SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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MORETON BINN, an individual, and MARISOL F, LLC, a limited liability company,

Plaintiffs,

– against –

MUCHNICK, GOLIEB & GOLIEB, P.C., a professional corporation, JOHN GOLIEB, an individual, DLA PIPER LLP (US), a limited liability partnership, and SYDNEY BURKE, an individual,

Defendants.

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DECISION AND ORDER
Index No.: 158105/2017

Mot. Seq. Nos.: 003-004

O. PETER SHERWOOD, J.:

Motion sequence numbers 003 and 004 are consolidated for disposition.

Plaintiffs Moreton Binn (Binn) and Marisol F, LLC bring this action against defendants John Golieb (Golieb), Muchnick, Golieb & Golieb, P.C. (collectively, the Golieb Defendants), DLA Piper LLP (US) (DLA) and Sidney Burke, incorrectly sued herein as "Sydney Burke," (collectively, DLA Defendants), alleging that defendants committed legal malpractice and breached their fiduciary duties to plaintiffs in connection with several corporate transactions. The seven-count first amended complaint (FAC) asserts the following cause of action: (1) legal malpractice against the Golieb Defendants arising out of three separate transactions (first through third causes of action); (2) breach of fiduciary duty against the Golieb Defendants (fourth cause of action); (3) legal malpractice against the DLA Defendants (fifth cause of action); (4) breach of fiduciary duty against the DLA Defendants (sixth cause of action); and (5) aiding and abetting breach of fiduciary duty against the DLA Defendants (seventh cause of action).

In motion sequence number 003, the DLA Defendants now move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the FAC. In motion sequence number 004, the Golieb Defendants likewise move to dismiss the FAC, pursuant to CPLR 3211 (a) (1), (5) and (7).

I. Background

Unless indicated otherwise, the following facts are taken from the FAC and are presumed to be true for purposes of the motions.

Nonparty Marisol Binn, the sole member of plaintiff Marisol F, LLC, and her husband Moreton Binn (collectively, Binns) founded an airport wellness spa business, which they operated under the brand name "XpresSpa." In 2000, the Golieb Defendants registered the entity "Binn and Partners, LLC" (B&P), which plaintiffs used to operate the XpresSpa business. Over the next 14 years, as the business expanded into an international chain of airport spas, additional investors joined as B&P members. The Golieb Defendants continued to provide legal services in connection with all aspects of the XpresSpa business, representing both B&P as well as plaintiffs in their individual capacities.

In 2011, B&P sought an infusion of additional capital from Mistral Equity Partners and its related affiliates (collectively, Mistral). The proposed transaction required B&P to transfer substantially all of its assets to a newly-created entity, XpresSpa Holdings, LLC (XpresSpa Holdings or Company), into which Mistral would then make its investment. This led to a lawsuit by one of the B&P members, entitled *JPS Partners v Binn et al.* (index No. 650430/2012, Supreme Court, New York County). After two years of litigation, the parties entered into a global settlement in June 2014 (JPS Settlement).

To fund the JPS Settlement, Mistral proposed the following transaction (Mistral Transaction): it would invest $1,281,068, while B&P members would invest $918,932; XpresSpa Holdings would then issue 4,400,000 common shares, in consideration for the $2.2 million in investments, with Mistral obtaining majority ownership of XpresSpa Holdings. In an email dated June 9, 2014, describing the proposed transaction, Binn declared that he and his wife would not be "the Deep Pockets to this relationship" and explained that once B&P was consolidated into XpresSpa Holdings, "Mistral [would] have 3 out of 5 votes on the Board" and "[would] hold the Majority of the Shares" (DiGennaro affirmation, exhibit C at 1). In a July 18, 2014 memorandum, Binn provided the B&P members with additional information regarding the Mistral Transaction, including that, "[s]ince the JPS Amount [was] being used to fund a B&P obligation [*i.e.* the JPS Settlement]," it would be "treated as a distribution from XSPA to the B&P members" and that "Mistral [would] control the Board" (DiGennaro affirmation, exhibit A to exhibit D, ¶¶ 4 [e], [f]).

Allegedly, relying on the advice of the Golieb Defendants, plaintiffs executed the Third Amended and Restated Limited Liability Company Operating Agreement of XpresSpa Holdings, LLC, dated July 28, 2014 (Third A&R Operating Agreement). However, according to plaintiffs,

"Golieb advised [them] to execute signature pages separate from the body of the JPS Settlement agreement. The final documentation of the Mistral Transaction was not provided to Plaintiffs, or the other minority shareholders, until 2015" (FAC ¶ 54).

The Third A&R Operating Agreement provides, in pertinent part, that the five-member board of directors shall consist of two non-Mistral directors (B&P Directors), initially the Binns, and three directors representing Mistral (Mistral Directors), initially Beth Bronner, Andrew R. Heyer and William P. Phoenix (*see* DiGennaro affirmation, exhibit F, § 3.02 [a] [i], [ii]). With respect to the recapitalization portion of the transaction, the Third A&R Operating Agreement provides, in pertinent part, that:

> "**Section 2.09 Recapitalization Transactions**. In connection with the amendment and restatement of the Second A&R Agreement, the following transactions have occurred, each of which are hereby consented to by the Members:
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> * * *
>
> "(d) *JPS Settlement*. . . . the Company [*i.e.*, XpresSpa Holdings] shall use the proceeds from the Common Unit Issuance to fund (i) the payments required pursuant to that certain Settlement Agreement and General Release (the '**JPS Settlement Agreement**'), dated as of July 24, 2014, related to the JPS Litigation (the '**JPS Settlement Payment**') . . .. For all purposes of this Agreement, the JPS Settlement Payment shall be considered an advance to the B&P Members of Distributions payable under Section 5.02. . . ."
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> * * *
>
> "**Section 5.02 Allocation of Distributions**. . . .
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> * * *
>
> "(a) Common and Profits Interest Participation: . . .
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> * * *
>
> "As provided in Section 2.09(d), the JPS Settlement Payment shall be treated as an advance of Distributions payable under this Section 5.02 to the B&P Members for all purposes of this Agreement."

(*id.*, §§ 2.09 [d], 5.02 [a]). The Third A&R Operating Agreement also contains a release, providing, in pertinent part, that:

> "as of the Effective Date [July 28, 2014], each B&P Member . . . irrevocably and unconditionally fully and forever waive, release and discharge B&P, the Company . . . and each of the respective

> past or present directors, officers, managers, employees, direct and indirect equityholders, agents, advisors, and representatives of any of the foregoing (in each case, in their capacities as such and individually) . . . from any and all . . . . claims, demands, proceedings, actions, causes of action, orders, obligations, judgments, fees, damages, contracts, agreements, debts, liabilities, and Losses of any kind whatsoever, whether known or unknown, suspected or unsuspected, both at law and in equity (collectively, 'Claims') . . . arising on or prior to the Effective Date or on account of or arising out of any matter, cause or event occurring on or prior to the Effective Date (including the transactions described in Section 2.09) that in any way relate to B&P, the Company, or any investment in B&P or the Company . . .."

