Tirschwell v TCW Group Inc.
2020 NY Slip Op 31816(U)
June 11, 2020
Supreme Court, New York County
Docket Number: 150777/2018
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29
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SARA TIRSCHWELL,

Plaintiff, Index No.: 150777/2018

-against-

TCW GROUP INC., TCW LLC, DAVID LIPPMAN and JESS RAVICH,

Defendants.

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ROBERT D. KALISH, J.:

This action arises out of plaintiff Sara Tirschwell's claims that her former employer, TCW Group Inc. (TCW), as well as defendants David Lippman (Lippman) and Jess Ravich (Ravich), discriminated against her on the basis of gender and also retaliated against her, in violation of the New York City Human Rights Law (NYCHRL). Plaintiff also asserts causes of actions against TCW grounded in breach of contract and breach of the covenant of good faith and fair dealing.

In motion sequence 006, TCW, TCW LLC and Lippman (collectively, TCW defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's first, third, fourth and fifth causes of action and dismissing plaintiff's second cause of action if Ravich's motion for summary judgment is granted. TCW defendants further request an order, striking plaintiff's demand for actual and consequential damages in its entirety, or, alternatively, striking plaintiff's demand for actual or consequential damages after February 28, 2018. They further seek to strike plaintiff's demand for punitive damages as against them.

In motion sequence 008, defendant Ravich moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's first and second causes of action as against him. Ravich is also seeking to strike plaintiff's demand for punitive damages as against him.

In motion sequence 009, TCW defendants move to strike 1) Plaintiff's memorandum of law in opposition to the TCW defendants' motion for summary judgment (NYSCEF Doc. Nos. 399 and 439), 2) the affirmation of Steven Storch and all exhibits thereto (NYSCEF Doc. Nos. 441-531), 3) the affidavits of Barry Kupferberg (Kupferberg) (NYSCEF Doc. Nos. 405 and 517) and the exhibits attached thereto (NYSCEF Doc. Nos. 518-531) and Chitra Raghavan (Raghavan) (NYSCEF Doc. Nos. 403 and 625) and the exhibit attached thereto (NYSCEF Doc. No. 626); and 4) Plaintiff's memorandum of law in opposition to defendant Ravich's motion for summary judgment (NYSCEF Doc. Nos. 400 and 440); or 5) in the alternative, the note of issue (NYSCEF Doc. No. 176).

In response to motion sequence 009, Plaintiff cross-moves, pursuant to CPLR §§ 2001, 2004, and/or 2214(c), accepting and deeming, *nunc pro tunc*, the papers filed by plaintiff in this action at NYSCEF Doc. Nos. 439 through 629 to have been timely served and filed, on the grounds that defendants were not prejudiced thereby and good cause therefor exists.

In motion sequence 010, Ravich moves to strike plaintiff's memorandum of law in opposition to Ravich's summary judgment motion (NYSCEF Doc. No. 533), the affirmation of Steven Storch and all exhibits thereto (NYSCEF Doc. Nos. 534-609), and the Raghavan affidavit (NYSCEF Doc. No. 404). In response, plaintiff cross-moves for the same relief requested in the cross motion made in motion sequence 009.

Motion sequence numbers 006, 008, 009 and 010 are hereby consolidated for disposition. Upon review of the submitted papers and having conducted oral argument, defendants' motions

for summary judgment are granted dismissing the first, third and fifth causes of action and striking plaintiff's demand for punitive damages, and is otherwise denied. Defendants' motions to strike are granted in part, with respect to the expert affidavits for the purposes of the instant motion and attached exhibits thereto, and are otherwise denied.

BACKGROUND AND FACTUAL ALLEGATIONS

Prior to her alleged unlawful termination on December 14, 2017, plaintiff was employed by TCW, an asset management firm, serving as Managing Director of the Distressed Strategy Group and Portfolio Manager of the TCW Distressed Fund. NYSCEF Doc. No. 1, Complaint, ¶ 2. Plaintiff works in the financial service industry, referring to herself as a "recognized leader in the distressed investment community where women in senior management positions—especially Portfolio Managers—are scarce." *Id.*, ¶ 17.

Plaintiff Joins TCW

In late 2015, Ravich, TCW's Group Managing Director and Head of Alternative Products, suggested that plaintiff join TCW to develop and manage a distressed fund. "At the time, TCW did not offer a distressed-debt product, so a distressed fund would be a new offering for the firm." *Id.*, ¶ 27. Ravich and plaintiff have known each other since 1994. They dated in 2012 for approximately a year and remained friendly.

Lippman, TCW's President and Chief Executive Officer, first met plaintiff in early 2016 when Ravich suggested that plaintiff develop a distressed investing fund for TCW. Ravich disclosed to Lippman that he and plaintiff had a prior romantic relationship. This had concerned Lippman, as Ravich "would supervise [plaintiff] and it was important for [him] to be assured that despite their prior relationship, they could work together professionally." NYSCEF Doc. No. 240, Lippman aff, ¶ 5. Both plaintiff and Ravich assured Lippman that, "should they begin

working together, there would be no resumption of any romantic involvement and that they each believed they could work together in a strictly professional manner." *Id.*

In March 2016, plaintiff was initially brought on for a six-month period as an independent contractor. It was agreed that initially plaintiff would both manage and own a 51% interest in the new venture with TCW owning 49%. Complaint, ¶ 30; *see also* NYSCEF Doc. No. 205, TCW-Tirschwell Term Sheet.

August 2016 - Plaintiff Enters Into An Employment Agreement With TCW

By the summer of 2016, it was apparent that the Distressed Fund was failing to attract sufficient investors. As a result, plaintiff's status changed to being an employee of TCW, and plaintiff and TCW entered into an employment agreement on August 26, 2016 (Employment Agreement). Ravich signed the agreement on behalf of TCW as Group Managing Director.

In relevant part, the Employment Agreement indicated that plaintiff's base salary was $250,000 plus a guaranteed bonus of $500,000 if she was an employee of TCW at the end of the fiscal quarter. However, if, on March 31, 2017, TCW was not managing at least $100,000,000 in the TCW Distressed Strategy fund, plaintiff would not earn the bonus.

The Employment Agreement further indicated that TCW may terminate plaintiff prior to the expiration of the employment term with or without cause or that plaintiff may terminate the Employment Agreement for good reason. If plaintiff was terminated without cause, she was entitled to the severance amount, as indicated below, medical benefits, her accrued compensation and her pro rata portion of an annual incentive compensation. The severance payment, for being terminated without cause or resigning for good reason was equal to the following:

> "the sum of (A) your Base Salary and (B) your Guaranteed Bonus, for a period (the 'Severance Period') equal to the greater of (i) one-half of the remaining term of this Agreement on your date of termination of (ii) one year, payable within 60 days after

> termination of your employment; but in no event more than the remaining term of the Agreement."

NYSCEF Doc. No. 256, Employment Agreement at A-2.

The Employment Agreement had an automatic early termination (Automatic Early Termination) provision whereby plaintiff's employment would automatically terminate on March 31, 2017 if:

> "TCW is not managing at least $100,000,000 in the TCW Distressed Strategy [fund] with a minimum of 1.25% aggregate management fee in either (1) a hedge fund format, or (2) a private equity fund format with a term of at least six (6) years, then your employment shall automatically terminate without the action of any party."

Id. at 4.

An Automatic Early Termination is considered to be a termination for cause. If plaintiff was terminated for cause, she was entitled to payment for any accrued or unpaid Base Salary, any earned portion of the Guaranteed Bonus not yet paid to plaintiff, any unused time-off and reimbursement of expenses. In addition, "Cause" is defined as the following, in pertinent part:

> " (i) (A) fraud or (B) gross negligence in the performance of your duties and responsibilities; (ii) your repeated failure or repeated refusal, after written notice of such repeated failure or refusal has been given to you, in any material respect, to perform faithfully or diligently, all or a substantial portion of your duties to TCW, as described in this Agreement; (iii) your conviction of or plea of *nolo contendere* to a felony; or (iv) your engaging in conduct that would require you to answer 'YES' to any question under Item 11 of Form ADV … with respect to the events described in clause (ii), (x) TCW shall have delivered written notice to you of its intention to terminate your employment for Cause, which notice specifies in reasonable detail the circumstances claimed to give rise to its right to terminate your employment for Cause, (y) TCW shall have provided you with 10 business days after receipt of such notice to cure such circumstances, and (z) failing a cure, TCW shall have terminated your employment at any time within 60 days after the expiration of the 10 business day period set forth in clause (y)."

Id. at 2-3.

April 2016 - March 2017: Ravich Allegedly Makes Unwanted Sexual Demands

According to plaintiff, over the course of a 10-month period starting in the Spring of 2016, Ravich arranged seven or eight breakfast meetings where Ravich would make unwanted

sexual advances and coerce plaintiff into having sex with him, in exchange for favors he had done for her or would do for her in the future. The first breakfast meeting occurred shortly after plaintiff became an independent contractor for TCW. Plaintiff testified that she was supposed to meet Ravich at a hotel but then he changed the meeting location to his apartment. When plaintiff arrived at Ravich's apartment, "he was wearing a bathrobe." NYSCEF Doc. No. 482, plaintiff's tr at 1093. She continued that, "we sat and we had a discussion about various things, the expenses, the ICG, how the marketing was progressing ... ." *Id.* at 1101. Plaintiff testified that, after they finished discussing business, Ravich took off his robe and they had sex. Plaintiff recalled that on several of the occasions Ravich took her wrist and led her into the bedroom. She testified that she had "a general recollection of having sex, getting out of bed quickly and going to the bathroom and rushing out of there each time." *Id.* at 1136-1137. Plaintiff summarized that the meetings with Ravich "generally starting out with talking about what was going on at the fund, what was going on with marketing and then moved to whatever Jess had done for me lately, and then sex. And then I left." *Id.* at 1214.

Also, in February 2017, plaintiff's Employment Agreement with TCW was approaching the date by which it would automatically terminate if plaintiff was not managing at least $100,000,000 in the the Distressed Fund. As plaintiff had not yet met this requirement, Ravich assisted plaintiff in getting an extension to her Employment Agreement, and the deadline for automatic termination was extended to February 28, 2018.

Plaintiff also claims that, on at least two occasions between September 2016 and February 2017, Ravich groped her breasts and crotch while in her office. *See* plaintiff's tr at 1246, 1252-56. On one occasion, Ravich allegedly walked into plaintiff's office, talked about

something work related and then reached over her desk and grabbed her breast. Ravich "then walked out as if he thought [the whole incident] was cute." *Id.* at 1255.

March 2017 - December 2017: Plaintiff Allegedly Stops Attending Breakfast Meetings and Suffers Adverse Treatment

Plaintiff alleges that she stopped attending these breakfast meetings in early 2017. "By February 2017, [plaintiff] was so distressed by Ravich's sexual demands, especially how he tied them to what he was 'getting for her,' that she determined it had to stop." Complaint, ¶ 57.

According to plaintiff, after ending the sexual relationship with Ravich, sometime around February 2017, his attitude towards her changed. Plaintiff testified that "[i]t's an accumulation of things that happened over time. All I know is I stopped having sex with him and his attitude toward me and the support for my fund changed, that's all I know." Plaintiff's tr at 830. For instance, plaintiff alleges, that at the inception of the Distressed Fund, she was vested with sole trading authority. Plaintiff asserts that after she stopped attending the breakfast meetings, Ravich made some changes to the trading procedures, requiring that all trades would need to be approved by plaintiff, Ravich and Steve Purdy (Purdy), a trader working for the Distressed Fund. Plaintiff states that Ravich "sent me a trade ticket that he asked to be filled out every time that we did a trade." *Id.* at 937.

Plaintiff further alleges that, after she stopped the sexual relationship, both Ravich and TCW reduced their marketing, legal and operational support for the Distressed Fund. For example, plaintiff alleges that the legal department failed to timely negotiate a necessary International Swaps and Derivative Associates (ISDA) agreement for the Distressed Fund and that this failure was the direct cause of a loss in the fund. "These were exactly the kind of difficulties Ravich attempted to smooth over when he was having 'breakfast meetings' with Tirschwell." Complaint, ¶ 66. Further, Ravich purportedly "dismissed [plaintiff's] legitimate

concerns [voiced in June 2017]" that the Distressed Fund had not been actively marketed since March 2017. *Id*., ¶ 67.

In November 2017, Ravich purportedly began to "pressure" plaintiff about a voluntary exit from TCW prior to the automatic termination of her contract. At that time, plaintiff "thought she had a potential investor who would invest $100 million to be managed by Tirschwell in the Distressed [Fund]." *Id*., ¶ 71. Plaintiff alleges that "Ravich and TCW planned to eliminate [plaintiff] completely, with TCW taking over management of the Distressed Fund." *Id*., ¶ 9. In support of this, plaintiff points to letters that TCW had begun drafting in November 2017 to inform investors that Plaintiff would no longer be with the fund, effective December 6, 2017.

