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| Matter of Plaid Inc. (Hunzinger) |
| 2018 NY Slip Op 30098(U) |
| January 12, 2018 |
| Supreme Court, New York County |
| Docket Number: 652578/2012 |
| Judge: Andrea Masley |
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NYSCEF DOC. NO. 224
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

RECEIVED NYSCEF: 01/18/2018

Application of VERONICA HUNZINGER,

Petitioner,

For the Judicial Dissolution of PLAID INC.,

Respondent.

Action No.: 1
Index No.: 652578/2012
Mot. Seq. No.: 011

VERONICA HUNZINGER, individually and derivatively
on behalf of PLAID INC.,

Plaintiff,

Action No.: 2
Index No.: 653086/2012
Mot. Seq. Nos.: 009 & 010

-against-

CAROL COSTELLO,

Defendant.

Hon. Andrea Masley
Decision and Order

In re Application of Veronica Hunzinger, Index No. 652578/2012 (Action No. 1), was commenced in July 2012 by petitioner Veronica Hunzinger for the judicial dissolution of respondent Plaid Inc. (Plaid), a closely-held corporation, pursuant to Business Corporation Law (BCL) § 1104-a (a) (1) and (a) (2). In her petition, Ms. Hunzinger alleges that Plaid's majority shareholder, president, and director, Carol Costello, engaged in oppressive conduct toward Ms. Hunzinger, the minority shareholder, and that the property/assets of Plaid were being looted, wasted, and/or diverted for non-corporate purposes (*see generally* Petition).

Hunzinger v Costello, Index No. 653086/2012 (Action No. 2) was commenced in September 2012 by plaintiff Ms. Hunzinger, individually and derivatively on behalf of Plaid, against Ms. Costello. In the amended complaint, Ms. Hunzinger asserts derivative breach of fiduciary claims under the common law and BCL § 720, as well as an accounting claim. Individually, Ms. Hunzinger alleges that Ms. Costello breached the

parties' oral contract, and seeks a declaratory judgment granting her access to Plaid's financial and accounting records (*see generally* Amended Complaint [Compl.]).

The two actions were not consolidated; rather, the court ordered that discovery in Action No. 2 would "proceed alongside" that of Action No. 1 (Second Conference Order, Index. No. 653086/2012 [Oing, J.] [NYSCEF Doc. No. 31]).

In Action No. 1, Plaid moves, pursuant to CPLR 3212, for an order to summarily dismiss the petition for judicial dissolution (Mot. Seq. No. 011, Index No. 652578/2012).

In Action No. 2, Ms. Costello moves, pursuant to CPLR 3212, for an order to summarily dismiss the amended complaint (Mot. Seq. No. 009, Index No. 653086/2012).

In both Action No. 1 and Action No. 2, Ms. Hunzinger requests partial summary judgment; however, she submits a notice of motion and supporting documents in only Action No. 2 (Mot. Seq. No. 010, Index No. 653086/2012).¹ Ms. Hunzinger asks the court to issue, among other things: an order, pursuant to CPLR 3212, awarding her partial summary judgment as to "its Breach of Fiduciary Claims;" an order, pursuant to BCL § 706 (d), removing Ms. Costello as a director and officer of Plaid, or, alternatively, an order, pursuant to BCL § 1104, dissolving Plaid; and an order directing Ms. Costello to repay to Plaid the attorneys' fees incurred in defending these actions.

Background

Prior to the formation of Plaid, Ms. Hunzinger and Ms. Costello were colleagues at Wolff Olins, a branding company. In August 2005, Ms. Hunzinger was terminated by Wolff Olins. She then approached Ms. Costello, who was still employed at Wolff Olins,

¹ Because the two actions are not consolidated, and Ms. Hunzinger has not filed a notice of motion or supporting papers in Action No. 1, her request for summary relief related to the petition in Action No. 1 is not properly before the court (*see generally* CPLR 3212).

about leaving that firm to create a new marketing/branding company, Plaid. In

September 2005, Ms. Hunzinger formed Plaid on her own,² and Ms. Costello left Wolff Olins in October 2005 to join the venture. Though no written shareholder agreement was executed, it is undisputed that Ms. Hunzinger and Ms. Costello decided at the outset that: Ms. Costello would hold 55% of the shares and Ms. Hunzinger would hold the remaining 45%; each would earn a salary amounting to 50% of their individual billable earnings, though Ms. Costello's billing rate would be greater than that of Ms. Hunzinger; and that both shareholders would serve as Plaid's managers and officers. It is alleged by Ms. Hunzinger that the parties agreed that each would serve as Plaid's principals, determine whether and when to make pro rata profit distributions, and that their shared authority to make business decisions would continue until either party voluntarily left the company, was terminated for cause, or sold her shares.

From 2006 to 2009, Plaid earned approximately \$2 million annually, and Ms. Hunzinger's and Ms. Costello's annual salaries averaged \$110,000 and \$200,000, respectively. During that time, the parties also received pro rata profit distributions as Plaid's shareholders. In 2006, 2007, and 2008, Ms. Hunzinger's distributions totaled \$254,022, \$185,600, and \$271,525, and Ms. Costello's totaled \$310,471, \$226,845, and \$331,864. According to Ms. Hunzinger, she was ousted from Plaid in 2009 when her employment was terminated and she was removed as an officer and director. Ms.

² At the outset of Plaid's formation, prior to Ms. Costello's joining the company, Ms. Hunzinger was the sole shareholder. Ms. Costello referred Ms. Hunzinger to Ms. Costello's personal attorney, David Gordon, to review Ms. Hunzinger's severance from Wolff Olins and to assist Ms. Hunzinger with the formation of Plaid. Mr. Gordon then continued to represent Plaid over the course of the parties' cooperation at Plaid, and Mr. Gordon currently represents Ms. Costello and Plaid, as defendant and respondent, respectively, in these two actions. The court notes that Ms. Hunzinger previously moved in Action No. 2 (Mot. Seq. No. 002) to disqualify Mr. Gordon as counsel for Plaid and Ms. Costello, but that motion was denied (see 1/27/14 Decision and Order [Oing., J.] [653086/2012, NYSCEF Doc. No. 29]).

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Hunzinger further alleges that, after her departure, Ms. Costello directed Plaid to cease making profit distributions to its shareholders, apportion Ms. Costello a flat salary exceeding \$400,000 annually, and engage Ms. Costello's husband, Paul Worthington, as a consultant.

