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NEW YORK SUPREME COURT
COUNTY OF NEW YORK

JOHN BRUMMER,

Plaintiff,

- against –

RED RABBIT, LLC, and RHYS W. POWELL,

Defendants.

Index No.: 652565/2012

Part 49
Hon. O. Peter Sherwood, J.S.C.

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

Plaintiff John Brummer ("Brummer" or "Plaintiff") brought this action against Defendants Rhys W. Powell ("Powell") and Red Rabbit, LLC ("Red Rabbit" or the "Company," collectively "Defendants") after being defrauded into selling the majority of his membership interest in Red Rabbit , a Company that Brummer helped build by providing investment capital and lending his credibility as a medical professional. In negotiations leading up to the sale, Defendants failed to disclose the material fact that multiple venture capitalists ("VCs") were about to invest in the Company, instead convincing Brummer to sell his interest in the Company at a significant discount.

Defendants seek to avoid liability for their own concealment and breach of fiduciary duty by turning the nature of the duty upside down. In particular, they attempt to transform Powell's fiduciary duty to disclose to company owners like Brummer the material fact that multiple investors were interested in making an investment in the Company into an affirmative obligation by Brummer to guess that Powell was hiding these discussions with new investors.

Defendants' motion for summary judgment ("Defendants' Motion") fails as there is without question at least a material question of fact regarding whether Defendants defrauded Brummer and breached their fiduciary duty to him. Defendants also attempt to transform an objective analysis of what information is material, into a subjective one, arguing what Brummer should have done, and could have done, and what he should have known. But this is wholly irrelevant. The proper test requires Defendants to show this Court that there is no material question of fact that a reasonable investor should

have guessed about the buyout discussions, or would have or could have done what Defendants now want Brummer to have done.

Defendants' Motion seeks summary adjudication on all claims—for fraud, fraudulent concealment, breach of fiduciary duty, and unjust enrichment—while failing to make even a prima facie showing of the absence of material issues of fact on any of them. Even if they did, by Plaintiff's allegations in the Complaint and the information brought to light during discovery, including Powell's own testimony, Plaintiff offers ample rebuttal evidence that demonstrates the existence of genuine issues of material fact.

In particular, there are issues which a jury should address as to (1) whether Powell intentionally concealed the existence of discussions with the VCs and their plans to inject hundreds of thousands of dollars in investments into Red Rabbit; (2) whether Powell breached his duty to disclose to Brummer, a managing member and founding investor of Red Rabbit, that negotiations between Powell and venture capitalist firms were proceeding concurrently with Powell's pressuring Brummer to sell nearly all of his membership interest ("Membership Interest") in Red Rabbit (which resulted in Powell's interest not being as diluted by the sale of Red Rabbit shares to the VCs); and (3) whether Powell put his own financial interests in Red Rabbit above the fiduciary duty he owed Brummer because he understood that the buyout costs of 86% of Brummer's Membership Interest would be significantly increased if Brummer had knowledge of all the facts present when Powell approached him regarding the partial

buyout ("Partial Buyout"). These material issues preclude the Court from imposing the drastic, final remedy of summary judgment.

Defendants have not met their substantial burden of showing that either Plaintiff cannot establish an essential element of his claims or that they have a complete defense to Plaintiff's claims. There remain genuine disputes over the material facts with respect to each of these causes of action, so the Court should deny Defendant's Motion with prejudice in its entirety.

Finally, Plaintiff's cross-motion for summary judgment (the "Cross Motion") should be granted with respect to Defendants' counterclaim, and that claim should be dismissed, as none of the obligations Defendants seek retroactively to impose upon Plaintiff are contained in any of Red Rabbit's operating agreements. Defendants' allegations in their amended answer (the "Amended Answer") amount to little more than a list of non-actionable grievances, designed to draw attention away from their own fraud and fiduciary breaches.

FACTUAL BACKGROUND

Plaintiff John Brummer was defrauded in connection with his interest in Red Rabbit, a company that, with Brummer's initial investment and good name, created a niche market delivering healthy breakfasts, lunches, and snacks to schools in the New York metro area. Defendants' fraud and corresponding breaches in fiduciary duty occurred when Powell deceived Brummer into transferring almost all of his ownership interest in the Company just as his shares were about to become extremely valuable.

