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

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GEDESCO FINANCE S.L., STATOR MANAGEMENT S.L.U., GEDESCO INNOVFIN, S.L., VENALTA CAPITAL, S.L., ANTHOPHILA CAPITAL, S.L., MIGUEL RUEDA HERNANDO, OLE GROTH, ANTONIO AYNAT, and JAVIER GARCIA,

Plaintiffs,

- v -

DAVID ZALAZNICK, JOHN W. JORDAN, JZ INTERNATIONAL LLC, JZ FUND III, L.P., JZ FUND III GP, L.P., and JORDAN/ZALAZNICK ADVISERS, INC.,

Defendants.

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INDEX NO. 154809/2023

MOTION DATE

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 108, 109

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

In motion sequence number 004, defendants David Zalaznick, John W. Jordan II, JZ International LLC (JZI), Jordan/Zalaznick Advisers, Inc. (JZ Advisers) JZI Fund III, L.P. (Fund III), and JZI Fund III GP, L.P. (Fund III GP) move pursuant to CPLR 203 (f), 214 (3), 215 (3), 301, 302 (a)(1)-(4), 3013, 3016 (a) and (b), and 3211 (a)(1), (a)(7), and (a)(8) to dismiss the amended complaint.[1]

[1] The parties' briefs submitted in connection with this motion (seq. 004) address the twelfth through seventeenth causes of action which were added in the amended complaint, as well as defamation allegations added in paragraph 79 of the amended complaint. The parties incorporate by reference their briefs filed in connection with defendants' first motion to dismiss (seq. 001), which address the original first through eleventh causes of action reiterated in the amended complaint. The combined briefs total approximately 200 pages and are well above the extended word limit authorized by

Plaintiffs are Gedesco Finance S.L. (Gedesco Finance), Stator Management S.L.U. (Stator), Gedesco Innovfin, S.L. (Gedesco Innovfin), Venalta Capital, S.L. (Venalta), Anthophila Capital, S.L. (Anthophila), Miguel Rueda Hernando, Ole Groth, Antonio Aynat, and Javier Garcia. Rueda and Groth bring this action directly and derivatively on behalf of JZI Executive Co-investment Scottish Partnership (Scottish Partnership).[2]

Background

The following facts are taken from the amended complaint unless otherwise noted and for the purposes of this motion are accepted as true.

Parties

Defendants

JZI, founded in 2001, is a private equity firm with €45 million in invested capital; its holdings consist primarily "of ownership interests in privately held financial services and insurance companies in Spain, the United Kingdom, and elsewhere in Europe." (NYSCEF Doc. No. [NYSCEF] 84, Amended Complaint [AC] ¶ 36.) JZI is majority-owned by Zalaznick and Jordan. (*Id*. ¶¶ 28-29, 36.) Nonparty JZ Asset Management LLC (JZ Asset Management) is JZI's management company. (*Id*. ¶ 33.) JZ Advisers is the sole managing member of JZ Asset Management; JZ Advisers is wholly owned by

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the court in connection with motion sequence number 004. (*See* Rules of Commercial Div of Sup Ct [22 NYCRR 202.70 (g)] rule 17.)

[2] On June 27, 2025, counsel for plaintiffs informed the court that Gedesco Finance and Stator "are currently under the control of a court-appointed administrator pursuant to bankruptcy proceedings ongoing in Spain and thus [counsel] presently lacks authority to pursue claims on behalf of Gedesco and Stator." (NYSCEF 113, Letter.) It appears that, at the time this motion was briefed and argued, Gedesco Finance and Stator were not in bankruptcy. The court has not been appraised of any limitations on the court's adjudication of the motion as to the parties not in bankruptcy.

Zalaznick and Jordan. (*Id*. ¶¶ 33, 39.) Zalaznick, JZI's CEO (*id*. ¶ 8), "had full control of all aspects of JZI's business, all with the knowledge and approval of Jordan" and "personally made all material decisions regarding investment of JZI funds, financing of any purchases, management and financing of portfolio companies and distribution of profits." (*Id*. ¶ 37.)

Besides being JZI's management company, JZ Asset Management's purpose is to serve as the management company to various JZI funds, including Fund III, Fund III GP, and nonparty EuroMicrocap Fund-B, L.P. (Fund B). (*Id*. ¶ 39.) Fund III is a limited partnership. (*Id*. ¶ 31.) Fund III GP, also a limited partnership, is the general partner of Fund III. (*Id*. ¶ 32.) JZ Advisers is the general partner of Fund III GP. (*Id*. ¶ 42.)

Plaintiffs

Gedesco Finance, a non-bank financing company based in Spain, was founded in 2001 by Aynat and Garcia. (*Id*. ¶¶ 1, 44.) Aynat and Garcia are Gedesco Finance's CEO and Head of Sales, respectively. (*Id*. ¶¶ 26-27.) In February 2007, JZI acquired a 60% share of Gedesco Finance; post-acquisition Aynat and Garcia continued to serve as Gedesco Finance's principal managers. (*Id*.) Gedesco Finance's business consists of factoring services, asset-backed lending, and direct lending to medium-sized companies. (*Id*. ¶ 45.) Gedesco Finance's business was "closely tied" to nonparty Toro Finance S.L. (Toro), another financing company within JZI portfolio. (*Id*. ¶¶ 5, 46.) The two entities "had overlapping management, and as a practical matter … shared certain corporate services." (*Id*. ¶ 46.)

Since the early 2000s, Rueda and Groth served as JZI's European asset managers. (*Id*. ¶ 4.) Specifically, Rueda was a "Member, Principal and Managing

Principal" of JZ Asset Management; Groth was a principal of JZ Asset Management. (*Id*. ¶ 40.) Rueda and Groth also served as officers and directors of JZI's portfolio companies held by the JZI funds. (*Id*. ¶¶ 6, 40.) They were managers and minority shareholders of Gedesco Finance and Toro. (*Id*. ¶ 7.) Rueda and Groth also are Class B Limited Partners of Fund III GP and limited partners of nonparty JZI Fund III Special Carry, L.P. (Fund III SC). (*Id*. ¶¶ 42-43.) Rueda and Groth also hold units in Scottish Partnership, an entity that JZI established to hold equity interest in certain companies within the JZI portfolio. (*Id*. ¶ 38.) Rueda and Groth were compensated "through a combination of salaries, fixed bonuses, income sharing, management fees, special transaction bonuses, carried interest, and other direct or indirect interests held in the Funds." (*Id*. ¶ 40.)

Gedesco Innovfin, Gedesco Finance's affiliate, provides non-bank financing and fintech services in Spain. (*Id*. ¶ 23.) Venalta and Anthophila are minority shareholders of Gedesco Finance and Gedesco Innovfin. (*Id*. ¶¶ 24-25.)

Stator, a company managed by Rueda and Groth (*id*. ¶ 21), "started by buying and seeking to recover on defaulted loans of Gedesco [Finance], and later functioned as a private equity firm acquiring businesses and selling them for a profit." (*Id*. ¶ 85.)

Gedesco Finance Valuation

In 2020, Gedesco Finance began working with investment bankers to plan for an initial public offering (IPO) for Gedesco Finance and Toro. (*Id*. ¶ 50.) Santander Bank valued Gedesco Finance at over €500 million; the combined Gedesco/Toro IPO was valued at over €1 billion. (*Id*.) Upon Santander Bank's recommendation that Gedesco Finance "acquire a retail bank to complement its alternative lending offerings," Gedesco

Finance acquired Kompas Bank, "placing Gedesco [Finance] in prime position for an [IPO] in 2022." (*Id*.) By 2022, Gedesco Finance had become "the leading fintech company in non-bank financing for small and medium-sized businesses in Spain." (*Id*. ¶ 5.)

Defendants' Self-Dealing

Plaintiffs allege that "in managing JZI's business and [JZI funds], Zalaznick, with the knowledge and consent of Jordan" engaged in self-dealing to the detriment of other investors and plaintiffs by, e.g., (i) "forc[ing] portfolio companies to borrow funds from JZI at above-market interest rates," (ii) "pledg[ing] the assets of third parties (including assets of Plaintiffs and other portfolio companies) to secure these above-market loans" without any compensation to third parties, (iii) "imposing a 5% management fee [on portfolio companies] that further disadvantaged minority shareholders and the portfolio companies of JZI's European operations," (iv) "charg[ing] the partnerships for expenses to fund their lavish personal lifestyles, including the costs of private jets that were included in the [JZ Asset Management] budget and invoiced as part of various transactions," and (v) "charg[ing] costs of part of JZI's financial department … to the portfolio company structure to reduce JZI's costs against the interest of limited partners," with such self-dealing resulting in the increase of "Zalaznick's profits from the portfolio companies at the expense of both the portfolio companies (which paid unnecessarily high debt and other expenses) and limited partners and management, whose fees and carried interests were lower due to the unnecessary and improper interest expenses." (*Id*. ¶ 52.) "Zalaznick, with the knowledge and consent of Jordan" also misrepresented to investors that the JZI funds "had an investment committee that

approved investments in accordance with established investment guidelines" while "[u]ntil 2021, JZI had no investment committee, and … all decisions were made solely by Zalaznick, with the knowledge and consent of Jordan, in their own personal interest." (*Id*. ¶ 53.) "Zalaznick, with the knowledge and consent of Jordan" would also "frequently increase the management fees due to his company, as well as change rates and terms of outstanding loans, unchecked and at will, to serve his own financial interests, to the detriment of JZI's limited partners," e.g. "JZI began collecting a 5% interest fee before any distributions were made to minority shareholders." (*Id*. ¶ 54.) Plaintiffs also allege that "Zalaznick and Jordan have also engaged in other bad faith conduct to reduce or withhold distributions owed to Rueda and Groth." (*Id*. ¶ 55.)

Rueda and Groth's Departure, the New York Action, and Dissemination of False Claims

Due to Jordan and Zalaznick's alleged self-dealing, plaintiffs "decided to start their own fund … separate from Zalaznick;" the plan was discussed with Zalaznick and announced to investors in 2021. (*Id*. ¶ 57.) Rueda and Groth would "continue to oversee JZI's European assets for a four-year period, and … [then] discontinue any future investments with Zalaznick." (*Id*.) To execute the plan, in June 2021, Rueda and Groth created a new partnership, Quarto Capital Partners LLP (Quarto), engaging nonparty Quest Fund Placement Ltd. (Quest Fund Placement) to assist with establishing the fund, and began to partner with banks and other sources of funding to secure financing. (*Id*. ¶ 59.) In 2022, several limited partners and a European fund expressed interest in investing in Quatro. (*Id*. ¶ 60.) Nonparty HarbourVest Partners, LLC (HarbourVest), a private equity firm, offered to provide "€1 billion in financing for a

fund that would buy out Zalaznick and his partners at net asset value." (*Id*.) "On March 14, 2022, the parties agreed to start due diligence on the HarbourVest offer." (*Id*.)