In her petition in Action No. 1, Ms. Hunzinger seeks judicial dissolution of Plaid under BCL § 1104-a (a) (1) and (a) (2). Specifically, she alleges that Ms. Costello engaged in fraudulent and/or oppressive actions, including: prohibiting Ms. Hunzinger from attending client meetings; denying her access to Plaid's financial/accounting records; removing her access to Plaid's bank accounts; decreasing her salary by "refus[ing]" to assign her billable work; and discontinuing profit distributions to the shareholders. Ms. Hunzinger alleges that her position as vice president of Plaid was constructively terminated as of July 20, 2009, and that she was removed as a director of Plaid on May 19, 2010. Additionally, Ms. Hunzinger claims that, after her "ouster," she was deprived of her "rightful profit distributions" because Ms. Costello "unreasonably" raised her own salary and relocated Plaid to an "unreasonably" large new office space, among other things, to ensure that Plaid's profits were driven down.

In the amended complaint filed in Action No. 2, Ms. Hunzinger, on behalf of Plaid's shareholders, raises derivative claims of breach of fiduciary duty against Ms. Costello under the common law (first cause of action) and BCL § 720 (second cause of action), and seeks an accounting (fourth cause of action) (see Compl. ¶¶ 34-51, 59-61). In her individual capacity, Ms. Hunzinger asserts a claim of breach of contract against Ms. Costello (third cause of action), and seeks a declaratory judgment entitling Ms. Hunzinger to the production of Plaid's financial and accounting records (fifth cause of action) (Compl. ¶¶ 52-58, 62-64).

Legal Standard

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [internal quotation marks and citation omitted]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant makes the requisite showing, the burden shifts to the opposing party to present evidentiary facts sufficient to raise triable issues of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The court is required to examine the evidence in the light most favorable to the opposing party (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]), and summary judgment "should not be granted where there is any doubt as to the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]).

The court notes that the drastic remedy of summary judgment operates through strict procedural mechanisms which guide the submission, and the court's analysis, of the motions and supporting/opposing documents (see CPLR 3212; *Winegrad*, 64 NY2d at 853). Here, Ms. Costello and Plaid, in submitting identical/joint memoranda of law and supporting documents, and in crafting their arguments, have blurred the requisite procedural boundaries. Moreover, Ms. Hunzinger has failed to file her motion for partial summary judgment in Action No. 1, despite seeking relief in that action, and failed to submit any documents opposing Plaid's motion for summary judgment in Action No. 1 (see NYSCEF Index No. 652578/2012, Mot. Seq. No. 011).

Part I:
Summary Judgment Motions of Plaid and Ms. Costello

Plaid seeks summary dismissal of the petition for judicial dissolution (Action No. 1, Mot. Seq. No. 011), and Ms. Costello seeks summary dismissal of the amended complaint (Action No. 2, Mot. Seq. No. 009). Briefly, they contend that: the derivative causes of action for breach of fiduciary duty, under the common law and BCL § 720, should be dismissed, and, therefore, the petition for dissolution should be dismissed; Ms. Hunzinger's individual breach of contract claim is defeated by her own deposition testimony, which demonstrates that mutual assent was not achieved as to material terms of the alleged oral agreement; and that Ms. Hunzinger's derivative accounting claim is moot because she has received the demanded documents through discovery.

1. Action No. 2, Mot. Seq. No. 009: Ms. Costello's Motion to Summarily Dismiss the Common Law and BCL § 720 Breach of Fiduciary Duty Claims³

Preliminarily, Ms. Costello and Plaid argue, relying on *770 Owners Corp. v Spitzer* (25 Misc 3d 1204[A], 2009 Slip Op 519068[U] [Sup Ct, Kings County 2009]), that Ms. Hunzinger's BCL § 720 breach of fiduciary duty claim should be dismissed as duplicative of the common law breach of fiduciary claim; however, *770 Owners Corp.* does not hold, or even suggest, that a BCL § 720 breach of fiduciary duty claim is duplicative of a common law breach of fiduciary claim, and, therefore, that argument is rejected.

³ In her original complaint, Ms. Hunzinger alleged breach of fiduciary duty as both individual and derivative claims; however, in her amended complaint, she states causes of action for breach of fiduciary duty, under the common law and BCL § 720, only derivatively. The court notes that, in her motion for partial summary judgment in Action No. 2 (Mot. Seq. No. 010), Ms. Hunzinger asks the court to conform the pleadings to the proof such that the amended complaint is deemed to contain direct, as well as derivative, claims of breach of fiduciary duty. That issue is addressed below in Part II of this decision, which analyzes Ms. Hunzinger's motion; therefore, as is procedurally required, the breach of fiduciary claims are considered only derivative in nature for the purposes of evaluating the motions of Plaid and Ms. Costello.

Ms. Costello and Plaid also argue that the evidence demonstrates that the challenged decisions made by Ms. Costello as sole director of Plaid—including raising her own salary, relocating to and renovating a new office space, engaging Ms. Costello's husband as a consultant, and discontinuing Plaid's policy of making profit distributions—are protected by the business judgment rule, were demonstrably fair to the company, and/or do not constitute corporate waste or bad faith on the part of Ms. Costello.

Ms. Hunzinger responds that the challenged decisions are self-interested transactions which render the business judgment rule inapplicable and shift the burden to Ms. Costello to affirmatively demonstrate the absence of breach of fiduciary duty and/or that her actions were fair to Plaid. In reply, Ms. Costello and Plaid assert that Ms. Hunzinger has failed to submit any evidence of harm or unfairness to Plaid, or bad faith in relation to the challenged transactions.

The court finds that Ms. Costello has failed to tender evidence demonstrating the absence of all triable issues of fact as to the two indirect breach of fiduciary duty claims. For the following reasons, those branches of Ms. Costello's motion are denied (Action No. 2, Mot. Seq. No. 009).

"[I]t is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect. This is a sensitive and inflexible rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty" (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014], quoting *Birnbaum v Birnbaum*, 73 NY2d 461, 466 [1989]).

