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

ROWEN SEIBEL, Individually and on behalf of FCLA, LP and THE FAT COW LLC, Plaintiffs, v. GORDON RAMSAY and G.R. US LICENSING, LP, Defendants, and FLCA, LP and THE FAT COW, LLC, Nominal Defendants.	INDEX NO. 651046/14 PART 60 HON. MELISSA A. CRANE
GORDON RAMSAY and G.R. US LICENSING, LP, Defendants-Counterclaimants, v. ROWAN SEIBEL, Plaintiff-Counterdefendant.	

POST TRIAL BRIEF
OF GORDON RAMSAY AND G.R. US LICENSING, LP

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I. INTRODUCTION

This case concerns a "deadlocked" and insolvent restaurant—The Fat Cow—whose 50/50 owners—Rowen Seibel and GR US Licensing ("GRUS")—could not agree on several fundamental matters and had agreed to part ways. Since there was no tie-breaking mechanism in the formation documents, there were only two options: dissolution of the entities operating The Fat Cow; or one partner buying out the other. In late 2013 and early 2014, the parties were negotiating a buy-out of Seibel's interests, while GRUS and Defendant Gordon Ramsay, with the knowledge of Seibel, were attempting to mitigate The Fat Cow's losses by negotiating a new restaurant concept with the landlord of the restaurant site. But the possibility of a buy-out was destroyed once Seibel initiated these proceedings. As a direct result of Seibel's conduct, the landlord terminated the lease and new restaurant negotiations, and sued for millions in unpaid rent. Mr. Ramsay and GRUS were left to clean up the mess and cover The Fat Cow's substantial liabilities, without the aid of Seibel.

Now, Siebel contends that Mr. Ramsay and GRUS ***owe him*** millions of dollars. His claims for damages are entirely premised on the fictive premise that, despite The Fat Cow's abysmal performance, it was worth $10 million at the time Mr. Ramsay closed it. That premise is conditioned on the absurd notion that Mr. Ramsay could be forced to continue operating The Fat Cow for 15 years to benefit Seibel, and the speculative assertion that the restaurant would have immediately and drastically improved if only it had stayed open. But Seibel's claims are impossible to square with—and flatly contradicted by—the facts adduced at trial, including:

- **Poor Financial Performance.** The restaurant never made a profit, was unable to meet its debts, had negative cash flow, was insolvent and seriously considering bankruptcy, and survived as long as it did only because Mr. Ramsay was contributing funds (with no obligation to do so) while ***Seibel made unauthorized withdrawals*** from The Fat Cow account. No party had any obligation to provide additional capital, and Mr. Ramsay had no desire to continue funding the venture with Seibel as his partner.

- **Negative Reviews, Employee and Vendor Problems, and Trademark Infringement.** The restaurant was a failure by every other metric. The food was panned by critics, customers, and the landlord. Relationships with contractors were mishandled by Seibel, who refused to pay them, instead calling them "crooks" and "terrorists" because they wanted to be paid for their work. Employee relations spawned several claims, culminating in a $2 million class action, which Seibel refused to settle because it was "blackmail." This followed Seibel's refusal to pay an employee, admittedly owed money, whom Seibel's team labelled a "terrorist." Later, Seibel plainly lied about having cut a check to that employee. The restaurant also faced a trademark infringement claim (it was infringing a registered federal mark) that required it to adopt a new name. Contrary to Seibel's claims, these issues were not overcome in late 2013, and the restaurant, while improved in some respects, continued to have serious financial and operational problems.
- **Bad Press for Mr. Ramsay.** These problems resulted in adverse publicity for celebrity chef Mr. Ramsay, but not for Seibel, a relatively anonymous business man.
- **Partner Deadlock.** The parties fundamentally disagreed and were deadlocked about a variety of business issues, including: how Seibel treated employees and vendors; how to improve the restaurant; what menu to adopt; whether to spend money to improve restaurant operations; and, most importantly, whether The Fat Cow operations could continue.
- **Seibel's Dishonest Conduct.** Seibel unilaterally, secretly, and wrongfully took illegal kickbacks from vendors and tried to develop The Fat Cow in Egypt without Mr. Ramsay, and

then gave dishonesty testimony about these acts. Seibel also repeatedly made unauthorized efforts to exploit Mr. Ramsay's celebrity in connection with other restaurants, falsely holding himself out as having authority to negotiate and enter contracts with respect to Mr. Ramsay's name and various restaurant brands, and wrongfully trying to divert the benefit of contacts to himself. There was a fundamental distrust between the partners, justified in Mr. Ramsay's case by Seibel's conduct.

- **Agreement to Part Ways.** The parties had, for many of these reasons and more, agreed in principle to a buy-out, and to let Mr. Ramsay proceed on his own with a new restaurant in The Fat Cow space. This would mitigate the parties' mutual, ongoing, and expensive Lease obligations. Mr. Ramsay's plans for a new restaurant were based on the expectation of a buy-out, which had been outlined in various written documents over time. Indeed, a new restaurant would not have been possible unless a buy-out occurred. The landlord had to approve any new restaurant and would not do so amidst a dispute between the partners. The effort to mitigate damages failed only because Seibel filed this lawsuit, ending the new restaurant discussions, and leading to another lawsuit by the landlord for the remaining rent on the 10-year lease. Seibel's conduct closed off all options except dissolution.

For all these reasons and others, the Defendants are entitled to prevail on all of the claims in this action. Specifically, the Court should find as follows:

Dissolution Is Warranted. Mr. Ramsay was entitled to dissolve the entities operating The Fat Cow because: (1) the restaurant was insolvent; (2) the partners were deadlocked, with no contractual means of breaking it; (3) Seibel's bad acts had harmed Mr. Ramsay, and dissolution was necessary to protect his rights; and (4) Seibel had mismanaged The Fat Cow, abused his authority, and engaged in other dishonest conduct. Even if Seibel's causes of action otherwise had merit (they do not), the entitlement to dissolution ends all Seibel's claims to damages. Those claims all assume 15 years of joint operations, which dissolution precluded.

Upon dissolution, restaurant operations had to cease and its assets sold to meet its debts. Since those debts far exceeded The Fat Cow's assets, there were no assets left to distribute upon winding up. Alternatively to dissolution, Mr. Ramsay could have completed the anticipated buy-out and purchased Seibel's shares. He would have done so if Seibel had not caused additional damage, and destroyed the possibility of mitigation, by initiating this suit.

Ramsay Is Entitled to Indemnity. Because The Fat Cow was insolvent, and because Seibel's actions destroyed the possibility of mitigating losses, Mr. Ramsay alone was left to satisfy the substantial remaining liabilities of The Fat Cow. In total, he paid approximately $1.6 million to settle those liabilities, without any contribution from Seibel (who, despite knowing of The Fat Cow's "dire" financial situation, secretly withdrew $80,000 from its bank account).

Seibel Failed to Prove Liability for Breach of Contract or Breach of Fiduciary Duty; It Was Seibel Who Breached. Mr. Ramsay did not breach contracts or fiduciary duties by closing the restaurant over Seibel's objection. ***First***, in light of the partners' deadlock, insolvency, the looming threat of massive liability from the class action, and many other issues, continued operation of The Fat Cow was not reasonably practicable. While Seibel claims Mr. Ramsay had no right to force closure, Seibel had no right to force continued operations, particularly where operations could only have continued if the parties had contributed substantial additional capital to the insolvent restaurant, which they had no obligation to do (and Seibel refused to do). Thus, as a matter of law, the decision to close it was protected by the doctrine of impossibility/impracticability. ***Second***, Seibel failed to prove his own performance of the agreements, an essential element of his claims. Because Seibel took unilateral and improper cash withdrawals, and engaged in other wrongful actions that breached the contracts, Defendants' performance was excused. ***Third***, Seibel's dishonest and inappropriate conduct constitutes unclean hands, barring his claims.

Seibel repeatedly argues that Mr. Ramsay improperly claimed that the restaurant had to close solely because of the trademark issues. The evidence shows otherwise. For example, as Mr. Ramsay testified, he would have been willing to change the name if all the other restaurant problems had not existed. The need to change the name put a deadline on closing, but was hardly the only reason for closure. And Mr. Ramsay never stated (and Seibel never believed) that it was. Seibel was well aware of the financial and other issues. Similarly, Seibel incorrectly claims that Ramsay tried to hide the new restaurant. Not so. Seibel was long aware that Mr. Ramsay would change the name and concept of the restaurant, as part of the buy-out process. Seibel was not involved in planning the new restaurant because the parties had agreed in principle to the buy-out, which Mr. Ramsay intended to complete. And Mr. Ramsay could not hide a new celebrity restaurant in a public mall. In any event, even if Mr. Ramsay had improperly stated that the name change was the only reason to close, and even if he could have successfully hidden the new restaurant, that would not matter. There are indisputable ***facts*** justifying dissolution and closure. Alleged misstatements or nondisclosures do not change those facts or the entitlement to dissolution.

By contrast, the evidence clearly established several breaches by Seibel of his contractual and fiduciary obligations, including his unilateral withdrawals and secret kickback schemes.

Seibel Failed to Establish Any Damages. Even if Seibel could defeat dissolution or prove breaches, his damage claims still would fail. His alleged damages are based on pure speculation that an insolvent restaurant—which had lost over $2 million during its lifetime, was facing substantial additional liabilities from a class action lawsuit, was seriously considering bankruptcy, and which Seibel was willing to sell for no more than his initial $800,000 investment (less his share of contribution to certain liabilities)—was somehow worth $10 million as of the date it closed. The damage calculation is speculative and improper as a matter of law because it is not based on historical The Fat Cow data (and indeed flatly contradicts that data) or any comparable restaurant data. And the calculation assumes 15 years of continuous profitable operations even though The Fat Cow Lease lasted only 10 years!

The Court should order dissolution, award Mr. Ramsay reimbursement of the payments subject to indemnity, find Seibel liable for breach of contract and fiduciary duty, and dismiss Seibel's claims. The Court should also award attorneys' fees to GRUS under the attorney's fees provision in the FCLA, LP agreement.

II. DETAILED FACTUAL BACKGROUND

A. 2010: Introduction of Seibel and Ramsay.

In late 2010, Mr. Ramsay, an accomplished celebrity chef with numerous Michelin-starred restaurants and multiple successful television shows, was introduced to Seibel. Seibel was not and is not a chef or expert in restaurant menus or operations. Trial Transcript ("TT"), 60:19-25, 292:1-11; Seibel Deposition ("RS Depo."), 85:23-86:10. Rather, he has taken third party restaurant brands and concepts and licensed those brands and concepts, including to Caesar's-affiliated hotels in Las Vegas. TT, 42:2-25. He proposed assisting Mr. Ramsay in introducing restaurants there. In May 2012, the parties separately negotiated for and opened Gordon Ramsay Steak ("GR Steak") at Caesar's Paris Hotel. In December 2012, they opened Gordon Ramsay Pub & Grill ("GR Pub") at Caesar's Desert Palace Hotel. Also in December

2012, they opened Gordon Ramsay Burgr ("GR Burgr") at Caesar's Planet Hollywood hotel.[1] TT, 940:4-17, 941:24-942:3. The parties' dealings with these restaurants were essentially contemporaneous with The Fat Cow and affected their The Fat Cow relationship. By all accounts, these restaurants have been financially successful.

B. 2011: The Fat Cow and Seibel's Involvement.

In 2011, before Seibel was involved, Mr. Ramsay discussed opening The Fat Cow with Andi Van Willigan, a chef with whom he had worked extensively. TT, 166:19-167:5; 336:10-18. Seibel asked to participate. Seibel had earlier attempted to open a "Serendipity" restaurant at the Grove outdoor mall in Los Angeles. Mr. Caruso, the Grove's owner, rejected the project because he thought Serendipity "would not be a suitable restaurant for the Grove." Rick Caruso ("RC") Depo., 65:8-19, 66:4-67:1. Seibel got another chance with The Fat Cow. Seibel and Mr. Ramsay orally agreed to each invest $800,000 in capital for the new restaurant. Ms. Van Willigan was to earn an ownership share in the restaurant through "sweat equity." *See* Ex. 210; TT, 168:5-15; 184:2-18. Seibel participated in the Lease negotiations, but asked that his identity be concealed from the Grove negotiators.[2]

[1] For GR Steak and GR Pub, Ramsay and Seibel-affiliated companies each made their own separate agreements with Caesars. *See* Exs. 450, 451, 452, and 457. For GR Burgr, Caesars contracted with GR Burgr, LLC, whose members were GRUS and Seibel. Exs. 305, 476.

