EPMMNY LLC v NY CANNA LLC
2023 NY Slip Op 32455(U)
July 13, 2023
Supreme Court, New York County
Docket Number: Index No. 655480/2018
Judge: Andrea Masley

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

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EPMMNY LLC,

Plaintiff,

- v -

NYCANNA LLC, TERRADIOL MANAGEMENT COMPANY LLC, TERRADIOL OHIO LLC, NYCI HOLDINGS LLC, NEW AMSTERDAM DISTRIBUTORS LLC, IMPIRE STATE HOLDINGS LLC, JOHN VAVALO, DOMINIC FALCONE, DENNIS T DUVAL, DINO DIXIE, PATRICK HARVEY, PHILLIP HAGUE, JEFFREY B SCHEER, BOND, SCHOENECK & KING PLLC, ACREAGE NEW YORK, LLC, and NY MEDICINAL RESEARCH & CARING, LLC,

Defendants.

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INDEX NO. 655480/2018

MOTION DATE _____

MOTION SEQ. NO. 003 004 005 007

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 121, 122, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 192, 193, 194, 195, 196, 197, 245, 250, 276, 277, 753, 759, 760, 761, 762

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 170, 171, 198, 199, 200, 201, 202, 203, 204, 238, 239, 240, 246, 251, 278, 758, 763

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 85, 86, 87, 88, 89, 90, 172, 173, 207, 247, 252, 279, 764

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 176, 177, 205, 249, 254, 281, 765

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

This action arises from a 2015 application for a license to operate a medicinal cannabis business in New York.

In motion sequence number 003, defendants Bond, Schoeneck & King PLLC (Bond) and Jeffrey B. Scheer, Esq. move pursuant to CPLR 3211(a)(1) and 3016(b) to dismiss the First Amended Complaint. (NYSCEF 48, [FAC].)

In motion sequence number 004, defendants NYCI Holdings LLC (NYCI), New Amsterdam Distributors, LLC (New Amsterdam), John Vavalo, Dominic Falcone, Dennis T. Duval, Dino Dixie, and Patrick Harvey (the Individual Defendants) (together, the NYCI Defendants) move pursuant to CPLR 3211(a)(1)(3) and (7), GOL §5-701(a)(1), and BCL 503(b) and 626 to dismiss the FAC.

In motion sequence number 005, defendants Terradiol Management Company, LLC (Terradiol Management) and Terradiol Ohio, LLC (Terradiol Ohio) (together the Terradiol Defendants) move pursuant to CPLR 3211(a)(7) and (8) to dismiss the FAC.

In motion sequence number 007, defendants NY Canna, LLC f/k/a New York Canna, Inc. (NY Canna, LLC[1]), New York Medicinal Research & Caring (NYMRC), Impire State Holdings, LLC (Impire), and Acreage New York LLC f/k/a High Street Capital Partners, LLC (Acreage)[2] (together the NY Canna Defendants) move pursuant to CPLR 3211 to dismiss the FAC.

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[1] Plaintiff asserts in the FAC that NY Canna, LLC and New York Canna, Inc. are one in the same entity, and refers to these entities as "NY Canna" throughout the FAC without distinguishing between the two entities. However, only NY Canna, LLC is listed as a defendant. Where it is unclear to which entity a party refers, the court uses "NY Canna."

[2] Plaintiff alleges that "Upon information and belief, and according to numerous articles published on the 'Acreage Holdings' website (acreageholdings.com), High Street Capital Partners, LLC did business as 'Acreage Holdings,' and Acreage New York, LLC now does business as 'Acreage Holdings' in the United States as the

Phillip Hague was named as a defendant and filed a motion to dismiss the FAC. (NYSCEF 104, Notice of Motion [mot. seq. no. 006].) On January 18, 2022, the parties filed a stipulation of discontinuance with prejudice as to Hague (NYSCEF 617) and thus the court denied motion sequence number 006 as moot pursuant to the stipulation of discontinuance. (NYSCEF 812, Decision & Order [mot. seq. no. 006].) However, Hague's arguments are addressed to the extent that NYCI Defendants, Scheer and Bond have incorporated arguments from other defendants into their own motions.

Background

The background is set forth in the court's January 6, 2020, decision and order on motion sequence numbers 003 through 007 (NYSCEF 245-249) based on the January 19, 2019, amended complaint (FAC).[3] The court supplements the facts as necessary in this decision which are accepted as true for the purposes of these motions.

Plaintiff initiated this action in 2018. (NYSCEF 1 and 2, Summons and Complaint.) Plaintiff alleges: (1) breach of an ownership contract against New Amsterdam; (2) breach of a management contract against New Amsterdam and NY Canna; (3) breach of good faith and fair dealing against New Amsterdam and NY Canna; (4) breach of fiduciary duty against Hague; (5) diversion of corporate opportunity against Hague; (6) breach of fiduciary duty against New Amsterdam and Individual

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successor to High Street Capital Partners, LLC. Accordingly, Acreage New York, LLC will be referred to herein as 'Acreage Holdings.'" (NYSCEF 48, FAC ¶ 17.) Acreage New York LLC is the only defendant before this court. None of the other related parties have been served or appear in the caption.

[3] In that decision and order, the court held motions 003 through 007 in abeyance to determine the threshold issue of David Feder's capacity to bring this action on behalf of EPMMNY. (*Id.*) After a hearing, the court determined that Feder has capacity to bring this action. (NYSCEF 756.)

Defendants; (7) aiding and abetting breach of fiduciary duty against the Individual Defendants, Ian DeQueiroz,[4] Mana Labs, LLC,[5] and Scheer; (8) aiding and abetting breach of fiduciary duty against Acreage Holdings, NYMRC, NYCI, Impire; (9) unjust enrichment against all defendants; (10) conversion against all defendants; (11) quantum meruit against all defendants; (12) accounting against NY Canna, New Amsterdam, Terradiol Defendants, NYCI and NYMRC; (13) fraud against all defendants; (14) promissory estoppel against all defendants; (15) de facto merger against all defendants; (16) de facto merger against Acreage Holdings; (17) illegal freeze-out merger against NYMRC;[6] (18) misappropriation of trade secrets against al defendants; (19) fraudulent conveyance against NY Canna; (20) declaratory judgment against all defendants that plaintiff owns 25% of NY Canna its affiliates and successors: Teradiol, NYCI, New Amsterdam, Impire, Acreage Holdings and NYMRC; (21) injunctive relief against all defendants barring defendant from taking any action to convey or encumber the assets of NY Canna; (22) constructive trust against New Amsterdam and the Individual Defendants; (23) minority shareholder oppression and freeze-out against New Amsterdam and the Individual Defendants; (24) legal malpractice against Scheer and Bond; (25) tortious interference with potential business opportunity against all defendants; (26) tortious interference with contract against Acreage Holdings, NYCI and Impire; (27) specific performance of a contract between New Amsterdam and EPMMNY giving EPMMNY 25% of NY Canna and permitting EPMMNY to operate and manage

[4] Not listed in the caption and no affidavit of service filed in NYSCEF.
[5] Not listed in the caption and no affidavit of service filed in NYSCEF.
[6] The heading to this count lists Caring LLC, but it is not listed in the caption and no affidavit of service filed in NYSCEF.

NY Canna against New Amsterdam and NY Canna; (28) unfair competition against all defendants pursuant to GBL §340(1); and (29) derivative action on behalf of NY Canna for waste and mismanagement against New Amsterdam and Individual Defendants. In addition to damages, plaintiff seeks punitive damages and attorneys' fees with no stated legal basis.

Discussion

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted].) "[B]are legal conclusions as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487 [1st Dept 1995] [citation omitted].)

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted].) "A cause of action may be dismissed under CPLR 3211(a)(1) only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].)

As an initial matter, defendants challenge the affidavit of David Feder, a member of EPMMNY, filed in opposition to each of the motions to dismiss. (NYSCEF 132, 171, 173, 177 [Feder Affidavit][7].) The NYCI Defendants argue that the Feder Affidavit should not be considered because it exceeds the word limit (Rule 17) by over 6,000 words, but defendants overlook that Feder's affidavit is responsive to four motions. Feder's 13,000-word affidavit is well below the limit of 24,000. Accordingly, defendants' failure to articulate any prejudice caused by the alleged surplus is of no moment. However, the affidavit, replete with legal arguments, violates the court rules. (*See* 12 NYCRR §202.8 [c].)[8] Plaintiff fails to respond.

The court will consider the Feder Affidavit, only to the extent it supplements the factual allegations of the FAC, not the legal arguments. "[A]ffidavits may be used freely to preserve inartfully pleaded, but potentially meritorious, claims." (*Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 540 [1st Dept 2009] [internal quotation marks and citation omitted] [finding a complaint, when read together with an affidavit in opposition to the motion to dismiss, sufficiently stated a cause of action.]) Regardless, as discussed below, the Feder Affidavit does little to help plaintiff's cause.

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[7] The court refers throughout this decision to the Feder Affidavit filed at NYSCEF 132, though they are identical.

[8] The NYCI Defendants also challenge whether Feder is a practicing attorney, as he asserts. However, the registration information the NYCI Defendants provided showing that Feder is "Delinquent," is "as of 07/17/2019", (NYSCEF 201) but his affidavit was signed and filed on June 3, 2019. (NYSCEF 171 at 44.) In any event, Feder submitted an affidavit, not an affirmation.

Motion Sequence Number 007 — the NY Canna Defendants (NY Canna LC, NYMRC, Impire and Acreage)

Plaintiff's Claims Against NY Canna, LLC that Rely on Plaintiff's Membership Interest in that Entity are dismissed without Prejudice (motion 7)

This case turns on whether plaintiff has an interest in NY Canna. The NY Canna Defendants argue that plaintiff cannot allege claims against NY Canna, LLC because it is not the same entity as NY Canna, Inc., in which plaintiff allegedly had an interest. In the caption, plaintiff asserts that NY Canna, LLC is a f/k/a of NY Canna, Inc. On this motion, plaintiff asserts that successor liability applies.

"[A] corporation which acquires the assets of another is not liable for the torts of its predecessor." (*Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983] [citations omitted].) However, "[a] corporation may be held liable for the torts of its predecessor if (1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations." (*Id.* at 245.)

Plaintiff fails to plead successor liability. Plaintiff's sole allegation related to the purported transition of NY Canna, Inc. into NY Canna, LLC is that "New Amsterdam and its members further undertook to unilaterally change the corporate structure of NY Canna, transforming the entity into a limited liability company sometime in 2016, without the knowledge or consent of EPMMNY." (NYSCEF 48, FAC ¶ 84.) Otherwise, plaintiff fails to acknowledge the transition. Confusingly, plaintiff references the defendant as NY Canna throughout without distinguishing between LLC

and Inc. Plaintiff attempts to cure this deficiency with statements in its opposition memo including that (1) NY Canna, LLC carries the duties and obligations of the license from New York Canna, Inc., (2) NY Canna, LLC had the same owners as NY Canna Inc., (3) New York Canna, Inc. "transferred the intangible assets, goodwill, customer lists, accounts receivable, trademarks, and records and business in general to NY Canna LLC," and (4) "NY Canna LLC inherited the management, personnel, physical location, assets, and general business operation of NY Canna Inc." (NYSCEF 176, plaintiff's memorandum of law at 19.) According to plaintiff, all four of the *Schumacher* exceptions apply here. However, none of these factual assertions are contained in the FAC.

