UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NADIA TARAZI, individually and derivatively as a member of PAINTED WINGS MEDIA, LLC and MICRONUTRIENT SOLUTIONS, INC.,

Plaintiffs,

- against -

TRUEHOPE INC., OPEN MIND CONSULTING, INC., DANA RAY STRINGAM, AUTUMN STRINGAM, QUINTESSENTIAL BIOSCIENCES, LLC, d/b/a Q SCIENCES, and ANTHONY STEPHAN,

Defendants,

and

PAINTED WINGS MEDIA, LLC,

Nominal Defendant.

13 Civ. 1024 (LAK) (JCF)

REPORT AND RECOMMENDATION

NADIA TARAZI, individually and derivatively as a member of PAINTED WINGS MEDIA, LLC,

Plaintiff,

- against -

QUINTESSENTIAL BIOSCIENCES, LLC, d/b/a Q SCIENCES,

Defendant,

and

PAINTED WINGS MEDIA, LLC,

Nominal Defendant.

15 Civ. 1038 (LAK) (JCF)

TO THE HONORABLE LEWIS A. KAPLAN, U.S.D.J.:

The plaintiffs, Nadia Tarazi, Painted Wings Media, LLC ("Painted Wings"), and Micronutrient Solutions, Inc. ("Micronutrient Solutions" or "MSI"), bring this consolidated action against Dana Stringam, Autumn Stringam, Open Mind Consulting, Inc. ("Open Mind"), Truehope Inc. ("Truehope"), Quintessential Biosciences, LLC ("Q Sciences"), and Anthony Stephan. This litigation arises from a failed business venture to market a nutrient product (the "Micronutrient Product"). The defendants, with the exception of Mr. Stephan, have filed three motions to dismiss the Consolidated and Third Amended Complaint ("TAC") in part. For the reasons that follow, I recommend that the motions each be granted in part and denied in part.

Background

A. Factual Background

The facts in this litigation have been previously rehearsed at length. See Tarazi v. Quintessential Biosciences, LLC, No. 15 Civ. 1038, 2015 WL 4010477, at *1-2 (S.D.N.Y. July 1, 2015); Tarazi v. Truehope Inc., No. 13 Civ. 1024, slip op. at 2-7 (S.D.N.Y. July 1, 2015); Tarazi v. Truehope Inc., 958 F. Supp. 2d 428, 431-32 (S.D.N.Y. 2013). I will review the necessary facts here.

This controversy resulted from a failed business venture to distribute the Micronutrient Product in the United States and to market Ms. Stringam's personal experiences with it. (TAC, ¶¶ 13-14, 17, 21). Mr. Stephan and David Hardy first developed the

Micronutrient Product from a nutritional formula originally designed for swine; then, after Mr. Stephan's daughter -- Ms. Stringam -- allegedly managed her bipolar disorder symptoms with the product, Ms. Stringam wrote a book about her experience. (TAC, ¶¶ 13, 15). Mr. Stephan and Mr. Hardy then began marketing the product commercially in Canada through Truehope. (TAC, ¶¶ 13-14).

In 2011, Ms. Tarazi read Ms. Stringam's book and contacted her about marketing her experience. (TAC, ¶¶ 17-18). In 2012, Ms. Tarazi and Ms. Stringam -- along with Mr. Stringam, Ms. Stringam's husband -- agreed to start a joint venture (the "Joint Venture") to sell the Micronutrient Product and to promote Ms. Stringam's narrative. (TAC, ¶¶ 20-21). The Stringams also agreed to secure the exclusive rights to market the Micronutrient Product in the United States from Mr. Stephan and to form any "legal entities" necessary "to effectuate the purpose of the Joint Venture." (TAC, ¶¶ 24, 26).

In April 2012, the partners formed Painted Wings, in which Ms. Tarazi and Ms. Stringam each have a fifty percent "membership interest." (TAC, ¶ 32). Ms. Tarazi is the "President," and Ms. Stringam is the "Content Director." (TAC, ¶ 36). Painted Wings' operating agreement states that its purpose is to sell and market Ms. Stringam's "life story" and related products. (TAC, ¶ 33). After Painted Wings was created, Ms. Stringam entered into an exclusivity agreement (the "Transmedia Assignment Agreement") with

Painted Wings, assigning all rights to it to use and market her name, likeness, and "life story." (TAC, ¶ 34).

In July 2012, Truehope entered into the "Exclusivity Agreement" with the Stringams, granting them "an exclusive perpetual license to market, sell[,] or distribute [the private label Micronutrient Product] in the United States." (TAC, ¶ 42 (second alteration in original)).

The Stringams and Ms. Tarazi then entered into a series of agreements related to the sale of the Micronutrient Product. (TAC, ¶ 44). The first agreement was the "Memorandum of Understanding," entered into by Ms. Tarazi and her company -- Micronutrient Solutions -- and the Stringams and their company -- Open Mind. (TAC, ¶ 45). The Memorandum of Understanding outlined the "division of labor between the parties"; it also stated that Mr. Stringam and Open Mind had "all the necessary authorization from Truehope empowering [them] to re-assign the [Exclusivity Agreement]." (TAC, ¶ 47 (alterations in original)). It further stated that the parties would sell the product under Micronutrient Solutions' brand name for the fifteen-year term of the Exclusivity Agreement. (TAC, ¶ 46).

The next agreement was the "Micronutrient Assignment Agreement" between the Stringams and Micronutrient Solutions, whereby the Stringams assigned their rights in the Exclusivity Agreement to Micronutrient Solutions. (TAC, ¶ 48).

Next, Ms. Tarazi, Micronutrient Solutions, Mr. Stringam, and Open Mind entered into the "Letter Agreement," which annexed the Exclusivity Agreement, Memorandum of Understanding, and Micronutrient Assignment Agreement. (TAC, ¶ 49). It stated that Mr. Stringam and Open Mind had obtained authorization from Truehope to re-assign the Exclusivity Agreement. (TAC, ¶ 49).

The final agreement was the "Endorsement Agreement" entered into by Ms. Tarazi, Ms. Stringam, Micronutrient Solutions, and Painted Wings. Ms. Stringam agreed to endorse Micronutrient Solutions products, and Ms. Stringam would receive compensation from the products sold by Micronutrient Solutions. (TAC, ¶ 50).

The plaintiffs allege that Truehope and Mr. Stephan were aware of the Joint Venture, and they assert that representatives of Truehope told Ms. Tarazi that they knew of her partnership with the Stringams. (TAC, ¶¶ 51, 56). Additionally, Truehope generated a purchase order instructing its manufacturer to provide Micronutrient Solutions with one thousand bottles of the Micronutrient Product with labels provided by Micronutrient Solutions; Truehope then had the order shipped to Micronutrient Solutions' warehouse. (TAC, ¶ 57).

After the agreements were entered, Micronutrient Solutions and Ms. Tarazi began preparing to market and sell the Micronutrient Product and publicly launch the Joint Venture. (TAC, ¶¶ 67, 69). But on December 6, 2012, Mr. Stephan informed the Stringams that

Truehope had instead entered into an agreement with Q Sciences, a third-party, to market and sell the Micronutrient Product in the United States. (TAC, ¶ 69). Nonetheless, the Stringams reassured Ms. Tarazi in December 2012 that they were committed to the Joint Venture. (TAC, ¶ 77). However, the plaintiffs claim that, at this time, Q Sciences and Truehope "offered the Stringams lucrative financial rewards if the Stringams disregarded their . . . [other] obligations." (TAC, ¶ 80). Around December 17, 2012, the Stringams began promoting the product with Q Sciences. (TAC, ¶¶ 80, 83).

Q Sciences then "misappropriat[ed] business plans developed by Tarazi for the Joint Venture," and Q Science took control of websites that had been operated by the Joint Venture. (TAC, ¶¶ 106-108). Since at least January 2013, the Stringams ceased working with the Joint Venture, failed to comply with the agreements, and worked for Q Sciences instead. (TAC, ¶¶ 95, 103-104). As a result, Painted Wings and the Joint Venture were unable to succeed. (TAC, ¶ 40).

B. Procedural History

In January 2013, Truehope filed suit in Alberta, Canada, against Ms. Tarazi, Micronutrient Solutions, the Stringams, and Open Mind, seeking to invalidate the Micronutrient Assignment Agreement on the ground that the Exclusivity Agreement was not assignable without Truehope's consent. Tarazi, 958 F. Supp. 2d at

431. Ms. Tarazi and Micronutrient Solutions then filed the Tarazi v. Truehope Inc. action, No. 13 Civ. 1024, against the defendants in February 2013, which I stayed in July 2013 pending the resolution of the Canadian case. Tarazi, 958 F. Supp. 2d at 438-39.

In June 2014, the Honorable Mr. Justice D.K. Miller of the Court of Queen's Bench of Alberta ruled that the Stringams did not have the right to assign the Exclusivity Agreement without Truehope's consent, concluding that the Micronutrient Assignment Agreement was therefore void. Truehope Inc. v. Stringam, 2014 ABQB 386, ¶¶ 25, 39 (Can.). The court further noted that Truehope, Ms. Tarazi, and Micronutrient Solutions had agreed that all issues other than the "assignability of the [Exclusivity Agreement] and whether it had been assigned . . . could be determined in the United States action," and therefore any issues remaining between the parties could be determined in New York. Id., ¶¶ 40-41.

