SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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| BERYL ZYSKIND and JOEL GOLD, Plaintiffs, - against - FACECAKE MARKETING TECHNOLOGIES, INC., Defendant. | Index No. 652140/10 |

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COUNTERCLAIMS**

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Plaintiffs Beryl Zyskind and Joel Gold (collectively, "Plaintiffs"), by and through their counsel, Sichenzia Ross Friedman Ference LLP, respectfully submit this memorandum of law in opposition to Defendant FaceCake Marketing Technologies, Inc.'s ("Defendant") Motion to Dismiss Plaintiffs' Counterclaims, pursuant to CPLR §§ 3211 (a)(1), (5) and (7) (the "Motion to Dismiss"). For the reasons set forth below, none of Defendant's arguments justify dismissal of any of the Plaintiffs' Counterclaims.

## PRELIMINARY STATEMENT

Plaintiffs are individual investors and New York residents who took a substantial risk when they invested in a small California corporation based on their mistaken belief that they were investing in a properly managed company that would do well by its shareholders and honor its contractual obligations. Instead, Defendant took nearly $750,000 from Plaintiffs and thumbed its nose at its contractual obligations – failing to repay Plaintiffs their principal and interest, refusing to provide its shareholders with any insight into the company's finances or management, cancelling previously issued and fully-paid for shares of company stock, and issuing additional equity to subsequent investors in violation of Plaintiffs' bargained for "anti-dilution" protections. Indeed, Plaintiffs have already obtained a judgment against Defendant for its misconduct in the amount of $1,064,317.93.

Before this Court are ten (10) counterclaims (the "Counterclaims") that Plaintiffs have adequately pled. The Motion to Dismiss fails for not withstanding the slightest analysis and incorrectly arguing the merits of the Counterclaims instead of challenging whether Plaintiffs have stated cognizable claims. Accordingly, the motion should be denied in its entirety.

On or about September 28, 2004, Plaintiffs entered into identical loan agreements (the "Agreements") with Defendant, which the parties bargained for at arm's length with the benefit

of counsel. The Agreements provided that, in exchange for Plaintiffs' making $1,250,000 in investments over a period of time, Defendant would issue to Plaintiffs corresponding principal amounts of 8.0% Senior Notes (the "Notes") and 1,687,500 shares of Defendant's common stock ("Common Stock") representing twenty (20%) of the outstanding Common Stock. The Agreements also granted "anti-dilution" protections regarding Plaintiffs' ownership interests in Defendant and further required Defendant to provide quarterly, certified financial statements of Defendant in respect of its financial position and operating results. Defendant has repeatedly failed and refused to comply with the foregoing obligations despite funding by Plaintiffs. Plaintiffs have been substantially injured as result.

First, Plaintiffs have adequately alleged, and this Court already has determined, that Plaintiffs have made substantial loans to Defendant and Defendant has failed to repay same.

Second, Plaintiffs have alleged that, after receiving and retaining $650,000 from Plaintiffs, Defendant *unilaterally and retroactively cancelled* Plaintiffs' fully-paid for (and held) 1,755,000 shares of Common Stock, with no factual or legal basis to do so.

Third, Plaintiffs have adequately alleged that Defendant has, from the outset of Plaintiffs' financing, repeatedly failed to provide Plaintiffs with certified quarterly income, earnings and cash flow statements for Plaintiffs to monitor both their investments and Defendant's management, all of which was required under the Agreements and the Notes.

Fourth, Plaintiffs have adequately alleged that Defendant subsequently issued additional equity to other non-party investors in violation of Plaintiffs' bargained-for "anti-dilution" protections under the Agreements.

Fifth, Plaintiffs have alternatively and sufficiently alleged that Defendant has converted, or been unjustly enriched by, $90,000 in additional loans from Plaintiffs for which Defendant has refused to issue corresponding Notes and Common Stock as required to by the Agreements.

Sixth, based on all of the foregoing, Plaintiffs also have adequately pled causes of action for declaratory judgment and specific performance with respect to both the Common Stock that Defendant issued but subsequently cancelled and the Notes and Common Stock that Defendant has refused to issue in exchange for the $90,000 in additional loans, as well as pursuant to the "anti-dilution" protections in the underlying Agreements.

Finally, pursuant to the Agreements and Notes, which Defendant has not denied entering into, Plaintiffs have sufficiently alleged causes of action for an accounting and attorneys' fees.

For all of the foregoing reasons, Defendant's motion to dismiss should be denied in its entirety.

## STATEMENT OF FACTS

The relevant facts are fully set forth in the accompanying Affidavits of Beryl Zyskind (the "Zyskind Aff."), sworn to on January 6, 2012, and Joel Gold (the Gold Aff."), sworn to on January 9, 2012. Briefly stated, the pertinent facts are as follows:

On or about September 28, 2004, Zyskind and Gold entered into the Agreements, which provided for their making a series of investments in Defendant in exchange for Notes and equity in Defendant, totaling 20% of all outstanding Common Stock. (See Zyskind Aff. ¶8; Gold Aff. ¶8; Mot. to Dismiss at Ex. 2.) At all times, the parties were represented by counsel and negotiated at arm's length. (See Zyskind Aff. ¶7; Gold Aff. ¶7.) With respect to equity, the parties bargained for the following investment ratio: for every dollar that Plaintiffs loaned to Defendant, Plaintiffs would receive 2.7 shares of Common Stock, e.g., 337,500 shares of

Common Stock / $125,000 = 2.7 shares and 135,000 shares of Common Stock/$50,000 = 2.7 shares. (See Zyskind Aff. ¶10; Gold Aff. ¶10.)