[2] *See* Exs. 50, 52. Caruso did not like the Seibel team. Seibel points out that Caruso did not know him personally. But Caruso knew of his restaurant and team, and was not pleased with them. TT, 430:18-431:8. *See also* RC Depo., 65:8-19, 67:7-9 (Serendipity "not suitable" for the Grove, and Caruso knew Seibel was involved in Serendipity); Stuart Gillies ("SG") Depo., 84:1-6 (Caruso referred to Seibel's team as "the Vegas crew" and "he wasn't very happy" that they seemed to be running the restaurant). The Grove issued a draft letter of intent for the Serendipity restaurant at rent higher than offered to Mr. Ramsay (*see* Ex. 49), but Mr. Caruso rejected entering into any final lease with Seibel, choosing Mr. Ramsay instead. RC Depo., 66:4-23.

C. <u>November 11, 2011: The Grove Lease and Its Terms</u>.

Mr. Ramsay personally signed the Grove lease as of November 18, 2011. *See* Ex. 3 (the "Lease"). The Lease:

- Had a 10 year term. *See* Ex. 3, p. A-2, ¶ V.
- Gave the tenant at least 150 days after the April 1, 2012 "Commencement Date" to construct the premises before rent obligations began. *See* Ex 3, p. A-1, ¶ I; p. 3, § 2.2. That meant the restaurant was not anticipated to open before August 30, 2012.
- Established annual obligations of about $600,000 for rent, common maintenance, and other expenses, increasing based on a percentage of revenue over $5 million. *See* Ex. 3, Article III (defining rent obligations); Revised Report of Janet Lowder ("Lowder Rpt."), Ex. F.
- Restricted use of the premises to "***an upscale, full-service restaurant and bar operated by Gordon Ramsay serving California eclectic cuisine***, which shall consist only of [menu] items of the same quality and characteristics as the items on the menus attached hereto . . . and for no other purpose whatsoever." Ex. 3, p.A-1, ¶ L (emphasis added). The restaurant could substitute menu items, but only if "the theme and concept of the restaurant remain[ed] substantially the same," and any new items "are of the same or similar quality and price point" as the approved menu. *Id*.
- Generally barred assignments. *See* Ex. 3, p. 29, § 14.1. As an exception, assignments were permitted if: (a) Mr. Ramsay continued to own 50% or more of the stock of the assignee and the tenant continued to comply with the "permitted use clause" (requiring "operation" by Mr. Ramsay); or (b) Mr. Ramsay otherwise remained personally responsible for "product development" and was the "creative director" of any assigned restaurant. *See* Ex. 3 § 14.2. All other assignments required consent and remitted any extra rent to the landlord. *See* Ex. 3,

§§ 14.3, 14.4.3. As a result of these assignment restrictions, there was no means to profit from the Lease other than by operating a restaurant in which Mr. Ramsay was the key participant. Seibel has suggested from time-to-time that the Lease was below market. There was no evidence of that, but even if true, the Lease assignment restrictions prevented profiting from any such below-market rent through third party assignments.

D. November 2011 to September 2012: Pre-Opening Issues.

After the Grove turned over the leased property, the restaurant construction began.

1. Involvement of Ms. Van Willigan, Mr. Wenlock, and Ms. Tassan.

Initially, Ms. Van Willigan had responsibility for interviewing various contractors and vendors, with hiring ultimately subject to partner approval.[3] TT, 61:13-62:12. Mr. Stuart Gillies, the managing director of Mr. Ramsay's restaurant group, also participated in early decision-making. *See* attached App'x A (identifying witnesses). Mr. Andy Wenlock, an Operations Director in Mr. Ramsay's restaurant group with extensive experience in restaurant construction and operations, helped oversee build-out beginning as early as March 2012. *See* Ex. 156; TT, 1171:8-25, 1198:15-22, 1199:17-1200:6. He recommended hiring general contractor Gardiner & Theobold ("G&T") to supervise construction, in part because Ms. Van Willigan might not be able to handle the build-out on her own. Exs. 158, 159, 164; TT, 1172:18-1174:2. Mr. Wenlock had successfully worked with G&T previously. *Id.* In the course of the build out, Mr. Wenlock had some disappointments with G&T's services. *See, e.g.*, Exs. 159, 170. However, he stepped in as necessary to bring them into line. TT, 1174:3-14.

[3] During the pre-opening phase, Ms. Van Willigan prepared profit projections. *See, e.g.*, Exs. 5, 331, 606-610. Seibel apparently contends that these should be taken as accurate projections of future The Fat Cow profits. But they were created long before the restaurant opened, and were wildly optimistic and inaccurate as compared to actual operating results.

On April 8, 2012, Seibel directed Jerri Rose Tassan ("JRT"), who had worked with Seibel in his Las Vegas restaurants, to participate in the build out and restaurant planning. *See* Ex. 454. She had a significant ongoing role in dealing with contractors and other issues. Indeed, she noted in a July 10, 2012 email to Seibel that Seibel "want[ed] her to resign" from 'CP'" (i.e. Caesars Palace), where she worked on Seibel-affiliated restaurants, and that she was spending 40 hours per week on "FC" (i.e., Fat Cow) and anticipated spending more after her resignation. *See* Ex. 82; TT, 1202:5-1203:13.

In June 2012, Seibel and Ms. Van Willigan had a falling out. Ms. Van Willigan testified emphatically and wrote contemporaneous emails about Seibel making misogynistic comments; treating her abusively; and calling her a "fucking fag." *See* Ex. 58; Andi Van Willigan ("AVW") Depo., 102:3-103:1. While Seibel denied some of this conduct, he testified inconsistently, claimed simply "not to recall" much of it (*see* TT, 192:21-199:3; RS Depo. 248:4-252:4), and has no contemporaneous written denials (TT, 203:11-204:7). Ms. Van Willigan's accusations regarding Seibel's character are consistent with other Seibel conduct, explained below. Nevertheless, at this time, at least in part because of the dispute, Ms. Van Willigan was asked to resign, which she did on July 23, 2012. *See* Ex. 201; TT, 198:24-199:2, 471:6-17. Thereafter, JRT was the primary non-chef and non-restaurant staff person on the ground.[4] *See, e.g.*, TT, 1202:5-1203:13; SG Depo., 37:4-24 (JRT "on the ground" after Ms. Van Willigan left.)

