

**Medley Mgt., Inc. v Lowenstein Sandler, LLP**

2025 NY Slip Op 32436(U)

July 6, 2025

Supreme Court, New York County

Docket Number: Index No. 651987/2022

Judge: Joel M. Cohen

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

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MEDLEY MANAGEMENT, INC.,

Plaintiff,

- v -

LOWENSTEIN SANDLER, LLP, ROBERT HIRSCH,
DAVID GORET

Defendants.

INDEX NO. 651987/2022

MOTION DATE 12/20/2024

MOTION SEQ. NO. 007

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 007) 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534

were read on this motion for SUMMARY JUDGMENT

Defendants Lowenstein Sandler LLP, Robert Hirsh, Esquire, and David Goret, Esquire (collectively, "Defendants") move for summary judgment under CPLR 3212 dismissing Plaintiff Medley Management Inc.'s ("Plaintiff" or "MDLY") legal malpractice claim. For the following reasons, Defendants' motion is granted.

At a high level, this case involves a financially troubled client that had to navigate the notoriously complex and contentious process of federal bankruptcy. The push and pull between

negotiating with creditors and threatening to bypass them, all while under the glare of the bankruptcy court, involves countless difficult judgment calls. In this case, it was unsuccessful.

Having carefully reviewed the record, the Court finds that Plaintiff fails to raise a genuine issue of fact either that counsel's judgments were negligent or that but for counsel's actions this troubled company would have made it through bankruptcy intact. Instead, the summary judgment record reveals this case to be an attempt to shift the financial cost of the troubled company's failed business from its owners to its lawyers. Indeed, much of Plaintiff's purported evidentiary record consists of self-serving testimony of its principals (who only now, well after the fact and when it cannot actually impact them, profess willingness to have contributed additional funds to prop up the company during the bankruptcy) that is at odds with the contemporaneous documentary evidence.

Moreover, in opposing summary judgment Plaintiff has also dramatically veered from the factual narrative of the complaint – in which it argued, among other things, that Defendants' proposed bankruptcy plan “could not be confirmed” – to now argue that the plan *would* have been confirmed if Defendants had advised and acted differently. A plaintiff “cannot defeat [summary judgment] by contradicting the allegations of its own pleadings” (*Syncora Guarantee Inc v JP Morgan Sec*, 110 AD3d 87, 94 [1st Dept 2013]).

### **BACKGROUND**

MDLY was a holding company for a group of subsidiaries that operated an alternative asset management firm offering yield solutions to retail and institutional investors (NYSCEF 206 [“Alloto Decl.”] ¶9). The founding entity of the enterprise was Medley Capital LLC (“Medley Capital”), formed by brothers Brook and Seth Taube (the “Taubes”) in 2006 (NYSCEF 487 [Def's Statement of Undisputed Facts (“DSUF”) ¶2). Medley LLC (“the Debtor”) was formed in

October 2010 (NYSCEF 512 [Pl's Response to Statement of Undisputed Fact ("PSUF")] ¶3). Plaintiff MDLY was formed in 2014, and after its initial public offering, MDLY became the sole managing member of the Debtor (DSUF ¶¶4-5; PSUF ¶¶4-5). MDLY, Medley Capital, Medley LLC, and their various subsidiaries are referred to together as "Medley."

Starting in 2015, Medley's Fee Earning Assets Under Management ("FEAUM") and management fees began to decline steadily (DSUF ¶8; PSUF ¶8). By May 2018, Brook Taube felt that MDLY was under financial pressure (NYSCEF 474 [Taube Dep Tr] at 287:3-288:7). MDLY contemplated a transaction called "Project Integrate," which involved MDLY merging with two of Medley's clients: Sierra Income Corporation ("Sierra") and Medley Capital Corporation ("MCC") (PSUF ¶9). Certain MCC shareholders challenged the "Project Integrate" merger and brought suit in the Delaware Court of Chancery (the "FrontFour Litigation"). The Court of Chancery found that "[i]n this case, the timing, structure, initiation, and negotiation of the Proposed Transactions were conceived for the purpose of—and did—advance the Taubes' interest at the expense of Medley Capital's other stockholders" (*FrontFour Capital Group LLC v Taube*, 2019 WL 1313408, at \*26 [Del Ch 2019]).

