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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

KELLY BREZOCZKY,  
Plaintiff,  
v.  
DOMTAR CORPORATION,  
Defendant.

Case No. [5:16-cv-04995-EJD](#)

**ORDER GRANTING DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT  
AND DENYING PLAINTIFF’S CROSS-  
MOTION FOR SUMMARY JUDGMENT**

Re: Dkt. Nos. 63, 78

Plaintiff Kelly Brezoczky alleges that she formed a joint venture agreement with Defendant Domtar Corporation and that Domtar later breached that agreement. Domtar now moves for summary judgment on all of Brezoczky’s claims. Brezoczky moves for summary judgment on Domtar’s fifth affirmative defense, which asserts that Brezoczky failed to mitigate her damages.

Domtar’s motion will be granted. Brezoczky’s motion will be denied.

**I. BACKGROUND**

In 2011, Brezoczky founded Butterfly Health, Inc. (“Butterfly 1”), which developed products to protect against accidental bowel leakage. Def.’s Reply Separate Statement (“RSS”) ¶¶ 92–93, Dkt. No. 81. By early 2016, the company was in financial distress, and Brezoczky was exploring ways to wind it down. *Id.* ¶ 94.

In February 2016, Brezoczky asked Domtar to partner with her to make a stalking horse bid for Butterfly 1’s assets in a bankruptcy auction. *Id.* ¶¶ 95–97. After a series of phone calls and email exchanges, Brezoczky and Domtar executed a letter of intent (“LOI”) on March 28, 2016.

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1 Id. ¶¶ 99–110; LOI, id. Ex. 1, Dkt. No. 14-1. The LOI proposed that Brezoczky and Domtar would  
2 form a new entity—Butterfly Acquisition, LLC (“Butterfly 2”)—that would make a bid to acquire  
3 Butterfly 1’s assets. RSS ¶¶ 99–110.

4 On April 30, 2016, Domtar told Brezoczky by phone that it intended to terminate the LOI.  
5 Id. ¶ 20; Def.’s Mot. for Summ. J. (“MSJ”) 7, Dkt. No. 63; Pl.’s Cross-Mot. for Summ. J. (“Cross-  
6 MSJ”) 10, Dkt. No. 78. Written termination followed on May 2, 2016. RSS ¶ 20; MSJ 7; Cross-  
7 MSJ 10. In June 2016, Domtar—without Brezoczky or Butterfly 2—acquired Butterfly 1’s assets  
8 at auction. RSS ¶ 121. Brezoczky filed this action in August 2016, in which she brings claims  
9 against Domtar for (1) breach of fiduciary duty and (2) breach of contract. First Am. Compl.  
10 (“FAC”) ¶¶ 180–95, Dkt. No. 14.

11 Domtar now moves for summary judgment on both of Brezoczky’s claims. Brezoczky also  
12 moves for summary judgment on Domtar’s fifth affirmative defense for failure to mitigate  
13 damages.

14 **II. LEGAL STANDARD**

15 “Summary judgment is proper where no genuine issue of material fact exists and the  
16 moving party is entitled to judgment as a matter of law.” Samuels v. Holland American Line—  
17 USA Inc., 656 F.3d 948, 952 (9th Cir. 2011) (citing Fed. R. Civ. P. 56(a)). The Court “must draw  
18 all reasonable inferences in favor of the nonmoving party.” Id. “The central issue is ‘whether the  
19 evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-  
20 sided that one party must prevail as a matter of law.’” Id. (quoting Anderson v. Liberty Lobby,  
21 Inc., 477 U.S. 242, 251–52 (1986)).

22 **III. DISCUSSION**

23 The parties’ dispute centers on whether Domtar and Brezoczky entered into a contract to  
24 pursue a joint venture. “Under California law, a contract will be enforced if it is sufficiently  
25 definite (and this is a question of law) for the court to ascertain the parties’ obligations and to  
26 determine whether those obligations have been performed or breached.” Bustamante v. Intuit, Inc.,

1 141 Cal. App. 4th 199, 209 (2006) (quoting Ersa Grae Corp. v. Fluor Corp., 1 Cal. App. 4th 613,  
2 623 (1991)). “To be enforceable, a promise must be definite enough that a court can determine the  
3 scope of the duty[,] and the limits of performance must be sufficiently defined to provide a  
4 rational basis for the assessment of damages.” Id. (quoting Ladas v. Cal. State Auto Ass’n, 19 Cal.  
5 App. 4th 761, 770 (1993) and Robinson & Wilson, Inc. v. Stone, 35 Cal. App. 3d 396, 407  
6 (1973)). However, “[w]here a contract is so uncertain and indefinite that the intention of the  
7 parties in material particulars cannot be ascertained, the contract is void and unenforceable.” Id.  
8 (quoting Cal. Lettuce Growers v. Union Sugar Co., 45 Cal. 2d 474, 481 (1955)).

9 Section 7 of the LOI states that the LOI is not a binding agreement:

10 No Contract. It is expressly understood that this LOI (except for  
11 Sections 3 through 9<sup>1</sup> hereof, to which the parties intend to be bound  
12 and for which each acknowledges that adequate consideration has  
13 been given) is not intended to be, and shall not be construed to be, a  
14 binding commitment, agreement or contract and that neither Buyer  
15 nor Seller shall be entitled to any recourse, in the form of damages,  
16 equitable relief or otherwise, for expenses incurred or benefit  
17 conferred or lost before or after the date first written above in the  
18 event that there is a failure, for whatever reason, of Buyer and Seller  
19 to agree on any term or terms and/or provisions of a definitive  
20 purchase agreement.

21 LOI 4 (emphasis added). In addition, section 9 provides that either party may unilaterally  
22 terminate the LOI:

23 Termination. This LOI may be terminated without any obligation or  
24 liability to any party hereto (a) at any time, by the mutual agreement  
25 of Buyer and Seller, (b) by either of Buyer and Seller at any time  
26 after April 15, 2016 or (c) by Seller if Seller determines in good  
27 faith (after consultation with its outside counsel) that entering into  
28 definitive agreements regarding the Transaction on the terms  
outlined herein would reasonably be expected to be a breach of its  
fiduciary duties under applicable law.

LOI 5. As such, the LOI cannot form the basis of a binding joint venture agreement  
between Brezoczky and Domtar.

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<sup>1</sup> Sections 1 and 2 describe the terms of the proposed transaction.

1           Instead, Brezoczky argues that she entered into a separate oral contract with Domtar to  
2 pursue a joint venture. Cross-MSJ 10–12. Although the alleged oral agreement was never  
3 committed to writing, Brezoczky argues that section 2 of the LOI reflects its terms, “including the  
4 structure and governance of Butterfly 2, her ownership interest, and Domtar’s ability to buy her  
5 out at its discretion if Butterfly 2 hit certain milestones.” RSS ¶ 28. As discussed above, section 7  
6 provides that section 2 “is not intended to be . . . a binding commitment, agreement, or contract.”  
7 LOI 4. Brezoczky appears to argue that, while the LOI itself is not binding, the terms of section 2  
8 are enforceable because they represent the substance of a separate oral agreement between her and  
9 Domtar.

10           Brezoczky explains that a joint venture agreement “requires little formality” and “may be  
11 formed by oral agreement.” Cross-MSJ 10 (citing Pepper, N.A. v. Expandi, Inc., No. 15-cv-  
12 04066-NC, 2016 WL 1611039, at \*2 (N.D. Cal. Apr. 22, 2016) and Nelson v. Abraham, 29 Cal.  
13 2d 745, 749–50 (1947)). She alleges several facts to support her position that she and Domtar  
14 entered into an oral contract that was separate from the LOI. In October 2015, she met Mike  
15 Fagan, President of Domtar’s Personal Care Division, at an industry conference. Cross-MSJ 4. In  
16 February 2016, she called Fagan “to inquire whether Domtar would be interested in participating  
17 as her strategic partner in a stalking horse bid for § 363 sale acquisition of Butterfly 1.” Id. Fagan  
18 replied that Domtar would only be interested in making a bid if Brezoczky were involved, and that  
19 “ ‘Domtar would never consider getting in the business’ without her.” Id.

20           Brezoczky alleges that on February 26, 2016, she participated in a conference call with  
21 “Fagan and others at Domtar to discuss their approach to acquire Butterfly 1’s assets in a § 363  
22 sale.” Id. at 5. On March 4, 2016, she emailed Steve Makris, Domtar’s Vice President of Strategy  
23 and Innovation, to ask for an outline of how he viewed their proposed partnership. Id. He replied:

24                     I’ll send bullets in the morning my time, building around our key  
25                     objectives:

- 26                     1. Create a unique and meaningful partnership together with you in  
27                     Butterfly 2, built on what we each bring to the venture, and I’ll

1 detail Domtar’s investment, capabilities, scale, and desire to have a  
controlling interest;

2 2. Structured with incentives & alignment to jointly build B2 to  
3 reach its full potential; and

4 3. Having a clear path to full Domtar ownership, at a prescribed  
milestone in B2’s business development.

5 Id. Brezoczky alleges that “discussions with Makris and Fagan advanced through March 14, 2016,  
6 by which time she and Domat [sic] had orally reached a joint venture agreement.” Id.

7 In March and April, Fagan and others at Domtar “reiterated on multiple occasions that  
8 [Brezoczky’s] involvement was essential in the effort to acquire Butterfly 1’s assets.” Id. at 4.  
9 Brezoczky obtained approval for the proposed transaction from Butterfly 1’s senior secured  
10 lender, City National Bank (“CNB”), after which Fagan wrote to Brezoczky: “Yeah!!! Congrats!  
11 1st step now we have to see it thru to close and scale it the way we both know is possible!” Id. at  
12 4, 6.

13 Domtar and Butterfly 1 executed the LOI on March 28, 2016. Id. at 5, 7. According to  
14 Brezoczky, the LOI “memorialized their joint venture agreement” that had previously existed in  
15 the form of an oral agreement. Id. at 5. The parties, she argues, “still had an oral agreement and  
16 nothing in the LOI can be read to the contrary.” Id.

17 Around April 12, 2016, Domtar’s counsel indicated to Brezoczky’s counsel that “he  
18 believed Domtar was not ‘totally on board with the deal.’ ” Id. On April 19, 2017, Makris left  
19 Brezoczky a voicemail message in which he said:

20 I’m sure there must be some misunderstanding, confusion. But  
21 please give me a call when you have a moment and let’s talk. But,  
22 no wavering one iota on commitment to build the partnership. I  
don’t know, I haven’t get to talk to Chris or Ania yet.

23 Id. at 8. He followed up with text messages that read: “My message from earlier was that Domtar  
24 is 100% committed to the LOI and getting the deal done. . . . Our CEO is fully supportive and you  
25 know how Mike and I feel. We are very excited to be your partner in Butterfly 2!!” Id. at 8–9.

26 However, despite its earlier enthusiasm, Domtar terminated the LOI on May 2, 2016. Id. at

1 9. In June 2016, Domtar acquired Butterfly 1’s assets at auction. RSS ¶ 121. According to Domtar,  
2 it was unable to continue negotiations with Brezoczky because her “demands . . . moved far afield  
3 of what the parties contemplated in their non-binding Letter of Intent,” and because she engaged in  
4 “a pattern of . . . self-dealing in violation of her obligations to other parties.” Letter from Domtar’s  
5 Counsel on August 22, 2016, at 1, Dkt. No. 14-10. Domtar claims that Brezoczky “made  
6 numerous misrepresentations about [Butterfly 1]” and “chose to pursue her own interests, at the  
7 expense of the company where she was an officer and director with obligations to shareholders  
8 and creditors.” *Id.* As a result, Domtar chose to exercise its right under section 9 to terminate the  
9 LOI.

10 The Court finds that Brezoczky’s evidence does not establish the existence of an oral joint  
11 venture agreement. Domtar’s statements show that it was eager (at first) to pursue a partnership  
12 with Brezoczky. From February through April 2016, Brezoczky and Domtar discussed the terms  
13 of the proposed partnership, and they agreed to memorialize those terms in the LOI. But none of  
14 Domtar’s statements show that a binding partnership agreement was ultimately formed. Rather,  
15 Domtar’s statements are consistent with its position that it reached a tentative agreement with  
16 Brezoczky regarding the terms of a possible partnership. The LOI explicitly provided that it was  
17 nonbinding and that Domtar could unilaterally terminate it if negotiations broke down. That is  
18 what happened here, according to the evidence on the record—and no evidence plausibly suggests  
19 that Domtar agreed, orally or otherwise, to give up its right to terminate the LOI.

20 Brezoczky also argues that Domtar is liable because it indicated to CNB (Butterfly 1’s  
21 senior secured lender) that it would use “commercially reasonable efforts” to complete the  
22 transaction contemplated in the LOI. FAC ¶¶ 189–92; Cross-MSJ 20. Both Brezoczky and Domtar  
23 executed separate “Side Letter Agreements” with CNB to that effect on March 31, 2016. MSJ 8.  
24 Brezoczky’s argument fails for two reasons. First, Brezoczky was not a party to the agreement that  
25 Domtar executed with CNB, and she has not established a basis to assert its terms against Domtar.  
26 Second, even if Brezoczky could assert a claim arising from Domtar’s Side Letter Agreement, no

1 evidence suggests that Domtar failed to use “commercially reasonable efforts” to complete the  
2 transaction.

3 Domtar has established that there is insufficient evidence of a binding joint venture  
4 agreement between Brezoczky and Domtar, and that there is no genuine dispute of material fact on  
5 this issue. As such, Domtar is entitled to summary judgment on Brezoczky’s breach-of-contract  
6 claim. Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102 (9th Cir. 2000)  
7 (“In order to carry its burden of production, the moving party must either produce evidence  
8 negating an essential element of the nonmoving party’s claim or defense or show that the  
9 nonmoving party does not have enough evidence of an essential element to carry its ultimate  
10 burden of persuasion at trial. . . . In order to carry its ultimate burden of persuasion on the motion,  
11 the moving party must persuade the court that there is no genuine issue of material fact.”)  
12 (citations omitted). Domtar is also entitled to summary judgment on Brezoczky’s claim for breach  
13 of fiduciary duty because that claim depends on the existence of a contractual relationship. FAC  
14 ¶¶ 180–85.

15 **IV. CONCLUSION**

16 Domtar’s motion for summary judgment (Dkt. No. 63) is GRANTED. Brezoczky’s cross-  
17 motion for summary judgment (Dkt. No. 78) is DENIED AS MOOT. The Clerk shall close this  
18 file.<sup>2</sup>

19  
20 **IT IS SO ORDERED.**

21 Dated: December 5, 2017



EDWARD J. DAVILA  
United States District Judge

22  
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24  
25 <sup>2</sup> Defendant Polsinelli PC was previously dismissed. Dkt. No. 72. Domtar’s counterclaim was also  
26 dismissed. Dkt. No. 74. The only remaining claims are Brezoczky’s claims against Domtar for (1)  
27 breach of fiduciary duty (FAC ¶¶ 180–85) and (2) breach of contract (FAC ¶¶ 196–95). Domtar’s  
28 motion for summary judgment (Dkt. No. 63) disposes of those claims.

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