

<b>Johnson v Cestone</b>
2022 NY Slip Op 33011(U)
September 8, 2022
Supreme Court, New York County
Docket Number: Index No. 152444/2015
Judge: Melissa Crane
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 60

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SARAH JOHNSON,

Plaintiff,

Index No. 152444/2015  
Mot. Seq. No. 021

-against-

MARIA CESTONE, CHRISTOPHER WOODROW,  
MOLLY CONNERS, HOYT DAVID MORGAN,  
ROSELAND VENTURES LLC, PROSPECT POINT  
CAPITAL LLC, WORLDVIEW ENTERTAINMENT  
HOLDINGS LLC, WORLDVIEW ENTERTAINMENT  
HOLDINGS INC., WORLDVIEW ENTERTAINMENT  
CAPITAL LLC, WORLDVIEW ENTERTAINMENT  
CAPITAL II LLC, WORLDVIEW ENTERTAINMENT  
PARTNERS IV LLC, WORLDVIEW ENTERTAINMENT  
PARTNERS V LLC, WORLDVIEW ENTERTAINMENT  
PARTNERS VI LLC, WORLDVIEW ENTERTAINMENT  
PARTNERS VII LLC, and WORLDVIEW  
ENTERTAINMENT PARTNERS IX LLC,

Defendants.

-----X  
**HON. MELISSA CRANE:**

In this action, inter alia, to recover damages for breach of contract, defendants  
Worldview Entertainment Holdings LLC (Holdings LLC), Worldview Entertainment Holdings  
Inc. (Worldview Inc.), Worldview Entertainment Capital LLC (WEC I), Worldview  
Entertainment Capital II LLC (WEC II), Worldview Entertainment Partners VII LLC (WEP  
VII), and Worldview Entertainment Partners IX LLC (WEP IX) move, pursuant to CPLR 3212,  
for summary judgment dismissing the causes of action in the second amended complaint  
denominated as: Count VII, Count VIII, Count IX, Count X, Count XVII, Count XVIII, and  
Count XIX.

## BACKGROUND

Defendant Holdings LLC owns Defendant Worldview Inc. Worldview Inc. is a movie production company that created separate entities to finance its film projects. This action arises from certain payments plaintiff Sarah Johnson made to these entities between 2011 and 2014, totaling more than \$25 million. These entities include defendants WEC I, WEC II, WEP VII, and WEP IX.

Johnson alleges that Worldview Inc., Holdings LLC, and the other defendants in this action, including several of their officers or principals, provided her with inflated projections and made other misrepresentations, promises, and omissions to lure her to invest. She claims that after doing so, defendants grossly mismanaged the film entities, resulting in her only recouping a fraction of the millions of dollars she contributed. Johnson also alleges that defendants breached express agreements to handle her investments with ordinary care and reasonable diligence, and that her investments in certain entities would only be deployed for financing, production or management fees after she recouped her investment, plus a 20% return.

Additionally, Johnson alleges that, in 2014, she loaned over \$10 million to defendant WEC II and Holdings LLC in 2014 based upon false projections and assurances. Johnson claims that WEC II and Holdings LLC then improperly classified these loans as “equity investments.”

Johnson commenced this action in March 2015. In the second amended complaint (SAC), Johnson seeks damages for fraud, aiding and abetting fraud, civil conspiracy, negligent misrepresentation, fraudulent concealment, breach of contract, breach of fiduciary duty, gross negligence, conversion, and unjust enrichment. Johnson also seeks a judgment declaring that the funds she contributed to WEC II and Holdings LLC in 2014 were loans, not equity investments.

In an order, dated March 17, 2017, and entered March 22, 2017, another justice of this court (Eileen A. Rakower, J.), dismissed some of the claims asserted by Johnson in the SAC, including those seeking damages for fraud, aiding and abetting fraud, fraudulent concealment, and negligent misrepresentation (*Johnson v Cestone*, 2017 NY Slip Op 30532 [U][Sup Ct, NY County 2017], *affd in part* 162 AD3d 526 [1st Dept 2018]) (hereinafter the March 2017 order). Additionally, defendants Worldview Inc., Holdings LLC, WEC I, WEC II, WEP VII, and WEP IX (the moving defendants) moved to dismiss the complaint insofar as asserted against them (Mot Seq No 016), and the court granted in part and denied in part that motion to dismiss in the same March 2017 order. The March 2017 order was affirmed insofar as Johnson appealed it.

Now before the court is the moving defendants' motion for summary judgment dismissing the remaining claims in the SAC (Counts VII, VIII, IX, X, XVII, XVIII, and XIX) as asserted against them. For the reasons that follow, the motion is granted in part and denied in part.

### DISCUSSION

On a motion for summary judgment, the movant "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d 69, 73-74 [2020] [internal quotation marks and citations omitted]). If the moving party fails to make such a showing, the motion must be denied "regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Matter of New York City Asbestos Litig.*, 176 AD3d 506, 506 [1st Dept 2019]). If the moving party succeeds in making the proper showing, "the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action"

(*Trustees of Columbia Univ. in the City of N.Y. v D'Agostino Supermarkets, Inc.*, 36 NY3d at 74 [internal quotation marks and citations omitted]). The motion “should not be granted where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]).

The court views the facts in the light most favorable to the non-moving party (*see Bill Birds, Inc. v Stein Law Firm, P.C.*, 35 NY3d 173, 179 [2020]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). “However, bald, conclusory assertions or speculation and [a] shadowy semblance of an issue are insufficient to defeat summary judgment, as are merely conclusory claims” (*Stonehill Capital Mgt. LLC v Bank of the W.*, 28 NY3d 439, 448 [2016] [internal quotation marks and citations omitted]).

#### **Count VII – Breach of Contract**

In Count VII, Johnson alleges that she entered into an agreement with WEP VII, Holdings LLC, and Worldview Inc. pursuant to which these defendants promised that “[1] no financing, production and/or management fees would be paid out of funds contributed by [Johnson] to WEP VII until [Johnson] recouped her investment plus 20% ROI [return on investment] and, [2] that [Johnson’s] investment would be handled with, at a minimum, ordinary care and reasonable diligence”

(Second Amended Complaint, ¶ 246 [NYSCEF Doc. No. 708]). Johnson alleges that they breached this agreement by “causing unauthorized financing, production and/or management fees to be paid to Worldview Inc. and/or Holdings [LLC]” and “by recklessly engaging in acts that have resulted in the effective freezing of the distribution of returns to investors” (*id.* ¶ 248).

The moving defendants argue that this cause of action must be dismissed because it alleges derivative claims that Johnson cannot bring in her individual capacity. They correctly contend that a shareholder of a corporation does not have standing to pursue a direct claim to

redress wrongs that a corporation suffered (*Bradbury v Israel*, 204 AD3d 563, 565 [1st Dept 2022]).

“A plaintiff asserting a derivative claim seeks to recover for injury to the business entity. A plaintiff asserting a direct claim seeks redress for injury to him or herself individually. Sometimes whether the nature of the claim is direct or derivative is not readily apparent” (*Yudell v Gilbert*, 99 AD3d 108, 113 [1st Dept 2012]). The First Department has “adopted the test developed by the Supreme Court of Delaware in *Tooley v Donaldson, Lufkin & Jenrette, Inc.* (845 A2d 1031, 1039 [Del 2004]) as a common sense approach to resolving such issues” and held that such test “is consistent with existing New York State law” (*Serino v Lipper*, 123 AD3d 34, 40 [1st Dept 2014], citing *Yudell v Gilbert*, 99 AD3d 108). The courts “consider (1) who suffered the alleged harm (the corporation or the suing stockholders, individually) and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)” (*Yudell v Gilbert*, 99 AD3d at 114, quoting *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d at 1033).

“The lost value of an investment in a corporation is quintessentially a derivative claim by a shareholder” (*Serino v Lipper*, 123 AD3d at 41). However, a plaintiff can maintain an individual claim “when the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged” (*Abrams v Donati*, 66 NY2d 951, 953 [1985]; see *Goldman v Nerds Broadway LLC*, 202 AD3d 436, 436 [1st Dept 2022]). “This is a narrow exception” (*Serino v Lipper*, 123 AD3d at 39).

Here, Johnson alleges that defendants did not handle her investment in WEP VII with ordinary care and reasonable diligence as promised -- i.e., that defendants mismanaged her investment (see also Second Amended Complaint at §§ 3, 114, 132-133 [NYSCEF Doc. No.

708]). The nature of this alleged injury is derivative (*see Sajust, LLC v Mendelow*, 198 AD3d 582, 582-583 [1st Dept 2021]; *Yudell v Gilbert*, 99 AD3d at 115).

Johnson also alleges that defendants breached their promise not to use the funds she contributed to WEP VII for financing, production or management fees until she recouped her investment plus a 20% return. To the extent this claim alleges direct harm, “it cannot separately stand” “if it is confused with or embedded in the harm to the corporation” (*Serino v Lipper*, 123 AD3d at 40 [“If there is any harm caused to the individual, as opposed to the corporation, then the individual may proceed with a direct action. On the other hand, even where an individual harm is claimed, if it is confused with or embedded in the harm to the corporation, it cannot separately stand”]; *Abrams v Donati*, 66 NY2d at 953-954; *Gjuraj v Uplift El. Corp.*, 110 AD3d 540 [1st Dept 2013]; *Yudell v Gilbert*, 99 AD3d at 115; *Hahn v Stewart*, 5 AD3d 285 [1st Dept 2004]; *see also Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d at 1039 [“The stockholder’s claimed direct injury must be independent of any alleged injury to the corporation”]). That appears to be the case here.

Even assuming that defendants deployed financing, production or management fees from Johnson’s investment before she recouped her investment plus a 20% return (as opposed to using her investment for other, allowable purposes), any resulting injury is embedded in the harm the defendants’ alleged mismanagement caused to the business entity. In this regard, Johnson alleges that Worldview Inc. and Holdings LLC were paid “exorbitant financing, management and/or production fees in connection with nearly all of the film investments that it made – oftentimes directly from investor money,” and that these fees were “contrary to industry standards” (Second Amended Complaint at ¶ 114 [NYSCEF Doc. No. 708]). The harm this mismanagement caused is inextricably intertwined with the harm Johnson claims occurred as a

result of defendants misusing her funds for financing, production or management fees.

Therefore, this claim cannot separately stand on its own (*see Sajust, LLC v Mendelow*, 198 AD3d 582, 583 [1st Dept 2021] [“Even though plaintiff alleges an individual harm . . . such claim cannot separately stand on its own because it is embedded in (the corporation’s) harm”]).

Additionally, Johnson alleges that defendants promised that Worldview Inc. would not receive any management fees, or would receive these fees only after *investors* in the fund recouped *their investment* plus a 20% return (Second Amended Complaint at ¶ 117 [NYSCEF Doc. No. 708]). She further characterizes the alleged breach of contract as follows: “Holdings, Worldview Inc. and the Worldview Film Funds also breached express promises made to [Johnson] by, inter alia, paying production, financing and/or management fees to Holdings and Worldview Inc. — at times taken directly *from investor funds* — despite express agreements *that such fees would not be paid*” (*id.* at ¶ 4). In light of these allegations, Johnson’s damages in this regard would be no different from any other WEP VII investor’s losses (*see Serino v Lipper*, 123 AD3d at 41).<sup>1</sup>

Even assuming that this claim could stand on its own, it must be dismissed because the alleged agreement is unenforceable. In opposition to this motion, Johnson characterizes the agreement as an oral promise defendants made to her alone, and no other investor. She alleges that defendants promised to segregate her investment in a separate fund and that the fund would not be deployed for financing, production or management fees until she recouped her investment,

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<sup>1</sup> Johnson asserts that the court already rejected this argument in deciding the moving defendants’ motion to dismiss (*Johnson v Cestone*, 2017 NY Slip Op 30532 [U], *affd in part* 162 AD3d 526). However, on their motion to dismiss, defendants asserted this argument only in support of dismissing Johnson’s claims for gross negligence, breach of fiduciary duty, and abetting breach of fiduciary duty, and her unjust enrichment claim insofar as asserted against Worldview Inc. (NYSCEF Doc. No. 454). They did not raise this argument in connection with the breach of contract claims at issue now. Therefore, the March 2017 order does not dictate the outcome of the issue in this context (*see Matter of Part 60 RMBS Put - Back Litig.*, 195 AD3d 40, 47-48 [1st Dept 2021]).

plus a 20% return. However, Johnson characterizes the same agreement in the SAC as defendants' promise that "Worldview's operations were being funded solely by [Maria] Cestone" (a member of the board of Worldview, Inc.), and that "Worldview Inc. would not be paid any management fees, or would be paid such sums only after investors in the fund recouped their investment plus a 20% return" (SAC at ¶¶ 114, 117 [NYSCEF Doc. No. 708]). As already discussed, Johnson's allegations in the SAC pertain to investor money in general, not just Johnson's contributions. Elsewhere in the SAC, Johnson characterizes the same agreement as a more general promise not to pay certain fees to Holdings LLC or Worldview Inc. in connection with Johnson's investments in the film entities (*id.* at ¶ 122).

These are materially different promises. Johnson's own descriptions of the promise in the SAC are nebulous and the court cannot determine what the parties agreed based on the evidence in this record (*see Cobble Hill Nursing Home v. Henry & Warren Corp.*, 74 NY2d 475, 482 [1989] ["If an agreement is not reasonably certain in its material terms, there can be no legally enforceable contract"]). Indeed, "unless a court can determine what the agreement is, it cannot know whether the contract has been breached, and it cannot fashion a proper remedy" (*Marlio v McLaughlin*, 288 AD2d 97, 99 [1st Dept 2001] [internal quotation marks and citation omitted]).

Accordingly, Count VII of the SAC is dismissed. The moving defendants' remaining contentions related to the dismissal of Count VII are academic.

#### **Count VIII – Breach of Contract**

In Count VIII, Johnson alleges that she entered into an agreement with WEP IX, Holdings LLC, and Worldview Inc., pursuant to which they promised that "no financing, production and/or management fees would be paid out of funds contributed by [Johnson] to WEP

IX and additionally, that [Johnson's] investment would be handled with, at a minimum, ordinary care and reasonable diligence" (SAC, ¶ 251 [NYSCEF Doc. No. 708]). Johnson alleges that defendants materially breached the agreement by "causing unauthorized financing, production and/or management fees to be paid to Worldview Inc. and/or Holdings" LLC (*id.* ¶ 253).

Count VIII is dismissed for the reasons stated above in connection with the dismissal of Count VII.

#### **Count IX – Breach of Contract**

In Count IX, Johnson alleges that she entered into an agreement with WEC I, Holdings LLC, and Worldview Inc. that "no financing, production and/or management fees would be paid out of funds contributed by [Johnson] to WEC I and additionally, that [Johnson's] investment would be handled with, at a minimum, ordinary care and reasonable diligence" (*id.* ¶ 256). She alleges that they materially breached this agreement by "causing financing, production and/or management fees to be paid to Worldview Inc. and/or Holdings" LLC and by "failing to exercise reasonable care in deploying [Johnson's] capital and managing the investments of the fund" (*id.* ¶ 258).

Count IX is dismissed for the reasons stated above in connection with the dismissal of Count VII.

#### **Count X- Breach of Contract**

In Count X, Johnson alleges that she entered into an agreement with WEC II, Holdings LLC and Worldview Inc. that "funds loaned by [Johnson] to WEC II would not be deployed until the required minimum capital raise of \$30 million was reached for the fund and, additionally, that [Johnson's] investment would be handled with, at a minimum, ordinary care and reasonable diligence" (*id.* ¶ 261). She also alleges that pursuant to the agreement, "no

financing, production and and/or management fees would be paid out of funds contributed by [Johnson] to WEC II and, additionally, that [Johnson's] investment would be handled with, at a minimum, ordinary care and reasonable diligence" (*id.* ¶ 262).

Johnson alleges that these defendants materially breached the agreement by "causing financing, production and/or management fees to be paid to Worldview Inc. and/or Holdings" and by "deploying more that \$7 million of [Johnson's] funds loaned to WEC II despite the fact that the minimum capital raise of \$30 million had never been reached" (*id.* ¶ 264). Johnson further alleges that they failed "to engage in any reasonable care in managing the improperly deployed funds, including transferring at least \$6 million to [The Weinstein Company] without any requisite agreement in place" (*id.* ¶ 264). In this regard, Johnson also states that "[a]s a result of the improper distribution of funds prior to the minimum capital raise mandated by the WEC II operating agreement and private placement memorandum, at least two WEC II investors have sued to claw back their investments in the fund" (*id.* ¶ 128).

Count X is dismissed for the reasons stated above in connection with the dismissal of Count VII.

#### **Count XVII – Unjust Enrichment**

As relevant to this motion, Johnson alleges in Count XVII that: (1) WEP VII, WEP IX, WEC I, and WEC II were unjustly enriched by Johnson's payment of funds to them entities, and that she made these payments as a result of misrepresentations and omissions (*id.* ¶ 308); (2) Worldview Inc. was unjustly enriched by "the unauthorized transfer of financing, production and/or management fees from the funds transferred by [Johnson] as investments in . . . WEP VII, WEP IX, WEC I and WEC II" (*id.* ¶ 309); and (3) Holdings LLC was unjustly enriched "by the transfer of funds from [Johnson] to Holdings [LLC], which [Johnson] made as a loan but which

Holdings [LLC] has since attempted to categorize improperly as an equity investment” (*id.* ¶ 310).

For the reasons discussed above in connection with the dismissal of Count VII, Johnson’s unjust enrichment claim asserted against Worldview Inc., alleging that it was unjustly enriched because of the unauthorized transfer of financing, production or management fees, is dismissed (*see Sajust, LLC v Mendelow*, 198 AD3d at 583; *Serino v Lipper*, 123 AD3d at 41).

Johnson argues that Judge Rackower already rejected defendants’ theory that Johnson’s allegations of oral agreements preclude unjust enrichment claims. Johnson seems to argue that the law of the case precludes defendants from raising this contention a second time. Johnson correctly contends that the moving defendants raised this argument on their prior motion to dismiss (*see* NYSCEF Doc. No. 454 [Mem in Support of MS 016] at 70) and that the court impliedly rejected it by denying this branch of their motion (NYSCEF Doc. No. 712 at 16).

However, in the March 2017 order, Judge Rackower did not analyze or explicitly reject defendants’ argument and Johnson did raise the issue before the Appellate Division on her appeal from that order. Thus, there is no mandate from an appellate court with respect to this issue and the court declines to apply the law of the case doctrine to preclude its consideration (*see National Mtge. Consultants v Elizaitis*, 23 AD3d 630, 630 [2d Dept 2005]; *see generally People v Evans*, 94 NY2d 499, 503 [2000] [law of the case doctrine “is a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power. As such, law of the case is necessarily amorphous in that it directs a court’s discretion but does not restrict its authority.”] [internal quotation marks and citations omitted]; *Matter of Part 60 RMBS Put - Back Litig.*, 195 AD3d at 48 [court’s discretion under

the law of the case “is circumscribed where the decision providing the basis for [law of the case] is by an appellate court”).

Moreover, this branch of the unjust enrichment claim echoes the same assertions as in the breach of contract claims against Worldview Inc. and, therefore, dismissal of this branch of the claim is also appropriate on that basis (*see Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790-791 [2012]; *NYAHS A Servs., Inc., Self-Ins. Trust v Recco Home Care Servs., Inc.*, 141 AD3d 792, 796 [1st Dept 2016] [“the assertions raised in defendant’s unjust enrichment claim echo those set forth in its breach of contract claim . . . and, therefore, such claim must be dismissed.”]). This is not a case where the claim arises from facts “wholly independent of any contract upon which plaintiff” is suing (*Sebastian Holdings, Inc. v Deutsche Bank AG*, 78 AD3d 446, 448 [1st Dept 2010]). Accordingly, Count XVII is dismissed as asserted against Worldview Inc.

Johnson’s claim that her payment of money to WEC I, WEC II, WEP VII, and WEP IX unjustly enriched these entities relies upon certain alleged misrepresentations and omissions that defendants made to Johnson about actual and projected returns on investments. This claim is not, as the moving defendants suggest, based upon the existence of a contract and is not, therefore, duplicative of the breach of contract claims. However, Johnson bases this portion of her unjust enrichment claim on the same allegations as her failed fraud-based claims that the court previously dismissed (*Johnson v Cestone*, 2017 NY Slip Op 30532 [U], *affd in part* 162 AD3d 526) and seeks the same damages. Thus, this portion of the claim is also dismissed (*see Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC*, 160 AD3d 596, 598 [1st Dept 2018]; *see American Mayflower Life Ins. Co. of N.Y. v Moskowitz*, 17 AD3d 289, 293 [1st Dept 2005] [“The court was correct in dismissing the twelfth and thirteenth causes of action for unjust enrichment and money had and received. They are duplicative of the sixth cause of action to the

extent they allege underlying fraud”]; *see also Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 791 [2012] [“an unjust enrichment claim cannot remedy” an otherwise defective tort claim]).

Finally, Johnson’s unjust enrichment claim against Holdings LLC relies on the existence of the same loan agreement Johnson alleges in Count XFX. Therefore, this branch of the claim is duplicative (*see Sergeants Benevolent Assn Annuity Fund v Renck*, 19 AD3d at 118). In any event, as discussed below, the moving defendants are entitled to a declaration in their favor on Count XIX.

Accordingly, Count XVII is dismissed as against the moving defendants.

#### **Count XVIII - Declaratory Judgment**

Johnson alleges that in or around early 2014, she obtained a low-interest-rate line of credit from UBS. Johnson claims that, in March 2014, she “transferred \$9.1 million to WEC II on condition that Worldview Inc. pay the . . . interest charges (associated with the line of credit) and repay the loan on a priority basis vis-à-vis the investors in WEC II” (SAC, ¶ 314 [NYSCEF Doc. No. 708]). Specifically, she alleges that “on March 17, 2014, [she] wired \$2.1 million to WEC II and on March 26, 2014, [she] wired \$7 million to WEC II as a loan” (*id.* at 94). Johnson contends that WEC II has since improperly characterized her contribution “as an investment to be repaid *pari passu* with other investors” (*id.* ¶ 316). Accordingly, Johnson seeks a declaration that her “financial contribution is properly characterized as a loan and that the loan, plus all associated interest charges and fees, be repaid prior to the recoupment of any amounts by WEC II investors” (*id.* ¶ 318).

“A loan is a contract whereby one party advances monies to the other upon a promise to repay at a future time a sum equivalent to that which was transferred, with or without interest. The agreement to repay may be express or implied. . . . Where the obligation to repay is established, the law regards the transaction as a loan, regardless of form. Furthermore, an advance of money constitutes a loan if the extension of the advance carries with it the obligation to repay. Whether a particular transaction constitutes a loan

is to be determined by the surrounding facts of the particular case. No one factor is dispositive, including the parties' formal designation of the transaction. Generally, several factors should be considered, including the intent of the parties, which is inferable from the language of the contracts, the presence or absence of interest, and the parties' tax treatment of the payment. Ultimately, however, where the obligation to repay the amount extended is deduced, the law will regard the transaction as a loan"

(*People v Grasso*, 13 Misc 3d 1227 [A], 2006 NY Slip Op 52019[U] \*20-\*21 [Sup Ct, NY County 2006], *mod on other grounds* 54 AD3d 180 [2009] [internal citations omitted]).

Here, the moving defendants submit evidence demonstrating that while these funds were drawn from the line of credit Johnson secured through UBS, defendants were obligated to pay only the interest on the line of credit, not to repay the funds as a loan. For example, Johnson sent an email to another WEC II investor on October 23, 2014, stating:

"I must say I am a bit flabbergasted at way Patrick presented my investment in WEC II. I established a line of credit for Worldview for this entity. The agreement was that they would treat it as an investment *pari passu* to other investors, but that they would pay the interest on the line which is .68% per annum from the operating account"

(NYSCEF Doc. No. 731).

Defendants also point to Johnson's testimony at her deposition. While Johnson testified during her deposition that these contributions were "loans" (Johnson EBT Tr, at 189 [NYSCEF Doc. No. 717]), she also testified:

"Q. Did you have an understanding of whether your contributions from the UBS line would be paid at the same time as the other investors or at some other time?

A. There was no agreement in place.

Q. As I think we have seen from the e-mails, you wanted the . . . contribution to be treated as an equity investment?

A. That was what they agreed to do and pay the interest on the line"

(*id.* at 317).

However, in opposition to the motion, Johnson raises a genuine issue of fact as to whether her contributions to WEC II were loans or investments. She submits an email from Molly Conners, Worldview Inc.'s then Chief Executive Officer, to another WEC II investor. In that email, Conners characterizes \$7.01 million from Johnson as an "Additional Capital loan" (NYSCEF Doc. No. 765). Additionally, Maria Cestone testified that while Connor's characterization was not "correct," she knew that Johnson "wanted it to be a loan" (Cestone EBT Tr, at 420 [NYSCEF Doc. No. 742]).

Johnson also submits the deposition testimony of Patrick Thompson, a Worldview Vice President:

"Q. . . . on the actual books and record of WEC II, Ms. Johnson's seven-plus-million-dollar contribution was being deemed a capital loan, correct?

...  
A. That's what I understand"

(Thompson EBT Tr at 252 [NYSCEF Doc. No. 754]). Thompson also stated in an email to WEC II investors, dated September 11, 2014, that:

"-Maria Cestone has agreed to treat her monies as an investment in the fund

-Sarah Johnson is committed that her monies remain characterized as a loan to the fund; the impact of which is twofold:

1) the FOUR (4) fund investors will exclusively share in the back-end upside with the favorable terms outline; Sarah Johnson will not share in this upside

2) Sarah Johnson, as a lender, will have her return capped at the 0.654% interest rate on the loan as a lender this return will be in a priority position to the fund investors"

(NYSCEF Doc. No. 766).

Johnson also contends that defendants attempted to change Johnson's mind about her "problematic" characterization of these funds. Thompson testified:

“Q. And Ms. Johnson’s position was problematic for you because WEC II did not have the ability to repay its investors, who now wanted the return of their investment because she was getting precedent, right?”

