Mayer v Marron
2015 NY Slip Op 32811(U)
November 12, 2015
Supreme Court, New York County
Docket Number: 652987/2014
Judge: Eileen Bransten

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

PRESENT: EILEEN BRANSTEN **PART** 3

Justice

MAYER, JR., ROBERT C

INDEX NO. 652987/2014

MOTION DATE 04/16/2015

- V -

MARRON, PATRICK

MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause - Affidavits - Exhibits	No(s)	1
Answering Affidavits - Exhibits	No(s)	2
Replying Affidavits	No(s)	3
Cross Motion		No

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the accompanying memorandum decision.

DATED: 11/ 12 /2015

EILEEN BRANSTEN , J.S.C.

1. CHECK ONE : ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE : MOTION IS : ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE : ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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ROBERT C. MAYER, JR., D. WALKER WAINWRIGHT, AMERICAN INTERMODAL CONTAINER MANUFACTURING CO., LLC, and AMERICAN INTERMODAL CONTAINER MANUFACTURING, INC.,

Plaintiffs,

-against-

PATRICK MARRON, JOHN MAGUIRE, HOWARD LEGGETT, ONE-WAY LEASE, INC., HUMBERTO GARCIA and WILLIAM FRANCIS HARLEY, III,

Defendants.

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Index No. 652987/2014
Motion Seq. No. 001
Motion Date: 4/17/2015

BRANSTEN, J:

This action arises from the removal of Plaintiffs D. Walker Wainwright and Robert C. Mayer, Jr. from the Board of Managers of American Intermodal Container Manufacturing, Inc. ("AICMC") by Defendants. Plaintiffs' complaint asserts eight claims: breach of contract; promissory estoppel; tortious interference with contract; breach of fiduciary duty; aiding and abetting breach of fiduciary duty; tortious interference with business relations; breach of implied covenant of good faith and fair dealing; and, declaratory judgment.

Defendants seek dismissal of the complaint in its entirety pursuant to CPLR 3211(a)(1) and (a)(7). Plaintiffs oppose. For the reasons set forth below, Defendants' motion is granted in part and denied in part.

I. **Background**[1]

In July 2012, Wainwright and Mayer founded Plaintiff AICMC, which develops, manufactures, and sells 53-foot containers used in truck, rail, and shipping transport. Plaintiff American Intermodal Container Manufacturing, Inc. ("AICM Inc.") was formed in May of the following year as AICMC's operating company. (Compl. ¶¶ 2, 3, 41 & 49.) The companies were established under Delaware law, and their principal place of business and only office is in New York. *Id.* ¶¶ 30-31.

A. *Formation of AICMC*

Pursuant to AICMC's February 1, 2013 Operating Agreement, Wainwright and Mayer were appointed, along with Defendant John Maguire, as the three initial members of AICMC's Board of Managers ("Board"), with the authority to make all decisions regarding its operation and management. *Id.* ¶ 50. Wainwright also was AICM Inc.'s president and chairman. Mayer was AICM Inc.'s secretary. (Compl. ¶¶ 51-52.)

Pursuant to the Operating Agreement, AICMC's membership interests were as follows: Mayer (19%); Wainwright (19%); Maguire (22%); Defendant Howard Leggett (20%); Defendant Patrick Marron (12%); and, Defendant Humberto Garcia and other

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[1] The allegations cited in this section are drawn from the complaint, unless otherwise noted.

members who are non-parties in this action (collectively, 8%). *See* Affirmation of David E. Ross Ex. 2, Schedule 1.

B. *Wainwright and Mayer's Role at AICMC*

The complaint asserts that Wainwright took the lead in managing the business of AICMC and AICM Inc. (collectively, the "Companies") because he had extensive experience in investment banking and management of financial strategies for manufacturing and logistics companies. (Compl. ¶¶ 47, 53.) Wainwright and Mayer were able to attract more than 96% of AICMC's initial investors – deemed high-quality investors that contributed approximately $1 million in first-round financing – and were actively pursuing an additional $45 million in second-round financing. *Id.* ¶¶ 58-64.

Although Defendants Marron, Maguire and Leggett purportedly had no experience in raising capital, Maguire suggested a potential investor, Harley – a hedge fund manager with an alleged track record of managing funds in which investors suffered heavy losses where Harley gained considerable personal benefits. *Id.* ¶¶ 65-68. Wainwright and Mayer were unwilling to consider any involvement in the Companies by Harley and made that clear to Marron and Maguire. *Id.* ¶ 70.

Although Leggett initially was an AICMC member, he purportedly agreed in January 2014 to relinquish his membership due to his ownership and control of non-party

OWL, a company that does business with competing Chinese container manufacturers. Leggett's ownership of OWL allegedly created a "disabling conflict of interest" with the Companies. (Compl. ¶¶ 5, 107.) All other AICMC members agreed that it was "desirable and necessary" for Leggett to relinquish his membership interest and sever all connections with AICMC, and that all further communications with Leggett and OWL would be directed only through Wainwright and AICMC's lawyer. *Id.* ¶¶ 6, 9. At Leggett's request, Plaintiffs discontinued all references both to him and OWL concerning the Companies, including in private placement memoranda that Plaintiffs prepared for AICMC. *Id.* ¶ 8.

From January 2014 to June 2014, Wainwright and Mayer continued to advance the Companies' business, including by negotiating an important contract with International Truck and Engine Investments Corp., a subsidiary of Navistar, Inc. ("Navistar"), to manufacture containers. (Compl. ¶ 12.) During that time period, Defendants were aware of Plaintiffs' negotiation with Navistar and of their fund-raising efforts and prospects. *Id.* ¶ 13. Defendants also were aware of an important June 6, 2014 determination by the United States International Trade Commission ("ITC"), which addressed alleged illegal subsidies of Chinese-made containers and the possibility of imposing sanctions and tariffs on such containers. *Id.* ¶ 14. Defendants understood that the ITC's determination enhanced the Companies' prospects for success in manufacturing and selling containers

made in the United States. *Id.* ¶ 15. Awareness of the ITC determination purportedly was a "substantial factor" in Defendants' decision to remove Wainwright and Mayer and to install themselves as managers of AICMC. *Id.* ¶ 86.

C. *Defendants' Removal of Wainwright and Mayer from the AICMC Board*

On June 17, 2014, Defendants "blindsided" Wainwright and Mayer with an email notice that purported to remove them from AICMC's Board and replace them with Marron and Harley. (Compl. ¶ 16.) Plaintiffs allege that the "secret and underhanded" alliance of Leggett in facilitating such notice breached his agreement for his separation from the Companies, as well as the duty of good faith and fair dealing. *Id.* ¶ 19.

In a second notice to Wainwright and Mayer, dated June 24, 2014, Marron, Maguire and Leggett, purported to appoint Garcia as a manager and board member of AICMC, replacing Harley, who apparently resigned sometime between the dates of these two notices. *Id.* ¶ 20. This June 24th notice was allegedly "facilitated" by Garcia and Harley. *Id.* Plaintiffs contend that the notices were invalid because when they were sent, Leggett was not a member of AICMC and lacked the authority to take action that purported to overturn its management, which had the backing of virtually all of its investors and whose leadership brought it to the "threshold of success." *Id.* ¶ 21. According to Plaintiffs, Maguire, Marron and Leggett's claim in the June 24th notice that

they were "owners of a majority of the shares" of AICMC was false because: (1) Leggett was no longer an owner/member, since he agreed in January to relinquish his member interests and (2)Maguire and Marron did not own a majority of the shares entitling them to take the purported action. *Id.* ¶¶ 93-95. Thus, the other Defendants "did not and do not have sufficient voting control of AICMC to effect any ouster themselves." *Id.* ¶ 22. After June 17, 2014, plaintiffs contend that Marron, Maguire and Garcia improperly attempted to exercise control over AICM Inc., even though they were and are without authority to do so. *Id.* ¶ 24.

Wainwright and Mayer reacted to these notices with "prompt and prolonged" efforts to reach a "reasonable resolution" to preserve the Companies' prospect for success. (Compl. ¶ 25.) Their efforts allegedly were supported by virtually all initial investors in AICMC, who were brought in by Wainwright and Mayer, and who invested with the understanding that these two individuals would run the Companies' business. *Id.* ¶ 26. Defendants purportedly responded to Wainwright and Mayer's efforts with further delay, causing damages to the Companies and investors, all of which precipitated Plaintiffs' filing of this lawsuit. *Id.* ¶ 27.

II. **Discussion**

Defendants now seek to dismiss the complaint in its entirety pursuant to CPLR 3211(a)(1) and (a)(7).

A. *Applicable Legal Standards*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d

154, 154 (1st Dep't 1993). The Court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003)). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

B. *Documentary Evidence*

In support of their dismissal motion, Defendants argue that two documents flatly rebut the complaint's allegations: (1) AICMC's Operating Agreement; and (2) a May 16, 2014 draft settlement agreement ("Draft Settlement") between the Companies and Leggett/OWL. The Draft Settlement purportedly demonstrated the parties' intent and effort to settle various issues, including Leggett's potential sale of his member interest back to AICMC and his resignation from all AICMC positions. This Draft Settlement, however, never was signed. (Ross Affirm. Ex. 3.)