"Zalaznick, with Jordan's knowledge and consent," however, "embarked on a plan that would … punish Rueda and Groth." (*Id*. ¶ 62.) First, Zalaznick allegedly fabricated claims in *JZ International LLC v Miguel Rueda Hernando*, Index. No. 651216/2022, an action filed by JZI and its fund, Fund B, against Rueda and Groth, which also implicated Aynat and Garcia for allegedly conspiring with Rueda and Groth (New York Action).[3] (*Id*. ¶ 63.) In the New York Action, JZI and Fund B alleged that Rueda and Groth "'secretly sold a JZI portfolio company, Faus International, to themselves through a sham sale process that they manipulated.'" (*Id*. ¶ 65.) Zalaznick and Jordan allegedly knew that the claims in the New York Action were false. (*Id*. ¶¶ 63, 66.) In 2023, JZI and Fund B discontinued the New York Action. (*Id*. ¶ 64; NYSCEF 17 & 18, Stipulations of Discontinuance.)

"[A]round the same time that the New York Action was initiated … Zalaznick, with the knowledge and consent of Jordan" disseminated the false claims to the

> "JZI team, the limited partners of JZI, each of the portfolio companies (including their directors and key executives), and the banks, lenders and other companies with whom the Plaintiffs worked, including Banca IMI [S.P.A], Soci6t6 G6n6rale S.A. …, Citibank, N.A., Nomura [Securities], J.P. Morgan, HarbourVest, Quest Fund Placement, and CVC Capital Partners" (CVC). (NYSCEF 84, AC ¶ 66.)

"Zalaznick, with Jordan's knowledge and consent," also disseminated the false claims in a press release issued by nonparty JZ Capital Partners Ltd., a public investment fund traded on the London Stock Exchange. (*Id*. ¶ 67.)

[3] Rueda, Groth, and Sator were defendants in the New York Action.

Zalaznick, Jordan, JZI, and JZ Advisers directed the false and defamatory communications to "the directors of each of the portfolio companies, who include numerous prominent and influential persons in the business and financial community in Spain and internationally, including senior officers of KPMG, PWC and numerous financial institutions." (*Id*. ¶ 68.) These communications accused Aynat, Garcia, Rueda, and Groth "(and thereby Gedesco [Finance] and Gedesco Innovfin) … of fraudulent activity, causing the recipients to believe the allegations, destroying their reputations in their community and rendering it impossible for them, or the companies with which they were affiliated, to continue to do business." (*Id*.) Defendants continued to make the same defamatory allegations in 2022, 2023, and 2024. (*Id*. ¶ 79.) Additionally, Zalaznick and Jordan bribed and pressured witnesses to support their false accusations. (*Id*. ¶ 69.)

Finally, Zalaznick and JZI, acting through a JZI's subsidiary, filed a criminal complaint in Spain against Aynat, Garcia, Rueda, Groth, Stator, Venalta, and Anthophila accusing them of "fraud, disloyal administration, misappropriation, use of company secrets, accounting and documentary falsification, impediment of the exercise of corporate rights, and imposition of abusive agreements" and disseminated the contents of the criminal complaint to press in Spain. (*Id*. ¶ 113)

The false communications had a devastating impact on plaintiffs. Financial institutions refused to renew credit facilities to Gedesco Finance and Toro "causing [the entities] to be unable to continue the lending activities that were critical to their survival" (*id*. ¶ 71) and resulting in dramatic damages; "the business that Santander Bank had recently valued at €1 billion is now close to worthless." (*Id*. ¶ 72.) Gedesco Finance

and Gedesco Innovfin's IPO prospects were destroyed. (*Id*. ¶ 74.) Due to the defamatory statements, Rueda and Groth also are "unable to launch their fund or take advantage of the €1 billion in financing available to the fund from HarbourVest." (*Id*. ¶ 75.)

Zalaznick and Jordan allegedly used the New York Action's allegations to cause Rueda and Groth to be terminated for cause as limited partners of Fund III SC on March 17, 2022. (*Id*. ¶¶ 81-82.)

Stator

In the New York Action, Stator was allegedly falsely accused of being a "'front'" for plaintiffs. (*Id*. ¶ 86.) Specifically, it was alleged that Rueda and Groth had an ownership interest in Stator and "engaged in self-dealing by orchestrating a sale of a JZI portfolio company — Faus International — to Stator for a below-market price." (*Id*.) These claims were widely disseminated. (*Id*. ¶ 87.) Also, Zalaznick and Jordan "conspired to misappropriate assets from Stator and cover up their scheme;" Zalaznick and Jordan, in coordination with Stator's managing directors Maximo H. Buch and Ernesto Bernia,

> "defraud[ed] Stator of over €25 million in assets, distributing €21 million in value of shares of portfolio companies and compensat[ing] them in the form of expected future dividends. Zalaznick, Jordan, Buch and Bernia sold assets and collected the cash in their own companies to the tune of over €2 million, and unlawfully distributed cash to their companies, with no justification." (*Id*. ¶ 89.)

Zalaznick and Jordan then induced Buch and Bernia to provide testimony helpful to them and provide recordings of Buch and Bernie's several conversations with Rueda

and Groth and hundreds of emails "in return for releasing Buch and Bernia from claims for the misappropriation of funds from Stator."[4] (*Id*.)

Causes of Action

Plaintiffs allege 17 causes of action. In the first three causes of action for tortuous interference with prospective business advantage, Rueda and Groth allege that, by disseminating defamatory and false information, Zalaznick, Jordan, JZI, and JZ Advisers (collectively, JZ Defendants) tortiously interfered with Rueda and Groth's business relationships with (i) HarbourVest which offered to provide €1 billion of financing for Rueda and Groth's new fund (*id*. ¶¶ 91-92), (ii) Quest Fund Placement which was engaged to assist with establishing Rueda and Groth's new fund (*id*. ¶ 98), and (iii) "banks and other sources of financing in Europe, including Banca IMI, which, based on a guarantee from the European Investment Fund, provided a €250 million credit line to Gedesco/Toro," Morgan Stanley, which issued a €300 million securitized financing for Gedesco/Toro, and with Soci6t6 G6n6rale, Nomura and J.P. Morgan. (*Id*. ¶ 103.)

In the fourth cause of action, Rueda and Groth allege that the JZ Defendants defamed them by disseminating false allegations that Rueda and Groth were engaged in self-dealings and dishonest conduct and were "'criminals.'" (*Id*. ¶¶ 109, 111.)

In the fifth cause of action, Gedesco Finance and Gedesco Innovfin assert tortious interference with contract against the JZ Defendants. Gedesco Finance and Gedesco Innovfin allegedly had "contractual relationships" and "business relationships" with Banca IMI, which provided a €250 million credit line to Gedesco/Toro, Morgan

[4] It is not alleged that defendants had any interest in Stator.

Stanley, which issued a €300 million securitized financing for Gedesco/Toro, as well as with Soci6t6 G6n6rale, Nomura, J.P. Morgan, and CVC. (*Id*. ¶ 116.) The JZ Defendants allegedly "procured termination of such agreements" by disseminating false claims that Gedesco Finance and its managers engaged in self-dealing and dishonest acts. (*Id*. ¶ 118.)

Gedesco Finance, Gedesco Innovfin, Venalta, Anthophila, Aynat, and Garcia allege as against the JZ Defendants causes of action for tortious interference with prospective business advantage by interfering with these plaintiffs' business relationships with Banca IMI, Morgan Stanley, Soci6t6 G6n6rale, Nomura, J.P. Morgan, and CVC by disseminating false claims that Gedesco Finance and its managers engaged in self-dealing and dishonest acts (sixth cause of action) (*id*. ¶¶ 124-125) and defamation by disseminating false statements through the New York Action and in communications to third parties (seventh cause of action). (*Id*. ¶ 131.)

Stator alleges causes of action for conspiracy against Zalaznick and Jordan by conspiring with Buch and Bernia to misappropriate over €25 million of Stator's assets (eighth cause of action) (*id*. ¶¶ 135-139) and defamation against the JZ Defendants for disseminating, through the New York Action and in communications to third parties, false statements that Stator had engaged in self-dealing and dishonest conduct (ninth cause of action). (*Id*. ¶¶ 140-145.)

Aynat, Garcia, Venalta, and Anthophila allege that the JZ Defendants defamed them by filing a criminal complaint in Spain which contained false statements and by disseminating the contents of the criminal complaint to the Spanish press (tenth cause of action). (*Id*. ¶¶ 146-150.)

The remaining causes of action eleven through seventeen are alleged by Rueda and Groth. The eleventh cause of action is against Fund III LP and Fund III GP for contractual indemnification in connection with this action.[5] (*Id*. ¶¶ 151-155.)

The twelfth cause and thirteenth causes of action are for breach of contract against JZ Advisers. In the twelfth cause of action, Rueda and Broth allege that JZ Advisers breached Fund III GP's Amended and Restated Agreement of Exempted Limited Partnership (LPA) by "failing to distribute or properly allocate funds owed to Rueda and Groth in breach of Article III of the Fund III GP LPA," "engaging in acts of self-dealing that resulted in decreased distributions owed to Rueda and Groth in breach of Article III of the Fund III GP LPA," "charging expenses to the Partnership beyond what was permitted under Article IV of the Fund III GP LPA," and "acting outside the authority granted to it pursuant to Article V of the Fund III GP LPA by taking actions that were inconsistent with its fiduciary duties." (*Id*. ¶ 159.) In the thirteenth cause of action, Rueda and Groth allege that JZ Advisers breached Fund III SC's Agreement of Limited Partnership (LPA) by "purporting to terminate Rueda and Groth for Cause as limited partners of the Fund III SC when no Cause for termination existed in breach of Article IV of the Fund III SC LPA," "failing to distribute or properly allocate funds owed to Rueda and Groth in breach of Articles V and VI of the Fund III SC LPA," "engaging in acts of self-dealing that resulted in decreased distributions owed to Rueda and Groth in breach of Articles V and VI of the Fund III SC LPA," "charging expenses to the Partnership beyond what was permitted under Section 5.2 of the Fund III SC LPA," and "acting

[5] The indemnification claim was withdrawn to the extent plaintiffs sought reimbursement for expenses incurred in the New York Action. (NYSCEF 49, Opp Brief at 31/37 n 8.)

outside the authority granted to it pursuant to Section 7.1 of the Fund III SC LPA by taking actions that were inconsistent with its fiduciary duties." (*Id*. ¶ 164.)

The fourteenth, fifteenth, and sixteenth causes of action are for conversion by the JZ Defendants.[6] Specifically, Rueda and Growth allege the JZ Defendants converted Scottish Partnership's assets by "self-dealing to inflate their profits" at the expense of Scottish Partnership's assets and withholding distributions and fees owed to Rueda and Groth (*id*. ¶ 168) (fourteenth cause of action), Fund B's assets by self-dealing to inflate their profits (*id*. ¶¶ 176-177) (fifteenth cause of action), and Fund III's assets by self-dealing to inflate their profits (*id*. ¶¶ 184-185) (sixteenth cause of action).

