SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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MICHAEL FRUHLING, as Trustee of the HOCHFELDER FAMILY TRUST, created April 27, 2005, and ADAM HOCHFELDER,

Plaintiffs,

- v -

ANTHONY WESTREICH, MAX GLOBAL, LLC, FRIEDMAN, LLP, RICHARD KLASS, JOHN DOE 1-10, and XYZ CO. 1-10,

Defendants.

INDEX NO.	161487/2017
MOTION DATE	05/31/2018, 05/31/2018
MOTION SEQ. NO.	004 005

DECISION AND ORDER

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MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 98, 99, 100, 101, 102, 103, 104, 105, 115, 116, 117
were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 005) 91, 92, 93, 94, 95, 96, 97, 106, 107, 108, 109, 110, 111, 112, 113, 114
were read on this motion to/for DISMISSAL

In Motion 004, defendants Friedman, LLP (Friedman), an accounting firm, and Michael Klass, an accountant at Friedman, move, pursuant to CPLR 3211 (a) (1), (a) (5), and (a) (7) to dismiss the amended complaint of plaintiffs Michael Fruhling (Trustee), as Trustee of the Hochfelder Family Trust (Trust), and Adam Hochfelder.

In Motion 005, defendant Anthony Westreich moves, in his individual capacity and as the former managing member of defendant Max Global, LLP (MG), a now-dissolved and canceled Delaware limited liability company, pursuant to CPLR 3211 (a) (1), (a) (2), (a) (3), (a) (5), (a) (7), and (a) (8), to dismiss plaintiffs' amended complaint.

Background

The facts are taken from plaintiffs' April 23, 2018 amended complaint (NYSCEF 45 [4/23/18 compl]; *see also* NYSCEF 74, 94 [same as exhibit (ex) to Motion 004 and Motion 005]) except as otherwise indicated.

This action arises principally from certain transactions between Westreich, Hochfelder, their related/affiliated entities, and certain other individuals by which Westreich obtained a 99% membership interest in, and became the managing member of, MG, with Hochfelder retaining a 1% membership interest in MG and positioned as MG's only other member. Westreich and Hochfelder, and/or affiliated entities, were members of MG prior to the LLC Agreement.

The purchase and transfer of interest in MG was effectuated by the contemporaneous execution, on November 12, 2004, of two agreements: (1) the Third Amended and Restated Limited Liability Company Agreement of Max Global, LLC (LLC Agreement) (NYSCEF 95); and (2) the Separation Agreement (SA) (NYSCEF 96) (together, Agreements).

The LLC Agreement, which reorganized MG under, and is controlled by, the laws of Delaware, was entered between Westreich, Hochfelder, and certain affiliated entities and established Westreich as the managing member of MG (NYSCEF 26 [LLC Agreement]). Under the LLC Agreement, Hochfelder remained a member, with a 1% interest in MG, entitled to and obligated by the terms of the LLC Agreement.

The SA, which was entered between Westreich, Hochfelder, Amy Hochfelder, and Max Capital Management Corp., set the terms and conditions of the MG transfer; the SA essentially unwound the prior business ventures engaged in by Westreich,

Hochfelder, and their affiliates/entities, and amounts to the manner in which Westreich bought out Hochfelder's interest, but for 1%, in MG by, for example, making certain payments and releasing Hochfelder and his affiliates from liability for financial and legal obligations arising from their numerous real estate business ventures (NYSCEF 96). The SA specified which of the numerous related entities would be retained or released by, or transferred to/from, the Westreich and Hochfelder affiliates, respectively, and identified the SA parties' agreement as to the treatment of such unwinding matters for federal tax purposes. Specificallly, under SA § 17 (a), the SA parties agreed, with certain exceptions, that allocations of profits and losses would be effective pursuant to the dates of transfers, as set forth in § 17, and that the Westreich and Hochfelder affiliated persons and entities would be apportioned profits and losses for each entity "with respect to the period prior to such date from each of such entities in accordance with the respective agreements relating to such entities as in effect for such period"; as to periods following the effective transfer dates in § 17, the SA parties "shall be allocated such profits and losses as are consistent with their interests following such transfers" "or changes in allocated interests" (*id.*).

