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

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

Plaintiffs,

- against -

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

Defendants.

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

Counterclaim-Plaintiffs,

- against -

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

Counterclaim-Defendants.

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

Cross-claim Plaintiffs,

- against -

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

Third-Party Cross-claim Defendants.

Index No. 653488/2015

Part 49

Hon. O. Peter Sherwood

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

Oral Argument Requested

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Other Authorities

PWP respectfully submits this reply Memorandum of Law in further support of its Motion for Summary Judgment (the "PWP Motion" or "PWP Mot.") (Dkt. 680).[1]

PRELIMINARY STATEMENT

Despite Defendants' innumerable attempts to distract from, deflect, and diminish the significance of PWP's claims, Defendants cannot hide from the simple, undisputed facts of this case. And those undisputed facts clearly demonstrate Defendants' wrongdoing. Defendants cannot seriously dispute that (i) they engaged in solicitation by secretly plotting to form a competing firm while still active PWP partners and employees, including by developing equity splits for a "NewCo" (and offering those splits to each other and other senior members of PWP's Restructuring Group)—splits that were almost identical to Ducera's original equity ownership; (ii) they solicited PWP's clients and prospective clients, using the goodwill PWP developed with those clients at PWP's expense; (iii) PWP had broad discretion to terminate Defendants for Cause; and (iv) in doing so, PWP followed the requirements of the PWP Agreements.[2]

Faced with this grim reality, Defendants make a number of puzzling arguments. For example, instead of confronting the factual record of their wrongdoing, Defendants argue that the non-solicitation provisions in the PWP Agreements are unenforceable as a matter of law.

[1] This memorandum refers to Defendants with the same conventions as in the PWP Motion (PWP Mot. 1, 5 n.2), and cites to Plaintiffs' Rule 19-a Statement of Undisputed Material Facts ("Pls.' 19a") (Dkt. 679); Defendants' Opposition to Plaintiffs' Motion for Summary Judgment ("Opp.") (Dkt. 725); Defendants' Statement of Material Facts ("Defs.' 19a") (Dkt. 477); Plaintiffs' Rule 19-a(b) Response ("Pls.' 19a Resp.") (Dkt. 766); Defendants' Response to Plaintiffs' Rule 19-a Statement ("Defs.' 19a Resp.") (Dkt. 724); Affirmation of Christopher D. Belelieu, dated January 24, 2020 ("Belelieu Aff. I") (Dkt. 480); Affirmation of Christopher D. Belelieu, dated February 21, 2020 ("Belelieu Aff. II") (Dkt. 726); Affirmation of Deana Davidian, dated January 24, 2020 ("Davidian Aff. I") (Dkt. 376); and Affirmation of Deana Davidian, dated February 21, 2020 ("Davidian Aff. II") (Dkt. 682).

[2] "The "PWP Agreements" refer to the contracts attached to Belelieu Aff. I at Exhibits 2 (PWP MC LP Agreement), 4 (PWP Equity I LP Agreement), 5 (PWP Employee Agreement) and 6 (PWP LLC Agreement)."

However, besides the fact that the law refutes their position, the Individual Defendants do not dispute that (i) they accepted PWP's restrictive covenants after having an opportunity to review and negotiate them; (ii) they agreed that the covenants were reasonable and tailored to protect PWP's legitimate interests; (iii) a breach of the restrictive covenants could result in their termination for Cause; (iv) if terminated for Cause, they would forfeit their equity and deferred compensation; and (v) they later included similar restrictive covenants in Ducera's LLC Agreement—only months after PWP terminated them for violating their restrictive covenants.

In another attempt to avoid the factual record of their wrongdoing, Defendants argue that PWP "rammed the Individual Defendants' terminations through a handpicked group of PWP LLC members" (Opp. 1), while making no attempt to show (because they cannot) that PWP's decision-making process deviated from what was required by the PWP Agreements. Nor do Defendants show that any information that PWP considered in making its decision was false: Kramer held a secret meeting on a Sunday at his home to discuss forming a new firm with senior members of the Restructuring Group, and Kramer promised those individuals equity at the new firm as memorialized in the "Kramer Proposal" (which later became the same equity given to the PWP partners and employees who left PWP for Ducera). Indeed, Kramer ***admitted*** discussing a "theoretic new firm," including equity and income splits for that new firm, and further enticed the attendees to join him by representing that the new firm would be "a place that was not contracting, not stale, or stagnant but rather growing." To be sure, the Individual Defendants, including Kramer, tried to cover their tracks by, among other things, avoiding use of their PWP email accounts, holding private meetings they did not disclose to PWP, and downloading an app on their phones to automatically destroy text messages between themselves and the PWP employees they

solicited. But in the end, these efforts proved unavailing as PWP uncovered their scheme, which was confirmed by evidence gathered in this lawsuit.

Because they cannot dispute any of these facts, in a last-ditch effort to avoid summary judgment, Defendants engage in hyperbolic rhetoric and concoct a fictitious counter-narrative about PWP's leadership trying to push Kramer out. But there is no evidence to support such a narrative. To the contrary, even Defendants' cited evidence shows that PWP tried to keep Kramer at PWP. But regardless of what PWP did (or did not do), none of it excuses the Individual Defendants' breaches of their obligations to PWP. Because the breach of those obligations and Defendants' other tortious conduct is clear, PWP is entitled to summary judgment and Defendants' counterclaims should be dismissed.

COUNTERSTATEMENT OF FACTS[3]

In their Opposition, Defendants attempt to sidestep, obfuscate and distract from their own wrongdoing by focusing on irrelevant (and incorrect) facts. Defendants, however, concede the material facts establishing liability. Those include:

- The Individual Defendants agreed to the Non-Solicitation Provisions upon joining PWP, which prohibited them from soliciting PWP employees and clients, and which they agreed were "reasonable" and "not more restrictive than necessary to protect the legitimate interests of [PWP]." (Defs.' 19a Resp. ¶¶16-20, 22.)

- PWP had "the sole and absolute discretion" to terminate the Individual Defendants for Cause, including for any breach of the Non-Solicitation Provisions. (*Id.* ¶¶16-18, 23-26.)

- If the Individual Defendants resigned or were terminated for Cause, they would "continue to be bound by all responsibilities, fiduciary duties and obligations owed to" PWP for an additional 90-day "Notice Period." (*Id.* ¶¶16-18, 21.)

[3] PWP incorporates the facts entitling it to summary judgment in the PWP Motion and PWP's Opposition to Defendants' Motion for Partial Summary Judgment ("PWP Opposition" or "PWP Opp.") (Dkt. 767), and the accompanying 19a Statements.

- Under the PWP LLC Agreement and the Deferred Compensation Agreements, if a Partner is terminated for Cause, PWP has the option to impose forfeiture of a Partner's equity interests and deferred compensation, respectively. (*Id.* ¶¶28, 34.)

- Kramer hosted a meeting on Sunday, January 11, 2015 at his Connecticut home, attended by the Individual Defendants and senior members of the Restructuring Group, where Kramer "probably spoke the most" and outlined "what a theoretic new firm would be." (*Id.* ¶¶61, 66-67.) Kramer also stated that his friend, David Skatoff, would join the new firm, which he later did. (*Id.* ¶¶72-73, 152.)

