SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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CRESCO LABS NEW YORK, LLC,CRESCO LABS LLC,AN ILLINOIS LIMITED LIABILITY COMPANY,

Plaintiff,

- v -

FIORELLO PHARMACEUTICALS, INC.,ERIC SIROTA, SUSAN YOSS, JOHN DOES 1 - 10

Defendant.

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INDEX NO. 652343/2018

MOTION DATE 05/16/2019

MOTION SEQ. NO. 007

AMENDED DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 007) 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 113, 114, 116

were read on this motion to/for DISMISSAL.

Defendants Fiorello Pharmaceuticals, Inc. (**Fiorello**), Eric Sirota, and Susan Yoss (Fiorello, Susan Yoss, and Eric Sirota, collectively, the **Defendants**) move for an order dismissing the amended complaint pursuant to CPLR § 3211 [a] [1] and [7]. For the reasons set forth below, the motion is granted to the extent that the second and fourth causes of action are dismissed and is otherwise denied.

FACTS RELEVANT TO THE MOTION

Cresco Labs, LLC is a medical cannabis company organized under the laws of Illinois and holding interests in medical cannabis licenses and cultivation facilities in Arizona, California, Illinois, Nevada, Ohio, and Pennsylvania (Amended Complaint ¶ 5). Cresco Labs New York, LLC, a limited liability company organized under the laws of New York, is a wholly-owned subsidiary of Cresco Labs, LLC and was created to facilitate a potential reverse subsidiary

merger transaction with Fiorello (Cresco Labs LLC and Cresco Labs New York, LLC, collectively, **Cresco**) (*id.* ¶ 6). Fiorello is a corporation organized under the laws of the State New York and holds one of New York's ten medical cannabis licenses (*id.* ¶ 7). As a "Registered Organization" under New York's medical cannabis program, Fiorello possesses a vertically-integrated license authorizing it to cultivate and process medical cannabis and establish up to four medical cannabis dispensaries within the State of New York (*id.* ¶ 14).

To position itself favorably for its planned initial public offering on the Canadian Securities Exchange in December 2018, Cresco sought to increase its valuation by expanding into new markets, including New York (*id.* ¶ 13). To that end, in December 2017, Cresco and Fiorello entered into negotiations regarding a potential sale of Fiorello's equity to Cresco, and with it, the right to apply to transfer its medical cannabis license (*id.* ¶ 15). After extensive negotiations, the parties entered into an Equity Purchase Agreement Letter of Intent (**LOI**), dated February 14, 2018, by and between Fiorello and Cresco, which set forth the proposed terms for the acquisition by Cresco of 100% of the outstanding and issued shares of Fiorello (LOI at 1, Lefton aff, exhibit A1). Pursuant to the proposed terms of the LOI, the parties agreed that Cresco would commit to provide a minimum funding amount of $22.5 million in consideration for the acquisition of 100% of Fiorello's shares (*id.*). The LOI states that it is "intended to be binding on the parties until supplanted by a definitive agreement" (the **Definitive Agreement**) (*id.* at 1). The LOI further provides that the parties will "endeavor to execute the Definitive Agreement as soon as practicable; provided, however, the closing shall be set to occur on or about April 15, 2018" subject to satisfactory due diligence, board and shareholder approvals, and approval by the New York State Department of Health (*id.* at 2).

