SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

WESTPAW FILMS INC., directly and derivatively on behalf of the D&D Production,

Plaintiff,

-against-

JAMES SPRATTLEY, MICHAEL ANDREW PASCAL, and FANTASY GAME FILMS LLC,

Defendants,

And

the D&D PRODUCTION,

Nominal Defendant.

Index No. 505665/2014

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Defendants hereby submit this Memorandum of Law in support of their Motion to Dismiss the Complaint pursuant to N.Y. C.P.L.R. §§ 3211(a)(1), (7) and (10).

PRELIMINARY STATEMENT

There is an empty chair on set, and across the back of it is written "ICONOSCOPE FILMS LLC."

This lawsuit is simply the latest episode in Plaintiff's history of selectively disregarding its undertakings to suit its own desires. For example, in July 2012, Plaintiff preregistered copyright in the D&D Production, the film project on which it collaborated with Iconoscope, naming Iconoscope as the film's co-owner. Subsequently deciding that cooperation with Iconoscope was inconvenient, Plaintiff the following year unilaterally repudiated its own copyright preregistration, claiming sole ownership of the D&D Production. (Graubart Aff., Ex. 1).

Now, having entered into a Settlement Agreement with Iconoscope, by which it gained Iconoscope's acquiescence not only to Plaintiff's expropriation of the film copyright but also a surrender of "full creative and business control" over the film, Plaintiff – though it enjoys the benefits of the deal, has decided that its concomitant arbitration agreement with and release of Iconoscope is not to its liking. Though Plaintiff purported to commence arbitration against the Defendants and Iconoscope in February 2014, it never completed the commencement process in relation to any party. Instead, after much delay, Plaintiff commenced this action against the Defendants, an attempt to obtain by other means what it should properly pursue in an arbitration against Iconoscope (whom Plaintiff has asserted has breached the Settlement Agreement).

In this action, Plaintiff purports to allege nine separate direct causes of action against Defendants, plus additional derivative versions of the same. All either directly entail or necessarily implicate non-party Iconoscope. Most obviously, Plaintiff's causes of action for

aiding and abetting a breach of fiduciary duty to Iconoscope and for alter ego are self-evidently claims which require a direct reckoning with the absent Iconoscope.

But so too are Plaintiff's cause of action for direct breach of fiduciary duty, which is premised on Defendant Sprattley and Pascal's alleged status as "managers" of a Westpaw-Iconoscope partnership, as is the cause of action for fraudulent conveyance. The cause of action for constructive trust depends on those fiduciary duty claims, and even the unfair competition, conversion and unjust enrichment causes of action implicates the Settlement Agreement between Iconoscope and Plaintiff, to which Defendants are not parties. None of these causes of action can proceed in the absence of Iconoscope.

Consequently, in addition to each cause of action's failure on its own terms, each should be dismissed for failure to join a necessary party.

FACTUAL BACKGROUND

A full recitation of the facts is set forth in the Affidavit of Michael Andrew Pascal sworn to July 21, 2014 ("Pascal Aff.") and the Affirmation of Adam B. Kagan, dated July 21, 2014, ("Kagan Aff."), each submitted in connection with Defendants' Opposition to Plaintiff's Motion for a Preliminary Injunction. For the Court's convenience, a summary is set forth below.

The Initial Partnership. Defendant Andrew Pascal originated the idea for a documentary film about the fantasy game Dungeons & Dragons ("D&D") in December 2010, and discussed his initial ideas about such film with, among others, co-Defendant James Sprattley shortly thereafter. Months later, they decided to approach Anthony Savini, owner of Plaintiff Westpaw Films Inc. ("Westpaw"), to suggest that he direct the proposed film (the "D&D Production").

Sprattley and Pascal formed Iconoscope Films LLC ("Iconoscope") in February 2012, after which Sprattley and Pascal transferred their ownership in the film project to Iconoscope,

which entity became partners with Westpaw with respect to the Production; this partnership is referred to herein as the "Partnership."[1] (Compl. ¶ 24). All parties agreed that Iconoscope and Westpaw would share equally in the ownership of the project (Compl. ¶ 18), and on July 8, 2012, Westpaw and Iconoscope jointly filed a preregistration claiming copyright ownership in the D&D Production, entitled "Dungeons & Dragons: A Documentary." (Compl. ¶ 25). Westpaw and Iconoscope agreed to divide responsibilities as follows: Westpaw would have creative control over the project and Iconoscope would handle financing, marketing and distribution matters.

Though there were early warning signs of strife, in August 2012 Iconoscope and Westpaw raised about $176,000 via a Kickstarter campaign.[2] But despite the tremendous results of that campaign, or perhaps because of it, relations between Iconoscope and Westpaw became contentious, and Iconoscope found it nearly impossible to work with Westpaw as winter turned to spring in 2013. (Compl. ¶ 34).

The Partnership is Terminated in June 2013. The parties turned to mediation to resolve their disputes. The mediation took place on May 16 and 17, 2013 but was not successful. (Compl. ¶¶ 35-36). Since the parties could not agree on a framework for going forward together, Iconoscope terminated the partnership and communicated that fact to Westpaw. After mediation discussions collapsed, Plaintiff and Savini immediately retained counsel, instructed Iconoscope to communicate to Plaintiff and Savini only through counsel, and took the position that Westpaw alone owned 100% of the film and footage. (Graubart Aff., Ex. 1).

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[1] Plaintiff defines the term "D&D Production" as "a New York Partnership or Joint Venture." (Compl. ¶ 1). It then proceeds to conflate the partnership with the partnership's film project, both of which it refers to interchangeably as the "D&D Production." For clarity, Defendants will herein refer to the partnership as the "Partnership" and its film project as the "D&D Production."