Feder asserts some facts that may point towards successor liability, such as an email from Scheer explaining the intention to "convert" New York Canna, Inc. into an LLC (NYSCEF 132, Feder Aff. ¶ 97), that New York Canna, Inc. was dissolved, (*Id.* ¶ 12) and that NYCI, which owns a portion of NY Canna, LLC, is a wholly owned subsidiary of New Amsterdam. (*Id.* ¶ 95.) However, these scattered, sometimes contradictory,[9] assertions that NY Canna, LLC is the successor in liability to New York Canna, Inc. are not sufficient. (See *Worldcom Network Services, Inc. v Polar Communications Corp.*, 278 AD2d 182 [1st Dept 2000].) Plaintiff's strongest allegation is that the second application submitted to the NYSDOH describes NY Canna, LLC as

[9] The Feder Affidavit and Amended Application state that the owners of NY CANNA, LLC were NYCI (50%) and NYMRC (50%) (NYSCEF 132, Feder Aff. ¶ 97; NYSCEF 135, EPMMNY October 13, 2016 Minutes at 3–5) whereas plaintiff alleges in the complaint that plaintiff and New Amsterdam owned New York Canna, Inc. 25%/75% respectively which undermines plaintiff' contention the New Canna LLC is a successor of New Canna Inc. (NYSCEF 48, FAC ¶ 41.)

"successor-in-interest to New York Canna, Inc." (NYSCEF 132, Feder Affidavit ¶ 119; NYSCEF 163 at 2.) However, holding yourself out as a successor is relevant to the successor liability determination under the continuation of enterprise theory, but not conclusive in New York.[10] (*Salvati v Blaw-Knox Food and Chem. Equip., Inc.,* 130 Misc 2d 626, 633 [Sup Ct, Queens County 1985].) Rather, plaintiff's assertions of successor liability appear to be an afterthought and attempts to salvage its successor claim are a failure.

Another contradiction is that throughout the FAC, the plaintiff alleges both that defendants failed to provide it with 25% of the equity of NY Canna (*see, e.g.* NYSCEF 48, FAC ¶ 145), and that it was frozen out of NY Canna by defendants (*see, e.g. id.* ¶ 167) implying that plaintiff had its shares. Plaintiff cannot both have its 25% interest and not have its interest. Plaintiff alleges that defendants represented plaintiff had a 25% equity stake in the new entity NY Canna that was later reduced. (*Id.* ¶ 91.) Feder states that defendants represented it never had an equity interest because plaintiff did not sign a subscription agreement, but was being offered a new deal for equity in NYCI. (NYSCEF 132, Feder Aff ¶ 97.) Whether plaintiff had a 25% share of NY Canna is a fact issue that cannot be resolved on this motion. Plaintiff can allege conflicting theories in the alternative. While plaintiff admits that successor liability is necessary for it to successfully assert claims against NY Canna that rely on a membership interest in that entity, plaintiff has not done so. Therefore, to the extent plaintiff's claims rely on successor liability of NY Canna, they are dismissed without prejudice to replead.

[10] The Court of Appeals declined to adopt the continuation of enterprise theory known as the Turner theory. (*Schumacher v Richards Shear Co., Inc.*, 59 NY2d 239, 245 [1983].)

I. Plaintiff's Second Cause of Action for Breach of Management Contract is Dismissed against NY Canna, LLC

Plaintiff asserts a breach of a management contract against NY Canna. Specifically, plaintiff alleges "[t]he members of EPMMNY and New Amsterdam agreed that . . . EPMMNY would control, be responsible for, and be compensated for operational aspects of the business." (NYSCEF 48, FAC ¶ 41.) Plaintiff also alleges that on May 21, 2015, Scheer forwarded a "proposed term sheet for investment . . . in New York Canna." (*Id.* ¶ 45.) There is no allegation that NY Canna, was a party to the alleged management agreement. This makes sense since investors agree to invest in a corporation; the corporation does not invest in itself and thus is not a party to the investors' agreement. Moreover, any claim by plaintiff for breach of contract against NY Canna, LLC relies on its being a successor to New York Canna, Inc, which plaintiff also has not alleged, as discussed above. Accordingly, plaintiff has not adequately alleged a breach of a management contract against NY Canna, and therefore, plaintiff's second cause of action is dismissed.

The NY Canna Defendants also assert the Statute of Frauds as a bar to the 2d cause of action which is addressed below.

II. Plaintiff's Third Cause of Action for Breach of the Duty of Good Faith and Fair Dealing is Dismissed against NY Canna, LLC

Plaintiff alleges a breach of the duty of good faith and fair dealing based on New Amsterdam and NY Canna's "(a) failing to provide EPMMNY with 25% of the equity of NY Canna, (b) misappropriating EPMMNY's intellectual property and (c) inducing EPMMNY's members to leave EPMMNY and work for NY Canna directly, New Amsterdam and (d) misappropriating EPMMNY's operational control and compensation

. . ." (NYSCEF 48, FAC ¶ 153.) Plaintiff's claim for breach of the duty of good faith and fair dealing fails in the absence of an enforceable contract against NY Canna LLC. Therefore, this claim is dismissed against NY Canna, LLC.

III. Plaintiff's Eighth Cause of Action for Aiding and Abetting Breach of Fiduciary Duty Against Acreage, NYMRC, and Impire is Dismissed

Plaintiff asserts that Acreage, NYMRC, and Impire aided and abetted breaches of fiduciary duty by New Amsterdam, the Individual Defendants, and Hague. (NYSCEF 48, FAC ¶¶ 175-178.) The NY Canna Defendants argue that this claim should be dismissed against Acreage, NYMRC, and Impire because (1) plaintiff's claims against them are based on impermissible group pleading which robs defendants of notice of the material elements of each cause of action, (2) plaintiff has not alleged any underlying breach of fiduciary duty, and (3) plaintiff has not alleged that these defendants had any knowledge of the alleged breaches or induced or participated in them.

The elements of a claim for aiding and abetting a breach of fiduciary duty are: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that the plaintiff suffered damage as a result of the breach." (*Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003].)

First, as discussed below, plaintiff has not alleged a breach of fiduciary duty by New Amsterdam or the Individual Defendants, and therefore, to the extent plaintiff's claim is based on the sixth cause of action, it is dismissed. Second, to the extent plaintiff's eighth cause of action is based on the purported breach of fiduciary duty by Hague, plaintiff alleges no facts as to how Acreage, NYMRC or Impire assisted Hague in breaching his fiduciary duty to EPMMNY. The only claim in the FAC is that defendants' use of the marijuana license and intellectual property was allegedly

provided by Hague. (NYSCEF 48, FAC ¶¶ 115, 116, 157.) Defendants' use of the license or intellectual property does not amount to substantial assistance required for Hague's breach of fiduciary duty. (*Kaufman*, 307 AD2d at 126 ["Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur."])

The court agrees that plaintiff impermissibly conflates the NY Canna Defendants. (*Billy v Consol. Mach. Tool Corp.*, 51 NY2d 152, 163 [1980] ["[L]iability can never be predicated solely upon the fact of a parent corporation's ownership of a controlling interest in the shares of its subsidiary."] Plaintiff fails to allege facts to support a veil piercing theory. (*See Morris v N.Y. State Dep't of Taxation & Fin.*, 82 NY2d 135, 141–42 [1993] [veil piercing requires "complete domination" and "a wrongful or unjust act toward plaintiff."] [citations omitted].)

Plaintiff also fails to assert "specific and separate allegations for each defendant." (*CIFG Assur. North Am., Inc. v Bank of Am., N.A.*, 41 Misc 3d 1203[A], 2013 NY Slip Op 51565[U] [Sup Ct, NY County 2013.]) Plaintiff's allegations are boilerplate and conclusory e.g. all defendants (1) "knew or should have known that [Plaintiff] was a 25% equity partner in [New York Canna, Inc.]," (NYSCEF 48, FAC ¶ 182), (2) "were enriched at [Plaintiff]'s great expense," (Id. ¶ 183), and (3) "made many oral statements and written representations. " (Id. ¶ 197.) Since there are no supporting facts as to the NY Canna Defendants, Counts 9, 10, 11, 13, 14, 18, 20, 21, 25, 28 are dismissed. (*See Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, 736 [1st Dept 1981] [dismissing claims that were "pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant."])

Thus, plaintiff's eighth cause of action is dismissed.

IV. Plaintiff's Twelfth Cause of Action for Accounting is Dismissed Against NY Canna, LLC and NYMRC

The NY Canna Defendants argue that plaintiff's accounting claim should be dismissed against them because plaintiff does not allege the existence of a fiduciary relationship between itself and NY Canna or NYMRC. In its opposition, plaintiff asserts that such a relationship does exist because, now suddenly, "[p]laintiff's members intended to be and believed they were joint venture partners with the NAD [NYCI] Defendants in NY Canna Inc./LLC, and remain so to this day." (NYSCEF 176, memorandum of law at 32.) As discussed, above, plaintiff has not adequately alleged that it was a member of NY Canna. Further plaintiff cannot swap out its alleged corporate subscription agreement, stated in the complaint, for a joint venture theory, stated in plaintiff's memo of law. Even if it was a member, plaintiff cannot allege a claim against NYMRC based purely on its bald assertion that it is a "successor member" of NY Canna, LLC. (*Id.*) Thus, plaintiff's claim for accounting is dismissed against these defendants.

V. The Sixteenth Cause of Action for De Facto Merger against Acreage is Dismissed

Plaintiff asserts that Acreage should be liable for New Amsterdam's torts as its successor in interest. Acreage argues that plaintiff's claim should be dismissed because plaintiff has not alleged continuity of ownership. "[C]ontinuity of ownership is the touchstone of the [de facto merger] concept and thus a necessary predicate to a finding of a de facto merger." (*Ambac Assurance Corp. v Countrywide Home Loans, Inc.*, 150 AD3d 490, 490–91 [1st Dept 2017] [internal quotation marks and citations

omitted.) "Continuity of ownership exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation as the result of the successor's purchase of the predecessor's assets, as occurs in a stock-for-assets transaction." (*Id.* at 491 [internal quotation marks and citations omitted].). "Stated otherwise, continuity of ownership describes a situation where the parties to the transaction become owners together of what formerly belonged to each." (*Id.* [internal quotation marks and citations omitted].)

Plaintiff has not alleged a de facto merger between New Amsterdam and Acreage. The FAC contains one conclusory allegation concerning a continuity of ownership between the companies. (NYSCEF 48, FAC ¶ 211[a] ["Acreage Holdings and New Amsterdam have continuity of ownership."]) Plaintiff asserts in its opposition that Acreage's financial disclosures demonstrate that New Amsterdam received shares of Acreage in exchange for the transfer to Acreage of the entire NY Canna business but does not allege this in the FAC or by documentary proof or affidavit supplementing the complaint. While New Amsterdam's ownership of Acreage might be a factor in alleging the existence of a de facto merger, plaintiff has not sufficiently alleged one here.

VI. Plaintiff's Seventeenth Cause of Action for Illegal Freeze-Out Merger against NYMRC is Dismissed

Plaintiff asserts that it was frozen out of NY Canna through an illegal merger between NY Canna and NYMRC. NYSCEF 48, FAC ¶¶78-117.) The NY Canna Defendants argue that this claim fails because the documents included with plaintiff's own complaint demonstrate that there was never a merger between New York Canna, Inc. and NYMRC. In its opposition, plaintiff does not respond to this argument nor

mention its seventeenth cause of action. Therefore, plaintiff's seventeenth cause of action is dismissed.

VII. Plaintiff's Nineteenth Cause of Action for Fraudulent Conveyance against NY Canna is Dismissed

Plaintiff asserts that it is a creditor of NY Canna because it has failed to pay plaintiff any consideration for its 25% equity share, intellectual property, application submission work, or agreed management fee, and NY Canna has since transferred the same to NYCI, Terradiol Management, and Acreage while NY Canna was insolvent, without fair consideration, and with the intent to defraud plaintiff. The NY Canna Defendants argue that plaintiff cannot assert a fraudulent conveyance claim because New York Canna, Inc. does not exist and there is no basis for successor liability. Plaintiff's assertion of a creditor relationship with NY Canna, LLC relies on NY Canna, LLC's being a successor to New York Canna, Inc. which the court has already analyzed and rejected. Therefore, plaintiff's nineteenth cause of action is dismissed.

VIII. Plaintiff's Twenty-Sixth Cause of Action for Tortious Interference with Contract is Dismissed against Acreage and Impire

Plaintiff alleges that "[a] valid contract exists between EPMMNY and New Amsterdam. [The New Canna and NYCI Defendants] were aware of the contract between EPMMNY and New Amsterdam" and the "[New Canna and NYCI Defendants] intentionally and improperly procured a breach of the contract by New Amsterdam." (NYSCEF 48 FAC ¶¶ 259-260.) The elements for tortious interference with contract are: "(1) the existence of a valid, enforceable contract with a third party, (2) defendant's knowledge of that contract, (3) defendant's intentional and improper procurement of a breach, and (4) damages." (*RLR Realty Corp. v Duane Reade, Inc.*, 145 AD3d 444,

445 [1st Dept 2016].) Plaintiff's twenty-sixth cause of action is dismissed against Acreage and Impire because it is wholly conclusive.

IX. Plaintiff's Twenty-Seventh Claim for Specific Performance is Dismissed Against NY Canna

Plaintiff's twenty-seventh cause of action for specific performance is dismissed because as addressed above, plaintiff has not alleged a breach of contract against NY Canna. (*Walton & Willet Stone Block, LLC v City of Oswego Community Dev. Off.*, 206 AD3d 1688, 1689 [4th Dept 2022] [Since specific performance is a remedy, not a cause of action, when the court dismisses the breach of contract cause of action, specific performance is not available, and the action does not proceed even if plaintiff asserted a separate cause of action for specific performance.])

X. Plaintiff's Claim for Punitive Damages is Dismissed

Punitive damages may be awarded "to punish the tortfeasor and others similarly situated from indulging in the same conduct in the future." (*Ross v Louise Wise Servs.*, Inc., 8 NY3d 478, 489 [2007].) Punitive damages are permitted only when "defendants' actions were aimed at the public or 'evinc[ed] a high degree of moral turpitude and demonstrat[ed] such wanton dishonesty as to imply a criminal indifference to civil obligations.'" (*Linkable Networks, Inc. v Mastercard Inc.*, 184 AD3d 418, 419 [1st Dept 2020] [citations omitted].)

In opposition, plaintiff argues that its request for punitive damages is supported by the facts but fails to identify any such facts. Therefore, plaintiff's punitive damages claim is stricken.

Motion Sequence Number 004 – The NYCI Defendants

I. Dismissal Pursuant to CPLR 3013

The NYCI Defendants, and the other defendants, argue that several of plaintiff's claims should be dismissed pursuant to CPLR 3013 because they "impermissibly lump together multiple NYCI Defendants without giving each defendant notice of the specific allegations against them." (NYSCEF 103, NYCI memorandum of law at 17.)[11] Plaintiff insists that it has included specific allegations for each of the defendants in the factual section of their complaint, which satisfy New York's notice pleading standard. While the court agrees that defendants hyperfocus on the causes of action in the complaint to the exclusion of the fact section of the complaint, plaintiff's factual predicates are woefully inadequate. While the court will address the parties' arguments on this issue as to each individual claim, plaintiff's impermissible lumping is sufficient to dismiss the 6th, 7th, 10th, 12th, 13th, 14th, 18th, 20th, 21th, 22nd, 23rd, 25th, 28th and 29th causes of action. (*Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.,* 84 AD2d 736 [1st Dept 1981].)

II. Plaintiff's First and Second Causes of Action for Breach of Contract Against New Amsterdam

Plaintiff asserts the existence of a contract with New Amsterdam in its first count, "pursuant to which EPMMNY was to provide expertise, services and intellectual property for New Amsterdam's benefit in consideration for a non-dilutable twenty-five percent (25%) share of the equity of NY Canna as well as operational control and corresponding compensation." (NYSCEF 48, FAC ¶ 143.) In the second count, also against New Amsterdam, plaintiff asserts a breach of a management agreement which

[11] References to page numbers are to the NYSCEF generated page numbers.

called for the "appointment of [plaintiff] and its members by [New Amsterdam] as the operational managers of the NY Canna business operation", and "(a) EPMMNY would be paid separate 'bonus success' fees of $50,000 for the grant writing (which it had already undertaken) (b) EPMMNY would be paid an additional $600,000 to commence and oversee the management of the business operations for NY Canna for the first two (2) years, in the event a medical cannabis license was awarded." (NYSCEF 170, plaintiff's memorandum of law at 20.)

New Amsterdam first attacks plaintiff's failure to plead the formation of a written contract. Next, even if an oral contract exists, it would be barred by the statute of frauds GOL 5-701(a) which voids an oral contract whereby its terms cannot be performed within one year and Business Corporation Law §503(b).

As an initial matter, plaintiff's allegations concerning the ownership agreement in the FAC and the Feder Affidavit are inconsistent. (*Compare* NYSCEF 48, FAC ¶¶ 41-46 [alleging an oral agreement between plaintiff and New Amsterdam for a 25-75 non-dilutable split of NY Canna, in which any new investment would be taken from New Amsterdam's share, which was also reflected in a May 21, 2015 proposed term sheet]; *and* (NYSCEF 132, Feder Affidavit, ¶ 52 [asserting that a May 21, 2015 term sheet sent to EPMMNY provided for EPMMNY to receive 25% of the shares of NY Canna, a prospective investor to receive 35%, and for New Amsterdam to be a minority shareholder].) Plaintiff's contradictory allegations and recitation of the negotiating process lend some support to defendants' contention that plaintiff fails to allege that a contract was formed, oral or otherwise. (See NYSCEF 48 FAC ¶¶42, 45, 48, 65, 68, 98, 99, 112.) Negotiating or agreeing to agree is unenforceable. (See *Two Wall St. Assoc.*

Ltd. Partnership v Anderson, Raymond & Lowenthal, 183 AD2d 498 [1st Dept 1992].) However, there is more[12].

As to plaintiff's alleged ownership agreement, the court finds that plaintiff has alleged an oral subscription agreement. (NYSCEF 48, FAC 42, 48, 49, 165, 197.) However, in its opposition, plaintiff fails to mention Business Corporation Law § 503(b), which defendant argues precludes enforcement here. Section 503(b) provides that "a subscription, whether made before or after the formation of a corporation, shall not be enforceable unless in writing and signed by the subscriber." (BCL § 503[b].) However, BCL § 503(b) is inapplicable here because it "applies only to prevent enforcement of an oral subscription by the corporation against the subscriber . . ." (*Purnell v LH Radiologist, P.C.,* 228 AD2d 360, 361 [1st Dept 1996], *affd sub nom. Matter of Estate of Purnell v LH Radiologists, P.C.*, 90 NY2d 524 [1997].) NY Canna is not seeking to enforce the subscription agreement and thus BCL §503(b) is not a bar. Likewise, this action is not barred by the Statute of Frauds set forth in UCC § 8–319, which provides that "a contract for the sale of securities is not enforceable * * * unless (a) there is some writing signed by the party against whom enforcement is sought" since it "applies to transfers of securities after they have been issued" which is not the case here. (*Id.*) Defendants' reliance *on Zahr v Wingate Cr. Acquisition Corp.*, is misplaced since that was a summary judgment motion, and plaintiff there had the opportunity to acquire "through a post-incorporation agreement for the sale or transfer of securities . . ." (827 F Supp 1061, 1064 [SDNY 1993].)

[12] Should plaintiff amend its complaint, as it has indicated that it would, it must address this issue.

While the court rejects plaintiff's attempt to recast its incorporation as a joint venture, plaintiff has sufficiently alleged the existence of writings reflecting the parties' oral agreement as to ownership. "[W]hen all the essential terms and conditions of an agreement have been set forth in informal written memoranda and all that remains is their translation into a more formal document, such an agreement will be capable of specific performance." (*Brause v Goldman*, 10 AD2d 328, 332 [1st Dept 1960].) Here, plaintiff's allegations as to the existence of an oral agreement between itself and New Amsterdam of a 25-75 split in NY Canna, Inc. are sufficient. (NYSCEF 48, FAC ¶¶ 45-46.) The equity split was reflected in the initial application for NY Canna, Inc. filed with the New York State Department of Health on June 5, 2015, which plaintiff alleges was sworn to by Scheer and the members of New Amsterdam. (*Id.* ¶¶ 66-67.) Moreover, Scheer acknowledged plaintiff's ownership interest, although not the specific equity split, in three emails with his name printed at the end. (*Id.* ¶¶ 68, 77; NYSCEF 146, email dated July 2, 2015 at 25; NYSCEF 177, Feder Affidavit ¶ 97 [describing New Amsterdam's offer to provide EPMMNY equity in NYCI reflecting "an intent to honor the spirit of the original agreement."]) These writings together are sufficient to defeat dismissal as a matter of law. (*See Williamson v Delsener*, 59 AD3d 291 [1st Dept 2009] [finding emails exchanged between counsel with their printed names at the end sufficient to "constitute signed writings . . . within the meaning of the statute of frauds . . ."] [citation omitted].) At the very least, New Amsterdam's alleged acknowledgement of an agreement is sufficient to preclude application of the statute of frauds here. Whether there was a meeting of the minds is a factual issue that cannot be resolved on a motion to dismiss. Therefore, the first count proceeds against New Amsterdam.

The court credits plaintiff's allegations in the second cause of action alleging an oral management agreement. (NYSCEF 48, FAC ¶¶ 65, 197.) However, plaintiff has not alleged writings sufficient to reflect a management agreement. The initial 2015 application submitted by New Amsterdam, while allegedly sworn to by the New Amsterdam members, does not contain the material terms of the alleged management agreement. It only references that Morrison and Bergin, individually, would continue to provide expertise to NY Canna, Inc. if it received registration, not that plaintiff would operate the company for any particular compensation.

