Rutigliano v Locantro
2017 NY Slip Op 30446(U)
March 3, 2017
Supreme Court, New York County
Docket Number: 654118/2015
Judge: Eileen Bransten

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

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JOSEPH RUTIGLIANO,

Plaintiff,

-against-

Index No. 654118/2015
Motion Date: 7/19/2016
Motion Seq. Nos. 001, 002

WILLIAM LOCANTRO, ROBERT ROMANOFF, EDM ELECTRICAL CONTRACTORS, INC., BRAVO SALES GROUP, INC., JOHN DOES 1 THROUGH 10, ABC CORPORATIONS 1 THROUGH 10

Defendants.

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BRANSTEN, J.

This matter comes before the Court on Plaintiff-Petitioner's Petition for dissolution pursuant to Business Corporation Law § 1104-a (Motion Sequence 001), and Defendant-Respondents' motion to dismiss the Petition pursuant to CPLR §§ 404 and 3211 (Motion Sequence 002). Defendant-Respondents oppose the Petition for dissolution, and Plaintiff-Petitioner opposes the motion to dismiss. For the foregoing reasons, the Court denies Plaintiff-Petitioner's motion for dissolution. The Court grants, in part, Defendant-Respondents' motion to dismiss the Petition.

I. Background

The instant Petition arises from a dispute between Plaintiff-Petitioner Joseph Rutigliano ("Rutigliano") and Defendant-Respondents William Locantro ("Locantro") and Robert Romanoff ("Romanoff") regarding ownership and control of Absolute Electrical Contracting of NY Inc., a unionized electrical contracting business ("Absolute" or the "Company"). Plaintiff-Petitioner Rutigliano alleges he holds one-third of all outstanding shares of Absolute, but has been effectively "frozen out" of Absolute through the "oppressive and illegal conduct" of his partners, Locantro and Romanoff. Petition ¶ 1. Rutigliano separately alleges Locantro and Romanoff improperly "diverted Company assets for their own benefit and robbed the Company of corporate opportunities." *Id.*

The Petition alleges that, in or about 2006, Rutigliano was approached by Locantro to join Absolute. Petition ¶ 10. At that time, Locantro was the sole owner and officer. *Id.* When Rutigliano first began working for Absolute, his initial compensation was "base salary plus commissions." *Id.* ¶ 12. Rutigliano began taking on more responsibilities at Absolute, eventually taking responsibility for "all of the day-to-day operations of the Company." *Id.* ¶ 13.

In mid-2011, Rutigliano and Locantro began negotiating the terms of a shareholder agreement pursuant to which each would own a 50% stake in Absolute. Petition ¶ 15. Soon after, Locantro advised Rutigliano he wanted a childhood friend, Robert Romanoff, to join Absolute as its new Chief Financial Officer and part-owner. *Id.* ¶ 16.

On January 1, 2012, the parties signed an operating agreement governing the terms of operation and control of Absolute.[1] *See* NYSCEF No. 56, Romanoff Affidavit Exhibit A (the "Operating Agreement"). The Operating Agreement sets forth that Plaintiff-Petitioner Rutigliano, Defendant-Respondent Locantro, and Defendant-Respondent Romanoff were each to possess a one-third ownership stake in Absolute. *See* Operating Agreement at 4, 28. Locantro and Rutigliano's initial contributions were valued at $250,000, while Romanoff provided no initial contribution for his ownership stake. *See* Operating Agreement at 28.

The Petition alleges disagreements between the shareholders arose almost immediately. Petition ¶ 28. For example, the Petition alleges Defendant-Respondent Romanoff quickly fell behind on paying Absolute's creditors, bounced payroll checks, and generally "could not properly manage the company's finances." *Id.* ¶¶ 28-30. The Petition alleges that, around the same time, Defendant-Respondents began denying Plaintiff-Petitioner access to Absolute's books and Records. *Id.* ¶ 30.