- The evening after Kramer's January 11 meeting, Meyer, a meeting attendee, circulated a spreadsheet dividing up "income potential" among "senior members of the team," in which he accounted for "Kramer's equity and income expectations." (*Id.* ¶74.) That same evening, Verost circulated another spreadsheet, which he claims he drafted to "think[] about what a hypothetical firm could be." (*Id.* ¶¶75.)

- On January 19, 2015, Kramer sent a text message to Slonecker, Verost and Agnes Tang, a PWP managing director, stating, "Have you ever been a part of something that is bigger than yourself? I have, and it's an incredible feeling. Thanks Guys." Slonecker replied, "Much appreciated. I have as well and agree." (*Id.* ¶84.) Two days later, Verost sent a message to Tang and Meyer's personal email addresses, informing them that he had just spoken "with Mike [Kramer] for about an hour," and promising to relay information to them. (*Id.* ¶85.)

- On January 27, 2015, while still at PWP, Kramer received information about Pluperfect, a branding company, and on February 9, 2015, Kramer received a draft Pluperfect contract. (*Id.* ¶¶89, 94, 96.) Kramer later retained Pluperfect to develop Ducera's brand. (*Id.* ¶97.)

- Between March 1 and 3, 2015, each Individual Defendant, and Meyer, Verost and Tang, downloaded "Confide," a "confidential messenger" that creates "encrypted, self-destructing, and screenshot-proof messages." (*Id.* ¶135.)

Other facts are demonstrated by contemporaneous documentary evidence, none of which are subject to reasonable dispute. These include:

- Kramer promised Restructuring Group members equity (equity they did not have at PWP) if they left PWP to join Ducera, at amounts provided in a spreadsheet with a column entitled "Kramer Proposal" that mirrors the numbers in notes from Kramer's January 11 home meeting. (*See* Pls.' 19a ¶¶61, 69-71, 74.) Ducera's initial equity and income splits were ***nearly identical*** to those that Kramer offered during the meeting. (*Compare id.* ¶¶71, 74, *with id.* ¶153.)

- In January 2015, Scherer proposed to Kramer names for a new firm, all of which included the initials of Kramer, Slonecker and Scherer (the most senior members of PWP's Restructuring Group). (*Id.* ¶55.)

- Kramer, while still Head of PWP's Restructuring Group, called PWP client Fidelity Management to tell them that he planned to leave PWP with "several of his colleagues." (*Id.* ¶161.)

- On February 15, 2015, Kevin Cofsky informed PWP, and provided evidence, about the Individual Defendants' solicitation efforts. (*Id.* ¶119-21.)

- While still on garden leave, the Individual Defendants and other former Restructuring Group members continued working together to establish their new firm, Ducera. (*See, e.g.*, *id.* ¶¶139, 149.)

- On May 18, 2015, the day after the garden leave period ended, Kramer incorporated Ducera. (*Id.* ¶¶139, 150.)

- Within weeks of its founding, Ducera obtained business from Monsanto (a former PWP client). (*Id.* ¶¶150, 167.)[4]

ARGUMENT

I. THIS COURT SHOULD FOLLOW THE FIRST DEPARTMENT'S DECISION—WHICH DEFENDANTS CANNOT ARBITRARILY NARROW.

Defendants accuse PWP of "misrepresent[ing]" the First Department's decision in this case, claiming that it held merely that a breach of Defendants' non-solicitation obligations "would—as a matter of contract—constitute 'Cause.'" (Opp. 16.) But the decision was broader, holding that "***defendants' alleged misconduct*** by violating the non-solicitation and noncompete provisions of the DCA and breaching their duty of loyalty as alleged in the complaint" would "unquestionably constitute a termination for cause under the DCA" if proven. *Perella Weinberg*

[4] While PWP need not establish that Kramer resigned (which he did) to obtain summary judgment, PWP notes that Kramer emailed Scherer a year before his termination stating that he was considering resigning. (Belelieu Aff. I, Ex. 132, at PWP0032160.) Unable to dispute this fact, Defendants bizarrely note that the email's subject line was "Please," without addressing Scherer's response, "Let's resign!" (Defs.' 19a Resp. ¶37.) Defendants admit that "Kramer was openly considering his career options." (Defs.' Opp. 1.)

Partners LLC v. Kramer, 153 A.D.3d 443, 445 (1st Dep't 2017) (emphasis added). Because the undisputed facts prove PWP's allegations, this Court should follow the First Department's decision and find that PWP properly terminated the Individual Defendants for Cause.

II. PWP IS ENTITLED TO SUMMARY JUDGMENT ON ITS CLAIMS (COUNTS I-XIV OF COMPLAINT).

1. PWP Is Entitled to Summary Judgment on Its Contract Claims (Counts I-VII).

a. The Employee Non-Solicitation Provisions Are Enforceable.

The Non-Solicitation Provisions are enforceable to protect PWP's legitimate interests in its client relationships and confidential information. (PWP Opp. 12-23.) While Defendants claim that enforcing the Non-Solicitation Provisions would "impermissibly prohibit employees from ever complaining about their jobs or discussing future employment options" (Opp. 17), Defendants were not simply "complaining about their jobs" when they secretly plotted to start a competing firm and recruited the senior members of the Restructuring Group to join them. (PWP Opp. 20-21.) Defendants' actions go well beyond "water cooler talk."

Defendants also contend that "'protecting an employer's investment in its personnel' is [not] a legitimate interest." (Opp. 17-18 (internal brackets omitted).) That argument is contrary to well-established case law where employees have a client-facing role—the very precedent Defendants cite holds that "[t]he employer has a legitimate interest in preventing former employees from exploiting or appropriating the goodwill of a client or customer, which had been created and maintained at the employer's expense, to the employer's competitive detriment." *BDO Seidman v. Hirshberg*, 93 N.Y.2d 382, 392 (1999) (cited at Opp. 17-18, 27).[5] Defendants' reliance on *Lazer*

[5] Defendants' argument that *Weichert Co. of Pa. v. Young*, C.A. No. 2223, 2007 WL 4372823 (Del. Ch. Dec. 7, 2007) is "inapposite" because the employer there spent "'considerable resources' training its employees" (Opp. 18) is belied by PWP's substantial investment in the Restructuring Group and its clients (PWP Opp. 15-16).

Inc. v. Kesselinring, 13 Misc. 3d 427 (N.Y. Sup. Ct. 2005), is similarly misplaced—the employee there was not "a particularly valuable or unique employee." *Id.* at 433. In contrast, the Individual Defendants included the ***entire senior leadership*** of PWP's Restructuring Group, which Defendants boast generated almost half of PWP's advisory business in some years. (Defs.' 19a ¶34.)