"The business judgment rule 'bars judicial inquiry into actions of corporate

directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Gonzalez v Been*, 145 AD3d 434, 435 [1st Dept 2016], quoting *Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). The business judgment rule, however, "does not protect . . . corporate fiduciaries when they make decisions affected by inherent conflict of interest" (*Wolf v Rand*, 258 AD2d 401, 404 [1st Dept 1999]). Furthermore, the business judgment rule does not preclude "review of improper decisions, as when the challenger demonstrates that the board's action . . . deliberately singles out individuals for harmful treatment" (*Barbour v Knecht*, 296 AD2d 218, 224 [1st Dept 2002] [internal quotation marks omitted]).

Here, the business judgment rule does not apply to Ms. Costello's plainly self-interested determination to increase her own salary, and the court declines to conclude that the rule applies to her decision to engage and pay her husband as a consultant to Plaid (*see Marx v Akers*, 88 NY2d 189, 202 [1996] ["Directors are self-interested in a challenged transaction where they will receive a direct financial benefit from the transaction which is different from the benefit to shareholders generally."]).

Furthermore, Ms. Costello's decisions to raise her own salary, hire her husband, and discontinue making profit distributions to Plaid's shareholders cannot be resolved on a motion for summary judgment, as a trier of fact is required to resolve the issues of Ms. Costello's good faith, loyalty to Plaid, and intent (*see Bonnie Briar Country Club, Inc. v Bonnie Briar Syndicate, Inc.*, 260 AD2d 336, 336 [2d Dept 1999] ["Determinations as to whether the activities of defendants were undertaken in good faith for a legitimate corporate purpose and whether other means were available depend not only on an analysis of the objective facts but as well in part on an appraisal of defendants' motives,

involving as (they) will issues of credibility." (alteration in original)], quoting *Schwartz v Marien*, 37 NY2d 487, 493 [1975]).

Here, Ms. Costello's submissions pertaining to these decisions consist mainly of Ms. Costello's and Mr. Worthington's self-serving affidavits, which are entitled to little weight (*see Zoldas v Louise Cab Corp.*, 108 AD2d 378, 383 [1st Dept 1985]), and which are contradicted by other documents submitted by Ms. Costello in support of her motion. In sum, Ms. Costello's submissions fail to eliminate all issues of fact as to the fairness of the decisions to Plaid, as well as Ms. Costello's good faith in conducting the transactions, which—unprotected by the business judgment rule—are not shielded from the court's scrutiny.

Ms. Costello's submissions in support of her motion include the affidavits of Ms. Costello and Mr. Worthington, excerpts of Ms. Hunzinger's deposition testimony, two affidavits of Ms. Hunzinger, and Plaid's tax returns for 2006 to 2015. Certain of those affidavits and exhibits—in particular, Ms. Hunzinger's affidavits and excerpts of Ms. Hunzinger's deposition testimony—depict Plaid as a venture launched as a "partnership" between Ms. Costello and Ms. Hunzinger, and assert that the parties agreed that they: were both officers and directors of Plaid; were paid salaries according to their billable hours; and were paid pro rata profit distributions regularly until Ms. Hunzinger's departure from Plaid (*see generally* Hunzinger Tr.; Hunzinger 07/20/2012 & 10/03/2012 Affs.). Rather than eliminate triable issues of fact, these documents demonstrate that, prior to Ms. Hunzinger's departure, Ms. Costello and Ms. Hunzinger earned total compensation from Plaid in the form of salaries as employees and profit distributions as shareholders; however, after Ms. Hunzinger's departure, Plaid ceased making profit distributions, but Ms. Costello raised her own salary and began paying her

husband as a consultant, essentially maintaining her overall compensation from Plaid while depriving Ms. Hunzinger of any compensation whatsoever.

The other submissions of Ms. Costello do not eliminate the genuine issues of fact as to whether she breached her fiduciary duty. In her affidavit, Ms. Costello states that Ms. Hunzinger voluntarily left Plaid to join Ms. Hunzinger's husband's accounting company, and Ms. Costello's increased salary is justified because her responsibilities increased after Ms. Hunzinger's departure. She also asserts that Mr. Worthington was highly qualified for the valuable work he performed for Plaid, and his \$2,800 per day rate was fair to Plaid (Costello 04/07/2017 Aff.; see also Worthington 04/07/2017 Aff. [asserting that the work Mr. Worthington performed assisted Plaid to land a single new client and employ a "successful new business proposal approach"]).

The court notes that Ms. Costello also submits an email chain from 2008 reflecting Ms. Hunzinger's efforts, prior to her departure from Plaid, to find Plaid new office space. While the decision to move to a new office and purchase furniture may well be protected by the business judgment rule, those allegations of corporate waste are just two instances of the alleged actions which comprise Ms. Hunzinger's derivative causes of action for breach of fiduciary duty. Any finding with regard to the office space and furniture does not necessitate summary dismissal of the breach of fiduciary duty claims in their entirety.

2. Action No. 1, Mot. Seq. No. 011: Plaid's Motion to Summarily Dismiss the Petition for Judicial Dissolution

Plaid argues that the petition should be dismissed because Ms. Hunzinger cannot sustain any claim for breach of fiduciary duty. In opposition, Ms. Hunzinger argues that the breach of fiduciary duty actions should survive the motions for summary judgment, and that Plaid has failed to address her allegations of oppressive conduct.

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The court finds that Plaid has not tendered evidence sufficient to demonstrate the absence of all triable issues of fact with regard to the allegations contained in the petition. For the reasons that follow, Plaid's motion to summarily dismiss the petition for judicial dissolution is denied (Action No. 1, Mot. Seq. No. 011).

Ms. Hunzinger's petition seeks the judicial dissolution of Plaid under subsections (a) (1) and (a) (2) of BCL § 1104-a, which provide relief to shareholders of a close corporation when the controlling directors have either engaged in illegal, fraudulent, or oppressive actions toward the complainants, or the property/assets of the corporation are being looted, wasted, or diverted for non-corporate purposes. The term "oppressive," though not defined in the statute itself, "should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture" (*Matter of Kemp & Beatley, Inc.*, 64 NY2d 63, 73 [1984]). Whether the actions taken were oppressive necessarily "depend[s] on the circumstances in the individual case," and "[t]he appropriateness of an order of dissolution is in every case vested in the sound discretion of the court considering the application" (*id.*).