The Petition further alleges that, in September 2011, Defendant-Respondents Locantro and Romanoff formed EDM Electrical Contractors ("EDM") to bid on non-union contracting jobs for which Absolute was not eligible. Petition ¶ 26. To hide EDM's

[1] Notably, the Petition alleges the parties signed a similar operating agreement several months earlier on October 1, 2011. Petition ¶ 18. However, all parties are in agreement that the January 1, 2012 Operating Agreement has been the controlling document in this case since its inception. *See* Romanoff Affidavit ¶ 3; Rutigliano Affidavit ¶ 3; Pl. Reply Br. at 2 n.7 ("Petitioner does not dispute that the 2012 agreement controls").

existence from Plaintiff-Petitioner, Defendant-Respondents formed EDM under the name of the individual Defendant-Respondents' children. *Id.* ¶ 26.

The Petition further alleges that by late 2013, Absolute was significantly behind in repaying expenses which Rutigliano had incurred on Absolute's behalf. Petition ¶ 38. Then on November 2, 2013, Rutigliano was allegedly replaced as president of Absolute without prior notice. *Id.* ¶ 39. On November 12, 2013, Rutigliano met with Locantro to discuss his concerns regarding Absolute. *Id.* ¶ 41. Locantro allegedly told Plaintiff-Petitioner he "would pay the $250,000 owed to [Rutigliano] and that the Company would begin paying back all monies owed." *Id.*

On or about February 1, 2015, Defendant-Respondent Locantro called a meeting of the three shareholders for February 12, 2015. Petition ¶ 56. At that meeting, Defendant-Respondents Locantro and Romanoff allegedly "proceeded to vote to remove Rutigliano as 'managing member', officer, and 'member' of the Company. *Id.* ¶ 59. Locantro and Romanoff also "voted to suspend all compensation and other benefits owed to Petitioner." *Id.* By email dated March 6, 2015, Romanoff advised Rutigliano his "duties and responsibilities as president, officer, and managing member have been totally removed." *Id.* ¶ 61. Defendant-Respondents subsequently "denied Petitioner access to his office and mailed his personal effects to his home." *Id.*

At a shareholder meeting held on July 24, 2015, Locantro and Romanoff approved an immediate "capital call" which would require each of the three shareholders, including Plaintiff-Petitioner, to make a capital contribution of $102,550 within four days—by July

28, 2015. Petition ¶ 65. An additional shareholder meeting was held on October 9, 2015 for the purposes of issuing a second capital call. *Id.* ¶ 68. According to the Petition, Defendant-Respondents issued the capital calls in an improper attempt to dilute Plaintiff-Petitioner's interest in the company to nothing. *Id.* ¶ 69.

On December 9, 2015, Plaintiff-Petitioner filed the instant Petition seeking judicial dissolution of Absolute pursuant to Business Corporation Law § 1104-a (Count One). The Petition alleges nine additional causes of action against Defendant-Respondents, including "appointment of a receiver pursuant to Business Corporation Law § 1113" (Count Two); an accounting of Absolute and EDM (Count Three); breach of fiduciary duty (Count Four); breach of contract (Count Five); breach of the duty of good faith and fair dealing (Count Six); Conversion (Count Seven); unjust enrichment (Count Eight); tortious interference with Contract and economic advantage (Count Nine); and promissory estoppel (Count Ten).

II. Standards of Review

A respondent in a special proceeding "may raise an objection in point of law by setting it forth in his answer or by a motion to dismiss the petition, made upon notice within the time allowed for answer." C.P.L.R. § 404. The purpose of this provision "is to permit a motion to be made on all grounds available in an action under CPLR § 3211." *Bernstein Family Ltd. P'ship v. Sovereign Partners, L.P.*, 66 A.D.3d 1, 5 (1st Dep't 2009); *see also Langella v. Front Door Associates, Inc.*, 34 Misc. 3d 1212(A) at *1 (Sup. Ct. Suffolk Cty.

2012) (holding a motion to dismiss pursuant to CPLR § 404 "should not involve a contest on the merits of the targeted claims, but instead, should be limited to the assertion of one or more of defenses in bar of the type contemplated by CPLR 3211(a)").

