

⁵⁸ Defendants’ 19-A Stm. ¶ 86.

⁵⁹ PWP Mov. Br. at 15.

January, for example, Kramer emailed *these same individuals*, citing his “pure respect and commitment” to them, stating that he “value[d] [his] personal relationship” with them, and thanking them for “allowing [him] to be a part of [THEIR] team.”⁶⁰ Kramer concluded by stating: “I can’t imagine the things we can accomplish together – *but I am thrilled to take the journey together.*”⁶¹ Team-building emails like these speak to the loyalty and goodwill these individuals felt for one another – not a devious solicitation scheme.

H. There Is No Evidence Suggesting Defendants Worked with Pluperfect or Searched for Office Space Before Their Terminations

PWP next cites emails by Tang (who was not terminated) with her friend, Sarah Bellamy at Pluperfect, and a voicemail message left by Kramer for his friend, Steve Swerdlow at CBRE.⁶²

Tang’s uncontroverted testimony establishes that she reached out to Ms. Bellamy of her own accord. She “wanted to see if there was an opportunity to get her [friend] some business should Mr. Kramer leave PWP and decide to open a new firm.”⁶³ *Tang did not discuss the matter with Kramer or retain Pluperfect until after his termination* – despite receiving a draft engagement letter that she sent to Kramer, to which Kramer did not respond.⁶⁴ Ms. Bellamy confirmed this, testifying that Pluperfect’s engagement commenced on April 1, 2015,⁶⁵ and that she had *no* discussions with any Defendant before that date.⁶⁶

⁶⁰ Davidian 2/21/20 Aff., Ex. 7 [PWP0021616].

⁶¹ *Id.* (emphasis added).

⁶² PWP Mov. Br. at 16-17. As set forth below, such allegations would set forth *no violation of any duty* to PWP even if true. *Infra* at 24-26.

⁶³ Davidian 1/24/20 Aff., Ex. 30 [Tang Aff.] ¶¶ 13-15.

⁶⁴ *Id.*

⁶⁵ Davidian 2/21/20 Aff., Ex. 27 [Bellamy Tr.] at 88:13-18, 90:20-23, 92:10-13, 97:6-10, 98:18.

⁶⁶ Davidian 2/21/20 Aff., Ex. 27 [Bellamy Tr.] at 54:17-55:6, *see also* Belelieu Aff., Ex. 18 [Bellamy Tr.] at 20:10-21:3 (testifying she had never heard of Defendants during the time period that Tang worked at PWP).

Moreover, while Kramer left a voicemail message for his “long time, very, very close family friend” of twenty-plus years, Steve Swerdlow of CBRE, on February 11, 2015, the unrefuted evidence confirms his purpose was *not* to inquire about office space.⁶⁷ PWP admits it was not until after Kramer’s widely publicized termination that Mr. Swerdlow put Kramer in touch with John Nugent, the CBRE representative that eventually helped Kramer find office space.⁶⁸

I. PWP’s Sham “Investigation” Into Alleged Misconduct

On February 15, 2015, Cofsky, PWP’s General Counsel Vladimir Shendelman, and lawyers from Weil, Gotshal & Manges LLP (“Weil”) participated in a call in which Cofsky was asked to supply “facts” showing “*how Kramer and his team violated their agreements.*”⁶⁹ Less than 25 minutes later, and without speaking to Defendants or the non-party Managing Directors (who have all testified that they were *not* solicited by Defendants), PWP’s CEO approved Weinberg’s “plan” to terminate Defendants on the basis that they had engaged in improper solicitation.⁷⁰ By mid-afternoon that day, Weil circulated Kramer’s draft termination letter.⁷¹

Shendelman claims that at some point during this period, he and Weil “investigated” Cofsky’s allegations, with Weil providing “the heavy lifting.”⁷² Weil senior partner Jeffrey Klein, however, repeatedly denied that Weil participated in any “investigation” leading to the terminations.⁷³

⁶⁷ Belelieu Aff., Ex. 14 [Kramer Tr.] at 304:24-305:21.

⁶⁸ Belelieu Aff., Ex. 14 [Kramer Tr.] at 307:16-308:4; Davidian 2/21/20 Aff., Ex. 24 [Kramer Tr.] at 310:2-6; PWP Mov. Br. at 20.

⁶⁹ Defendants’ 19-A Stm. ¶¶ 101-03.

⁷⁰ Defendants’ 19-A Stm. ¶ 107.

⁷¹ Defendants’ 19-A Stm. ¶ 108.

⁷² Defendants’ 19-A Stm. ¶ 109.

⁷³ Defendants’ 19-A Stm. ¶ 110.

Of the five PWP LLC members handpicked by Weinberg and Shendelman to vote on Defendants' terminations, three (Perella, Meguid, and Kourakos) testified that their decision to terminate was based on *counsel's conclusions*, while the fourth (Steel) testified he accepted Weinberg's word without question.⁷⁴ None felt it necessary to speak to witnesses or review documents.⁷⁵

J. PWP Terminates the Individual Defendants

On February 16, 2015, at 12:14 p.m., PWP's Chief Compliance Officer emailed a "resolution" to this subset of PWP LLC's members reciting as a *conclusion of fact* that the partner Defendants "have been soliciting and encouraging each other and certain other employees of the Firm to leave the Firm and join a new firm" in violation of the partnership agreements, and seeking consent to terminate them for "Cause."⁷⁶

These PWP LLC members did not hold any meeting as contemplated by the PWP LLC Agreement – leading one (excluded) PWP LLC member and potential voter to complain that:

it would have been better [if Weinberg, Perella, or Steel gave] everyone in the MC a heads-up by email that this was going to be done this way and why, rather than presenting the MC with a fait accompli of a decision having been taken for them by supermajority and without a meeting.⁷⁷

Instead, the handpicked LLC members (who were scattered across the globe on vacation) emailed back their two-word consents to the terminations – many within minutes of receipt.⁷⁸

⁷⁴ Defendants' 19-A Stm. ¶¶ 128-131.

⁷⁵ Defendants' 19-A Stm. ¶ 126.

⁷⁶ Defendants' 19-A Stm. ¶ 112.

⁷⁷ Davidian 2/21/20 Aff., Ex. 8 [PWP0058673].

⁷⁸ Davidian 1/24/20 Aff., Exs. 71-75; *see also* Davidian 2/21/20 Aff., Ex. 20 [Steel Tr.] at 219:18-19; Davidian 1/24/20 Aff., Ex. 15 [Weinberg Tr.] at 32:11; Davidian 1/24/20 Aff., Ex. 15 [Weinberg Tr.] at 33:22-25; Davidian 2/21/20 Aff., Ex. 29 [Meguid Tr.] at 62:13; Belelieu Aff., Ex. 29 [Kourakos Tr.] at 46:13.

That evening, the Individual Defendants were notified that they had been terminated for “Cause,” “effective immediately,” for allegedly “soliciting and encouraging” each other, Cofsky, Meyer, and Tang “to leave the firm and join a new firm that Mr. Kramer intends to establish.”⁷⁹ PWP claimed an immediate forfeiture of 100% of Defendants’ equity, earned over their eight-year tenure,⁸⁰ the total value of which was \$50,494,000 as of that date.⁸¹ Two months later, out of the blue, PWP also claimed an additional forfeiture of 100% of Kramer and Slonecker’s deferred compensation, totaling over \$11 million.⁸²

It is undisputed that four of the five PWP LLC members who voted to terminate Defendants for “Cause” were entitled to share *pro rata* in the equity reallocated as a result of the terminations, to the exclusion of other PWP partners.⁸³ Moreover, PWP seized these amounts despite conceding that Defendants had not harmed PWP economically.⁸⁴ As Weinberg testified: “[Q]uite the opposite. They were working hard and working with clients and expanding [PWP’s] business.”⁸⁵

K. The 90-Day Gardening Leave Period

PWP claims that Defendants’ terminations “commenced a 90 day period, until **May 17, 2015**.”⁸⁶ During this time, Defendants: (i) were told they were “not to enter PWP’s offices”;⁸⁷

⁷⁹ Defendants’ 19-A Stm. ¶ 115.

⁸⁰ Defendants’ 19-A Stm. ¶ 116.

⁸¹ *Id.* Notably, the record reflects no Super Majority vote on PWP’s decision to claim a forfeiture of 100% of such equity. *See* Davidian 1/24/20 Aff., Exs. 71-75.

⁸² Defendants’ 19-A Stm. ¶ 117.

⁸³ Defendants’ 19-A Stm. ¶ 29.

⁸⁴ Defendants’ 19-A Stm. ¶ 118.

⁸⁵ *Id.*

⁸⁶ Kramer Aff., Ex. 9; Slonecker Aff., Ex. 3; Affidavit of Joshua S. Scherer sworn to January 21, 2020 (“Scherer Aff.”), Ex. 1; Affidavit of Adam W. Verost sworn to January 22, 2020 (“Verost Aff.”), Ex. 2.

⁸⁷ *Id.*

(ii) had no access to PWP email or electronic documents;⁸⁸ and (iii) were told they could not “conduct any business on behalf of PWP.”⁸⁹ PWP does not allege that Defendants engaged in any such conduct or that they misappropriated or misused PWP’s confidential information.

L. PWP Admitted That Defendants Did Not Resign From PWP

Finally, as the end date of Defendants’ gardening leave suggests, PWP’s claim that Defendants “resigned” from PWP prior to their terminations is *wholly refuted* by PWP’s own evidence. To take a few examples:

- On April 8, 2015, PWP’s CEO admitted in writing that the Individual Defendants “*never indicated they had decided to leave*.”⁹⁰
- PWP’s Head of Human Resources testified that she had *no knowledge of Scherer, Slonecker, or Verost resigning* – and that if such resignations had occurred, Human Resources would have been notified.⁹¹
- PWP’s outside counsel confirmed that *Verost did not resign*.⁹²
- PWP’s outside counsel sent Kramer’s counsel a draft Tolling Agreement stating that Kramer was only “*considering* resigning” as of February 13, 2015 – two days after Weinberg claimed Kramer resigned.⁹³
- Kramer’s counsel told PWP he wanted to discuss “not only [Kramer’s] potential departure from PWP,” but *also the possibility Kramer stays or enters into some sort of new affiliation with PWP*.⁹⁴
- *PWP’s General Counsel admits* that Kramer’s counsel confirmed to him that Kramer had not resigned.⁹⁵

⁸⁸ Davidian 2/21/20 Aff., Ex. 9 [PWP0063130]; *id.*, Ex. 10; *see also id.*, Ex. 11 [PWP0058180].

