SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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KATHLEEN PALELLA,

Plaintiff,

- v -

TMO VI LLC,ICON INTERMEDIATE HOLDINGS, LLC,TMO LLC,ICON PARKING 3 LLC,ICON PARKING HOLDINGS, LLC,ICON PARKING MANAGEMENT, LLC,ICON PARKING SERVICES, LLC,ICON PARKING SYSTEMS, LLC,58TH & 7TH PARKING LLC

Defendant.

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INDEX NO. 655556/2023

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 39, 40, 41, 43, 47, 48, 50, 51, 52, 53

were read on this motion to/for DISMISS.

On July 23, 2024, at oral argument, the court made several rulings as to certain aspects of defendants' motion to dismiss. The court dismissed the third cause of action for an accounting with leave to replead. As explained at pages 34-36 and 42 of the transcript (Tr.), plaintiff expressed neither need nor damages with respect to an accounting.

The court also dismissed the fourth cause of action for breach of the covenant of good faith and fair dealing as duplicative (Tr. pg 36). As to the seventh cause of action for waste and mismanagement of company assets, plaintiff admitted at page 36 of the transcript that this cause of action duplicated the first cause of action. Therefore, the court dismissed this cause of action too. Finally, the court dismissed the ninth and tenth causes of action with leave to replead (see Tr. pg. 42). The court took the remainder of the motion to dismiss on submission. As Delaware and New York law are the same on all relevant issues, the court applies New York law.

"[T]he business judgment rule prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes" (*Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY 2d 530, 538 [1990]). To overcome the business judgment rule, plaintiffs need to point to more than a mere disagreement with a business decision. Some sort of self-dealing or conflict of interest needs to be alleged (see, e.g. *Max v Alp, Inc,* 203 AD3d 580 [1st Dep't 2022]["[w]hile plaintiffs might disagree with decisions of ALP's Board of Directors, a cause of action will not lie where, as here, the complaint 'merely alleges that a course of action other than that pursued by the board of directors would have been more advantageous'"] internal citations omitted).

Cases upholding claims in the face of the business judgment rule uniformly contain allegations of some self-dealing at the very least. (see, e.g., *Amfesco Industries, Inc. v. Greenblatt,* 172 AD2d 261 [1st Dept 1991] ["Plaintiff alleged that David Greenblatt acted in his own self - interest instead of that of the stockholders by using the assets of the corporation in the leveraged buyout to profit personally"])

Similarly, in *Morgan v. Worldview Entertainment Holdings, Inc.,* 170 AD3d 500 (1st Dept 2019), the defendant, Woodrow, allegedly used control of his partner's property to benefit a different company that he controlled. In *Board of Managers of Greenwich Street Condominium v. SGN 443 Greenwich Street Owner LLC,* 224 AD3d 401 (1st Dept 2024), plaintiff pleaded the principals "fraudulently passed on to the unit owners the costs of construction and maintenance disguised as condominium common charges, and that they deliberately cut corners when renovating the building by making the renovations in a manner departing from the operating plan and calculated to save the sponsor money." In *Gallagher v. Crotty,* 226 AD3d 426 (1st Dept 2024), defendants' approval of compensation to themselves amounted to self-dealing. Finally, in *Yin Shin Leung Charitable Foundation v. Seng,* 177 AD3d 463 (1st Dept 2019), respondents controlled entities on either side of the transaction and therefore benefitted from the loan.

In this complaint, however, there are no allegations that defendants benefited themselves or anyone related to themselves. It does not even allege that defendants took the course of action they did in bad faith. The complaint merely amounts to an objection to the managing member's 2020 business decision to enter into a management agreement whereby the Company would earn 10% of revenues from the operation of a parking garage that Extell owned, rather than exercise the Company's option under a prior Lease with Extell to demand a new 49-year lease at market rate.

As defendants have aptly pointed out, there is a good deal of risk attendant to an assumption of indefinite rental obligations, perhaps especially so in 2020. By entering into the management agreement, the defendants guaranteed the Company a revenue stream during uncertain times without the risk of paying a lease at market rates month after month.

As plaintiffs have failed to point to any allegations of bad faith, self-dealing or the like, given the logical justification for defendants' actions, plaintiffs have failed to plead around the business judgment rule. Accordingly, the court now dismisses the second cause of action for breach of fiduciary duty and the fifth cause of action for loss of a corporate opportunity.

The sixth cause of action for "minority oppression" also falls. Not only is it insufficient because of the business judgment rule, but plaintiffs have also failed to plead how they suffered any differently than anyone else. Aside from stating in conclusory fashion that defendants "have unlawfully oppressed and frozen out plaintiff from receiving the benefits of the bargain that Plaintiff agreed to in the operating agreement" (which, incidentally, also duplicates the first cause of action for breach of contract), plaintiff never pleads how defendants' actions oppressed them in particular. Taking the pleading as a whole, the logical outcome is that the consequences of defendants' allegedly poor decisions would fall on everyone equally, not merely minority members. Therefore, not only does this cause of action duplicate the cause of action for breach of contract, and fails to get around the business judgment rule, it also fails to plead MINORITY oppression.

The eighth cause of action for tortious interference with the Operating Agreement is confusing to the extent it alleges that defendants interfered with their own contract. Obviously, a party cannot interfere with their own contact. That is merely a breach (see *Bradbury v. Israel*, 168 N.Y.S.3d 16, 18 (1st Dep't 2022) (holding that defendant's wholly owned and operated LLC was not a third-party stranger to the defendant's contract and therefore could not be liable for tortious interference). Nor does plaintiff ever oppose defendant's arguments pointing out the pleading deficiencies with this cause of action, including that there are no allegations that defendants committed a tort. Accordingly, this case of action is dismissed without prejudice.

Finally, the court dismisses the first cause of action. The first cause of action does not survive the business judgment rule either. According to plaintiff's opposition brief, the thrust of the amended complaint is that the Managing Member Defendants breached the Operating Agreement by "giv[ing] up" a contractual option to pursue a new, market rate 49-year lease on a parking garage in 2020 and instead entering into the Management Agreement, whereby the Company became entitled to 10% of parking garage's revenue. (See Opp. at 1). However, sections 6.1(a) and 6.1(c) of the Operating Agreement are clear that "[a]ll decisions regarding the management of the Company shall be vested in the Managing Member" and that "[a]ll decisions regarding the operation of the Property are vested solely in the Manager." (Operating Agreement at 8). Thus, the Managing Member defendants were operating well within their authority when they determined not to exercise the option under the Lease. Plaintiff's opposition fails to explain how Managing Member Defendants' choice not to pursue a 49-year lease was anything other than a provident exercise of business judgment exercised pursuant to the permissive language of the Operating Agreement. Again, there are no allegations of self-dealing or bad faith.

Accordingly, it is

ORDERED THAT the court grants the motion to dismiss without prejudice; and it is further

ORDERED THAT plaintiff has 30 days from the e-filed date of this decision and order to amend the complaint or the court will mark this matter disposed; and it is further

ORDERED THAT there shall be no further motion practice without prior conference with the court.

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8/19/2024
DATE

MELISSA A. CRANE, J.S.C.

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