(*id.*, § 2.10 [a]).

On or about January 8, 2015, DLA, which represented Mistral, circulated a Membership Interest Purchase Agreement (MIPA), intended to raise additional capital for XpresSpa Holdings. At the time, Marisol F, LLC held an anti-dilution right that protected it against an issuance of additional membership interests and "the Golieb Defendants had advised Marisol F, LLC not to invest additional funds in the company (*i.e.* not to take a greater equity position) . . .." (FAC ¶ 65). However, plaintiffs allege that the Golieb Defendants "did not advise Plaintiffs to refuse to participate in the January 2015 capital raise, which [Golieb] described as a loan to the company" *(id.)*. Allegedly relying on Golieb's representations that the transaction would be documented as debt rather than equity, Marisol F, LLC agreed to lend $262,500 and Binn agreed to lend $630,500 to XpresSpa Holdings. In return for their investment, plaintiffs received a "P-3 interest," which they allegedly understood to represent debt (*id.* ¶ 67).

Plaintiffs executed the MIPA, dated January 14, 2015. In pertinent part, the MIPA states that XpresSpa Holdings is offering a total of 5,000,000 Series A Preferred Units and that "[a]ll of the issued and outstanding equity interests in the Company, including the Purchased Units issued pursuant to this Agreement upon issuance and payment therefor, have been duly authorized and validly issued . . .." (DiGennaro affirmation, exhibit K, § 3.2 [b]). Contemporaneously with the MIPA, plaintiffs executed "Amendment No. 1" to the Third A&R Operating Agreement (Amendment No. 1), which defines "Series A Preferred Units" as "a Unit representing a fractional part of the ownership of the Company and having the rights and obligations specified with respect to Series A Preferred Units in this Agreement" (*id.*, exhibit L, § 1 [b]).

In January 2016, Marisol Binn resigned as a director of XpressSpa Holdings. Her B&P Director seat was ultimately filled by Ned Hentz (Hentz).

In February 2016, Bruce Bernstein, a board member of XpresSpa Holdings and the controlling principal of Rockmore Investment Master Fund Ltd., a major creditor of XpresSpa Holdings, was appointed to the board of Form Holdings Corp. (FH), a publicly traded corporation. In March 2016, plaintiffs first learned of a proposed merger between XpresSpa Holdings and FH. According to plaintiffs, the merger was presented as the only alternative to certain bankruptcy. In an email dated June 22, 2016, Binn described XpresSpa Holding's financial position as follows: "XpresSpa can't go on this way, in a weak financial position and they can't lose the Public Company's interest. IT IS THE END OF JUNE OR oblivion !!!" (*id.*, exhibit O at 2).

On August 3, 2016, XpresSpa Holdings held a members meeting. In an email to Golieb about that meeting, Binn stated that members received "a general up-date on Form Holding (FH)," that "[i]t appears that the deal is VERY ADVANCED" and that, "[a]ccording to Bill Phoenix, volumes and volumes of books and reports, with hundreds of pages, have already been prepared, most likely by FH" (Felicello affirmation, exhibit 3 at 2). According to plaintiffs, they "played no role in the negotiation of the merger and acquisition by FH" and "all the documents relating to the acquisition were prepared by DLA and counsel for FH" (FAC ¶ 75).

In an email to Golieb, among others, dated August 6, 2016, Binn stated, in pertinent part, that:

> "XpresSpa Holdings, LLC and Subsidiaries, un-audited Consolidated Statement Of Operations for the First 6 Months ending June 30th, 2016 shows a LOSS FROM OPERATIONS OF -$3,203,284. . . down 15.65%. YES . . . even though not the best solution, I think being acquired by FH is, at this point, the only decision we have. Must break away from Mistral's NEGATIVE chokehold"

(DiGennaro affirmation, exhibit P at 2). On the same day, Golieb emailed Binn with suggested language to be sent to Mistral, expressing Binn's consent to the merger under protest, based on Binn having been "frozen . . . out of any effective role in the management of the Company and the operation and direction of the Board" and having been "provid[ed] limited, curated information" regarding the proposed merger, on a "do or die" basis (DiGennaro affirmation, exhibit Q at 2). Binn responded that he wished to make the language stronger to reflect that Andrew Heyer had previously told him that "there was NO OTHER ALTERNATIVE" and to make clear that Binn

"had NOTHING to do with the day-to-day operations of XpresSpa, had no ability to make any decisions that would effect [sic] the Company one way or the other, [as he] was NOT an officer, was never entitled to see any information or figures until after the fact, etc." (*id.* at 1). Ultimately, Binn substantially adopted the language that Golieb had suggested and, in an email dated August 6, 2016, Binn consented to the merger "with grave reservations, under protest as to how this transaction has been handled and presented, and in all respects relying on [Andrew Heyer's] representations that the only choices at this point are this deal or the Company goes under" (*id.*, exhibit R, XpresSpa Holdings Board Minutes dated 8/7/16, exhibit A).

On August 7, 2016, DLA circulated draft merger documents, including the merger agreement (Merger Agreement), which Binn immediately forwarded to Golieb. Later that day, at a meeting of the board of directors for XpresSpa Holdings, the board unanimously approved the merger. According to the minutes, "Mr. Binn and Mr. Hentz voted in favor but noted that they did so with reservations that Mr. Binn had previously communicated in an e-mail to certain Directors and Members of the Company" (*id.*, exhibit R at 2).

As relevant to the instant action, the "Fourth Amended and Restated Limited Liability Company Operating Agreement of XpresSpa Holdings, LLC" (Fourth A & R Operating Agreement), dated April 22, 2015, provides that "the Board may not act with respect to Significant Matters [such as an agreement effecting a sale of the Company] without the affirmative consent of at least one of the B&P Directors and at least one of the Mistral Directors" (DiGennaro affirmation, exhibit J, § 3.03 [a]). In other pertinent part, the Fourth A&R Operating Agreement provides as follows:

> "**Section 13.13 Legal Representation.**
>
> "(a) The Mistral Vehicles have retained DLA Piper LLP (US) ("**DLA**") as counsel in connection with this Agreement and the consummation of the transactions contemplated hereby, and expect to retain (and may recommend that the Board cause the Company to retain) DLA in connection with the management and operations of the Company. Each Member acknowledges and agrees that (i) DLA is not representing and will not represent any Member (other than the Mistral Vehicles) in connection with any of the transactions described in the preceding sentence or any dispute which may arise between the Company or any Mistral Vehicle, on the one hand, and any other Member on the other hand, and (ii) such Member has or will, if it wishes legal counsel in connection with any of the matters or disputes described in the

> preceding clause (i), retain its own independent legal counsel. Notwithstanding the foregoing, each Member hereby agrees that DLA may represent the Company and/or any Mistral Vehicle in connection with any and all legal matters arising from and after the A&R Agreement Date . . . and hereby waives any present or future conflict of interest with DLA regarding any such matters."