[2] Plaintiff asserts the total amount raised was $195,480. (Compl. ¶ 31).

Iconoscope immediately retained legal counsel who initially worked with Westpaw's lawyers to try to negotiate a different, non-partnership structure as a way get the film finished, *i.e.*, various versions of a loan-out agreement, whereby Iconoscope would hire Westpaw as director, or conversely, as Westpaw proposed, Westpaw would hire Iconoscope to produce the film, while limiting contact and interaction between the parties as much as possible. Draft agreements proposed by both Iconoscope and Westpaw expressly provided that no partnership existed. (Graubart Aff., Ex. 2, § 24(c)).

As part of these negotiations in early June 2013, Westpaw expressly repudiated the existence of any partnership and insisted that it owned all rights in the film footage. (Graubart Aff., Ex. 1). Neither Iconoscope, Sprattley nor Pascal ever worked with Westpaw or Savini again, or did any work producing the film after May 2013. The attorneys spent the following months negotiating the formal wind-up and settlement of any partnership assets and negotiating the parties' separation.

The Final Settlement Agreement. As settlement negotiations dragged, Iconoscope realized that the only way to completely sever ties with Plaintiff and Savini was for Iconoscope to agree to give up everything. The final settlement agreement ("Settlement Agreement," Compl., Ex. A) stated that Plaintiff would own all rights to the footage, receive all the Kickstarter money (less a reserve set aside to fulfill donor rewards) and full and complete creative and managerial control of the film. Iconoscope had obligations to fulfill certain donor rewards and a share of net proceeds, if any, but no control or rights in the film. Specifically, the Settlement Agreement states

i. "Iconoscope quitclaims to [Plaintiff] its interest in the audio and video footage related to the project created prior to the date hereof . . . ." (Compl., Ex. A, §1).

ii. "[Plaintiff] shall . . . have full creative and business control [of the project]" (Compl., Ex. A, §2); and

iii. "equity interest" means (only) a share of net proceeds, not ownership. (*Id*., at page 3).

(Settlement Agreement, Compl. Ex. A).

Westpaw Asked For And Was Denied A Non-Compete. During the course of negotiations between counsel for Iconoscope and for Westpaw, Westpaw's counsel repeatedly sought the inclusion in the Settlement Agreement of a covenant not to compete, requests which Iconoscope's counsel flatly refused. There is no such covenant in the Settlement Agreement. (Compl., Ex. A). Iconoscope refused to agree to a non-compete because Sprattley and Pascal intended to make their own movie about D&D – the film project entitled and referred to herein as the "Great Kingdom" – a fact which Pascal communicated to Savini and Westpaw prior to Westpaw's requests for include a covenant not to compete.

ARGUMENT

I. Standard

In considering a motion to dismiss, "the facts pleaded are presumed to be true and are to be accorded every favorable inference." However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Berman v. Christ Apostolic Church Intern. Miracle Ctr., Inc.*, 87 A.D.3d 1094, 1096, 931 N.Y.S.2d 74, 76 (2d Dep't 2011) (quoting *Mayer v. Sanders*, 264 A.D.2d 827, 828, 695 N.Y.S.2d 593 (2d Dep't 1999)).

Defendants move to dismiss pursuant to N.Y. C.P.L.R. §§ 3211(a)(1), (7), and (10). Pursuant to N.Y. C.P.L.R. 3211(a)(1), a party may move to dismiss a cause of action on the ground that "a defense is founded upon documentary evidence." Dismissal pursuant to § 3211(a)(1) is warranted where, as here, "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon v. Martinez*, 84 N.Y.2d 83,

88, 614 N.Y.S.2d 97 974 (1994). "If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action." *Lazaroff v. Paraco Gas Corp.*, 38 Misc. 3d 1217(A), at *3, 967 N.Y.S.2d 867 (Sup. Ct. Kings Co. February 25, 2011) (table) aff'd, 95 A.D.3d 1080, 1080-81 (2nd Dep't 2012) (citing *Snyder v. Voris, Martini & Moore, LLC*, 52 A.D.3d 811, 812, 860 N.Y.S.2d 622, 623 (2nd Dep't 2008)).

Pursuant to N.Y. C.P.L.R. 3211(a)(7), a plaintiff must allege sufficient facts supporting each essential element of its claims. *Matlin Patterson ATA Holdings, LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 839, 929 N.Y.S.2d 571, 575 (1st Dep't 2011). The Court may dismiss a pleading, pursuant to § 3211(a)(7), if the factual allegations of the complaint do not fit within any "cognizable theory." *Leon*, 84 N.Y.2d at 87-88; *Salvatore v. Kumar*, 45 A.D.3d 560, 561, 845 N.Y.S.2d 384, 388 (2d Dep't 2007).

Pursuant to N.Y. C.P.L.R. 3211(a)(10), a defendant may move to dismiss a complaint on the ground that "the court should not proceed in the absence of a person who should be a party." Where a matter cannot be fully determined without the joinder of a necessary party, dismissal is appropriate. *Storrs v. Holcomb*, 245 A.D.2d 943, 945, 666 N.Y.S.2d 835, 837 (3d Dep't 1997) (citing *Fila v. Angiolillo*, 88 A.D.2d 693, 693–694, 451 N.Y.S.2d 316 (3d Dep't 1982), lv. denied 57 N.Y.2d 609, 457 N.Y.S.2d 1025 (1982)). If the court concludes that continued prosecution of the action will irreparably prejudice either the absentee or one of the existing parties, the case should be dismissed, without prejudice. N.Y. C.P.L.R. § 1003.