The parties agreed that upon Defendant's receipt of each loan payment from Plaintiffs, Defendant would issue corresponding Notes and Common Stock. (See Zyskind Aff. ¶11; Gold Aff. ¶11.) As each loan installment was a discrete action, the parties never bargained for or agreed that an alleged breach of *any* individual installment payment would trigger a default of *every* installment payment. (See Zyskind Aff. ¶13; Gold Aff. ¶13.) Similarly, the parties never bargained for or agreed that any such alleged breach would extinguish Plaintiffs' rights with respect to (a) issued and fully paid for Common Stock, (b) repayment of the Notes, (c) repayment and issuance of Notes and Common Stock for any other payments made to Defendant, or (d) anti-dilution protections. (See Zyskind Aff. ¶14; Gold Aff. ¶14.) Indeed, the Agreements provide:

> On each Closing Date, the Company shall deliver to Investor the relevant Note and the relevant Shares pursuant to Section 1 hereof.

(See Mot. to Dismiss Ex. 2, Section 2.) Furthermore, with regard to Common Stock issued to Plaintiffs, Defendant represented and warranted that upon issuance of same, the shares were deemed fully paid for and Plaintiffs' property. (See Zyskind Aff. ¶39; Gold Aff. ¶39.) To this end, the parties agreed:

> The Shares, upon the issuance thereof, shall be validly authorized and validly issued, full paid, and nonassessable and will not have been issued, owned or held in violation of any preemptive or similar right of stockholder.

(See Mot. to Dismiss, Ex. 2, Section 4(b)(vi).)

To induce Plaintiffs' risky investment in Defendant, the Agreements further provided that in the event that Defendant subsequently issued or agreed to issue any Common Stock, preferred stock, warrants, options or other rights to acquire such securities, to any person or entity, then

Defendant was required to issue additional shares (or equivalent securities) to prevent the dilution of Plaintiffs' ownership interests in Defendant. (See Zyskind Aff. ¶27; Gold Aff. ¶27.) As set forth in the Agreements:

> (ii) If at any time after the date hereof, the Company proposes to issue Equity Securities, the Company shall ... (A) give written notice thereof to the Investor, setting forth the reasonable detail: (1) the designation and the terms and provisions of the securities proposed to the issued (the "*Proposed Securities*"), including, where applicable, the voting powers, preferences, and relative participating, optional or other special rights, and qualification, limitations or restrictions thereon and any another material attributes thereof ...; (2) the price and other terms of the proposal sale of such securities; (3) the number of such securities to be issued; and (4) such other information as the Investor may reasonable request in order to evaluate the proposed issuance, and (B) **offer to use to the Investor a portion of the Proposed Securities equal to the Investor's Percentage Interest (as hereafter defined)**.
>
> (iii) The Investor must exercise his or its purchase rights hereunder within ten days after receipt of the noticed from the Company described in Section 7(b)(ii).
>
> (iv) During the 60 days following the expiration of the ten day offering period described above (or such longer periods as may be consented to by the affirmative vote of the Common Stock held by all stockholders, which consent shall not be unreasonably withheld or delayed), the Company will be free to seek to third parties such Proposed Securities as the Investor has not elected to purchase ... on terms and conditions no more favorable to the third parties than those offered to the Investor. **Any Proposed Securities offered or sold by the Company after such 60-day period (or such longer period as may be consented to by the affirmative vote of the stockholders of the Company holding a majority of the outstanding shares of Common Stock), must be re-offered to the Investor pursuant to this Section ....**
>
> (v) The election by the Investor not to exercise his or its subscription rights ... in any one instance shall not affect his or its right (other than in respect of a reduction in her or its relative interest and Percentage Interest in the Company) as to any subsequent proposed issuance of Equity Securities. **Any sale of such securities by the Company without first affording the Investor the opportunity to exercise his or its rights as described in this Section ... shall be nulled and void and of no force or effect.**

(See Mot. to Dismiss, Ex. 2, Sections 7(e) (ii) – (v) (emphasis added).)

Pursuant to the Agreements' terms, Defendant also agreed to provide Plaintiffs with its quarterly financial statements so that Plaintiffs could monitor Defendant's overall financial health and track its management. (See Zyskind Aff. ¶19; Gold Aff. ¶19.) To this end, pursuant to Section 4(a) of each Note issued to Plaintiffs, Defendant agreed to the following:

> So long as any amount remains unpaid on the Note...the [Defendant]...shall deliver to each Holder: as soon as available, and in any event within 45 days after the end of each of the first three quarterly fiscal periods of each fiscal year of [Defendant], consolidated statements of income, retained earnings, and cash flow of [Defendant], for such period and for the period from the beginning of the respective fiscal year to the end of such period, and the related consolidated balance sheet of [Defendant] and its subsidiaries, if any, as at the end of such period setting forth in the case of each such statement in comparative form the corresponding figures for the corresponding period in the preceding fiscal year, accompanied by a certificate of the chief financial officer of [Defendant], which certificate shall state that on behalf of [Defendant] and to his knowledge (A) such financial statements fairly present in all material respects the financial position and results of operations of [Defendant] and its subsidiaries, if any, all in accordance with generally accepted accounting principles consistently applied, and (B) no Default (as hereinafter defined) has occurred and is continuing or, if any Default has occurred and is continuing, a description thereof in reasonable detail and of the action [Defendant] has taken or proposes to take with respect thereto.

(See Mot. to Dismiss, Ex. 2.)

To elevate Plaintiffs' confidence in how Defendant would treat shareholders, Defendant further agreed that:

> [I]n the event that the Investor should sue the Company for breach of this Agreement ... and prevail in such action, the legal fees and expenses of such action incurred by the investor shall be paid for upon demand by the Company.

(See Mot. to Dismiss, Ex. 2, Sec. 8(a).) The parties included a similar term in each Note at Paragraph 6(b). (Zyskind Aff. ¶18.)

Based on the foregoing terms, the existence and validity of which Defendant does not dispute, on or about September 28, 2004, Plaintiffs made a series of loan payments to Defendant in exchange for, with respect to Mr. Zyskind, corresponding Notes totaling $275,000 and

742,500 fully paid for shares of Common Stock, and, with respect to Mr. Gold, $375,000 and 1,012,500 fully paid for shares of Common Stock. (See Zyskind Aff. ¶20; Gold Aff. ¶20.) During this same period, however, Defendant repeatedly failed to provide Plaintiffs, as shareholders, with updates, notices, or financial or audit statements as required by the Agreements in plain violation of the Agreements. (See Zyskind Aff. ¶22; Gold Aff. ¶22.) In other words, Defendant took the money and cut off contact with Plaintiffs. To date, Defendant has never cured any of its breaches despite the fact that Plaintiffs are entitled to receive this information three of four quarters every fiscal year. (See Zyskind Aff. ¶24; Gold Aff. ¶24.)

Under the mistaken belief that Defendant would eventually remedy its breaches and respect its shareholders, pursuant to the Agreements, Plaintiffs thereafter made additional loans totaling $90,000, all of which Defendant willingly, and without question or objection, received and retained. (See Zyskind Aff. ¶25; Gold Aff. ¶25.) Despite doing so, and in violation of the Agreements, Defendant refused to issue Plaintiffs corresponding Notes and Common Stock based on the parties' agreed-to investment ratio. (See Zyskind Aff. ¶26; Gold Aff. ¶26.) When Plaintiffs subsequently learned that Defendant had issued additional equity to other investors, Defendant also refused to honor Plaintiffs' "anti-dilution" rights under the Agreements, which refusal significantly diluted Plaintiffs' ownership in Defendant. (See Zyskind Aff. ¶27; Gold Aff. ¶27.) Finally, in or about August 2005, Defendant unilaterally and retroactively purportedly cancelled the Common Stock – 742,500 shares owned by Mr. Zyskind and 1,012,500 shares owned by Mr. Gold – that was previously already issued to and fully-paid for by Plaintiffs in plain violation of the Agreements. (Countercl. n. 5.)

## Argument

## POINT I

## LEGAL STANDARD FOR MOTION TO DISMISS

In the context of a motion to dismiss pursuant to CPLR § 3211, the Court must afford the pleadings a liberal construction, take the allegations of the complaint and any submissions in opposition to a dismissal motion as true and provide plaintiff the "benefit of every possible inference." Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 (1994); see also 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152, 746 N.Y.S.2d 131, 134 (2002); Salles v. Chase Manhattan Bank, 300 A.D.2d 226, 228, 754 N.Y.S.2d 236, 238 (1st Dep't 2002); Mutual Benefits Offshore Fund v. Zeltser, No. 650438-2009, 2011 WL 4031516, at *2 (N.Y. Sup., Sept. 7, 2011) (Fried, J.). To that end, the Court must determine whether the facts alleged in the Counterclaims fit within any cognizable legal theory. See Lawrence v. Miller, 11 N.Y. 3d 588, 595 (2008) (internal citation omitted); 1199 Housing Corp. v. Int'l Fidelity Ins. Co., 14 A.D.3d 383, 384, 788 N.Y.S.2d 88, 89 (1st Dep't 2005). Indeed, a cause of action may only be dismissed if " 'it has been shown that material fact as claimed by the pleader ... is not a fact at all and ... no significant dispute exists regarding it.'" Acquista v. New York Life Ins. Co., 285 A.D.2d 73, 76, 730 N.Y.S.2d 272, 274 (1st Dep't 2001) (internal citation omitted). In other words, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." EBC I., Inc. v. Goldman Sachs & Co., Inc., 5 N.Y.3d 11, 19, 799 N.Y.S.2d 170, 175 (2005).

A party may move for judgment dismissing one or more causes of action on the grounds that a defense is founded upon documentary evidence or fails to state a cause of action. See C.P.L.R. §§ 3211 (a)(1) (5) and (7) (McKinney 2005). Pursuant to §3211(a)(7), however, the

facts alleged in the pleading are presumed true, and it is the Court's role to "accord plaintiffs the benefits of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory." Arnav Indus., Inc. Retirement Trust v. Brown, Raysman, Millstein, Felder & Steiner, 96 N.Y.2d 300, 303, 727 N.Y.S.2d 688 (2001) (citing Leon, 84 N.Y.2d at 87-88). "'To be considered documentary,' evidence must be unambiguous and of undisputed authenticity." Fontanetta v. Doe, 73 A.D.3d 78, 86, 898 N.Y.S.2d 569, 575 (2d Dep't 2010) (internal citations omitted); see also Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561, 571, 807 N.Y.S.2d 583, (2005).

As set forth below, Plaintiffs' Counterclaims satisfy the applicable pleading standards. By contrast, Defendant fails to (a) demonstrate how the Counterclaims do not adequately plead – not prove – the causes of action or (b) produce any unambiguous, indisputable evidence to warrant dismissal of *any* of the Counterclaims. Indeed, Defendant wholly fails to demonstrate that the contractual documents, as a matter of law, negate the Counterclaims. Instead, they lend strong support for Plaintiffs' allegations that they complied with the applicable agreements to its detriment. Succinctly stated, Defendant's attempt – through a naked attorney affirmation and a memorandum of law – to submit emails, S.E.C. filings, and unrelated and irrelevant litigation excerpts and case law, falls short of the "documentary evidence" contemplated for dismissal purposes. See Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 865 (2002) (with respect to a pre-answer motion to dismiss based on CPLR 3211 (a)(1), dismissal is appropriate only where the "document" at issue "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law."); see also Waxman Real Estate LLC v. Sacks, No. 652057-2010, 2011 WL 4031522, at *2 (N.Y. Sup., Sept. 7, 2011) (Fried, J.) (recognizing that dismissal pursuant to 3211(a)(1) is appropriately granted "only

where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law."). Defendant has repeatedly and variously breached the Agreements and the Notes, and liberally implied terms into the contractual documents that are neither stated nor suggested.

Accordingly, Defendant's documentary evidence fails, as a matter of law, to provide a defense to the allegations contained in the Counterclaims.

## POINT II

### Defendant Fails to Submit "Documentary Evidence" That Satisfies CPLR § 3211(a)(1)

Without specific attribution to any cause of action, Defendant moves to dismiss the Counterclaims pursuant to CPLR 3211(a)(1) based upon "documentary evidence" – namely, the Affidavit of Linda Smith, Defendant's Chief Executive Officer (the "Smith Aff."), which Defendant previously submitted in its unsuccessful opposition to Plaintiffs' Motion for Summary Judgment in Lieu of Complaint, together with seven exhibits simply annexed to a bald attorney affirmation (the "DeRose Aff."). The Court should not consider these documents in deciding Defendant's Motion to Dismiss.

Where, as here, a party seeks dismissal pursuant to CPLR 3211(a)(1), it is well-settled that courts will not consider, inter alia, affidavits and emails submitted by the movant in support of its motion. See Fontanetta, 73 A.D.3d at 85-86 ("[I]t is clear that affidavits...are not 'documentary evidence within the intendment of a CPLR 3211(a)(1) motion to dismiss."); see also Tsimerman v. Janoff, 40 A.D.3d 242, 242, 835 N.Y.S.2d 146, 147 (1st Dep't 2007) (affidavit from defendant which did "no more than assert the inaccuracy of plaintiffs' allegations, may not be considered, in the context of a motion to dismiss, for the purpose of determining whether there is evidentiary support for the complaint ....").

In this case, Defendant's Motion relies extensively upon the Smith Affidavit – a voluminous, seventeen-page document brimming with myriad conclusory and unsupported allegations that merely dispute the Counterclaims' allegations. (See Mot. to Dismiss at pp. 2, 3, 10.) Moreover, the Smith Affidavit's accompanying exhibits, including email communications between the parties and correspondence between their counsel provides no factual or legal support for dismissal. Indeed, to the extent that the Court considers the emails annexed to the Motion to Dismiss, these communications merely document that, contrary to the suggestions of Defendant's counsel, Defendant, as a matter of course, had disregarded the timelines contemplated in the Agreements – a conclusion also considered by this Court when it rejected allegations of untimeliness raised in opposition to Plaintiffs' Motion for Summary Judgment in Lieu of Complaint. See Smith Aff. at Exs. 1, 3, 4, 5, 6; see also Lawrence, 11 N.Y.3d 588 at 595 (internal quotations, citations, and emphasis omitted).[1]

The DeRose Affirmation is similarly unhelpful to Defendant, because its exhibits – including case law and litigation docket excerpts from unrelated actions – while inflammatory, utterly fail to constitute evidence of the variety necessary for the Defendant to advance a defense, as a matter of law, any cause of action set forth in the Counterclaims. (See DeRose Aff. at Exs. 1-4, 6-7.) Defendant's Motion to Dismiss falls well short of its burden to prevail as to any of the Counterclaims. Accordingly, and as set forth below, the Court should deny Defendants' Motion to Dismiss in its entirety.

[1] By contrast, the Court "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint." Volt Delta Resources LLC v. Soleo Communications Inc., No. 601443/05, 2006 WL 800791, at *2 (N.Y. Sup., Mar. 29, 2006) (Fried, J.) (internal citation omitted).

## POINT III

### Plaintiffs Adequately Plead Breach of Contract

Plaintiffs' First, Second, Third, Fourth, and Tenth Counterclaims are premised upon Defendant's various breaches of the Agreements and Notes. (See Countercl. ¶¶ 109-30, 151-62.) It is axiomatic that a valid breach of contract claim contains the following elements: 1) the existence of a contract, 2) consideration, 3) performance of the contract by the plaintiff, 4) breach by the defendant, and 5) Plaintiff suffered damages as a consequence. See Honeywell International, Inc. v. Northshore Power Systems, LLC, No. 652163/10, 2011 WL 3198877, at *2 (N.Y. Sup., Jul. 25, 2011) (internal citations omitted) (Fried, J.). Plaintiffs' Counterclaims satisfy these *prima facie* elements.

First, Defendant does not dispute the existence of the terms of the Agreements and Notes or executing same; rather, Defendant believes that it can evade its obligations under the foregoing contractual documents by arguing against the merits of the Counterclaims – a misplaced objective for 3211 purposes. (See Countercl. ¶ 86; Smith Aff. ¶ 25, Ex. 2.)

In addition, the Counterclaims adequately plead the necessary elements. On or about September 28, 2004, Zyskind and Gold entered into the Agreements, which provided for their making a series of investments in Defendant in exchange for Notes and equity in Defendant, totaling 20% of all outstanding Common Stock. (See Zyskind Aff. ¶8; Gold Aff. ¶8; Mot. to Dismiss, Ex. 2.) In full satisfaction of their obligations, Plaintiffs thereafter made a series of loan payments to Defendant in exchange for, with respect to Mr. Zyskind, corresponding Notes totaling $275,000 and 742,500 fully paid for shares of Common Stock, and, with respect to Mr. Gold, $375,000 and 1,012,500 fully paid for shares of Common Stock. (See Zyskind Aff. ¶21; Gold Aff. ¶21.) During this same period, however, Defendant repeatedly failed to provide

Plaintiffs, as shareholders, with updates, notices, or financial or audit statements as required by the Agreements in plain violation of the Agreements. (See Zyskind Aff. ¶22; Gold Aff. ¶22.) Thereafter, Plaintiffs made additional loans totaling $90,000, all of which Defendant willingly, and without question or objection, received and retained. (See Zyskind Aff. ¶25-26; Gold Aff. ¶25-26.) Despite doing so, and in violation of the Agreements, Defendant refused to issue Plaintiffs corresponding Notes and Common Stock based on the parties' agreed-to investment ratio. (See id.) Subsequently, when Plaintiffs learned that Defendant had issued additional equity to other investors, Defendant also refused to honor Plaintiffs' "anti-dilution" rights under the Agreements, which refusal diluted Plaintiffs' ownership in Defendant. (See Zyskind Aff. ¶27; Gold Aff. ¶27.)

All of the foregoing constituted breaches of the Agreements. Furthermore, as alleged, in further breach of the Agreements, in or about August 2005, Defendant unilaterally and retroactively cancelled the Common Stock – 742,500 shares as to Mr. Zyskind and 1,012,500 shares as to Mr. Gold – that was previously issued to, and fully-paid for by, Plaintiffs. (See Zyskind Aff. ¶37; Gold Aff. ¶37; Countercl. n. 5.) As such, it is beyond dispute that Plaintiffs have adequately plead all of the elements of breach of contract, declaratory judgment, specific performance, and attorneys' fees associated with the enforcement of Plaintiffs' rights under the contracts, and the Court should deny Defendant's Motion to Dismiss.

### A. Defendant is Estopped From Arguing that it is Not Bound By the Agreements Because It Accepted Plaintiffs' Payments that Defendant Now Alleges Were "Outside the Payment Structure" of the Agreements

Although an argument directed to the merits of the Counterclaims, Defendant does not (and cannot) dispute its receipt and retention of approximately $740,000 of Plaintiffs' money

under the Agreements.[2] Instead, Defendant argues that it is not bound by the Agreements because Plaintiffs allegedly made some of their loans outside the Agreements' purportedly "rigid payment schedule". (See Mot. to Dismiss at p. 14.) This argument is without merit.

Defendant's acceptance of each and every one of Plaintiffs' loans estops it from denying its obligations to issue Plaintiffs' Notes and Common Stock thereunder. Indeed, the doctrines of estoppel and ratification require such result. Where a defendant accepts a plaintiff's performance under an agreement and the plaintiff subsequently seeks to enforce that agreement, the defendant is: 1) estopped from denying the existence of the agreement because he accepted the benefit of the very agreement he is now seeking to avoid; and 2) his conduct in accepting the tendered performance serves as an affirmative ratification of the existence of the agreement. See Treeline 990 Stewart Partners LLC v. RAIT Atria, LLC, No. 18904/10, 2011 WL 5903738, at *5 (N.Y. Sup., Nov. 10, 2011) (citing R.G. Group, Inc. v. The Horn & Hardart Co., 751 F.2d 69, 75-76 (2d Cir. 1984) ("[P]artial performance is an unmistakable signal that one party believes there is a contract; and the party who accepts performance signals, by that act, that it also understand a contract to be in effect."). Thus, if Defendant objected to Plaintiffs' $90,000 in additional loan payments as outside the Agreements' scope, it was obligated to provide Plaintiffs notice thereof. In all of the ensuing years, however, Defendant has never done so. As such, Defendant waived its right to object and was required to issue Notes and shares of Common Stock consistent with the parties' agreed-upon ratio ratios. (See Zyskind Aff. ¶40; Gold Aff. ¶40.)

Furthermore, Defendant's mere suggestion of a "rigid" and inflexible investment schedule is belied by the very contracts bargained for and executed by the parties that

[2] In truth, Defendant curiously still relies on the Smith Affidavit, which originally denied receipt of the vast majority of the loans made by Plaintiffs. However, on or about December 15, 2010, this Court held Defendant liable to Plaintiffs on the first $650,000 in principal payments, plus interest, fees and costs that were adjudicated by Motion for Summary Judgment in Lieu of Complaint. Presumably, Defendant's failure to finally concede same was an oversight.

contemplated the timing of loan payments. Specifically, the parties bargained for notice and opportunity to cure provisions, the ability to extend the time for the performance of the loan payments, and to altogether waive any portion of the Agreements and the Notes. (See Zyskind Aff. ¶33; Gold Aff. ¶33; Countercl. ¶¶ 91-100).

In addition, Defendant's actions and course of conduct with respect to the loan payments also demonstrates that Defendant knew it was receiving payments pursuant to the Agreements. As such, there is no basis in fact for Defendant's dubious position that certain losses were made outside of the contract.[3] In fact, with respect to the additional $90,000 in loan payments accepted by Defendant, Defendant has never challenged or objected to same. (See Zyskind Aff. ¶25-26; Gold Aff. ¶25-26.)

Nor, for dismissal purposes, should the Court countenance Defendant's contention that Defendant was not required to issue Notes and Common Stock in exchange for the $90,000 because the Agreements "do not contain any method to calculate how shares or notes should be allocated in response to payments of less than $50,000." (See Mot. to Dismiss at p. 14.) This argument is simply silly. To the contrary, the investment ratio relied upon by the parties in crafting the Agreements is straight-forward: for every dollar Plaintiffs invested they would receive 2.7 shares of Common Stock in Defendant. (See Zyskind Aff. ¶10; Gold Aff. ¶10.) As

[3] With regard to schedules contemplated by the Agreements, it also bears repeating that, as alleged in the Counterclaims, pursuant to Section 4(a) of the Notes, Defendant was obligated to provide Plaintiffs with financial statements so that Plaintiffs could monitor both Defendant's finances and overall management – an obligation that was to be performed on a quarterly basis starting with Plaintiffs' initial loan payments. (See Zyskind Aff at ¶19; Gold Aff. at ¶19.) Defendant never did so. (See id. ¶22.) Presumably, Defendant believes that this schedule was optional. See Fifty States Mgmt.. Corp. v. Niagara Permanent Sav. and Loan Assn., 58 A.D.2d 177, 181, 396 N.Y.S.2d 925, 928 (4th Dep't 1977) ("[o]ne who demands strict performance as to time by another party must [perform on its part all of the conditions which are requisite in order to enable the other party to perform its part.").

such, the plain language of the parties' Agreements does not support the dismissal arguments contained in Defendant's Motion to Dismiss.

### B. Defendant's Unilateral Cancellation of Common Stock Previously Issued and Fully-Paid For By Plaintiffs Was a Breach of the Agreements

In brazen disregard of the Agreements' terms, Defendant's counsel contends that the Counterclaims fail to state causes of action for breach of contract (as well as declaratory relief and specific performance), with respect to both Defendant's (a) unilateral and retroactive cancellation of issued and fully paid for Common Stock and (b) refusal to issue notes and Common Stock for the additional $90,000 in loans Plaintiffs made to Defendant after Defendant's served an alleged "default" notice, dated August 24, 2005. (See Zyskind Aff. ¶35; Gold Aff. ¶35; Smith Aff., Ex. 4; Mot. to Dismiss at pp. 15-16.) To wit, Defendant contends that:

> The Agreements do not state that once FaceCake issued shares to Zyskind and Gold its management ceded any right it had to cancel those shares, or otherwise manage the value of number of those shares in the course of FaceCake's business. If the Agreements required FaceCake to give up those rights, it would have stated so.

(See Mot. to Dismiss at p. 15.) As such, Defendant opines that it was free, in August 2005, to cancel the Common Stock issued to (and fully paid for by) Plaintiffs – 742,500 shares of Common Stock owned by Mr. Gold and 1,012,500 shares of Common Stock owned by Mr. Gold. (See Zyskind Aff. ¶37; Gold Aff. ¶37.) To the extent that Defendant relies on the Agreements for, as a matter of law, this defense, the Agreements provide no support. To the contrary, as evidence by Section 4(b)(vi) of the Agreements, the parties in fact agreed that:

> [t]he Shares, upon the issuance thereof, shall be validly authorized and validly issued, full paid, and nonassessable and will not have been issued, owned or held in violation of any preemptive or similar right of stockholder.

(See Smith Aff., Ex. 2.) Furthermore, the Agreements similarly provide no right for Defendant to have unilaterally refused to issue Notes and Common Stock to Plaintiffs with respect to their additional $90,000 in loan payments. Perhaps most compelling, neither the Agreements nor the Notes contain *any* terms providing for the cancellation of fully paid for Common Stock under any circumstances. (See Zyskind Aff. ¶13-15; Gold Aff. ¶13-15.) Indeed, the very argument appears to have been manufactured by Defendant's Counsel, which does not suffice for dismissal purposes.

## POINT IV

### Plaintiffs Adequately Plead Declaratory Judgment and Specific Performance Causes of Action

#### A. Plaintiffs' Declaratory Judgment Claim is Proper

Plaintiffs' First Counterclaim seeks a declaratory judgment based upon, inter alia, Defendant's unilateral cancellation of Plaintiffs' Common Stock and Defendant's failure to comply with the Agreements' "anti-dilution" protections in favor of Plaintiffs. (See Countercl. ¶¶ 110-116.) To wit, Plaintiffs seek a declaratory judgment that Defendant is obligated to, inter alia, replace or re-issue and honor 742,500 shares of Common Stock previously issued to Mr. Zyskind and 1,012,500 shares of Common Stock previously issued to Mr. Gold, and a declaration that Defendant has wrongfully repudiated its obligation to comply with the Agreements' "anti-dilution" protections regarding issuances of Common Stock or other securities as they relate to Plaintiffs. (See id. ¶116.) In this regard, it is beyond dispute that Plaintiffs are seeking a declaration as to the relative rights of the parties with respect to the matters in controversy in the Counterclaims. See Thome v. Alexander & Louisa Calder Foundation, 70 A.D.3d 88, 99, 890 N.Y.S.2d 16, 24 (1st Dep't 2009) (internal citations omitted).

Defendant unilaterally cancelled over 1.7 million shares of Common Stock owned by Plaintiffs. (See Zyskind Aff. ¶37; Gold Aff. ¶37; Countercl. n. 5.) At a minimum, the Court is presently able to issue a declaratory judgment finding, as a matter of law, that Defendant is obligated to reissue the cancelled Common Stock to Plaintiffs. And, doing so would serve a "practical end in quieting or stabilizing an uncertain or disputed jural relation" because it would clarify the parties' obligations. See Thome, 70 A.D.3d at 100. Furthermore, Defendant has asserted no basis for dismissal of this cause of action. As such, the Court should deny the Defendant's Motion to Dismiss with respect to declaratory relief.

**B. Plaintiffs' Specific Performance Claim is Proper**

Plaintiffs also have adequately pled their Second Counterclaim, which seeks specific performance under the Agreements by, inter alia, replacing or re-issuing the 742,500 shares of Common Stock that it previously issued to Mr. Zyskind and 1,012,500 shares of Common Stock that it previously issued to Mr. Gold. (See Countercl. ¶¶109-16.)

To obtain specific performance, a pleading must show:

> (1) the making of the contract and its terms;
> (2) that the plaintiff is ready, willing, and able to perform the contract and has fulfilled all of the plaintiff's duties to date;
> (3) that it is within defendant's power to perform...; and
> (4) that there is no adequate remedy at law..."

Lezell v. Forde, 891 N.Y.S.2d 606, 612 (N.Y. Sup., Kings Co. 2009) (internal quotations and citations omitted).

Plaintiffs have adequately pled the elements of a specific performance claim. To wit, they have pled the making of the Agreements and their terms as well as described in detail their own performance thereunder. (See Countercl. ¶¶117-20.) Moreover, Plaintiffs have adequately

pled that it is within Defendant's power to perform – indeed, only Defendant has the right to issue shares of its Common Stock, and Plaintiffs' otherwise have no adequate remedy at law.

Accordingly, Defendant's Motion to Dismiss fails to assert, as matter of law, a defenses to Plaintiffs' Counterclaim of specific performance.

## POINT V

## Plaintiffs Adequately and Alternatively Plead Unjust Enrichment

To prevail on an unjust enrichment claim, a party must show that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." Corsello v. Verizon New York, Inc., 77 A.D.3d 344, 908 N.Y.S.2d 57 (2d Dep't 2010) (internal quotations and citations omitted).

An unjust enrichment claim is neither grounded in contract nor tort; rather, it sounds in quasi-contract or restitution. See generally 22A N.Y.JUR.2D Contracts § 2512 (1996) ("The term 'unjust enrichment' does not signify a single well-defined cause of action [, but] is a general principle underlying various legal doctrines and remedies"). "Generally, courts will look to see if a benefit has been conferred on the defendant under mistake of fact or law, if the benefit still remains with the defendant, if there has been otherwise a change of position by the defendant, and whether the defendant's conduct was tortious or fraudulent." Paramount Film Dist. Corp. v. State, 30 N.Y.2d 415, 421 (1972).[4]

[4] Although Plaintiffs have alleged various breach of contract causes of action, Plaintiffs are entitled to plead unjust enrichment as an alternative theory of relief at this stage of the litigation. See Stewardship Credit Arbitrage Fund LLC v. Charles Zucker Culture Pearl Corp., No. 600634/2010, 2011 WL 1744217, at *7 (N.Y. Sup., May 4, 2011) (Fried, J.) ("New York law permits a party to plead alternative legal theories to support its claim for recovery."); see also Loheac, P.C. v. Children's Corner Learning Center, 51 A.D.3d 476, 476, 857 N.Y.S.2d 143, 144 (1st Dep't 2008) (allowing plaintiff to assert alternative theory of unjust enrichment in addition

As discussed above, Defendant does not dispute that it received and retained approximately $90,000 – the benefit - from Plaintiffs. (See Zyskind Aff. ¶40; Gold Aff. ¶40.) To the extent that the Court considers Plaintiffs payment of $90,000 in additional loans to Defendant as made without regard to the Agreements – as Defendant has asserted – then, Plaintiffs alternatively have pled the elements of unjust enrichment – Defendant received and exclusively retained same, and, Defendant's retention of Plaintiffs' monies, supports a cognizable unjust enrichment claim. See Marcus v. AT & T Corp., 138 F.3d 46, 64 (2d Cir. 1998) ("In order to success on their claim for unjust enrichment, the appellants must demonstrate that, in the absence of a contract, one party nonetheless possesses money 'under such circumstances that in equity and good conscience he out not to retain it, and which ... belongs to another'") (internal citations omitted).

Accordingly, the Court should deny Defendant's Motion to Dismiss the unjust enrichment cause of action.

## POINT VI

### Plaintiffs Adequately and Alternatively Plead Conversion

Plaintiffs' Fifth and Sixth Counterclaims adequately alleges counterclaims for Defendant's conversion of Plaintiffs' additional $90,000 in loan payments. "[C]onversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." Bahiri v. Madison Realty Capital Advisors, No. 650742/09, 2010 WL 5559404, at *2 (N.Y. Sup., Dec. 23, 2010) (internal quotations and citation omitted). Money is properly the subject of a conversion claim when it is specifically identified and segregated, and a defendant has an obligation to return or otherwise treat the specific fund in

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to its breach of contract action where parties disputed scope of original contract and whether the plaintiff was owed money outside of the contract).

a particular manner. See id. (internal citations omitted). In addition, a plaintiff must show legal ownership, or an immediate superior right of possession and control of the identifiable fund. See id. (internal citations omitted).

At bar, Plaintiffs' Counterclaims satisfy the elements of a conversion claim based upon money. To wit, the Counterclaims specifically identify the money that they loaned to Defendant, setting forth the specific dates and amounts of the loans. (See Countercl. ¶¶ 133, 138.) Defendant had an obligation to both return the loans and treat them in a particular manner, *i.e.*, by issuing corresponding Notes and Shares. Defendant failed to do so.

Defendant's Motion asserts that Plaintiffs' conversion claims are time-barred because the applicable three-year statute of limitations began running "on the dates that [Defendant] received the funds in question and did not issues notes shares." (Mot. to Dismiss at p. 19.) Defendant is mistaken. As the courts have aptly summarized:

> [W]here, as here, possession of the property is initially lawful, ***conversion occurs when there is a refusal to return the property after a demand.***

In re Coyle, 21 Misc.3d 742, 745, 864 N.Y.S.2d 765, 768 (Richmond Co. Surr. Ct. 2008) (internal citations omitted) (emphasis added). Accordingly, Plaintiffs' conversion claims did not accrue upon making the loan payments to Defendant because, at that time, Defendant's possession of Plaintiffs' money was lawful. Accordingly, the statute of limitations on Plaintiffs' conversion claims did not accrue until on or about September 19, 2008, when, in response to Plaintiffs' counsel's September 9, 2008 demand letter, Defendant refused to return Plaintiffs' money. (See Smith Aff., Ex. 6.) Accordingly, Plaintiffs' conversion claims are timely. See Malanga v. Chamberlain, 71 A.D.3d 644, 645, 896 N.Y.S.2d 385, 386 (2d Dep't 2010) (holding

that three-year conversion statute of limitations accrues when the defendant refuses to return the property upon demand).

For all of the foregoing reasons, Defendant's Motion to Dismiss fails to state a defense to Plaintiffs' conversion Counterclaims and should be denied.

## POINT VII

## Plaintiffs' Accounting Claim is Proper

Plaintiffs' Ninth Counterclaim seeks an accounting based on Defendant's misconduct and "to establish the value of Plaintiffs' ownership interest in Defendant, examine the issuances of equity affecting the valuation of Defendant, its expenses, profits and income, and the exercise prices of all such issuances, among other reasons." (Countercl. ¶¶ 158-159.) Plaintiffs are entitled, as a matter of law, to an equitable accounting as a matter of law. To be entitled to an equitable accounting, a party must demonstrate, inter alia, that he or she has no adequate remedy at law. Unitel Telecard Distribution Corp. v. Nunez, --- N.Y.S.2d ----, 2011 WL 6757430, at *1 (1st Dep't Dec. 27, 2011). Furthermore,

> The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship respecting property in which the party seeking the accounting has an interest.

Shapsis v. Kogan, No. 38418/07, 2011 WL 61727, at *10 (N.Y. Sup., Jan. 7, 2011) (internal quotations and citations omitted). Defendant argues that Plaintiffs' accounting claim is improper because there was no fiduciary relationship, that Plaintiffs never demanded an accounting, and – inexplicably – that Plaintiffs "do not even allege that they have entrusted [Defendant] with money or property." (Mot. to Dismiss at p. 22.) These arguments are without merit.

First, it is well-settled that Defendant and its officers and directors were in a fiduciary relationship with Plaintiffs – shareholders of Defendant. See Dingle v. Xtenit, No. 603277/06, 2008 WL 2840357, at *3 (N.Y. Sup., Jul. 16, 2008). As the Court held in Dingle:

> Directors and majority shareholders of a corporation have the power to manage the affairs of the corporation. ***Thus, they are in a fiduciary role as the guardians of the welfare of the corporation.*** As fiduciaries, they are obligated to exercise their responsibilities in good faith. They must treat all shareholders, majority and minority, fairly. ***In issuing new stock, directors, being fiduciaries, must treat existing shareholders fairly.***

See id. (internal citations omitted) (emphasis added). As such, Defendant had a fiduciary duty to Plaintiffs, who, as shareholders, owned more than 1.7 million shares of Defendant. Second, Plaintiffs repeatedly demanded an accounting of Defendant's books and records, which demands were consistently refused. (See Zyskind Aff. ¶23; Gold Aff. ¶23.)

Finally, Defendant's bald contention that Plaintiffs have not entrusted Defendant with money is absurd. As alleged, Defendant has received and retained approximately $740,000 from Plaintiffs, and this Court has already determined liability as to $650,000. As such, Plaintiffs have adequately pled a claim for an accounting and the Court should decline to dismiss same.

## CONCLUSION

Based on the foregoing, Plaintiffs respectfully submit that the Court should (i) deny Defendant's Motion to Dismiss in its entirety; and (ii) grant such further relief as this Court deems just and proper.

Dated: New York, New York
January 9, 2011

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