Perella Weinberg Partners LLC v Kramer
2016 NY Slip Op 31387(U)
July 19, 2016
Supreme Court, New York County
Docket Number: 653488/2015
Judge: Shirley Werner Kornreich
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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PERELLA WEINBERG PARTNERS LLC, PWP MC LP, PWP EQUITY I LP, and PERELLA WEINBERG PARTNERS GROUP LP,

Plaintiffs,

-against-

MICHAEL A. KRAMER, DERRON S. SLONECKER, JOSHUA S. SCHERER, ADAM W. VEROST, and DUCERA PARTNERS LLC,

Defendants.

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MICHAEL A. KRAMER, DERRON S. SLONECKER, JOSHUA S. SCHERER, and ADAM W. VEROST,

Counterclaim-Plaintiffs,

-against-

PERELLA WEINBERG PARTNERS LLC, PWP MC LP, PWP EQUITY I LP, and PERELLA WEINBERG PARTNERS GROUP LP,

Counterclaim-Defendants.

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MICHAEL A. KRAMER, DERRON S. SLONECKER, JOSHUA S. SCHERER, and ADAM W. VEROST,

Cross-claim Plaintiffs,

-against-

JOSEPH R. PERELLA, PETER A. WEINBERG, and KEVIN M. COFSKY,

Third-Party Cross-claim Defendants.

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Index No.: 653488/2015

DECISION & ORDER

[* 2]

SHIRLEY WERNER KORNREICH, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

Defendants/Counterclaim-Plaintiffs Michael A. Kramer and Derron S. Slonecker move, pursuant to CPLR 3212, for partial summary judgment on all claims in this action affecting their right to deferred compensation. Seq. 001. Plaintiffs/Counterclaim-Defendants Perella Weinberg Partners LLC (PWP LLC), PWP MC LP (PWP MC), PWP Equity I LP (PWP Equity), and Perella Weinberg Partners Group LP (PWP Group) (collectively, Perella Weinberg or the Company) and Third-Party Cross-Claim Defendants Joseph R. Perella (Perella), Peter A. Weinberg (Weinberg), and Kevin M. Cofsky move, pursuant to CPLR 3211, for partial dismissal of the counterclaims and cross-claims. Seq. 002. For the reasons that follow, the summary judgment motion is denied and the motion to dismiss is granted in part and denied in part.

I. Factual Background & Procedural History[1]

This action concerns disputes between the financial services firm Perella Weinberg and the former head of its restructuring group, Michael Kramer, and former members of that group. Kramer left the Company to start his own firm, defendant Ducera Partners LLC (Ducera). Longtime members of his restructuring group at the Company followed him to Ducera after they were terminated, purportedly for cause, by the Company.

The Company claims Kramer was a divisive, but nonetheless extremely high performing and valuable employee who saw his time at the Company end due to his own bad behavior. The Company claims Kramer and the former employees – Derron Slonecker, Joshua Scherer, and

[1] The court's decision on the summary judgment motion is based on facts that clearly are not in dispute. The court's decision on the motion to dismiss is based on the allegations in the answer and counterclaims (the Answer) (*see* Dkt. 12), which, unless clearly refuted by the documentary evidence, are assumed to be true for the purposes of this motion. References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

Adam Verost – violated their restrictive covenants and seeks damages and forfeiture of their accrued compensation. Kramer, on the other hand, claims that the Company's position is frivolous. His Answer alleges, in extensive, well pleaded detail, that Weinberg simply had a deep dislike for Kramer and sought to oust him from the Company, steal his deferred compensation and equity, and sabotage his ability to start his own firm.

The facts underlying this dispute are hotly contested. The court limits its discussion of the facts to those matters that are relevant to these motions – namely, whether the agreements governing the subject deferred compensation are unambiguous and whether each cause of action pleaded by Kramer, Slonecker, Scherer, and Verost (collectively, the Kramer Parties) state a claim upon which relief can be granted.

To begin, before Kramer and Slonecker joined the Company as lateral partners, they were sent offer letters dated November 28, 2006. *See* Dkt. 74 (Kramer Offer Letter) & Dkt. 42 (Slonecker Offer Letter) (collectively, the Offer Letters). The Offer Letters indicate that their expected start date was January 1, 2007. The Offer Letters outline Kramer's and Slonecker's compensation, including base salary, an equity grant, and benefits. As pertinent to the instant motions, the Offer Letters provide:[2]

> [W]e are pleased to offer you (i) an equity position in the Firm partnership equal to [375/50] basis points and (ii) [$7 million/$1 million] principal amount of so-called "B stock" **in each case under such terms and conditions applicable to other employees and subject to such restrictions to be agreed upon in the future. All components of your compensation are contingent upon satisfactory performance and conduct.**

See Dkt. 74 at 1 (emphasis added).

The Offer Letters further provide that they are:

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[2] Terms applicable to both Kramer and Slonecker are bracketed, with the term applicable to Kramer listed first followed by the term applicable to Slonecker.

> **not intended to constitute a formal partnership agreement between you and the Firm**, and nothing in this letter should be construed as a guarantee of any particular level of benefits, of your participation in any benefit plan, or of continued partnership for any period of time. Your partnership with the Firm will be "at will" which means that either you or the Firm may terminate your partnership for any reason, at any time, with or without notice. The Firm reserves the right to amend, modify or terminate, in its sole discretion, all benefit and compensation plans in effect from time to time.

See id. at 2 (emphasis added). Kramer and Slonecker both signed their Offer Letters.

Once at the Company, Kramer and Slonecker signed the Company's formal partnership and operating agreements. *See* Dkt. 38 (PWP MC's limited partnership agreement) (the PWP MC LPA); Dkt. 39 (PWP Equity's limited partnership agreement) (the PWP Equity LPA); Dkt. 73 (PWP Group's limited partnership agreement) (the PWP Group LPA) (collectively, the LPAs); Dkt. 70 (PWP LLC's operating agreement) (the PWP LLC Agreement) (collectively, along with the LPAs, the PWP Agreements).[3] In 2011, Scherer, who worked for Kramer at the Company, was promoted to partner and also received equity.

The Kramer Parties allege that, while their restructuring group was highly successful, Kramer and Weinberg did not get along. The Company went so far as to hire a "relationship coach" to help them mend their relationship. This proved futile. Kramer alleges that Weinberg "focused on diminishing Kramer's influence at the [Company] in order to induce Kramer to resign and therefore forfeit the substantial equity payout to which Kramer would be entitled if he were terminated without Cause." *See* Answer ¶ 69.[4]

In early 2014, the Company hired Bob Steel, a longtime colleague of Weinberg, as its CEO. Kramer contends that "Steel's mandate at [the Company] was to resolve various issues

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[3] PWP is a Delaware LLC. PWP MC, PWP Equity, and PWP Group are Delaware Limited Partnerships. The PWP Agreements are governed by Delaware law.

[4] The paragraph numbers referred to herein with the citation "Answer ¶ _" refer to the paragraph numbers in the counterclaims sections of the Answer (which begins on page 16 of the Answer).

among [the Company's] Partners, including but not limited to bringing to a close the protracted negotiations transpiring between PWP and a number of the Partners and employees in the Asset Based Value Group/Fund who were seeking to collectively leave PWP." *See* Answer ¶ 73.