Defendants fail to meaningfully distinguish the other cases cited by PWP. For example, Defendants' claim that in *Sensus USA, Inc. v. Franklin*, No. CV 15-742-RGA, 2016 WL 1466488 (D. Del. Apr. 14, 2016), the "only restrictive covenant at issue was the non-compete provision" is simply false—the *Sensus* court enforced covenants that prohibited "soliciting Sensus' customers or employees for two years," and found that "[t]he restrictive covenants serve Sensus' legitimate business interests." *Id.* at *1, *7-8.[6] Similarly, the fact that *Contempo Communications, Inc. v. MJM Creative Servs., Inc.*, 182 A.D.2d 351 (1st Dep't 1992), and *TBA Global, LLC v. Proscenium Events, LLC*, 114 A.D.3d 571 (1st Dep't 2014), involved client solicitation rather than employee solicitation makes no difference: an employer has a legitimate interest in protecting its goodwill and client relationships in both contexts. *See, e.g.*, *Poller v. BioScrip, Inc.*, 974 F. Supp. 2d 204, 222 (S.D.N.Y. 2013) (upholding 24-month employee and client non-solicitation provisions given "interest in maintaining client goodwill").

b. PWP Was Authorized to Terminate the Individual Defendants for Cause.

Defendants do not dispute that under the PWP Agreements, in making a Cause determination, PWP is:

> entitled to act "in its sole and absolute discretion," and ***to consider only such interests and factors as it desires*** and, to the fullest extent

[6] Indeed, the order following *Sensus* enjoined the defendant from, *inter alia*, "recruiting, soliciting or otherwise inducing or influencing" or "seeking to employ" any Sensus employee. Consent Order and Judgment at 2, *Sensus*, 2016 WL 1466488 (No. 15-cv-742-RGA), ECF No. 45.

> permitted by law, ***shall have no duty or obligation to give any consideration to any interest of or factors affecting the Partnership, the Partners, or any other person***.

(Defs.' 19a Resp. ¶25 (emphases added).) Notwithstanding this clear language, Defendants argue that the voting LLC members—PWP's most senior leaders—were required to personally "speak[] to witnesses" and "review[] documents" to ensure that the Individual Defendants' conduct constituted "Cause." (Opp. 19.) Neither the PWP Agreements nor the law imposes such requirements (although PWP's in-house and outside counsel did both before PWP terminated the Individual Defendants for Cause).

Defendants' reliance on *Seibold v. Camulos Partners LP*, No. C.A. 5176-CS, 2012 WL 4076182 (Del. Ch. Sept. 17, 2012), is unavailing. There, a hedge fund's managing partner had "sole and absolute discretion" to withhold the return of a limited partner's investments only in "extraordinary circumstances." *Id.* *7-8. The court held that the partnership failed to satisfy this criterion when an investment manager (not the managing partner) prevented a limited partner from withdrawing his investment, as it failed to show that the managing partner exercised its discretion and that an "extraordinary circumstance" existed. *Id.* at *9-10.

Here, PWP LLC indisputably had authority to terminate the Individual Defendants for "Cause," which the PWP Agreements defined to include any breach of the Non-Solicitation Provisions. (Defs.' 19a Resp. ¶¶23-26.) The Individual Defendants' misconduct clearly satisfied this definition, as proven by their own admissions and as Cofsky reported to PWP, contemporaneous notes of which Defendants admit there is "no reason to doubt." (PWP Opp. 25 (quoting Defs.' 19a ¶102).)

c. <u>The Individual Defendants Breached the Employee Non-Solicitation Provisions.</u>

Unable to contest the facts establishing their liability, Defendants isolate facts and argue (incorrectly) that each, alone, is not "solicitation." In doing so, Defendants define "solicitation"

in a manner contrary to the plain language of the PWP Agreements. (*Compare* Opp. 20 (defining "'solicitation' to require some type of 'personal petition to a particular individual to do a particular thing'"), *with* Defs.' 19a Resp. ¶¶19-20 (defining employee solicitation to include acts, "directly or indirectly in any capacity," to "hire or solicit, recruit, induce, entice, influence or encourage any [PWP employee or partner] to leave [PWP] or become hired or engaged by another firm").)[7]

Defendants attempt to deflect responsibility from the scheme's ringleader, Kramer, claiming that at the January 11 meeting, he was merely "responding to inquiries" and could not have been soliciting others to form a "new firm" because at that time, "there was (indisputably) no new firm nor any decision to form one." (Opp. 21.) Setting aside Kramer's steps to form a new firm ***before*** the meeting (PWP Mot. 7-11), the fact that Kramer had not yet created a new firm at the time of the meeting is unsurprising—he held the meeting to improperly recruit PWP's Restructuring Group and offer them equity in the firm to ensure they would join him if he left PWP. Defendants cannot credibly claim that the prospect of equity at a new firm, which they did not have at PWP, was not an "entice[ment]" to the attendees. (Opp. 21-22.)

Even accepting Defendants' narrative that the Individual Defendants—the highest-ranking Restructuring Group members—were only "responding to inquiries" from the Managing Directors, the ensuing negotiation of equity interests in "NewCo" between the Individual Defendants and other members of the Restructuring Group clearly constitutes solicitation. Defendants do not seriously dispute that the Managing Directors circulated multiple versions of the equity splits—including the "Kramer Proposal." (Defs.' 19a Resp. ¶¶139, 153.) The only

[7] Defined contractual terms—not general dictionary definitions—are "controlling" when "a reasonable person in the position of either party would have no expectations inconsistent with the contract language." *GMG Capital Invs., LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 780 (Del. 2012).

plausible explanation is that the Managing Directors and Individual Defendants were counterparties to that negotiation.

Defendants downplay the significance of the spreadsheets circulated after Kramer's meeting by citing to the Partner Defendants' self-serving testimony that they "neither s[aw] nor requested" them. (Opp. 23 (decapitalized).) But this is beside the point. The equity and income splits at Ducera, as Kramer admitted, were nearly identical to those in these spreadsheets and Cofsky's notes from the January 11 meeting, and the spreadsheets reference the "Kramer Proposal" (which naturally gives the Partner Defendants the greatest amount of equity). (PWP Mot. 22-23; Pls.' 19a Resp. ¶85.)

Defendants claim that the equity "step-downs" between the Partner Defendants in the "Kramer Proposal" are "virtually identical" to the step-downs that the Partner Defendants historically maintained because all of "[t]he Managing Directors were aware of the ... 'step-downs.'" (Opp. 24.) But the only supporting testimony Defendants cite is ***Meyer's*** (Opp. 9 & n.53), who not only drafted and shared with Kramer the "Business Plan Considerations" prior to the January 11 meeting, but was the first to send the other Managing Directors the "Kramer Proposal" after the January 11 meeting. (Defs.' 19a Resp. ¶¶46, 74.) Similarly, Defendants' conclusory assertion that the "Draft Business Plan Considerations" document drafted by Meyer is "devoid of evidentiary value" (Opp. 22-23) is belied by the fact that ***Meyer shared it with Kramer*** and Meyer was deeply involved with helping the Individual Defendants develop Ducera. (Defs.' 19a Resp. ¶46; *id.* ¶139 (failing to dispute that after his meeting, Kramer tasked Meyer with the "Launch Strategy" for "NewCo").)[8]

[8] As discussed infra § III.b, although the Partner Defendants' immediately forfeited their PWP equity by engaging in solicitation—not by competing with PWP—their immediate competition

d. The Individual Defendants Breached the Client Non-Solicitation Provisions.