In September 2019, following the FrontFour Litigation, the SEC commenced an informal inquiry, and by letter dated December 18, 2019, the SEC advised that a formal order of private investigation had been issued (PSUF ¶12).

MCC terminated its investment management agreement (IMA) with MDLY at the end of 2020 (DSUF ¶13). Due to its decline in revenue and the loss of the MCC IMA, Medley experienced a liquidity crisis that impaired the Debtor's ability to service over \$122 million of outstanding principal owed to the noteholders (DSUF ¶15; PSUF ¶15). As of the end of 2020, the Debtor had approximately \$140 million in liabilities, including over \$130 million in debt,

which exceeded its assets, prompting Medley to explore a potential restructuring, focusing initially on out-of-court options (DSUF ¶16; PSUF ¶16). On January 7, 2021, the Debtor engaged B. Riley Securities, Inc. (“B. Riley”) as investment banker and financial advisor to analyze strategic options to address its capital structure (DSUF ¶17).

***MDLY’s retention of Lowenstein***

In 2016, MDLY retained Lowenstein to provide it and the Debtor with advice regarding compliance and reporting obligations under the Securities Exchange Act of 1934, among other things (DSUF ¶21; PSUF ¶21). In late 2020, MDLY sought Lowenstein’s legal services regarding potential restructuring options for the Debtor (DSUF ¶19; PSUF ¶19).

On December 22, 2020, Defendants Robert Hirsh (“Hirsh”) and David Goret (“Goret”) and other members of the Lowenstein firm, made a presentation to MDLY’s Board of Directors to discuss a wide range of topics, including out-of-court and in-court restructuring options. It was during this meeting that Defendants first mentioned the possibility of a bankruptcy plan that could “be crammed down over creditor dissent” and pre-arranged bankruptcies that can be confirmed with the agreement of certain creditors. During this meeting, Defendants advised that a pre-arranged bankruptcy would typically take several months to confirm, as compared to a prepackaged bankruptcy that typically would be confirmed in a matter of weeks. The presentation did not recommend or commit to pursuing any specific restructuring option or to completing it in any specific timeframe (PSUF ¶165; NYSCEF 532 [Def’s Response to Pl’ Additional Statement of Undisputed Facts [“DASUF”] ¶165). In January 2021, Lowenstein was engaged in connection with a Chapter 11 bankruptcy filing (DSUF ¶22).

Due to the Board’s composition and the Enterprise’s organizational structure, on February 9, 2021, following Lowenstein’s advice, the Board unanimously approved the creation

of a subcommittee for the purpose of making decisions for the Debtor in the bankruptcy planning process and appointed Peter Kravitz (“Kravitz”) as Chair of the Subcommittee and a member of the Board. The Board also appointed two existing directors to serve on the Subcommittee: John Dyett (“Dyett”) and Guy Rounsaville (“Rounsaville”) (DSUF ¶¶31-35; PSUF ¶¶31-35).

Between December 2020 and late February 2021, MDLY explored numerous out-of-court options to restructure the Debtor’s balance sheet. Riley advised that they each came with the major challenge of identifying retail noteholders for purposes of negotiating with them on the terms of a potential out-of-court restructuring, as well as continued anticipated liquidity strains (DSUF ¶42; PSUF ¶42). By late February 2021 there was consensus at the Board and Restructuring Subcommittee of MDLY that it was in the best interests of Medley LLC to proceed with filing for Chapter 11 bankruptcy protection and proceed with a plan of reorganization (DSUF ¶43; PSUF ¶43).

Lowenstein was instructed that any plan should try to avoid a “change-of-control” event to guard against the risk of termination of key client contracts. In February 2021, John Fredericks, MDLY’s in-house counsel, alerted Lowenstein and B. Riley to Medley’s change-of-control requirements pursuant to the Investment Advisers Act of 1940 (DSUF ¶46; PSUF ¶46). Fredericks explained that any presumptive Change of Control under the Advisors Act would result in termination of MDLY’s investment advisory agreements with Sierra and the Sierra board would then be required to approve a new interim contract, which would have to be approved by Sierra’s shareholders within 150 days. To presumptively avoid an automatic change of control, it was necessary for the Taubes each to retain more than 25% voting control over Medley (DSUF ¶47; PSUF ¶47).

Under the restructuring plan that the Debtor initially filed in the Bankruptcy Case (the “Original Plan” or “Plan”), the intention was for MDLY and the Taubes to contribute “new value” to help justify that retention of equity to noteholders. Among other contemplated forms of “new value,” the Plan proposed to contribute to creditors newly issued MDLY stock and a \$1 million promissory note from the Taubes. To facilitate the Debtor’s reorganization, the Original Plan provided for the cancellation of the noteholders’ claims against the Debtor in exchange for providing them approximately 47% of the value of MDLY, and thus a similar percentage of the reorganized Debtor.

Because the noteholders would not be recovering in full, their claims were “impaired” under the Plan. The Original Plan also provided for broad liability releases by the Debtor and certain third parties in favor of the “Released Parties.” The “Released Parties” included Medley’s “current and former directors, managers, officers, [and] equity holders,” and thus encompassed MDLY and the Taubes (DSUF ¶¶51-55; PSUF ¶¶51-55). The Plan was structured so that it potentially could be confirmed over creditor objections if the Debtor later decided to shift to a cramdown approach (NYSCEF 189 [“B. Taube Dep.”] 53:9 – 54:14, 55:4-18, 208:22 – 209:6; NYSCEF 190 [“S. Taube Dep.”] 118:17 – 121:11, 114:15 – 118:4; NYSCEF 188 [“Fredericks Dep.”] 339:25 – 340:25, 540:10-17, 723:16-21). After considering the structure of the Original Plan, the Subcommittee supported it, resolving that it was in the Debtor’s best interests (DSUF ¶56; PSUF ¶56).

### ***Bankruptcy Filing***

On March 7, 2021, the Debtor filed a voluntary petition for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of Delaware, and the Debtor filed the Original Plan and an accompanying Disclosure Statement (DSUF ¶¶64-65; PSUF ¶¶64-65). The

Disclosure Statement acknowledged that a cramdown approach was a possibility “[i]n the event that it becomes necessary to confirm the Plan over the rejection of certain Classes.” (NYSCEF 208 at 7; PSUF ¶166; DASUF ¶166). An initial disclosure statement hearing was set for April 22, 2021 and a potential confirmation hearing was set for June 8, 2021 (DSUF ¶66; PSUF ¶66).

On March 7, 2021, Lowenstein filed a pro hac vice motion to appear in the Bankruptcy Court. On April 1, the Debtor filed an application seeking to retain Lowenstein, pursuant to 11 U.S.C. §327(a), as the Debtor’s bankruptcy counsel. Also on April 1, the Debtor filed a retention application seeking to retain Morris James, pursuant to 11 U.S.C. §327(a), as the Debtor’s bankruptcy co-counsel (as local counsel only, not reorganization counsel) (DSUF ¶¶68-69; PSUF ¶¶68-69).

Following the filing of the petition, U.S. Bank, a creditor of the Debtor, through its counsel Kelley Drye & Warren LLP and its financial advisor FTI Consulting, took an active role in the Bankruptcy Case. U.S. Bank initially asserted that the Original Plan was “not acceptable to U.S. Bank,” but that it looked forward to working with Lowenstein to achieve an acceptable plan (DSUF ¶70; PSUF ¶70). Thereafter, the Debtor and U.S. Bank engaged in plan negotiations (DSUF ¶71; PSUF ¶71).

On April 22, the U.S. Trustee filed a Notice of Appointment of Committee of Unsecured Creditors (the “UCC”), which included U.S. Bank (DSUF ¶76; PSUF ¶76). The Restructuring Subcommittee of MDLY, on behalf of the Debtor, sought to conduct an independent investigation of potential claims it may possess, and the UCC indicated that it had the right to conduct its own investigation (DSUF ¶79; PSUF ¶79).

On March 29, the SEC sent the Debtor a letter expressing its view that the Original Plan was “unconfirmable in that it appears to violate the absolute priority rule.” (DSUF ¶83; PSUF

¶83). On May 6, the SEC filed a proof of claim in the Bankruptcy Case asserting an undetermined claim against the Debtor for penalties, disgorgement, and prejudgment interest arising from possible violations of federal securities laws (DSUF ¶83; PSUF ¶83). On May 7, the SEC issued Wells Notices disclosing the SEC's intent to bring an enforcement action against MDLY, the Debtor, and the Taubes, among other Medley insiders, for violating federal securities laws (DSUF ¶85; PSUF ¶85). MDLY publicly disclosed the Wells Notices to its investors on May 13 (DSUF ¶86; PSUF ¶86).

On May 11, the SEC filed an objection to Lowenstein's Retention Application asserting that "because Lowenstein is irreconcilably conflicted and should not be employed pursuant to Section 327(a) of the Bankruptcy Code due to its concurrent representation of the Debtor and the Debtor's parent (Medley Management, Inc. ("MDLY"))" (NYSCEF 215; PSUF ¶89). In an omnibus hearing on May 18, Judge Owens considered the objections to Lowenstein's Retention Application, but did not rule on the SEC's objections at that time and continued the matter for further briefing (PSUF ¶91). Specifically, Judge Owens noted that she was concerned that Lowenstein was "represent[ing] a party that has an interest adverse to the estate" and decided to "adjourn the matter, because I think I need to be educated as to why you were even retained by a committee for the -- excuse me -- how the debtor retained you" (NYSCEF 218 at 47:10-25 – 48:1-2). Judge Owens concluded by noting that "I, again, I understand the balancing act that we are all under here. It seems as if liquidity and other things are extremely tight and we don't want to cause liquidation unnecessarily here and I acknowledge that, but these are bigger issues. Retention issues and things of that nature, those are bigger issues that goes to the integrity of the bankruptcy process, and so I, again, certainly understand why the committee might be focused

on results rather than process, but as a bankruptcy judge, I cannot ignore this issue” (*id.* at 48:8-17).

Lowenstein continued negotiating with the noteholders, and from April into May the Debtor and the UCC exchanged plan proposals and term sheets that built upon the structure and terms of the Original Plan (PSUF ¶93). On April 29, the Debtor provided the UCC a term sheet pursuant to which the noteholders would receive as much as 99% of the new common stock of the hypothetically reorganized Debtor (DSUF ¶94; PSUF ¶94). By early May, Lowenstein had prepared a draft First Amended Chapter 11 Plan of Reorganization based on these parameters (DSUF ¶95; PSUF ¶95).

Over the next several weeks, through at least May 27, the Taubes and the UCC engaged in negotiations and exchanged a series of offers and counteroffers for a potential consensual plan and its treatment of creditors’ claims against the Taubes (DSUF ¶99; PSUF ¶99). The Taubes and the UCC disagreed on material terms of a consensual plan, including the scope of any releases and the amount of consideration, and exchanged several proposals (DSUF ¶102-111; PSUF ¶102-111). Ultimately, the Taubes did not accept any plan settlement offers from the UCC (DSUF ¶115; PSUF ¶115).

#### ***Lowenstein’s Withdrawal of the Original Plan***

On May 13, 2021, Lowenstein, on behalf of the Debtor, withdrew the Original Plan (DSUF ¶116; PSUF ¶116). Kravitz affirmed that he discussed Lowenstein’s recommendation to withdraw the plan with Hirsh and that he consented to it (DSUF ¶117; NYSCEF 201 [“Kravitz Aff.”] ¶¶31-32). Notes of a Subcommittee meeting appear to indicate approval to withdraw the plan (NYSCEF 246 at LS-MDLY- 00135573 [“ON WITHDRAWAL. They defer to Rob/Peter.How looks to Framrers, sierra, doesn't make a difference, not conf8irmatble.GUY

JOHN CONFIRM COMFORTABLE”)). Two Subcommittee members, Rounsaville and Dyett, testified at their deposition that they could not recall approving the plan, but could not say with certainty that they did not approve it (NYSCEF 192 [“Rounsaville Dep.”] 150:23-151:9 [“I don’t remember this discussion, but I have no reason to believe these notes are not accurate.”]; NYSCEF 193 [“Dyett Dep.”] 267:8-269 [Dyett testified that if he did approve it, he didn’t understand that that’s what he was doing because there were “45 different things being described in a very short call. The idea that it would have been appropriate to approve of something as material as pulling a plan with no plan behind it on a call like this is hard for me to understand as being good practice.”]). Notably, there is no contemporaneous evidence indicating objection (by Subcommittee members or the Taubes) to the withdrawal of the Plan after it occurred.

On May 27, 2021, the Debtor withdrew Lowenstein’s Retention Application (DSUF ¶138; PSUF ¶138).

### *Sierra Cuts Ties with Medley*

Sierra’s then-Chairman, Stephen Byers, submitted an affirmation in this action that notwithstanding the SEC investigation and bankruptcy, Sierra was willing to continue doing business with Medley. However, Sierra’s counsel believed the Lowenstein firm had a conflict of interest in the bankruptcy, and once the reorganization plan was withdrawn, “it became obvious to the Sierra Board of Directors that the effort to successfully reorganize Medley, LLC was foundering and would likely be unsuccessful (NYSCEF 508 [“Byers Affirm”] ¶¶ 4-5, 6, 10). On September 21, 2021, Sierra announced it had executed a merger agreement with Barings BDC, Inc. (“Barings”), subject to shareholder approval (DSUF ¶136; PSUF ¶136). According to Sierra’s independent directors, the Barings transaction provided a 20% premium for Sierra shareholders, better management fees than the Medley IAA, and a “parent company that is

extremely financially astute and well run.” Sierra terminated its agreement with MDLY on February 24, 2022 (*id.*).

### *Subsequent Developments*

On July 22, the Debtor, Medley Capital LLC, and the UCC reached agreement on a global plan settlement, which resulted in the Second Amended Combined Disclosure Statement and Chapter 11 Plan of Medley LLC (DSUF ¶¶142; PSUF ¶¶142). On October 18, the Bankruptcy Court confirmed the Debtor’s Modified Third Amended Combined Disclosure Statement and Chapter 11 Plan of Medley LLC (the “Confirmed Plan”). The Confirmed Plan canceled equity interests in the Debtor, including those held by MDLY (DSUF ¶¶143-145; PSUF ¶¶143-145). MDLY did not file any objections to the Confirmed Plan or its treatment thereunder. The Confirmed Plan also provided for the creation of the Medley LLC Liquidating Trust (the “Liquidating Trust”), which was tasked with administering the reorganized Debtor’s assets and pursuing claims on behalf of its estate, including the Debtor’s claims against the Taubes and MDLY (DSUF ¶¶146-147; PSUF ¶¶146-147)

On November 8, 2021, the Liquidating Trust moved to compensate Lowenstein for its contributions to the Bankruptcy Case. The Bankruptcy Court denied the Liquidating Trust’s motion on the ground that Lowenstein was not approved as an estate professional and thus the Bankruptcy Code did not permit payment regardless of any benefits Lowenstein provided (DSUF ¶¶153-154; PSUF ¶¶153-154).

After the Confirmed Plan became effective, the Liquidating Trust continued to investigate and pursue the Debtor’s claims against the Taubes and other insiders. The UCC’s claims culminated in at least three separate settlement agreements that resulted a recovery of more than \$26 million for the Debtor’s creditors (DSUF ¶¶155-156; PSUF ¶¶155-156). On

March 24, 2022, the Taubes and MDLY each executed Offers of Settlement with the SEC (DSUF ¶162; PSUF ¶162).

### *Procedural History*

On April 29, 2022, MDLY brought this action asserting legal malpractice claims against Lowenstein Sandler LLP, Robert Hirsh, Esq., and David Goret, Esq., (collectively “Defendants”) in connection with Defendants’ legal representation of MDLY in its subsidiary Medley, LLC’s (the Debtor) bankruptcy *In re Medley LLC*, Case No. 21-10526 (Bankr. D. Del.). (*see* NYSCEF 1). The Complaint alleges that Defendants committed malpractice by, among other things, failing to disclose conflicts, continuing to represent the conflicted interests of MDLY and the Debtor, presenting and advocating a bankruptcy plan that it knew was not feasible, and advising MDLY that the Plan of Reorganization provided new value (when it did not as it was written and filed) and did not violate the absolute priority rules (when it did) (*see* NYSCEF 1 [“Compl.”] ¶¶142-152).

By Decision + Order dated May 9, 2023, the Court granted in part Defendants’ motion to dismiss the Complaint, dismissing the breach of fiduciary duty, unjust enrichment, and Judiciary Law § 487 claims, as well as the request for punitive damages, leaving only the legal malpractice claim (NYSCEF 88). Note of Issue was filed on November 20, 2024 (NYSCEF 170) and this motion for summary judgment followed.

### **DISCUSSION**

Under CPLR 3212, summary judgment is appropriate when a party establishes with evidence “that there is no material issue of fact to be tried, and that judgment may be directed as a matter of law” (*Brill v City of New York*, 2 NY3d 648, 651 [2004]). If the moving party crosses that threshold, the party opposing the motion “must produce evidentiary proof in

admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

The elements of a legal malpractice claim are: (1) attorney negligence; (2) proximate causation; and (3) damages (*Russo v Rozenholc*, 130 AD3d 492, 497 [1st Dept 2015]). “An attorney moving for summary judgment dismissing a legal malpractice claim has the burden of establishing, through the submission of proof in evidentiary form, that the plaintiff is unable to prove at least one of the essential elements of the cause of action” (*Ali v Fink*, 67 AD3d 935, 936 [2d Dept 2009]).

Here, based on the summary judgment record, and giving Plaintiff the benefit of reasonable inferences in its favor, and despite very creative efforts by Plaintiff’s counsel to flood the zone with potential areas of dispute, Plaintiff’s claims fail on all three elements.

#### *A. Negligence*

Attorney negligence is established by showing that an attorney “failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession” (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 115 AD3d 228, 236 [1st Dept 2014], *affd as mod*, 26 NY3d 40 [2015]).

However, “an attorney is not held to the rule of infallibility and is not liable for an honest mistake of judgment where the proper course is open to reasonable doubt. Thus, ‘selection of one among several reasonable courses of action does not constitute malpractice’. Absent such ‘reasonable’ courses of conduct found as a matter of law, a determination that a course of conduct constitutes malpractice requires findings of fact. The general rule is that an attorney may

be held liable for ignorance of the rules of practice, failure to comply with conditions precedent to suit, or for his neglect to prosecute or defend an action” (*Bernstein v Oppenheim & Co., P.C.*, 160 AD2d 428, 430 [1st Dept 1990] [internal citations omitted]).

In response, Plaintiff argues that this “professional judgment rule” does not apply because Defendants violated bright-line rules: section 1129(b)(2)(B) (absolute priority rule) of the US Bankruptcy Code, section 327(a) (representing an interest adverse to the estate), and the U.S. Supreme Court’s rule in *Bank of Am. Natl. Trust & Sav. Assn. v 203 N. Lasalle St. Partnership* (526 US 434, 437 [1999]) (new value cannot be exclusive to pre-petition equity).

These arguments turn on a dispute as to whether Defendants were instructed to pursue *only* a consensual reorganization under section 1129(a), instead of a cramdown under section 1129(b). Plaintiffs argue that they instructed Defendants to file a plan that could be crammed down under section 1129(b) and to file a plan with cash contributions to satisfy the new value exception to the absolute priority rule. However, Plaintiff has not cited any deposition testimony or contemporaneous communications identifying who, what, when, where, or how such a definitive instruction to pursue a cramdown was given to Defendants, let alone from the Subcommittee. At most, the testimony MDLY cites reflects a view that the Plan was structured so it potentially *could* be confirmed over creditor objections if the Debtor later decided to shift to a cramdown approach (B. Taube Dep. At 53:9 – 54:14, 55:4-18, 208:22 – 209:6; S. Taube Dep. at 118:17 – 121:11, 114:15 – 118:4; Fredericks Dep. at 339:25 – 340:25, 540:10-17, 723:16-21). Consistent with that flexible approach, the Disclosure Statement provides:

***In the event that it becomes necessary*** to confirm the Plan over the rejection of certain Classes, the Debtor may seek confirmation of the Plan notwithstanding the dissent of such rejecting Classes. ***The Bankruptcy Court may confirm the Plan pursuant to the “cramdown” provisions of the Bankruptcy Code***, which allow the Bankruptcy Court to confirm a plan that has been rejected by an impaired

Class if it determines that the Plan satisfies section 1129(b) of the Bankruptcy Code. See Article E of this Disclosure Statement, entitled “Confirmation Without Acceptance by All Impaired Classes.