Kramer alleges:

> Not long after Steel was hired, Kramer and Weinberg met at Weinberg's request. At this meeting, Weinberg bluntly (and falsely) informed Kramer that "no one in the partnership wanted to work with him," that he was not "electable." Weinberg further stated that, effective immediately, Kramer would be stripped of essentially all of his leadership positions and related responsibilities, including his position on [the Company's] Management Committee. In Weinberg's view, Kramer and [the Company] were just not a "good fit," and that "Kramer needed to consider whether he would stay at [the Company]" given these new parameters to his role.
>
> Weinberg further stated that he had "spoken to Joe [Perella] and Bob [Steel] about this" and each supported Weinberg's decision. Weinberg further advised Kramer that, despite the views of some others, he (Weinberg) was not willing to "extend [Kramer] an olive branch" regarding his future at the firm, stating to Kramer that the possibility of any potential for a future leadership role (including reinstatement to the positions from which Kramer was just demoted) at [the Company] did not exist. Instead, Weinberg stated, in no uncertain terms, that, should Kramer stay, he was to just continue to "generate business and turn it over to everyone else to execute."
>
> In response, Kramer asked Weinberg who specifically had taken issue with him and on what grounds.
>
> Weinberg, however, refused to answer, claiming concerns that Kramer might seek to "retaliate." He further declined to provide Kramer with specific examples of what conduct was causing the tension. Weinberg nonetheless stated he had full confidence in his allegations, because he had personally conducted a "full investigation" into the matter.
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> To this, Kramer stated, in substance, that there could not have possibly been an adequate or "full" investigation because no one asked to speak with him or any other member of the restructuring group. Kramer further expressed dissatisfaction with Weinberg's willingness to simply credit claims of unnamed partners who would remain wholly unaccountable for their views, without allowing Kramer any transparency whatsoever or any ability to respond to or resolve their issues.
>
> Weinberg responded by noting that no one was challenging Kramer's performance as a business generator and a source of substantial firm revenue and value. In fact, **Weinberg indicated to Kramer that Kramer would likely "only**

> **be happy if he started his own firm" and that Weinberg personally might even consider investing in such a venture.** Weinberg's decision in the middle of 2014 to effectively eliminate Kramer's management authority and consequentially demote Kramer while foreclosing any prospect of future growth at PWP effectively terminated Kramer's partnership role at the firm.
>
> This act, along with Weinberg's other statements at the time, were designed to further Weinberg's goal of divesting Kramer of his leadership role (despite his obvious contributions and consistent profitability) and inducing Kramer's resignation so that [the Company] would not be required to pay Kramer the almost $50 million in vested equity that would be owed to him if terminated without Cause by PWP.
>
> Indeed, subsequent to these meetings **Weinberg carefully papered his exchange with Kramer to suggest [the Company] maintained an interest in retaining Kramer despite this demotion, while obfuscating in or omitting from [the Company's] corporate record Weinberg's advice to Kramer that Krasner leave to start his own firm or that he had no future at [the Company]**.
>
> This is entirely consistent with statements by other [] Partners, like founding Partner and member of the Management Committee Bill Kourakos and Head of the U.S. Advisory Practice Chuck Ward, who both advised Slonecker prior to Plaintiffs' terminations that [the Company] would never terminate him (Slonecker) or Kramer without Cause — because PWP had no intention of allowing either of them to leave and "keep their money."

See Answer ¶¶ 74-84 (emphasis added; paragraph numbering and some breaks omitted).

According to Kramer, his demotion led to serious morale issues in the restructuring group. Many of Kramer's employees, such as Slonecker, Scherer, and Verost, were concerned about their career prospects in light of the feud between Kramer and Weinberg.[5] Kramer alleges that they approached him about their status at the Company and their careers prospects. On January 11, 2015, they met with Kramer at his home and discussed, among other things, starting a breakaway firm. Kramer claims that, at the time, he had no intention of leaving the Company and was hopeful things would get better.

[5] They allege numerous adverse employment effects resulting from the feud, such as being allocated a bonus pool disproportionally low relative to their group's performance.

Kramer contends that Weinberg and Steel subsequently "asked [him] 'where his head was' in terms of continuing with [the Company] under the 'no leadership influence' paradigm unilaterally imposed by Weinberg." *See* Answer ¶ 123. Kramer states that the following exchange took place:

> Kramer explained what he viewed his options to be: (1) accept the new paradigm and hope things get better (the "Hope Strategy"); (2) accept the new paradigm and commit less time and effort to [the Company]; (3) start his own firm; (4) associate with a competitor; or (5) retire or change his career to non-banking activities such as focusing on his family office or running a farm or a winery.
>
> Steel responded that "[he] was in control now," that he had "big plans" for the firm that he would not share them with Kramer unless Kramer agreed to "raise [his] right hand and pledge allegiance" to [the Company]. Kramer, having recently been stripped entirely of influence, said he was not prepared to do this in a vacuum. Steel responded that, by this response, Kramer was hurting himself within the firm. Kramer sought to clarify, stating that the easiest thing for him to do would be to "pledge his allegiance" without knowing what Steel meant, but Kramer wanted to be fully transparent. Weinberg retorted, "Don't expect us to applaud you for that."

See Answer ¶¶ 124-129 (paragraph numbering and some breaks omitted).

Weinberg then offered Kramer's job to Scherer. "Scherer responded that he wanted to continue to work with Kramer and Slonecker and that he would not be inclined to remain at [the Company] in the event that his colleagues left the firm." Answer ¶ 131. He also met with Kramer's group, who expressed their unhappiness with the current situation and informed Weinberg that they would likely leave the Company if Kramer left. This upset Weinberg, who then "told Kramer that he did not want to hear rumors that Kramer resigned and was hiring people." *See* Answer ¶ 138. Kramer told Weinberg that he would not do so. Kramer and Weinberg again attempted to resolve their disputes, but failed.[6]

[6] Those efforts included Kramer retaining Steven Kayman of Proskauer Rose LLP (Proskauer). This justice's husband is a partner at Proskauer, and she is well acquainted with Kayman. This was disclosed to the parties at the beginning of oral argument. *See* Dkt. 86 (3/31/16 Tr. at 2-3).

On February 16, 2015, the Company terminated Kramer, Slonecker, Scherer, and Verost. Their termination letters provide that their termination was for Cause due to their breach of the non-solicitation clauses in the PWP Agreements. *See* Dkt. 49-52. The Kramer Parties allege that such termination was wrongful and was in violation of the PWP Agreements' notice, opportunity to cure, and supermajority consent requirements, and that such requirements were ignored in an effort to cause the Kramer Parties to forfeit approximately $60 million in vested equity and deferred compensation.

With respect to the deferred compensation, Kramer and Slonecker had executed May 30, 2007 Deferred Compensation Agreements (the DCAs), in which they agreed (for, among other reasons, income tax deferral) to postpone receiving a portion of their earned compensation to June 1, 2012. *See* Dkt. 20 & 25. Kramer was owed $9,153,846.15 and Slonecker was owed $1,307,692.31. The DCAs are governed by New York law. *See* Dkt. 20 at 3. Paragraph 4 of the DCAs provide:

> The [Deferred] Compensation, plus any accrued but unpaid interest thereon (as described in Section 3), shall be payable by the Company to the Partner in lump sum on the earlier to occur of (a) the fifth anniversary of the Effective Date [January 1, 2007], or (b) the date 15 business days following the Partner's separation from service with the Company without Cause or by reason of death or Disability (such earlier date, the "Payment Date"). **The Compensation shall be forfeited in full upon a termination by the Company for Cause.**

See Dkt. 20 at 4 (emphasis added). Cause is defined to include, *inter alia*, "any act or omission which constitutes a material breach of the Partner's obligations to the Firm" and "violation by

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The parties did not object to the court hearing argument and deciding the instant motions. The personal involvement of Kayman and the involvement of Proskauer are irrelevant to the issues on the instant motions. Kayman, however, may well be a witness in this case. The court more fully explains its position on recusal at the conclusion of this decision. To be clear, however, nothing about the involvement of Kayman or Proskauer affected this court's ability to render an impartial decision on these motions, and, importantly, fully informed of the relationship, the parties declined the court's offer to recuse itself.

the Partner of any non-solicitation, noncompetition or similar restrictive covenant of the Firm to which the Partner is subject." *See* Dkt. 20 at 2-3. Kramer and Slonecker earned 8% interest on their deferred compensation. *See id.* at 7.