Plaid's evidence fails to eliminate triable issues of fact as to the alleged oppressive actions in the petition, particularly those surrounding the circumstances of Ms. Hunzinger's departure from Plaid. Specifically, Ms. Hunzinger's affidavits and excerpted deposition testimony, submitted by Plaid, depict her departure as the result of Ms. Costello's efforts to systematically diminish Ms. Hunzinger's billable work and deprive Ms. Hunzinger of access to Plaid's records and bank accounts. Moreover, that evidence shows that those actions ultimately culminated in Ms. Costello's termination of

Ms. Hunzinger's position as an officer and director of Plaid (see e.g. Hunzinger 10/03/2012 Aff.). Therefore, based solely on Plaid's evidence, issues of fact remain as to whether Ms. Costello engaged in the oppressive conduct alleged by Ms. Hunzinger (see *Matter of Kemp & Beatley, Inc.*, 64 NY2d at 73).

Moreover, genuine issues of fact exist as to whether the alleged oppressive conduct substantially defeated Ms. Hunzinger's expectations that, objectively viewed, were both reasonable under the circumstances and were central to her involvement with the Plaid venture (see *id.*; see also *Matter of Gould Erectors & Rigging, Inc.*, 146 AD3d 1128, 1130 [3d Dept 2017] [affirming application court's finding that oppressive conduct substantially defeated petitioner's reasonable expectations where petitioner was terminated as a director, dismissed as corporate secretary, denied access to customary work duties, and excluded from staff meetings, among other things]).

Plaid's submissions also do not eliminate genuine issues of fact as to the allegations of Ms. Costello's breaches of fiduciary duty, including corporate waste, looting, and/or diverting Plaid's assets (see Discussion in Part I, Section 1 above [finding, among other things, that the submissions of interested parties Ms. Costello and Mr. Worthington fail to eliminate triable issues of fact as to whether Ms. Costello breached her fiduciary duty]).

3. Action No. 2, Mot. Seq. No. 009: Ms. Costello's Motion to Summarily Dismiss Ms. Hunzinger's Individual Breach of Contract Claim

Ms. Costello asserts that the direct breach of contract cause of action must be dismissed because the evidence demonstrates that she and Ms. Hunzinger never mutually assented to, or discussed, various material terms of the alleged agreement.

Ms. Hunzinger responds that there are triable issues of fact regarding the parties' agreement concerning their status as partners in the management of Plaid and their

ongoing employment at Plaid, as demonstrated by their employment and conduct at the company prior to the events precipitating these actions.

Ms. Costello replies that Plaid's business practices prior to Ms. Hunzinger's departure do not refer to, or support, the terms of the purported agreement.

"The party seeking to enforce a contract bears the burden to establish that a binding agreement was made and to prove the terms of the contract. The agreement is required to be sufficiently definite so that a court can ascertain its terms for the purpose of determining whether it has been breached and avoiding imposition of contractual obligation under circumstances where intent to conclude a binding agreement is not present" (*Allied Sheet Metal Works, Inc. v Kerby Saunders, Inc.*, 206 AD2d 166, 169-170 [1st Dept 1994] [citations omitted]).

"In order to be generally enforceable, an oral agreement must arise by mutual assent and its terms must be sufficiently certain or definite" (*Polly Esther's S., Inc. v Setnor Byer Bogdanoff*, 10 Misc 3d 375, 395 [Sup Ct, NY County 2005], citing *Ruppert v Long Island R.R. Co.*, 281 AD2d 466, 467 [2d Dept 2001]). Where material terms of the oral agreement are omitted, the alleged oral contract may be unenforceable (*Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584 [1999], *rearg. denied* 93 NY2d 1042). Thus, "[s]ummary judgment is appropriate where a movant demonstrates fatal insufficiency of an oral contract's terms and the opposing party fails to raise a triable issue of fact to the contrary" (*Polly Esther's S., Inc.*, 10 Misc 3d at 395 [citation omitted]).

Here, Ms. Hunzinger alleges that the parties entered into an agreement at the inception of their joint venture in Plaid by which

"they would both become shareholders, officers, directors and employees of Plaid, and would jointly manage the corporation, and would be fairly paid annual distributions of earnings, and would each be fairly paid annual salaries, and would each remain to be paid salary (except if either voluntarily terminated her employment or was terminated for cause) and each would made [sic] all important decisions for the corporation, including hiring employees, corporate agents, and setting amounts for earnings, and

deciding upon the corporation's clients and the amounts to bill those clients, and that Costello would be President and Hunzinger would be Vice President, and that their percentages of ownership would be 55% and 45%, respectively" (Compl. ¶ 53).

Ms. Hunzinger further alleges that Ms. Costello breached the agreement by: diverting Ms. Hunzinger's billable hours such that Ms. Hunzinger was "constructively terminated" when her billable hours were reduced "to zero;" "forcing Hunzinger out as an officer and employee of Plaid, . . . then oust[ing] Hunzinger as a director;" "preventing Hunzinger to earn a salary and to remain employed by Plaid, and from jointly making all important business decisions in Plaid" (*id.* ¶¶ 54-57).

The court finds that Ms. Costello's submissions demonstrate prima facie entitlement to judgment as a matter of law with regard to Ms. Hunzinger's breach of contract claim inasmuch as the evidence establishes that the parties did not manifest mutual assent to various material terms of the alleged agreement. Specifically, excerpts of Ms. Hunzinger's deposition testimony reveal the following: the parties never agreed that they would both remain officers of Plaid, in perpetuity or otherwise (*see* Hunzinger Tr. at 73-74 [admitting that there was no discussion regarding whether Ms. Hunzinger "would always be an officer of Plaid," that Ms. Costello never assumed Ms. Hunzinger a role as an officer in an ongoing capacity, and the parties never discussed any scenario in which either would discontinue being officers of Plaid]). Ms. Hunzinger also testified that "[i]t was assumed" that both parties would "always" remain employees of Plaid, but the parties never discussed that matter (*id.* at 94). Additionally, Ms. Hunzinger testified that the parties never discussed, let alone agreed, that both parties would forever remain directors of Plaid (*see id.* at 73-74).

Regarding the management of Plaid, Ms. Hunzinger testified that, to the extent that the parties discussed making business decisions, Ms. Hunzinger "understood that if

[the parties] had any sort of specific point that [they] couldn't agree on, . . . [Ms. Costello] would be able to make the decision" (*id.* at 69). Ms. Hunzinger further testified that no document reflected the parties' alleged agreement to jointly manage Plaid; rather, she "believe[d] that the fact that [she] was a 45 percent owner and director was an indication that [she] would jointly manage Plaid" (*id.* at 72-73).