In considering a motion to dismiss for failure to state a claim under CPLR § 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). While factual allegations contained in a complaint are accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration. *Sud v. Sud*, 211 A.D.2d 423, 424 (1st Dep't 1995). The motion will be denied if the factual allegations contained within "the pleadings' four corners . . . manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151-52 (2002).

Where a motion to dismiss is based on documentary evidence under CPLR § 3211(a)(1), the claim will be dismissed "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002); *see also Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). Thus, courts will not grant dismissal based on documentary evidence where that evidence consists of contractual provisions which are ambiguous as applied, or which are subject to multiple "reasonable" interpretations.

Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc., 20 N.Y.3d 59, 64 (2012).

III. Discussion

Defendants move to dismiss the Petition in its entirety pursuant to CPLR § 3211 and § 404 on numerous grounds, including lack of standing, failure to state a claim and documentary evidence. The Court will address each argument separately below.

A. Dissolution of Absolute Pursuant to BCL § 1104-a

Defendant-Respondents argue the Petition's claim for judicial dissolution of Absolute (Count One) should be dismissed pursuant to CPLR §§ 3211(a)(1) and (7) for lack of standing and for failure to state a claim.

1. Standing

Defendant-Respondents first argue Plaintiff-Petitioner lacks standing to petition for dissolution because he does not meet the threshold ownership requirements set forth by BCL § 1104-a. Def. Mov. Br. at 9-11. Specifically, Defendant-Respondents argue Plaintiff-Petitioner's initial one-third stake in Absolute was "reduced to zero" due to failure to pay the July and October capital calls. Def. Mov. Br. at 9. In support, Defendant-Respondents rely on the provision of the Operating Agreement governing capital calls, as

well as several emails sent by Plaintiff-Petitioner regarding the relevant ownership dispute.[2]

Under BCL § 1104-a, "the threshold requirement for judicial dissolution is that the shareholder seeking dissolution hold at least 20% of the company's stock." *Shea v. Hambros PLC*, 244 A.D.2d 39, 52-53 (1st Dep't 1998) (citing BCL § 1104-a). The burden of showing a sufficient ownership interest is on the party seeking dissolution. This burden can be met in several ways, such as showing "the existence of an agreement between parties demonstrating an intent to form a corporation; tax records; as well as the conduct of the parties which may evidence exercise of functions consistent with shareholder status." *Klauss v. MacDonald*, 30 Misc. 3d 1221(A) at *8 (Sup. Ct. Suffolk Cty. 2011) (citing *Estate of Purnell v. LH Radiologists, P.C.*, 90 N.Y.2d 524, 529 (1997)).

Regarding capital calls made against members of Absolute, section 2.2 of the Operating Agreement states:

> No member shall be obligated to make any additional contribution to the Company's capital without the prior written consent of the Members. In the event any Member shall fail to contribute his full, pro rata share of any additional capital contribution then the Company interests of all Members shall be adjusted to reflect such capital contributions as are actually made.

Operating Agreement at § 2.2. Section 2.2 further indicates that the ownership interest of the member who fails to contribute such additional capital will be diluted by the following

[2] Because Defendant-Respondents' standing argument relies entirely on such documentary evidence, the Court will apply 3211(a)(1)'s documentary evidence standard here. *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002).

formula: "for each $1,000 of the capital call the member does not contribute he will lose .6% of his interest." *Id.*

According to Defendant-Respondents, once Plaintiff-Petitioner failed to pay the two capital calls, Section 2.2's dilution provision kicked in, resulting in the loss of Plaintiff-Petitioner's entire stake in Absolute. Def. Mov. Br. at 9. However, Plaintiff-Petitioner contends his failure to pay the capital calls had no effect on his ownership stake because Defendant-Respondents Locantro and Romanoff approved the calls without Plaintiff-Petitioner's consent, and thus failed to obtain "prior written consent of the members" as required by Section 2.2. Pl. Opp. Br. at 10-11. Notably, the parties dispute whether Section 2.2 requires unanimous consent to approve a capital call, or whether Defendant-Respondents' majority-vote approval was sufficient.