On May 31, 2011, Kramer and Slonecker executed virtually identical forms in which they elected to further postpone their deferred compensation as follows:

> I elect to defer the payment of 100%*[7] of my Deferred Compensation Amount of [$9,153,846.15 for Kramer and $1,307,692.31 for Slonecker] currently payable on June 1, 2012 (the "Payment Date"), **in accordance with the terms of the Deferred Compensation Agreement**, as amended, dated May 30, 2007, **until the earlier to occur of my separation from service** or the fifth anniversary of the Payment Date.

See Dkt. 21 & 26 (emphasis added) (the DCA Extension Forms).

After the Kramer Parties were terminated, Weinberg widely disseminated the claim that the Kramer Parties committed a "fundamental breach of trust" and that they were fired for violating their partnership and employment agreements. These claims were made to the Company's employees in a memorandum and at a town hall meeting. The Company leaked the memorandum to the press, including the New York Times, the Wall Street Journal, and Bloomberg. The Answer cites to February 17, 2015 articles by the Financial Times and the New York Times. *See* Answer ¶ 177. The Kramer Parties further allege that Weinberg caused the Company to repeat this alleged defamation to Kramer's clients and threatened to sue its own clients if they gave their business to Kramer. The Company, moreover, is alleged to have told these clients that they could take their business to any competing firm, but not to Kramer. By letters dated April 15, 2015, the Company informed Kramer and Slonecker that they had

[7] The percentage was hand-written, and the asterisk corresponds to a footnote that instructs the employee to fill in the percentage of the compensation to be deferred. Hence, aside from having the option to further defer all or none of the money, Kramer and Slonecker apparently could have chosen to defer a lower percentage of it.

forfeited their deferred compensation due to their purported for-Cause termination. *See* Dkt. 23 & 28.

On May 21, 2015, the Kramer Parties commenced an action against the Company, Perrella, Weinberg, and Cofsky (a managing director at the Company alleged to have conspired with Perella and Weinberg) (collectively, the PWP Parties) by filing a summons with notice under Index No. 651783/2015 (the Original Action). On October 20, 2015, the PWP Parties commenced the instant action by filing a complaint with 14 causes of action: (1) a declaratory judgment against the Kramer Parties regarding the validity and enforceability of the subject restrictive covenants;[8] (2) breach of the PWP MC LPA's partner and employee non-solicitation clauses against Kramer; (3) breach of the PWP Equity LPA's partner and employee non-solicitation clauses against Slonecker and Scherer; (4) breach of the partner and employee non-solicitation clauses in a Confidentially and Related Covenants agreement dated January 1, 2010 (the Verost Agreement) against Verost [*see* Dkt. 40];[9] (5) breach of the PWP MC LPA's client non-solicitation clauses against Kramer; (6) breach of the PWP Equity LPA's client non-solicitation clauses against Slonecker and Scherer; (7) breach of the Verost Agreement's client non-solicitation clauses against Verost; (8) breach of fiduciary duty against the Kramer Parties; (9) aiding and abetting breach of fiduciary duty against the Kramer Parties; (10) breach of the duty of loyalty and the faithless servant doctrine against the Kramer Parties;[10] (11) tortious

[8] In light of the discussed, voluminous factual background pertinent to the instant motions, the court declines to address the restrictive covenants in detail. The parties do not seek to litigate their validity or enforceability on these motions, nor do such covenants affect the disposition of the issues decided herein.

[9] Discussion of the Verost Agreements also is not necessary at this juncture.

[10] While the faithless servant doctrine need not be substantively addressed in this decision, the parties are respectfully referred to *Mayers v Stone Castle Partners, LLC*, 2015 WL 1941362, at

interference with contract against the Kramer Parties; (12) tortious interference with prospective business relations against all defendants (i.e., the Kramer parties and Ducera); (13) tortious interference with contract against Ducera; and (14) unfair competition against all defendants. *See* Dkt. 2. Two days after the complaint was filed in this action, on October 22, 2015, the Kramer Parties filed a complaint in the Original Action. *See* Dkt. 41.

In lieu of litigating under two index numbers, the Kramer Parties discontinued the Original Action and re-filed their claims as counterclaims and third-party claims in this action in their Answer, filed on November 9, 2015. *See* Dkt. 12. The Kramer Parties assert the following 14 causes of action against all of the PWP Parties:[11] (1) breach of the Offer Letters, the DCAs, and the DCA Extension Forms; (2) fraudulent inducement of the DCA Extension Forms; (3) breach of contract regarding the for-Cause termination of the Kramer Parties; (4) breach of the covenant of good faith and fair dealing; (5) equitable estoppel; (6) a declaratory judgment that the Kramer Parties' termination was without Cause and that the subject restrictive covenants are unenforceable; (7) a declaratory judgment that the subject restrictive covenants are void; (8) conspiracy to defraud, fraud, and fraudulent inducement; (9) violation of Article 6 of New York Labor Law (NYLL) § 190 *et seq.*; (10) breach of fiduciary duty (asserted both directly and derivatively on behalf of the Company); (11) tortious interference with prospective business relations; (12) defamation; (13) a declaratory judgment that Kramer was constructively discharged; and (14) an accounting.

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*7 (Sup Ct, NY County 2015) for a brief discussion of issues that may inform whether New York's faithless servant doctrine applies to employment governed by Delaware employment, LLC, and partnership agreements. The court mentions this to highlight a potential choice of law issue.

[11] While the factual detail in the Answer is commendable, the group pleading undermined the counterclaims.

On November 20, 2015, Kramer and Slonecker moved for partial summary judgment on their claim for their deferred compensation (the $9,153,846.15 and $1,307,692.31 amounts). On November 25, 2015, the PWP Parties moved for partial dismissal of the Kramer Parties' claims. The court reserved on the motions after oral argument. *See* Dkt. 86 (3/31/16 Tr.)

II. Kramer's and Slonecker's Partial Summary Motion (Seq. 001)

A. Legal Standard

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

B. Discussion

Under New York law, which governs the DCAs and the DCA Extension Forms, the question of whether a contract is ambiguous "is a question of law to be resolved by the courts." *W.W.W. Assocs., Inc. v Giancontieri*, 77 NY2d 157, 162 (1990). A contract is ambiguous if there is more than one commercially reasonable interpretation. *See Ellington v EMI Music, Inc.*, 24 NY3d 239, 250 (2014); *Cole v Macklowe*, 99 AD3d 595, 596 (1st Dept 2012). Extrinsic evidence may not be used to establish ambiguity unless the contract, on its face, is itself ambiguous. *See Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 (2013).

The DCA Extension Forms are ambiguous. While they do not – unlike the DCAs – condition payment of deferred compensation upon a without-Cause termination, they do purport to be governed "in accordance with the terms of the [DCAs]." The DCAs, however, provide that deferred compensation is forfeited if the employee is terminated for Cause. If the DCA Extension Forms had been drafted as more formal documents, instead of what appear to be human recourses administrative forms, perhaps the omission of forfeiture-for-Cause language might be interpreted as unequivocal evidence of the parties' intent to amend the DCAs on that issue. But, in light of the relative informality of the DCA Extension Forms and their statement that the DCAs govern, it is not unreasonable to conclude that the parties only intended to amend the payment date from 2012 to 2017, and no other term of the DCAs. Of course, that interpretation is not the only reasonable one, and thus interpretation of the DCA Extension Forms requires resort to evidence outside its four corners. This precludes pre-discovery summary judgment.