The court also rejects plaintiff's reliance on the part performance exception to the statute of frauds to establish the management agreement. First, the exception of partial performance does not apply to Section 5-701. (*Castellotti v Free*, 138 AD3d 198, 203 [1st Dept 2016].) Even if the exception could be applied here, "[t]he doctrine of part performance may be invoked only if plaintiff's actions can be characterized as unequivocally referable to the agreement alleged . . ." (*Anostario v Vicinanzo*, 59 NY2d 662, 664 [1983] [internal quotation marks omitted].) Plaintiff's performance, including preparing portions of the application, is not unequivocally referrable to a management agreement, because it is "reasonably explained by the possibility of other expectations" such as equity in New York Canna, Inc. or "as preparatory steps taken with a view toward consummation of an agreement in the future." (*See id.* [citation omitted].) Plaintiff's allegation that the management agreement provided that plaintiff would be paid "$600,000 to commence and oversee the business operations for NY Canna for the first two (2) years, in the event a medical cannabis license was awarded" is fatal to plaintiff's claim. (NYSCEF 48, FAC ¶46.) Plaintiff's claim for breach of a management

contract is thus barred under GOL §5-701(a)(1) because an agreement "to commence and oversee the business operations for NY Canna for the first two (2) years" (NYSCEF 170, plaintiff's memorandum of law at 20) plainly cannot be performed within one year. Therefore, the second count is dismissed.

III. Plaintiff's Third Cause of Action for Breach of the Duty of Good Faith and Fair Dealing is Dismissed Against New Amsterdam

Plaintiff alleges breach of the duty of good faith and fair dealing based on New Amsterdam "(a) failing to provide EPMMNY with 25% of the equity of NY Canna, (b) misappropriating EPMMNY's intellectual property and (c) inducing EPMMNY's members to leave EPMMNY and work for NY Canna directly, New Amsterdam and (d) misappropriating EPMMNY's operational control and compensation . . ." (NYSCEF 48, FAC ¶ 153.) New Amsterdam argues that this claim should be dismissed because it is duplicative of plaintiff's breach of contract claims.

A claim for breach of the implied covenant of good faith and fair dealing is properly dismissed as duplicative of a breach of contract claim where "both claims arise from the same facts and seek the identical damages for each alleged breach." (*Amcan Holdings, Inc. v Canadian Imperial Bank of Com.*, 70 AD3d 423, 426 [1st Dept 2010] [internal citations omitted]; *see also Bd. of Managers of Soho N. 267 W. 124th St. Condo. v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2014] [A claim for breach of the covenant of good faith and fair dealing "cannot be maintained where . . . the alleged breach is intrinsically tied to the damages allegedly resulting from a breach of the contract."] [internal quotation marks and citation omitted].) The four breaches plaintiff alleges as breaching the covenant are identical to the contract breaches. (NYSCEF 48, FAC ¶145.) Plaintiff's assertion that it has alleged additional wrongful conduct during

the negotiation process is of no moment, particularly since plaintiff fails to identify to which additional wrongful conduct it is referring. The third cause of action is dismissed against New Amsterdam.

IV. Plaintiff's Sixth Cause of Action for Breach of Fiduciary Duty against New Amsterdam, Vavalo, Falcone, Duval, Dixie, and Harvey (NYCI Defendants) is Dismissed

Plaintiff's sixth cause of action for breach of fiduciary duty is based on defendants' "freezing EPMMNY out of NY Canna and depriving EPMMNY of its 25% equity stake in NY Canna." (NYSCEF 48, FAC ¶ 167.) The NYCI Defendants argue that plaintiff's sixth cause of action fails because it is redundant of plaintiff's breach of contract claim and there is no fiduciary relationship between plaintiff and New Amsterdam or the Individual Defendants. Plaintiff responds that the breach of fiduciary duty claim against the Individual Defendants cannot be redundant of the breach of contract claims, and that the breach of fiduciary duty claim arises from a duty independent of the contract.

The elements of a breach of fiduciary duty claim are (1) the existence of a fiduciary relationship, (2) misconduct by the other party, and (3) damages directly caused by the party's misconduct. (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014].) "A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." (*William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [1st Dept 2000] [citation omitted].)

Plaintiff cannot assert a breach of fiduciary duty against the Individual Defendants. In response to the defendants' argument that the Individual Defendants are not members of NY Canna, plaintiff asserts that "it is clear that Plaintiff's members

intended to be and believed they were shareholders with the NAD Defendants in NY Canna, and remain so to this day." (NYSCEF 170, memorandum of law at 33.) This unilateral belief is plainly insufficient to support a claim. Moreover, the case plaintiff cites in support holds that a managing member of an LLC owes a fiduciary duty to a non-managing member, (*Pokoik*, 115 AD3d at 429) not that the members of an LLC (Individual members of New Amsterdam) owe a fiduciary duty to the members of another LLC where the two LLCs are shareholders of a corporation. Plaintiff does not argue that the defendants are managing members.[13]

Finally, in response to defendants' argument that the breach of fiduciary duty claim is duplicative of plaintiff's breach of contract claim, plaintiff merely responds that "the same conduct that may constitute a breach of contract may also constitute breach of a duty which arises out of the relationship created by contract, but which is independent of the contract itself." (NYSCEF 170, plaintiff's memorandum of law at 27.) While plaintiff's statement of law is correct, it fails to identify any conduct that is independent of the contract claim. Nevertheless, the claims could only be pled in the alternative because they rely on contradicting factual assertions. Specifically, plaintiff alleges that New Amsterdam breached its fiduciary duty by "freezing EPMMNY out of NY Canna and depriving EPMMNY of its 25% equity stake in NY Canna." (NYSCEF 48, FAC ¶ 167.) These actions are distinguishable from the breach of contract where plaintiff alleges defendants never provided plaintiff with 25% of the equity in NY Canna in the first place. (*Id.* ¶ 145.) In any event, plaintiff's sixth cause of action is dismissed.

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[13] Plaintiff alleges the DeQueiroz is a managing partner, though a partnership has never been asserted. (NYSEF 48, FAC ¶61[c].)

V. Plaintiff's Seventh Cause of Action for Aiding and Abetting Breach of Fiduciary Duty is Dismissed against Vavalo, Falcone, Duval, Dixie, and Harvey

Plaintiff asserts that the Individual Defendants and Scheer aided and abetted Hague's breach of fiduciary duty to EPMMNY. The NYCI Defendants argue, deferring to Hague's motion to dismiss, that plaintiff's seventh cause of action for aiding and abetting breach of fiduciary duty by defendant Hague fails against them, because plaintiff has not pled a breach of fiduciary duty against Hague. The NYCI Defendants further argue that even if plaintiff has asserted a breach of fiduciary duty by Hague, plaintiff has failed to allege with particularity, as required by CPLR 3016(b), that each of the Individual Defendants aided and abetted the breach. Plaintiff fails to identify factual allegations in support of its aiding and abetting claims and instead makes only general assertions that these defendants aided Hague.

Plaintiff's failure to assert allegations against each of the defendants is alone grounds for dismissal. (CPLR 3013.) Regardless, though, plaintiff has not adequately alleged a claim for aiding and abetting breach of fiduciary duty against Falcone, Duval, Dixie, or Harvey. "The defendants must have actual knowledge and not constructive knowledge of the breach of fiduciary duty." (*Epiphany Community Nursery School v Levey*, 171 AD3d 1, 11 [1st Dept 2019].) "A person knowingly participates in a breach of fiduciary duty only when he or she provides substantial assistance to the primary violator." (*Kaufman*, 307 AD2d at 126 [internal quotation marks and citations omitted].) Plaintiff pleads no facts to suggest that Falcone, Duval, Dixie, or Harvey took part in any

breach of fiduciary duty, other than the fact that they are members of New Amsterdam. This is wholly insufficient.[14]

VI. Plaintiff's Eighth Cause of Action for Aiding and Abetting Breach of Fiduciary Duty is Dismissed Against NYCI

Plaintiff alleges a claim against NYCI for aiding and abetting a breach of fiduciary duty by New Amsterdam Vavalo, Falcone, Duval, Dixie, and Harvey. As discussed above, plaintiff has failed to adequately allege a claim for breach of fiduciary duty against New Amsterdam or the Individual Defendants. Moreover, plaintiff does not address its aiding and abetting claim in its opposition, and therefore, plaintiff's claim for aiding and abetting breach of fiduciary duty against NYCI is dismissed.

VII. Plaintiff's Twelfth Cause of Action for Accounting is Dismissed Against New Amsterdam and NYCI

New Amsterdam and NYCI assert that plaintiff's claim for accounting fails because plaintiff has not alleged the existence of a fiduciary relationship between plaintiff and defendants. Plaintiff fails to address this argument. Therefore, the 12th count is dismissed against New Amsterdam and NYCI.

VIII. Plaintiff's Twenty-Second Cause of Action for Constructive Trust against New Amsterdam, Vavalo, Falcone, Duval, Dixie and Harvey is Dismissed

Plaintiff asserts a claim for constructive trust against New Amsterdam and the Individual Defendants based on its allegations that defendants were unjustly enriched. The NYCI Defendants argue that plaintiff's claim for a constructive trust fails because it is duplicative of plaintiff's breach of contract claim, and neither New Amsterdam nor the

[14] As to defendant Vavalo, plaintiff alleges more particular facts supporting its aiding and abetting claim. (*See, e.g.* NYSCEF 48, FAC ¶¶ 104, 110.) However, the court declines to analyze these allegations since plaintiff fails to do so.

Individual Defendants owes a fiduciary duty to plaintiff. Generally, to assert a claim for a constructive trust, a plaintiff must allege "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." (*Sharp v Kosmalski*, 40 NY2d 119, 121 [1976].) As discussed above, plaintiff's fiduciary duty claim fails and therefore, its claim for constructive trust is dismissed against them too.

IX. Plaintiff's Twenty-Third Cause of Action for Minority Shareholder Oppression and Freeze-Out Against New Amsterdam, Vavalo, Falcone, Duval, Dixie and Harvey is Dismissed

Plaintiff alleges that New Amsterdam and the Individual Defendants as the majority owner of 75% of NY Canna, LLC have frozen plaintiff out of the NY Canna business and failed to fulfill their fiduciary obligations to plaintiff. The NYCI Defendants argue that this claim fails because it is redundant of plaintiff's breach of contract claim, the Individual Defendants are not personally members of NY Canna, LLC, and plaintiff is not a member of NY Canna, LLC. Plaintiff fails to address defendants' arguments. Thus, plaintiff's twenty-third cause of action is dismissed.

X. Plaintiff's Twenty-Sixth Cause of Action for Tortious Interference with Contract is Dismissed against NYCI

Plaintiff asserts that NYCI tortiously interfered with its contract with New Amsterdam. The NYCI Defendants argue for dismissal because plaintiff offers only conclusory allegations with respect to this claim. In opposition, plaintiff utterly fails to identify any allegations supporting its claim, and instead simply states that they are in the FAC. The 26th count is dismissed because the court declines to presume which allegations support plaintiff's claim, particularly where plaintiff fails to do so.

XI. Plaintiff's Twenty-Seventh Claim for Specific Performance is Dismissed Against New Amsterdam

Plaintiff seeks an order "directing Defendants New Amsterdam and NY Canna to specifically perform the terms of the contract between EPMMNY and New Amsterdam, restoring EPMMNY as a fully-vested and undiluted owner of 25% of the equity of NY Canna and permitting EPMMNY and its members to operate and manage the business of NY Canna." (NYSCEF 48, FAC ¶ 263.) The NYCI Defendants assert that specific performance is not a separate cause of action.

"In general, specific performance is appropriate when money damages would be inadequate to protect the expectation interest of the injured party and when performance will not impose a disproportionate or inequitable burden on the breaching party." (*Cho v 401-403 57th St. Realty Corp.*, 300 AD2d 174, 175 [1st Dept 2002] [internal quotation marks and citations omitted].) Since plaintiff seeks money damages, and there is no allegation that money damages are inadequate, the 27th count is dismissed.

XII. Plaintiff's 29th Count Asserting a Derivative Claim on Behalf of NY Canna for Waste and Mismanagement of Corporate Assets against New Amsterdam Vavalo, Falcone, Duval, Dixie, and Harvey is Dismissed

The only cause of action that plaintiff clearly alleges as a derivative cause of action is the twenty-ninth cause of action for waste and mismanagement.[15] Plaintiff alleges that New Amsterdam and the Individual Defendants "have frozen EPMMNY out

[15] Plaintiff references "derivative claims" in its opposition but does not identify any other claims as derivative in the FAC. In opposition to Scheer and Bond's motion, plaintiff also claims that certain of its other claims are derivative claims. Even if plaintiff could or had asserted these claims on behalf of NY Canna, they would fail for the reasons stated here.

of the operations of NY Canna and converted EPMMNY's equity share in NY Canna" (NYSCEF 48, FAC ¶ 274), transferred assets from NY Canna to NYCI for little or no consideration (*id.* ¶ 276), and have "us[ed] assets of NY Canna to support a leveraged buyout to profit personally." (*Id.* ¶ 277.)

New Amsterdam and the Individual Defendants argue that the 29th count fails because EPMMNY was never a member of NY Canna, it is duplicative of plaintiff's 10th and 23rd cause of action, and plaintiff has failed to plead demand futility. Plaintiff does not address this argument in its opposition except to state that "[a]s to the futility of demand, Mr. Feder has amply satisfied this condition in his accompanying affidavit, which details the deteriorated state of affairs between Plaintiff and Defendnats [sic]." (NYSCEF 170, plaintiff's memorandum of law at 47.)

Moreover, Scheer and Bond, and the NY Canna Defendants assert that plaintiff cannot assert a derivative claim on behalf of NY Canna, LLC because it was never a member and is not currently a member. Plaintiff responds that it is a "*de facto* shareholder/member of NY Canna to this day" because it was a member before its shares were taken from it. (NYSCEF 131, memorandum of law at 14.) Plaintiff further asserts that even if it cannot assert a derivative action on behalf of NY Canna, LLC, it can still assert a derivative action on behalf of New York Canna, Inc.

Business Corporation Law § 626 "mandates that shareholders instituting a derivative action must demonstrate that they owned stock both when the lawsuit was brought and at the time of the transaction(s) of which they complain." (*Pessin v Chris-Craft Indus., Inc.*, 181 AD2d 66, 70 [1st Dept 1992].) Plaintiff alleges that New Amsterdam later informed plaintiff that it was reducing EPMMNY's equity interest to a

12.5% stake, (NYSCEF 48, FAC ¶ 91) and subsequently disenfranchised EPMMNY entirely. (NYSCEF 48, FAC ¶ 100.) Thus, regardless of whether NY Canna, LLC is the same entity as New York Canna, Inc., which plaintiff has not adequately alleged it is, plaintiff provides no legal support for its assertion that it may assert a derivative claim as a "de facto" shareholder.[16] Plaintiff's argument that it could sue on behalf of New York Canna, Inc. is irrelevant since plaintiff fails to do so in the FAC. Therefore, plaintiff's derivative claim fails.

Motion Sequence Number 005 — Terradiol Management Company, LLC and Terradiol Ohio, LLC)

I. Plaintiff Fails to Allege any Basis for Jurisdiction Over Terradiol Ohio

Terradiol Ohio argues that plantiff's complaint should be dismissed because this court does not have jurisdiction over it. CPLR 3211 (a)(8) provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that ... the court has not jurisdiction of the person of the defendant." "On a motion to dismiss pursuant to CPLR 3211 (a)(8), the plaintiff has the burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction." (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017] [citations omitted].)

First, Terradiol Ohio argues that the court has no general jurisdiction over Terradiol Ohio because it is an Ohio limited liability company and has its principal place of business in Canton, Ohio. (NYSCEF 87, Affidavit of Dennis T. Duval[17] ¶ 2.)

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[16] As discussed elsewhere, plaintiff has not alleged a de facto merger between New York Canna. Inc. and NY Canna, LLC.

[17] Dennis Duval is the Chief Operating Officer of Terradiol Ohio. (NSYCEF 87, Duval aff. ¶ 2.)

Terradiol Ohio asserts that it does not have operations in New York substantial enough to permit general jurisdiction. Plaintiff does not address general jurisdiction. Thus, plaintiff has abandoned any claim of general jurisdiction over Terradiol Ohio.

Second, Terradiol Ohio argues that the court has no specific personal jurisdiction over it under Section 302(a)(1) of New York's long arm statute because Terradiol does not transact any business in New York (NYSCEF 87, Duval aff ¶ 7) and plaintiff has not demonstrated how its causes of action arise out of any such business. CPLR 302 (a)(1) provides that "a court may exercise personal jurisdiction over any non-domiciliary ... who in person or through an agent ... transacts any business within the state or contracts anywhere to supply goods or services in the state." CPLR 302(a) (1) is a "'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988] [citations omitted].)

In opposition, plaintiff argues that Terradiol Ohio's successor liability satisfies the minimum contacts requirement. Plaintiff argues that Terradiol Ohio participated in a scheme to deprive plaintiff of its property and equity, that Terradiol Ohio should have reasonably foreseen the effects of its actions on plaintiff in New York pursuant to CPLR 302(a)(3)(ii), and finally, that requiring plaintiff to sue Terradiol Ohio in Ohio would offend due process. Plaintiff does not cite to any particular transaction or identify how particular causes of action are related to any transactions by Terradiol Ohio. Moreover, plaintiff does not allege in the FAC any transaction by Terradiol Ohio, other than its

formation and acceptance of plaintiff's intellectual property from New Amsterdam and NY Canna, but neither of these is a transaction alleged as occurring in New York. Additionally, plaintiff cites no case law supporting its assertion that successor liability confers jurisdiction.

However, because it did not file any reply, Terradiol Ohio does not address plaintiff's assertion of jurisdiction under CPLR 302(a)(3)(ii)[18] which provides jurisdiction over a defendant who "commits a tortious act without the state causing injury to person or property within the state . . . if he (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce." Nevertheless, plaintiff's assertion of jurisdiction under this section fails. Even if Terradiol Ohio's knowledge of plaintiff's contributions to NY Canna could constitute a reasonable expectation on Terradiol Ohio's part, plaintiff does not allege that Terradiol Ohio has derived any revenue from interstate or international commerce, other than an assertion in Feder's Affidavit that the "Terradiol Group's" website states it has pending license proposals in Massachusetts. (NYSCEF 132, Feder Affidavit ¶ 103.) Thus, plaintiff's complaint is dismissed against Terradiol Ohio.

II. Plaintiff's Fifteenth Cause of Action for De Facto Merger Against Terradiol Management is Dismissed

Plaintiff asserts that Terradiol Management should be held liable for the torts allegedly committed by New Amsterdam and the Individual Defendants because Terradiol Management is a successor to and alter ego of New Amsterdam. Terradiol

[18] Plaintiff does not assert personal jurisdiction in the FAC, but that does not prevent it from doing so on this motion. (*Fishman v Pocono Ski Rental Inc.*, 82 AD2d 906, 907 [2d Dept 1981] ["There is no requirement, in New York pleading practice, that the complaint allege the basis for personal jurisdiction."])

Management argues that plaintiff's de facto merger claim fails because plaintiff has not alleged a merger between Terradiol Management and New Amsterdam and the allegations concerning a de facto merger are conclusory. In its opposition, plaintiff does not address a de facto merger between Terradiol Management and New Amsterdam as asserted in the FAC, but rather, addresses only a de facto merger between New York Canna, Inc. and NY Canna, LLC, which then somehow transforms to a merger between NY Canna, LLC and New Amsterdam, and then Terradiol Management. In the FAC, plaintiff merely alleges the elements of a de facto merger, without stating any facts in support and thus its claim against New Amsterdam and Terradiol Management is dismissed. Moreover, plaintiff fails to address any claim of alter ego liability, except in the context of a de facto merger, and therefore, any alter ego claims against Terradiol Management are dismissed.[19]

III. Plaintiff's Twelfth Cause of Action for An Accounting is Dismissed against Terradiol Management

Terradiol Management argues that plaintiff's claim for an accounting fails because plaintiff fails to adequately allege that it is an alter ego of New Amsterdam, plaintiff has not alleged that it made a demand for an accounting, and plaintiff fails to allege a fiduciary duty. Since plaintiff fails to address successor liability, plaintiff's claim against Terradiol Management is dismissed.

[19] Plaintiff's conclusory facts added to the Feder Affidavit are insufficient to support its claims. (NYSCEF 132, Feder Aff. ¶ 103 [citing the Terradiol website stating that "Terradiol is the majority owner and driving force behind NYCANNA."])

Motion Sequence Number 003 – Bond and Scheer

I. Plaintiff's Twenty-Fourth Cause of Action for Legal Malpractice against Scheer and Bond is Dismissed

Bond and Scheer first argue that they are not subject to civil liability because they performed the acts alleged in the FAC in good faith and were not in privity or near privity with plaintiff. "Absent a contractual relationship between the professional and the party claiming injury, the potential for liability is carefully circumscribed." (*Jacobs v Kay*, 50 AD3d 526, 526 [1st Dept 2008] [internal quotation and citation omitted].) Thus, "[a] viable tort claim against a professional requires that the underlying relationship between the parties be one of contract or the bond between them so close as to be the functional equivalent of contractual privity." (*Id.* at 526-27 [citation omitted]; *see also HSBC Bank USA v Bond, Schoeneck and King, PLLC,* 16 Misc 3d 813, 833 [Sup Ct, Erie County 2007], *revd on other grounds,* 55 AD3d 1426 [4th Dept 2008] [shareholders stated attorney client relationship with corporation's attorney regarding stock sale].)

Plaintiff has not alleged the existence of an attorney-client relationship between itself and Bond or Scheer. Plaintiff's claim that such a relationship exists hinges on the fact that Bond and Scheer "represented NY Canna and the interests of its members, including EPMMNY." (NYSCEF 48, FAC ¶ 248; *see also id.* ¶ 44 [alleging that Scheer "was retained to perform legal services for NY Canna, including the drafting of a shareholders' agreement among the two NY Canna shareholders, New Amsterdam and EPMMNY."]; *see id.* ¶ 49 [referring to "attorney Scheer -- who was now performing legal services on behalf of NY Canna, of which EPMMNY owned 25% . . ."].) Even assuming plaintiff was a member of New York Canna, Inc. or NY Canna, LLC this would not automatically create an attorney client relationship between plaintiff and Scheer.

(*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 562 [2009] ["[A] corporation's attorney represents the corporate entity, not its shareholders or employees."])

Moreover, plaintiff does not allege anything to suggest that Bond or Scheer purported to act as attorneys for EPMMNY. As an initial matter, the fact that Bond had an engagement letter with NY Canna,[20] but not plaintiff, is not sufficient to demonstrate an attorney client relationship with plaintiff. (*Tropp v Lumer*, 23 AD3d 550, 551 [2d Dept 2005] ["[A]n attorney-client relationship may exist in the absence of a retainer or fee."] [internal quotation marks and citation omitted].) However, "[a] plaintiff's unilateral belief does not confer upon him [or her] the status of client . . . Rather, to establish an attorney-client relationship there must be an explicit undertaking to perform a specific task." (*Id.* [internal quotation mark and citations omitted].) Moreover, it is not clear from the FAC, or anything submitted by Scheer and Bond, that plaintiff was aware that Scheer and Bond also represented New Amsterdam, as they assert. (NYSCEF 84, Bond and Scheer memorandum of law at 9.) However, plaintiff does not allege any facts suggesting that Scheer or Bond purported to be plaintiffs, as opposed to NY Canna LLC's, attorney. Plaintiff argues that the FAC and Feder Affidavit "demonstrate that Attorney Scheer provided advice and assistance to Plaintiff and its members throughout the application process and beyond, and even offered to act as attorney

[20] Strangely, the engagement letter seems to refer to New Amsterdam as one in the same with NY Canna. (NYSCEF 122, Letter dated March 4, 2015 ["We are pleased to confirm our representation of New Amsterdam Distributors, LLC a New York limited liability company ("NY Canna") . . ."].)

escrow for Plaintiff."[21] (NYSCEF 131, plaintiff's memorandum of law at 15.) Again, plaintiff fails to point to any factual allegations in the FAC.

Plaintiff asserts that even in the absence of an attorney-client relationship, Scheer and Bond still owed it a fiduciary duty. However, plaintiff has not pled the existence of any fiduciary duty owed by Bond or Scheer to it, and therefore, cannot assert an attorney-client relationship on this basis. Plaintiff also asserts that its claims against Scheer and Bond are asserted derivatively on behalf of NY Canna, which was their client. Plaintiff does not clearly assert any derivative claims against these defendants, and even if it had, it has not adequately alleged any derivative claim for the reasons set forth above.

Finally, plaintiff has not alleged "fraud, collusion, malicious actions or other special circumstances" sufficient to defeat the privity exception. (*Prudential Ins. Co. of Am. v Dewey Ballantine, Bushby, Palmer & Wood*, 170 AD2d 108, 118 [1st Dept 1991] [internal quotation marks and citations omitted].) As discussed above, plaintiff has not alleged any claim against Scheer, nor, as set forth below, has plaintiff alleged a claim for aiding and abetting breach of fiduciary duty against Scheer. Plaintiff also asserts in its opposition that the FAC sets forth in detail facts demonstrating that Scheer "colluded with the members of [New Amsterdam], *inter alia*, to freeze Plaintiff out of NY Canna's management, equity and resultant profit sharing." (NYSCEF 131, plaintiff's

[21] Presumably, plaintiff is referencing paragraph 53 of the Feder Affidavit, citing a portion of a term sheet stating "Upon submission of the Application, $150,000 shall be remitted to the Founding Shareholder. This amount shall be deposited in Escrow, by the Beta Purchaser, with the Company's attorney (Bond, Schoeneck & King, PLLC) upon execution of this Term Sheet." (NYSCEF 132, Feder Affidavit ¶ 53.) If anything this further demonstrates that Bond and Scheer were attorneys for NY Canna.

memorandum of law at 15.) While the FAC contains numerous allegations about Scheer's failure to respond to plaintiff's emails and requests for an application, plaintiff does not allege how this amounts to collusion to freeze plaintiff out. Thus, plaintiff's malpractice claim is dismissed.

II. Seventh Cause of Action for Aiding and Abetting Breach of Fiduciary Duty is Dismissed Against Scheer

Plaintiff asserts that Scheer, along with the Individual Defendants, aided and abetted Hague in his breach of a fiduciary duty. Scheer argues that plaintiff's claim fails against him because plaintiff does not allege (1) that Scheer knew or should have known that Hague owed a fiduciary duty to EPMMNY or that Hague was not acting in his capacity as an officer of EPMMNY, (2) that Scheer knowingly participated in any breach, (3) that Scheer acted in any capacity beyond that as an attorney for NY Canna, and (4) this claim with the particularity required by CPLR 3016(b). In opposition, plaintiff fails to point to any acts by Scheer in support of its claim. Plaintiff also addresses Scheer's aiding and abetting a breach of fiduciary duty by New Amsterdam and the Individual Defendants, as well as a claim for aiding and abetting fraud, neither of which is alleged in count seven of the FAC.

The only allegations suggesting that Scheer aided and abetted Hague's breach of fiduciary duty are that:

> Hague had long intimated to EPMMNY members that he had been approached several times by Vavalo and attorney Scheer to work 'independently' of EPMMNY, but that he would not do so given his loyalty to EPMMNY and his status as its managing member and President. (NYSCEF 48, FAC ¶ 110.)
>
> . . . Hague gave into the inducements, seduction and contractual interference by the New Amsterdam members and attorney Scheer, and betrayed EPMMNY and his partners at EPMMNY by assisting NY Canna

> in, and receiving compensation for: preparing the build-out costs associated with the undertaking for the investor; working with NY Canna's architects to design and build out the NY Canna cultivation facility; and overseeing and managing the build-out and operations of the cultivation operation -- all separate from, and independent of EPMMNY. (*Id.* ¶ 113.)

According all reasonable inferences in plaintiff's favor, it has adequately alleged that Scheer knew Hague had a fiduciary duty to EPMMNY and would breach it by working "independently" of EPMMNY. However, the allegations against Scheer are not sufficiently particular to state a claim for aiding and abetting Hague's breach of fiduciary duty. Plaintiff does not allege when Scheer and Vavalo approached him or what "inducements, seduction and contractual interference" are referenced in paragraph 113 of the FAC. Thus, plaintiff's claim for aiding and abetting breach of fiduciary duty is dismissed against Scheer.

III. Sanctions

Scheer and Bond argue that plaintiff should be sanctioned for its claims against them without basis in fact or law, and for ignoring the insulation of the attorney-client relationship. 22 NYCRR Section 130-1.1 (a) empowers courts with discretionary authority to sanction attorneys or parties, in the form of costs and fees, for frivolous conduct. Conduct is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law;
>
> (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or
>
> (3) it asserts material factual statements that are false.
>
> (22 NYCRR Section 130-1.1[c][1]-[3].)

"In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place ... and whether or not the conduct was continued when its lack of legal or factual basis ... should have been apparent ...." (22 NYCRR Section 130-1.1[c].)

While the FAC lacks sufficient allegations to assert a claim against Scheer, plaintiff's claims against Scheer are not frivolous. Plaintiff alleges Scheer's assistance in activities which resulted in economic harm to plaintiff. While plaintiff has failed to allege a cause of action against Scheer in the FAC, it is not apparent that plaintiff has no basis for such a claim. Thus, the court declines to impose sanctions.

Causes of Action Asserted Against All Defendants

Several of plaintiff's claims are asserted against all defendants which the court addresses as to each party.

I. Plaintiff's Ninth Cause of Action for Unjust Enrichment and Eleventh Cause of Action for Quantum Meruit as to all Defendants

Plaintiff asserts in support of its unjust enrichment claim that the defendants were "enriched at EPMMNY's great expense and loss when EPMMNY was deprived of its 25% equity in NY Canna" (NYSCEF 48, FAC ¶ 183) and in support of its quantum meruit claim that "Defendants accepted the services and/or received the benefits of the services rendered by EPMMNY's members without complaint or protest, and were enriched as a result." (*Id.* ¶ 192.) Plaintiff expected to receive compensation in the form of equity and management rights in exchange for its services.

To adequately plead a claim for unjust enrichment, a "plaintiff must allege that (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] [internal quotation marks and citation omitted].)

To state a claim for quantum meruit, a plaintiff must allege "(1) the performance of services in good faith, (2) the acceptance of the services by the person to whom they are rendered, (3) an expectation of compensation therefor, and (4) the reasonable value of the services." (*Fulbright & Jaworski, LLP v. Carucci*, 63 AD3d 487, 488–89 [1st Dept 2009].)

A. The NYCI Defendants

The NYCI Defendants argue that plaintiff's claim for unjust enrichment should be dismissed because it is duplicative of plaintiff's breach of contract claims, plaintiff cannot use unjust enrichment to evade the statute of frauds, and plaintiff's 9th and 11th causes of action are likewise barred by the statute of frauds. If plaintiff's unjust enrichment and quantum meruit claims are not dismissed, NYCI Defendants argue they should be "limited to the fair value of the services actually rendered by EPMMNY, which is *de minimis*" and not a 25% equity stake. (NYSCEF 103, memorandum of law at 32.)

Plaintiff may assert a claim for unjust enrichment in the alternative to a claim for breach of contract, where, as here, defendants dispute the existence of the underlying contract. (*Kramer v Greene*, 142 AD3d 438, 441–42 [1st Dept 2016] ["[W]here there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies."] [internal quotation marks and citation omitted].) Therefore, plaintiff's breach of contract claims do not preclude plaintiff's unjust enrichment claim.

However, as to the alleged management contract, which was dismissed based on the statute of frauds, plaintiff cannot evade the statute of frauds using unjust enrichment. In other words, the statute of frauds also bars plaintiff's unjust enrichment claim based on the management agreement. Otherwise, plaintiff's unjust enrichment claim proceeds against the NYCI Defendants based on the 25% equity.

As to plaintiff's quantum meruit claim, NYCI Defendants' request to limit plaintiff's damages, is premature. There is no factual basis at this stage to determine the reasonable value of plaintiff's damages on this motion to dismiss. Therefore, plaintiff's quantum meruit claim is sustained.

B. The NY Canna Defendants and Terradiol Management

Both the NY Canna Defendants and Terradiol Management argue that plaintiff's claims for unjust enrichment and quantum meruit fail, because plaintiff has failed to allege any direct contact or relationship with any of them. Plaintiff does not address this argument but states that the NY Canna Defendants "directly received" plaintiff's work and intellectual property, and employed Hague and "because Defendant Hague, as Member and Officer of Plaintiff, is believed to have assisted Defendants in preparing updated budgeted projections for onboarding Acreage into the company, and that those very same updated budgeted projections were submitted in the supplemental application, said services were rendered directly for the benefit of the Acreage Defendants, who accepted same without compensating Plaintiff." (NYSCEF 176, plaintiff's memorandum of law at 29-30.) In opposition to Terradiol Management, plaintiff asserts that "[t]he Terradiol Defendants, through their principals, defendants Duval and Vavalo, were well aware that Plaintiff had provided innumerable contributions

to the NY Canna business, and so it cannot be said that Plaintiff and the Terradiol Defendants were "too attenuated" to sustain a claim for unjust enrichment." (NYSCEF 172, plaintiff's memorandum of law at 20.)

Plaintiff has adequately alleged a relationship that is not too attenuated to support these claims. Plaintiff alleges that "Scheer and the New Amsterdam members had conspired with the incoming investors, including defendants NYMRC, NYCI Holdings LLC (NYCI), Impire Holdings LLC (Impire) and Acreage Holdings, to illegally divest EPMMNY of its holdings in NY Canna and split their ill-gotten gains amongst themselves." (NYSCEF 48, FAC ¶ 94.) Plaintiff also alleges that Terradiol Management was created by Vavalo, also a member of New Amsterdam which purportedly contracted with plaintiff (*id.* ¶ 119) and that "[u]pon information and belief, the focus of Terradiol MC is to capitalize on the knowledge and expertise it had received from EPMMNY and its members, including Hague, the EPMMNY member who had defected, to own, operate, advise and direct other companies who seek medical and/or recreational cannabis licenses." (*Id.*) Thus, affording all reasonable inferences to plaintiff, these defendants were allegedly aware of plaintiff's asserted interest in NY Canna and the services EPMMNY provided to NY Canna. This is sufficient for purposes of the unjust enrichment claim. (*See Philips Int'l Invs., LLC v Pektor*, 117 AD3d 1, 7 [1st Dept 2014] [finding relationship between plaintiff and partnerships formed by plaintiff's joint venture partner for the purpose of appropriating the joint venture business was not too attenuated to support an unjust enrichment claim.])

A. Bond and Scheer

Bond and Scheer argue that plaintiff's claims for unjust enrichment and quantum meruit should be dismissed because plaintiff does not allege that Scheer or Bond accepted services from plaintiff or retained any benefit from the purported scheme, or that Scheer or Bond holds an interest in or control over any entity. In opposition, plaintiff admits that how defendant was compensated for its participation in the purported scheme is unknown but plaintiff seeks to determine this through discovery.

Plaintiff's 9th cause of action for unjust enrichment against Scheer and Bond are not sufficient. While plaintiff alleges that Scheer and Bond accepted fees without performing services, plaintiff has not alleged that it paid Scheer and Bond and they failed to perform for plaintiff. (See *New York State Workers' Compensation Bd. V Program Risk Mgt., Inc.,* 150 AD3d 1589 [3d Dept 2017].) As to quantum meruit, plaintiff's 11th cause of action fails because plaintiff does not allege that Scheer or Bond had any interest in any of the entities that allegedly benefit from plaintiff's alleged services. Plaintiff inartfully asserts that it needs discovery that is in the control of the defendants to complete this claim. However, plaintiff's own records would show whether it paid Bond and Scheer.

Plaintiff asserts in paragraph 94 of the FAC that "Scheer and the New Amsterdam members had conspired with the incoming investors, including defendants NYMRC, NYCI Holdings LLC (NYCI), Impire Holdings LLC (Impire) and Acreage Holdings, to illegally divest EPMMNY of its holdings in NY Canna and split their ill-gotten gains amongst themselves." (NYSCEF 48, FAC ¶ 94.) While Scheer's affidavit (NYSCEF 197) challenging plaintiff's argument is certainly not documentary evidence

and is insufficient on its face (*Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]), plaintiff fails to allege that Scheer is a member of any of those entities making it unclear how he could have acquired these ill-gotten gains.

II. Plaintiff's Tenth Cause of Action for Conversion

Plaintiff asserts a claim for conversion based on allegations that all of the defendants converted its 25% interest in NY Canna and the intellectual property it provided to NY Canna. "Conversion is the unauthorized assumption and exercise of the right of ownership over another's property to the exclusion of the owner's rights." (*Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012] [citation omitted].) "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012].)

First, plaintiff's claim for conversion of his business interest must be dismissed. (*Austin v Gould*, 168 AD3d 626, 627 [1st Dept 2019] [transferring "Austin's interest in Stonemar MM Jackson, LLC, to his (Gould's) wife without consideration or consent, was correctly dismissed, because [t]he conversion of intangible property is not actionable."] [internal quotation marks and citation omitted].)

Second, the court addresses the NY Canna Defendants' argument that intellectual property cannot be converted under New York law because "[t]he conversion of intangible property is not actionable.'" (*Sun Gold, Corp. v Stillman*, 95 AD3d 668, 669 (1st Dept 2012)].) Plaintiff challenges whether the disputed property is intangible. The property allegedly converted, including "the proprietary medical cannabis standard

operating procedures, equipment,[22] build-out specifications, technology, systems and designs written and provided by EPMMNY for use in the NY Canna application." (NYSCEF 176, memorandum of law at 32.) This property is not clearly the same type of intangible property the First Department has held is intangible. (*See MBF Clearing Corp.*, 212 AD2d 478, 479 [1st Dep't 1995] [dismissing claim for conversion of plaintiff's "time, assets, associations, employees' services and equipment."]) While plaintiff's conversion claim is not dismissed on this basis, plaintiff must demonstrate in this action that this property is property subject to conversion, should plaintiff amend its complaint.

Third, defendants argue that plaintiff has not alleged their dominion or control over any of plaintiff's property to plaintiff's exclusion. Plaintiff alleges that NY Canna used "the proprietary medical cannabis standard operating procedures, equipment, build-out specifications, technology, systems and designs written and provided by EPMMNY" in the application and that its intellectual property was "exploited by NY Canna and its affiliates for use on NY Canna's successor and co-defendant Terradiol Ohio LLC's application for a medical cannabis license in the State of Ohio." (NYSCEF 48, FAC ¶¶ 115, 117.) Conversion is dismissed against all defendants because a party who "does not exclude the owner from the exercise of his rights' is not liable for conversion." (*Leser v Karenkooper.com*, 18 Misc 3d 1119[A], 2008 NY Slip Op 50135[U] [Sup Ct, NY County 2008] [conversion claim dismissed where defendants copied and used plaintiff's images of handbags] [internal quotation marks and citation omitted].)

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[22] While plaintiff references "extraction equipment" in the FAC (NYSCEF 48, FAC ¶ 104), it is unclear whether such equipment exists as property that can be converted.

Finally, the NYCI Defendants argue that plaintiff's claim for conversion fails because it is duplicative of plaintiff's breach of contract claims and fails to allege that any property has been converted by the defendants. A claim for conversion "cannot be predicated on a mere breach of contract." (*Fesseha v TD Waterhouse Investor Servs.*, 305 AD2d 268, 269 [1st Dept 2003] [citation omitted].) There is nothing distinguishing plaintiff's conversion claim based on intellectual property from plaintiff's claim for breach of a contract for ownership. (NYSCEF 48, FAC ¶¶ 145, 188.) Plaintiff's conclusory assertion in opposition that "[New Amsterdam's] and NY Canna's unauthorized use of Plaintiff's IP, and breaches of Fiduciary Duty are separate and distinct causes of action, resulting in unique and demonstrable damages" (NYSCEF 170, memorandum of law at 28) changes nothing. Thus, plaintiff's claim for conversion is also dismissed against New Amsterdam and NY Canna.

III. Plaintiff's Thirteenth Cause of Action for Fraud

In its claim for fraud against all of the defendants, plaintiff alleges "[t]he many oral Statements and written representations made by Defendants contained in emails, letters and NYS DOH application materials, submissions and documents that EPMMNY (a) was a 25% owner of NY Canna equity and (b) would be responsible for ongoing operations of NY Canna were false representations of fact," but defendants "had no intention of honoring or complying with such Statements." (NYSCEF 48, FAC ¶¶ 197, 198.) The elements of a fraud claim are: "a misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].) CPLR 3016 requires that "the circumstances constituting the wrong shall be

stated in detail." "Under this standard," a complaint must contain "allegations concerning specific misrepresentations, who made such misrepresentations, and when they were made." (*Daly v Kochanowicz*, 67 AD3d 78, 90 [2d Dept 2009].) "The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of." (*Pludeman v N. Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008].)

First, defendants argue that plaintiff fails to allege its fraud claim with particularity and has resorted to improper group pleading. The court agrees. Plaintiff fails to allege who said what, when, how, and where. (*Deep v Urbach, Kahn & Werlin LLP*, 19 Misc 3d 1142[A], 2008 NY Slip Op 51139[U]) [Sup Ct, Albany County 2008].) While group pleading is permissible with a fraud claim, *Stewart Tit. Ins. Co. v Liberty Tit. Agency, LLC*, 83 AD3d 532 [1st Dept 2011], here there are distinct groups that came into the picture at different times. However, plaintiff fails to distinguish one group from the other by their specific acts of fraud at different times. Here, each defendant could not have engaged in the same wrongdoing as was alleged in *Stewart Tit. Ins. Co*. (*Id*.)

Second, the NYCI Defendants argue that plaintiff's fraud claim is duplicative of plaintiff's breach of contract claims against New Amsterdam and NY Canna. "[A] fraud claim is not stated by allegations that simply duplicate, in the facts alleged and damages sought, a claim for breach of contract, enhanced only by conclusory allegations that the pleader's adversary made a promise while harboring the concealed intent not to perform it." (*Cronos Grp. Ltd. v. XComIP, LLC*, 156 AD3d 54, 62 [1st Dept 2017]; *see also Fairway Prime Estate Mgt., LLC v. First Am. Intl. Bank*, 99 AD3d 554, 557 [1st Dept 2012] [a fraud claim "can be predicated upon an insincere promise of future

performance only where the alleged false promise is collateral to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative."] [internal quotation marks and citation omitted].) Plaintiff alleges that defendants had no intention of honoring their promises to provide plaintiff with 25% of the equity in NY Canna or give EPMMNY operational duties over NY Canna. (NYSCEF 48, FAC ¶¶ 197-198.) These allegations are plainly duplicative of, and not collateral to, plaintiff's first cause of action for breach of contract.

However, in its opposition, plaintiff argues the NYCI Defendants also misrepresented their team's capabilities and willingness to assist with the application development, the amount of money invested in the project, and their willingness to partner with plaintiff after a license was awarded. This argument is supported by Feder who asserts that New Amsterdam misrepresented the finances of NY Canna, stating its balances for months before the company was formed, and made such representation to induce plaintiff to abandon its own licensing efforts and partner with plaintiff. (NYSCEF 132, Feder Aff ¶ 46.) However, plaintiff's insinuation that these statements are false have no factual predicate. Also, the alleged misrepresentations of unwillingness to partner and assist with the application are revamped versions of plaintiff's assertion that defendants never intended to comply with the contract, making it duplicative against New Amsterdam and New Canna. Therefore the fraud claim is dismissed against New Amsterdam and New Canna for this independent reason.

With regard to Scheer, Bond, and NYCI, plaintiff offers the 2017 application as proof that all of their prior statements that plaintiff owned 25% of New Canna Inc. were false because plaintiff's 25% is disavowed in the 2017 application. Plaintiff also alleges

that NYCI defendants and Scheer induced plaintiff to perform valuable services without giving plaintiff the promised consideration of 25%. (*See* NYSCEF 48, FAC ¶¶ 45, 49, 52, 65, 68, 77, 91, 94, 106, 110.)

Plaintiff cannot assert a claim for fraud based on misrepresentations in the initial application or thereafter because plaintiff's alleged reliance on defendant's alleged fraud --its preparation of the application and submission of intellectual property—was prior to the submission of the first application. Second, even if plaintiff could assert a claim based on misrepresentations of future performance, plaintiff does not allege anywhere that Scheer promised any performance by New Amsterdam, prior to the submission of the initial application. The negotiation of the contract between the two entities does not constitute a promise on which plaintiff could have relied, particularly since plaintiff does not allege facts to suggest that Scheer believed any such representations were false. Thus, plaintiff's claim for fraud against Scheer and Bond, and all defendants, is dismissed.

IV. Plaintiff's Fourteenth Count for Promissory Estoppel

Plaintiff alleges that "[d]efendants clearly and unambiguously promised that EPMMNY owned a nondilutable 25% interest in the equity of NY Canna, in return for the services and intellectual property of EPMMNY in the medical cannabis application process." (NYSCEF 48, FAC ¶ 203.) A claim for promissory estoppel requires allegations that "(1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." (*MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 AD3d 836, 841–42 [1st Dept 2011] [citations omitted].)

Each of the defendants argues that plaintiff has not alleged that they made any promise to plaintiff on which plaintiff relied. As set forth above in the court's discussion of plaintiff's fraud claims, plaintiff has not alleged that any of the defendants, aside from New Amsterdam, made a promise on which plaintiff relied.

The NYCI Defendants argue that plaintiff's claim for promissory estoppel is duplicative of its breach of contract claims. A promissory estoppel claim must be dismissed as duplicative of a breach of contract claim, where the plaintiff "alleges no duty owed him by defendants independent of the contract." (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 61 AD3d 614, 615 [1st Dept 2009].) Plaintiff's promissory estoppel claim is based on defendants' promise that "EPMMNY owned a nondilutable 25% interest in the equity of NY Canna, in return for the services and intellectual property of EPMMNY in the medical cannabis application process." (NYSCEF 48, FAC ¶ 203.) The alleged promise is the consideration plaintiff alleges it was owed under its contract with New Amsterdam. Plaintiff asserts that defendants' retention of intellectual property is independent of the breach of contract, but plaintiff alleges this as part of its first claim for breach of contract that defendants misappropriated its intellectual property. (NYSCEF 48, FAC ¶ 145.) Therefore, plaintiff's promissory estoppel claim is duplicative and must be dismissed against all defendants.[23]

[23] Promissory estoppel is an alternative to a contract where the contract is disputed, but that argument is not made here.

X. Plaintiff's Eighteenth Cause of Action for Misappropriation of Trade Secrets

Plaintiff asserts a claim against all defendants for impermissibly using trade secrets provided by plaintiff to NY Canna in breach of their agreement to give plaintiff 25% of the equity in NY Canna.

To state a claim for misappropriation of trade secrets, plaintiff must allege that "(1) it possessed a trade secret and (2) the defendants used that trade secret in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means." (*Schroeder v Pinterest Inc.*, 133 AD3d 12, 27 [1st Dept 2015] [internal quotation marks and citations omitted].) This claim is dismissed against all defendants.

First, plaintiff's allegation that "EPMMNY has a possessory right to, or interest in, 25% of the equity ownership of NY Canna and/or its successors, as well as the intellectual property provided to NY Canna during the medical cannabis application process," and "constituted trade secrets" is vague and conclusory in violation of CPLR 3013. (NYSCEF 48, FAC ¶¶187, 218.) Also, the equity ownership is not a trade secret.

Second, plaintiff's claim for misappropriation of trade secrets is dismissed against New Amsterdam as duplicative of its contract claim. Plaintiff alleges that New Amsterdam breached its contract for ownership in part by "misappropriating EPMMNY's intellectual Property" (NYCEF 48, FAC ¶ 145) and that the NYCI Defendants "are using EPMMNY's trade secrets in breach of their agreement, as NY Canna and New Amsterdam have not provided EPMMNY with 25% of the non-dilutable equity of NY Canna." (*Id.* ¶ 220.)

Plaintiff's claim for misappropriation of trade secrets also fails as to all other defendants, because, as they all argue, plaintiff fails to allege that these defendants "used the trade secrets in breach of an agreement, confidential relationship or duty, or as a result of discovery by improper means." (*Schroeder*, 133 AD3d at 28.) Plaintiff has not alleged that any of these defendants has a confidential relationship with or duty to plaintiff, nor has plaintiff alleged that they have any agreement with it. Nor has plaintiff alleged a claim of misappropriation by improper means against any of these defendants. Plaintiff merely asserts that all defendants are using the trade secrets in breach of the contracts with New Amsterdam and NY Canna. Thus, plaintiff fails to allege how any of the defendants themselves misappropriated any trade secrets. Therefore, plaintiff's claim for misappropriation is dismissed against all defendants.

VI. Plaintiff's Twentieth Cause of Action for Declaratory Judgment

Plaintiff seeks a declaratory judgment that "Plaintiff is the rightful owner of 25% of the non-dilutable equity of NY Canna, its affiliates and successors, including Terradiol MC, Terradiol OH, NYCI Holdings LLC, New Amsterdam, Impire State Holdings, LLC, Acreage Holdings., and NY Medicinal Research & Caring, LLC." (NYSCEF 48, FAC ¶ 231.) "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations." (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 99 [1st Dept 2009] [internal quotation marks and citations omitted].) "While it is true that a request for a declaratory judgment is ordinarily premature where a future event affecting the obligations of the contracting parties is contemplated, yet uncertain of occurrence and beyond the parties' control, such relief is available where the declaration will have

the immediate and practical effect of influencing the parties' current conduct." (*Buller v Goldberg*, 40 AD3d 333, 333 [1st Dept 2007] [internal quotation marks and citations omitted].)

The NYCI Defendants argue that plaintiff's declaratory judgment claim fails because it is duplicative of plaintiff's breach of contract claim. Without addressing any of their cases or citing law of its own, plaintiff responds that, while it is also seeking monetary damages and specific performance of its agreement with NY Canna and New Amsterdam, a declaratory judgment would bind all of the defendants. Plaintiff's utter failure to oppose NYCI Defendants requires dismissal. Since plaintiff alleges that Terradiol Management is an affiliate of New Amsterdam, this claim is dismissed against Terradiol Management for the same reason. Scheer and Bond are dismissed from this claim because plaintiff fails to mention them in the claim. The NY Canna Defendants argue that plaintiff's claim for a declaratory judgment should be dismissed because it is an equitable remedy rather than an independent cause of action. Plaintiff fails to respond. Thus, plaintiff's claim for a declaratory judgment is dismissed against all defendants.

V. Plaintiff's Twenty-First Cause of Action for Injunctive Relief is Dismissed

Here, plaintiff seeks the return of its 25% interest in NY Canna. The NY Canna Defendants argue that this claim should be dismissed because it is an equitable remedy rather than an independent cause of action. Plaintiff fails to respond to this argument and instead states why it has stated its claim. As to Terradiol Management, plaintiff has not alleged that it has any property or equity of plaintiff that it could return to plaintiff. As to all defendants, plaintiff fails to allege irreparable harm.

Plaintiff seeks money damages and fails to explain why money damages are insufficient. (*Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596, 597 [1st Dept 2011].) Therefore, plaintiff's twenty-first count is dismissed against all defendants.

VI. Plaintiff's Twenty-Fifth Cause of Action for Tortious Interference with Potential Business Opportunity is Dismissed

Plaintiff alleges that the defendants deprived plaintiff of the opportunity to operate and manage NY Canna and receive corresponding compensation, by luring Hague away from plaintiff and selling plaintiff's ownership interest to Impire. The elements of a claim for tortious interference with prospective business relations are: "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship." *(Thome v Alexander & Louisa Calder Found.,* 70 AD3d 88, 108 [1st Dept 2009].) The alleged interfering conduct must have been "undertaken for the sole purpose of harming plaintiff, or . . . wrongful or improper independent of the interference allegedly caused." (*Jacobs v Continuum Health Partners, Inc.*, 7 AD3d 312, 313 [1st Dept 2004]).

All defendants object that plaintiff has not alleged that they used any improper means to recruit Hague or sell plaintiff's ownership.

As an initial matter, plaintiff has not alleged that any of the defendants, other than Scheer, Bond, Vavalo or New Amsterdam were involved in recruiting Hague. Further, in the FAC, plaintiff merely restates the elements without pointing to any allegations of wrongful means or that plaintiff's acts were taken with the sole purpose of harming plaintiff. While the defendants' actions may have been harmful to plaintiff, or in breach

of an agreement, plaintiff does not state how the actions themselves were wrongful. (*Smith v Meridian Techs., Inc.*, 86 AD3d 557, 560 [2d Dept 2011] ["As a general rule, such wrongful conduct must amount to a crime or an independent tort, and may consist of physical violence, fraud or misrepresentation, civil suits and criminal prosecutions. Such wrongful conduct may include some degrees of economic pressure; however, persuasion alone is not sufficient."] [internal quotation marks and citations omitted].) Indeed, plaintiff asserts defendants' self-interest motivated by fortune and fame, so the sole purpose was not to harm plaintiff. (*Thome,* 70 AD3d at 108.) Therefore, the twenty-fifth count for tortious interference with potential business opportunity is dismissed against all defendants.

VII. Plaintiff's Twenty-Eighth Cause of Action for Unfair Competition is Dismissed

Plaintiff alleges that all defendants have conspired prevent EPMMNY's entry in the medical and recreational cannabis market in the state of New York in violation of the Donnelly Act. All defendants argue that plaintiff's claim fails because plaintiff fails to (1) identify the relevant market, (2) allege a conspiracy, and (3) allege how such a conspiracy harmed the market as a whole. "A plaintiff alleging a claim under the Donnelly Act must identify the relevant product market, allege a conspiracy between two or more entities, and allege that the economic impact of that conspiracy was to restrain trade in the relevant market." (*Thome.* 70 AD3d at 111.) A plaintiff must allege "losses . . . tantamount to injury to competition in the market as a whole" not merely the plaintiff itself. (*Benjamin of Forest Hills Realty, Inc. v. Austin Sheppard Realty, Inc.*, 34 AD3d 91, 97 [2d Dept 2006].)

Plaintiff's claim for unfair competition fails because plaintiff has not alleged a harm to the "medical and recreational cannabis market in the state of New York." Specifically, the fact that NY Canna, LLC took one of the limited licenses from another applicant is not sufficient to allege this. Moreover, even if plaintiff had alleged that defendants' use of the NY Canna name or of plaintiff's own name constitutes a harm to the market as a whole, which plaintiff does not, these allegations would not be sufficient. Plaintiff does not state in its opposition how the use of the NY Canna name would be harmful to the public. Thus, plaintiff's claim for unfair competition is dismissed against all defendants.

The court has considered all other arguments by all parties and finds they do not change the outcome.

Accordingly, it is

ORDERED, that motion sequence number 003 is granted; and it is further

ORDERED that motion sequence numbers 004, 005, and 007 are granted in part; and it is further

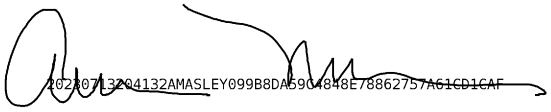
ORDERED that plaintiff's second, third, fourth, fifth, sixth, seventh, eighth, tenth, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-sixth, twenty-seventh, twenty-eighth, and twenty-ninth counts are dismissed against all defendants without prejudice; and it is further

ORDERED that plaintiff's first count proceeds against New Amsterdam; and it is further

ORDERED that the 9th and 11th counts proceed against NYCI Defendants, Terradiol Management Company LLC, and NY Canna Defendants; and it is further

ORDERED, that all claims are dismissed against Terradiol Ohio, LLC, Jeffrey Scheer Esq., and Bond, Schoeneck & King, PLLC; and it is further

ORDERED, that plaintiff's demand for punitive damages is stricken.



7/13/2023
DATE

ANDREA MASLEY, 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