In the face of undisputed evidence of Defendants' client solicitation, Defendants brazenly fault PWP for "refus[ing] to voluntarily dismiss these claims." (Opp. 26.) Defendants' arguments ignore key facts and apply a heightened standard of "solicitation" unsupported by law. *See Mercer Health & Benefits LLC v. DiGregorio*, 307 F. Supp. 3d 326, 351 (S.D.N.Y. 2018) (collecting cases holding that announcing new employment with competitor to clients constitutes improper solicitation); *Seitz v. Siegfried Grp., LLP*, No. C.A. 99C-12-025CHT, 2001 WL 1198941, at *7-8 (Del. Super. Ct. Oct. 2, 2001) (defendant may be liable for client solicitation without previously servicing client).

Monsanto. Unable to explain away the documentary evidence of their solicitation of Monsanto (PWP Mot. 34), Defendants rely solely on the conclusory testimony of a former Monsanto employee that "Monsanto 'was never solicited by [Defendants].'" (Opp. 26-27). Yet Defendants do not seriously dispute that the agreements underlying the Kramer Capital acquisition include "Monsanto/Solutia" within the "Transferred Contracts" from Kramer Capital to PWP; a week after Kramer's termination, he "contacted Monsanto to provide" his "personal" contact information; and shortly thereafter, Monsanto terminated its PWP engagement. (Defs.' 19a Resp. ¶¶12, 162-64.) PWP may enforce its client Non-Solicitation Provisions to protect client engagements that it purchased. *Capstone Logistics Holdings, Inc. v. Navarrete*, No. 17-cv-4819, 2018 WL 6786338, at *7 (S.D.N.Y. Oct. 25, 2018) (under Delaware law, restrictive covenants were "essential" to protect company's "customers that [it] purchased from Defendants"). Further, because PWP subsidized the Individual Defendants' relationships with Monsanto, including

with PWP would have led to forfeiture of their equity under Defendants' interpretation of the Non-Compete Provision. (*See* Opp. 25.)

through expense accounts (Pls. 19a Resp. ¶141; *see also* Belelieu Aff. II, Ex. 28), and because Monsanto worked with bankers at PWP aside from the Individual Defendants (Pls.' 19a Resp. ¶147), Defendants' cited cases are inapt. *See Good Energy, L.P. v. Kosachuk*, 49 A.D.3d 331, 332 (1st Dep't 2008) (clients "were not serviced by defendant"); *Riedman Corp. v. Gallager*, 48 A.D.3d 1188, 1189–90 (4th Dep't 2008) (employer "did not subsidize or otherwise financially support" customer relationship); *FTI Consulting, Inc. v. Graves*, No. 05-cv-6719, 2007 WL 2192200, at *8 (S.D.N.Y. July 31, 2007) (no evidence that client relationship was "developed at [plaintiff's] expense").

Caesars. Defendants argue that PWP was unable "'to reach an agreement on revenue share' with the Individual Defendants" for Caesars, and that Caesars "***excoriated*** PWP in writing for refusing to be 'an adult' in negotiating such agreement." (Opp. 27-28). Yet Defendants omit that Kramer, while still on garden leave paid for by PWP, insisted on a "60/40 split in [his] favor," which Caesars believed made "Kramer ... less accommodating" in the negotiation. (Pls.' 19a Resp. ¶154.)

Alpha. Defendants contend that creditors of Alpha Natural Resources ("Alpha"), not Alpha itself, ultimately engaged Ducera. (Opp. 28-29.) But even if true, Alpha's creditors were a prospective PWP client: A list of Restructuring Group "Pitches/Prospects" that Slonecker and Verost drafted for PWP before leaving the firm listed "Company, ***Creditor***" as the potential client for Alpha, and each Individual Defendant as responsible for the engagement. (Belelieu Aff. I, Ex. 108, at PWP0058114 (emphasis added); Defs.' 19a Resp. ¶114.) It is undisputed that the Partner Defendants agreed that "for a period of 180 days" after their garden leave period, they would not "directly or indirectly in any capacity ... solicit or entice away or in any manner attempt to persuade any ... ***prospective client or customer***" of PWP. (Defs.' 19a Resp. ¶¶16-17, 19 (emphasis added).)

Indeed, on June 19, 2015, when Kramer emailed one of Alpha's creditors to "pitch" Ducera's services, he relied on the goodwill that the Individual Defendants developed with Alpha on PWP's dime, stating that that they had "some unique insights and access to Alpha," which was "a situation [they] ha[d] been following closely for a while, and we actually have direct access to the senior management team." (Belelieu Aff. I, Ex. 157.)

Fidelity. The law does not support Defendants' argument that their "[i]ntentions" or "hopes" of continued business with PWP clients cannot constitute client solicitation. *See Deloitte & Touche USA LLP v. Lamela*, No. C.A. 1542-N, 2005 WL 2810719, at *8 (Del. Ch. Oct. 21, 2005) (likelihood of improper solicitation where defendant met plaintiff's clients in "hope of generating tax work from them"). None of Defendants' cited cases address situations where, as here, a senior firm member informed a client that he and other employees were leaving to start a competing venture. *See In re DTI*, 275 F. Supp. 3d 465, 469-70 (S.D.N.Y. 2017) (no evidence departing employees informed clients of new employer); *Unger v. Ganci*, 136 A.D.3d 1388, 1388-89 (4th Dep't 2016) ("assuming ... plaintiff breached the agreement by taking over the financial accounts of six of defendants' clients," but reversing summary judgment award for failure to prove entitlement to rescission); *Ferguson v. Ferrante*, 664 F. App'x 58, 62 (2d Cir. 2016) ("notifying certain clients of his departure," ***without mentioning new firm with other colleagues***, did not constitute solicitation); *FTI*, 2007 WL 2192200, at *7 (company had "no information" that defendant "solicited any" clients). Further, *Estee Lauder Cos. v. Batra*, 430 F. Supp. 2d 158 (S.D.N.Y. 2006), supports ***PWP's*** position, as the court *enjoined* the defendant-employee from violating his non-solicitation provision. *Id.* at 181-82.[9]

[9] Cofsky's testimony that he did not "think talking to a friend [at Fidelity] about leaving the firm" was "a breach of trust" (Opp. 30) is irrelevant: the friend was already aware of Kramer's

2. PWP Is Entitled to Summary Judgment on Its Breach of Fiduciary Duty Claims (Counts VIII-X).

Defendants do not dispute that their conduct, if proven, would breach their fiduciary duties to PWP. (*See* PWP Mot. 35.) Instead, they argue that (i) PWP's claims are duplicative, and (ii) they owe PWP no fiduciary duties. These arguments fail.

