SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

RICHARD D. SEGAL, Plaintiff, v. RETHINK CAPITAL PARTNERS, INC., DOUGLAS F. RAY, JONATHAN L. WINER, MICHAEL WALDEN, SHAK CHOWDHURY, and ANDERSEN TAX LLC, Defendants.	Index No. 74512/2024 Hon. Linda S. Jamieson

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT ANDERSEN TAX LLC'S MOTION TO DISMISS THE COMPLAINT

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Plaintiff respectfully submits this memorandum of law in opposition to defendant Andersen's motion to dismiss the Complaint.[1] NYSCEF Nos. 46 ("Motion"), 47 ("Mem.")

PRELIMINARY STATEMENT

This action arises from an egregious scheme perpetuated by the majority members of Rethink, a $2.5 billion private equity firm, against Plaintiff, the minority member and holder of a 40.9% membership interest. Through dishonest conduct, the RCP Defendants attempted to acquire Plaintiff's membership interest at an artificially depressed price by manipulating the buy-out procedure in the Operating Agreement.

The Complaint alleges Andersen was a key player in the scheme to deprive Plaintiff of the fair value of his interest. *See* Compl., ¶¶ 5, 65. It alleges the RCP Defendants hired Andersen to produce a sham valuation report and Andersen knowingly participated in the scheme by, among other things, excluding carried interest and valuing only half the firm's profits, using the RCP Defendants' fabricated and fanciful cash flow projections, allowing the RCP Defendants to select comparable companies, manipulating valuation multiples, excluding Plaintiff from the valuation process, and depressing the value of the Company by using the wrong valuation standard and valuation date. *Id.*, ¶¶ 5, 6, 71, 74, & 84.[2]

Andersen's Motion does not deny these allegations. It could not given the content of its recently produced workpapers, which expose the illegitimacy of the appraisal. Instead, it improperly relies on materials outside the Complaint and asks the Court to draw inferences and make findings of fact in its favor. None of Andersen's arguments have merit.

[1] Capitalized terms not defined herein have the same meaning ascribed to them in the Complaint.

[2] For purposes of efficiency, Plaintiff sets forth only the specific factual allegations necessary to refute Andersen's arguments. Additional facts can be found in the Complaint and accompanying Declaration of Howard Schub ("Schub Decl.").

First, at the pleading stage, the Court cannot accept Andersen's argument that it did nothing wrong. It must accept the Complaint's allegations that Andersen knowingly worked with the other defendants to prepare a bogus valuation.

Second, Andersen's claim that the aiding and abetting and conspiracy claims are conclusory is makeweight. The Complaint alleges that Andersen knew from its review of the Operating Agreement, financial data, discussions with management and valuation experience that it was providing an improper valuation and explains how Andersen deviated from generally accepted valuation methodologies to artificially depress the valuation.

Third, Andersen's claim that Plaintiff cannot be a third-party beneficiary because he was not named in the contract is a red herring. The Engagement Letter states that the valuation is being done to value Plaintiff's "40.9091 percent Class A membership interest" and identifies him as the "holder of the Subject Interest." *See* NYSCEF No. 50, Toce Affirm'n, Ex. A, Engagement Letter, pg. 1.

Fourth, Andersen's claim that declaratory relief will "not have any practical effect" because Plaintiff cannot make Andersen perform a new valuation misses the point. Plaintiff is not seeking a new valuation from Andersen. It is seeking a declaration to settle the dispute between the parties as to the validity of the appraisal. Moreover, Andersen's claim that Plaintiff has an adequate remedy at law is premature and rings hollow in the face of its argument that Plaintiff has no viable claim for breach of contract.

Fifth, the Court is not required to dismiss the breach of contract claim, let alone all claims, against Andersen based on the forum selection clause in the Engagement Agreement. This Court has jurisdiction over the aiding and abetting, conspiracy and declaratory relief claims, which do not arise under the Engagement Agreement, and resolving the entire dispute in one action will

serve the interests of efficiency and avoid piecemeal litigation. Further, transferring one breach of contract claim to Delaware would impose a material hardship on Plaintiff and not prejudice Andersen, which has a New York office where its employees performed the valuation.

Finally, should the Court find merit in any of Andersen's arguments, Plaintiff should be granted leave to amend to cure any perceived pleading deficiencies.

ARGUMENT

I. LEGAL STANDARD

"On a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and accorded the benefit of every possible favorable inference." *Granada Condominium III Assn. v Palomino*, 78 A.D.3d 996 (2d Dep't 2010); *see* *Leon v Martinez*, 84 N.Y.2d 83, 87-88 (1994). "If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail." *Baker v Andover Assoc. Mgt. Corp.*, 30 Misc. 3d 1218(A) (Sup. Ct. 2009).

A CPLR 3211(a)(1) motion "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002); *see also* *Rodolico v Rubin & Licatesi, P.C.*, 114 A.D.3d 923, 924-925 (2d Dep't 2014). "The evidence submitted in support of such motion must be documentary or the motion must be denied." *Cives Corp. v George A. Fuller Co., Inc.*, 97 A.D.3d 713, 714 (2d Dep't 2012) (internal quotation marks omitted); *see* *Attias v Costiera*, 120 A.D.3d 1281 (2d Dep't 2014); *Fontanetta v John Doe 1*, 73 A.D.3d 78, 84 (2d Dep't 2010).

II. The Court Should Not Consider Andersen's Evidence on a Motion to Dismiss.

The Motion should be denied because it constitutes a premature motion for summary judgment. Disposition by summary dismissal under CPLR 3211 is premature if the complaint is sufficient on its face even where a motion is supported by affidavits. *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 634 (1976). Here, Andersen submits two affirmations and two exhibits—a conference transcript and engagement letter. Andersen MTD, p. 2, 3, 5-7; Toce Affirm'n, Ex. A; and NYSCEF No. 48, Ohring Affirm'n, Ex. 1. These materials do not support dismissal.

First, they are not integral to the Complaint and do not constitute documentary evidence. *See S & J Serv. Ctr., Inc. v Commerce Commercial Group, Inc.*, 178 A.D.3d 977, 977-78 (2d Dep't 2019) ("neither affidavits, deposition testimony nor letters" constitute documentary evidence); *Bianco v Law Offices of Yuri Prakhin*, 189 A.D.3d 1326, 1328 (2d Dep't 2020) (hearing transcripts do not constitute documentary evidence).

Second, they do not conclusively prove that Andersen is not a proper party to this dispute. In the transcript, Plaintiff's counsel explains, in a section not quoted by Andersen, that Andersen aided and abetted the Rethink Defendants' breach of fiduciary duty by improperly valuing half of Plaintiff's interest on the wrong date. *See* Ohring Affirm'n, Ex. 1, 1/6/2025 H'rg. Trans., at 4:23-5:20. As to the Engagement Letter, it is ambiguous as to the portions upon which Andersen seeks to rely. Indeed, Andersen's argument that the boilerplate third-party beneficiary disclaimer precludes Plaintiff's claim is belied by the fact that other portions of the letter specifically identify Plaintiff and acknowledge the express purpose of the engagement was to value Plaintiff's membership interest. This conflicting language does not conclusively prove that Plaintiff was not an intended beneficiary. As to Plaintiff's aiding and abetting and civil conspiracy claims, the

Engagement Letter does not prove anything about what Andersen knew or did after it was signed, and it bolsters Plaintiff's claims, as it demonstrates that Andersen knowingly agreed to provide a fair market valuation when Rethink's Operating Agreement required a fair valuation.

Third, the Court cannot consider materials outside the Complaint without considering other materials outside the Complaint and without converting the motion to a motion for summary judgment, which is not appropriate at this time given that discovery has just begun. *See* CPLR 3211(d); *Yu Chen v. KuPoint (USA) Corp.*, 160 A.D.3d 787 (2d Dep't 2018) (motion to dismiss properly denied where court did not convert motion into a summary judgment motion and the evidentiary submissions did not conclusively establish that plaintiff had no cause of action).

There is evidence, not submitted by Andersen, that strongly supports the claims. As to the allegation that Andersen improperly excluded the value of carried interest, the handwritten notes of an Andersen employee show that it was informed by defendant Chowdhury that Rethink "gets carried interest" but he told them not to include it. *See* Schub Decl., Exhibit 1 (Andersen Notes). Supporting the allegation that defendants excluded Plaintiff from the valuation process, an email from defendant Chowdhury to Andersen reveals his instruction that Andersen "deal directly with me only." *Id.* at, Exhibit 2 (S. Chowdury Email). Andersen's Valuation Report proves that it reviewed Rethink's Operating Agreement and knew it required a calculation of the "fair value of the interest" of a withdrawing member, not fair market value. *Id.* at Exhibit 3 (Valuation Report, relevant excerpts only). And an email from Plaintiff's son to Andersen proves Andersen knew Plaintiff was the intended beneficiary of the appraisal. *Id.* at Exhibit 4 (N. Segal Email).

It is premature and improper for the Court to consider Andersen's evidentiary submissions or the foregoing documents on a motion to dismiss without converting the Motion to a motion for summary judgment. But such a conversion is not appropriate where, as here, discovery has just

begun and facts necessary to oppose such a motion have not yet been disclosed by the defendants. *Id*. at ¶¶ 6-11.

III. The Complaint Properly Pleads a Claim for Aiding and Abetting a Breach of Fiduciary Duty.

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 the plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003)). A plaintiff must also allege substantial assistance in the breach. *Baker v Andover Assoc. Mgt. Corp.*, 30 Misc. 3d 1218(A) (Sup. Ct. 2009). "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." *Smallberg v Raich Ende Malter & Co., LLP*, 140 A.D.3d 942, 944 (2d Dep't 2016). The Complaint easily meets this standard.

The Complaint alleges Andersen knowingly participated in the Rethink Defendants breach of their fiduciary duties by colluding with the RCP Defendants and Chowdhury to generate a sham Valuation Report that artificially deflated the value of Plaintiff's membership interest in the Company. Despite knowing that its Valuation Report would be used to determine the purchase price of Plaintiff's membership interest, Andersen failed to provide a proper valuation in accordance with the Operating Agreement. Andersen was aware that the Operating Agreement and Plaintiff's Separation Agreement required an ***independent*** valuation of Plaintiff's interest on a ***fair value*** basis ***after*** Plaintiff withdrew from the company. *Id.*, ¶¶ 5, 6, and Ex. A (Operating Agreement, Article 10.6(c)). Yet, Andersen deliberately worked with the RCP Defendants to generate a ***non-independent*** valuation on a ***fair market value*** basis on a date ***before*** Plaintiff withdrew. *Id.*, ¶¶ 13-14, 81.

Andersen argues that the Complaint contains only one "conclusory allegation" that Andersen knew it was aiding and abetting a breach of fiduciary duty. This is not true. Andersen ignores that the cause of action incorporates the prior allegations of the Complaint as to how and why Andersen knew it was participating in a nefarious scheme to artificially depress the value of Plaintiff's membership interest.[3]

Andersen next argues that it could not have substantially assisted in any breach of fiduciary duty because it delivered an appraisal that complied with its Engagement Agreement. This argument is wrong. New York and Delaware courts[4] have repeatedly held that a third party may aid and abet a breach of fiduciary duty by, among other things, participating in an unreasonable valuation process.

Mesirov v. Enbridge Energy Co., 2018 WL 4182204, at *15 (Del. Ch. Aug. 29, 2018) is on point. There, the court held that a financial adviser tasked with providing a fairness opinion for a proposed transaction could be held liable for aiding and abetting by relying on one-sided data, failing to consider certain economic benefits of the transaction, ignoring and failing to consider prior comparable transactions—all while knowing that its valuation and fairness opinion would be used to justify the transaction. In that case, a plaintiff owner of limited partnership units alleged that a defendant financial advisor hired by the co-defendants aided and abetted a breach of fiduciary duty by using a manipulated valuation and ignoring certain data inputs in order to represent that the transaction at issue was fair from a financial point of view. The plaintiff alleged

[3] Andersen argues that the Complaint only alleges Andersen had constructive knowledge of the other defendants' breaches of fiduciary duty. Mem. at 14. That is not true. The Complaint alleges that Andersen knew of the scheme and knew, like any appraiser "would have known", that it was aiding and abetting a breach by using bogus projections and the wrong valuation standard and date to calculate the fair value of Plaintiff's interest. Compl., ¶ 127.

[4] Andersen cites New York and Delaware law in its brief. As to aiding and abetting, the pleading standard is the same.

that the defendant financial advisor refused to account for a comparable transaction involving a similar sale of the same assets; used only revenue, operating expense, and maintenance capital expenditure estimates provided by the seller; failed to perform valuations for certain classes of stock; and failed to incorporate valuation constraints or declining prospects typically associated with cost-of-service models into its analysis. *Id.* at 14. Further, the plaintiff alleged the defendant financial advisor was aware that the co-defendants would use the fairness opinion as a means to escape liability for breach of fiduciary duty following the closing of the transaction. *Id.* Rejecting the financial advisor's argument, like Andersen's here, that the complaint only alleged a disagreement with its valuation conclusion but no scienter, the Court found the plaintiff had sufficiently pleaded a viable claim for aiding and abetting a breach of fiduciary duty. *Id* at *16.

Similarly, in *Tiny 1, Ltd. v Samfet Marble Inc.*, 201 A.D.3d 423, 424 (1st Dep't 2022), the court affirmed that where a plaintiff pleads that a third party assisted in the breach of fiduciary duty by assisting with the reduction of a company's value, the claim for aiding and abetting survives a motion to dismiss. There, the potential purchasers of a company took advantage of the seller's owner—who was ill at the time—engaging in a scheme to acquire the company at a substantially reduced value. *Id.* The company's owner brought an aiding and abetting claim against a third party, who prepared and presented a falsified balance sheet that purportedly reduced the company's value by $9 million. *Id.* The court held that the "complaint therefore states a claim that by his conduct, [defendant] substantially assisted the primary violators in, at a minimum, devaluing [the company] so defendants could buy it at an artificially reduced price." *Id.*

Other courts have held similarly. *See also Smallberg*, supra, (denying motion to dismiss aiding and abetting claim against defendant company that assisted plaintiff's former partner in taking business from company); *Caprer v. Nussbaum,* 36 A.D.3d 176, 194 (2d Dep't 2006)

(accountants may be held liable for aiding and abetting the breach of fiduciary duty where they have knowledge of misuse of funds, and were indispensable to the board-member defendants efforts to conceal the misuse); *In re Nine Sys. Corp. S'holders Litig.*, 2014 WL 4383127, at *48 (Del. Ch. Sept. 4, 2014) (director aided and abetted breach of duty by failing to adequately explain valuation); *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 99 (investment banker participated in board's breach of duty where "RBC *created* the unreasonable process and informational gaps that led to the Board's breach of duty" (emphasis in original)); *Anglo Am. Sec. Fund, L.P. v. S.R. Glob. Int'l Fund, L.P.*, 829 A.2d 143, 157 (Del. Ch. 2003) (accounting firm can be held liable for aiding and abetting a breach of fiduciary duty where it disregards discrepancies in their reporting).

Here, too, Plaintiff sufficiently pleads a claim of aiding and abetting a breach of fiduciary duty. Andersen was aware of the Rethink Defendants' fiduciary duties to Plaintiff to conduct a proper valuation of Plaintiff's membership interest. The Engagement Letter defines the objective and scope of its services as providing a "comprehensive valuation report" that "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 Amended and Restated Operating Agreement." *See* Compl., ¶¶ 63, 65, 69; Toce Affirm'n, Ex. A, Engagement Letter, at pg. 1. The RCP Defendants breached their fiduciary duties by manipulating the valuation process and orchestrating a sham valuation. Andersen knowingly participated in the scheme by delivering a defective valuation that understated the value of Plaintiff's membership interest by millions of dollars. It cannot escape liability on a motion to dismiss by claiming it did nothing wrong.[5]

[5] Andersen's claim that it cannot be liable for performing a valuation, which is an ordinary business function, is off base. Producing a sham valuation report is not a routine business function. Andersen is also wrong to suggest that nothing required it to talk to Plaintiff, apprise itself of facts,

IV. The Complaint Properly Pleads a Claim Against Andersen for Civil Conspiracy.

Under New York law, "a plaintiff may plead conspiracy 'to connect the actions of separate defendants with an otherwise actionable tort." *Silverboys, LLC v. Skordas,* 2019 NY Slip. Op. 30330 (U), Index No. 653874/2014 (Feb. 11, 2019) (*quoting Alexander & Alexander of N.Y., Inc. v. Fritzen*, 68 N.Y.2d 968, 969 (1986)) (conspiracy allegations "connect the actions of the individual Defendants with an actionable, underlying tort, and establish that those actions were a part of a common scheme").

Plaintiff alleges "the primary tort," *i.e.*, aiding and abetting a breach of fiduciary duty, "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*, 75 A.D.3d 472, 474 (1st Dep't 2010); *see also Silverboys, LLC,* 2019 NY Slip. Op. 30330 (U).

Plaintiff satisfies the first element as he alleges that the Company hired Andersen to value Plaintiff's membership interest and that Andersen agreed to only take direction from the RCP Defendants and Chowdhury, notwithstanding its obligation to allow Plaintiff to provide direction under Section 10.6(c) of the Operation Agreement. Plaintiff satisfies the second element as Plaintiff sufficiently alleges that Andersen participated in the RCP Defendants and Chowdhury's scheme to obtain Plaintiff's membership interest at an artificially lower value by generating a sham Valuation Report using obviously false data and improperly excluding Plaintiff from the process.

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and use the correct valuation standard and date. Under IRS Revenue Ruling 59-60 and court decisions, a valuation must be based on all relevant facts and be the product of informed judgment and reasonableness. Andersen's cases dealing with dismissal of legal malpractice and aiding and abetting fraud claims against attorneys providing routine legal services (Mem. at 15) have no application here.

Plaintiff satisfies the third element as he sufficiently alleges that Andersen's participation in the scheme was intentional, as Section 10 of the Operating Agreement is specifically incorporated in the Engagement Letter executed by Andersen and the Company. *See* Toce Affirm'n, Ex. A, Engagement Letter.

Section 10.6(c) of the Operating Agreement expressly requires that the expert retained to perform the valuation of a withdrawing member's interest be independent and take direction from ***both*** the Company's manager and the withdrawing member. *See* Compl., ¶ 64. Therefore, Andersen was fully aware that by creating the Valuation Report without any input or direction from Plaintiff, the selling member, that it was violating its obligation to perform an independent valuation. Finally, Andersen's bogus Valuation Report caused Plaintiff severe financial harm as it has robbed Plaintiff, a septuagenarian with a failing heart, of the fair value of his membership interest that he is entitled to under Section 10.6 of the Operating Agreement.

Even if assessed under Delaware law, the conspiracy claim is properly stated. To plead civil conspiracy under Delaware law, Plaintiff must allege "(i) a confederation or combination of two or more persons; (ii) an unlawful act done in furtherance of the conspiracy; and (iii) damages resulting from the action of the conspiracy parties. *See Aviation W. Charters, LLC v. Freer*, No. CVN14C09271WCCCCLD, 2015 WL 5138285, at *10 (Del. Super. Ct. July 2, 2015).

Regarding the first element, Plaintiff has sufficiently pleaded confederacy, as the Complaint alleges that Andersen worked with the Company, the RCP Defendants, and Chowdhury to further the scheme of purchasing Plaintiff's membership interest at a deflated value. *See* Compl., ¶¶ 65, 84, 133. Plaintiff alleges that Andersen, at the sole direction of Rethink, developed the Valuation Report without any input or participation from Plaintiff in violation of the Operating Agreement and the Engagement Letter. *Id.*, ¶ 66. *See also,* Schub Decl., Ex. 2 (email in which

Rethink's CFO instructed Andersen to only address questions regarding the valuation to the CFO directly and no one else). The RCP Defendants and Chowdhury met privately with Andersen and had complete control over what documents and other information Andersen was to base its valuation on. *Id.*, ¶ 68. Andersen knew that it was obligated to produce an independent evaluation of Plaintiff's membership interest as set forth in the Operating Agreement referenced in the Engagement Letter, yet relied only on subjective information provided by the RCP Defendants and Chowdhury. *See* Toce Affirm'n, Ex. A, Engagement Letter, pg. 1. Section 10.6(c) of the Operating agreement states that the "independent valuation expert…shall be directed by the Manager ***and selling Class A Member***." Compl., ¶¶ 63, 64. Notwithstanding Andersen's obligation to take direction from Plaintiff, Andersen acquiesced to the RCP Defendants and Chowdhury's demands that it should take direction solely from them and precluded Plaintiff from providing any input whatsoever. Compl., ¶¶ 68, 72, 75. In essence, Andersen agreed to work with the RCP Defendants and Chowdhury to completely exclude Plaintiff from the valuation process in flagrant disregard of Andersen's obligations under Section 10.6(c) of the Operation Agreement, which was incorporated by reference into the Engagement Letter, thus satisfying the first conspiracy element.

Second, Andersen contributed to the unlawful act—engaging in a scheme to steal Plaintiff's membership interest for a fraction of its value—by generating a sham Valuation Report that both violated the Operating Agreement, as well as the governing standards of Andersen's profession. Compl., ¶¶ 69, 79-88. Andersen openly admits in its Valuation Report that it did not verify any of the data provided by the RCP Defendants and Chowdhury. *Id.,* ¶127. Andersen intentionally omitted from the Valuation Report carried interest, additional revenue from new funds, and additional assets under management, overstated salaries to members that were intentionally included to artificially increase expenses, and included losses in multiple years of projections when

historically there have been no such losses and when revenue and assets under management have continued to increase. Compl., ¶¶ 79-88, 134. Andersen even used the wrong valuation date to artificially deflate Plaintiff's membership interest, opting to evaluate the Company as of April 15, 2024, rather than October 16, 2024, when Plaintiff withdrew. *Id.* ¶¶ 62, 63, 81. Andersen knew these representations were false and facially deficient, yet it still assisted the RCP Defendants in depriving Plaintiff of the fair value of his interest by creating the sham Valuation Report, which it knew was going to be used to purchase Plaintiff's membership interest in the company. *Id.*, ¶¶ 134-135. Finally, Andersen's participation in the conspiracy to suppress Plaintiff's membership interest resulted in his loss of millions of dollars due to the RCP Defendants' reliance on the sham Valuation Report as cover to continue to refuse to purchase Plaintiff's membership interest at fair value. Compl., ¶¶ 3, 89. Plaintiff has pleaded more than enough to survive a motion to dismiss.

V. The Complaint Properly Pleads a Claim for Declaratory Judgment.

Plaintiff's claim for declaratory judgment asking the Court to find that Andersen's valuation of the Company is invalid presents a justiciable controversy and would assist in the resolution of this case.[6] Under New York law, the court may render a "judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." CPLR § 3001. "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an

[6] Andersen's motion suggests that Plaintiff's claim for declaratory relief seeks to compel Andersen to affirmatively conduct another valuation of Plaintiff's membership interest. *See* Motion, pg. 18. Nowhere in the Complaint does Plaintiff seek to compel Andersen to prepare a new valuation. Nor would Plaintiff request such relief given the grave errors in the Valuation Report and Andersen's complete lack of independence and fairness in preparing the same.

uncertain or disputed jural relation either as to present or prospective obligations." *James v Alderton Dock Yards*, 256 NY 298, 305 (1931).[7]

Here, an actual, adversarial controversy exists between Plaintiff, Andersen, and the Rethink Defendants as to whether Andersen's valuation satisfied the obligation relating to Plaintiff's right to a fair valuation by an independent expert under the Operating Agreement and such a finding will have a "practical effect" in resolving this matter. Section 10.6 of the Operating Agreement obligated the Company to purchase the membership of a Class A member upon his withdrawal from the Company (the date of which being the "Purchase Event"). Compl., ¶ 63. Plaintiff resigned and withdrew as a member on October 15, 2024. *Id.* Under Section 10.6(c) of the Operating Agreement, 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.*, ¶ 64.

Defendants engaged Andersen to satisfy the member valuation requirement contained in Section 10.6(c) of the Operating Agreement. Andersen's Valuation Report valued Plaintiff's total membership interest at $4,740,000.00, nearly the same price the RCP Defendants valued half of Plaintiff's membership interest in April 2022 when the Separation Agreement was executed. *Id.*, ¶ 70. Andersen explicitly stated in the Valuation Report that it "has relied upon information furnished by others, which is believed to be reliable", but did "not independently verif[y] the

[7] The standard is similar under Delaware law. *See XL Specialty Ins. Co. v WMI Liquidating Tr.*, 93 A3d 1208, 1217 (Del 2014).

accuracy or completeness of the information." *Id.*, ¶ 71. It further states: "During the course of our analysis, we were provided certain financial information, including estimates of cash flow, by management." *Id.*, ¶ 72. The Valuation Report also states that Andersen primarily relied upon: "Discussions with Management," and a "forecast developed by Management." *Id.*, ¶ 73. The Valuation Report also states that the list of comparable companies, which were used for the valuation analysis in the Market Approach and to calculate a revenue growth rate in the Discounted Cash Flow analysis, was developed with management's assistance. *Id.*, ¶ 74. In violation of Section 10.6(c) of the Operating Agreement, Plaintiff was precluded from joining Andersen's "discussions with Management," and from providing any input into or reviewing the "forecast developed by Management," which Andersen "primarily" relied upon. *Id.*, ¶ 75. The resulting forecast using only the RCP Defendants' information was not consistent with the Company's historical performance, current business operations, or future prospects and was materially misleading. *Id.*, 77.

The valuation methods utilized in the Valuation Report were also flawed in ways that served to lower the value of the Company. For example, the income approach utilized by Andersen omitted revenue from new investment funds, incorrectly assumed a level of revenue growth that was much lower than the Company's historical revenue growth, and overstated expenses and the weighted average cost of capital. *Id.*, ¶ 79. Likewise, the market approach used by Andersen undervalued Plaintiff's membership interest by using multiples aligned with the lower quartile multiple of comparable companies rather than the median multiples of the comparable group, incorrectly applied a 12.5% marketability discount, and failed to perform a comparable precedent transactions analysis.

There are also many other issues with the Valuation Report including: (a) it does not account for Carried Interest; (b) it calculates the value of Plaintiff's membership interest as of April 15, 2024, rather than October 15, 2024, when Plaintiff withdrew from the Company as prescribed by Section 10.6 of the Operating Agreement; (c) it improperly values Plaintiff's shares at the "fair market value" rather than the "fair value" as prescribed by Section 10.6 of the Operating Agreement; (d) it values Plaintiff's shares using the fair market value rather than the fair value; and (e) it improperly discounted the value of Plaintiff's membership interest due to a lack of marketability, which should not have been a factor in the valuation. *Id.,* ¶ 81.

Andersen's claim that it is not a party to this controversy and cannot be ordered to perform another valuation does not defeat the claim. To begin with, it is the Court, not Andersen, that will decide what relief is appropriate after presented with the evidence. *See Staver Co. v Skrobisch,* 144 AD2d 449, 450 (1988) ("A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration."). Furthermore, much of Andersen's motion seeks to defend its conduct generally and the Valuation Report specifically. As such, a real and justiciable controversy exists, despite Andersen's argument to the contrary. It is of no moment that Andersen is not a party to the Operating Agreement. *See Skyway Container Corp. v. Castagna*, 27 A.D. 2d 542 (2d Dep't 1966) (landlord was proper party to declaratory judgment claim even though lease dispute was between tenants, not landlord).

Andersen's procedural argument that declaratory relief is unavailable because Plaintiff has an adequate remedy at law in the form of a breach of contract claim is not valid. First, a plaintiff is entitled to plead claims in the alternative. *Matter of 1650 Realty Assoc. v. Golden Touch Mgt.*, 2012 NY Slip Op 33864 (Sup. Ct. Nassau 2012). Second, to the extent Andersen is referring to

the breach of contract claim against it, Andersen argues no such claim exists. To the extent Andersen is referring to the breach of contract claim against the RCP Defendants, the Rethink Defendants filed an Answer denying that claim as well.[8] Accordingly, the Complaint adequately states a claim for declaratory relief.

VI. The Complaint Properly Pleads a Breach of Contract Claim Against Andersen.

In order to have standing as a third-party beneficiary, a plaintiff must show that "(i) the contracting parties intended that the third party beneficiary benefit from the contract, (ii) the benefit was intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party was a material part of the parties' purpose in entering into the contract." *Dolan v Altice USA, Inc.*, CV 2018-0651-JRS, 2019 WL 2711280, at *7 (Del Ch June 27, 2019).[9]

Here, the Complaint pleads that Plaintiff is an intended third-party beneficiary of Andersen's Engagement Letter and Andersen knew Plaintiff was the beneficiary of the appraisal, as it is clear that Andersen's services were being performed specifically to assign a value to Plaintiff's membership interest, which the Company would then use as the purchase price for his membership interest under Section 10.6(c) of the Operating Agreement.

Andersen argues Plaintiff's breach of contract claim must be dismissed because the intent to benefit Plaintiff is not shown on the face of the contract. This is not true. The Engagement Letter states: "[t]he purpose of our valuation analysis is to estimate the fair market value of a 40.9091 percent Class A Membership Interest (the "Subject Interest") in the Company." Toce

[8] Andersen's reliance on *Singer Asset Fin. Co. v. Melvin*, 33 A.D.3d 358 (1st Dep't 2006) is misplaced. That case was decided on a motion for summary judgment, not a motion to dismiss, and plaintiff was awarded full relief on the breach of contract claim.

[9] Plaintiff cites Delaware law as the agreement provides that Delaware law applies.

Affirm'n, Ex. A, Engagement Letter, p. 1. It states the "final product" of the engagement will be a "comprehensive valuation report" "that 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 Amended and Restated Operating Agreement" of Rethink. *Id.* Moreover, the Engagement Letter make clear that Andersen understood "that the holder of the Subject Interest may have certain indirect economics derived from subsidiaries that may need to be factored into our analysis." *Id.*, pgs. 1, 4. As noted above, Andersen knew from discussions prior to the Engagement Letter being finalized, that Plaintiff was the "holder of the Subject Interest" and the beneficiary of the valuation.

Andersen's reliance on a boilerplate contractual disclaimer of liability is unavailing, because Delaware courts will disregard a general third-party beneficiary disclaimer where, as here, the contract includes more specific language demonstrating an intent to benefit a third party. *See Crispo v. Musk*, 304 A.3d 567, 575 (Del. Ch. 2023) ("Delaware courts will disregard a general no-third-party-beneficiaries provision where the contract includes more specific language demonstrating an intent to benefit a third party"). Andersen cites *Bromwich v. Hanby*, 2010 WL 8250796 (Del. Super. Ct. July 1, 2010) for the proposition that a contract must clearly identify the alleged third-party beneficiary. To the contrary, the court in *Bromwich* found that a contract *does not require* that the intended beneficiary be referenced by name, instead, stating that "it is not necessary that a third-party beneficiary be specifically named and identified in the contract in order for third-party beneficiary rights to be created", so long as the beneficial effect on the third-party is a material part of the contract's purpose. *Id.*, *2. Here, the beneficial effect of Andersen's services was clearly contemplated, as the scope of the Engagement Agreement defines the purpose of Andersen's services as determining the value of Plaintiff's membership interests in anticipation of his withdrawal from Rethink.

Here, despite the boilerplate disclaimers, the more specific language defining the purpose of the engagement together with the specific reference to the "holder of the Subject Interest" being bought out demonstrates that Andersen knew that Plaintiff was the intended beneficiary of the Engagement Letter. Given this express language identifying Plaintiff and his property as the core subject matter of the engagement, Andersen's argument is not compelling. *See* *Crispo*, 304 A.3d at 575.

VII. Plaintiff Is Not Required To Bring All Claims Against Andersen in Delaware.

Although Andersen argues that Plaintiff is not a party to the Engagement Letter, it alternatively argues that, should the Court determine that Plaintiff is a third-party beneficiary, any claims against Andersen should be brought in Delaware, not New York. The Court should decline to transfer or relinquish jurisdiction over the matter based on the doctrine of *forum non conveniens*, as enforcing the forum selection clause under these circumstances would be unreasonable.

Under Delaware law, "courts afford a great deal of respect to a plaintiff's choice of forum, and this respect should be even more stalwart where both parties have agreed in advance to a forum by contractual provision." *Aveta, Inc. v. Colon*, 942 A.2d 603, 607 (Del. Ch. Ct. 2008) (declining to enforce forum selection clause based on *forum non conveniens*, where litigant demonstrated that litigation in the selected forum would impose material hardship). Even so, the doctrine of *forum non conveniens* permits a court to decline to hear a case despite having jurisdiction over the subject matter and parties when there is a similar action pending elsewhere and when "considerations of convenience, expense, and the interests of justice dictate that litigation in the forum selected by the plaintiff would be unduly inconvenient, expensive or otherwise inappropriate." *Id.*, at 607-608 (*quoting* *Sumner Sports, Inc. v. Remington Arms Co. Inc.*, C.A. No. 11841, 1993 WL 67202, *7

(Del. Ch. Mar. 4, 1993)). Application of the doctrine resides with the discretion of the trial court judge. *Id*.

As an initial matter, Andersen argues that if Plaintiff is an intended beneficiary, then Plaintiff must bring all claims against it in Delaware. This is incorrect. The aiding and abetting breach of fiduciary duty, conspiracy, and declaratory judgment claims are based on Andersen's misconduct after the Engagement Letter was signed and that misconduct occurred in New York. The only claim that Plaintiff could possibly be compelled to be brought in Delaware is the breach of contract claim. The other claims do not "arise out of or relat[e] to" the Engagement Letter. Rather the aiding and abetting and civil conspiracy claims arise out of the Defendants' scheme to deprive Plaintiff of the fair value of his membership interest. The Valuation Report was an essential part of that scheme, but it arose out of the Defendants' desire to cheaply acquire the interest and not the Engagement Letter itself. These claims should not be sent to Delaware under any circumstance.

If the Court concludes, as it should, that the Complaint adequately alleges that Plaintiff is a third-party beneficiary of the Engagement Letter, the Court should refrain from enforcing the forum selection clause, as enforcement would be unreasonable under the circumstances.[10] Indeed, considerations of convenience, expense, and the interests of justice dictate that litigation in Delaware would be unduly inconvenient, expensive, or otherwise inappropriate. To begin with, Plaintiff is not signatory to the Engagement Letter and, as a result, did not have an opportunity to reject or negotiate the selection of Delaware as the forum for related disputes. Thus, the rationale

[10] Andersen concedes that the forum selection clause should only be enforced against Plaintiff if he is deemed a third-party beneficiary of the Engagement Letter. Thus, Andersen concedes that Plaintiff's other claims against Andersen are properly brought in New York.

for forcing Plaintiff to bring his claims in Delaware—*i.e.*, that he agreed to resolve disputes in that forum—is inapplicable.

The Court undisputedly has personal jurisdiction over the six (6) Defendants (including Andersen) and no Defendants have asserted otherwise. Nor is there any dispute that the Court has subject matter jurisdiction over the claims against the other Defendants or that venue is proper. Given that the claims against Andersen and the other Defendants arise out of the same set of facts, requiring Plaintiff to litigate a breach claim against Andersen in Delaware, while pursuing the remainder of its claims against the other Defendants in New York, would be inefficient, would increase expenses, and would give rise to the potential for inconsistent rulings or judgments.

Further, transferring a portion of this action to Delaware would impose a material hardship on Plaintiff. Plaintiff is an elderly gentleman who suffers from a serious heart condition. In fact, the RCP Defendants previously attempted to use Plaintiff's health issues to attempt to force him out of the Company. Requiring Plaintiff to participate in two actions—one of which, Delaware, is a forum where he does not reside and has minimal contact with—would be unfair and prejudicial. To the contrary, Andersen would suffer no prejudice or hardship by litigating this matter in New York, where it maintains an office and where the primary Andersen individuals involved in the valuation efforts reside and work. Under these circumstances, enforcement of the forum selection clause would be unreasonable and inequitable.

VIII. Alternatively, Plaintiffs Should be Allowed to Amend the Complaint.

If the Court finds that any pleading defects exist and need to be cured, the Court should allow Plaintiffs to amend pursuant to CPLR 3025(a). *See, e.g.*,*Polish* *Am. Immigr. Relief Comm., Inc. v. Relax*, 172 A.2D 374, 375 (1st Dep't 1991) (CPLR 3025(a) provides: "A party may amend his pleading once without leave of court at any time before the period for responding to it

expires. A motion to dismiss ... pursuant to CPLR 3211(a) operates to extend the time in which to serve a pleading in response thereto until 10 days after service of notice of entry of the order disposing of the motion.”). At this early stage of litigation, amending the Complaint would not prejudice Andersen, and Plaintiff respectfully requests the Court to allow him to file an amended complaint to cure any pleading defects as to Andersen.

CONCLUSION

For the foregoing reasons, the Court should deny Andersen’s Motion or allow Plaintiff to replead, and grant such other and further relief as the Court deems just and proper.

Dated: February 14, 2025
New York, New York

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CERTIFICATE OF COMPLIANCE

The total number of words in the foregoing memorandum of law, inclusive of headings and footnotes and exclusive of the caption, table of contents, table of authorities, and signature block, is 6,845 and is in compliance with Rule 17 of the Rules of the Commercial Division of the Supreme Court, effective October 1, 2018.

Dated: February 14, 2025
New York, New York

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