As for earning an annual salary, Ms. Hunzinger's testimony reflects that the parties' discussions related to only how their salaries would be calculated by billable hours; they did not agree to any specific amount that each would be entitled to earn annually. Moreover, in response to a question asking whether the parties "ever discuss[ed] what would happen to [their] salaries if one of [them] stopped working at Plaid," Ms. Hunzinger responded "[n]o, I don't think it was assumed either of us would ever stop working at Plaid" (*id.* at 86-87, 91).

The parties do not dispute that Ms. Hunzinger did, in fact, become an officer and director at Plaid upon Ms. Costello's joining the company, or that the parties both earned a salary calculated in accordance with their billable hours during Ms. Hunzinger's time there. Likewise, they do not dispute that pro rata profit distributions were made throughout the course of Ms. Hunzinger's tenure at Plaid. Notably, the parties did not enter into a shareholder agreement prior to Ms. Hunzinger's departure. Therefore, insofar as an oral agreement may have existed as to the formation of Plaid, and to the parties' roles and compensation during their time as Plaid employees and directors, such an agreement was not breached.

However, Ms. Costello's evidence affirmatively refutes Ms. Hunzinger's allegation that the parties orally agreed that they would remain directors, officers, and employees of Plaid until such time as either voluntarily left or was terminated for cause, and that

profit distributions would be made in perpetuity. As demonstrated by the excerpts of Ms. Hunzinger’s testimony, no agreement existed as to those provisions; in fact, the parties never discussed arrangements for either party’s resignation, termination, or the manner in which business decisions would be handled following such an event.

Ms. Hunzinger’s repeated testimony that various terms of the agreement, though not discussed, were “assumed,” is insufficient to demonstrate mutual assent. Rather, “the existence of a binding contract is not dependent on the subjective intent” of either of the parties purported to be bound (*see Brown Bros. Elec. Contractors, Inc. v Beam Const. Corp.*, 41 NY2d 397, 399 [1977] [citations omitted]). “In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look, rather, to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds” (*id.* [citations omitted]). It is “the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain” (*id.* at 400 [citations omitted]).

Therefore, viewing the proof submitted by Ms. Costello in the light most favorable to Ms. Hunzinger, as the court must, there is no indication that the parties agreed, at the formation of the joint venture or afterwards, that each would hold an officer and director position in perpetuity, or be guaranteed a salary or the authority to jointly make business decisions until such a time as one party was terminated for cause or voluntarily resigned. To the contrary, the evidence shows that those issues were not discussed by the parties, and—at most—Ms. Hunzinger’s subjective understanding of those terms of the purported oral agreement was based upon her own assumptions.

Accordingly, Ms. Costello has met her burden of demonstrating prima facie entitlement to judgment as a matter of law, shifting the burden to Ms. Hunzinger to raise a triable issue of fact.

Ms. Hunzinger submits her own affidavit, dated June 22, 2017, and excerpts of her deposition testimony, among other documents.⁴ Her counsel argues that the parties' past performance of the provisions of the alleged oral contract—as demonstrated by Ms. Costello's deposition testimony, and the circumstances of Plaid's operation prior to Ms. Hunzinger's departure—establish that the parties agreed: "to be partners in the ownership and operation of Plaid;" they would each "receive a wage;" they would each be officers; they would "manage the Company together;" and "they would issue profit distributions and share in them" (see Pl's Mem. in Opp. at 13-16).

Ms. Hunzinger's counsel cites a single case, *Gross v Vogel* (81 AD2d 576 [2d Dept 1981]), in support of Ms. Hunzinger's argument that the parties' prior operation of Plaid constitutes past performance that is "unequivocally referable" to the alleged oral contract. *Gross*, however, discusses part performance of a purported oral contract as an exception to the Statute of Frauds, and does not address circumstances such as those presented here. The *Gross* court held that "Special Term erred[] . . . in ruling as a matter of law that plaintiff's performance could not be unequivocally referable to the alleged oral agreement for a joint venture since it was also referable to an oral contract of employment for an agreed salary. Performance is an exception to the Statute of

⁴ Notably, in Ms. Hunzinger's memorandum of law in opposition to the motion, her attorney refers to, and quotes, excerpts of Ms. Costello's deposition testimony; however, Ms. Hunzinger has not included any portion of Ms. Costello's deposition testimony in her submissions in opposition to the motion. Accordingly, that testimony is not properly before the court for the purposes of raising a triable issue of fact to defeat Ms. Costello's motion for summary judgment. In any event, that deposition testimony fails to raise a triable issue of fact sufficient to preclude summary judgment on the contract action.

Frauds as a form of equitable estoppel" (*id.* at 577). Past performance as an exception to dismissal under the Statute of Frauds is not the issue presented in this motion.

Moreover, as Ms. Costello notes in reply, the past "performance" of the parties' and Plaid's practices prior to Ms. Hunzinger's departure is not unequivocally referable to an oral contract purportedly guaranteeing the parties salaried positions, directorship, and profit distributions until such a time as either party resigned or was terminated for cause because there was no past performance relating to that contingency—neither party had resigned or was terminated prior to the events that precipitated these actions, and nothing in the parties' or Plaid's actions prior to Ms. Hunzinger's departure had any bearing on a post-termination or post-resignation scenario.

Furthermore, Ms. Hunzinger's affidavit fails to raise a triable issue of fact on the breach of contract cause of action. Ms. Hunzinger restates that the parties agreed to own Plaid in a 55% to 45% split, and to each be employed by and serve as officers and directors of Plaid. She further states that she was told by Ms. Costello and Plaid's counsel, Mr. Gordon, that Ms. Costello would "be a tiebreaker" if there was a disagreement as to a "business decision;" however, Ms. Hunzinger asserts that it was not discussed at any time that "agreements as to employment, access to financial information, or distribution of funds would be unilateral 'business decisions' to which [Ms. Costello] would be entitled to break" (*see* Hunzinger 06/22/2017 Aff., ¶¶ 4-5). She further asserts that Ms. Costello referred to the parties as "partner[s]," and that Ms. Hunzinger "had no reason to believe [she] was anything less than [Ms. Costello's partner]" (*id.* ¶ 6).

