EPMMNY LLC v NYCANNA LLC
2025 NY Slip Op 30217(U)
January 20, 2025
Supreme Court, New York County
Docket Number: Index No. 655480/2018
Judge: Andrea Masley
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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. 024

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 024) 849, 850, 851, 852, 853, 854, 855, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 906, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 972, 973, 1043

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Plaintiff seeks leave to file a fifth amended complaint (Proposed Fifth AC).[1] In the Proposed Fifth AC, plaintiff alleges ten causes of action: fraudulent or unlawful merger (against New York Canna, Inc. [NY Canna], NYCANNA LLC [NYCANNA], NYCI Holdings LLC [NYCI], and New York Medicinal Research & Caring LLC [NYMRC]), breach of contract[2] (against NYCANNA), unjust enrichment (against NYCANNA), unjust

[1] Plaintiff withdrew its second, third, and fourth amended complaints by stipulation and without prejudice to the filing of this motion. (NYSCEF Doc. No. [NYSCEF] 763, Stipulation.)
[2] In its decision on defendants' motions to dismiss the amended complaint, the court held that plaintiff sufficiently alleged an oral subscription agreement with NAD.

enrichment (against Terradiol Management Company LLC [Terradiol MC] and Terradiol Ohio LLC [Terradiol OH]), aiding and abetting fraudulent merger (against NYCANNA, NYCI, NYMRC, Kevin Murphy, Impire State Holdings LLC [Impire], High Street Capital Partners LLC d/b/a Acreage Holdings [Acreage], Dino Dixie, Dennis T. Duval, Dominic Falcone, Partick Harvey, John Vavalo, Jeffrey B. Scheer, and Bond, Schoeneck & King PLLC [BSK]), breach of fiduciary duty (against New Amsterdam Distributors LLC [NAD]), aiding and abetting breach of fiduciary duty (against NYCANNA, NYCI, NYMRC, Murphy, Impire, Acreage, Dixie, Duval, Falcone, Harvey, Vavalo, Scheer, and BSK), fraudulent conveyance (against NYCANNA, NYCI, and NAD), tortious interference with contract (against NYCI, NYCANNA, and Acreage), and unjust enrichment (against NYCI and NYCANNA).

"[L]eave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit … and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court." (*Davis v S. Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks and citations omitted]; *see also* CPLR 3025 [b].) "[L]eave to amend a complaint should be denied if the proposed complaint could not survive a motion to dismiss. A proposed amended complaint that would be subject to dismissal *as a matter of law* is, by definition, 'palpably insufficient or clearly devoid of merit' and thus should not be permitted under CPLR 3025." (*Olam Corp. v Thayer*, 2021 NY Slip Op 30345[U], *3-4 [Sup Ct, NY County 2021].) "When the non-moving

(NYSCEF 845, Decision and Order at 19 [seqs. 003, 004, 005, 007] ["As to plaintiff's alleged ownership agreement, the court finds that plaintiff has alleged an oral subscription agreement"].) Plaintiff now alleges this cause of action against NYCANNA.

party opposes amendment on the ground of futility, the moving party should be prepared in its reply brief to defend the proposed pleading as if it were opposing a motion to dismiss." (*Id.* at 4.)

"[P]rejudice occurs when the party opposing amendment has been hindered in the preparation of [its] case or prevented from taking some measure in support of [its] position." (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654-55 [1st Dept 2009] [internal quotation marks and citation omitted].) "[M]ere lateness … is not a barrier to amendment. Lateness must be coupled with significant prejudice to [a non-moving party]." (*Seda v New York City Housing Authority*, 181 AD2d 469, 470 [1st Dept 1992] [citation omitted], *lv denied* 80 NY2d 759 [1992].)

> "The kind of prejudice required to defeat an amendment … must … be a showing of prejudice traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add." (*Jacobson v Croman*, 107 AD3d 644, 645 [1st Dept 2013] [internal quotation marks and citations omitted].)