Pursuant to the LOI, Cresco agreed to pay Fiorello a good-faith payment of $500,000 (the **Good Faith Payment**), due and payable upon the execution and delivery of the LOI (*id.*). The Good Faith Payment is to be credited against Cresco's payment for the shares upon closing of the Definitive Agreement (*id.*). The LOI further states that the Good Faith Payment will be refunded to Cresco in the event that (i) Cresco is unable to complete its due diligence review of Fiorello within 30 days of execution of the LOI due to Fiorello's failure to timely provide Cresco with requested materials, or (ii) the Parties fail to close the Definitive Agreement for any reason other than illegal actions, intentional misconduct, or grossly negligent conduct by Cresco (*id.*). The LOI provides that, "[t]he binding nature of this LOI notwithstanding," both parties are entitled to perform due diligence and "will endeavor to complete their respective due diligence reviews as promptly as practicable" (*id.* at 3). The LOI further states that the parties will work in good faith to prepare and execute agreements including, but not limited to, operating and investment agreements and any ancillary agreements—together constituting the Definitive Agreement—which will "contain terms substantially consistent with this LOI" (*id.*). The parties agreed to, "with reasonable diligence, do all such things and provide all such reasonable assurances as may be required to consummate the transaction" (*id.*).

The "Timing" section of the LOI states as follows:

> Both Parties agree that they will each use their respective best efforts to complete and execute the Definitive Agreement and conclude due diligence consistent with the terms of this LOI *at the earliest possible date* but no later than thirty (30) business days from the date of the execution of this LOI (unless otherwise extended by the mutual agreement of the Parties) (*id.* at 4 [emphasis in original]).

The "Timing" section further provides:

> By executing this LOI, the Parties agree that they will not discuss or enter into any transaction with any third-party involving (a) the sale of a majority equity stake in, or all or substantially all of the assets of, Fiorello or any subsidiary or parent entities of Fiorello, including without limitation, any sale or other transfer of the grower and dispensary license used or owned by Fiorello to any third-party or (b) the purchase of any equity interest in or assets of another medical marijuana company in the State of New York by [Cresco] (*id.*).

The LOI's deadlines passed and a Definitive Agreement never materialized. In an email dated April 4, 2018, Fiorello co-CEO Eric Sirota informed Cresco CEO Charles Bachtell that, despite diligent efforts to reach an agreement, "we still have a number of substantive issues to resolve" (NYSCEF Doc. No. 24). "Given this," Mr. Sirota added, "after the LOI expired on March 28th, our attorneys advised us to discontinue discussions until we had an extension of the LOI in place and a clearer picture of where this transaction is headed given the above" (*id.*). In a subsequent email sent on April 6, 2018, Fiorello indicated that its Board of Directors had determined that an amended LOI would have to be executed for negotiations regarding a Definitive Agreement to continue (Amended Complaint ¶ 30). On April 8, 2018, Fiorello sent an email alleging that Cresco had breached its confidentiality obligations under the LOI (*id.* ¶ 31). Then, in an email dated April 12, 2018, Fiorello indicated that it was "ending discussions" with Cresco and offered to refund the Good Faith Payment (*id.* ¶ 32).

By this time, Fiorello had entered into discussions with one or more third parties, John Does 1-10, regarding the potential sale of a majority stake in Fiorello (*id.* ¶ 25). On May 22, 2018, Counsel for Fiorello informed the Court during oral arguments on the motion to seal the record in this matter that Fiorello was "negotiating with other prospective suitors who have actually offered 68% more than" Cresco's offer (Lefton aff, exhibit A2 7:17-19). On June 14, 2018,

Fiorello's counsel solicited best and final bids by email for the potential acquisition of Fiorello's equity to be submitted by June 22, 2018 (Amended Complaint ¶ 35).

Fiorello ultimately entered into a reverse subsidiary merger transaction with a third-party entity, a defendant John Doe herein. Pursuant to the Written Consent of the Board of Directors of Fiorello Pharmaceuticals, Inc., dated June 25, 2018, by and between Fiorello and its Board of Directors, and Written Consent of the Shareholders of Fiorello Pharmaceuticals, Inc., dated June 29, 2018, by and between Fiorello and its shareholders, Fiorello's shareholders agreed to sell 100% of the outstanding shares of Fiorello to an acquisition subsidiary, which will merge with and into Fiorello, with Fiorello continuing as the surviving entity and a wholly-owned subsidiary of the parent entity of the acquisition subsidiary (Lefton aff, exhibit A3). This reverse subsidiary merger transaction requires the approval of the New York State Department of Health, which it has not yet received. Accordingly, the transaction has not been consummated as of the date of this Decision and Order (Lefton aff ¶ 7).