II. Plaintiff's Causes of Action Implicating Iconoscope Should Be Dismissed Pursuant to N.Y. C.P.L.R. § 3211(a)(10)

Plaintiff is attempting to evade the general release and arbitration agreement which it negotiated and to which it agreed in the Settlement Agreement. (Compl. Ex. A §§ 11, 13).

Unable to bring Iconoscope into this action directly, Plaintiff instead attempts to obtain a judgment on Iconoscope's alleged culpability – and therefore Defendants' – by this impermissible backdoor method.

N.Y. C.P.L.R. § 1001, in pertinent part, defines a "necessary party" as one "one who might be inequitably affected by a judgment in the action. "Nonjoinder of a party who should be joined under section 1001 is a ground for dismissal of an action." N.Y. C.P.L.R §1003. "[T]he court should not proceed in the absence of a person who should be a party." N.Y. C.P.L.R. § 3211(a)(10).

It is evident that Iconoscope is a necessary party to – at least – Plaintiff's cause of action for aiding and abetting Iconoscope's alleged breach of fiduciary duty, intrinsic to which is a finding that Iconoscope has breached a fiduciary duty to Plaintiff. Were this cause of action to proceed, Iconoscope could be adjudged culpable on a cause of action to which it has not been – and by the terms of the Settlement Agreement, cannot be – afforded an opportunity to defend itself.

Moreover, Iconoscope's joinder in the action is necessary in an action for a partnership accounting, and in seeking a declaration of alter-ego. *Goodwin v. MAC Resources Inc.,* 149 A.D.2d 666, 667, 540 N.Y.S.2d 477, 478 (2d Dep't 1989) (all partners are necessary parties in action for partnership accounting); *Stewart Tenants Corp. v. Sq. Indus., Inc.*, 269 A.D.2d 246, 248, 703 N.Y.S.2d 453 (1st Dep't 2000) (an action to pierce the corporate veil requires that the purported dummy corporations be parties); *Popowich v. Korman*, 73 A.D.3d 515, 517, 900 N.Y.S.2d 297, 300 (1st Dep't 2010) (denying claims based on alter-ego where entity was not made party to the action).

Finally, most – if not all – of the remaining causes of action implicate Iconoscope, and should be dismissed accordingly. Plaintiff's cause of action for unfair competition – at least as far as it concerns the email account – alleges a role for Iconoscope therein, as do the causes of action for conversion, fraudulent conveyance and accounting. Likewise, Plaintiff's cause of action for fraudulent inducement implicates Iconoscope's allegedly culpable misstatements and omissions. All of these claims should be dismissed in the absence of Iconoscope.

III. Plaintiff's Causes of Action Founded on Breach of Fiduciary Duty Must Fail

A. Plaintiff fails to meet the standard for a cause of action for breach of fiduciary duty or aiding and abetting a breach of fiduciary duty by non-party Iconoscope

In order to maintain a claim for breach of fiduciary duty, a plaintiff must allege the existence of (1) a fiduciary relationship, (2) misconduct by defendants and (3) damages that result directly from that misconduct. *Palmetto Partners, L.P. v. AJW Qualified Partners, LLC*, 83 A.D.3d 804, 807, 921 N.Y.S.2d 260, 264 (2d Dep't 2011). To maintain a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege "(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 damages as a result of the breach." *Id*. at 808-09. Further, "a cause of action sounding in breach of fiduciary duty must be pleaded with the particularity required by CPLR 3016(b)." *Id*. at 807.

Plaintiff fails to assert a cognizable theory under which either (a) Defendants themselves owe (or at any relevant time owed) a fiduciary duty to Plaintiff or (b) Defendants are liable for aiding and abetting a breach of duty by non-party Iconoscope.

B. Defendants owe no direct fiduciary duty to Plaintiff

Fundamentally, a fiduciary relationship is based on trust reposed by the principal in the fiduciary; in this case, allegedly by Plaintiff in Sprattley and Pascal. *Penato v. George*, 52

A.D.2d 939, 942, 383 N.Y.S.2d 900, 904 (2d Dep't 1976). And if the parties "do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them." *Northeast Gen. Corp. v. Wellington Advertising, Inc.*, 82 N.Y.2d 158, 162, 604 N.Y.S.2d 1, 3 (1993). To maintain the cause of action, therefore, Plaintiff would need to allege that Sprattley and Pascal had undertaken to act "primarily for the benefit of" Plaintiff, or that there were "special circumstances," such as the control of Plaintiff by Sprattley and Pascal for the good of Plaintiff, in order to establish such duties. *DiTolla v. Doral Dental IPA of New York, LLC*, 100 A.D.3d 586, 587, 953 N.Y.S.2d 155, 156-57 (2d Dep't 2012).

Plaintiff alleges that Defendants Sprattley and Pascal owed Plaintiff fiduciary duties as "managers" of the Partnership. (Compl. ¶ 73; Savini Aff. ¶¶ 5-6). To support this claim, Plaintiff relies on the supposed "three man" decision-making structure which it alleges governed the Partnership. Plaintiff alleges that each of Savini, Sprattley and Pascal (the principals of, respectively, Plaintiff and Iconoscope) retained equal voting rights over the management of the Partnership. (*Id.*). It <u>does not</u> allege, however – nor does the law conceive – that these principals acted in a capacity other than through their respective corporate partners.

Of course, following the Settlement Agreement, which granted Plaintiff "full creative and business control" of the D&D Production (Compl. Ex. A § 2), the partnership's primary asset, Plaintiff cannot sustain an allegation that Sprattley and Pascal retained <u>any</u> control over the Partnership, let alone a majority. But even before the Settlement Agreement, there is no allegation that the resulting 2:1 ratio of voting power – Sprattley and Pascal on the one hand, Savini on the other – is anything other than an agreed allocation of authority between the corporate partners.