Plaintiff testified that, in November 2017, she and Ravich had conversations about the "potential winding down of the fund." Plaintiff's tr at 197. Plaintiff states that "[t]here was a specific conversation where [Ravich] told me that David Lippman thought that I was cranky and that I was bitchy and that I yelled at people." *Id.* Ravich advised her that "TCW was going to let [her] contract expire at the end of February [2018]." *Id.* Plaintiff commenced a job search. *Id*, at 193-194. [cite]

On December 3, 2017, Ravich told plaintiff that he could get her a severance package of $700,000 if she left by the end of the year. If she waited until the end of her contract, she would not receive any additional severance. Plaintiff testified, in relevant part:

> "So at some point [Ravich] said to me that maybe it would be easier if I just left before the end of the year and then there was a whole discussion about whether the fund was going to be wound down, whether the fund wasn't going to be wound down, and he said -- I said what kind of severance are you talking about and he said I could probably get you $750,000. He said part of that would come from TCW and part of that would come from my [sic] what he referred to as his slush fund within TCW."

Id. at 198.

Plaintiff told Ravich that she would be "willing to take $2 million predicated on, you know, winding down the fund . . . ." *Id.* at 199. TCW rejected plaintiff's request for two million in severance payments. Lippman stated that he was "not willing to authorize any severance greater than provided in her employment contract." Lippman aff, ¶ 50. According to plaintiff, Ravich told her that Lippman was going to meet with her around December 6, 2017 "and that he could not predict what would happen at that meeting." Plaintiff's tr at 199; *see also* NYSCEF Doc. No. 199, Ravich aff, ¶ 29.

Plaintiff's HR Complaint

On December 5, 2017, plaintiff filed a complaint with Cheryl Marzano (Marzano), TCW's Head of Human Resources, describing "Ravich's sexual harassment of her and increasing acts of retaliation, including the imminent threat of her job ending, one way or the other, which she was being subjected to as a result of refusing Ravich's demands and in spite of her own efforts to secure more capital for the Fund." Complaint ¶ 74.

Marzano stated that, on December 5, 2017, while on the way to New York, she received an email (the HR Complaint) from plaintiff stating as follows:

> "Dear Cheryl,
>
> This is one of the most difficult letters I have ever had to write. I am writing to report to Human Resources that Jess Ravich, Group Managing Director and my direct supervisor, was in a sexual relationship with me, under the guise of breakfast meetings to discuss the development of the Fund, between mid 2016 and early 2017 when I ended it. Since that time, I have been finding it has been increasingly hard for me to do my job and Jess has now advised me that the CEO purportedly wants me to leave the firm.
>
> Over the past few days, Jess has been pressing me for a decision as to whether I will agree to do so. Jess has called me repeatedly to pressure me to agree to leave voluntarily for a package of $700,000, inclusive of Cobra, and now says that if I do not agree, the CEO will meet with me tomorrow to terminate my employment. …
>
> I have decided that it is an appropriate time to speak up now and stop being silent because I believe that the hard effort I have put in over the past almost 2 years to build

> the Fund will have gone to waste and seriously harm my career. In addition, I have daughters and it is time to bring this kind of behavior by persons with power over my financial wellbeing to an end.
>
> Please feel free to contact me with any questions.
>
> Sincerely,
>
> Sara Tirschwell"

NYSCEF Doc. No. 342, HR Complaint.

After consulting with Lippman and Meredith Jackson (Jackson), TCW's general counsel, who had also consulted with litigation counsel, Marzano "recommended that TCW retain an independent investigator to look into [plaintiff's] allegations and we made an immediate decision that we were going to hire an outside investigator to thoroughly investigate [plaintiff's] allegations." NYSCEF Doc. No. 245, Marzano aff, ¶ 21.

On December 6, 2017, Marzano and Jackson decided that they still needed to interview plaintiff and Ravich "to learn what happened. These interviews were to be preliminary. We needed to understand the scope of the allegations to further refine the plan of action." *Id.*, ¶ 22. Marzano spoke to plaintiff on December 6, 2017 and to Ravich on December 8, 2017. Ravich was instructed not to have any further interaction with the TCW Distressed Fund or its team members. *Id.*, ¶ 26. Plaintiff did not report any harassment to Marzano or to anyone else prior to December 5, 2017.

TCW "chose Attorney-Investigator Elizabeth Gramigna (Gramigna) and formally executed a retainer agreement on December 15, 2017." *Id.*, ¶ 25.[1]

[1] The contract between TCW and Gramigna states that "TCW has retained Gramigna as outside counsel to conduct an independent investigation and to provide a frank and unbiased assessment of facts concerning a workplace complaint." NYSCEF Doc. No. 253 at 1.

Plaintiff's Termination

Plaintiff was terminated on December 14, 2017. Jackson advised plaintiff that she was terminated for "gross negligence—an ethical wall violation." Complaint, ¶ 83. Plaintiff's termination letter stated the following, in relevant part:

> "As Jeff Engelsman and Meredith Jackson discussed with you this morning, the Company discovered earlier this week that you had provided information to Direct Lending regarding an issuer whose securities are held in the Distressed Fund, without prior Legal or Compliance approval. In the last year, you committed 4 other compliance violations, including 2 prior ethical wall violations. On August 1, 2017, Jeff Engelsman and Meredith Jackson formally addressed your compliance violations, told you that you would be required to undergo mandatory re-training on insider trading, ethical walls and related issues, and warned you that any further violation could result in immediate termination. On November 27, 2017, the mandatory training was conducted for you and your team, in the form of a focused training on the issues that had given rise to violations. At that time, you were specifically counseled not to have contact with Direct Lending of any type, and particularly regarding any issuer whose securities were held in the distressed fund, unless approved in advance by Legal or Compliance. Despite the warning and the training, this was exactly the nature of the violation that we addressed today. At your meeting today with Jeff Engelsman and Meredith Jackson, you admitted you had provided information to Direct Lending regarding an issuer whose securities are in the Distressed Fund, even though you denied some of the substance of what you are quoted as saying. That expressly prohibited interaction constitutes gross negligence in the performance of your employment duties. As we discussed this morning, your compliance violation record, which constitutes 'cause' under Section 6(a) of your [Employment] [A]greement with TCW, is the reason for our decision to terminate your employment with TCW, effective today."

NYSCEF Doc. No. 336 at 1.

The termination letter also advised plaintiff that TCW was giving plaintiff an opportunity to resign, "with a non-negotiable severance package of $500,000, plus one year of paid COBRA." *Id.*

On the date of plaintiff's termination, Lippman, Marzano and Jackson met with plaintiff. Lippman again offered plaintiff the $500,000 severance that "TCW had decided was most appropriate." Lippman aff, ¶ 63. He continued that, while he was speaking to plaintiff, she would not "meet my eyes. As such, I said something to the effect of 'look at me' before telling

[plaintiff] that our severance figure was not negotiable." *Id.*, ¶ 64. Marzano stated that, to her recollection, plaintiff "was not looking at Mr. Lippman for an initial time period after he began speaking." Marzano aff, ¶ 30.

Plaintiff alleges that, instead of investigating her allegations of discrimination, TCW interviewed TCW employees searching for a pretext to terminate her. "When they did not find one, TCW manufactured one." Complaint, ¶ 82. In the complaint, plaintiff alleges that there is no ethical wall (Ethical Wall) between the Distressed Fund and Direct Lending. Regardless, she asserts that she did not provide Direct Lending with any non-public information.

Shortly after this incident, plaintiff commenced the instant action, alleging, as set forth below, that she was terminated in retaliation for filing her HR Complaint.

ARGUMENTS AND EVIDENCE SUBMITTED ON THE INSTANT MOTIONS

I. Summary Judgment Motions (Seqs. 006, 008)

A. First Cause of Action – Retaliation by TCW Defendants

In the first cause of action, plaintiff alleges that she was retaliated against, in violation of the NYCHRL, when she complained of being subjected to discriminatory conduct. "As a result of [plaintiff's] good faith complaint of sexual harassment and discrimination to [TCW], [TCW], Lippman and Ravich took adverse employment actions against [plaintiff], including terminating her employment. Complaint, ¶ 103. Plaintiff continues that, at a minimum, the HR Complaint was a factor in the adverse actions taken against her. Furthermore, TCW and Lippman allegedly had been trying to find a pretext to terminate her for months for gender-motivated reasons.

1. TCW Defendants' Motion for Summary Judgment Dismissing the First Cause of Action

According to TCW defendants, plaintiff was a "serial compliance rule violator," and her termination on December 14, 2017 was the culmination of a disciplinary process that started well before any complaints of sexual harassment. TCW defendants provide affidavits and documentation in support of their contentions that plaintiff was not terminated in retaliation for her HR Complaint, but ultimately as a result of her contact with Direct Lending.

The first compliance violation occurred on April 7, 2016 when plaintiff "failed to close a personal securities trade within the window for which she had been precleared to make that trade." NYSCEF Doc. No. 189, affidavit of Jeffrey Engelsman (Engelsman), Chief Compliance Officer, ¶ 18. Plaintiff self-reported this violation. *See* NYSCEF Doc. No. 278 at 1 ("My broker] filled this order this morning. I gave him the order on April 5. What should I do?").

Plaintiff's second violation of TCW's compliance policies occurred between May 2 and 5, 2016 by "trading in securities of the same issuer and realizing a profit on those trades within a 60-day period." Engelsman aff, ¶ 21. Plaintiff also self-reported this violation.

Engelsman stated "[i]t is every employee's obligation to know and adhere to TCW's policies. I am certain Ms. Tirschwell was aware of her obligations, because she self-reported these violations." *Id*., ¶ 25. Engelsman was also "involved in counseling Ms. Tirschwell regarding TCW's restrictions on distributing research materials to third parties." *Id*., ¶ 26.

Plaintiff committed her third compliance violation in May 2017, when she "engaged in personal securities trading that violated TCW's blackout provisions." *Id*., ¶ 27. More specifically, plaintiff sold bonds she personally owned three days before selling bonds from the same issuer that the Distressed Fund owned. Engelsman stated that he and Jackson investigated, spoke to plaintiff and also consulted with outside counsel.

Plaintiff's fourth violation also occurred in May 2017, when plaintiff "email[ed] a portfolio manager at The Carlyle Group, without pre-approval and in violation of an Information Barrier that prohibits communications between TCW and Carlyle." *Id.*, ¶ 34.[2] Plaintiff had previously signed an "acknowledgement that she had read and received both the Code of Ethics and the Carlyle Group-TCW Information Barrier Policy … ." *Id.*, ¶ 37. In June 2017, Oladipo Ashiru (Ashiru), the Senior Vice President and Associate General Counsel in TCW's legal department, counseled plaintiff regarding this violation.

In July 2017, Engelsman presented plaintiff's compliance violations to the Compliance Committee, noting that they were "the greatest number accumulated by a TCW employee at that time and/or in a similar window of time." *Id.*, ¶ 40.

Also, in July 2017, plaintiff breached an Ethical Wall by communicating with another TCW group — Direct Lending — with respect to financing for a security issuer, American Broadband, which Tirschwell also had under "active consideration" for an investment by the Distressed Fund. *Id.*, ¶¶ 44, 47. While TCW did not categorize it as a formal compliance violation, Engelsman states that this "raised significant concerns about Ms. Tirschwell's willingness to adhere to TCW's compliance requirements." *Id.*

On August 2, 2017, Engelsman and Jackson met with plaintiff to discuss this breach and to review her history of compliance violations. Engelsman stated that he advised plaintiff, as he had done on multiple occasions, that she was not allowed to talk to Direct Lending, despite plaintiff's "belief that she should be able to talk to Direct Lending." *Id.*, ¶ 49. Engelsman concluded, in relevant part:

> "We also explicitly told Ms. Tirschwell that she was not permitted to discuss any fact concerning any issuer with any member of Direct Lending without first contacting the legal or compliance department and receiving their determination whether or not those

[2] The Carlyle Group owns a stake in TCW.

> conversations could take place and under what circumstances. We also specifically told Ms. Tirschwell that the prohibition applied to public information, as well as private information."

Id., ¶ 51.

During this meeting, plaintiff was warned that any further compliance violations could be grounds for termination. "Following that discussion, Ms. Tirschwell followed the proper procedure on at least one occasion, specifically reaching out to Mr. Ashiru for permission to speak with Direct Lending about a securities issuer." *Id.,* ¶ 53. Plaintiff does not deny anywhere in the papers that these events took place.

On November 27, 2017, plaintiff and the members of the Distressed Fund group received a retraining on "ethical walls, information barriers, and 'rules of the road' concerning the sharing of information between TCW groups." NYSCEF Doc. No. 191, Ashiru aff, ¶ 53. Ashiru stated that he worked directly with plaintiff since the inception of the Distressed Fund. Among other things, he "sent many Ethical Wall memoranda to members of the Distressed Group over the course of its existence at TCW," including the Ethical Wall Memorandum for The Fresh Market, Inc. *Id*. (Fresh Market), ¶¶ 17-18.

In December 2017, plaintiff committed her fifth violation when she spoke to Alison Weiss (Weiss), a Direct Lending investment professional, without getting approval in advance. Gladys Xiques (Xiques), Deputy Chief Compliance Officer, stated that "[o]n or about December 11, 2017, Sean Plater — an in-house TCW lawyer — informed me of a potential communication between Ms. Tirschwell and a member of the Direct Lending team." NYSCEF Doc. No. 190, Xiques aff, ¶ 10.[3] Xiques investigated this allegation and "concluded that Ms. Tirschwell violated the ethical wall established for The Fresh Market, by discussing the issuer with Ms.

[3] Engelsman also stated, "[o]n or about December 11, 2017, I learned that Ms. Tirschwell likely had communicated with a member of the Direct Lending group about an issuer — The Fresh Market — in which Ms. Tirschwell's group had invested." Engelsman aff, ¶ 58.