While plaintiffs allege that the SA "contains no exculpatory clause for Westreich" or "limit his liability" under the SA, the SA transfers Hochfelder's and his affiliates equity interests and shares in all "Max Affiliate" entities, and other entities, subject to certain exceptions (*id.* § 4.2). Hochfelder's 1% interest in MG is not excepted from SA § 4.2; however, the SA incorporates the LLC Agreement, which is attached as Exhibit 3 to the SA and is noted executed in consideration for the transfers, releases, and payments contemplated in the SA.

Under the LLC Agreement, Westreich—as the Manager—had "sole discretion" to distribute MG's available cash (pursuant to an order of priorities), when and how to distribute MG capital proceeds (subject to priorities), to appoint all officers and directors and delegate their related duties, and to consult with professionals (i.e., accountants, attorneys, etc.), and "[t]he opinion of such [professionals] as to matters which the Manager reasonably believes to be within such Person's professional or expert competence shall constitute ·full and complete authorization and protection in respect of any action taken or suffered or omitted by the Manager" (*see e.g.* NYSCEF 96 §§ 4.3, 4.5, 5.6). The LLC Agreement further provides:

> "Whenever in [the LLC Agreement] or any other agreement contemplated [in the LLC Agreement, including the SA,] the Manager is permitted or required to make a decision, the Manager shall be entitled to consider only such interests and factors as the Manager desires and shall have no duty or obligation to consider any interest of or factors affecting some or all the Members (including without limitation any tax consequences to any of the Members or Substitute Members) in deciding whether to cause the Company to take or decline to take any actions under the authority prescribed in this Agreement. Each Member hereby agrees that any standard of care or duty imposed in this Agreement or any other agreement contemplated hereby or under the Act or any other applicable Law shall be modified, waived or limited in each case as required to permit the Manager to act under this Agreement or any other agreement contemplated hereby and to make any decision pursuant to the authority prescribed in this Agreement, including, without limitation, this Section"

(*id.* § 5.10).

Section 5.9 of the LLC Agreement further states that,

> "[t]o the maximum extent permitted by law, the Manager shall not be liable to [MG], the Members or Persons who have acquired interests m any Membership Interest, whether as members, assignees or otherwise, for any acts or omissions or any other reason. Any action by or on behalf of the Company (or its Members) against the Manager hereunder may be instituted solely by an affirmative vote of a majority of the Common Members, and each individual Member expressly disclaims and releases any right it may have to bring any action in the nature of a derivative suit or claim on behalf of the Company."

While the Manager "shall oversee and exercise all authority over the activities of

[MG] and shall have full and complete power and authority to do all things they deem necessary or desirable to conduct the business of [MG]," and, except as otherwise provided in the LLC Agreement, "all management powers over the business and affairs of the [MG] shall be
exclusively vested in the Manager, and the Members shall not have any right of control or management power over the business and affairs" (*id.* § 5.1), Article 5 of the LLC Agreement was "entered into by the Members pursuant to the provisions of the Separation Agreement" (*id.*). Nevertheless, Hochfelder and Westreich vested the Manager of MG "with the sole and exclusive power and authority to manage the activities and affairs of [MG] in accordance with this Agreement (including without limitation the provisions of Sections 5.9 and 5.10 [Manager Liability and Manager's Discretion] . . .)" as "a material part of the inducements for the parties to enter into the Separation Agreement and that such power and authority of the Manager in accordance with this Agreement shall not be reduced or affected by any future event, condition, or occurrence, whether currently contemplated or hereafter arising, with respect to any Business Segment, Company Assets, or any other affairs of [MG]" (*id.*).

According to plaintiffs, Hochfelder assigned his 1% interest in MG to the Trust, though they assert that Hochfelder maintains that interest if the assignment is invalid (NYSCEF 45, ¶¶ 19-20). An MG member may only properly assign that interest "solely with the written consent of the Manager," Westreich, which may be withheld in the Manager's sole discretion, and an assignment purportedly made without such consent "shall be null and void and of no force or effect whatsoever" (NYSCEF 96, §§ 9.1-9.2).