(*id.*, §13.13 [a]).

Pursuant to the Merger Agreement, dated August 8, 2016, all "Unitholders," including the B&P members of XpresSpa Holdings, would receive, "common stock in FH, series D convertible preferred shares of FH, and five-year warrants to purchase common stock of FH" (FAC ¶ 80). However, a portion of the preferred stock would be held in escrow for a period of 18 months. During that period, FH would be able to make claims against the preferred stock held in escrow, including for attorney's fees. In addition, a Mistral entity, Mistral XH Representative, LLC (Mistral XH), would act on behalf of the Unitholders. Specifically, the Merger Agreement provides, in pertinent part, that:

> "8.1 Unitholders' Representative. By executing this Agreement, a Joinder Agreement or by accepting any consideration payable hereunder, each Company Unitholder shall have irrevocably authorized, appointed and empowered Mistral XH Representative, LLC (together with any subsequent or successor representative, the **"Unitholders' Representative"**) to be the exclusive proxy, representative, agent and attorney-in-fact of each of the Company Unitholders, with full power of substitution"

(Burke affirmation, exhibit C, § 8.1). In addition, the Merger Agreement contains the following provision with respect to Mistral XH:

> "8.3 No Liability.
>
> "(a) Each of the Parties acknowledges and agrees that the Unitholders' Representative is a party to this Agreement solely to perform certain administrative functions in connection with the consummation of the transactions contemplated hereby. . . .
>
> * * *
>
> "(c) . . . In connection with this Agreement and the ancillary documents, and in exercising or failing to exercise all or any of the powers conferred upon the Unitholders' Representative

> hereunder or thereunder, (i) the Unitholders' Representative (and its Affiliates) shall incur no responsibility whatsoever to any Company Unitholder by reason of any error in judgment or other act or omission performed or omitted hereunder . . . .

(*id.*, exhibit C, §§ 8.3 [a], [c]).

On or about August 8, 2016, "on the same date that FH would be making an initial investment in XpresSpa," Mistral made an investment of approximately $1.7 million into FH, thus enabling Mistral "to take additional control away from the unitholders of XpresSpa such as Plaintiffs" (FAC ¶ 84).

According to plaintiffs, Golieb continued to provide them with advice concerning the merger after Binn cast his vote in favor of the transaction. "Specifically, Golieb exchanged emails with Plaintiffs' accountant, Jay Shulman, and Plaintiffs relating to the proper tax treatment for the transaction at least on or about August 12, 2016; August 16, 2016; August 17, 2016; August 18, 2016; August 23, 2016; and August 24, 2016" (FAC ¶ 87).

In a September 24, 2016 email, Binn expressed concern over the volume and complexity of the documents provided to the B&P members in connection with the merger, stating that it was "[t]oo dangerous NOT to have a Legal [sic] and Accountant go over these 475 pages" and that he was considering Kramer Levin Naftalis & Frankel LLP (Kramer Levin) as "[a] fresh pair of eyes" (DiGennaro affirmation, exhibit T at 2). To this, Golieb replied that he was "[a]lways happy to provide any insight that might be helpful," but that "[he would] leave this to [Kramer Levin] to handle on [Binn's] behalf" (*id.* at 1).

On Friday, October 28, 2016, XpresSpa Holdings' in-house counsel circulated documents for the B&P members to execute in connection with the merger. On Monday, October 31, 2016, Golieb emailed the Binns, stating that he "ha[d] taken a (less than in depth) look at these documents," that they "[were] very significant and include[d] substantial indemnification obligations on the part of all XSPA Members," and advising that "[c]ounsel should be retained on behalf of all the members to review these in depth and to see how exposure of members might be minimized" (*id.*, exhibit U at 1).

In a November 1, 2016 email to B&P members, Binn wrote, in pertinent part, that Golieb had "suggested that the Shareholder's 'As A Group' retain outside council [sic] to read ALL the documents, and answer all [their] questions" (*id.*, exhibit V at 5). When one of the members

responded that it might be better and cheaper, to have Golieb review the documents, because of his familiarity with the transaction, Binn responded that Golieb "said 'this would be better handled by a Law Firm with more staff and more Diversified Internal Resources,'" but "[i]f needed, [Golieb] will assist" (*id.* at 3). In another email from Golieb to Binn, Golieb explained that he did not have the time to do this work and recommended Kramer Levin, stating that he would be "available to speak with them and guide them through the concerns and issues [he saw] so far" (*id.* at 1). He also stated that counsel should review the merger document, "not with a view to renegotiating the terms of the merger which are already locked in," but with a focus on "risks to the members and what, if anything, can be done to mitigate the risks" *(id.)*.

In an email to B&P members dated November 21, 2016, Binn wrote, in pertinent part, that:

> "A group of us have been working hard, especially over the past few weeks, to tighten up the Form Holdings / XpresSpa Holdings transaction, trying to make sure the interests of ALL the original BINN AND PARTNERS investors are protected as much as possible. We now have a deal that Marisol and I support. 'We signed on', and if not already, we recommend you ALL join in as well.
>
> * * *
>
> "To review the Transaction Documentation for the Minority Group, I hired the distinguished International Law Firm of Kramer Levin Naftalis & Frankel, 1177 Avenue of the Americas, in New York. The Minority Shareholders are being represented by Michael Mayerfeld, a Partner. I am pleased to add that the Law Firm's bill, for this initial representation, is being paid by . . . XpresSpa Holdings.
>
> "Please . . . on all the signature pages write . . . 'THESE SIGNATURE PAGES ARE BEING SENT SUBJECT TO THE AGREEMENTS BEING NEGOTIATED ON MY BEHALF BY KRAMER LEVIN NAFTALIS & FRANKEL'"

(Burke affirmation, exhibit E at 2).