Weiss." *Id.*, ¶ 17. "This compliance violation by Ms. Tirschwell concerned precisely the same subject matter — ethical walls and information barriers — about which I had recently instructed Ms. Tirschwell and the Distressed Fund team in the November 2017 retraining and mirrored the American Broadband situation." *Id.*, ¶ 18; *see also* oral arg tr at 30-32.

On December 13, 2017, Engelsman, Jackson, Lippman, Marzano, among others convened to address plaintiff's fifth compliance violation. Ravich was not at the meeting and he played no role "in the identification, investigation or decision how to handle any of [plaintiff's] compliance violations." Jackson aff, ¶ 49. Jackson stated that, if plaintiff had not made her HR Complaint, she would have been terminated immediately. However, due to the HR Complaint, Jackson and others then consulted with outside counsel to "ensure that TCW was responding lawfully to this apparent violation." *Id.*, ¶ 38. Lippman states that although TCW was aware that plaintiff could claim retaliation, "litigation exposure could not be and was not our primary concern; our fiduciary responsibilities and our integrity were." *Id.*, ¶ 39.

Lippman further notes that, during his tenure as CEO, plaintiff "had five compliance violations, which is more than any employee at TCW had ever accumulated." Lippman aff, ¶ 28. Engelsman recommended that, "if the violation occurred as we understood it," plaintiff should be terminated. NYSCEF Doc. No. 241, Jackson aff, ¶ 35. Jackson stated that she too, concluded, "if there was no additional information or explanations to discover," plaintiff should be terminated. *Id.*, ¶ 36. "Lippman made it clear to me that I was authorized to terminate [plaintiff's] employment if warranted, following our discussion with [plaintiff]. First we wanted to hear her side of the story." *Id.*, ¶ 37.

Jackson and Engelsman met with plaintiff on December 14, 2017 to discuss the Fresh Market violation. They did not provide the name of the Direct Lending employee.

> "Ms. Tirschwell did not deny the discussions. She named Ryan Carroll as the Direct Lending Employee.
>
> ...
>
> Ms. Tirschwell then stated that she had not broken any laws. We told her that it did not matter if she had broken a law, because she had violated TCW's policies after repeated discussions about those policies and how they applied. Ms. Tirschwell then changed her story and said she didn't discuss The Fresh Market, and had only handed Ryan Carroll, a Direct Lending employee, a news article about the company without saying anything."

Engelsman aff, ¶¶ 68, 71; *see also* oral arg tr at 30-32

On that same day, after meeting with plaintiff, and as authorized by Lippman, Jackson made the decision to terminate plaintiff, for cause. Jackson aff, ¶ 2. Jackson was concerned that plaintiff was "flouting TCW's rules and explicit directives" and that she "could not be trusted." *Id.*, ¶ 36. Jackson "found it very disturbing that at this point, [plaintiff] had changed her story, right in front of our eyes, in an apparent attempt to avoid a clear compliance violation." *Id.*, ¶ 46. Jackson reiterated that plaintiff's recurrent misconduct exposed TCW to "fiduciary, reputational and regulatory risk," leaving TCW no choice other than terminating plaintiff. *Id.*, ¶ 3.

Furthermore, well before plaintiff filed her HR Complaint, Lippman had been separately planning to terminate plaintiff on December 6, 2017; and, well before that decision was made, Lippman had been concerned and frustrated with plaintiff's performance.

Lippman stated that, in the first quarter of 2017, he spoke to Ravich and plaintiff and "questioned the viability of the Fund." Lippman aff, ¶ 18. After Ravich and plaintiff "expressed confidence" that the Distressed Fund would reach its $100 million threshold, Lippman agreed, in February 2017, to extend the March 31, 2017 automatic termination date to February 28, 2018. However, by the Spring of 2017 the Fund was still not doing well.[4]

[4] Plaintiff herself emailed Ravich, "[w]e kind of suck," in response to the Distressed Fund's May 2017 report. NYSCEF Doc. No.196, exhibit 10 at 1.

By November 2017, Lippman had concluded—and, with Lippman's blessing, Ravich informed plaintiff—that TCW would not continue its Employment Agreement with plaintiff after its automatic termination date of February 28, 2018. Several employees from various departments in TCW were consulted in making this determination. For instance, in November 2017, Marzano, Jackson and Lippman discussed plaintiff's employment status and the automatic termination date of February 28, 2018. The topics of this discussion included plaintiff's history of compliance violations, the fact that these violations "had become the subject of Board discussions," concerns raised that plaintiff treated her team disrespectfully and unprofessionally, the fact that plaintiff did not have $100 million in assets under management (AUM) in the Distressed Fund and "appeared to have no realistic prospect for doing so," among other concerns. Marzano, ¶ 9.

In November 2017, the decision was made to discontinue plaintiff's employment rather than allow her contract to lapse on February 28, 2018. *Id.*, ¶ 10. Marzano drafted possible severance payment options that would be consistent with the terms of plaintiff's Employment Agreement. The record indicates that Marzano drafted these with a termination date of December 6, 2017 and considered the severance payments owed under a termination-for-cause based on the automatic termination provision and the provision titled "Termination Not for Cause (may give option to Resign)." *See* NYSCEF Doc. Nos. 270, 271. Marzano stated that Lippman made the decision to offer plaintiff $500,000. *Id.*, ¶ 12. Marzano stated that she and Lippman discussed meeting with plaintiff on or about December 6, 2017 to discuss plaintiff's severance and that Marzano scheduled a trip to New York for this purpose. *Id.* ¶ 15.

Similarly, Ashiru stated that he "learned from my November discussions with Ms. Marzano and Ms. Jackson, that TCW had made the decision that it would not continue Ms.

Tirschwell's employment beyond February 28, 2018 and was considering an exit package for her." Ashiru aff, ¶ 51. In November 2017, at the direction of Jackson, Marzano and outside counsel, Ashiru prepared drafts of a notification that could be sent to Distressed Fund investors, "advising them of the departure of a 'Key Person' (Ms. Tirschwell)." *Id.*, ¶ 50.[5]

On November 29, 2017, Ashiru and outside counsel received the following email from Marzano, which states in relevant part:

> "I'm reaching out because we've decided to end Sara Tirschwell's employment on 12/6/17. Our CEO and I will meet with her that day to communicate the decision and exit her out. As background, we're sure we would be able to auto-term her on 2/28/18 as we're confident she won't meet the AUM hurdle, but we want to end things now because we've had serious complaints about her behavior including abusive treatment of people on her team as well as outside business relationships. I don't know that it would meet the definition of 'cause' under the contract. Our plan is to let her know we're letting her go (not for cause) but give her the opportunity to resign. We'd like to 'be nice' and part ways amicably if we can. The lump sum severance amount is more generous than required by the severance provision according to our reading of the contract. (She's not earning any 'Annual Incentive Compensation' based on her group's economics.)"

NYSCEF Doc. No. 350, exhibit 103 at 1.

Ashiru too, was advised that Jackson and Lippman "would be travelling to New York for TCW's holiday party, and that they intended to speak with Ms. Tirschwell about terminating her employment at TCW." Ashiru aff, ¶ 54.

Lippman stated that he received several complaints about plaintiff's abusive treatment of TCW employees. He described a situation where, in autumn of 2017, he heard plaintiff call out loudly to members of the Distressed Fund for them to give her a document. A few seconds later,

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[5] The draft notification stated:

> "[Dear Investor] We are writing to inform you that Sara Tirschwell, the current portfolio manager of the Fund, will be leaving TCW and will no longer be involved in the management of the Fund, effective December 6, 2017. However, the Fund will continue operating following Ms. Tirschwell's departure using the same investment strategy and investment team (other than Ms. Tirschwell)."

NYSCEF Doc. No. 196, exhibit 5 at 1.

he heard plaintiff shout "very loudly, 'where the fuck is that document!?'" Lippman aff, ¶ 37. Lippman stated that this incident "crystalized in [his] mind that TCW could not continue an employment relationship with [plaintiff] beyond February 28, 2018." *Id*. Lippman states that plaintiff's "behavior in shouting profanity at members of her team was inappropriate and inconsistent with TCW's culture and behavior standards." *Id.*, ¶ 38.

Regarding plaintiff's treatment of other employees, in October 2017, members of the Distressed Team "voiced numerous complaints" about plaintiff. Marzano aff, ¶ 5. In October 2017, Ravich told Marzano that "members of the TCW Distressed [Fund] team had spoken to him about [plaintiff's] behavior towards members of her team." *Id.*, ¶ 4. Marzano stated that, "[o]ther than bringing these concerns to my attention, [Ravich] was not involved in my independent discussions with the [team members]." *Id.*, ¶ 6. She alleges that, even prior to October 2017, three other people complained about plaintiff's treatment of employees. *Id.*, ¶¶ 7-8.

Ashiru too, provided four instances where plaintiff acted in a hostile manner and also insulted him.[6]

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[6] Ashiru described one of the interactions as follows:

> "On June 19, 2017, I spoke with Ms. Tirschwell about her violation of the Carlyle Group-TCW Information Barrier Policy. During that discussion, Ms. Tirschwell told me that she was aware of the policy, but did not believe her actions were illegal. She also stated that TCW Legal/Compliance was being 'uptight' about the situation. When I attempted to counsel Ms. Tirschwell as to the importance of the policy, she stood up from her chair and started shouting at me in words or substance that she 'couldn't understand why TCW was being so difficult about it or why I was being so obstructionist to her business', stating that I had 'no idea what material non-public information is' and that she had 'not broken any laws.' She got right in my face and demanded I answer whether she had broken any laws; she then said she did not have time for the discussion, would speak to Mr. Ravich, and stormed out of my office."

Ashiru aff, ¶ 46.

In sum and substance, TCW Defendants argue that the decision to end plaintiff's employment was made weeks before her HR Complaint to Marzano and the reason for ending her employment was, her history of compliance violations, her poor treatment of fellow employees, and the poor performance of the Distressed Fund. As such, TCW Defendants argue that this Court should dismiss plaintiff's first cause of action for retaliation as there was no connection between her termination and her HR Complaint.

2. Plaintiff's Opposition to TCW Defendants Motion for Summary Judgment Dismissing the First Cause of Action

In response to TCW defendants' motion, plaintiff argues that several factors preclude granting summary judgment. First, plaintiff argues that, at the very least, there is an issue of fact as to whether her termination was motivated in part by retaliation, as the termination occurred shortly after she filed her complaint. Next, that there is an issue of fact as to whether TCW defendants' reasons for terminating her are pretextual, as she was not terminated in accordance with her Employment Agreement. Plaintiff argues that she was supposed to receive notice and an opportunity to cure, prior to termination.

Plaintiff argues that TCW undertook "no serious investigation" of the Fresh Market violation and that the serial compliance violations themselves were pretextual. According to plaintiff, when confronted with the Direct Lending/Fresh Market charges in December 2017, she never confirmed TCW's version of the events. Rather, plaintiff argues that "TCW has now changed its story to claiming that her violation was that she handed a publicly available news article … and that this was somehow a violation ... ." NYSCEF Doc. No. 439, plaintiff's memorandum of law in opposition at 6.

Plaintiff claims that TCW attempted to build a fake record by extracting complaints from employees. She continues that Lippman tried to extort her by allowing her to resign and receive a nonnegotiable $500,000 in severance.

Further, plaintiff argues that she was subject to disparate treatment as a male employee had four compliance violations and did not suffer any consequences. Plaintiff asserts that, based on information that she allegedly received from Ravich, Lippman displayed gender animus by referring to her as "bitchy", "cranky" and "sharp elbowed." Plaintiff claims that she was subject to additional gender-stereotype name calling from the male dominated TCW culture: e.g. being referred to as "difficult", "entitled", "emotional" and "dramatic". According to plaintiff, when men shouted profanities there were no repercussions.

Plaintiff also argues that Alison Weiss was never disciplined for her role in the Fresh Market / Direct Lending violation—which ultimately resulted in plaintiff's employment being terminated. Plaintiff argues that this disparity of treatment—in close proximity to her filing of the HR Complaint—creates an inference of retaliation.

Further, plaintiff argues that there was a secret campaign to push her out of TCW—organized by Ravich and Lippman—in order to take over the Distressed Fund. To this end, plaintiff points out that the day after her HR Complaint, her market research subscriptions were canceled, and that this is further evidence that her violations were "trumped up" to justify her termination.

Finally, plaintiff claims that the conduct of Human Resources in failing to investigate her complaint before she was terminated, shows pretext. She also alleges that "TCW has made misrepresentations about Gramigna's independence ... ." *Id.* at 13.

3. Ravich's Motion for Summary Judgment Dismissing the First Cause of Action

Ravich argues that the retaliation claim should be dismissed as against him because he did not participate in the decision to terminate plaintiff. Plaintiff complained to Human Resources on December 5, 2017. On that date, Jackson called Ravich, informed him that a complaint by plaintiff had "been lodged against [him] and that [he] would be walled off from the Distressed Fund effective immediately and that [he] should not have any more contact with Plaintiff." NYSCEF Doc. No. 199, Ravich aff, ¶ 10. Ravich states that, after speaking to Jackson, he has not spoken to plaintiff at any point. According to Ravich, he only learned of plaintiff's termination after it occurred. He "was not consulted about, did not participate in, and did not make the decision to terminate Plaintiff's employment at TCW." *Id.*, ¶ 12.