1. AICMC's Operating Agreement

As to the Operating Agreement, Defendants argue that two provisions therein – Sections 11.10 and 4.3(b) – negate Plaintiffs' allegations that Leggett was not an AICMC member when the removal notices were sent and that the notices were invalid because Defendants had insufficient voting control to effectuate the removal of Wainwright and Mayer.

Specifically, Defendants contend that Section 11.10 of the Operating Agreement requires all amendments or modifications be in a signed writing. According to Defendants, there is no writing reflecting Leggett's sale of his member interest to AICMC. Moreover, Defendants argue that Section 4.3(b) provides for removal of AICMC managers "with or without cause" by an affirmative vote of a "Member Majority." Therefore, Defendants maintain that Leggett was still a member of the Board in June 2014, such that Leggett, Maguire and Marron collectively held 54% of AICMC's interests, satisfying the Member Majority to effect a valid removal of Wainwright and Mayer.

This argument is persuasive; however, it ignores the remainder of Section 11.10, which states that "notwithstanding anything to the contrary in this Operating Agreement, the Board may, *in its sole discretion and without the approval of the Members, modify or amend this Operating Agreement* if such modifications or amendments are ... (b) for the

purpose of ... reductions from the Capital Accounts of the Members, and any associated adjustment to the Membership Interests or Shares..." Six months before the June 2014 termination notices were sent, Defendant Leggett allegedly resigned from the AICMC Board and relinquished his membership interests. According to Plaintiffs, the Board was in the process of documenting Leggett's relinquishment of his membership interests when the termination notices were issues. Accordingly, Section 11.10 of the Operating Agreement does not "conclusively establish" that Leggett remained a member of the Board at time of Plaintiff Wainwright and Mayer's termination, such that they could be validly terminated under Section 4.3(b), invalidating Plaintiffs' claims as a matter of law.

2. Draft Settlement Agreement

Plaintiffs next contend that the May 6, 2014 Draft Settlement is not documentary evidence, arguing that only documents such as "mortgages, deed, contracts, and any other papers, the contents of which are essentially undeniable" may qualify, and that, in any event, prior to the termination notices, "the wording of the parties' [Settlement Agreement] had been finalized" by their attorneys. *See* Pls.' Opp. Br. at 13.[2] This argument is unpersuasive. In *Yenom Corp. v. 155 Wooster St., Inc.*, 23 A.D.3d 259 (1st Dep't 2005), the First Department dismissed a breach of contract claim, relying on a draft

[2] While Plaintiffs allege that the Draft Settlement was "finalized" by June 3, 2014, they failed to produce a copy of the "finalized" product to support their allegation.

contract circulated between the parties to determine, among other things, that the parties did not have a meeting of the minds on material terms. In making this determination, the First Department deemed the draft contract to be documentary evidence. *Yenom Corp.*, 23 A.D.3d at 259. Accordingly, with regard to the instant motion, the Court will consider the Draft Settlement as such.

As to the Draft Settlement, Defendants argue that Section 11 therein provides that Leggett's sale of his interest and his withdrawal from AICMC would be effective only upon his execution of Settlement Agreement, but that Leggett never did so. Defendants argue that this documentary evidence "conclusively refutes" the allegation that Leggett contracted to sell his member interest back to AICMC and requires dismissal of the breach of contract claim against him and the tortious interference with contract claim against the other Defendants. Defendants further argue that because the Operating Agreement expressly provides that the removal of Wainwright and Mayer may be effectuated "with or without cause," their removal did not require any explanation and, as such, the breach of the implied covenant of good faith and fair dealing claim should likewise be dismissed.

Notably, Defendants do not rebut the allegation that, although the Draft Settlement was never signed, Leggett's lawyer confirmed in a May 30, 2014 email that, before the settlement was finalized, Leggett and OWL had been "out of the picture at AICM for

long enough." (Compl. ¶¶ 124, 125.) According to Plaintiffs, this allegation demonstrates the parties' prior course of conduct and "the understanding that Leggett was no longer associated with the Companies and that Plaintiff would continue as Managing Members." *Id.* In light of these allegations, which are deemed true in the context of a motion to dismiss and which Defendants neither refute nor address, the absence of a signed Draft Settlement and/or a written amendment to the Operating Agreement, which Defendants argue are documentary evidence, do not "conclusively establish" a defense to the claims as a matter of law. *Weil, Gotshal & Manges LLP v Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 271 (1st Dep't 2004). Accordingly, dismissal pursuant to CPLR 3211(a)(1) on the grounds of the Draft Settlement is unwarranted.

B. *Failure To State A Cause of Action*

The complaint asserts eight causes of action, and Defendants move to dismiss, arguing that the complaint fails to state actionable claims. The parties' contentions are discussed below.

1. Breach of Contract Claim (Against Leggett, OWL, Marron, Maguire and Garcia)

The breach of contract claim has two parts: (1) Leggett (and OWL) breached the January 2014 oral agreement whereby Leggett stated that he would disengage himself

from, and relinquish his membership interest in, AICMC due to his/OWL's disabling conflict with the Companies; and (2) Marron, Maguire and Garcia breached the oral agreement of February 2014, in which they agreed that they would no longer communicate with Leggett/OWL except through Wainwright and the Companies' counsel.

To state a breach of contract claim, a plaintiff must allege: a contractual obligation, performance by the plaintiff, breach of the obligation by the defendant, and resulting damages to the plaintiff. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). Moreover, courts have recognized the common-law rule, which authorizes a "review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract." *Flores v. Lower E. Side Serv. Ctr.*, 4 N.Y.3d 363, 370 (2005); *see also Kowalchuk v. Stroup*, 61 A.D.3d 118, 125 (2009); *Options Grp., Inc. v. Vyas*, 91 A.D.3d 446, 447 (1st Dep't 2012) ("Even if plaintiff never formally executed the settlement agreement it proffered to defendant, the record demonstrates that both parties intended to be bound by the agreement, and it is therefore enforceable"). Where there is an absence of a signed agreement, courts have observed: "[i]n determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look . . . to the objective

manifestations of the intent of the parties as gathered by their expressed words and deeds ..." *Flores*, 4 N.Y.3d at 368 (internal quotation marks and citation omitted).

The instant complaint alleges that there was a meeting of the minds as to Leggett/OWL's disengagement from the Companies in January 2014. (Compl. ¶ 111.) Defendants also do not dispute the allegations that conferences were held in February 2014 to discuss Leggett/OWL's disabling conflict of interest and that Defendants agreed not to communicate with Leggett/OWL. The complaint also asserts that Plaintiffs performed their obligations under the agreements by removing Leggett/OWL from AICMC's private placement memoranda and by continuing their fund raising efforts, and that such course of conduct was consistent with their "shared understanding" that Leggett/OWLwould no longer play a role in the Companies. Defendants nonetheless purportedly violated the agreements by joining together to remove Wainwright and Mayer, and Plaintiffs suffered damages as a result of said breach. *Id.* ¶¶ 146-155. Notably, it is also undisputed by Defendants that Leggett's counsel acknowledged in his May 30, 2014 email that Leggett/OWL had been "out of the picture at AICM" for a long time. *Id.* ¶ 125.

The foregoing course of conduct exhibited by the parties demonstrates for the purpose of this motion to dismiss that there was, at a minimum, an understanding if not a meeting of minds as to the crux of their agreements. The fact that the parties retained

counsel to document the terms of Leggett's sale of his member interest to AICMC further evidenced their intent to proceed with the agreements, even though the definitive terms thereof were not finalized in a signed writing in June 2014. Plaintiffs assert that the inability to finalize the Draft Settlement was due to the June 2014 ITC determination that enhanced the Companies' prospects for success, and that Leggett breached the Operating Agreement by removing Wainwright and Mayer from the Companies to "reinsert himself into the business." (Pls.' Opp. Br. at 16; Compl. ¶¶ 80-86.)

Defendants also acknowledge that courts have allowed oral modifications to contracts, notwithstanding contractual provisions requiring modifications to be in writing, where "the parties' partial performance of the contract is unequivocally referable to the oral modification," and that the partial performance will "admit no other possible explanation except one pointing directly to the existence of the oral agreement." (Defs.' Reply Br. at 5 n.4; *see also Rose v. Spa Realty Assoc.*, 42 N.Y.2d 338, 340 (1977) ("Partial performance of an oral agreement to modify a written contract, if unequivocally referable to the modification, avoids the statutory requirement of a writing.").) Here, it is undisputed that the parties partially performed the oral agreements by, among other things, deleting all references to Leggett/OWL in AICMC's capital raising documents, continuing necessary fundraising efforts, and negotiating the Draft Settlement. This course of conduct and the alleged facts are deemed true, for purposes of this motion, and

"unequivocally referable" to, and "pointing directly to the existence" of, the oral agreements.

Marron, Maguire and Garcia, though not disputing the existence of the February 2014 oral agreement, argue that the agreement is not binding because it was allegedly "far too vague" and failed to contain any "temporal limitation." (Defs.' Moving Br. at 14.) They also argue that because they were "indefinitely" required to cease communication with Leggett, and that since the oral agreement could not be performed within one year, it violated the Statute of Frauds for lack of a writing. *Id.* The arguments are unavailing. The agreement to stop communicating with Leggett except through Wainwright or the Companies' counsel is not "far too vague."

Moreover, "[w]e have long held that a contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute - such as the statute of frauds (General Obligations Law § 5-701) - that imposes such a requirement." *Flores*, 4 N.Y.3d at 368. Importantly, Defendants' unilateral assertion that the oral agreement could be performed within one year is not borne out by the facts of the case. Section 5-701(1) states that the oral agreement or promise is void only if it is "[b]y its terms is not to be performed within one year from the making thereof or the performance of which is not to be completed before the end of a lifetime." Nothing in the complaint or the alleged facts indicate that Defendants were required to cease

communication with Leggett for more than one year or such obligation "is not to be completed before the end of a life time." Indeed, where the time of performance is not specified in a contract, the law requires it to be completed within a reasonable time. *Savasta v. 470 Newport Assoc.*, 82 N.Y.2d 763, 765 (1993). "What constitutes a reasonable time for performance depends upon the facts and circumstances of the particular case" *Id.* The alleged facts do not support Defendants' assertion that the oral agreement, "by its terms," cannot be completed within one year or a reasonable time; particularly, Plaintiffs allege that the Draft Settlement was near completion by June 2014, less than five months after the February 2014 oral agreement.

Defendants' failure of consideration argument is also unpersuasive. Even though Leggett argues that the "purported items of consideration" benefitted the Company only, *see* Defs.' Reply Brief at 11, he does not dispute that the removal of his/OWL's names from AICMC's documents also benefitted him and OWL because it allowed OWL to serve as a broker for competing Chinese container manufacturers without a conflict of interest. Thus, the benefit, or the consideration, under the agreement was mutual. Other Defendants also benefitted because they hold interest in AICMC, which is a direct beneficiary of the agreement due to the removal of Leggett/OWL's disabling conflict of interest.

Accordingly, Defendants' arguments have not demonstrated as a matter of law that Plaintiffs fail to state a breach of contract claim. The breach of contract claim therefore is not be dismissed.

2. Promissory Estoppel (Against Leggett, OWL, Marron, Maguire and Garcia)

In support of the promissory estoppel claim, Plaintiffs allege that Leggett promised to relinquish his member interest and role in AICMC and that other Defendants promised not to communicate with Leggett and abide by the understanding that Leggett/OWL would not play any role in AICMC's operations. (Compl. ¶¶ 156-158.) The complaint also alleges that Plaintiffs reasonably relied on Defendants' promises while performing their obligations thereunder, but that Defendants joined in usurping AICMC's management control and failed to fulfill their promises, which resulted in significant financial harm to Plaintiffs, including lost businesses and profits. *Id.* ¶¶ 159-161.

As acknowledged by Defendants, the elements for a promissory estoppel claim are: a clear and unambiguous promise; reasonable reliance on the promise; and, injury caused by the reliance. *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 841 (1st Dep't 2011). Defendants argue that the purported promises were indefinite and that Plaintiffs' reliance was unreasonable in light of the Operating Agreement's requirement of a signed writing to reflect Leggett's relinquishment of his member

interest. The argument is unavailing. While the definitive terms of the oral agreement or promise were not finalized in January or Feburary 2014, the crux of the promise was that Leggett would no longer be associated with the Companies because of the disabling conflict of interest and the parties would retain counsel to finalize such terms. The lack of a signed writing evidencing the agreement does not defeat this claim for the reasons articulated above. Finally, as to damages, the complaint alleges that the removal of Wainwright and Mayer disrupted the Companies' existing and prospective business opportunities and "scared away additional investors from an essential second round of financing." As a result, Plaintiffs and their investors were "unjustly deprived of AICMC's rightful management and suffered significant financial harm." (Compl. ¶¶ 129-132, 135.) Therefore, the complaint satisfies the liberal pleading requirement for a promissory estoppel claim. *Braddock v. Braddock*, 60 A.D.3d 84, 95 (1st Dep't 2009) (holding that defendants' allegations should not be read, in the context of a 3211 motion to dismiss, to invalidate as a matter of law plaintiff's claim of injury sustained in reasonable reliance upon the defendant's promise).

Defendants next seek dismissal of the promissory estoppel claim on the grounds that it is duplicative of the breach of the contract claim. While a promissory estoppel claim "cannot stand when there is a contract between the parties," *see Susman v. Commerzbank Capital Markets Corp.*, 95 A.D.3d 589, 590 (1st Dep't 2012), the parties

here dispute the existence of a valid contract. Therefore, Plaintiffs may plead promissory estoppel as an alternative to the breach of contract claim. *See* CPLR § 3017 (relief in the alternative may be demanded in the complaint); *see also Polargrid LLC v. Videsh Sanchar Nigam Ltd.*, 2006 WL 903184, at *3 (S.D.N.Y. April 7, 2006) ("[Plaintiff] is entitled to plead the alternative theory of promissory estoppel in the event it is later determined there is no enforceable contract"). Accordingly, dismissal of the promissory estoppel claim is unwarranted at this juncture.

3. Tortious Interference With Contract (Against Marron, Maguire, Garcia and Harley)

Plaintiffs next contend Defendants Marron, Maguire, Garcia, and Harley tortiously interfered with Plaintiffs' oral contract with Leggett regarding his disengagement from all of AICMC's business operations. Plaintiffs further allege that Defendants knew of the contract and, in February 2014, acknowledged its existence in conference calls, during which they promised not to communicate directly with Leggett/OWL. Nevertheless, Defendants subsequently induced Leggett to join in the unauthorized notices of June 2014 in their attempt to remove Wainwright and Mayer and to install Marron and Harley, and eventually Garcia, in their places. (Compl. ¶¶ 163-168.)

"Tortious interference with contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract,

defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 424 (1996). Defendants argue that the tortious interference claim must be dismissed, since there is no valid contract between Plaintiffs and Leggett/OWL. The argument fails because, as explained above, the complaint pleads a viable breach of contract claim against Leggett/OWL.

Alternatively, Defendants argue that, even if the complaint pleads tortious interference, the claim should be dismissed because they acted in "their own economic interest." As the Court of Appeals has explained, "[i]n response to [a tortious interference with contract] claim, a defendant may raise the economic interest defense – that it acted to protect its own legal or financial stake in the breaching party's business." *White Plains Coat & Apron Co., Inc. v. Cintas Corp.*, 8 N.Y.3d 422, 426 (2007). However, Plaintiffs' allegations here state that Defendants acted with malice, which is an exception to the economic interest defense. *Foster v. Churchill*, 87 N.Y.2d 744, 750 (1st Dep't 1996) ("The imposition of liability in spite of a defense of economic interest requires a showing of either malice on the one hand, or fraudulent or illegal means on the other."). Contrary to Defendants' assertion, the complaint alleges that Defendants acted to "advance their financial interests by trying to wrestle control of management from Wainwright and Mayer" and that their actions "have not been merely negligent or the

product of poor judgment, but constitute egregious, calculated and intentional misconduct." *Id.* ¶¶ 87, 134. Accordingly, Defendants' motion to dismiss the tortious interference with contract claim is denied.

4. Tortious Interference With Business Relations (Against All Defendants)

The elements of a tortious interference with business relations cause of action are: the plaintiff had business relations with a third party; the defendant interfered with those relations; the defendant acted with the sole purpose of harming the plaintiff or using unlawful means; and resulting injury to the business relations. *Thome v. Alexander & Louisa Calder Found.*, 70 A.D.3d 88, 108 (1st Dep't 2009).

Here, Defendants argue that this claim must be dismissed because Plaintiffs failed to allege "unlawful or wrongful means." 'Wrongful means' include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 191 (2004). "[A]s a general rule, the defendant's conduct must amount to a crime or an independent tort." *Id.* at 190.

Plaintiffs allege tortious conduct by Defendants. The complaint alleges, among other things that Defendants wrongfully claimed to act for AICM Inc. when they were not

so authorized to act and in doing so, breached their fiduciary duties. Complaint, ¶¶ 96-100, 134, 172-191, 202-203. Although Defendants dispute these claims, they remain viable at this juncture.

Next, Defendants contend that Plaintiffs have failed to allege the loss of any of the Companies' business relationships as a result of Defendants' alleged misconduct. This argument is unpersuasive. Specifically, the complaint also alleges, among other things, that Defendants' misconduct "put a full stop" to the signing and completion of the Navistar contract, which was expected by August 2014; "impaired" the Company's ability to perform under the Navistar purchase order dated March 7, 2014; and "impeded" capital raising efforts expected for the summer of 2014. (Compl. ¶¶ 130, 131, 135.) Moreover, annexed to the complaint are letters addressed to Defendants, dated July 11, 2014, from investor Bogan (on behalf of other investors) which, among other things, stated their "justifiable outrage" as to the removal of Wainwright and Mayer and urged that these individuals be "restored to unchallenged managerial control." (Compl. Ex. D.) Thus, the complaint alleges a tortious interference of business relations claim, and Defendants' request to dismiss such claim is denied.

5. Breach Of Fiduciary Duty (Against Marron, Garcia and Harley)

Unless otherwise provided for in the governing limited liability company ("LLC") agreement under Delaware law,[3] an LLC's managers and controlling members owe the traditional fiduciary duties owed by directors and controlling shareholders in a corporation. *See William Penn Partnership v. Saliba*, 13 A.3d 749, 756 (Del. 2011).

Defendants argue that because Marron, Garcia and Harley were neither "controlling members" nor "managing members" when Wainwright and Mayer were removed, they do not owe a fiduciary duty to Plaintiffs. This argument is unpersuasive. Pursuant to the June notices, Marron, Maguire and Leggett, acting as a "Member Majority," removed Wainwright and Mayer, and replaced them with Marron and Harley, and later Garcia. Based on these notices, Marron, Garcia and Harley purportedly served as "managing members," and as such, they owe fiduciary duties to AICMC and its other members, including Wainwright and Mayer.[4]

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[3] As the Companies are formed under Delaware law and the Operating Agreement is governed by Delaware law, Delaware law applies to this claim since it pertains to the internal affairs and governance of a Delaware corporation or limited liability company (LLC). *See, e.g. Oppman v. IRMC Holdings, Inc.*, 14 Misc.3d 1219(A) (Sup. Ct. N.Y. Cnty. Jan. 23, 2007) ("Because the law of the state of incorporation governs the internal affairs of the corporation, Delaware law applies to Plaintiffs' claim that Defendants breached their fiduciary duties."). Plaintiffs do not dispute this point.

[4] AICMC is the corporate parent of AICM Inc., but the parties do not discuss whether Marron, Garcia and Harley also owe a fiduciary duty to AICM Inc.

Moreover, Defendants assert that Marron, Garcia and Harley were not managing members of the Company when the June notices were issued.[5] However, the complaint's breach of fiduciary claim alleges more than just the removal of Wainwright and Mayer. For example, it alleges that these Defendants placed their self-interest ahead of the best interests of the Company and its members and investors; failed to ensure that the Company is sufficiently capitalized to provide contract partners such as Navistar with reasonable assurances that contractual obligations can be met; and, impeded the Company's ability to raise second-round investments that Wainwright and Mayer had identified. (Compl. ¶¶ 179-181.)

These allegations are distinct from the allegations underlying Plaintiffs' breach of contract claim; therefore, Defendants' argument that this claim should be dismissed as duplicative fails.

Accordingly, Defendants' motion to dismiss the breach of fiduciary duty claim is denied.

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[5] Notably, in their reply papers, Defendants contend that "the alleged conduct occurred before Marron and Garcia became Managers of the Company, and thus occurred before Marron and Garcia owed a fiduciary duty to Wainwright and Mayer." (Defs.' Reply Brief at 14.)

6. Aiding And Abetting Breach Of Fiduciary Duty (Against Maguire and Leggett)

To assert an aiding and abetting breach of fiduciary duty claim under Delaware law,[6] a plaintiff must allege: "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach." *Malpiede v. Townson*, 780 A.2d 1075, 1996 (Del. 2001).

Defendants argue that no aiding and abetting claim can lie against Maguire and Leggett because there was no underlying breach of fiduciary duty by Marron, Garcia and Harley. However, since Plaintiffs' breach of fiduciary duty claim is not dismissed, the aiding and abetting claim survives.

7. Breach Of The Implied Covenant Of Good Faith (Against All Defendants Except OWL)

In support of their breach of the implied covenant of good faith claim, Plaintiffs allege that Defendants' "abrupt, unauthorized and unreasonable attempt to grab control of AICMC has deprived Plaintiffs of AICMC's rightful management" and prevented

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[6] *MMA Meadows at Green Tree, LLC v Milllrun Apartments, LLC*, 130 AD3d 529, 531 (1st Dept 2015) ("Delaware law applies to a claim of aiding and abetting a breach of duty by a fiduciary of a Delaware entity").

Plaintiffs and AICMC's investors "from receiving the benefits of their bargain." (Compl. ¶¶ 209-211.)

This claim is duplicative of Plaintiffs' breach of contract claim, in that it asserts the same wrong and seeks identical damages. *See, e.g., Netologic, Inc. v. Goldman Sachs Group, Inc.*, 110 A.D.3d 433, 433-34 (1st Dep't 2013). Through the implied covenant claim, Plaintiffs once again assert that their termination was wrongful and in violation of the parties' agreement and seek damages "in an amount to be determined at trial but in no event less than $50 million." (Compl. ¶¶ 209-212.) Therefore, this claim is dismissed.

8. Declaratory Judgment

Finally, Plaintiffs request a declaration that: (1) Defendants' removal of Mayer and Wainwright is invalid and void; (2) Mayer and Wainwright remain the rightful managers of AICMC; and, (3) all acts taken by Marron, Maguire or Garcia on behalf of AICMC or AICM Inc. after June 17, 2014 are without authority and therefore void. Plaintiffs assert that because "there exists a real and justiciable legal controversy as to the rights and legal relations of the parties," entry of a declaratory judgment is appropriate in this case. (Compl. ¶¶ 214-215.)

Defendants oppose this claim on the grounds that Plaintiffs' breach of contract claim provides an adequate, alternative remedy. The Court agrees. Plaintiffs' declaratory judgment allegations parallel the breach of contract claims and seek a declaration of the same rights and obligations to be determined under the first cause of action. Accordingly, the declaratory judgment claim is dismissed. *See, e.g., Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50, 54 (1st Dep't 1988) ("A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract.").

C. *Dismissal Based On Alleged Lack Of Capacity To Sue*

Defendants argue that Wainwright and Mayer lack the authority to sue on behalf of AICMC and AICM, Inc., contending that the two individuals were validly removed from the Board pursuant to the June 2014 notices and Section 6.7 of the Operating Agreement, which prohibits non-manager members from acting on behalf of AICMC.[7] As discussed above, whether Wainwright and Mayer were validly removed remains in dispute in this case, and as such, Defendants have not established that these two individuals lack the capacity to sue.

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[7] Section 6.7 states, in relevant part: "No Member (other than the Managers or an authorized officer of the Company) has the authority or power to act for or on behalf of the Company . . .."

Defendants argue in the alternative that dismissal is warranted since Plaintiffs failed to allege that a demand was made on the Companies to institute this action. However, if the purported removal of Wainwright and Mayer were invalid, Wainwright and Mayer remained AICMC managing members, authorized by Section 6.7 of the Operating Agreement to take action on AICMC's behalf, including but not limited to suing Defendants. No demand on the Board would be necessary.

Defendants also argue that Plaintiffs lack the capacity to sue on behalf of AICM Inc. because it is a wholly-owned subsidiary of AICMC. Therefore, according to Defendants, only AICMC managers can act on AICM Inc.'s behalf to institute an action. Defendants rely solely upon AICM Inc.'s "Consent of Directors" document, dated May 16, 2013, as purported documentary evidence to show that AICMC is the corporate parent and shareholder of AICM Inc. *See* Ross Reply Affirm. Ex. 1. The argument is unpersuasive. As noted, Plaintiffs' claim as to the validity of Wainwright and Mayer's termination from their positions as Members remains pending. Further, even if AICMC is the corporate parent, Defendants have not conclusively established that AICMC can act for AICM Inc. in all matters, without regard to corporate independence and governance of the Companies, and Defendants do not cite caselaw in support of their argument. Importantly, prior to their alleged removal, it is undisputed that Wainwright was AICM Inc.'s chairman and president and Mayer was its secretary, both of whom were officers of

AICM Inc., as stated in the "Consent of Directors," and thus, were authorized and empowered to take specified actions on its behalf. Accordingly, dismissal based upon lack of capacity to sue is unwarranted.

III. **Conclusion**

Accordingly, based on all of the foregoing, it is

ORDERED that defendants' motion to dismiss the complaint and all causes of action, pursuant to CPLR 3211(a)(1) and (a)(7), is granted only with respect to the complaint's seventh (breach of the implied covenant of good faith and fair dealing) and eighth (declaratoy judgment) causes of action, and is otherwise denied; and it is further

ORDERED that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on December 15, 2015, at 10 AM.

Dated: New York, New York
November 12, 2015

ENTER:

Hon. Eileen Bransten, J.S.C.