SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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WORLDVIEW ENTERTAINMENT HOLDINGS INC., WORLDVIEW ENTERTAINMENT HOLDINGS LLC, and ROSELAND VENTURES LLC,

Plaintiffs,

- v -

CHRISTOPHER WOODROW, SARAH WOODROW, and THE ESTATE OF CONSTANCE WOODROW,

Defendants.

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CHRISTOPHER WOODROW,

Counterclaim Plaintiffs,

-v-

WORLDVIEW ENTERTAINMENT HOLDINGS LLC, WORLDVIEW ENTERTAINMENT HOLDINGS INC., PROSPECT POINT CAPITAL LLC, ROSELAND VENTURES LLC, MARIA A. CESTONE, SARAH E. JOHNSON a/k/a SARAH JOHNSON REDLICH AND MOLLY A. CONNERS,

Counterclaim Defendants,

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Index No. 159948/14

DECISION and ORDER

Mot. Seq. 1, 4

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs' claims in this action arise from their allegations concerning defendant Christopher Woodrow ("Woodrow"), the former President and Chief Executive Officer ("CEO") of Worldview Entertainment Holdings Inc. ("Worldview Inc.").

As alleged in Plaintiffs' Complaint, Woodrow served as the President and CEO of Worldview Inc. until June 2, 2014 when Worldview Inc.'s Board of

Directors terminated him. Plaintiffs' Complaint, filed on October 10, 2014, asserts the following claims: breach of fiduciary duty against Woodrow as an officer of Worldview Inc.; unjust enrichment; fraud; imposition of constructive trust; conversion; accounting; breach of contract; tortious interference with contract and prospective economic relations; breach of covenant of good faith and fair dealing; negligence; and breach of the duty of loyalty against Woodrow as an officer of Worldview Inc. Defendants Woodrow, Sarah Woodrow, and The Estate of Constance Woodrow (collectively, "Defendants") interposed an Answer with Counterclaims.

Defendants move for an Order, pursuant to CPLR § 3025, for leave to amend their Answer with Counterclaims and to compel Plaintiffs to advance Woodrow's expenses incurred to defend against the claims brought in this case and in related litigation, pursuant to Delaware General Corporations Law §145.[1] Plaintiffs oppose.[2] Oral argument was held.

The following facts, as alleged in the Complaint, relate to corporate organization and are relevant to the motions presently before the Court. Maria A. Cestone ("Cestone") and Woodrow formed Roseland Ventures LLC ("Roseland Ventures" or "Roseland"), a Delaware limited liability company, and executed a

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[1] Woodrow previously sought advancement of expenses in Motion Sequence 002. The application was denied without prejudice based upon a finding that the prior pleading was insufficient to support the claim. Woodrow's proposed pleading contains a proposed counterclaim for advancement of fees.

[2] Defendants' motion was fully briefed on July 20, 2015. On December 4, 2015, Defendants filed a "supplemental memorandum of law," "supplemental affirmation" and a "revised proposed pleading" to remove Woodrow's claims regarding film producer credits, identify proposed related claims against non-parties as third party claims rather than counterclaims, and to "show that Plaintiffs are able to advance Woodrow's defense expenses notwithstanding their claimed lack of available cash." On January 13, 2016, Plaintiffs submitted a memorandum of law and affirmation in response to Defendants' submission. Further, on March 30, 2016, upon the motion of Cestone and Roseland Ventures in the action captioned *Johnson v. Cestone*, Index No. 152444/2015 action, and upon the cross motion of Woodrow, this action and the following three related actions were consolidated for joint discovery for purposes of efficiency and economy: (1) *Johnson v. Cestone*, Index No. 152444/2015; (2) *Hoyt David Morgan v. Worldview Entertainment Holdings Inc.*, Index No. 652323/2014; and (3) *Shanahan Capital Ventures LLC v. Cestone, et al.*, Index No. 652034/2015.

Limited Liability Company Agreement ("Roseland Agreement"). Cestone and Woodrow were each designated as members with a fifty percent interest in Roseland Ventures. Effective May 4, 2010, Cestone and Woodrow formed Prospect Point Capital LLC ("Prospect Point"), a Delaware limited liability company, and executed a Limited Liability Company Agreement ("Prospect Agreement"). Cestone and Woodrow were each designated as members with a fifty percent interest in Prospect Point. Woodrow was designated as Prospect Point's managing member. In January 2011, Roseland Ventures and Prospect Point formed Worldview Entertainment Holdings LLC ("Worldview LLC or Holding Company"), a Delaware limited liability company. Woodrow, on behalf of Prospect Point, executed a Limited Liability Company Agreement ("Worldview Agreement").[3]

Turning to Defendants' motion for leave to amend their Answer and Counterclaims, Defendants proposed counterclaims are as follows: breach of contract (first proposed counterclaim); breach of contract- indemnification agreements (second proposed counterclaim); breach of covenant of good faith and fair dealing (third proposed counterclaim); breach of fiduciary duty against Roseland Ventures, Holding Company, Cestone, and Conners (fourth proposed counterclaim); waste of corporate assets (fifth proposed counterclaim); negligent misrepresentation against Cestone (sixth proposed counterclaim); promissory estoppel against Worldview Companies and Cestone (seventh proposed counterclaim); quantum meruit against Worldview Companies (eighth proposed counterclaim); conversion (ninth proposed counterclaim); tortious interference with business relations against Cestone and Conners (tenth proposed counterclaim); and defamation against Worldview Companies, Cestone, and Conners (eleventh proposed counterclaim).[4]

Plaintiffs oppose Defendants' motion to amend to the extent that it seeks to add the following proposed counterclaims: breach of contract (first proposed

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[3] As alleged in the Complaint, the Roseland, Prospect, and Worldview Agreements contain a provision stating that they are "governed by, interpreted and construed in accordance with, the laws of the State of Delaware, without regard to principles or conflict of laws." "New York law is clear in cases involving a contract with an express choice-of-law provision: Absent fraud or violation of public policy, a court is to apply the law selected in the contract as long as the state selected has sufficient contacts with the transaction." (*Hartford Fire Ins. Co. v. Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 556 [2nd Cir. 2000]).