Fraudulent Merger (against NY Canna, NYCANNA, NYCI, and NYMRC)

Plaintiff alleges that NY Canna merged into NYCANNA through two acts: merger into NYCI, NAD's subsidiary, and then NYCI's transfer of NY Canna's assets to NYCANNA. (NYSCEF 851, Proposed Fifth AC ¶ 188.) It is alleged that NY Canna was merged into NYCI for the sole purpose of transferring NY Canna's assets into NYCANNA so Murphy and his companies could become NY Canna's owners. (*Id.* ¶ 190.) NYCANNA became wholly owned by Murphy and Acreage. (*Id.* ¶¶ 191-192.) Murphy and Acreage offered plaintiff an exchange which allegedly was a diluted indirect share in NYCANNA through NYCI. (*Id.* ¶¶ 193-194.) Plaintiff alleges that the offered

NYCI membership interest would have amended the agreement entered into by plaintiff, NAD, and NY Canna. (*Id.* ¶¶ 195, 42.) Plaintiff's interest would decrease to "a 12.5% indirect beneficial interest in the restructured applicant NYCANNA LLC by EPMMNY holding 25% of NYCI which would hold 50% of NYCANNA LLC." (*Id.* ¶ 195.) Plaintiff would also no longer have management rights. (*Id.* ¶ 196.) When the offer was presented to plaintiff, unbeknownst to plaintiff, NAD, NYCI, NYCANNA, NYMRC, Acreage, and Murphy already entered merger and restructuring agreements. (*Id.* ¶¶ 197-198.) On November 30, 2016, plaintiff rejected the exchange offer still not knowing that the merger already occurred. (*Id.* ¶ 200.) On January 11, 2017, plaintiff was informed of the merger. (*Id.* ¶ 201.) Plaintiff was informed that a 12.5% interest was the only offer available to it. (*Id.* ¶ 202.) Plaintiff alleges that NAD, Murphy, NYCANNA, and NYMRC fraudulently merged plaintiff's 25% non-dilutable interest in NY Canna "out of existence." (*Id.* ¶ 203.) Pursuant to Business Corporation Law (BCL) § 623, plaintiff should have been informed of the merger within 10 days of the date that the merger was authorized. (*Id.* ¶ 204.) Acreage eventually acquired all interest in NYCANNA and sold such to its Canadian arm, Acreage Holdings Inc. (Canada). (*Id.* ¶ 222.)

"Generally, the remedy of a shareholder dissenting from a merger and the offered 'cash-out' price is to obtain the fair value of his or her stock through an appraisal proceeding." (*Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 567 [1984], *citing* BCL §623.) "The pursuit of an appraisal proceeding generally constitutes the dissenting stockholder's exclusive remedy. An exception exists, however, when the merger is unlawful or fraudulent as to that shareholder, in which event an action for equitable relief is authorized." (*Id.* at 568 [citations omitted].) "[T]he equitable relief sought must be the

primary relief sought." (*Sparks v Metrovest Equities*, 186 AD3d 1177, 1179 [1st Dept 2020] [citations omitted].)

Although plaintiff alleges that there is no adequate remedy at law and seeks rescission of the merger or a constructive trust if recession is impracticable, plaintiff alternatively seeks monetary damages if a constructive trust is impracticable, thus, contradicting that there is no adequate remedy at law. (*See* NYSCEF 851, Proposed Fifth AC ¶¶ 225-227.) "[A]ny monetary recovery, if available at all, can only be ancillary to a grant of some form of equitable relief." (*Breed v Barton*, 54 NY2d 82, 87 [1981].) This is truly an action for monetary damages and equitable relief is not the primary relief sought. (*SBE 44 Wall, LLC v New 44 Wall St., LLC*, 2013 NY Slip Op 32104[U], *6 [Sup Ct, NY County 2013] [holding that (t)o be considered an 'appropriate action,' the dissenting shareholders (members) must seek 'equitable relief,' not just bring a cause of action over which equity would take jurisdiction" (citation omitted)].) Plaintiff really seeks a monetary award. A review of the Proposed Fifth AC "reveals that the over-all nature and character of the case is legal and not equitable." (*Schlick v Am. Bus. Press*, 246 AD2d 450, 450 [1st Dept 1998] [citation omitted].) Again, as admitted in plaintiff's own pleading, money damages afford a complete and adequate remedy. (*See* NYSCEF 851, Proposed Fifth AC ¶ 227; *Romanoff v Romanoff*, 148 AD3d 614, 616 [1st Dept 2017] [holding that "rescission is unavailable because money damages are available and will make plaintiff whole"].)

