SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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RICHARD D. SEGAL,

Plaintiff,

v.

RETHINK CAPITAL PARTNERS, INC., DOUGLAS F. RAY, JONATHAN L. WINER, MICHAEL WALDEN, SHAK CHOWDHURY, and ANDERSON TAX, LLC,

Defendants.

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Index No.: 74512/2024

Motion Seq. No. 1

DEFENDANT ANDERSEN TAX LLC'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S COMPLAINT

YANKWITT LLP

Russell M. Yankwitt
Jonathan Ohring
140 Grand Street, Suite 705
White Plains, NY 10601
Tel.: (914) 686-1500
Fax: (914) 487-5000
russell@yankwitt.com
jonathan@yankwitt.com

Attorneys for Defendant Andersen Tax LLC

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Defendant Andersen Tax LLC ("Andersen") respectfully submits this memorandum of law in support of its motion to dismiss the complaint (the "Complaint") filed by plaintiff Richard D. Segal ("Plaintiff") pursuant to CPLR 3211(a)(1) and (a)(7).[1]

PRELIMINARY STATEMENT

This action arises from an intra-partnership dispute between Plaintiff and his former private equity firm, Rethink, regarding the valuation of his membership interest. To assist with valuing his interest, Rethink engaged Andersen pursuant to a written agreement (the "Engagement Agreement" or "EA") to perform valuation services and prepare a written report (the "Valuation Report"). The Engagement Agreement—which is solely between Rethink and Andersen, and which does not mention Plaintiff by name—contains numerous provisions making clear that Andersen's services were solely for the benefit of Rethink and expressly stating that no third parties (*i.e.*, Plaintiff) have any rights thereunder.

After Andersen performed its services and prepared the Valuation Report, which valued Plaintiff's membership interest at $4.74 million, Rethink sought to buy out Plaintiff's interest at that value. Plaintiff disputed the valuation and filed the Complaint, alleging that the majority members of Rethink (the "RCP Defendants") engaged in a "scheme" to "oust Plaintiff and acquire his membership interest at an artificially depressed value by manipulating the buy-out procedure" in Rethink's Operating Agreement. Plaintiff alleges that the RCP Defendants "secretly created and gave Andersen all of the inputs for the valuation" and excluded him from the valuation process, thereby "unethically influenc[ing]" Andersen to undervalue his interest.

[1] Capitalized terms not otherwise defined herein have the meanings ascribed to them in the Complaint. In addition, to avoid confusion, Andersen notes that Plaintiff misspelled Andersen's name as "Anderson" in the caption of the Complaint. The correct spelling is set forth herein.

Even though this dispute, as Plaintiff's counsel acknowledged at the preliminary conference with the Court, "just comes down to a valuation dispute between the partners,"[2] Plaintiff has dragged in Andersen in an attempt to obtain leverage over the RCP Defendants. For the reasons set forth below, however, the Complaint fails to state any claims against Andersen, and Andersen should be dismissed from the case entirely.

First, Plaintiff's breach of contract claim against Andersen (Count VII) must be dismissed as a matter of law because Plaintiff is not a party to the Engagement Agreement, and Plaintiff's assertion that he is a third-party beneficiary is contradicted and precluded by the unambiguous terms of the Engagement Agreement.

Second, Plaintiff's claim that Andersen aided and abetted breaches of fiduciary duty by the RCP Defendants (Count IV) fails because Plaintiff does not allege, as he must, that Andersen had actual knowledge of any breach. Moreover, under well-settled law, Plaintiff cannot allege that Andersen substantially assisted in any breach where it is alleged simply to have provided the professional services requested by its client.

Third, Plaintiff's civil conspiracy claim against Andersen (Count V) must be dismissed as there is no independent cause of action for conspiracy under New York law, and Plaintiff fails to allege any of the elements of the underlying tort of fraud. Plaintiff's claim also fails as a matter of law because he fails to allege any facts showing that Andersen conspired with the RCP Defendants to defraud him.

Fourth, the declaratory judgment claim (Count VIII), which seeks a declaration that Andersen's valuation is "invalid," must be dismissed. It does not involve a justiciable controversy for which a declaration of rights will have any practical effect because Plaintiff has no ability to

[2] *See* Transcript of Jan. 6, 2025 Conf. at 5:24-25 (attached as Exhibit 1 to the Affirmation of Jonathan Ohring, submitted contemporaneously herewith).

force Andersen to issue a new valuation. Moreover, Plaintiff has an adequate remedy at law—namely, money damages—if he is able to establish his claims against the other Defendants.

Finally, and in the alternative, to the extent Plaintiff seeks to pursue any rights as a third-party beneficiary (rights which he does not have), his claims must be dismissed because the Engagement Agreement requires any proceeding arising out of or relating to the Agreement or the work performed by Andersen to be brought in Delaware.

BACKGROUND[3]

A. The Parties.

Rethink (also referred to herein as the "Company"), formerly known as Seavest Investment Group, LLC, is a limited liability company with a principal place of business in White Plains, New York. (Compl. ¶¶ 2, 19.) Rethink is an investment adviser to private funds registered with the Securities and Exchange Commission. (*Id.* ¶ 2.)

