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 ANDERSON TAX LLC, Defendants.	Index No. 74512/2024 Hon. Linda S. Jamieson

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION TO ENFORCE THE DECISION AND ORDER DATED APRIL 10, 2025 OR REINSTATE CLAIMS

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PRELIMINARY STATEMENT[1]

Plaintiff Richard D. Segal ("Plaintiff") respectfully submits this memorandum of law in support of his motion to enforce this Court's Decision and Order, dated April 10, 2025 (the "Order") or reinstate claims and compel the Rethink Defendants to comply with the Order and work with Plaintiff to obtain a new valuation that adheres to the contractual requirements contained in Section 10.6(c) of the Operating Agreement. *See* Affidavit of Howard Schub (Schub Aff."), Ex. 1 (Operating Agreement), at 12. The Order expressly found that the Andersen valuation "was not obtained in accordance with Section 10.6(c) of the Operating Agreement … cannot be used to value plaintiff's interests … [and] the parties must refer to the Operating Agreement to obtain a new valuation that complies strictly with section 10.6(c)." NYSCEF No. 59 at p. 9.

Despite these clear findings and directive, the Rethink Defendants contend that this Court's Order did not require them to do anything, the Andersen valuation is still in force, the Order was based on a mistake, and they can ignore it without seeking any relief from the Court. As demonstrated below, these contentions are invalid as a matter of fact and law. The Order is valid and should be enforced.

FACTUAL BACKGROUND

To avoid unnecessary repetition, the Court is respectfully referred to the Complaint (NYSCEF No. 1) and the Order for the general factual background. In short, 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 Rethink Defendants attempted to acquire Plaintiff's membership

[1] Unless otherwise defined, capitalized terms have the meaning set forth in the Complaint and/or the Order.

interest at an artificially depressed price by manipulating the buy-out procedure in the Operating Agreement.

Section 10.6(c) of the Operating Agreement expressly requires a determination of the fair value of Plaintiff's membership interest immediately following his withdrawal from the company by an independent expert who is directed by both Rethink and Plaintiff to prepare a written valuation report. The full text of that provision is:

> The purchase price (the Purchase Price) of an affected Class A Membership Interest to be purchased and sold pursuant to this Section 10.6 (the Affected Class A Membership Interest) 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 the selling Class A Member to promptly prepare a written report of his determination** (the Valuation Report). In the event that the Manager and the selling Class A Member cannot agree upon a valuation expert meeting the above criteria within thirty (30) days following the Purchase Event, each of the Manager and the selling Class A Member shall promptly select a valuation expert who meets the above criteria, and such valuation experts shall jointly select a third valuation expert who meets the above criteria, and such third valuation expert (and only such third valuation expert) shall be directed by the Manager and the selling Class A Member to prepare the Valuation Report, The Company shall bear the cost of producing the Valuation Report.

Operating Agreement, § 10.6(c) (emphasis added). See Schub Decl., Ex. 1, at 12.

To perpetuate their scheme, the Rethink Defendants enlisted the help of Andersen to conduct a valuation of Plaintiff's membership interest. The Complaint alleges the Rethink Defendants secretly created and gave Andersen all of the inputs for the valuation, including the cash flows for Andersen's discounted cash flow "analysis" and the comparable companies for Andersen's market "analysis," and excluded Plaintiff -- the person with the most experience and knowledge about the Company -- from the entire appraisal process. Andersen took direction only from the Rethink Defendants, not Plaintiff, and accepted their financials, newly manufactured projections and factual representations regarding the Company. By controlling the appraisal

process, the Rethink Defendants tainted its independence and unethically influenced Andersen to lower the valuation of Plaintiff's interest, by among other things, understating revenue, overstating expenses, omitting key financial information, and presenting the company as a third-rate business.

While there are disputed issues of fact regarding the extent to which the Rethink Defendants and Andersen manipulated data, conspired with each other or otherwise acted improperly as alleged by the Complaint, there are material facts that are undisputed and indisputable. These undisputed facts include the following:

- The Operating Agreement requires a valuation of a withdrawing members' interest to be done by an independent expert, directed by both Rethink and the withdrawing member, on a fair value basis, immediately following his withdrawal as a Class A member. *See* Schub Aff., Ex. 1 (Operating Agreement), at 11-12; Rethink Defendant's Answer, NYSCEF No. 22, at pg. 1; NYSCEF Doc. No. 24 (Joint Description of Facts and Parties' Contentions); Statement of Undisputed Material Facts ("SOF"), ¶¶ 1-4.