See Complaint, attached to the Krautheim Affirmation ("Krautheim Aff.")[1] as Exhibit L, ¶¶ 24-27, 53-58. Although Brummer remains an owner of Red Rabbit to this day, in September 2010, after Powell and Red Rabbit had benefitted from Brummer's investments and reputation for almost five years, Powell convinced Brummer to sell 86% of his shares—without disclosing to Brummer the Company's months long discussions with VCs who planned to pump hundreds of thousands of dollars into the Company, take over a significant portion of its equity, and provide the financing sufficient for the Company—and its value—to greatly expand. *Id.* ¶¶ 2-4, 11, 24-27, 35, 39, 41-44, 46, 54-56, 61, 62.

Defendants have produced and authenticated countless email exchanges between Powell and VCs from the six months prior to the transfer of Brummer's Membership Interest on September 22, 2010. *See* email exchanges between Powell and VCs, dated March through September, Exs. Q and R; *See* Excerpts from Deposition of Rhys Powell ("Powell Dep."), dated July 24, 2013, Ex. S, at 193-208 (authenticating same emails). During this time, board meetings, which otherwise took place frequently (though not on a regular basis) were not held, and Powell's communications with Brummer were scant until the days leading up to his Partial Buyout on September 22, 2010. *See* Affidavit of John Brummer, dated May 15, 2014, Ex. D ¶3; *See also* Powell Dep., Ex. U, (admitting that documents were not signed to finalize the Partial Buyout until October 1, 2010).

[1] Whenever Plaintiff references an exhibit in this memorandum of law, the exhibit is attached to the Krautheim Aff.

Defendants have not produced one scrap of evidence demonstrating that Powell's discussions with VCs were ever disclosed to Brummer prior to the transfer. *See* July 23, 2013, Transcript of Deposition of John Brummer ("Brummer Dep."), Ex. I, at 244:12-25; 245:1-7, (attesting that Brummer was not told anything about the VCs until long after the transfer of most of his Membership Interest was negotiated in late September, 2010); Indeed, when asked repeatedly at his deposition if he ever remembered telling Brummer any of this relevant information, Powell repeatedly claimed that he did not know or could not remember. He did, however, consistently tell Brummer that at any day, Red Rabbit could go bankrupt. *See* Excerpts from Brummer Dep., Ex. G at 70.

Powell had ample opportunity to broach the topic of the VCs with Brummer when, in September 2010, Brummer and his financial advisor had multiple communications with Powell regarding whether the proposed buyout price was fair. *See* emails negotiating terms of Partial Buyout in late September 2010, Ex. F. But Powell did not disclose the VCs or the potential infusion of cash. Instead, he affirmatively represented that Brummer's buyout price was "fair." *Id*. Moreover, despite learning in an email on September 8, 2010, that VCs valued Red Rabbit at $1,274,000, and that it would soon be valued at $1,474,000 (post investment), Powell represented to Brummer less than two weeks later that the Company was worth $665,000. *Id*.; *See also* emails between Powell and VCs regarding value of Red Rabbit, Ex. R.

Powell knew exactly what he was doing. In fact, his intention in omitting these material details was to push Brummer out of Red Rabbit on the cheap so that Powell

could profit from the new investment in the Company at Brummer's expense. *See* Complaint, Ex. L ¶¶ 2, 3, 24. Ultimately, Defendants' fraudulent conduct and fiduciary breaches caused Brummer to sell 86% of his interest in Red Rabbit (6% of the Company) for far less than it was actually worth. *Id*. ¶¶ 24-27, 53-58. The consequence is injury to Brummer, who still is an owner and wants only the best for the Company—simply not at his expense. *See* Excerpts from the Brummer Dep., Ex. G, at 70-71. Brummer's shares in the absence of Defendants' misconduct would be worth at least hundreds of thousands of dollars by now, and certainly many hundreds of thousands of dollars more as Red Rabbit continues to grow. *Id*. ¶¶ 28-29; *See also* Plaintiff's Expert Report, Ex. C, at 2, 25. And while Brummer was damaged, Powell personally profited: by jettisoning most of Brummer's ownership on the cheap, Powell profited by not having his own ownership in the company diluted as much as it otherwise would have been. *See* Operating Agreements, Ex. N, Profit and Loss Allocation.