Finally, Rueda and Groth, derivatively on behalf of Scottish Partnership, allege causes of action for (a) breach of fiduciary duty against JZI and (b) aiding and abetting breach of fiduciary duty against JZ Advisers, Zalaznick, and Jordan (seventeenth cause of action). Rueda and Groth allege that JZI, as Scottish Partnership's corporate partner with managerial responsibilities, as well as a majority shareholder in the holding companies in which Scottish Partnership is a minority shareholder, owed fiduciary duties to Scottish Partnership and breached the duties by self-dealing to Scottish Partnership's detriment of by charging excessive fees and costs and withholding distributions from the sale of portfolio companies owed to the Scottish Partnership and its partners. (*Id*. ¶¶ 191-193.) The remaining three defendants allegedly provided substantial assistance. (*Id*. ¶¶ 194-195.)

[6] The sixteenth cause of action is also alleged against Fund III GP.

Legal Standard

Pursuant to CPLR 3211(a)(4), a party may move to dismiss on the grounds that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." (CPLR 3211[a][4].)

On a CPLR 3211(a)(7) motion to dismiss, 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, 487 [1st Dept 1995] [citation omitted].) "On a CPLR 3211 motion to dismiss, a court may consider affidavits to remedy pleading problems." (*Sargiss v Magarelli*, 12 NY3d 527, 531 [2009] [citation omitted].)

A defendant may move pursuant to CPLR 3211(a)(8) to dismiss an action for lack of personal jurisdiction. (CPLR 3211[a][8].) "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] [citation omitted].) However, "since facts relevant to this determination are frequently in the exclusive control of the opposing party and will only be uncovered during discovery," plaintiff is required only to make a "sufficient start in demonstrating … the existence of personal

jurisdiction" in opposing motion to dismiss. (*Matter of James v iFinex Inc.*, 185 AD3d 22, 30 [1st Dept 2020] [internal quotation marks and citation omitted].)

Discussion

Comity

Defendants argue that this action should be dismissed on the grounds of international comity to avoid litigating near-identical issues in separate countries, avoid inconsistent outcomes, and promote efficiencies. Defendants state that, before this action was filed, JZI's subsidiary JZ Gedhold B.V. commenced a criminal action in Spain against all plaintiffs herein except Gedesco Finance and Gedesco Innovfin (Spanish Criminal Action).[7] The Spanish Criminal Action allegedly involves the issues raised in this action and is far ahead of this action.

> "International comity has been described by the Supreme Court as the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." (*Duff & Phelps, LLC v Vitro S.A.B. de C.V.*, 18 F Supp 3d 375, 382 [SD NY 2014] [internal quotation marks and citations omitted].)

International comity is not "an imperative obligation of courts but rather is a discretionary rule of practice, convenience, and expediency." (*Royal & Sun Alliance Ins. Co. of Canada v Century Intl. Arms, Inc*., 466 F3d 88, 92 [2d Cir 2006] [internal quotation marks and citations omitted].) "[T]he decision whether to extend comity is a matter of discretion" (*Banco Nacional De Mexico, S.A., Integrante Del Grupo Financiero Banamex v Societe Generale*, 34 AD3d 124, 131 [1st Dept 2006] [citations omitted]; *see*

[7] Defendants' Spanish counsel explains that Spanish law allows private parties to initiate and pursue criminal proceedings by filing a criminal complaint before an investigative judge. (*See* NYSCEF 30, Gabriel Castro Salillas aff ¶ 6.)

In re Oi Brasil Holdings Cooperatief U.A., 578 BR 169, 213 [Bankr SD NY 2017]), and the burden of proof to establish its appropriateness is on the moving party. (*Duff & Phelps, LLC.*, 18 F Supp 3d at 382.)

> "Comity is appropriately exercised when there is a showing that the case is related to a foreign judicial proceeding before a court of competent jurisdiction and the foreign proceeding has not nor will not result in injustice to New York citizens, unfair prejudice to a creditor's New York statutory remedies, or violation of New York public policy." (*Nam Tai Elecs., Inc. v UBS Painewebber Inc.*, 2005 NY Slip Op 30343[U], *5 [Sup Ct, NY County 2005] [citations omitted], *appeal abandoned* 46 AD3d 486 [1st Dept 2006].)

Comity to foreign bankruptcy proceedings has been recognized as particularly appropriate as "the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding." (*Sustainable Pte Ltd. v Peak Venture Partners LLC*, 2017 NY Slip Op 30202[U], *16 [Sup Ct, NY County 2017] [internal quotation marks and citations omitted].) Outside of the bankruptcy context, comity has been recognized, for example, as a ground for dismissal of fiduciary duty claims which involved the issue of whether shareholders of a Taiwanese company owe fiduciary duties to each other, which was before a Taiwanese court. (*J-K Apparel Sales Co., Inc. v Jacobs*, Sup Ct, Nassau County, Oct. 31. 2017, Bucaria, J. [Index. No. 600612/2015, NYSCEF 748 at 2, 5], *affd* 189 AD3d 1011 [2d Dept 2020].)

It is undisputed that the Spanish Criminal Action involves alleged misconduct by *plaintiffs* – in sum, that they "harmed Gedesco … and diverted approximately €80 million from the Gedesco corporate group and other companies for their own benefit." (NYSCEF 90, Salillas aff ¶ 8.) As discussed *supra*, this action is comprised of seventeen causes of action alleging misconduct by *defendants*. Accordingly, it cannot

be said that this action is "related to a foreign judicial proceeding" – the Spanish Criminal Action – so as to warrant dismissal on the grounds of international comity. (*Nam Tai Elecs., Inc. v UBS Painewebber Inc.*, 2005 NY Slip Op 30343[U], *5 [Sup Ct, NY County 2005] [citations omitted].)

Next, defendants rely on four actions filed in Spain by several plaintiffs herein. Defendants assert that Groth and Rueda filed a civil defamation claim before the Madrid Provincial Court against the JZ Defendants and others seeking damages arising from the alleged defamatory accusations made in the New York Action. (NYSCEF 26, Ortiz[8] aff ¶ 6[a].) Defendants admit, however, that the JZ Defendants filed "a declinatory plea (a type of jurisdictional challenge) against that [civil defamation] claim, which was upheld by the" Spanish court. (NYSCEF 25, León[9] aff ¶ 8[a].) Having admitted that the Spanish civil defamation proceeding was dismissed on jurisdictional grounds, defendants failed to demonstrate that the Spanish court is the court of "competent jurisdiction" to resolve the issue of defamation. (*Nam Tai Elecs., Inc.*, 2005 NY Slip Op 30343[U], *5 [Sup Ct, NY County 2005]; *see also Hernandez v Bank of Nova Scotia*, 2008 NY Slip Op 32689[U], *13 [Sup Ct, NY County 2008] ["Dismissal on comity grounds requires that [an adequate] forum be available. An adequate alternative forum does not exist if the defendant is not subject to jurisdiction in the foreign country" (citations omitted)].)[10]

[8] Antonio Flix del Saz Ortiz is Spanish counsel to Rueda and Groth. (NYSCEF 26, Ortiz aff ¶ 2.)
[9] Alejandro Huertas León is Spanish counsel to the JZ Defendants. (NYSCEF 25, León aff ¶ 8[a].)
[10] Although defendants state that the appeal from the Madrid Provincial court's decision addressing the jurisdictional challenge was pending as of August 28, 2023, it is unclear whether the appeal was decided. (NYSCEF 25, León aff ¶ 8[a].)

The second Spanish action arose from Groth and Rueda's criminal complaint filed in Spain against the JZ Defendants and others who allegedly committed criminal libel by wrongfully accusing Rueda and Groth of committing several crimes, which is a crime punishable by imprisonment. (NYSCEF 26, Ortiz aff ¶ 6[b].) The truth of the allegations made in the New York Action is allegedly at issue in this criminal matter. (*Id*.) Given that the Spanish matter alleges a criminal violation, the court declines to exercise its discretion to dismiss the claims herein on the grounds of comity; this matter may proceed parallel to the Spanish criminal libel matter without offending "the principles upon which international comity is based: the proper respect for litigation in and the courts of a sovereign nation, fairness to litigants, and judicial efficiency." (*Royal & Sun Alliance Ins. Co. of Can. v Century Intl. Arms, Inc.*, 466 F3d 88, 94 [2d Cir 2006] [citations omitted].) The court notes that defendants proffered no cases, and the court has located none, where a civil matter was dismissed on the grounds of comity due to a foreign criminal matter.

The third action in Spain is by Venalta and Anthophila, as Gedesco Innovfin's minority shareholders, "for damages caused by the [JZ Defendants] pursuant to their actions (publicity of the New York action and underlying allegations and the corresponding effects in the market), infringing their loyalty duties as shadow administrators." (NYSCEF 26, Ortiz aff ¶ 6[c].) Defendants note that the third Spanish action is the same as the sixth cause of action herein, which is brought by Gedesco Finance, Gedesco Innovfin, Venalta, Anthophila, Aynat, and Garcia and against the JZ Defendants for tortious interference with prospective business advantage with these plaintiffs' business relationships with Banca IMI, Morgan Stanley, Soci6t6 G6n6rale,

Nomura, J.P. Morgan, and CVC by disseminating false claims that Gedesco Finance and its managers engaged in self-dealing and dishonest acts. On this record, which contains only a brief and vague description of the Spanish action (*see* NYSCEF 26, Ortiz aff ¶ 6[c]), defendants fail to demonstrate that the issue before this court in the sixth cause of action – whether the JZ Defendants tortiously interfered with Gedesco Innovfin's prospective business advantage – is the same as issue before the Spanish courts as to warrant dismissal on the grounds of comity.

For the same reason, the court declines to dismiss this action on the ground of comity based on the fourth Spanish action, which is by Gedesco Innovfin for "damages caused by the [JZ Defendants] pursuant to their unlawful actions (publicity of the New York action and underlying allegations and the corresponding effects in the market), violating the rule of not causing damage, known as 'extracontractual liability.'" (*Id*. ¶ 6[d].) Defendants assert that the fourth Spanish action is the same as the fifth cause of action, which is brought by Gedesco Finance and Gedesco Innovfin against the JZ Defendants, alleging tortious interference with these plaintiffs' financing contracts with Banca IMI, Morgan Stanley, Soci6t6 G6n6rale, Nomura, J.P. Morgan, and CVC by disseminating false claims that Gedesco Finance and its managers engaged in self-dealing and dishonest acts. Again, on the limited record before the court, defendants fail to demonstrate that the claim before this court is truly the same as issue before the Spanish court as to warrant dismissal based on comity.

Additionally, the court notes that the fifth and sixth causes of action involve more plaintiffs than their alleged Spanish counterparts, further demonstrating that dismissal on the comity grounds is not warranted.

Personal Jurisdiction over Jordan

Defendants argue that the court lacks general personal jurisdiction over Jordan who resides in Florida. CPLR 301 provides for general jurisdiction over an individual domiciled in New York "or in an exceptional case where an individual's contacts with a forum [are] so extensive as to support general jurisdiction notwithstanding domicile elsewhere." (*IMAX Corp. v Essel Group*, 154 AD3d 464, 465-66 [1st Dept 2017] [internal quotation marks and citation omitted].)[11]

> "'Domicile' is not necessarily synonymous with 'residence,' and one can reside in one place but be domiciled in another. [D]omicile is established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there. Thus, a person can have multiple residences but can have only one domicile." (*Deer Consumer Prods., Inc. v Little,* 35 Misc 3d 374, 381 [Sup Ct, NY County 2012] [internal quotation marks and citations omitted].)