First, PWP's breach of fiduciary duty claims are not duplicative of its breach of contract claims because, at a minimum, the two claims seek different remedies. (*See* PWP Opp. 28-29.) PWP's fiduciary claim seeks disgorgement of the Individual Defendants' compensation while they were actively plotting against PWP, which is not a remedy for breach of contract. *See* PWP Compl. ¶132 (Dkt. No. 2); *In re Mobilactive Media, LLC*, C.A. No. 5725-VCP, 2013 WL 297950, at *20 n.219 (Del. Ch. Jan. 25, 2013). Delaware law allows disgorgement of a disloyal employee's compensation. (PWP Opp. 29 (citing *Triton Const. Co. v. E. Shore Elec. Servs., Inc.*, No. C.A. 3290-VCP, 2009 WL 1387115, at *28 (Del. Ch. May 18, 2009).)

Second, the Partner Defendants cannot disclaim their fiduciary duties to PWP. Under Delaware law, limited partners "assume fiduciary duties if they take on an active role in the management of the entity." *Feeley v. NHAOCG, LLC*, 62 A.3d 649, 662 (Del. Ch. 2012); *see also* 6 Del. C. § 17-1101(d) ("[A]t law or in equity," a partner may owe "fiduciary duties ... to a limited partnership or to another partner").[10] Here, Kramer was a member of PWP LLC, which made up PWP's management committee, thus creating a fiduciary relationship. (PWP LLC Agreement

---

departure and Cofsky expressed no opinion about talking to a client about leaving ***to start a new firm***. (*See* Belelieu Aff. I, Ex. 27, at 180:5-16.)

[10] The case cited by Defendants involved a limited partnership in which the plaintiff was an ***investor*** without any managerial role. *See Bond Purchase, L.L.C. v. Patriot Tax Credit Props., L.P.*, 746 A.2d 842, 863-64 (Del Ch. 1999).

§ 4.01(a).) Indeed, Defendants cite this provision to assert Kramer was "vested with" management authority.[11] (Defs' 19a ¶11.) In addition, Slonecker was head of U.S. Restructuring at PWP, Head of Corporate Finance and co-chair of the Fairness Opinion Committee. (Pls.' 19a Resp. ¶16; Belelieu Aff. I, Ex. 15, at 65:6-14, 127:14-15.)

Regardless, all of the Individual Defendants had fiduciary duties as key employees occupying special positions of trust at PWP. Indeed, each Individual Defendant played a key role in managing PWP's client relationships and accessing confidential information about PWP's operations. (PWP Opp. 15-16.) Because they received access to PWP's confidential information, including client-related information, they were obligated to use that information only in PWP's best interests. *See Mitchell Lane Publishers, Inc. v. Rasemas*, No. C.A. 9144-VCN, 2014 WL 4925150, at *6 (Del. Ch. Sept. 30, 2014); Pls.' 19a Resp. ¶141; *Triton*, 2009 WL 1387115, at *11 (employee had fiduciary duty by "acquir[ing] secret information relating to ... employer's business," and breached duty by using that "information for his own and [competitor]'s benefit").

Moreover, if any Individual Defendant lacked fiduciary duties, Defendants ignore their liability for aiding and abetting Kramer's fiduciary breach. (PWP Mot. 35, n.13; *see RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 862-63 (Del. 2015) (defendant aided and abetted board's fiduciary breach by engaging in "back-channel communications" for "improper motives").)

3. PWP Is Entitled to Summary Judgment on Its Unfair Competition and Tortious Interference Claims (Counts XI-XIV).

PWP's claims for tortious interference and unfair competition against the Individual Defendants are not duplicative of PWP's contract claims because each claim is predicated on

[11] Though Defendants claim Kramer was "stripped" of his management authority (Opp. 32), this is belied by the undisputed fact that, from joining PWP until his termination, Kramer remained a limited partner of PWP LLC. (PWP Opp. 23).

different facts. (PWP Opp. 30-31 (citing *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 A.D.3d 1, 9 (1st Dep't 2008).)

Defendants' only argument on the merits of the unfair competition claim—that Defendants have not misappropriated any commercial advantage by "infringement or dilution of a trademark or trade name or by exploitation of proprietary information or trade secrets" (Opp. 32)—ignores that New York's unfair competition law covers an "'incalculable variety' of illegal practices." (PWP Opp. 32-33 (quoting *Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095, 1105 (2d Cir. 1982)).) Defendants' scheme to create a competing firm by soliciting PWP partners and employees with access to proprietary information and PWP's client relationships constitutes unfair competition. *See Anesthesia Assocs. of Mount Kisco, LLP v. N. Westchester Hosp. Ctr.*, 873 N.Y.S.2d 679, 684 (2d Dep't 2009) (awarding summary judgment on unfair competition claim "based on the wrongful diversion of business from the plaintiffs to [defendants]"). Plaintiffs' harm is likewise attributable to Ducera, as Ducera has benefited from PWP's client relationships, including by improperly obtaining work from former PWP clients. (*See* Pls.' 19a ¶¶12, 81, 162, 171; Pls.' 19a Resp. ¶¶8, 140.)

Ducera contends it cannot be liable for tortious interference because it did not exist when the Individual Defendants engaged in wrongdoing. However, a later-created company is liable for its promoters' misconduct where it knowingly accepts benefits or ratifies that misconduct. *See Hwang v. Grace Rd, Church*, No. 14-cv-7187, 2016 WL 1060247, at *9 (E.D.N.Y. Mar. 14, 2016); *see also Schumacher v. Richards Shear Co., Inc.*, 59 N.Y.2d 239, 244 (1983) ("A corporation may be held liable for the torts of its predecessor" where it "impliedly assumed the predecessor's tort liability"). A corporation is also liable for the acts of its employees where, as here, the employees seek "to divert" their employer's "accounts by soliciting employees to withdraw and to join [a new

firm]." *McRoberts Protective Agency, Inc. v. Lansdell Protective Agency, Inc.*, 61 A.D.2d 652, 653-54 (1st Dep't 1978).

Although Defendants contend that *Hwang* is "contrary to controlling case law" (Opp. 34), they fail to cite ***any*** contrary law—and indeed, Defendants cite no cases in which courts distinguish between assuming tort and contractual liability. The other cases Defendants cite (Opp. 33-34) are irrelevant because ***none*** involve consideration of whether a corporation accepted the benefits of its promoter's wrongful conduct. Here, Ducera hired PWP's solicited partners and employees, who then generated millions of dollars in ill-gotten gains derived from PWP's client relationships. (*See* Pls.' 19a ¶¶12, 81, 162, 171; Pls.' 19a Resp. ¶¶8, 140.)

III. PWP IS ENTITLED TO SUMMARY JUDGMENT ON DEFENDANTS' COUNTERCLAIMS.

1. PWP Is Entitled to Judgment on Defendants' Contract Counterclaims (Counterclaims I-IV).

a. PWP Was Entitled to Terminate the Individual Defendants for Cause.