The Counterclaim

On May 31, 2013, Defendants filed an Amended Answer with Counterclaim, seeking to recover additional funds from Brummer in connection with the September 2010 Partial Buyout. *See* Amended Answer, Ex. M. In the Amended Answer, Defendants claimed, for the first time, that portions of the funds that they themselves deemed acceptable as payment for the buyout, should be rescinded on the basis that Brummer failed to perform. *Id.*¶ 48. In particular, Defendants assert that Brummer breached his agreement with Defendants because he represented that he would provide

medical and nutritional expertise, secure clients, and act secure investors, but did not do what he said he could do. *Id.*

None of the Operating Agreements required Brummer to provide medical and nutritional expertise, secure clients, or secure investors (*See* Operating Agreements, Ex. N) and at the time of the Partial Buyout, Powell made no mention—and there is none on the record—of any issue or disappointment regarding Plaintiff's contributions to Red Rabbit or the work that he had done as a Managing Partner. *See* Affidavit of John Brummer, Ex. D ¶4. In fact, Powell admits that Plaintiff Brummer made many important contributions during his time as Managing Partner of Red Rabbit, which included: providing a credit card to the Company, introducing the Company to potential investors and other contacts, purchasing a van for the Company, making deliveries, and even working in the kitchen. *See* Complaint ¶¶ 21-23; *See also* Powell Dep., Ex. O at 68: 14-25, 69: 2-16, 69:21-25, 70, 76: 7-25, 77: 2-11.

APPLICABLE STANDARD

"[I]n order to obtain summary judgment the movant must make a 'prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.'" *Goldberger v. Brick & Ballerstein, Inc.*, 217 A.D.2d 682, 683 (2nd Dept. 1995) (quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). If the movant makes this showing, the opponent must demonstrate the existence of genuine issues of material fact, which should then preclude summary judgment. *See Goldberger*, 217 A.D.2d at 683.

In evaluating the evidence, "the court is not to determine credibility, but whether there exists a factual issue, or if *arguably* there is a genuine issue of fact." *S. J. Capelin Assoc., Inc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 (1974) (citations omitted) (emphasis added). "Since summary judgment is a drastic remedy, it should *not* be granted where there is *any doubt* as to the existence of a triable issue." *Kaung v. Bd. of Managers of Biltmore Towers Condo. Ass'n*, 873 N.Y.S.2d 421, 430 (2008) (citing *Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223, 231 (1978) (emphasis added)). A court must accept *any evidence* submitted by the non-movant as true, as well as any evidence submitted by the movant which is favorable to the non-movant. *See Weiss v. Garfield*, 21 A.D.2d 156, 158 (3rd Dept. 1964) (emphasis added) (affirmed holding where circumstantial evidence of mutual mistake precluded summary judgment). "[W]hen the existence of an issue of fact is even arguable or debatable, summary judgment should be denied." *Kaung*, 873 N.Y.S.2d at 430 (citations omitted).

ARGUMENT

I. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE FRAUD CLAIM FAILS BECAUSE THERE IS AMPLE EVIDENCE THAT DEFENDANTS DEFRAUDED BRUMMER BY INTENTIONALLY OMITTING AND CONCEALING MATERIAL FACTS

Plaintiff has established a prima facie case for fraud and supported his claim with substantial facts. The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by the defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and

injury. *Colasacco v. Robert E. Lawrence Real Estate*, 68 A.D.3d 706, 708 (2d Dept. 2009); *Orlando v. Kukielka*, 40 A.D.3d 829, 831 (2d Dept. 2007). Where the fraud claim at issue is based on an omission or concealment of a material fact, the plaintiff must demonstrate that the defendant had a duty to disclose material information and failed to do so. *Barrett v. Freifeld*, 77 A.D.3d 600, 601 (2d Dept. 2010). Even a cursory glance at the Complaint and the record before this Court makes plain that these elements are present, and that there is ample evidence of Defendants' fraud, warranting denial of Defendants' Motion for Summary Judgment.

A. Powell Owed a Duty to Brummer

Powell owed a duty to Brummer both as a fiduciary and under the "special facts" doctrine. The duty to disclose may arise from a fiduciary relationship (*Dembeck v. 220 Cent. Park S., LLC*, 33 A.D.3d 491, 492 (1st Dept 2006)), or under the "special facts doctrine." (*Jana L. v. W. 129th St. Realty Corp.*, 22 A.D.3d 274, 277 (1st Dept. 2005). The "special facts doctrine" applies where "one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." (*Id.* [internal quotation marks and citations omitted].) A duty to disclose may also arise when a party with superior knowledge knows that the other is acting on the basis of mistaken information. *Stevenson Equip. v Chemig Constr. Corp.*, 170 A.D.2d 769, 771, (3d Dept. 1991).

Here, as discussed thoroughly in Section II of this Argument, Powell's duty to disclose arises from a fiduciary relationship with Brummer, a fellow investor, equity holder, and managing member of Red Rabbit. Powell's own testimony concedes that Brummer is an owner, (*See* Excerpts from Powell Dep., Ex. T at 6:1-5) and the operating

agreements make clear that Brummer remains a unit holder and member of the LLC. *See* Operating Agreements, Ex. N. The fiduciary duty owed in this context is one of undivided and undiluted loyalty, and it includes the obligation to provide a fellow LLC member with full disclosure of all material facts in connection with a transaction such as a Partial Buyout, which Powell did not do.

In addition, Powell owed a separate duty to Brummer under the "special facts doctrine," because Powell's superior knowledge and nondisclosure of essential facts about the VCs and their intention to invest in Red Rabbit, rendered the Partial Buyout inherently unfair—Brummer unwittingly sold his shares at a discount. Not even Powell can deny that he knew Brummer was acting on the basis of mistaken information concerning the value of the Company. *See* email exchanges regarding value of Red Rabbit, sent prior to Powell's negotiations with Brummer, Ex. R). Powell never corrected the mistaken information. *See* emails negotiating terms of the buyout, dated September 17-21, Ex. F.

B. Defendants Concealed Material Facts

Although it is a question for the jury to decide, Plaintiff has demonstrated that Defendant concealed "Material Facts." Where a claim is based upon a failure to disclose, the omitted fact is material if it would have assumed actual significance in the deliberations of a reasonable investor and would have been viewed by the reasonable investor "as having significantly altered the total mix of information made available" *State v. Rachmani Corp.*, 71 N.Y.2d 718, 726 (1988). "The issue of materiality may be characterized as a mixed question of law and fact, involving as it does the application of

a legal standard to a particular set of facts. In considering whether summary judgment on the issue is appropriate, we must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination of materiality. The determination requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *TSC Industries, Inc. v. Northway, Inc*. 426 U.S. 438, 450 (1976).

From the outset, Plaintiff notes that Defendants misapply the test for materiality. Instead of applying an objective analysis of assessing what a reasonable shareholder would draw from a given set of underlying facts, Defendants apply a subjective test, arguing for pages about what Brummer should have done, what he could have done, what he should have known, and what must not have mattered to him. But the actual test requires the analysis through the lens of what a reasonable investor would have found significant.

In any event, the record plainly identifies which omitted information would have been significant in the deliberations of a reasonable investor. That information includes the following:

- Powell's discussions with VCs (*See* emails showing Powell's negotiations with VCs prior to Partial Buyout, Ex. Q);
- The VC's statements regarding the outlook of Red Rabbit (*See* emails showing Powell's negotiations with VCs prior to Partial Buyout, Ex. Q);
- That the VCs had reviewed Red Rabbit's financials (*See* emails showing Powell's negotiations with VCs prior to Partial Buyout, Ex. Q);

- The VC's statements regarding the valuation of Red Rabbit prior to their investment (*See* emails between Powell and VCs regarding value of Red Rabbit prior to Partial Buyout, Ex. R);

- The VC's statements regarding what the value of Red Rabbit would be after their investment (*See* emails between Powell and VCs regarding value of Red Rabbit prior to Partial Buyout, Ex. R);

- That the VCs saw value in Red Rabbit and were extremely interested in investing in the Company (*See* negotiation and valuation emails between Powell and VCs, Exs. Q and R).

All of these omissions would have been viewed by the reasonable investor "as having significantly altered the total mix of information made available." *Rachmani,* 71 N.Y.2d 718, 726. But Powell concealed this information despite having had ample opportunity to broach the topic with Brummer in September 2010, when Brummer and his financial advisor had multiple communications with Powell regarding whether the proposed buyout price was fair. *See* emails negotiating terms of Partial Buyout in September 2010, Ex. F. Not only did Powell conceal this information, he affirmatively represented that Brummer's buyout price was "fair." *See* emails between Brummer and Powell discussing the value of 86% of Brummer's membership interest, dated September 21, 2010, Ex. F. Moreover, despite learning in an email on September 8, 2010, that VCs valued Red Rabbit at $1,274,000, and would soon be valued at $1,474,000 (post investment), Powell represented to Brummer less than two weeks later, that the Company was worth $665,000. *Id.*; *See also* emails between Powell and VCs regarding value of Red Rabbit, Ex. R.

Defendant concealed "Material Facts," warranting denial of Defendants' Motion.

C. Defendants Acted With Fraudulent Intent

Brummer has demonstrated that Defendants acted with fraudulent intent. Intent to deceive is satisfied by evidence of a knowing misrepresentation. *Jo Ann Homes At Bellmore, Inc. v Dworetz*, 25 N.Y.2d 112, 120-1 (1969); *Owens v Waterhouse*, 225 A.D. 582, 584 (4th Dept. 1929); *United Nat'l Bank v Ettinger*, 59 A.D.2d 584, 586 (3d Dept. 1977); NY PJI 3:20, Comment at 14). Failure to disclose material facts "is of the same legal effect and significance as affirmative misrepresentations." *Nasaba Corp. v Harfred Realty Corp.*, 287 N.Y. 290, 295 (1942); NY PJI 3:20, Comment at 8). Thus, the failure to disclose material facts that the defendant is obligated to disclose also satisfies the intent to deceive element. *Striker v. Graham Pest Control Co. Inc.*, 179 A.D.2d 984, 985 (3d Dept. 1992); NY PJI 3:20, Comment at 15).

Here, Defendants failed to disclose material facts that Powell was having discussions with VCs, that VCs made positive statements regarding the outlook of Red Rabbit, that VCs had decided to invest in the company, and that VCs set a value on Red Rabbit that would be close to 1.5 million, following their investment. In addition to omitting facts he was obligated to disclose, Powell also affirmatively represented to Brummer that Red Rabbit was worth far less than VCs indicated to him. *See* emails between Powell and VCs regarding value of Red Rabbit, Ex. R. These misrepresentations and omissions satisfy the intent to deceive element of Brummer's fraud claim, warranting denial of Defendants' Motion.

D. Defendants' Breach Damaged Brummer

Defendants' fraud damaged Brummer. A plaintiff who is fraudulently induced to enter into a transaction in which he accepts something of less value than what he gives up, can state a cause of action for fraud, even if that plaintiff happened to make a profit. *Starr Foundation v. American Intern. Group, Inc.,* 76 A.D.3d 25 (1st Dept. 2010). A plaintiff who is damaged in this regard is compensated for what they lost because of the fraud. *Id.*

Brummer has shown that Powell deceived him into giving up 86% of his Membership Interest to Powell for much less than it was worth. Powell understood that the buyout costs of 86% of Brummer's Membership Interest would be significantly higher if Brummer had knowledge of all the facts present regarding the Partial Buyout, so Powell concealed and misrepresented material facts concerning the VCs and the value of the company. As a result, Brummer is entitled under his fraud claims to at least the difference between what he was paid for his 6% Membership Interest and what his Membership Interest was actually worth in September 2010. *See* Expert Report valuing Brummer's Partial Buyout at tens of thousands higher than what he was paid, Ex. C.

Plaintiff has demonstrated that he was damaged by Defendants' fraud, warranting denial of Defendants' Motion.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE BREACH OF FIDUCIARY CLAIM FAILS BECAUSE THERE IS AMPLE EVIDENCE THAT POWELL BREACHED HIS FIDUCIARY DUTY TO BRUMMER

Powell breached his fiduciary duty to Brummer. A breach of fiduciary duty claim has three elements: the existence of a fiduciary duty, a breach of that duty and damages directly caused by the breach. *McGuire v Huntress*, 83 A.D.3d 1418 (4th Dept. 2011). Plaintiff has demonstrated through ample evidence that each of the elements is present, warranting denial of Defendants' Motion.