Additionally, Ms. Hunzinger states that it was never agreed that Ms. Costello would have "the power to fire [her] from the company," but she does not assert that

there was an agreement at any time pertaining to when, how, or whether either party could be terminated (see *id.* ¶ 7). Moreover, Ms. Hunzinger states that the parties' "agreement as to the ownership, the management, and the future of Plaid was clear from the moment [she] initially proposed the idea to Costello in 2004," and Ms. Hunzinger notes that she stated at deposition that she "assumed" her future at Plaid was secure because she "had no idea that a business of which [she] conceived, built, invested in and relied on for the support of [her] family could be taken away from [her]" (*id.* ¶ 8).

Accordingly, Ms. Hunzinger has not raised a triable issue of fact. Ms. Costello's motion is granted with respect to Ms. Hunzinger's individual breach of contract claim, which is dismissed.

4. Action No. 2, Mot. Seq. No. 009: Ms. Costello's Motion to Summarily Dismiss the Accounting Claim

Ms. Costello contends that Ms. Hunzinger's derivative accounting claim is moot because Ms. Hunzinger has received all the demanded records through discovery. Ms. Hunzinger does not oppose, challenge, or respond to this argument. Accordingly, that branch of Ms. Costello's motion is granted, and the fourth cause of action is dismissed (see *Boyle v Local 237 Teamsters-Town of Islip Health & Welfare Fund*, 2017 NY Slip Op 30332[U], *14 [Sup Ct, NY County 2017]).

However, while Ms. Costello's notice of motion in Action No. 2 seeks summary dismissal of all five of Ms. Hunzinger's causes of action, including that which individually seeks a declaratory judgment,⁵ Ms. Costello's submissions do not address the

⁵ The fifth cause of action in the amended complaint seeks a declaratory judgment entitling Ms. Hunzinger to access to and "production of any and all books and records of Plaid, and an order requiring production of the documents and information that have been requested to date" (Compl. ¶¶ 62-64).

declaratory judgment claim. Because Ms. Costello has not argued or demonstrated any evidence that Ms. Hunzinger has continuing access to Plaid's records in her shareholder capacity, Ms. Costello's motion for summary judgment is denied with respect to the fifth cause of action.

Part II: Ms. Hunzinger's Partial Summary Judgment Motion

Ms. Hunzinger moves, by notice of motion and accompanying submissions (Action No. 2, Mot. Seq. No. 010), for the following relief: (1) partial summary judgment pursuant to CPLR 3212 "as to liability on its Breach of Fiduciary Claims;" (2) removal of Ms. Costello as a director and an officer of Plaid pursuant to BCL § 706 (d), or, alternatively, an order dissolving Plaid pursuant to BCL § 1104; (3) an order compelling Ms. Costello to reimburse Plaid for the attorneys' fees accrued defending "this action;" and (4) an order awarding Ms. Hunzinger punitive damages in an amount to be determined at trial.

A previously noted, Ms. Hunzinger has neither filed a notice of motion nor supporting documents in Action No. 1, and the two actions are not consolidated. Therefore, no motion for partial summary judgment by Ms. Hunzinger in Action No. 1 is properly before the court. To the extent that Ms. Hunzinger seeks relief in Action No. 1 through the motion and supporting papers filed by her in Action No. 2, those requests are procedurally improper (CPLR 3212; *see generally Ostrov v Rozbruch*, 91 AD3d 147, 155 [1st Dept 2012] ["(O)ur court system is dependent on all parties engaged in litigation abiding by the rules of proper practice." (alteration in original)], citing *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 81 [2010]).

1. Ms. Hunzinger's Motion for Partial Summary Judgment as to Ms. Costello's Liability on the Breach of Fiduciary Duty Causes of Action, and Ms. Hunzinger's Request that the Court Conform the Pleadings to the Proof

Ms. Hunzinger argues that Ms. Costello breached her fiduciary duties in that she: engaged in self-interested transactions by using company funds for personal purchases, paid exorbitant consulting fees to her husband, and doubled her own salary; and made "kickback"/"bribery" payments to James Kelly, Plaid's point-of-contact at its largest client, PricewaterhouseCoopers (PWC), as well as embezzled monies from PWC by charging services performed for Mr. Kelly's personal business to PWC. Additionally, Ms. Hunzinger argues that the pleadings should be conformed to the proof such that the amended complaint is deemed to contain direct, as well as derivative, causes of action against Ms. Costello for breach of fiduciary duty, and that the court should grant summary judgment in favor of Ms. Hunzinger as to those direct claims. Notably, Ms. Hunzinger has not moved for, or otherwise sought, leave to amend the previously-amended complaint to insert direct claims for breach of fiduciary duty.

- a. *Ms. Hunzinger's request to conform the pleadings to the proof to add and obtain summary judgment as to direct breach of fiduciary claims.*

Ms. Costello opposes the request to conform the pleadings to the proof on the basis that Ms. Hunzinger has not moved for leave to amend her amended complaint. Notably, the original complaint was amended, and direct actions for breach of fiduciary duty were removed, in 2012. Ms. Costello also argues that Ms. Hunzinger cannot obtain summary judgment on claims not pleaded in the amended complaint. Contrary to Ms. Costello's argument, the court may in its discretion conform a party's pleadings on a motion for summary judgment, and "summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party

has not been misled to its prejudice" (*Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998]).

The court, however, declines to exercise that discretion here. Even if the court were to find that Ms. Costello has not been prejudiced, Ms. Hunzinger's breach of fiduciary duty claims are wholly derivative, not direct. Therefore, Ms. Hunzinger would not be entitled to summary judgment on conformed pleadings containing direct claims of breach fiduciary duty, rendering the exercise pointless.

"[A] stockholder has no individual cause of action against a person or entity that has injured the corporation," even if the alleged wrongful acts diminished the value of the shares of the corporation or where a shareholder incurred personal liability (*Serino v Lipper*, 123 AD3d 34, 39 [1st Dept 2014]). A shareholder "may not obtain a recovery that otherwise duplicates or belongs to the corporation" (*id.* at 40, citing *Herbert H. Post & Co. v Sidney Bitterman, Inc.*, 219 AD2d 214, 225 [1st Dept 1996]), except under the narrow exception applicable "where the wrongdoer has breached a duty owed directly to the shareholder which is independent of any duty owing to the corporation" (*Serino*, 123 AD3d at 39, citing *Abrams v Donati*, 66 NY2d 951 [1985]).