Defendants falsely assert that "PWP cites no undisputed evidence that it 'properly' terminated Defendants for Cause." (Opp. 34 (capitalization removed).) Defendants, however, admit that a super majority of PWP LLC members voted to terminate Individual Defendants for Cause (Defs.' 19a Resp. ¶125); and fail to properly dispute that this was the only requirement for PWP to terminate the Partner Defendants. *See Balanced Return Fund Ltd. v. Royal Bank of Canada*, No. 600949/2009, 2014 WL 5525174, at *6 (N.Y. Sup. Ct. Oct. 30, 2014) (nonmoving party failed to establish material dispute by "deny[ing], without citation to evidence" moving party's contention).[12] Defendants fail to explain what additional requirements PWP failed to meet

[12] Defendants' contention that "the existence of 'Cause' is irrelevant" to Kramer and Slonecker's claims for their forfeited deferred compensation (Opp. 34 n.178) is meritless for the reasons discussed in PWP's Opposition (*id.* 35-40).

or cite any evidence supporting their position. (*Id.* ¶35.) Instead, Defendants merely ask the Court to "see generally" the Partnership Agreements, without explaining how those Agreements limit PWP LLC's "sole and absolute discretion." (*See id.* ¶35 n.22.)

b. The Partner Defendants Forfeited Their Equity Under Their Own Interpretation of the Partnership Agreements.

The Partner Defendants claim that under the Non-Compete Provision, they had a choice whether to compete with PWP and lose their equity or "sit[] on the bench for three years" and retain that equity. (Opp. 25.) But contrary to Defendants' contention, PWP did not "divest[] them of the ability to choose" between these options (Opp. 35): Defendants made that choice when they began working to poach their PWP colleagues to start a competing firm ***while still employed by PWP***. The Partner Defendants' "immediate [equity] forfeiture" was not based on breaching the Non-Compete Provision but on their violation of the Non-Solicitation Provisions. (Kramer Aff. Ex. 9; Slonecker Aff. Ex. 3; Scherer Aff. Ex. 1.)

Defendants cannot dispute that they chose to immediately compete with PWP within the three-year Non-Compete period—they worked to establish Ducera for months, and Kramer incorporated Ducera immediately upon the expiration of his garden leave. (*See* PWP Mot. § II.1.b.) Thus, independent of their solicitation scheme, the Partner Defendants chose to "compet[e] within three years of [their] departure and forfeit[ed] any retained equity." (*Id.*)

c. Defendants Fail to Create a Material Dispute on Their Implied Covenant Claim.

Defendants' implied covenant claim impermissibly attempts to "imply new contract terms merely because" the PWP Agreements "grant[] discretion" to PWP. *Oxbow Carbon & Minerals Holdings, Inc. v. Crestview-Oxbow Acquisition, LLC*, 202 A.3d 482, 503 (Del. 2019). Defendants argue that PWP violated this covenant by conducting an inadequate investigation into their misconduct. (Opp. 36.) Even assuming that were true (it is not), the cases Defendants rely upon

show that PWP had no obligation, express or implied, to follow any specific procedure in finding the Individual Defendants engaged in conduct constituting "Cause." *See Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 390 (1995) (SAT administrator was "expressly permit[ted]" to cancel test score where it "found 'reason to question' its validity"; "[n]othing in the contract compelled [defendant] to prove that the test-taker cheated" or "conduct a field investigation or gather evidence to verify or counter the test-taker's documentation"). PWP's only contractual obligation in exercising its discretion to find "Cause" was to "to consider only such interests and factors as it desires." (Defs.' 19a Resp. ¶25.) The implied covenant cannot "override" this "express agreement." *Related Westpac LLC v. JER Snowmass LLC*, No. C.A. 5001-VCS, 2010 WL 2929708, at *6 (Del. Ch. July 23, 2010).

Nor did PWP act "arbitrarily, capriciously, irrationally, or maliciously" in terminating the Individual Defendants for Cause. (Opp. 36.) Even assuming Kramer's self-serving testimony that Weinberg suggested Kramer start his own firm was true (*see* PWP 19a Resp. ¶89), that is far different from Weinberg telling Kramer to leave PWP with almost the entire Restructuring Group. Further, the record belies Defendants' contention that Cofsky "manufacture[d] allegations to be used against Defendants" (Opp. 36), and indeed, Defendants ***do not dispute the accuracy of Cofsky's statements to PWP and its outside counsel***. (Defs.' 19a Resp. ¶¶118-19; *see also* Belelieu Aff. I, Ex. 181.) None of Defendants' cited cases found that a party acted in bad faith by exercising its contractual discretion based on an account of the underlying facts corroborated by undisputed evidence and Defendants' own admissions. *Cf. Kent Bldg. Servs., LLC v. Kessler*, No. 17-CV-3509, 2018 WL 1322226, at *3-5 (S.D.N.Y. Mar. 14, 2018) (confirming arbitral award finding that employee was terminated in bad faith where employer "had no proof to support" reason for termination); *Amirsaleh v. Bd. of Trade of City of N.Y., Inc.*, No. C.A. 2822-CC, 2008

WL 4182998, at *7-9 (Del. Ch. Sept. 11, 2008) (triable issue on whether defendant acted in bad faith where defendant claimed plaintiff missed deadline but provided no evidence that deadline existed). PWP's "after-acquired evidence" of the Individual Defendants' misconduct further justifies their for-Cause terminations. (PWP Opp. 26-27.)

2. PWP Is Entitled to Judgment on Defendants' Defamation and Tortious Interference Counterclaims (Counterclaims VI and VII).

a. Defendants Fail to Raise a Material Dispute on Their Defamation Claim.

Defendants' Second Amended Complaint ("SACC") pleads independent claims for (i) tortious interference—based on allegedly "defamatory statements" regarding Defendants' "integrity and honesty," which interfered with Defendants' "business relationships" with "numerous clients" (SACC ¶¶280-85 (Dkt. 182, Ex. A).); and (ii) defamation—based on two discrete statements in PWP's February 17, 2015 internal memorandum (the "PWP Internal Memorandum") (*see id.* ¶294). Yet, in their Opposition, Defendants attempt to improperly conflate, and use interchangeably, the statements underlying each of these independent claims as support for one another. (Opp. 39-40.)

Defendants, however, may not bolster their infirm defamation claim with unpled, allegedly defamatory statements: "In an action for libel or slander, the particular words complained of ***shall be set forth in the complaint***." CPLR 3016(a) (emphasis added); *see also Gardner v. Alexander Rent-A-Car, Inc*., 28 A.D.2d 667, 667 (1st Dep't 1967) (CPLR 3016(a) "is strictly enforced and the exact words must be set forth").

Moreover, Defendants fail entirely to address PWP's arguments regarding why their defamation claim fails as a matter of law. (PWP Mot. 44-45).

First, Defendants make no showing that the statements in the PWP Internal Memorandum were false, and their defamation claim should be dismissed on that basis alone. *Diaz v. Espada*, 8

A.D.3d 49, 50 (1st Dep't 2004). Defendants contend that "PWP has already conceded that several of the statements ... were false" (Opp. 41), yet the only evidence they cite to support this contention is unrelated to the PWP Internal Memorandum (*see* Opp. 40 nn.205, 209).