Since neither party's proffered position is unreasonable, discovery is necessary to ascertain the parties' intent. Likewise, the question of whether the Kramer Parties were

terminated for Cause is a disputed question of fact. Consequently, Kramer's and Slonecker's motion for partial summary judgment on their claim for deferred compensation is denied.[12]

III. The PWP Parties' Motion to Dismiss (Seq. 002)

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the pleading as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Harago Fabrics*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the pleading or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the pleading states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the pleading may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the motion to dismiss the pleading is based upon documentary

[12] This conclusion obviates the need to address the procedural issue of the summary judgment motion being made prior to joinder of issue on the counterclaims. *See Myung Chun v N. Am. Mtg. Co.*, 285 AD2d 42, 45 (1st Dept 2001) (court is "without power to grant summary judgment before joinder of issue"); *see Westchester Exp., Inc. v State Ins. Fund*, 151 AD2d 357 (1st Dept 1989) ("summary judgment under CPLR 3212(a) would not lie, because issue had not been joined on the counterclaim, properly treated by the court as a complaint"), citing *Edelman v Edelman*, 88 Misc2d 156, 159 (Sup Ct, Nassau County 1976) (under CPLR 3019, "[a] cause of action contained in a counterclaim ... shall be treated, as far as practicable, as if it were contained in a complaint").

evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. Discussion

The PWP Parties concede that some of the Kramer Parties' claims are properly pleaded and should survive dismissal. *See* Dkt. 36 at 11 ("the Counterclaims must be dismissed in their entirety as to some Defendants, and must be dismissed in large part as to all other Defendants."). The gist of their motion is that many of the Kramer Parties' breach of contract claims are asserted against parties not in privity on the contracts in question; that the Kramer Parties' non-contract claims are largely duplicative and generally fail to state a claim; and that the NYLL claims are not viable. The court addresses these issues in turn.

1. Breach of Contract Claims

All of the contracts are governed by either New York or Delaware law. The PWP Parties contend, and the Kramer Parties do not dispute, that one may only assert a breach of contract claim against one's contractual counterparty. *See Leonard v Gateway II, LLC*, 68 AD3d 408 (1st Dept 2009); *LNR Partners, LLC v C-III Asset Mgmt. LLC*, 2014 WL 1312033, at *9 (Del Ch 2014) ("under New York law, the plaintiff typically must be either a party to the contract or an intended third party beneficiary. Similarly, under Delaware law, only parties to a contract and intended third party beneficiaries may enforce the contract terms.") (citations and quotation marks omitted). All of the contracts delineate the contracting parties. The Kramer Parties' only quibble is with respect to the DCAs. They argue: "As to the [DCAs], it is premature to dismiss claims against the PWP entities who are not signatories thereto, as these agreements clearly

contemplate that Kramer and Slonecker will provide services to the 'Firm' as a whole, including the named entity defendants." *See* Dkt. 68 at 15. That argument is erroneous. While Kramer's and Slonecker's services may have benefited multiple PWP entities, the DCAs name only PWP Group. *See* Dkt. 20 at 2. These sophisticated parties could have contracted otherwise,[13] but did not. All breach of contract claims asserted against non-contracting parties, therefore, are dismissed with prejudice. Moreover, to provide clarity, as further directed below, the Kramer Parties must file amended counterclaims in accordance with this decision that set forth who the plaintiffs and defendants are on each of the claims.

That being said, the PWP Parties also contend that the Kramer Parties cannot state a viable claim for breach of the Offer Letters against any of the PWP Parties. They aver that the Offer Letters are agreements to agree and that the Kramer Parties' claims to the subject equity are governed by subsequent agreements, such as the PWP Agreements and pledge agreements (discussed below).[14]

"[A] mere agreement to agree, in which a material term is left for future negotiations, is unenforceable." *Joseph Martin, Jr., Delicatessen, Inc. v Schumacher*, 52 NY2d 105, 109 (1981); *see generally Cobble Hill Nursing Home, Inc. v Henry & Warren Corp.*, 74 NY2d 475, 482 (1989). Two essentials terms, the type (B Stock) and amount of equity, are explicitly set forth in the Offer Letters. However, the Offer Letters state that the terms governing the equity will be "agreed upon in the future." *See* Dkt. 74. Hence, while there was an unequivocal promise to

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[13] For instance, as discussed below, the Firm is defined in the Notes to include affiliates of PWP Group.

[14] Since the Offer Letters do not indicate what law they are governed by, and since the parties rely on New York law, the court addresses the agreement to agree issue under New York law. It should be noted that the Offer Letters appear to have been issued in New York.

provide a fixed amount of equity, the terms of such equity – limited partnership interests – was ultimately to be governed by the limited partnership agreements. Indeed, that is what occurred.

Nonetheless, the court will not resolve the parties' dispute over the enforceability of the Offer Letters because such dispute is not dispositive – that is, the claim for breach of the Offer Letters fails for other reasons. To be sure, Kramer and Slonecker claim they never received the B Stock promised to them in the Offer Letters. Had the PWP Parties merely disputed this allegation (which they do) and contended that Kramer and Slonecker actually received their B Stock, this question of fact would survive a motion to dismiss. Instead, the PWP Parties submit proof that such stock was pledged as collateral for loans made by PWP Group to Kramer and Slonecker. *See* Dkt. 45 (Kramer's Promissory Note); Dkt. 46 (Slonecker's Promissory Note) (collectively, the Notes); Dkt. 47 (Kramer's Pledge Agreement); Dkt. 48 (Slonecker's Pledge Agreement) (collectively, the Pledge Agreements).[15] Section 1 of the Pledge Agreements (which, like the Notes, are dated May 30, 2007), provides:

> The Pledgor hereby assigns, transfers and pledges to the Pledgee, and hereby grants to the Pledgee a security interest in, **all of the Pledgor's right, title and interest in, to and under its limited partnership interests in PWP Professionals B LP and any alternative investment vehicle of PWP Professionals B LP** (collectively, the "LP Interest") including all distributions, cash, instruments and other property from time to time received, receivable or otherwise distributed in respect of or in exchange for any or all of such LP Interest (the "Collateral").

See Dkt. 47 at 2 (emphasis added). In other words, Collateral is defined to include all of Kramer's and Slonecker's B Stock. This refutes Kramer's and Slonecker's contention that Collateral only includes stock purchased by them *after* they received the B Stock initially promised to them in the Offer Letters. Moreover, section 12 of the Pledge Agreements provides

[15] The Notes and Pledge Agreements are governed by New York law. *See* Dkt. 45 at 7; Dkt. 47 at 7.

that, upon an Event of Default under the Notes, PWP Group is entitled to take title to the Collateral. *See id.* at 5-6. Section 5.1(f) of the Notes defines Events of Default to include Kramer's and Slonecker's "tenure with the Firm [defied as PWP Group and its affiliates] ceas[ing] **for any reason**." *See* Dkt. 45 at 5-6 (emphasis added).

Since it is undisputed that Kramer and Slonecker no longer work for PWP, and since they do not claim that the Notes have been repaid, under the Pledge, they have forfeited their right to the B Stock. Consequently, they have no claim to any B Stock they may not have received under the Offer Letters, and, as a result, have no claim for breach of the Offer Letters, regardless of whether such letters are mere agreements to agree. The claim is dismissed with prejudice.

2. Fraudulent Inducement of the DCA Extension Forms

"The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); *see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014). Pursuant to CPLR 3016(b), "the circumstances constituting the wrong shall be stated in detail." *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008).

Kramer and Slonecker have no viable claim for being fraudulently induced to execute the DCA Extension Forms. They signed those forms in 2011, three years before the subject controversies began. They do not allege any false statement of fact made to induce them to agree to defer their payments, then due on June 1, 2012, until 2017. Kramer and Slonecker could have taken the money in 2012, but voluntarily chose to further defer their compensation to reduce their tax burden and to receive more interest under the DCAs. While they do claim that Weinberg conspired to steal this compensation, critically, they do not allege that such scheme

began prior to their execution of the DCA Extension Forms in 2011. Hence, the conduct at issue in this case cannot have fraudulently induced Kramer and Slonecker to execute the DCA Extension Forms.

To the extent the alleged fraudulent inducement is based on the Company supposedly misrepresenting the legal effect of the DCA Extension Forms, that, too, is not a viable claim. The Answer does not contend that anyone at the Company lied to Kramer and Slonecker about the effect of the DCA Extension Forms. All the Answer claims is that the Company (no individual is identified) assured them that the DCA Extension Forms would not impair their rights under the DCAs. *See* Answer ¶ 216. The DCAs provide for forfeiture, and, notably, Kramer and Slonecker do not allege that anyone at the Company expressly told them that the forfeiture provision in the DCAs would not apply if they signed the DCA Extension Forms. This claim is dismissed with prejudice.

3. Breach of the Covenant of Good Faith and Fair Dealing

In pleading this claim, the Kramer Parties are not specific about which contracts are the subject of this cause of action.[16] Construed liberally, the complained-of conduct in the section of the counterclaims devoted to this cause of action [*see* Dkt. 12 at 52-53] contends that virtually all of the PWP Parties' wrongdoing constitutes a breach of the implied covenant. Principally, it appears that the Kramer Parties' implied covenant claim is that Weinberg's alleged scheme to freeze Kramer out of the Company deprived Kramer of the benefits of his employment and partnership at the firm. In a word, Weinberg, allegedly, sought to establish pretextual grounds to

[16] *See* Answer ¶¶ 242-243 (The agreements between the individual Plaintiffs and Defendants — other than the void restrictive covenants and other provisions that are not enforceable against the Plaintiffs —are valid and enforceable contracts against Defendants (the "Agreements"). The Agreements require Defendants to provide the individual Plaintiffs with deferred compensation and certain partnership interests and rights to the award of equity upon their departure from the firm.").

cause the Kramer Parties' equity and deferred compensation to be forfeited. The court views this allegation as arising from the PWP Agreements – the contracts which govern the Kramer Parties' relationship to the Company – all of which are governed by Delaware law. Therefore, contrary to the parties' briefs – which do not address the choice of law issue and cite to New York cases applying New York law – the court evaluates the Kramer Parties' implied covenant claim under Delaware law.[17]

Under Delaware law, "[t]he implied covenant of good faith and fair dealing involves ... inferring contractual terms to handle developments or contractual gaps that ... neither party anticipated." *See Nationwide Emerging Managers, LLC v Northpointe Holdings, LLC*, 112 A3d 878, 896 (Del 2015) (quotation marks omitted), citing *Nemec v Shrader*, 991 A2d 1120, 1125 (Del 2010). "The implied covenant, however, only applies where a contract lacks specific language governing an issue and the obligation the court is asked to imply advances, and does not contradict, the purposes reflected in the express language of the contract." *Haney v Blackhawk Network Holdings, Inc.*, 2016 WL 769595, at *8 (Del Ch 2016) (citation and quotation marks omitted).

Here, the parties' rights are extensively set forth in limited partnership and LLC Agreements. Delaware law mandates strict adherence to the contractual terms governing the parties' rights in alternative entities. *See Wood v Baum*, 953 A2d 136, 141 (Del 2008); *Achaian, Inc. v Leemon Family LLC*, 25 A3d 800, 802-03 (Del Ch 2011). The PWP Parties contend that the only way to read the implied covenant claim as not asserting a duplicative contract claim is that the alleged wrongdoing inequitably affected the Kramer Parties. That, of course, would not

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[17] New York law is similar and likely would call for the same result, for instance, if the implied covenant claim was meant to be pleaded with respect to the DCAs. *See 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 (2002). Regardless, the implied covenant is a contractual right that necessarily is governed by the same law that governs the contract.

be a valid claim. The equities do not matter if the parties' express contractual obligations are clear. *See Dieckman v Regency GP LP*, 2016 WL 1223348, at *11 (Del Ch 2016). However, in their opposition brief, the Kramer Parties clarify that "PWP breached implied promises not to engage in behavior designed to compel [the Kramer Parties] to resign and not to fabricate a basis for withholding the agreed-upon compensation and equity." *See* Dkt. 68 at 16 (emphasis and quotation marks omitted). To support this claim, the Kramer Parties rely on allegations pertinent to other contract and tort claims, making it difficult to discern where the express contract and tort claims end and the implied covenant claims begin. Moreover, the Kramer Parties do not appear to seek affirmative relief for the alleged implied covenant breaches. Rather, they invoke the duty of good faith and fair dealing to dispute the PWP Parties' claim that their termination may be deemed for Cause. In other words, the implied covenant claim appears to be more of a defense than an affirmative claim.

The court will not reach the merits because, while breaches of the implied covenant may well exist here, they are insufficiently pleaded in the Answer. More clarity is needed, for instance, regarding the applicable contracts and the proper counterparties. For these reasons, the implied covenant claim is dismissed without prejudice and with leave to replead.

4. Equitable Estoppel

Equitable estoppel is not an independent, affirmative cause of action; it is a defense to a breach of contract claim based on detrimental reliance. *Clifford R. Gray, Inc. v LeChase Constr. Servs., LLC*, 31 AD3d 983, 987 (3d Dept 2006); *see Kopelowitz & Co. v Mann*, 83 AD3d 793, 798 (2d Dept 2011) ("equitable estoppel is not basis to recover damages"); *Einiger v Citigroup, Inc.*, 2014 WL 4494139, at *2 n.1 (SDNY 2014) ("the weight of authority suggests that equitable estoppel is not a cause of action under New York law.") (citations omitted); *see also Samsung*

Am., Inc. v Yugoslav-Korean Consulting & Trading Co., Inc., 1994 WL 16857187 (Sup Ct, NY County 1994) ("The general rule ... is as follows: Equitable estoppel does not operate to create rights otherwise non-existent; it operates merely to preclude the denial of a right claimed otherwise to have arisen.") (citation omitted).[18] The Kramer Parties may avail themselves of this defense, but they cannot maintain it as a separate affirmative cause of action.

To the extent this defense[19] is viable – an issue implicating disputed questions of fact – it is only pertinent against appropriate counterparties. This is yet another reason why, as noted earlier, the Kramer Parties must replead with more specificity.

5. *Conspiracy*

Likewise, New York law does not recognize an independent cause of action for conspiracy. *See Alexander & Alexander of N.Y., Inc. v Fritzen*, 68 NY2d 968, 969 (1986). Rather, conspiracy is a legal theory that permits liability to be imposed on someone who aids the tortfeasor in the wrongdoing. *See id.* As a stand-alone cause of action, it must be dismissed. Moreover, as a liability theory, dismissal is required since New York law does not permit conspiracy liability to be imposed on officers, agents, and employees of corporate defendants. *See Atl. Int'l Movers, LLC v Ocean World Lines, Inc.*, 914 FSupp2d 267, 280 (EDNY 2012).[20]

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[18] It should be noted that some cases inartfully describe an equable estoppel defense as a "claim", thus creating confusion that it is an independent cause of action.

[19] The court understands this defense as being based on Weinberg's statement to Kramer that he should be permitted to start a competing firm, just as Weinberg himself had done in the past when he founded the Company. This practice, allegedly, is common in the financial industry, notwithstanding the existence of restrictive covenants. The court will not resolve the merits of this fact laden issue at this juncture.

[20] This proposition appears well settled in New York federal district courts, but does not seem to be discussed by New York state courts. *See Atl. Int'l Movers*, 914 FSupp2d at 280 ("The intracompany conspiracy doctrine posits that the officers, agents, and employees of a single corporate or municipal entity, each acting within the scope of his or her employment, are legally

The PWP Parties correctly contend that all of them fit this description. The Kramer Parties do not address this contention in their opposition brief. The conspiracy claims are dismissed.

