

<b>EMC Presents Delphi LLC v Delphi Studios LLC</b>
2025 NY Slip Op 33050(U)
July 28, 2025
Supreme Court, New York County
Docket Number: Index No. 655192/2024
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49M

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EMC PRESENTS DELPHI LLC,	INDEX NO.	<u>655192/2024</u>
Plaintiff,	MOTION DATE	<u>04/29/2025</u>
- v -	MOTION SEQ. NO.	<u>002</u>
DELPHI STUDIOS LLC and ANDREA JACOBS		
Defendants.	<b>DECISION + ORDER ON MOTION</b>	

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HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (MS002) 27, 28, 29, 30, 31, 32, 33

were read on this motion to/for DISMISS

Plaintiff EMC Presents Delphi LLC (EMC) brings this action against defendants Delphi Studios LLC (Delphi Studios) and Andrea Jacobs (Jacobs, and together with Delphi Studios, defendants), asserting claims for breach of contract, breach of fiduciary duty, tortious interference with contract, and an accounting in connection with the failed financing of an entertainment business venture (NYSCEF # 18 – AC or Amended Complaint). Presently before the court is defendant Jacobs' motion, pursuant to CPLR 3211(a)(7) and (8), to dismiss the Amended Complaint (NYSCEF # 27). EMC opposes the motion. For the following reasons, Jacobs' motion is granted in part and denied in part.

**Background**

The following facts are drawn from the complaint and its accompanying exhibits. They are assumed true for purposes of this motion.

This action involves a business venture to create and produce entertainment and live-streaming events (the Project) (AC ¶ 22). As alleged, the Project required capital of at least \$100 million, which Jacobs offered to finance (*id.*). To that end, on March of 2023, Jacobs introduced EMC to a company called ETHOS Asset Management, Inc. (ETHOS) that provided financing to domestic and international business (*id.* ¶ 23). The parties contemplated that ETHOS would provide the requisite \$100 million in financing in scheduled installments between April and October of 2023 (*id.* ¶ 24).

As part of this financing arrangement, EMC and defendants agreed to deposit a \$20 million security deposit (the Security) in an account at Morgan Stanley Smith Barney (Morgan Stanley) to secure repayment to ETHOS (*see* AC ¶¶ 4, 25). EMC would provide 50% of the Security (the Phase A Security), while Jacobs' company, non-party Pythia Global, LLC (Pythia), would provide the remaining 50% (the Phase B Security) (*id.* ¶ 26). ETHOS entered into identical financing arrangements with EMC and Jacobs, although the contracting party in each case was Delphi Studios 1 (DS1), a wholly-owned subsidiary of Delphi Studios (*id.* ¶ 27).

To facilitate the Project and ETHOS' anticipated financing, EMC and defendants entered into several transaction-related agreements. The first agreement was the Limited Liability Operating Agreement of Delphi Studios, dated March 27, 2023 (the Operating Agreement), which officially formed Delphi Studios to "develop, create, design, present, produce, promote, manage and operate mutually agreed entertainment events" (AC ¶ 29; NYSCEF # 19 – OA § 1.03). Under the Operating Agreement, the parties agreed that the "Manager"—i.e., a designated representative of Delphi LLC and a designated representative of non-party J&M Productions LLC—would manage the affairs of Delphi Studios and any of its subsidiaries, including DS1 (OA § 3.01 & Appendix A). Delphi Studios was separately required to "maintain . . . all records and materials referred to in the Act, including, without limitation, separate books of account for the Company that shall show a true and accurate record of all costs and expenses incurred, all charges made, all credits made and received and all income derived in connection with the operation of the Company," and EMC, as a member, also had a right to request and copy these books and records (*see id.* § 3.06). Finally, as part of entering the Operating Agreement, the parties agreed that any "suit, action, or proceeding based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby, shall be brought solely in state or federal court in New York" (OA § 11.05).