Upon review, the Court concludes the precise meaning of "prior written consent of the members" in Section 2.2 of the Operating Agreement is ambiguous enough to call into question whether the capital calls and resulting dilution of Plaintiff-Petitioner's ownership stake were permitted under the Operating Agreement. As such, at this early stage of litigation, the Operating Agreement alone is insufficient to "conclusively establish" Plaintiff-Petitioner's lack of standing to sue for dissolution under BCL § 1104-a. *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 64 (2012).

In further support of the argument that Plaintiff-Petitioner held less than a 20% interest in Absolute at the time the Petition was filed, Defendant-Respondents point to two

messages sent by Plaintiff-Petitioner to Defendant-Respondents Locantro and Romanoff after the capital calls were issued. *See* Def. Mov. Br. at 9-10. In the first, an email dated November 4, 2013, Plaintiff-Petitioner states "it is my belief that we both need to move on in an amicable way." NYSCEF No. 9, Petition, Exhibit H. In the second, a letter dated April 29, 2015, Plaintiff-Petitioner states "it is clear that I am owed money for my ownership interest in Absolute." NYSCEF No. 22; Petition, Exhibit U.

However, the Court concludes these statements fail to conclusively show Plaintiff-Petitioner was no longer an Absolute Shareholder at the time the statements were made. While the statements show Plaintiff-Petitioner's intent to divest himself of his interest in Absolute, the statements also indicate that the parties had not yet followed through on this intent. Thus, at the time they were sent, it appears that Plaintiff-Petitioner still maintained a claim to the one-third ownership stake discussed in those communications. Accordingly, Defendant-Respondents have failed to meet their burden of "conclusively establishing" Plaintiff-Petitioner lacked standing to sue under BCL § 1104-a. *Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002); CPLR § 3211(a)(1).

2. Whether the Petition alleges entitlement to dissolution generally

Next, Defendant-Respondents argue Plaintiff-Petitioner has failed to sufficiently allege any of BCL § 1104-a's prescribed grounds for dissolution.

The statute provides that a petitioner may move for judicial dissolution under one or more of the following grounds:

> (1) The directors or those in control of the corporation have been guilty of illegal, fraudulent or oppressive actions toward the complaining shareholders; (2) The property or assets of the corporation are being looted, wasted, or diverted for non-corporate purposes by its directors, officers or those in control of the corporation.

N.Y. Bus. Corp. Law § 1104-a. In this context, "illegal" and "fraudulent" actions take on their generally accepted common law definitions. *Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d 63, 70 (1984). "Oppressive actions" refer to conduct that "substantially defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise." *Id.* at 72 (internal citation omitted).

First, Defendant-Respondents argue Plaintiff-Petitioner fails to make a showing of "oppressive actions" because, as a minority shareholder, he could be out-voted in the resolution of all disputes by Defendant-Respondents and thus had no "reasonable expectation" of any particular benefit from his ownership of Absolute. Def. Mov. Br. at 10-11.[3]

However, as noted above, ambiguity remains as to whether the Operating Agreement required unanimous consent of all members—rather than a simple majority vote—in order to take certain shareholder actions. If the Operating Agreement, in fact, required unanimous consent to issue a capital call, as Plaintiff-Petitioner contends, then Defendant-Respondents' issuance of the capital call (and subsequent dilution of Plaintiff-Petitioner's ownership stake) pursuant to a mere majority vote may constitute an improper

[3] In making this argument, Defendant-Respondents rely entirely on the provisions of the Operating Agreement governing shareholder voting. As such, the Court will apply 3211(a)(1)'s documentary evidence standard here. *See Goshen v. Mut. Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002).

frustration of Plaintiff-Petitioner's "reasonable expectations" of membership in Absolute. *See Matter of Kemp & Beatley, Inc.*, 64 N.Y.2d at 70. Accordingly, the Court declines to dismiss the Petition's allegations of oppressive conduct on these grounds. *See Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y.3d 59, 64 (2012). [4]

Second, Defendant-Respondents argue the Petition fails to plead fraud or illegal conduct. To plead a cause of action for common law fraud, the plaintiff must allege a misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when made, and that there was justifiable reliance and resulting injury. *Braddock v. Braddock*, 60 A.D.3d 84, 86 (1st Dep't 2009). When alleging either fraudulent or illegal conduct under BCL § 1104-a, each element must be pled with particularity pursuant to CPLR § 3016. *Id.* at 88; *Berardi v. Berardi*, 108 A.D.3d 406, 407 (1st Dep't 2013).

In support of the Petition's allegations of fraud, Plaintiff-Petitioner argues only that Defendant-Respondents' use of EDM to secretly compete with Absolute "is clearly fraudulent as to Petitioner." Pl. Opp. Br. at 18. Upon review, however, the Court concludes

[4] Plaintiff-Petitioner also alleges numerous additional "oppressive actions" by Defendant-Respondents, including his termination from employment with Absolute, Defendant-Respondents' refusal to reimburse loans and other expenses incurred on behalf of Absoute, and cutting off access to company information. *See* Pl. Opp. Br. at 19. However, as with the Petition's claims of "oppressive acts" premised on the two capital calls, a determination as to whether these additional actions constitute "oppressive acts" turns on whether such shareholder actions required prior unanimous consent of the shareholders. Because, as discussed above, this determination requires a more developed factual record, consideration of these allegations is premature at this early stage of the proceeding.

the Petition's allegations relating to Defendant-Respondents' creation and operation of EDM sound in breach of fiduciary duty, not fraud. *See, e.g., Burkhart, Wexler & Hirschberg, LLP v. Liberty Ins. Underwriters*, 19 Misc. 3d 1112(A) at *8 (Sup. Ct. Nassau Cty. 2008), *aff'd sub nom. Burkhart, Wexler & Hirschberg, LLP v. Liberty Ins. Underwriters, Inc.*, 60 A.D.3d 884 (2nd Dep't 2009) (finding allegations of a firm pursuing interests in competition with its client sounded in breach of fiduciary duty). Accordingly, Count One is dismissed *without prejudice* to the extent it is premised on allegations of fraudulent conduct by Defendant-Respondents.

Regarding allegations of Defendant-Respondents' "illegal" conduct, Plaintiff-Petitioner argues the alleged conduct violated tax laws and labor laws, including the National Labor Relations Act ("NLRA"). Pl. Opp. Br. at 18. Plaintiff-Petitioner points to Defendant-Respondents' alleged comingling of Absolute's "union shop" labor pool with EDM's non-union labor pool as a potential violation of the NLRA. *Id.*

However, Plaintiff-Petitioner does not indicate the specific NLRA provisions or tax laws allegedly violated by such conduct, and the Court will not imply a violation of law where none is explicitly set forth in the Petition or accompanying briefing. *Berardi*, 108 A.D.3d at 407 (requiring misconduct presented as the basis for a dissolution motion to be alleged with specificity). Accordingly, the claim for dissolution is dismissed *without*

prejudice to the extent it is premised on allegations of illegal conduct by Defendant-Respondents.[5]

B. Appointment of a Receiver Pursuant to BCL §1113

Defendant-Respondents argue Plaintiff-Petitioner has failed to state a claim for entitlement to a receiver pursuant to BCL § 1113. Def. Mov. Br. at 12-13.

Under BCL § 1113, the Court may, at its discretion, appoint a temporary receiver for the purpose of "preserving the property and carrying on the business of the corporation" during the pendency of litigation. BCL § 1113. To show entitlement to a temporary receiver, the movant must show, by clear and convincing evidence, the non-movant's continued control of the corporation in question would result in "irreparable loss or material injury to the corporation or its assets." *McBrien v. Murphy*, 156 A.D.2d 140, 140 (1st Dep't 1989); *see also In re Judicial Accounting of Sakow*, 280 A.D.2d 378, 378 (1st Dep't 2001), *aff'd sub nom. In re Sakow*, 97 N.Y.2d 436 (2002).