Plaintiffs executed the Joinder Agreement, dated October 28, 2016, thereby "becom[ing] a party to the Merger Agreement as a Company Unitholder . . . [and] agree[ing] . . . [to] abide by all of the terms and conditions of the Merger Agreement, the Escrow Agreement, and related documents . . . (collectively, the 'Transaction Documents')" (DiGennaro affirmation, exhibit W, § 1). In executing the Joinder Agreement, each "Joinder Party. . . agree[d] to withdraw all written objections to the Merger and/or demands for appraisal, valuation or similar procedures, if any,

with respect to the Company Units owned by the Joinder Party" (*id.* § 2 [b]). In other pertinent part, the Joinder Agreement states that:

> "The provisions of Section 13.13(a) (Legal Representation) of the [Fourth A&R Operating Agreement] apply *mutatis mutandis* with respect to this Joinder and the other Transaction Documents. The Joinder Party acknowledges that DLA Piper LLP (US) is not representing and will not represent any Member (as defined in the [Fourth A&R Operating Agreement]) other than the Mistral Vehicles (as defined in the [Fourth A&R Operating Agreement]) in connection with this Joinder and the other Transaction Documents or any dispute that may arise between the Company or any Mistral Vehicle, on the one hand, and any other Member on the other hand. The Joinder Party has obtained the advice of their own legal counsel with respect to this Joinder, the other Transaction Documents, and the transactions contemplated hereby and thereby"

(*id.*, § 13). In executing the Joinder agreement, plaintiffs added the following handwritten statement beneath their signatures: "These signature pages are being sent subject to the agreements being negotiated on my behalf by Kramer Levin Naftalis & Frankel LLP" (*id.* at 12, 14).

According to plaintiffs, because the managing members of XpresSpa Holdings (*i.e.* Mistral) would only agree to reimburse the B&P members $25,000 for legal fees, "Plaintiffs and the other minority [B&P] members were not able to find counsel to thoroughly represent their interest. Instead, they were able to retain counsel only willing to agree to a narrow scope of services effectively limited to reviewing the documents as they existed at that time" (FAC ¶ 91).

After commencing the instant action, plaintiffs also commenced an action in the United States District Court for the Southern District of New York, alleging that XpresSpa Holdings' board members and FH executives conspired to mislead them to ensure they would vote in favor of the FH merger.

II. Analysis

"[O]n a motion to dismiss the complaint for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). "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, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [internal citation omitted]). Where the defendant seeks to dismiss the complaint based

upon documentary evidence, "the documentary evidence [must] utterly refute[] 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] [internal citation omitted]). "[T]o constitute documentary evidence, the papers must be 'essentially undeniable' and support the motion on its own. . . . In our electronic age, emails can qualify as documentary evidence if they meet the 'essentially undeniable' test" (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 432, 433 [1st Dept 2014] [internal citations omitted]).

A. The Golieb Defendants' Motion to Dismiss (Motion Sequence Number 004)

The Golieb Defendants contend that plaintiffs' first legal malpractice claim, based on the 2014 Mistral Transaction, is refuted by documentary evidence. In addition, the Golieb Defendants contend that the claim is barred by the release contained in the Third A&R Operating Agreement and the statute of limitations. With respect to the second malpractice claim, based on the MIPA, the Golieb Defendants again point to documentary evidence establishing that plaintiffs understood the nature of the transaction. As to the third malpractice claim, based on the FH merger, the Golieb defendants contend that the claim must be dismissed because of plaintiffs' inability to demonstrate proximate causation. They also contend that, by executing the Joinder Agreement, plaintiffs ratified the transaction. Lastly, the Golieb Defendants contend that the breach of fiduciary duty claim must be dismissed as duplicative.

Plaintiffs counter that the Golieb Defendants merely raise issues of fact about what plaintiffs knew. In addition, plaintiffs argue that any release is unenforceable, because the Golieb Defendants procured the release while under an irreconcilable conflict of interest and in violation of rule 1.8 (h) of the Rules of Professional Conduct. Plaintiffs also contend that the statute of limitations does not bar the first malpractice claim, because the Mistral Transaction was not finalized until 2015 and, in any event, the statute of limitations was tolled under the continuous representation doctrine. Lastly, plaintiffs argue that their breach of fiduciary duty is distinct from their malpractice claims.

A plaintiff alleging legal malpractice must allege "that counsel failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession and that 'but for' the attorney's negligence the plaintiff would have prevailed in the matter or would have avoided damages" (*Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 10 [1st Dept 2008] [internal quotation marks and citations omitted]). While "[p]laintiff

is not obliged to show, at this stage of the pleadings, that [he] actually sustained damages," he must plead "allegations from which damages attributable to [defendant's conduct] might be reasonably inferred" (*InKine Pharm. Co. v Coleman*, 305 AD2d 151, 152 [1st Dept 2003] [internal quotation marks and citation omitted]). "Moreover, [plaintiff] must plead specific factual allegations establishing that but for counsel's deficient representation, there would have been a more favorable outcome to the underlying matter" (*Dweck Law Firm v Mann*, 283 AD2d 292, 293 [1st Dept 2001]). "Even if counsel improperly advises the client, the advice is not the proximate cause of the harm if the client cannot demonstrate its own likelihood of success absent such advice" (*Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002]).

The statute of limitations for a legal malpractice claim is three years (CPLR 214 [6]). "An action to recover damages for legal malpractice accrues when the malpractice is committed. . . . not when the client discover[s] it" (*Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001] [internal quotation marks and citation omitted]). The continuous representation doctrine will toll the limitations period on a malpractice claim, but "only where the continuing representation pertains specifically to the matter in which the attorney committed the alleged malpractice" (*id.* at 168; *see also McCoy v Feinman*, 99 NY2d 295, 306 [2002] ["[t]he continuous representation doctrine tolls the statute of limitations only where there is a mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim"]).

To establish a breach of fiduciary duty claim, a plaintiff must allege: (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). Where the breach of fiduciary duty claim "ar[ises] from the same facts as the legal malpractice claim and allege[s] similar damages," it will be dismissed as duplicative (*InKine Pharm. Co.*, 305 AD2d at 152).

i. Legal Malpractice against the Golieb Defendants in Connection with Mistral Transaction (First Cause of Action)

The first cause of action for malpractice must be dismissed. First, the documentary evidence refutes plaintiffs' allegations that the Golieb Defendants advised them to enter the Mistral Transaction without informing them that: (1) "[plaintiffs] would be giving up their majority ownership interest and majority board membership" (FAC ¶ 48); (2) the $2.2 million would be "defined by XpresSpa as funding an obligation of [B&P] and [would be] treated as a distribution from XpresSpa to the members of [B&P]" (*id.* ¶ 49); and (3) plaintiffs could avoid the Mistral

Transaction by using their independent wealth to fund the JPS Settlement and, thereby, retain control of the XpresSpa business (*see id.*, ¶¶ 50, 52, 103-115). As plaintiffs' emails leading up to the Mistral Transaction demonstrate, plaintiffs were fully informed of these facts. In an email dated June 9, 2014, Binn declared that he and his wife would not be "the Deep Pockets to this relationship" and explained that once B&P was consolidated into XpresSpa Holdings, "Mistral [would] have 3 out of 5 votes on the Board" and "[would] hold the Majority of the Shares" (DiGennaro affirmation, exhibit C at 1). In a July 18, 2014 memorandum, Binn provided members with additional information regarding the Mistral Transaction, including that, "[s]ince the JPS Amount [was] being used to fund a B&P obligation [*i.e.* the JPS Settlement]," it would be "treated as a distribution from XSPA to the B&P members" and that "Mistral [would] control the Board" (DiGennaro affirmation, exhibit A to exhibit D, ¶¶ 4 [e], [f]). These emails do more than raise questions of fact about what plaintiffs knew. They utterly refute the factual allegations forming plaintiffs' first cause of action.