6. *Breach of Fiduciary Duty*

The parties correctly recognize that since the Kramer Parties' fiduciary duty claims concern the internal affairs of Delaware companies, the claims are governed by Delaware law. *See Davis v Scottis Re Group, Ltd.*, 138 AD3d 230, 233 (1st Dept 2016) ("Under the internal affairs doctrine, claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation"), citing *Hart v General Motors Corp.*, 129 AD2d 179, 182 (1st Dept 1987); *see also Hamilton Partners. L.P. v Highland Capital Mgmt., L.P.*, 2012 WL 2053329, at *3 n.14 (Del Ch 2012).

As an initial matter, the court notes that the Kramer Parties assert both direct and derivative fiduciary duty claims. The derivative claims are clearly infirm. They concern allegations that Weinberg's vendetta against Kramer was bad business given Kramer's value. This is a derivative claim since the harm is suffered by all members and partners equally and any recovery on this claim would go to the company. *See Citigroup Inc. v AHW Investment P'ship*, 2016 WL 2994902, at *1 (Del 2016) (Strine, C.J.) ("*Tooley* and its progeny deal with the narrow issue of whether a claim for breach of fiduciary duty or otherwise to enforce the corporation's own rights must be asserted derivatively or directly. Before evaluating a claim under *Tooley*, 'a more important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?"), *quoiting NAF Holdings. LLC v Li & Fung (Trading) Ltd.*, 118 A3d 175, 180 (Del 2015); *see Tooley v Donaldson, Lufkin*

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incapable of conspiring with each other.") (quotation marks omitted). In any event, the Kramer Parties ignore this issue in their opposition brief. In reply, the PWP Parties note that the Kramer Parties' opposition appears to be pivoting to a claim of aiding and abetting liability. The court will not opine on an un-pleaded cause of action.

& Jenrette, Inc., 845 A2d 1031, 1033 (2004) ("in determining whether a stockholder's claim is derivative or direct. That issue must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?"). Leaving aside the failure to properly plead demand futility and the clear application of the business judgment rule, the PWP Parties correctly contend that dismissal of this derivative claim is warranted since the Kramer Parties' counterclaims do not actually seek damages on behalf of the Company, as opposed to for themselves individually.

There are myriad other serious issues with this claim not addressed by the parties, such as standing (do the Kramer Parties still own equity in the Company?). No authority supports the proposition (nor is any cited) that an ousted member or partner can sue for breach of fiduciary duty based on the claim that the Company is worse off without them. The Kramer Parties' opposition brief does not cite a single case to defend their ability to maintain their derivative claims on the facts alleged. Any claim regarding the Kramer Parties' termination, the impact of their termination on the money contractually owed to them by the Company, and the ability of the Company to enforce the subject restrictive covenants against them are all issues that uniquely affect the Kramer Parties, not the other partners, members, and employees of the Company. Ergo, any viable claim the Kramer Parties have is necessarily direct, not derivative.

As for the direct fiduciary duty claims, it is well settled Delaware law that, unless expressly disclaimed in a limited partnership or operating agreement, those partners and members who run the company have fiduciary duties to the company and to the other partners and members. *See Kelly v Blum*, 2010 WL 629850, at *10 (Del Ch 2010) ("[U]nless the LLC agreement in a manager-managed LLC explicitly expands, restricts, or eliminates traditional

fiduciary duties, managers owe those duties to the LLC and its members and controlling members owe those duties to minority members."); *see generally Feeley v NHAOCG, LLC*, 62 A3d 649, 661 (Del Ch 2012) (discussing similar duties of managing LLC members and partners). That said, regardless of the fiduciary duties that may exist here, the Kramer Parties have not actually stated a claim for breach of fiduciary duty. Under Delaware law, where the alleged breach of fiduciary duty is nothing more than a claim that the partnership or operating agreement was breached, no separate, duplicative fiduciary duty claim may be maintained. *See AM Gen. Holdings LLC v Renco Group., Inc.*, 2013 WL 5863010, at *10 (Del Ch 2013) ("[W]here a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim" and "any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous."). This is true, as noted, even if such breach would otherwise state a claim for breach of fiduciary duty.

In *Mayers v Stone Castle Partners, LLC*, 2015 WL 1941362 (Sup Ct, NY County 2015), this court addressed a similar for-Cause dispute that raised the issue of whether an exception to this rule applies, holding that the plaintiff's "for-Cause claim, obviously, could not exist but for the LLC Agreement, as the entire for-Cause framework is established by the LLC Agreement." *See id.* at *6, citing *Nemec*, 991 A2d at 1129 (for-Cause framework is "solely a creature of contract"; "[a]ny separate fiduciary duty claims that might arise out of the Company's exercise of its contract right, therefore, [are] foreclosed.").[21] Here, too, all of the rights the Kramer Parties alleged were violated are contractual. But for the contracts, such rights would not have existed. Thus, regardless of the fiduciary duties the PWP Parties may have had to the Kramer

[21] The underlying facts are more thoroughly set forth in a prior decision. *See Mayers v Stone Castle Partners, LLC*, 42 Misc3d 1227(A) (Sup Ct, NY County 2014).

Parties, the Kramer Parties have not stated a breach of fiduciary duty claim that is not otherwise duplicative of their breach of contract claims.

As countless courts have explained, in the Delaware alternative entire context, where the operating or partnership agreement addresses the subject matter, the parties' rights are almost always strictly contractual. *See Elf Atochem N. Am., Inc. v Jaffari*, 727 A2d 286, 291 (Del 1999). This bedrock principal of Delaware law is not dependent of the equities of the parties' posture. *See The Haynes Family Trust v Kinder Morgan G.P., Inc.*, 2016 WL 912184, at *2 (Del 2016) (Strine, C.J.) ("with the benefits of investing in alternative entities often comes the limitation of looking to the contract as the exclusive source of protective rights."). Simply put, since all of the Kramer Parties' allegations turn on whether their rights under the subject contracts were violated, they have not stated a claim for breach of fiduciary duty.

7. *Tortious Interference with Prospective Business Relations & Defamation*

"To prevail on a claim for tortious interference with business relations in New York, a party must prove 1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3) that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and 4) that the defendant's interference caused injury to the relationship with the third party." *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 (1st Dept 2009), citing *Carvel Corp. v Noonan*, 3 NY3d 182, 189 (2004).

The major difference between this cause of action and the similarly named tortious interference with contract cause of action[22] is that this claim requires the pleading of malice or an

[22] *See Carvel Corp.*, 3 NY3d at 189 ("We have recognized that inducing breach of a binding agreement and interfering with a nonbinding 'economic relation' can both be torts, but that the elements of the two torts are not the same.").

independent tort. Contrary to the PWP Parties' contentions, the Kramer Parties have pleaded both. Actual malice is pleaded based on the allegation that Weinberg sought to harm Kramer's new company out of spite, and not based on economic self-interest. Weinberg is alleged to have told the Company's clients that he was fine with them doing business with any of the Company's competitors, except for Kramer. Weinberg is even alleged to have threatened to sue the clients if they gave business to Kramer. Such threats were accompanied by alleged defamation disseminated to the entire industry via the press. The subject matter of the defamation was that the Kramer Parties committed the very wrongful acts that, allegedly, are being used by the PWP Parties as pretext to steal their accrued compensation and equity. This is relevant to the Kramer Parties' tortious interference cause of action because "[d]efamation is a predicate wrongful act for a tortious interference claim." *Amaranth*, 71 AD3d at 47, citing *Stapleton Studios LLC v City of New York*, 26 AD3d 236 (1st Dept 2006).

To the extent that the PWP Parties suggest that the tortious interference claim is pleaded with insufficient specificity, the court rejects that contention. They cite no authority for the proposition that a plaintiff must plead each of the clients that did not do business with it due to the alleged tortious interference. The Kramer Parties aver that they did not wish to name the clients due to privacy concerns, and also that the PWP Parties know exactly which of their clients they contacted. It also is likely that such information may only be known to the PWP Parties. While such information is fair game for discovery, its omission in the Kramer Parties' pleadings is not grounds for dismissal. The Answer permits a plausible inference that some of the Company's clients did not do business with Ducera in light of the public, and now litigious disputes at issue.