The second agreement was an Investment Letter, dated March 27, 2023, between EMC and Delphi Studios, in which EMC agreed to invest \$10 million in DS1 in exchange for EMC obtaining 10% of Delphi Studios' aggregate membership interests (AC ¶¶ 30-31, NYSCEF # 20). And the third agreement was a Side Letter, also dated March 27, 2023, in which Delphi Studios promised to use EMC's Phase A Security "as collateral" for the financing transaction with ETHOS and further agreed to "promptly refund" this amount if Delphi Studios did not receive \$20 million in financing from ETHOS by July 1, 2023 (the Side Letter) (AC ¶¶ 34-35; NYSCEF # 21).

On March 30, 2023, DS1 entered into an agreement with ETHOS, which was signed by Jacobs, to formalize \$50 million in financing from ETHOS and the Phase A Security (the Phase A Agreement) (AC ¶ 37). The next month, DS1 entered into a second agreement with ETHOS, again signed by Jacobs, to formalize the remaining

half of the transaction (*id.* ¶ 38). For both agreements, DS1 agreed to maintain a Pledge Account with Morgan Stanley (*id.* ¶¶ 38-40). DS1 also agreed to permit ETHOS, under specific conditions, to draw upon a margin amount of the Security (*id.* ¶¶ 40, 45).

On March 29, 2023, at Jacobs' instructions, EMC wired the Phase A Security to Morgan Stanley (AC ¶ 41). The next month, on April 24, 2023, Jacobs directed DS1 to wire \$8 million from the Pledge Account to DS1's account at Citizens Bank (*id.* ¶ 42). Jacobs, in turn, directed DS1 to wire \$7.3 million to ETHOS' account at Bank of New York Mellon (*id.*). By contrast, neither Jacobs nor her company, Pythia, deposited the requisite Phase B Security at Morgan Stanley (AC ¶¶ 33, 43). Instead, in or about April 2023, an entity controlled by non-party John K. Garff—a Utah-based investor and business owner—deposited \$10 million in the name of Pythia (*id.*).

ETHOS immediately drew upon, and then retained, the \$7.3 million it received from DS1 (AC ¶¶ 45-46). However, while doing so, it failed to make any the required funding under the Phase A Agreement (*see id.* ¶¶ 46-48). Due to ETHOS' failure to fulfill its financing obligations, DS1 and ETHOS signed a Settlement Agreement whereby (1) the Phase A Agreement's transaction was cancelled, (2) ETHOS agreed to return the \$7.3 million from DS1 by November 24, 2023, and (3) DS1 agreed to release ETHOS and its officers of any claims (AC ¶¶ 49-50). Yet despite this agreement, ETHOS never returned the \$7.3 million payment as required under the Settlement Agreement (*id.* ¶ 50). Instead, on November 12, 2023, ETHOS's CEO, Carlos Santos, was arrested by the United States Department of Homeland Security (DHS) for conspiracy to commit wire fraud (*id.* ¶¶ 51-53).

Since that time, EMC avers, defendants have refused to provide EMC with (1) information regarding the Morgan Stanley account, including what, if any portion, of the Phase A Security remains in the account, or (2) any documents and communications between Jacobs and ETHOS that were provided to DHS (*see* AC ¶¶ 44, 56). Plaintiff further asserts that defendants have refused to refund EMC its Phase A Security as required under the Side Letter (*id.* ¶ 36). Conversely, three months later, without informing EMC, Jacobs returned the \$10 million deposit back to John K. Garff (*id.* ¶ 43).

Accordingly, on October 1, 2024, EMC commenced this action (NYSCEF # 1). Thereafter, on January 13, 2025, EMC filed the operative Amended Complaint (NYSCEF # 18). In the Amended Complaint, EMC asserts five causes of action. *First*, EMC asserts a claim for breach of the side letter against Delphi Studios (*id.* ¶¶ 60-7). *Second*, EMC asserts a claim for breach of the operating agreement against Delphi Studios (*id.* ¶¶ 68-77). *Third*, EMC asserts a claim for breach of fiduciary duty against Jacobs (*id.* ¶¶ 78-85). *Fourth*, EMC asserts a claim for tortious interference with contracts against Jacobs (*id.* ¶¶ 86-91). *Finally*, EMC asserts a claim for accounting against Delphi Studios (*id.* ¶¶ 92-94).

### Legal Standard

Pursuant to CPLR 3211(a)(8), a party may move to dismiss on the ground that the court lacks personal jurisdiction over defendants (CPLR 3211 [a] [8]). On such a motion, the court is required to accept as true allegations set forth in the complaint and accord plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013]; *Whitcraft v Runyon*, 123 AD3d 811, 812 [2d Dept 2014]). The plaintiff nevertheless bears the “burden of presenting sufficient evidence, through affidavits and relevant documents, to demonstrate jurisdiction” (*Coast to Coast Energy, Inc. v Gasarch*, 149 AD3d 485, 486 [1st Dept 2017]). Although plaintiff need not conclusively establish that there is personal jurisdiction in defending against a motion to dismiss, he or she must make at least a “‘sufficient start’ in demonstrating, prima facie, the existence of personal jurisdiction” (*see Matter of James v iFlex Inc.*, 185 AD3d 22, 29-30 [1st Dept 2020]).

Meanwhile, under CPLR 3211(a)(7), a party may seek dismissal if a pleading “fails to state a cause of action.” On a motion brought pursuant to CPLR 3211(a)(7), the court “must accept as true the facts as alleged in the complaint and submissions in opposition to the motion” and “accord plaintiffs the benefit of every possible favorable inference” (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.*, 20 NY3d 59, 63 [2012]). Courts will test the facial sufficiency of a pleading, assessing whether plaintiff has “stated a claim cognizable at law” or, if the claim is cognizable, whether plaintiff has “failed to assert a material allegation necessary to support the cause of action” (*see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014]).

### Discussion

In her motion, Jacobs advances two primary bases for dismissal of the Amended Complaint. *First*, Jacobs maintains that the court lacks both general and specific jurisdiction over her (NYSCEF # 30 – MOL at 2-7). *Second*, Jacobs avers that, even if the court had jurisdiction, EMC’s tortious interference claim must be dismissed because an officer of a company cannot be held liable for tortious interference with one of the company’s contracts (*id.* at 7-8). EMC opposes Jacobs’ motion, arguing that the court has jurisdiction pursuant to the Operating Agreement’s forum selection clause, and that it has stated a claim for tortious interference because Jacobs exceeded the bounds of her authority as Delphi Studios’ manager (NYSCEF # 32 – Opp at 3-18).

#### I. Motion to Dismiss for Lack of Personal Jurisdiction

Jacobs advances three primary arguments in support of her contention that the court lacks personal jurisdiction over her. To start, Jacobs avers that the court lacks general jurisdiction because she neither resides nor works in New York (MOL

at 2-3). Next, Jacobs contends that the court lacks specific jurisdiction because she has not purposefully availed herself to New York (*id.* at 3-4). Finally, Jacobs maintains that she was not present in New York for any of the alleged torts, does not regularly do or solicit business in the state, and did not expect her actions to have consequence in the state (*id.* at 4-5). Jacobs also argues that, even if jurisdiction existed under New York's long-arm statute, EMC could not establish that exercising jurisdiction over her would satisfy due process (*id.* at 5-7).

In response, EMC maintains that Jacobs' jurisdiction arguments are precluded by the forum selection clause included in the Operating Agreement, which designates New York as the forum for "any matter arising out of or in connection with" the Operating Agreement or the transactions it contemplated (Opp at 6-9). EMC further contends that, although Jacobs is not a party to the Operating Agreement, she is nevertheless "closely related" to two of its signatories and thus it was foreseeable that she would be bound to the clause (*id.* at 6-9).

At the outset, Jacobs did not reply to EMC's opposition and hence failed to contest EMC's forum-selection-clause jurisdiction arguments. As a consequence, Jacobs seemingly concedes the applicability of the forum selection clause to her given that her original motion failed to address this issue (*see Am. Express Travel Related Servs. Co., Inc. v Homestyle Dining, LLC*, 2019 WL 132524, at \*2 n3 [Sup Ct, NY County, Jan. 8, 2019] [concluding that argument was "deemed conceded" by defendant when it did not "address the merits of [plaintiff's] argument in its opposition"]). In any event, as explained below, the Operating Agreement's forum selection clause confers jurisdiction over Jacobs.

It is the "well-settled 'policy of the courts of [New York] to enforce contractual provisions for . . . selection of a forum for litigation" (*Sterling Natl. Bank as Assignee of NorVergence, Inc. v E. Shipping Worldwide, Inc.*, 35 AD3d 222, 222 [1st Dept 2006], quoting *Koob v IDS Fin. Servs.*, 213 AD2d 26, 33 [1st Dept 1995]). Thus, if a valid forum selection clause designates New York as the forum to hear the parties' dispute, courts will construe the clause to confer personal jurisdiction over all parties to the agreement (*see Natl. Union Fire Ins. Co. of Pittsburgh, Pa. v Williams*, 223 AD2d 395, 397-398 [1st Dept 1996] ["It is settled that a selection of forum clause affords a sound basis for the exercise of personal jurisdiction over a foreign defendant"]).

Here, there is no dispute that parties to the Operating Agreement "agree[d] that any suit, action, or proceeding based on any matter arising out of or in connection with, this Agreement or the transactions contemplated hereby, shall be brought solely in" a New York state or federal court (OA § 11.05). And a cursory review of the Amended Complaint, in turn, confirms that EMC's claims all relate to the fallout from the parties' failed financing transaction in connection with the Project, which, as set forth in the Operating Agreement, served as the entire basis for forming Delphi Studios (*see* AC ¶¶ 1, 22, 29; OA § 1.03 [explaining that Delphi



Studios was formed to “develop, create, design, present, produce, promote, manage and operate mutually agreed entertainment events” using “the technology and social media platform exclusively controlled by Company under exclusive license from Pythia LLC” and to offer its “products and services in and out of Puerto Rico”). In other words, EMC’s claims in the Amended Complaint all “aris[e] out of” the Operating Agreement or its contemplated transactions. Accordingly, EMC’s claims are plainly covered by the Operating Agreement’s forum selection clause (*see Wolf v Wahba*, 164 AD3d 1405, 1407 [2d Dept 2018] [concluding that forum selection clause that provided that “parties hereto agree that any suit or proceeding arising out of this Agreement or the consummation of the transaction contemplated thereby” was “broad”]).

Although Jacobs is not a signatory to the Operating Agreement, the reach of its forum selection clause extends to her. “Under New York law, a signatory to a contract may invoke a forum selection clause against a non-signatory if the non-signatory is ‘closely related’ to one of the signatories such that ‘enforcement of the forum selection clause is foreseeable by virtue of the relationship between the signatory and the party sought to be bound’” (*see Metro-Goldwyn-Mayer Studios Inc. v Canal+ Distrib. S.A.S.*, 2010 WL 537583, at \*5 [SD NY, Feb. 9, 2010, No. 07 Civ. 2918(DAB)]). In this case, Jacobs is “closely related” to both Delphi LLC and Pythia, two of the four members of Delphi Studios, because, as alleged, she has full control of those entities (*see* AC ¶¶ 9, 21, 26, 28, 32, 43). Indeed, Jacobs signed the Operating Agreement twice in her capacity as Chief Executive Officer for these entities (OA at 25). Jacob’s clear ownership and/or controlling interest in Pythia and Delphi LLC thus makes it entirely foreseeable that EMC could later seek to bind her to the Operating Agreement’s forum selection clause in the event of a dispute arising out of that agreement. EMC has therefore established that the court may exercise personal jurisdiction over Jacobs by virtue of the Operating Agreement’s forum selection clause (*see Universal Inv. Advisory SA v Bakrie Telecom Pte., Ltd.*, 154 AD3d 171, 179 [1st Dept 2017] [observing that a close relationship between a nonsignatory and a signatory exists “[i]f the nonsignatory party has an ownership interest or a direct or indirect controlling interest in the signing party,” or if “the entities or individuals consulted with each other regarding decisions and were intimately involved in the decision-making process” of the signatory]).

Jacob’s motion to dismiss pursuant to CPLR 3211(a)(8) is denied.

## **II. Motion to Dismiss Claim for Tortious Interference with Contract (Count IV)**

Jacobs maintains that dismissal of EMC’s tortious interference claim is warranted because Jacobs’ actions or inactions were undertaken in her capacity as an offer of Delphi Studios (MOL at 8). Jacobs avers that, because there is no claim that her actions or inactions exceeded the bounds of her authority, she is immune from any claim of tortious interference (*id.*). EMC counters that it has established that Jacobs exceeded the bounds of her authority as Delphi Studios’ Manager

because she was required to provide, but ultimately prevented, EMC from accessing Delphi Studios' books and records, and because she prevented Delphi Studios from refunding EMC pursuant to the terms of the Side Letter (Opp at 17).

To state a cause of action for tortious interference with contract, a plaintiff must allege "a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (*330 Acquisition Co., LLC v Regency Sav. Bank, F.S.B.*, 293 AD2d 314, 315 [1st Dept 2002]). When a plaintiff seeks to hold a corporate officer or agent liable for inducing a breach, such claims are subject to an enhanced pleading standard (*see Petkanas v Kooyman*, 303 AD2d 303, 305 [1st Dept 2003]). In such cases, plaintiff must allege that the officer or agent acted "outside the scope of [its] authority," or that it "personally profited from [its] acts" (*see Shear Enters., LLC v Cohen*, 189 AD3d 423, 424 [1st Dept 2020]). This typically requires pleading that the corporate officer or agent was motivated "solely by malice" or otherwise had committed independent torts and/or predatory acts directed at another (*Murtha v Yonkers Child Care Assoc.*, 45 NY2d 913, 915 [1978] ["A corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer (and did not commit) independent torts or predatory acts directed at another"] [alterations omitted]; *Bradbury v Israel*, 204 AD3d 563, 564 [1st Dept 2022] [to sufficiently state tortious interference claim "it must be alleged that defendant's conduct was motivated solely by malice or to inflict injury by unlawful means going beyond mere self-interest or other economic considerations"]).

Here, the crux of EMC's tortious interference claim is that Jacobs intentionally interfered with EMC's contractual rights by refusing to turn over documents to which EMC is entitled under the Operating Agreement and preventing Delphi Studios from refunding \$10 million due under the Side Letter (AC ¶¶ 86-91). EMC, however, fails to allege any facts that support even an inference that Jacobs was motivated by malice or that her conduct constituted an independent tort or predatory act. Contrary to EMC's suggestion in opposition (Opp at 17-18), the mere fact that Jacobs has prevented Delphi Studios from complying with its contractual obligations, without more, is not sufficient to state a plausible claim for relief (*see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 110 [1st Dept 2002] ["a pleading must allege that the acts complained of, whether or not beyond the scope of the defendant's corporate authority, were performed with malice and were calculated to impair the plaintiff's business for the personal profit of the defendant"])). Therefore, EMC's tortious interference claim must be dismissed.

Jacob's motion to dismiss EMC's tortious interference claim is granted.



**Conclusion**

For the foregoing reasons, it is hereby

ORDERED that defendant Andrea Jacobs' motion, pursuant to CPLR 3211(a)(7) and (8), to dismiss the Amended Complaint is granted to the extent of dismissing plaintiff EMC Presents Delphi LLC's claim for tortious interference and denied in all other respects; and it is further

ORDERED that defendant Jacobs is directed to serve an answer to the complaint within 30 days of the e-filing of this order; and it is further

ORDERED that within 30 days of service of the answer, the parties shall meet and confer and stipulate to a discovery schedule, and contact the assigned justice's Part Clerk regarding a preliminary conference; and it is further

ORDERED that defendant shall serve a copy of this Decision and Order with notice of entry on the Clerk of the Court in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page and on the court's website).

7/28/2025

DATE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

APPLICATION:

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SETTLE ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION

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GRANTED IN PART

☐

OTHER

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SUBMIT ORDER

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FIDUCIARY APPOINTMENT

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REFERENCE

MARGARET A. CHAN, J.S.C.