What is more, plaintiffs executed the Third A&R Operating Agreement, memorializing the terms of the Mistral Transaction. The Third A&R Operating Agreement expressly states that Mistral shall hold three of the five board of director seats (DiGennaro affirmation, exhibit F, § 3.02 [a] [i], [ii]) and that "the JPS Settlement Payment shall be considered an advance to the B&P Members of Distributions" (*id.*, § 2.09 [d]). Even assuming, as the court must, that "Golieb advised Plaintiffs to execute signature pages separate from the body of the JPS Settlement agreement" and that "[t]he final documentation of the Mistral Transaction was not provided to Plaintiffs . . . . until 2015" (FAC ¶ 54), "[p]laintiff[s] will not be heard to claim that [they] received only a signature page for the . . . agreement, since [they were] bound to know and read what [they] signed." *Friedman v Fife*, 262 AD2d 167, 168 [1st Dept 1999]; *see also Beattie v Brown & Wood*, 243 AD2d 395, 395 [1st Dept 1997] [dismissing complaint alleging that defendant law firm failed to advise the plaintiff of the terms of the underlying settlement agreement, because no fraud was alleged; the plaintiff was competent; and the plaintiff "[was] responsible for his signature and [was] bound to read and know what he signed"]). Therefore, the terms of the Third A&R Operating Agreement contradict plaintiffs' alleged ignorance of the terms of the Mistral Transaction (*see Freeman v Brecher*, 155 AD3d 453, 453 [1st Dept 2017] [dismissing legal malpractice claim arising out of an underlying settlement, where the "[p]laintiff's equivocal denial

of knowledge of the terms of the settlement [was] flatly contradicted by the clear terms of the settlement agreement"]).

Plaintiffs improperly rely on *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner* (96 NY2d 300 [2001], *overruled on other grounds Oakes v Patel*, 20 NY3d 633 [2013]) for the proposition that the "binding nature of [an] agreement between plaintiffs and a third party is not a complete defense to the professional malpractice of the law firm that generated the agreement to its client's detriment" (*id.* at 305). As the First Department explained, "the holding in *Arnav* is limited to the unique facts of that case, which the Court of Appeals ultimately found excepted it from the general rule that 'a party who signs a document is conclusively bound by its terms absent a valid excuse for having failed to read it'" (*Bishop v Maurer*, 33 AD3d 497, 500 [1st Dept 2006], *affd* 9 NY3d 910 [2007], quoting *Arnav Indus., Inc. Retirement Trust*, 96 NY2d at 304). In *Arnav,* the court held that "plaintiffs were entitled to rely on the [their attorneys'] representation that the revision, other than one minor correction, was identical to a document plaintiff had [previously] reviewed, agreed to and executed" (*Bishop*, 33 AD3d at 500). Here, unlike in *Arnav*, plaintiffs claim complete ignorance of the terms of an agreement they signed. "[G]iven the clarity of the [Third A&R Operating Agreement], plaintiff[s] [are] responsible for [their] signature and [are] bound to read and know what [they] signed" (*Bishop*, 33 AD3d at 499 [dismissing malpractice claim based on allegation that attorney failed to inform plaintiff of provisions of executed documents]).

Second, the broad release of the Third A&R Operating Agreement—releasing claims against B&P's "agents, advisors, and representatives . . . arising out of any matter, cause or event occurring on or prior to the Effective Date [July 28, 2014] (including the transactions described in Section 2.09 [*i.e.* the recapitalization portion of the Mistral Transaction]) that in any way relate to B&P, the Company, or any investment in B&P or the Company" (DiGennaro affirmation, exhibit F, § 2.10 [a])—bars the first cause of action. The alleged negligence occurred before the execution of the Third A&R Operating Agreement and plainly relates to B&P and XpresSpa Holdings (*i.e.* the Company). The alleged malpractice is, therefore, within the purview of the release. In addition, because the release applies to agents of B&P, it applies to the Golieb Defendants, who represented B&P in the transaction. The Golieb Defendants, therefore, demonstrate their entitlement to dismissal of the first cause of action based on the release (*see Berkowitz v Fischbein, Badillo, Wagner & Harding*, 7 AD3d 385, 387 [1st Dept 2004] [finding legal malpractice claim

barred by broad release, executed as part of a buyout transaction, where release discharged the "[counterparty] and his 'agents' from liability in any action brought by [the plaintiff] 'by reason of any matter, cause [or] thing whatsoever from the beginning of the world to the day of this release arising out of matters related to [the transaction]'"]); *see also Blum v Perlstein*, 47 AD3d 741, 742 [2d Dept 2008] [dismissing malpractice claim, where attorneys demonstrated that the alleged misconduct "predated a general release that the plaintiff executed . . . , came within the ambit of that release. . . . [and] that the release applied to them, as they represented the releasee, and the plaintiff discharged the releasee and its 'agents' from liability"]).

Plaintiffs correctly point out that the Rules of Professional Conduct prohibit an attorney from "mak[ing] an agreement prospectively limiting the lawyer's liability to a client for malpractice" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 1.8 [h] [1]) and that a release obtained in violation of that rule may not "shield a lawyer from liability before the facts and circumstances surrounding the execution of the document are fully examined" (*Swift v Ki Young Choe*, 242 AD2d 188, 192 [1st Dept 1998]). However, the release at issue is not prospective, as it is limited to matters "arising out of any matter, cause or event *occurring on or prior to* the Effective Date" (DiGennaro affirmation, exhibit F, § 2.10 [a] [emphasis added]). It is, therefore, not in violation of rule 1.8 (h) (1). To the extent plaintiffs contend that, in simultaneously representing B&P and plaintiffs in the Mistral Transaction, the Golieb Defendants were conflicted and, therefore, may not benefit from the release, plaintiffs do not cite any legal authority nor has the court found any. Therefore, the first cause of action is also dismissed as barred by the release of the Third A&R Operating Agreement.

In any event, the first cause of action is barred by the statute of limitations. Here, the malpractice claim is based on the Golieb Defendant's alleged failure to properly advise plaintiffs on the substance of the Mistral Transaction before they executed the Third A&R Operating Agreement in July 2014. Accordingly, the statute of limitations began to run at that time, "when the malpractice [was] committed" (*Shumsky*, 96 NY2d at 166). The instant action was not commenced until September 2017, more than three years after the complained of conduct occurred. As such, the claim is time-barred (*see* CPLR 214 [6]).