Ravich denies having sex with plaintiff while she worked at TCW. "I did not engage in any sexual conduct with Plaintiff since we ended our romantic relationship in late 2013 . . . ." *Id.,* ¶ 17. Ravich further asserts that he "never groped" plaintiff in her office. *Id.*, ¶ 19. Nonetheless, Ravich argues that, even accepting as true plaintiff's allegations that they engaged in sexual conduct during plaintiff's employment at TCW, plaintiff cannot establish that the sex was unwelcome. Ravich also asserts that plaintiff never communicated to him that she was ending the alleged sexual relationship. Ravich argues that, as such, plaintiff cannot establish that any of the purported discriminatory conduct that she alleges began in March 2017 was motivated by stopping the sexual conduct. Ravich further denies the allegations that he stopped interceding on her behalf to support the Distressed Fund after she stopped having sex with him. He states, in relevant part:

> "Therefore, even though I never had sex with Plaintiff, I would have had no basis to know that anything in our relationship had changed – i.e., I would have had no way of knowing if Plaintiff was unwilling to come to my apartment. Not knowing that anything

> had changed, I could not have had any reason to stop supporting her. It is impossible that a person could engage in retaliation for conduct that he was not aware was happening."

Id., ¶ 23.

4. Plaintiff's Opposition to Ravich's Motion for Summary Judgment Dismissing the First Cause of Action

In her opposition, plaintiff argues that Ravich retaliated against her by interfering with her success on the Distressed Fund. Plaintiff argues that Ravich took adverse actions against her that were retaliatory in nature, including reducing marketing efforts, reducing backroom support, and taking away her autonomy to make transactions. Plaintiff argues that all of this would be "reasonably likely to deter a person from engaging in protected activity." Furthermore, plaintiff claims that Ravich can still be held liable for retaliation under the NYCHRL even if he did not directly participate in the decision to terminate plaintiff because his actions put into motion and arguably affected TCW's decision to terminate plaintiff. Plaintiff claims that, after she stopped having sex with Ravich, Lippman and Ravich worked together for over six months to develop a pretextual reason to terminate plaintiff. Plaintiff argues that, as part of this effort, Ravich participated in preparing the November termination letter to inform investors of plaintiff's departure from the Distressed Fund.

Notwithstanding the aforesaid arguments, plaintiff's counsel admits that the only protected activity that plaintiff engaged in was her filing of the HR Complaint on December 5, 2017. Oral arg tr at 27-28, 54-58.

B. Second Cause of Action - Gender Discrimination

In the second cause of action, alleged against TCW and Ravich, plaintiff contends that she was discriminated against based on gender in violation of the NYCHRL. As set forth in the complaint, at all relevant times, Ravich was an upper level manager/executive at TCW who acted

as plaintiff's direct supervisor. Ravich allegedly subjected plaintiff to improper sexual demands, "which resulted in her being treated differently than her male counterparts in respect to her terms, conditions, and privileges of employment." Complaint, ¶ 110. Among other things, along with incurring the loss of past and future earnings, plaintiff alleges that Ravich and TCW's gender discrimination caused damage to her professional reputation. She is seeking punitive damages, alleging that TCW and Ravich exhibited a conscious disregard of her rights under the NYCHRL's anti-gender discrimination provisions.

1. Ravich's Motion for Summary Judgment Dismissing the Second Cause of Action

According to Ravich, plaintiff provides no evidence to substantiate her claim for gender discrimination. Although Ravich denies having any sexual contact with plaintiff after 2013, Ravich argues that even accepting as true plaintiff's allegations that they did have sex, plaintiff cannot establish that it was nonconsensual. He states that plaintiff's actions, including telling him about her personal family matters, undermines her allegations that he was subjecting her to unwanted sexual advances. Further, Ravich argues the fact that Plaintiff did not suggest that they meet somewhere other than his apartment supports his argument that any sex they may have had was not unwanted. Ravich of course reiterates, however, that he did not have sex with plaintiff at any time during her affiliation with TCW. Regardless, according to Ravich, plaintiff never "communicate[d] to me, in words or actions, that she would not or did not want to come to my apartment or meet me for breakfast." Ravich aff, ¶ 22.

Ravich argues that there is no evidence that discrimination was a motivating factor in his treatment of plaintiff. He claims that the record only supports that they had three breakfast meetings, with the last one in September 2016. Shortly after, he secured large investments for the Distressed Fund and advocated that plaintiff's contract be extended. According to Ravich, he

"continually supported" plaintiff and it would be "irrational" for him to stop supporting plaintiff as he was the one who referred her to TCW. He continues that he "personally invested approximately $5 million of [his own] and [his] family's money on the Distressed Fund; the success of the Distressed Fund was in [his] personal financial interest." *Id.*, ¶ 24.

Ravich further denies withdrawing support for the Distressed Fund after March 2017. "Although the Distressed Fund had a rocky start, I still had confidence in the potential success of the Fund." *Id.*, ¶ 27. Ravich states that there were at least 25 marketing meetings for the Distressed Fund in 2017 and three new employees were added to support the fund. Ravich denies plaintiff's allegation that he somehow limited her trading autonomy. He states that both he and plaintiff discussed adding Purdy to assist with trading so that plaintiff "could spend more time on investment selection." *Id.*, ¶ 25. In November 2017, plaintiff thanked Lippman for his support and advised him that the "team seems to be gelling; the hard work that everyone put in earlier this year in establishing protocols and processes shows in the last 5 or 6 months of results and the camaraderie around here." NYSCEF Doc. No. 214 at 1.

According to Ravich, in October 2017, he proposed to Lippman that plaintiff earn incentive compensation for the upcoming several years based on the success of the Distressed Fund. Lippman advised Ravich that he would not grant that request because he had planned on letting plaintiff's contract expire at the end of its term. Ravich "requested and received [Lippman's] permission to tell Plaintiff that her contract likely was not going to be extended" so that she would not be surprised and that she would have time to find a new job. Ravich aff, ¶ 27. Ravich had several conversations with plaintiff beginning in November 2017 about Lippman's conversation with him. He claims that, although he attempted to increase plaintiff's proposed severance package, "Lippman would not authorize such an allocation because he said that

TCW's Human Resources Department applies a standard severance calculation uniformly across all employees." *Id.*, ¶ 28. On December 5, 2017, Ravich called plaintiff to let her know that Lippman intended to meet with her on December 6, 2017. *Id.*, ¶ 29. Shortly after Ravich made that phone call, plaintiff filed the HR Complaint.[7]

2. Plaintiff's Opposition to Ravich's Motion for Summary Judgment Dismissing the Second Cause of Action

In opposition, plaintiff argues that she and Ravich did have sex and that it was improper and unwelcome. Ravich was plaintiff's supervisor and TCW's Employee Handbook prohibits supervisors from engaging in a sexual relationship with a subordinate employee.[8] Plaintiff further argues that the instances of nonconsensual groping in the office would be sufficient to impose liability for a hostile work environment claim.

Plaintiff testified to, and produced, several different text messages related to their encounters. In one text message, dated May 12, 2016, Ravich texted plaintiff, "At whiskey tasting. If [S]cott weren't staying over...." NYSCEF Doc. 474 at 1. On May 24, 2016, plaintiff texted Ravich, "Left my brush at your apartment." NYSCEF Doc. No. 477 at 1. On that same date—and one minute before—plaintiff also texted a friend, "Had Sex w/Jess this morning."

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[7] TCW is not moving for summary judgment dismissing the sex discrimination claim as against it. However, TCW argues that "[g]iven that TCW's liability is derivative, if the Court grants Mr. Ravich's motion, the claim should be dismissed against TCW." NYSCEF Doc. No. 390, TCW's memorandum of law in support at 15 n 11.

[8] "Supervisors, managers, directors and officers in any department are strictly prohibited from dating or engaging in romantic or sexual relationships with subordinate employees whom they directly or indirectly supervise, or over whom they have influence regarding general employment, promotion, salary administration, and other related management or personnel considerations." *See* NYSCEF Doc. 196, exhibit 27, TCW Employee Handbook at 6. Both Ravich and plaintiff signed acknowledgments that they "read and understand each of the policies contained in the Employee Handbook, including the Unlawful Harassment and Discrimination Policy, and voluntarily agree to the terms and conditions therein." NYSCEF Doc. No. 197, exhibits 97 and 98.

NYSCEF Doc. No. 503 at 1. In August 2016, Ravich texted plaintiff "Happy birthday! Love u. Off to Prague, Jess." NYSCEF Doc. 474 at 3.

Plaintiff maintains that the sex was unwelcome notwithstanding what Ravich claims. Plaintiff further argues that, under the NYCHRL, she is not required to establish that the sex was unwelcome to support a claim for sex discrimination. Plaintiff argues that "[a]ll that needs to be shown is that the sex was reasonably understood to be tied to benefits or lack thereof in the workplace." NYSCEF Doc. No. 533, plaintiff's memorandum of law in opposition at 1. Plaintiff states that every breakfast meeting with Ravich in the 10-month period was prefaced with Ravich telling plaintiff about everything he had done to help her. Ravich would then make an unwelcome sexual advance, leading plaintiff to believe that, if she rejected Ravich's advances, he would stop supporting the Distressed Fund.

After she stopped the sexual relationship, Ravich allegedly changed the terms of her employment adversely by reducing marketing efforts and limiting her trading authority. Plaintiff claims that Ravich "ceased intervening" on her behalf and she had difficulty securing backroom support, daily profit and loss statements or timely ISDA agreements. *Id.* at 6.

In sum and substance, plaintiff argues that, after she stopped having sex with Ravich, he "plotted" to have her removed from TCW. She continues that "Ravich aligned with Lippman in wanting her gone" and "plotted with Lippman to limit [her] trading authority and impose other restrictions in violation of the terms of the private placement memorandum for the Fund." *Id.* Plaintiff alleges that Ravich was "actively laying the groundwork for terminating [plaintiff] and that he "arranged for HR to solicit three employees to file complaints against [plaintiff]." *Id.* at 7. She alleges that he had secret meetings with plaintiff's team and excluded plaintiff and that he was involved in drafting the November 2017 letters to investors advising them that plaintiff was

no longer with TCW. Plaintiff argues that all of this was a form of punishment for ending the sex and is evidence in support of her second cause of action for gender discrimination.

C. Third Cause of Action - Aiding and Abetting by Lippman

In this cause of action, plaintiff alleges that Lippman violated the NYCHRL by knowingly aiding and abetting TCW and Ravich's discrimination and harassment. According to TCW defendants, this cause of action must be dismissed as Lippman did not participate in the conduct giving rise to the discrimination claim. Prior to receiving the complaint on December 5, 2017, Lippman "had no information, from any source, which caused [him] to suspect or believe that there was any sexual or romantic interaction between [Ravich] and [plaintiff]." Lippman aff, ¶ 27. Lippman further states that, prior to this date, he was unaware that plaintiff felt that she was subjected to sexual harassment or discrimination.

In opposition, plaintiff argues that Lippman actively participated in the acts giving rise to the second cause of action. Furthermore, plaintiff claims that, TCW would still be liable for Lippman's own actions, as it pertains to the second cause of action, regardless of whether Ravich's motion for summary judgment is granted. *See* oral arg tr at 26.

D. Fourth Cause of Action - Breach of Contract against TCW

In this cause of action, plaintiff alleges that TCW breached the Employment Agreement by "purporting to terminate [plaintiff] for 'cause' pursuant to Section 6(a) of the Employment Agreement and falsely accusing [plaintiff] of 'gross negligence' in performance of her duties when no such cause existed." Complaint, ¶ 130. In addition to pre- and post- judgment interest, plaintiff is seeking to be compensated for, among other benefits, the salary and profit sharing that she would have earned, had TCW not breached the agreement.

As noted, TCW maintains that plaintiff committed several compliance violations and was terminated after TCW concluded that she had committed an Information Barrier violation. In its motion for summary judgment, TCW argues that plaintiff acted with gross negligence and TCW terminated her for cause: "TCW acted on December 14 because [plaintiff] had demonstrated that she could no longer be trusted to hold a fiduciary position." NYSCEF Doc. No. 390, memorandum of law in support at 5. TCW argues that, as such, plaintiff would not be entitled to any compensation after her December 14, 2017 termination date.

TCW further argues that even if plaintiff can recover on her breach of contract claim, her damages stopped accruing after February 28, 2018. Prior to December 5, 2017, TCW determined, and plaintiff was so informed by Ravich, that her contract would not be renewed after February 28, 2018. TCW argues that, as such, plaintiff is unable to prove any actual or consequential damages after this date.

In response, plaintiff argues that "[g]ross negligence must 'smack of intentional wrongdoing and be conduct that evidences a reckless indifference to the rights of others." Plaintiff's memorandum of law at 11 (internal quotation marks and citation omitted). According to plaintiff, TCW has not explained how plaintiff's conduct can be considered grossly negligent. Furthermore, pursuant to the Employment Agreement, an employee who is fired for cause, must be provided with a written notice of intent to terminate and 10-day period to cure the circumstances giving rise to the termination. Plaintiff continues that TCW did not follow the terms of the Employment Agreement when it failed to give her notice and a time period to cure.

During oral argument held, on March 11, 2020, the parties reiterated their arguments. In brief, TCW argued that, the court should determine, as a matter of law, that plaintiff was grossly negligent: "There's no other fact that needs to be considered to sustain the discharge for cause.