It is well established that courts are to exercise "extreme caution" in appointing a temporary receiver, "because such appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits." *Hahn v. Garay*,

[5] While the majority of Plaintiff-Petitioner's claim for dissolution survives the instant motion to dismiss, the above analysis nonetheless indicates that outstanding issues of fact must be resolved through further proceedings before entitlement to dissolution can be determined. For this reason, the Court denies Motion Sequence 001, through which Plaintiff-Petitioner moves for the ultimate relief sought in Count One of the Petition—namely, the dissolution of Absolute. This dismissal is *without prejudice* to Plaintiff-Petitioner's right to continue prosecuting this special proceeding for dissolution to its ultimate conclusion.

54 A.D.2d 629, 629-30 (1st Dep't 1976). Thus, where the movant can obtain complete relief for alleged harm to the corporation through further judicial proceedings in a dissolution action, a request for a temporary receiver will be denied. *See McBrien* 156 A.D.2d at 140; *see also In re Harrison Realty Corp.*, 295 A.D.2d 220, 220-21 (1st Dep't 2002) (denying request for temporary receiver in dissolution action where alleged harm to the subject corporation "would be properly addressed in the final accounting submitted to the court in the course of effecting the dissolution").

The Court concludes Plaintiff-Petitioner fails to establish entitlement to a temporary receiver because the Petition and accompanying papers are devoid of allegations of irreparable loss to the corporation. In opposition to the instant motion to dismiss, Plaintiff-Petitioner argues that Defendant-Respondents "grossly mismanaged" Absolute and engaged in self-dealing at Plaintiff-Petitioner's expense. Pl. Opp. Br. at 21. Plaintiff-Petitioner further cites to the alleged capital calls as evidence of Absolute's resulting insolvency. *Id.* However, as noted above, allegations of corporate wrongdoing such as mismanagement or self-dealing are insufficient to warrant the appointment of a temporary receiver where such harms can be remedied by a monetary award at the conclusion of a dissolution action. *See In re Harrison Realty Corp.*, 295 A.D.2d 220, 220-21 (1st Dep't 2002).

Furthermore, while the alleged capital calls may be indirect evidence of Absolute's financial distress, the Petition fails to sufficiently allege Absolute is in any danger of insolvency or financial collapse. *See*, e.g., Petition ¶ 70 (alleging Absolute's operation

continues, albeit to the detriment of Plaintiff-Petitioner). Thus, each of the harms alleged in the Petition may properly be addressed at the conclusion of instant dissolution proceeding, and the appointment of a temporary receiver is not warranted. *See In re Harrison Realty Corp.*, 295 A.D.2d at 220-22. Count Two is therefore dismissed *with prejudice*.

C. Whether Counts Three through Ten Were Properly Brought as Direct Rather than Derivative Claims

In Counts Three through Ten, Plaintiff-Petitioner alleges a series of common law claims arising from the same set of facts as his claim for statutory dissolution. Each of these Counts, alleging various harms committed by Locantro, Romanoff, EDM and related entity "Bravo Sales Group," is asserted on behalf of Plaintiff-Petitioner as an individual.

A corporate shareholder has no individual cause of action for a wrong against the corporation, even if the shareholder loses the value of his investment or incurs personal liability as a result of the wrong. *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985). Significantly, "the fact that a corporation is closely held and the defendant fiduciaries own a large share does not provide a basis for departure from the [general rule] that the claim be brought derivatively." *Fisher v. Big Squeeze (N.Y.), Inc.*, 349 F. Supp. 2d 483, 488 (E.D.N.Y. 2004) (citing *Wolf v. Rand,* 258 A.D.2d 401, 403 (1st Dep't 1999)).

The Court of Appeals has recognized three exceptions to this rule: a shareholder may sue in his individual capacity for a wrong against the corporation where (1) the

plaintiff sustained a loss disproportionate to that sustained by the corporation; (2) the defendants breached a duty to the plaintiff independent of any duty owed to the corporation; or (3) the plaintiff will be unable to enforce his contractual rights against the corporation in the event that the corporation is made whole through a derivative action. *Abrams*, 66 N.Y.2d at 954.