As explained by the First Department in *Yudell v Gilbert* (99 AD3d 108, 114 [1st Dept 2012]), "a court should consider (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)" (*id.* [internal quotation marks and citation omitted]). Direct claims fail as a matter of law where the harm alleged is anything other than harm to the individual shareholder alone; if the allegations confuse the complaining shareholder's derivative and individual rights, even if some of the claims are direct in nature, the claims cannot stand (*id.* at 115).

Here, the harm alleged by Ms. Hunzinger is harm for which only Plaid can

recover, as the company itself is the true injured entity. Ms. Hunzinger's claims that Ms. Costello, as sole director, engaged in self-interested transactions, kickback payment schemes, and corporate waste state, at most, derivative claims for which Plaid would be the redressed party. Thus, "[i]t is only through loss to [the corporation] that plaintiff[] suffer[s] a loss at all" (*id.* at 114; *see also Doppelt v Smith*, 2015 NY Slip Op 31861[U], *11 [Sup Ct, NY County 2015]).

Accordingly, the court declines to exercise its discretion to conform the pleadings to the proof to permit Ms. Hunzinger to add direct claims of breach of fiduciary duty to the amended complaint.

b. *Ms. Hunzinger's motion for partial summary judgment on the issue of liability for the derivative breach of fiduciary duty causes of action.*

i. Ms. Costello's expenditures

Ms. Hunzinger's first argument regarding entitlement to judgment as a matter of law on the issue of Ms. Costello's liability for breach of fiduciary duty concerns certain expenditures, amounting to \$35,246.52 over the span of seven years, which Ms. Hunzinger asserts constitute diversion of Plaid's funds for non-corporate purposes. In her May 3, 2017 affidavit submitted in support of her motion for partial summary judgment, Ms. Hunzinger asserts that, "after [her] ouster, . . . Costello began to spend lavishly and used corporate funds for her own personal expenses" (Hunzinger 5/3/2017 Aff. ¶ 24).

A chart is then depicted in the affidavit, which purports to demonstrate "COSTELLO'S EXPENDITURES" from 2009 until April 6, 2016 (*id.*). The list contains numerous itemized purchases organized by date, amount, and payee, with "Comments," and that chart, in turn, refers to the general ledgers submitted as an

exhibit to Ms. Hunzinger’s counsel’s affirmation in support. The expenditures total \$35,246.52 over the span of seven years, and the greatest single expenditures are Ms. Costello’s annual parking payment of \$3,900. Many of the comments indicate that the purchases were “Personal,” though some specify “Grocery store,” “Clothing store,” “Restaurant,” and so forth. There are also various purchases that are noted in the comments to be “Plaid Executive Meeting.”

Even assuming that Ms. Hunzinger’s evidence is sufficient to demonstrate prima facie entitlement to judgment as a matter of law on the issue of whether Ms. Costello breached her fiduciary duties to Plaid, triable issues of fact preclude summary judgment as to Ms. Costello’s liability for those payments. In opposition to the motion, Ms. Costello submits the June 23, 2017 affidavit of Plaid’s certified public accountant, who has served in that position since 2009. He asserts that he has reviewed Plaid’s accounting ledgers and accounts, and “confirm[s] that [Ms. Costello] does not owe any money to Plaid as of June 23, 2017” (Kilbane 06/23/2017 Aff.). Additionally, Ms. Costello submits as an exhibit to her affidavit in opposition to the motion a chart detailing the purpose of the expenditures and identifying those which were corporation-related and those which were personal, but which were repaid to Plaid.

Accordingly, at the very least, triable issues of fact as to Ms. Costello’s allegedly improper expenditures of Plaid’s corporate funds preclude summary judgment on that issue.

- ii. Ms. Costello’s salary and Mr. Worthington’s consulting fees

Ms. Hunzinger next argues that Ms. Costello breached her fiduciary duties by raising her own salary and hiring her husband as a consultant, transactions which Ms. Hunzinger characterizes as a self-interested and which Ms. Hunzinger argues benefited

only Ms. Costello and her family, individually, at the expense of Plaid. In support of those contentions, Ms. Hunzinger's submissions include Plaid's general ledgers and tax returns from 2012 to 2016, Ms. Costello's and Mr. Worthington's deposition transcripts, and charts demonstrating Ms. Costello's salary since Plaid's inception and Mr. Worthington's consulting fees. In her May 3, 2017 affidavit, Ms. Hunzinger asserts that Ms. Costello's freezing out and termination of Ms. Hunzinger, raising her own salary, and paying Mr. Worthington excessive consulting fees were part and parcel of Ms. Costello's scheme to benefit herself at the expense of the company.

Even assuming that Ms. Hunzinger's submissions establish prima facie entitlement to judgment as a matter of law on the issue of liability for Ms. Costello's raising her own salary and hiring her husband as a consultant, triable issues of fact preclude granting partial summary judgment as to those transactions.

As stated in Part I, Section 1 of this decision, the business judgment rule does not protect Ms. Costello's self-interested transactions, including her determination to raise her own salary (*see Marx*, 88 NY2d at 202), and the court declines to apply that rule to the decision to hire and Mr. Worthington as a consultant. Nonetheless, those challenged determinations cannot be resolved on papers because a trier of fact is required to resolve the issues of fact as to Ms. Costello's good faith, loyalty to Plaid, and intent, and the fairness of the transactions to the company (*see Bonnie Briar Country Club, Inc.*, 260 AD2d at 336). Credibility is a factor as well.

None of the evidence submitted by Ms. Hunzinger compels a different result than that reached above. Accordingly, Ms. Hunzinger's motion is denied as to Ms. Costello's determinations regarding her own and her husband's compensation.

iii. Corporate waste in relocating offices and new office furniture

Ms. Hunzinger has failed to tender evidence sufficient to demonstrate prima facie entitlement to partial summary judgment with regard to the alleged corporate waste that resulted from Ms. Costello's decisions to relocate Plaid's offices and purchase new office furniture. At most, those determinations, if not covered by the business judgment rule, are not suited for summary judgment as there are issues of fact as to fairness of those transactions to the company. In any event, issues of fact preclude granting summary judgment as to Ms. Hunzinger's derivative causes of action for breach of fiduciary duty, generally, and these corporate waste allegations are subsumed by those causes of action. Accordingly, that branch of Ms. Hunzinger's motion is denied.

iv. The alleged kickback scheme and embezzlement of PWC funds

Ms. Hunzinger argues that that Ms. Costello breached her fiduciary duty to Plaid by engaging in kickback payments to Mr. Kelly—Plaid's point-person at PWC, Plaid's largest client—and perpetrating an embezzlement scheme by which Ms. Costello charged PWC for work that Plaid performed for Mr. Kelly's private brand, J. Peloton.