Ms. Van Willigan never received a "sweat equity" share of ownership, and Mr. Ramsay or his entities personally paid Ms. Van Willigan $69,000 for her pre-opening The Fat Cow

[4] Mr. Gillies later wrote "[t]oo late to be sorry" and Mr. Ramsay said "bullshit" when she penned her resignation letter. *See* Ex. 201. Mr. Ramsay did not remember what he was referencing. TT, 498:9-499:8. However, he continued to work with Ms. Van Willigan on his television shows, and later re-hired her at The Fat Cow. TT, 506:13-19; AVW Depo., 101:8-16.

work.[5] Seibel resisted having The Fat Cow pay for Ms. Van Willigan's pre-opening work, although The Fat Cow paid JRT's salary and Ms. Van Willigan admittedly provided extensive services before she resigned. Exs. 458; 499; TT, 188:4-192:13, 207:13-15, 323:2-324:7. Paying Ms. Van Willigan for her work became a bone of contention between Seibel and Mr. Ramsay. *Id.*

2. Lavu Issue.

One of the pre-opening decisions was selecting a Point of Sale ("POS") system. Ms. Van Willigan considered various systems, and recommended Lavu. She had successfully used Lavu "many times" on Mr. Ramsay's television shows. *See* Ex. 18. Also, it was cutting edge and created "an efficiency of service" by operating on a Wi-Fi connected mobile device rather than from a fixed station. *See* Ex. 18, ¶ 3. Seibel suggested using an alternative POS product, Micros, but as Ms. Van Willigan noted, that was more expensive and lacked Lavu's cutting-edge features. *Id.* Seibel admitted that had no reason to doubt those claims. TT, 201:11-203:4. Ultimately, all parties, including Seibel, agreed to Lavu. TT, 135:1-10, 203:5-10.

Later, Lavu had problems, and Seibel has tried to blame Mr. Ramsay and his team for selecting that product. But the problems with Lavu were the Wi-Fi connection, not Lavu itself. TT, 1209:4-1212:15. Moreover, there was no evidence that anyone could have expected the Lavu problems that eventually occurred, particularly given that the product had worked well on Mr. Ramsay's television shows.[6] In any event, the Lavu system was eventually replaced, and Seibel has not explained and cannot explain how any fault in its selection supports his claims.

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[5] The $69,000 resulted from an allocation, undisputed by Siebel, of Ms. Van Willigan's time spent on The Fat Cow as opposed other Ramsay projects. *See, e.g.*, Exs. 336, 380, 456, 458.
[6] An April 19, 2012 email mentions a potential "bigger opportunity" for the Ramsay team with Lavu. *See* Ex. 161. Seibel intimated at trial that Mr. Wenlock selected Lavu despite being a subpar vendor in order to pursue that opportunity. But no one recalled what that opportunity was or that it was ever exploited. TT, 1207:3-1208:8. Moreover, there was no evidence—and it would make no sense—that Mr. Ramsay's team would knowingly select a flawed product. Also,

3. "Las Vacas Gordas" Trademark Issue.

Early on, Mr. Grusd, a lawyer with Seibel's Certilman Balin law firm, learned that the "Fat Cow" name could not likely be trademarked. In Ex. 56, a February 2, 2012 email, Mr. Grusd advised Mr. Trevor James (a Ramsay representative at the time) that a trademark for the "Fat Cow BBQ" had already been rejected because it was too similar to an existing trademark, "Las Vacas Gordas" ("The Fat Cows" in Spanish). Mr. Grusd noted "foreign language trademarks encompass the English translation." *Id*. And because "The Fat Cow" was not just similar but exactly the same as "Las Vacas Gordas," the rejection of "Fat Cow BBQ" made rejection of "The Fat Cow" virtually certain.

The day after Mr. Grusd identified the problem, Mr. Seibel had an email exchange with Ms. Aves-Elliott, Mr. Ramsay's non-lawyer assistant in London. *See* Ex. 12. Seibel noted the problem identified by Mr. Grusd, in response to which Ms. Elliott said that she had filed registrations for "The Fat Cow" in both London and the United States. After noting that she had filed the registrations, she jocularly noted "Don't you worry, I'm the trademark queen." *Id*. But she was not a lawyer, and not even resident in the United States.

Seibel repeatedly has contended that Ms. Aves-Elliott's jocular remark was some kind of guarantee that Mr. Ramsay could fix the trademark issue. But Seibel knew that was not the case, and he would not and did not rely on Ms. Aves-Elliott over the opinion of his own lawyer. Indeed, in the very same "trademark queen" email, Seibel noted the "Fat Cow BBQ" problem and asked "[a]re we sure the US [registration] went thru?" *See* Ex. 12. In response, Ms. Aves-Elliott noted the registration process was "long and laborious"; that "the name will not have a

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Seibel suggested that Mr. Wenlock delayed unnecessarily in making the change to Micros. But Mr. Wenlock testified that JRT was supposed to be addressing issues until the change in POS systems was made. TT, 1212:17-1213:18.

protection and can be challenged until it has been registered"; and that "we will just have to wait to hear from the US TM office." *Id*. Later on February 3, 2012, the same day as Ms. Aves-Elliott's email, Mr. Grusd sent another email, reiterating his concern about the rejection of the "Fat Cow BBQ"; noting that even if The Fat Cow were registered, the trademark could be challenged for up to five years; and also observed that "[s]ince capital and time investment will be made to build brand recognition and value, this needs to be considered." *See* Ex. 303. Only a month later and as expected, the USPTO did reject the "The Fat Cow" registration. *See* Ex. 453. Seibel ultimately conceded that the parties mutually agreed to go forward, notwithstanding their full knowledge of the trademark challenges, and to address the issue later. TT, 72:24-73:1; Ex. 13. It was not surprising that, as detailed below, the issue did arise later.

4. The Hell's Kitchen Contract.

On September 24, 2012, Mr. Seibel signed an agreement to have The Fat Cow mentioned in programming for Hell's Kitchen, a television cooking competition hosted by Mr. Ramsay. Ex. 399. The agreement provided that airdates were in the discretion of Fox, the program's distributor. Ex. 399, p. 1. The winning chef would be offered, but was no obligated to accept, a head chef job at The Fat Cow at $100,000 per year to be paid by The Fat Cow. *See* Ex. 399, ¶ 2(A)(1), p. 1. In the agreement, Seibel represented that The Fat Cow was "in the process of obtaining trademark registration," but failed to disclose that the "Fat Cow" trademark already had been rejected. *Id.* ¶ G; TT, 182:12-184:1.