Plaintiffs allege that Westreich was obligated under the Agreements (each individually), as well as under state and federal law, to allocate profits and losses to MG members and their capital accounts from 2005 to 2018, and, during that time, Westreich had complete control over all matters pertaining to maintaining, accounting, and issuing all MG tax forms and reports (NYSCEF 45, ¶¶ 25-28). Plaintiffs assert that at the close of the 2004 tax year, Hochfelder's MG capital account had a negative balance of -$51,339,924; from 2004 to 2010, that negative balance was not materially altered and, for tax year 2004 to 2010, defendants' computation of losses and income allocable to Hochfelder's MG capital account, and reporting/noticing for those matters, was "correct

or not sufficiently out of the ordinary" (*id.* ¶¶ 31-32). Plaintiffs allege, however, that "Westreich and [MG] intentionally allocated in the aggregate approximately [$21.6 million] in income to [plantiffs]," which was "unexplained, improperly-allocated, [and] excess reportable income," by 2015 (*id.* ¶ 33; *see also id.* ¶ 37 [plaintiffs' chart of "incorrectly reported" "profits" labeled "Hochfelder's K-1's"]). Specifically, plaintiffs assert that, from tax year 2011 and its reporting in 2012, "[d]efendants [intentionally and, as to Westreich, in bad faith,] improperly allocate[d] profits and losses of [MG] to Hochfelder and [] decrease[d] his negative capital account balance without any justification or support under the law or proper accounting practice" (*id.* ¶¶ 34-35). As a result of that conduct, plaintiffs allege that they were required to report and account for that income to relevant taxing authorities (*id.* ¶¶ 34-36).

Essentially, plaintiffs allege that Hochfelder's negative $51 million capital account was inexplicably, improperly, and without justification from defendants converted, by allocations, to a $21.5 million surplusage causing plaintiffs to sustain prejudice in defendants "eliminat[ed] the negative balance" (*id.* ¶ 38). Further, upon information and belief, plaintiffs allege that the "corresponding effect" was to permit Westreich to retain approximately $21.6 million in profits, "which was not reportable" to tax authorities or disclosed to Westreich's former wife during their divorce litigation (*id.* ¶ 39).

Plaintiffs note, in their amended complaint, that Hochfelder's tax obligations had been audited by the IRS from at least 2004 "(or earlier)" until 2017; separately, however, the New York State Department of Taxation notified Hochfelder that his state taxes would be audited on the basis of the MG K-1 form for 2013 which allegedly allocated Hochfelder more than $50 million (*id.* ¶¶ 43-44). Plaintiffs allege that representatives of Hochfelder "and/or" the Trust have sought documents—in particular, worksheets—concerning Hochfelder's 2011-2015 K-1 forms from Westreich, Friedlman, and Klass, but defendants have all refused to provide the requested worksheets or explain their calculations for Hochfelder's MG capital account during those years (*id.* ¶¶ 45-47).

Plaintiffs' Claims

In their amended complaint, plaintiff raises the following causes of action:

1. Accounting against Westreich and MG;
2. Breach of fiduciary duty against Westreich under the LLC Agreement;

3. Breach of fiduciary duty against Westreich under the SA;

4. Breach of contract (LLC Agreement) against Westreich and MG;

5. Breach of contract (SA) against Westreich;

6. Breach of the good faith and fair dealing covenant (both Agreements) against Westreich; and

7. Professional negligence against Freidman and Klass for 2004-2015.

Westreich (individually and as former manager of MG) now moves, pursuant to CPLR 3211 (a) (1), (a) (2), (a) (3), (a) (5), (a) (7), and (a) (8), to dismiss the amended complaint (Motion 005).

Defendants Freidman and Klass now move, pursuant to CPLR 3211 (a) (1), (a) (5), and (a) (7), to dismiss the amended complaint (Motion 004).

Discussion

Application of law

Whereas the SA applies New York law, the LLC Agreement is governed by Delaware law. Accordingly, where the LLC Agreement is at issue, the court applies the law of the forum state to procedural matters and Delaware law to substantive matters (*Royal Park Investments SA/NV v Stanley*, 165 AD3d 460, 461 [1st Dept 2018]).

Standard on a CPLR 3211 (a) motion

The standard for dismissal, regardless of which claim is being analyzed, is controlled by New York's procedural rules for CPLR 3211 (a) motions (*Davis v Scottish Re Group Ltd.*, 30 NY3d 247, 257 [2017]).

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference" (Leon v Martinez, 84 NY2d 83, 87–88 [1994] [citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (Summit Solomon & Feldesman v Lacher, 212 AD2d 487, 487 [1st Dept 1995]). Dismissal under subsection (a) (1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (Leon v Martinez, 84 NY2d 83, 88 [1994]).

The Trust's standing and purported assignment of Hochfelder's interest

Standing is a threshold issue that must be determined at the outset; absent standing, there is no controversy over which the court has jurisdiction to adjudicate (*see Society of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 769 [1991] [internal citations omitted]). Generally, a party has standing to pursue tort claims when it has been actually aggrieved; that is, absent an injury, there is no controversy to be adjudicated by the court (see Siegel, NY Prac § 136 at 232-233 [4th ed 2005]; *see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). To have standing to enforce or challenge a contract, on the other hand, a plaintiff must be a party to, or a third-party beneficiary of, the agreement at issue (*see generally Carrieri v Kim*, 2014 WL 5342524 [Sup Ct, NY County 2014). "[A] simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*OP Sols., Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 622 [1st Dept 2010], quoting *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

Here, the Trust's standing hinges on whether it was properly assigned Hochfelder's membership interest in MG, a matter that is squarely controlled by the LLC Agreement, the examination of which is a substantive contract/LLC law issue to which the court applies Delaware law (*e.g. Project Cricket Acquisition, Inc. v FCP Invs. VI, L.P.*, 159 AD3D 600, 599 [1st Dept 2018].)

The assignment of Hochfelder's membership interest in MG was not valid absent Westreich's written consent. Applying nearly identical, unambiguous provisions as those in the LLC Agreement restricting the transfer and assignment of membership interests, and stating that improperly effectuated transfers/assignments, Delaware courts have found that the purported assignment is void (*see Absalom Absalom Trust f/k/a Anne Deane 2013 Revocable Trust v Saint Gervais LLC,* CV 2018-0452-TMR, 2019 WL 2655787, at *3 [Del Ch June 27, 2019] [discussing recent Delaware Supreme Court cases]). Further, the Trust's equitable defenses, such as estoppel and acquiescence, have no application where, as in *Absalom Absalom Trust*, the improper acts are not merely voidable—they are unambiguously void and null (*id.*; *see* NYSCEF 96, §§ 9.1-9.2 [assignments "shall be null and void and of no force or effect whatsoever" if not authorized by the Manager's written consent]).

Accordingly, the Trust lacks standing as it has no membership interest in MG or contractual privity with any of the defendants; it is further not a third-party beneficiary of either of the Agreements at issue here. The claims, therefore, are dismissed as raised by the Trust, and the remainder of the discussion examines the claims as raised by only Hochfelder, whose membership interest in MG and contractual privity as to the SA are unaffected by the null assignment.

Motion 005: Westreich's motion to dismiss the amended complaint

1. *Breach of fiduciary duty and breach of contract arising from the LLC Agreement and accounting*

Westreich contends that he is insulated from plaintiffs' fiduciary duty claims as the LLC Agreement eliminates all fiduciary duties and common law duties owed to Hochfelder, that the claim is duplicative of the contract claim, and that Hochfelder is not entitled to an accounting.

Title 6 of the Delaware Code permits members and managers of an LLC to eliminate or restrict any duties, including fiduciary duties, to the company or each other in law or equity, except for implied contractual covenant of good faith and fair dealing; further, a LLC operating agreement can restrict or eliminate "any and all liabilities for breach of contract and breach of [fiduciary] duties" of any member or manager to the company or other members but for liability for acts or omissions that constitute bad faith violations of implied contractual covenant of good faith and fair dealing (Del Code Ann § 18–1101 [c], [e]).

MG's LLC Agreement broadly shields the manager and members from liability to each other and the company: Section 5.9 provides that manager is not liable "for any acts or omissions or any other reason" "[t]o the maximum extent permitted by law"; section 5.10 permits the manager to make managerial decisions upon consideration of "only such interests and factors as the Manager desires," and the manager "shall have no duty or obligation to consider any interest of or factors affecting . . . Members (including without limitation any tax consequences to any of the Members)," and Hochfelder—as the sole member other than Westreich—agreed "that any standard of care or duty imposed in [the LLC] Agreement or any other agreement contemplated hereby or under the [Delaware LLC] Act or any other applicable Law shall be modified,

waived or limited in each case as required to permit the Manager to act under [the LLC] Agreement or any other agreement considered [in the LLC Agreement] and to make any decision pursuant to the authority prescribed in [the LLC] Agreement"; section 6.5 limits a member's liability to other members or MG to only liability resulting from the member's "gross negligence or intentional disregard of the terms of [the LLC] Agreement"; section 5.3 authorizes the manager, "acting alone" and "whether or not in the ordinary course of business," to act or determine MG's business matters, including "making any distributions other than in accordance with [the LLC] Agreement"; and section 5.6 grants the manager authority to consult with and rely on the opinions of experts and professionals, including accountants, and the manager's "reasonabl[e] belief" that the matters are within the professional's expert competence "constitute[s] full and complete . . . protection in respect of any action taken or suffered or omitted by the Manager" (NYSCEF 96).