Nevertheless, this claim fails on another ground. Plaintiff's claim is based on fraud; specifically, that NY Canna, NYCANNA, NYCI, and NYMRC failed to disclose that the merger agreements had already been entered into when the offer to plaintiff was

made. (NYSCEF 851, Proposed Fifth AC ¶¶ 197-198.) Plaintiff alleges that it did not learn of the merger until January 2017. (*Id.* ¶ 201.) However, this is contradicted by documentary evidence. On November 20, 2016, Hague forwarded David Feder[3] an email from Scheer stating, in relevant part,

> "[i]n order to accomplish the conversion:
>
> o New York Canna, Inc. is merging into NYCI Holdings, LLC; and
> o NYCI Holdings, LLC, as the surviving entity of the merger, will then contribute its assets (i.e., the application to NYSDOH) to a new LLC.
>
> The new operating entity will be NYCANNA, LLC. NYCI Holdings, LLC owns a 50% membership interest in NYCANNA, LLC (the investor holds the other 50%). I have reviewed this re-structuring with counsel at NYSDOH and it presents no issues or concerns.
>
> Given the change in circumstances and passage of time, but still with an intent to honor the spirit of the original agreement, EPMMNY, LLC will subscribe for a 25% economic interest in NYCI Holdings, LLC. This will entitle EPMMNY, LLC to 25% of the profits, losses and distributions that flow through from NYCANNA, LLC to NYCI Holdings, LLC. Any EPMMNY, LLC member who provides services to the operating entity will be separately compensated." (NYSCEF 955, Scheer Email.)

Although Feder asserts that this email just purports that a restructuring occurred, and he was never presented with formal documentation (NYSCEF 961, Feder aff ¶ 109), the email put him on notice that this transaction was occurring. "To allege a cause of action based on fraud, plaintiff must assert "a misrepresentation or a material omission of fact which was false." (*Connaughton v Chipotle Mexican Grill, Inc.,* 29 NY3d 137, 142 [2017] [citation omitted].) Without an omission, there is no fraud on which this claim is based.

[3] Feder is a shareholder in plaintiff EPMMNY. (NYSCEF 851, Proposed Fifth AC ¶ 44.)

Aiding and Abetting Fraudulent Merger (against NYCANNA, NYCI, NYMRC, Murphy, Impire, Acreage, Dixie, Duval, Falcone, Harvey, Vavalo, Scheer, and BSK)

"[T]o state a claim for aiding and abetting liability, the pleading must allege, inter alia, underlying tortious conduct." (*Alliance Network, LLC v Sidley Austin LLP*, 43 Misc 3d 848, 865 [Sup Ct, NY County 2014] [citations omitted]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476, [1st Dept 2009], *lv denied* 13 NY3d 709 [2009] ["In order to plead properly a claim for aiding and abetting fraud, the complaint must allege: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud" (internal quotation marks and citation omitted)].) This claim fails as the underlying claim for fraudulent merger is without merit.

Breach of Contract (against NYCANNA)

Plaintiff alleges that it entered into an agreement with NY Canna and NAD, whereby it was agreed that plaintiff was a 25% owner of NY Canna's non-dilutable stock and would be responsible for NY Canna's operations. (NYSCEF 851, Proposed Fifth AC ¶¶ 229-230.) This claim is alleged against NYCANNA as successor to NY Canna. Plaintiff alleges that NY Canna breached the agreement by participating in the merger which violated plaintiff's right to fund instead of NAD, maintain a 25% non-dilutable interest, and approve or disapprove the merger. (*Id.* ¶ 245.)