- In July 2024, Rethink retained Andersen to prepare a valuation of Plaintiff's interest. *See* SOF, ¶ 5; Schub Aff., Ex. 2; Answer, ¶ 65.

- Andersen Tax was retained solely by the Company. *See* SOF, ¶ 5; Schub Aff., Ex. 2.

- Plaintiff is not a party to the Engagement Letter. *See* SOF, ¶ 7; Schub Aff., Ex. 2, at 1 & 6.

- The Engagement Letter disclaims any duties to Plaintiff. *See* SOF, ¶ 8; Compl., ¶¶ 6, 60, 62; Andersen MTD, pgs. 5,7; Schub Aff., Ex. 2, at 1 & 3.

- Rethink and Andersen agreed that the valuation was being done in reliance "on financial and other information provided by [Rethink]" and "our conclusions will be dependent on such information." *See* SOF, ¶ 10; Schub Aff., Ex. 2, at 3; NYSCEF No. 51.

- Rethink's CFO instructed the head of Andersen's valuation team to consult only with him. See SOF, ¶ 11; Schub Aff., Ex. 3 (July 15, 2024 email from Chowdhury to Andersen).

- Plaintiff resigned and withdrew as a Class A member of Rethink on October 15, 2024. See SOF, ¶ 12; Schub Aff. Ex. 4 (October 15, 2024 resignation email); See Schub Aff., Ex. 5 (Rethink's Verified Petition to Stay Arbitration), ¶ 5.

- The Engagement Letter requested Andersen to perform a valuation of Plaintiff's 40.9% interest on a fair market value basis as of April 15, 2024. *See* SOF, ¶ 9; Schub Aff., Ex. 2, at 1; Compl., ¶ 69; Answer, ¶ 69.

- Andersen concluded the fair market value of Rethink as of April 15, 2024 was approximately $12,000,000 and Plaintiff's interest was worth $4,740,000. *See* SOF, ¶ 16; Schub Aff., Ex. 6, at 5; Answer, ¶ 70.

- The majority members of Rethink previously verified that Rethink was worth approximately $32,000,000, $20,000,000 more than the Andersen valuation. *See* SOF, ¶ 17; Schub Aff., Ex. 7 (verified valuations of SIG supplied by Douglas Ray, Michael Walden, and Jonathan Weiner). Indeed, defendant Doug Ray, the CEO of Rethink, certified that his 40.9% interest in Rethink -- the same 40.9% interest that Plaintiff owns -- was worth $13,020,853, 275% higher than Andersen's $4.74 million valuation. *See* SOF, ¶ 17; Schub Aff., Ex. 7, at 1.

- The Andersen valuation does not comply with the express terms of section 10.6(c) of the Operating Agreement in several respects:

    - First, it determined the "fair market value," not the "fair value," of Rethink and Plaintiff's membership interest. *See* Order, at pg. 6; Complaint, ¶ 81.

    - Second, it determined a value for Rethink as of April 15—six months before, not "immediately following" Plaintiff's resignation and withdrawal as a Class A member of Rethink on October 15, 2024. *Id.*

    - Third, the valuation was not done by an "independent" expert as Andersen depended on Rethink for inputs for the valuation. *See* Order, at 4 & 8; Complaint ¶ 86.

    - Fourth, Andersen was directed solely by Rethink, not by both "by the Manager (Rethink Inc.) and the selling Class A Member (Plaintiff)". Order, at pg. 8; Complaint ¶ 84.

On November 4, 2024, Plaintiff filed this action, asserting the following claims: Breach of Contract against the Rethink Defendants (Count I), Breach of Implied Covenant of Good Faith and Fair Dealing against the Rethink Defendants (Count II), Breach of Fiduciary Duty against the Rethink Defendants (Count III), Aiding and Abetting Breach of Fiduciary Duty against Shak Chowdhury and Andersen Tax (Count IV), Civil Conspiracy against all defendants (Count V), Breach of Contract against Andersen Tax (Count VII), and Declaratory Judgment against all defendants (Count VIII).[2] *See* NYSCEF No. 1. With respect to Count VIII (Declaratory

[2] Count VI was omitted from the Complaint.

Judgment), Plaintiff sought a judicial determination that the Andersen valuation was invalid as it did not satisfy the requirements of the Operating Agreement. *See* Compl., ¶¶ 153-157.

On December 23, 2024, the Rethink Defendants filed their Answer. *See* NYSCEF No. 22. In their Answer, they admit that the Operating Agreement is the governing document for the valuation procedure. *See* Answer, pg. 5, ¶5. They also admit that Plaintiff's withdrawal date was October 15, 2022. *Id*. at p.22-23, ¶¶60, 62; *See also* Schub Aff., Ex. 5 (Rethink's Verified Petition to Stay Arbitration), ¶5; Verified Petition to Stay Arbitration filed in Westchester County Supreme Court in *Rethink Capital Partners I, LLC, et al., vs. Richard D. Segal* at ¶5 ("In October 2024, Segal resigned and withdrew as a Class A member of Rethink LLC"). They admit that only Rethink retained Andersen in July 2024. *See* Answer, p. 24, ¶65. They admit Andersen valued Plaintiff's Class A membership interest at $4.74 million as of April 15, 2024. *Id*. at p. 25, ¶70. At the end of their Answer, the Rethink Defendants sought dismissal of the Complaint together with such other and further relief as the Court deems just and proper. They did not assert any counterclaims. *Id*. at p.48.

On January 31, 2025, Andersen moved to dismiss pursuant to CPLR 3211(a)(1) and 3211(a)(7). NYSCEF Nos. 46 ("MTD") & 47 ("MTD Memo"). Among other things, Anderson argued that Plaintiff lacked standing to bring a breach of contract claim, as he was not a third-party beneficiary of the Engagement Agreement; it could not be held liable for aiding and abetting any breach of fiduciary duty, as it was merely providing "professional services" requested by Rethink. MTD Memo., p. 2-3. Andersen also defended its reliance on data, information, and assumptions provided by Rethink, asserting that it was "entitled to rely on all information provided by Rethink and its representatives, and that its conclusions are dependent thereon." *See* MTD Memo., at pgs. 1, 10-11. In support of the motion, Andersen submitted documentary evidence, including the

Engagement Letter, and Plaintiff did as well. *See* NYSCEF Nos. 46 & 47. At no time did the Rethink Defendants object to the Court issuing any rulings based on the documentary evidence submitted by Andersen or Plaintiff.

On April 10, 2025, this Court issued its Order, finding that the Andersen valuation cannot be used to value Plaintiff's membership interest because it was not obtained in accordance with section 10.6(c) of the Operating Agreement. NYSCEF No. 59. In so finding, the Court quoted at length from the Complaint and the Operating Agreement, including the requirements that the valuation be done on a fair value basis immediately following Plaintiff's withdrawal from Rethink by an independent expert who is directed by both Rethink and Plaintiff. The Court directed the parties to obtain a new valuation that strictly complies with the Operating Agreement.

The Court granted the motion to dismiss without prejudice, because it specifically ruled that the Andersen valuation was facially invalid and could not be used to value Plaintiff's Membership interest:

> A reasonable view of the facts alleged demonstrates that plaintiff cannot recover any damages based on the Andersen valuation. This is not because plaintiff may not have valid claims against defendants – a finding which the Court cannot make at this juncture – but because the Andersen valuation simply cannot be the operative valuation, as it was not obtained in accordance with Section 10.6(c) of the Operating Agreement.
>
> The Court thus finds that (1) the Andersen valuation cannot be used to value plaintiff's interests; (2) the parties must refer to the Operating Agreement to obtain a new valuation that complies strictly with section 10.6(c); and (3) this action must be dismissed, as it is based on a valuation that was not procedurally proper. This dismissal is without prejudice, so that plaintiff may assert his claims again, if he wishes, once a procedurally proper valuation is obtained.

Order, p. 9-10.

On April 11, 2025, promptly after the Order was issued, Plaintiff's counsel asked the Rethink Defendants "what independent valuation expert Rethink proposes for the valuation." *See*

Schub Aff., Ex.8 (April 2025 Email Correspondence), at pg. 3. The Rethink Defendants did not respond. On April 15, 2025, Plaintiff again asked the Rethink Defendants to identify who they proposed to perform a new valuation. In response, the Rethink Defendants frivolously asserted that the Court's Order -- which directed the parties to obtain a new valuation -- did *not* require them to obtain a new valuation:

> The Court dismissed your case. It did not enter any judgment requiring anyone to do anything (let alone a mandatory injunction that no party sought). Nor does the Court's 'finding' with respect to the propriety of the Andersen Tax valuation have any post-dismissal effect on our clients' rights, since our clients manifestly had no opportunity to litigate the issue that the court purports to have decided….your case is dismissed and the Andersen Tax valuation remains in force.

See Id., at pgs. 2-3.. The Rethink Defendants also claimed that because Plaintiff agreed to the selection of Andersen to perform the valuation, the Order -- which observed that there was no allegation that Andersen was mutually agreed upon -- was based on a misimpression of the facts and invalid.[3] *Id*.

On April 15, 2025, Plaintiff's counsel responded that the Rethink Defendants' position flies in the face of the Order as the Order explicitly ruled that the Andersen valuation could not be used to value Plaintiff's interest and ordered the parties to obtain a new valuation. *Id*., at pgs. 1-2. He also advised that whether Plaintiff agreed to use Andersen was immaterial, because Plaintiff did not agree that Rethink and Andersen could exclude him from the valuation process and conspire to concoct a valuation using the wrong valuation standard and valuation date in violation of the

[3] The Rethink Defendants also falsely suggested that Plaintiff had misled the Court that Plaintiff never agreed to use Andersen. That is not true. The Complaint does not allege that plaintiff did not agree to use Andersen. It alleges Rethink conspired with Andersen to artificially depress the value of the Company and that Andersen was hired solely by the Company, and prepared, at Rethink's direction, a valuation using the wrong valuation standard and wrong valuation date, while providing Andersen with bogus data and excluding Plaintiff from the valuation process.

requirements of section 10.6(c) of the Operating Agreement. *Id*. Plaintiff's counsel asked defense counsel to advise whether the Rethink Defendants would be seeking relief from the Order or abiding by their position that the Order was not binding on the Rethink Defendants. Defense counsel did not initially respond. *Id.* On April 16, 2025, Plaintiff served the Rethink Defendants and their counsel with certified copies of the Order. *See* Schub Aff., Ex. 9 (Proof of Service of Certified Copies of the Order).

On April 21, 2025, the Rethink Defendants responded, arguing that the Order's findings were not true findings of fact because they were made on a motion to dismiss where the Court allegedly must accept a plaintiff's allegations as true,[4] and further arguing that the motion was based on a mistaken assumption that Plaintiff never agreed to use Andersen. *See* Schub Aff., Ex. 8, at pg. 1. The Rethink Defendants did not respond as to whether they would seek any relief from the Order. However, based on a letter they submitted to the Court that same day, it appears the Rethink Defendants believe they can ignore the Court's Order without seeking "any specific relief" from the Order. *See* NYSCEF No. 61, Letter dated April 21, 2025.[5]

Because the Rethink Defendants have unilaterally declared that the Court's Order is not binding on them and they will not honor it or seek any relief from it, Plaintiff moves this Court for an order enforcing the Order and compelling the Rethink Defendants to comply with the Court's directive and obtain a new valuation that strictly complies with section 10.6(c) of the Operating

[4] This argument is flawed because the Court was not required to accept Plaintiff's allegations as true. Andersen moved to dismiss based on documentary evidence under CPLR 3211(a)(1). Furthermore, on a motion to dismiss under 3211(a)(7), a court can consider matters integral to the Complaint, like the Operating Agreement and Engagement Letter.

[5] While supposedly submitting its letter "as officers of the Court" to correct a "factual misapprehension" by the Court, Rethink's counsel did not disclose to the Court that the Rethink Defendants were not seeking "any relief" because they had unilaterally elected to ignore the Court's Order.

Agreement. In the alternative, Plaintiff moves the Court to reinstate its declaratory judgment claim (Count VIII), and grant summary judgment declaring the Andersen valuation invalid or reinstate all its claims and direct the parties to complete discovery under a new expedited pretrial schedule.

ARGUMENT

I. The Court Should Enforce the Decision and Order Pursuant to CPLR 5104.

A party is not free to decide when or whether to obey a court order. *See* *Dept. of Hous. Preserv. and Dev. of City of New York v Mill Riv. Realty, Inc.*, 169 A.D.2d 665, 669-70 (1st Dept. 1991) ("Obedience to a lawful order of the court is required even if the order is thereafter held 'erroneous or improvidently made or granted by the court under misapprehension or mistake'"); *Bel-Aqua Pool Supply, Inc. v Ocean Blue Pools, Inc.*, 28 Misc. 2d 665, 665-66 (Sup. Ct., Nassau County 1961) ("It would lead to legal chaos to have litigants decide in their sole discretion what orders of the court they will observe and when").

Courts have the express statutory authority to enforce their orders and the Court should do so here to compel the Rethink Defendants to comply with the Order and submit to a new independent valuation process that adheres to the contractual requirements contained in Section 10.6(c) of the Operating Agreement. *See* NY CPLR. § 5104. Such an Order would be consistent with the law, preclude the Rethink Defendants from making a mockery of these proceedings, and promote judicial efficiency, justice, and fairness. CPLR § 5104 provides, in relevant part:

> Any interlocutory or final judgment or order, or any part thereof…may be enforced by serving a certified copy of the judgment or order upon the party or other person required thereby or by law to obey it and, if he refuses or willfully neglects to obey it, by punishing him for a contempt of the court.

Applying this law, the Court should enter an Order compelling the Rethink Defendants to cooperate and work in good faith with Plaintiff to obtain a new valuation, and failing such

cooperation, hold the Rethink Defendants in contempt and impose fines and sanctions, including an award of attorneys' fees for any subsequent noncompliance.

The Court's Order is manifestly clear. It provides, in relevant part, "(1) the Andersen valuation cannot be used to value plaintiff's interests; (2) the parties must refer to the Operating Agreement to obtain a new valuation that complies strictly with section 10.6(c)… ." Order, at pg. 9. The Rethink Defendants are fully aware of the contents of the Order, as they both received it from the Court and were served with certified copies. Yet, they refuse to comply with the Order by refusing to participate in a new valuation and improperly claiming that the Andersen valuation is still valid. The Court should not permit the Rethink Defendants to evade their obligations under the Court's clear and unambiguous Order and should require the Rethink Defendants to participate in a new independent valuation of Plaintiff's Class A membership interest in Rethink.

The Rethink Defendants' position that they can ignore the Order has no merit. First, the Rethink Defendants' assertion that the Order does not require them to do anything is demonstrably false. The Order expressly provides "the parties must refer to the Operating Agreement to obtain a new valuation that complies strictly with section 10.6(c)." *See* Order, pg. 9. Second, the Rethink Defendants incorrectly claim that since they were not parties to the motion to dismiss, they cannot be bound by the Court's Order. It is irrelevant that the Rethink Defendants did not technically join in the motion to dismiss. The findings are the findings, and are based on the stipulated facts, the Operating Agreement, the Engagement Letter, and the Answer. Moreover, the Rethink Defendants requested the Court to dismiss the Complaint in their Answer. The Court was not limited to granting the precise relief requested by Andersen in its motion. A court can dismiss a case *sua sponte* and has the power to order relief supported by the record. *See* *Macias v. New York City Transit Auth.*, 240 AD 2d 196 (1st Dept. 1997) (court did not improvidently exercise its discretion

in *sua sponte* dismissing the action); *Frankel v. Stavsky*, 40 AD 3d 918 (2d Dept. 2007) ("a court may grant relief that is warranted by the facts plainly appearing on the papers on both sides, if the relief granted is not too dramatically unlike the relief sought, the proof offered supports it, and there is no prejudice to any party"); *See also Carr v State*, 30 Misc. 2d 983, 985 (Ct. Cl. 1961), *affd*, 15 A.D.2d 709 (3d Dept. 1962) ("if either party is entitled to judgment on the pleadings the Court may give judgment to the party entitled thereto, disregarding which party instituted the motion.").

Third, the Court's Order is not invalid even if the Court incorrectly assumed that Plaintiff did not consent to engage Andersen. The Court's Order was founded on its conclusion that the Andersen valuation was not in accordance with section 10.6(c) of the operating Agreement. *See* Order, pg. 9. That conclusion is correct and supported by the undisputed and indisputable facts that: (1) the Andersen valuation determined the fair market value of Rethink, not its fair value, as required by the Operating Agreement; (2) the Andersen valuation determined the value of Rethink as of April 15, 2024, the date Plaintiff resigned as Executive Director, not immediately following his withdrawal as a Class A member of Rethink on October 15, 2024, as required by the Operating Agreement; (3) Andersen, which depended on Rethink for valuation data, was not independent, as required by the Operating Agreement; and (4) Andersen was directed exclusively by Rethink, not Rethink and Plaintiff, as required by the Operating Agreement. *See* Order, pgs. 1-10.