(NYSCEF 208 at 7).

In sum, the contemporaneous record shows that cramdown was an alternative, but clearly not the only or main strategy. Plaintiffs failed to produce evidence sufficient to raise a disputed issue of fact that Defendants pursued a strategy that was contrary to Plaintiff’s instructions. Instead, the record shows that Plaintiffs’ claims are based on hindsight, and questioning counsel’s “selection of one among several reasonable courses of action,” which is insufficient to support a malpractice claim (*Brookwood Companies, Inc. v Alston & Bird LLP*, 146 AD3d 662, 667 [1st Dep’t 2017] [“a client’s disagreement with its attorney’s strategy does not support a malpractice claim, even if the strategy had its flaws”]). MDLY points to no authority *requiring* Lowenstein to have pursued a cramdown strategy at the outset of the Bankruptcy Case or at any other time. Accordingly, Plaintiffs’ related arguments that Defendants violated the bankruptcy law absolute priority rule and/or *Bank of Am. v 203 N. Lasalle* are inapposite.

The Court also finds that the withdrawal of the Plan is protected by the professional judgment rule, even if in hindsight that judgment can be questioned. Plaintiffs argue that the withdrawal was “unauthorized,” citing testimony from Subcommittee members Rounsaville and Dyett. But it is undisputed that the chair of Subcommittee authorized the withdrawal (NYSCEF 201 [“Kravitz Aff.”] ¶¶31-32). The documentary record confirms the Subcommittee’s approval of that decision (NYSCEF 246 at LS-MDLY- 00135573 [“ON WITHDRAWAL. They defer to Rob/Peter. How looks to Framrers, sierra, doesn't make a difference, not conf8irmatble.GUY JOHN CONFIRM COMFORTABLE”]). What Rounsaville and Dyett testified at deposition was that, while they did not recall being informed of the proposed withdrawal, they could not dispute

they may have been (NYSCEF 192 [“Rounsaville Dep.”] 150:23-151:9 [“I don't remember this discussion, but I have no reason to believe these notes are not accurate.”]; NYSCEF 193 [“Dyett Dep.”] 267:8-269 [testifying that if he did approve it, he didn't understand that that's what he was doing because there were “45 different things being described in a very short call. The idea that it would have been appropriate to approve of something as material as pulling a plan with no plan behind it on a call like this is hard for me to understand as being good practice.”]). This testimony is insufficient to raise a triable issue of fact that Defendants made the highly unlikely decision to withdraw a bankruptcy plan over the opposition of its client. Indeed, if that had been the case, it is reasonable to expect that there would have been *some* contemporaneous evidence of vehement client objection immediately *after* the plan had been withdrawn. There was none.

As to Plaintiffs' argument that Defendants violated section 327, a conflict does not by itself support a malpractice claim (*In re Jackson*, 630 BR 700, 734-35 [Bankr D Conn 2021], *affd*, 653 BR 1 [D Conn 2023] [“While a conflict of interest amounting to a violation of New York Rules of Professional Conduct does not, in and of itself, amount to malpractice, liability can follow where the client can show that he or she suffered actual damage as result of that conflict.”]). And Section 327 governs counsel's obligations to *a debtor* and its estate—not to nondebtor entities like MDLY; if anything, as this Court has observed, the “conflict” concern here was that Lowenstein would be *too loyal* to MDLY (NYSCEF 89 at 37:13-20 [“THE COURT: what the Bankruptcy Court and the SEC were worried about is that they were too loyal to the parent and were not sufficiently independent to protect the debtor's principal interest, at least in that context, of protecting its creditors; right? Isn't that what they were really accused of, was that they were trying to benefit the parent to the detriment of creditors? MR. FRANK: Yes.”]). Therefore, the Court finds that Plaintiff's attempt to make use of the bankruptcy court's

finding of a conflict—based on facts known to Plaintiff throughout—is unavailing in this malpractice case.

Accordingly, the Court finds there is no triable issue of fact as to negligence.

***B. Proximate Cause***

With respect to proximate causation, “[i]n order to survive dismissal, the complaint must show that but for counsel’s alleged malpractice, the plaintiff would not have sustained some actual ascertainable damages” (*Pellegrino v File*, 291 AD2d 60, 63 [1st Dept 2002]). This is an “exacting standard.” (*Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 9 [1st Dept 2008]). “[A] plaintiff in such an action must prove a case within a case” (*Nazario v Fortunato & Fortunato, PLLC*, 32 AD3d 692, 695 [1st Dept 2006]).

Here, even if Plaintiffs could establish a dispute of fact as to negligence, Plaintiffs’ causation argument is based on speculation, including, among other things, that the Bankruptcy Court would have approved a cramdown plan of reorganization. *Heritage Partners, LLC v Stroock & Stroock & Lavan LLP* (133 AD3d 428 [1st Dept 2015]) is instructive. There, the plaintiff alleged it would not have lost its equity in property had the defendant advised it to pursue bankruptcy (*id.* at 428). The First Department affirmed dismissal of the malpractice claim because the plaintiff’s causation theory rested on speculation about what the plaintiff’s principals, the bankruptcy court, and third parties would have done in the face of obstacles to achieving reorganization in the first place (*id.* at 429). Similarly, in *Phillips-Smith Specialty Retail Group II, L.P. v Parker Chapin Flattau & Klimpl, LLP* (265 AD2d 208, 210 [1st Dept 1999]), the First Department concluded that the plaintiff could not establish proximate causation because its theory depended on a “hypothetical course of events ... involving the nature and timing of acts by plaintiffs themselves, other parties having interests in [the debtor] and the

bankruptcy court.” (*id.* at 210). The Opposition makes no effort to address *Heritage Partners* or *Phillips-Smith*. Rather, Plaintiffs portrays confirmation under 11 USC §1129(b), inaccurately, as a mere box-checking exercise (*see e.g., In re Hertz Corp.*, 120 F4th 1181, 1202 [3d Cir 2024]) “[A] plan is not automatically fair and equitable under [Section 1129(b)] merely because it complies with the requirements in that section.”]; *Matter of Kennedy*, 158 BR 589, 599 [Bankr DNJ 1993] “[S]imple technical compliance with the requirements of section 1129(b)(2) does not assure that the plan is fair and equitable.”)].

Accordingly, the Court finds there is no triable issue of fact as to proximate causation.

### C. Damages

Finally, “[t]he damages claimed in a legal malpractice action must be ‘actual and ascertainable’ resulting from the proximate cause of the attorney’s negligence” (*Zarin v Reid & Priest*, 184 AD2d 385, 387-88 [1st Dept 1992]). Here, Plaintiff was fully aware of and accepted the bankruptcy risks. MDLY’s only response is to repeat its cram-down and plan-withdrawal theories. As discussed above, those fail to present triable disputes. Moreover, as a general matter, the Bankruptcy Code’s “absolute priority waterfall” requires that creditors be paid in full before equity holders are entitled to any recovery (NYSCEF 204 [“Prager Rep.”] ¶26; NYSCEF 202 [“Gross Rep.”] 31-33). Defendant’s expert observed in his report that the Debtor’s notes were trading substantially below their face value, and that the Debtor would need to satisfy over \$100 million in debt—which it could not do—before its shareholders, including MDLY, would be entitled to any recovery under the absolute priority waterfall (Prager Rep. ¶¶28-29). MDLY does not dispute this, and thus the existence of *any* value it might have recouped from the bankruptcy is inherently speculative. MDLY and its experts testified they did not know how much equity MDLY would have retained (*see* NYSCEF 199 [“O’Brien Dep.”] 92:4-12;

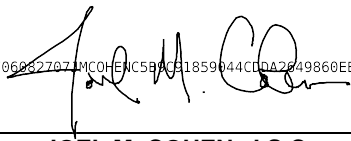
NYSCEF 200 [“Molder Dep.”] 259:2-10; Fredericks Dep. at 538:10-539:16). There is, therefore, no triable issue of fact as to damages.

Accordingly, it is

**ORDERED** that Defendants’ Motion for Summary Judgment is **GRANTED**, and the complaint is dismissed with taxable costs and disbursements to Defendants as calculated by the Clerk upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

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7/6/2025  
DATE

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JOEL M. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER

OTHER

APPLICATION:

SETTLE ORDER

FIDUCIARY APPOINTMENT

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

REFERENCE