SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOEL M. COHEN PART 03M

Justice

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FIRST EQUITY REALTY, INDEX NO. 650273/2015

Plaintiff,

- v -

THE HARMONY GROUP, II, MADISON AVENUE INVESTMENT PARTNERS, LLC,

Defendants.

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DECISION AFTER NON-JURY TRIAL

This case concerns the aftermath of what had been an amicable business divorce. Bryan Gordon and Ronald Dickerman went into business together in 1997. Deploying a business plan developed by Mr. Gordon, they created Madison Avenue Investment Partners, LLC ("MAIP") and other related entities to purchase illiquid equity stakes in real estate ventures with the goal of realizing profits upon sale of the underlying properties. After a successful five-year run, they decided to go their separate ways in 2002.

At a high level, the arrangement – set forth in a Letter Agreement dated January 31, 2002 – was straightforward: Mr. Gordon (through his company The Harmony Group II ("Harmony")) would manage the legacy entities, winding down their investments and making distributions to Mr. Dickerman and his company, First Equity Realty, LLC ("FER"), under the existing Operating Agreement if and when they arose. The parties further agreed to grant each other a carried interest in a defined piece of their future, separate endeavors (referred to as "Bryco" and "Ronco") during a two-year transition period. The parties disclaimed continuing fiduciary duties to one another with respect to the Bryco and Ronco businesses.

In this action, FER (effectively Mr. Dickerman) alleges that MAIP and Harmony (effectively Mr. Gordon) breached the Operating Agreement and Letter Agreement by failing to make the full distributions to which FER was entitled between 2002 and 2013. Defendants deny those allegations with respect to pre-2009 distributions and assert that FER's claims with respect to those distributions are barred by the applicable six-year statute of limitations. In addition, Harmony asserts a counterclaim seeking carried interest payments it alleges it should have received from FER with respect to certain Ronco endeavors.

After a bench trial, the Court finds that FER's claims relating to MAIP profit distributions from 2002-2008 are barred by the applicable six-year statute of limitations. FER's assertion that Defendants are estopped from asserting the statute of limitations as a defense is unavailing. The evidence did not establish that Defendants misled Plaintiff about their activities during this period. The Court finds that Mr. Dickerman, who had been the de facto Chief Operating Officer of the parties' joint operations, failed to take reasonable steps to obtain the information upon which his lawsuit is based for well more than six years before the Complaint was filed. He was entitled to such information (and much more) under the Letter Agreement but failed to pursue or critically review such information until (at the earliest) 2014. In any event, FER failed to prove this branch of its breach of contract claim by a preponderance of the evidence.

FER has, however, established that Harmony wrongfully distributed to itself funds it had specifically reserved for payment to FER with respect to distributions covering 2009-2013. Those distributions were withheld at Mr. Gordon's direction – and without notice to FER – because of his suspicion, without supporting evidence, that Mr. Dickerman may have failed to make required payments to Harmony due under the Letter Agreement with respect to certain Ronco investments. Mr. Gordon agreed at trial that Harmony's receipt of those funds for its own account when MAIP was liquidated was inappropriate, and testified that he did not approve that transaction. FER is entitled to judgment in the amount of $276,768 plus statutory prejudgment interest.

Finally, the Court finds that Harmony's counterclaim for damages under the Letter Agreement is untimely. As was the case with Mr. Dickerson, Mr. Gordon made little effort to seek information to which he was contractually entitled from FER with respect to those investments in which he had a potential financial interest, relying instead on internet searches by his staff years after the fact. Mr. Gordon knew of FER's failure to provide required information investments for years, and at the latest by 2007, and did nothing about it. At that time he believed he was owed money with respect to Ronco's "German Fund" investments, but failed to bring a claim for eight years. In any event, Harmony failed to prove its counterclaim by a preponderance of the evidence.

UNDISPUTED FACTS AND PROCEDURAL HISTORY

The facts leading up to and in the immediate aftermath of the parties' business divorce are largely undisputed. Counsel helpfully submitted in advance of trial a detailed statement of stipulated facts and procedural history (NYSCEF 844), which is set forth below with minor additions to reflect additional facts that were not disputed at trial.

I. BUSINESS VENTURES BETWEEN FER AND HARMONY

1. Ronald Dickerman is the President of First Equity Realty, LLC. Bryan Gordon was the Managing Member of The Harmony Group, LLC, which merged into The Harmony Group II, LLC, on or about September 10, 1998. Bryan Gordon is the Managing Member of The Harmony Group II, LLC.

2. Around 1997, Ronald Dickerman, through FER, and Bryan Gordon, through

Harmony, went into business together. Dickerman and Gordon met at Columbia Business School in 1985 and later worked together at Smith Barney.

3. Between approximately 1997 and 2002, FER and Harmony organized various companies for the purposes of acquiring, managing, and liquidating interests in the parties' collective investment vehicles. To that end, FER and Harmony became members of various limited liabilitycompanies together, most notably Madison Avenue Investment Partners, LLC ("MAIP").