In February 2015, Ms. Tarazi filed the Second Amended Complaint in the Tarazi v. Truehope Inc. action. She also initiated Tarazi v. Quintessential Biosciences, LLC, No. 15 Civ. 1038, later in February, which was stayed. The defendants then moved to dismiss most of the claims in the former action. In July 2015, I recommended that the motions be granted in part and denied in part. The Honorable Lewis A. Kaplan, U.S.D.J., substantially adopted my recommendations but allowed the plaintiffs leave to replead many of the claims.

The two federal actions were consolidated in January 2016. The plaintiffs then filed the Consolidated and Third Amended Complaint, which is the subject of the defendants' motions to dismiss. Open Mind and the Stringams move together to dismiss three claims: the breach of a joint venture agreement claim brought against the Stringams, the derivative claim for breach of fiduciary duties against Ms. Stringam, and the derivative claim for breach of the Transmedia Assignment Agreement against Ms. Stringam. Q Sciences also moves to dismiss three claims against it: an unjust enrichment claim, a derivative claim for tortious interference with contact, and a derivative claim for aiding and abetting Ms. Stringam's breach of fiduciary duties. Truehope moves to dismiss all claims against it, including derivative claims.

Discussion

A. Legal Standard

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). A court's charge in ruling on a 12(b)(6) motion "is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." GVA Market Neutral Master Ltd. v. Veras Capital Partners Offshore Fund, Ltd., 580 F. Supp. 2d 321, 327 (S.D.N.Y. 2008) (quoting Eternity Global Master Fund Ltd. v. Morgan Guaranty Trust Co. of New York, 375 F.3d 168, 176 (2d Cir. 2004)). A court must construe the complaint in the light most favorable to the plaintiff, "taking its factual allegations to be true and drawing all reasonable inferences in the plaintiff's favor." Harris v. Mills, 572 F.3d 66, 71 (2d Cir. 2009).

B. Choice of Law

When a federal court sits in diversity, it applies the choice of law rules of the forum state, which in this action is New York. See Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, 496 (1941). In this case, all parties' briefs "assume that New York substantive law governs the issues . . . presented here, and such implied consent is, of course, sufficient to establish the applicable choice of law." Arch Insurance Co. v. Precision Stone, Inc., 584 F.3d 33, 39 (2d Cir. 2009) (alteration in original) (quoting Golden Pacific Bancorp v. FDIC, 273 F.3d 509, 514 n.4 (2d Cir. 2000)); see In re Parmalat Securities Litigation, 479 F. Supp. 2d 332, 342 n.56 (S.D.N.Y. 2007) (where neither party submits evidence on foreign law, court may presume it is equivalent to local law). Accordingly, I will apply New York substantive law.

C. Exceeding Leave to Amend

Judge Kaplan granted the plaintiffs only limited leave to amend their complaint. (Order dated Aug. 25, 2016, at 2; Order dated Aug. 30, 2016 ("8/30/16 Order"), at 5; Orders dated Dec. 6, 2016). The Court did not grant the plaintiffs blanket leave to add new claims. The plaintiffs' TAC, however, alleges several derivative claims by Painted Wings against Ms. Stringam, Truehope, and Mr. Stephan that were not alleged in previous iterations of the complaint. (TAC, ¶¶ 143-149, 156-162, 218-235). Accordingly, there would be adequate basis to dismiss these new claims on the ground that the plaintiffs have not been granted permission to add them. See Palm Beach Strategic Income, LP v. Salzman, 457 F. App'x 40, 43 (2d Cir. 2012); Ong v. Park Manor (Middletown Park) Rehabilitation and Healthcare Center, No. 12 Civ. 974, 2015 WL 5729969, at *22 (S.D.N.Y. Sept. 30, 2015); Pagan v. New York State Division of Parole, No. 98 Civ. 5840, 2002 WL 398682, at *3 (S.D.N.Y. March 13, 2002); Kuntz v. New York State Board of Elections, 924 F. Supp. 364, 367 (N.D.N.Y. 1996), aff'd sub nom. Kuntz v. New York State Senate, 113 F.3d 326 (2d Cir. 1997).

With respect to the derivative claims against Truehope, the plaintiffs argue that even though they did not have permission, the claims may be added as of right. (Plaintiffs' Memorandum of Law in Opposition to Truehope's Motion to Dismiss the Third Amended Complaint ("Pl. Opp. to Truehope") at 18-19). They assert that because no answer has been filed in the Tarazi v. Quintessential Biosciences, LLC, action, the plaintiffs may amend as of right and bring the derivative claims there. This argument fails for two reasons. First, according to the caption of the TAC, the plaintiffs are asserting the derivative claims in the Tarazi v. Truehope Inc. action. While the plaintiffs contend that this was "a technical error, for which Plaintiffs should be granted leave to correct" (Pl. Opp. to Truehope at 19 n.14 (citing cases)), there is no indication from the TAC that the plaintiffs intended to bring the derivative claims in the Q Sciences action.

Even if the Court were to adopt this reasoning, the plaintiffs' argument fails because parties may not be added as of right in the Q Sciences action. A party may amend as of right only (1) twenty-one days after serving a pleading or (2) "if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1)(A)-(B). Neither prerequisite has been satisfied here.

While the derivative claims against Ms. Stringam, Truehope, and Mr. Stephan could simply be dismissed for exceeding the scope to replead, see Ong, 2015 WL 5729969, at *22, the standard for granting motions to amend is generous, see Fed. R. Civ. P. 15(a)(2); in an effort to advance this litigation, I will therefore proceed on these claims as if the plaintiffs had been given leave to amend, see Vitale v. Marlborough Gallery, No. 93 Civ. 6276, 1994 WL 654494, at *1 n.1 (S.D.N.Y. July 5, 1994); First Marine Shipyard, Inc. v. Harbor Insurance Co., No. 86 CV 2005, 1987 WL 27003, at *1 (E.D.N.Y. Nov. 25, 1987).

D. Claim for Breach of the Joint Venture Agreement

The TAC alleges a claim against the Stringams for breaching the Joint Venture Agreement. This claim was previously dismissed sua sponte for failure to adequately plead a breach of contract claim. The Second Amended Complaint had failed to identify clearly what specific provisions of the contract were breached. (Report and Recommendation dated July 1, 2015 ("7/1/15 R&R") at 14-16). The Stringams argue that the TAC fails to rectify those shortcomings. (Memorandum of Law in Support of Defendants Open Mind Consulting, Inc., Dana Ray Stringam, and Autumn Stringam's Motion to Dismiss Plaintiff's First, Fifth, and Seventh Causes of Action in Plaintiffs' Consolidated and Third Amended Complaint ("Open Mind Memo.") at 6-7).

Under New York law, a breach of contract claim is established by showing (1) the existence of a contract, (2) performance of the contract by one party, (3) breach by the other party, and (4) damages suffered as a result of the breach. Turner v. Temptu Inc., 586 F. App'x 718, 720 (2d Cir. 2014); First Investors Corp. v. Liberty Mutual Insurance Co., 152 F.3d 162, 168 (2d Cir. 1998).

"To establish the existence of an enforceable agreement, the plaintiff must demonstrate 'an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound.'" Allison v. Clos-ette Too, L.L.C., No. 14 Civ. 1618, 2015 WL 9591500, at *5 (S.D.N.Y. April 20, 2015) (quoting Beautiful Jewelers Private Ltd. v. Tiffany & Co., 438 F. App'x 20, 22 (2d Cir. 2011)). The plaintiff must also allege the "essential terms of the parties' purported contract in nonconclusory language, including the specific provisions of the contract upon which liability is predicated," and must "clearly identify which contract provisions were breached as a result of the defendant's conduct." Broughel v. Battery Conservancy, No. 07 Civ. 7755, 2009 WL 928280, at *5 (S.D.N.Y. March 30, 2009).

The plaintiffs' allegations in the TAC satisfy the first element, specifically alleging the terms of the Joint Venture Agreement. Ms. Stringam agreed to

> contribute the rights to her life story, including the exclusive rights to her book, to the Joint Venture, and to continue to expand upon it by creating educational and advertising content for the Micronutrient Product and other supplements for mental health, through a variety of public speaking events, including on TV and radio, and by creating regular content for the Joint Venture's websites and social media . . . .

(TAC, ¶ 22). Mr. Stringam committed to "contribute his operations skills and knowledge of the Micronutrient Product, and the operations of a micronutrient business, to the Joint Venture; among other contributions, for example, he agreed to set up all aspects of the supply-chain, such as label printing and manufacturing, to fulfillment and customer follow-up and education." (TAC, ¶ 22). The TAC further alleges that "Dana and Autumn Stringam also agreed to secure the best price and exclusive rights to market the Micronutrient Product in the United States from Autumn's father, Anthony Stephan, and to assign any such rights to the Joint Venture." (TAC, ¶ 24). As for Ms. Tarazi's role, she agreed to

> contribute her marketing and business skills and make certain capital contributions to the Joint Venture; among other contributions, for example, she agreed to develop a business plan, financial model, brand strategy[,] and marketing plan, assemble and retain a team of developers and designers to promote the Joint Venture, oversee the building of websites for the Joint Venture, contribute initial capital, source additional sources of capital, and negotiate with third-party suppliers for supplement products;

(TAC, ¶ 22).

The second requirement is also met. The TAC alleges that Ms. Tarazi partly performed on the agreement when she "invested significant financial resources in the Joint Venture." (TAC, ¶ 28). She also

> lent the Joint Venture a large injection of capital to cover all startup operating expenses; purchased a number of URLs, for promotional and protective purposes; purchased inventory of two support supplements that the Joint Venture would sell; [and] paid designers and developers to create logos, artwork and interactive features for both the Transmedia Project and the private label business . . . .

(TAC, ¶ 63). Ms. Tarazi -- along with designers and developers that she hired -- created websites and social media webpages for the venture. (TAC, ¶ 35, 37). Ms. Tarazi also "developed a brand strategy and started implementing a comprehensive marketing plan to promote Autumn's story and the benefits of micronutrients." (TAC, ¶ 37). The complaint alleges that she

> built financial projections, inventory spreadsheets and internal databases; hired designers and developers; purchased and built a website to sell the private label products; researched scientific papers and FDA guidelines concerning the sale of supplement products; interviewed financial and legal advisors; developed daily agendas to keep the team on track through daily meetings and an internal database; and developed comprehensive marketing campaigns to tie the Transmedia Project to the Micronutrient Product and other private label products.

(TAC, ¶ 62). These allegations sufficiently demonstrate Ms. Tarazi's performance.

The plaintiffs have also adequately pled breach by the Stringams. Ms. Stringam allegedly (1) did not develop videos or online content for the venture, (2) promoted a competitor's product, including by using her "life story," (3) stopped creating material for the Joint Venture, and (4) did not obtain the exclusive rights to the Micronutrient Product for the venture. (TAC, ¶¶ 94-95, 97, 99, 120, 128). Mr. Stringam (1) did not set up the supply chain for the product and (2) failed to obtain the exclusive rights to the product. (TAC, ¶¶ 86, 120).

Finally, the TAC pleads damages, stating that the Stringams' promotion and selling of Q Sciences product caused Ms. Tarazi damages "in an amount to be determined at trial, but no less than $2 million." (TAC, ¶¶ 88, 129); see Pu v. Russell Publishing Group, Ltd., __ F. App'x __, __, 2017 WL 1103436, at *1 (2d Cir. 2017) (plaintiff must "allege facts showing that the complained-of activity caused him damages"); Samsung Display Co. v. Acacia Research Corp., No. 14 Civ. 1353, 2014 WL 6791603, at *3 (S.D.N.Y. Dec. 3, 2014) ("The fact that [the plaintiff's] damages are 'difficult to ascertain' does not strip its claim of plausibility."); Hard Rock Café International, (USA), Inc. v. Hard Rock Hotel Holdings, LLC, 808 F. Supp. 2d 552, 567 (S.D.N.Y. 2011). Therefore, I recommend denying Open Mind's and the Stringams' motion to dismiss the breach of a joint venture agreement claim.[1]

E. Derivative Claim for Breach of Assignment Agreement

Ms. Tarazi, derivatively on behalf of Painted Wings, alleges

[1] The Stringams also argue that the claim must fail because there was no provision for the sharing of joint venture losses. (Open Mind Memo. at 6-7). To be sure, in order to establish the existence of a joint venture and a claim for an accounting, a party must evidence a provision for the sharing of both profits and losses. See Snider v. Lugli, No. 10 CV 4026, 2013 WL 888485, at *4 (E.D.N.Y. March 7, 2013). However, the plaintiffs' claim here is a contract claim for breach of the Joint Venture agreement (whether or not it actually established a joint venture), not for an accounting arising out of a joint venture; therefore, there is no need to show a provision to share losses and profits. See id. at *6. Even if the plaintiffs were required to show that element, the complaint satisfactorily alleges the sharing of both profits and losses. (TAC, ¶ 25; 8/30/16 Order at 1).

that Ms. Stringam breached the Transmedia Assignment Agreement when Ms. Stringam promoted products on behalf of Q Sciences. (TAC, ¶¶ 143-49). The defendants assert that the claim should be dismissed in favor of arbitration because Painted Wings' operating agreement[2] contains an arbitration clause; alternatively, they argue that the claim should be dismissed because the plaintiffs have failed to properly plead demand futility. (Open Mind Memo. at 7-9).

1. Dismissal in Favor of Arbitration

The Stringams have moved to dismiss in favor of arbitration but have not moved to compel arbitration. (Open Mind Memo. at 7 ("Dismissal of this cause of action is warranted by the arbitration provision in the Painted Wings Operating Agreement.")). The first issue, then, is whether the standard for a motion to dismiss controls or if the standard for a motion to compel arbitration guides this inquiry. While a district court may treat a motion to dismiss as a motion to compel arbitration where the party implicitly or explicitly requests arbitration, it is not required to do so when the party seeking to dismiss does not request that the court compel arbitration. See Nicosia, 834 F.3d at 230

[2] While only the complaint is usually considered on a motion to dismiss, the operating agreement here is "attached to [the complaint] as an exhibit [and] incorporated in it by reference." Nicosia v. Amazon.com, Inc., 834 F.3d 220, 230 (2d Cir. 2016) (quoting Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002)).

("[B]ecause Amazon's motion to dismiss neither sought an order compelling arbitration nor indicated that Amazon would seek to force Nicosia to arbitrate in the future, it was proper not to construe the motion to dismiss as a motion to compel arbitration, to which the summary judgment standard would apply."). Because Open Mind and the Stringams have only requested dismissal and have not implicitly requested arbitration (Open Mind Memo. at 7-9), I will treat this request as a motion to dismiss and apply the corresponding standards. See Nicosia, 834 F.3d at 230.

The Federal Arbitration Act (the "FAA") provides that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of [the] contract . . . shall be valid, irrevocable, and enforceable."[3] 9 U.S.C. § 2. "In deciding whether a dispute is arbitrable, [the court] must answer two questions: (1) whether the parties agreed to arbitrate, and, if so, (2) whether the scope of that agreement encompasses the claims at issue." Holick v. Cellular Sales of New York, LLC, 802 F.3d 391, 394 (2d Cir. 2015) (quoting Bank Julius Baer & Co. v. Waxfield Ltd., 424 F.3d 278, 281 (2d Cir. 2005)). The question of whether the parties agreed to arbitrate is controlled by state law contract principles. Applied Energetics, Inc. v. Newoak Capital Markets,

[3] The parties do not dispute that the transaction involved interstate commerce.

LLC, 645 F.3d 522, 526 (2d Cir. 2011). As for the second inquiry, there is a "strong federal policy in favor of arbitration," and "the existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Holick, 802 F.3d at 395 (quoting Smith/Enron Cogeneration Ltd. Partnership, Inc. v. Smith Cogeneration International, Inc., 198 F.3d 88, 99 (2d Cir. 1999)).

The plaintiffs contend that Painted Wings -- the holder of the derivative claim -- is not bound to the operating agreement's arbitration clause because Painted Wings did not sign the agreement. (Plaintiffs' Memorandum of Law in Opposition to Defendants Open Mind Consulting, Inc., Dana Ray Stringam and Autumn Stringam's Motion to Dismiss the Plaintiffs' First, Fifth and Seventh Causes of Action ("Pl. Opp. to Open Mind") at 5-6). According to New York law on limited liability entities, an LLC's operating agreement is primarily an agreement between its members, and the entity upon whose behalf it is created is not required to assent to it. N.Y. Ltd. Liab. Co. Law § 417(a) ("[T]he members of a limited liability company shall adopt a written operating agreement . . . ."). Furthermore, the plaintiffs are correct that Painted Wings is not a signatory to its operating agreement.

(Operating Agreement of Painted Wings Media, LLC ("Operating Agreement"), attached as Exh. A to TAC, at 15). It seems then that Painted Wings has not expressly "agreed to arbitrate." See Cordts-Auth v. Crunk, LLC, 815 F. Supp. 2d 778, 798 (S.D.N.Y. 2011) (holding that LLC was not party to its own operating agreement because operating agreement was "means by which [LLC] was created").

Nonetheless, Painted Wings may still be bound by estoppel. When a party is not a signatory to an arbitration agreement, that party may still be compelled to arbitrate under a theory of estoppel. See Thomson-CSF, S.A. v. American Arbitration Association, 64 F.3d 773, 776 (2d Cir. 1995). "Guided by '[o]rdinary principles of contract and agency,' [the Second Circuit has] concluded that where a company 'knowingly accepted the benefits' of an agreement with an arbitration clause, even without signing the agreement, that company may be bound by the arbitration clause." MAG Portfolio Consultant, GMBH v. Merlin Biomed Group LLC, 268 F.3d 58, 61 (2d Cir. 2001) (first alteration in original) (quoting Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S., 9 F.3d 1060, 1064 (2d Cir. 1993)). "The benefits must be direct -- which is to say, flowing directly from the agreement." Id.

Painted Wings is surely "exploiting" the benefits from its operating agreement. The agreement (1) defines the business purpose of the company (Operating Agreement, ¶ 4), (2) requires capital contributions to the company (Operating Agreement, ¶ 5), (3) controls distribution of cash flow and assets (Operating Agreement, ¶ 6), creates duties of the members to the company (Operating Agreement, ¶ 8), and provides for recordkeeping and bank accounts (Operating Agreement, ¶ 11). Painted Wings has accepted those benefits: (1) initial capital contributions have been made to Painted Wings (Operating Agreement at 16); (2) Ms. Tarazi has worked on behalf of Painted Wings, including by creating media for it (TAC, ¶¶ 37-40, 121); (3) Painted Wings has signed contracts (TAC, ¶¶ 34, 50); and (4) it has an accountant and must file tax returns (TAC, ¶¶ 123-124). Furthermore, Painted Wings has asserted claims for breach of fiduciary duties owed to it, and the operating agreement defines some of those duties. (Operating Agreement, ¶¶ 4, 8). Additionally, New York limited liability law, while not requiring the company to sign the operating agreement, provides that the agreement may bind the company and set forth "(i) the business of the limited liability company, (ii) the conduct of its affairs and (iii) the rights, powers, preferences, limitations or responsibilities of its members, managers, employees or agents, as the case may be." N.Y. Ltd. Liab. Co. Law § 417(a). Therefore, Painted Wings has assented to the arbitration provision.

The second prong of the arbitration test is also satisfied here. To determine whether a particular dispute falls within the scope of an arbitration clause, a court must decide whether the arbitration clause at issue is broad or narrow. Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001). The court must also decide whether the issue to be arbitrated "is on its face within the purview of the clause" or if the issue is instead collateral to the agreement containing the arbitration clause. Id. (quoting Rochdale Village, Inc. v. Public Service Employees Union, 605 F.2d 1290, 1295 (2d Cir. 1979)). If the clause is narrow and the issue collateral, then the matter is generally ruled beyond the purview of the clause. Id. If the clause is broad, arbitration is presumed even if the matter is collateral when the collateral matter "implicates issues of contract construction or the parties' rights and obligations under [the agreement containing the arbitration clause]." Id. (quoting Collins & Aikman Products Co. v. Building Systems, Inc., 58 F.3d 16, 23 (2d Cir. 1995)).

The arbitration clause at issue is clearly broad, stating, "Any dispute arising under, out of, in connection with, or in relation to this Agreement, or the making or validity thereof, or its interpretation or any breach thereof, shall be determined and settled by arbitration." (Operating Agreement, ¶ 22); see JLM Industries, Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 172 (2d Cir. 2004) ("[T]he arbitration clause at issue in this case provides that '[a]ny and all differences and disputes of whatsoever nature arising out of this Charter' are subject to arbitration. This language is at least as expansive as the language contained in a number of arbitration clauses that this Court has characterized as 'broad.'" (second alteration in original)).

The Transmedia Assignment Agreement, the subject of this claim, is collateral to the operating agreement. See Louis Dreyfus Negoce, 252 F.3d at 228 ("[The plaintiff's] claim for indemnification under the letters of indemnity is not brought directly under the charter agreement, but is made under a collateral agreement. We have explained that for purposes of arbitration, a collateral agreement is 'a separate, side agreement, connected with the principal contract which contains the arbitration clause.'" (quoting Prudential Lines, Inc. v. Exxon Corp., 704 F.2d 59, 64 (2d Cir. 1983))). Nonetheless, the Transmedia Assignment Agreement implicates "the parties' rights and obligations" under the operating agreement. Id. at 224. The operating agreement states that the business of the LLC is to, among other things, launch "Transmedia Projects" and promote Ms. Stringam's "life story." (Operating Agreement, ¶ 4). The assignment agreement granted Painted Wings the rights to her life story, which Ms. Stringam breached when she began promoting with a competitor. (TAC, ¶ 144). Therefore, I recommend that this claim be dismissed in favor of arbitration.

2. Demand Futility

Open Mind and the Stringams argue that the derivative claim for breach of the Transmedia Assignment Agreement also fails because Ms. Tarazi never made a demand on Painted Wings to initiate an action for breach. (Open Mind Memo. at 8-9). Ms. Tarazi admits to not making a demand but contends that any demand would have been futile because Ms. Stringam -- who jointly owns Painted Wings -- would presumably refuse to consent to a suit. (Pl. Opp. to Open Mind at 6; Pl. Opp. to Truehope at 21-23). Open Mind and the Stringams assert that demand would not have been futile because, under the terms of the operating agreement, Ms. Tarazi's business decisions are final in the event of a disagreement between the two and therefore Ms. Tarazi could have unilaterally initiated a suit by Painted Wings directly. (Open Mind Memo. at 8-9).

Generally, to bring a derivative claim, a plaintiff must meet the "demand requirement," which requires that the complaint "allege the efforts of the plaintiff to secure the initiation of [the desired] action or the reasons for not making such effort." Cordts-Auth, 815 F. Supp. 2d at 792 (alteration in original) (quoting Tzolis v. Wolff, 10 N.Y.3d 100, 109, 855 N.Y.S.2d 6, 11 (2008)). A plaintiff need not meet this requirement if demand would be futile. Demand is futile "if a complaint alleges with particularity that (1) a majority of the directors are interested in the transaction, or (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction." Cordts-Auth, 815 F. Supp. 2d at 796 (alteration in original) (quoting Marx v. Akers, 88 N.Y.2d 189, 198, 644 N.Y.S.2d 121, 126 (1996)).

New York case law on the issue of evenly split boards -- when there is no majority -- is thin, and the Court of Appeals has not addressed the issue. Thus, I must "undertake the imprecise but necessary task of predicting" how the Court of Appeals would rule on this issue. DiBella v. Hopkins, 403 F.3d 102, 111-12 (2d Cir. 2005). Doing so requires some exploration behind the reasons for the futility exception. The exceptions to demand were created from the premise that shareholders should be able to bring a lawsuit when "the alleged wrongdoers control or comprise a majority of the directors." Barr v. Wackman, 36 N.Y.2d 371, 379, 368 N.Y.S.2d 497, 505 (1975). In Barr, the New York Court of Appeals stated,

> [I]f it appeared that the directors of the corporation refused to prosecute by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation was still under the control of those who must be made the defendants in the suit, the stockholders, who are the real parties in interest, would be permitted to file a bill in their own names, making the corporation a party defendant.

Id. at 378-79, 368 N.Y.S.2d at 505 (quoting Robinson v. Smith, 3 Paige Ch. 222, 233, 3 N.Y. Ch. Ann. 126 (N.Y. Ch. 1832)). The

Court of Appeals, then, is chiefly concerned with enabling shareholders to sue when demand would be truly hopeless; that is, when the board is controlled by the "wrongdoers."

Cases applying Delaware law generally hold that if a board is deadlocked, then demand is futile. See, e.g., Transeo S.A.R.L. v. Bessemer Venture Partners VI L.P., 936 F. Supp. 2d 376, 398 (S.D.N.Y. 2013) ("As Plaintiffs have pleaded particularized facts plausibly raising doubts as to the independence of half of the [board] at this stage -- in other words, facts rendering it plausible that a [board] . . . would not vote to sue . . . themselves -- Plaintiffs' demand on the [board] is thus excused."). However, other decisions have determined that under Delaware law "half of an even-numbered board is sufficient for demand futility purposes [] unless 'Defendants in a particular case . . . argue that less than a board majority can cause the corporation to accept demand.'" Kernaghan v. Franklin, No. 06 Civ. 1533, 2008 WL 4450268, at *4 n.4 (S.D.N.Y. Sept. 29, 2008) (alteration in original) (quoting Beneville v. York, 769 A.2d 80, 87 (Del. Ch. 2000)).

Painted Wings' board is not controlled by the wrongdoer. While Ms. Tarazi and Ms. Stringam each own fifty percent of Painted Wings, Ms. Tarazi has the power to make all final business decisions in the event of a dispute. (Operating Agreement, ¶ 8(b) ("All decisions regarding the Company shall be made jointly and shall require the mutual participation and approval of each of Tarazi and Stringam; provided, however, that (i) except solely as set forth in clause (ii) below, in the event of disagreement regarding any creative, business and/or financial decisions concerning the Company or any projects developed by the Company, Tarazi's decision shall be final and binding . . . ."). "Whether a corporation should bring a lawsuit is a business decision . . . ." RCM Securities Fund, Inc. v. Stanton, 928 F.2d 1318, 1326 (2d Cir. 1991). Ms. Tarazi therefore could have compelled Painted Wings to initiate a lawsuit against Ms. Stringam, overriding any objection. Thus, there would have been no deadlock. Ms. Tarazi has failed to show that demand would have been futile, and this derivative claim should be dismissed.

F. Derivative Claim for Breach of Fiduciary Duties

1. Whether the Claim is Duplicative

Ms. Stringam argues that the derivative claim against her for allegedly breaching fiduciary duties owed to Painted Wings is duplicative of the derivative claim for breach of the Transmedia Assignment Agreement and should therefore be dismissed. (Open Mind Memo. at 10).

A court may grant a motion to dismiss a breach of fiduciary duty claim if it is based on the same allegations as a breach of contract claim. Atlantis Information Technology, GmbH v. CA, Inc., 485 F. Supp. 2d 224, 232 (E.D.N.Y. 2007); William Kaufman

Organization, Ltd. v. Graham & James LLP, 269 A.D.2d 171, 173, 703 N.Y.S.2d 439, 442 (1st Dep’t 2000). Thus, a plaintiff may not maintain both a contract claim and a breach of fiduciary duty claim without “allegations that, apart from the terms of the contract, the parties created a relationship of higher trust than would arise from their contracts alone, so as to permit a cause of action for breach of a fiduciary duty independent of the contractual duties.” Balta v. Ayco Co., 626 F. Supp. 2d 347, 360-61 (W.D.N.Y. 2009) (quoting Brooks v. Key Trust Co. National Association, 26 A.D.3d 628, 630, 809 N.Y.S.2d 270, 272-73 (3d Dep’t 2006)).

The contract claim is primarily founded on Ms. Stringam’s assignment of “the rights to her life story” to Painted Wings and her subsequent breach when she began promoting her experiences with Q Sciences. (TAC, ¶ 144). While the breach of fiduciary duties claim is similar to the breach of contract claim (TAC, ¶ 157 (“Autumn Stringam has abandoned her duties entirely to Painted Wings, including by frustrating the intended purpose of Painted Wings by using her image and life story to promote products sold by Q Sciences without the involvement of Painted Wings . . . .”)), the fiduciary duties claim is somewhat broader, and includes allegations of breaching “confidentiality obligations,” failing to provide information for Painted Wings’ tax returns, and providing a competitor access to Painted Wings’ marketing material (TAC, ¶¶

108, 124). Therefore, this claim should not be dismissed as duplicative.

2. Statute of Limitations

Open Mind and the Stringams further assert that this claim is time-barred because more than three years have passed since Ms. Stringam's breach. (Open Mind Memo. at 10-11). The plaintiffs do not contest that the statute of limitations is three years for this claim, instead relying on continuing violation and relation back theories. (Pl. Opp. to Open Mind at 6).

a. Continuing Violation Doctrine

The continuing violation doctrine, if applicable, provides an exception to the normal claim accrual date. Gonzalez v. Hasty, 802 F.3d 212, 220 (2d Cir. 2015). It applies only to claims "composed of a series of separate acts that collectively constitute one unlawful [] practice." Id. (alteration in original) (quoting Washington v. County of Rockland, 373 F.3d 310, 318 (2d Cir. 2004)). "The continuing violation doctrine thus applies not to discrete unlawful acts, even where those discrete acts are part of a 'serial violation[],' but to claims that by their nature accrue only after the plaintiff has been subjected to some threshold amount of mistreatment." Id. (alteration in original) (quoting National Railroad Passenger Corp. v. Morgan, 536 U.S. 101, 114–15 (2002)).

The claim here cannot be properly characterized as a continuing violation. A breach of fiduciary duties claim may sometimes be characterized as a continuing wrong if the wrong is of the same character, repeated "over and over," for example, a recurring imprudent investment marked by repeated imprudent decision-making. L.I. Head Start Child Development Services, Inc. v. Economic Opportunity Commission of Nassau County, 558 F. Supp. 2d 378, 400-401 (E.D.N.Y. 2008). "Ordinarily, a tort claim for a breach of fiduciary duty accrues on the date the fiduciary breaches his duty." St. John's University, New York v. Bolton, 757 F. Supp. 2d 144, 169 (E.D.N.Y. 2010). Furthermore, while a breach of fiduciary duty may be tolled during the duration of the fiduciary relationship, tolling ends "when the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated." Id. (quoting Golden Pacific Bancorp v. FDIC, 273 F.3d 509, 518 (2d Cir. 2001)). The TAC alleges that "[s]ince December 2012, [] Autumn abandoned all of her duties to Painted Wings." (TAC, ¶ 121). There is no indication of repeat imprudent decision-making of the same type or character. Therefore, the continuing violation doctrine is inapplicable.

b. Relation Back

Rule 15(c) states that an amendment to the complaint relates back to the date of the original complaint for the purposes of the statute of limitations if:

> (A) the law that provides the applicable statute of limitations allows relation back;
>
> (B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out -- or attempted to be set out -- in the original pleading; or
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:
>
> > (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
> >
> > (ii) knew or should have known that the action would have been brought against it, but for a mistake concerning the proper party's identity.

Fed. R. Civ. P. 15(c)(1). Because the plaintiffs' amendment to bring derivative claims adds Painted Wings as a party, relation back can be achieved only through Rule 15(c)(1)(A) or Rule 15(c)(1)(C). See Strada v. City of New York, No. 11 CV 5735, 2014 WL 3490306, at *5, 9 (E.D.N.Y. July 11, 2014). The more generous standard will apply. Paulay v. John T Mather Memorial Hospital, No. 14 CV 5613, 2016 WL 1445384, at *5 (E.D.N.Y. March 14, 2016).

i. Rule 15(c)(1)(C)

Because the amendment seeks to add a plaintiff, not a defendant, the applicability of Rule 15(c)(1) is not readily apparent since the Rule does not specifically provide for the addition of plaintiffs. Many courts in this circuit have held that all the elements of Rule 15(c)(1)(C) must be satisfied for a new plaintiff's claim to relate back, including the requirement that the plaintiff establish mistake. See, e.g., Merryman v. J.P. Morgan Chase Bank, N.A., 319 F.R.D. 468, 472-73 (S.D.N.Y. 2017); Paulay, 2016 WL 1445384, at *3; Dial Corp. v. News Corp., No. 13 Civ. 6802, 2016 WL 690895, at *2 (S.D.N.Y. Feb. 9, 2016); Wilder v. News Corp., No. 11 Civ. 4947, 2015 WL 5853763, at *16 (S.D.N.Y. Oct. 7, 2015) (collecting cases); Charlot v. Ecolab, Inc., 97 F. Supp. 3d 40, 83 (E.D.N.Y. 2015) (collecting cases). Other courts have held that a showing of mistake is not required, primarily reasoning that Rule 15(c)(1)(C) only mentions defendants or parties against whom claims are asserted; these courts have instead applied more lenient standards. Zorrilla v. Carlson Restaurants Inc., __ F. Supp. 3d __, __, 2017 WL 2559231, at *7-8 (S.D.N.Y. 2017); Beach v. Citigroup Alternative Investments LLC, No. 12 Civ. 7717, 2014 WL 904650, at *19 (S.D.N.Y. March 7, 2014); In re South African Apartheid Litigation, 617 F. Supp. 2d 228, 290 (S.D.N.Y. 2009); In re Gilat Satellite Networks, Ltd., No. 02 Civ. 1510, 2005 WL 2277476, at *25 (E.D.N.Y. Sept. 19, 2005); In re Simon II Litigation, 211 F.R.D. 86, 145 (E.D.N.Y. 2002), order confirmed (Oct. 15, 2002), vacated & remanded on other grounds, 407 F.3d 125 (2d Cir. 2005).

The cases abandoning the mistake requirement assert that requiring a showing of mistake is not consistent with Rule 15's liberal attitude toward resolving claims on the merits. In re

South African Apartheid Litigation, 617 F. Supp. 2d at 290; In re Gilat, 2005 WL 2277476, at *26. Those cases also note that the plain text of the Rule only requires a showing of mistake when adding defendants and is silent with respect to plaintiffs.[4] Zorrilla, __ F. Supp. 3d at __, 2017 WL 2559231, at *7; In re South African Apartheid Litigation, 617 F. Supp. 2d at 290; In re Gilat, 2005 WL 2277476, at *26.

There are compelling reasons to apply the mistake requirement. The Second Circuit's opinion in Levy v. U.S. General Accounting Office, 175 F.3d 254 (2d Cir. 1999) (per curiam), makes clear that mistake must be established, affirming the district court's refusal to apply relation back because "[the plaintiff] did not seek to add the [new] plaintiffs because of a mistake, as

[4] Zorrilla ultimately applied a test endorsed in the First Circuit:

> [T]he amended complaint must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading; there must be a sufficient identity of interest between the new plaintiff, the old plaintiff, and their respective claims so that the defendants can be said to have been given fair notice of the latecomer's claim against them; and undue prejudice must be absent.

Zorrilla, __ F. Supp. 3d at __, 2017 WL 2559231, at *8 (quoting Young v. Lepone, 305 F.3d 1, 14 (1st Cir. 2002); see also In re Syntex Corp. Securities Litigation, 95 F.3d 922, 935 (9th Cir. 1996) (applying same set of factors); Sherwin Manor Nursing Center, Inc. v. McAuliffe, No. 92 C 6659, 1997 WL 367368, at *6 (N.D. Ill. June 25, 1997) (same); Page v. Pension Benefit Guaranty Corp., 130 F.R.D. 510, 513 (D.D.C. 1990) (same).

required by Fed. R. Civ. P. 15(c)(3)(B).”[5] Id. at 255; cf. Advanced Magnetics, Inc. v. Bayfront Partners, Inc., 106 F.3d 11, 19 (2d Cir. 1997) (“While Rule 15(c) is framed in terms of an amendment that would change the party ‘against’ whom a claim is asserted and of the new party’s ability to maintain a ‘defense,’ it is also applicable to a proposed change of plaintiffs.”). That conclusion is also supported by the Advisory Committee’s notes on the Rule, which state, “The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. . . . [T]he attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs.” Fed. R. Civ. P. 15 advisory committee’s note to 1966 amendment.

While the reasons to apply a more forgiving test to additions of plaintiffs are compelling, the reasons requiring a showing of mistake are more convincing. This Court is bound by the Second Circuit’s decision in Levy, which strongly suggests that a finding of mistake is required. See Wilder, 2015 WL 5853763, at *16. Additionally, the Advisory Committee’s notes, while not binding, are persuasive. Therefore, I will impose the mistake requirement.

The plaintiffs do not suggest that there was any mistake as

[5] Rule 15(c)(3)(B) was renumbered as 15(c)(1)(C)(ii) in 2007 without substantive modifications as part of the general restyling of the Rules. Merryman, 319 F.R.D. at 472 n.8.

to the identity of Painted Wings. Indeed, that argument would be absurd, given Tarazi's status as president and fifty percent shareholder of Painted Wings. (TAC, ¶ 2). Therefore, the TAC does not relate back to the date of the original complaint.

ii. Rule 15(c)(1)(A)

Rule 15(c)(1)(A) will apply if it is more "generous" to the party seeking amendment. See Paulay, 2016 WL 1445384, at *5. The parties agree that New York law provides the applicable statute of limitations (Open Mind Memo. at 10; Pl. Opp. to Open Mind at 6; Pl. Opp. to Truehope at 20), and therefore New York law on relation back guides this inquiry, see Fed. R. Civ. P. 15(c)(1)(A); Paulay, 2016 WL 1445384, at *6.

Under New York law, an amendment seeking to add a new plaintiff will relate back only if (1) the claims arise out of the same transaction or occurrence, and (2) the new plaintiff is so closely related to or united in interest with the original plaintiff such that the earlier claims put the defendant on notice of the potential for liability arising from the new claim. Paulay, 2016 WL 1445384, at *4 (quoting Fazio Masonry v. Barry, Bette & Led Duke, Inc., 23 A.D.3d 748, 749, 803 N.Y.S.2d 729, 730 (3d Dep't 2005));[6] see CPLR 203(f). Additionally, "the claim of a newly

[6] The Third Department in Fazio Masonry suggested a third requirement, that a new claim must not increase the measure of liability to which the defendants are exposed such that the new claims seek new or additional damages. See Fazio Masonry, 23

added plaintiff should only relate back to the claim of the preexisting plaintiff ‘where the substance of the claims of the newly joined plaintiff and those of [the] existing plaintiff are virtually identical.’” Fazio Masonry, 23 A.D.3d at 749, 803 N.Y.S.2d at 730 (alteration in original) (quoting Key International Manufacturing, Inc. v. Morse/Diesel, Inc., 142 A.D.2d 448, 459, 536 N.Y.S.2d 792, 798-99 (2d Dep’t 1988). The chief concern here is fairness to a defendant because a defendant ought to “be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations, and he ought not to be called on to resist a claim where the ‘evidence has been lost, memories have faded, and witnesses have disappeared.’” Duffy v. Horton Memorial Hospital, 66 N.Y.2d 473, 476, 497 N.Y.S.2d 890, 892 (1985) (quoting Flanagan v. Mount Eden General Hospital, 24 N.Y.2d 427, 429, 301 N.Y.S.2d 23, 25 (1969)).

In the Second Amended Complaint, Ms. Tarazi and Micronutrient Solutions brought a breach of fiduciary duties claim with respect to duties owed to the Joint Venture. But that is insufficient to

A.D.3d at 749, 803 N.Y.S.2d at 730. But the Court of Appeals in Loomis v. Civetta Corinno Construction Corp., 54 N.Y.2d 18, 444 N.Y.S.2d 571 (1981), suggested that a defendant’s mere exposure to greater liability is not sufficient to deny amendment. Id. at 23, 444 N.Y.S.2d at 573; see also Giambrone v. Kings Harbor Multicare Center, 104 A.D.3d 546, 548, 961 N.Y.S.2d 157, 159 (1st Dep’t 2013) (“Defendant’s exposure to greater liability does not require denial of the motion to amend.”). This precedent cautions against application of this third element, and I will not apply it here.

alert the defendants that they may have been facing a fiduciary duties claim for duties owed to Painted Wings. Nothing in the original complaints suggests that Ms. Stringam would be sued for breach of fiduciary duties owed to a corporate entity. Therefore, the breach of fiduciary duties claim does not relate back to the original complaints under either Rule 15(c)(1)(A) or Rule 15(c)(1)(C).

c. Whether the Claim is Therefore Time-Barred

"[A] defendant may raise an affirmative defense in a pre-answer Rule 12(b)(6) motion if the defense appears on the face of the complaint." Staehr v. Hartford Financial Services Group, Inc., 547 F.3d 406, 425 (2d Cir. 2008). "Timeliness is 'material when testing the sufficiency of a pleading.'" Id. (quoting Fed. R. Civ. P. 9(f)). The statute of limitations for a breach of fiduciary duties is three years, where, as here, the plaintiffs seek only a monetary remedy. IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 139, 879 N.Y.S.2d 355, 359 (2009).

> The claim accrues as soon as "the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint." As with other torts in which damage is an essential element, the claim "is not enforceable until damages are sustained." To determine timeliness, we consider whether plaintiff's complaint must, as a matter of law, be read to allege damages suffered so early as to render the claim time-barred.

Id. at 140, 879 N.Y.S.2d at 360 (internal citations omitted) (quoting Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90, 94, 595 N.Y.S.2d

931, 934 (1993)). The plaintiffs first suffered loss from the alleged breach around December 2012. (TAC, ¶¶ 83, 157). There is nothing in the TAC suggesting that a claim against Ms. Stringam for breach of fiduciary duties would otherwise be timely. While the TAC alleges that “Dana and Autumn Stringam continue to work in concert with Truehope and Q Sciences to sell the Micronutrient Product” and “the Stringams’ breaches are ongoing” (TAC, ¶ 88), these allegations are too conclusory to stand on their own and do not make the 2012 claim timely. Therefore, I recommend that the breach of fiduciary duties claim against Ms. Stringam be dismissed as untimely.

3. Dismissal in Favor of Arbitration

Open Mind and the Stringams also move to dismiss the derivative claim for breach of fiduciary duty in favor of arbitration. (Open Mind Memo. at 9). I have already determined that Painted Wings is bound to the arbitration agreement contained in the operating agreement. I further find, as above, that the derivative breach of fiduciary duty claim falls within the operating agreement’s arbitration clause because it sufficiently implicates the parties’ rights and obligations under the operating agreement. Regarding the breach of fiduciary duties claim, the TAC alleges, “Autumn Stringam has abandoned her duties entirely to Painted Wings, including by frustrating the intended purpose of Painted Wings by using her image and life story to promote products sold by Q Sciences without the involvement of Painted Wings or any benefit flowing to Painted Wings." (TAC, ¶ 157). These allegations implicate issues of the parties' obligations under the operating agreement's intended business purpose, which includes Ms. Stringam's duty to "sell[] and market[] products related to [her] life story." (Operating Agreement, ¶ 4). Therefore, this claim too should be dismissed in favor of arbitration.

4. Demand Futility

As I have already determined, demand would not have been futile in this case because Ms. Tarazi controls whether Painted Wings initiates a lawsuit. Therefore, this claim should be dismissed for failure to make a demand on Painted Wings.

G. Derivative Claims Against Q Sciences

Ms. Tarazi brings two derivative claims against Q Sciences, one for aiding Ms. Stringam's breach of fiduciary duties owed to Painted Wings and the other for tortious interference with contract. (TAC, ¶¶ 174-82, 193-201). Q Sciences argues that these claims fail because Ms. Tarazi did not make a demand on Painted Wings. (Memorandum Of Law of Defendant Quintessential Biosciences, LLC dba Q Sciences in Support of Its Motion to Dismiss the Tenth, Thirteenth, and Seventeenth Claims for Relief in Plaintiffs' Consolidated and Third Amended Complaint ("Q Sciences Memo.") at 3-6). As I have already determined, Ms. Tarazi controlled Painted Wings, and she thus could have unilaterally initiated a lawsuit against Q Sciences. Therefore, these claims should be dismissed for failure to make a demand on Painted Wings.

H. Unjust Enrichment Claim Against Q Sciences

The plaintiffs bring an unjust enrichment claim against Q Sciences, alleging that Q Sciences misappropriated marketing materials created by the plaintiffs. (TAC, ¶¶ 213-217). Q Sciences argues that this claim is preempted by both the Copyright Act and the New York Civil Rights Law and should be dismissed. (Q Sciences Memo. at 6-9).

1. New York Civil Rights Law Preemption

In New York, when a claim seeks remedy for nonconsensual commercial uses of a person's name and likeness, the exclusive remedy is sections 50 and 51 of the New York Civil Rights Law. Pearce v. Manhattan Ensemble Theater, Inc., 528 F. Supp. 2d 175, 183 (S.D.N.Y. 2007); Myskina v. Conde Nast Publications, Inc., 386 F. Supp. 2d 409, 420 (S.D.N.Y. 2005). Thus, the New York Civil Rights Law subsumes unjust enrichment claims for the unauthorized use of an image or likeness. Pearce, 528 F. Supp. 2d at 183; Myskina, 386 F. Supp. 2d at 420. Section 51 provides:

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided [in section 50] may maintain an equitable action . . . to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use . . . .

N.Y. Civ. Rights § 51 (internal footnote omitted). "[T]he statute is to be narrowly construed and 'strictly limited to nonconsensual commercial appropriations of the name, portrait[,] or picture of a living person.'" Messenger ex rel. Messenger v. Gruner + Jahr Printing and Publishing, 94 N.Y.2d 436, 552, 706 N.Y.S.2d 52, 55 (2000) (quoting Finger v. Omni Publishing International, 77 N.Y.2d 138, 141, 564 N.Y.S.2d 1014, 1016 (1990)).

The defendants' reliance on this theory is misplaced. The plaintiffs' do no allege any privacy claim or use of Ms. Stringam's name, likeness, or personality without her consent. Q Sciences motion on this theory should therefore be denied.

2. Copyright Act Preemption

Section 301 of the Copyright Act preempts a state law claim if two prongs are established: (1) the work at issue comes "within the subject matter of copyright," and (2) the right being asserted is "equivalent to any of the exclusive rights within the general scope of copyright." Faktor v. Yahoo! Inc., No. 12 Civ. 5220, 2013 WL 1641180, at *4 (S.D.N.Y. April 16, 2013) (quoting 17 U.S.C. § 301(b)). The work comes within the subject matter of copyright if the work is fixed a tangible medium of expression and falls within the ambit of a category of copyrightable works. Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc., 373 F.3d 296, 305 (2d Cir. 2004). Indeed, if the ideas that are the subject of a claim are "fixed in writing -- whether or not the writing itself is at issue -- the claim is within the subject matter of copyright." Forest

Park Pictures v. Universal Television Network, Inc., 683 F.3d 424, 430 (2d Cir. 2012). The work "need not consist entirely of copyrightable material" but must "only fit into one of the copyrightable categories in a broad sense." Briarpatch, 373 F.3d at 305.

"The second prong, referred to as the 'general scope requirement,' is satisfied when the state-created right may be abridged by an act that would, 'in and of itself,' infringe an exclusive right provided by federal copyright law." Faktor, 2013 WL 1641180, at *5 (quoting Forest Park Pictures, 683 F.3d at 430). "In other words, the state law claim must involve acts of reproduction, adaptation, performance, distribution[,] or display." Briarpatch, 373 F.3d at 305. The state law claim is not pre-empted, however, if the state law claim requires any "extra element that make[s] it qualitatively different from a copyright claim." Id. Courts "take a restrictive view of what extra elements transform an otherwise equivalent claim into one that is qualitatively different form a copyright infringement claim." Id. at 306.

The plaintiffs' unjust enrichment claim here rests on two fairly different sets of facts. One set encompasses allegations that Q Sciences used Ms. Tarazi's marketing and business strategies. (TAC, ¶¶ 106, 108, 214). This set is not preempted because using a business strategy, by itself, does not involve acts of distribution, reproduction, adaption, performance, or display. See Briarpatch, 373 F.3d at 305. The second set of discernible facts, however, consists of allegations that Q Sciences misappropriated and used Ms. Tarazi's designs for websites and social media webpages. (TAC, ¶¶ 107-108, 215). An unjust enrichment claim arising from this set of facts is preempted because it involves acts of reproduction, distribution, display, and adaption, and the material falls within the scope of copyrightable material, namely pictures and writings. See Briarpatch, 373 F.3d at 306; Levine v. Landy, 832 F. Supp. 2d 176, 188 (N.D.N.Y. 2011); Gusler v. Fischer, 580 F. Supp. 2d 309, 316 (S.D.N.Y. 2008). Therefore, I recommend that an unjust enrichment claim arising from the displayed materials be dismissed, but that any claim arising from misappropriation of business plans and marketing ideas remain.

I. Claims Against Truehope

Truehope seeks dismissal of all claims brought against it, arguing that (1) the TAC's inconsistency with earlier complaints warrants dismissal, (2) res judicata bars all claims, and (3) collateral estoppel applies. (Truehope Inc.'s Memorandum of Law in Support of Its Motion to Dismiss Plaintiffs' Consolidated and Third Amended Complaint ("Truehope Memo.") at 7-16).

1. Inconsistency of New Facts

A court may disregard factual allegations in an amended complaint when a plaintiff significantly changes her narrative and directly contradicts earlier pleadings. Baines v. City of New York, No. 10 Civ. 9545, 2015 WL 3555758, at *1 (S.D.N.Y. June 8, 2015); Colliton v. Cravath, Swaine & Moore LLP, No. 08 Civ. 400, 2008 WL 4386764, at *6 (S.D.N.Y. Sept. 24, 2008), aff'd, 356 F. App'x 535 (2d Cir. 2009). However, "the more usual and benevolent option is to accept the superseded pleadings but allow the factfinder to consider the earlier pleadings as admissions in due course." Baines, 2015 WL 3555758, at *1 (quoting Barris v. Hamilton, No. 96 Civ. 9541, 1999 WL 311813, at *2 (S.D.N.Y. May 17, 1999)). Allegations that are merely inconsistent will generally not be disregarded. See Kermanshah v. Kermanshah, 580 F. Supp. 2d 247, 266 (S.D.N.Y. 2008).

Truehope first contends that the TAC and First Amended Complaint ("FAC") allege different dates on which the Joint Venture began, stating that the "[p]laintiffs initially alleged that the joint venture was established in August 2012. But the TAC alleges that the joint venture was established six months earlier, in February 2012." (Truehope Memo. at 9). This assertion misconstrues the earlier complaints. In the earlier complaints, the plaintiffs did not allege what day the Joint Venture was established; rather, the earlier complaints only asserted that an agreement to sell Micronutrient Product -- the "JV Agreement" -- was entered into in August 2012. (FAC, ¶ 25). The TAC's allegation is not inconsistent with that assertion.

Truehope next contends that the TAC names Ms. Tarazi and the Stringams as the Joint Venture partners, but that the FAC states that the Joint Venture partners were Mr. Stringam, Micronutrient Solutions, and Open Mind. (Truehope Memo. at 9). However, the FAC names only the signatories to an agreement to sell the Micronutrient Product; it does not purport to name all of the Joint Venture partners. (FAC, ¶ 25). These allegations are not inconsistent.

Third, Truehope asserts that the earlier pleadings limited the Joint Venture's scope to the "August 17, 2012 'Memo Agreement.'" (Truehope Memo. at 9). This is incorrect. While it is true that the TAC alleges more facts and details about the Joint Venture, there are no facts in this vein that are prejudicially inconsistent.

Finally, Truehope argues that the complaints' allegations of Truehope's knowledge of the Joint Venture are contradictory. It asserts that the allegation in the Second Amended Complaint ("SAC") that "Anthony Stephan [] traveled to Utah to help Dana Stringam set up MSI's account" is inconsistent with the TAC's allegation that "Anthony Stephan also traveled to Utah to help Dana Stringam set up <u>the Joint Venture's</u> account (in the name of Tarazi's company, MSI)." (SAC, ¶ 55; TAC, ¶ 59 (emphasis added); Truehope

Memo. at 11). Truehope also makes the following argument to the same effect:

> Similarly, the SAC alleges that in November 2012, "Truehope instructed its manufacturer to ship 1008 bottles of the Micronutrient Product . . . to MSI's warehouse," and that "Truehope covered the cost . . . as agreed with MSI." But the TAC alleges that "Truehope instructed its manufacturer to ship 1008 bottles of the Micronutrient Product . . . to the Joint Venture's warehouse," and that "Truehope covered the cost . . . as agreed between Stephan and the Joint Venture."

(Truehope Memo. at 11 (alterations in original) (quoting SAC, ¶ 60, and TAC, ¶ 65)). While the plaintiffs' allegations in the TAC are somewhat broader, these allegations are not so inconsistent as to warrant disregarding them or dismissing claims against Truehope.

2. Res Judicata

Truehope argues that res judicata bars the plaintiffs' "inconsistent allegations." (Truehope Memo. at 12). Generally, if "[t]he court in the first action has expressly reserved the [litigant's] right to maintain the second action," then res judicata does not apply. Chevron Corp. v. Donzinger, 886 F. Supp. 2d 235, 292 (S.D.N.Y. 2012) (alterations in original) (quoting Restatement (Second) of Judgments § 26(1)(b)). Additionally, if the parties agreed "in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein," then a judgment will not preclude the litigation of related claims in a later action. Restatement (Second) of Judgments § 26(1)(a).

Justice Miller's decision in the Canadian Action states:

> In oral argument, [Truehope] agreed that after the issues of the assignability of the [Exclusivity Agreement], and whether it had been assigned, were determined, all other issues could be determined in the United States action. This was the result sought by Nadia Tarazi and MSI. Given these positions and the findings in this decision, it is therefore not necessary for this Court to address [whether Alberta is the appropriate forum to determine the remaining issues between the parties].
>
> . . . . Any issues remaining between [Truehope], Nadia Tarazi and MSI are to be determined in the United States action.

Truehope, 2014 ABQB 386, ¶¶ 40-41. This holding unequivocally precludes application of res judicata. Therefore, I recommend that this argument again be rejected.

3. Collateral Estoppel

Truehope argues that "the doctrine of collateral estoppel should also bar Plaintiffs from relitigating issues here." (Truehope Memo. at 14). The parties' briefs assume that federal standards govern this issue, which is sufficient to establish the applicable law.[7] (Truehope Memo. at 14 (citing Luo v. Baldwin

[7] While I had applied New York law on preclusion in my previous Report and Recommendation (R&R at 9), the parties had admitted that there was no significant difference between federal and New York law (Truehope Inc.'s Memorandum of Law in Support of Its Motion to Dismiss Plaintiffs' Second Amended Complaint at 7 n.6; Plaintiffs' Memorandum of Law in Opposition to Truehope, Inc.'s Motion to Dismiss at 8-9); see also Chevron, 886 F. Supp. 2d at 278 n.267 ("To the extent, however, that there is any question of whether federal law should be used to determine whether the Judgment here would be enforceable, the standard under federal law is substantially the same as it is under New York law.").

Union Free School District, 677 F. App'x 719, 721 (2d Cir. 2017) (applying collateral estoppel to federal claim)); Pl. Opp. to Truehope at 17 (citing Interoceanica Corp. v. Sound Pilots, Inc., 107 F.3d. 86, 91 (2d Cir. 1997) (applying collateral estoppel to federal claim))); see Trikona Advisers Limited v. Chugh, 846 F.3d 22, 31 (2d Cir. 2017). Under the federal standard, collateral estoppel applies if

> "(1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." If these four factors are satisfied, collateral estoppel applies even if the subsequent action asserts a different cause of action, or the issue "recurs in the context of a different claim."

Luo, 677 F. App'x at 721 (internal citations omitted) (first quoting Proctor v. LeClaire, 715 F.3d 402, 414 (2d Cir. 2013), then quoting Wyly v. Weiss, 697 F.3d 131, 140 (2d Cir. 2012)).

In its brief, the only issue that Truehope suggests is barred is whether Truehope knew about the Joint Venture. (Truehope Memo. at 15-16). It points to the following language from the Canadian Judgment as establishing that Truehope had no knowledge of the Joint Venture:

> The evidence adduced by Nadia Tarazi and MSI, characterized by these defendants as [Truehope's] acquiescence to the assignment, is nothing more than an attempt by these two defendants to pull themselves up by the bootstraps by relying on actions taken by the Stringams.

> When the other evidence is also considered, Nadia Tarazi and MSI's position becomes even more untenable. The undisputed evidence is that neither Nadia Tarazi nor MSI ever contacted [Truehope] to obtain its permission to the assignment, and that neither Autumn Stringam nor Dana Stringam ever obtained permission to assign.

(Truehope Memo. at 16 (alterations in original) (quoting Truehope, 2014 ABQB 386, ¶¶ 34-35)). This passage establishes only that Truehope did not consent to assignment of rights to the Micronutrient Product; this does not establish that Truehope did not know about the Joint Venture.

Truehope points to no others issues it believes the plaintiffs should be precluded from arguing. Indeed, a review of the TAC and the Truehope action in Canada reveals no identical issues that were raised and litigated. Therefore, Truehope's argument on this ground should be rejected.[8]

J. Derivative Claims Against Truehope

1. Statute of Limitations

Truehope argues that the derivative claims brought against it -- for tortious interference with contract as well as aiding and abetting breach of fiduciary duty -- are time-barred. (Truehope Memo. at 17-19). The plaintiffs, as before, argue that the

[8] Additionally, Truehope seeks to incorporate res judicata and collateral estoppel arguments from its previous filings. (Truehope Memo. at 12-15). However, those arguments were rejected (7/1/15 R&R at 30-31; 8/30/15 Order at 2), and Truehope has not provided a sufficient reason to reconsider those decisions.

derivative claims are continuing violations and that they relate back to the filing date of the original complaint. (Pl. Opp. to Truehope at 19-21).

a. Continuing Violation

Tortious interference with contract claims are not continuing torts, instead accruing when the defendant performs an action or inaction that constitutes interference. Corporate Trade, Inc. v. Golf Channel, No. 12 Civ. 8811, 2013 WL 5375623, at *5 (S.D.N.Y. Sept. 24, 2013); Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90, 94, 595 N.Y.S.2d 931, 933-34 (1993); Thome v. Alexander & Louisa Calder Foundation, 70 A.D.3d 88, 108, 890 N.Y.S.2d 16, 30 (1st Dep't 2009). Similarly, claims for breach of fiduciary duties are generally not characterized as continuing violations unless the violation arises from the same type of imprudent decision-making. See St. John's University, 757 F. Supp. 2d at 169; L.I. Head Start, 558 F. Supp. 2d at 400-401. The violations alleged here are not of repeated type or character. Therefore, the plaintiffs cannot benefit from the continuing wrong doctrine.

b. Relation Back

I found above that to benefit from the federal relation back standard for adding plaintiffs, the plaintiffs must establish mistake of identity, which they plainly cannot here. The state standard, however, warrants more examination. The parties agree that New York law applies to this issue. (Pl. Opp. to Truehope

20-21; Truehope Inc.'s Reply Memorandum of Law in Further Support of Its Motion to Dismiss Plaintiffs' Consolidated and Third Amended Complaint at 6). Therefore, the same standards under New York law articulated above apply.

Ms. Tarazi is not so united in interest with Painted Wings as to warrant relation back for the tortious interference of the Transmedia Assignment Agreement claim. While the previous complaints mention breach of the Transmedia Assignment Agreement, they would not have put the defendants on notice of a derivative claim from Painted Wings arising from the Transmedia Assignment Agreement. Therefore, this claim does not relate back to the original complaints.

The derivative claim for aiding and abetting breach of fiduciary duties owed to Painted Wings fails for the same reason that the derivative claim for breach of fiduciary duties against Ms. Stringam failed. The original complaints do not suggest that a fiduciary duties claim by Painted Wings would be brought. Therefore, the derivative claims do not relate back.

c. Whether the Derivative Claims are Time-Barred

The two derivative claims against Truehope are subject to a three-year limitations period. See CPLR § 214(4); Antonios A. Alevizopoulos & Associates, Inc. v. Comcast International Holdings, Inc., 100 F. Supp. 2d 178, 183 (S.D.N.Y. 2000). These claims accrued in December 2012, when Ms. Stringam allegedly "abandoned all of her duties" to Painted Wings and the Joint Venture, and when Truehope allegedly interfered with the Transmedia Assignment Agreement. (TAC, ¶¶ 40, 87, 121). Therefore, the derivative claims against Truehope should be dismissed as time-barred.

2. Whether the Derivative Claims are Well Pled

a. Tortious Interference with Contract

To state a claim for tortious interference with contact under New York law, a plaintiff must establish (1) a valid contract between her and a third party, (2) that the defendant knew of the contract, (3) that the defendant intentionally procured the third-party's breach of the contract without justification, (4) breach, and (5) damages resulting from the breach. Symquest Group, Inc. v. Canon U.S.A., Inc., 186 F. Supp. 3d 257, 266 (E.D.N.Y. 2016); Lama Holding Co. v. Smith Barney Inc., 88 N.Y.2d 413, 424, 646 N.Y.S.2d 76, 82 (1996). Conclusory allegations of interference with an unspecified contract or of wrongful, intentional, malicious, or improper actions are insufficient at the pleading stage. Symquest, 186 F. Supp. 3d at 266; 57th Street Arts, LLC v. Calvary Baptist Church, 52 A.D.3d 425, 426, 861 N.Y.S.2d 946, 946 (1st Dep't 2008). Truehope argues that the second and third elements have not been sufficiently pled.

While the plaintiffs offer a handful of allegations satisfying the third element (TAC, ¶¶ 80, 84, 220 (alleging that

Truehope offered financial rewards and counseled the Stringams to disregard contractual obligations)), the plaintiffs do not adequately allege knowledge, claiming only that "Truehope and Anthony Stephan had knowledge of Autumn Stringam's obligations under the Transmedia Assignment Agreement" and that Truehope was aware of the Transmedia Project (TAC, ¶¶ 60-61, 219). The TAC does not allege that Truehope knew about the contract, only that it knew about some of Ms. Stringam's obligations. See Medtech Products Inc. v. Ranir, LLC, 596 F. Supp. 2d 778, 797 (S.D.N.Y. 2008). Therefore, the plaintiffs have not alleged a derivative claim for tortious interference with contract.

b. Aiding Breach of Fiduciary Duty

"A plaintiff alleging a claim for aiding and abetting a breach of fiduciary duty must show '(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach.'" Meridian Horizon Fund, LP v. KPMG (Cayman), 487 F. App'x 636, 643 (2d Cir. 2012) (quoting Kaufman v. Cohen, 307 A.D.2d 113, 125, 760 N.Y.S.2d 157, 169 (1st Dep't 2003)). "To satisfy the 'knowing participation' element, a plaintiff must show that the defendant provided 'substantial assistance' to the primary violator." Id. (quoting Kaufman, 307 A.D.2d at 126, 760 N.Y.S.2d at 170).

Truehope contends that (1) the complaint does not establish that Truehope knew of Painted Wings and (2) there are no allegations that Truehope substantially assisted in the breach. (Truehope Memo. at 24-25). However, the TAC states, "Upon information and belief, Q Sciences and Truehope pursued the Stringams aggressively and offered the Stringams lucrative financial rewards if the Stringams disregarded their fiduciary duties and contractual obligations to the Joint Venture and Painted Wings." (TAC, ¶ 80). It also alleges that Truehope "urged the Stringams to breach the Joint Venture agreement and the other marketing and promotional agreements they had entered into with Tarazi, MSI and Painted Wings and counseled the Stringams regarding how to avoid their contractual obligations and fiduciary duties." (TAC, ¶ 84). These allegations, though thin, are sufficient to overcome Truehope's objections.

3. Demand Futility

I have already determined that Ms. Tarazi could have initiated an action by Painted Wings and that the requirements for establishing demand futility have not been met. Therefore, the derivative claims against Truehope should be dismissed for failing to establish demand futility.

Conclusion

For the foregoing reasons, I recommend that Open Mind's and the Stringams' motion to dismiss (Docket no. 125) be granted in part and denied in part, Truehope's motion to dismiss (Docket. no. 130) be granted in part and denied in part, and Q Sciences' motion to dismiss (Docket. no. 134) be granted in part and denied in part. This resolution would entail dismissing all the derivative claims (Claims 5, 7, 10, 13, 18, and 19). The unjust enrichment claim against Q Sciences (Claim 17) would be dismissed insofar as it alleges a claim arising from designs for websites and social media; however, any claim for use of business plans and ideas would remain.

Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the Chambers of the Honorable Lewis A. Kaplan, Room 2240, and to the Chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,

James C. Francis IV

JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
July 28, 2017

Copies transmitted this date to:

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