⁸⁹ Kramer Aff., Ex. 9; Slonecker Aff., Ex. 3; Scherer Aff., Ex. 1; Verost Aff., Ex. 2.

⁹⁰ Davidian 1/24/20 Aff., Ex. 62.

⁹¹ Davidian 2/21/20 Aff., Ex. 17 [Sugarman Tr.] at 100:12-11.

⁹² Davidian 2/21/20 Aff., Ex. 28 [Klein Tr.] at 249:23-250:21.

⁹³ Kramer Aff., Ex. 6 at PWP0035171 (emphasis added); Davidian 2/21/20 Aff., Ex. 28 [Klein Tr.] at 148:11-153:2 (confirming that Weil received these purported facts from PWP).

⁹⁴ Kramer Aff., Ex. 5 (emphasis added).

⁹⁵ Davidian 2/21/20 Aff., Ex. 18 [Shendelman Tr.] at 220:3-17.

- Although required by contract, *none of the Defendants submitted a written resignation*.⁹⁶

Moreover, PWP intentionally did *nothing* that a firm would ordinarily do upon an employee's resignation. For example, PWP:

- *Never spoke to Defendants* to confirm Weinberg's claim that they were resigning, not even to ask about departure dates or how to handle then-pending engagements.⁹⁷
- Declined to confirm the supposed resignations with Kramer's attorney – because it “wasn't in [PWP's] interest” to do so.⁹⁸
- Calculated time periods for Defendants' gardening leaves and benefits *from February 16, 2015 (their termination date) – not the dates of their purported resignations*.⁹⁹

Even Weinberg – the sole source for PWP's “resignations *en masse*” narrative¹⁰⁰ – *testified that he did not know if any Defendant actually resigned, and that he never even spoke to Verost*.¹⁰¹

⁹⁶ Davidian 2/21/20 Aff., Ex. 18 [Shendelman Tr.] at 166:21-169:16; Davidian 2/21/20 Aff., Ex. 30 [Weinberg Tr.] at 232:8-19. While PWP misleadingly refers this Court to an undated draft resignation letter Kramer authored in 2013, there is no dispute that this draft was never completed or submitted to PWP. Kramer Aff. ¶ 21.

⁹⁷ See, e.g., Davidian 2/21/20 Aff., Ex. 17 [Sugarman Tr.] at 76:12-18; Davidian 2/21/20 Aff., Ex. 20 [Steel Tr.] at 176:4-23; Davidian 2/21/20 Aff., Ex. 22 [Ward Tr.] at 212:21-6.

⁹⁸ Davidian 2/21/20 Aff., Ex. 18 [Shendelman Tr.] at 217:23-218:6.

⁹⁹ Davidian 2/21/20 Aff., Ex. 12; Davidian 2/21/20 Aff., Ex. 17 [Sugarman Tr.] at 166:9-167:17, 168:4-171:15, 171:24-173:7.

¹⁰⁰ See PWP Mov. Br. at 17 (citing only Weinberg's testimony as evidence of resignations).

¹⁰¹ See, e.g., Davidian 2/21/20 Aff., Ex. 30 [Weinberg Tr.] at 265:15-266:9 (admitting he “d[id not] remember” if Kramer said that he resigned); Davidian 2/21/20 Aff., Ex. 30 [Weinberg Tr.] at 232:23-233:9, 262:5-21 (testifying only that Slonecker and Scherer told him they would go with Kramer *if he left* – but admitting he “d[id]n't know if that constitutes resignation); see also *id.* at 267:14-19; *id.* at 270:7-271:6, 270:25-273:2 (testifying that he “d[idnt] remember talking with Adam Verost”; having no answer when asked “to whom [Verost] resigned”; and admitting that he just “assumed” Verost resigned).

ARGUMENT

I. PWP MISREPRESENTS THE FIRST DEPARTMENT'S HOLDING.

Contrary to PWP's contentions, the First Department did not hold that PWP's *allegations*, if proven, would "unquestionably constitute a termination for cause."¹⁰² The sufficiency of PWP's solicitation allegations was not before the Court and the parties had not yet begun to address whether the non-solicitation provision was even enforceable. *See Perella Weinberg Partners LLC v. Kramer*, 153 A.D.3d 443, 444 (1st Dep't 2017). To the contrary, the Court simply noted, in *dicta*, that a *breach* of PWP's non-solicitation provisions would – as a matter of contract – constitute "Cause." *Id.* at 445.

II. PWP IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS CONTRACT CLAIMS (COUNTS I-VII).

A. As Set Forth in Defendants' Moving Brief, the Employee Non-Solicitation Provision Is Unenforceable, Both as Written and as Applied

As set forth in Defendants' Moving Brief, PWP's employee non-solicit provisions are unenforceable as a matter of law – as, among other things, they do not satisfy the "legitimate interest" test, and their overbreadth imposes undue hardship on employees.¹⁰³ Indeed, PWP does not invoke these provisions to cover solicitation.¹⁰⁴ Instead, PWP seeks to impose a "contractual gag rule" on at-will employees – each of whom was either demoted or dissatisfied with their compensation or prospects at PWP – to prevent them from commiserating, discussing potential alternatives, or furthering their career prospects.¹⁰⁵

¹⁰² PWP Mov. Br. at 27.

¹⁰³ Defendants' Mov. Br. at 24-32. While a full discussion of partial enforcement here is best left to the reply papers on Defendants' own motion, partial enforcement of the employee non-solicitation clause is inappropriate on the facts here. *See, e.g., Ashland Mgmt. Inc. v. Altair Invs. NA, LLC*, 59 A.D.3d 97, 106 (1st Dep't 2008).

¹⁰⁴ *See also infra* at 24-26.

¹⁰⁵ PWP Mov. Br. at 7-8, 31 (citing as purported evidence of "solicitation" the fact that the partner Defendants had been discussing "career options" since Kramer's abrupt demotion).

But a *restrictive covenant is unenforceable where, as here, it “purports to prohibit at-will employees, who have yet to accept an offer of new employment, from ‘inducing’ or even ‘encouraging’ their coworkers to leave their present employer”* – as such restrictions would impermissibly prohibit employees from ever complaining about their jobs or discussing future employment options. *In re Document Techs. Litig. (“DTI”)*, 275 F. Supp. 3d 454, 466-68 (S.D.N.Y. 2017) (characterizing such restriction as “nothing short of a contractual gag rule”). In fact, as drafted and applied by PWP, the breadth of the employee non-solicitation provisions would impair protected discourse. *See id.*; *cf.* N.Y. Labor Law § 194, § 4(a) (employers may not prohibit employees “from inquiring about, discussing, or disclosing ... wages”); *NLRB v. Main Street Terrace Care Center*, 218 F.3d 531, 537 (6th Cir. 2000). Because these provisions foreclose even the most innocuous of co-worker discussions, “neither New York law¹⁰⁶ nor common sense could possibly enforce [them], let alone have a lawful basis for doing so.” *DTI*, 275 F. Supp. 3d at 467-68.

PWP’s argument for enforceability fails on its face – as PWP’s desire to “protect[] its investment in its personnel” is *not a cognizable legitimate interest* for purposes of the enforceability analysis.¹⁰⁷ *See, e.g., Lazer Inc. v. Kesselring*, 13 Misc. 3d 427, 433 (Sup. Ct. Monroe County 2005) (“*the mere cost associated with recruiting and hiring employees is not a legitimate interest protectable by a restrictive covenant in an employment contract*” (citation omitted; emphasis added)); *DTI*, 275 F. Supp. 3d at 467 (the “Court of Appeals has ‘limited the

¹⁰⁶ Because PWP and Defendants agree that New York and Delaware law on the enforceability of restrictive covenants is substantially similar, *this Court should “apply the law of New York, the forum state.”* *TBA Glob., LLC v. Proscenium Events, LLC*, 114 A.D.3d 571, 572 (1st Dep’t 2014) (applying New York law to non-solicit provision despite Delaware choice of law clause, as “there is “no conflict of laws that would have a ‘significant possible effect on the outcome of the trial’”); *see* PWP Mov. Br. at 28 nn.10-11.

¹⁰⁷ PWP Mov. Br. at 28 n.11 (claiming its employee non-solicitation provisions “serve PWP’s legitimate interest in protecting its investment in its personnel”). Even if this were a legitimate interest, PWP’s restraints are far broader than required to protect such interest – and thus unenforceable. *BDO Seidman*, 93 N.Y.2d at 388-89.

cognizable employer interests ... to the protection against misappropriation of the employer's trade secrets or of confidential customer lists, or protection from competition by a former employee whose services are unique or extraordinary” (quoting *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 389 (1999)). None of PWP's four cases is to the contrary – as not one holds that “protecting [an employer's] investment in its personnel” is a legitimate interest for enforceability purposes under New York law, and three do not involve the enforceability of an employee non-solicitation clause at all.¹⁰⁸ PWP's sole case addressing an employee non-solicitation provision is inapposite – as there, unlike here, the employer had expended “considerable resources” training its employees, including “establish[ing] a precicensing school where it teaches potential agents before they take their licensing exams.” *Weichert Co. of PA v. Young*, 2007 WL 4372823, at *4 (Del. Ch.). Here, the record reflects the Individual Defendants and Managing Directors came to PWP trained, and PWP identifies no evidence suggesting otherwise.

Because the employee non-solicitation provisions are unenforceable, PWP is not entitled to summary judgment on its claims for breach thereof (Counts I-IV).