[4] By Stipulation so-ordered on January 19, 2016, Defendants' counterclaims relating to Woodrow's failure to receive film credit were discontinued.

counterclaim), breach of contract- indemnification agreements (second proposed counterclaim), breach of covenant of good faith and fair dealing (third proposed counterclaim), breach of fiduciary duty against Roseland, Worldview, Cestone, and Conners (fourth proposed counterclaim), waste of corporate assets (fifth proposed counterclaim), promissory estoppel against Worldview Companies and Cestone (seventh proposed counterclaim), quantum meruit against Worldview Companies (eighth proposed counterclaim), and defamation against Worldview Companies, Cestone, and Conners (eleventh proposed counterclaim).

Defendants have withdrawn their fifth proposed counterclaim for waste of the corporate assets.

CPLR § 3025 permits a party to amend or supplement its pleading "by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." (CPLR § 3025[b]). Pursuant to CPLR § 3025(b), such "leave shall be freely given upon such terms as may be just including the granting of costs and continuances." (CPLR § 3025[b]; *Konrad v. 136 East 64th Street Corp.*, 246 A.D.2d 324, 325[1st Dep't 1998]). In addition, pursuant CPLR § 1003, parties may be added at any stage of the action by leave of court. (CPLR § 1003). However, "[w]hen a proposed amendment to a pleading is devoid of merit, leave to amend should be denied so as to avoid needless, time-consuming litigation." (*Terminal Cent. v. Henry Modell & Co.*, 212 A.D.2d 213, 217 [1st Dep't 1995]). Additionally, "[w]here no cause of action is stated, leave to amend will be denied." (*Konrad v. 136 E. 64th St. Corp.*, 246 A.D.2d 324, 325 [1st Dep't 1998]).

As for Defendants' first proposed counterclaim, for breach of contract against Worldview Companies, under New York law, "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v. New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dep't 2009]). In determining whether a contract exists, "the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the transaction." (*Central Federal Sav., F.S.B. v. National Westminster Bank*, 176 A.D.2d 131, 132 [1st Dep't 1991]). In order to invoke "the power of law . . . to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained." (*Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109 [1981]). A cause of action for breach of contract is subject to dismissal at the pleading stage "as too indefinite, and therefore, unenforceable." (*Caniglia v. Chicago Tribune-New York News Syndicate, Inc.*, 204 A.D.2d 233, 234 [1st Dept 1994]) (holding the trial court "properly dismissed, without leave to replead, the

plaintiffs' first cause of action, purporting to set forth a cause of action for breach of contract, as too indefinite, and therefore, unenforceable, for plaintiffs' failure to allege, in nonconclusory language, as required, the essential terms of the parties' purported personal services contract, including those specific provisions of the contract upon which liability is predicated, whether the alleged agreement was, in fact, written or oral, and the rate of compensation.").

Similarly, under Delaware law, "It is well settled Delaware law that three elements are necessary to prove the existence of an enforceable contract: (1) intent of the parties to be bound, (2) sufficiently definite terms, and (3) consideration." (*Gallagher v. E.I. DuPont De Nemours & Co.*, No. CIV.A. 06C-12-188 WC, 2010 WL 1854131, at *3 [Del. Super. Apr. 30, 2010]). In addition, "an enforceable contract must contain all material terms of the agreement and material provisions that are indefinite will not be enforced." (*Id.*). "Where the terms in an agreement are so vague that a court cannot determine the existence of a breach, then the parties have not reached a meeting of the minds, and a court should deny the existence of a contract." (*Id.*).

Here, Defendants' proposed pleading alleges from August 2008 through June 2014, "Woodrow provided services for the Worldview Companies pursuant to a binding contract, as initially agreed and as amended." The proposed pleading alleges, "The Woodrow Contract initially was made orally, and was confirmed in a series of writings such as emails that stated certain of its terms and that documented the parties' course of dealings pursuant to the Woodrow Contract." It further alleges, "Cestone made and amended the Woodrow Contract on behalf of the Worldview Companies, and Woodrow acted on his own behalf." The proposed pleading alleges that pursuant to the "Woodrow Contract," Woodrow would provide certain services, including directing strategic planning, soliciting investments, managing Worldview, providing management services for Holding Company as Cestone, forming and managing film funds, directing public relations activity, and forming and action plans for businesses. The proposed pleading alleges, in exchange for these services, Woodrow would receive a "[s]alary commensurate with qualifications and duties" and a "[b]onus commensurate with performance." The proposed pleading further alleges Cestone and Woodrow agreed that "Worldview initially would accrue but defer payment of any salary or bonus for a time." The proposed pleading further alleges:

> Cestone told Woodrow repeatedly that she knew the Woodrow Salary was far less than appropriate for someone with Woodrow's qualifications and responsibilities and performance, and she promised Woodrow that his

> compensation would later be enhanced substantially by bonuses in amounts that were to be determined in part according to the financial performance of the Worldview Companies, after revenues from films were received, to more than offset the difference between the deficient Woodrow Salary and adequate compensation for Woodrow's contributions.