The LLC Agreement further provides as to taxes: the manager shall arrange for all MG state and federal tax return matters, though "[t]he classification, realization and recognition of income, gain, losses and deductions and other items shall be on the cash or accrual method of accounting for federal income tax purposes, as the Manager shall determine" (*id.* § 8.1); the members intend that MG be treated as a partnership for Federal income tax purposes (*id.* § 8.4); however, the members "expressly do not intend . . . to form a partnership" of any kind, or have any partnership relationship to each other, "or create any fiduciary relationship among themselves solely by virtue of their status as Members," and MG is intended to be treated as a partnership "for federal, state and local income tax purposes only" (*id.* § 14.2); and Westreich or any member designated by the Manager "shall be the 'tax matters partner'" under Delaware Code 6231 authorized and required to represent MG in connection with examination of MG by tax authorities (*id.* § 8.3).

In any event, it is clear that Westreich, as manager of MG, has default fiduciary duties as the manager of MG, though most of his duties, fiduciary and otherwise, at law and in equity, as limited by the affirmative obligations of the LLC Agreement, are exculpated, restricted, and/or elimniated (*e.g. Lerner v Westreich*, 12 Misc 3d 1164(A), 2006 WL 1540310 [Sup Ct, NY County 2006]). The court need not reach plaintiffs'

allegation that Westreich breached an independent, non-exculplated fiduciary duty to properly act in his capacity as "tax matters partner" of MG in violating federal and/or state tax regulations in a bad faith scheme connected to Westreich's divorce litigation—to the extent that those allegations are even remotely pleaded with non-speculative, non-conclusory facts—because the breach of fiduciary duty claim arising under the LLC Agreement is duplicative of the breach of LLC Agreement claim, requiring dismissal of the fiduciary duty claim at this stage (*see MHS Capital LLC v Goggin*, 2018 WL 2149718, at *8 [Del Ch May 10, 2018] ["Delaware law is clear that fiduciary duty claims may not proceed in tandem with breach of contract claims absent" a basis independent of the contractual claims]).

Here, the contract claims relating to the LLC Agreement relate to the same obligations—Westreich's obligations as manager and tax matters partner—as the breach of contract claim, which alleges that Westreich failed to properly perform his obligations as to MG's manager, sole decision maker, and final authority on all tax matters, allocations, and other relevant matters of MG. Accordingly, the breach of fiduciary duty claims arising under the LLC Agreement are dismissed as duplicative, the breach of contract claim can proceed on a limited basis with regard to the tax returns prepared for 2011-2015, only.

Further, Hochfelder is expressly not entitled to a full accounting of MG. The LLC Agreement states in section 7.1 that, while the books and records of MG are "required to be maintained in accordance with generally accepted accounting principles," the manager has "sole discretion as to the terms and conditions under which any Member may review any books or records of [MG]" to the "maximum extent permitted by the [LLC] Act or applicable law." In addition, Hochfelder agreed that the "books and records contain confidential and proprietary information about [MG] and its Business Segments" (NYSCEF 96). Nevertheless, Westreich has certain fiduciary duties to Hochfelder—those that are not disclaimed by the LLC Agreement, or those contradicted by affirmative obligations in the LLC Agreement, and any conduct that would amount to a violation of the implied covenant of good faith and fair dealing as discussed above under Title 6 of the Delaware Code—and, while the breach of fiduciary duty claims are dismissed as duplicative, Westreich shall provide documents necessary to permit

Hochfelder to confirm that his own tax returns and K-1 forms for 2011 to 2015 were calculated correctly and to answer to the New York State tax authorities and identify the nature or location of the $20+ million allocated to Hochfelder's MG capital account, which plaintiffs assert they did not receive (*see* NYSCEF 45, ¶ 33).

None of this relief is precluded by the six-year statute of limitations applicable to equitable claims (such as the limited accounting relief afforded here) and contract claims in New York.