E. <u>September 26, 2012: The Fat Cow Opens</u>.

The Fat Cow opened on September 26, 2012. While this was a few weeks later than the parties had hoped, Mr. Wenlock, the most experienced witness at restaurant openings, reported that the delays were not beyond the ordinary. TT, 1174:20-1175: 5, 1215:8-17. Seibel also intimated at trial that the build-out was over budget, but presented no conclusive evidence that was the case, by how much, or why. In any event, again, whether the opening of The Fat Cow was later than expected or over-budget would not support any of Seibel's claims.

F. <u>October 2012: The Parties Sign the Applicable Agreements</u>.

Although the parties had commenced negotiations over The Fat Cow agreements in 2011, they did not sign the following operative agreements until October 2012:

- An agreement forming Fat Cow, LLC, a California LLC, owned equally by Seibel and GRUS. The Fat Cow, LLC was to be managed by the "unanimous consent" of its two managers, Seibel and Mr. Ramsay. *See* Ex. 7. Seibel and GRUS were the only parties to this agreement. *Id.*, p. 1.
- A limited partnership agreement for FCLA, LP, a Delaware LP. *See* Ex. 8. Fat Cow, LLC was the general partner of and managed the LP. Fat Cow, LLC owned 2% and GRUS and Seibel each owed 49% of FCLA, LP, and FCLA, LP owned the restaurant. *Id.* ¶ 7.2. The business of the LP was "[t]o develop, own and operate a first class" restaurant. *Id.* ¶ 4. Seibel, GRUS, and Fat Cow, LLC were the only parties to this agreement. *Id.*, p. 1.
- Neither of the above agreements obligated the parties to contribute any specified amount of initial capital, or to commit to any additional capital or loans absent unanimous consent. *See* Ex. 7, ¶¶ 8-9; Ex. 8, ¶¶ 6.2-6.5.
- A license agreement under which the Fat Cow LLC licensed the restaurant's concept and name to FCLA, LP. Ex. 11. This agreement, signed by Seibel and Mr. Ramsay, expressly confirmed that "The Fat Cow" had been refused registration and that the parties could not "assure … registration" of any "related trademark." *Id.*, at App'x A.

- An assignment of the Lease to FCLA, LP, under which FCLA, LP indemnified Mr. Ramsay for his personal Lease obligations. *See* Ex. 9.
- An indemnity agreement, under which Seibel promised personally to indemnify Mr. Ramsay for 50% of the Lease obligations and 50% of "all manner of loss, damage, charge, claims, suit, action and liability, including counsel fees, which Ramsay may for any cause at any time sustain or incur by reason of having entered into the aforesaid Lease." *See* Ex. 10.

The structure of a master Fat Cow, LLC, which licensed restaurant concepts to a limited partnership owning the specific restaurant, contemplated the possibility of opening more Fat Cow restaurants. In that event, Fat Cow, LLC would similarly control and license the concepts to other entities that each would own new Fat Cow restaurants in other locations. TT, 970:6-13.

The parties had discussed early on in the drafting process how to address potential ownership deadlocks. In a memo dated November 8, 2011 (Ex. 53), Mr. Grusd asked whether the agreements should "include provisions for what will happen in the event of a deadlock between GR and Rowen as 50/50 owners." *See* Ex. 53, p. 6. But Certilman, as the counsel for Seibel and primary drafter, never included any such provision. In fact, nothing in the agreements ever addressed how to resolve deadlocks. Accordingly, both parties were acutely aware that they had provided no failsafe and no way forward if they could not agree. TT, 773:12-17, 968:3-15.

G. Post-Opening Problems: Fall 2012 to Summer 2013.

Very shortly after opening, the restaurant began experiencing significant operational problems and disagreements between Seibel and the Ramsay team.

1. Contractor/Vendor Issues and Adverse Publicity.

a. Seibel Refuses to Pay Contractors.

Mr. Craig Green was a close associate of Seibel's and, at Seibel's request, became involved in The Fat Cow as early as October, 2012. *See* Ex. 202; TT, 85:10-16, 218:130-23. Seibel, Green, and particularly JRT had initial responsibility for addressing contractor payments. And, as the testimony and exhibits well document, they took an unreasonably hard line that led to bad publicity, poor landlord relations, and partner disagreement.

For example, on September 14, 2012, JRT emailed Seibel noting that G&T had not been paid. Seibel instructed to "stall" them until all the approvals were "signed off," because then "we[']re in control. And that's how we like it." Ex. 459. As shown by later events, Seibel consistently tried to get what he needed from the contractors and other vendors without paying them, and then (after no longer needing their services) to stonewall them and refuse payment.

On October 2, 2012, JRT emailed Seibel about The Fat Cow architect, Mr. Jacek Ostoya of the Gold Grenade architectural firm, who was also demanding payment, and was threatening to tell the Grove about non-payment, in response to which Seibel wrote "WHO CARES!" Ex. 461. When Mr. Ostoya then did complain to the Grove and put a lien on the property, Seibel said to do "nothing." Ex. 462. On October 5, 2012, G&T wrote JRT asking for overdue payment. Seibel told her to pay them "[n]othing" and suggested no other response. Ex. 464. On November 19, 2012, Amy Kim, the kitchen designer, complained to Ms. Aves-Elliott that JRT and Seibel had told her that they "don't plan on paying because somehow I took [] advantage of the project and I should just be happy that they are not taking me to court." Ex. 470. Ms. Kim said she had tried to reach them for weeks to discuss the matter with no response. Ms. Aves-

Elliott forwarded this email to JRT because she and Seibel were handling the contractor issues. *Id.*[7]

On December 19, 2012, Gold Grenade filed a mechanics lien against the Grove and the leasehold. *See* Ex. 232 (mentioning that lien). The lien followed another example—but worse—of the practices identified in Exhibit 459. JRT and Seibel had issued Gold Grenade "a cheque for completion. [Mr. Ostoya] then handed over the permit drawings … and then the cheque was subsequently cancelled…. Then there was no communication and then around 6-8 weeks ago Craig [Green] ... reached out to make him an offer for [only] 'out-of-pocket' expenses." Ex. 491. Green quite appropriately later admitted the incident was a "small piece of check fraud," and that the decision to "ignore [the contractors] for 3 months is a policy we cannot ever endorse again." Ex. 286. Mr. Ramsay, who knew nothing about any of this misconduct, was embarrassingly and publicly confronted by Mr. Ostoya about the fake check and non-payment while dining at The Fat Cow with his family. TT, 464:18-465:4.

On January 4, 2013, Restaurant Design International ("RDI"), which supplied some of The Fat Cow kitchen equipment, wrote JRT an email threating yet another mechanic's lien for an "extremely overdue" invoice. *See* Ex. 83. In response, Green referred to RDI as "schmucks." *Id.* On January 15, 2013, RDI filed the mechanic's lien. *See* Ex. A to Ex. 486 (RDI complaint).

b. Resulting Lease Defaults and Adverse Publicity.

On February 28, 2013, the Grove sent a letter declaring Lease defaults based on the liens (and other conduct discussed below). *See* Ex. 228. The Grove sent a second formal notice of

[7] On December 6, 2012, JRT wrote to Mr. Wenlock listing issues supposedly justifying non-payment of the contractors. *See* Ex. 172. Eventually, as explained below, Mr. Wenlock investigated these alleged justifications and found them lacking.

default over the liens on March 25, 2013[8]. *See* Ex. 230. On April 3, 2013, RDI filed a lawsuit against Mr. Ramsay based on the non-payment. *See* Ex. 486. On April 15, 2013, TMZ, a celebrity news service, announced its intention to run an article about the RDI lawsuit, and Mr. Gillies complained to Seibel that "it's gone too far with this holding out strategy." Ex. 65. On April 16, 2013, Grub Street, a restaurant and food publication, ran an article entitled: "Gordon Ramsay Sued over Unpaid Construction at the Fat Cow." Ex. 488. The same day TMZ published an article with Mr. Ramsay's picture entitled "Gordon Ramsay: Fat Cow Sued for Being Dairy Dairy Cheap." Ex. 489. Neither article mentioned Seibel. On April 19, 2013, the Grove wrote that it would bond the liens at The Fat Cow's expense and demanded indemnity and protection against the liens. *See* Ex. 232.

c. Ramsay Team Disagreement With Seibel Approach.

Not surprisingly, Mr. Ramsay and his team were not at all happy about how these issues had been handled. They created undue publicity, unfortunate relations with the landlord, and unjustified distractions. They were also unreasonably aggressive vendor treatment and an inappropriate way to run a business. *See* TT, 464:3-17, 465:5-21, 1181:4-1183:22. The dissatisfaction was captured in detail in the audiotape of a telephone conversation occurring just days after Ex. 230, the March 25, 2013 default notice. *See* Ex. 681, 8:25-9:1 (mentioning receiving the Grove letter two days ago). In the recording, Seibel labels the contractors "crooked" (*id.*, 9:25) and admits offering the contractors (who were owed tens of thousands of dollars) nothing but the "out-of-pocket costs, meaning if they went to file permits or they wrote checks to the county for a couple of thousand dollars, whatever that number is, we'll reimburse

[8] On January 22, 2013, Mr. Wenlock, not then aware of the RDI and Gold Grenade liens, had a note from G&T that presaged that the "landlord will take a very dim view of this [the threatened liens] so not good for future relations." Ex. 173.

them for that." *Id.*, 12:3-8.

Mr. Gillies then expresses his plain frustration: "[T]he annoying thing for me is that … when we spoke about it way back, you, me and Craig and Andy, ... you said, yeah we'll take care of it[. W]e'll make it go away. So then suddenly we get the big bad letter in again from Caruso, now a 15-day timeline. It's a ticking bomb." *Id.*, 13:13-22. He goes on to say "I mean you—you should [have] let us know that [lowball offer], Rowan. I didn't know anything about this." Seibel responds: "[B]ut you have to understand, we're handling the negotiation…." *Id.*, 15:9-24. Mr. Gillies then says: "My worry is as soon as this thing goes to a like DEFCON 2 ... the chances of the bad press coming out and Gordon's name being in the press is always super high… I wanted it gone weeks ago…. I spoke to [Green] ... I thought it was all gone and then now we're a month later and …it's escalated ten times." *Id.*, 16:13-17:5. He lamented the "fight with the landlord, which – it's just getting worse by the week." *Id.*, 17:13-14. Seibel responds: "Its [the contractor issue is] bullshit… And I'm not willing to say okay, because then you're negotiating with terrorists. I don't negotiate with terrorists." *Id.*, 18:14-22:15.

Mr. Gillies notes that it would have been more productive to take a less hardline position. *See, e.g.*, *id.*, 29:3-37:16 and in particular 35:22-25 ("[W]e're putting ourselves out on a potential suicide mission here for $80,000. It just does not stack up to me.") And he disavows Seibel's name-calling of contractors: "I don't think any derogatory remarks about someone's profession or history or actual ability is doing anything to help our case to be honest." *Id.*, 34:13-16.

Mr. Gillies added in his deposition. *See* SG Depo., 54:15-55:22 (Seibel called the contractors "blood suckers," "parasites" and "terrorists holding us [for] ransom," which the Ramsay team "disagreed with because that is not how we think… You can't treat people like that… you can't just say that they are terrorists …. because they are demanding payment for services delivered.… [In] every project we do there is often problems … but ultimately you work through it… you can't just not pay them."). *See also id*, 55:23-59:13.

d. Ramsay Team Resolves the Contractor Issues.

Mr. Wenlock had to come to Los Angeles to sort out the contactor issues. He addressed all the complaints by Seibel and JRT about the contractors and found them largely without merit. He interviewed the contractors, thoroughly investigated, and found that most of the overdue amounts should be paid, while in some cases obtaining contractor agreements to make fixes. His detailed emails with the recommendations are Exs. 69, 179, 180, 715, and 716. *See also* TT, 1176:10-1181:3. Mr. Wenlock, the witness most experienced in restaurant build outs, also confirmed that Seibel's hardline was unproductive and inconsistent with how Mr. Ramsay's team conducted business. TT, 1181:4-1183:22. *See also* SG Depo., 54:15-21. And while Seibel fronted some of the funds to bond the mechanic's liens with the Grove, he continued (in some cases secretly) to undermine reasonable resolution of the contractor issues.[9] Eventually, the Ramsay team resolved the contractor claims, but with Seibel fighting the whole way.

e. Seibel's Unreasonable Hardline With Other Vendors.