While plaintiffs allege that the Golieb Defendants did not provide them with all of the documentation for the Mistral Transaction until 2015, this does not change the outcome. Plaintiffs do not allege that they continued to rely on the Golieb Defendants to negotiate, advise or draft

documents in connection with the Mistral Transaction after the execution of the Third A&R Operating Agreement. Instead, the complained of malpractice relates solely to defendants' alleged failure to properly advise plaintiffs regarding the Mistral Transaction *prior* to its closing in July 2014. As such, there was no "mutual understanding of the need for further representation on the specific subject matter underlying the malpractice claim" that would toll the statute of limitations (*McCoy*, 99 NY2d at 306; *see also Nahoum v Weiss*, 17 Misc 3d 1118[A], 2007 NY Slip Op 52058[U], *5 [Sup Ct, NY County 2007] [holding that the "[d]efendants[s] subsequent mailing of the [documents] . . . was a ministerial act that was no more than a continuity of a general professional relationship between the parties, which did not constitute continued legal representation"]). Plaintiffs' contention, that the Golieb Defendants continued to provide plaintiffs with legal advice concerning the XpresSpa business until 2016, is also insufficient to toll the statute of limitations under the continuous representation doctrine, as this demonstrates "only the continuation of a general professional relationship, and not an ongoing representation concerning the specific matters from which their claims arose" (*Lai v Gartlan*, 28 AD3d 263, 263-264 [1st Dept 2006]).

For the foregoing reasons, the first cause of action is dismissed.

ii. Legal Malpractice against the Golieb Defendants in Connection with the 2015 MIPA (Second Cause of Action)

The allegations of the second claim for legal malpractice are likewise contradicted by documentary evidence. Plaintiffs allege that the Golieb Defendants "fail[ed] to advise Plaintiffs that the P-3 transaction was not debt but was an investment for equity" (FAC ¶ 118). However, the MIPA, which plaintiffs executed, expressly states that the "Series A Preferred Units" being issued pursuant to the MIPA are "*equity interests* in the Company" (DiGennaro affirmation, exhibit K, § 3.2 [b] [emphasis added]). Moreover, Amendment No. 1, which plaintiffs executed contemporaneously with the MIPA, defines "Series A Preferred Units" as "a Unit representing *a fractional part of the ownership of the Company*" (*id.*, exhibit L, § 1 [b] [emphasis added]). Plaintiffs were "bound to read and know what [they] signed" and, therefore, the second cause of action for legal malpractice is dismissed (*Bishop*, 33 AD3d at 499; *see also Freeman*, 155 AD3d at 453).

iii. Legal Malpractice against the Golieb Defendants in Connection with FH's Acquisition of XpresSpa Holdings (Third Cause of Action)

The third cause of action must be dismissed, because plaintiffs cannot demonstrate that "but for counsel's deficient representation, there would have been a more favorable outcome" (*Dweck Law Firm, LLP*, 283 AD2d at 293).

The third cause of action alleges that the Golieb Defendants (a) advised plaintiffs to vote in favor of the acquisition without performing due diligence or insisting on additional protections of plaintiffs' interests; (b) failed to advise plaintiffs to seek additional counsel "until too late in the process, *i.e.* after the Board of Directors had already voted on the transaction and Plaintiffs had voted in favor of the transaction upon the advice of the Golieb Defendants" (FAC ¶ 125); (c) failed to advise plaintiffs that the limited scope of review undertaken by Kramer Levin was inadequate to protect the plaintiffs' interests; (d) "fail[ed] to advise Plaintiffs that the proposed structure of the transaction and valuation of XpresSpa were unfair to Plaintiffs and sought to benefit Mistral and Rockmore Investment Master Fund Ltd. and their respective principals at the expense of, and to, Plaintiffs' detriment" (*id.* ¶ 127); (e) and "fail[ed] to advise Plaintiffs that they should seek to force Mistral to invest the approximately $1.7 million in XpresSpa directly instead of using those funds to fund Form Holdings' acquisition of the company, by withholding their consent to the merger" (*id.* ¶ 128). Plaintiffs allege that, in reliance on the Golieb Defendants' advice, plaintiffs voted in favor of the acquisition, "which led directly to the devaluation and dilution of their investment" (*id.* ¶ 130).

As concerns plaintiffs' allegations of negligent representation with respect to the initial negotiations of the merger—claiming that the Golieb Defendants essentially rubber stamped the transaction put together by Mistral and FH, failed to conduct due diligence or to negotiate better terms and handed off a locked-in deal to Kramer Levin—they are contradicted by plaintiffs' own statement that plaintiffs "played no role in the negotiation of the merger and acquisition by FH" and "documents relating to the acquisition were prepared by DLA and counsel for FH" (FAC ¶ 75). Indeed, at the time of the merger, Binn repeatedly complained that he was excluded from the process and provided only limited information (*see* DiGennaro affirmation, exhibit Q at 1 [Binn stating that he "had no ability to make any decisions that would effect [sic] the Company one way or the other" and "was never entitled to see any information or figures until after the fact"]; *see also id.*, exhibit A to exhibit R [Binn stating that he was voting in favor of the merger, but with

reservations, because he had been "frozen [ ] out of any effective role in the management of [the Company] and the operation and direction of the Board" and was "provid[ed] only limited, selected information" regarding the proposed merger, on a "do or die" basis]). Plaintiffs do not allege any facts demonstrating that the Golieb Defendants had any more access to information than plaintiffs. Nor do plaintiffs "plead specific factual allegations establishing that but for counsel's deficient representation, there would have been a more favorable outcome . . .." (*Dweck Law Firm, LLP*, 283 AD2d at 293). While plaintiffs claim that they would not have entered into the transaction had they been apprised of all the facts, they do not allege that they had alternate options or any leverage to negotiate a better outcome. Therefore, the claim fails to allege "causally related damages" (*see Learning Annex, L.P. v Blank Rome LLP*, 106 AD3d 663, 663-664 [1st Dept 2013] [affirming dismissal of legal malpractice cause of action, because the claim, arising out a business transaction in which the defendant law firm represented the plaintiff, was based on "speculation as to what plaintiff would have done, had it been aware of [allegedly withheld information], and the possibility that another party may pursue a claim against plaintiff in the future . . ."]).

In any event, pursuant to the terms of the Fourth A&R Operating Agreement, the vote of one B&P Director sufficed to go forward with the merger (DiGennaro affirmation, exhibit J, § 3.03 [a]) and XpresSpa Holdings' board of directors voted unanimously in favor of the merger, with both B&P Directors, Binn and Hentz, voting in favor (*id.*, exhibit R at 2). Therefore, documentary evidence establishes that the transaction would have been approved, irrespective of Binn's vote. In opposition, plaintiffs contend that Hentz's vote, in favor but with reservations, suggests that Hentz was following Binn's lead and that he might have voted differently had Binn done so. However, plaintiffs' speculations aside, the FAC is devoid of "specific factual allegations establishing that but for" the Golieb Defendants' advice, the vote in favor of the merger would have failed (*Dweck Law Firm*, 283 AD2d at 293). Therefore, to the extent that the third claim for malpractice is premised on the Golieb Defendants' alleged failure to adequately advice plaintiffs prior to the board's vote, the claim is dismissed.

To the extent that the third malpractice claim arises out of the Joinder Agreement, the claim is dismissed because plaintiffs were represented by Kramer Levin. As such, the Golieb Defendants could not be the proximate cause of plaintiffs' alleged damages. While plaintiffs allege that Kramer Levin's representation was limited and that the Golieb Defendants continued to represent

plaintiffs in their individual capacities, these allegations are contradicted by plaintiffs' emails with Golieb and B&P members as well as the Joinder Agreement itself.

Early in the process, while Mistral was circulating preliminary drafts of the joinder documents, Binn expressed a desire to hire Kramer Levin to review the documents and Golieb replied that he would "leave this to . . . [Kramer Levin] to handle on your behalf" (DiGennaro affirmation, exhibit T at 1, 2). Shortly after Mistral presented plaintiffs with the final documents, Golieb advised plaintiffs to retain counsel on behalf of all B&P members, because he did not have the time to do the work (*see id.*, exhibit U). Binn did so, stating in an email to B&P members that, "[t]o review the Transaction Documentation for the Minority Group, [he] hired the distinguished International Law Firm of Kramer Levin Naftalis & Frankel" (DiGennaro reply affirmation., exhibit X at 2; Burke affirmation, exhibit E at 2). What is more, plaintiffs expressly acknowledged that Kramer Levin represented them with respect to the Joinder Agreement when, in executing the Joinder Agreement, they added that "[t]hese signature pages are being sent subject to the agreements being negotiated on my behalf by Kramer Levin Naftalis & Frankel LLP" (DiGennaro affirmation, exhibit W at 12, 14). Plaintiffs cannot now claim that the Golieb Defendants abandoned them without enough time to find adequate representation or that they continued to rely on their advice. Documentary evidence utterly refutes such claims. Having chosen another law firm to represent them in the transaction, plaintiffs cannot now sue the Golieb Defendants for malpractice. "[A] legal malpractice claim cannot be sustained where '[i]t is clear that the proximate cause of any damages sustained by plaintiff was not the alleged malpractice of defendants, but rather the intervening and superseding failure of plaintiff's successor attorney[]'" (*Boye v Rubin & Bailin, LLP*, 152 AD3d 1, 9-10 [1st Dept 2017] [internal citation omitted]).

For the foregoing reasons, the third cause of action is dismissed.

iv. Breach of Fiduciary Duty Against the Golieb Defendants (Fourth Cause of Action)

The breach of fiduciary duty claim merely restates the allegations underlying plaintiffs' malpractice claims against the Golieb Defendants. That the breach of fiduciary duty claim includes allegations of conflicts of interest (*see* FAC ¶ 137) and seeks forfeiture of legal fees, is insufficient to demonstrate that the claim is distinct from the malpractice claims (*see Alphas v Smith*, 147 AD3d 557, 559 ([1st Dept 2017] [finding breach of fiduciary duty claim was duplicative of legal malpractice claim "even though the fiduciary duty claim was based on the defendants' conflict of

interest" and "allege[d] *similar* damages"] [internal quotation marks and citations omitted]). As such, the fourth cause of action is dismissed as duplicative (*InKine Pharm. Co.*, 305 AD2d at 152).

For the foregoing reason, the Golieb Defendants' motion to dismiss the FAC as against them is granted.

B. The DLA Defendants' Motion to Dismiss (Motion Sequence Number 003)

The DLA Defendants contend that the malpractice claim against them must be dismissed, because documentary evidence demonstrates that they were never in an attorney-client relationship with plaintiffs and plaintiffs fail to allege any relationship of privity or near privity. They also contend that the breach of fiduciary duty and aiding and abetting breach of fiduciary duty against them must be dismissed as duplicative of the malpractice claim. In addition, the DLA Defendants argue that, because the general waiver of liability against Mistral XH contained in the Merger Agreement bars breach of fiduciary duty claims against Mistral XH, plaintiffs cannot state an aiding and abetting claim against the DLA Defendants.

Plaintiffs respond that as attorneys for plaintiffs' agent, Mistral XH, the DLA Defendants were in privity or, at the very least, in a relationship of near privity with plaintiffs. Plaintiffs also argue that, because the DLA Defendants undertook this representation of plaintiffs, despite having previously stated in the Joinder Agreement that they would not, this demonstrates deceit, which renders the breach of fiduciary duty claim distinct from the malpractice claim. Lastly, they dispute that the Merger Agreement's waiver bars a breach of fiduciary duty claim against Mistral XH and contend that, in any event, any waiver of liability against Mistral XH does not extend to the DLA Defendants.

Generally, "'New York courts impose a strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of his client'" (*Federal Ins. Co. v North Am. Specialty Ins. Co.*, 47 AD3d 52, 59 [1st Dept 2007]), quoting *Lavanant v General Acc. Ins. Co. of Am.*, 164 AD2d 73, 81 (1990), *affd* 79 NY2d 623 (1992). However, courts will permit a malpractice claim, in the absence of privity, where the "relationship sufficiently approach[es] privity" (*Estate of Schneider v Finmann*, 15 NY3d 306, 309 [2010]), or where a third party suffers harm as a result of "professional negligence in the presence of fraud, collusion, malicious acts or other special circumstances" (*Good Old Days Tavern v Zwirn*, 259 AD2d 300, 300 [1st Dept 1999]).

To state a claim for aiding and abetting a breach of fiduciary duty, plaintiff must demonstrate "a breach of fiduciary duty, that the defendant knowingly induced or participated in the breach, and damages resulting therefrom" (*Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 464 [1st Dept 2007]). "A person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator." *Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003] [citation omitted]).

Here, plaintiffs allege that following the merger, on August 8, 2016, the DLA Defendants undertook to represent plaintiffs, because DLA was Mistral XH's agent, which, in turn, was plaintiffs' agent. Plaintiffs allege that the DLA Defendants breached their duty of care to plaintiffs by:

> "*inter alia* advising the Mistral XH to agree to amendments to the Merger Agreement that substantially increased the amount of merger consideration to be held in escrow[;] . . . failing to conduct adequate due diligence of (i) FH's true financial condition in and around the time of the merger, and (ii) FH's recently appointed directors, Bruce T. Bernstein, Richard K. Abbe, and Salvatore Giardina, who were not independent or disinterest members of the Board of Directors but instead acted as a control group using FH to serve their own selfish interest[;]. . . . failing to adequately advise Mistral XH as to how to minimize the charges assessed against the merger consideration held in escrow and otherwise failing to represent the best interests of Plaintiffs in the operation of FH following the merger"

(FAC ¶ 150). Plaintiffs also allege that the DLA Defendants suffered from conflicts of interest because they simultaneously represented Mistral and XpresSpa Holdings and because a DLA partner had invested in Mistral. However, none of these allegations can overcome the documentary evidence, establishing that the DLA Defendants were never in an attorney-client relationship with plaintiffs.

Plaintiffs' allegations that they relied on DLA's representation are contradicted by the Joinder Agreement, in which plaintiffs expressly acknowledged that they were not and would not be represented by DLA (Burke affirmation, exhibit D § 13). Moreover, plaintiffs were represented by their own legal counsel in the transaction, namely Kramer Levin (*see id.* at 11, 13 [in executing the Joinder Agreement plaintiffs added that "[t]hese signature pages are being sent subject to the agreements being negotiated on my behalf by Kramer Levin Naftalis & Frankel LLP"]; *see also id.*, exhibit E at 2 [Binn stating that, "[t]o review the Transaction Documentation for the Minority

Group, [he had] hired the distinguished International Law Firm of Kramer Levin Naftalis & Frankel"]).

Plaintiffs attempt to claim a relationship of privity through Mistral XH. In doing so, not only do they overlook the express language of the Joinder Agreement, they ignore the well-settled principle "that a corporation's attorney represents the corporate entity, not its shareholders or employees" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009]). To the extent that plaintiffs rely on *Schneider v Freres & Co.* (159 AD2d 291 [1st Dept 1990]), their reliance is misplaced. In *Schneider*, shareholders were permitted to sue bankers hired by the corporation's special committee, because the special committee was formed "to advise the shareholders with respect to a [buyout of the corporation] . . . whose end and aim was to obtain for the shareholders the highest possible price for their stock" (159 AD2d at 297). Under those circumstances, the court found that "the relationship between the shareholders and the special committee was essentially that of principal and agent on which principles of corporate law should not be superimposed" (*id.*). The court, therefore, concluded that the bankers, as agents of the shareholders' agent, were in a relationship of privity with the shareholders and could be sued (*id.* at 296 ["a principal is in privity with his agent's agent, or with anyone else his agent deals with on his behalf"]). Here, Mistral XH is empowered to act on the behalf of the minority members as their "proxy, representative, agent and attorney-in-fact" (Burke affirmation, exhibit C, § 8.1). However, unlike the special committee in *Schneider*, Mistral XH does not exist to safeguard the shareholders' interests. Instead, under the Merger Agreement, Mistral XH exists "solely to perform certain administrative functions in connection with the consummation of the transactions contemplated hereby" (*id.*, exhibit C, § 8.3 [a]). As such, the holding of *Schneider*, which is limited to a very specific set of facts, is inapplicable in the instance case (*Cf. Meyer v Goldman Sachs & Co.*, 234 AD2d 129, 130 [1st Dept 1996] [finding that the plaintiffs "failed to allege sufficient facts with respect to the existence of a principal and agent relationship," where the "directors, who, plaintiffs alleged, were their representatives, were not members of a special committee set up specifically to advise and protect their interests in a buyout auction in which management was a participant and the end and aim of which was to obtain for them the highest possible price for their stock"]). For the foregoing reasons, the DLA Defendants' motion to dismiss the fifth cause of action is granted.

Plaintiffs' sixth cause of action, for breach of fiduciary duty against the DLA Defendants, is virtually identical to their failed malpractice claim. Plaintiffs' contention that the claim is based on allegations of deceit is without merit. First, the FAC is devoid of such allegations. Second, plaintiffs' contention that DLA represented, in the Joinder Agreement, that it would not represent plaintiffs distorts section 13 of that agreement. Section 13 is an *acknowledgement* by the parties to the Joinder Agreement that DLA would represent Mistral only (*see* Burke affirmation, exhibit D, § 13). It is not a promise by DLA, who was not a party to the agreement. Therefore, the sixth cause of action is dismissed as duplicative of the malpractice claim (*see Waggoner v Caruso*, 68 AD3d 1, 6 [1st Dept 2009], *affd* 14 NY3d 874 [2010] [affirming dismissal of breach of fiduciary duty claim, as redundant of legal malpractice claims, which failed for lack of attorney-client relationship]; *see also Boye*, 152 AD3d at 9-10).

Notably, the court declines to address whether the waiver in the Merger Agreement (*i.e.*, the "No Liability" provision found in section 8.3 [c]) bars a breach of fiduciary duty claim against Mistral XH and, accordingly, an aiding and abetting claim against the DLA Defendants, because, while the parties dispute whether the language is sufficient to bar the claim, neither side offers any supporting authority for its position.

Nonetheless, the seventh cause of action for aiding and abetting breach of fiduciary duty must be dismissed for failure to state a claim. Plaintiffs allege that Mistral XH breached its fiduciary duties to plaintiffs, by "permitting the merger agreement to be amended to increase the amount of merger consideration due Plaintiffs to be held in escrow, permitting excessive charges to be assessed against Plaintiffs' equity held in escrow," and that the DLA Defendants represented Mistral XH in connection with this amendment (FAC ¶ 170). However, the provision of "routine legal services" is insufficient to demonstrate substantial assistance (*Learning Annex, L.P.*, 106 AD3d at 663; *see also Mendoza v Akerman Senterfitt LLP*, 128 AD3d 480, 483 [1st Dept 2015] [finding that "[t]he claim of aiding and abetting . . . breach of its fiduciary duty to plaintiff fail[ed] because defendants' actions [e.g. conducting an investigation and drafting amendments to a partnership agreement] were completely within the scope of [their] duties as . . . attorney[s]"] [internal quotation marks and citation omitted]). Therefore, the seventh cause of action is dismissed.

For the foregoing reasons, the DLA Defendants' motion to dismiss the FAC as against them is granted.

Accordingly, it is hereby

ORDERED that the motion by defendants DLA Piper LLP (US) and Sidney Burke to dismiss the first amended complaint (motion sequence number 003) is granted and the first amended complaint is dismissed in its entirety as against said defendants with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the motion by defendants John Golieb and Muchnick, Golieb & Golieb, P.C.'s to dismiss the first amended complaint (motion sequence number 004) is granted and the first amended complaint is dismissed in its entirety as against said defendants with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: March 5, 2019

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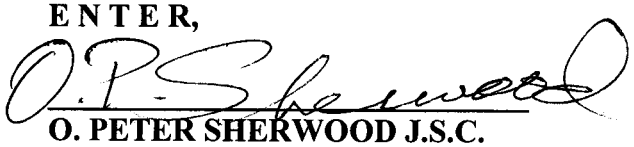

O. PETER SHERWOOD J.S.C.