2. *Breach of fiduciary duty and breach of contract under the SA*

It appears on its face of the SA to be an unambiguous agreement setting forth the terms of Westreich's buy-out of certain Hochfelder and Hochfelder-affiliates' interests and the manner in which those and other interests would be handled in the period of winding down the transactions contemplated in the SA and the agreements it contemplates. The SA incorporates the LLC Agreement, which is attached to the SA as an Exhibit and which controls much of the ongoing obligations of Westreich contemplated in the SA. While the SA imposes obligations on Westreich to manage and allocate income for various real estate entities, nothing in the SA invokes any express intent to establish fiduciary relationships. In any event, the breach of fiduciary duty claim under the SA is insufficiently pleaded as premised on only speculation that Westreich misallocated funds to Hochfelder's MG capital account to hide the funds during Westreich's divorce litigation and seeks $25+ million in damages for the purported breach without adequate support for that figure (NYSCEF 45, ¶¶ 86-90).

The claim for breach of the SA is dismissed as duplicative of the claim breach of the LLC Agreement. Though the SA agreement obligates Westreich to allocate income and losses for various interests contemplated in that agreement "consistent with each member's interest in [MG]," plaintiffs SA contract claim alleges only that Westreich failed to comply with the SA in failing to properly allocate income and losses to Hochfelder's MG capital account, which is plainly controlled by the LLC Agreement. Absent the LLC Agreement, which controls the method and manner of Westreich's performance of his obligations at issue in the fifth cause of action, Hochfelder may have stated a non-duplicative claim for breach of the SA; however, given the LLC Agreement's express control of those matters, plaintiffs' breach of the SA is superfluous and simply reiterates

the conclusory/speculative damages asserted in the breach of fiduciary duty claim under the SA—which, given the dominion of the LLC Agreement over such allocations and exculpation for money damages arising from such matters (but for those intentional/undertaken in bad faith), is not viable under the circumstances.

3. *Breach of the implied covenant of good faith and fair dealing under the Agreements*

Plaintiffs' good faith and fair dealing claim purports to assert breach of the Agreements on the basis that Westreich refused to turn over documents to Hochfelder and/or the Trust's representatives from 2015 to 2017. To the extent that Hochfelder's right to books and records of MG following the execution of the Agreements, this claim is refuted by the LLCAgreement, which provides that Hochfelder's access to the books and records of MG are to be provided at the manager's sole discretion. In any event, this claim is superfluous given the relief awarded above in connection with the breach of the LLC Agreement claim and the accounting claim. Accordingly, this claim is dismissed on that basis.

4. *Laches*

The court rejects Westreich's laches defense as he fails to identify any prejudice sustained by the purported delay in plaintiffs' raising the equitable claims in the amended complaint.

Motion 004: Freidman and Klass's motion to dismiss the amended complaint

Friedman and Klass contend that the professional negligence claim against them must be dismissed. The court agrees. Plaintiffs' professional negligence claim is alleged with only speculative, conclusory facts that are contradicted by other allegations in the complaint which assert, repeatedly, that the purported misallocation of funds was the result of Westreich's intentional or, at least, improper diversion of assets to Hochfelder's MG capital account in order to subvert Westrech's "contentious" divorce litigation. The claim is, therefore, dismissed.

Accordingly, as to Motion Sequence Number 004, it is

ORDERED that the motion of defendants Friedman and Klass is granted and the seventh cause of action in the amended complaint is dismissed and those parties are dismissed as defendants; and it is further

As to Motion Sequence Number 005

ORDERED that the motion of Westreich is granted in part and the second, third, fifth, and sixth causes of action are dismissed; and it is further

ORDERED that the first and third causes of action shall proceed in the limited manner expressed in the decision above; and it is further

ORDERED that Westreich, individually and as the former manager of Max Global, LLC, shall answer the amended complaint within 20 days of entry of this decision on NYSCEF by the court; and it is further

ORDERED that the parties shall appear for a compliance conference on July 30, 2019 at 12:30 p.m. and the August 16, 2019 appearance is cancelled.

Motion Seq. No. 04:

7/5/19
DATE

HON. ANDREA MASLEY
ANDREA MASLEY, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☐ DENIED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐ REFERENCE

Motion Seq. No. 05:

7/5/19
DATE

HON. ANDREA MASLEY
ANDREA MASLEY, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION	
	☐	GRANTED	☐ DENIED	☒	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER	
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