**B. PWP's Contractual “Discretion” Does
Not Eliminate Its Contractual Obligations**

PWP erroneously claims it is entitled to summary judgment on Counts II-IV for breach of contract because PWP could “determine whether to terminate a partner or employee for ‘Cause’ in [its] ‘discretion.’”¹⁰⁹ But the fact that PWP has discretion to determine whether *to terminate* an employee upon an event constituting “Cause” does not mean that it can effect such termination *where no such event has occurred*. *Seibold v. Camulos Partners LP*, 2012 WL

¹⁰⁸ See *Contempo Commc'ns, Inc. v. MJM Creative Servs., Inc.*, 182 A.D.2d 351, 353 (1st Dep't 1992) (client non-solicit); *TBA Glob., LLC*, 114 A.D.3d at 571-72 (same); *Sensus USA, Inc. v. Franklin*, 2016 WL 1466488, at *2, 6-8 (D. Del.) (in action to enjoin defendant from working for competitor, only restrictive covenant at issue was the *non-compete* provision, not the non-solicitation clause; enforcement of non-compete relied largely on defendant having “in-depth information regarding [plaintiff's] proprietary technology”).

¹⁰⁹ PWP Mov. Br. at 33.

4076182, at *10 (Del. Ch.).

It's actually just the opposite. That is, the contractually mandated requirement that [a specified event occur] before the general partner can [take a subsequent action] is an *exception from the general rule that the general partner is given the power to act in its sole discretion without regard for the interests of the [partnership] or the limited partners....*

Id. (emphasis added). “To hold otherwise would make the requirement [that an act or omission of Cause have occurred] *superfluous* by allowing the general partner to [terminate for Cause] *for any reason however trifling or conflicted it deemed sufficient.*” *Id.* (emphasis added). It would, further, render meaningless the contract language that defines “Cause,” as well as the protections that such language is meant to accord the Limited Partners. *See id.*

In fact, by PWP’s own admission, the relief it seeks in Counts II-IV turns on whether Defendants actually “*breached* [their] partner and employee non-solicitation obligations.”¹¹⁰ If these provisions are unenforceable, if the evidence fails to prove such a breach, or if PWP materially breached its own obligations, PWP cannot prevail on these claims, and its reference to “discretion” is irrelevant.

In any event, the voting Super Majority LLC members (a subset handpicked by Weinberg to rubberstamp Defendants’ terminations) testified that they simply assumed that “Cause” had occurred here – without ever speaking to witnesses, reviewing documents, *or even understanding what any Defendant was alleged to have done.*¹¹¹ This presumption of “Cause” is further reflected by the corporate resolution circulated to these voting members, which states that PWP had already determined that an event of “Cause” had occurred – before any vote and absent any substantive discussion of the alleged acts.¹¹² PWP’s contractual “discretion” to

¹¹⁰ Compare Davidian 1/24/20 Aff., Ex. 1 ¶¶ 93-104 (Counts II, III, IV) (emphasis added).

¹¹¹ Defendants’ Mov. Br. at 15-17; Defendants’ 19-A Stm. ¶¶ 112, 120, 126-137.

¹¹² Defendants’ 19-A Stm. ¶ 112.

undertake certain actions does not absolve it of the consequences of these undisputed facts; nor does it “immun[ize PWP’s acts] from judicial review.” *Seibold*, 2012 WL 4076182, at *8-10.

**C. The Undisputed Evidence Shows No Breach
of PWP’s Employee Non-Solicitation Provisions**

Defendants’ Moving Brief sets forth evidence confirming that no improper employee solicitation occurred here – including, among other things, PWP’s admission that the actions purportedly taken by Kramer *would not have been considered breaches* if they had been done by other partners.¹¹³ In contrast, PWP’s motion relies almost entirely on (i) assertions of fact that are *refuted* by the record (in many cases, by PWP’s own evidence); and (ii) so-called “proposals” that were drafted by non-parties whom PWP never accused of wrongdoing, and which were neither requested nor seen by the partner Defendants.

1. The January 11, 2015 Meeting Does Not Constitute Improper Solicitation

Merely responding to overtures from others does not constitute solicitation. *See, e.g., FTI Consulting, Inc. v. Graves*, 2007 WL 2192200, at *7-8 (S.D.N.Y.). That is, courts understand “solicitation” to require some type of “personal petition to a particular individual to do a particular thing.” *Matter of Koffler*, 51 N.Y.2d 140, 146 (1980) (defining “solicit” as “to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing” (citing Webster’s Third New International Dictionary and Black’s Law Dictionary); *see* Defendants’ Mov. Br. at 28.

Here, PWP has made the January 11, 2015 meeting the centerpiece of its litigation – claiming that Kramer convened this gathering in order to extend job offers to his group and invite them to join a new firm he had decided to form.¹¹⁴ But the record (including Cofsky’s

¹¹³ Defendants’ Mov. Br. at 27, 33-34; Defendants’ 19-A Stm. ¶¶ 94-99, 125.

¹¹⁴ PWP Mov. Br. at 11-12.

testimony) establishes that Kramer held this meeting *at the request of the Managing Directors*.¹¹⁵ Similarly, the statements that PWP cites as purported evidence of solicitation were *responses to inquiries* from the non-party Managing Directors and Kevin Cofsky, who raised the topic of a hypothetical new firm.¹¹⁶

Indeed, PWP's selective (and misleading) quotations highlight its inability to adduce any non-manipulated evidence of solicitation. Specifically, while PWP references snippets of Defendants' testimony as purported evidence of solicitation, in each instance it substitutes its own fictional narrative for what the testimony actually reflects. To take a few examples:

- PWP characterizes Kramer as planning "*the new firm*"¹¹⁷ – neglecting to mention that (i) there *was (indisputably) no new firm nor any decision to form one*;¹¹⁸ and (ii) the very testimony cited by PWP indicates that Kramer was merely *responding to inquiries* as to what a hypothetical firm would have to look like for him to consider participating.¹¹⁹
- PWP combines unrelated quotations (some 11 pages apart) to claim that Kramer discussed a "'theoretic[al] new firm' that would ... allow each Managing Director 'to make about two million a year'"¹²⁰ – again neglecting to mention that Kramer was *responding* to an inquiry from a Managing Director (likely Cofsky) as to whether a different kind of firm might enable him to approach the "\$2 million a year" he felt he deserved.¹²¹
- PWP states that Kramer made these statements "to entice the meeting attendees"¹²² – a *false and purely speculative conclusion* that has no basis in the record.
- PWP claims that Slonecker's efforts to "entice" others to leave PWP are

¹¹⁵ Defendants' 19-A Stm. ¶¶ 69-72.

¹¹⁶ Defendants' 19-A Stm. ¶¶ 69-78.

¹¹⁷ See, e.g., PWP Mov. Br. at 29 (falsely claiming that "Kramer testified that the group began discussing how to 'split up equity' at *the new firm*," and falsely claiming that Kramer "emphasized the potential 'growth' at *the new firm*" (emphasis added)).

¹¹⁸ Defendants' 19-A Stm. ¶¶ 69-80.

¹¹⁹ Defendants' 19-A Stm. ¶ 78.

¹²⁰ PWP Mov. Br. at 29.

¹²¹ Defendants' 19-A Stm. ¶¶ 73, 76, 78.

¹²² PWP Mov. Br. at 29.

evidenced by the fact that he admitted “ask[ing] Mike [Kramer] to have’ the January 11, 2015 meeting” – but the quoted testimony itself confirms that Slonecker did so *only in response to the Managing Directors’ entreaties*.¹²³

Misstatements such as these – *which are refuted by the very excerpts PWP purports to cite* – provide no basis for summary judgment in its favor. Moreover, even assuming PWP’s claims are true, merely responding to inquiries from others – hypothetically and in the abstract, about a firm that does not even exist – does not constitute a contractual breach, and PWP provides no undisputed evidence that Defendants did anything but this. *See, e.g., FTI Consulting*, 2007 WL 2192200, at *7-8. *Indeed, PWP’s own witnesses have testified that simply participating in the January 11th meeting, by itself, is not an act of solicitation*.¹²⁴

2. The “Draft Business Plan Considerations” Document
Was Drafted by Non-Party Bradley Meyer and
Neither Requested Nor Seen by the Partner Defendants

PWP next prominently features, as purported evidence of solicitation by Defendants, a document entitled “Draft Business Plan Considerations.”¹²⁵ It is undisputed, however, that:

- This document was drafted by non-party Bradley Meyer, a former PWP employee who has never been accused of wrongdoing;¹²⁶
- Meyer prepared this document *of his own accord* because he was “pitching” to Kramer the idea of opening a new firm and seeking favor by highlighting his own experience in doing so;¹²⁷
- Kramer (a seasoned professional who had experience starting a business and had no need for Meyer’s advice) *never asked* Meyer for this document and never responded to it;¹²⁸ and

¹²³ Davidian 1/24/20 Aff., Ex. 10 [Slonecker Tr.] at 183:19-184:11.

¹²⁴ *See, e.g.,* Defendants’ 19-A Stm. ¶ 86.

¹²⁵ PWP Mov. Br. at 8-9, 29.

¹²⁶ *See, e.g.,* Davidian 1/24/20 Aff., Ex. 29 [Meyer Aff.] ¶¶ 26-27, 34-35.

¹²⁷ Davidian 1/24/20 Aff., Ex. 29 ¶ 10.

¹²⁸ Davidian 1/24/20 Aff., Ex. 29, ¶ 11.

- Slonecker and Scherer *never saw* this document before this litigation.¹²⁹

Undeterred, PWP tries to link this document to Defendants by stating that Kramer, Slonecker, and Meyer met on December 8, 2014 and that it was sometime “[a]fter this meeting” that Meyer gave the “Draft Business Plan Considerations” document to Kramer.¹³⁰ The only support for this sequence of events is an Outlook “invite” that neither reflects the invite’s subject matter nor confirms that a meeting actually occurred.¹³¹ Moreover, PWP failed to ask Meyer or Kramer about the purported December 8, 2014 meeting during their depositions,¹³² and thus its suggestion of some causal link between this purported meeting and Meyer’s document is speculative and devoid of evidentiary value. *See, e.g., Castore v. Tutto Bene Rest. Inc.*, 77 A.D.3d 599, 599 (1st Dep’t 2010) (“rank speculation” is not a substitute for admissible “evidentiary proof”).

3. The Spreadsheets Were Neither Seen Nor Requested by the Partner Defendants

Similarly, PWP fails in contending that spreadsheets created and exchanged by the Managing Directors are evidence of improper solicitation by Kramer, Slonecker, and Scherer.¹³³ The record confirms the partner Defendants were unaware of any such spreadsheets.¹³⁴ The sole evidence identified by PWP to support its claim that the partner Defendants even knew of these spreadsheets is Cofsky’s pre-litigation claim that he saw Kramer reading from a spreadsheet at

¹²⁹ *See, e.g.,* Davidian 2/21/20 Aff., Ex. 16 [Scherer Tr.] at 175:12-176:4; Davidian 2/21/20 Aff., Ex. 25 [Slonecker Tr.] at 163:22-164:9.

¹³⁰ PWP Mov. Br. at 8.

¹³¹ Belelieu Aff., Ex. 38.

¹³² Slonecker recalled no such meeting. Davidian 2/21/20 Aff., Ex. 25 [Slonecker Tr.] at 308:12-18.

¹³³ PWP Mov. Br. at 9-15.

¹³⁴ Defendants’ 19-A Stm. ¶ 85.

the January 11th meeting.¹³⁵ *But Cofsky recanted this claim at deposition* – admitting under oath that he had no idea what paper (if any) Kramer was holding, whether it was typed or handwritten, or even whether it contained words or numbers.¹³⁶

4. The Equity/Income Ratios Among the Partner Defendants Were Known to the Managing Directors in Preparing the Spreadsheets

Moreover, the similarity of the equity and income splits on the spreadsheets created by Meyer, Cofsky, and Verost does not prove that Kramer proposed those splits as part of a solicitation effort.¹³⁷ That is, PWP is incorrect in claiming that “only the Partner Defendants would have known” of the “historic compensation ratios that Kramer, Slonecker, and Scherer maintained as a ‘benchmark’ for allocating their compensation.”¹³⁸ The Managing Directors were aware of the ratios or “step-downs” among Kramer, Slonecker, and Scherer;¹³⁹ thus, as a matter of logic, their numbers would be virtually identical. This does not suggest “solicitation.”

5. Defendants Are Allowed to Consider Competing (and Even Make Preparations to Do So)

As PWP’s “evidence” of alleged solicitation makes clear, PWP’s true purpose in this litigation is to justify the use of its employee non-solicitation clauses to prohibit *acts in preparation for competition*. Merely characterizing preparatory acts, falsely, as acts of solicitation does not grant PWP rights for which it did not contract – nor can it serve as a basis for prohibiting employee conduct that is *indisputably* permitted and protected under the law.

Indeed, as PWP has acknowledged, competition is not a breach of any applicable PWP

¹³⁵ Davidian 1/24/20 Aff., Ex. 59 at WGM0000628.

¹³⁶ *Supra* at 8.

¹³⁷ PWP Mov. Br. at 9-10, 12-14, 29-30.

¹³⁸ *Id.* at 29-30 (arguing, incorrectly, that no one but the Partner Defendants knew these ratios).

¹³⁹ *Supra* at 6, 8.

agreement.¹⁴⁰ Rather, a terminated PWP partner is allowed to choose between (i) competing within three years of his or her departure and forfeiting any retained equity; **or** (ii) sitting on the bench for three years and receiving the value of that equity.¹⁴¹ PWP's contracts therefore contemplate **considering** the economic value of competing with PWP, which is not prohibited.

"A correlate of [the] right to compete after termination is the right to make preparation prior to termination to set up or enter into employment with a competing business." *Abraham Zion Corp. v. Lebow*, 593 F. Supp. 551, 571 (S.D.N.Y. 1984); *see also Feiger v. Iral Jewelry, Ltd.*, 41 N.Y.2d 928, 929 (1977) (employee was permitted, during employment, to "plan[] and t[ake] preliminary steps to enter into a competitive business" so long as he "never lessened his work on behalf of defendant and never misappropriated to his own use any business secrets or special knowledge"); *Fredric M. Reed & Co. v. Irvine Realty Grp., Inc.*, 281 A.D.2d 352, 352 (1st Dep't 2001) (same); *see also ABC, Inc. v. Wolf*, 52 N.Y.2d 394, 405-06 (1981) (court will not "create a noncompetitive covenant by implication"). For this reason, PWP's employees may prepare to compete without breaching any contract. *See, e.g., Feiger*, 41 N.Y.2d at 929; *see also, e.g., DTI*, 275 F. Supp. 3d at 464 (employees "may prepare to compete during the term of a non-competition [provision], because restraining such acts 'would have the effect of extending the term of the covenant'").

It is also well-settled that ***such preparations, which may include "incorporating a later competing business," "building facilities," and "preparing and circulating ... rudimentary spreadsheets," violate no duty to the employer.*** *DTI*, 275 F. Supp. 3d at 465 (noting that "preparing such a spreadsheet is no different than building a facility for a later competing

¹⁴⁰ Davidian 2/21/20 Aff., Ex. 18 [Shendelman Tr.] at 289:11-290:6; Davidian 2/21/20 Aff., Ex. 17 [Sugarman Tr.] at 81:24-82:24, 149:20-150:4.

¹⁴¹ Kramer Aff., Ex. 4 § 5.02(c)(i)(D); Slonecker Aff., Ex. 2 § 5.02(c)(i)(D).

business, for the spreadsheet has no effect on DTI's economic interests until it is actually used").

PWP cannot erase the right to engage in these acts by deeming them "solicitation."

**D. PWP Has Admitted, and Clients Confirm, That There Was
No Improper Client Non-Solicitation (Counts I, V-IX, XII, XIV)**

PWP has repeatedly admitted (and relevant clients have confirmed) that PWP had no basis to accuse Defendants of breaching the *client* non-solicitation provisions. Nonetheless, because PWP has refused to voluntarily dismiss these claims, Defendants respond as follows:

1. No Solicitation Claim Can Be Established as to Monsanto

Monsanto's General Counsel has repeatedly averred that Monsanto "was never solicited by [Defendants]." ¹⁴² He further testified that:

- "Monsanto's relationship with Michael Kramer *predates* Mr. Kramer's tenure with [PWP]," and Monsanto "*wouldn't have gone to Perella if Mike Kramer wasn't there.*" ¹⁴³
- PWP left Monsanto without access to Kramer – who was "extremely important given his history with [Monsanto]" – during a "critical transaction," and Monsanto even contemplated suing PWP. ¹⁴⁴
- Because it believed PWP lacked the skill set to handle its work, Monsanto requested that PWP permit it to continue working with Mr. Kramer, "either in tandem with PWP or separately" – but PWP refused to consider this request. ¹⁴⁵
- Monsanto replaced PWP with a different firm *not because of any solicitation*, but because of PWP's intransigence and insistence on sacrificing its client's interests for its own. ¹⁴⁶

Moreover, Monsanto confirmed that when it later hired Ducera, this was a result of Monsanto

¹⁴² Defendants' 19-A Stm. ¶ 150.

¹⁴³ Defendants' 19-A Stm. ¶ 151.

¹⁴⁴ Defendants' 19-A Stm. ¶ 150.

¹⁴⁵ *Id.*

¹⁴⁶ Davidian 1/24/20 Aff., Ex. 32 ¶¶ 5-8; Davidian 2/21/20 Aff., Ex. 33 [PWP0036974-75] (reporting that Monsanto's CFO requested that PWP work out an arrangement allowing Kramer to continue working on the engagement, and that otherwise Monsanto "will consider breaking off ... and appointing a new independent advisor"); *see also* Davidian 1/24/20 Aff., Ex. 20 at 166:12-16, 167:6-10.

reaching out to Kramer – not because of any solicitation by Defendants.¹⁴⁷

These facts preclude any claim of improper client solicitation as to Monsanto. *See BDO Seidman*, 93 N.Y.2d at 392-93 (non-solicit cannot be enforced as to pre-existing clients “who came to the firm solely to avail themselves of [defendant’s] services”); *Good Energy, L.P. v. Kosachuk*, 49 A.D.3d 331, 332 (1st Dep’t 2008); *Scott, Stackrow & Co., C.P.A.’s. P.C. v. Skavina*, 9 A.D.3d 805, 806 (3d Dep’t 2004) (non-solicit cannot cover client relationships acquired outside employer); *FTI Consulting*, 2007 WL 2192200, at *8. PWP cannot escape this conclusion by claiming, falsely, to have “purchased [Monsanto’s business] when it acquired Kramer Capital.”¹⁴⁸ PWP never “acquired” Kramer Capital (which remains in operation, wholly owned by Kramer and Slonecker).¹⁴⁹ The relevant transaction documents make clear that *only specified assets* were transferred – not including Kramer Capital’s “goodwill,” and certainly not the highly valuable Monsanto relationship *in toto*.¹⁵⁰ This Court should decline PWP’s invitation to rewrite this contract to grant PWP a windfall that is inconsistent with both the contract language and the meager \$1,000 price PWP paid for the specified assets. *See, e.g., Riedman Corp. v. Gallagher*, 48 A.D.3d 1188, 1190 (4th Dep’t 2008) (no transfer of pre-existing client relationships where agreement did not refer to purchase of “customer accounts, customer lists or goodwill” and price did not suggest goodwill was included).

2. The Evidence Confirms that the Caesars Engagement Was Lost Due to PWP’s Own Conduct

PWP has admitted that it lost the Caesars engagement not due to any improper solicitation, but “because of [PWP’s] inability to reach an agreement on revenue share” with the

¹⁴⁷ Defendants’ 19-A Stm. ¶ 150; *Belelieu Aff.*, Ex. 155; *Davidian 1/24/20 Aff.*, Ex. 32 ¶ 9.

¹⁴⁸ PWP Mov. Br. at 3, 24.

¹⁴⁹ *Supra* at 2.

¹⁵⁰ *Kramer Aff.*, Ex. 2 at Sched. 1.2 & 1.3.

Individual Defendants.¹⁵¹ Indeed, Caesars *excoriated* PWP in writing for refusing to be “an adult” in negotiating such agreement and for placing PWP’s interests above those of its client.¹⁵² Defendants testified, without contradiction, that they did not solicit Caesars.¹⁵³ Like Monsanto, the loss of Caesars was a wound self-inflicted by PWP, and any claim predicated on this loss should fail.

3. Alpha Natural Resources Is Not the Same as the
“Alpha DIP Lenders” for Which Ducera Provided Services

PWP’s allegations of solicitation as to Alpha Natural Resources (“Alpha”) also fail. It is undisputed that, at some point before Defendants’ terminations, PWP considered developing a relationship with Alpha itself.¹⁵⁴ But Ducera provided services to a group of senior lenders to Alpha, consisting of [REDACTED] (collectively, “Alpha DIP Lenders”).¹⁵⁵ The Alpha DIP Lenders were not “clients” or “prospective clients” of PWP, and PWP failed to identify them as such during discovery.¹⁵⁶ It is precluded from taking a contrary position now. *See, e.g., Inc. Vill. of Cove Neck v. Petrara*, 47 A.D.3d 885, 886 (2d Dep’t 2008); *In re 8th Judicial Dist. Asbestos Litig.*, 28 A.D.3d 1191, 1992 (4th Dep’t 2006) (“failure of plaintiffs to name IDI as a supplier in their response to interrogatories constitutes an admission that IDI was not a source”).

Moreover, PWP has no protectable interest in the Alpha DIP Lender group, as it *did not*

¹⁵¹ Defendants’ 19-A Stm. ¶ 154.

¹⁵² Defendants’ 19-A Stm. ¶ 153.

¹⁵³ Kramer Aff. ¶ 17; Slonecker Aff. ¶ 7; Scherer Aff. ¶ 7; Verost Aff. ¶ 7.

¹⁵⁴ PWP 19-A Stm. ¶ 178; Davidian 1/24/20 Aff. Ex. 30 ¶ 7.

¹⁵⁵ Belelieu Aff., Ex. 168; Davidian 1/24/20 Aff., Ex. 30 ¶¶ 27-28.

¹⁵⁶ Davidian 2/21/20 Aff., Ex. 34, at Responses to Interrogatory Nos. 2 & 3.

even exist until well *after* Defendants’ terminations.¹⁵⁷ *See, e.g., Portware, LLC v. Barot*, 2006 N.Y. Slip. Op. 50282[U], at *5 (Sup. Ct. N.Y. County) (plaintiff “has no legitimate interest in preventing [defendant] from competing for the patronage of customers with whom he never developed a relationship while at [plaintiff]” or “customers with whom [defendant] began a relationship after he left”). Bradley Meyer’s email mentioning unspecified “alpha creditors” is of no moment.¹⁵⁸ Meyer testified that (i) this term is “non-specific” because there are many different creditor groups that form in a restructuring, and that “Alpha was still at least six months away from filing Chapter 11 and that DIP facility was not even contemplated at this point in time.”¹⁵⁹ PWP has cited no evidence to refute this testimony.

4. Allegations That Defendants “Intended” to Solicit Clients, or Informed a Client of an Intent to Leave, Do Not Establish Solicitation

For its final attempt to substantiate its client solicitation claim, PWP claims that (i) Nate Van Duzer (a Fidelity Investments employee) indicated that Kramer had stated “that he had decided to leave PWP”; and (ii) Defendants “intended to take [certain clients] with them.”¹⁶⁰

Even if accepted as true, neither assertion constitutes client solicitation. “Intentions” or “hopes” do not constitute action. *See, e.g., Unger v. Ganci*, 136 A.D.3d 1388, 1388-39 (4th Dep’t 2016) (lower court erred in granting summary judgment for defendant as to his claims that plaintiff had improperly solicited clients, where defendant claimed plaintiff “intended to solicit business” from former clients); *DTI*, 275 F. Supp. 3d at 465 (preparation of spreadsheet containing client information did not constitute evidence that defendants “inappropriately solicited any of [plaintiff’s] clients”). The law is similarly clear that merely *informing a client*

¹⁵⁷ Davidian 2/21/20 Aff., Ex. 26 [Meyer Dep. Tr.] at 346:6-348:20.

¹⁵⁸ PWP 19-A Stm. ¶ 115.

¹⁵⁹ Davidian 2/21/20 Aff., Ex. 26 [Meyer Tr.] at 345:24-349:6.

¹⁶⁰ PWP Mov. Br. at 24, 34.

of one's desire or intent to leave a firm does not constitute client solicitation. *See, e.g., FTI Consulting*, 2007 WL 2192200, at *7 (that former employee had “informed [clients] that he was leaving FTI,” even if credited, was not “sufficient to give rise to an inference that he solicited FTI’s clients and falls short of establishing” breach); *see also id.* at *10 (informing clients and coworkers of intent to leave does not breach duty of loyalty); *DTI*, 275 F. Supp. 3d at 469-70 (informing clients of intent to leave is not improper solicitation); *Ferguson v. Ferrante*, 664 F. App’x 58, 62 (2d Cir. 2016) (New York law; employee’s “mere act of notifying certain clients of his departure” does not constitute solicitation). ***This is particularly true where, as here, the employer admits the employee was meeting his obligations to the company during this time.***¹⁶¹ *FTI Consulting*, 2007 WL 2192200, at *7.¹⁶²

PWP’s effort to suggest otherwise is undermined by Cofsky (the sole source of PWP’s employee solicitation allegations), who admitted that he, too, informed the same client that he was considering leaving PWP.¹⁶³ When asked if he had breached any duties in doing so, Mr. Cofsky testified (consistent with New York law):

I don’t think talking to a friend about leaving the firm, and even if that client is a friend, I don’t believe that leaving employment is a breach of trust. And talking about leaving, I don’t believe that’s a breach of trust.¹⁶⁴

PWP cannot have it both ways: If informing a client of an intent to leave violates its client non-solicitation covenant, then selectively disregarding such violation compels the conclusion that this prohibition is ***not necessary to protect a “legitimate interest.”*** *See Estee*

¹⁶¹ PWP admits that, at the time that Kramer is alleged to have told Fidelity of his possible departure, he and the other Individual Defendants “***were working hard and working with clients, and expanding [PWP’s] business.***” Defendants’ 19-A Stm. ¶ 118.

¹⁶² Notably, allegations or evidence that the former employee had informed clients of his upcoming departure was insufficient as a matter of law to substantiate a client solicitation claim – separate and apart from whether he had fulfilled his obligations to FTI in the meantime. *FTI Consulting*, 2007 WL 2192200, at *7.

¹⁶³ *Belelieu Aff.*, Ex. 27 at 180:5-10, 181:5-8, 190:22-9.

¹⁶⁴ *Id.* at 183:6-15.

Lauder Cos., Inc. v. Batra, 430 F. Supp. 2d 158, 182 (S.D.N.Y. 2006) (New York law; company's selective enforcement of restrictive covenants indicates that a one-year restraint "is generally unnecessary").

III. PWP IS NOT ENTITLED TO SUMMARY JUDGMENT ON ITS FIDUCIARY CLAIMS (COUNTS VIII-X).

First, and as set forth in Defendants' Moving Brief,¹⁶⁵ PWP's fiduciary causes of action are entirely duplicative of its contract claims – a point that PWP's own motion papers confirm.¹⁶⁶ This, by itself, defeats PWP's effort to obtain summary adjudication of these claims.

Second, Delaware does not recognize the faithless servant doctrine. *Enzo Life Scis., Inc. v. Adipogen Corp.*, 82 F. Supp. 3d 568, 606 (D. Del. 2015) ("Delaware has not adopted the faithless servant doctrine").

Third, there is no legal basis for PWP's claim that Defendants owe "statutory" fiduciary obligations. Under Delaware law, *only PWP* – as the "general partner of a limited partnership" – is "subject to the restrictions" and carries "the liabilities" of "a partner in a partnership governed by the Uniform Partnership Law." *See* 6 Del 17-403; *see also* RULPA ("A limited partner does not have any fiduciary duty to the limited partnership or to any other partner solely by reason of being a limited partner."); *Bond Purchase, L.L.C. v. Patriot Tax Credit Properties, L.P.*, 746 A.2d 842, 863-64 (Del. Ch. 1999) (limited partner who has no discretion to manage partnership owes no fiduciary duties). PWP's argument to the contrary appears to be premised on 6 Del Ch. 15-404(b),¹⁶⁷ which applies solely to *general partnerships*.

Here, the Individual Defendants did not exercise managerial authority and thus owed no

¹⁶⁵ Defs Mov. Br. at 38.

¹⁶⁶ PWP Mov. Br. at 35 (claiming Defendants violated fiduciary obligations by purported acts of solicitation).

¹⁶⁷ PWP Mov. Br. at 35.

statutory fiduciary obligations.¹⁶⁸ Slonecker and Scherer were exclusively Limited Partners of PWP Equity I L.P. and thus not vested with authority to manage or control the firm.¹⁶⁹ Kramer, in turn, had been stripped of “all” his management authority.¹⁷⁰ As to Verost, PWP’s own case law provides that “[a] mere employee ... does not ordinarily occupy a position of trust and confidence toward his employer.” *Brophy v. Cities Serv. Co.*, 70 A.2d 5, 10 (Del. Ch. 1949). PWP’s attempt to impose statutory fiduciary obligations on Defendants should be rejected. *See Bond Purchase*, 746 A.2d at 863-64; *In re Estate of Conway*, 2012 WL 524190, at *3 (Del. Ch.).

IV. PWP’S CLAIMS FOR INTERFERENCE AND “UNFAIR” COMPETITION (COUNTS XI-XIV) SHOULD FAIL.

As set forth in Defendants’ Moving Brief,¹⁷¹ PWP’s claims for tortious interference (Counts XI and XII) and unfair competition (Count XIV) against the Individual Defendants are expressly based on the same allegations underlying its contract claims, and must be dismissed as duplicative.¹⁷²

PWP’s tortious interference and unfair competition claims against *all* Defendants (including Ducera) also fail on the merits. As this Court has noted, New York’s unfair competition doctrine requires “the bad faith misappropriation of a commercial advantage *belonging to another* by infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets.” *BGC Capital Mkts. L.P. v. Tullett Prebon Am.’s Corp.*, 2013 WL 6142927, at *7 (Sup. Ct. N.Y. County Nov. 22, 2013) (Sherwood, J.) (emphasis in original; citation omitted); *Ruder & Finn, Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 671

¹⁶⁸ Defendants’ 19-A Stm. ¶¶ 42-57; Slonecker Aff. ¶ 3 & Ex. 2; Scherer Aff. ¶ 3.

¹⁶⁹ Slonecker Aff. ¶ 3 & Ex. 2; Scherer Aff. ¶ 3.

¹⁷⁰ Defendants’ 19-A Stm. ¶¶ 42-57.

¹⁷¹ Defendants’ Mov. Br. at 40. PWP’s tortious interference and unfair competition claims *also* fail on the merits to the extent premised on PWP’s allegations of client solicitation. *See id.* at 42.

¹⁷² Defendants’ Mov. Br. at 40.

(1981). Here, there is no allegation and no evidence that Defendants misappropriated any confidential or proprietary information. Instead, PWP's unfair competition claims are premised on allegations that Defendants tortiously interfered with PWP's client and employee relationships (Counts XII and XIII).¹⁷³ ***But New York law does not recognize tortious interference as a basis for unfair competition.*** See, e.g., *JA Apparel Corp. v. Abboud*, 682 F. Supp. 2d 294, 321-22 (S.D.N.Y. 2010).

Moreover, Ducera did not exist at the time the Individual Defendants are (falsely) alleged to have improperly solicited each other as current partners or employees of PWP.¹⁷⁴ Accordingly, PWP can neither allege nor prove that Ducera tortiously induced any breach of PWP's employee non-solicitation provisions.¹⁷⁵ Further, while PWP argues that an entity may be held liable for tortious conduct committed by its promoters before its formal creation, this is contrary to ***controlling*** case law. ***As the First Department has held, a corporate entity cannot be held liable for tortious conduct occurring before its formation.*** See, e.g., *Fisher Bros. Sales v. United Trading Co. Desarrollo y Comercio, S.A.*, 191 A.D.2d 310, 312 (1st Dep't 1993) (if entity did not exist when alleged contract was breached, it cannot be liable for tortious interference with that contract). Indeed, while an entity may sometimes be bound by ***contracts*** that its promoters entered pre-formation, ***New York has not extended this principle to tort liability.*** See, e.g., *Gianino v. Panacya, Inc.*, 2000 WL 1224810, at *7 (S.D.N.Y.).

The sole decision PWP cites in support of its argument is an E.D.N.Y. case that is

¹⁷³ *Id.*

¹⁷⁴ Compare Davidian 1/24/20 Aff., Ex. 1 ¶¶ 54-71 (alleging that improper solicitation occurred between October 2014 and January or February 2015), with Defendants' 19-A Stm. ¶ 166 (Ducera's formation).

¹⁷⁵ There was no contractual prohibition on Defendants hiring ***former*** PWP employees, and any former PWP personnel were no longer employees of PWP by the time they were hired by Ducera. Defendants' 19-A Stm. ¶ 169; *id.* ¶ 168 (terminations and resignations in February 2015, with notice periods for Meyer, Tang, Davis, and Leung ending March 15, 2015); see also Defendants Mov. Br. at 19, 41 (contract provision barring hiring of company employees did not apply to *former* employees).

contrary to controlling New York law and erroneous on its face¹⁷⁶ – and which has, furthermore, never been cited by a court for this proposition. Count XIII against Ducera should be dismissed. *See, e.g., Pioli v. Town of Kirkwood*, 117 A.D.2d 954, 954-55 (3d Dep’t 1986).

V. PWP IS NOT ENTITLED TO SUMMARY JUDGMENT ON DEFENDANTS’ COUNTERCLAIMS.

**A. PWP Is Not Entitled to Dismissal of Defendants’
Contract Counterclaims (Counterclaims I-IV)**

**1. PWP Cites No Undisputed Evidence that
It “Properly” Terminated Defendants for Cause**

As noted above, PWP’s own witnesses and documents undermine the “deceptive lift out scheme” narrative that PWP so doggedly advances in this case – and provide no support for the notion that “Cause existed to terminate Defendants.”¹⁷⁷ Moreover, and as already discussed, PWP’s so-called “discretion” does not eliminate the requirement that an act constituting Cause have occurred; nor did it insulate PWP from responsibility for its own contractual breaches or bad faith. *See supra* at 18-19 (citing *Seibold*, 2012 WL 4076182, at *8). For these reasons, PWP is not entitled to dismissal of Counterclaims I-IV.¹⁷⁸

**2. PWP Has No Basis to Withhold Equity on the Grounds
that Defendants “Resigned” and Thereafter “Competed”**

First, as set forth in detail above, PWP has repeatedly confirmed that none of the

¹⁷⁶ While *Hwang v. Grace Rd. Church (in N.Y.)*, 2016 WL 1060247 (E.D.N.Y.), proposes that a corporation can be held liable for pre-formation tortious conduct when it knowingly accepts the benefits thereof, it cites (in purported support) two authorities that say *literally nothing of the kind*. The first, a Fourth Department case, addresses *contractual* liability only, and makes no mention of tort liability. *Universal Indus. Corp. v. Lindstrom*, 92 A.D.2d 150 (4th Dep’t 1983). The treatise section cited by *Hwang*, in turn, cites *not one New York case* supporting the imposition of *tort* liability on an entity formed after an alleged tort. *See* § 218.Torts by and against promoters, 1A Fletcher Cyc. Corp. § 218.

¹⁷⁷ PWP Mov. Br. at 39.

¹⁷⁸ As to Counterclaim II, the existence of “Cause” is irrelevant because (as PWP’s longtime counsel conceded) the 2011 Extension Forms did not extend the Original Payment Date and Kramer and Slonecker should have been paid their deferred compensation amounts on that date. Defendants’ Mov. Br. at 22-23.

Defendants resigned.¹⁷⁹ *This is not a question of disputed facts, or of weighing the credibility of competing witnesses.* The entire universe of evidence on this issue confirms there was no resignation – and Weinberg, the sole source of PWP’s fictional resignation narrative,¹⁸⁰ was unable to testify otherwise.¹⁸¹

Second, PWP’s contracts do not bar competition; rather, they provide *incentives* not to compete by giving departing partners the option of (i) competing within three years and forfeiting any retained equity, or (ii) refraining from competition and receiving the value of their equity.¹⁸² Here, however, it is undisputed that, on February 16, 2015, PWP claimed a forfeiture of **100%** of the partner Defendants’ equity¹⁸³ – thus eliminating the sole contractual incentive for Defendants to refrain from post-termination competition, and *divesting them of the ability to choose between (i) competing post-termination and (i) retaining their remaining equity.*¹⁸⁴ Under these facts, there is no legal authority for PWP to return to this same well.¹⁸⁵

3. Defendants’ Claim for Breach of the Implied
Covenant of Good Faith and Fair Dealing Should Survive

Even “when a contract gives one party the power to make a discretionary decision, the covenant of good faith requires (1) that neither party do anything that will destroy or injure the right of the other party to receive the fruits of the contract, and (2) that neither party act arbitrarily or irrationally in exercising its discretion.” *Kent Building Servs., LLC v. Kessler*, 2018 WL 1322226, at *3-4 (S.D.N.Y.); *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995);

¹⁷⁹ *Supra* at 14-15 (citing numerous PWP statements and documents).

¹⁸⁰ *See* PWP Mov. Br. at 17.

¹⁸¹ *Supra* at 15.

¹⁸² *Supra* at 3-4.

¹⁸³ Defendants’ 19-A Stm. ¶¶ 115-16.

¹⁸⁴ *Supra* at 3-4; Defendants’ Mov. Br. at 46-47.

¹⁸⁵ PWP Mov. Br. at 40-41.

Gerber v. Enter. Prods. Holdings, LLC, 67 A.3d 400, 419 (Del. 2013), *rev'd in part on other grounds*, *Winshall v. Viacom Int'l Inc.*, 76 A.3d 808 (Del. 2013). Such duties cannot be waived or disclaimed. *See, e.g., Amirsaleh v. Bd. of Trade of N.Y.C., Inc.*, 2008 WL 4182998, at *1 (Del. Ch.) (“the law presumes that parties never accept the risk that their counterparties will exercise their contractual discretion in bad faith”).

Here, PWP’s partnership agreements include implied promises that PWP: (i) would not encourage or induce Defendants to engage in acts that PWP would later cite as a pretext for terminating them for “Cause”; and (ii) would act reasonably and in good faith – as opposed to arbitrarily, capriciously, irrationally, or maliciously – in determining whether an act constitutes “Cause” and whether terminations and forfeitures should result.¹⁸⁶ These are implied promises “which a reasonable person in [Defendants’ position] would be justified in understanding were included” in their contracts. *Dalton*, 87 N.Y.2d at 389. A factfinder is entitled to conclude these were breached by PWP by, among other things:

- demoting Kramer and urging him to start his own firm, with Weinberg even suggesting that he might personally invest in such a venture;¹⁸⁷
- conspiring with Cofsky to manufacture allegations to be used against Defendants;¹⁸⁸
- exercising discretion in bad faith by (among other things) declining to conduct any legitimate, good-faith assessment of the acts purportedly constituting “Cause” and instead acting out of their personal animus and financial self-interests;¹⁸⁹ and
- withholding relevant information from the LLC members who were asked to

¹⁸⁶ Davidian 1/24/20 Aff., Ex. 3 ¶¶ 255-56.

¹⁸⁷ Defendants’ 19-A Stm. ¶¶ 88-89, 42-57.

¹⁸⁸ Defendants’ 19-A Stm. ¶¶ 101-111.

¹⁸⁹ Defendants’ 19-A Stm. ¶¶ 101-137; *see also id.* ¶¶ 35-36, 42-49 (describing personal animus towards Kramer); *id.* ¶ 29 (describing financial self-interest of voting LLC members).

consent to Defendants' terminations.¹⁹⁰

Accordingly, PWP is not entitled to summary dismissal of Defendants' implied covenant claim. *See Hong Leong Fin. Ltd. (Singapore) v. Morgan Stanley*, 2014 NY Slip Op. 51396(U), at *10 (Sup. Ct. N.Y. County) (declining to dismiss implied covenant claim alleging arbitrary and bad faith exercise of discretion), *aff'd*, 131 A.D.3d 418 (1st Dep't 2014); *Dalton*, 87 N.Y.2d at 392 (court will interfere with a discretionary determination that is "performed arbitrarily or irrationally"); *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 504 n.93 (Del. 2019) (implied covenant is implicated "when a party to the contract is given discretion to act as to a certain subject and it is argued that the discretion has been used in a way that is impliedly proscribed by the contract's express terms"). None of PWP's cases is to the contrary.¹⁹¹

**B. PWP Is Not Entitled to Dismissal of Kramer's
Fiduciary Counterclaim (Counterclaim VIII)**

As the First Department recognized, Kramer's fiduciary claim is based on "alleged pre-termination misconduct" that is "distinct" from his claim that PWP breached its contracts by terminating him for purported "Cause." *Perella Weinberg*, 153 A.D. 3d at 450. ***Accordingly, PWP's "discretion" to terminate partners for Cause provides no basis to dismiss this claim.***

Specifically, Kramer alleges – and the record confirms – a pattern of deception and

¹⁹⁰ Defendants' Mov. Br. at 33-34.

¹⁹¹ Three of PWP's cases dismissed an implied covenant claim where the "complained-of conduct consist[ed] entirely of acts [a party] was authorized to do by [an express term of] the contract," and there was no allegation that a party exercised its contractual discretion arbitrarily and in bad faith in a manner that would deprive the other party of the fruits of its bargain. *Transit Funding Assocs., LLC v. Capital One Equip. Fin. Corp.*, 149 A.D.3d 23, 29-30 (1st Dep't 2017) (defendant's failure to advance funds did not breach implied covenant where agreement expressly permitted defendant to deny requests to advance funds *for any reason*); *Peter R. Friedman, Ltd. v. Tishman Speyer Hudson Ltd. P'ship*, 107 A.D.3d 569, 570 (1st Dep't 2013) (defendant's failure to pay commission did not breach covenant where condition precedent to plaintiff's entitlement to commission did not occur); *Oxbow*, 202 A.3d at 504 (noting that the "Minority Members do not argue that the Board exercised its contractual discretion in bad faith"). PWP's fourth case recognized that "the implied covenant ... required that [a party] not [act] arbitrarily," and allowed plaintiff to plead its claim. *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 445 (Del. 2005).

abusive behavior by Weinberg and Perella designed to induce Kramer to (i) resign or (ii) engage in acts that it could use as a pretext to terminate him for “Cause” and trigger the forfeiture of millions of dollars in equity. Such conduct included (among other things):

- stripping Kramer of all management authority and leadership roles;¹⁹²
- falsely advising Kramer that people at PWP “are repelled by him as a manager/ leader,” and that he was “not liked [or] trusted” in an effort to precipitate Kramer’s separation from PWP;¹⁹³ and
- undermining Kramer’s influence by offering his job to his subordinates while he was still a partner at PWP.¹⁹⁴

These acts are independent of PWP’s contract breaches and reflect PWP’s failure to deal fairly and in good faith with Kramer.

Moreover, PWP’s contractual “discretion” does not eliminate the fiduciary obligations of PWP, Perella, or Weinberg. Under Delaware law, and as the First Department recognized, default fiduciary duties apply unless *clearly and unambiguously* disclaimed. *Perella Weinberg*, 153 A.D.3d at 450 (noting that Kramer, as a PWP MC limited partner, was owed fiduciary duties by PWP LLC, Perella, and Weinberg, and that “the alleged [fiduciary] duties stem from partnerships organized under Delaware law”); *Miller v. Am. Real Estate Partners, L.P.*, 2001 WL 1045643, at *6-9 (Del. Ch.) (“restrictions on fiduciary duties [must] be set forth clearly and unambiguously”). *Contract provisions that grant a manager “sole discretion” are insufficient to disclaim all such fiduciary duties. See, e.g., Miller*, 2001 WL 1045643, at *6-9 (“sole discretion” clause did not insulate defendants from fiduciary liability because agreement “does not expressly preclude the application of default principles of fiduciary [duty]”).

¹⁹² Defendants’ 19-A Stm. ¶¶ 42, 44, 48, 50-51, 53-54.

¹⁹³ Defendants’ 19-A Stm. ¶¶ 42, 49.

¹⁹⁴ Davidian 2/21/20 Aff., Ex. 16 [Scherer Tr.] at 112:9-113:12; Davidian 2/21/20 Aff., Ex. 30 [Weinberg Tr.] at 202:9-21.

Here, the PWP LLC and LP Agreements do not expressly disclaim “fiduciary” duties. To the contrary, their plain language *preserves* liability for non-disclaimable duties owed by Delaware corporate directors¹⁹⁵ – including (i) the “duty of loyalty”; (ii) the duty to refrain from “acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law”; and (iii) the duty to refrain from “any transaction from which [PWP LLC, Perella, or Weinberg] derived an improper personal benefit.”¹⁹⁶ The First Department therefore correctly concluded that PWP LLC, Perella, and Weinberg owed fiduciary duties – including the duty of good faith – to Kramer. *See Miller*, 2001 WL 1045643, at *6-9.

C. PWP Is Not Entitled to Dismissal of Defendants’ Defamation and Tortious Interference Counterclaims (Counterclaims VI and VII)

PWP’s arguments for dismissal of Defendants’ defamation and tortious interference claims fail. As an initial matter, PWP mischaracterizes the basis of these claims,¹⁹⁷ which do not consist of merely (i) claiming that Defendants had “violated” obligations to PWP or (ii) expressing PWP’s view as to its “legal rights.”¹⁹⁸ Rather, PWP, through Weinberg, Cofsky, and others:

- engaged in a coordinated defamation offensive (described by PWP itself as a “*shock and awe*” campaign)¹⁹⁹ – with the *admitted* goal of impairing Defendants’ professional prospects;²⁰⁰
- made defamatory *per se* statements about Defendants to third parties²⁰¹ – claiming

¹⁹⁵ Belelieu Aff., Ex. 2 § 4.06; Belelieu Aff., Ex. 4 § 4.06; Belelieu Aff., Ex. 6 § 4.08. Specifically, the agreements provide that such individuals and entities are not exculpated for any acts or omissions for which a corporation could not exculpate a director under the Delaware general corporations law. *Id.*

¹⁹⁶ 8 Del. C. § 102.

¹⁹⁷ PWP Mov. Br. at 42.

¹⁹⁸ PWP Mov. Br. at 42-45.

¹⁹⁹ Defendants’ 19-A Stm. ¶ 142; Davidian 1/24/20 Aff., Ex. 84; Davidian 1/24/20 Aff., Ex. 77.

²⁰⁰ *See, e.g.*, Davidian 1/24/20 Aff., Ex. 88; *infra* at 42-43.

²⁰¹ Defendants’ 19-A Stm. ¶¶ 143-46; Davidian 2/21/20 Aff., Ex. 35 [DEF00001481]; Davidian 1/24/20 Aff. Ex. 77.

undefined misconduct so severe that PWP could “not expose team members to work directly with them”;²⁰²

- stated *that it knew of some “non-public” information about Defendants beyond their alleged breaches of contract*;²⁰³
- claimed that Defendants had engaged in undisclosed “misconduct the likes [of] which [Perella] had never before been exposed [to] in his career”²⁰⁴
- falsely informed third parties that Kramer (i) had breached PWP’s trust by creating a new firm before his termination; and (ii) caused “a total of eight professionals” to resign from PWP – claims PWP concedes were incorrect;²⁰⁵
- falsely told third parties (including potential clients and employees) that they were contractually prohibited from working with Defendants for over a year;²⁰⁶ and
- threatened to embroil third parties in litigation should they seek to work with Defendants.²⁰⁷

1. PWP’s Statements Are Actionable as Both Defamation and Interference

These statements – *which PWP does not deny making* – are defamatory *per se* as they relate to each Defendant’s “integrity in performing his [professional] duties, ... thereby affecting his business and professional reputation,” *People ex rel. Spitzer v. Grasso* (“Grasso”), 21 A.D.3d

²⁰² Davidian 2/21/20 Aff., Ex. 35 [DEF00001481].

²⁰³ Davidian 1/24/20 Aff., Ex. 77 at PWP0036989; Davidian 2/21/20 Aff., Ex. 30 [Weinberg Tr.] at 400:24-406:10 (admitting that reference to purported “non-public” information was deliberate, and noting that “a number of us” at PWP talked about the letter); Davidian 2/21/20 Aff., Ex. 20 [Steel Tr.] at 250:15-251:20 (no knowledge of what “nonpublic” circumstances Weinberg was “alluding to”).

²⁰⁴ Davidian 2/21/20 Aff., Ex. 36 [Standen Aff.] ¶ 5; Davidian 1/24/20 Aff., Ex. 77. Of course, as Perella himself effected a collective departure from his former firm, with the colleagues who would shortly thereafter found PWP with him, he had certainly been “exposed” to the same (alleged) conduct before. *See, e.g.*, Davidian 2/21/20 Aff., Ex. 32 [Kourakos Tr.] at 73:14-77:25.

²⁰⁵ *Compare* Davidian 1/24/20 Aff., Ex. 77 at PWP0036988 (claiming Kramer had solicited personnel to join “a new firm set up by Mike”), *and* Davidian 2/21/20 Aff., Ex. 37 [Mulé Aff.] ¶ 3; *with* Davidian 1/24/20 Aff., Ex. 17 [Steel Tr.] at 247:11-25 (PWP’s CEO admitting this statement was “inaccurate”); *compare* Davidian 1/24/20 Aff., Ex. 77 at PWP0036988, *with* Davidian 2/21/20 Aff., Ex. 20 [Steel Tr.] at 248:8-249:5 (PWP’s CEO admitting this statement to be incorrect).

²⁰⁶ *See, e.g.*, Davidian 1/24/20 Aff., Ex. 32 [Snively Aff.] ¶ 5; Davidian 2/21/20 Aff., Ex. 36 [Standen Aff.] ¶ 8; Davidian 2/21/20 Aff., Ex. 37 [Mulé Aff.] ¶¶ 5-6; Davidian 1/24/20 Aff., Ex. 30 ¶ 21; Davidian 1/24/20 Aff., Ex. 29 ¶ 33; Davidian 1/24/20 Aff., Ex. 31 ¶ 10.

²⁰⁷ *See, e.g.*, Davidian 2/21/20 Aff., Ex. 38 [PWP0040272]; Davidian 2/21/20 Aff., Ex. 15 [PWP0050604].

851, 852 (1st Dep’t 2005); and “impugn[] the basic integrity or creditworthiness of [Defendants’] business,” *Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 A.D.3d 40, 48 (1st Dep’t 2009).

None of PWP’s arguments compels a different conclusion. As to the notion that “truth is an absolute defense” to a defamation or interference claim,²⁰⁸ PWP has already conceded that several of the statements described above were false.²⁰⁹ PWP’s defamatory conduct also consisted of far more than (false) claims that Defendants had breached contracts with PWP. PWP repeatedly reached out to countless third parties to accuse Defendants of (among other things) unprecedented misconduct too egregious to discuss or make public.²¹⁰

Such statements are not – as PWP would suggest – “nonactionable” expressions of opinion. To the contrary, statements of opinion are actionable where the speaker “*implies a basis in facts which are not disclosed* to the reader or listener.” *Gross v. N.Y. Times Co.*, 82 N.Y.2d 146, 153-54 (1993) (emphasis added); *Grasso*, 21 A.D.3d at 852 (statements of opinion are actionable if they imply a basis in “detrimental facts that were known to the speaker ... [but] not disclosed”); *Davis v. Boenheim*, 24 N.Y.3d 262, 272-73 (2014) (prefatory caveats such as “I believe” do not “transform [such] statements into nonactionable pure opinion”). Here, PWP did not merely “imply” a basis in undisclosed facts; it expressly stated as much.²¹¹

Similarly, PWP’s own case law confirms that statements of one’s legal rights must be “in good faith” to avoid liability for interference or defamation. *Thur v. IPCO Corp.*, 173 A.D.2d 344, 345 (1st Dep’t 1991); *Lombardo v. Dr. Seuss Enters., L.P.*, 2017 WL 1378413, at

²⁰⁸ PWP Mov. Br. at 42, 44.

²⁰⁹ *Supra* at 40.

²¹⁰ *Supra* at 39-40.

²¹¹ *Supra* at 40.

*7 (S.D.N.Y.). Here, PWP cites no facts (let alone undisputed facts) suggesting that its statements – *which were without contractual basis* – were made in good faith. For example:

- Defendants have already set forth evidence indicating that PWP had no good-faith basis to believe there was Cause to terminate them.²¹²
- PWP falsely told non-parties Tang, Meyer, and Mark Davis that if they resigned they would not be able to work with Defendants for “over a year”²¹³ – even though PWP’s own contracts contain no such prohibition.²¹⁴
- PWP falsely told Monsanto, Colt, and Silver Point that Defendants were contractually prohibited from working with them.²¹⁵

Finally, and as PWP’s own case law again confirms, a purported statement of legal opinion is still actionable if it “affect[s] defendant ‘in his profession by imputing fraud, dishonesty, misconduct or unfitness.’” *S.L.C. Consultants/Constructors, Inc. v. Raab*, 177 A.D.2d 965, 966 (4th Dep’t 1991). PWP’s statements do so on their face.²¹⁶

2. The Record Also Raises an Inference of Malice and Causation

The evidence is also more than sufficient to raise an inference that PWP acted with malice and without economic justification. *PWP repeatedly indicated, among other things, that it was happy to lose clients so long as they did not go to Defendants.*²¹⁷ In particular, Cofsky expressly stated as much to Caesars and Colt.²¹⁸ Weinberg, too, seemingly admits that his defamatory statements about Kramer to Monsanto were intended to end Monsanto’s

²¹² *Supra* at 11-12, 19-20.

²¹³ Davidian 1/24/20 Aff., Ex. 30 [Tang. Aff.] ¶ 21; Davidian 1/24/20 Aff., Ex. 29 [Meyer Aff.] ¶ 33; Davidian 1/24/20 Aff., Ex. 31 [Davis Aff.] ¶ 10.

²¹⁴ Belielieu Aff., Ex. 2 § 5.02(e); Belielieu Aff., Ex. 4 § 5.02(e); Verost Aff., Ex. 1 at PWP00001089.

²¹⁵ Davidian 1/24/20 Aff., Ex. 32 [Snively Aff.] ¶ 5; Davidian 2/21/20 Aff., Ex. 36 [Standen Aff.] ¶ 8; Davidian 2/21/20 Aff., Ex. 37 [Mulé Aff.] ¶¶ 5-6.

²¹⁶ *Supra* at 39-40.

²¹⁷ *PWP repeatedly indicated, among other things, that its clients were “free to terminate PWP’s engagement and take [its] restructuring work to a PWP competitor,” but could not take work to Kramer or Slonecker.* Davidian 2/21/20 Aff., Ex. 36 [Standen Aff.] ¶¶ 5, 6, 8; Davidian 2/21/20 Aff., Ex. 40 [PWP0052580]; Davidian 2/21/20 Aff., Ex. 38 [PWP0040272].

²¹⁸ Davidian 2/21/20 Aff., Ex. 40 [PWP0052580].

longstanding relationship with Kramer, stating: “My guess is that [Monsanto has] terminated [its relationship with] Mike . . . , *hard not to after summarizing his breach [to its CEO]*.”²¹⁹

PWP also falsely claims that “Defendants cannot identify one client that refused to do business” with Defendants due to PWP’s conduct.²²⁰ The record reflects that Monsanto, Caesars, Colt, and Silver Point all made clear to PWP that they wanted to work with the Individual Defendants²²¹ – and that they were all entitled to do so, at a minimum, after the Individual Defendants’ garden leaves expired.²²² PWP nonetheless refused these requests – in some cases threatening (without legal basis) to embroil such clients in litigation should they work with Defendants:

- Monsanto testified that, because of PWP’s (false) claim “that Mr. Kramer was contractually prohibited from working with Monsanto,” it “retained [Centerview] to advise Monsanto and its board.”²²³
- Perella rejected Colt’s “proposed solution” that Slonecker provide services as an independent contractor, calling it “unworkable.”²²⁴
- When Caesars “asked what would happen if they just worked with Mike&co.,” PWP responded: “[W]e would have to consider a suit”²²⁵
- Ed Mulé of Silver Point testified that (i) PWP would not agree to his request that Kramer continue working on the project; and (ii) Weinberg claimed (falsely) that Kramer “was prohibited from working with Silver Point.”²²⁶

²¹⁹ Davidian 1/24/20 Aff., Ex. 88.

²²⁰ PWP Mov. Br. at 43.

²²¹ Davidian 1/24/20 Aff., Ex. 32 ¶ 8, Davidian 2/21/20 Aff., Ex. 31 [Snively Tr.] at 188; Davidian 2/21/20 Aff., Ex. 41 [PWP0052993]; Davidian 2/21/20 Aff., Ex. 38 [PWP0040272]; Davidian 2/21/20 Aff., Ex. 37 [Mulé Aff.] ¶¶ 3, 5-6; Davidian 2/21/20 Aff., Ex. 39 [PWP0058286].

²²² Belelieu Aff., Ex. 2 § 5.02(e); Belelieu Aff., Ex. 4 § 5.02(e); Verost Aff. Ex. 1 at PWP00001089.

²²³ Davidian 1/24/20 Aff., Ex. 32 [Snively Aff.] ¶ 8; Davidian 2/21/20 Aff., Ex. 31 [Snively Tr.] at 188:6-21.

²²⁴ Davidian 2/21/20 Aff., Ex. 41 [PWP0052993].

²²⁵ Davidian 2/21/20 Aff., Ex. 38 [PWP0040272].

²²⁶ Davidian 2/21/20 Aff., Ex. 37 [Mulé Aff.] ¶¶ 3, 5-6.

After these threats (and PWP's corresponding defamation campaign), these clients opted to take their business elsewhere – with Monsanto explicitly tying its decision to PWP's misconduct.²²⁷

The record contains sufficient evidence from which a factfinder could infer that PWP engaged in defamatory and tortious conduct, solely out of malice, that interfered with Defendants' prospective business advantage. *See, e.g., Butler v. Delaware Otsego Corp.*, 234 A.D.2d 639, 639-40 (3d Dep't 1996). Moreover, because the evidence indicates that Cofsky – along with Weinberg and others – actively defamed and interfered with Defendants' prospects,²²⁸ PWP's request that he be dismissed from this action should be denied.

CONCLUSION

For the reasons set forth above and in Defendants' Moving Brief, Defendants respectfully request that the Court deny PWP's Motion for Summary Judgment and award such other and further relief as this Court deems just and proper, including costs and fees of this motion.

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New York, New York

Respectfully submitted,

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²²⁷ *Supra* at 26.

²²⁸ *Supra* at 39, 42.

CERTIFICATION OF COUNSEL

I hereby state, pursuant to Rule 17 of the Rules of Practice for the Commercial Division, 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, and signature block is 13,951.

Date: February 21, 2020
New York, New York

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