Second, PWP's statements regarding its decision to terminate Defendants are inactionable statements of opinion. (PWP Mot. 44.) While Defendants argue that the presence of prefatory caveats such as "I believe" or "we believe" are not dispositive (Opp. 41), whether a statement is fact or opinion depends on the "full context of the communication in which the statement appears." *Davis v. Boeheim*, 24 N.Y.3d 262, 270 (2014). The PWP Internal Memorandum expressed PWP's inactionable "pure opinion" by expressly stating the basis for the Individual Defendants' for-Cause terminations, with no implicit but unstated detrimental facts. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289-95 (1986) .

Third, Defendants fail to show that the statements in the PWP Internal Memorandum were not PWP's good faith legal position regarding PWP's termination of the Individual Defendants. (PWP Mot. 44-45). They claim "PWP had no good-faith basis to believe there was Cause to terminate them" (Opp. 42), but as discussed *supra* § III.1.c., that statement is plainly untrue, thus rendering PWP's statements inactionable. *See S.L.C. Consultants/Constructors, Inc. v. Raab*, 177 A.D.2d 965, 965 (4th Dep't 1991) ("[A] statement of plaintiff's legal position with regard to its employment agreement with defendant" is inactionable).

Fourth, even assuming Defendants could satisfy the elements of defamation (they cannot), the PWP Internal Memorandum is conditionally privileged because it was only provided to other PWP members, each of whom have a "common interest" in Individual Defendants' terminations; Defendants cannot claim the statements were made with "malice." *Foster v. Churchill*, 87 N.Y.2d 744, 752 (1996). PWP's decision to terminate the Individual Defendants, the PWP Internal

Memorandum's description of that decision, was based on discussion, analysis, and advice from counsel, in a good-faith effort to protect PWP's business and client relationships. (Pls.' 19a ¶¶119-23; Pls.' 19a Resp. ¶¶107, 109, 110-12.)

b. Defendants Fail to Raise a Material Dispute on Their Tortious Interference Claim.

In claiming that PWP made additional "defamatory statements" in support of their tortious interference claim (Opp. 39-40, 42), Defendants rely on nothing more than innuendo and mischaracterization of the record:

Defs.' False Allegations (Opp. 39-40)	**Evidence**
PWP "engaged in a ... 'shock and awe' campaign."	The cited email refers to ***Defendants' tactics*** as "Shock and Awe Part 1." (Pls.' 19a Resp. ¶142.) This message was internal to PWP, and was never communicated to clientele.
PWP "admitted" that it sought to "impair[] Defendants' professional prospects."	The cited email exchange does not, even loosely, support Defendants' allegation. (*See* Davidian Aff. II, Ex. 88, at PWP0040227; Pls.' 19a Resp. ¶146.)
PWP claimed "undefined conduct so severe that PWP could 'not expose team members to work directly with them.'"	The cited email references no "undefined conduct." It clearly explains, "[W]e certainly will not seek to preclude you from contacting Mr. Slonecker if you believe that he has information necessary to the successful execution of such transactions. Importantly, however, ***given Mr. Slonecker's attempt to recruit members of Perella Weinberg***, we will not expose team members to work directly with him, other than [Weinberg] and [Perella]." (Davidian Aff. II, Ex. 35, at DEF00001481 (emphasis added).)
PWP "stated that it knew of some 'non-public' information about Defendants beyond their alleged breaches of contract"	The cited letter does not reference circumstances going "beyond" Defendants' contractual breaches. Rather, it expressly states that Kramer was terminated for "soliciting partners and employees to join a new firm set up by [Kramer]." (Davidian Aff. I, Ex. 77, at PWP0036988-89.)
PWP "claimed that Defendants had engaged in undisclosed 'misconduct the likes [of] which [Perella] had never before been exposed [to] in his career.'"	The cited affidavit does not mention PWP referring to "undisclosed 'misconduct'" and instead states that PWP described exactly why Kramer and Slonecker were terminated: "***as a result of having breached their contracts with PWP***." (Davidian Aff. II, Ex. 36 ¶5 (emphasis added).)
PWP "informed third parties that Kramer ... had breached PWP's	Kramer, in fact, was setting up his new firm before his termination. (Pls.' 19a ¶¶45-47, 50-51, 55-56, 61, 66-69,

trust by creating a new firm before his termination ... [a] claim[] PWP concedes w[as] incorrect."	71, 74, 84, 90, 96.) In Defendants' citation, PWP CEO Bob Steel testifies to his understanding that asserting that Kramer had created a new firm would have been technically "inaccurate as of February 28[, 2015]" because at that point, all PWP had publicly "claim[ed]" was that Kramer was "***intending* to set up a firm**," rather than having already established one. (Davidian Aff. I, Ex. 17, at 247:11-25 (emphasis added).)
PWP "informed third parties that Kramer ... "caused 'a total of eight professionals' to resign from PWP—[a] claim[] PWP concedes w[as] incorrect"	The cited letter does not state that Kramer "caused" eight individuals to resign from PWP, but that since Kramer's termination "a total of eight professionals in [Kramer's] restructuring group have resigned from the firm." (Davidian Aff. I, Ex. 77, at PWP0036988.) After this letter was written, exactly eight former members of PWP's Restructuring Group joined Ducera. (Defs.' 19a Resp. ¶¶14, 153.)
PWP "told third parties (including potential clients and employees) that they were contractually prohibited from working with Defendants for over a year"	In three of the cited affidavits, representatives of former PWP clients aver that, ***in February 2015***, PWP stated that Kramer and Slonecker were contractually prohibited from representing them ***at that time***; none mention a prohibition lasting "for over a year." (Davidian Aff. I, Ex. 32, ¶5; Davidian Aff. II, Ex. 36, ¶¶3, 8; *id.* Ex. 37, ¶¶3, 5.) **In February 2015, each Individual Defendant remained subject to their restrictive covenants.** (Defs.' 19a Resp. ¶¶20-21.) Defendants' remaining citations are to self-serving affidavits prepared by Tang, Meyer and Davis, who are not mere "third parties" but ***current partners of Defendant Ducera***. (*Id.* ¶153.)
PWP "threatened to embroil third parties in litigation should they seek to work with Defendants"	The cited exhibits refer only to litigation contemplated against the Defendants, not any "third parties." (Davidian Aff. II, Ex. 38; *id.*, Ex. 15, at PWP0050604.) PWP never threatened its own clients with litigation.

Thus, the undisputed record dooms Defendants' tortious interference claim. And even if Defendants had accurately characterized the facts, the law would doom their claim.