The proposed pleading alleges that Worldview Companies breached the terms of the "Woodrow Contract" by "failing to pay [the] Woodrow Bonus;" "failing to otherwise provide reasonable compensation for the Woodrow Services;" and "failing to reimburse Woodrow for all reasonable expenses he incurred on behalf of the Worldview Companies."

In opposition, Plaintiffs allege that Defendants' "first proposed counterclaim for breach of an alleged oral contract is devoid of merit because the alleged agreement is too indefinite as to compensation and therefore is unenforceable."[5]

Here, applying either New York or Delaware law, Defendants' first proposed counterclaim purporting to set forth a breach of contract is legally insufficient to state a claim. Defendants have failed to allege in nonconclusory language what compensation Woodrow was owed under the purported contract, an essential term of the parties' alleged agreement. While Defendants allege that Woodrow was entitled to additional consideration under the purported contract, there are no allegations concerning the amount claimed or any basis in the proposed pleading that would allow a determination or calculation of that amount. "Where no cause of action is stated, leave to amend will be denied." (*Konrad*, 246 A.D.2d at 325). Accordingly, leave to amend Defendants' Answer to add the proposed first counterclaim is denied.

As for Defendants' second proposed counterclaim, for breach of the certain indemnification agreements[6], Defendants' proposed pleading identifies certain

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[5] The parties disagree as to which law applies with respect to the sufficiency of the proposed claims asserted. Plaintiffs contend that New York law applies. Defendants argue that Delaware law applies because Plaintiffs are Delaware corporations and their Bylaws and Operating Agreements and Management Agreement all specify that the Delaware law controls.

[6] The agreements with indemnification provisions are: Limited Liability Company Agreement of Roseland Ventures LLC, effective December 4, 2009; Worldview

operating agreements and bylaws that contain indemnification provisions. The proposed pleading alleges "[c]ertain of the claims against Woodrow in this case, the Johnson Case, and the Parnassus Case are within the scope of the indemnity terms of the Indemnity Agreements," and Worldview Companies have breached these agreements "by refusing Woodrow's demands for advancement of expenses." Leave to amend Defendants' answer to add the second proposed counterclaim is granted.

As for Defendants' third proposed counterclaim for breach of covenant of good faith and fair dealing, "implied in every contract is a covenant of good faith and fair dealing, which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement." (*Jaffe v. Paramount Communs.*, 222 A.D.2d 17, 22-23 [1st Dep't 1996]). The implied obligation "is in aid and furtherance of other terms of the agreement of the parties", and "an obligation that would be inconsistent with other terms of the contractual relationship cannot be implied." (*Sheth v. New York Life Ins. Co.*, 273 A.D.2d 72, 73 [1st Dep't 2000]). "A claim for breach of the implied covenant of good faith and fair dealing cannot substitute for an unsustainable breach of contract claim." (*Skillgames v. Brody*, 1 A.D.3d at 252). "There can be no claim of breach of the implied covenant of good faith and fair dealing without a contract." (*Randall's Is. Aquatic Leisure, LLC v City of New York*, 92 A.D.3d 463, 463 [1st Dep't 2012]).

Under Delaware law, "The implied covenant of good faith and fair dealing embodies the law's expectation that "each party to a contract will act with good faith toward the other with respect to the subject matter of the contract." (*Allied Capital Corp. v. GC-Sun Holdings, L.P.*, 910 A.2d 1020, 1032 [Del. Ch. 2006]). "To state a claim of breach of the implied covenant of good faith and fair dealing, a party "must allege [1] a specific implied contractual obligation, [2] a breach of that obligation by the defendant, and [3] resulting damage to the plaintiff." (*Kelly v. Blum*, No. CIV.A. 4516-VCP, 2010 WL 629850, at *13 [Del. Ch. Feb. 24, 2010)].

In opposition, Plaintiffs allege, "Woodrow's third proposed counterclaim for breach of the covenant of good faith and fair dealing is legally insufficient because such a claim cannot stand in the absence of a contract and because it is improperly duplicative of this proposed breach of contract claim."

Entertainment Holdings Inc.'s Bylaws, effective November 11, 2010; Operating Agreement of Worldview Entertainment Holdings LLC, effective January 5, 2011; and Management and Administrative Services Agreement, effective January 5, 2011.

Here, to the extent that the proposed pleading alleges that the Worldview Companies breached a duty to pay Woodrow "fair compensation ... in an amount that greatly exceeded [his] salary" for the services he rendered in accordance with "[t]he spirit of the Woodrow Contract," the proposed pleading fails to plead a valid contract from which such a duty would arise under New York law or Delaware law. To the extent that Defendants argue the "Worldview Companies received the benefit of Woodrow's services while he was acting with the understanding that he had the indemnity and expense advancement protections of Delaware law and the Indemnification Agreements," the proposed pleading is duplicative of Defendants' second proposed counterclaim which asserts breach of those same indemnification agreements.

As for Defendants' fourth proposed counterclaim, for breach of fiduciary duty against Roseland, Holding Company, Cestone, and Conners, the elements of a cause of action for breach of fiduciary duty "requires proof of two elements: (1) that a fiduciary duty existed and (2) that the defendant breached that duty." (*Beard Research, Inc. v. Kates*, 8 A.3d 573, 601[Del. Ch. 2010]). [7] Plaintiffs oppose Defendants' fourth proposed counterclaim to the extent that it asserts breach of fiduciary duty against Roseland and Holding Company; Plaintiffs does not oppose the claim against Cestone and Conners.

The proposed pleading alleges, "Woodrow owns 50% of the member interest of Roseland and 50% of the member interest of Prospect Point, and thus is the indirect owner of 37.5% of Holding Company, and consequently, the indirect owner of 37.5% of Worldview." As against Roseland, the proposed pleading alleges, "Roseland, as managing member of Holding Company, owed fiduciary duties of loyalty and due care to Holding Company and to its [Holding Company's] members,

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[7] Under New York law, the elements of a breach of fiduciary duty are (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages caused by the misconduct. (*Armentano v. Paraco Gas Corp.*, 935 NYS2d 304 [2nd Dep't 2011]). A cause of action sounding in breach of fiduciary duty must be pleaded with particularity. (CPLR 3016[b]). A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." (*EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 [2005] *quoting* Restatement [Second] of Torts § 874, Comment a). "Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions." (*Id.*).

Roseland and Prospect Point." As against Holding Company, the proposed pleading alleges, "Holding Company, as sole stockholder of an insolvent Worldview, owes fiduciary duties to Worldview's creditors." The proposed pleading alleges, "Those fiduciary duties were owed to Woodrow because of his direct ownership of Roseland, and because of his indirect ownership of Holding Company and Worldview, and because he is a creditor of Worldview." The proposed pleading alleges, "Holding Company and Roseland breached their duties of loyalty and care to Woodrow by breaching contracts, engaging in devastating litigation, and permitting gross management of company operations and finances by Cestone and Conners after termination of Woodrow." In opposition, Plaintiffs allege, "Woodrow's fourth proposed counterclaim for breach of fiduciary duty against Roseland and Worldview LLC fails because neither of these Plaintiffs owes a fiduciary duty to Woodrow."

Defendants' proposed pleading fails to plead a fiduciary relationship between Roseland Ventures and Woodrow, and Holding Company and Woodrow to support a breach of fiduciary claim. To the extent that the proposed pleading alleges that Roseland owes Woodrow fiduciary duties because he is a member of Roseland Ventures or because of his "direct ownership of Roseland", such an allegation cannot support his proposed claim for breach of fiduciary as a matter of law under Delaware law because under Delaware law, a corporation does not owe fiduciary duties to its shareholders. (*A.W. Fin. Servs., S.A., v. Empire Res., Inc.*, 981 A.2d 1114, 1127 n. 36 [Del. 2009]); *Furchtgott-Roth v. Wilson*, No. 9 Civ. 9877, 2010 WL 3466770, at *5 [S.D.N.Y. August 21, 2010] (applying Delaware law) ("Plaintiff has not cited authority indicating that a Delaware limited liability company owes fiduciary duties to its members and the Court is not aware of any. In an analogous context, Delaware courts hold the corporations do not owe fiduciary duties to their shareholders."). To the extent that the proposed pleading alleges that Holding Company owes fiduciary duties to Woodrow because of Woodrow's direct ownership of Roseland, Woodrow's indirect ownership of Holding Company and Worldview, Woodrow's role as a creditor of Worldview, the claim would similarly fail. The proposed pleading does not plead with particularity facts sufficient to support a cause of action for breach of fiduciary duty by Roseland or Holding Company to Woodrow.[8]

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[8] In reply, Defendants contend that by statute, Delaware provides that limited liability companies can expand or contract fiduciary duties owed to their members. (See 6 Del. C. § 1101; *Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1213 [Del. 2012]; *Auriga Capital Corp. v. Gatz Properties, LLC*, 40 A.3d 839, 874 [Del. Ch. 2012], *aff'd*, 59 A.3d 1206 [Del. 2012]). Defendants argue that Plaintiffs'

Defendants have withdrawn their fifth proposed counterclaim for waste of the corporate assets. Defendants' proposed sixth counterclaim asserted against Cestone is for negligent representation. Plaintiffs do not oppose this claim.

As for Defendants' seventh proposed counterclaim against Worldview Companies and Cestone, for promissory estoppel, under New York law, "[In] order to state a viable cause of action for promissory estoppel, the following elements must be established: (1) an oral promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." (*NYC Health and Hosp. Corp. v. St. Barnabas Hosp., 10 A.D.3d 489*, 491 [1st Dept. 2004]). A claim for promissory estoppel cannot stand when there is a contract between the parties. (*Susman v. Commerzbank Capital Mkts. Corp.*, 95 A.D.3d 589, 590 [1st Dep't 2012]). "In the absence of a duty independent of the agreement, [a] promissory estoppel claim [is] duplicative of the breach of contract claim." (*Celle v. Barclays Bank P.L.C.*, 48 A.D.3d 301, 303 [1st Dept 2008]).