PROCEDURAL HISTORY

Cresco commenced this action on May 11, 2018 by filing a summons with notice, together with an order to show cause seeking a temporary restraining order and an order to seal the record of the case in its entirety (NYSCEF Doc. Nos. 1, 2). During oral arguments on the order to show cause, New York State Supreme Court Justice Charles E. Ramos denied the motion to seal the record but instructed that the parties may "redact to your heart's content" (Lefton aff, exhibit B ¶¶ 10:1-20). On June 26, 2018, Cresco filed its original complaint (NYSCEF Doc. No. 8). Cresco then moved by order to show cause for a temporary restraining order and preliminary

injunction seeking, *inter alia*, to enjoin Fiorello from selling its business operations, including its medical cannabis license (NYSCEF Doc. No. 16). Following oral arguments, Justice Ramos denied the motion for a preliminary injunction (NYSCEF Doc. No. 97 ¶ 16:16-18). The Decision and Order denying the motion for a preliminary injunction was entered on August 2, 2018 (NYSCEF Doc. No. 36). On November 20, 2018, Cresco filed an amended complaint adding Cresco Labs LLC as a plaintiff (Lefton aff, exhibit A). On January 16, 2019, the Defendants brought the instant motion to dismiss the amended complaint (NYSCEF Doc. No. 84).

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 [a] [7], the court affords the pleadings a liberal construction (CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994]). The court must accept the facts alleged in the complaint as true and accord the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal theory (*id.*). Dismissal under CPLR 3211 [a] [1] is warranted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

First Cause of Action: Breach of the LOI

The first cause of action alleges breach of the LOI's "no-shop" or exclusivity provision against Fiorello (Amended Complaint ¶¶ 42-47). To state a claim for breach of contract, a plaintiff must allege (i) the existence of a valid contract, (ii) the plaintiff's performance, (iii) the defendant's

breach, and (iv) resulting damages [*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-46 [1st Dept 2016]). Fiorello argues that the LOI was merely a preliminary agreement, *i.e.*, an agreement to agree, but "[e]ven where the parties acknowledge that they intend to hammer out details of an agreement subsequently, a preliminary agreement may be binding" (*Art and Fashion Group Corp. v Cyclops Production, Inc.*, 120 AD3d 436, 438 [1st Dept 2014], quoting *Richbell Information Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 [1st Dept 2003]).

The amended complaint alleges the existence of a valid and binding agreement, the LOI, which contains a no-shop provision (Amended Complaint ¶ 43). The amended complaint alleges that Cresco fulfilled its obligations under the LOI as it "refrain[ed] from engaging in discussions or transactions with other New York medical cannabis companies (*id.* ¶¶ 39, 45). The amended complaint further alleges that Fiorello beached the LOI by engaging in discussions with other New York medical cannabis companies "and ultimately by entering into a transaction for the sale of Fiorello to a third party" in contravention of the no-shop provision (*id.* ¶ 46). Specifically, Cresco states that Fiorello's breach occurred "soon after" the execution of the LOI on February 14, 2018 (*id.* ¶¶ 25-28). The allegations set forth in the amended complaint, which are accepted as true for the purposes of this motion, support the inference that Fiorello's discussions with third-party medical cannabis companies began during the period of exclusivity under the no-shop provision of the LOI. The amended complaint also sufficiently alleges that Cresco has incurred monetary damages as a result of Fiorello's breach of the no-shop provision. Accordingly, the motion to dismiss is denied with respect to the first cause of action for breach of the no-shop provision of the LOI.

Second Cause of Action: Breach of Contract for the Sale of Fiorello's Stock

Cresco's second cause of action alleges breach of contract against Fiorello. Cresco alleges that the LOI itself is a binding agreement for the sale of Fiorello's equity, even in the absence of a Definitive Agreement. Binding preliminary agreements fall into two categories: Type I preliminary agreements, which reflect a meeting of the minds as to all perceived issues, and Type II preliminary agreements, which may reflect agreement as to some of the material terms, but call for further negotiations as to other terms (*IDT Corp. v Tyco Group*, S.A.R.L., 54 AD3d 273, 274-75 [1st Dept 2008], citing *Brown v Cara*, 420 F3d 148, 153 [2d Cir 2005]). While "a Type I preliminary agreement binds both sides to their ultimate contractual objective," (*Brown*, 420 F3d at 153 [internal quotation marks omitted]), "Type II agreements do not commit the parties to their ultimate contractual objective but rather to the obligation to negotiate the open issues in good faith in an attempt to reach the . . . objective within the agreed framework (*id.* [internal quotation marks omitted]).

The agreement at issue in this case falls into the category of a Type II preliminary agreement. The terms set forth in the LOI were referred to as "proposed terms" and the LOI expressly contemplated further negotiations and a subsequent Definitive Agreement (LOI at 1, Lefton aff, exhibit A1). There was no meeting of the minds here as to the final terms of the agreement. In its April 4, 2018 email to Cresco, Fiorello indicated that there were material issues with the terms being negotiated (NYSCEF Doc. No. 24). In a follow-up email to Cresco dated April 6, 2018, Fiorello indicated that its board of directors determined that an amended LOI was required if negotiations regarding a Definitive Agreement were to continue (Amended Complaint ¶ 30).

These communications, along with the express terms of the LOI, unequivocally demonstrate that the parties never reached agreement as to the terms of the prospective deal. In short, the LOI in this case is an agreement to agree as to a prospective deal that never came to fruition. The motion to dismiss is granted with respect to the second cause of action for breach of contract.

Third Cause of Action: Tortious Interference with Contract

The third cause of action alleges tortious interference with contract against defendants John Doe 1-10. To state a claim for tortious interference with contract, the pleading must allege (i) the existence of a valid contract between the plaintiff and a third party, (ii) the defendant had knowledge of the contract, (iii) the defendant intentionally procured a breach of the contract without justification, (iv) actual breach of the contract, and (v) resulting damages to the plaintiff (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 [1st Dept 1999]). There can be no remedy for tortious interference with contract if there is no underlying breach of contract (*NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614, 621-622 [1996]). The nature of the plaintiff's enforceable legal rights dictates the degree to which the plaintiff is entitled to protection for a tortious interference with a contract by a third-party competitor (*Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 193 [1980]). Where a complaint alleges interference with prospective contract rights rather than breach of an existing contract, the plaintiff has a heightened burden to establish wrongful means or more culpable conduct by the defendant (*id.* at 193-94).

Here, the LOI was a binding agreement between the parties to work exclusively, diligently, and in good faith to consummate a Definitive Agreement within 30 days. It was not binding with

respect to the terms of the proposed reverse subsidiary merger transaction. In that regard, although binding on the parties as to its own operative terms such as the no-shop provision, it was nothing more than an agreement to agree with respect to a potential future deal. It set forth the "proposed terms" of such a deal, not the final terms. In sum, consummation of the LOI "represented no more than a hope that [the] shareholders . . . would in fact approve the transaction" (*NBT Bancorp Inc. v Fleet/Norstar Financial Group, Inc.*, 87 NY2d 614, 622 [1996]). Therefore, this is best viewed as a cause of action for tortious interference with precontractual or prospective economic relations.

To state a claim for tortious interference with prospective economic relations, the pleading must allege that the plaintiff would have entered into a contract but for the defendant's wrongful or culpable conduct (*Vigoda v DCA Productions Plus, Inc.*, 293 AD2d 265, 266 [1st Dept 2002]). Here, Cresco has failed to allege that Cresco and Fiorello would have entered into a Definitive Agreement for the acquisition of Fiorello's equity and medical cannabis license but for the alleged interference of John Does 1-10. As such, the amended complaint fails to allege an essential element of the cause of action.

To the extent that this cause of action is premised on the LOI itself rather than a prospective Definitive Agreement, the allegations in the amended complaint are sufficient to withstand the Defendants' motion to dismiss. The amended complaint alleges that Fiorello and Cresco entered into a binding agreement, *i.e.*, the LOI, and that the John Doe defendants knew or should have known of the LOI's existence, including the no-shop provision calling for exclusive negotiations (Amended Complaint ¶¶ 59-60). The amended complaint further alleges that the John Doe

defendants intentionally procured Fiorello's breach of the LOI by initiating negotiations with Fiorello, and that they did so without justification (*id.* ¶¶ 61-62). The amended complaint asserts that Cresco was ready, willing, and able to perform its obligations under the agreement and suffered monetary damages as a result of the conduct of the John Doe defendants (*id.* ¶¶ 63-64). Cresco has therefore stated a cause of action for tortious interference with contract as it relates to the LOI, and the motion to dismiss the third cause of action is denied.

Fourth Cause of Action: Unjust Enrichment

The fourth cause of action alleges unjust enrichment against Susan Yoss and Eric Sirota. The elements of a cause of action for unjust enrichment are "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered" (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 516 [2012]). Here, the complaint fails to allege that Eric Sirota and Susan Yoss were enriched at Cresco's expense. The complaint asserts that, "[a]s substantial shareholders in Fiorello, Sirota and Yoss *stand to benefit* from Fiorello's breaches of contract by receiving a large proportion of the additional compensation that Fiorello would receive from selling itself to a third party rather than to Cresco" (Amended Complaint ¶ 66 [emphasis added]). Cresco has failed to allege that Eric Sirota and Susan Yoss actually benefited in any way at Cresco's expense, or that Cresco suffered any cognizable loss (*Edelman v Starwood Capital Group, LLC*, 70 AD3d 246, 251 [1st Dept 2009]). There is no allegation, for example, that Fiorello's deal with the John Doe defendant was ever approved by the Department of Health or that Eric Sirota and Susan Yoss personally profited from the transaction. As pleaded, the amended complaint

alleges only speculative and unascertainable damages. Accordingly, the motion to dismiss the fourth cause of action for unjust enrichment is granted.

Sealing Order

The parties have failed to show good cause for sealing the record in this case. Therefore, in the interest of preserving public access to court records, the court orders that the record be unsealed in its entirety subject to any appropriate redactions and the parties shall submit any such replacement documents by May 31, 2019 with appropriate redactions for the court's review. In the event that the court does not receive a replacement document which may be filed under a new NYSCEF number by May 31, 2019, all currently uploaded documents will be unsealed as of June 5, 2019.

Accordingly, it is

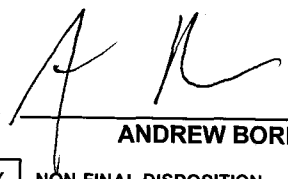
ORDERED that the Defendants' motion to dismiss the first cause of action for breach of the exclusivity provision in the letter of intent dated February 14, 2018 is denied; and it is further

ORDERED that the Defendants' motion to dismiss the second cause of action for breach of contract is granted; and it is further

ORDERED that Defendants' motion to dismiss the third cause of action for tortious interference is granted in part to the extent that the complaint alleged interference with a prospective definitive agreement rather than with the letter of intent and is otherwise denied; and it is further

ORDERED that Defendants' motion to dismiss the fourth cause of action for unjust enrichment are dismissed and defendants Sirota and Yoss are dismissed from the action; and it is further

ORDERED that the parties are directed to submit any proposed redactions and replacement documents to the court no later than May 31, 2019 for the court's review.



10/15/2019
DATE

ANDREW BORROK, J.S.C.

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