A. Powell Owed Brummer a Fiduciary Duty

Powell simply cannot claim he owed no Fiduciary Duty to Brummer. Courts have recognized a common law and statutory right of members of an LLC to bring an action for breach of fiduciary duty against other members. *Nathanson v. Nathanson*, 20 A.D.3d 403 (2d Dept. 2005); *Salm v. Feldstein*, 20 A.D.3d 469, 470 (2d Dept. 2005); *Lio v. Mingyi Zhong*, 10 Misc.3d 1068(A) (Sup. Ct, N.Y. Co., 2006); *Zulawski v. Taylor*, 11 Misc.3d 1058(A) (Sup. Ct, Erie Co., 2005). The relationship among LLC members is analogous to that of partners, who, as fiduciaries of one another, owe a duty of undivided loyalty to the partnership's interests. *See Willoughby v. Webster*, 13 Misc.3d 1230(A) (Sup. Ct, Nassau Co., 2006), citing *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989). It is equally well-settled that a fiduciary duty arises, even in a commercial transaction, where one party reposed trust and confidence in another who exercises discretionary functions for the party's benefit or possesses superior expertise on which

the party relied. *See, e.g., Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 122 (1st Dept. 1998).

Defendants here do not dispute—nor could they—that Brummer remains, and was at the time of the breach, a member of Red Rabbit and part owner of the Company. In fact, Defendants openly admit in their Amended Answer that Brummer invested equity in Red Rabbit and that he continued to invest in Red Rabbit by extending credit to the Company. *See* Amended Answer, Ex. M ¶ 16. Defendants also concede that Brummer's debt contributions to Red Rabbit included his guarantee and monthly payments on a $10,000 credit line as well as his payments towards Red Rabbit's first delivery car. *Id*. Further, Defendants repeatedly advertised in their own promotional material the fact that Brummer was a managing partner and founding investor in the Company. *See* Red Rabbit Investor Materials, Ex. A at ¶5. And finally, Defendants do not dispute—nor could they—that Brummer remains a member and equity holder of the Company to this day. *See* Amended Answer, Ex. M ¶ 48; *See also* Operating Agreements, Ex. N. Indeed, during Powell's deposition, Powell openly admitted that Brummer remains a member and owner of Red Rabbit. *See* Powell Dep., Ex. T, at 5:16-25; 6:1-6.

Defendants' suggestion that no fiduciary relationship existed between the parties is wholly untenable, and contradicts their own acknowledgement that Brummer still is an owner of the Company. As members of a New York LLC, Powell and Brummer owed each other fiduciary duties of undivided and undiluted loyalty, obligating them to provide each other with full disclosure of all material facts regarding the Company.

Defendants' assertions suggesting otherwise must fail, and Defendants' Motion should be denied.

B. Powell Breached his Duty by Concealing Material Facts

As discussed at length in Sections I.A. and I.B. above, Powell breached his duty by concealing or omitting material facts. A member of a limited liability company, has a fiduciary obligation to others in the limited liability company which bars not only blatant self-dealing, but also requires avoidance of situations in which the fiduciary's personal interest might possibly conflict with the interests of those to whom the fiduciary owes a duty of loyalty. *Willoughby v. Webster*, supra, at 4. In *Nathanson v. Nathanson*, supra, 20 A.D.3d 403, 404, quoting LLCL § 409(a), the Appellate Division reiterated that the defendant had a statutory duty to perform his duties "in good faith and with that degree of care that an *ordinarily prudent person* in a like position would use under similar circumstances." The plaintiff's allegations that the defendant engaged in self-dealing were sufficient to sustain a cause of action for breach of fiduciary duty. Similarly, in *Salm v. Feldstein*, 20 A.D.3d 469, the defendant was held to owe the plaintiff a fiduciary duty to make full disclosure of all material facts.

Powell did not make full disclosure of all material facts surrounding the Partial Buyout; indeed, the evidence shows that Powell hid discussions with the VCs at exactly the same time he was having conversations with Brummer to buy out Brummer's shares. In particular, he did not disclose that he was having negotiations and discussions with VCs prior to the Partial Buyout of Brummer's Membership Interest. *See* negotiation and valuation emails between Powell and VCs, Exs. Q and R. He also

did not disclose that VCs had decided to invest in the company prior to Brummer's Partial Buyout. *Id.* Nor did he disclose information concerning VC's current and future valuation of the Company, despite having discussions with Brummer concerning the value of Red Rabbit, and despite Brummer's suggestion that they consider the Company's future growth potential. *See* emails between Powell and VCs regarding value of Red Rabbit prior to Partial Buyout, Ex. R; *See also* emails between Brummer and Powell negotiating the value of 86% of Brummer's membership interest, dated September 21, 2010, Ex. F. In fact, Powell affirmatively represented to Brummer during negotiations of the Partial Buyout that Red Rabbit was worth far less than VCs indicated to him. *Id.*

Powell breached his fiduciary duty to Brummer by concealing or omitting material facts, warranting denial of Defendants' Motion.

C. Brummer Had No Affirmative Obligation to Guess That Powell Was Hiding Discussions With New Investors

Powell seeks to avoid his fiduciary obligations by arguing that the onus was on Brummer to guess (1) that Powell was having discussions with new VCs, (2) that those VCs had decided to invest in Red Rabbit, and (3) that they placed a value on the company was much higher than what Powell represented it was worth in negotiations with Brummer. This is not the way a fiduciary duty works, and rightfully so. Under Defendants' formulation, any time a faithless fiduciary with superior knowledge withholds facts essential to fair negotiations with one of his co-venturers, he would be

absolved of his duty of undivided loyalty simply if the co-venturer failed to ask a sufficient number of questions.

Defendants' contention that it is somehow Brummer's fault for not asking enough questions about what was happening secretly behind his back distorts the law regarding fiduciaries, and deserves no credence. In any event, Brummer did question the fairness of the Partial Buyout and the current and future value of the Company, and Powell did not disclose the VCs or their plans to invest in response, warranting denial of Defendants' Motion.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE UNJUST ENRICHMENT CLAIM FAILS BECAUSE THERE IS AMPLE EVIDENCE THAT POWELL'S ACTIONS HAVE CAUSED HIS UNJUST ENRICHMENT AT BRUMMER'S EXPENSE

The facts presented make out a prima facie claim that Powell was unjustly enriched at Brummer's expense. "To prevail on a claim of unjust enrichment, 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" *Citibank, N.A. v. Walker*, 12 AD3d 480, 481 (2d Dept. 2004). These elements have been met.

A. Powell and Red Rabbit Have Received a Benefit

Powell has received a benefit. After Powell and Red Rabbit had benefitted from Brummer's investments and reputation for almost five years, Powell convinced Brummer to sell 86% of his shares. These shares were sold—unbeknownst to Brummer—at a massive discount, because Powell never disclosed to Brummer prior to

his Partial Buyout, the Company's months long discussions with new venture capitalist investors who planned to pump hundreds of thousands of dollars into the Company. *See* negotiation and valuation emails between Powell and VCs, Exs. Q and R.

The Membership Interest sold by Brummer went directly to Powell, whose Membership Interest increased from 87% prior to the Partial Buyout, to 93%, after the Partial Buyout, and thereby lessened the impact of the dilution of his shares. *See* Schedule A of Second and Third Amended Restated Operating Agreements, Ex. N.

B. Brummer Sustained a Clear Loss

Brummer sustained a loss. "[N]o matter how favorable the terms might be," a party wronged by a faithless fiduciary, "can follow and reclaim the abstracted funds in any form they may take, however enhanced in value." *Marcus v. Otis*, 168 F.2d 649, 654 (2d Cir. 1948) (citing Restatement of Restitution § 202 (193)); *See In re Estate of Rothko*, 43 N.Y.2d 305, 322 (1977) (permitting petitioner to seek appreciation damages where artwork sold in breach of trust); *See Diamond v. Oreamuno*, 24 N.Y.2d 494, 498-99 (1969) (fiduciary not permitted to keep profits gained through breach of trust, even if no damages resulted from faithless conduct).

Here, Brummer sustained a loss consisting of the difference between what he was paid for his 6% Membership Interest and what his Membership Interest was actually worth in September 2010. *See* expert report valuing Brummer's Partial Buyout at tens of thousands higher than what he was paid, Ex. C. He also sustained a loss in that his shares in the absence of Defendants' misconduct would be worth at least hundreds of thousands of dollars by now, and certainly many hundreds of thousands of

dollars more as Red Rabbit continues to grow. *Id*. ¶¶ 28-29; *See also* Plaintiff's expert report, Ex. C, at 25.

Defendants have failed to establish their entitlement to judgment as a matter of law with regard to Plaintiff's unjust enrichment claim, and Defendants' Motion should be denied.

IV. PLAINTIFF DESERVES JUDGMENT ON DEFENDANTS' SOLE COUNTERCLAIM BECAUSE IT IS FLATLY REFUTED BY THE FACE OF THE AGREEMENTS

A. Plaintiff Did Not Breach The Operating Agreement Because There Was No Affirmative Duty to Be a Fundraiser

Defendants' assertion in its counterclaim that Brummer breached his contract with Defendants by not securing investors fails because Plaintiff had no duty to be a fundraiser. "It is well settled that a written agreement which is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. . . .Further, a court may not, under the guise of interpreting a contract, add or omit terms or distort the meaning of those used to fashion a new contract on behalf of the parties." *Masters v. 14-22 Leonard St. Assoc. LLC,* 11 A.D.3d 380, 381-382 (internal citations omitted).

Here, the parties' obligations are set forth in the Operating Agreements. There is not a single provision in any of the Agreements requiring Brummer to raise funds, bring in investors, or be a Fundraiser for Red Rabbit. The Original Operating Agreement states that "the Company intends to provide with a greater membership interest as consideration for fund raising services that result in capital for use by the

Company as provided within this Agreement" (*See* Operating Agreements, Ex. N, at 1) and that "[i]n the case of Member Brummer, consideration for his fundraising services shall be limited to an increase in his membership interest as provided within this Agreement" *See* Operating Agreements, Ex. N, at 7; *See also* Excerpts from the Brummer Dep., Ex. P, at 42-44. The contract is clear in that it rewards Brummer for any funds that he may raise for the company but it, in no way, through the means of any provision or liberally construed interpretation of the language in the contract, asserts that Plaintiff is required to be a fundraiser. Defendants' allegation that Brummer breached his contract with Defendants by not securing investors fails because it is flatly refuted by the Operating Agreements, warranting dismissal of the Counterclaim.

B. Plaintiff Did Not Breach The Operating Agreement Because There Was No Affirmative Duty to Be a Nutrition Expert

Defendants' assertion in its counterclaim that Brummer breached his contract with Defendants by not providing medical and nutritional expertise or securing clients, similarly fails, as it is flatly refuted by the Operating Agreements. *See* Operating Agreements, Ex. N.

Here again, there is not a single provision in any of the Operating Agreements requiring Brummer to provide medical and nutritional expertise or secure clients. Since there is a written agreement which is complete, clear and unambiguous on its face, that agreement must be enforced according to the plain meaning of its terms.

Defendants' allegations amount to little more than a list of non-actionable grievances, designed to draw attention away from their own fraud and fiduciary

breaches. Not surprisingly, during the discussion and the negotiation of the buyout price, Defendants made no mention that they were unhappy in any way with Plaintiff's performance and contributions as a member of Red Rabbit. *See* Affidavit of John Brummers, Ex. D ¶4; *See also* emails negotiating terms of Partial Buyout in late September 2010, Ex. F.

In fact, Powell admits that Plaintiff Brummer made many important contributions during his time as Managing Partner of Red Rabbit, which included: providing a credit card to the Company, introducing the Company to potential investors and other contacts, purchasing a van for the Company, making deliveries, and even working in the kitchen. *See* excerpts from Powell Dep., Ex. O at 68: 14-25, 69: 2-16, 69:21-25, 70, 76: 7-25, 77: 2-11. There are no issues of fact in dispute regarding Defendants' counterclaim. That claim fails as a matter of law and should be dismissed accordingly.

CONCLUSION

Defendants' Motion for Summary Judgment fails in its entirety and should be denied, while Plaintiff's Motion for Summary Judgment should be granted.

Defendants' application fails as there are, at the least, material questions of fact regarding whether Defendants defrauded Brummer and breached their fiduciary duty to him. Even if, arguendo, Defendants had made out a prima facie showing of the absence of material issues of fact on any of Brummer's claims—and they did not because they could not—Plaintiff's allegations in the Complaint, along with the

information brought to light during discovery, offers ample rebuttal evidence demonstrating genuine issues of material fact, warranting denial of Defendants' Motion.

In stark contrast to Defendants' bid for summary judgment, Plaintiff's Cross Motion should be granted with respect to Defendants' only counterclaim. Plaintiff is entitled to a judgment as a matter of law on that claim because none of the obligations that Defendants seek retroactively to impose upon Plaintiff are contained in Red Rabbit's Operating Agreements. The Court should dismiss Defendants' sole counterclaim, and this case should proceed towards its resolution.

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Respectfully submitted,

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