A corporate shareholder may bring a direct (as opposed to derivative) action for harm suffered to the shareholder individually where "he or she can prevail without showing an injury to the corporation." *Yudell v. Gilbert*, 99 A.D.3d 108, 114 (1st Dep't 2012). However, "even if some of plaintiffs' claims were direct, a complaint the allegations of which confuse a shareholder's derivative and individual rights will . . . be dismissed." *Id.* at 115 (internal quotation marks omitted) (citing *Abrams v Donati*, 66 NY2d 951, 953 (1985)). And furthermore, because the direct or derivative nature of a claim is a matter of standing, a claim is subject to *sua sponte* dismissal where it is improperly brought as a direct action against corporate managers. *See Stark v. Goldberg*, 297 A.D.2d 203, 204 (1st Dep't 2002) ("standing goes to the jurisdictional basis of a court's authority to adjudicate a dispute").

Below, the Court will address whether Counts three through ten were appropriately pled on behalf of Plaintiff-Petitioner as an individual.[6]

[6] For clarity, the Court has divided its analysis of Counts Three through Ten into three discreet sections: Counts Three and Four; Count Five; and Counts Six through Ten.

1. Counts Three (accounting) and Four (breach of fiduciary duty)

Counts Three and Four allege harm against Absolute itself. For example, Count Three alleges that "monies earned by EDM[7] should properly have been paid to Absolute" because "Respondents formed EDM to engage in secret competition with Absolute." Petition ¶ 89. Count Four similarly alleges that Defendant-Respondents diverted Absolute's assets and engaged in secret competition between Absolute and EDM. Petition ¶ 95. Thus, while Plaintiff-Petitioner may have been harmed by Defendant-Respondents' actions, it is clear that this harm was suffered "derivatively" through Plaintiff-Petitioner's stake in Absolute.

Plaintiff-Petitioner's argument that "there are only three shareholders of the Company and, with the exception of Petitioner, all other shareholders engaged in the misconduct complained of" does not save these claims from dismissal. Pl. Opp. Br. at 24. As noted above, the fact that Defendant-Respondents control a majority of Absolute does not change the fact that the claims for harm against Absolute belong to the corporation. *See Wolf v. Rand,* 258 A.D.2d 401, 403 (1st Dep't 1999) ("Even where the corporation is closely held, and the defendants might share in the award, the claims belong to the corporation").

[7] As noted above, EDM Electrical Contractors was allegedly formed by Defendant-Respondents Locantro and Romanoff in September 2011 to improperly compete with Absolute. Petition ¶ 26.

Accordingly, the Court concludes the Petition's claims for an accounting and breach of fiduciary duty were improperly pled on behalf of Plaintiff-Petitioner as an individual. *See id.* Counts Three and Four are therefore dismissed *without prejudice*.

2. Count Five (Breach of Contract)

Count Five premises its breach of contract allegations on two independent bases. First, Plaintiff-Petitioner alleges that Defendant-Respondents breached certain provisions of the Operating Agreement, including the "non-disclosure provision," and the "non-compete provision." Pl. Opp. Br. at 29. Plaintiff-Petitioner argues that Defendant-Respondent Romanoff similarly breached the Operating Agreement by "failing to provide short term working capital loans," by competing against Absolute through doing work for EDM, and failing to reimburse members' monthly expenses. *Id.*

Second, the Petition alleges that, after the Operating Agreement was signed, Defendant-Respondent Locantro entered into an oral agreement to purchase a portion of Plaintiff-Petitioner's interest in the company for $250,000. Petition ¶¶ 31, 41. Specifically, the Petition alleges that in September 2012, Locantro "agreed to purchase a significant portion of Petitioner's interest in the Company for $250,000." *Id.* ¶ 31. The Petition further alleges that in November 2013, Locantro again promised Plaintiff-Petitioner he would pay $250,000 for a portion of his ownership interest, and "the Company would begin paying back all monies owed." *Id.* ¶ 41.