The Seibel team's unproductive hardline attitude extended to other vendors. For example, on January 10, 2013, Green received an email from Braun Linen complaining about

[9] For example, Mr. Wenlock asked for contractor invoices to facilitate his reconciliations. In response, Green told Mr. Wenlock he would work on it, but then secretly emailed Seibel suggesting that they withhold the invoices. Seibel responded "[s]end nothing" to Mr. Wenlock. Ex. 493. On May 30, 2013, Malcolm France, a then-finance officer in the Ramsay group, attempted to confirm payment of liens and other matters. Green responded to Seibel only noting that they should tell Mr. France that they did not approve payment. Seibel responded to "[l]et em get pregnant"; in other words, let Mr. Ramsay pay, and then complain and protest after the fact (a consistent Seibel practice). Ex. 494. On June 5, 2013, France emailed Wenlock saying he was still trying to finalize payment to the contactors and could do so only "by side-lining Rowen as I think it would all grind to a halt if we tried to get him on board." *See* Ex. 181.

short paying of The Fat Cow invoices. Green had refused to pay certain charges even though they were part of the agreed contract, and had not returned Braun's calls. *See* Ex. 285. On February 21, 2013, Young's Market wrote that The Fat Cow invoices had been short paid on instructions by Green, and there had been refusal to pay delivery fees. Ex. 484. On December 5, 2012, in response to complaints about Lavu, Seibel writes "I'll take pleasure plundering their biz." Ex. 284. Presaging this hardline and arrogant attitude, Green wrote an October 15, 2012 memo to himself on "Fat Cow musts," which had to include a "Minimum Rebate" from all suppliers: "Let them know if they have problems with this we will shut them out at Caesars. We are not small timers, and we will not be taken advantage of." *See* Ex. 465. (As explained below, these "rebates" were actually kickbacks hidden from Mr. Ramsay and his team). In a November 26, 2012 email (Ex. 474), Seibel urged Green to "go[] to battle" to aggressively seek rebates from the Landlord, notwithstanding a 40 plus page Lease spelling out all Grove charges. The email referenced securing rebates using the "La Frieda" method, Seibel's name for the kickback scheme. Thus, while (as explained below) Mr. Ramsay was trying to maintain his relationship while Mr. Caruso, Seibel threatened to undermine it through such tactics.

2. Employee Problems and Adverse Publicity.

The unproductive hardline taken by Seibel, Green and JRT on vendors was matched by an equally unacceptable hardline on employee issues. And where the vendor payments were marked by check fraud, the employee issues were marked by Seibel's outright dishonesty.

a. Spencer Nguyen and Seibel's Dishonest Testimony.

(i) Seibel Stonewalls Nguyen.

The employee issues start with Spencer Nguyen. On September 28, 2012, Mr. Nguyen, who had been hired as a Fat Cow manager and had not been paid, wrote requesting payment to

Nick Brown, the Fat Cow's then general manager, and JRT. *See* Ex. 59. He noted that they had not responded to his earlier emails requesting payment. He advised that he would submit his claims to the California Labor Commissioner if they continued not to respond. Nguyen then forwarded the email to Seibel. Ex. 72 (next to last page). Mr. Nguyen sought two weeks' wages at an annual salary of $40,000. Ex. 59. Seibel and his team did not respond. TT, 253:10-13. However, that same day, JRT and Seibel exchanged emails in which Seibel told JRT "tell him to submit [to the Labor Commissioner]—I don't do threats." JRT responded "we do not negotiate with terrorist," a catch phrase Seibel used repeatedly in reference to The Fat Cow business. *See* Ex. 460. But there was no dispute that Mr. Nguyen had done work and was entitled to pay, and no one from the Ramsay team received any of these emails. TT, 246:9-247:6.

(ii) Adverse Ruling Handled by JRT Without Knowledge of the Ramsay Team.

On December 14, 2012, The Fat Cow received notice of Nguyen's Labor Commissioner claim about this issue. Ex. 477. Andy Wenlock received a copy of the claim from Nick Brown, then asked JRT and Green what it was, but received no response, and it was thereafter handled only by JRT and Green. *See* Exs. 599, 600, and 719; TT, 1189:3-1191:1.[10] On May 8, 2013, the Labor Commissioner issued a ruling following an April 3, 2013 hearing. *See* Ex. 90. The ruling awarded Mr. Nguyen almost $14,000, including various penalties. And Seibel, Green and JRT had sent no lawyer—JRT was the only representative. *Id.* No one on the Ramsay team had been informed about or involved in preparing or presenting the defenses at the hearing, or knew

[10] *See also* Ex. 721 (Matt Woolf got notice that no one had attended the first scheduled hearing, then JRT says she assumes Green was handling). That Green and JRT were handling these issues was also consistent with Ex. 279, showing Green handling payroll as of December 14, 2012, and also with Ex. 282, Green's January 10, 2013 email referring to himself as the "Finance Director" at The Fat Cow.

anything about the outcome until after the fact.[11]

(iii) Siebel Dishonest Testimony About the Nguyen Check.

Upon learning of the hearing's result, Michael Thomas immediately became involved and communicated with a California lawyer, Mr. Shapiro, for advice. *See* Ex. 72. Mr. Shapiro represented to Mr. Thomas that Seibel had said that he would testify he had cut a check for Mr. Nguyen's salary, and that Nguyen had just failed to pick it up. *Id.* Seibel testified that he had so told Mr. Shapiro and in fact presented a copy of such a check at trial. TT, 250:17-24; Ex. 294.