As for the alleged kickback payments, Ms. Hunzinger submits evidence in the form of Plaid's ledgers and the chart attached to Ms. Hunzinger's May 3, 2017 affidavit demonstrating that certain payments, termed as client gifts—in the amounts of \$1,200, \$5,000, \$5,000, \$2,000, and \$3,000—were made by Plaid between December 2010 and December 2014 via credits paid to cycling shops frequented by Mr. Kelly. Ms. Hunzinger also submits transcripts of Mr. Kelly's and Ms. Costello's depositions.

Ms. Hunzinger has failed to tender evidence sufficient to demonstrate entitlement to judgment as a matter of law with regard to the kickback payments. Her submissions do not eliminate triable issues of fact as to whether the payments were bribes or

kickbacks, as opposed to gifts; in fact, the deposition testimony of both Mr. Kelly and Ms. Costello depict the cycling shop credits as Christmas gifts. Ms. Hunzinger has also failed to show Ms. Costello's bad faith in issuing the credits, or any resulting harm to Plaid.

As to the alleged embezzlement scheme, Ms. Hunzinger contends that invoices for Plaid's J. Peloton project, including fees, expenses, and other charges totaling \$119,000 were paid using PWC funds, as shown by Plaid's general ledgers, and the transcripts of Mr. Kelly's and Ms. Costello's depositions. Ms. Hunzinger states in her affidavit that she investigated J. Peloton and discovered that the brand trademark is owned by Mr. Kelly, and "a former Plaid employee" told Ms. Hunzinger that J. Peloton is " 'a business Jim Kelly wanted to start,' " and that Plaid's work on that project was done for Mr. Kelly personally, not for PWC (Hunzinger 5/3/2017 Aff. ¶ 31).

Ms. Hunzinger's evidence fails to demonstrate entitlement to judgment as a matter of law as to the alleged embezzlement scheme. Ms. Hunzinger has presented no evidence of the ownership of J. Peloton aside from Mr. Kelly's contradicted deposition testimony and Ms. Hunzinger's inadmissible hearsay statements. Moreover, the deposition testimony of Mr. Kelly and Ms. Costello present conflicting narratives surrounding the J. Peloton work performed by Plaid (*compare* Kelly Tr. at 54-57 *with* Costello Tr. at 494-496). Even assuming that the project was completed for Mr. Kelly and not PWC, there are issues of fact as to whether Ms. Costello was aware of that information when the project was performed, particularly as the invoices for the project were delivered to PWC.

Accordingly, Ms. Hunzinger's motion as to Ms. Costello's liability for the alleged kickback payments and embezzlement scheme is denied.

2. Ms. Hunzinger's Motion to Compel Ms. Costello to Repay Attorneys' Fees

Ms. Hunzinger contends that Ms. Costello should be compelled to reimburse Plaid for the attorneys' fees accrued in defending these two actions pursuant to BCL § 725 (a). Under BCL § 720 (a), attorneys' fees may be reallocated back to the corporation at the end of an action where the director has been found not to have been entitled to indemnification. Ms. Costello opposes this prong of Ms. Hunzinger's motion on the basis that Plaid's by-laws specifically provide for indemnification of a director's legal fees, and no finding of bad faith, material dishonesty, or illegal financial gain has been made by the court to trigger any responsibility on the part of Ms. Costello to reimburse Plaid for the legal fees expended in defending these actions.

As there has been no final adverse determination as to Ms. Costello's liability or bad faith, or any finding that Ms. Costello is not otherwise entitled to indemnification, Ms. Hunzinger's motion seeking an order requiring Ms. Costello to repay to Plaid the attorneys' fees accrued in defending these actions is denied without prejudice to renew at the close of trial.

3. Ms. Hunzinger's Motion to Remove Ms. Costello as Director Pursuant to BCL § 706 (d), or, Alternatively, to Judicially Dissolve Plaid Pursuant to BCL § 1104-a

Inasmuch as Ms. Hunzinger has not filed a notice of motion or supporting papers in Action No. 1, her request for an order summarily dissolving Plaid pursuant to BCL § 1104-a is not properly before the court. In any event, as discussed above in Part I, Section 2 of this decision, there are issues of fact precluding summary judgment as to the petition for dissolution, and none of the evidence contained in Ms. Hunzinger's submissions in support of her motion for partial summary judgment compel an alternate result. Accordingly, that branch of Ms. Hunzinger's motion is denied.

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Ms. Hunzinger's request to remove Ms. Costello as a director and officer of Plaid is also denied. Ms. Hunzinger cites no case law in support of that request, and does not make any substantive arguments as to removal. Moreover, neither Ms. Hunzinger's pleadings in the petition nor the amended complaint raise removal of Ms. Costello pursuant to BCL § 706.

Accordingly, it is

ORDERED that respondent Plaid's motion for summary judgment in Action No. 1, Index No. 652578/2012 (Mot. Seq. No. 011), is denied; and it is further

ORDERED that defendant Ms. Costello's motion for summary judgment in Action No. 2, Index No. 653086/2012 (Mot. Seq. No. 009), is granted in part and denied in part, and the third and fourth causes of action in the amended complaint are dismissed; and it is further

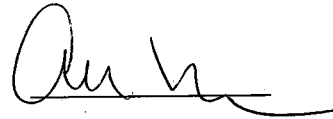
ORDERED that plaintiff Ms. Hunzinger's motion for partial summary judgment in Action No. 2, Index No. 653086/2012 (Mot. Seq. No. 010), is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the parties in both actions shall appear for a pretrial conference at 60 Centre Street, Room 242, New York, NY 10007 at 9:30 a.m. on February 21, 2018.

Dated: 1/12/18

ENTER:



Hon. Andrea Masley, J.S.C.