Plaintiff is an individual who founded Rethink in 1981. (*Id.* ¶ 17.) From Rethink's inception until April 2022, Plaintiff served as Chairman of the Board and Chief/Co-Chief Executive Officer and held a 40.9091% membership interest. (*Id.*)

Defendants Ray, Winer, and Walden are officers of Rethink who also hold membership interests therein. (*Id.* ¶¶ 20-22.) Defendant Chowdhury is Rethink's Chief Financial Officer. (*Id.* ¶ 23.)

[3] While Andersen vigorously disputes the veracity of the Complaint, it accepts the Complaint's factual allegations as true solely for purposes of this motion, as required at this stage. In ruling on this motion, the Court may consider the Engagement Agreement and any other relevant materials. *See* Siegel, N.Y. Prac. § 257 (6th ed.) ("Pleadings, affidavits, depositions, documentary proof, admissions, letters, and any other papers or proof having an evidentiary impact in the particular situation may generally be considered on any CPLR 3211 motion regardless of its ground.").

Defendant Rethink Capital Partners, Inc. (the "Manager") is the non-member manager of Rethink. (*Id.* ¶ 24.) Ray, Winer, and Walden are the members and managers of the Manager. (*Id.* ¶ 25.)

Andersen is a Delaware limited liability company. (*Id.* ¶ 26.) Andersen is a firm that provides tax, valuation, financial advisory and consulting services to individuals and corporate clients throughout the United States and internationally.

B. Plaintiff's Separation from Rethink.

In early 2022, the RCP Defendants allegedly pressured Plaintiff to resign as CEO. (*Id.* ¶¶ 52-55.) On April 5, 2022 (the "Separation Effective Date"), Plaintiff entered into a Separation and Release Agreement (the "Separation Agreement") with Rethink, Ray, Walden, and Winer, pursuant to which Plaintiff resigned from his management positions with the Company as of that date. (*Id.* ¶¶ 56-57.)

Under the Separation Agreement, for two years following the Separation Effective Date, Plaintiff held the title of "Executive Director" with the Company (the "Executive Director Period"). (*Id.* ¶ 58.) The Executive Director Period concluded on April 15, 2024. (*Id.* ¶ 60.)

The Separation Agreement further provided that, no later than six months after the expiration of the Executive Director Period (the "Withdrawal Date"), Plaintiff was to resign and withdraw as a Class A member of the Company, and the Company was to purchase his membership interest in accordance with Section 10.6 of the Company's Operating Agreement. (*Id.* ¶ 61.) The Withdrawal Date was October 15, 2024. (*Id.* ¶ 62.)

Section 10.6 of the Operating Agreement provides that the Company shall purchase the membership of a Class A member upon his withdrawal from the Company (the "Purchase Event"), and that the purchase price shall be "the fair value of the Affected Class A membership interest immediately following the Purchase Event as determined by an independent valuation expert who

is experienced in valuing companies such as the Company who is mutually agreed upon by the Manager and the selling Class A member. Such valuation expert shall be directed by the Manager and selling Class A Member to promptly prepare a written report of his determination." (*Id.* ¶¶ 63-64 (quoting Operating Agreement § 10.6(c)).)

C. Andersen's Retention and the Engagement Agreement.

In July 2024, Rethink retained Andersen "to provide valuation services related to Rethink Capital Partners, LLC" by entering into the Engagement Agreement. (EA, p.1.; *see also* Compl. ¶ 65.)[4] The Engagement Agreement consists of a Job Arrangement Letter ("JAL"), including a "Statement of Limiting Conditions," and Andersen's "Engagement Terms" attached to the JAL. (EA, Engagement Terms, p.1.) The JAL was directed to Chowdhury and was signed by Ray on Rethink's behalf, and expressly defines "the Client" as Rethink Capital Partners, LLC. (*See* EA, pp. 1, 6.) The Engagement Agreement was not addressed to Plaintiff and does not reference him anywhere by name.

The Engagement Agreement states that "[t]he purpose of [Andersen's] valuation analysis is to estimate the fair market value of a 40.9091 percent Class A Membership Interest (the 'Subject Interest') in the Company." (EA, p.1; *see also id.* at p.2 ("the standard of value to be utilized for the equity analysis is fair market value").) It further provides that "[t]he final product resulting from our Work (as defined in the Engagement Terms) provided under this Agreement will be a comprehensive valuation report (the 'Report'). We understand that the Report is to be used for business planning purposes in conjunction with the withdrawal of a Class A Member as outlined in Section 10.6 of the [Operating Agreement]. The date of value to be utilized will be as of April

[4] Despite referring to the Engagement Agreement, Plaintiff did not attach it to his Complaint. The Engagement Agreement is attached as Exhibit A to the Affirmation of William Toce, submitted contemporaneously herewith.

15, 2024 (the 'Valuation Date')." (*Id.* at p.1.) The Engagement Agreement provides that Andersen is entitled to rely on all information provided by Rethink and its representatives, and that its conclusions are dependent thereon.[5] It further instructed that Andersen was not performing "an examination, review, or compilation in accordance with standards prescribed by the American Institute of Certified Public Accountants." (EA, p.7, ¶ 3.)

The Engagement Agreement makes clear that the Valuation Report was prepared solely for the benefit of Andersen's client, Rethink, for its business planning purposes, that Andersen itself had no authority to make purchase or sale recommendations, and that no third parties were permitted to rely on the Valuation Report:

- "As noted above, we understand that the Report will be used solely for business planning purposes. We have not been engaged to make specific purchase or sale recommendations. The Report will be designed to provide information that will allow management to make an informed decision. As our Report is for Client's purposes only and no third parties may rely upon it, any additional parties that the Client wishes to have access to the Report must enter into a separate contractual relationship with Andersen." (EA, p.3.)

- "[T]he Work is only for the Client and no third party is an intended or implied third party beneficiary under this Agreement, nor is it entitled to have access to, rely on, or make any use of the Work. Any intent to benefit any third party is specifically disclaimed." (EA, Engagement Terms, p. 3, "No Third Party Rights.")

- "[N]o third party rights are created under this Agreement[.]" (*Id.*, p.3, "Affiliates.")

- "Client's management shall be solely responsible for applying independent business judgment with respect to Andersen's Work, including decisions on

[5] *See* EA, p.3 ("During the course of preparing the Report, Andersen will rely on financial and other information as provided by Client or obtained from private and public sources we believe to be reliable, and our conclusions will be dependent on such information being complete and accurate in all material respects."); EA, p.7, ¶ 2 (Andersen "has relied upon information furnished by others, which is believed to be reliable. We have not independently verified the accuracy or completeness of the information."); *id.* ¶ 3 (similar); EA, Engagement Terms, p.1 (Andersen "shall be entitled to rely on all information, decisions, and approvals provided by Client or Client's advisors, consultants, employees, or legal counsel (collectively, 'Client Agents') as reliable, accurate, complete, and current. . . . Client shall not rely on any Work it believes or has reason to believe is based on incorrect or incomplete information that has been provided to Andersen by Client or Client Agents.").

implementation or other course(s) of action, and shall be solely and exclusively responsible for those decisions." (*Id.*, p.1.)

- "The Report has been prepared solely for the purpose stated, and should not be used for any other purpose or by any other person / party than to or for whom it is addressed and prepared." (EA, p.7, ¶ 5.)

The Engagement Agreement provides that Andersen "is not required to give further consultation . . . with reference to the Subject Asset(s) in question or to update any report, recommendation, analysis, conclusion, or other document related to our services, unless additional arrangements are made." (EA, p.7, ¶ 7; *see also* EA, Engagement Terms, p.2 ("It is understood that unless Client and Andersen agree otherwise, in writing, Andersen shall have no responsibility to update the Work after its completion.").)

The Engagement Agreement further provides that "any suit, action or proceeding arising out of or relating to th[e] Agreement, a JAL or the Work will be brought solely in the state or federal courts of the State of Delaware," that the parties "consent[ed] to the exclusive jurisdiction of" such courts, and that they "waive[d] any objection" to such venue. (EA, Engagement Terms, p.3.)

D. Andersen's Valuation Report.

On October 15, 2024, Andersen issued the Valuation Report, which stated that the fair market value of Plaintiff's membership interest was $4.74 million as of April 15, 2024. (Compl. ¶¶ 69-70.) Consistent with the Engagement Agreement, the Valuation Report stated that Andersen "relied upon information furnished by others, which is believed to be reliable[,]" and that Andersen did not "independently verif[y] the accuracy or completeness of the information." (*Id.* ¶ 71; *see also id.* ¶¶ 72-73.)

Plaintiff alleges that the RCP Defendants excluded him from all communications with Andersen relating to the preparation of the Valuation Report even though he was "entitled to

participate in conversations and document sharing with Andersen by virtue of his then-membership." (Compl. ¶ 66; *see also* *id.* ¶ 68.) Plaintiff alleges that, because Andersen took direction solely from Rethink and its management, Andersen "was not an independent or objective valuation expert" and therefore failed to comply with IRS Business Valuation Guidelines and the Association of International Professional Certified Accountants Code. (*Id.* ¶¶ 82-84.)

Plaintiff also alleges that the projections and forecasts provided to Andersen by Rethink's management were "not conceivably reasonable or realistic" (*id.* ¶ 76), and that there were "defects" in the income and market approaches considered by Andersen (*id.* ¶¶ 79-80). Plaintiff further alleges that the Valuation Report failed to account for carried interest, and that Andersen allegedly improperly calculated the value of his membership interest using "fair market value" as of April 15, 2024 (as set forth in the Engagement Agreement), rather than using "fair value" as of October 16, 2024 (as supposedly required by the Operating Agreement). (*Id.* ¶¶ 81, 85.) According to Plaintiff, a "proper" valuation would value his interest at "over $20,000,000." (*Id.* ¶¶ 3, 15.)

Based on Andersen's valuation, the RCP Defendants claimed Plaintiff's membership interest was worth $4.74 million and made a first installment payment based on that value, which Plaintiff rejected. (*Id.* ¶¶ 89, 91-92.) The RCP Defendants continue to claim that "the Valuation Report is valid" and Plaintiff is bound by it. (*Id.* ¶ 93.)