She was grossly negligent. Committing a repeat violation of that nature, failing to take heed that public information was not an exception is grossly negligent." NYSCEF Doc. No. 764, oral arg tr at 64. Plaintiff responded that "there's a disputed issue of fact on gross negligence. . . . [G]ross negligence has an element of not only willfulness but of bad faith." *Id.* Plaintiff therefore argues that if there was no bad faith, then, pursuant to the Employment Agreement, TCW was required to give plaintiff written notice of the violations and a time period to cure.

Plaintiff argues that she is entitled to actual and consequential damages at least through her renewal date if a jury determines that she was prematurely fired before being able to reach her funding goal. Plaintiff argues that the decision to terminate her contract prior to its end date of February 28, 2018 was a breach of said contract and was motivated by discriminatory and retaliatory animus.

E. Fifth Cause of Action - Breach of the Implied Covenant of Good Faith and Fair Dealing Against TCW

Plaintiff argues that TCW's conduct, including failing to provide her with marketing and back office support and access to TCW's institutional investors as well as limiting her autonomy, violated the Employment Agreement's implied covenant of good faith and fair dealing. This conduct allegedly impeded both plaintiff's ability to do her job and her ability to extend her Employment Agreement, particularly by preventing her from reaching the $100,000,000 funding requirement. The complaint indicates that, as a result of the breach, plaintiff is seeking the same amount of damages sought in the breach of contract cause of action.

TCW argues that this cause of action should be dismissed as, among other reasons, the damages sought herein are identical to those in the fourth cause of action for breach of contract.

F. Branch of Motions Seeking to Strike Certain Claims for Damages

TCW Defendants and Ravich each move to strike plaintiff's claims for punitive damages, arguing there is no evidence of sufficiently culpable conduct to support such an award. In addition, TCW Defendants argue that the court should strike plaintiff's claims for actual and consequential damages to the extent plaintiff claims these damages accrued after February 28, 2018—the end date of plaintiff's Employment Agreement—reasoning that they had decided not to renew the Employment Agreement prior to plaintiff filing the HR Complaint. Plaintiff opposes both of these attempts to limit her potential recovery of damages.

II. Motions to Strike and Cross Motions to Accept Papers (motion sequences 009-010)

Plaintiff's opposition papers were due to be served and filed on December 10, 2019. On December 10, 2019, plaintiff's counsel advised defendants that the filing would be delayed due to computer glitches. Defendants received the briefs and affidavits on December 11, 2019 and received additional exhibits on December 12, 2019. The memorandum of law was 16 pages long, which was over the court's 15-page rule. By letter dated December 18, 2019, TCW defendants advised this court about the delay, the page limit and the inclusion of expert witness declarations. On the same date, plaintiff's counsel responded with the following, in relevant part: "We acknowledge that this was a regrettable law office failure that should not have happened. It will not happen again. I sincerely apologize to the Court and the parties. We did our utmost to rectify this as quickly as possible ... ." NYSCEF Doc. 437 at 2. Defendants ultimately received a revised Plaintiff's memorandum of law on December 23, 2019 to comply with the court rules.

In opposition to defendants' summary judgment motions, plaintiff submitted the expert witness affidavits of Barry Kupferberg (Kupferberg) and Chitra Raghavan (Raghavan) along

with attached exhibits. Kupferberg was retained to provide his opinion on certain compliance issues and standard industry practice in the financial services industry. Raghavan, a licensed clinical psychologist, was retained to provide his opinion on the dynamics of coercive control and sexual coercion between plaintiff and Ravich.

In motion sequence 009, TCW defendants move to strike plaintiff's opposition papers to TCW defendants' motion for summary judgment. These papers include plaintiff's memorandum of law, the affirmation of Steven Storch and all attached exhibits thereto and the affidavits of proposed experts Kupferberg and Raghavan, along with the attached exhibits thereto.

TCW defendants state that the opposition papers should be stricken for being untimely and not in accordance with the court's rules. Further, they argue that when they ultimately received the revised and condensed version of the memorandum of law, several paragraphs were substantively modified from the initial memorandum of law. TCW defendants believe that the expert affidavits should be stricken because the parties agreed that expert evidence would not be used until after the summary judgment motions were decided. According to TCW defendants, at plaintiff's request, the parties agreed to "Federal" style expert discovery, limiting substantive expert disclosure. In addition, TCW defendants provide several reasons for why both expert affidavits are inadmissible.

The record establishes the following, in relevant part:

- On July 2, 2019, TCW defendants contacted plaintiff and requested, among other things, that the parties "set a schedule to exchange expert reports." NYSCEF Doc. No. 644 at 1.
- Pursuant to a letter dated July 3, 2019, plaintiff responded, in relevant part, that "[w]e would propose revisiting discussions regarding an expert discovery

schedule, at the earliest, after summary judgment motions are fully submitted." NYSCEF Doc. No. 645 at 2.

- After a conference held on July 9, 2019, the parties entered into a stipulation, signed and so-ordered by the court, indicating that the "parties have agreed to expert disclosure to be completed after summary judgment motions have been decided." *See* NYSCEF Doc. No. 646 at 1.

In motion sequence 010, Ravich moves to strike plaintiff's memorandum of law, the affirmation of Steven Storch and all attached exhibits thereto and Raghavan's affidavit. Ravich presents the same arguments as TCW defendants; namely that plaintiff's opposition papers are untimely and defective, that the parties agreed to delay expert discovery until after the summary judgment motions were fully submitted. Ravich also argues that the Raghavan affidavit is inadmissible.

Plaintiff opposes defendants' motions and cross moves for an order accepting the papers as timely. Plaintiff states that a "law office failure" led to the late filing of the papers. Among other reasons, counsel explains that the dissolution of counsel's prior law firm and the inadequate facilities at the new office caused the unintentional delay. Specifically, the law firm's printers and scanners were unable to handle the large number of documents and the associated redactions. The law firm lost extensive changes it had made to the documents and could not fix the problems by December 10, 2019. Briefs and affidavits were served the next day. Counsel states that "[c]orrected versions fixing typographical errors, citations, and eliminating the 16th page on each brief were subsequently served on December 23, 2019." NYSCEF Doc. No. 727, Storch affirmation in opposition to defendants' motions to strike, ¶ 3. With respect to the page

limit, plaintiff claims that the briefs were 16 pages long, with the 16th page having one sentence as the conclusion.

According to plaintiff, "[t]here was no agreement to forego us[ing] experts, if necessary, to oppose summary judgment." Storch affirmation, ¶ 31. Plaintiff provides several reasons for why the expert affidavits are proper and are admissible.

DISCUSSION

I. Motions to Strike and Cross Motions to Accept Papers (motion sequences 009 and 010)

As set forth above, defendants argue that plaintiff's opposition papers should be rejected for being untimely and for not complying with the court's rules. After submitting partial opposition papers one day late, plaintiff ultimately submitted complete papers, complying with all page limits, 13 days late. In its discretion, the court finds that plaintiff has given a reasonable excuse for her late filings and that defendants have not been prejudiced by said late filings. Moreover, for this court to strike plaintiff's opposition papers and effectively dismiss her action for her late filing—after over a year of discovery—would be contrary to this state's strong public policy of resolving actions on the merits. As such, this court denies the part of defendants' motions seeking to strike plaintiff's opposition papers and grants the corresponding part of plaintiff's cross motion to have her papers be deemed timely served.

Accordingly, the court will accept and deem timely plaintiff's papers submitted in opposition to defendants' motions for summary judgment; namely the Storch affirmation, the memoranda of law and the attached exhibits thereto. Defendants have not shown any prejudice as a result of the delay and have already submitted reply papers. *See e.g. Prato v Arzt*, 79 AD3d 622, 623 (1st Dept 2010) ("More importantly, defendant has not shown that he suffered any prejudice as a result of the court's acceptance of plaintiff's late opposition paper"); *see also*

Walker v Metro-North Commuter R.R, 11 AD3d 339, 340 (1st Dept 2004) ("The failure to comply with CPLR 2215 or 2214 may be excused in the absence of prejudice").

In addition, plaintiff cross-moved pursuant to CPLR 2004. "[F]or purposes of that statute, law office failure — plaintiffs' excuse here — constitutes good cause shown." *N450JE, LLC v Priority 1 Aviation, Inc.,* 102 AD3d 631, 633 (1st Dept 2013) (internal quotation marks and citation omitted). Shortly after the delay, counsel apologized and explained to the court why, due to law office failure, the papers were not fully submitted on time. Accordingly, the court grants plaintiff's cross motions pursuant to CPLR 2004, upon a showing of good cause.

However, in opposition to the summary judgment motions, plaintiff attaches the affidavits and related exhibits for two experts. Defendants move to strike these papers, claiming, among other arguments, that the parties agreed to delay expert disclosure until after summary judgment motions were submitted. In addition, TCW defendants provide arguments for why both expert affidavits are inadmissible, and Ravich contends that the Raghavan affidavit is inadmissible.

The undisputed record indicates that, at plaintiff's request, defendants agreed to wait on expert discovery until after the summary judgment motions were decided. The July 9, 2019 so-ordered stipulation, signed by all parties and the court, confirms that all "parties have agreed to expert disclosure to be completed after summary judgment motions have been decided." NYSCEF Doc. No. 644 at 1. The court rejects plaintiff's argument that this stipulation was not intended to preclude any party from submitting an affidavit by an expert in support of said party's summary judgment arguments. Further, plaintiff has not shown any reason why she should be released from this stipulation and the court will not consider this material. *See S. Shore D'Lites, LLC v First Class Products Group, LLC*, 150 AD3d 626, 626-27 (1st Dept 2017).

In light of this determination, at this time, the court will not address arguments related to expert admissibility. Accordingly, the part of defendants' motions seeking to strike the expert affidavits, and the exhibits attached thereto, is granted, and the corresponding portion of plaintiff's cross motion is denied.

Notwithstanding the aforementioned ruling, this court has reviewed the expert affidavits submitted by plaintiff as part of her opposition and, as will be further explained, even if this court were to allow the submission of these expert affidavits, this court's decision on the instant summary judgment motions would not change; and, to the extent admissible, these expert affidavits are insufficient to create an issue of fact.

II. Motions for Summary Judgment (motion sequences 006 and 008)

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso,* 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

A. First Cause of Action – NYCHRL Retaliation

Under the NYCHRL, it is unlawful to retaliate or discriminate against someone because he or she opposed discriminatory practices. Under the broader interpretation of the NYCHRL, "[t]he retaliation . . . need not result in an ultimate action . . . or in a materially adverse change . . . [but] must be reasonably likely to deter a person from engaging in protected activity." Administrative Code § 8-107 (7).

The Appellate Division, First Department, has reaffirmed the applicability of the burden shifting analysis to discrimination cases as developed in *McDonnell Douglas Corp. v Green*, 411 U.S. 792 (1973), in addition to "the mixed motive analysis." *See Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 113 (1st Dept 2012) ("[A]n action brought under the NYCHRL must, on a motion for summary judgment, be analyzed under both the McDonnell Douglas framework and the somewhat different 'mixed-motive' framework recognized in certain federal cases.")

For plaintiff to successfully plead a claim for retaliation under the NYCHRL, she must demonstrate that: "(1) [she] participated in a protected activity known to defendants; (2) defendants took an action that disadvantaged [her]; and (3) a causal connection exists between the protected activity and the adverse action." *Fletcher v Dakota, Inc.*, 99 AD3d 43, 51-52 (1st Dept 2012). Protected activity under the NYCHRL refers to "opposing or complaining about unlawful discrimination." *Brook v Overseas Media, Inc.,* 69 AD3d 444, 445 (1st Dept 2010) (internal quotation marks and citations omitted).

To establish its entitlement to summary judgment in a retaliation case, a defendant must demonstrate that the plaintiff cannot make out a prima facie claim of retaliation or, having offered legitimate, non-retaliatory reasons for the challenged actions, that there exists no triable

issue of fact as to whether the defendant's explanations were pretextual. *Delrio v City of New York*, 91 AD3d 900, 901 (2d Dept 2012).

If the plaintiff is able to set forth a prima facie case of retaliation, then the burden shifts to the defendant to rebut the presumption by demonstrating non-retaliatory reasons for its employment actions. *Id*. If the defendant meets this burden, plaintiff has the obligation to show that the reasons proffered by the defendant were pretextual. *Id.*

Where a defendant presents evidence justifying its decisions for nondiscriminatory reasons, plaintiff must show that these reasons were "merely a pretext, or show that, regardless of any legitimate motivations the defendant may have had, the defendant was motivated at least in part by an impermissible motive." *Brightman v Prison Health Serv., Inc*., 108 AD3d 739, 741 (2d Dept 2013).

1. As Regarding TCW Defendants

As set forth extensively in the facts, TCW defendants submitted numerous affidavits and also documentation spanning the course of plaintiff's employment, in support of their contentions that plaintiff was terminated for, inter alia, committing compliance violations, breaching company policies, treating her fellow employees in an abusive manner, and exercising poor judgment.

In brief, by July 26, 2017, plaintiff had committed four compliance violations. These were well documented by several employees at TCW. For example, in September 2017, Engelsman sent a memorandum to the Boards of TCW Funds and other affiliates setting forth the Code of Ethics violations for not only plaintiff, but other TCW employees for the quarter ending June 30, 2017. *See* NYSCEF Doc. 298. Lippman states that these violations were discussed at several company meetings, including the TCW Board meeting. He continues that "[s]everal

members of TCW's mutual fund boards and members of TCW's Compliance Committee, expressed to me their concerns that [plaintiff's] compliance history was putting at risk TCW's reputation and brand." Lippman aff, ¶ 31. Lippman assured the members of the TCW Board that TCW "took compliance matters extremely seriously and that any further violations would be dealt with in a most harsh way." Lippman aff, ¶ 32.

On August 2, 2017 plaintiff was told that she was not allowed to talk to the Direct Lending group without prior approval, despite her belief that she was permitted to do so. During this meeting, plaintiff was warned that any further compliance violations could be grounds for termination. On November 27, 2017, plaintiff and the members of the Distressed Fund group received a compliance retraining on Ethical Walls and Information Barriers. Notwithstanding the warning and the retraining, in December 2017 plaintiff committed her fifth violation when she violated the Ethical Wall for the Fresh Market by speaking to the Direct Lending group without getting approval in advance. As Jackson summarized, "[plaintiff's] repeated failure to follow our Code of Ethics made plain that she could no longer be trusted to discharge her fiduciary duty as portfolio manager." Jackson aff, ¶ 4.

Upon review of the papers submitted and having conducted oral argument, the court finds that TCW defendants have met their burden on the retaliation claim by establishing that there is no causal connection between the termination and plaintiff's HR Complaint and by offering non-retaliatory and non-pretextual reasons for the challenged actions. Although plaintiff provides several arguments in opposition, they fail to raise a triable issue of fact. For instance, plaintiff argues that she did nothing wrong and complains that TCW blew the situation out of proportion and used it as a pretext to terminate her. However, the record indicates that plaintiff was warned on several occasions not to have any contact with the Direct Lending group unless it was pre-

approved by the legal or compliance department and that this directive applied to both public and private information. Plaintiff also specifically received an Ethical Wall memorandum advising her not to speak to anyone outside of the Distressed Fund about Fresh Market without seeking approval first.[9] It is well settled that "[t]he mere fact that [plaintiff] may disagree with [her] employer's actions or think that [her] behavior was justified does not raise an inference of pretext." *Melman*, 98 AD3d at 121 (internal quotation marks and citations omitted).

Plaintiff contends that TCW altered its story regarding the Fresh Market violation and that, in any event, she did not provide Direct Lending with any non-public information. This is belied by the record, as several employees memorialized the incident in the same manner, with plaintiff directly speaking to an employee in Direct Lending without getting pre-approval. Thus, there is no indication that TCW Defendants were mistaken in believing that the incident occurred in the manner reported. Whether the discussion concerned public or non-public information is not relevant on the issue of the violation since plaintiff required prior approval to institute the discussion which she did not have.

In addition, plaintiff was given a warning that any further conduct could lead to her termination, and plaintiff does not dispute that she received this warning. Moreover, numerous employees, not just Lippman, proposed termination as a consequence for plaintiff's actions. Plaintiff has failed to demonstrate how TCW deviated from the company policy in terminating plaintiff. Accordingly, this court will "not sit as a super-personnel department that reexamines

[9] For example, in September 2016, Ashiru issued a memorandum to plaintiff and others entitled, "Non-Public Information Ethical Wall; The Fresh Market, Inc." NYSCEF Doc. No. 197, exhibit 75 at 1. Ashiru advised plaintiff, among other things, that "[e]ach person within the Department should refrain from talking to anybody outside of the Department about the Company and should decline comment if they receive inquiries about the Company from employees who are not Department members." *Id.* Ashiru informed employees that they must advise him, "when you believe the information is either public or no longer material and you will not be receiving additional Information; or if you learn that the Company will be making a public offering of any of its securities." *Id.*

an entity's business decisions." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 966 (1st Dept 2009) (internal quotation marks and citation omitted). Plaintiff had an Employment Agreement and "could have been terminated for any lawful reason, and this Court may not substitute its business judgment for that of the employer." *Nikitovich v O'Neal*, 40 AD3d 300, 300 (1st Dept 2007) (internal citations omitted).[10] "It matters not whether the employer's stated reason for the challenged action was a good reason, a bad reason, or a petty one. What matters is that the employer's stated reason for the action was nondiscriminatory." *Melman*, 98 AD3d at 121 (internal emendation omitted).

As regards the argument of causation "[p]roof of causation can be shown either: (1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by the defendant." *Gordon v New York City Bd. of Educ.*, 232 F3d 111, 117 (2d Cir 2000). Plaintiff claims that she can establish causation as the termination occurred shortly after her complaint. However, other than the short time period between the two, plaintiff "offered no evidence of a causal connection." *Cadet-Legros v New York Univ. Hosp. Ctr.*, 135 AD3d 196, 206-207 (1st Dept 2015). In this case the court finds plaintiff's termination "was the culmination of continuous progressive discipline" that long preceded her HR Complaint. *Id.*

Further, plaintiff argues that she can establish pretext as she was never given notice and an opportunity to cure pursuant to her Employment Agreement. At the time plaintiff was terminated, TCW had determined that plaintiff had engaged in gross negligence. Employees

[10] As set forth in the Employee Handbook, "employment at TCW is employment at-will." NYSCEF Doc. 196, exhibit 27 at 2.

who are terminated for gross negligence are not provided with a notice and opportunity to cure. Even if, ultimately, plaintiff did not engage in gross negligence, "these purported issues of fact pertain to whether the company's decision to terminate plaintiff's employment was correct or justified. They do not raise an inference of pretext ... ." *Breitstein v Michael C. Fina Co.,* 156 AD3d 536, 537 (1st Dept 2017).

By way of another example, plaintiff claims that TCW attempted to build a fake record by extracting complaints from employees. The record, however, indicates that employees complained in October 2017, well before plaintiff's HR Complaint. Although these employees had initially complained to Ravich, Marzano met with them independently. Marzano also stated that, prior to these complaints, she separately had received other complaints about the way plaintiff treated other employees. In opposition, "plaintiff offered nothing but speculation that any of the defendants' challenged actions were motivated, even in part, by unlawful discrimination or retaliation, and such speculation is insufficient to defeat summary judgment." *Ellison v Chartis Claims, Inc*., 178 AD3d 665, 669 (2d Dept 2019).

In addition, plaintiff argues that Lippman tried to extort her into taking a $500,000 severance and that this shows pretext. The record indicates that TCW had been calculating severance packages based on the terms of the Employment Agreement and had decided to offer $500,000 to plaintiff as a severance. Ravich advised plaintiff that he could possibly secure around $700,000. Through Ravich, plaintiff attempted to negotiate a $2 million severance package, which was rejected. Ravich told plaintiff that Lippman would be meeting with her on December 6, 2017 to discuss the terms. Plaintiff filed the HR Complaint on December 5, 2017. In opposition to TCW defendants' motion, plaintiff has not provided anything more than self-serving allegations in support of her contentions that the severance proposal was pretextual.

"[S]elf-serving testimony . . . is insufficient to defeat summary judgment." *Deebs v ALSTOM Transp., Inc.*, 346 Fed Appx 654, 656 (2d Cir 2009) (internal quotation marks omitted).

Plaintiff asserts that Human Resources failed to investigate her complaint until after she was terminated and that this shows pretext. However, plaintiff's conclusory assertions are again belied by the record. Rather, the record indicates that TCW took immediate action with respect to plaintiff's complaint. Plaintiff and Ravich were both interviewed and Ravich was removed from the Distressed Fund and advised not to speak to plaintiff. An outside investigator, Elizabeth Gramigna, Esq., was hired to conduct an investigation, although plaintiff was terminated prior to the start of Ms. Gramigna's investigation. Plaintiff only speculates that Ms. Gramigna was not impartial.

Plaintiff claims that she was subjected to disparate treatment, alleging that a male employee who had four violations was "being drawn into the Distressed circle by Ravich and Purdy." Plaintiff's memorandum of law at 7. However, the record indicates that the other male employee had four violations, while plaintiff had five. Furthermore, after his fourth violation, that employee was compelled to undergo retraining and warned that "any further violation could be cause for his immediate termination." Engelsman aff, ¶ 57.

With respect to the profane language, Lippman testified that it was not just the use of profanity that he found unacceptable but it was the way that plaintiff treated other employees. Lippman testified that he also had conversations with other male employees when he felt that their behavior "was not acceptable to what I expect." NYSCEF Doc. No. 676, Lippman tr at 547.

Ravich allegedly advised plaintiff that Lippman made inappropriate gender-based comments when Lippman discussed not renewing plaintiff's Employment Agreement. However,

even if Lippman made inappropriate comments, "under the circumstances, they constitute at most stray remarks which, even if made by a decision maker, do not, without more, constitute evidence of discrimination." *Hudson v Merrill Lynch & Co., Inc.*, 138 AD3d 511, 517 (1st Dept 2016) (internal quotation marks and citation omitted).

According to plaintiff, TCW and Lippman's actions with respect to the Distressed Fund, demonstrate pretext. She asserts that TCW, Lippman and Ravich tried to drive her out of the company by diverting marketing resources away from the Distressed Fund, thereby impairing her ability to meet the $100 million threshold. Plaintiff further claims that they divested her of trading authority by requiring Ravich and Purdy to approve of all trades. Further, plaintiff asserts that TCW withheld back office support, such as timely negotiating ISDA agreements. Also, Plaintiff asserts that, at a point when plaintiff thought that she could possibly meet the $100 million goal, TCW was motivated to get her out before this could happen.

Nonetheless, plaintiff provides no basis for her claims that TCW and Lippman's actions with respect to the Distressed Fund were motivated by gender animus. For example, with respect to the ISDA agreements, Ashiru states that, "[a]t no point was I given any instruction — by Mr. Ravich or anyone else — to take my time with or otherwise delay negotiations and finalization of ISDA agreements for the Distressed Fund, nor did I do so." Ashiru aff, ¶ 37. Moreover, the record indicates that Lippman had personally invested over $5 million in the Distressed Fund.

The record indicates that Lippman was planning to meet plaintiff on December 6, 2017 to advise her that TCW was not extending her Employment Agreement. Nonetheless, even if there was any discrepancy with the letters written to investors, or discrepancy as to whether her end date would be December 6, 2017 or February 28, 2018, plaintiff fails to demonstrate how gender

discrimination was a motivating factor in TCW defendants' treatment of her. Accordingly, even viewing the evidence in a light most favorable to plaintiff, plaintiff fails to produce any evidence that TCW defendants treated her differently under the circumstances, due to her gender. "Stated otherwise, on this record, no triable issue exists as to whether the employer, in taking the challenged action, was motivated at least in part by [gender] discrimination." *Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 81 (1st Dept 2017) (internal quotation marks and citation omitted).

Accordingly, in light of above, plaintiff having failed to establish that the reasons given by the TCW defendants were pretextual, TCW defendants are granted summary judgment dismissing plaintiff's first cause of action for retaliation in violation of NYCHRL.

2. As Regarding Ravich

Under the cause of action alleging retaliation, the complaint sets forth that, "[a]s a result of [plaintiff's] good faith complaint of sexual harassment and discrimination to [TCW], [TCW], Lippman and Ravich took adverse employment actions against [plaintiff], including terminating her employment. Complaint, ¶ 103. Here, plaintiff cannot establish a prima facie claim of retaliation as she has produced no evidence that Ravich was involved in the decision to terminate her employment.

In opposition to the summary judgment motions, it appears that plaintiff is claiming that Ravich retaliated against her by adversely altering the terms and conditions of her employment after she ended the sexual relationship and that he effectively set in motion and facilitated events that culminated in the termination of her employment. Referencing *Malena v Victoria's Secret Direct, LLC*, 886 F Supp 2d 349 (SDNY 2012), plaintiff claims that Ravich may be held liable for retaliation even if he did not actually make the decision to terminate plaintiff because his

actions may have affected TCW defendants' decision to terminate plaintiff. In relevant part, in *Malena*, O'Malley, an individual defendant, complained to Human Resources "that she was concerned about Malena's [plaintiff] performance and concerned that a second child may keep her out of the office." *Id.* at 354 (internal quotation marks omitted). Malena had also complained to Human Resources about O'Malley's treatment towards her. Malena was fired shortly after making this complaint. Malena commenced an action alleging, among other things, that she was discriminated and retaliated against on the basis of her pregnancy and maternity leave. In opposition to Malena's prima facie retaliation claim, the Court found that there was no evidence adduced showing whether or not the corporate defendants considered either O'Malley or Malena's complaint prior to terminating plaintiff. The Court denied O'Malley's summary judgment motion dismissing the retaliation claim alleged against her, holding that "[b]y supplying the intent and the complaints that may have led to [Malena's] termination, O'Malley may have actually participate[d] in the conduct giving rise to the [Malena's] . . . claim[s]." *Id.* at 366 (internal quotation marks and citations omitted).

First, as Ravich notes, these theories were not asserted in plaintiff's complaint and cannot be considered at this time. *See e.g. Ostrov v Rozbruch*, 91 AD3d 147, 154 (1st Dept 2012) (internal quotation marks and citations omitted) ("A court should not consider the merits of a new theory of recovery, raised for the first time in opposition to a motion for summary judgment, that was not pleaded in the complaint."). Regardless, these alternative theories are without merit. Plaintiff concedes that she did not engage in protected activity prior to December 5, 2017. Oral arg tr at 27-28, 54-58. Accordingly, Ravich's alleged actions, all of which predate December 5, 2017, cannot be causally connected to the protected activity and cannot support the retaliation claim. Further, *Malena v Victoria's Secret Direct, LLC*, *supra*, is inapplicable. In contrast to

Malena, in the instant situation, it is undisputed that Ravich—unlike O'Malley—did not participate in the termination decision and it was plaintiff's own actions that led to her termination.[11]

Accordingly, as plaintiff fails to raise a triable issue of fact that Ravich retaliated against her, Ravich is granted summary judgment dismissing the first cause of action as against him.

B. Second Cause of Action – NYCHRL Gender Discrimination

Pursuant to the NYCHRL, as set forth in Administrative Code § 8-107 (1) (a), it is an unlawful discriminatory practice for an employer to discriminate against an individual in the terms, conditions or privileges of employment because of the individual's gender. The provisions of the NYCHRL are to be construed more liberally than its state or federal counterparts. *Bennett v Time Warner Cable, Inc.*, 138 AD3d 598, 599 (1st Dept 2016).

To establish a discrimination claim under the NYCHRL, plaintiff has to prove by a "preponderance of the evidence that she has been treated less well than other employees because of her gender." *Williams v New York City Housing Auth.*, 61 AD3d 62, 78 (1st Dept 2009); *see also Suri v Grey Global Group, Inc.*, 164 AD3d 108, 115 (1st Dept 2018) ("The [NYCHRL] speaks to unequal treatment and does not distinguish between sexual harassment and hostile work environment"). Further, under "the greater protections afforded to plaintiffs under the City HRL," plaintiff does not have to allege that Ravich subjected to her to an adverse employment action. *O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 91 (1st Dept 2017); *see also Williams v New York City Housing Auth.*, 61 AD3d 62 at 79 (holding that "a focus on unequal treatment based on gender--regardless of whether the conduct is 'tangible' (like hiring or firing) or not--is in fact the approach that is most faithful to the uniquely broad and remedial purposes

[11] As will be further discussed, whether Ravich—prior to plaintiff filing her HR Complaint on December 5, 2017—took discriminatory actions that impeded plaintiff from succeeding at TCW, that issue goes to plaintiff's second cause of action for gender discrimination.

of the local statute"). Despite the broader application of the NYCHRL, conduct that consists of "petty slights or trivial inconveniences ... do[es] not suffice to support a hostile work environment claim." *Buchwald v Silverman Shin & Byrne PLLC*, 149 AD3d 560, 560 (1st Dept 2017) (internal quotation marks and citation omitted).

As with claims for unlawful retaliation, as discussed in the subsection above, the *McDonnell Douglas Corp*. burden shifting analysis applies when an employer brings a motion for summary judgment in a discrimination case. This analysis first requires plaintiff to set forth that she is a member of a protected class, was qualified for the position, suffered an adverse employment action, and that said adverse action occurred under circumstances giving rise to an inference of discrimination. *Ferrante v American Lung Assn*., 90 NY2d 623, 629 (1997).

If the plaintiff is able to set forth a prima facie case of discrimination, then the burden shifts to the defendants to rebut the presumption by demonstrating that the adverse action occurred for a nondiscriminatory reason. *Id*. If the defendant meets this burden, the plaintiff "is still entitled to prove that the legitimate reasons proffered by defendant were merely a pretext for discrimination." *Id*. at 629-630.

Further, on a motion for summary judgment under the NYCHRL, when a defendant has put forth its nondiscriminatory reason for its actions, the court should then refrain from then going back to the question of whether a prima facie case has been made, but proceed to see whether "no jury could find defendant liable under any of the evidentiary routes - - *McDonnell Douglas*, mixed motive, 'direct' evidence, or some combination thereof." *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 45 (1st Dept 2011).

At this stage, plaintiff must show that there is an issue of material fact as to whether the employer's stated reasons are false and or pretextual (*Melman*, 98 AD3d supra at 114), or

"unlawful discrimination was one of the motivating factors, even if it was not the sole motivating factor," for the employer's action. *Id*. at 127; *see also Carryl v MacKay Shields, LLC*, 93 AD3d 589, 590 (1st Dept 2012); *Bennett*, 92 AD3d at 39. Where the plaintiff "responds with some evidence that at least one of the reasons proffered by defendant is false . . . such evidence of pretext should in almost every case indicate to the court that a motion for summary judgment must be denied." *Bennett*, 92 AD3d at 45.

In cases involving alleged sexual misconduct, courts have "dispensed with the need for much of the nomenclature . . . such as sexual harassment and quid pro quo, and instead focused on the existence of differential treatment in connection with unwanted gender-based conduct." *Suri v Grey Global Group, Inc*., 164 AD3d at 114 (internal quotation marks and citation omitted). For example, in *Suri v Grey Global Group, Inc*., the plaintiff alleged that, after rejecting her supervisor's sexual advance, the supervisor subjected her to a hostile work environment. The supervisor allegedly complimented the plaintiff and squeezed her thigh. The plaintiff "understood [his] behavior as a sexual overture." *Id.* at 111. The supervisor denied the allegations asserted against him. Specifically, after this incident, the supervisor's behavior towards the plaintiff changed and he, among other things, allegedly "dismissed her work; talked over her; put his hand in her face when she was talking; criticized, belittled and mocked her in front of other employees; cut her out of meetings; withheld resources; and delayed one of her projects." *Id.* at 111-112.

The Court recognized that "differential treatment may be actionable even where the treatment does not result in an employee's discharge." *Id.* at 120. Accordingly, even if plaintiff could not prove that her discharge was discriminatory, she may still be able to recover for differential treatment based on gender. The Court noted that the supervisor did not engage in

sexually charged conversations and that he denied making any sexual overtures. However, it held that "[s]exual advances are not always made explicitly. The absence of evidence of a supervisor's direct pressure for sexual favors as a condition of employment does not negate indirect pressure or doom the claim." *Id.* at 116. It held that, "[i]t is a jury's function to determine what happened between [the supervisor] and Suri, and whether it amounted to gender discrimination." *Id.* Further, the *Suri* court reasoned that if plaintiff's testimony is credited that "her treatment at the workplace deteriorated in the wake of these incidents, then a jury could find that such behavior did not constitute petty slights or trivial inconveniences." *Id.* at 117 (internal quotation marks and citations omitted). The *Suri* court ultimately found that issues of fact remained as to whether the plaintiff was treated less well due to her gender in violation of the NYCHRL.

As illustrated by *Suri*, while NYCHRL does not place a strict prohibition on a sexual relationship between a supervisor and his or her subordinate, it can impose liability for differential treatment based on such a relationship. This is because NYCHRL protects an employee from being pressured to sleep with his or her supervisor to proverbially "get ahead." Put another way, NYCHRL protects employees from having to compete with one another sexually to succeed in the workplace.

As set forth extensively, plaintiff testified about how Ravich arranged "breakfast meetings," where Ravich would make unwanted sexual demands and tie them into what favors he did or would do for her. Ravich's alleged favors included, but were not limited to: investing in the Distressed Fund himself, along with getting several other TCW executives and friends to invest, providing marketing and trading support for the fund and securing an extension of time for plaintiff's automatic termination provision in her Employment Agreement. Complaint, ¶ 53.

For example, Ravich stated that he would "personally see to it that Investor A committed to a $25 million investment in the Fund," implying that if plaintiff rejected his advances, he would withdraw his financial support for the Distressed Fund. *Id.*, ¶ 34.

Here, as in *Suri v Grey Global Group, Inc.*, assuming "[t]he absence of evidence of a supervisor's direct pressure for sexual favors as a condition of employment does not negate indirect pressure or doom the claim." *Id.* at 116. Ravich first acted as the liaison who brought plaintiff into TCW and ultimately became plaintiff's supervisor. Plaintiff claims that Ravich improperly used his dominant position at TCW to impose sexual demands on plaintiff as an implicit condition for supporting the Distressed Fund. Plaintiff further believed that rejecting Ravich's sexual advances would lead to him withdrawing his support. Therefore, in the present case, viewed in the light most favorable to plaintiff, plaintiff has raised a triable issue of fact that Ravich subjected her to different terms, conditions and privileges of her employment based on gender, and thereby treated her less well than other employees due to her gender. *See e.g. Crookendale v New York City Health & Hosps. Corp.,* 175 AD3d 1132, 1132 (1st Dept 2019) (internal quotation marks and citation omitted) ("In her affidavit in opposition to defendant's motion, plaintiff sufficiently described being touched and complimented inappropriately to permit a jury reasonably to find that she was treated less well than her male colleagues because of her gender and that the conduct complained of was neither petty nor trivial").

Plaintiff testified that, after she stopped having sex with Ravich, his attitude towards her and support for the fund changed. According to plaintiff, Ravich stopped intervening on her behalf to obtain the necessary back office support for the Distressed Fund, he limited her trading autonomy and he ultimately put pressure on her to leave. Plaintiff claims that these actions were adverse and that they were causally related to stopping the sexual relationship. Ravich denies

these assertions, denies any causal connection and tries to establish that plaintiff suffered no adverse consequences. However, and to reiterate, under the NYCHRL, a plaintiff is not required to establish that she "suffer[ed] a materially adverse employment action in order to succeed in an anti-discrimination action ... ." *O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 91 (1st Dept 2017). The jury must determine from the admissible evidence whether Ravich "linked tangible job benefits to the acceptance or rejection of sexual advances." *Karibian v Columbia University*, 14 F3d 773, 778 (2d Cir 1994).

Notwithstanding the evidence put forward by plaintiff, Ravich denies having sex with plaintiff. He further denies plaintiff's allegations that he groped her breasts and crotch in her office, which, if true, may sustain a hostile work environment claim under the NYCHRL. However, this "denial that he engaged in any of the alleged conduct and the other individual defendants' denial of any knowledge of such conduct raises genuine credibility issues that the court may not decide on a motion for summary judgment." *McRedmond v Sutton Place Rest. & Bar, Inc.*, 95 AD3d 671, 672 (1st Dept 2012).

Ravich further argues that, even accepting plaintiff's allegations as true, the sex was not unwelcome so it would not support a claim for unwanted gender-based conduct. However, "the question of whether particular conduct was unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact." *Alpha Animal Health, P.C.*, 124 AD3d 852, 854 (2d Dept 2015) (internal quotation marks and citation omitted). Accordingly, the details of the breakfast meetings and whether the plaintiff was subject to unwelcome sexual advances are questions of fact for the jury.

Ravich alternatively argues that there is no evidence that the alleged sexual conduct played a motivating role in his actions. Nonetheless, "the overall context in which [the

challenged conduct occurs] cannot be ignored." *Suri v Grey Global Group, Inc*., 164 AD3d at 115 (internal quotation marks and citation omitted). According to plaintiff, the unwelcome sexual advances started right after Ravich facilitated the agreement for plaintiff to start at TCW as an independent contractor. They continued throughout the time plaintiff was brought on as an employee. According to the plaintiff, when the sex ended, so did Ravich's willingness to effectively play the role of her go-to person at TCW.

Accordingly, Ravich's motion for summary judgment dismissing the second cause of action is denied.

TCW defendants take no position on whether this branch of Ravich's motion should be granted, but argue that if this court dismisses the second cause of action as against Ravich, the second cause of action should also be dismissed as against TCW defendants, as their liability here is solely derivative of Ravich's. To the contrary, Plaintiff maintains that TCW Defendants' liability here is not only derivative as to the conduct of Ravich. Plaintiff argues that TCW would still be liable for gender discrimination towards her for the discriminatory actions of Lippman and others at TCW.

As set forth in the analysis of the first cause of action, plaintiff fails to raise a triable issue of fact that her termination by TCW defendants was motivated, even in part, by an impermissible motive. Furthermore, in response to TCW defendants' motions, plaintiff fails to raise a triable issue of fact that Lippman or anyone besides Ravich at TCW discriminated against her on the basis of gender. Plaintiff provides no support for her arguments that Lippman or anyone else at TCW "plotted" with Ravich or that any of TCW's actions in connection to the Distressed Fund were motivated by a discriminatory animus.[12] As such, there can be no derivative liability to

[12] Plaintiff alleges that Ravich plotted with Lippman "to limit [plaintiff']s trading authority and impose other restrictions in violation of the terms or the private placement memorandum for the

TCW for the actions of Lippman or others at TCW other than potentially Ravich which the court will explain as follows.

While plaintiff may have been dissatisfied with TCW's back office functions, or upset with changes to the way trades were made, she offers no support that anyone at TCW knew about her alleged sexual relationship with Ravich. Further, even viewing the evidence in a light most favorable to plaintiff, plaintiff fails to produce any evidence that anyone at TCW—other than Ravich—treated her differently, under the circumstances, due to her gender. "Stated otherwise, on this record, no triable issue exists as to whether the employer, in taking the challenged action, was motivated at least in part by [gender] discrimination." *Hamburg v New York Univ. Sch. of Medicine*, 155 AD3d 66, 81 (1st Dept 2017) (internal quotation marks and citation omitted).

Nonetheless, the NYCHRL "imposes strict liability on employers for the acts of managers and supervisors, including where, as here, the offending employee exercised managerial or supervisory responsibility." *McRedmond v Sutton Place Rest. & Bar, Inc*., 95 AD3d at 673 (internal quotation marks and citations omitted)*; see also* Administrative Code 8-107 (13) (b) (1). As a result of this decision, to the extent that TCW defendants seek summary judgment on the second cause of action, that part of TCW defendants' motion is denied in light of the denial of Ravich's motion with regard to the second cause of action. However, if Ravich is ultimately found liable, TCW's liability will be purely vicarious as an employer under the NYCHRL.

Fund." Plaintiff's memorandum of law in opposition to Ravich's motion at 6. Plaintiff also makes broad and unsupported complaints against various departments at TCW, blaming them for the failure of the Distressed Fund.

C. Third Cause of Action – NYCHRL Aiding and Abetting as against Lippman

Administrative Code § 8-107 (6) provides that an individual employee may be held liable for aiding and abetting discriminatory conduct. *See e.g. Ananiadis v Mediterranean Gyros Prods., Inc*., 151 AD3d 915, 917 (2d Dept 2017) ("An employee who did not participate in the primary violation itself, but who aided and abetted that conduct, may be individually liable based on those actions under both the [New York State Human Rights Law] and the NYCHRL").

Plaintiff seeks to hold Lippman liable as an aider and abettor under the NYCHRL. For the reasons set forth below, this court dismissed the third cause of action during oral argument held on March 11, 2020. Plaintiff stated that Lippman "is primarily liable not as an aider or abettor but as a primary actor." Oral arg tr at 62. Here, however, plaintiff alleges that it was the majority of Lippman's conduct that gives rise to the discrimination claim as to TCW. Lippman cannot be held liable for aiding and abetting his own alleged discriminatory conduct. *See Hardwick v Auriemma*, 116 AD3d 465, 468 (1st Dept 2014).

Furthermore, plaintiff conceded that "there's no evidence that [Lippman] had personal knowledge" of Ravich's alleged discriminatory treatment directed at plaintiff. Oral arg tr at 62. For this reason, the aiding and abetting claim also fails. *See e.g. Asabor v Archdiocese of N.Y*., 102 AD3d 524, 529-530 (1st Dept 2013) (internal quotation marks and citations omitted) ("However, plaintiff failed to identify any evidence that any of the individual defendants actually participate[d] in the alleged discriminatory acts so as to support her alternative theory of individual liability on the grounds of aiding and abetting the alleged acts.").

Accordingly, TCW defendants are granted summary judgment dismissing the aiding and abetting cause of action alleged as against Lippman.

D. Fourth Cause of Action - Breach of Contract as Against TCW

The elements of a breach of contract claim are: (1) the existence of a valid contract (2) performance of the contract by the injured party; (3) breach by the other party; and (4) resulting damages. *Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 (1st Dept 2007).

Pursuant to the Employment Agreement, there are four separate and distinct scenarios whereby TCW can terminate an employee for cause. In relevant part, one is for "fraud or gross negligence in the performance of your duties and responsibilities." Another scenario is where, "your repeated failure or repeated refusal, after written notice of such repeated failure or refusal has been given to you, in any material respect, to perform faithfully or diligently, all or a substantial portion of your duties to TCW." Only in this scenario, and not the other three, is an employee entitled to written notice and a cure period, prior to termination. It is well settled that "a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Quadrant Structured Products Co., Ltd. v Vertin*, 23 NY3d 549, 559-560 (2014). As previously stated, TCW defendants have argued that plaintiff was grossly negligent and that such conduct was a basis for her termination. Accordingly, as provided in plaintiff's Employment Agreement, if TCW believed that plaintiff was grossly negligent, they could terminate her without providing her with written notice of the violations and a cure period. The contractual language is unambiguous and plaintiff would not be entitled to notice and time to cure.

This Court finds, however, that an issue of fact remains as to whether plaintiff was grossly negligent. There is no definition provided in the Employment Agreement for gross negligence. At common law, gross negligence is "conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing." *Lubell v Samson Moving &Storage,*

Inc., 307 AD2d 215, 216 (1st Dept 2003) (internal quotation marks and citation omitted). Moreover, "[o]rdinarily the question of gross negligence is a matter to be determined by the trier of fact." *Id.*

TCW defendants argue that repeated compliance violations and committing an information barrier violation constitute gross negligence as a matter of law. Plaintiff argues that her "conduct did not rise to the level of reckless indifference." *Sommer v Federal Signal Corp*., 79 NY2d 540, 555 (1992). On this motion, TCW defendants have failed to establish that plaintiff's conduct was grossly negligent as a matter of law. "Whether this indeed is a case of a simple mistake or reckless indifference is for a jury to determine." *Id.*

Accordingly, the branch of TCW defendants' motion for summary judgment dismissing the fourth cause of action for breach of contract as against TCW is denied.

E. Fifth Cause of Action - Breach of the Implied Covenant of Good Faith and Fair Dealing as Against TCW

"[A] covenant of good faith and fair dealing is implicit in all contracts. This covenant is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." *Gettinger Assoc, L.P. v Abraham Kamber Co. LLC*, 83 AD3d 412, 414 (1st Dept 2011) (internal quotation marks and citations omitted). Plaintiff claims that TCW's conduct, which allegedly "fell short in providing other industry-norm back office functions" impeded plaintiff's ability to secure the $100 million of assets under management that "would have resulted in an automatic extension of her Employment Agreement." Complaint ¶¶ 65, 135.[13]

[13] Plaintiff does not address this cause of action in opposition to TCW's motion for summary judgment. During oral argument plaintiff stated that "documents produced by TCW shows that the marketing meetings, after the first quarter of 2017, when Ms. Tirschwell says that the sex stopped with Mr. Ravich, fell off by 95 percent." Oral arg tr at 74; *see also* NYSCEF Doc. No. 511, Spreadsheet of Marketing Meetings.

It is well settled that "claims for breach of the implied covenant of good faith and fair dealing ... which are based on the same allegations and seek the same damages as the breach of contract [claims] ... should [be] dismissed as duplicative." *Ullmann-Schneider v Lacher & Lovell-Taylor, P.C.*, 121 AD3d 415, 416 (1st Dept 2014). Here, although plaintiff is seeking the same amount of damages as under her breach of contract claim, it is not based on the same underlying allegations as the breach of contract claim and cannot be dismissed as duplicative.

Nonetheless, TCW defendants dispute plaintiff's allegations with documentation and numerous affidavits. For instance, Joseph Carieri (Carieri), head of marketing for TCW, stated that he is unaware of any change in the level of marketing support provided to the Distressed Fund, nor was he asked to reduce marketing efforts. Carieri states that TCW's marketing efforts included "making over 400 solicitations to over 100 potential investors in the period March 1, 2017 through November 2017." NYSCEF Doc. No. 193, Carieri aff, ¶ 21. In addition, in August 2017, TCW provided more marketing support to the Distressed Fund by hiring someone with "significant experience in marketing alternative investments." *Id.*, ¶ 23. Plaintiff never complained to Carieri that the marketing was inadequate.

By way of another example, Ashiru, who was involved in negotiating the ISDA agreements, stated that he explained the process to plaintiff. He asserts that finalization of ISDA agreements can typically take between three to six months and that the ISDA agreements were negotiated in a commercially reasonable time frame. "[Plaintiff] complained repeatedly to me that TCW was not working quickly enough. I believe her complaints were unreasonable, and I know that TCW employees were working diligently to secure the agreements." Ashiru aff, ¶ 35.[14]

[14] Jackson concurred that the timeframe was the industry standard.

TCW has established that it acted in good faith with its efforts in providing office support for the Distressed Fund. In opposition, plaintiff fails to raise a triable issue of fact that TCW acted in a way that "would deprive the other party of the right to receive the benefits under their agreement." *Gettinger Assoc, L.P.*, 83 AD3d at 414.

Accordingly, TCW is granted summary judgment dismissing the fifth cause of action for breach of the implied covenant of good faith and fair dealing.

F. Punitive Damages

Pursuant to Administrative Code § 8-502 (a), a plaintiff can recover punitive damages under the NYCHRL. "[T]he standard for determining punitive damages under the NYCHRL is whether the wrongdoer has engaged in discrimination with willful or wanton negligence, or recklessness, or a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard." *Chauca v Abraham*, 30 NY3d 325, 334 (2017) (internal quotation marks and citation omitted). Punitive damages "are intended to address gross misbehavior" and "may only be awarded for exceptional misconduct which transgresses mere negligence." *Id.* at 331 (internal quotation marks and citations omitted).

Here, TCW defendants and Ravich have established that there is no evidentiary route by which a jury could reasonably find that they acted with "conscious disregard of the rights of others," and plaintiff has failed to raise a triable issue of fact in response. *Chauca v Abraham*, 30 NY3d 325, 334 (2017); *see also Gerulaitis v Recreational Concepts, Inc.*, 295 AD2d 562, 563 (2d Dept 2002) ("[F]or a plaintiff to hold an employer liable for punitive damages where liability is vicariously derived from an employee's acts, the plaintiff must establish that the employer knowingly ordered, participated in, or ratified the conduct of the employee.").

Accordingly, the branches of TCW Defendants and Ravich's motion seeking summary judgment dismissing plaintiff's claim for punitive damages is granted.

G. Actual and Consequential Damages

Plaintiff was terminated by TCW for committing several compliance violations, as well as for other issues with her conduct and job performance. She has failed to raise a triable issue of fact that this termination was retaliatory. Plaintiff has also failed to raise a triable issue of fact that anyone other than possibly Ravich at TCW denied her support prior to reaching her funding goal, either in breach of the covenant of good faith and fair dealing, or based on gender animus. Furthermore, TCW has set forth evidence that, even prior to committing the fifth compliance violation, plaintiff was scheduled to be terminated on December 6, 2017.

Nonetheless, it will be for the jury to decide if plaintiff prevails on her second and fourth causes of action, and what if any damages she may be entitled to. Of course, plaintiff's potential recovery of damages on her fourth cause of action for breach of her Employment Agreement will be governed by the terms of said agreement; but this court declines to place any restrictions on how the trial judge might handle the issues of damages at the time of trial. *See generally Amaducci v Metro. Opera Ass'n*, 33 AD2d 542, 543 (1st Dept 1969); *see also Rather v CBS Corp.*, 68 AD3d 49, 55 (1st Dept 2009). If plaintiff prevails on her breach of contract claim, the amount of damages owed to plaintiff for said breach can be precisely calculated from the terms of her Employment Agreement, with the outstanding issue being whether she was terminated with or without cause pursuant to the terms of the Employment Agreement.

Similarly, it will be for the trial court to determine what potential damages are recoverable if plaintiff prevails on her second cause of action for sex discrimination. *See Albunio v City of New York*, 67 AD3d 407, 409 (1st Dept 2009) (affirming damage awards for

psychological, professional and reputational injuries in NYCHRL discrimination case), *affd*, 16 NY3d 472 (2011).[15]

Accordingly, TCW defendants' request to strike plaintiff's demand for actual or consequential damages after February 28, 2018 is denied.

CONCLUSION

Accordingly, it is hereby

ORDERED that defendants TCW Group Inc., TCW LLC and David Lippman's motion for summary judgment (motion sequence 006), is granted with respect to dismissing plaintiff's first, third, and fifth causes of action and striking the demand for punitive damages, and the motion is otherwise denied; and it is further

ORDERED that the part of defendant Jess Ravich's motion for summary judgment (motion sequence 008) seeking to dismiss the first cause of action and the request for punitive damages is granted, and the motion is otherwise denied; and it is further

ORDERED that defendants TCW Group Inc., TCW LLC and David Lippman's motion to strike (motion sequence 009) is granted to the extent of striking the affidavits of Kupferberg (NYSCEF Doc. Nos. 405 and 517) and the exhibits attached thereto (NYSCEF Doc. Nos. 518-531) and Raghavan (Raghavan) (NYSCEF Doc. Nos. 403 and 625) and the exhibit attached thereto (NYSCEF Doc. No. 626), and the motion is otherwise denied; and it is further

[15] TCW defendants state that, after plaintiff was terminated, the compliance department uncovered at least two additional compliance violations which would have supported the decision to terminate plaintiff. Plaintiff was required to disclose or preclear ownership interests in certain properties, but failed to do so. Plaintiff also transmitted research memoranda to outside parties without receiving prior approval from the compliance department. However, "[s]uch evidence is not a bar to litigation and does not warrant summary judgment, but only affects the plaintiff's damages if and when the employer is found liable." *Baldwin v Cablevision Sys. Corp.*, 65 AD3d at 967.

ORDERED that that plaintiff's cross motion to accept and deem timely the papers filed by plaintiff in this action is granted with respect to plaintiff's memorandum of law in opposition to the TCW defendants' motion for summary judgment (NYSCEF Doc. Nos. 399 and 439), the affirmation of Steven Storch and all exhibits attached thereto (NYSCEF Doc. Nos. 441-531) and plaintiff's memorandum of law in opposition to defendant Jess Ravich's motion for summary (NYSCEF Doc. Nos. 400 and 440), and the cross motion is otherwise denied; and it is further

ORDERED that defendant Jess Ravich's motion to strike (motion sequence 010) is granted to the extent of striking the Raghavan affidavit (NYSCEF Doc. No. 404), and the motion is otherwise denied; and it is further

ORDERED that plaintiff's cross motion to accept and deem timely the papers filed by plaintiff in this action is granted with respect to Ravich's summary judgment motion (NYSCEF Doc. No. 533) and the affirmation of Steven Storch and all exhibits thereto (NYSCEF Doc. Nos. 534-609), and the cross motion is otherwise denied; and it is further

ORDERED that within ten (10) of the e-filing date of this decision and order, counsel shall e-file a copy of said decision and order with notice of entry.

The foregoing constitutes the decision and order of this Court.

Dated: ___June 11, 2020___

ROBERT DAVID KALISH, J.S.C.

ENTER: