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

SYBRON CANADA HOLDINGS, INC.,
IMPLANT DIRECT SYBRON INTERNATIONAL, LLC,
IMPLANT DIRECT SYBRON MANUFACTURING, LLC,
IMPLANT DIRECT SYBRON ADMINISTRATION, LLC,

Index No. 650908/14

Plaintiffs,

- against -

GERALD A. NIZNICK, IMPLANT DIRECT INT'L, INC.,
IMPLANT DIRECT MFG., LLC,
MIKANA MANUFACTURING COMPANY, INC.,

Defendants.

LAWRENCE K. MARKS, J.:

Motion sequence numbers 005, 006, and 011 are consolidated for disposition.

In motion 005, defendants Implant Direct Int'l, Inc. (IDI), Implant Direct Mfg., LLC (IDM) and Mikana Manufacturing Company, Inc. (MMC) (collectively, ID Companies) move, pursuant to CPLR 3211(a)(1), (5) and (7), for dismissal of the first, second, fourth, sixth, seventh, and ninth causes of action of the amended complaint.

In motion 006, defendant Gerald A. Niznick moves, pursuant to CPLR 3211(a)(8), for dismissal of the amended complaint as against him on the ground of lack of personal jurisdiction, or, in the alternative, pursuant to CPLR 3211(a) (1), (5) and (7), for dismissal of the third, fourth, fifth, sixth and eighth causes of action, and, pursuant to CPLR 3024(b), for the striking of scandalous matter from the amended complaint.

In motion 011, plaintiffs Sybron Canada Holdings, Inc. (Danaher), Implant Direct Sybron International, LLC (IDSI), Implant Direct Sybron Manufacturing, LLC (IDSM) and Implant

Direct Sybron Administration, LLC (IDSA) move, pursuant to CPLR 3211, for dismissal of the fifth, sixth, eighth and ninth counterclaims, third affirmative defense, and the counterclaims to the extent that they are asserted derivatively.[1]

For the reasons set forth below, motion sequence 005 is denied, except to the extent of dismissing the fourth cause of action; motion sequence 006 is denied, except to the extent of dismissing the fourth cause of action; and motion sequence 011 is denied, except to the extent of dismissing the fifth counterclaim.

BACKGROUND

Amended Complaint

The facts as alleged in the amended complaint and other averments plaintiffs have submitted in connection with the motions are as follows. Niznick began manufacturing and selling dental implants through the ID Companies in 2006. IDM manufactured dental implant devices and related products; IDI marketed and sold these products; and MMC provided administrative support. Niznick controlled each of these companies. Am Compl, ¶ 36. The ID Companies captured 4% of the global market in dental implants in their first four years. Id., ¶ 37.

Danaher is also in the dental implant business. Its dental platform, known as the "KaVo Kerr Group," consists of a number of dental companies, serving dental practices throughout the world. On November 17, 2010, Danaher purchased 75% of the equity interests in the ID Companies for $225 million. Id., ¶ 38. As of November 2010, Niznick and related entities owned and controlled the ID Companies, which are shells that carry on no active business, and

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[1]Plaintiffs' notice of motion refers to dismissal of the seventh counterclaim to the extent that it is asserted derivatively. In their memorandum of law, however, plaintiffs argue for dismissal of all derivative claims.

are Niznick's alter egos. Id., ¶ 29.

To effectuate this transaction, each ID Company formed a "Joint Venture Company" (JVC). IDM formed IDSM, IDI formed IDSI and MMC formed IDSA. Each ID Company then contributed 100% of its assets to the JVC that it formed, and sold 75% of the membership units (Membership Units) they owned in the JVCs to Danaher. Id., ¶ 39. The "Transaction Agreement" is the contract pursuant to which Danaher acquired 75% of the ID Companies' business. Id., ¶ 40.

Niznick negotiated with Danaher three parallel "Operating Agreements," executed on December 30, 2010 by Danaher and the ID Companies, to provide for the management of the JVCs. Id., ¶ 41). Under these agreements, a four-person "Board of Managers" (Board) is responsible for the companies' management. Id., ¶ 3. Because of Niznick's technical expertise and knowledge, Danaher employed him as the first president of the JVCs. Originally, his employment was governed by an agreement signed November 17, 2010 (Employment Agreement), with a February 3, 2013 expiration date, subsequently changed to December 31, 2012, with a one-year automatic renewal. The expiration date of an "Employment Call Option" (ECO), which gave Dahaner the right to purchase all of the ID Companies' shares in the JVCs, was likewise changed to December 31, 2012. Id., ¶¶ 45, 51.

Niznick's tenure as president of the JVCs was checkered, because he acted offensively and unprofessionally toward JVC employees. Id., ¶ 52. Aware of Niznick's behavior, the then-Chairman of the Board, Dan Even, admonished Niznick at the JVCs' first Board meeting to modify his behavior to avoid further complaints. Niznick did not do so. Id., ¶¶ 53-54.

In October 2013, a complaint alleged that Niznick and a subordinate were having a sexual

relationship that resulted in the subordinate receiving more authority, a higher salary and preferable treatment. Id., ¶ 60. Niznick attempted to stop an investigation into the matter by demanding a formal Board vote. In the same email in which he demanded a Board meeting, Niznick resigned as president, writing: "Per my employment contract, I hereby give you 30 days notice. My last day with the company will be November 30, 2013." Consistent with that notice, Niznick's employment with the JVCs terminated on November 30, 2013. Id., ¶¶ 60-61.

On November 26, 2013, the Board appointed executive vice president of "Global Sales and Business Development" Tom Stratton to replace Niznick as president, beginning on December 1, 2013. Id., ¶ 67. At that meeting, Niznick voted in favor of Stratton's appointment as president, believing that Stratton would serve as his shill in operating the companies, having boasted that Stratton would still be reporting to him for the next 10 to 15 years. Id., ¶ 70.

Although Niznick resigned as president as of November 30, 2013, his expertise regarding dental implants remained valuable. Accordingly, on December 20, 2013, IDSI and Niznick entered into a "Consulting Agreement," allowing IDSI to receive the benefit of Niznick's expertise, even after he had no role in day-to-day management. Id., ¶ 74. In addition, Danaher, Niznick and the ID Companies entered into a third amendment to the Operating Agreements (Third Amendment) pertaining to the JVCs and their members' capital contributions. Id., ¶ 78.

After terminating his employment as president, Niznick made good on his threat to be "the worst minority shareholder anyone has ever seen." Id., ¶ 80. Despite promising in the Transaction and Consulting Agreements not to do so, Niznick disparaged the JVCs and their employees. Id., ¶ 87.

Trusts controlled by Niznick (Niznick Trusts) nominally own two buildings that currently

house the JVCs. On February 28, 2014, the Niznick Trusts purported to rescind lease extensions based on a disagreement over the JVCs' distribution of retained earnings. Then, on March 7, 2014, the ID Companies and the Niznick Trusts filed an action in Los Angeles County Superior Court seeking declarations as to the effectiveness of the rescission (*Niznick v. Sybron Canada Holdings, Inc.*, Case No. BC538650 (Los Angeles County Superior Court)). Id., ¶¶ 97-98. The following week, Niznick caused the ID Companies to sue Danaher and the JVCs for a second time in Los Angeles County Superior Court (*Implant Direct Mfg. v. Sybron Canada Holdings*, Case No. BC539077 (Los Angeles County Superior Court)), claiming that they wrongfully terminated the ID Companies' right to appoint a Board member. Id., ¶ 103.

The second California action is a thinly veiled attempt to circumvent forum selection and choice of law clauses and dispute resolution requirements in the Transaction Agreement and the Operating Agreements. Niznick also is attempting improperly to remove from this Court's purview the factual issues underlying the ECO, namely whether he committed acts constituting "Cause," and whether he voluntarily terminated his employment as president of the JVCs. Id., ¶ 106.

During early 2014, the parties exchanged "Dispute" notices and responses as required by the Transaction Agreement and the Operating Agreements. The parties then engaged in negotiations regarding the noticed Disputes. Those discussions did not resolve the matter. On March 20, 2014, the parties unsuccessfully mediated their various Disputes. Id., ¶¶ 106-07.

The amended complaint originally contained eleven causes of action, two of which have been discontinued.

The first cause of action, against the ID Companies, seeks a declaration that Niznick's

acts constitute "Cause" under the Operating Agreements. A "Cause Call Option" (CCO) therein affords Danaher the right to purchase the ID Companies' Membership Units upon a judicial determination that any defendant or affiliate has committed an act that constitutes Cause. Id., ¶ 112. Niznick committed numerous such acts, including: encouraging Stratton, five of Stratton's direct reports, John McLachlan, Wayne Smith and Jon Konheim to leave the JVCs, and engaging in conduct to entice the departure of other employees. Id., ¶ 113.

The second cause of action, against the ID Companies, seeks a declaration that Niznick resigned without "Good Reason" and, therefore, Dahaner may exercise the "Employment Call Option" (ECO) contained in the Operating Agreements, which permits Danaher to purchase the ID Companies' shares in the JVCs at a price set forth in section § 9.04(b)(i)(2) therein. Id., ¶ 121.

The third cause of action alleges that Niznick breached his fiduciary duties by: (1) encouraging employees to sue the JVCs; (2) cancelling the JVCs' lease extensions for their Calabasas and Valencia, California facilities; (3) soliciting employees to leave the JVCs; (4) engaging in offensive conduct toward JVC employees; and (5) interfering with investigations of complaints about his behavior.

The fourth cause of action, against all defendants, alleges that Niznick's acts, included in the allegations set forth in the third cause of action, breached the implied covenant of good faith and fair dealing.

The fifth cause of action, for conversion against all defendants, has been discontinued.

The sixth cause of action, against all defendants, alleges that they breached the Transaction Agreement by disparaging the JVCs, their majority owner (Danaher) and their

employees and management.

The seventh cause of action, against the ID Companies, seeks a declaration that the Third Amendment to the Operating Agreements has been terminated, because Niznick failed to cure acts constituting Cause within 30 days after receiving notice.

The eighth cause of action, against all defendants, alleges that they breached the forum selection clauses in the Transaction Agreement and the Operating Agreements by bringing the two actions in the Superior Court for Los Angeles County, California, regarding disputes within the scope of those clauses.

The ninth cause of action, against the ID Companies, seeks a declaration that they lost their right to appoint a manager to the Board, because Niznick (1) committed an act constituting Cause; and (2) prematurely terminated his employment without Good Reason.

The tenth cause of action, against Niznick, alleges that Niznick personally guaranteed the ID Companies' "punctual and full performance of all obligations" under the Transaction Agreement and the Operating Agreements, and is liable for their failure to perform fully under these agreements.

The eleventh cause of action, which sought a declaration as to the accuracy of retained earnings calculations for year-end 2013, has been discontinued.

ID Companies' Answer

Niznick has not answered the amended complaint. The IDC Companies' answer, in addition to asserting affirmative defenses, interposes 11 counterclaims. The overall theme of the counterclaims is that Danaher, as majority owner of the JVCs, has oppressed the ID Companies, the minority owners. A major disagreement is the circumstance of the conclusion of Niznick's

employment as president of the JVCs – either he wrongfully resigned, as asserted by plaintiffs, or he was wrongfully terminated, as asserted by defendants.

The first counterclaim alleges that, beginning on January 31, 2014, Danaher breached a mandatory buy-out clause (Mandatory Buy-Out), by failing to purchase a 5% membership interest in the JVCs at the Mandatory Buy-Out price. Answer, ¶¶ 168-69.

The second counterclaim alleges that Danaher has no right to exercise the ECO because (1) it released any rights it had to exercise the option; and (2) alternatively, all of the conditions precedent to Danaher's right to exercise the option have not been satisfied. Id., ¶ 173.

The third counterclaim alleges that Danaher has no right to exercise the CCO because all of the conditions precedent to Danaher's right have not been satisfied. Id., ¶ 177.

In the fourth counterclaim, the ID Companies seek (1) an injunction requiring the reinstatement of Niznick to the Board; (2) an injunction prohibiting Danaher and the JVCs from continuing to manage the business of the JVCs via a three-person Board consisting of Danaher-appointed managers only; and (3) a decree nullifying all votes taken on and after January 29, 2014 by a three-person Board consisting of Danaher-appointed managers only. Id., ¶ 186.

The fifth counterclaim alleges that plaintiffs breached the Second Amendment to the Operating Agreements (Second Amendment), by failing to distribute to the ID Companies $4,177,684 in accumulated retained earnings, instead distributing only $123,425. Id., ¶¶ 190-91.

The sixth counterclaim alleges that the JVCs are required to make quarterly distributions to the ID Companies of their pro rata share of 90% of "Excess Cash." Based on the preliminary unaudited financial statements, the JVCs had $29,456,741 cash on hand as of June 30, 2014.

Danaher and the JVCs have breached the covenant of good faith and fair dealing by refusing to make the quarterly distributions as required by the Second Amendment, without any purpose related to the reasonable needs of the business. Id., ¶¶ 195-200.

Alternatively, Danaher and the JVCs breached the covenant of good faith and fair dealing by (1) failing to make the required annual distribution to the ID Companies in an amount equal to their share of 50% of the Excess Cash the JVCs had as of December 31, 2013; (2) determining in bad faith that the cash on hand in 2014 was insufficient to warrant Excess Cash distributions more frequently than annually; and (3) refusing in bad faith to continue making quarterly tax distributions to the ID Companies. Id.

The seventh counterclaim alleges that plaintiffs breached the Operating Agreements by: (1) failing to provide advance notice of the "Integration Transaction" to the ID Companies; and (2) going forward with that transaction notwithstanding the ID Companies' veto over that transaction. According to the counterclaim, Danaher sought to create an "integrated organization" that would "strategically unite" and "formally link" the ID Companies and Danaher's "Dental Platform Companies under one identity with shared values" and one name, the KaVo Kerr Group. Id., ¶¶ 113, 204-07.

The eighth counterclaim alleges that Danaher breached fiduciary duties owed to the ID Companies by: (1) excluding them from the management of the business; (2) terminating Niznick's employment and replacing him with a far less competent president, who is more loyal to Danaher and the KaVo Kerr Group than to the JVCs; (3) ceasing the distribution of earnings; (4) cutting off the flow of information about the business; (5) attempting to force the ID Companies to sell their interest in the business for a fraction of its value by asserting baseless

claims; (6) using the JVCs' employees, services and intellectual property to further Danaher's economic interests; (7) terminating and harassing valuable employees and replacing them with less competent workers loyal to Danaher and the KaVo Kerr Group; (8) implementing the Integration Transaction, despite the ID Companies' veto; and (9) doing all it could to prevent the ID Companies from deriving any economic benefit from their interest in the business. Id., ¶ 214.

The ninth counterclaim alleges that, in or before March 2014, Danaher unlawfully misappropriated trade secrets by using its majority control over the JVCs. Id., ¶ 221.

The tenth counterclaim alleges that plaintiffs' breaches of duty and misconduct require an accounting to determine: (1) the Mandatory Buy-Out price; (2) the JVCs' actual earnings to calculate distributions; and (3) the extent of the ID Companies' damages. Id., ¶ 226.

The eleventh counterclaim alleges that plaintiffs must produce the JVCs' financial records. Id., ¶¶ 229-33.

The ID Companies now seek dismissal of the first, second, fourth, sixth, seventh and ninth causes of action. Niznick seeks dismissal of the entire amended complaint as against him on the ground of lack of personal jurisdiction; or, alternatively, dismissal of the third, fourth, fifth, sixth and eighth causes of action, and the striking of scandalous matter from the amended complaint. Plaintiffs seek dismissal of the fifth, sixth, eighth and ninth counterclaims, third affirmative defense and the counterclaims to the extent that they are asserted derivatively.

DISCUSSION

Motion 005

First cause of action

Plaintiffs seek a declaration that Niznick's acts constitute Cause under the Operating Agreements, triggering plaintiffs' right to exercise the CCO and purchase the ID Companies' Membership Units. The ID Companies argue that plaintiffs have failed to plead that Niznick's acts constitute Cause, because they did not give defendants the requisite notice of default and opportunity to cure pursuant to the Operating Agreements.

Specifically, the ID Companies argue as follows. Plaintiffs claim they gave defendants the required notice in a "subsequent letter that concerned . . . the acts identified in the January 29, 2014 letter, [in which] the Joint Venture Companies confirmed that Niznick 'may attempt to cure' the identified grounds within 30 days. Niznick, however, has not done so" (citing Am Compl, ¶ 115). However, the ID Companies aver that this letter, dated February 7, 2014, references the Consulting Agreement, and offers the opportunity to cure their breach under that agreement. This, they contend, is evident from the language employed therein: "we would refer him to Tom Stratton's letter of January 30, 2014. In it, the Joint Venture companies describe their intent to terminate the Consulting Agreement for cause, which Dr. Niznick may attempt to cure within 30 days thereafter pursuant to Section 7.2 of the Consulting Agreement." *See* Aff of Gerald A. Niznick, sworn to August 8, 2014, Exh E at 2-3 (Niznick Aff). According to the ID Companies, the actual notice is a January 29, 2014 letter sent by Stratton to defendants, which letter fails to offer the required opportunity to cure. Niznick Aff., Exh C. Plaintiffs counter that defendants' response to the notice confirms conclusively that they understood their cure right. Moreover, plaintiffs argue, providing an opportunity to cure would be futile, because of the

denial of any wrongdoing.

Based on the foregoing, it is evident that defendants have not demonstrated that the cause of action is subject to dismissal under any of the three grounds upon which the motion for dismissal is made, namely CPLR 3211(a)(1), (5) and (7). The ID Companies do not allege that the claim fails to state a cause of action, or that it comes within any of the enumerated bases under CPLR 3211(a)(5) for dismissal. As for the third ground, they have not shown that documentary evidence conclusively forecloses the claim.

The controlling Appellate Division cases that the ID Companies cite involved summary judgment. *See, e.g., Kalus v. Prime Care Physicians, P.C.*, 20 A.D.3d 452 (2d Dep't 2005); *Rebh v. Lake George Ventures*, 223 A.D.2d 986 (3d Dep't 1996); *Hanson v. Capital Dist. Sports*, 218 A.D.2d 909 (3d Dep't 1995). They also cite *Filmtrucks, Inc. v. Express Indus. & Term. Corp.*, 127 A.D.2d 509 (1st Dep't 1987), which involved a landlord-tenant situation, and the seeking of possession of property, creating an urgency not present here.

Second cause of action

Plaintiffs seek a declaration that Niznick resigned without Good Reason, and that Dahaner may exercise the ECO. Defendants argue that the first amendment to the Operating Agreements shortened the original expiration date of February 3, 2013 to December 31, 2011, and there were no further amendments to this date. Thus, a voluntary resignation by Niznick triggered application of the ECO if it occurred prior to December 31, 2011. The amended complaint alleges a purported termination without Good Reason in November 2013, after expiration of the ECO.

Plaintiffs argue that the JVCs renegotiated Niznick's Employment Agreement, which

extended Niznick's employment until December 31, 2012, and provided for an automatic one-year renewal, until December 31, 2013, unless either party provided written notice not to extend the employment term. The agreement also provided for a similar extension for the ECO expiration date. Because neither party canceled the Employment Agreement prior to October 31, 2012, the term of Niznick's employment, and the ECO expiration date, were extended to December 31, 2013.

Defendants counter that the Employment Agreement cannot amend the Operating Agreement, which is governed by section 15.05 thereof. It provides that "the terms and provisions of this Agreement may not be modified or amended at any time without the unanimous consent of all Members approving such modification or amendment," which, defendants contend, did not occur.

Because of conflicting assertions and the apparent ambiguity resulting from the interplay of the two sets of agreements and amendments, dismissal of this cause of action at this stage of the litigation is unwarranted. A cause of action may be dismissed under CPLR 3211(a)(1) "'only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law.'" *Art & Fashion Group Corp. v. Cyclops Prod., Inc.*, 120 A.D.3d 436, 438 (1st Dep't 2014) (quoting *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002)). Discovery should shed light on these issues and the parties' intent underlying the relevant contractual provisions.

Defendants also argue that the second cause of action should be dismissed because, in the Consulting Agreement, Danaher waived and released any rights it may have under the ECO under section 9.04(b)(i) of the Operating Agreements. Because the Consulting Agreement is

dated December 20, 2013, and provides that it is effective December 1, 2013, after the alleged resignation at issue, the release bars plaintiffs from pursuing the second cause of action. Plaintiffs argue that the release is not enforceable because it was procured by fraud.

"Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release." *Centro Empresarial Cempresa S.A. v. América Móvil, S.A.B. de C.V.*, 17 N.Y.3d 269, 276 (2011) (internal quotation marks and citation omitted). "A release may be invalidated, however, for any of the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake." Id. (internal quotation marks and citation omitted). "A plaintiff seeking to invalidate a release due to fraudulent inducement must 'establish the basic elements of fraud, namely a representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury.'" Id. (quoting *Global Mins. & Metals Corp. v. Holme*, 35 A.D.3d 93, 98 (1st Dep't 2006)).

Plaintiffs contend that Niznick represented in "Exhibit B" to the Consulting Agreement "that he is not aware of any claims he or the signatories below have against [the Joint Venture Companies], Sybron Canada Holdings Inc. or any other Danaher company or their members, officers, affiliates, subsidiaries, employees, agents or representatives." In exchange for that representation, IDSI waived and released any claims against Niznick that arise out of the Employment Agreement and employment relationship between Niznick and IDSI. Plaintiffs allege that they reasonably relied on Niznick's statement that he was unaware of any claims against them in executing the waivers in Exhibit B to the Consulting Agreement. Am Compl, ¶ 90.

Plaintiffs assert that the waivers and releases were fraudulently induced and fail for lack of consideration. Id., ¶ 92. Defendants counter that a party cannot reasonably rely on a representation as to something about which it had, or should have had, knowledge. However, the reasonableness of the reliance "implicates factual issues whose resolution would be inappropriate at this early stage." *Knight Sec. v. Fiduciary Trust Co.*, 5 A.D.3d 172, 173 (1st Dep't 2004) (citation omitted). Based on the controverted facts as to the validity of the representation, dismissal would be premature, because plaintiffs have alleged facts showing that the release may have been fraudulently obtained. *Gonzalez v. 40 W. Burnside Ave. LLC*, 107 A.D.3d 542, 544 (1st Dep't 2013).

Fourth cause of action

Plaintiffs allege that Niznick's acts, included in the allegations set forth in the third cause of action, breached the implied covenant of good faith and fair dealing. This cause of action is dismissed as duplicative of the breach of contract claims. *See Ullmann-Schneider v. Lacher & Lovell-Taylor, P.C.*, 121 A.D.3d 415, 416 (1st Dep't 2014).

Sixth cause of action

Plaintiffs allege that defendants breached the Transaction Agreement by disparaging the JVCs, their majority owner (Danaher) and their employees and management. The ID Companies argue that plaintiffs have not alleged that the comments, attributed to Niznick, were made in a representative capacity. For example, the acts of disparagement, such as calling Stratton untrustworthy, suggesting that Scott Henkel is incompetent and telling numerous persons that the JVCs would never exceed 8 to 9% growth under the new management, were allegedly made by Niznick, and not at the ID Companies' direction, or on their behalf.

Plaintiffs argue that, as the alter ego for Niznick, the ID Companies can be liable for Niznick's wrongful acts relating to the business in which the ID Companies participated. Plaintiffs argue further that the amended complaint alleges that Niznick was acting on behalf of the ID Companies when he disparaged the JVCs in a January 2, 2014 request for an emergency Board meeting, because, they contend, only the managers, as representatives of the members, have that right. They also argue that he had actual, implied and apparent authority to speak for those entities.

Plaintiffs are seeking reverse piercing, i.e., "where a plaintiff seeks to hold a company liable for the debts of its shareowner . . . rather than 'traditional' piercing (where a plaintiff seeks to hold a shareowner liable for the debts of the company)." *Harvardsky Prumyslovy Holding, A.S.-V Likvidaci v. Kozeny,* 117 A.D.3d 77, 83 (1st Dep't 2014). "Under either theory, there is a disregard of the corporate form, and the controlling shareholders are treated as alter egos of the corporation and vice versa." Id. (internal quotation marks and citation omitted). "[P]iercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993).

The amended complaint alleges that the ID Companies are completely controlled, influenced, governed and dominated by Niznick, and share such unity of interest and ownership with Niznick and that they do not have separate personalities or existences. It alleges that the ID Companies are shells with no active business and few, if any, assets other than their 25% ownership of the JVCs, and have had no active officers, directors or managers except for

Niznick. They exercise no business discretion independent of Niznick's personal wishes, and their sole purpose is to shield Niznick from liability. Am Compl, ¶ 29. Although they nominally own 25% of the JVCs, Niznick refers to their purported ownership as "my minority interest." Niznick also describes distributions from the JVCs to the ID Companies pursuant to the terms of the Operating Agreements as "my share of the profits." Niznick appointed himself to the ID Companies' seat on the Board of Managers to ensure that "I would have a continuing voice in the management of the business." Niznick also arrogated to himself the right to exercise the ID Companies' veto, which he does at his sole discretion "to ensure that Danaher would not, without my consent . . . treat the Joint Venture Companies as subsidiaries or divisions of Danaher." Id., ¶ 30. The Calabasas, California and Valencia, California buildings are nominally owned by the Niznick Trusts, but Niznick has asserted that he owns them and that he leased the buildings to the JVCs, and that the JVCs are his tenants." Id., ¶ 31.

The amended complaint also alleges that, at a national sales meeting, "Niznick told sales people, managers, visiting doctors, and key opinion leaders in the dental implant field that the Joint Venture Companies, which were targeting annual sales growth of at least 25%, would never exceed 8 or 9% in annual sales growth." Id., ¶ 87. Plaintiffs aver that Niznick stated that he would be attending that meeting as a shareholder, and that only the ID Companies are shareholders (*see* Transcript of oral argument on motions to dismiss, at 57; Affidavit of Henricus van Duijnhoven, sworn to September 24, 2014, Exh A.

As for the requirement that domination was used to commit a fraud or wrong against the plaintiffs which resulted in their injury, the amended complaint alleges that Niznick used his control over the ID Companies to cause them to breach the various operative agreements. *See,*

e.g.. Am Compl, ¶¶ 140, 152.

Accordingly, dismissal of this cause of action is denied.

Seventh cause of action

Plaintiffs seek a declaration that the Third Amendment to the Operating Agreement has been terminated. Defendants argue that, under both the Consulting Agreement and the Third Amendment, plaintiffs' right to terminate the Third Amendment is triggered by delivery of a valid notice of intent to terminate the Consulting Agreement for Cause, which contains a 30-day cure period. The acts which plaintiffs claim constitute Cause, and trigger their right to terminate, consist of a series of 10 disparaging remarks purportedly made by Niznick, identified in paragraph 162 of the amended complaint. However, defendants argue, plaintiffs' purported cure notice (January 30, 2014) was defective. Defendants also argue that, by paying Niznick long after they had knowledge of the alleged acts constituting the breach, plaintiffs waived any right to terminate the Consulting Agreement based thereon.

Dismissal of this cause of action is denied for the same reasons dismissal of the first cause of action is denied.

Ninth Cause of action

The ninth cause of action, against the ID Companies, seeks a declaration that their right to appoint a manager has terminated because, under the Operating Agreements, Niznick (1) committed an act constituting Cause; and (2) terminated his employment without Good Reason prior to the conclusion of his employment term.

The ID Companies argue that plaintiffs can neither state nor establish a claim that Niznick committed an act constituting Cause, because plaintiffs did not send the required notice

of default and opportunity to cure. They also allege that, as asserted above as to the first cause of action, because Niznick's alleged resignation took place in November 2013, after the operative date of December 31, 2011, the right was not triggered.

Again, dismissal of this cause of action is denied for the same reasons that dismissal of the first cause of action is denied.

Motion 006

Jurisdiction

Niznick states that plaintiffs do not claim that the Court has jurisdiction over him on the ground that he is present in the State, or on the ground that he committed the alleged wrongs here. Rather, the purported basis for asserting jurisdiction is the forum selection clauses found in section 11.01 (c) of the Operating Agreements and section 10.07 (c) of the Transaction Agreement. He argues that, although these agreements contain forum selection clauses, he signed the Operating Agreements in a personal capacity "solely for the purposes of Article X, Section 3.03, Section 15.03 and Section 15.15," and for the Transaction Agreement, "solely for the purposes of Section 2.29(b), 5.3 and 10.13" (Niznick's Memorandum of Law in Support of Motion to Dismiss, at 6). Thus, he contends, he is not bound by the forum selection clauses as to the issues in this action.

The burden of establishing jurisdiction rests on plaintiff as the party asserting jurisdiction. *O'Brien v. Hackensack Univ. Med. Ctr.*, 305 A.D.2d 199 (1st Dep't 2003). Plaintiffs have met their burden. Niznick concedes that he is personally bound by, among other provisions of the Operating Agreements, Article X. Article X pertains to "Fiduciary Duties," and the third cause of action asserts a breach of fiduciary duty claim for actions encompassed by Article X, such as

encouraging key employees to leave the JVCs.

Moreover, the sixth cause of action alleges breach of the Transaction Agreement through the disparagement of the JVCs. Forum selection clauses are not restricted to pure breaches of the contracts containing the jurisdiction clauses, but also cover claims related to the agreement. *Roby v. Corporation of Lloyd's*, 996 F.2.d 1353, 1361 (2d Cir. 1993); *Nanopierce Tech. v. Southridge Capital Mgt. LLC*, 2003 WL 22882137, 2003 US Dist LEXIS 21858 (SDNY 2003). Here, the alleged wrongs in those causes of action are inextricably intertwined with Article X, to which Niznick agreed to be personally bound pertaining to fiduciary duties.

The tenth cause of action alleges breach of Niznick's guarantee in the Transaction Agreement and Operating Agreements, whereby he personally guaranteed the ID Companies' "punctual and full performance of all obligations" under the Transaction Agreement and the Operating Agreements. Niznick is liable for the ID Companies' failure to perform under these agreements, Am Compl, ¶¶ 186-88; Transaction Agreement, § 10.13; Operating Agreements, § 15.15, thereby rendering him subject to jurisdiction in the forum where the ID Companies are subject. *See State Bank of India v. Taj Lanka Hotels*, 259 A.D.2d 291, 291 (1st Dep't 1999).

Moreover, "'a nonparty that is closely related to one of the signatories can enforce a forum selection clause.'" *Tate & Lyle Ingredients Ams., Inc. v. Whitefox Tech. USA, Inc.*, 98 A.D.3d 401, 401 (1st Dep't 2012) (quoting *Freeford Ltd. v. Pendleton*, 53 A.D.3d 32, 39 (1st Dep't 2008). As discussed above, pertaining to the alter ego claim, this would be applicable to Niznick and the ID Companies.

Third cause of action

Niznick argues that the breach of fiduciary duty claim should be dismissed because the amended complaint fails to allege the basis for his duty in that he and IDSI entered into the Consulting Agreement, effective December 1, 2013, under which he was designated an independent contractor, and did not owe any fiduciary duties to plaintiffs. Thus, he argues, the cause of action, which is based on acts that occurred after the operative date of this agreement, must be dismissed. This argument is unavailing in that the amended complaint alleges acts that occurred prior thereto. *See, e.g.,* Am Compl, ¶¶ 52-56, 64, 65.

Niznick also argues that any claims that plaintiffs may have that Niznick breached his fiduciary duties that arise out of conduct that occurred prior to the operative date of the Consulting Agreement similarly must be dismissed, because Niznick was released therefrom. This argument is rejected for the reasons discussed above.

Fourth cause of action

Plaintiffs allege that Niznick's acts, included in the allegations set forth in the third cause of action, breached the implied covenant of good faith and fair dealing. As discussed above, this cause of action is dismissed as duplicative of the breach of contract claims. *See Ullmann-Schneider v. Lacher & Lovell-Taylor, P.C.*, 121 A.D.3d 415, 416 (1st Dep't 2014).

Fifth cause of action

This claim has been discontinued.

Sixth cause of action

Plaintiffs allege that defendants breached the Transaction Agreement by disparaging the JVCs, Danaher and their employees and management while the Transaction Agreement was in

effect, including Stratton, Scott Henkel and Tom Creighton.

Niznick argues that this claim fails because it is based on section 10.14 of the Transaction Agreement, and he is not bound by that section. He claims that he is a party to that agreement "solely for the purposes of Sections 2.29 (a), 5.3 and 10.13 of the Transaction Agreement." This argument is also rejected for the reasons discussed above.

Eighth cause of action

Plaintiffs allege that defendants breached the forum selection clauses in the Transaction Agreement and the Operating Agreements by bringing two actions in the Superior Court for Los Angeles County, California regarding disputes within the scope of those clauses.

Niznick argues that this cause of action fails, because he has not brought either of these suits as an individual, and because he is not bound by section 11.01 of the Operating Agreements or section 10.07(a) of the Transaction Agreement. As discussed above, he is bound by the forum selection clauses, and could be liable for the breaches even if he had not commenced them acting in an individual capacity (e.g., as a trustee).

Striking of scandalous claims

Niznick argues that the amended complaint's numerous scandalous allegations should be stricken, because they were advanced to embarrass him. He asserts that they do not support any claim advanced, and even if they did, they should be stricken given their prejudicial nature. For example, in paragraphs 6 and 52 of the amended complaint, plaintiffs allege that Niznick engaged in crude behavior at a national sales meeting. However, he argues, these allegations do not support plaintiffs' claim that they can exercise the CCO, which is, instead, based on purported allegations of competition and disparagement. Am Compl, ¶¶ 112-13, 116. Nor are

they related to the alleged workplace complaint referenced in paragraph 8 of the amended complaint, which resulted in a challenged investigation into Niznick's conduct. He contends that the same is true of the allegations contained in paragraph 54, describing his alleged conduct at a business lunch and an all-hands sales meeting, and in paragraph 56, describing purported communications with three JVC sales associates. He describes the allegations contained in paragraphs 58 and 59 as inflammatory, and asserts that, although they relate to the workplace complaint, referenced in paragraph 8, they are too prejudicial to remain in the pleading.

"In reviewing a motion pursuant to CPLR 3024(b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." *Soumayah v. Minnelli*, 41 A.D.3d 390, 392 (1st Dep't 2007). "A motion to strike scandalous or prejudicial material from a pleading . . . will be denied if the allegations are relevant to a cause of action." *New York City Health & Hosps. Corp. v. St. Barnabas Community Health Plan,* 22 A.D.3d 391, 391 (1st Dep't 2005).

Here, at a minimum, the allegations complained of are relevant to the third cause of action alleging breach of fiduciary duty. Arguably, the specific allegations describing offensive comments could also be related to issues pertaining to the CCO, in that they could have unintentionally "encouraged" employees to leave, to depart from an unpleasant working environment.

Motion 011

Fifth counterclaim

The ID Companies claim that plaintiffs breached the Second Amendment to the Operating Agreements, because they failed to distribute to the minority members $4,177,684 in

accumulated retained earnings, instead distributing only $123,425.

In seeking dismissal, plaintiffs contend that on February 28, 2014, defendants rescinded the Second Amendment, along with the lease extensions, causing the JVCs to move to a new manufacturing facility. They emphasize that the validity of the effectiveness of the unilateral rescission is, in effect, mooted by their June 12, 2014 consent to the rescission.

Defendants argue that plaintiffs have not shown in their papers that the purported rescission was effectuated. They contend that plaintiffs did not respond to the February 2014 notice by accepting its terms, or agreeing to rescind the Second Amendment and lease extensions. Instead, they commenced this action, seeking a declaratory judgment that their distribution of $123,425 in accumulated retained earnings was proper. They also assert that plaintiffs responded to the attempt to rescind the Calabasas lease by making arrangements to move from there to another location, and, therefore they did not rely to their detriment on defendants' attempt to rescind the Second Amendment.

A review of the February 28, 2014 letter and the June 12, 2014 response reveals that the parties intended the rescission to affect the parties' rights and obligations under the Second Amendment. *Cf. Mode Contempo, Inc. v. CKI 23rd St. LLC*, 41 A.D.3d 293, 293 (1st Dep't 2007). The parties agreed to rescind without condition. *Cf. K.I.D.E. Assoc. v. Garage Estates Co.*, 280 A.D.2d 251, 254 (1st Dep't 2001).

The February 28, 2014 letter stated that its purpose was "to give formal notice of rescission" of, among other things, the Second Amendment. No conditions were attached to the rescission. Although the June 12, 2014 response discussed the willingness to "restore everything of value" that was "received under the Agreements" on the condition that the ID Companies do

likewise, the consent to the rescission itself was not so conditioned. The letter unequivocally stated that the agreements were "rescinded immediately by consent of the parties." "Once an agreement has been rescinded, there can be no claims based on the cancelled agreement unless the right to make such claims is expressly or impliedly reserved within the terms of the rescission." *Milan Music, Inc. v. Emmel Communications Booking, Inc.*, 37 A.D.3d 206, 206 (1st Dep't 2007).

Accordingly, the fifth counterclaim is dismissed.

Sixth counterclaim

Defendants allege that plaintiffs have breached the covenant of good faith and fair dealing by refusing in bad faith to make the quarterly Excess Cash distributions to the Minority Members, as required by the Second Amendment to the Operating Agreements.

Plaintiffs argue that the counterclaim should be dismissed as duplicative, because it is based on alleged breaches of express provisions of the Operating Agreements. However, the issue is not whether it is based on breaches of express provisions of an agreement, but, rather, whether the claim is based on the same allegations and seeks the same damages as a breach of contract claim elsewhere in the pleadings. *See Ullmann-Schneider v. Lacher & Lovell-Taylor, P.C.*, 121 A.D.3d 415, 416 (1st Dep't 2014). Here, in contrast to thed claim asserted in the amended complaint (discussed above), the counterclaim is not duplicative, because the ID Companies do not assert this claim elsewhere in their answer.

Eighth counterclaim

Based on the alleged breaches of fiduciary duties, set forth above, the ID Companies seek on their own behalf and derivatively on behalf of the JVCs: (1) compensatory damages; and (2)

an injunction (a) restraining Danaher and the Board of the JVCs from using the ID Companies' name, logo, customer list and customer information in connection with the marketing and promotion of KaVo Kerr Group products, and from placing the management of the JVCs under the KaVo Kerr Group's control, and (b) compelling Danaher and the Board of the JVCs to unwind and reverse to the maximum extent possible all acts taken by them in furtherance of the Integration Transaction.

Plaintiffs argue that this counterclaim should be dismissed, because the Operating Agreements provide that "all fiduciary duties owed under any Requirement of Law by any Member, in its capacity as a Member, to any other Person are hereby eliminated, or otherwise restricted, to the fullest extent permitted under the Act and any other requirement of Law" (Operating Agreements, § 10.03). They assert that the relevant "Acts" are the Nevada LLC Act (for IDSI) and the California LLC Act (for IDSM and IDSA). Under section 10.03, the same applies to "Managers."

As persuasively noted by the ID Companies, section 10.03 does not state that fiduciary duties are unconditionally eliminated, but that they are "eliminated, or otherwise restricted, to the fullest extent permitted under the Act [the California Revised Uniform Limited Liability Company Act for IDSM and IDSA, Chapter 86 of the Nevada Revised Statutes for IDSI] and any other Requirement of Law." They also cite section 10.6 of the Transaction Agreement, entitled "Governing Law," which provides:

> [A]ll claims, disputes, controversies or causes of action (whether in contract, tort, equity or otherwise) that may be based upon, arise out of or relate to this Agreement . . . [and] any . . . exhibit hereto [including the Operating Agreements] . . . shall be governed by and construed in accordance with the internal Laws, and not the Laws governing conflicts of Laws (other than Sections 5-1401 and 5-1402 of the New York General Obligations Law), of the State of New York.

Section 15.07 of the Operating Agreements states that, "[e]xcept as otherwise provided" therein, the Operating Agreements "shall be governed and construed in accordance with the laws of the State of New York." They argue further that, although section 10.03 refers to the laws of California and Nevada, New York law is applicable because of the language that the extent to which fiduciary duties can be eliminated by contract is determined by reference to California Law (IDSM and IDSA), Nevada law (IDSI), "and any other Requirement of Law." This, they argue, is significant, because under New York law, an LLC manager owes fiduciary duties, including the "duty of fidelity," to the company and its members and it prohibits the wholesale elimination of such duties by contract. *See* Limited Liability Company Law § 417(a)(l). The ID Companies also contend that any contractual elimination of fiduciary duties would not affect a claim for breach of the implied covenant of good faith and fair dealing in carrying out the provisions of the Operating Agreements.

The motion papers do not resolve the issue as to the effect of the language in the Operating Agreements "and any other Requirement of Law." "Where a contract is ambiguous, extrinsic evidence of the parties' intent may be submitted by the parties and evaluated by the trier of fact." *RM Realty Holdings Corp. v. Moore*, 64 A.D.3d 434, 440-441 (1st Dep't 2009). Here, the parties argued at length the effect of the laws of the various jurisdictions, but have not adequately addressed the intent and scope of the contractual language.

Ninth counterclaim

The ninth counterclaim alleges that, in or before March 2014, Danaher unlawfully misappropriated trade secrets by using its majority control over the JVCs.

Plaintiffs argue that the Transaction Agreement expressly permits Danaher to disclose the

JVCs' trade secrets to its affiliates and to use those trade secrets for the purposes for which they are disclosed, citing section 5.3(b)(ii), which provides:

> (b) Buyer recognizes that by reason of . . . . (ii) the information provided by Sellers to Buyer in connection with the transactions contemplated hereby, it has acquired and/or will acquire Confidential Information of the Business Companies, the ID Business and Sellers, the use or disclosure of which could cause Sellers, the Business Companies, the ID Business and/or their respective Affiliates substantial loss and damages that could not be readily calculated and for which no remedy at law would be adequate. Accordingly, Buyer covenants and agrees with Sellers that it will not at any time, except (A) in performance of its obligations pursuant to the Transaction Documents, (B) in accordance with its rights pursuant to the Joint Venture Company Agreements or (c) to its Affiliates, directly or indirectly, use, disclose or publish, or permit other Persons (including Buyer's Affiliates) to disclose or publish, any Confidential Information, or use any such information in a manner detrimental to the interests of Sellers, the Business Companies or any of their Affiliates . . . ."

Plaintiffs also cite section 15.03(a) of the Operating Agreements, which provides:

> During the term of this Agreement, certain confidential non-public information and materials of a Member and its Affiliates or the Company and its Affiliates may be disclosed to the other Members and their respective Affiliates and designated Managers. It is agreed that such materials, information and data (collectively, 'Confidential Information') constitute the property of the disclosing party, and that the receiving Member, Niznick and the Trust shall, and shall cause their Affiliates and designated Managers to, maintain as confidential and not disclose such Confidential Information other than to their Affiliates, directors, officers, employees, agents and representatives that need to know such Confidential Information in connection with such receiving Member's, Niznick's and the Trust's interests in the Company or use it for any purpose other than for the specific purposes for which such Confidential Information has been disclosed to such receiving Member, Niznick or the Trust or their Affiliates or designated Managers, without the prior written consent of the disclosing party in each case. Each receiving Member, Niznick and the Trust agree to ensure that their Affiliates, designated Managers, directors, officers, employees, agents and representatives will comply with this Section 15.03, and shall be liable for any failure to comply with this Section 15.03.

There are issues of fact arising out of the above-quoted provisions, and the allegations set forth in the answer, such as whether the disclosures have been made "in a manner detrimental to the interests of the [ID Companies]" (Transaction Agreement, § 5.3(b)(ii)), or have been used

"for any purpose other than for the specific purposes for which such Confidential Information has been disclosed" (Operating Agreements, § 15.03(a)).

Derivative claims

Plaintiffs seek dismissal of the counterclaims to the extent that they are asserted derivatively. They argue that the ID Companies fail to assert demand futility with particularity. Instead, plaintiffs argue, the ID Companies assert in a single sentence: "[A] demand on the Joint Venture Companies to file suit would be futile, and is therefore excused, because all of the Danaher-appointed Board managers . . . are themselves interested in the acts and transactions being challenged by this cause of action." Answer, ¶ 223.

In *Marx v. Akers*, 88 N.Y.2d 189, 200 (1996), the Court of Appeals held:

> Demand is excused because of futility when a complaint alleges with particularity that a majority of the board of directors is interested in the challenged transaction. Director interest may either be self-interest in the transaction at issue . . . or a loss of independence because a director with no direct interest in a transaction is 'controlled' by a self-interested director.

The pleading must allege with particularity any of the grounds for excusing demand on the board of directors as futile. *Wandel v. Eisenberg*, 60 A.D.3d 77, 80 (1st Dep't 2009).

Here, the answer adequately alleges that a demand on the Board would be futile. As alleged in the answer, defendants challenge the transaction between the JVCs and the KaVo Kerr Group to integrate the JVCs' business into the KaVo Kerr Group, the termination of Niznick's employment, his removal from the Board, and the transfer of the JVCs' trade secrets to the KaVo Kerr Group. It also alleges that Danaher has the right to appoint three Board managers, that the Board chairman is Henk Van Duijnhoven, president of the KaVo Kerr Group, and that the other Board managers appointed by Danaher are Danaher executives. After allegedly removing

Niznick from the Board on January 29, 2014, the Board functions with only these three Danaher appointees. Thus, the answer adequately alleges that the entire Board is interested in the challenged transactions and appointed by Danaher, which directly benefits from the challenged transactions. *See* Answer, ¶¶ 47, 75, 90, 93, 95, 109, 151, 155, 183, 186, 211, 213, 217.

Third affirmative defense

The third affirmative defense asserts that the leases for the properties in Calabasas, California and Valencia, California are subject to litigation in the counties in which they are located. Both properties that are the subject of these leases are located in Los Angeles County, where the actions were commenced.

Plaintiffs argue that, by this defense, defendants assert that they properly brought their California lawsuits in that forum, notwithstanding the mandatory New York forum selection clauses in the parties' agreements, because they concern "Organizational Matters" under section 15.07 of the Operating Agreements. However, plaintiffs continue, this conclusion was rejected in both of the California actions, and, therefore, defendants' third affirmative defense should be dismissed pursuant to CPLR 3211(b). In the "Implant Direct Action, No. BC539077," plaintiffs filed a motion to dismiss based on the exclusive New York forum selection clauses. The Los Angeles County Superior Court granted the motion, which was a final ruling on the merits, and, plaintiffs argue, defendants are collaterally estopped from relitigating it here. In the "Real Estate Action," No. BC538650, the Los Angeles County Superior Court issued a tentative ruling that likewise enforced the exclusive New York forum selection clauses. During the court's postponement of a final decision to determine whether the case was moot based on plaintiffs' consent to the rescission, defendants voluntarily dismissed the case.

The ID Defendants persuasively contend that collateral estoppel does not apply under California law unless the prior proceeding results in a final judgment on the merits, and when the time for appeal has expired, citing *Ferraro v. Camarlinghi,* 161 Cal. App. 4th 509, 532-533 (6th Dist. 2008). The papers do not reflect that the appeal has been resolved.

The Court has considered the parties' other arguments and finds them unavailing.

Accordingly, it is

ORDERED that motion sequence 005 by defendants Implant Direct Int'l, Inc., Implant Direct Mfg., LLC and Mikana Manufacturing Company, Inc. is denied, except to the extent of dismissing the fourth cause of action; and it is further

ORDERED that motion sequence 006 by defendant Gerald A. Niznick is denied, except to the extent of dismissing the fourth cause of action; and it is further

ORDERED that motion sequence 011 by plaintiffs Sybron Canada Holdings, Inc., Implant Direct Sybron International, LLC, Implant Direct Sybron International, LLC and Implant Direct Sybron Administration, LLC is denied, except to the extent of dismissing the fifth counterclaim.

This constitutes the Decision and Order of the Court.

Dated: February 3, 2015

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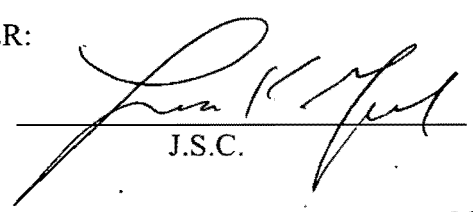

J.S.C.

HON. LAWRENCE K. MARKS