4. MAIP was formed to implement the partners' investment strategy, which consisted of acquiring interests in illiquid investments and reaping value through natural liquidation. MAIP is organized under the laws of Delaware. MAIP is governed by an Amended and Restated Operating Agreement, dated July10, 1997, which is governed by Delaware law (the "MAIP Operating Agreement"). Harmony received six Voting Units and FER received four Voting Units in MAIP.

5. Section 4.3 of the MAIP Operating Agreement states:

> Cash Distributions. Cash available for distribution shall be distributed at such times as are determined by a Majority of the Members in the following order of priority, provided that, within 90 days after the end of each calendar year, unless otherwise determined by a Supermajority of the Members, the Company shall in any event make a distribution to the Members in an amount equal to the lesser of (i) the sum of the Cash Distribution Receipts for such year, or (ii) the amount of Tax Distributions for such year:
>
> (i) First, 75% to Harmony and 25% to FER until the Aggregate Cash Amount equals one million dollars;
>
> (ii) Next, 70% to Harmony and 30% to FER until the Aggregate Cash Amount equals three million dollars;
>
> (iii) Next, 60% to Harmony and 40% to FER until the Aggregate Cash Amount equals five million dollars;
>
> (iv) Next, 50% to Harmony and 50% to FER until the Aggregate

Cash Amount equals seven million dollars; and

(v) Thereafter, 60% to Harmony and 40% to FER.

6. Per the MAIP Operating Agreement, "'Majority of the Members' as of any date means those Members who collectively own 51% of the Voting Units of the Company."

7. As of January 30, 2002, the Aggregate Cash Amount was greater than seven million dollars. Accordingly, allocation under Section 4.3 going forward was set at 60% to Harmony and 40% to FER.

8. Section 5.6.1 of the MAIP Operating Agreement states in part:

> No Member, nor any officer, director, shareholder, member, employee or agent of a Member, nor any Managing Director, shall be liable, in damages or otherwise, to the Company or to any Member for any act or omission based upon errors of judgement, negligence, or other fault in connection with the business or affairs of the Company, provided that such Member or such person acted in a manner reasonably believed by such Member or person to be within the scope of his, her or its authority under this Agreement and in the best interests of the Company, and provided further that such act or omission does not constitute gross negligence or willful misconduct.

9. The current members of MAIP are FER and Harmony.

10. MAIP has been liquidated but not dissolved.

II. THE BUSINESS SEPARATION OF FER AND HARMONY

18. In 2001 or 2002, Mr. Gordon approached Mr. Dickerman about ending their business relationship.

19. Mr. Gordon, Harmony, Mr. Dickerman, and FER signed a letter agreement, dated as of January 31, 2002 (the "Letter Agreement").

20. The Letter Agreement incorporated by reference the Written Consent by a Majority of Members to Action of Company [MAIP], dated January 28, 2002 (the "Written

Consent").

21. Mr. Gordon, Harmony, Mr. Dickerman, and FER signed an addendum to the Letter Agreement, dated as of November 2004 (the "Addendum").

22. The parties had the benefit of legal counsel when negotiating the Letter Agreement and Addendum.

23. The Addendum provides that it and the Letter Agreement are governed by New York law.

24. The parties consented to the exclusive jurisdiction of the state and federal courts in New York in connection with any action relating to the Addendum and/or Letter Agreement.

25. The Addendum contains a merger clause.

A. Completing the parties' pending business

26. FER and Harmony agreed to complete the pending business of their companies, including MAIP.

27. Relevant to this action, MAIP would operate until the investments on its books at the time of the separation were complete.

B. Amendments to the MAIP Operating Agreement and MAIP's Management

28. FER and Harmony maintained their ownership in MAIP, however the Letter Agreement, Addendum, and Written Consent amended some terms of the MAIP Operating Agreement and MAIP's management.

29. For example, the Letter Agreement provided: "Any cash available for distribution to FER or Harmony from any MCM Company under the terms of the operating agreement or partnership agreement governing that MCM Company will be distributed within 45 days after that cash becomes available for distribution, subject to deduction or offset for expenses,

repayment of 'Provided Resources loans,' and/or provision of such reserves as [Mr. Gordon] determine[s] to be reasonable." MAIP is an MCM Company.

30. The Letter Agreement directed that FER "will receive all monthly, quarterly and annual financial and other reports customarily prepared by [Harmony and MAIP] that relate to any interest that [it has] in any funds or other investment vehicles or in any other distributions, including a monthly management reporting package and 'back-end report' which will be sent by the last day of the following month."

31. The Letter Agreement entitled FER "to audit, at [its] sole cost and expense, not more than once in any calendar year, the reports furnished to [it], including, without limitation, the back-end account" and permitted Mr. Dickerman "to participate, in a non-voting consultative capacity, in any quarterly portfolio management reviews relating to any interest that [it had] in any funds or investment vehicles" and provided that Mr. Dickerman "will be notified not less than five days prior to such meetings as to their time and location."

32. Per the Written Consent, Mr. Gordon was chairman of the ad hoc investment committee and "responsible for the administration and day-to-day management of the business and assets of [MAIP] (subject to the Operating Agreement and without prejudice to the responsibilities of Dickerman for origination of new investment opportunities)."