Upon review, the Court determines these allegations combine both direct and derivative claims against Defendant-Respondents Locantro and Romanoff. For example, allegations that Defendant-Respondents breached the non-compete provision of the Operating Agreement by operating EDM in competition with Absolute are directed to harms suffered by the corporation. However, allegations that Locantro breached a separate agreement by failing to pay Plaintiff-Petitioner $250,000 for his interest in Absolute plead a wrong to Plaintiff-Petitioner himself. As such, the Court concludes that Count Five impermissibly confuses Plaintiff-Petitioner's individual and derivative rights. *Yudell v. Gilbert*, 99 A.D.3d 108, 114 (1st Dep't 2012). Count Five is therefore dismissed *without prejudice*.

3. Counts Six through Ten (Breach of the Duty of Good Faith and Fair Dealing, Conversion, Unjust Enrichment, Tortious Interference with Contract, and Promissory Estoppel)

Counts Six through Ten, alleged on behalf of Plaintiff-Petitioner as an individual, similarly combine and confuse Plaintiff-Petitioner's individual and derivative rights. For example, Count Six (breach of the duty of good faith and fair dealing) alleges harms caused directly to Plaintiff-Petitioner by, among other things, Defendant-Respondents' refusal to provide Plaintiff-Petitioner with access to Absolute's books and records. *See Roy v. Vayntrub*, 15 Misc. 3d 1127(A) at *4 (Sup. Ct. Nassau Cty. 2007) (finding that claim premised on denial of access to corporate books and records was personal to individual

shareholders); *see also Wallace v. Perret*, 28 Misc. 3d 1023, 1032 (Sup. Ct. Kings Cty. 2010) (same).

However, Count Six also appears to allege claims which must be pled derivatively on behalf of Absolute, such as Defendant-Respondents' improper increase of Absolute's debt load. *See In re Harrison Realty Corp.*, 295 A.D.2d at 220-21 (noting shareholders have no individual cause of action for corporate mismanagement).

Similarly, Counts Seven (conversion) and Eight (unjust enrichment) allege misuse of Corporate assets on behalf of Plaintiff-Petitioner, though such claims belong in the first instance to Absolute itself. *Id.* Count Nine (tortious interference with contract) alleges harm to Plaintiff-Petitioner resulting from contracts between Absolute and its clients to which Plaintiff-Petitioner was not a party, creating a purely derivative cause of action. *See Wolf v. Rand,* 258 A.D.2d 401, 403 (1st Dep't 1999) (holding that claims for wrong to corporation must be brought derivatively, even if individual shareholders may suffer damages as a result). Count Ten (promissory estoppel) improperly combines allegations of direct harm to Plaintiff-Petitioner's equity stake with allegations of derivative harm resulting from Defendant-Respondents' looting of Absolute. *See Yudell v. Gilbert*, 99 A.D.3d 108, 114 (1st Dep't 2012) (holding that claims which confuse direct and derivative rights must be dismissed). As such, Counts Six through Ten are dismissed *without prejudice*.

IV. Conclusion[8]

Based on the foregoing, Defendant-Respondents' motion to dismiss is the Petition is granted in part and denied in part. Plaintiff-Petitioner's motion for dissolution is denied *without prejudice*.

Accordingly, it is

ORDERED that Count One is dismissed *without prejudice* to the extent it alleges fraudulent or illegal conduct by Defendant-Respondents; Count Two is dismissed *with prejudice*; and Counts Three through Ten are dismissed *without prejudice*; and it is further

ORDERED that Plaintiff-Petitioner's motion for dissolution is denied *without prejudice*; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on April 24, 2017 at 10:00 A.M.

Dated: March 3, 2017
New York, New York

ENTER

Hon. Eileen Bransten, J.S.C.

[8] Defendant-Respondents also argue the Petition's dissolution and non-dissolution claims should be severed. (Def. Mov. Br. at 7-9). The Court need not address this argument, as all non-dissolution claims have been dismissed (albeit *without prejudice*). However, should the Court have reached this argument, the Court would likely have rejected it and determined that the Petition's dissolution and non-dissolutions claims are interrelated enough to warrant such joint pleading. *See Edmonds v. Amnews Corp.*, 224 A.D.2d 358, 358 (1st Dep't 1996) (concluding that dissolution and non-dissolution claims were properly pled together where such claims were "inextricably intertwined").