Instead, Plaintiff here asks this Court to create an entirely new category of *ex officio* fiduciary. It is inevitable that decisions in a partnership between two or more juridical entities must be made by members or officers of those entities, but decision-making by those members or officers does not transform members or officers of partner entities into "managers" of the partnership with *ex officio* fiduciary duties toward the partners. The concept of a partnership "manager" or officer is unknown to New York general partnership law; Defendants have been unable to locate a single decision in which any court has held that a non-partner owes a fiduciary duty to a partner or to the general partnership by virtue of that party's role in "managing" the partnership. Partners, not their principals, owe a fiduciary duty to one another. To find otherwise would be to create for every future aggrieved partner a backdoor to a finding of alter ego against his corporate partner.

Plaintiff's outlandish claim of *ex officio* fiduciary status is a gloss by which Plaintiff hopes to escape a proper recitation of allegations sufficient to sustain the existence of a fiduciary duty on the part of Sprattley and Pascal. Plaintiff has not alleged that Plaintiff reposed its complete trust in Sprattley and Pascal at the time of the actions of which Plaintiff complains. On the contrary, it is evident from Plaintiff's own allegations and statements that by August of 2013, such trust had completely evaporated. According to Plaintiff, relations between all parties became "strained" over the course of 2012 and early 2013, and the parties' relationships deteriorated. (Savini Aff. ¶¶ 12-13). By June 2013, the parties had attempted and failed to mediate their differences, and both parties retained legal counsel, Plaintiff instructed Defendants to communicate only through Plaintiff's counsel and asserted that it alone held title to the D&D Production and the shot footage. (Graubart Aff., Ex. 1). Consequently, by August 2013, the date

of the earliest activity of which Plaintiff complains, the idea that Plaintiff reposed its complete trust in Sprattley and Pascal is not merely unasserted; it is incredible.

C. Absent an actionable fiduciary duty by Iconoscope, Defendants cannot be liable for aiding and abetting a breach thereof

To be viable, a claim for aiding and abetting a breach of duties requires an underlying breach. *See, e.g.*, *Gerber v. Enterprise Products Holdings, LLC*, 2012 WL 34442, C.A. No. 5989–VCN (Del. Ch. January 6, 2012) (rev'd on other grounds). Indeed, the Court of Appeals has held that where a plaintiff has "failed to allege facts giving rise to a fiduciary duty owed to it, [defendants] cannot be liable for aiding and abetting a breach of such fiduciary duty." *Oddo Asset Mgt. v. Barclays Bank PLC*, 19 N.Y.3d 584, 594, 950 N.Y.S.2d 325, 332 (2012) rearg. denied, 19 N.Y.3d 1065, 979 N.E.2d 801 (2012).

Here, Plaintiff alleges that Defendants aided and abetted a breach of fiduciary duty by non-party Iconoscope, but fails to allege a cognizable theory under which Iconoscope owes it an actionable fiduciary duty. Under the terms of the December 5, 2013 Settlement Agreement, non-party Iconoscope has not since (at latest)[3] that date been Plaintiff's partner, and owes no fiduciary duties to Plaintiff. To the extent that Plaintiff asserts that a Westpaw-Iconoscope partnership existed prior to the Settlement Agreement, the Settlement Agreement explicitly releases Iconoscope from any causes of action relating to the D&D Production. (Compl., Ex. A § 11).

1. Iconoscope is not Plaintiff's partner following the Settlement Agreement

Assuming *arguendo* that a Westpaw-Iconoscope Partnership persisted until the December 5, 2013 Settlement Agreement, it could not survive thereafter. It is a *sine qua non* in any partnership or joint venture that the partners must both "share in the profits of the business and

[3] Defendants expressly reserve their contention that as a matter of fact, the Partnership terminated at the latest in June, 2013.

submit to the burden of making good the losses." *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 317, 151 N.E.2d 170, 178 (1958) (emphasis added). Though Iconoscope retains a passive interest in any net profits[4] (Compl, Ex. A § 2), the Settlement Agreement specifically prevents Iconoscope from sharing in any net losses: the Settlement Agreement does not allow Plaintiff to call on Iconoscope for further contributions, and Plaintiff undertakes to indemnify Iconoscope from any third party claims. *Id*. This is insufficient to support a claim of partnership or joint venture. *Davella v. Nielsen*, 208 A.D.2d 494, 616 N.Y.S.2d 800 (2d Dep't 1994) (holding that "an assertion that there was an agreement to distribute the proceeds of an enterprise on a percentage basis will not suffice" to establish a joint venture).

Further, by the terms of the Settlement Agreement, Plaintiff took possession of the Partnership's primary assets: the film and the bulk of the remaining money. (Compl. Ex. A §§ 1-3). Where a partner transfers to himself the partnership's primary asset, he has "manifested an unequivocal election to dissolve the partnership." *Staines Assocs. v. Adler*, 266 A.D.2d 52, 52-53, 698 N.Y.S.2d 639, 640 (1st Dep't 1999).

2. Any alleged breach of duty by Iconoscope prior to the Settlement Agreement is released

The earliest action that Plaintiff alleges constitutes a breach allegedly occurred "in or about August 2013." (Compl. ¶ 43). Even if – which Defendants deny – Iconoscope at or after that date owed fiduciary duties to Plaintiff, any liability for a breach of such a duty before December 5, 2013 was expressly released by Plaintiff in the Settlement Agreement. (Compl. Ex. A § 11). As set forth above in this section, where no action can lie against Iconoscope for breach

[4] Though the Settlement Agreement nominally accords each party an "equity interest" in the D&D Production, a close reading of § 2 reveals that Iconoscope's "equity interest" is in reality only a right passively to receive a share of net profits received by Westpaw. (Compl., Ex. A, § 2).

of fiduciary duty, neither can an action lie against Defendants for aiding and abetting such a breach.

Further, Plaintiff has admitted that Iconoscope is not culpable in connection with this cause of action. In a hearing before this Court on July 30, 2014, Plaintiff's attorney, Peter Dee, stated:

> It's Iconoscope is really not doing anything wrong, it's their principals [Defendants Sprattley and Pascal] causing all the problems here.

(July 30, 3014 Hearing Transcript, p. 40).

If, as thus asserted, Plaintiff's true complaint is solely against Defendants Sprattley and Pascal, it should pursue whatever causes of action it may have against them directly, not by reference to activity by non-party Iconoscope, which is "really not doing anything wrong."[5] (*Id.*)

IV. Plaintiff fails to meet the standard for a claim for unfair competition

"[T]he general public policy favoring robust and uninhibited competition should not give way merely because a particular employer wishes to insulate himself from competition." *Walter Karl, Inc. v. Wood*, 137 A.D.2d 22, 29 (2d Dep't 1988), quoting *American Broadcasting Cos. v. Wolf*, 52 N.Y.2d 394, 404 N.Y.S.2d 482, 420 N.E.2d 363 (1981). In order to maintain an action for unfair competition, Plaintiff must demonstrate a (1) bad faith (2) misappropriation of a commercial advantage (3) belonging to Plaintiff (4) by Defendants' exploitation of Plaintiff's proprietary information or trade secrets. *Out of the Box Promotions, LLC v. Koschitzki*, 55 A.D.3d 575, 579, 866 N.Y.S.2d 677, 681 (2d Dep't 2008). Plaintiff merely recites the utterly unsupported conclusion that "Defendants in bad faith misappropriated the commercial advantage

[5] Mr. Dee later revised Plaintiff's position by asserting instead that "[T]hey [Iconoscope] are doing, of course, another breaching the settlement agreement." (*Id.*)

belonging to Plaintiff … by exploitation of [the] Proprietary Assets," which "include trade secrets." (Compl. ¶¶ 106-07).

A. <u>The so-called "Proprietary Assets"</u>

Plaintiff defines the Proprietary Assets vaguely as "the network of contacts, trade secrets, goodwill, reputation and/or other proprietary information belonging to the D&D Production." (Compl. ¶ 42). A careful parsing of the complaint reveals only four categories of these "assets":

1. the identities and "goodwill" of certain persons who were interviewed for the D&D Production (Compl. ¶¶ 43-45, 48, 52-54, 56) (the "Interviewees");

2. the identities and "goodwill" of certain other persons who donated to or were in some other way helpful to the D&D Production, a category that seems to include donors to the D&D Production Kickstarter campaign (Compl. ¶¶ 47-48, 50-54) (the "Contacts"); and

3. a release allegedly signed by a person interviewed for the D&D Production (Compl. ¶ 46) (the "Release");

4. an email account Plaintiff alleges belongs to the D&D Production (Compl. ¶¶ 56-62, 66-68) (the "Email Account").

1. <u>The identities of the Interviewees and the Contacts are not trade secrets</u>

First, Plaintiff alleges that the "Proprietary Assets are "trade secrets." (*see* Compl. ¶¶ 42, 106). Of the "Proprietary Assets," only the identities of the Interviewees and the Contacts could conceivably be construed as trade secrets. However, the identities of the Interviewees and Contacts, far from being trade secrets, were and are known or ascertainable to anyone, not merely those in either the gaming or film industries, let alone merely those in the inner circle of Plaintiff, a point which Plaintiff has all but conceded. (Savini Reply Aff. ¶5).

To be considered a trade secret, something must be secret. *See Ashland Mgt.*, 82 N.Y.2d at 407. The Court of Appeals has provided clear and relevant guidance on this issue in *Leo Silfen, Inc. v. Cream*, 29 N.Y.2d 387, 328 N.Y.S.2d 423 (1972). There, plaintiffs' former employee established a competing business and solicited several of plaintiffs' customers.

Plaintiffs sought damages and injunction under a cause of action for unfair competition, alleging that the identities of their customers were trade secrets. "A trade secret," the Court of Appeals opined, "is nothing more than private matter; something known only to a few and kept from the general public; and not susceptible to general knowledge." *Id.* at 394-95. Where the identities of business contacts are "readily ascertainable outside the … business as prospective [contacts,] … trade secret protection will not attach." *Id.* at 391-92. The court distinguished between "physical taking or studied copying … [or] studied memory" (*id.* at 392, 395) and retention of experience or casual memory. *Id.* at 391 n.1, *accord. id.* at 395). The former may constitute wrongful conduct; the latter does not. The Second Department has extended this rationale further, finding that "an employee's recollection of information pertaining to specific needs and business habits of particular customers is not confidential." *Walter Karl,* 137 A.D.2d at 27.

Defendants' knowledge of the (publicly available) identities of, and even their existing relationships with some of, the Interviewees and Contacts is not the result of physical taking or of studied copying or memory, but rather the result of casual memory and acquired experience. The fact that some of that memory and experience was gained while working with Iconoscope does not transform Sprattley and Pascal's lived experience into trade secrets held exclusively by Plaintiff or the Westpaw-Iconoscope partnership.

2. <u>The dungeonsdoc@gmail.com email address does not belong to Plaintiff</u>

Plaintiff's claim that Defendants competed unfairly by not turning over to it control of an email address (dungeonsdoc@gmail.com). Control of the email address does not "belong to Plaintiff," the third element of a claim for unfair competition.

Plaintiff alleges that that <u>non-party Iconoscope</u>, not the Defendants, failed to turn over the email account. (Compl. ¶ 66). First, clearly the proper target, if any, for this cause of action is Iconoscope, not the Defendants. To the extent that Plaintiff alleges that Defendants are

responsible for Iconoscope's alleged failure (*id.*), Plaintiff's failure to join Iconoscope, a necessary party, dooms this cause of action pursuant to N.Y. C.P.L.R. § 3211(a)(10); *see* Section II above.

Second, it is clear that even Iconoscope has no obligation to hand over control of the email account to Plaintiff. Plaintiff, by its own admission, has had access to the email account at all relevant times but "did not remember receiving" the login information. (Savini Reply Aff. ¶ 9). Though Plaintiff alleges that the email account is "crucial" and "integral" to its creative control over its film project (Compl. ¶ 57), nothing in the Settlement Agreement, which clearly delineates the respective obligations of each Westpaw and Iconoscope, obligates Iconoscope to give exclusive control of the email account to Westpaw. (Compl., Ex. A). Moreover, while on a motion to dismiss, the Court must accept the facts alleged in the Complaint, this does not include allegations that are inherently incredible. *Greene v. Doral Conference Center Associates*, 18 A.D.3d 429, 430, 795 N.Y.S.2d 252, 253 (2d Dep't 2005). One such is Plaintiff's claim as to the account's "crucial" importance to the D&D Production (Compl. ¶ 57). Plaintiff had evidently been capable of working extensively on the D&D Production for more than three years without ever accessing the email account, even during the six or so months roughly corresponding with the latter half of 2013 during which the parties did not communicate, but during all of which time Plaintiff never requested access to the email account.

3. Plaintiff has not alleged any cognizable theory in connection with the Release

The remaining "Proprietary Asset" – the Release – is a red herring. Plaintiff alleges that "[u]pon information and belief, Defendants have sought to exploit this Proprietary Asset for the benefit of the [Great Kingdom]." (Compl. ¶ 46). This bald assertion is accompanied by no explanation of the "exploitation" in which Defendants are supposed to have engaged. The

allegation is patently ludicrous: even did they possess the Release – which allegation Defendants have continually denied – possession of such a Release would be useless to Defendants in connection with the Great Kingdom since it would only give permission to use particular interview footage which has always been in Plaintiff's exclusive possession. (Savini Reply Aff. ¶ 4). Indeed, it is impossible even to imagine how Defendants could "exploit" the Release.

B. <u>Plaintiff's reliance on the Settlement Agreement must fail</u>

Nor can Plaintiff maintain this cause of action by pointing to the promise by non-party Iconoscope to "use good faith efforts to deliver the remaining goodwill and benefit associated with … expenditures … of Kickstarter Funds."[6] (Compl., Ex. A § 3; *see* Compl. ¶ 38). First, this obligation belongs solely to Iconoscope, not to the Defendants. As in Section III.B above, to find otherwise would be to create a backdoor to a finding of alter ego by any aggrieved contracting party against the shareholders of the defendant corporate counterparty.

Second, the Settlement Agreement proceeds to specify that "[n]otwithstanding the foregoing, the Parties acknowledge and agree that such goodwill may be with third parties who are not subject to this Agreement," (*id.*), an express acknowledgement that Iconoscope is not obligated to deliver to Plaintiff the "goodwill" of the Contacts or Interviewees.

V. Plaintiff's Claim for Conversion Must Fail

"[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. New York Organ Donor Network, Inc.,* 8 N.Y.3d 43, 49-50, 827 N.Y.S.2d 96, 100 (2006). "Two key elements of conversion are (1) plaintiff's

[6] The email account at gmail.com was both (a) gratis and (b) established months before the Partnership embarked on its Kickstarter fundraising campaign. (Compl. ¶ 61). Consequently, the email account cannot be considered "associated with … expenditures … of Kickstarter Funds."

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.*

Excepting the Release, the "Proprietary Assets" are not susceptible to conversion. The "contacts" are public information not Westpaw property; any "goodwill" is not personal property or chattel that can be converted; the defendants simply do not have the release plaintiff complains about; and the Gmail account does not properly belong to plaintiff as it was not part of the Settlement Agreement. In any event, plaintiff has never been denied access or control over the Gmail account. (Savini Reply Aff. ¶ 9).

VI. Plaintiff's Causes of Action Sounding in Fraud Fail to State a Claim

Plaintiff's fifth cause of action (Compl. ¶¶ 95-104) is entitled "Fraudulent Inducement." Plaintiff's third cause of action (Compl. ¶¶ 83-88) is entitled "Accounting and Fraudulent Conveyance." Plaintiff's demand for an accounting is discussed in Section IX below. Plaintiff cannot succeed on its fraud claims as it has failed to make a prima facie showing of the elements of fraud, and to plead the elements with the requisite particularity.

The elements of fraud "are (1) a misrepresentation or a material omission of fact which (2) was false and (3) known to be false by defendant, made for the purpose of inducing the other party to rely upon it, (4) justifiable reliance of the other party on the misrepresentation or material omission, and (5) injury." *Continental Realty, LLC v. Kennelly Development Company, LLC*, 19 Misc. 3d 1140(A), 866 N.Y.S.2d 91 (Sup. Ct. Kings Co. June 3, 2008) (citing *Orlando v. Kukielka*, 40 A.D.3d 829, 831 (2007)) (Demarest, J.). In order to properly plead a cause of action for fraud, a plaintiff must allege each of these elements of fraud with particularity and support them with allegations of fact. N.Y. C.P.L.R. § 3016(b); *Fink v. Citizens Mtge. Banking*, 148 A.D.2d 578, 539 N.Y.S.2d 45 (2d Dep't 1989) (bare, conclusory allegations are insufficient to sustain a cause of action for fraud).

A. Plaintiff does not allege a misrepresentation or actionable omission

Plaintiff alleges no misrepresentation of fact by Defendants. The only misrepresentation alleged in the complaint appears to be a written "whereas" clause from the Settlement Agreement, which was signed only by non-party Iconoscope, and not by any of the Defendants. Moreover, even if such language could be attributed to Defendants, it is at best a covenant that Iconoscope negotiated the agreement in good faith. It is not a statement of fact that can serve as the basis for fraud. *New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, 318, 639 N.Y.S.2d 283, 289 (1995) (recognizing that in every contract there is an implied covenant of good faith and fair dealing and then dismissing a claim for fraudulent inducement where the complaint did not allege a separate misrepresentation from a good faith obligation, stating the allegations were nothing more than a breach of the contract claim).

Likewise, the allegations sounding in omissions on the part of Defendants also fail as a matter of law. In order for an omission to be cognizable as fraud, the Plaintiff must allege and demonstrate that Defendants had a duty to disclose material information and failed to do so. *Barrett v. Freifeld*, 77 A.D.3d 600, 601, 908 N.Y.S.2d 736, 737 (2d Dep't 2010). The only duty that Plaintiff alleges is the purported fiduciary duty of Sprattley and Pascal to Westpaw, which as set forth above, do not exist; *see* Section III.B above. In addition, as set forth above, there are no trade secrets or confidential materials at issue here as Plaintiff claims, so any failure by Defendants to disclose their alleged misuse of the so-called "Proprietary Assets" would be an impossibility. *See* Section III.A above.

B. Plaintiff has not sufficiently alleged falsity or an intent to defraud

Plaintiff's allegations of intent – that Defendants "expressly and intentionally misrepresented" (Compl. ¶ 97, emphasis added) – is a bare conclusion, a mere recital of intention with no particularized facts concerning Defendant's knowledge of the statement's falsity at the

time it was made or their intention to use such statement to induce Plaintiff into entering into the Settlement Agreement. Such pleading fails as a matter of law. *Fink*, 148 A.D.2d at 539.

C. Plaintiff has alleged no injury from any purported fraud

Plaintiff's allegations of injury deriving from Defendants' "fraudulent inducement" are at best hard to identify, and in any event, are hardly credible. (Compl. ¶¶ 96, 102). Notably, the Settlement Agreement accords to Plaintiff "full creative and business control" of the D&D Production, a quitclaim from Iconoscope with respect to the film, and the bulk of the remaining funds from the Kickstarter campaign. (Compl. Ex. A §§ 1-3).

In any event, Plaintiff's allegations are certainly not plead with the requisite particularity. Merely stating that Plaintiff would not have entered into the Settlement Agreement is insufficient, and the fraud claim will fail for this reason as well.

D. Plaintiff's assertion of rescission must fail

Plaintiff's assertion that it "deems the Settlement Agreement rescinded" is not cognizable. First, rescission is an equitable remedy, and those seeking rescission must demonstrate "there is lacking complete and adequate remedy at law". *Weinstein v. Natalie Weinstein Design Assoc., Inc.*, 86 A.D.3d 641, 643, 928 N.Y.S.2d 305, 309 (2d Dep't 2011) (denying accounting where "damages appear adequate"). Second, once again, an action for rescission cannot be maintained in the absence of Iconoscope, a necessary party, and must be dismissed pursuant to N.Y. C.P.L.R. § 3211(a)(10); *see* Section II above.

E. Plaintiff's fraudulent conveyance claim must fail on its face

In addition to the foregoing reasons, Plaintiff's fraudulent conveyance claim must fail on its face. First, such claim is brought "under the Common Law and Business Corporation Law §720." (Compl., Third Cause of Action). That statutory provision, by its terms, applies only to directors and officers of "corporations" (N.Y. BUS. CORP. LAW § 720(a)), and is therefore

irrelevant here. Second to the extent it attempts to assert a claim for common law fraudulent conveyance, it contains no fact allegations whatsoever, nor does it even cursorily address any elements of fraud. Third, the accompanying demand for an accounting is addressed to Defendants Sprattley and Pascal "as managers of the D&D Production" a status dispensed with in Section III.B above. Fourth, and finally, as above, this cause of action cannot be maintained in the absence of Iconoscope, a necessary party, and must be dismissed pursuant to N.Y. C.P.L.R. § 3211(a)(10); *see* Section II above.

VII. Plaintiff's Cause of Action for Constructive Trust Must Fail

First, Plaintiff asserts this claim strictly as a derivative one (Compl. ¶ 119), and so it must fail. See Section X, below. But even as a direct claim it would fail. "The elements of a cause of action to impose a constructive trust are (1) the existence of a confidential or fiduciary relationship, (2) a promise, (3) a transfer in reliance thereon, and (4) unjust enrichment." *Canzona v. Atanasio*, 118 A.D.3d 841, 842-43, 989 N.Y.S.2d 44 (2d Dep't 2014) (citing *Dee v. Rakower*, 112 A.D.3d at 212, 976 N.Y.S.2d at 477). As set forth in Section III.B above, Plaintiff fails to allege a cognizable fiduciary relationship between Defendants and Plaintiff. Absent such a relationship, Plaintiff's cause of action for a constructive trust must also fail.

VIII. Plaintiff's Cause of Action for Alter Ego Fails on its Face

Plaintiff has not satisfied the pleading requirements for an alter ego claim. Piercing the veil is a drastic remedy requiring that: "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit fraud or wrong against the plaintiff which resulted in the plaintiff's injury." *Morris v. New York State Dept. of Taxation and Fin.*, 82 N.Y.2d 135, 141, 603 N.Y.S.2d 807, 810-11 (1993); *see also Fernbach, LLC v. Calleo*, 92 A.D.3d 831, 832, 939 N.Y.S.2d 501, 503 (2d Dep't 2012). Generally considered are such factors as "whether there is an overlap in ownership,

officers, directors and personnel, inadequate capitalization, a commingling of assets, or an absence of separate paraphernalia that are part of the corporate form ... such that one of the corporations is a mere instrumentality, agent and alter ego of the other." *John John, LLC v. Exit 63 Dev., LLC*, 35 A.D.3d 540, 541, 826 N.Y.S.2d 657, 659 (2d Dep't 2006).

The *John John* court dismissed plaintiff's alter ego theory because plaintiff failed to submit any evidence of the foregoing and thus failed to raise a triable issue of fact. 35 A.D.3d at 541, 826 N.Y.S.2d at 659. Similarly here, Plaintiff has submitted no evidence, or even plead any specific facts of the kind required to pierce the veil. *Goldman v. Chapman*, 44 A.D.3d 938, 939, 844 N.Y.S.2d 126, 127 (2d Dep't 2007) ("conclusory assertions that the corporation acted as their 'alter ego,' without more, will not suffice to support the equitable relief of piercing the corporate veil.").

Further, an action to pierce the corporate veil requires that the purported dummy entity be a party. *Stewart Tenants Corp. v. Sq. Indus., Inc.*, 269 A.D.2d 246, 248, 703 N.Y.S.2d 453 (1st Dep't 2000); *see also Popowich v. Korman*, 73 A.D.3d 515, 517, 900 N.Y.S.2d 297, 300 (1st Dep't 2010) (denying claims based on alter-ego where entity was not made party to the action). Consequently, this cause of action cannot be maintained in the absence of Iconoscope.

IX. Plaintiff's Demand for an Accounting Must Fail

Plaintiffs' demand for an accounting (Compl. ¶¶ 83-88) fails for the same reasons its cause of action for breach of fiduciary duty fails. "The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest." *Center for Rehabilitation & Nursing at Birchwood, LLC v. S & L Birchwood, LLC*, 92 A.D.3d 711, 713, 939 N.Y.S.2d 78 (2d Dep't 2012) (quoting *Palazzo v. Palazzo*, 121 A.D.2d 261, 265, 503 N.Y.S.2d 381 (1986)) (quotations omitted); N.Y. P'SHIP LAW §§ 44, 74. As discussed in

Section III.B above, Plaintiff has failed as a matter of law to allege the existence of a fiduciary relationship between Plaintiff and Defendants.

Further, this claim also fails due to the non-joinder of Iconoscope. As set forth in Section II above, it is well settled in New York law that all partners are necessary parties in an action for a partnership accounting. It is undisputed that Sprattley and Pascal transferred their interests in the Partnership to Iconoscope, after which time Iconoscope and Westpaw were the two partners. In this action for an accounting, only one of the partners, Westpaw, is a party. Iconoscope's absence warrants dismissal of the accounting claim.

X. Plaintiff's Assertion of Derivative Claims Are Inapplicable and Must Fail

All of Plaintiff's derivative claims should be dismissed for failing to state a claim on a number of grounds. First, the Second Department has not recognized derivative claims in the general partnership context.[7] *See Schwartz v. Travelers Hotel, Inc.*, 19 A.D.2d 552, 240 N.Y.S.2d 925 (2d Dep't 1963) (holding that a shareholder's derivative action and breach of fiduciary duty under a joint venture are not allowed in the same action). The basis of derivative claims – that a shareholder has no managerial rights and thus must "derive" the right to sue from the entity itself – is inapposite to general partnerships where partners have the right to manage the affairs of the business, including the right to sue in court. *See e.g.*, *Gotham v. Hallwood Realty Partners, L.P.*, 1998 WL 832631, No. CIV. A. 15754–NC (Del. Ch. November 10, 1998);

[7] A thorough search of Second Department caselaw returns zero instances of derivative actions in the general partnership or joint venture context. Derivative suits are authorized in the corporate context by N.Y. BUS. CORP.LAW § 626; in the limited partnership context by N.Y. P'SHIP LAW § 115-a (only granting the cause of action to limited partners); and in the LLC context by a recent ruling of the Court of Appeals, *Tzolis v. Wolff,* 10 N.Y.3d 100, 855 N.Y.S.2d 6 (2008). These authorities exemplify the fact that the right to sue derivatively is not a universal right afforded to every constituent party to a business entity, and has been excluded from the general partnership context on purpose.

Daniel S. Kleinberger, *Direct vs. Derivative, or "What's a Lawsuit Between Friends in an 'Incorporated Partnership'?"*, 22 WILLIAM MITCHELL L. REV. 1203 (1996).

Accordingly, the derivative portions of Plaintiff's First (Comp. ¶¶ 72-76), Second (Comp. ¶¶ 77-82), Sixth (Comp. ¶¶ 105-12), Seventh (Comp. ¶¶ 113-17), and Eighth (Comp. ¶¶ 118-20) Causes of Action should be dismissed as failing to state a claim. Plaintiff's Fourth Cause of Action (Comp. ¶¶ 89-94) sounding in conversion, which is solely derivative, should be dismissed in its entirety. Plaintiff, imbued with the rights of a general partner can, and in fact does, bring suit on its own behalf, and seeks to receive the entire benefit of any recovery or other remedy.

CONCLUSION

For all the foregoing reasons, the Court should dismiss the Complaint.

Dated: New York, New York
August 6, 2014

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