The following facts are relevant to determine domicile:

> "current residence; voting registration and voting practices; location of personal and real property; location of brokerage and bank accounts; membership in unions, fraternal organizations, churches, clubs, and other associations; place of employment or business; driver's license and automobile registration; payment of taxes … No single factor is conclusive." (*Id*. [internal quotation marks and citations omitted].)

Defendants argue that Jordan is domiciled in Florida. They rely on the amended complaint's allegation that Jordan resides in Florida. (NYSCEF 84, AC ¶ 29.) Additionally, Jordan submits an affidavit averring that he has been residing in Florida since 2019, votes in Florida, has a Florida driver's license, runs his family office in Florida, belongs to clubs in Florida, filed a Florida Declaration of Domicile in January

[11] Defendants argue that the allegations in the amended complaint do not support the proposition that Jordan has extensive contacts with New York so as to subject him to general jurisdiction under CPLR 301 as a non-domiciliary. Plaintiffs do not address this argument in their opposition brief.

2019, has a primary land-based personal telephone number that is a Florida number, has his primary personal bank accounts in bank branches in Florida, and that since 1988, he never intended to make New York his fixed and permanent home. (NYSCEF 31, Jordan aff ¶¶ 2, 6-13.)

In opposition, plaintiffs argue that Jordan admitted in the Spanish actions that he is domiciled in New York. Plaintiffs proffer a November 15, 2022 power of attorney signed by Jordan which was filed in two Spanish actions. The document, which is in English and Spanish, states that Jordan is "a U.S. national … domiciled for such purposes at 9 West 57th Street, 33rd Floor, Nueva York, NY 10019." (NYSCEF 46, Power of Attorney at 2/8; *see* NYSCEF 40, Rueda aff ¶¶ 18-19.) Jordan executed this document in New York. (NYSCEF 46, Power of Attorney at 7/8.) Next, plaintiffs proffer a November 14, 2022 declaration submitted to a Spanish court by JZI's counsel which states that Jordan is "residing" in New York. (NYSCEF 47, Court Filing at 3/28; NYSCEF 40, Rueda aff ¶¶ 20.) In reply, defendants submit an affidavit by their Spanish counsel opining that the term "domiciled" as used in the power of attorney "is a reference to the address designated by the grantor specifically to execute the POA in connection with Spanish legal proceedings, and it does not imply that such address is the 'domicile' of the grantor as understood under New York law." (NYSCEF 59, León aff ¶ 13.)

Plaintiffs submitted "'tangible evidence" that establishes that Jordan is domiciled in New York and thus New York has general jurisdiction over Jordan. (*Robins v Procure Treatment Ctrs., Inc.*, 157 AD3d 606, 607 [1st Dept 2018] ["the record contains a State filing in which [defendant] identified itself as having a principal place of business

in Manhattan" which undermined defendant's contrary statements].)[12] Jordan's statements constitute judicial admissions.[13] "To constitute a judicial admission, a statement must be "deliberate, clear, and unequivocal." (*Bank of New York Mellon v Gordon*, 171 AD3d 197, 211 [2d Dept 2019].) While JZI's counsel's statement filed in Spain is an informal judicial admission, Jordon's sworn statement is a formal judicial admission. "A formal judicial admission is an act of a party done in the course of a judicial proceeding, which dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary." (*Kegg v Truck-Rite Distrib. Sys. Corp.*, 84 Misc 3d 564, 576 [Sup Ct 2024] [quoting Prince, Richardson on Evidence § 8-219, at 530 [Farrell 11th ed].) The motion to dismiss this action as against Jordan on the grounds of personal jurisdiction is denied.

Defendants alternatively argue that the court lacks personal jurisdiction over Jordan pursuant to CPLR 302 (a)(1), the long-arm statute providing for jurisdiction over a non-domiciliary.[14] In opposition, plaintiffs argue that exercise of personal jurisdiction over Jordan based on CPLR 302 (a)(1) is proper and recite the amended complaint and Rueda's affirmation stating, in sum, that Jordan conducted business in New York

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[12] After jurisdictional discovery in *Robins*, the Appellate Division found the state filing years earlier alone to be insufficient to establish general jurisdiction. (*Robins v Procure Treatment Centers, Inc.*, 179 AD3d 412 [1st Dept 2020].) Here, we have Jordan, an individual, making a judicial admission less than six months before this case was initiated.

[13] Judicial admissions made in a related proceeding are admissible. (*See Ferolito v Vultaggio*, 36 Misc 3d 1227(A) [Sup Ct, NY County 2012].)

[14] "As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, 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].)

through JZI and JZ Advisers who have principal place of business in New York, controlled JZI, and traveled to New York to conduct business on numerous occasions.

Plaintiffs' conclusory allegations are insufficient as a matter of law to establish jurisdiction pursuant to CPLR 302 (a)(1).

> "To establish that a defendant acted through an agent, a plaintiff must convince the court that [the New York actors] engaged in purposeful activities in this State in relation to [the] transaction for the benefit of and with the knowledge and consent of [the defendant] and that [the defendant] exercised some control over [the New York actors]. [T]o make a prima facie showing of control, a plaintiff's allegations must sufficiently detail the defendant's conduct so as to persuade a court that the defendant was a 'primary actor' in the specific matter in question; control cannot be shown based merely upon a defendant's title or position within the corporation, or upon conclusory allegations that the defendant controls the corporation." (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486-87 [1st Dept 2017] [internal quotation marks and citations omitted].)

Plaintiffs' allegations as to Jordan's conduct are limited to their allegations that Zalaznick acted with Jordan's approval, knowledge and/or consent (*see e.g*. NYSCEF 84, AC ¶¶ 8, 37, 52-54, 62) and that Jordan "along with Mr. Zalaznisk … make all final decisions," "directs and controls the New-York Based executive teams," and "travelled to New York to conduct business on numerous occasions" (NYSCEF 40, Rueda aff ¶¶ 15-17); no conduct by Jordan is otherwise alleged in the 43-page amended complaint.[15] Therefore, the court's jurisdiction over Jordan is based on CPLR 301.

Defamation and Tortious Interference

Absolute Privilege for Allegations in Pleadings

Defendants argue that the defamation and tortious interference causes of action are barred by absolute privilege to the extent those causes of action are predicated on

[15] Defendants also argue that the court cannot exercise personal jurisdiction over Jordan under CPLR 301 (a)(2), (3), and (4). Plaintiffs offer no opposition.

alleged defamatory statements made in the New York Action and the Spanish Criminal Action.

"[A]bsolute immunity from liability for defamation exists for oral and written statements made by attorneys in connection with a proceeding before a court when such words and writings are material and pertinent to the questions involved." (*Gottwald v Sebert*, 40 NY3d 240, 253 [2023] [internal quotation marks and citations omitted].) "The test of pertinency to the litigation is extremely liberal, so as to embrace anything that may possibly or plausibly be relevant or pertinent." (*Davidoff v Kaplan*, 217 AD3d 918, 920 [2d Dept 2023] [citations omitted].) "The litigation privilege, being absolute, confers immunity from liability regardless of motive." (*Gottwald*, 40 NY3d at 253 [internal quotation marks and citations omitted].) Absolute privilege covers statements made in a complaint. (*See Joseph v Joseph*, 107 AD3d 441, 442 [1st Dept 2013].)

Here, the defamation and tortious interference causes of action are barred to the extent predicated on alleged defamatory statements contained in the complaints in New York Action and the Spanish Criminal Action against plaintiffs. (*See Gottwald*, 40 NY3d at 254; *dMY Sponsor, LLC v Glatt*, 79 Misc 3d 1207[A], 2023 NY Slip Op 50547[U], *8 [Sup Ct, NY County 2023] [holding that tortious interference with business relations claim predicated on defamatory statements made in litigation is barred by absolute privilege].) Plaintiffs in this action complain about the core allegations of the New York Action and the Spanish Criminal Action as defamatory. (*See* NYSCEF 84, AC ¶¶ 63-65, 113, 144, 147.) The complained of allegations of the two actions thus pass the relevancy test. Additionally, the court notes that plaintiffs proffered no argument on the

absolute privilege issue. (*See e.g. Butler v City of NY*, 202 AD3d 471, 472 [1st Dept 2022] [granting motion to dismiss to the extent it was unopposed].)

Follow-On Communications – Defamation

The defamation and tortious interference causes of action are also predicated on alleged defamatory statements made after the New York Action and the Spanish Criminal Action were filed and outside of those actions.[16] Defendants argue that, to the extent defamation and tortious interference causes of action are based on such follow-on communications, the causes of action fail as they lack specificity required under CPLR 3016 (a).

Plaintiffs allege defamation in the fourth, seventh, ninth, and tenth causes of action. "Defamation is the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of [plaintiff] in the minds of right-thinking persons, and to deprive [plaintiff] of their friendly intercourse in society." (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014] [internal quotation marks and citations omitted].) To state a claim for defamation, plaintiff must allege "(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm." (*Id*. [citation omitted].) "[T]he particular words complained of … shall be set forth in the complaint" alleging defamation. (CPLR 3016[a].) "The complaint also must allege the time, place and

[16] While not apparent from the amended complaint, in their opposition brief, plaintiffs appear to state that the defamation claims are premised on communications made after the New York Acton was filed. (NYSCEF 49, Opp Brief at 27/37 n 7.)

manner of the false statement and specify to whom it was made." (*Dillon v City of New York*, 261 AD2d 34, 38 [1st Dept 1999] [citation omitted].)

In their 43-page complaint, plaintiffs identify only a few specific defamatory statements that appear to pass the requirement that "particular words complained of" be alleged. (CPLR 3016[a].) Specifically, plaintiffs allege Zalaznick broadly disseminated false allegations made in the New York Action, and that the complaint in the New York Action accused Rueda and Groth of (i) "'secretly [selling] a JZI portfolio company, Faus International, to themselves through a sham sale process that they manipulated'" and (ii) "caus[ing] one of their portfolio companies, Pack Benefit S.L.U., to receive €3 million in funding from a subsidiary of Stator Management, a company allegedly owned by Rueda and Groth." (NYSCEF 84, AC ¶ 65; *see id*. ¶ 66.) The causes of action for defamation still fail to the extent predicated on the above statements because plaintiffs fail to allege any further specifics – "the time, place and manner of the false statement and specify to whom it was made." (*Dillon*, 261 AD2d at 38.) Plaintiffs merely allege that "around the same time that the New York Action was initiated, Zalaznick put the second stage of his plan into action and took further steps to destroy any chance that Plaintiffs had of surviving this baseless attack" (NYSCEF 84, AC ¶ 66); and that the statements were disseminated to

> "the entire JZI team, the limited partners of JZI, each of the portfolio companies (including their directors and key executives), and the banks, lenders and other companies with whom the Plaintiffs worked, including Banca IMI, Soci6t6 G6n6rale S.A. …, Citibank, N.A., Nomura, J.P. Morgan, HarbourVest, Quest Fund Placement, and CVC." (*Id*. ¶ 66; *see also id*. ¶ 2, 78, 87, 109-110, 131-132, 141-142, 147.)

Such allegations are insufficient. (*See CSI Group, LLP v Harper*, 153 AD3d 1314, 1320 [2d Dept 2017] ["Failure to state the particular person or persons to whom the allegedly

defamatory statements were made also warrants dismissal" (citation omitted)], *lv dismissed* 31 NY3d 1061 [2018]; *Tsatskin v Kordonsky*, 189 AD3d 1296, 1299 [2d Dept 2020] ["to the extent that the amended complaint alleges that certain alleged defamatory statements were made over a two-year period from 2015 through 2017, those allegations were not sufficiently specific with respect to time"].)

To the extent plaintiffs allege that the defamatory statements were disseminated to the financial community via JZ Capital Partners Ltd.'s press-release (*id*. ¶ 67), the press-release does not identify plaintiffs. (NYSCEF 19, Press-release at 1.) Moreover, the press-release includes no falsity – it states that "allegations of fraudulent conduct" have been made and "[a] claim has been made in respect thereof in the New York State Supreme Court." (*Id*.; *see Dillon*, 261 AD2d at 39 ["Truth provides a complete defense to defamation claims" (citation omitted)].)

Plaintiffs' defamation claims also fail to the extent predicated on the allegations that defendants (i) "accused the Gedesco Directors (and thereby Gedesco and Gedesco Innovfin) and Stator of fraudulent activity" (NYSCEF 84, AC ¶ 68); (ii) accused Sator of being a front for plaintiffs (*id*. ¶ 86); and (iii) and distributed the contents of the Spanish criminal complaint which accused certain plaintiffs "of crimes of fraud, disloyal administration, misappropriation, use of company secrets, accounting and documentary falsification, impediment of the exercise of corporate rights, and imposition of abusive agreements." (*Id*. ¶¶ 113, 144, 147.) Such allegations do not pass the high bar of CPLR 3016(a). (*See Manas v VMS Assoc., LLC*, 53 AD3d 451, 455 [1st Dept 2008] ["[s]ince the actual defamatory words were never pleaded with particularity, but were only paraphrased in a manner such that the actual words were not evident from the face

of the complaint, the long-standing rule is that dismissal is required" (internal quotation marks and citation omitted)]; *Goldberg v Sitomer, Sitomer & Porges*, 97 AD2d 114, 117 [1st Dept 1983] [allegations "to the effect that [plaintiff] had been a knowing and culpable wrongdoer in the securities law violations … fail to state a cause of action because they do not comply with the requirements of CPLR 3016 (subd [a]) that in libel and slander cases 'the particular words complained of shall be set forth in the complaint'"], *affd* 63 NY2d 831 [1984]; *see also Dillon*, 261 AD2d at 38 ["[l]oose, figurative or hyperbolic statements, even if deprecating the plaintiff, are not actionable" (citation omitted)].) The above allegations cannot form the basis of defamation for the additional reason that plaintiffs fail to "allege the time, place and manner of the false statement and specify to whom it was made." (*Dillon*, 261 AD2d at 38 [citation omitted].)

Rueda's affidavit, which plaintiffs submitted to supplement the amended complaint, does not cure the discussed deficiencies of the defamation allegations. (*See Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998] [in opposition to a motion to dismiss, "a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims. Though limited to that purpose, such additional submissions of the plaintiff, if any, will similarly be given their most favorable intendment" (internal quotation marks and citations omitted)].) The affidavit lacks any further specific allegations of defamatory words, time, place, or manner of the defamatory statement or to whom they were uttered. The affidavit merely states that defendants disseminated defamatory statements about plaintiffs' fraud and self-dealing. (NYSCEF 40, Rueda aff ¶¶ 8-11.) The affidavit attaches five letters to "JZI's limited

partners and portfolio companies" that allegedly broadcasted the false allegations made in the New York Action. (*Id*. ¶ 7.) As relevant here, the letters merely state, in sum, that the New York Action alleging fraud, conspiracy to defraud, breach of fiduciary duties, conversion, and/or aiding and abetting the same was initiated against Rueda, Groth, and Sator. (NYSCEF 41-45, Letters.)[17] Being truthful, these communications are not actionable as fraud. (*Dillon*, 261 AD2d at 39 ["Truth provides a complete defense to defamation claims" (citation omitted)].)

The new defamation allegations of the amended complaint's paragraph 79 are subject to the arguments made in the briefing pertaining to motion sequence 004. These arguments are addressed below.

Plaintiffs allege that on November 15, 2022, in a meeting with representatives of nonparty Alvarez & Marsal, Zalaznick stated that "Rueda and Groth had engaged in improprieties in connection with a loan from an entity named Mookameli to Fund-B portfolio company PackBenefit, including claiming (falsely) that Mr. Rueda and Mr. Groth had a personal financial interest in Mookameli" (NYSCEF 84, AC ¶ 79 [a]); on November 24, 2022, in a call with Alvarez & Marsal and Zalaznik's counsel Alejandro Huertas, Zalaznick stated that "Aynat had engaged in criminal activities in connection with Fund-B portfolio company Toro Finance" (*id*. ¶ 79 [b]), and on February 15, 2023 in a meeting with Alvarez & Marsal, Zalaznik stated that Ruega, Groth, and Aynat were criminals. (*Id*. ¶ 79 [b].) These allegations form the basis of fourth and/or seventh causes of action for defamation. (*See id*. ¶¶ 111, 131.)

[17] The letter filed at NYSCEF 45 was sent by nonparty "EuroMicrocap Fund 2010 GP, LLC, the General Partner of" Fund B. (NYSCEF 45, Letter.)

Defamation claims are subject to a one-year statute of limitations and accrue at the time when a defamatory statement is published. (*See* CPLR 215 [3]; *Melious v Besignano*, 125 AD3d 727, 728 [2d Dept 2015].) The alleged November 15 and 24, 2022 and February 15, 2023 statements were added in the amended complaint filed on March 19, 2024, i.e., outside the one-year limitations period. Thus, the issue is whether the fourth and seventh causes of action for defamation, to the extent predicated on these statements, relate back to the initial May 26, 2023 complaint.

A claim in an amended pleading relates back to the original pleading "unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." (CPLR 203[f].) "[T]he [relation back] doctrine enables a plaintiff to correct a pleading error -- by adding either a new claim or a new party -- after the statutory limitations period has expired." (*Buran v Coupal*, 87 NY2d 173, 177 [1995].) Where an amendment

> "contains an untimely claim against a defendant who is already a party to the litigation, the relevant considerations are simply (1) whether the original complaint gave the defendant notice of the transactions or occurrences at issue and (2) whether there would be undue prejudice to the defendant if the amendment and relation back are permitted." (*O'Halloran v Metro. Transp. Auth.*, 154 AD3d 83, 87 [1st Dept 2017] [citations omitted].)

The initial complaint does not give notice of the alleged defamatory statement made to Alvarez & Marsal and Huertas. Vague reference in the original complaint that the New York Action alleged "a wide-ranging conspiracy affecting portfolio companies not only of JZI, but also of another fund, Fund-B" (NYSCEF 1, Complaint ¶¶ 55) and that Zalaznick "broadly disseminated the false and defamatory claims to … other companies with whom the Plaintiffs worked" (*id*. ¶ 56) is insufficient to put defendants on notice of the alleged defamatory statements made to Alvarez & Marsal and Huertas.

Indeed, the opposition brief's assertation that Alvarez & Marsal is a company with whom plaintiffs worked is conclusory and unsupported. The amended complaint is silent on the relationship between plaintiffs and Alvarez & Marsal and Huertas.

The court rejects plaintiffs' reliance on materials outside the original complaint to demonstrate that defendants in fact were on notice of the alleged statements to Alvarez & Marsal. (*Shapiro v Schoninger*, 122 AD2d 38, 40 [2d Dept 1986] ["mere notice alone, independent of the original pleadings, is inadequate; the pleadings themselves must give the requisite notice" (citations omitted)].)

The allegations of paragraph 79 (d) of the amended complaint include no statements about plaintiffs. (NYSCEF 84, AC ¶ 79 [d] ["On March 29, 2023, in a telephone call with Mr. Skelton, Mr. Zalaznick expressed anger that Mr. Skelton, on behalf of Fund-B, had withdrawn Fund-B's claims against Mr. Rueda and Mr. Groth, and urged Mr. Skelton not to do business with Messrs. Rueda, Groth and Aynat"].) The statement of paragraph 79 (d) that "Rueda and …Groth were 'criminals'" (*id*. ¶ 79 [e]) was allegedly made to a process server by Sang Lee, chief financial officer of JZI and JZ Advisers; Lee is not a defendant, and plaintiffs proffer no argument as to why Lee's statements shall be attributed to JZI and JZ Advisers. Indeed, in their opposition, plaintiffs fail to address dismissal arguments aimed at allegations of paragraph 79 (d) and (e). (*See e.g. Butler*, 202 AD3d at 472 [granting motion to dismiss to the extent it was unopposed].)

CPLR 3211(d)

The court declines to sustain the motion to dismiss defamation causes of action based on CPLR 3211(d).[18] Rueda's affidavit fails to demonstrate that "facts essential to justify opposition may exist but cannot then be stated." (CPLR 3211 [d]; *see e.g. Valyrakis v 346 W. 48th St. Hous. Dev. Fund Corp.*, 161 AD3d 404, 408 [1st Dept 2018] ["the affidavit [plaintiffs] submitted in opposition to defendants' cross motion [to dismiss] does not satisfy CPLR 3211 (d), and, even on appeal, plaintiffs do not specify the discovery they seek" (citation omitted)]; *see* NYSCEF 40, Rueda aff ¶¶ 8-11.) The court notes that, although a deposition of Mark Skelton of Alvarez & Marsal was permitted to proceed (*see* NYSCEF 78, Decision and Order [mot. seq. no. 002]), plaintiffs added no allegations actionable as defamation.

Accordingly, the fourth, seventh, nineth, and tenth causes of action for defamation are dismissed.

Follow-On Communications – Tortious Interference

The first, second, third, and sixth causes of action are for tortious interference with prospective business advantage; the fifth cause of action is for tortious interference with contract. As stated, defendants argue that these causes of action fail as they lack specificity required under CPLR 3016 (a). Plaintiffs counter that the tortious

[18] "Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just." (CPLR 3211[d].)

interference causes of action are not subject to CPLR 3016's heightened pleading standard.

To state a claim for tortious interference with prospective business advantage plaintiff "must allege that: (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] [citations omitted].) To state a claim for tortious interference with contract, plaintiff must allege (1) "the existence of a valid contract between the plaintiff and a third party," (2) "defendant's knowledge of that contract," (3) "defendant's intentional procurement of the third-party's breach of the contract without justification," (4) "actual breach of the contract," and (5) "damages resulting therefrom." (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] [citations omitted].) "Defamation is a predicate wrongful act for a tortious interference claim." (*Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009] [citation omitted], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]; *see also Conciatori v Longworth*, 259 AD2d 459, 460 [2d Dept 1999].)

Here, the five tortious interference claims are predicated on alleged publishing of defamatory and false information about plaintiffs to HarbourVest (NYSCEF 84, AC ¶ 92), Quest Fund Placement (*id*. ¶ 98), and Banca IMI, Morgan Stanley, Soci6t6 G6n6rale, Nomura, J.P. Morgan, and CVC. (*Id*. ¶¶ 104, 118, 125-126.) As the tortious interference causes of action are predicated on defamation, "the underlying defamation [shall be pleaded] with the required specificity, setting forth the particular words that

were said, who said them and who heard them, when the speaker said them, and where the words were spoken." (*Amaranth LLC*, 71 AD3d at 48, citing CPLR 3016 [a] and *Dillon*, 261 AD2d at 37-38; *see also Amaranth LLC v J.P. Morgan Chase & Co.*, 32 Misc 3d 1235[A] [Sup Ct, NY County 2011] [where tortious interference cause of action is predicated on defamation, "[t]he actual defamatory words must be pleaded with particularity as required by CPLR 3016(a) and the plaintiff must demonstrate the requisite publication of the defamatory statement and cannot rely solely on hearsay or conclusory allegations that such defamatory statement was made" (citation omitted)], *affd* 100 AD3d 573 [1st Dept 2012].) As the underlying defamation claims are not pleaded with particularity (*see supra* at 24-28), the five tortious interference causes so too fail.[19]

The court rejects plaintiffs' reliance on *Graham v Dim-Rosy U.S.A. Corp.*, 128 AD2d 417 (1st Dept 1987) for the proposition that CPLR 3016(a)'s heightened pleading standard does not apply to a claim for tortious interference with contract. In *Graham*, the tortious interference with contract claim was predicated on "fraudulent representations" and not on defamatory statements. (*Graham*, 128 AD2d at 418.) Accordingly, the first, second, third, fifth, and sixth causes of action are dismissed.

Conspiracy Relating to Stator's Assets

In the eighth cause of action for conspiracy, plaintiffs allege that Zalaznick and Jordan conspired with Buch and Bernia, Stator's former managers, in connection with the alleged taking of €25 million in Stator's assets; plaintiffs do not specify the

[19] There is no indication that the tortious interference causes of action are based on the alleged defamatory statement made to Alvarez and Marshal.

underlying tort in the amended complaint, referring to the alleged transaction as "misappropriat[ing]" (NYSCEF 84, AC ¶ 136) and "defrauding." (*Id*. ¶ 89.) Defendants interpret the amended complaint as alleging conspiracy to commit fraud. In the opposition brief, plaintiffs assert that the underlying tort is conversion, not fraud.

> "To establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort, plus the following four elements: an agreement between two or more parties; an overt act in furtherance of the agreement; the parties' intentional participation in the furtherance of a plan or purpose; and resulting damage or injury." (*Cohen Bros. Realty Corp. v Mapes*, 181 AD3d 401, 404 [1st Dept 2020] [citations omitted].)
>
> As to the underlying tort, plaintiffs allege that Buch and Bernia,
>
> "misappropriated over €25 million in assets, distributing €21 million in value of shares of portfolio companies and compensated them in the form of expected future dividends. They sold assets and collected the cash in their own companies to the tune of over €2 million and unlawfully distributed cash to their companies with no justification." (NYSCEF 84, AC ¶ 136.)

The underlying conversion is insufficiently alleged for failure to "identify the property allegedly converted." (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 440 [1st Dept 2014] [internal quotation marks and citation omitted].) Indeed, although it appears that portfolio companies' shares represented €21 million in converted assets, no portfolio companies are identified, and there is no identification of the remaining converted assets allegedly worth €4 million. Accordingly, the conspiracy cause of action is dismissed.

Indemnification

In the eleventh cause of action against Fund III and Fund III GP, Rueda and Groth seek indemnification for expenses that Rueda and Groth incurred in this action.[20] Specifically, they allege that, pursuant to a management agreement between JZ Asset Management and Fund III and Fund III GP, "'[t]he Manager and any delegate of the Manager shall not be liable and shall be exculpated and indemnified by the JZI III Partnerships for any liabilities incurred by the Manager to the full extent provided in Section 5.10 and 5.11 of the [JZI Fund III] Partnership Agreements.'" (NYSCEF 84, AC ¶ 153.) They rely on section 5.11 (a) of Fund III's LPA which states:

> "[Fund III] will indemnify (A) the members of the Investment Team [including Rueda and Groth] … against any losses, liabilities, damages or expenses (including amounts paid for attorneys' fees, judgments and settlements in connection with any threatened, pending or completed action, suit or proceeding) to which any of such persons may become subject in connection with such person's activities on behalf of [Fund III] or in connection with any involvement with a Portfolio Company (including serving as an officer, director, consultant or employee of any Portfolio Company) directly or indirectly on behalf of [Fund III]." (NYSCEF 22, Fund III LPA § 5.11 [a] [at 43/82]; *see id*. § 1.1, 2.1 [a] [at 8/82].)

"'Portfolio Company'" is defined as "any corporation, partnership, limited liability company or other entity in which [Fund III] has made an investment, other than Short-Term Investments." (*Id*. § 2.1 [a] [at 19/82].) Plaintiffs allege Rueda and Groth were members of the investment team. (NYSCEF 84, AC ¶ 155; *see* NYSCEF 22, Fund III LPA § 2.1 [a] [at 16/82].)

In the amended complaint, plaintiffs allege in a conclusory fashion that Rueda and Groth are entitled to indemnification for expenses incurred in this action. They fail

[20] As stated, Rueda and Groth withdrew the indemnification cause of action, in part, to the extent they sought reimbursement of expenses incurred in the New York Action. (NYSCEF 49, Opp Brief at 31/37 n 8.)

to detail, however, how this action falls under the indemnification provision. Upon review of the amended complaint, there is no indication that the expenses related to this action were incurred "in connection with [Rueda and Groth]'s activities on behalf of [Fund III]" (NYSCEF 22, Fund III LPA § 5.11 [a] [at 43/82]) – indeed, they are not suing or being sued on behalf of Fund III; the amended complaint likewise provides no indication that the expenses incurred in connection with this action are incurred in connection with Rueda and Groth's "involvement with a Portfolio Company." (*Id*.; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-92 [1989] ["When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed"]; *Dunham v Weissman*, 281 AD2d 220, 222 [1st Dept 2001] ["All of paragraph 34a is limited to tort situations … and thus it does not provide a basis for indemnification … with respect to the costs of the litigation engendered by plaintiff's breach of contract claim" (citation omitted)], *lv denied in part, dismissed in part* 729 NYS2d 665 [2001].) Indeed, the only claim involving Fund III is for conversion of Fund III's assets and is based on Rueda and Groth's alleged possessory interest in assets of Fund III. (NYSCEF 84, AC ¶¶ 182-189.) As plaintiffs fail to allege that the indemnification provision was triggered, the eleventh cause of action is dismissed.

Breach of Fund III GP Fund III SC's Partnership Agreements

Rueda and Groth are Class B Limited Partners of Fund III GP and were limited partners of Fund III SC. (*Id*. ¶¶ 42-43.) JZ Advisers is the general partner of the two funds. (*Id*. ¶¶ 157, 162.)

In the twelfth cause of action, Rueda and Groth allege that JZ Advisers breached Fund III GP's LPA by "failing to distribute or properly allocate funds owed to Rueda and Groth in breach of Article III," "engaging in acts of self-dealing that resulted in decreased distributions owed to Rueda and Groth in breach of Article III," "charging expenses to the Partnership beyond what was permitted under Article IV," and "acting outside the authority granted to it pursuant to Article V … by taking actions that were inconsistent with its fiduciary duties." (*Id*. ¶ 159; *see* NYSCEF 101, Fund III GP LPA.)

In the thirteenth cause of action, Rueda and Groth allege that JZ Advisers breached the Fund III SC LPA by "purporting to terminate Rueda and Groth for Cause as limited partners of the Fund III SC when no Cause for termination existed in breach of Article IV," "failing to distribute or properly allocate funds owed to Rueda and Groth in breach of Articles V and VI," "engaging in acts of self-dealing that resulted in decreased distributions owed to Rueda and Groth in breach of Articles V and VI," "charging expenses to the Partnership beyond what was permitted under Section 5.2," and "acting outside the authority granted to it pursuant to Section 7.1 … by taking actions that were inconsistent with its fiduciary duties." (NYSCEF 84, AC ¶ 164; *see* NYSCEF 94, Fund III SC LPA.[21])

Plaintiffs identify the alleged wrongful conduct and the LPA articles or sections that were allegedly breached by such conduct; plaintiffs' allegations are sufficiently specific to put defendants on "notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each

[21] The February 11, 2021 Fund III SC LPA is filed at NYSCEF 94. As the termination occurred on March 16, 2022 (*see* NYSCEF 97, Termination Letters), the February 11, 2021 LPA is the operative agreement.

cause of action." (CPLR 3013.) "[T]here is no requirement of heightened particularity in a contract claim." (*Miami Firefighters' Relief & Pension Fund v Icahn*, 199 AD3d 524, 526 [1st Dept 2021] [citation omitted].)

The court rejects defendants' argument that the two breach of contract causes of action shall be pleaded with particularity per CPLR 3016 (b) to the extent predicated on JZ Advisers' "acting outside the authority granted to it pursuant to [Article V of Fund III GP LPA and Section 7.1 of Fund III SC LPA] … by taking actions that were inconsistent with its fiduciary duties." (NYSCEF 84, AC ¶¶ 159 [iv], 164 [v].) Per CPLR 3016 (b), "[w]here a cause of action or defense is based upon … breach of trust … the circumstances constituting the wrong shall be stated in detail." (CPLR 3016 [b].) Here, the two causes of action are predicated on alleged breach of the LPA provisions, and plaintiffs seeks enforcement of the bargain. The mere fact that the LPA provisions require that JZ Advisers' conduct be "consistent with its fiduciary duties" (NYSCEF 94, Fund III SC LPA § 7.1 [at 21/60]; NYSCEF 101, Fund III GP LPA § 5.1 [a] [at 17/42]) does not subject causes of action for breach of these provisions to CPLR 3016 (b). Indeed, defendants cite no cases where a breach of contract cause of action was subjected to a heightened pleading standard of CPLR 3016 (b). The court likewise located none.

This cause of action fails, however, to the extent plaintiffs allege termination of Rueda and Groth for cause when no cause existed. Per the LPA, "[a]ny Limited Partner may be Terminated for Cause pursuant to an Investment Committee Determination but not for any other reason." (NYSCEF 94, Fund III SC LPA § 4.1 [at 16/60].) The Investment Committee is the investment committee of the fund's manager, JZ Asset

Management. (*Id*. § 2.1 [at 11/60].) The LPA makes clear that JZ Advisers was bound by the Investment Committee Determinations: "[s]ubject to an Investment Committee Determination, the General Partner will have full control over the business and affairs of the Partnership consistent with its fiduciary duties arising under the Law provided that nothing in the forgoing shall permit the General Partner to act inconsistently with an Investment Committee Determination." (*Id*. § 7.1 [at 21/60].) Indeed, the termination letters show that the resolution to terminate Rueda and Groth was adopted by JZ Asset Management's investment committee; the same resolution was then adopted and approved by JZ Advisers as the General Partner. (NYSCEF 97, Termination Letters at 2, 4/5.) Given that decisions as to the limited partners' termination were delegated to JZ Asset Management, and JZ Advisers was bound to follow such decisions, it cannot be said that JZ Advisers breached the LPA. (*See generally* 10 Corbin on Contracts § 53.1 [2025] ["A breach of contract is always a non-performance of duty when that performance is due"].)

The court rejects plaintiffs' suggestion, which is unsupported by citation to authority or allegations, that the court disregard "formalistic distinctions" between the two entities – JZ Advisers and JZ Asset Management.

Accordingly, the thirteenth cause of action is dismissed to the extent predicated on the alleged breach of Fund III SC LPA's article IV by terminating Rueda and Groth. (NYSCEF 84, AC ¶ 164 [i].)

Claims Relating to Scottish Partnership

Rueda and Groth allege a direct claim for conversion of Scottish Partnership's assets against JZ Defendants (fourteenth cause of action). They also allege derivative

claims on behalf of the Scottish Partnership for breach of fiduciary duty against JZI and aiding and abetting breach of fiduciary duty against JZ Advisers, Zalaznick, and Jordan (seventeenth cause of action).

Defendants argue that the claims involving the Scottish Partnership should be dismissed based on the forum selection clause in the 2006 Scottish Partnership Agreement (SPA), to which Rueda, as Initial Partner, and JZI, as Corporate Partner, were parties. (NYSCEF 98, SPA at 4, 21/24.) The forum selection clause states:

> "Each of the parties to this Agreement irrevocably agrees that the Court of Session shall have exclusive jurisdiction to hear and decide any suit, action or proceedings, and/or to settle any disputes, which may arise out of or in connection with this agreement … and, for these purposes, each party irrevocably submits to the jurisdiction of the Court of Session." (*Id*. § 24.2 [at 19/24].)

1. Enforcement of Forum Selection Clause

First, at issue is whether JZ Defendants may enforce the forum selection clause. Defendants acknowledge that only JZI was a signatory to the SPA; they maintain, however, that per the amended complaint's allegations, the remaining defendants – Zalaznick, Jordan, and JZ Advisers – may invoke the forum selection clause as they are closely related to JZI.[22]

"The general rule under New York law is that parent corporations may not enforce, or have enforced against them, terms of a contract, including forum selection clauses, signed by their separately existing subsidiaries." (*Tate & Lyle Ingredients*

[22] The SPA states that "[t]his Agreement (and any dispute, controversy, proceedings or claim of whatever nature arising out of or in any way relating to this Agreement or its formation) shall be governed by and construed in accordance with the law of Scotland." (NYSCEF 98, SPA § 24.1 [at 19/24].) Both sides, however, cite New York law in connection with their arguments relating to the forum selection clause's applicability. Accordingly, this court will apply New York law.

Ams., Inc. v Whitefox Tech. USA, Inc., 98 AD3d 401, 401 [1st Dept 2012] [citation omitted].) There are exceptions to this general rule, however. As relevant here, "a nonsignatory may invoke a forum selection clause if the relationship between the nonparty and the signatory is sufficiently close so that the nonparty's enforcement of the forum selection clause is foreseeable by virtue of the relationship between the nonparty and the party sought to be bound." (*Freeford Ltd. v Pendleton*, 53 AD3d 32, 40 [1st Dept 2008] [citations omitted], *lv denied* 12 NY3d 702 [2009].)

Plaintiffs allege a close relationship of Zalaznick, Jordan, and JZ Advisers with JZI. Specifically, Zalaznick and Jordan are co-founders and majority owners of JZI (NYSCEF 84, AC ¶¶ 28-29, 36); "Zalaznick had full control of all aspects of JZI's business, all with the knowledge and approval of Jordan. Zalaznick personally made all material decisions regarding investment of JZI funds, financing of any purchases, management and financing of portfolio companies and distribution of profits." (*Id*. ¶ 37.) "JZI established the Scottish Partnership to hold equity interests in certain JZI portfolio companies." (*Id*. ¶ 38.) JZ Advisers, owned by Zalaznick and Jordan, is the managing member of JZ Asset Management, JZI's management company. (*Id*. ¶ 33.) Accordingly, plaintiffs plead facts supporting the finding of close relationship of Zalaznick, Jordan, and JZ Advisers with JZI, such as that it was foreseeable that Zalaznick, Jordan, and JZ Advisers could invoke the forum selection clause. (*See e.g. Westaub II LLC v Westermann*, 200 AD3d 550, 551 [1st Dept 2021] ["Defendant's enforcement of the forum selection clause was readily foreseeable, given that his close relationship to signatory … was well known to plaintiffs"]; *Dogmoch Intl. Corp. v Dresdner Bank AG*, 304 AD2d 396, 397 [1st Dept 2003] [affirming dismissal pursuant to

forum selection clause where clause was invoked by nonsignatory parent based on its close relationship to signatory subsidiary].)[23]

Next, plaintiffs oppose the application of the forum selection clause to the breach of fiduciary duty claim, which is brought derivatively on behalf of Scottish Partnership. Plaintiffs assert that Scottish Partnership is not a party to the SPA, and thus, cannot be bound by its terms.[24] This argument is rejected. Scottish Partnership is undoubtedly a third-party beneficiary of its own SPA. (*See e.g. Arfa v Zamir*, 2008 NY Slip Op 31332[U], *7 [Sup Ct, NY County 2008] ["There is no doubt that the LLC and the Managers regarded the Operating Agreements, adopted unanimously by members, as governing their relationship, and for the benefit of the LLCs"].) As such, Scottish Partnership is bound by the forum selection clause. (*Highland Crusader Offshore Partners, L.P. v Targeted Delivery Tech. Holdings, Ltd.*, 184 AD3d 116, 122 [1st Dept 2020] ["A non-signatory may be bound by a contract under certain limited circumstances, including as a third-party beneficiary"].)

2. Scope of Forum Selection Clause & Causes of Action

The next threshold question is whether the forum selection clause encompasses the three causes of action at issue. (*See e.g. Roby v Corp. of Lloyd's*, 996 F2d 1353, 1361 [2d Cir 1993] [if the substance of … claims, stripped of their labels, does not fall within the scope of the [forum selection] clauses, the clauses cannot apply"], *cert denied*

[23] JZI resigned as a partner in the Scottish Partnership by May 19, 2021. (NYSCEF 100, Withdrawal Agreement [undated]; NYSCEF 99, May 19, 2021 Minute Agreement at 4/13 [stating that JZI "has resigned as the Corporate Partner"].) Accordingly, JZ Defendants' ability to enforce the forum selection clause is limited to the events pre-dating the withdrawal.

[24] Defendants fail to address this argument.

510 U.S. 945 [1993].) As a preliminary matter, the court rejects plaintiffs' attempt to supplement the amended complaint's allegations in the opposition brief.[25] On a motion to dismiss, plaintiffs may remedy defects in their complaint via an affidavit (*see Leon*, 84 NY2d at 88), not a brief. (*See Cannonball Fund, Ltd. v Marcum & Kliegman, LLP*, 2013 NY Slip Op 32891[U], *9 [Sup Ct, NY County 2012], *affd* 110 AD3d 417 [1st Dept 2013].) The court will consider the causes of action as alleged in the amended complaint.

i. Conversion

In the fourteenth cause of action for conversion, plaintiffs allege that as partners in Scottish Partnership, plaintiffs have a possessory interest in the partnership's portfolio companies. (NYSCEF 84, AC ¶ 167.) JZ Defendants allegedly converted Scottish Partnership's assets by "self-dealing to inflate their own profits, at the expense of Scottish Partnership's Assets" and withholding "certain of the distributions and fees owed to Rueda and Groth, including distributions owed to Rueda and Groth from the liquidation of certain of the Scottish Partnership's Assets, including the sale of Galilea." (*Id*. ¶ 168.) "As a result of this self-dealing and improper withholding of funds, monies

[25] Plaintiffs state in their opposition brief: "Plaintiffs' claims primarily arise out of the Defendants' roles with respect to JZIS, not with respect to JZI's former status as a Corporate Partner in the Scottish Partnership. As to the conversion claim, the JZ-entities are stealing money from Defendants based on JZI's majority equity interest in the holding companies in which the Scottish Partnership holds a minority interest. Similarly, the fiduciary duties at issue arise from the majority/minority relationship between JZI and the Scottish Partnership. *See* AC ¶ 191 (NYSCEF 84). JZI, as a majority shareholder, owes fiduciary duties to Scottish Partnership, as a minority shareholder." (NYSCEF 103, Opp Brief at 28/35.) "JZIS" is not defined in the opposition brief or mentioned in the amended complaint.

belonging to Rueda and Groth are being held in accounts held or controlled by Zalaznick, Jordan, JZI and/or JZ" Advisers. (*Id*. ¶ 169.)

The conversion allegations are imprecise such that it is unclear whether the conversion claim "arise[s] out of or in connection with" the SPA. (NYSCEF 98, SPA § 24.2 [at 19/24].) The conversion cause of action may be interpreted as alleging JZI's misconduct as a partner in Scottish Partnership relating to matters governed by the SPA, such as distributions; such allegations would fall within the forum selection clause.[26] Elsewhere, plaintiffs allege that Scottish Partnership and JZI hold equity interests in various holding companies. (NYSCEF 84, AC ¶ 38.) Accordingly, the alleged conversion may also be interpreted as a claim based on siphoning of assets of a third party by JZI, as the third party's member, to the detriment of another member, Scottish Partnership, and thus, to the detriment of Scottish Partnership's partners; such allegations would fall outside the forum selection clause.[27] (*U.S. Immigration Fund LLC v Litowitz*, 2019 NY Slip Op 30789[U], *12 [Sup Ct, NY County 2019] ["An action arises out of an agreement when it asserts claims for breach of the contract or seeks to enforce rights thereunder" (citation omitted)], *mod in part on other grounds* 182 AD3d 505 [1st Dept 2020]; *Direct Mail Prod. Servs. v MBNA Corp.*, 2000 US Dist LEXIS 12945, *17, 2000 WL 1277597, *6 [SD NY, Sep. 6, 2000, No 99 Civ. 10550 (SHS)] ["if

[26] As stated, JZI resigned as a partner in the Scottish Partnership by May 19, 2021. (NYSCEF 100, Withdrawal Agreement; NYSCEF 99, May 19, 2021 Minute Agreement at 4/13.)

[27] To the extent conversion is based on withholding of proceeds of the Galilea sale, the cause of action falls outside the forum selection clause because the Galilea sale closed on September 27, 2023 (NYSCEF 87, AC ¶ 55), well after JZI withdrew as partner of the Scottish Partnership in 2021. (*See* NYSCEF 100, Withdrawal Agreement; NYSCEF 99, May 19, 2021 Minute Agreement at 4/13)

the duty [sought to be enforced] arises from the contract, the forum selection clause governs the action" [internal quotation marks and citations omitted].) "[A] forum selection clause in one contract should not be applied to suits concerning an entirely separate matter." (*U.S. Immigration Fund LLC*, 2019 NY Slip Op 30789[U], *12 [Sup Ct, NY County 2019] [collecting cases].) In sum, on the face of the unclear pleading, the court cannot determine whether the conversion cause of action falls within the forum selection clause. Thus, the forum selection clause does not support dismissal of the conversion cause of action.

Alternatively, defendants move to dismiss the conversion cause of action for failure to meet the CPLR 3013 pleading standard. The court agrees: as to conversion, the amended complaint fails to put defendants on "notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action." (CPLR 3013.) Indeed, as discussed *supra*, at a minimum it is unclear what was converted, beyond the Galilea sales proceeds; it is likewise unclear when the alleged conversion of unidentified assets occurred. (*See Nationstar Mtge., LLC v Ocwen Loan Servicing, LLC*, 194 AD3d 490, 492 [1st Dept 2021] [affirming dismissal of indemnification and breach of contract claims for failure to satisfy CPLR 3013 where "[t]he complaint did not allege facts giving adequate notice of the nature of the claims or when they occurred"].) Accordingly, the conversion cause of action is dismissed.

ii. Breach of Fiduciary Duty & Aiding and Abetting

In the seventeenth cause of action for breach of fiduciary duty against JZI, plaintiffs allege that

> "At all relevant times JZI had a fiduciary relationship with the Scottish Partnership. Until at least early 2021, JZI served as the Corporate Partner of the Scottish Partnership and had managerial responsibilities. JZI also is or was at the relevant time a majority shareholder in the holding companies in which the Scottish Partnership is a minority shareholder." (NYSCEF 84, AC ¶ 191.)

JZI allegedly breached its fiduciary duties to Scottish Partnership by "self-dealing that benefited JZI and harmed the Scottish Partnership and its investments, charging excessively high fees and costs without authorization, and withholding distributions received from the sale of portfolio companies that are owed to the Scottish Partnership and its partners." (*Id*. ¶ 192.) Similar to conversion, on the face of the amended complaint, the court cannot determine whether the breach of fiduciary duty claim falls within the forum selection clause. Although plaintiffs allege that JZI had fiduciary duties to Scottish Partnership as "Corporate Partner … [with] managerial responsibilities," it is unclear whether the alleged wrongful conduct is in violation of JZI's fiduciary duties arising from his role as the Corporate Partner. Whether seventeenth cause of action for the aiding and abetting falls within the forum selection clause likewise cannot be determined. (*See Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003] ["A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach" [citations omitted].) Thus, the forum selection clause does not warrant dismissal of the breach of fiduciary duty and aiding abetting causes of action.

Alternatively, defendants move to dismiss the breach of fiduciary duty and aiding and abetting causes of action for plaintiffs' failure to meet the heightened pleading requirement of CPLR 3016 (b).

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011] [citations omitted].) "Where a cause of action or defense is based upon … breach of trust … the circumstances constituting the wrong shall be stated in detail." (CPLR 3016 [b].)

Here, plaintiffs fail to plead JZI's misconduct with particularity. Indeed, as noted *supra*, the allegations are conclusory and unspecific. JZI allegedly engaged "self-dealing that benefited JZI and harmed the Scottish Partnership and its investments, charging excessively high fees and costs without authorization, and withholding distributions received from the sale of portfolio companies that are owed to the Scottish Partnership and its partners." (NYSCEF 84, AC ¶ 192.) Such allegations, however, lack specificity and supporting factual allegations. (*See e.g. Hamrick v Guralnick*, 2015 NY Slip Op 31696[U], *14-15 [Sup Ct, NY County 2015] [dismissing breach of fiduciary duty claim for lack of particularity], *affd* 146 AD3d 606 [1st Dept 2017].) As to a single specific factual allegation – the sale of Galilea with alleged withholding of sale proceeds – plaintiffs allege that "[u]pon information and belief, the proceeds from the sale of Galilea are being wrongfully withheld by or have been wrongfully distributed" (NYSCEF 84, AC ¶ 55), without alleging who is the wrongdoer.

Plaintiffs' reliance on unspecific allegations of self-dealing elsewhere in the amended complaint is misplaced. Again, there is no factual specificity: no specific self-dealing directed at Scottish Partnership is stated, no portfolio companies besides Galilea are identified, no dates or timeframe of sale of such portfolio companies are

stated. Moreover, given the number of actors and various funds involved, the allegations stated generally, with no connection to any particular entity or individual, are insufficient to meet the heightened pleading standard. (*See e.g. id*. ¶¶ 52, 54 ["Zalaznick repeatedly forced portfolio companies to borrow funds from JZI at above-market interest rates," "Zalaznick and Jordan also charged costs of part of JZI's financial department, like Mr. Dwyer, to the portfolio company structure to reduce JZI's costs against the interest of limited partners," "Zalaznick, with the knowledge and consent of Jordan, also regularly changed the applicable agreements to improve the value that JZI received and to reduce the economics of limited partners," "[Zalaznick] would frequently increase the management fees due to his company, as well as change rates and terms of outstanding loans"].) Accordingly, the causes of action for breach of fiduciary duty and the aiding and abetting breach of fiduciary duty are dismissed.[28]

Conversion of Fund B and Fund III Assets

Rueda and Groth allege causes of action for conversion of Fund B assets (fifteenth cause of action) and Fund III assets (sixteenth cause of action).[29] Rueda and Groth allege that "through their various roles with [Fund B and Fund III] and [the funds'] management, [Rueda and Groth] have a possessory interest in assets of" the two funds. (*Id*. ¶¶ 175, 183.) Allegedly, the conversion defendants "without authorization, have distributed [Fund B and Fund III] Assets to themselves" and "engaged in improper self-

[28] For the avoidance of doubt, should plaintiffs replead causes of action for conversion, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, defendants are not precluded from raising the forum selection clause argument.
[29] Conversion of Fund B assets is alleged against JZ Defendants; conversion of Fund III assets is alleged against JZ Defendants and Fund III GP (collectively, conversion defendants).

dealing to inflate their own profits, at the expense of" Fund B and Fund III. (*Id*. ¶¶ 176, 184.) As a result of conversion, funds "belonging to Rueda and Groth are being held in accounts held or controlled by" the conversion defendants. (*Id*. ¶¶ 177, 185.)

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." (*Colavito v NY Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006] [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." (*Id*. at 50 [citations omitted].)

"[A]n action will lie for the conversion of money where there is a specific, identifiable fund and an obligation to return or otherwise treat in a particular manner the specific fund in question." (*Family Health Mgt., LLC v Rohan Devs., LLC*, 207 AD3d 136, 139 [1st Dept 2022] [internal quotation marks and citations omitted].) "[W]hen the funds at issue in an action for the conversion of money constitute a 'specific sum,' one that is 'determinate,' and reflects an 'ascertained' amount, the money is 'specifically identifiable'." (*Id*. [citations omitted].) Indeed, "the 'specifically identifiable' element of an action for the conversion of money seeks to ensure not that 'a specific description of each bill' is proved but that the 'amount converted is ascertained'." (*Id*. [citation omitted]; *see also id*. at 139-145 [collecting and discussing cases].)

The conversion claims relating to Fund B and Fund III assets fail because the allegedly converted assets are not specifically identifiable. Plaintiffs merely allege that assets of the two funds were converted, resulting in funds "belonging to Rueda and

Groth … being held in accounts held or controlled by Zalaznick, Jordan, JZI and/or JZAI," and for Fund III, also in the account held or controlled by Fund III GP. (NYSCEF 84, AC ¶¶ 177, 185.) Such allegations are insufficient to allege a specifically identifiable fund. (*See Picard v Madoff (In re Bernard L. Madoff Inv. Sec. LLC)*, 458 BR 87, 133 [Bankr SD NY 2011] [no identifiable fund alleged where complaint alleges that "'BLMIS had a possessory right and interest to its assets, including its customers' investment funds' and [defendants] 'converted the investment funds of BLMIS customers when they received money originating from other BLMIS customer accounts in the form of loans, payments, and other transfers'" (citations omitted)].) The amended complaint is devoid of any allegations stating the amount converted or indicating that such an amount is ascertained. Plaintiffs' cited authority is not to the contrary. (*See HSCM Bermuda Fund Ltd. v Newco Capital Group VI LLC*, 619 F Supp 3d 434, 438 [SD NY 2022] [plaintiff alleged that "at least $1.4 million in money otherwise owing to SHPC, and in which [plaintiff] has a security interest, has been rendered inaccessible" due to defendant's conduct]; *Busrel Inc. v Dotton*, 2023 US Dist LEXIS 6883, *30, 2023 WL 177265, *10 [WD NY, Jan 13, 2023, No. 1:20-CV-01767] ["Plaintiff's $8,200,000 payment constitutes a 'specific sum' identified in the Bill of Sale and is 'specifically identifiable' for the purposes of Plaintiff's conversion claim" (citations omitted)].)

The court has considered the balance of the parties' arguments and finds them without merit or otherwise not warranting an alternate result.[30]

[30] The court has reviewed defendants' Commercial Division rule 18 letters (NYSCEF 114, 118), plaintiffs' responsive letter (NYSCEF 115), the arbitration award (NYSCEF 119), and the decision by Madrid's Fifth Commercial Court (NYSCEF 120). The arbitration award and the decision by Madrid's Fifth Commercial Court do not alter the court's decision on this motion to dismiss.

Accordingly, it is

ORDERED that the motion is granted, in part, to the extent that first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, fourteenth, fifteenth, sixteenth, and seventeenth causes of action are dismissed; and thirteenth cause of action is dismissed in part to the extent predicated on the alleged breaches of Fund III SC LPA by "purporting to terminate Rueda and Groth for Cause as limited partners of the Fund III SC when no Cause for termination existed in breach of Article IV" (NYSCEF 84, AC ¶ 164 [i]);[31] and it is further

ORDERED that accordingly, the amended complaint is dismissed in its entirety as against defendants David Zalaznick, John W. Jordan II, JZ International LLC, JZI Fund III, L.P., and JZI Fund III GP, L.P., with costs and disbursements to these defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of these defendants; and it further

ORDERED that the action is severed and continued against the remaining defendant, Jordan/Zalaznick Advisers, Inc.; and it is further

ORDERED that the caption be amended as follows and that all future papers filed with the court bear the amended caption

----------X

MIGUEL RUEDA HERNANDO and OLE GROTH,

Plaintiffs,

- v -

[31] The remaining causes of action are by Rueda and Groth and against ZJ Advisers alleging breach of Fund III GP's LPA (twelfth cause of action); and breach of the Fund III SC's LPA, to the extent not dismissed in this decision and order (thirteenth cause of action).

JORDAN/ZALAZNICK ADVISERS, INC.,

Defendant.

----------X

; and it is further

ORDERED that counsel for movants serve a copy of this order with notice of entry upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website); and it is further

ORDERED that Jordan/Zalaznick Advisers, Inc. is directed to serve an answer to the amended complaint within 20 days after service of a copy of this decision and order with notice of entry; and it is further

ORDERED that the parties shall submit a proposed Part 48 Preliminary Conference Order or, if no agreement can be reached, competing proposed orders by September 19, 2025.

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8/22/2025
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**