A. Yes.

Q. And so that’s why there were multiple attempts to get her to change her mind?

A. Yes”

(Thompson EBT Tr, at 226 [NYSCEF Doc. No. 754]).

Thus, there are triable issues of fact as to whether the parties intended for Worldview Inc. to repay these funds. Accordingly, this branch of the moving defendants’ motion is denied (*see Brown v First Alert Ambulette*, 250 AD2d 400, 400 [1st Dept 1998] [complaint seeking, inter alia, a declaratory judgment and repayment of a loan improperly dismissed where issues of fact remained as to whether “the oral agreement between the parties was a preincorporation agreement for a capital contribution or a loan to defendants, and whether defendants fulfilled those obligations”]; *38 Town Assoc. v. Barr*, 225 AD2d 613, 614 [2d Dept 1996] [“there are questions of fact as to whether the monies advanced were either loans or capital contributions based on the surrounding circumstances and the conduct of the parties.”]); *Hynes v Barr*, 225 AD2d 588 589 [2d Dept 1996] [same]; *Sakow v 633 Seafood Rest.*, 186 AD2d 31, 32 [1st Dept 1992] [summary judgment denied where issues of fact existed regarding “critical question of whether one-third of plaintiffs’ substantial advancement was an investment or a loan”]; *Brown v Defalco*, NYLJ, Jun 22, 2004 at 2, [col. 3], 2004 NYLJ LEXIS 2910, \*11).

### **Count XIX – Declaratory Judgment**

Johnson alleges that, on or about February 18, 2014, she agreed to wire \$1.18 million to Holdings LLC from the UBS line of credit. She alleges that the \$1.18 million was intended to cover certain obligations of Worldview, Inc., including interest payments for Johnson’s sister’s

loan to Worldview, Inc. and Worldview's \$1 million donation commitment to amfAR, a foundation dedicated to AIDS Research (SAC, ¶ 90 [NYSCEF Doc. No. 708]). In Count XIX, Johnson alleges that she made this \$1.18 million transfer "on the express condition that those funds were to be treated as a loan and repaid with interest" (SAC, ¶ 320 [NYSCEF Doc. No. 708]). She further claims that she "reiterated this condition in several subsequent communications, and a financial consultant of Holdings [LLC] confirmed that these funds were characterized as a loan in the internal financial statements of Holdings" LLC (*id.*).

Johnson alleges that Holdings LLC has nonetheless "characterized [her] \$1.18 million loan . . . as a purported 'equity investment'" (*id.* ¶ 321). She seeks a "declaration that her financial contributions to Holdings [LLC] are properly characterized as a loan and that this loan, plus all associate interest charges and fees, be repaid prior to the recoupment by Holdings [LLC] of any of its film investments" (*id.* ¶ 323).

The moving defendants argue that this cause of action should be dismissed because Johnson stated in writing and testified at her deposition that this contribution was an investment. In an email dated March 24, 2014, Johnson stated: "[j]ust for clarification," she was "willing to cover the [amfAR]" donation commitment and "the loan to [her sister]," and that she "would like to have [them] shown as an equity investment on the books" (NYSCEF Doc. No. 728). At her deposition, Johnson acknowledged that she covered the amfAR donation in connection with her desire to have an ownership interest in Holdings LLC. Johnson testified:

"Q. So did you agree to cover the amfAR expense or not?"

A. Yes.

Q. So you agreed to cover the amfAR commitment as part of your desire to have an ownership interest in the business?"

A. Yes.

Q. Did you agree to pay any other funds . . . in exchange for becoming an owner of the business?

A. Not that I recall”

(Johnson EBT Tr at 277-278 [NYSCEF Doc. No. 717]).

Johnson also testified she was willing to “move” the contribution from a loan to an equity investment in exchange for a 20% ownership interest in Holdings LLC (Johnson EBT Tr at 308 [NYSCEF Doc. No. 762]), and that she actually signed an operating agreement granting her a 20% ownership interest in that company (Operating Agreement [NYSCEF Doc. No. 711]).

Johnson testified that she signed the operating agreement at the end of 2013 because she wanted to become a 20% owner to have access to the company’s financial records (Johnson EBT Tr at 58-61 [NYSCEF Doc. No. 717]).

Johnson further testified that, in December 2013, she tried to obtain a mortgage from Wells Fargo to purchase a property in Florida. She believed that if she could demonstrate to the bank that she was a 20% owner of Holdings LLC, it would help her to secure the loan (*id.* at 107-108). By email on December 10, 2013, she represented to the bank that she was “now a 20 percent owner of the company” (*id.* at 110). Johnson explained that she had yet to sign the operating agreement when she sent that email, but that she had “[h]oped to be [an owner] soon” (*id.* at 110-111).

The moving defendants have established prima facie entitlement to a declaratory judgment that Johnson’s contribution was an equity investment, not a loan. In opposition, Johnson fails to demonstrate the existence of triable issues of fact.

Johnson asserts that the issue whether her \$1.18 million transfer to Holdings LLC was an investment “revolves around the question of whether a proposed operating agreement that was

circulated among Johnson, her attorney, and agents of [Holdings LLC], was legitimately entered into by the parties” (Mem in Opp at 19 [NYSCEF Doc. No. 773]). Johnson asserts that parts of her testimony demonstrate that she did not legitimately entered into the operating agreement. While Johnson acknowledged at her deposition that she signed the agreement in December 2013, she testified that she did not consider herself an owner of the company because she unwittingly signed a copy that did not incorporate edits proposed by her attorney (*id.* at 52-53).

Johnson submits emails demonstrating that she and her attorney were concerned about her having executed the operating agreement before the changes were made and thought it needed to be amended (NYSCEF Doc. Nos. 767-768). Johnson acknowledges that she did, at times, identify herself as an owner of Holdings LLC. She contends, however, that she believed either that she would soon become an owner, that she did not realize that she had signed an incorrect copy of the operating agreement, or that she thought defendants would amend the agreement to include her attorney’s changes (Johnson EBT Tr at 111, 116, 137 [NYSCEF Doc. No. 740]).

Johnson also relies on certain email exchanges dated between February and March 2014. In those emails, Johnson stated that she wanted to have the amfAR donation papered as a loan (NYSCEF Doc. Nos. 769-771). She further points to an email she wrote to Daudi Titus (a Holdings LLC employee) in September 2014 regarding a Schedule K-1 he distributed to her for the 2013 tax year. That Schedule K-1 apparently indicated that Johnson had a 20% interest in Holdings LLC (NYSCEF Doc. No. 772). In her email to Titus, Johnson stated: “I think there is some mistake on this document. What is the 20%??? I am not nor have ever been a partner. There was a potential 20% ownership agreement which was circulated at the start of 2014 . . . but it was never properly done” (*id.*). Johnson asserts that based upon the foregoing evidence, a trier

of fact could conclude that there was no meeting of the minds with respect to the operating agreement and, therefore, a question of fact exists as to whether her contribution was a loan or an investment.

The moving defendants do not specifically address the Johnson's argument on the efficacy of the operating agreement. Instead, they argue that the operating agreement establishes that Johnson does, in fact, have a 20% interest in Holdings LLC and, thus, her contribution was an investment. The issue, as the parties have framed it, is whether they legitimately entered into the operating agreement. In essence, Johnson's argument for invalidating the agreement is that she signed it without reading it, not realizing that her attorney's edits were never incorporated. However, "[a] party who executes a contract is presumed to know its contents and to assent to them. Thus, [a] party who signs a document without any valid excuse for having failed to read it is conclusively bound by its terms, unless there is a showing of fraud, duress, or some other wrongful act on the part of any party to the contract" (*Prompt Mtge. Providers of N. Am., LLC v Zarour*, 155 AD3d 912, 914 [2d Dept 2017] [internal quotation marks and citations omitted]). Here, Johnson fails to make such a showing.

Accordingly, Count XIX is dismissed, and it is declared in favor of the moving defendants' that Johnson's \$1.18 million contribution to Holdings LLC is not a loan.

### CONCLUSION

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is


**ORDERED** that the motion for summary judgment is granted to the extent that Count VII, Count VIII, Count IX, Count X, and Count XVII in the second amended complaint are dismissed as asserted against defendants Worldview Entertainment Holdings LLC, Worldview

Entertainment Holdings Inc., Worldview Entertainment Capital LLC, Worldview Entertainment Capital II LLC, Worldview Entertainment Partners VII LLC, and Worldview Entertainment Partners IX LLC; and it is further

**ORDERED, ADJUDGED and DECREED** on Count XIX that plaintiff's \$1.18 million contribution to defendant Worldview Entertainment Holdings LLC is not a loan; and it is further

**ORDERED** that the motion is otherwise denied.

9/8/2022  
DATE

  
MELISSA CRANE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE