UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

LI FEN YAO, as Administrator of the Estate of Sam Mingsan Chen Plaintiff, v. ROBERT CHEN, OTTER AUDITS LLC, and RC SECURITY LLC, Defendants.	Case No. 8:23-cv-00889-TDC

REPLY MEMORANDUM IN FURTHER SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Defendants identified numerous inaccuracies in Plaintiff's legal theories, exposed that the Complaint had misrepresented facts, and demonstrated that Plaintiff had no valid claims. Since Plaintiff cannot remedy the Complaint's terminal deficiencies, her Opposition brief instead invents new legal and factual theories. Even so, she still concedes at least a half-dozen dispositive points:

First, Plaintiff concedes that Robert's authority to dissolve OtterSec is not in question. Second, Plaintiff concedes large parts of this lawsuit should have been a derivative action but seeks to circumvent this infirmity by inventing exceptions foreclosed by Wyoming law. Third, Plaintiff concedes her Lanham Act claim in its entirety by not responding at all to Defendants' arguments identifying its shortcomings. Fourth, caught misrepresenting the fact that David knew Robert was talking with Jump, Plaintiff now claims that David knew the *fact* that Robert was talking to Jump, but did not know the *substance* of those conversations. This is completely at odds with the Complaint which referred, in a boldfaced heading, to "**Robert Chen's Undisclosed Discussions with Jump Crypto**." Compl. at 6. Fifth, Plaintiff concedes that Wyoming law governs much of this case. Sixth, Plaintiff concedes that the Estate was never a member of OtterSec—only a transferee with limited rights. This is no mere technicality. Involving non-members in an LLC's affairs "fundamentally undermine[s] the 'pick your partner' principle" at the heart of LLC law.[1]

Plaintiff's brief focuses on distractions, chief among them the purported "Second Amendment," which was a good faith but legally invalid effort, made in conjunction with counsel, to resolve an ongoing dispute. The law is clear: OtterSec entered dissolution when Sam died, before the purported "Second Amendment" was even drafted. The Opposition also repeats—seven times—Robert's suggestion, after he was left as the only working member of a personal services

[1] Daniel S. Kleinberger, *The Plight of the Bare Naked Assignee*, 42 Suffolk U. L. Rev. 587, 615 (2009).

auditing business, that he *might* "dissolve the company and remake it." As the 60% owner of OtterSec, he had the right to do so but ultimately never did because Sam's death took dissolution out of his hands. At other points the Opposition tries to drum up false suspicion, questioning how much Robert paid for OtterSec's assets (exactly $210,000—it is not a secret), or why Defendants only attached bank records up to March 31, 2023 to their Amended Answer (the Complaint was filed on that date, so no later records were germane to answering its claims). The Court can ignore these sideshows and focus on the law and the facts concerning OtterSec and its dissolution.

OtterSec was a personal services blockchain auditing business. Like any personal services business (an accounting firm, for example), the value and profitability of the company come not from the trademark, website, and physical assets, but from the personal services of its professionals. Robert paid fair value for OtterSec's website, trademark, and other assets, and Robert has never denied that the Estate is entitled to 40% of the value he paid for them. Plaintiff wants more and demands 40% of *Robert's* value as a security auditor. She asks this Court to award her 40% of Robert's profits in perpetuity—wherever he goes and whatever he does—effectively indentured servitude. This suit is not about Defendants' wrongdoing because there has been none.

On these pleadings, the law mandates dismissal of Plaintiff's Complaint.

LEGAL STANDARD

I. The Court Can and Should Consider Exhibits to Defendants' Amended Answer.

Under Rule 10(c), Defendants' Exhibits attached to their Amended Answer are part of the pleadings, and the Court considers them on this Rule 12(c) motion. Mem. in Supp. of Defs.' Mot. for Judgment on the Pleadings, ECF No. 50-1 ("Mem.") at 6. Rule 10(c) does not require that a document be "integral" to the Complaint, though four of Defendants' exhibits are. Exhibit 1 to Defendants' Amended Answer, for example, is the First Amendment, which forms the basis for Plaintiff's breach of contract claim. Plaintiff, hoping the Court will rely on Plaintiff's cherry-

picked quotations in isolation and not look at the full documents, argues against the Court's consideration of the Exhibits without ever mentioning Rule 10(c).

The primary case on which Plaintiff relies, *Lefkoe v. Jos. A. Bank Clothiers*, No. 06-cv-1892, 2008 WL 7275126 (D. Md. May 13, 2008), however, contains an extended discussion of Rule 10(c). *Lefkoe* noted that it was "persuaded by" an Eleventh Circuit case stating that under Rule 10(c), an attachment could be considered on a 12(c) motion if it was "(1) central to the plaintiff's claim; and (2) undisputed . . . mean[ing] that the authenticity of the document is not challenged." *Id.* at *5 (quoting *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002)). *Horsley* found that documents quoted in and relied on by the complaint were sufficiently central, and *Lefkoe* excluded certain exhibits on the ground that they had not been referenced in the complaint. *Id.* *Lefkoe*, then, suggests that the chat logs attached as Exhibits 3 and 4 to the Amended should be considered in their entirety because the Complaint quotes from them and Plaintiff has not disputed their authenticity. Likewise Robert's announcements about his meetings with Jump, Exhibit 2 to the Amended Answer, can be considered because Plaintiff relies on David's supposed lack of knowledge of these meetings in attempting to "plead[] a *prima facie* case." *Lefkoe*, 2008 WL 7275126, at *5. In any event, *Lefkoe* is persuasive authority at best, and this Court is not bound to follow its precise contours in applying Rule 10(c) if the Court finds Defendants' Exhibits are part of the pleadings based on the plain text of the Rule.

II. Wyoming Law Applies Pursuant to Maryland's Choice-of-Law Rules.

Plaintiff does not dispute that Wyoming Law governs claims concerning OtterSec's operations and dissolution. Instead, Plaintiff selectively invokes Maryland law at only a few points. The Opposition does not reference or engage with Maryland's "internal affairs doctrine," the forum state choice-of-law rule that dictates the general application of Wyoming law. This is despite the Opposition's agreement that Maryland's choice-of-law rules apply. Pl.'s Mem. of Law in

Opp'n to Defs.' Mot. for J. on the Pleadings and to Stay Disc., ECF No. 55 ("Opp'n") at 17 n.5. While some courts have said that "the internal affairs doctrine does not apply in circumstances such as contracts and torts where the rights of third parties external to the corporation are at issue," no Maryland court appears to have done so and, in any event, "the conflicts practice of both state and federal courts has consistently been to apply the law of the state of incorporation to 'the entire gamut of internal corporate affairs.'" *M-Tek Kiosk, Inc. v. Clayton*, No. 15-cv-886, 2016 WL 2997505, at *5 (M.D.N.C. May 23, 2016); *see also Roselink Inv'rs, L.L.C. v. Shenkman*, 386 F. Supp. 2d 209, 225 (S.D.N.Y. 2004) (explaining that the doctrine applies to tort claims that are brought by "shareholders, officers or directors" and to derivative suits (like this one should be)).

ARGUMENT

I. PLAINTIFF CONCEDES SEVERAL POINTS FATAL TO HER CLAIMS.

A. Plaintiff Concedes That a Derivative Action Would Have Been Appropriate Here, and She Cannot Identify an Exception That Would Permit Her Direct Action.

The Opposition acknowledges the Complaint's failure to allege meaningful direct harms to the Estate (which is dispositive) and instead invents exceptions to Wyoming law that could allow the Estate to recover for "traditionally derivative harms" in a direct action. Opp'n at 17. The Opposition's attempt to create exceptions to the Wyoming Supreme Court's "rule that derivative injuries must be remedied by derivative actions," and its directive that "Wyoming courts are *without discretion* to allow a direct action to remedy derivative injuries," fails across the board.[2] *Fritchel v. White*, 452 P.3d 601, 606 (Wyo. 2019) (emphasis added); *see* Mem. at 11–12.

Plaintiff's effort to craft exceptions to *Fritchel*, Opp'n at 17–20, relies on Delaware caselaw and a 1985 Wyoming Supreme Court case concerning a different type of corporation formed under

[2] The Opposition's unsuccessful efforts to identify new direct harms are addressed, *infra* Part III, on a claim-by-claim basis.

a different Wyoming statute. Delaware's Out of state caselaw is not persuasive here, where the controlling Wyoming law is unambiguous. *See* Mem. at 11–12. Plaintiff's only Wyoming case, *Lynch v. Patterson*, 701 P.2d 1126 (Wyo. 1985), is nearly forty years old. It concerns whether a derivative suit plaintiff could also *recover* directly, not whether she could bring a direct suit for a derivative injury, as this Plaintiff hopes to do. *Id.* at 1130–31; *id.* at 1128 ("These appeals stem from a stockholders' derivative action . . . ."). *Lynch* does not concern an LLC and was decided 31 years before Wyoming adopted its LLC Act. *See* Wyo. Stat. Ann. § 17-29-101 (West) (effective July 1, 2010). That Act *explicitly prohibits* direct recovery in a derivative action, *id.* § 17-29-906(a), so *Lynch* could not be applied in the LLC context today. There is no reason to look across the country, or back to the last century, when the Wyoming Supreme Court has spoken repeatedly, clearly, and recently regarding direct versus derivative actions in the context of LLCs. *See Fritchel*, 452 P.3d at 606; *Mantle v. N. Star Energy & Constr. LLC*, 437 P.3d 758, 806–07 (Wyo. 2019).

Plaintiff's effort to create exceptions to Wyoming law also fails to grapple with the limited rights available to the holder of a transferred interest in an LLC. *See* Mem. at 9. Even if these supposed exceptions existed, the Opposition cites nothing suggesting that the Estate, as a mere transferee, would be able to take advantage of them. This is not unfair, *contra* Opp'n at 19: Sam and Robert could have drafted an operating agreement that gave heirs of deceased members more rights than transferees, but they did not. It makes sense that LLC members would, by default, give themselves more rights than their heirs and assignees because "[p]artnership" in an LLC "is a voluntary association," and most LLC members would not want to commit to managing the company with anyone other than their chosen partners, even their partner's heirs. *See* Kleinberger, 42 Suffolk U. L. Rev. at 489–90; *see also* Mem. at 10 (collecting additional support).

The Opposition makes additional errors with respect to Wyoming law on derivative actions. For one thing, OtterSec's dissolution does not mean that a derivative action is impossible. *Contra* Opp'n at 19 (implying otherwise). Wyoming law provides that a dissolved LLC in the process of winding up can still "[p]rosecute and defend actions and proceedings, whether civil, criminal[,] or administrative," Wyo. Stat. Ann. § 17-29-702(b)(ii)(C). For another, Plaintiff quotes language from section 17-29-107(a) regarding "principles of law and equity," but omits language from that same provision stating that the terms of the statute are paramount. *Id.* ("Unless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter.")

B. Plaintiff Concedes That Robert's Authority to Carry out the Dissolution of OtterSec Is Not at Issue, and Her Arguments That He Did So Improperly Can Be Rejected.

Plaintiff backs away from asserting that Robert "exploit[ed] his control and authority over OtterSec to unilaterally dissolve OtterSec" and that "there could be no legitimate basis to dissolve the company and remake it." Compl. ¶¶ 3, 79. She now agrees that the Court need not consider Robert's authority and claims only that he "dissolved OtterSec in bad faith." Opp'n at 11–12. In other words, Plaintiff now agrees that dissolution was proper (and required under the First Amended Operating Agreement), but objects only that Robert pursued dissolution for the wrong reasons. This curtailment of the claims makes the Court's job easier: The propriety of OtterSec's dissolution is clear under the Operating Agreement and Wyoming law, and the Complaint does not sufficiently allege the bad faith that is—supposedly—at the core of most of its claims.

1. OtterSec entered dissolution upon Sam's death, not based on anything Robert did.

Plaintiff ignores that OtterSec's dissolution was automatic, triggered by Sam's death pursuant to the First Amended Operating Agreement. *See* Mem. at 7–8 & J.R.0084. Plaintiff's account of OtterSec's dissolution glosses over Sam's death and instead mischaracterizes Robert's prior comments in May after David quit and alleged actions in September as if they amounted to

Robert electing to dissolve the company. Opp'n at 3, 11–14. This misrepresents when and how OtterSec dissolved as well as what it means for a Wyoming LLC to dissolve generally. Plaintiff also seeks to distract with an irrelevant digression concerning the "Second Amendment."

The dissolution of a Wyoming LLC is not a single-day event. It begins on a particular date but continues through the LLC's winding-up period. *See In re Lovell's Am. Car Care, LLC v. Wells Fargo Bank, N.A.*, 438 B.R. 355 (table), 2010 WL 2769056, at *6 (B.A.P. 10th Cir. 2010) (describing "the continued existence of an LLC in the process of dissolution" where "a dissolving event [had] occurred, which began the process of dissolution, but the [LLC] had not yet been 'dissolved'"). Wyoming LLCs enter a "winding up" period when they begin dissolution but can still take a variety of actions during this winding-up period. Wyo. Stat. Ann. § 17-29-702(b). Among these actions, dissolving LLCs "[m]ay"—but are not required to—file articles of dissolution and transfer property, as OtterSec did in September and October 2022. *Id.*

OtterSec did not simply cease to exist upon Sam's death because that is not how an LLC dissolves under Wyoming law. But neither did it continue unchanged until articles of dissolution were filed. Sam's death was an independent and unfortunate "dissolving event . . . which began the process of dissolution." *In re Lovell's Am. Car Care, LLC*, 2010 WL 2769056, at *6.

The legal status of OtterSec and its members was not immediately clear in the weeks following Sam's death. In hindsight, however, there can be no legitimate dispute that under the Operating Agreement in effect when Sam died on July 13, 2022, his death triggered the start of OtterSec's dissolution. Mem. at 7–8. In September and October, Robert instructed corporate counsel to carry out further steps to formalize the dissolution of OtterSec with the Wyoming Secretary of State, but the company had already entered dissolution months prior.

a. *The "Second Amendment" is a distraction with no relevance to Plaintiff's claims.*

The "Second Amendment," dated August 15, 2022, was part of a good-faith effort on OtterSec's part to resolve the dispute with David, Sam, and the Estate, taken in consultation with OtterSec's corporate counsel, Iqan Fadaei. *See* Opp'n at 7 n.2. It has no bearing on any of Plaintiff's claims and is ultimately invalid and irrelevant to this case. Corporate counsel's involvement, noted in the Complaint, shows that the document was created and signed in good faith, an attempt to resolve the confusion surrounding the Operating Agreement by amending it.

As a matter of contract law, the "Second Amendment" (which does not purport to apply retroactively) was ineffective because Section 1.3(c) of the First Amended Operating Agreement came into effect and commenced OtterSec's dissolution upon Sam's death. Mem. at 7–8; J.R.0089; *see Dudley v. Dudley*, No. CA2008-07-165, 2009 WL 683702, at *3 (Ohio Ct. App. Mar. 16, 2009) ("The original Operating Agreement . . . deal[t] explicitly and unambiguously with respect to the triggering events leading to the [c]ompany's dissolution," one of which was the death of a member. It would "render [part] of their original Operating Agreement meaningless" if an amendment after that trigger could "supersede and defeat the intent of the parties found in . . .the original Operating Agreement.).[3] Plaintiff agreed with this analysis as recently as March 2023, when she filed her Complaint. Compl. ¶ 98 ("[T]he First Amendment, which was theoretically in effect at the time of Sam's death, would have required OtterSec to dissolve upon Sam's death."). Treating the "Second Amendment" as valid would defeat the intent and expectations of the parties to the First Amended Operating Agreement and the purpose of contract law. *See* 1 Williston on Contracts § 1:1 (4th ed. 2024) ("Contract law is designed to protect the expectations of the contracting parties.").

[3] *Cf. Nicolai v. Md. Agr. & Mech. Ass'n*, 53 A. 965, 967 (Md. 1903) (explaining that a corporate charter may "prescribe that [the corporation] shall cease to exist . . . on the happening of a certain contingency" and that "the corporation is ipso facto dissolved when that contingency does arise").

2. The Complaint does not allege bad faith with the specificity required to survive a motion for judgment on the pleadings.

Plaintiff no longer contests that Robert had the authority to formalize the dissolution of OtterSec in September and October 2022 or that the Estate was a transferee that lacked voting power to contest OttSec's dissolution (which was required in any event). *See* Opp'n at 11 (not contesting Robert's authority); *id.* at 14 (admitting the Estate was a transferee); Mem. at 9–10 (explaining the rights of a transferee). All that remains of her claims concerning dissolution is the idea that "the Complaint plainly alleges that Robert dissolved OtterSec in bad faith." Opp'n at 12. But the Complaint does not use the term "bad faith" outside of a single reference in its Lanham Act claim. Compl. ¶ 120. Bad faith is not pleaded sufficiently to survive a motion for judgment on the pleadings since Plaintiff has done nothing more than baselessly attribute a mental state to a defendant exercising contractual and statutory authorities while working with counsel. Nor can Plaintiff ever allege Robert's "bad faith" mental state regarding dissolution because Sam's death, not Robert's actions or intent, caused OtterSec's dissolution. Plaintiff's allegations regarding Robert's intent are therefore not only wrong—they are completely irrelevant.

Fundamentally, the "[C]omplaint does not contain any factual allegation sufficient to plausibly suggest [a particular] state of mind"—supposed bad faith—on Robert's part. *Ashcroft v. Iqbal*, 556 U.S. 662, 683 (2009). Rather, the Complaint recounts a litany of communications from OtterSec's corporate counsel, Iqan Fadaei, all of which suggest that Robert, then nineteen years old, was acting in *good* faith, in consultation with counsel, to resolve a dispute with David that was further complicated by Sam's death. Compl. ¶¶ 82, 90–91, 93–96, 101–02. *See Roy v. County of Lexington*, 141 F.3d 533, 548 (4th Cir. 1998) (explaining that relying on advice of counsel indicates good faith, even if that advice is ultimately incorrect). The Complaint's own factual allegations are thus more indicative of good faith than bad on Robert's part.

Plaintiff alleges Robert's supposed bad faith based on facts that in no way suggest an improper motive. She emphasizes that Robert asserted his authority to dissolve the company as early as May based on his 60% ownership (months before Sam died, the event that triggered the *actual* dissolution). Opp'n at 11. This assertion did no more than accurately describe his contractual rights under Section 8.1. Mem. at 8. It cannot show bad faith. *1899 Holdings, LLC v. 1899 Ltd. Liab. Co.*, 568 F. App'x 219, 228 n.8 (4th Cir. 2014) ("vague and conclusory allegations regarding bad faith" do not suffice under the 12(b)(6) pleading standard when the defendant is "exercis[ing] a right expressly provided to it by [a] contract"). At most this would show a "disagree[ment] . . . in the interpretation of their contract"[4] and not "allegations that plausibly support an inference that [the defendant] acted in bad faith or with a sinister motive." *Liston-Smith v. Casa Fire & Cas. Ins. Co.*, No. 16-cv-510, 2016 WL 6246300, at *3 (D. Conn. Oct. 25, 2016).

In an effort to shore up the Complaint's paltry allegations, Plaintiff then invokes the Court's speculation regarding the proceeds of the asset sale. Quoting the Court—not her own Complaint—Plaintiff says that "the funds paid by Robert Chen for OtterSec's assets were then returned to him." Opp'n at 12 (quoting Mem. Op. at 12, ECF No. 36). The Court's speculation turns out to be incorrect. And, most importantly for purposes of this motion, it does not appear in the Complaint. Robert did not return the funds to himself, and the Complaint does not claim he did. There is no reason, other than pure speculation, to think that Robert undervalued OtterSec's assets (he did not). And speculation is not sufficient to survive a Rule 12(c) motion.

[4] This disagreement is no basis for a breach of contract claim. OtterSec did not dissolve pursuant to Section 8.1, *see supra* Section I.B.1., and even if the contract were somehow implicated, the Court could determine as a matter of law that Robert acted consistent with his contractual rights. *Springer v. Blue Cross & Blue Shield of Wyo.*, 944 P.2d 1173, 1176 (Wyo. 1997) ("Whether a contract is ambiguous is a question of law, as is interpretation of an unambiguous contract.").

It is only through a selective reading of Wyoming law that the Opposition claims, citing *Acorn v. Moncecchi*, 386 P.3d 739 (Wyo. 2016) and Wyo. Stat. Ann. § 17-29-702(b)(ii)(C), that it is Robert's burden to prove that the sale of OtterSec's assets was fair—even though Plaintiff has not met her pleading burden. *See* Opp'n at 13, 29. *Acorn* and section 17-29-409(b)(ii) concern only breaches of fiduciary duty. This burden-shifting framework does not apply to Plaintiff's seven other claims, and her breach of fiduciary duty claim fails, as explained in Defendants' opening brief and below, because Plaintiff cannot identify an extant duty that was breached. The effort to import the burden-shifting framework to her Complaint as a whole, *see* Opp'n at 13, and to her conversion claim in particular, *see id.* at 29, misstates Wyoming law.

C. Plaintiff Concedes That Robert Never Concealed His Conversations with Jump, and Her New Account of How He Supposedly Deceived Sam and David Is Implausible.

In another major retrenchment, Plaintiff claims never to have argued that Sam and David were unaware of "the *fact* of Robert's discussions with Jump," but only that they were unaware of "the *substance* of them." Opp'n at 27. This is surprising, as the Complaint referred, in a boldfaced heading, to "**Robert Chen's Undisclosed Discussions with Jump Crypto**." Compl. at 6. Elsewhere it alleged that "Robert did not initially disclose his discussions with Jump to David (or Sam Chen)," *id.* at ¶ 32, that "Robert did not disclose ["these discussions"] at the time to either of Sam or David," *id.* ¶ 35, that "Sam and David Chen first learned of Robert's discussions with Jump" after the 10% transfer, *id.* at ¶ 40, that "neither Sam nor David was aware at the time of Robert's discussions with Jump," *id.* at ¶ 45, and that "Robert advised David of his discussions with Jump for the first time . . . [on] April 18, 2022," *id.* at ¶ 53. Now that the evidence (incorporated by the Complaint) contradicts those claims, Plaintiff attempts to pivot.

Since she does not dispute the authenticity of Defendants' exhibits, Plaintiff's claims concerning the 10% transfer become even less plausible under her new version of events posited

in the Opposition—*i.e.*, that Sam and David were aware of the Jump conversations but not their substance. Plaintiff's account of the supposed deception is now that:

- Sam and David did know that OtterSec was meeting not just with Sino Global Capital and Race Capital, Compl. ¶¶ 29–32, *but also with Jump Crypto*. Opp'n at 27.
- David did know on April 12, 2022, that Robert was meeting with Jump Crypto, including with Jump's president, Mr. Kariya, Ex. 2 to Am. Answer, J.R.0090.
- David did know on April 14 that Robert "was 'talking to some potential vcs,'" meaning venture capital investors, and had spoken to "a company" that he did not identify. Compl. ¶ 36, 38. David asked Robert to identify "the real reason [he] want[ed] investment" and noted that Robert had been "very deflective" on the topic. *Id.* ¶ 37.
- The very next day, April 15, David and Sam—aware that Robert was fundraising and had met with Mr. Kariya, and *with suspicions that Robert was concealing further information*—proposed that Sam transfer 10% of the company to Robert. *Id.* ¶¶ 43–44.

Plaintiff would have the Court believe that David and Sam would not have made this transfer if they had known specifically that Jump was considering—but had not yet made—"an offer." Opp'n at 24. It is simply not plausible, according to Plaintiff's own account, that knowledge of a *potential* offer (which never materialized) *from a company with whose president they knew Robert was speaking while thinking broadly about the future of the company*, would have made a difference.

II. OTTER AUDITS AND RC SECURITY ARE STILL NOT ALLEGED TO HAVE DONE ANYTHING, AND ANY CLAIMS AGAINST THEM ARE BARRED BY STATUTE.

Plaintiff misstates that Defendants only argued that her claim for tortious interference alleged no tortious conduct by either Otter Audits or RC Security. Opp'n at 32. In fact, Defendants argued that *none of her claims* identified any relevant conduct—tortious or otherwise—by either company. Mem. at 27. Plaintiff has no response to this, Defendants' actual argument.

The Complaint does not allege that either company did anything, and the Opposition makes only incoherent attempts to explain why they have been named as Defendants. In explaining her aiding and abetting claim against them, Plaintiff claims at one point that the companies "both had knowledge" of "Robert's actions beginning in May 2022"—months before either existed. Opp'n at 25. Plaintiff also responds that the Complaint has alleged torts against Robert and "that he is using Otter Audits and RC Security to commit them." *Id.* at 32. Elsewhere she says that they were "the vehicles Robert used to steal OtterSec." *Id.* at 25. Even if true, that would not make them defendants against whom she has alleged a well-pleaded claim.[5]

Moreover, to the extent that Plaintiff argues her claims against Otter Audits and RC Security can proceed because they are successors to OtterSec itself, *see* Opp'n at 12—they are not—these claims are barred by statute. Under Wyoming law, "[a] claim against a dissolved limited liability company is barred" if proper notice to known claimants of the dissolution was provided and the claimants failed to timely provide notice of their claims. Wyo. Stat. Ann. § 17-29-703(c). Plaintiff does not (and cannot) plead that she provided the required notice of her claims against OtterSec within the required period, and thus her claims against OtterSec are barred. By extension, because her claims against RC Security and Otter Audits stem solely from her (incorrect) contention that they succeed to OtterSec's liabilities, those claims are likewise barred by statute. To be clear, Otter Audits and RC Security are ***not*** successor entities—but Plaintiff's claims against them rely on the idea that they are. If they were, the Estate needed to timely provide notice to OtterSec of its claims pursuant to section 17-29-703(c). *See Ridgerunner, LLC v. Meisinger*, 297 P.3d 110, 116–17 (Wyo. 2013) (addressing the functionally identical notice

[5] Since Plaintiff is attempting to assert an ownership interest in the South Dakota companies, her argument for involving them in this case sounds more like an argument that the court should assert *in rem* jurisdiction over them to adjudicate their ownership—but she has never made this argument.

requirement for Wyoming corporations under 17-16-1406(c)). It did not. Because Otter Audits and RC Security have no liability other than whatever they supposedly derive from OtterSec, the South Dakota companies cannot be sued on claims for which they were never given proper notice.

III. THE OPPOSITION CANNOT RESCUE ANY OF THE COMPLAINT'S CLAIMS.

A. Lanham Act

The Opposition completely ignores three arguments raised in Defendants' opening brief against Plaintiff's Lanham Act claims: The Estate does not fall in the zone of interests protected by the Lanham Act, Mem. at 12–13; the Estate cannot meet the Act's proximate cause requirement, *id.* at 14; and the Complaint does not allege Defendants used a misleading mark possessed by the Estate, *id.* at 14–15. It does not cite a single Lanham Act case in responding to Defendants' Act-specific arguments concerning the Estate's lack of an injury. *Id.* at 13–14. The derivative nature of any alleged Lanham Act injury also remains fatal. *See supra* Section I.A.

Plaintiff's argument for piercing the corporate veil relies entirely on citations to a declaration Robert filed in connection with a prior motion. Since affidavits—especially ones not attached to a pleading—are not properly considered on a 12(c) motion, this argument is improper. *See Malinowski v. Lichter Grp., LLC*, No. 14-cv-917, 2015 WL 857511, at *4 (D. Md. Feb. 26, 2015). Since Plaintiff is unable to identify facts in her Complaint justifying holding Robert liable for the South Dakota companies' conduct, her Lanham Act claim against him must be dismissed.

B. Breach of Fiduciary Duty

The Opposition fails to identify any allegation in the Complaint laying out "direct harm to Sam" during his lifetime other than his voluntary transfer of his 10% interest. Opp'n at 14. The Opposition lists the following events: "Robert first *announced* his scheme"; "then [he] *repeated* it"; "Robert *put his plan in motion*"; "Mr. Fadaei announced that 'Robert *will be exercising* his right to dissolve'"; "Mr. Fadaei circulated *a proposed plan*"; and finally, in summation, "Robert

had taken *substantial steps*." Opp'n at 14–15 (emphases added). None of these steps amount to direct harm to Sam because *none of them describes anything actually happening*. Robert's expression of an intent to dissolve a company of which he owned 60%, even if mischaracterized as a "threat" to dissolve the company, did no injury to Sam. This would be the case even if he was wrong about his rights under the Operating Agreement. Furthermore, these statements, months before Sam's death, cannot have breached any duty to the Estate, which did not exist at the time.

As explained above, the 10% transfer itself is not plausibly alleged to have breached Robert's fiduciary duty to Sam. The fiduciary in *Squaw Mountain Cattle Co. v. Bowen*, 804 P.2d 1292 (Wyo. 1991), which Plaintiff cites, had lacked candor because he hid a specific offer—$1.25 million to settle a lawsuit—from shareholders and directors to whom he owed a fiduciary duty. *Id.* at 1294, 1297. No specific offer to acquire OtterSec was—or would ever be—on the table when Sam and David volunteered to transfer 10% of Sam's ownership to Robert. In the similar context of Rule 10b-5 violations, the Fourth Circuit has said that there is no duty to disclose discussions that are "preliminary, contingent, and speculative," or ones that "[a]t best . . . culminated in a vague 'agreement' to establish a relationship" with "no agreement as to the price or structure of the deal." *Taylor v. First Union Corp. of S.C.*, 857 F.2d 240, 244 (4th Cir. 1988) ("Those in business routinely discuss and exchange information on matters which may or may not eventuate in some future agreement. Not every such business conversation gives rise to legal obligations.").

The Opposition has no counter to the straightforward Wyoming law establishing that Robert did not owe a fiduciary duty to the Estate. It cites section 17-29-409(c) of the Wyoming Statutes, which lays out a member's fiduciary duty to other members, Opp'n at 15, but ignores section 17-29-112, which speaks directly to members' duties to transferees and dissociated members. The Opposition also fails to acknowledge the lack of any duties to transferees or

dissociated members in the Operating Agreement, *see* Mem. at 18. No "informal fiduciary relationship" or "confidential relationship" existed either. Opp'n at 15. This kind of relationship can emerge "when one party has gained the confidence of the other and purports to act or advise with the other's interests in mind." *Johnson v. Reiger*, 93 P.3d 992, 999 (Wyo. 2004). Sam's family, David in particular, was mistrustful of Robert as early as April—Robert did not have the family's confidence, nor did he ever purport to act with their interest in mind. Compl. ¶ 67; Mem. at 24. Even if Robert did owe a duty to the Estate, the Complaint has not plausibly (or with particularity) alleged that he acted in bad faith when exercising his contractual and statutory rights to dissolve OtterSec. *See supra* Section I.B.2.; Mem. at 7–8.

D. Fraud

Wyoming law, not Maryland's, governs Plaintiff's fraud claim. Plaintiff attempts to boil the elements of fraud down to "(a) whether Robert intended to defraud or deceive David and Sam, and (b) whether Robert and Sam took action in justifiable reliance on the concealment." Opp'n at 27. This oversimplification omits the requirement—in Maryland as well as Wyoming—that the defendant actually misrepresent or fail to disclose something, and not just intend to do so. *E.g.*, *Richey v. Patrick*, 904 P.2d 798, 802 (Wyo. 1995); *Ellerin v. Fairfax Sav., F.S.B.*, 652 A.2d 1117, 1123 (Md. 1995). The Complaint fails to plausibly allege even Plaintiff's abbreviated elements because Plaintiff's account of the 10% transfer—*see supra* Section I.C.—does not allege *justifiable* reliance. She alleges that David doubted Robert was being truthful. Compl. ¶¶ 37–38. She never alleges that David or Sam asked whether acquisition by Jump was a possibility, or that Robert denied that fact. *See Taylor*, 857 F.2d at 244 (finding no breach of a duty to disclose, and no securities fraud in connection with undisclosed preliminary discussions about a merger where "[t]here is no allegation that defendants had previously denied the possibility of a merger at some

future time"). In that context, it was not justifiable for Sam or David to rely on the assumption that Robert had disclosed every detail of his conversations with Jump.

As for laches, the Opposition misconstrues Defendants' argument regarding the delay. It is not the eleven months between the transfer and the Complaint that matters, but rather the fact that, after extensive back-and-forth correspondence among counsel, Sam, David, and the Estate, none of them had ever objected to the 10% transfer on the basis of lack of information about the Jump discussions until the Estate filed the Complaint. Sam and David did not demand the 10% back when, later in Spring 2022, they learned of Robert's conversations with Jump that they now claim would have made a difference. This, too, undercuts the plausibility of the Complaint and further exposes the *post hoc* invention of Plaintiff's claims.

E. Misappropriation and Conversion

Plaintiff's argument for misappropriation and conversion relies on the idea that the dissolution of OtterSec was improper. As explained above, *supra* Section I.B.1., it was required, and Plaintiff does not contest that Robert had the authority to carry it out. Plaintiff says she was not required to demand the return of whatever property Defendants supposedly stole because she "plainly alleges that she seeks the return of property wrongfully taken." Opp'n at 30. This cannot possibly be a reason to eliminate the demand requirement since any plaintiff alleging conversion in a complaint "seeks the return of property" that, from the plaintiff's perspective, was "wrongfully taken." *Id.* Circumstances like these, where Plaintiff admits that Robert had the authority to dissolve OtterSec, are precisely the types of cases where that demand requirement is enforced. Any property Robert held was lawfully obtained by him as 60% owner of OtterSec or through his

lawful purchase of OtterSec assets, so Plaintiff needed to have demanded its return before bringing this claim. *See Lieberman v. Mossbrook*, 208 P.3d 1296, 1304 (Wyo. 2009).[6] She did not.

F. Breach of Contract

The Opposition selectively quotes Robert's chats with David and *Roussalis v. Wyo. Med. Ctr., Inc.*, 4 P.3d 209 (Wyo. 2000), in order to concoct a new theory: Robert is supposedly liable for breach of contract because he *repudiated* OtterSec's Operating Agreement when he "threat[ened]" to "dissolve the company and remake it" on May 10, 2022. Opp'n at 16. In fact, Robert, as quoted in the Complaint, said "i'll ***probably*** dissolve the company and remake it," Compl. ¶ 77 (emphasis added). The omission of "***probably***" from Plaintiff's brief is significant because, according to *Roussalis*, "[f]or a repudiation to have legal effect, the threatened breach must be serious . . . The statement must be sufficiently positive to be reasonably understood as meaning that the breach will ***actually*** occur." 4 P.3d at 254 (emphasis added). "A party's expressions of doubt as to its willingness or ability to perform do not constitute a repudiation." *Id.* (quoting Farnsworth on Contracts § 8.20, 474–79 (1990)); *see also Fountain City Drill Co. v. Peterson*, 106 N.W. 17, 18 (Wisc. 1906) ("[T]he notice of repudiation must be so authoritative and unambiguous as to wholly and beyond doubt absolve the seller from any duty to proceed to completion of the contract[.]"). Robert described only a potential plan—he would "probably" dissolve the company. This probability was not definite enough to constitute repudiation.

The Opposition also claims that Defendants overlooked a claim for a breach of the implied covenant of good faith and fair dealing when, in fact, this was addressed in Defendants' brief.

[6] Citations to *Acorn* and section 17-29-409(b)(ii) in the misappropriation and conversion section of Plaintiff's brief are not relevant, Opp'n at 29, since those authorities concern breaches of fiduciary duty, not misappropriation and conversion.

Mem. at 25. The breach of contract claim further fails for other reasons discussed above: because bad faith on Robert's part is not adequately pleaded and any alleged injury is wholly derivative.

G. Tortious interference

Contrary to the Opposition, Opp'n at 31 n.8, Defendants contended that Plaintiffs fail to allege each element of tortious interference, not just one. *See* Mem. at 27 ("Plaintiff fails most obviously to plead the existence of a valid relationship element and the damage element."). Without a valid relationship or business expectancy, the second and third elements also fail. *See id.* The Opposition ignores that a plaintiff must have "a valid contractual relationship or business expectancy," *Sheaffer v. State ex rel. Univ. of Wyo.*, 202 P.3d 1030, 1044 (Wyo. 2009), and does not explain the Complaint's failure to identify one beyond claiming that Robert interfered with "Plaintiff's interest in OtterSec and OtterSec's business," Opp'n at 17. Robert, as the majority owner, sole member, and primary decisionmaker for OtterSec, cannot, as a matter of law, have interfered with Plaintiff's business relationship with OtterSec because Robert was an agent of OtterSec, and "[i]t has long been the rule in [Wyoming] that a claim for intentional interference with contract cannot survive if it involves an assertion that an agent for one party to the contract interfered with it." *Pinther v. Am. Nat'l Prop. & Cas. Ins. Co.*, 542 P.3d 1059, 1070 (Wyo. 2024).

Wyoming law applies, but in Maryland, too, "[a]s a matter of law, a party to a contract cannot tortiously 'interfere' with his or her own contract." *Affable Servs., LLC v. C-Care LLC*, No 19-cv-02877, 2020 WL 1675920, at *3 (D. Md. Apr. 6, 2020) (quoting *Blondell v. Littlepage*, 968 A.2d 678, 698 (Md. Ct. Spec. App. 2009). In *Affable Services LLC*, the Court held that the President and CEO of an LLC could not tortiously interfere with the LLC's own business because he acted on behalf of the LLC. *Id.* Nor could Robert tortiously interfere with OtterSec's "business" with Sam or the Estate. The claim cannot succeed in Wyoming, Maryland, or anywhere else.

H. Accounting

Plaintiff emphasizes that the Estate has "a statutory right to an accounting" with respect to OtterSec, Opp'n at 32, but can make no such assertion with respect to Otter Audits or RC Security, whose books the Estate has no right to inspect. Once OtterSec's assets were sold, the Estate's 40% interest was in the proceeds of that sale (which are sitting in OtterSec's undistributed accounts), not in the assets themselves, even if they are in the hands of supposed successor companies.

I. Declaratory Judgment

Plaintiff's arguments in favor of a constructive trust invoke doctrines grounded in "good conscience" and "equitable dut[ies]," Opp'n at 23, but there is nothing conscionable or equitable about a demand that the Court exercise its discretion to award the Estate an interest in two companies that Sam never had anything to do with. Robert founded Otter Audits and RC Security long after the breakdown of his relationship with Sam (and David), and Sam's Estate has no equitable right to any percentage of the work Robert has been able to accomplish through his new businesses.

IV. A STAY OF DISCOVERY IS WARRANTED.

With Plaintiff having conceded so many substantive points in her Opposition, a stay of discovery is more warranted than ever. Now that David's knowledge of Robert's conversations with Jump is not at issue, even a partial ruling in Defendants' favor would limit the scope of this case considerably. Hardly any discovery concerning events prior to Sam's death should be needed, even if a limited set of claims surrounding the dissolution proceed (though none should).

CONCLUSION

For the foregoing reasons, Defendants request that the Court grant judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) and dismiss the Complaint. Defendants also request that the Court stay discovery and all related deadlines pending the outcome of this Motion.

Respectfully submitted,

Dated: May 24, 2024

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CERTIFICATE OF SERVICE

I certify that on May 24, 2024, I filed the foregoing using CM/ECF which serves a copy on all counsel of record.

/s/ Rachel Clattenburg
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