Thus, the Court's apparent mistaken belief that Plaintiff did not agree to use Andersen is harmless error because the record is clear that Plaintiff did not agree to be excluded from the valuation process or railroaded by the defendants who delivered a valuation that failed to comply with section 10.6(c) of the Operating Agreement in multiple respects. *See Matter of Treider v. Lamora*, 44 AD 3d 1241 (3d Dept. 2007) (court error in considering matters outside the record

was harmless because the court's decision was fully supported by other facts in the record). *See also* *Arep Fifty-Seventh, LLC v. PMGP ASSOC., LP*, 2014 NY Slip Op 1409, (1st Dept. 2014) (dismissal of claim appropriate where record contained grounds for dismissal not relied upon by the court); *American Dental Coop. v Attorney-General of the State of N.Y.*, 127 AD2d 274, 279 n 3 (1st Dept 1987) (court's failure to consider jurisdictional challenge was harmless error where record evidence showed court had jurisdiction).

Fourth, if the Rethink Defendants believe the Order was based on a false impression, the proper approach is to seek relief from the Order, not to ignore it. *See* *Iacovacci v. Brevet Holdings, LLC*, 2021 NY Slip Op 50657 (Supreme Co., N.Y. Cty. 2021)("an application could have been made to modify the Order, rather than disobeying the Order"). In fact, the Rethink Defendants did reach out to the Court to identify the alleged error in the Court's Order—not to seek relief from, or clarification, of the Order—but rather in a clumsy and misguided attempt to criticize Plaintiff and his counsel. Thus, the Rethink Defendants want to leave intact the portion of the Order that dismisses the claims against them while ignoring the portion of the Court's Order that directs them to obtain a new valuation. This type of gamesmanship should not be accepted.

The Rethink Defendants' refusal to comply with the Order is just the latest example of their contempt and lack of respect for this Court and its Orders. For example, the Court entered a Preliminary Conference Order dated January 6, 2025 that expressly provided that January 13, 2025 would be "the start date for defendants to begin producing documents (including projections … and other readily accessible data) in response to Plaintiff's First Set of Requests for Production of Documents, which were served in November 2024." *See* NYSCEF No. 34; PCO at p. 5 of 11, ¶ IV(1)(a). However, the Rethink Defendants did not produce any documents on January 13. When Plaintiff demanded compliance with the PCO, defense counsel frivolously denied that the PCO

required them to start producing documents, asserting "we do not agree with your description of what the Preliminary Conference Order requires." *See* Schub Aff., Ex 10 (Jan 17, 2025 Email from defense counsel), at pg. 1. As another example, the Court entered an Order directing mediation of this action on January 10, 2025. *See* NYSECF No. 42. However, the Rethink Defendants, who refused to agree to mediation, begrudgingly participated in the mediation, and did not make any settlement offer or counter Plaintiff's offer, which scuttled the mediation. Accordingly, this is the third time that the Rethink Defendants have elected to ignore this Court's Orders.

For these reasons, the Court should enforce its Order and compel the Rethink Defendants to work with Plaintiff to obtain a new valuation of Plaintiff's membership interest in strict compliance with Section 10.6 of the Operating Agreement.[6]

II. In the Alternative, The Court Should Reinstate the Declaratory Judgment Claim Against the Rethink Defendants and Grant Summary Judgment Declaring the Andersen Valuation Invalid or Reinstate the Complaint.

If the Court is disinclined to enforce its Order for procedural reasons, Plaintiff requests that the Court modify the Order to reinstate Plaintiff's Declaratory Judgment claim (Count VIII) and grant summary judgment declaring that "Andersen's valuation of the Company is invalid because the valuation does not satisfy the requirements of the Operating Agreement." Compl., ¶¶ 153-157. Such a course would effectuate the findings in the Order and better serve the interests of judicial efficiency—particularly given the Rethink Defendants' position that Plaintiff is now "out of

[6] Should the Rethink Defendants continue to flout and disregard this Court's Order or any subsequent enforcement order, Plaintiff requests the Court hold them in contempt in accordance with NY CPLR §§ 5104 & 753(A)(3) to enforce compliance with the Order and to compensate Plaintiff for the damages suffered as a result of the Rethink Defendants' disobedience of the Order—including actual costs, expenses, and attorneys' fees. *See Diorio v. Peekskill Common Counsel*, 13 A.D.3d 523 (2d Dept. 2004) (attorneys' fees can be awarded when a party delays or prolongs the resolution of the litigation).

court"; that they have no obligation to conduct a new valuation; and that, if Plaintiff wants relief from the defective Andersen valuation, he must re-file the substantially same complaint and claims and start the litigation process all over. Requiring Plaintiff to re-file this action would not promote either the interests of judicial efficiency or move the parties' disputes closer to final resolution. In the alternative, if the Court accepts the Rethink Defendants' argument that the Andersen valuation was facially compliant with the Operating Agreement because Plaintiff consented to the use of Andersen, then the Court should reinstate the Complaint as Plaintiff can now assert its remaining claims for recovery of damages based on the Andersen valuation.

Under CPLR 2221(a), "the Supreme Court has inherent power to set aside, correct or modify its own orders" on any bases or upon terms it finds appropriate. *Buch v Teman*, 64 Misc. 3d 1221(A) (Sup. Ct. 2019) (quoting *Halloran v. Halloran*, 161 A.D.2d 562 (2d Dept. 1990)). Further, under CPLR § 104, the rules shall be liberally construed to secure the just, speedy, and inexpensive determination of every civil judicial proceeding. In light of the Rethink Defendants' argument that the Order is not binding on them, the Court can and should reinstate the Complaint or the dismissed declaratory judgment claim against the Rethink Defendants seeking a declaration that the Andersen valuation is invalid and grant summary judgment as to that claim seeking a new valuation.

"Summary judgment is proper in a declaratory judgment action where the record presents undisputed facts." *Russell v Town of Pittsford*, 94 A.D.2d 410, 412 (4th Dept. 1983). Moreover, under CLPR §3211(c) "if necessary and appropriate, a motion to dismiss may be converted to one for summary judgment." *Marvinney v Australian Spirit L.L.C.*, 79 Misc. 3d 264, 268 (Sup. Ct. 2023). "A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any

material issue of fact." *DeCicco v Syosset Cent. School Dist.*, 34 A.D.3d 621, 622 (2d Dept 2006). "While under appropriate circumstances, summary judgment may lie within the confines of a declaratory judgment action the test of its applicability is no different than in any civil action." *Subdivisions, Inc. v Town of Sullivan*, 75 A.D.3d 978, 980 (3d Dept. 2010).

Here, for the reasons set forth above, there is no material dispute of fact that the Andersen valuation was not obtained in accordance with section 10.6(c) of the Operating Agreement. The Andersen valuation provided a value using the wrong standard of value, the wrong valuation date, and the wrong valuation process—all of which were unilaterally and exclusively directed by Rethink as the sole counterparty to the Engagement Letter with Andersen. *See* Complaint ¶¶ 81-86. For these reasons, the Court should grant summary judgment declaring the Andersen valuation ineffective. Thereafter, the parties can obtain a valuation that strictly complies with section 10.6(c) of the Operating Agreement and return to Court if that process does not result in a mutually acceptable resolution of the matter. Alternatively, the Court should reinstate the Complaint and enter a new preliminary conference order containing a modified case management plan. As noted above, the Order dismissed the Complaint finding that Plaintiff cannot recover any damages based on the Andersen valuation, "not because plaintiff may not have valid claims against defendants – a finding which the Court cannot make at this juncture – but because the Andersen valuation simply cannot be the operative valuation." Order at 9. If the Court accepts the Rethink Defendants' argument that the Andersen valuation is an "operative valuation", then the Court should reinstate the Complaint and allow Plaintiff to assert his claims for damages based on the misconduct that led to that artificially depressed valuation report.

CONCLUSION

For the foregoing reasons, the Court should grant the motion to enforce its April 10, 2025 Decision and Order, or in the alternative, reinstate the Complaint or the declaratory judgment claim against the Rethink Defendants and grant summary judgment declaring the Andersen valuation invalid and grant such other and further relief as the Court deems just and proper.

Dated: April 25, 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 5,306 and is in compliance with Rule 17 of the Rules of the Commercial Division of the Supreme Court, effective October 1, 2018.

Dated: April 25, 2025
New York, New York

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