Under Delaware law, "[i]n order to establish a claim for promissory estoppel, a plaintiff must show by clear and convincing evidence that: (i) a promise was made; (ii) it was the reasonable expectation of the promisor to induce action or forbearance on the part of the promisee; (iii) the promisee reasonably relied on the promise and took action to his detriment; and (iv) such promise is binding because injustice can be avoided only by enforcement of the promise." (*Lord v. Souder*, 748 A.2d 393, 400 [Del. 2000]).

Here, the proposed pleading alleges that "Worldview Companies, by Cestone, made clear and unambiguous promises to Woodrow regarding future compensation he would receive in the form of the Woodrow Bonus in return for his performance

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Operating Agreements create such duties. Defendants argue, for example, the Agreements provide at § 6.5: "Liability for Certain Acts. Each Manager must perform his or her duties as Manager in good faith, in a manner he or she reasonably believes to be in the Company's best interest and with such care as an ordinarily prudent person in a like position would use under similar circumstances." Defendants argue that because Roseland Ventures managed Worldview LLC, Roseland Ventures had fiduciary duties to its members, Roseland Ventures and Prospect Point. The Court does not read those agreements as expanding such fiduciary duty to the members' member.

of the Woodrow Services, and regarding expense advancement and indemnification he would be provided," "misrepresented material facts to Woodrow and concealed material facts from Woodrow regarding compensation and expense advancement and indemnification, and regarding their intention not to provide the compensation or expense advancement or indemnification that they represented and warranted to Woodrow they would provide," and "made those misrepresentations and omissions with the intention to induce Woodrow thereby to provide the Woodrow Services for less compensation than he otherwise would have provided them, and at greater personal risk of unreimbursed expense and liability than he would have accepted." The proposed pleading alleges Woodrow "did not know that Cestone and the Worldview Companies did not intend to honor their promises regarding compensation," "reasonably relied on the Worldview Companies' and Cestone's misrepresentations and omissions," and "suffered a prejudicial change in his position as a result of this reliance." The proposed pleading alleges "Worldview Companies and Cestone should be estopped from denying the Woodrow Bonus" and "from denying expense advancement or indemnification from Woodrow."

In opposition, Plaintiffs allege, "Woodrow's seventh proposed counterclaim for promissory estoppel is defective because it is improperly duplicative of Woodrow's purported counterclaim for breach of contract." Plaintiffs argue that in order to allege a claim for promissory estoppel, a party has to allege a breach of legal duty outside of a contractual obligation and Woodrow fails to do so.

In reply, Defendants argue that "Plaintiffs' argument is also factually incorrect, because there is a basis to find a duty on the part of the Plaintiffs that is independent of the alleged contract, namely, the fiduciary duties argued above, that arise both by law and through the bylaws and operating agreements."

As for Defendants' eighth proposed counterclaim against Worldview Companies, for quantum meruit, in order to sustain a cause of action for quantum meruit, the plaintiff must allege: (1) the performance of services in good faith; (2) the acceptance of the services by the person to whom they are rendered; (3) an expectation of compensation therefor; and, (4) the reasonable value of the services. (*Soumayah v. Minnelli*, 41 A.D.3d 390, 391 [1st Dep't 2007]). *See also Petrosky v. Peterson*, 859 A. 2d. 88, 79 [Del. 2004]) (quantum meruit is "a quasi-contract claim that allows a party to recover the reasonable value of his or her services if: (i) the party performed the services with the expectation that the recipient would pay for them; and (ii) the recipient should have known that the party expected to be paid."

"[T]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." (Clark- Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y. 2d 382, 399 [1987]). However, "where there is a bona fide dispute as to the existence of a contract or the application of a contract in the dispute in issue, a plaintiff may proceed upon a theory of quasi contract as well as breach of contract, and will not be required to elect his or her remedies." (*Sabre Intl. Sec., Ltd. v. Vulcan Capital Mgt., Inc.*, 95 A.D.3d 434, 438-39 [1st Dep't 2012]. *See also Chrysler Corp. v. Airtemp Corp.*, 426 A.2d 845, 854 [Del. Super. 1980] ("With respect to the theory of quantum meruit or contract implied by law, courts of this State have long recognized that recovery on such a theory will be considered only if it is determined that the relationship of the parties is not governed by an express contract implied in law.").

Here, the proposed pleading alleges that Woodrow provided services to Worldview Companies, Worldview Companies accepted those services, Woodrow expected "reasonable compensation" for those services, including a bonus and expense advancement and indemnification. The proposed pleading alleges the compensation provided to Woodrow for his services and role as "as an officer and director was less than the reasonable value of the services provided" and Woodrow seeks "the difference between the amount of actual contribution and the full reasonable value of the services provided."

In opposition, Plaintiffs allege "Woodrow's eighth proposed counterclaim for *quantum meruit* fails because the law does not allow Woodrow, who received a salary for the services he provided, to maintain a claim in quantum meruit for the alleged difference between the salary he received and the purported (greater) value of the services provided." Plaintiffs rely upon the following cases: *Mance v. Mance*, 128 A.D. 2d 448, 449 [1st Dept. 1987]) ("As regards the claim seeking to recover in quantum meruit, plaintiff received compensation for services he rendered to the company. It is undenied that in addition to a salary, plaintiff received fringe benefits such as hospitalization, a car and gasoline, car insurance and maintenance, vacation expenses and other benefits. Thus, there is no merit to the proposed amended complaint."); *Freedman v. Pearlman*, 271 A.D. 2d 301, 304 [1st Dept 2000] (affirming dismissal of employee's cause of action for quantum meruit based on "allegation that he performed services far greater than defendants deserved for the compensation he actually received . . . where none of the services allegedly performed are "so distinct from the duties of his employment and of such nature that it would be unreasonable for the employer to assume that they were rendered without expectation of further pay.").

In reply, Defendants argue that the cases that Plaintiffs rely upon to support their contention that claims for quantum merit "lack merit when agreed salary and other compensation has been paid" are "inapposite here, because Woodrow did not receive deferred compensation and bonuses that had been promised to him." Defendants claims that Woodrow "is not seeking a supplement to previously-agreed compensation, which Plaintiffs' cases reject, he is seeking to get for the first time the full measure of the compensation he was promised." Defendants further argue, "Plaintiff misreads the cases to the effect that any partial payment to an employee estops a claim for quantum meruit, which is plainly unreasonable."

Defendants' proposed seventh and eighth counterclaims are based upon conclusory allegations concerning Plaintiffs "promises to Woodrow regarding future compensation he would receive" and Woodrow's expectation of a "reasonable compensation" for the services he provided "in the form of the Woodrow Bonus in return for his performance of the Woodrow Services ... expense advancement and indemnification he would be provided" by Plaintiffs. To the extent that Defendants' proposed counterclaims seek to recover a "Woodrow Bonus" in addition to the salary he was paid, the proposed pleading contains only generalities. The proposed pleading fails to quantify the amount of the alleged bonus owed to Woodrow, how the bonus was be paid, or whether the bonus was discretionary or guaranteed. Such generalities are not sufficient to satisfy the requirements of an "unambiguous promise," a necessary element of a promissory estoppel claim, or a means to measure the "reasonable value of the services" allegedly performed by Woodrow, an element of a quantum meruit claim. Furthermore, Woodrow's continued employment for Plaintiffs belies any purported claim of detrimental reliance, another element of a promissory estoppel claim. Additionally, to the extent that Defendants' counterclaims are based upon any promise or expectation of advancement of expenses or indemnification, those claims would be duplicative of Defendants' proposed counterclaim which seeks breach of those indemnification agreements. Furthermore, the parties do not dispute there are agreements which contain provisions concerning the advancement of legal fees and indemnification.

Defendants' ninth proposed counterclaim as against Holding Company and Worldview is for conversion. Defendants' tenth proposed counterclaim against Cestone and Connors is for tortious interference with business relations. Plaintiffs do not oppose these proposed claims.

As for Defendants' eleventh proposed counterclaim, for defamation, the proposed pleading alleges, "The Worldview Companies, Cestone, and Conners made false statements accusing Woodrow of embezzlement and other financial

misconduct, and stating that Woodrow had resigned from Worldview because of the alleged misconduct ("Defamatory Statements")." The proposed pleading alleges that purported Defamatory Statements "included false accusations of 'embezzlement' and 'theft' and 'fraud on the part of Woodrow," and that "Woodrow had 'resigned' from Worldview when in fact he had been dismissed under protest." The proposed pleading alleges that these purported Defamatory Statements "were false and misleading," "constituted defamation per se," and placed "Woodrow in a false light." The proposed pleading further alleges that the purported Defamatory Statements "were published in emails and other writings, and in telephone calls and personal conversations of Cestone and Conner," "published by Cestone and Conners primarily from the offices of the Worldview Companies, and also during off-site meetings," "published to filmmakers, investors, potential investors, and other third parties by the Worldview Companies, Cestone and Conners," and "published by the identified Counterclaim Defendants during the period June 2014 through October 2014." In opposition, Plaintiffs allege, "Woodrow's eleventh proposed counterclaim for defamation is legally insufficient because it is (sic) fails to comply with the heightened pleading requirements for such a claim." Defendants' proposed counterclaim for defamation is devoid of merit because it fails to plead a cause of action for defamation with the particularity required by CPLR 3016(a). While Defendants argue that Delaware applies to the defamation claim, the Court finds that New York law is applicable. The pleading fails to identify with particularity the precise content of the defamatory remarks, to whom made and when.

Defendants' twelfth proposed counterclaim Holding Company and Worldview seeks an accounting. Defendants' thirteenth proposed counterclaim against Cestone is for personal liability as the alleged alter ego of the Plaintiff entities. Plaintiffs do not oppose these proposed claims.

Woodrow's Motion For Advancement of Legal Fees

Turning to Woodrow's motion to compel Plaintiffs' to advance Woodrow's defense expenses incurred to defend against the claims brought in this case and in related litigation, a party seeking a preliminary injunction must demonstrate, by clear and convincing evidence: (1) a likelihood of success on the merits; (2) irreparable injury absent the granting of the preliminary injunction; and, (3) a balancing of the equities in the movant's favor. (*Gilliland v. Acquafredda Enters.*, LLC, 92 A.D.3d 19, 24 [1st Dep't 2011], *citing Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839 [2005]). The purpose of a preliminary injunction is, "not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a

full hearing on the merits." (*Residential Bd. of Managers of Columbia Condominium v. Alden*, 576 N.Y.S.2d 859, 861 [1st Dep't 1991]).

Sections 145(a) and (b) of the Delaware General Corporation Law (8 Del Code Ann § 145) give corporations the power to indemnify current and former corporate officials for expenses incurred in legal proceedings "by reason of the fact that the person is or was a director, officer, employee or agent of the corporation." Section 145(c) provides, "To the extent that a present or former director or officer of a corporation has been successful on the merits or otherwise in defense of any action," he or she "shall be indemnified against expenses (including attorneys' fees) actually and reasonably incurred by such person in connection therewith." "The right to indemnification cannot be established, however, until after the defense to legal proceedings has been 'successful on the merits or otherwise.'" (*Homestore, Inc. v. Tafeen*, 888 A.2d 204, 211 [Del. 2005]).

"Advancement is an especially important corollary to indemnification as an inducement for attracting capable individuals into corporate service." (*Homestore,* 888 A.2d at 211). "Advancement provides corporate officials with immediate interim relief from the personal out-of-pocket financial burden of paying the significant on-going expenses inevitably involved with investigations and legal proceedings." (*Id.*)

Section 145(e) of Delaware Corporation Law permits a corporation to advance corporate officials the costs of defending an investigation or lawsuit. Section 145(e) provides:

> [e]xpenses (including attorneys' fees) incurred by an officer or director in defending any civil ... action... may be paid by the corporation in advance of the final disposition of such action ... upon receipt of an undertaking by or on behalf such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation. Such expenses (including attorneys' fees) incurred by *former directors and officers or other employees and agents may be so paid upon such terms and conditions, if any, as the corporation deems appropriate*." (emphasis added).[9]

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[9] The Delaware Court explained:

> Section 145(e) provides corporations with the flexibility to advance funds to *former* corporate officials, ... without an express undertaking. Nevertheless,

Woodrow asserts a right to advancement of attorneys' fees pursuant to: (1) Worldview LLC Operating Agreement, effective January 5, 2011, Section 5.3; (2) The Management and Administrative Services Agreement dated January 5, 2011 between Worldview Inc. and the Holding Company ("Services Agreement"), Section 5.1; (3) The Limited Liability Company Agreement of Roseland Ventures LLC, effective December 4, 2009 ("Roseland Operating Agreement"), Section 5.4; and (4) Worldview Inc.'s Bylaws, effective November 11, 2010. In opposition, Plaintiffs argue that the Woodrow's request for advancement of fees under the Worldview Operating Agreement and the Services Agreement fail because Woodrow is not an indemnitee pursuant to the terms of the indemnification provision in the Worldview LLC Operating Agreement and Plaintiffs' claims against Woodrow do not fall within the subject of the indemnification provision contained in the Services Agreement and the Roseland Operating Agreements. As such, Plaintiffs argue that Woodrow cannot establish the likelihood of success on the merits of his advancement of fees claim under any of these agreements.

1. Worldview LLC Operating Agreement

Section 5.3 of the Worldview LLC Operating Agreement provides as follows:

> 5.3 Indemnification. The Company shall indemnify any person who is *a Member or Manager of the Company* (an "Indemnified Person") against expenses (including, but not limited to, attorneys' fees), judgments, fines, and amounts paid in settlement, actually and reasonably incurred by such Indemnified Person ("Liabilities"), to the fullest extent now or hereafter permitted by law in connection with any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative or investigation ("Proceeding"), brought or threatened to be brought against such

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> when corporations ... do not have advancement provisions that expressly require an undertaking, the ultimate right to keep payments characterized as an "advancement" depends upon whether the former corporate official is entitled to indemnification. In addition to an express undertaking requirement, corporations may specify by bylaw or contract the terms and conditions upon which present and former corporate officials may receive advancement, *e.g.*, proof of an ability to repay or the posting of a secured bond.

(Homestore, 888 A.2d at 211-12).

> Indemnified Person by reason of the fact that he or she is or was serving Member or Manager of the Company. *The Managers, by resolution adopted in each specific instance, may similarly indemnify any Person other than an Indemnified Person for Liabilities incurred by him or her in connection with services rendered by him or her for at the request for the Company.* Advance expenses (including, but not limited to, attorneys' fees) incurred by other Persons may be paid *if the Managers* deem it appropriate and upon such terms and conditions, including the giving of an undertaking, as the Managers deem appropriate. (emphasis added)

Woodrow relies on Section 5.3 of the Worldview LLC Operating Agreement as support that "officers and directors are entitled to be indemnified against reasonable expense and liability in connection with lawsuits like this one that allege misconduct by an officer, including the right to have legal fees and other expenses incurred in defense of such a suit paid in advance by the Company prior to final disposition." In opposition, Plaintiffs contend that Section 5.3 identifies only "Member[s] or Manager[s] of the Company" as those entitled to indemnification under the provision. Plaintiffs state that Woodrow is not currently, and has never been a Member of Worldview Entertainment Holdings, LLC. As such, Plaintiffs argue that any indemnity provided under the Worldview LLC Operating Agreement does not extend to Woodrow.

2. The Services Agreement

Section 5.1 of The Services Agreement provides as follows:

> 5.1 Indemnification by [Worldview] LLC [Holding Company] agrees to indemnify and hold harmless [Worldview] Inc., its successors-in-interest, permitted assigns, officers, directors, employees, agents and representatives, from and against any liability, damage, cost, expense and loss, or threat thereof, including, without limitation, reasonable attorneys' fees, expenses and court costs, and from and against any and all claims or actions based upon, or arising out of, damage or injury to persons or property caused by, or attributable to or arising in connection with [Worldview]'s Inc.'s performance, nonperformance, or delayed performance of the services contemplated by this Agreement or any acts or omissions of [Worldview] Inc. or any person or entity acting on behalf of [Worldview] Inc.