As for whether the alleged predicate tort – defamation[23] – is properly pleaded, the PWP Parties' only objection is that the pleading requirements of the actual malice standard, which they contend applies, are not satisfied. The court will not reach the issue of whether actual malice – a term of art in the defamation context – is properly pleaded because it is not required in this case. The extra element of actual malice applies only when the plaintiff is a general or limited purpose public figure. *See Krauss v Globe Int'l, Inc.*, 251 AD2d 191-92 (1st Dept 1998), accord *N.Y. Times Co. v Sullivan*, 376 US 254, 280 (1954); *see generally Kipper v NYP Holdings Co.*, 12 NY3d 348, 353-54 (2009) ("As set forth in [*New York Times Co. v Sullivan*] and its progeny, the U.S. Constitution's First Amendment bars a public figure from recovering damages in a libel action unless clear and convincing evidence proves that a false and defamatory statement was published with actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not") (quotation marks omitted).

The PWP Parties contend Kramer is a limited purpose public figure. They are wrong. As the First Department has explained:

> A person is considered a limited public figure regarding a particular issue or subject when he or she voluntarily injects him or herself into a public controversy with a view toward influencing it. Significantly, in order to be considered a public controversy for this purpose, the subject matter must be more than simply newsworthy. Instead, it must be a real dispute, the outcome of which affects the

[23] "Defamation is the making of a false statement about a person that 'tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him [or her] in the minds of right-thinking persons, and to deprive him [or her] of their friendly intercourse in society.'" *Frechtman v Gutterman*, 115 AD3d 102, 104 (1st Dept 2014), quoting *Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 379 (1977). "To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm [defamation per se]." *Stepanov v Dow Jones & Co.*, 120 AD3d 28, 41-42 (1st Dept 2014), citing *Dillon v City of New York*, 261 AD2d 34, 38 (1st Dept 1999). "A statement is defamatory on its face when it suggests improper performance of one's professional duties or unprofessional conduct." *Frechtman*, 115 AD3d at 104, citing *Chiavarelli v Williams*, 256 AD2d 111, 113 (1st Dept 1998).

> general public or some segment of it in an appreciable way. Specifically, a divorce that is no more than a private matter of public concern merely to gossips is not a public controversy requiring a limited-purpose public-figure analysis.

Krauss, 251 AD2d at 192-93 (internal citations and quotation marks omitted); *see also Guerrero v Carva*, 10 AD3d 105, 115 (1st Dept 2004) ("The actual malice standard has also been applied to 'limited public figures,' or those persons who have voluntarily injected themselves or are drawn into a particular public controversy and thereby become public figures for a limited range of issues."), quoting *Gertz v Robert Welch, Inc.*, 418 US 323, 351 (1974).

The PWP Parties do not explain why the parties' disputes qualify as a public controversy, as opposed to a mere newsworthy story reported on by the press. Moreover, Kramer did not make his dispute with the Company public. Weinberg did that. *See Krauss*, 251 AD2d at 192, citing *Wolston v Reader's Digest Ass'n*, 443 US 157, 167 (1979) ("The private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention"), accord *Silvester v Am. Broadcasting Cos.*, 839 F2d 1491, 1496 (11th Cir 1988) ("the press entity which publishes the defamatory material cannot make a previously private individual into a public figure merely by flooding the public with many articles about the plaintiff. The essence of these cases is that the plaintiff must have been a public figure prior to the publication of the particular defamatory speech which is the issue of the litigation."); *see also Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 880, 883 (2d Dept 2011) ("The evidence submitted demonstrated that the plaintiffs did not voluntarily inject themselves into a particular public controversy"). Weinberg leaked the PWP Parties' allegations to the press. Hence, as it was the PWP Parties' that were the sole cause of Kramer's publicity with respect to this matter, not Kramer, the malice standard applicable to limited purpose public

figures does not apply. And since the PWP Parties do not challenge the pleading sufficiency of the defamation claim on any other ground, it survives dismissal.[24]

8. Constructive Discharge

The Kramer Parties' have no independent cause of action for constructive discharge under New York law. They have no claim for illegal discrimination or wrongful termination, and the Company was permitted to terminate them with or without cause. The cases cited by the parties concern situations where an adverse employment action (e.g., termination) violated a New York statute prohibiting, for instance, gender based discrimination. *See, e.g., Mascola v City Univ. of N.Y.*, 14 AD3d 409 (1st Dept 2005). In such a situation, constructive discharge may be considered an adverse employment action. *See id.*; *see also Nelson v HSBC Bank USA*, 41 AD3d 445, 447 (2d Dept 2007).

To the extent the issue of constructive discharge is at all relevant, New York's common law is neither dispositive nor an independent source of relief. The issues of whether Kramer's separation from the Company should be deemed a constructive discharge (e.g., that he allegedly was constructively discharged in 2014 before any of the alleged solicitation) and whether such constructive discharge has legal import must be governed by Delaware law. The parties' agreements concerning termination and the attendant compensation and restrictive covenant implications are matters governed by the PWP Agreements, which are governed by Delaware law. Kramer has no extra-contractual right of recovery due to his allegedly being coerced to resign. In other words, but for the existence of the PWP Agreements, he could not maintain any claim (absent issues such as illegal discrimination) for constructive discharge. The PWP Agreements must govern this issue.

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[24] The court will not opine on whether the other requirements for pleading defamation under CPLR 3016(a) are met since they are not raised in the PWP Parties' briefs.

That said, even if Kramer's position with respect to him being constructively discharged is correct, that is a matter within the scope of his breach of contract claim. A separate cause of action for constructive discharge affords him no extra rights or remedies and is therefore dismissed with prejudice.

9. Accounting

Likewise, the court cannot understand the purpose for which the Kramer Parties' have requested an accounting. In their moving and opposition briefs, the parties dispute, without explanation, whether New York or Delaware law applies to this claim. There are meaningful differences between the standard for an accounting under New York law in the First Department and under Delaware law. *See Barry v Clermont York Assocs. LLC*, 50 Misc3d 1203(A), at *13 n.13 (Sup Ct, NY County 2015); *but see Unitel Telecard Distribution Corp. v Nunez*, 90 AD3d 568, 569 (1st Dept 2011) ("To be entitled to an equitable accounting, a claimant must demonstrate that he or she has no adequate remedy at law").[25] Here, since the Kramer Parties seek an accounting of Delaware companies, Delaware law applies. And under Delaware law, an accounting is a remedy for breach of fiduciary duty, not an independent cause of action. *See Gallagher v Long*, 2013 WL 718773, at *4 (Del Ch 2013) ("any request for an accounting must be based on a successful claim for breach of fiduciary duty"), *aff'd* 65 A3d 616 (Del 2013), citing *Stevanov v O'Connor*, 2009 WL 1059640, at *15 (Del Ch 2009) ("A claim for an accounting ... generally reflects a request for a particular type of remedy, rather than an equitable claim in and of itself."). This cause of action is dismissed with prejudice.

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[25] The Kramer Parties have an adequate remedy at law in this case – their claim for monetary damages.

10. Punitive Damages

Punitive damages are not permitted in this case, a private commercial dispute over money between sophisticated parties that does not affect the public. The Answer does not plead the requisite "moral turpitude" or that the subject conduct "demonstrate[s] such wanton dishonesty as to imply a criminal indifference to civil obligations." *See Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 (1st Dept 2011), quoting *Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 (2007).

11. NYLL Claims

The NYLL cause of action is based on the claim that the PWP Parties' failure to remit to the Kramer Parties the discussed deferred compensation is a violation of NYLL § 193. They also seek the damages, penalties, and attorneys' fees permitted for such a violation under §§ 198 and 198(1-a). "Section 193 of the Labor Law prohibits an employer from making 'any **deduction** from the wages of an employee' unless permitted by law or authorized by the employee for certain payments made for the employee's benefit." *Wachter v Kim*, 2013 WL 144760 (Sup Ct, NY County 2013) (Ramos, J.) (emphasis added). As Justice Ramos explained, "[u]nder well-established precedent, section 193 of the Labor Law does not apply when a plaintiff merely alleges a failure to pay wages and cannot cite to a specific deduction from wages." *See id.* (collecting cases); *see also Ackerman v N.Y. Hosp. Med. Ctr. of Queens*, 127 AD3d 794, 795 (2d Dept 2015) (§ 193 claims concern deductions).

The parties dispute whether the subject unpaid money qualifies as wages under § 193 and whether the non-payment constitutes a deduction. While the Kramer Parties correctly observe that a "guaranteed and non-discretionary bonus", like the subject disputed compensation, may be considered "wages" for the purpose of § 193 [*see Ryan v Kellogg Partners Institutional Servs.*,

19 NY3d 1, 16 (2012)], as the PWP Parties correctly contend, that is not the end of the relevant inquiry. Rather, as with all claims under § 193, the complaint must be for deductions, not wholesale withholding of a disputed category of compensation.

As the cases cited below explain, deductions are understood to include partial withholding of compensation to pay for benefits, such as insurance or a gym membership. In contrast, complete non-payment based on a dispute over whether any of the funds are owed under a contract is not considered a deduction. This is the consensus of numerous post-*Ryan* New York federal courts. Those courts have held that a dispute over a payment contingent on the basis of the employee's termination (e.g., for Cause) is a breach of contract dispute that that may not give rise to liability under § 193. *See generally Gold v Am. Med. Alert Corp.*, 2015 WL 4887525, at *2-5 (SDNY 2015) (Keenan, J.); *see also, e.g., Goldberg v Jacquet*, 2015 WL 5172939, at *2-3 (SDNY 2015) (Crotty, J.), *aff'd* 2016 WL 3569930, at *1 (2d Cir June 30, 2016) ("In order to state a claim for a violation of NYLL § 193, a plaintiff must allege a specific deduction from wages and not merely a failure to pay wages"); *O'Grady v BlueCrest Capital Mgmt. LLP*, 111 FSupp3d 494, 506 (SDNY 2015) (Stein, J.) ("[plaintiff's] section 193 claim fails because section 193 applies to amounts deducted from wages, not unpaid wages and severance"), *aff'd* 2016 WL 1459673 (2d Cir Apr. 14, 2016); *see also Wachter*, 2013 WL 144760 ("Because [plaintiff] merely alleges the failure to pay wages rather than a specific unauthorized deduction from his wages, his claim for violation of section 193 of the Labor Law fails.").

No Appellate Division or Court of Appeals case has issued an express holding to the contrary. The federal courts interpret *Ryan* to have merely addressed the meaning of wages (and that a bonus can be considered wages), not whether all wholesale failures to pay bonuses are §

193 violations. Simply put, § 193 could have stated that any non-payment of wages owed is a violation. Instead, the word "deduction" was used. This, as the federal courts explain, was a deliberate drafting decision. Courts must give meaning and effect to the Legislature's decision to use the word "deduction." *See Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 286 (2009) (courts must look to clear wording of statute to interpret Legislature's intent). The cited federal decisions do so, and the court agrees with their persuasive reasoning and the cases on which they rely. In this case, the Kramer Parties' entitlement to all of the disputed compensation turns on whose interpretation of the contracts and version of events is true. This is the classic type of dispute the federal courts hold is not covered by § 193. The § 193 claim, therefore, is dismissed.

As a result, the claims under §§ 198 and 198(1-a), necessarily, also must be dismissed. Recovery under these sections is not permitted absent a viable, substantive NYLL violation. *See Gold*, 2015 WL 4887525, at *2 ("It is settled that section 198 does not 'permit recovery ... on a common-law contractual remuneration claim' as the recovery of attorney's fees and liquidated damages is 'limited to actions for wage claims founded on the substantive provisions of Labor Law article 6.'"), quoting *Gottlieb v Kenneth D. Laub & Co.*, 82 NY2d 457, 464-65 (1993); *see also Graham Court Owner's Corp. v Taylor*, 24 NY3d 742, 751 (2015) ("The Court in *Gottlieb* held that Labor Law § 198 did not authorize recovery of attorneys' fees for a common-law contractual claim. In reaching this conclusion, the Court held that the statute's terms and cumulative legislative history evinced an intent to limit its application to 'actions for wage claims founded on the substantive provisions of Labor Law article 6'"). The Kramer Parties fail to state a viable claim for their only alleged statutory violation, § 193, and, therefore, their entire NYLL cause of action is dismissed with prejudice.

IV. Recusal

Shortly after oral argument, the parties filed a joint letter dated May 10, 2016, setting forth their respective positions on the question of whether this court should recuse itself due to the possibility that Kayman may be a witness in this case. *See* Dkt. 87. To be clear, neither party has taken the position that this court is obligated to recuse itself nor has either party expressly asked the court to do so.

Yet, while the parties' positions are somewhat qualified, they both seem to recognize that the court's relationship to Kayman poses a problem should it ever have to assess his credibility as a witness. The court is willing to go a step further than the parties and state, unequivocally, that its adjudication of this case with Kayman as a witness would create an appearance of impropriety that, even if recusal was not mandatory, would result in the court recusing itself to avoid all doubts as to its impartiality.

That said, the question the court must grapple with is whether recusal at this juncture is appropriate if Kayman's involvement as a witness is uncertain. As noted earlier, the court is not currently conflicted out of this case, but the possibility of conflict is looming. The court is mindful of the possibility of gamesmanship (not that the court is accusing either side of this) should either side perceive the court's view of the case to not be in their favor. In other words, either side might later decide to call Kayman as a witness to give it a (perceived) tactical advantage of procuring recusal. Moreover, there is the concern that the longer this case proceeds, and the more knowledge of the case the court acquires, the prejudice of recusal increases since another judge will be burdened with duplicating this court's work. This is particularly worrisome given the volume and complexity of the issues in this case. Such a waste of judicial resources ought to be avoided.

With these concerns with in mind, the court is not willing to further preside over this action. Accordingly, it is

ORDERED that the motion for partial summary judgment by Kramer and Slonecker is denied; and it is further

ORDERED that the PWP Parties' motion for partial dismissal of the Kramer Parties' counterclaims is granted to the extent that: (1) the entirety of the Answer is dismissed without prejudice with leave to replead in accordance with this decision; (2) the amended answer must address the specific deficiencies set forth herein, such as clear identification of the parties against whom the counterclaims are asserted; (3) the amended answer shall not include claims this decision finds to be clearly without merit, such as the breach of contract claims asserted against non-contracting parties, the causes of action dismissed with prejudice [the claim for breach of the Offer Letters, fraudulent inducement of the DCA Extension Forms and all other fraud claims (conspiracy to defraud, fraud, and fraudulent inducement), equitable estoppel (dismissed only as a cause of action, not as an affirmative defense), the NYLL claims, breach of fiduciary duty, the claim for a declaratory judgment that Kramer was constructively discharged (dismissed as an independent cause of action but without reaching whether constructive discharge is a valid consideration under the PWP Agreements), and an accounting], and the demand for punitive damages; (4) causes of action dismissed herein without prejudice and with leave to replead may only be repleaded if the deficiencies addressed in this decision are remedied; and (5) the amended answer must be filed within 30 days of the entry of this order on the NYSCEF system and must be responded to within 30 days after it is filed; and it is further

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ORDERED that the court recuses itself and directs the Trial Support Office to randomly reassign this action to another Justice in the Commercial Division.

Dated: July 19, 2016

ENTER: