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

JOHN BRUMMER Plaintiff, -against- RED RABBIT, LLC and RHYS W. POWELL, Defendants.	Index No.: 652565/12 **Part 49** **Judge Sherwood**

DEFENDANTS RED RABBIT, LLC AND RHYS W. POWELL'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Statutes and Rules

INTRODUCTION

Defendants Rhys W. Powell ("Powell") and Red Rabbit, LLC ("Red Rabbit") (collectively, "Defendants") submit this memorandum of law in support of their Motion for Summary Judgment pursuant to CPLR § 3212. The Summons and Complaint in this case was filed by Plaintiff John Brummer ("Plaintiff" or "Brummer") on July 25, 2012. The claims were essentially split into two distinct time periods – the time at which Plaintiff first invested in Red Rabbit in 2005 (the "entry claims") and the time at which he sold back the majority of his membership interest in 2010 at a tidy profit (the "payback claims"). Dubious from the day the complaint was filed, the entry claims no longer form a part of this action, as they held so little weight that they were both abandoned by Plaintiff and dismissed by this Court as time barred

The entry claims were monetarily the bulk of the Plaintiff's case against the Defendants. The remaining payback claims based in 2010 – namely, fraud, fraudulent concealment, breach of fiduciary duty, and unjust enrichment – are without merit and should similarly be dismissed.

Defendants respectfully request that the Court grant this Motion for Summary Judgment in favor of the Defendants, dismissing Plaintiff's Complaint in its entirety.

STATEMEMT OF FACTS

Powell is the founder and current President and CEO of Red Rabbit. Lancia Aff., Ex. 39 at 167, lns. 12 – 16. Red Rabbit was the brainchild of Powell, who saw a void in the healthy school meals market and sought to fill that void. Lancia Aff., Ex. 3 at 27 – 28.

Brummer and Powell became friends after Brummer, a podiatrist, began treating Powell for a foot injury. Brummer approached Powell to invest in the yet-formed company after Powell told him he wanted to start a company focusing on providing healthy school lunches to New

York City school children. Lancia Aff., Ex. 4 at 50 – 54. The two had several discussions about the Plaintiff's investment in Red Rabbit regarding both the investment of capital and the fact that the members would together help to run and grow the business and recruit even more investors. *Id.* at 54 – 57.

Powell's idea ultimately came to fruition in October 2005, when Powell, the Plaintiff and a former member, Francis Hwang, executed Red Rabbit's first Operating Agreement. Lancia Aff., Ex. 5. At the time of the initial investment, Brummer owned seven (7) percent equity in Red Rabbit, having invested $12,500 on October 19, 2005. Lancia Aff., Ex. 5 at 21, Ex. 6 at 60, Ex. 7 at 166; Lancia Aff., Ex. 10 at 47 lns. 5 – 7. The rest of Brummer's investment, approximately $12,500 more was invested between his initial investment and the eventual 2010 buyout. In total, the Plaintiff invested approximately $25,000 into Red Rabbit. In 2005 and 2006 alone, Powell invested approximately $80,000 into Red Rabbit. Lancia Aff., Ex. 6 at 60 lns. 20 – 23. He has since invested more capital into the company, bringing his total investment to over $100,000. Lancia Aff., Ex. 3 at 29 lns. 13 – 17. Powell has lent the company over $60,000 in addition to his capital investment. *Id.* at 30 – 31. Red Rabbit still owes $40,000 of the $60,000+ loan to Powell. *Id.* at 31 lns. 5 – 10. Powell has also not received any return on the over $100,000 he invested in Red Rabbit over the years. Lancia Aff., Ex. 40 at 43 lns. 13 – 21.

Like most startups, Red Rabbit had trouble making money for several years. Red Rabbit's financial situation began to look brighter in 2009, when new schools began executing school lunch contracts, providing additional revenue for Red Rabbit. The new contracts and additional revenue were known to all of the members of Red Rabbit because Red Rabbit's financial condition was discussed at Board meetings attended by Brummer, Powell and other Red Rabbit members. *See, e.g.*, Lancia Aff., Ex. 12; Lancia Aff., Ex. 13 at 130 – 132; Lancia

Aff., Ex. 14 at 146 – 147, 150 – 152.

At least as early as 2008, more than two years before the sale would finally occur, Brummer indicated to Powell that he was interested in selling his membership interest in Red Rabbit back to the company. Lancia Aff., Ex. 9 at 60 lns. 19 – 22; Lancia Aff., Ex. 21 at 80 lns. 10 – 22. In 2008, Powell told Brummer that Red Rabbit did not have the financial ability to buy back his interest, but that it would be possible once more contracts, and thus higher revenues, were generated. Lancia Aff., Ex. 11 at 65 ln. 13 – 66 ln. 10.[1] Brummer requested a buyback of his interest at least three times before the actual negotiations finally began. *Id.* at 63 ln. 18 – 64 ln. 12; Lancia Aff., Ex. 21 at 82 lns. 14 – 18. When he initially requested the buyback, Brummer was looking to offload his entire interest in Red Rabbit. Lancia Aff., Ex. 11 at 69 lns. 13 – 19. He did not want to retain any ownership interest in the company.

At a Red Rabbit member meeting in 2009, Brummer's buyback was discussed. Lancia Aff., Ex. 41. Specifically, it was agreed before or during the meeting that Brummer's entire 7 percent membership interest, represented by the $25,000 he invested into Red Rabbit, would be converted from equity to debt. *Id.* at 240. Brummer, already treating his membership interest as debt, agreed to receive only the full amount of his investment plus interest. *Id.* Had the buyout been completed in August 2009, the only profit Brummer would have received for his investment in Red Rabbit would be the interest payments under a promissory note. *Id.* The only reason the buyback was not completed in 2009 was that Red Rabbit did not have the financial

[1] Because Red Rabbit has never made money, Powell has never received a stable salary, though at times he has done virtually all of the work, including preparing and delivering the lunches to the children at the schools singlehandedly. He was paid approximately $80,000 in 2010, $70,000 in 2011, and from January until July 2013 was compensated approximately $20,000 for his work. Lancia Aff., Ex. 40 at 42 ln. 25 – 43 ln. 8. In early 2011, Powell negotiated an employment contract with Red Rabbit whereby he was to receive a $120,000 annual salary for the work he performed as CEO and President. *Id.* at 35 – 37. Powell only took $48,000 of the $120,000 he could have taken as compensation because the company could not afford it. *Id.* at 37 lns. 14 – 15, 17. Powell sacrificed his own compensation to preserve the viability of the company.

means to repurchase Brummer's interest. Lancia Aff., Ex. 11 at 64 ln. 23 – 65 ln. 22.

With more revenue generated by Summer 2010, it was possible for Red Rabbit and Powell to entertain such a buyout and the parties again discussed terms for the buyout the Plaintiff had been seeking for at least two years. Lancia Aff., Ex. 11 at 68 lns. 11 – 21. After waiting at least two years, Brummer was eager to get his money and divest himself of most of his membership interest; he would sell at any price, as long as he got all of his investment back. Scott, Aff., ¶¶ 5 – 7.

Powell and Plaintiff reached an agreement on terms of the deal at a meeting in August 2010. Lancia Aff., Ex. 11 at 69 lns. 23 – 25, 71 ln. 19 – 72 ln. 2. At that meeting, Powell and Brummer decided that Red Rabbit would convert 6 of his 7 percent membership interest from equity to debt under a promissory note, and Brummer would still retain a one percent membership interest in the company. *Id.* at 70, lns. 2 – 11. Brummer retained a one percent ownership in Red Rabbit, even though he initially wanted his full membership repurchased because he no longer believed Red Rabbit was a good investment. *Id.* at lns. 2 – 16.

Brummer knew the financial state of Red Rabbit from 2005 through 2010, and yet he did not ask how Red Rabbit was suddenly able to buy back his interest at that point. Brummer made no request for any documents showing the value of the company either at the meeting, or through the time he executed the promissory note. Lancia Aff., Ex. 15 at 81. Brummer, most importantly, never asked whether there were new investors on the horizon in August 2010 or any time thereafter, though he was on notice that Red Rabbit and its members were always attempting to find new investors. Lancia Aff., Ex. 15 at 80 lns. 4 – 8; Lancia Aff., Ex. 5. Indeed, he executed the Third Amended and Restated Operating Agreement dated January 1, 2009, in which the first page highlighted that Red Rabbit "members recognize that additional

members may be added to the Company and that accordingly membership interests shall be reallocated to reflect the resulting membership structure." Lancia Aff., Ex. 27. at 1. Though Brummer retained an investment advisor for the buyback transaction, he made none of the basic inquiries that one would expect a person in his situation to make. Lancia Aff., Ex. 23 at 18 ln.18 – 19 ln. 20. Brummer failed to make those inquiries because the Red Rabbit financial status no longer mattered to him; he was happy to get his money back, make a healthy profit and retain a small interest in the company.

During the negotiations, Powell showed him a way to value his membership interest even though it had no market value. Lancia Aff., Ex. 35 at 779. He provided Brummer with financial information without prompting to help him value his interest so he could exit profitably at a time when Red Rabbit was still accumulating losses. *Id.* Although Brummer was exiting and Powell owed his undivided loyalty to the interests of Red Rabbit, he acquiesced to a deal where Brummer would receive nearly double his investment.

Plaintiff's total payout under the promissory note, including the agreed upon value of Plaintiff's six percent (6%) membership interest, plus nine percent (9%) interest and an additional payment for Brummer's cash advances, was equal to $48,383.91. Lancia Aff., Ex. 34. This number was calculated based on a valuation of Red Rabbit negotiated as follows: Powell told Brummer one way to value a tiny, unprofitable company like Red Rabbit was to multiply one (1) times revenues. The projected revenues for 2010 were between $800,000 and $900,000; the actual revenues for 2009 were $475,000. Lancia Aff., Ex. 35 at 779. Even knowing that 2010 revenues were projected to be between $800,000 and $900,000, Brummer agreed that the buyout value of the company was $665,000, which was the approximate average of revenues from 2009 and 2010. *Id.* at 778. This valuation set the value of the 6% of Brummer's interest

being repurchased at $40,000. *Id.* Although Brummer could have tried to obtain a greater amount using a valuation of one times projected revenues for 2010, in his hasty desire to get all of his investment back plus nearly a 100% return, he agreed to a lower amount.

Brummer did not know how a company like Red Rabbit was typically valued. Lancia Aff., Ex. 16 at 203 lns. 16 – 20. Although he had consulted his financial advisor Frank Mesa ("Mesa") regarding the deal, Brummer did not ask his Mesa whether one times revenues was the proper valuation for a company like Red Rabbit. *Id.* at 204 lns. 8 – 12. In fact, Brummer made no inquiry of any person whether the valuation equation represented by Powell was proper for Red Rabbit. *Id.* at lns. 13 – 20. Neither the valuation of Red Rabbit at the time of the negotiations, nor the fact that a potential investment was looming would have made any difference; Brummer would have taken the $40,000 plus generous interest payments for his membership interest. *See* Scott Aff. Brummer was extremely happy with the deal that he received. *See* Lancia Aff., Ex. 22 at 89 ln. 20 – 90 ln. 4; Lancia Aff., Ex. 37; Lancia Aff., Ex. 23 at 21 lns. 5 – 9.

During this negotiation process, Brummer consulted Mesa, who considered the deal a "home run" because Brummer would get all of his money back, plus a return on his investment, and also keep a percentage of the company. Lancia Aff., Ex. 23 at 23 ln. 18 – 24 ln. 5. *See* Lancia Aff., Ex. 18 at 242 lns. 11 – 23. According to Mesa, Brummer was satisfied with the deal he struck with Powell for the buyout. Lancia Aff., Ex. 23 at 21 lns. 5 – 9. In fact, Brummer even thanked Powell for repurchasing his membership interest at the agreed upon terms. Lancia Aff., Ex. 22 at 89 ln. 20 – 90 ln. 4. He is the only investor who has made a profit on his Red Rabbit investment; Powell has seen no return to date on his investment to date, other than his meager, unstable salary, though he has invested well over $100,000 in Red Rabbit. Lancia Aff.,

Ex. 3 at 29; Lancia Aff., Ex. 40 at 43 lns. 13 – 21.

Payments to Brummer under the promissory note began on October 19, 2010. The final payment, by way of two checks for $11,543.94 and $3,500, was tendered to Brummer on June 1, 2012. Lancia Aff., Ex. 34. All payments, excluding the final tendered amount, were accepted by Brummer, even when the payments were late. He cashed *every single check* that Red Rabbit and Powell sent to him as payment under the promissory note until June 2012, when he was advised by his current counsel not to cash the check for the final payment. *See* Lancia Aff., Ex. 30. Though Brummer did complain about payments being late, he did not take any action – Brummer looked into options regarding accelerating the payments, but eventually just kept with the payment vouchers with a set payment schedule to make sure Red Rabbit and Powell would make more timely payments. *See* Lancia Aff., Exs. 31, 36 and 37.

At a Red Rabbit members meeting held in December 2010, Powell told the other members, including Brummer, there was a potential deal in place whereby new investors would infuse capital into Red Rabbit. Lancia Aff., Ex. 18 at 244 – 248. Plaintiff raised no objection, never offered to return the money he had been paid in return for his interest and did not seek the return of membership interest he sold. He did not ask Powell to change the terms of the promissory note; and he certainly did not ask for information regarding what the valuation of Red Rabbit would be after the investment was completed. *Id.*

The investment deal was not completed until March 30, 2011. On that date, all of the pertinent documents regarding the investment were fully executed by the members of Red Rabbit, including the Plaintiff, without objection. Lancia Aff., Ex. 28. The new investors, Serious Change LP ("Serious Change") and the Mitchell D. Kapor Trust ("Kapor") infused a total of $200,000 into Red Rabbit for their initial investment. *Id.* at Schedule A. On March 30,

2011, when signing into effect the new investment deal, Brummer knew the incoming investors valued Red Rabbit at $1.274 million to determine their investment and membership percentage. In fact, as part of the deal, Brummer's interest was further diluted; he approved it anyway. *Id.* Brummer still did nothing, said nothing to Powell regarding his buyout, but approved the investment by signing the new Operating Agreement. *Id.* In addition to ratifying the investment deal central to this portion of his Complaint, in an email to Powell dated June 4, 2011, some six months after discovering the Kapor and Serious Change investment, Brummer wrote

> "I wanted to tell you I think we had a great meeting last week and I appreciate our friendship and business relationship. I understand what you said and by no means do i want to cause any stir in this great business that we have built. I am happy and proud to be a founding member of red rabbit and look forward to serving on the Board and joining you as a partner in future ventures."

Lancia Aff., Ex. 37. This is not the statement of a man who believes he was wronged in a financial deal, but rather the actions of pleased investor who doubled his money.

The financial state and value of Red Rabbit improved because new contracts and customers began purchasing the product. However, Red Rabbit has still not made any profit to date. In 2013, Red Rabbit had negative net equity and negative operating income, and paid no distributions to its members. Lancia Aff., Ex. 38. The company, though it has grown significantly since its inception, does not have real value as is seen by the negatives present in the 2013 Profit and Loss Statement. Brummer was fortunate to get any sort of money in a buyout from Red Rabbit and is the only investor to date to make profit from his investment. The 192% return he received for his initial investment is more than any investor or member of Red Rabbit could have expected or hoped for.

STANDARD OF REVIEW

Pursuant to CPLR § 3212, the court can award summary judgment upon motion by any

party when the moving party can establish that it is entitled to judgment as a matter of law, demonstrating "the absence of any material issues of fact." *Sheppart-Mobley v. King*, 10 A.D.3d 70, 74, 779 N.Y.S.2d 98 (N.Y. App. Div. 2d Dep't 2004). The moving party does not need to "disprove every remotely possible state of facts on which its opponent might win the case" but only show that the material facts are not in issue. *Ferluckaj v. Goldman Sachs & Co.*, 12 N.Y.3d 316, 320, 908 N.E.2d 869, 880 N.Y.S.2d 879, 2009 NY Slip Op 2483 (2009).

ARGUMENT

1. PLAINTIFF'S FRAUD-BASED CLAIMS ARE MERITLESS AND MUST BE DISMISSED

A. THERE ARE NO FACTS THAT SUPPORT THE PLAINTIFF'S ALLEGATION OF FRAUD AGAINST THE DEFENDANTS

In order to make out a prima facie case for fraud, a Plaintiff must prove "(1) a material misrepresentation or omission of fact (2) made by defendant with knowledge of its falsity (3) and intent to defraud; (4) reasonable reliance on the part of the plaintiff; and (5) resulting damage to plaintiff." *Del Carmen Onrubia de Beeck v. Costa*, 39 Misc. 3d 347, 358, 959 N.Y.S.2d 628, 637 (Sup. Ct. N.Y. Cnt'y 2013) (internal citations omitted). The Plaintiff fails to prove *at least* three of the five necessary elements, requiring the Court to dismiss the fraud action against the Defendants.

The most important and glaringly absent element of the Plaintiff's fraud claim is any intent to defraud. The non-party individuals deposed by Plaintiff in this action all testified in the same manner – Steven DeBerry ("DeBerry"), Mitchell Kapor ("Kapor"), and Kesha Cash ("Cash"), all associated in some manner with the investors Serious Change and the Kapor Trust – specifically stated that they did not know of Powell's buyout deal with Plaintiff at the time it was

happening. Lancia Aff., Ex. 24 at 32 lns. 13 – 17; Lancia Aff., Ex. 25 at 38 lns. 1 – 2, 41 lns. 10 – 18; Lancia Aff., Ex. 26 at 31 lns. 19 – 25. DeBerry and Kapor did not even know that Brummer himself existed at the time they were talking to Powell about the possibility of investing in Red Rabbit. Lancia Aff., Ex. 25 at 38 lns. 1 – 2, 41 lns. 10 – 18; Lancia Aff., Ex. 26 at 31 lns. 19 – 25. It was only after this action was filed that Kapor or DeBerry found out who Brummer was. *Id.*

Powell told Brummer of the so-called "fraud" when he revealed the investors, the business valuation and other information to Brummer. Brummer then *provided approval and tendered a portion of his remaining interest* so that the Kapor Trust and Serious Change could purchase that interest. Lancia Aff., Ex. 28 at Schedule A. "Intent to defraud" is impossible where, as here, Powell and Red Rabbit informed Brummer of the "fraud" and then asked him to approve that "fraud" and then watched as he contributed to the "fraud." It is a ridiculous claim.

Plaintiff also cannot prove that he was damaged by Defendants' alleged fraud. Plaintiff invested approximately $25,000 into Red Rabbit in the company's early years; in the buyback deal he negotiated with Defendants, Brummer would be paid in excess of $48,000. This represents a return on his initial investment of 192%. There is no plausible argument that can be made to support that the Plaintiff was in any way damaged – he got back all of his money plus nearly the full amount as a profit. Damage to Plaintiff must be proved in order to make out a prima facie case for fraud, and Plaintiff has not and cannot meet that burden.

Finally, Defendants did not omit any material information in negotiations with Plaintiff regarding the value of Red Rabbit. As discussed thoroughly in Section 2 of this Argument, *infra,* the fact that a new investment in Red Rabbit was occurring was simply not material – Plaintiff's own inaction after his promissory note was executed, after learning of the new investors, and at

the time the investment was consummated clearly prove that the Plaintiff would not have made a different decision regarding the buyback of his shares even if he had known the information. Because the information regarding new investors had no bearing on his decision, it was not material.

The Plaintiff, for several important reasons, does not make the requisite showing to support a claim for fraud against Defendants Powell and Red Rabbit. Because he does not remotely approach a prima facie showing for his claim, Plaintiff's cause of action for fraud must be dismissed.

B. PLAINTIFF DOES NOT PRESENT A PRIMA FACIE CASE FOR FRAUDULENT CONCEALMENT AGAINST DEFENDANT POWELL

The required elements for fraudulent concealment fully encompass those for fraud discussed above. Therefore, the reasons for which this cause of action must also be dismissed are nearly identical to those reasons presented for fraud. A successful action for fraudulent concealment requires proof that "the defendant had a duty to disclose material information and that it failed to do so," *P.T. Bank Cent. Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376, 754 N.Y.S.2d 245, 250, 2003 N.Y. App. Div. LEXIS 103, 8 (N.Y. App. Div. 1st Dep't 2003), "in addition to the elements of fraud." *S&L Metro Prop., LLC v. Clear Channel Outdoor, Inc.*, 2011 N.Y. Slip Op 33841(U), 9, 2011 N.Y. Misc. LEXIS 6903, 11 (Sup. Ct. N.Y. Cnt'y July 27, 2011). *See also Swersky v. Dryer & Traub*, 219 A.D.2d 321, 326 (N.Y. App. Div. 1st Dep't 1996).

Because all of the elements required for fraud are not present in this case, and the cause of action for fraudulent concealment is rooted in fraud, there is no way that this cause of action can stand. Assuming *arguendo* that the court somehow finds the Plaintiff has presented all of the

elements necessary for fraud, this cause of action should still be dismissed because the additional duty element required to prove fraudulent concealment does not exist. The Plaintiff, by all of the actions he took after agreeing to his membership buy back deal, has shown that the information he now deems to be material simply was not. Brummer signed the promissory note with Red Rabbit on October 1, 2010. Lancia Aff., Ex. 29. In December 2010, at a Red Rabbit members meeting, Powell informed all of the then-current members, including the Plaintiff, that that new investors were entering the company. Lancia Aff., Ex. 18 at 244 ln. 18 – 245 ln. 11. At that time, Plaintiff did nothing – he did not request documents; he did not ask any questions regarding the timing of the investment; he did not ask who the investors were; and he did not inquire as to whether this would affect his buyback deal/promissory note. He did, however, sign documents assigning his repurchased membership interest to Defendant Powell, confirming the repurchase of his membership interest even further by executing a revised operating agreement *after learning of the investment*. Lancia Aff., Exs. 28, 32 and 33.

Furthermore, when the investment deal finally closed on March 30, 2011, the Plaintiff again did nothing. He did not try to renegotiate the terms of his buyout; he did not ask Defendants to return his membership interest in exchange for the money he had already been paid. Instead, he signed the documents that ratified the deal and allowed the investment to occur. Lancia Aff., Ex. 19 at 287 lns. 15 – 21; Lancia Aff., Ex. 28. Since the new investment was clearly not material to Brummer's decision to accept the proposed membership buyout in August 2010 – Brummer was ready to sell and would have taken the same deal *no matter the circumstances* – Powell had no duty to disclose it. The cause of action for fraudulent concealment against Defendant Powell should be dismissed because (1) the necessary elements for fraud are not present and (2) the extra duty element cannot be met, as the information

Brummer now claims he was entitled to was not material.

2. DEFENDANTS HAD NO FIDUCIRY DUTY TO DISCLOSE THE INFORMATION PLAINTIFF COMPLAINS OF BECAUSE IT WAS NOT MATERIAL

The elements of a breach of fiduciary duty are "the existence of a fiduciary relationship [between plaintiff and defendant], misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." *Del Carmen Onrubia de Beeck v. Costa*, 39 Misc. 3d 347, 360, 959 N.Y.S.2d 628, 638, 2013 N.Y. Misc. LEXIS 249, 24, 2013 NY Slip Op 23024, 9, 2013 WL 322244 (N.Y. Sup. Ct. N.Y. Cnt'y 2013) (internal citations omitted). In the context of limited liability companies, the manager owes co-members the duty "to make full disclosure of all *material* facts." *JPS Partners v. Binn*, 2013 N.Y. Misc. LEXIS 6196, 18-19, 2013 NY Slip Op 33366(U), 14 (N.Y. Sup. Ct. Apr. 5, 2013) (citing *Salm v. Feldstein*, 20 A.d.3d 469, 470 (N.Y. App. Div. 2d Dep't 2005) (emphasis added). To be material, Plaintiff must show there is "substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder." *State v. Rachmani Corp.*, 71 N.Y.2d 718, 726, 535 N.E.2d 704, 709, 530 N.Y.S.2d 58, 62 (1988) (discussing actionable material omissions under the Martin Act). As the Court of Appeals and First Department have held, determination of whether a fiduciary duty exists is "necessarily fact-specific to the particular case." *Wiener v. Lazard Freres & Co*, 241 A.D.2d 114, 122, 672 N.Y.S.2d 8, 14, 1998 N.Y. App. Div. LEXIS 4043, 13 (N.Y. App. Div. 1st Dep't 1998). *See also EBC I, Inc., v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 832, NE.2d 26 (2005); *International Oil Field Supply Services Corp. v. Fadeyi*, 35 A.D.3d 372, 825 N.Y.S.2d 730 (N.Y. App. Div. 2d Dep't 2004); *Bestolife Corp v. American Amicable Life*, 5 A.D.3d 211, 774 N.Y.S.2d 18 (N.Y App. Div. 1st Dep't 2004); *Talansky v. Schulman*, 2 A.D.3d 355, 770 N.Y.S.2d 48 (N.Y. App. Div. 1st Dep't 2003); *Murray Schwartz Enterprises Employee Pension Plan Trust v. Four Corners Productions,*

Inc., 293 A.D.2d 388, 741 N.Y.S.2d 35 (N.Y. App. Div. 1st Dep't 2002); *La Barte v. Seneca Resources Corp.*, 285 A.D.2d 974, 728 N.Y.S.2d 618 (N.Y. App. Div. 4th Dep't 2001); *SSR II, LLC v. John Hancock Life Ins. Co (U.S.A.)*, 37 Misc. 3d 1204(A), 1204A, 964 N.Y.S.2d 63, 2012 NY Slip Op 51880(U) (N.Y. Sup. Ct. N.Y. Cnt'y 2012) (citing *EBC I*, 5 N.Y.3d 11).

The information that Brummer complains was not disclosed to him, namely that Powell "had negotiations regarding large capital investments in Red Rabbit," was not material to his decision to sell the majority of his membership interest at the agreed-upon price. Lancia Aff., Ex. 1 at ¶ 61. The requirement for materiality, decided on a case by case basis, is that the omission by the Defendant would have actually been significant to the ultimate decision of the Plaintiff. *See Rachmani*, 71 N.Y.2d 718. Whether or not new investors were entering Red Rabbit or the amount they were paying would not have been significant to Brummer's decision to sell his shares at the price he did because he accepted a valuation of Red Rabbit far less than the valuation Powell and Red Rabbit put on the company. Every one of his actions during the negotiation of the buyout, through the consummation of the new investment, and until June 2012 supports that statement. Because the information was not material to Brummer's decision, neither Powell nor Red Rabbit can be liable, as no duty to disclose the irrelevant information ever existed.

The parties had actually agreed upon buyout terms as early as August 2009. Lancia Aff., Ex. 41 at 240. Under this agreement, discussed in a members meeting on August 10, 2009, Plaintiff's entire 7 percent membership interest would be converted to debt; the interest was valued at $25,000, which represented only the amount of money Brummer invested into the company. *Id.* The figures Brummer agreed to in 2009 would have gained him no real profit on his investment beyond interest payments under a promissory note. Brummer was so eager to sell

his interest, he did not even care whether he made a profit, as long as he got all of his money back.

Brummer never claimed that new members investing in Red Rabbit at a different valuation than he negotiated his buyout for would have affected his decision to sell back to the company until this suit was filed. He did nothing for nearly two years to show that he was unhappy with the deal he got and never once asked Powell for more money or to return his interest. Brummer himself even signed the documents that gave the six percent (6%) he sold back to Red Rabbit directly to Powell. Lancia Aff., Exs. 32 and 33. Plaintiff and Defendant re-negotiated the buyout figures in August 2010, this time agreeing that Red Rabbit would only repurchase six of the seven percent Brummer held. Lancia Aff., Ex. 11 at 71 – 72. At the same time that the estimated valuation of Red Rabbit was discussed by the parties, Powell and Brummer *together* came up the $900,000 valuation of the company for 2010. Lancia Aff., Ex. 17 at 222 lns. 2 – 9; Lancia Aff., Ex. 35 at 779.

During the subsequent discussions, Powell plainly laid out the value of Red Rabbit for both 2009 and 2010, telling Brummer that a normal valuation for a company such as Red Rabbit was one times earnings. *Id.* Brummer did not question Powell's representation regarding valuation. Although Brummer had no idea how a company like Red Rabbit was valued, he made no inquiry of any other person knowledgeable about the valuation of food services companies. Lancia Aff., Ex. 16 at 203 lns. 16 – 20. Brummer's financial advisor, Mesa, was also copied on the emails in which the terms of the buyout were negotiated, and yet Brummer did not ask Mesa whether the valuation that Powell presented was proper. *Id.* at 204 lns. 8 – 12. Brummer made exactly zero inquiries with any person regarding how the typical valuation for a company in the same industry was done. *Id.* at lns. 17 – 20.

Earnings for 2009 totaled $475,000, while the projected earnings for 2010 was $900,000. Lancia Aff., Ex. 35 at 778. Brummer did not propose or consider a valuation different from one times revenues. Lancia Aff., Ex. 18 at 238 lns. 10 – 21. Even knowing all of the information regarding the value and revenues of the company, Brummer agreed to value Red Rabbit at $665,000 to determine the price of his buyout. *Id*; *see also* Lancia Aff., Ex. 29. Brummer did not ask for documents to attempt to confirm the revenues of Red Rabbit for 2009 or 2010. Lancia Aff., Ex. 16 at 210 lns. 2 – 13. He also did not request, or direct Mesa to request, any documents pertaining to the financial status of Red Rabbit in 2010. *Id.* Clearly, it did not matter at what number any potential investor was going to value Red Rabbit. Brummer agreed to a far lower valuation than the actual revenues of Red Rabbit for that year, and would have taken the deal even if he had known about the value that the then-potential investors had put on Red Rabbit. He wanted his money, and he had wanted to sell for at least two years at that point; *see* Lancia Aff., Ex. 9 at 60 lns. 19 – 22; Lancia Aff., Ex. 21 at 80 lns. 10 – 22; nothing could have changed his mind or altered his deliberations and ultimate decision to sell. Nothing about the deal struck between Brummer and Powell would have been different.

Further, Brummer *knew* that Red Rabbit and its members were constantly seeking new investors. Not only did he admit this during his deposition, but it is written on the first page of the initial operating agreement from 2005 and also in the Third Amended and Restated Operating Agreement executed in 2009. Lancia Aff., Ex. 8 at 42 lns. 8 – 25; Lancia Aff., Ex. 5; Lancia Aff., Ex. 27. Because he was on notice, he knew that he could and should ask whether or not new investors were coming in; this was not only reasonable because he knew from the time he entered the company as a member that new investors were probable, but because he knew that the financial history of Red Rabbit was unstable at best and any buyout proceeds must have to

come from another outside source. And yet, Brummer made no such inquiry. Lancia Aff., Ex. 16 at 210 lns. 14 – 18. As he is well aware because he has done so recently during this case, Brummer could have demanded all financial documents pursuant to the New York LLC Law. NY LLCL § 1102. As a member, he was entitled to request such documents, yet he did not ask for any documents when determining whether or not to accept the buyout price that Powell offered him. *Id.* at 210 lns. 2 – 13. Brummer also did not sell his interest based on the then-current value of Red Rabbit discussed by the parties ($900,000), but instead agreed to a much lower valuation to calculate the value of his interest ($665,000). Lancia Aff., Ex. 35 at 778. That's because negotiations with new investors at a slightly higher valuation was irrelevant to whether Brummer sold his interest.

When the buyout deal was done, Brummer knew that the revenues of Red Rabbit were expected to increase, and yet that did not affect his decision – he agreed to a valuation of less than the standard Powell recommended: one times revenues. Members looking to exit a company, for buyout purposes, look at the actual value of the company at the time that they are negotiating a buyout. Brummer did not even agree to a buyout at this standard valuation, but accepted a valuation far less to determine the value of his interest; this would have been the case whether or not he knew about the incoming investors. It is clear from the fact that he was willing to accept the lower valuation that he would have taken the same deal no matter the circumstances, even if he knew about the valuation determined by the new investors.

There is also a difference between valuation for outgoing members and new investors. While outgoing members look at the current state of a company for valuation, new investors look at the future potential of the company to determine at what price point they were willing to buy into a struggling company. This is one reason why the valuation that Kapor and Serious Change

set for Red Rabbit when deciding whether or not to invest was higher than the valuation that Brummer and Powell agreed on for Brummer's buyout.

During a member meeting in December 2010, Powell disclosed to all of the members that Red Rabbit had new investors that would be entering the company in the coming months. Lancia Aff., Ex. 18 at 245 lns. 1 – 11. At that point, Brummer could have done a number of things if that information had been material to him and the amount of his buyout. He could have sought return of his interest, but did not. *Id.* at 252 lns. 9 – 18. Brummer could have asked Powell for more money at that point, knowing that there was more money available, or otherwise negotiated new terms for his buyout. He did none of the things one would expect an individual who believes he was "wronged" to do. Instead, he sat back, content to collect, never asking Powell a single question about the timing of the investment, who the investors were, or when these investors first expressed interest in Red Rabbit. *Id.* at 244 ln. 18 – 248 ln. 10. Brummer actually admitted in testimony that he was "happy but surprised" about the new investors because the company had never been able to attract investors before that point. *Id.* at 247 lns. 22 – 25. This was only the first point at which Brummer did nothing and showed that the information was immaterial to his decision.

For the three months following Powell's revelation that new investors were incoming, Brummer continued his pattern of inaction regarding the information he now claims would have been material to his decision to sell at the price he did. He cashed each and every single check tendered to him by Red Rabbit for payment under the promissory note until June 2012. Lancia Aff., Ex. 34. Nearly six months after Brummer struck his deal, on March 30, 2011, the final paperwork, the Fourth Amended and Restated Operating Agreement, allowing the new investors to enter Red Rabbit was executed by all of the members of Red Rabbit including Brummer and

the new investors. Lancia Aff., Ex. 28. By signing this Operating Agreement, the Plaintiff agreed to relinquish even more of his remaining membership interest to the incoming investors. Lancia Aff., Ex. 28 Schedule A. At this point although he knew definitively that the valuation the new investors set for Red Rabbit was $1.274 million, Brummer approved the deal without question, ratifying the investment he now uses as the basis for his claims, allowing a new infusion of cash to flow into Red Rabbit. He actively gave up more of his interest without opposition. *Id.*

There were a number of things that Brummer could have done instead of simply approving the investment without ever questioning if it affected his buyout and promissory note. If he felt as deceived as he now claims, Brummer easily could have used withholding his consent as leverage to renegotiate the terms of his promissory note for more money. But he signed the investment documents anyway. Brummer could have rescinded his deal and gotten his shares returned to him, but he did not even ask for this; Lancia Aff., Ex. 18 at 252 lns. 9 – 18; he signed the investment documents without a second thought. Alternatively, he could have just asked for more money for his buyout; again, he did no such thing at this point, or at any other point after learning of the new investors. That he did none of these things completely defeats Brummer's current argument that the investor information was material to his buyout deal. What Brummer did do was send an email to Powell six months after first learning about the new investors and two months after approving the investment, expressing his value of their business relationship and asking to be kept in mind "as partner in future ventures." Lancia Aff., Ex. 37. Brummer testified under oath that, even after the new investors infused capital into the company, his only concern was to "finish getting paid" under the promissory note. Lancia Aff., Ex. 42 at 271 ln. 22 – 272 ln. 9.

Brummer continued to accept the payments under his promissory note even after signing off on the new investors, retaining approximately $34,000 of the $48,000 he was due. Lancia Aff., Exs. 30 and 34. This alone shows that he was happy with his deal regardless of the infusion of capital. It just does not seem reasonable that the information regarding incoming investors would have been material, rising to the level of breach of fiduciary duty, when all of his actions lead to the opposite conclusion. Not only do his actions clearly show that the information was not material in any way, but Brummer actually admitted that the reason he brought suit against the Defendants had nothing to do with belief that the information was material. *See* Lancia Aff., Ex. 20 at 292 – 293.

On June 1, 2012, Powell and Red Rabbit tendered Brummer checks representing the final payment owed under the promissory note, which Brummer rejected as being "too late to complete the buyout." Lancia Aff., Ex. 20 at 292 ln. 24 – 293 ln. 17. Brummer accepted all of the other checks tendered to him, even when they were late. After wanting to be bought out for two years before any deal was finalized, Brummer just wanted his money; the rejection of the final checks does not make sense absent external influences. When asked about his other reasons for rejecting the final checks beyond the payment being too late, Brummer invoked attorney-client privilege and refused to provide any other reasons. *Id.* at 295 lns. 13 – 25. From this, one can readily conclude that it was only at advice of counsel that Brummer refused the final payment and that it was counsel, and not the Plaintiff, that believed the information not disclosed to Brummer was material and drawn out legal action was necessary.[2]

The information Brummer complains was not disclosed to him was simply not material.

[2] Shortly before Plaintiff was advised by his counsel to reject the final payment tendered by Red Rabbit, Plaintiff's counsel and his partner executed confessions of judgment totaling $1.7 million in favor of a creditor. Those confessions of judgment were then filed several months later. Plaintiff's counsel filed suit in this court under Index Number 650921/2014 to vacate the judgments entered against the partners, claiming, *inter alia*, that the firm was under economic duress, was threatened with bankruptcy and had no assets to repay its debts to the creditor.

It would not have affected his buyout negotiation, which is clear from the fact that he accepted a lower valuation than one times revenue in his haste to get paid and leave the company. His actions from the time of his buyout even after he learned about the new investors support the contention that the information was immaterial to his deliberations. Powell therefore owed Brummer no fiduciary duty that could be breached.

3. DEFENDANT POWELL WAS NOT BY ANY STANDARD UNJUSTLY ENRICHED AND THE PLAINTIFF'S CAUSE OF ACTION CANNOT BE MAINTAINED

Just as each of the other remaining claims should not be permitted to stand against the Defendants, the unjust enrichment claim against Defendant Powell must be dismissed. To maintain an action for unjust enrichment, a plaintiff must prove three elements: that "the other party was enriched...at [the plaintiff's] expense" and that it would be "against equity and good conscience to permit [the other party] to retain what is sought to be recovered." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182, 944 N.E.2d 1104, 1110, 919 N.Y.S.2d 465, 471 (2011). In determining whether recovery for unjust enrichment is appropriate, "the general rule is that 'the plaintiff *must have suffered a loss* and an action not based upon a loss is not restitutionary.'" *Edelman v. Starwood Capital Group, LLC*, 70 A.D.3d 246,250, 892 N.Y.S.2d 37,40 (N.Y. App. Div. 1st Dep't 2009) (emphasis in original) (citing *State of New York v. Barclays Bank of N.Y.*, 76 N.Y.2d 533, 540 (1990).

There is not a single fact in this case that possibly shows that Powell was unjustly enriched at the expense of the Plaintiff. In its complaint, Plaintiff baldly states that he received less than his membership interest was worth and therefore, "[t]his benefit enriched Powell." Lancia Aff., Ex. 1 at ¶ 65. Brummer conveniently omits that the amount he received for the membership interest he sold back to Red Rabbit was bargained for and agreed upon by himself

and Powell. The Plaintiff accepted, for the purposes of valuing his membership interest, a valuation of Red Rabbit much lower than the standard one times projected revenues for the year 2010. *See* Lancia Aff., Ex. 35. He wanted so badly for years to sell his interest in the company and get his money back that he would have accepted the amount offered to him no matter the circumstances. The Plaintiff made that clear by cashing all of the checks the Defendants send to him under the promissory note even after he found out about the new investors, and even after signing into effect the deal that would make the new investment and therefore higher company valuation possible. It is contrary to logic that the Plaintiff now claims Defendant Powell was enriched at his expense, when he would have agreed to the same deal no matter the financial situation of Red Rabbit – he was just in that much of a rush to get his money and run.

No reasonable person can look at the deal between Brummer and the Defendants and say that it would be "against equity and good conscience" to allow Powell to retain the value of the shares that Brummer sold back to the company. At the time of Brummer's buyout, Red Rabbit was a company with negative net equity, negative operating income, and no distributions to its members; essentially a company that had no value whatsoever. This has not changed. Lancia Aff., Ex. 38. Brummer's shares assigned to Powell had no real value at the time of the buyout and, since the net equity and operating income of Red Rabbit are still negative, the interest represents no real value to Powell. In addition to the membership interest having no value, Brummer himself had to approve the assignment of his former interest to Powell, and did so without complaint or question even after he learned of the new investors. Lancia Aff., Exs. 32 and 33. A person who believes that another party is being enriched at his expense would not act in this way – he would not continue to sign document after document allowing for the transactions he eventually complained about to be consummated; he would not accept and cash

checks for payment under his promissory note for over a year without complaint; and he certainly would not fail to ask a single question regarding where his money was going to come from when he knew the dire financial state of the company at the time he made his deal.

This however is not the central inquiry for the court when determining whether any party was in fact unjustly enriched at the expense of another – the Plaintiff also must have suffered a loss. *Edelman* at 250. Brummer *did not* suffer any loss. He invested a total of approximately $25,000 into Red Rabbit. Had he actually accepted the final tender of payment under the promissory note in June 2012, the Plaintiff's investment return would have been 192%. That is a return of nearly double the amount that he invested. No reasonable person can argue that a return of 192% of an investment can constitute a *loss*. The math behind that sort of argument just does not make sense. Plaintiff will undoubtedly argue that the loss is represented with what Brummer *could have potentially gotten*. However, it is obvious that the Plaintiff was eager to sell his interest in the company and receive his initial investment plus a profit for at least two years before actually executing the promissory note. He accepted a company valuation far less than the value of Red Rabbit's projected revenues for 2010; he would have accepted the deal, as negotiated, no matter what other factors were in play. There are no issues of material fact regarding the unjust enrichment claim, the Plaintiff cannot meet the requirements the cause of action, and therefore this cause of action must be dismissed.

CONCLUSION

The Plaintiff's Complaint must be dismissed in its entirety for several reasons. First, the cause of action for fraud does not set forth a prima facie case. The Plaintiff fails to provide evidence to support at least three of the five requirements for that cause of action, namely that

the Plaintiff cannot prove intent, does not show any damage, and does not present evidence showing that the omitted information was material. The cause of action for fraudulent concealment must also be dismissed. In addition to the requirements for fraud that were not met by Plaintiff, the Plaintiff does not have any evidence to show that Defendants had any duty to disclose the information to the Plaintiff.

The remaining cause of action for breach of fiduciary duty is also not proven. Defendant Powell had the duty to disclose all *material* facts to the Plaintiff. It is clear from the actions, and inaction, of the Plaintiff that the information regarding incoming investors would and could not have been material to his deliberations surrounding his buyout deal. Plaintiff had ample opportunities to say or do anything to improve on the already impressive deal he negotiated with Powell in August 2010. Even after learning about the new investors and the terms of their investment, the Plaintiff did none of the things one would expect a person who believes that information would have changed his decision to do. He did not ask a single question about where or how Red Rabbit found the money to finance his buyout when he knew the financial history of the company. The information was simply immaterial to the Plaintiff's decision to sell his shares to the company at the price negotiated.

Finally, the claim of unjust enrichment against Defendant Powell is baseless. Powell received no enrichment due to the deal he struck with the Plaintiff – the company still to this day does not have any real value for its interest holders, as it is not making any sort of profit. More importantly, the Plaintiff has presented no evidence to support the contention that he suffered a loss due to Powell's actions. The Plaintiff's return on his initial investment into Red Rabbit was 192%, nearly double what he invested. This can in no way be considered a loss, which is essential to a claim for unjust enrichment. Based on the foregoing, summary judgment on the

issue of Defendants' liability must be decided in favor of the Defendants, and the Plaintiff's Complaint must be dismissed.

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Yours, etc.
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