33. The Written Consent also provided that "the responsibilities and authority (subject to the approval of a Majority of the Members) of [Mr.] Dickerman shall be limited to origination of new investment opportunities." He was "removed as a voting member, and [became] a non-voting advisory member, of the ad hoc Investment Committee."

C. The Parties' New Businesses and Limited Sharing of Profits

34. In addition to agreeing to complete the Pending Business, the parties agreed to

grant each other a limited carried interest in their future, separate endeavors.

35. Mr. Gordon and Mr. Dickerman agreed they separately would "generate, develop, manage and operate any new business and/or funds through one or more new companies" after January 31, 2002 (the "Transition Date").

36. Mr. Gordon organized Madison Capital Group, LLC and agreed to do "business (other than the business of the MCM Companies) through that company and its affiliates and subsidiaries."

37. In the Letter Agreement, "those companies, whether formed or to be formed after the Transition Date, and the business of each of them, and, as the context requires, [Mr. Gordon], individually, and/or Harmony, are collectively referred to as 'Bryco.'"

38. Mr. Dickerman agreed to "acquire or organize, and do business (other than the business of the MCM Companies) through, one or more entities."

39. In the Letter Agreement, "those entities, whether formed or to be formed after the Transition Date, and the business of each of them, and, as the context requires, [Mr. Dickerman], individually, and/or FER, are collectively referred to as 'Ronco.'"

40. In the Letter Agreement, the parties agreed that "Ronco and Bryco will be independent of one another and, except as expressly provided herein, Ronco will not owe any duty, fiduciary or otherwise, to Bryco or any of its funds or investment vehicles, and Bryco will not owe any duty, fiduciary or otherwise, to Ronco or any of its funds or investment vehicles."

D. Bryco's Carried Interest in the German Funds

41. In the Letter Agreement, Ronco agreed to grant Bryco "15% of the '*Ronco Net Profits Participation*' (as defined below) attributable to the first $7.5 million of "Invested Capital" (as defined below), 10% of the Ronco Net Profits Participation attributable to the Invested Capital in excess of $7.5 million but not in excess of $15 million, and 5% of the Ronco

Net Profits Participation attributable to all Invested Capital in excess of $15 million."

42. The "'*Ronco Net Profits Participation*' is the promotional net profits participation (or the equivalent) granted to Ronco in any German Funds remaining after payment of promotional or profits interests to employees and economic partners [excluding] any interest in (i) asset management fees or expense reimbursements, or (ii) any assets or investments (or interests therein) acquired by Ronco as principal with its proprietary capital."

43. "'*Invested Capital*' is moneys committed to German Funds during the Transition Period by investors to German Funds and subsequently invested in German l.p. interests, regardless of when such funds are actually contributed to or invested by any German Fund, with the Bryco's carried interest being measured by the time of investment of funds (that is, the first $7.5 million invested by German Funds from moneys committed to German Funds during the Transition Period constitutes the first $7.5 million of Invested Capital)."

44. The "German Funds" are (i) Madison International Liquidity Fund, LLC and (ii) Madison International Liquidity Services, LLC.

45. The "Transition Period" is January 31, 2002 to January 30, 2004.

46. Under the Addendum, Bryco's participation in the Ronco Net Profits Participation, if any, was to be paid within 10 business days of the date that such participation accrues.

47. The Addendum obligated Ronco to furnish Bryco with periodic reports relating to the funds and other investment vehicles from which the potential carried interest derived.

E. Ronco's Carried Interest in the RCarry Funds

48. In the Letter Agreement, Bryco agreed to grant Ronco "a carried interest in Bryco's carried interest in each fund or other investment vehicle originated or sponsored by

Bryco to the extent that such fund or other investment vehicle makes investments in the 'Core Businesses' of the MCM Companies" in the two years following January 31, 2002.

49. These funds or other investment vehicles in which Ronco was entitled to a carried interest were called the "RCarry Funds."

50. The "'Bryco Net Profits Participation' is the promotional net profits participation in any fund or other investment vehicle granted to Bryco remaining after payment of promotional or profits interests to employees and economic partners and does not include any interest in (a) asset management fees or expense reimbursements, or (b) any assets or investments (or interests therein) acquired by Bryco as principal with its proprietary capital."

51. Under the Addendum, Ronco's participation in the Bryco Net Profits Participation, if any, is to be paid to Ronco within 10 business days of the date that such participation accrues.

52. The Addendum obligated Bryco to furnish Ronco with periodic reports relating to the funds and other investment vehicles from which the potential carried interest derived.

II. POST-SEPARATION EVENTS

53. The investment phase of the Pending Business was completed within two years from the Transition Date.

54. Mr. Dickerman vacated the New York office on March 10, 2004.

55. FER was provided yearly K-1s from MAIP until MAIP liquidated, i.e., through tax year 2013.

PROCEDURAL HISTORY

56. Following FER's requests for financial information, Harmony and MAIP filed suit against FER in Colorado state court on December 19, 2014, alleging breach of the Letter Agreement and seeking a declaratory judgment (the "Colorado Action") (NYSCEF 707).

57. The Colorado Action was dismissed without prejudice on February 24, 2015 by agreement of the parties. (NYSCEF 708).

58. On January 30, 2015, FER commenced this action, asserting nine claims against Harmony and MAIP (NYSCEF 1). In an Order filed on October 1, 2015, the Court (Bransten, J.) dismissed six of those claims—conversion (Claim I), fraud (Claim II), negligent misrepresentation (Claim III), breach of fiduciary duty (Claim IV), breach of the covenant of good faith and fair dealing (Claim VII), and conspiracy (Claim IX)—and also struck FER's demand for punitive damages (NYSCEF 35).

59. On May 10, 2019, FER filed its Fourth Amended Complaint ("FAC") asserting six claims against Harmony and MAIP (NYSCEF 604):

a. Count I: Breach Of Contract (Failure To Pay Profits And Return Capital) (Against MAIP and Harmony II),

b. Count II: Breach Of Contract (Improper Dissolution) (Against MAIP and Harmony II),

c. Count III: Piercing The Corporate Veil (Against MAIP and Harmony II),

d. Count IV: Breach Of Contract (Letter Agreement And Addendum) (Against MAIP and Harmony II),

e. Count V: Breach Of Contract (Colorado Action) (Against MAIP and Harmony II),

f. Count V: Accounting (Against Harmony II) as to MAIP and the RCarry Funds.

60. On April 20, 2021, FER voluntarily discontinued Counts II, III, IV, and V

(Colorado Action) (NYSCEF 843).

61. In Count I, FER alleges breach of contract against Harmony and MAIP for allegedly failing to make proper distributions under the MAIP Operating Agreement.

62. In Count III, FER alleges a veil-piercing claim because Harmony allegedly improperly dominated MAIP causing MAIP to commit the alleged wrongs against FER.

63. In Count V (Accounting), FER seeks an equitable accounting from Harmony of (a) MAIP and (b) the RCarry Funds.

64. In an order dated August 17, 2020, following motions for partial summary judgment filed by each side, the Court dismissed Count V (Accounting) regarding the RCarry Funds. It made the following findings:

a. There is no fiduciary relationship between FER and Harmony concerning the carried interests.

b. The general disclaimer of fiduciary duties in the Letter Agreement does not clearly and unambiguously dissolve the fiduciary relationship between FER and Harmony established under Delaware law.

65. On June 10, 2019, Defendants filed an Answer, with Defenses and Counterclaims, to the FAC, asserting two counterclaims against FER (NYSCEF 605).

66. The counterclaims are:

a. Counterclaim Count I: Breach of Contract (by Harmony against Plaintiff) and

b. Counterclaim Count II: Declaratory Judgment (by Harmony against Plaintiff).

67. In Counterclaim Count II, Harmony sought a declaratory judgment that it is discharged from performing its obligations under the relevant agreements because FER allegedlymaterially breached its payment and reporting obligations regarding the German

Funds under theLetter Agreement and Addendum.

68. In an order dated August 17, 2020, following motions for partial summary judgment filed by each side, the Court dismissed Counterclaim Count II as to Madison International Liquidity Fund, LLC, but not as to Madison International LiquidityServices, LLC. It made the following findings:

a. Ronco did not earn carried interest from Madison International Liquidity Fund.

b. Ronco did not earn carried interest from Madison International LiquidityServices, LLC Tranche I or Tranche II.

c. Ronco did earn carried interest from Madison International Liquidity Services,LLC Tranche III.

d. Breach of the reporting obligations under the Letter Agreement is not material.

69. In a Decision + Order on Motion entered on February 5, 2020, the Court denied defendants' motion to vacate a prior order denying Defendants' request to extend expert disclosure to permit the substitution of their expert (NYSCEF 758). The Appellate Division affirmed (*First Equity Realty v Harmony Group, II*, 187 AD3d 458 [1st Dept 2020]).

70. The Court held a non-jury trial on June 1-2, 2021. Thereafter the parties submitted post-trial memoranda and proposed judgments. Based on the evidence admitted at trial, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

FER'S CLAIMS

71. The nub of FER's various claims is that Harmony and MAIP (under Mr. Gordon's direction) improperly withheld distributions that should have been paid to FER from 2002 through 2013. Based on the evidence, the claims can be divided into two time periods during which disputed distributions were made: 2002-2008 and 2009-2013. As shown below, FER does not assert a claim with respect to 2007 distributions (indeed, they acknowledge an over-distribution to FER during that year) and a de minimis under-distribution in 2008.

72. The gravamen of the claim for the 2002-2008 period is that FER received a lower percentage of MAIP distribution than the 40% to which it was contractually entitled.

73. For the 2009-2013 period, the claim is that distributions were withheld from FER *entirely*. During that period, FER continued to receive K-1s from MAIP indicating that FER maintained a 40% interest in profits, leading Mr. Dickerman to believe that no distributions were made during those years to *either* party. In fact, distributions were being made to Harmony, while MAIP's distributions were withheld at Mr. Gordon's direction. Upon MAIP's liquidation in 2012, Harmony received the distributions that had been withheld from FER.

74. FER asserts damages, on a year-by-year basis, as follows:

Year	FER's Under-Distribution
2002	$896,482
2003	$377,921
2004	$540,846

2005	$163,401
2006	$355,069
2007	$(171,916)
2008	$1,683
2009	$181,632
2010	$21,032
2011	$17,568
2012	$341
2013	$56,195
Total	**$2,440,253**

(Pl. Post-Trial Br. (NYSCEF 1111) at 22).[1]

A. <u>2002-2008</u>

76. The Court finds that FER failed to take reasonable and timely steps to inform itself as to the accrual of any claims it might have had against Defendants with respect to distributions made between 2002 and 2008. (As a practical matter, the challenged distributions occurred between 2002 and 2006.)

77. As noted above, FER had the contractual right under Paragraph 19 of the Letter Agreement to receive "all monthly, quarterly, and annual financial and other reports customarily prepared by Bryco and the MCM Companies that relate to any interest that [Dickerman], FER or Ronco have in any finds or other investment vehicles or in any other distributions, including a monthly management reporting package and 'back-end report' which will be sent by the last day of the following month" (JX 66 at 12). FER also had a right to receive a monthly accounting of all expenses deducted from any interest it had in any

[1] According to Plaintiff's expert, Mr. Levin, FER should have received $214,826 in cash distributions in 2007, but instead received $386,742, for an apparent *surplus* of $171,916. However, the prior year FER purportedly should have received $355,069 but instead received zero. Distributions in 2008, in the midst of the financial crisis, were minimal (NYSCEF 870 at 29).

funds or investment vehicles, as well as "tax information and tax projections comparable to that prepared by Bryco for [Mr. Gordon]" (*id*). FER also had the right to audit the reports furnished by Defendants, and the right to "participate, in a non-voting consultative capacity, in any quarterly portfolio management reviews relating to any interest that [Mr. Dickerman], FER or Ronco have in any funds or investment vehicles and will be notified not less than five days prior to such meetings as to their time and location" (*id*).

78. As the former COO of MAIP, Mr. Dickerman knew exactly what to ask for to keep track of FER's investments as they proceeded toward events triggering distribution. Instead, the record shows, he paid little attention to the information that was provided, and failed to request the information to which he was contractually entitled. To the extent Defendants failed to provide certain information that was required under the Letter Agreement, Mr. Dickerman was or should have been aware of that failure – and his entitlement to substantial information – well before January 30, 2009 (*i.e.*, more than six years before filing suit). For reasons not adequately explained at trial, he did not pursue that information until 2014.

79. Mr. Dickerman's assertion that he was at an information disadvantage because Mr. Gordon and his MAIP staff relocated from New York is unpersuasive. He continued to communicate with MAIP staff and was able to freely request and receive financial information. He did not require daily in-person contact to keep abreast of MAIP's activities, particularly given his contractual rights and familiarity with the business and MAIP's accounting personnel.

80. Prior to 2008, Defendants did not mislead Mr. Dickerson as to MAIP's operations or distribution of proceeds.

81. The evidence did not establish that Defendants engaged in grossly negligent or willful misconduct with respect to the allocation of distributions between FER and Harmony from 2002 through 2008. Indeed, the evidence introduced at trial with respect to MAIP distributions from 2002 through 2008 was quite thin. The only witness called by Plaintiff at trial on this point was an expert (Mr. Levin), who reviewed MAIP's annual tax returns and concluded that because FER did not receive 40% of the total distributions made during each year (after taking into account certain adjustments based on transactions between the parties), FER must have been shortchanged. The information upon which that analysis was based was available to FER prior to January 30, 2009.

82. While Mr. Levin's analysis was logical, and suggests the possibility that some distributions may have been misallocated, it does not address the facts and circumstances relevant to any particular distributions, which in turn were based on particular transactions and potential offsets and expenses. The Court cannot conclude, based solely on the aggregated data in the tax returns, whether FER was shortchanged on distributions between 2002 and 2008 or, if so, by how much. Accordingly, the Court concludes that FER failed to prove this claim by a preponderance of the evidence.

B. 2009-2013

83. By contrast, the evidence established that at some point in late 2007 or early 2008 Mr. Gordon made an affirmative decision to *suspend* distributions to FER, which impacted distributions made between January 2009 and December 2013, within the 6-year statute of limitations period prior to filing this action. That decision was willful and plainly in breach of contract.

84. Although the record is murky, the Court finds that it is most likely that while

Mr. Gordon had some discussions during 2007 with respect to this issue, it did not result in any actual withholding of distributions until 2009. As noted above, there were only de minimis distributions in 2008, and an apparent over-distribution to FER in 2007.

85. Mr. Gordon explained that the suspension of distributions was intended to be temporary, until it could be determined whether FER and Mr. Dickerman had failed to make required carried interest payments to Harmony with respect to German Fund Ronco investments. The plan, according to Mr. Gordon, was to release those funds to FER once the matter was sorted out.

86. Even assuming such self-help suspension of distributions was permitted under the parties' agreement (it was not), Mr. Gordon conceded that upon MAIP's liquidation the "suspended" distributions improperly were paid *to Harmony*, though he testified that was done without his knowledge or approval.

87. Defendants concede in their Post-Trial Reply Brief that "Plaintiff's Count I should be granted as to January 1, 2009, to December 31, 2013 and FER awarded $274,743, with statutory interest" (NYSCEF 1150 at 3).

88. The Court finds that, based on the unrebutted testimony of Plaintiff's expert, the actual amount of net withheld distributions for the 2009-2013 period is $276,768, as follows: 2009 ($181,832); 2010 ($21,032); 2011 ($17,568); 2012 ($341); and 2013 ($56,195) (NYSCEF 870 at 29).

<u>HARMONY'S COUNTERCLAIMS</u>

89. Under the Letter Agreement, FER granted Harmony a carried interest in certain investment vehicles called the "German Funds." (JX2 ¶13.) Following this Court's decision on the parties' motions for partial summary judgment, the only issue for trial on

Harmony's counterclaim was whether FER owed Harmony carried interest related to MILS Tranche III (NYSCEF 812 at 25–30).

90. By Mr. Gordon's own admission, Harmony knew of FER's failure to report for years, and at the latest by 2007 (Gordon ¶¶103–04; PX2 ¶¶ 41–42). At that time, Mr. Gordon allegedly believed he was owed money (Gordon ¶105), but failed to bring a cause of action for damages until almost eight years later (JSSF ¶57).

91. With respect to its first Counterclaim, Harmony failed to prove by a preponderance of the evidence that FER improperly withheld carried interest payments from Ronco investments under the Letter Agreement. Very little evidence was introduced at trial about the Ronco "German Fund" investments to which Harmony asserts entitlement to a carried interest. The evidence was murky as to whether and to what extent capital was committed to those investments during the transition period set forth in the Letter Agreement, which might have triggered Harmony's entitlement to a share in later distributions. In short, the Court cannot conclude based on the evidence presented that FER was contractually obligated to pay Harmony a share of any Ronco distributions.

92. Specifically, Harmony failed to establish by a preponderance of the evidence that capital was committed to Tranche III before the conclusion of the Transition Period set forth in the Letter Agreement. Accordingly, it failed to prove that it was entitled to receive subsequent distributions relating to Tranche III.

93. Moreover, even assuming there had been a breach, Harmony did not establish its damages with credible evidence.

94. Finally, with respect to its second counterclaim, Harmony failed to establish by a preponderance of the evidence that it substantially performed under the relevant

agreements ,or that FER materially breached its obligations under the Letter Agreement and Addendum, or that Harmony's performance under the relevant agreements was discharged as a result of such breaches.

CONCLUSIONS OF LAW

A. FER's Count I (Breach of Contract)

To establish a claim for breach of contract under Delaware law, FER had to prove by a preponderance of the evidence: (1) existence of a contract, "whether express or implied," (2) "breach of an obligation imposed by that contract," and (3) "resultant damage" (*VLIW Tech., LLC. v Hewlett-Packard Co.*, 840 A2d 606, 612 [Del 2003]). There is no dispute that the MAIP Operating Agreement and the Letter Agreement are valid and binding contracts. The parties sharply dispute, however, the extent to which Defendants breached one or both agreements, the damages flowing from any such breach, and whether FER's claims are timely.

(i) FER's Claims Based On Distributions 2002-2008 Are Untimely

New York law prescribes the statute of limitations even though Delaware law governs the LLC Agreement (*Portfolio Recovery Assocs., LLC v King*, 14 NY3d 410, 415–16 [2010]; *Martin v Julius Dierck Equip. Co.*, 43 NY2d 583, 588 [1978]). The statute of limitations on a breach of contract claim is six years (CPLR 213[2]). The "cause of action accrues when the contract is breached" (*Deutsche Bank Natl. Tr. Co. Tr. for Harborview Mtge. Loan Tr. v Flagstar Capital Markets Corp.*, 32 NY3d 139, 145 [2018]). Individual breaches of contract accrue each time a party breaches the contractual obligation (*Bulova Watch Co. v Celotex Corp.*, 46 N.Y.2d 606, 608 [1979]).

Absent grounds for tolling the running of the six-year period, FER may not recover on Count I for any misallocated section 4.3 distributions paid to MAIP's members before January 31, 2009 (*i.e.*, six years prior to bringing this action). As a result, FER's claims with respect to improperly allocated distributions from 2003 through 2008 are barred unless FER can establish that the limitations period was tolled. FER argues that Defendants are equitably estopped from asserting a statute of limitations defense.

"Our courts have long had the power, both at law and equity, to bar the assertion of the affirmative defense of the Statute of Limitations where it is the defendant's affirmative wrongdoing . . . which produced the long delay between the accrual of the cause of action and the institution of the legal proceeding" (*Gen. Stencils, Inc. v Chiappa*, 18 NY2d 125, 128 [1966]). There are "two distinct theories of equitable estoppel": the first theory "precludes a party from asserting the statute of limitations as a defense where the party commencing the action or proceeding was 'induced by fraud, misrepresentations or deception to refrain from filing a timely [suit]'" and the second theory provides that, where "a fiduciary relationship exists and there are colorable allegations of concealment, the doctrine of equitable estoppel may apply to toll the statute of limitations" (*Matter of Thomas*, 124 AD3d 1235, 1240–41 [4th Dept 2015] [citations omitted]). "Where the defendant has a fiduciary duty to the plaintiff, the doctrine of equitable estoppel may be invoked based on the defendant's failure to disclose facts underlying the claim" (*N. Coast Outfitters, Ltd. v. Darling*, 134 AD3d 998, 999 [2d Dept 2015]; *see also Zumpano v Quinn*, 6 NY3d 666, 675 [2006] ["Where concealment without actual misrepresentation is claimed to have prevented a plaintiff from commencing a timely action, the plaintiff must demonstrate a fiduciary relationship . . . which gave the defendant an obligation to inform him or her of facts underlying the claim"] [alteration in original] [quoting *Gleason v Spota*, 194 AD2d 764, 765 [2d Dept 1993]]).

The post-divorce legal relationship between FER and the Defendants defies easy categorization. On the one hand, FER is correct that Harmony (as manager of MAIP) owes FER fiduciary duties under the MAIP Operating Agreement, which does not by its terms opt out of Delaware's default rule with respect to fiduciary duties. Moreover, as the Court previously found, the disclaimer of fiduciary duties in the Letter Agreement does not clearly and unequivocally apply to Harmony's continued stewardship of the legacy pre-divorce businesses (NYSCEF 811 at 12). Indeed, the most natural reading of the disclaimer language is that it applied only to the forward-looking Bryco and Ronco businesses, and not to the legacy businesses. Accordingly, the Court rejects Defendants' contention that the Letter Agreement extinguished all fiduciary obligations with respect to Harmony's operation of MAIP and related entities.

On the other hand, FER and Mr. Dickerman are far from unsophisticated wards entitled to blind reliance on Mr. Gordon without looking after their own interests. At an operational level, Mr. Dickerman ran MAIP and its related businesses for years. He knew, as well as Mr. Gordon if not better, the specific investments and the records that would be needed to keep track of them and any associated distributions. That experience no doubt informed the terms of the Letter Agreement, which lay out in detail the information to which FER and Mr. Dickerman were entitled to receive to monitor their ongoing interests in MAIP and which gives FER the right to conduct an audit if anything was perceived to be amiss. In addition, Mr. Dickerman was well acquainted with the MAIP accounting staff, and was able to reach out to them to obtain information or ask questions.

The evidentiary record in this case might be significantly different if Mr. Dickerman had exercised reasonable diligence in tracking MAIP's financial performance, as it was his contractual right to do. As it stands, Plaintiff's expert felt limited to relying mainly of MAIP's tax returns rather than contemporaneous records supporting each challenged distribution. And indeed, even assuming the expert's analysis of tax returns could have been sufficient to establish a claim for breach of contract, the tax returns for the years in which material under-distributions are alleged (2002-2006) were readily available to Mr. Dickerman well before the statute of limitations expired.

Finally, Plaintiffs' reliance on Mr. Gordon's subsequent decision – in 2007 or 2008 – to suspend all distributions to FER is unavailing to trigger equitable estoppel for claims asserted with respect to the challenged distributions in prior years. First, the nature of the conduct that began in 2009 was qualitatively different than what is alleged for the prior years. Second, the same basic tax information that could have given rise to claims before and after 2009 was readily available to Mr. Dickerman throughout the entire period, and each breach triggered the running of a new limitations period.

In sum, FER has not met its burden of establishing that Defendants are equitably estopped from asserting a statute of limitations defense. Accordingly, the branch of Count I of the Complaint seeking damages for alleged under-distributions from 2002 through 2008 is dismissed. In any event, as noted above, FER failed to prove its claim by a preponderance of the evidence.

(ii) <u>FER Proved Its Claims Based On Withheld Distributions 2009-2013</u>

FER established, by a preponderance of the evidence, that Defendants breached the MAIP Operating Agreement by withholding and then paying to Harmony distributions totaling

$276,768 between 2009 and 2013. Accordingly, FER is entitled to that amount plus prejudgment interest.

B. <u>FER's Count V (Accounting)</u>

An accounting is an equitable claim (*Estate of Calderwood v ACE Group Intl. LLC*, 157 AD3d 190, 199 [1st Dept 2017]). In an accounting, "[t]he plaintiff must establish some basis for the obligation to account, the defendant is ordered to account, and the plaintiff then gets an order directing payment of the sum of money found due" (*Ederer v Gursky*, 9 NY3d 514, 525 [2007], citing Eichengrun, <u>Remedying the Remedy of Accounting</u>, 60 Ind LJ 463, 463 [1984–1985]).

In this case, FER does not seek to have the Court order an accounting. It argues instead that the Court should simply enter a judgment in FER's favor on its accounting claim based on the evidence introduced at trial (NYSCEF 1149 at 30 ["Here, FER has, through discovery, received all relevant financial records and an independent expert has determined the amount of money that Harmony should return to FER. On this record, the Court should enter a judgment in FER's favor on its claim for an accounting (Count V) in the amount of $2,440,253"]). FER's accounting claim, which did not appear in its pleadings until its Fourth Amended Complaint, thus seeks the same damages as its claim for breach of contract (*id*. at 26 ["FER seeks this equitable remedy if, and only if, it cannot be made whole under its breach of contract claim"]).

Indeed, a separate accounting would be a futile exercise. The parties have already spent years in litigation, with the full CPLR discovery arsenal at their disposal. Both sides were sufficiently satisfied with the output of that process to declare ready for trial. Even assuming there are gaps in the available records, "ordering an accounting would not cure this shortcoming. To order an accounting that will not, and cannot, be complete or helpful serves no discernable [sic] purpose" (*Stone v Stant*, C.A. 890-VCN, 2010 WL 4926580, at *2 [Del Ch Nov. 30, 2010]).

Even assuming FER's accounting claim is not barred by the same statute of limitations defense that doomed its breach of contract claim, which the Court believes it is,[2] the Court finds that the record is insufficient to permit an equitable accounting. As noted above, the evidence upon which FER relies – its expert's analysis of tax returns containing aggregated information rather than distribution-specific information – is insufficient to reach a reliable judgment as to whether FER was underpaid and, if so, by how much. Accordingly, the Court declines to exercise its equitable discretion to dictate through an accounting what FER could not obtain through its claim for breach of contract.

C. Harmony's Counterclaim 1 (Breach of Letter Agreement)

As noted above, statute of limitations on a breach of contract claim is six years (CPLR 213[2]). "Individual breaches of contract accrue each time a party breaches the contractual obligation. Generally, any Statute of Limitations begins to run when a cause of action accrues. In New York, a breach of contract cause of action accrues at the time of the breach. '[T]he Statute runs from the time of the breach though no damage occurs until later'" (*Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 402 [1993] [citations omitted]).

Here, there is no question of equitable tolling. The Letter Agreement unambiguously disclaims any fiduciary duties between FER and Harmony with respect to "Ronco" activities.

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[2] Generally, the statutory limitations period on a claim for accounting against a fiduciary does not begin to run until there is an open repudiation of the fiduciary's obligation (*Homapour v Harounian*, 182 AD3d 426, 430 [1st Dept 2020]). In this case, the Court previously found that there was no evidence of "open repudiation" by Harmony or Mr. Gordon until 2014, and that therefore equitable tolling "may apply" (NYSCEF 812 at 23). However, based on the evidence at trial, the application of equitable tolling is not so simple in this case as a search of open repudiation. As noted above, FER and Mr. Dickerman had the clear right and opportunity to monitor their interests in MAIP's distributions but failed to do so. In those circumstances, the Court believes that equitable tolling should not apply to FER's accounting claim, which essentially is the same as its breach of contract claim. Accordingly, the accounting claim is barred by the six-year statute of limitations.

Mr. Gordon claimed he had reason to believe (or at least suspect) by 2007 or latest 2008 that Harmony was entitled to distributions arising from FER's "German Funds" business, but failed to take action until 2015. He was, at a minimum, aware from the outset that he was not receiving the reports on Ronco businesses described in the Letter Agreement, but took no action to pursue that information or otherwise protect his or Harmony's alleged rights to distributions for well more than six years. The claim is dismissed as untimely.

Even if the claim had been timely, it was not adequately proven at trial. As described above, Harmony failed to prove by a preponderance of the evidence that FER improperly withheld carried interest payments from Ronco investments under the Letter Agreement. Accordingly, the claim fails on the merits as well.

D. <u>Harmony's Counterclaim 2 (Declaratory Judgment)</u>

Finally, Harmony failed to prove its second counterclaim – seeking various forms of declaratory relief – by a preponderance of the evidence. Except for the findings above with respect to Harmony's improper retention of FER's distributions between 2009 and 2013, the evidence introduced at trial was insufficient for the Court to reach a conclusion as to either party's adherence to their respective contractual obligations. Accordingly, the Court does not believe it appropriate to enter a finding in either party's favor except as set forth above.

CONCLUSION

Accordingly, based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED AND ADJUDGED that the branch of Plaintiff's claim for breach of contract (count I) concerning damages from 2002 through 2008 is dismissed with prejudice; it is further

ORDERED AND ADJUDGED that Plaintiff has prevailed on the branch of its claim for breach of contract (count I) concerning damages from 2009 through 2013; it is further

ORDERED AND ADJUDGED that Plaintiff's claim for an accounting (count V) is dismissed with prejudice; it is further

ORDERED AND ADJUDGED that Harmony's counterclaim for breach of the Letter Agreement (counterclaim 1) and for a declaratory judgment (counterclaim 2) is dismissed with prejudice; it is further

ADJUDGED AND DECLARED that Harmony has not established entitlement to the declarations it seeks; and it is further

ORDERED that the parties settle a judgment consistent with the foregoing.

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DATE: 3/3/2022 **JOEL M. COHEN, JSC**

Check One: ☐ **Case Disposed** ☐ **Non-Final Disposition**

Check if Appropriate: ☐ **Other (Specify ______________________________)**