E. The Lawsuit.

On November 4, 2024, Plaintiff filed the Complaint. The Complaint asserts claims against Ray, Winer, Walden and the Manager for allegedly breaching the Operating Agreement and the implied covenant of good faith and fair dealing therein, and for allegedly breaching their fiduciary duties to Plaintiff. (Compl. ¶¶ 94-124 (Counts I, II, and III).) The Complaint also asserts a claim against Andersen and Chowdhury for aiding and abetting breach of fiduciary duty (*id.* ¶¶ 125-29 (Count IV)), and against all Defendants for civil conspiracy (*id.* ¶¶ 130-44 (Count V)). In addition,

the Complaint asserts a breach of contract claim against Andersen, on the theory that Plaintiff is an intended third-party beneficiary of the Engagement Agreement. (*Id.* ¶¶ 145-52 (Count VII)). Plaintiff also seeks a declaratory judgment against all Defendants that "Andersen's valuation of the Company is invalid because the valuation does not satisfy the requirements of the Operating Agreement." (*Id.* ¶¶ 153-57 (Count VIII).)[6]

On January 6, 2025, the Court held a preliminary conference and a pre-motion conference on the instant motion, at which the Court set a briefing schedule and stayed discovery as to Andersen.

LEGAL STANDARDS

"A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the pleading fails to state a cause of action." CPLR 3211(a)(7). "Dismissal . . . is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery." *Connaughton v. Chipotle Mexican Grill, Inc.*, 29 N.Y.3d 137, 142 (2017).[7] "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009).

In addition, heightened pleading standards apply to all causes of action "based upon fraud, misrepresentation, mistake and willful default[,]" requiring that the "circumstances constituting the wrong shall be stated in detail." CPLR 3016(b). Thus, the Complaint must be dismissed unless

[6] The Complaint does not contain a Count VI.

[7] Unless otherwise indicated, internal citations, quotation marks, and alterations are omitted from case citations.

the claims are supported by "specific and detailed allegations of fact in the pleadings." *Callas v. Eisenberg*, 192 A.D.2d 349, 350 (1st Dep't 1993).

Moreover, under CPLR 3211(a)(1), dismissal is required "when documentary evidence utterly refutes the plaintiff's allegations, conclusively establishing a defense as a matter of law." *McMahan v. McMahan*, 131 A.D.3d 593, 594 (2d Dep't 2015).

ARGUMENT

I. PLAINTIFF'S BREACH OF CONTRACT CLAIM MUST BE DISMISSED.

Count VII asserts a breach of contract claim against Andersen based on alleged breaches of the Engagement Agreement. (Compl. ¶¶ 145-52.) Plaintiff acknowledges that he is not a party to the Engagement Agreement, but claims he is an intended third-party beneficiary. (*Id.* ¶¶ 146, 150). Plaintiff is wrong.

As an initial matter, in his response to Andersen's pre-motion letter (NYSCEF Doc. No. 25), Plaintiff argues that Delaware law governs this issue, apparently due to the Delaware choice-of-law provision in the Engagement Agreement—while at the same time ignoring the forum selection provision requiring any disputes relating to the Engagement Agreement to be brought in Delaware. (*See infra*, Section V.) But whether New York or Delaware law governs Plaintiff's rights (or lack thereof), the result is the same: Plaintiff is not a third-party beneficiary of the Engagement Agreement and cannot assert a claim thereunder.

Under New York law, to assert rights as a third-party beneficiary, a plaintiff must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [his] benefit and (3) that the benefit to [him] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [him] if the benefit is lost." *Mendel v. Henry Phipps Plaza W., Inc.*, 6 N.Y.3d 783, 786 (2006). To plead a third-party beneficiary claim under Delaware law, "(1) the contracting parties must have intended

that the third party beneficiary benefit from the contract, (2) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (3) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract." *Madison Realty Partners 7, LLC v. Ag ISA, LLC*, 2001 WL 406268, at *5 (Del. Ch. Apr. 17, 2001).

Critically, both New York and Delaware law require that intent to benefit the third party be shown unambiguously on the face of the contract. *See, e.g.*, *LaSalle Nat. Bank v. Ernst & Young LLP*, 729 N.Y.S.2d 671, 676 (1st Dep't 2001) ("[T]he parties' intent to benefit the third party must be apparent from the face of the contract. Absent clear contractual language evincing such intent, New York courts have demonstrated a reluctance to [infer] such an intent."); *Bromwich v. Hanby*, 2010 WL 8250796, at *2 (Del. Super. Ct. July 1, 2010) ("the contract language must clearly contemplate" the alleged third-party beneficiary). Because the Engagement Agreement does not evince—and in fact disclaims—any intent to benefit third parties, Plaintiff's third-party beneficiary claim fails as a matter of law.[8]

Not only does the Engagement Agreement lack any language showing an intent to benefit Plaintiff, but it contains numerous provisions, including a section titled "No Third Party Rights," making clear that the Valuation Report is intended solely for the benefit of Andersen's client, Rethink, and that the Engagement Agreement creates no rights in any third parties. (*See* EA, Engagement Terms, p. 3, "No Third Party Rights" ("[T]he Work is only for the Client and no third party is an intended or implied third party beneficiary under this Agreement, nor is it entitled to have access to, rely on, or make any use of the Work. Any intent to benefit any third party is

[8] To the extent New York law governs, the claim fails for the additional reason that the Engagement Agreement created no duty to compensate Plaintiff if the benefit of the contract was lost (*i.e.*, Andersen failed to provide the valuation report). *See Mendel*, 6 N.Y.3d at 786. To the extent Delaware law governs, the claim also fails because Plaintiff does not (and cannot) allege that the Engagement Agreement was intended as a gift or in satisfaction of a pre-existing obligation. *See Madison Realty Partners*, 2001 WL 406268, at *5.

specifically disclaimed."); *id.*, p.3, "Affiliates" ("no third party rights are created under this Agreement"); EA, p.3 ("As our Report is for Client's purposes only and no third parties may rely upon it, any additional parties that the Client wishes to have access to the Report must enter into a separate contractual relationship with Andersen."); EA, p.7, ¶ 5 ("The Report has been prepared solely for the purpose stated, and should not be used for any other purpose or by any other person / party than to or for whom it is addressed and prepared.").) Such provisions are routinely enforced in New York and Delaware. *See, e.g.*, *Baker v. Andover Assocs. Mgmt. Corp.*, 2009 WL 7400085, at *23 (Sup. Ct. Westchester Cnty. Nov. 30, 2009) ("[W]here a provision in the contract expressly negates enforcement by third-parties, that provision is controlling."); *Kronenberg v. Katz*, 872 A.2d 568, 605 n.74 (Del. Ch. 2004) ("[P]arties may . . . expressly provide that a nonparty shall not have any rights as a third-party beneficiary.").[9]

As the Engagement Agreement conclusively demonstrates that there was no intent to benefit Plaintiff, his third-party beneficiary claim must be dismissed. *See Edward B. Fitzpatrick, Jr. Constr. Corp. v. Suffolk Cnty.*, 525 N.Y.S.2d 863, 866 (2d Dep't 1988) (affirming dismissal of plaintiff's third-party beneficiary claim where contracts "contain[ed] clauses to the effect that no third-party rights accrued therefrom"); *Envolve Pharmacy Sols., Inc. v. Rite Aid Hdqtrs. Corp.*, 2021 WL 140919, at *10-11 (Del. Super. Ct. Jan. 15, 2021) (dismissing third-party beneficiary claim where contract expressly disclaimed any third-party beneficiary rights).[10]

[9] In his response to Andersen's pre-motion letter, Plaintiff argued that "Delaware courts disregard a general no-third-party-beneficiaries provision" where the contract "includes more specific language demonstrating an intent to benefit a third party." (NYSCEF Doc. No. 25.) However, the Engagement Agreement contains no such language and, in fact, makes clear that there is no intent to benefit any third parties. *See supra*.

[10] To the extent Plaintiff is regarded as a third-party beneficiary of the Engagement Agreement, for the reasons discussed *infra*, Section V, all of his claims must be dismissed because the Engagement Agreement would require his claims to be brought in Delaware.

II. PLAINTIFF'S AIDING AND ABETTING CLAIM MUST BE DISMISSED.

Plaintiff's claim against Andersen for allegedly aiding and abetting breaches of fiduciary duty by the RCP Defendants (Compl. ¶¶ 125-29 (Count IV)) fails under CPLR 3211(a)(7). To state a claim for aiding and abetting breach of fiduciary duty, a plaintiff must allege: "(1) a breach by a fiduciary of obligations to another; (2) that the defendant knowingly induced or participated in the breach; and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003). In alleging that a defendant "knowingly induced or participated in the breach," a plaintiff "must not only allege the aider and abettor's actual knowledge [of the primary breach] but he . . . must also allege substantial assistance in the breach." *Baker*, 2009 WL 7400085, at *24.

Assuming *arguendo* that Plaintiff could establish a breach of fiduciary duty by the RCP Defendants and damages resulting therefrom, his aiding and abetting claim fails because he does not allege Andersen's (i) actual knowledge of, or (ii) substantial assistance in, any breach.

First, as to actual knowledge, "[a] plaintiff may not merely rely on conclusory and sparse allegations that the aider or abettor 'knew' . . . about the primary breach of fiduciary duty." *Bullmore v. Ernst & Young Cayman Islands*, 846 N.Y.S.2d 145, 149 (1st Dep't 2007). Moreover, "[c]onstructive knowledge of the breach of fiduciary duty by another is legally insufficient to impose aiding and abetting liability." *Kaufman*, 307 A.D.2d at 125. "[S]ince a claim of aiding and abetting a breach of fiduciary duty must be supported by an allegation that the defendant had actual knowledge of the breach of duty, as opposed to mere constructive knowledge, an allegation that the defendant 'knew or should have known' about the breach of duty is insufficient to support such a claim." *Baron v. Galasso*, 921 N.Y.S.2d 100, 104 (2d Dep't 2011).

Here, the Complaint contains the sole, conclusory allegation that "Andersen, at all relevant times, had knowledge of the RCP Defendants' fiduciary duties and breach of fiduciary duties to

Plaintiff." (Compl. ¶ 126.) This is exactly the sort of allegation that courts have held is insufficient to state an aiding and abetting claim. *See Bullmore*, 846 N.Y.S.2d at 148-49 (affirming dismissal of aiding and abetting claim lacking factual allegations as to actual knowledge of breach). Moreover, Plaintiff's allegation that "any appraiser would have known" of the alleged breaches of fiduciary duty (Compl. ¶ 127) likewise fails because such constructive knowledge is insufficient as a matter of law. *See Baron*, 921 N.Y.S.2d at 104.

Second, the Complaint fails to allege facts showing that Andersen substantially assisted in any breach of fiduciary duty. "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *Kaufman*, 307 A.D.2d at 126.[11] Moreover, "[a]llegations that the purported aider and abettor merely performed ordinary business functions are insufficient to establish substantial assistance." *Karipaparambil v. Polus*, 145 N.Y.S.3d 796, 796-97 (1st Dep't 2021); *see also Binn v. Muchnick, Golieb & Golieb, P.C.*, 121 N.Y.S.3d 13, 16 (1st Dep't 2020) (counsel for investor did not substantially assist in alleged breach of fiduciary duty by drafting documents to the detriment of majority interest holders, as drafting such documents was routine legal services on client's behalf).

Here, the Complaint alleges that "Chowdhury and Andersen" aided and abetted the RCP Defendants' alleged breaches of fiduciary duty by "helping the RCP Defendants create inaccurate and misleading projections" and "issuing a Valuation Report that lowered the value of Plaintiff's membership interest[.]" (Compl. ¶ 127.) Plaintiff's conclusory allegations, based on his self-serving beliefs as to the value of his membership interest, fail to plead that Andersen substantially

[11] "[T]he mere inaction of an alleged aider or abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff[,]" *Kaufman*, 307 A.D.2d at 126, which Plaintiff does not (and cannot) allege here.

assisted in the RCP Defendants' alleged breaches.[12] *See Karipaparambil*, 145 N.Y.S.3d at 796-97 (affirming dismissal of aiding and abetting claim based on conclusory allegations of substantial assistance).

In addition, by the Complaint's own allegations, Andersen acted pursuant to its retention by Rethink under the Engagement Agreement to provide routine valuation services of the kind for which it is regularly engaged. Such allegations cannot amount to substantial assistance in the RCP Defendants' alleged breaches of fiduciary duty. *See Binn*, 121 N.Y.S.3d at 16; *Learning Annex, L.P. v. Blank Rome LLP*, 966 N.Y.S.2d 78, 79 (1st Dep't 2013) (allegation that defendants "provided routine legal services to the alleged fraudsters is likewise insufficient to establish a claim for aiding and abetting fraud"). Moreover, the Engagement Agreement makes clear that Andersen was not "engaged to make specific purchase or sale recommendations[,]" that the Valuation Report was "designed to provide information that [would] allow management to make an informed decision[,]" and that Rethink's management was "solely responsible for applying independent business judgment with respect to Andersen's Work." (EA, p.3; EA, Engagement Terms, p.1.) These express limitations reinforce that Andersen's performance of its obligations cannot give rise to an aiding and abetting claim. *See Baker*, 2009 WL 7400085, at *24 (dismissing aiding and abetting claim against investment advisor in absence of allegations supporting substantial

[12] While Andersen disputes Plaintiff's allegation that Andersen "exclud[ed] Plaintiff from the valuation process" (Compl. ¶ 127), even if the allegation were accepted as true, it does not state any wrongdoing by Andersen. Plaintiff does not, and cannot, allege why Andersen was obligated to include Plaintiff in the valuation process, given that the Engagement Agreement, which was solely with Andersen's client Rethink, does not identify any such obligation. Similarly, Plaintiff alleges that Andersen "prepared a valuation report that blatantly failed to comply with the requirements of the Operating Agreement[,]" including by using "the wrong valuation standard and wrong valuation date" (*id.*), but there is nothing in the Engagement Agreement that required the valuation report to comply with the Operating Agreement or use the valuation standard or valuation date set forth therein. And, of course, Andersen is not a party to the Operating Agreement and has no obligations thereunder.

assistance, "especially in light of the provisions of the [c]onsulting [a]greement that extricated [defendant] from any involvement in the consultation or management of" the investment).

III. PLAINTIFF'S CIVIL CONSPIRACY CLAIM MUST BE DISMISSED.

Count V's claim against Andersen for civil conspiracy (Compl. ¶¶ 130-44) must also be dismissed. "A mere conspiracy to commit a tort is never of itself a cause of action." *Alexander & Alexander of N.Y., Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986). "Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Id.* Thus, to plead a claim of civil conspiracy, "the plaintiff must demonstrate the primary tort, plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Abacus Fed. Sav. Bank v. Lim*, 905 N.Y.S.2d 585, 588 (1st Dep't 2010). Here, Plaintiff fails to allege either a primary tort or the additional elements.