First, as shown above, the ***only*** "inaccuracy" that Defendants manufacture is Steel's testimony regarding the precise timing of Kramer forming Ducera. Such a minor inaccuracy is insufficient to render this statement actionable. *Obi v. Amoa*, 63 N.Y.S.3d 208, 216 (N.Y. Sup. Ct. 2017) ("'[S]ubstantial truth' is all that is required" for statement to be inactionable; "minor

inaccuracies are to be overlooked." (citation omitted)). No evidence shows that "PWP falsely told" anyone that if the Managing Directors resigned, they would not be able to work with Defendants, nor that "PWP falsely told" any of its clients that they were prohibited from working with Defendants. (Opp. 40-42); *see Denby v. Pace Univ.*, 294 A.D.2d 156, 157 (1st Dep't 2002) (dismissing tortious interference claim based on truthful statement). The Managing Directors' self-serving affidavits, "introduced solely in opposition to summary judgment," cannot create a material dispute. *Slates v. N.Y.C. Housing Auth.*, 79 A.D.3d 435, 436 (1st Dep't 2010). Even if they were admissible, any alleged false statements to the Managing Directors are not causally linked to any clients lost by Ducera. *See Vigoda v. DCA Prods. Plus*, 293 A.D.2d 265, 266-67 (1st Dep't 2002) ("'but for' causation" required for tortious interference).

Second, PWP's statements regarding its legal rights are inactionable, even if this Court ultimately determines that PWP may have "misconceive[d] what those rights are[.]" *Thur v. IPCO Corp.*, 173 A.D.2d 344, 345 (1st Dep't 1991) (quoting *Kaplan v. Helenhart Novelty Corp.*, 182 F.2d 311, 314 (2d Cir. 1950)).

Third, Defendants cannot show with "'reasonable certainty' that a contract would have been entered, but for" PWP's allegedly defamatory statements. *Penn Warranty Corp. v. DiGiovanni*, 10 Misc. 3d 998, 1006 (N.Y. Sup. Ct. 2005). As shown above, each statement from a client that hired someone other than one of the Individual Defendants (Opp. 43) did so while the Individual Defendants remained subject to their restrictive covenants. (*See* Defs.' 19a Resp. ¶¶16-17, 21). And the Managing Directors who (falsely) claimed PWP told them that they were prohibited from working with Defendants all became partners at Ducera. (*Id.* ¶152.)

Fourth, Defendants cannot show that, in making any of the statements above, PWP acted out of "malice" "or fraudulent or illegal means" rather than "to protect an economic interest."

Foster, 87 N.Y.2d at 750-51. Thus, even if PWP made these statements "with an absence of good faith," they remain "justified by economic considerations," including protecting PWP's business, and are thus inactionable. *Id.* at 751. Defendants' extraordinary claim that PWP "was happy to lose clients so long as they did not go to Defendants" distorts their cited evidence, all of which discuss statements from February 2015, when the Individual Defendants ***remained employed by PWP***. (Davidian Aff. II, Exs. 36 ¶3, 38, 40.)

3. PWP Is Entitled to Dismissal of Kramer's Fiduciary Duty Counterclaim (Counterclaim VIII).[13]

Defendants' strawman argument that simply having the "sole discretion" to act does not remove ***all*** fiduciary duties (Opp. 38-39) ignores the point: By giving PWP the "sole and absolute discretion" to terminate Kramer, the PWP Agreements overrode any fiduciary duty PWP otherwise may have had regarding for-Cause terminations. (Defs.' 19a Resp. ¶25.) In deciding whether to terminate Kramer, the PWP Agreements made clear that PWP had "no duty or obligation to give any consideration to any interest of or factors affecting the Partnership, the Partners or any other Person." (*Id.*) Defendants cannot create a fiduciary obligation inconsistent with PWP's contractual right. *See Norton v. K-Sea Transp. Partners L.P.*, 67 A.3d 354, 362 (Del. 2013) (partnership agreement eliminated General Partner's fiduciary duties regarding merger approval where it had "sole discretion" to "consent to a merger"); *Related Westpac LLC v. JER Snowmass LLC*, No. C.A. 5001-VCS, 2010 WL 2929708, at *8 (Del. Ch. July 23, 2010) ("When a fiduciary duty claim is plainly inconsistent with the contractual bargain struck by parties to an ... alternative entity agreement, the fiduciary duty claim must fall[.]"). Because PWP had a contractual right to

[13] The PWP Motion inadvertently refers to this counterclaim as Count X. (*See* PWP Mot. § II.4.)

terminate Kramer for Cause, PWP could not have breached a fiduciary duty to Kramer ***even if*** Kramer's termination was "pretext[ual]" (which it was not). (Opp. 38).

Attempting to jury-rig a claim on something other than his termination, Kramer cites "abusive behavior by Weinberg and Perella," allegedly "designed to induce Kramer to (i) resign or (ii) engage in acts that [PWP] could use as a pretext to terminate him for 'Cause'[.]" (Opp. 38.) Yet the evidence on which Kramer relies shows only that PWP consistently sought to keep Kramer at PWP as a business "producer." (Pls.' 19a Resp. ¶44; *see id.* ¶¶48-49, 54, 56.) The supposed "facts" on which Kramer relies fare no better:

Kramer Allegation (Opp. 38)	Evidence
He was "strip[ped]" of "all management authority and leadership roles"	Kramer only cites his own self-serving testimony to claim that he was removed as Head of Restructuring, but contemporaneous documents show he ran the group, and remained a member of the management committee, until his termination. (Pls.' 19a Resp. ¶¶45, 52.) While Kramer held other leadership roles, these were not roles that he was hired to assume but rotating positions at PWP. (*Id.* ¶50.)
PWP "falsely advis[ed] 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"	Kramer provides no evidence that the two quoted statements are false or that PWP wanted Kramer to leave. Internal PWP emails show PWP's continued efforts to work with Kramer. (Pls.' 19a Resp. ¶¶44, 48-49, 54, 56.)
PWP "undermin[ed] Kramer's influence by offering his job to his subordinates while he was still a partner at PWP"	This distorts the timeline. While Kramer disputes that he resigned on February 10, he admits he met with Weinberg on that date and discussed leaving PWP. (Defs.' 19a Resp. ¶99.) Only after that discussion, did PWP offer Slonecker the role that Kramer intended to vacate. (Pls.' 19a¶¶101-03.)

CONCLUSION

For the reasons above, and those in the PWP Motion, PWP respectfully requests that the Court grant its Motion for Summary Judgment.

Dated: March 20, 2020
New York, New York

/s/ Christopher D. Belelieu
Jonathan D. Schiller
Christopher D. Belelieu
BOIES SCHILLER FLEXNER LLP
55 Hudson Yards
New York, New York 10001
Telephone: (212) 446-2300

Attorneys for Plaintiffs and Counterclaim-Defendants Perella Weinberg Partners LLC, PWP MC LP, PWP Equity I LP, and Perella Weinberg Partners Group LP, and Third-Party Cross-claim Defendants Joseph R. Perella, Peter A. Weinberg, and Kevin M. Cofsky

CERTIFICATION OF COUNSEL

I hereby state, pursuant to Rule 17 of the Commercial Division Rules, that the foregoing Brief was prepared on a computer using Microsoft Word. Pursuant to the word count system in Microsoft Word, the total number of words in the Brief, excluding the caption, table of contents, table of authorities, signature block, and this certification is 8,400.

Dated: March 20, 2020
New York, New York

/s/ Christopher D. Belelieu
Christopher D. Belelieu