Plaintiffs argue that Worldview LLC's indemnification obligation under the Services Agreement are limited to claims "based upon, or arising out of, damage or injury to persons or property," and that none of Plaintiffs' claims against Woodrow in this action are personal injury or property damage claims. As such, Plaintiffs argue that Woodrow is not entitled to any indemnity under the terms of the indemnification provision in the Services Agreement with respect to Plaintiffs' claims against him in this action. Additionally, Plaintiffs argue that even if the indemnity provision in the Services Agreement applied to the claims asserted against Woodrow, the provision does not include any requirement that Worldview LLC advance defense fees or costs to any indemnitee.

3. The Roseland Operating Agreement

Section 5.4 of The Roseland Operating Agreement provides, in relevant part:

> 5.4 Indemnification. The Company shall indemnify any person who is a Member or Manager of the Company (an "Indemnified Person") against expenses (including, but not limited to, attorneys' fees), judgments, fines and amounts paid in settlement, actually and reasonably incurred by such Indemnified Person ("liabilities"), to the fullest extent now or hereafter permitted by law in connection with any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative or investigative ("Proceeding"), brought or threatened to be brought against such Indemnified Person by reason of the fact that he or she is or was serving as a Member or Manager of the Company. ... Expenses (including, but not limited to, attorneys' fees) incurred by any Indemnified Person in defending a Proceeding shall be paid by the Company in advance of the final disposition of the Proceeding upon receipt of an undertaking, by or on behalf of such Indemnified Person, to repay such amount without interest if it shall ultimately be determined that he or she is not entitled to be indemnified by the Company as authorized by law.

Plaintiffs argue that Woodrow's request for advancement of defense fees costs under Section 5.4 of the Roseland Operating Agreement fails because Plaintiffs' claims against Woodrow arise out of his employment with Worldview Inc., and do not arise by reason of Woodrow's activities as a member of Roseland.

4. Worldview Inc.'s Bylaws

Section 1 of Article VII of the Worldview Inc. Bylaws provides, in relevant part:

> Except as prohibited by law, every person shall be entitled as of right to be indemnified by the corporation against reasonable expense and any liability paid or incurred by such person in connection with any actual or threatened claim, action, suit or proceeding, civil, criminal, administrative, investigative or other, whether brought by or in the right of the corporation or otherwise, *by reason of such person being or having been a director or officer of the corporation* or by reason of the fact that such officer or director of the corporation is or was serving at the request of the corporation as a director, officer, employee, fiduciary or other representative of another corporation, partnership joint venture, trust, employee benefit plan or other entity (such claim, action suit or proceeding hereinafter being referred to as "action"). Such indemnification shall include the right to have expenses incurred by such person in connection with an action paid in advance by the corporation prior to final disposition of such action, subject to subsequent determination of the right to be indemnified.

Plaintiffs argue that Woodrow is not entitled to the requested advancement of fees and costs in defending Plaintiffs' claims in this action under the indemnity provision in the Worldview Inc. Bylaws because Plaintiffs' claims are not brought "by reason of fact" that Woodrow was an officer of Worldview Inc., but rather because Woodrow acted in a personal capacity, rather than an official corporate capacity, when he engaged in the alleged embezzlement and other misconduct.

Here, Woodrow was an employee, President, and CEO of Worldview Inc. Worldview Inc.'s Bylaws provide that the officers and directors of Worldview Inc. shall be indemnified "by the corporation against reasonable expense and any liability paid or incurred by such person in connection with any actual or threatened claim, action, suit or proceeding ... whether brought by or in the right of the corporation or otherwise, by reason of such person being or having been a director or officer of the corporation ..." The Bylaws expressly state that officers and directors should be given advancement of their legal expenses by the corporation in such an action "prior to final disposition" and "subject to subsequent determination of the right to be indemnified." Accordingly, Worldview Inc. must advance Woodrow his legal expenses in this matter.

Additionally, Woodrow is obligated to post a bond in accordance with CPLR § 6312(b) which states, in relevant part: "prior to the granting of a preliminary injunction the plaintiff *shall* give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction...." (emphasis added).

Wherefore, it is hereby

ORDERED that Defendants' motion to amend their Answer and Counterclaims is granted (with the exception of the first proposed counterclaim for breach of contract; third proposed counterclaim for breach of covenant of good faith and fair dealing; fourth proposed counterclaim for breach of fiduciary duty against Roseland and Holding Company; fifth proposed counterclaim for waste of corporate assets; seventh and eighth proposed counterclaims for promissory estoppel and quantum meruit, respectively; and eleventh proposed counterclaim for defamation); and it is further

ORDERED that Amended Answer and Counterclaims annexed to the moving papers shall be deemed served on the parties upon service of a copy of this Order with notice thereof; and it is further

ORDERED that Defendants' motion for the advancement of Woodrow's fees is granted; and it is further

ORDERED that advancement of fees is made conditional upon Defendants' service of an Amended Answer and Counterclaims consistent with this decision and the posting of a bond in the amount of $500,000.00; and it is further

ORDERED that Plaintiffs' pending motion to dismiss certain of the counterclaims asserted in Defendants' prior Answer and Counterclaims is denied as moot (Mot. Seq. 1).

This constitutes the decision and order of the court. All other relief is denied.

DATED: APRIL 28, 2016

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EILEEN A. RAKOWER, J.S.C.