In his conspiracy claim, Plaintiff alleges that Defendants conspired with each other "to *defraud* Plaintiff and acquire his membership interest for a lower value." (Compl. ¶ 132 (emphasis added).) In turn, to plead fraud in support of a conspiracy claim, a plaintiff must allege "(1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance, and (5) damages." *B&H Flooring, LLC v. Folger*, 215 N.Y.S.3d 115, 119-120 (2d Dep't 2024). As a claim based upon fraud, the heightened pleading standard in CPLR 3016 applies, requiring "specific and detailed allegations of fact in the pleadings." *McMahan*, 131 A.D.3d at 594.[13]

[13] Plaintiff does not appear to allege that Andersen conspired with the RCP Defendants to commit an underlying tort of breach of fiduciary duty. (*See* Compl. ¶ 132 (alleging only that Andersen conspired to defraud Plaintiff).) Nor could he, as any such claim would fail as a matter of law. *See Nat. Organics, Inc.*

Plaintiff fails to allege facts supporting an underlying tort of fraud, let alone with the particularity required by CPLR 3016. Critically, he does not allege that he relied on any misrepresentation by any Defendant. To the contrary, he alleges that Rethink provided information to Andersen in connection with the preparation of the Valuation Report, and he, in turn, ***rejected*** the "validity" of the Valuation Report—the exact opposite of reliance. (*See* Compl. ¶¶ 91-92, 139-40 (alleging that Plaintiff rejected the first installment payment because the valuation of his interest was allegedly insufficient).) Accordingly, Plaintiff fails to plead a primary fraud claim and, so, his conspiracy claim fails as well. *See Philip S. Schwartzman, Inc. v. Pliskin, Rubano, Baum & Vitulli*, 187 N.Y.S.3d 702, 707 (2d Dep't 2023) ("[P]laintiffs have failed to state a cause of action alleging fraud, so they also failed to state a cause of action alleging civil conspiracy to commit fraud, since it stands or falls with the underlying tort.").

Plaintiff also fails to allege the additional elements showing that Andersen conspired with the RCP Defendants to commit any fraud. The only allegation as to Andersen's alleged involvement in the purported conspiracy is that "Andersen knowingly accepted . . . facially deficient representations" from the RCP Defendants "and looked the other way in the face of obvious omissions." (Compl. ¶ 135.) As with his aiding and abetting claim, Plaintiff's allegations of Andersen's supposed knowledge are entirely conclusory and unsupported by any facts, let alone particularized allegations satisfying CPLR 3016. And notwithstanding Plaintiff's allegation that Andersen ignored the RCP Defendants' "obvious omissions," Andersen owed no legal duties to Plaintiff. In any event, the Engagement Agreement states that Andersen "shall be entitled to rely on all information . . . provided by client or . . . Client's Agents as reliable, accurate, complete, and current" (EA, Engagement Terms, p.1), and Andersen had no duty to "independently verif[y]

v. Smith, 824 N.Y.S.2d 764 (Sup. Ct. Nassau Cnty. 2006) ("Clearly Nature's Way does not have a fiduciary duty to plaintiff and thus cannot commit conspiracy to breach same.").

the accuracy or completeness of the information" furnished to it by Rethink (EA, p.7, ¶ 2). *Cf. Transp. Workers Union of Am. Loc. 100 AFL-CIO v. Schwartz*, 794 N.Y.S.2d 308, 310 (1st Dep't 2005) (affirming dismissal of civil conspiracy claim against non-fiduciary defendant where "nothing more than knowing acquiescence was alleged").

IV. PLAINTIFF'S DECLARATORY JUDGMENT CLAIM MUST BE DISMISSED.

In Count VIII, Plaintiff asserts that "a bona fide, justiciable, and substantial controversy exists between Plaintiff and Defendants as to the validity of the Valuation Report" (Compl. ¶ 154), and he seeks a declaratory judgment that "Andersen's valuation of the Company is invalid because the valuation does not satisfy the requirements of the Operating Agreement" (*id* ¶ 155). The declaratory judgment claim must be dismissed as against Andersen for two reasons.

First, there is no justiciable controversy as to the "validity" of the Valuation Report (Compl. ¶ 154), at least as to Andersen. *See* CPLR 3001 ("The supreme court may render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy."). "A justiciable controversy is a real dispute between adverse parties, involving substantial legal interests, for which a declaration of rights will have some practical effect." *Downe v. Rothman*, 627 N.Y.S.2d 424, 425 (2d Dep't 1995). Here, the declaration sought by Plaintiff—that "Andersen's valuation of the Company is invalid" (Compl. ¶ 155)—does not involve a dispute between Plaintiff and Andersen, and it would have no practical effect: Even if he obtained the declaratory judgment he seeks, Plaintiff has no ability to force Andersen to prepare a new valuation. Only Rethink can seek a new report, and only then on additional agreed-upon terms. (*See* EA, p.7, ¶ 7 ("Our engagement team is not required to give further consultation . . . or to update any report, recommendation, analysis, conclusion, or other document related to our services, unless additional arrangements are made."); EA, Engagement Terms, p.2 ("It is understood that unless Client and Andersen agree otherwise, in writing, Andersen shall have no

responsibility to update the Work after its completion."). Thus, a declaratory judgment that the Valuation Report was "invalid" would not allow Plaintiff to take any further action against Andersen.

Second, "[P]laintiff may not seek a declaratory judgment when other remedies are available, such as a breach of contract action." *Singer Asset Fin. Co., LLC v. Melvin*, 33 A.D.3d 355, 358 (1st Dep't 2006); *see also Bartley v. Walentas*, 434 N.Y.S.2d 379, 381-82 (1st Dep't 1980) ("A declaratory judgment action is generally appropriate only when a conventional form of remedy is not available."). Notwithstanding his boilerplate assertion that he "has no adequate remedy at law for such harms and accordingly requires a remedy in the form of declaratory relief" (Compl. ¶ 156), Plaintiff expressly seeks a traditional remedy at law—damages for alleged breach of contract and other claims. There is no reason why monetary damages would not make him whole for the alleged undervaluation of his interest in Rethink. *See Bartley*, 434 N.Y.S.2d at 382 (declaratory judgment claim "is unnecessary where an action at law for damages will suffice").

V. ALTERNATIVELY, PLAINTIFF'S CLAIMS MUST BE BROUGHT IN DELAWARE.

As set forth *supra*, Section I, Plaintiff is not a third-party beneficiary of the Engagement Agreement. Even if he were, however, all of Plaintiff's claims against Andersen must be dismissed because the forum selection clause in the Engagement Agreement requires any suit to be brought in Delaware. *See Boss v. Am. Express Fin. Advisors, Inc.*, 6 N.Y.3d 242, 246 (2006) (affirming dismissal under CPLR 3211(a)(1) and (a)(7) where forum selection clause stated "unambiguously that any disputes are to be decided in the courts of Minnesota").

New York and Delaware law make clear that a non-signatory seeking to enforce a contract as a third-party beneficiary is bound by any forum selection clause in the contract. *See, e.g., Tatko Stone Prods., Inc. v. Davis-Giovinzazzo Constr. Co.*, 883 N.Y.S.2d 665, 666 (3d Dep't 2009) ("[I]n

seeking to enforce [a] bond as a third-party beneficiary of it, plaintiff . . . is bound by its forum selection provision."); *Javice v. JPMorgan Chase Bank, N.A.*, 2023 WL 4561017, at *2 n.2 (Del. Ch. July 13, 2023) ("[A] third-party beneficiary is bound by forum selection and other similar provisions when the third-party beneficiary seeks to enforce a right under the contract."). Indeed, "[a] court will not allow a third-party beneficiary to cherry-pick certain provisions of a contract which it finds advantageous in making its claim, while simultaneously discarding corresponding contractual obligations which it finds distasteful." *NAMA Hldgs., LLC v. Related World Mkt. Ctr., LLC*, 922 A.2d 417, 431 (Del. Ch. 2007).

Here, the forum selection clause in the Engagement Agreement provides that "any suit, action or proceeding arising out of or relating to th[e] Agreement, a JAL or the Work will be brought solely in the state or federal courts of the State of Delaware," and that such courts would be the "exclusive jurisdiction for any suit, action or proceeding relating to arising out of th[e] Agreement or the Work." (EA, Engagement Terms, p.3.) This language, which covers claims not only "arising out of" the Engagement Agreement, but also those "relating to th[e] Agreement, a JAL or the Work"—requires *all* of Plaintiff's claims against Andersen to be brought in Delaware, because they all clearly "relat[e] to" both the Engagement Agreement and the valuation services performed thereunder. *See Walker, Truesdell, Roth & Assocs., Inc. v. Globeop Fin. Servs. LLC*, 2013 WL 8597474, at *8 (Sup. Ct. N.Y. Cnty. May 27, 2013) (forum selection clause providing for Amsterdam court to hear all disputes "relating to this Contract" covered plaintiff's claims for breach of contract and related torts including fraud and aiding and abetting breach of fiduciary duty); *ASDC Holdings, LLC v. Richard J. Malouf 2008 All Smiles Grantor Retained Annuity Tr.*, 2011 WL 4552508, at *1, 7-8 (Del. Ch. Sept. 14, 2011) (forum selection clause applying to claims "arising under or relating to the transaction" was sufficiently broad to provide exclusive

jurisdiction over claims for, *inter alia*, fraud, fraud in the inducement, breach of fiduciary duty, and related conspiracy).

Accordingly, to the extent Plaintiff is permitted to invoke the status of a third-party beneficiary, all of his claims against Andersen must be dismissed because he is required to bring them in Delaware.

CONCLUSION

For the foregoing reasons, the Court should grant Andersen's motion to dismiss in its entirety, and dismiss Counts IV, V, VII, and VIII of the Complaint as against Andersen.

Dated: January 31, 2025
White Plains, New York

YANKWITT LLP

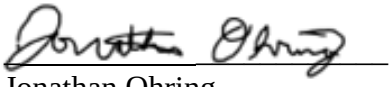
By: _Russell M. Yankwitt_____
Russell M. Yankwitt, Esq.
Jonathan Ohring, Esq.
140 Grand Street, Suite 705
White Plains, New York 10601
Tel: (914) 686-1500
Fax: (914) 487-5000

Attorneys for Defendant Andersen Tax, LLC

Certification Pursuant to Commercial Division Rule 17

I hereby certify that the foregoing Memorandum of Law complies with the word count limitation of Rule 17 of the Rules of the Commercial Division because it contains 6,745 words, excluding the caption, table of contents, table of authorities and signature block.

Dated: January 31, 2025



Jonathan Ohring