Although this claim is only alleged against NYCANNA, NAD takes issue with footnote 3 in the Proposed Fifth AC in which plaintiff states "[t]he Court found that Plaintiff has alleged an oral subscription agreement in the Court's Decision and Order on Defendants' motions to dismiss the First Amended Complaint." (NYSCEF 851, Proposed Fifth AC n 3.) As previously discussed, the court held in its decision on

defendants' motions to dismiss the amended complaint that "plaintiff's allegations as to the existence of an oral agreement between itself and [NAD] of a 25-75 split in NY Canna, Inc. are sufficient." (NYSCEF 845, Decision and Order at 20 [seqs. 003, 004, 005, 007].)

It is unclear as to whether, by inclusion of this footnote, plaintiff is attempting to incorporate the court's decision, or the allegations contained in the amended complaint, into the Proposed Fifth AC. Plaintiff does not address this footnote in its reply.

CPLR 3013 provides that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." A reference to a prior pleading in a footnote does not satisfy CPLR 3013. Further, if leave to amend is granted, the Proposed Fifth AC will supersede the amended complaint and references to the amended complaint will not be incorporated. (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005] [holding that original complaint superseded by amended complaints and "the sufficiency of the allegations in the earlier complaints is rendered academic"].) Thus, footnote 3 shall be stricken from the Proposed Fifth AC.

NYCANNA's sole argument is that it would be prejudiced by this amendment. Specifically, it argues that plaintiff was in possession of facts on which this claim is based when it filed the original complaint but chose to delay. However, the parties agreed that plaintiff could move to amend within 10 days after the court's decision on the motions to dismiss the amended complaint. (NYSCEF 755, Stipulation.)

Nevertheless, NYCANNA fails to evidence significant prejudice. NYCANNA's argument that granting this motion will result in the expense of briefing another motion to dismiss is moot, as defendants have already filed their motions to dismiss and expended fees. Also, its argument that delaying this action will cause more prejudice because Feder will continue disparaging it on social media is speculative. Thus, leave to amend to add this cause of action is granted.

Unjust Enrichment (against NYCANNA)

For the same reasons as stated above, NYCANNA has not shown sufficient prejudice warranting denial of this motion as to this claim. Thus, leave to amend to add this cause of action is granted.

Unjust Enrichment (Terradiol MC and Terradiol OH)

Plaintiff alleges that the Terradiol defendants capitalized on plaintiff's trade secrets, knowledge, and expertise "to own, operate, advise and direct" other companies seeking cannabis licenses. (NYSCEF 851, Proposed Fifth AC ¶ 274.)

The court previously dismissed Terradiol OH for lack of personal jurisdiction. (NYSCEF 844, Decision and Order [seqs 003, 004, 005, 007] at 30-32.) Plaintiff argues it has remedied that defect by pleading that Terradiol OH was enriched by receiving EPMMNY's trade secrets, knowledge, and expertise, which were derived from EPMMNY in New York. However, the court previously held that "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." (Id. at 31-32.) Plaintiff fails to remedy this defect in the Proposed Fifth AC. Thus, leave to amend to add Terradiol OH as a defendant is denied.

To state 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 citations omitted].) "[A] plaintiff cannot succeed on an unjust enrichment claim unless it has a sufficiently close relationship with the other party." (*Id.*) "[A] plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, there must exist a relationship or connection between the parties that is not "too attenuated." (*Id.* [internal quotation marks and citation omitted].) Here, plaintiff fails to allege a relationship with Terradiol MC. For example, there are no allegations that these parties had any dealings with each other. The conclusory allegation that Terradiol MC was aware of plaintiff's interest in NY Canna is insufficient. (*See id.* at 518 [conclusory allegation that defendant "knew" was not enough].) Leave to amend to add this claim is denied.

Breach of Fiduciary Duty (against NAD)

Plaintiff alleges that NAD breached its fiduciary duty to plaintiff in connection with the merger and restructuring. In opposition, NAD asserts that leave to amend is prejudicial. NAD's argument, however, focuses on the oral subscription agreement and not the breach of fiduciary duty claim. Thus, there is effectively no opposition to amend as to this claim.

Aiding and Abetting Breach of Fiduciary Duty (against NYCANNA, NYCI, NYMRC, Murphy, Impire, Acreage, Dixie, Duval, Falcone, Harvey, Vavalo, Scheer, and BSK)

Plaintiff alleges that these defendants participated in NAD's breach of fiduciary duty. Murphy asserts that this claim should be dismissed as against him, because as a corporate officer, he cannot be held personally liable for actions taken in connection with the corporation's business.

> "In order for a plaintiff to state a viable claim against a shareholder of a corporation in his or her individual capacity for actions purportedly taken on behalf of the corporation, plaintiff must allege facts that, if proved, indicate that the shareholder exercised complete domination and control over the corporation and abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice. Since, by definition, a corporation acts through its officers and directors, to hold a shareholder/officer … personally liable, a plaintiff must do more than merely allege that the individual engaged in improper acts or acted in bad faith while representing the corporation." (*E. Hampton Union Free Sch. Dist. v Sandpebble Bldrs., Inc.*, 16 NY3d 775, 776 [2011] [internal quotation marks and citation omitted].)

"The plaintiff must adequately allege the existence of a corporate obligation and that defendant exercised complete domination and control over the corporation and 'abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice." (*Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47-48 [2018] [internal quotation marks and citation omitted].)

Here, plaintiff alleges that Murphy exercised control and dominion over NYCI, NYCANNA, NYMRC, and Impire to effectuate the merger. (NYSCEF 851, Proposed Fifth AC.) This conclusory allegation is insufficient. "Those seeking to pierce a corporate veil . . . bear a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences." (*Sheridan Broadcasting*

Corp. v Small, 19 AD3d 331, 332 [1st Dept 2005] [internal quotation marks and citations omitted].) Leave to amend to add this cause of action against Murphy is denied.

Defendants NYCI, Duval, Falcone, Harvey, and Vavalo argue that granting the motion to amend would be prejudicial to them. However, these defendants focus their opposition on the contractual claim, which is not alleged against them, and assert that the piecemeal pleading does not give proper notice of a claim for breach of an enforceable contract. They do not address this claim, and thus, there is no opposition. Leave to amend is granted to the extent that this claim is alleged against NYCI, Duval, Falcone, Harvey, and Vavalo.

Dino Dixie does not submit opposition, and thus, leave to amend is granted to the extent that this claim is alleged against him.

NYCANNA, NYMRC, and Acreage assert that amendment would prejudice them. They argue that plaintiff was in possession of these facts earlier in the litigation and delayed in amending its complaint. As previously discussed, these defendants fail to evidence significant prejudice. The argument that granting this motion will result in the expense of briefing another motion to dismiss is moot, as defendants have already filed their motions to dismiss and expended fees. Also, the argument that delaying this action will cause more prejudice because Feder will continue disparaging it on social media is speculative. Thus, leave to amend to add this cause of action is granted as against NYCANNA, NYMRC, and Acreage.

Plaintiff alleges that Impire was a 50% owner of NYMRC when NYCANNA was formed as joint venture between NYMRC and NYCI. (NYSCEF 851, Proposed Fifth AC ¶ 163.) Plaintiff further alleges that NYCI, NAD and NYCANNA, together with Murphy,

Acreage, NYMRC and Impire, "actively participated in their plan to transfer the New York Canna Business to Acreage." (*Id.* ¶ 212.)

"The mere existence of a parent-subsidiary corporate relationship is insufficient to establish a unity of interest between the two corporations. Related corporations … are united in interest only where one corporation is vicariously liable for the acts of the other, and, in order for such vicarious liability to exist, the parent corporation must exercise complete dominion and control [over] the subsidiary's daily operations." (*Achtziger v Fuji Copian Corp.*, 299 AD2d 946, 948 [4th Dept 2002] [internal quotation marks and citations omitted].) 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].)

Further, plaintiff's conclusory allegation that Impire actively participated in the transfer plan, without any specification of Impire's tortious conduct also is fatal. As the court held on its decision on defendants' motions to dismiss the amended complaint, 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].) The motion for leave to amend to add this claim against Impire is denied.

As to Scheer and BSK, they assert that they did not aid and abet in any breach of fiduciary duty by NAD. Rather, Scheer and BSK argue that they merely prepared the transactional documents to complete the authorized merger. However, plaintiff alleges

conduct by Scheer and BSK that goes beyond the mere preparation of documents. Thus, the motion for leave to amend this claim against Scheer and BSK is granted.

Fraudulent Conveyance (against NYCANNA, NYCI, and NAD)

NYCI and NAD assert that leave to amend is prejudicial. However, as previously discussed, their argument focuses on the oral subscription agreement; it does not focus on the fraudulent conveyance claim. Thus, there is effectively no opposition to amend to add this claim by these defendants.

For the same reasons as stated above, NYCANNA has not shown sufficient prejudice warranting denial of this motion as to this claim. Thus, leave to amend to add this cause of action is granted.

Tortious Interference with Contract (against NYCI, NYCANNA, and Acreage)

"The statute of limitations for tortious interference with contract and with prospective business relations is three years from the date of injury, which is triggered when a plaintiff first sustains damages." (*Bandler v DeYonker*, 174 AD3d 461, 462 [1st Dept 2019] [citations omitted].) The conduct alleged in connection with this claim occurred in November 2016.

However, in connection with plaintiff's motion for leave to file a second amended complaint (seq. 008), the parties executed a stipulation whereby they agreed that [d]efendants stipulate that the withdrawal of the Leave To Amend Motions does not affect the statute of limitations, that any claims alleged in the complaints attached to the Leave To Amend Motions that would have been timely (or not) as of the date of the filing of the Leave To Amend Motions will not be affected adverse to Plaintiff by the withdrawal of the Leave To Amend Motions." (See NYSCEF 763, Stipulation.) The

June 2019 proposed second amended complaint alleges a claim for tortious interference with contract against NYCANNA. (NYSCEF 183, Proposed Second Amended Complaint ¶¶ 273-276.) Thus, by agreement this claim is timely.

Again, the court rejects NYCI and Acreage's arguments regarding the asserted prejudice of these amendments. The motion to amend to add this claim is granted.

Unjust Enrichment (derivatively, against NYCI and NYCANNA)

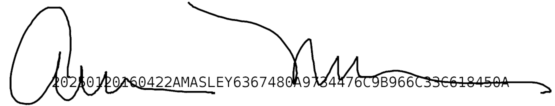
The only opposition to this amendment is based on the same arguments of prejudice rejected by the court. Thus, the motion to amend as to this claim is granted.

Accordingly, it is

ORDERED that the plaintiff's motion for leave to amend the complaint is granted, in part, as follows: leave is granted to amend the second (breach of contract – with the exception of footnote 3 which is stricken), third (unjust enrichment), sixth (breach of fiduciary duty), seventh (aiding and abetting breach of fiduciary duty as to defendants NYCANNA, NYCI, NYMRC, Acreage, Dixie, Duval, Falcone, Harvey, Vavalo, Scheer, and BSK), eighth (fraudulent conveyance), ninth (tortious interference with contract), and tenth (derivative unjust enrichment) causes of action and to this extent the proposed amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the complaint is denied with respect to the proposed first and fifth causes of action and those causes of action are stricken; Plaintiff shall refile a copy of the Fifth AC in accordance with this decision (omitting defendants, footnote 3, and causes of action to which this motion was denied); and it is further

ORDERED that a briefing schedule will be issued regarding defendants' pending motions to dismiss the Fifth AC in a separate order.



1/20/2025 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