But the check, and the testimony that Seibel had prepared it, plainly were fabricated. First, there was no original of the check ever presented. Second, there was no mention of the check at the time of the Seibel email that said "let him submit." The check purported to be dated the day before that email, and it is inconceivable that Seibel would have cut the check the day before, and then failed to have mentioned it to either JRT or Nguyen the next day. Third, the check was never mentioned as a defense during the Nguyen hearing. *See* Ex. 90. Seibel had no explanation (and there was none) for having then failed to mention the check as a defense if it had then actually been cut. TT, 255:13-16. Fourth, when asked why he did not simply remind Nguyen to pick up the check supposedly cut the day before, Seibel's only explanation was Nguyen wanted a "larger amount." TT, 716:8-22. But that testimony was demonstrably false—***the purported check was in the exact amount that Mr. Nguyen demanded***. *Cf*. Ex. 294 (check for $1,205.48) and Ex. 72 (Nguyen sought two weeks wages at an annual salary of $40,000, and

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[11] *See* TT, 249:11-16, 466:17-23, 1190:12-1191:24; RS Depo., 581:11-20; SG Depo., 193:19-196:14. *See also* Ex. 69, p.2 (Wenlock first reporting on the Labor Commissioner matter post-hearing); Ex. 574 (Wenlock gathering additional details he had not previously known). Mr. Wenlock continued to seek updates from Green, who had been handling the labor issues. *See, e.g.,* Exs. 182, 508.

2/52 times that amount equals $1,205.48).[12]

b. Other Labor Issues and Seibel's Abusive Attitude.

The Fat Cow had other employee issues, and there are other examples of Seibel's inappropriate attitude toward employees. For example, on October 22, 2012, JRT reported three worker's compensation claims in 20 days. *See* Ex. 203. Starting on November 20, 2012, Seibel, Green, and JRT exchanged an email about an employee who apparently made an order mistake. Seibel labelled her a "moron" and asked Green and JRT to "Get rid of that dumb trashcan." Ex. 473. On January 10, 2013, another employee, Ricardo Pineda, noticed a Labor Commissioner hearing. Ex. 483. On May 31, 2013, Seibel noted: "They have to replace this loser," referring to the chef. Ex. 495. On June 10, 2013, Certilman (the Seibel lawyers) received a Labor Commissioner notice about a hearing for another employee, Alex Corella. Ex. 79. Certilman received the claim because Seibel's team had been primarily handling labor issues.

Green and Seibel focused on slashing costs, employee morale be damned. For example, Green and Seibel wanted to treat workers as consultants not employees and limit their hours to avoid providing them medical coverage. Mr. Wenlock disagreed with such a stance: "I fundamentally do not agree with having employees as consultants, and all should be on the payroll. The savings that [you are] talking about are small fry … [and] risk that this will not give the security to two employees who may be tempted away for security and employment rights as a valued and engaged employee." Ex. 70 (May 21, 2013 email).

Seibel's attitude is also illustrated in a December 4, 2012 email chain. *See* Ex. 475. There, JRT emails Green and Seibel about how to address vacation, sick leave, and personal time

[12] Green declined to vouch for the check's authenticity, admitting that for all he knew, the check could have been backdated. TT, 545:21-546:14.

off for The Fat Cow employees. Seibel responds to the inquiry "[f]orget this shit." JRT says in response "[w]e are not trying to upset you" but rather want to "appease the uk [Ramsay] team" who obviously took a different view. Seibel responds: "I've got enuf of this nonsense in vegas. When I start getting 'sick' days, everyone can too. I believe in work and dedication. Not laziness and sloth." *Id.*[13] The Ramsay team just fundamentally disagreed with how Seibel dealt with employees. *See* TT, 465:23-466:16, 467:20-468:10.

c. The *Becerra* Class Action Lawsuit and Adverse Publicity.

On May 9, 2013, ***the day after the Labor Commission ruling regarding the Nguyen cas***e, Matt Woolf (then head chef of The Fat Cow) noted that employees were being approached to join a class action lawsuit. Ex. 559. On May 10, 2013, several former The Fat Cow employees, including Jennifer Becerra, sent a letter to the California Labor & Workforce Development Agency complaining about wage and hour violations and as a predicate to suit under California's Private Attorney General Act. *See* Exs. 91, 571. On May 23, 2013, Green emailed Mr. Wenlock that Mr. Woolf might be rounding employee hours, creating a serious liability concern. *See* Ex. 289. The Fat Cow's account, Bill Yoo, reported the same concern on the same day. *See* Ex. 184. And Seibel acknowledged that there had been time shaving and that was a "huge problem." *See* Ex. 683, 28:13-30:14.[14]

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[13] By contrast, Mr. Ramsay sought to create a safe and supportive work environment. For example, on October 19, 2012, he promptly fired chef Matt Butcher based on allegations of sexual harassment and asked that staff keep "eyes and ears open" to "report any [other] untoward behaviour." Ex. 202.

[14] Seibel has suggested that the *Becerra* action was based solely on Lavu issues. While Lavu issues may have played a role, *Becerra* raised issues (such as allegedly intentional time-shaving, meal and rest period compliance, and document problems) having nothing to do with Lavu. *See, e.g.,* Bill Yoo ("BY") Depo., 97:2-98:15; Ex. 137 (Littler memo noting failure to provide meal and rest breaks, failure to timely pay departed employees, and other issues unrelated to Lavu).

On June 13, 2013, Becerra and other plaintiffs filed a class action lawsuit. *See* Ex. 293. Negative publicity immediately ensued—again about Mr. Ramsay, not Seibel. For example, on June 14, 2013, the celebrity website Radar ran an article: "Gordon Ramsay's Own Kitchen Nightmare! Class Action Lawsuit Filed Against Him by Restaurant Employees." Ex. 503. *See also* Ex.73 (Law 360 article). On June 18, 2013, the Becerra plaintiffs appeared on the nationwide television show "Good Morning America" ("GMA"). The program and the other publicity focused on the irony of problems at a restaurant owned by a chef one of whose television shows ("Kitchen Nightmares") purported to fix others' failing restaurants. *See* Ex. 74 (announcing the GMA program); Ex. 509 (tape of GMA program played at trial and entitled "Gordon Ramsay's Real-Life Kitchen Nightmare.").

Again, the Ramsay team was very unhappy with the publicity and events leading to it. TT, 465:23-466: 16 (GMA "was a big dent"). They believed—and properly—that the failure to address the Nguyen complaint and other employment issues that had not been fully disclosed by the Seibel team lead to the circumstances resulting in the Becerra case. TT, TT, 404:7-23 (the Nguyen issues "spurned on a class action"), 410:12-19, 1043:2-23; *see also supra* this section (employees approached to join class the day after the Nguyen ruling). And, as demonstrated below, the financial threats posed by the lawsuit became increasingly serious.

3. Negative Food Reviews and Landlord Dissatisfaction.

Besides the contractor/vendor and employee issues, The Fat Cow faced negative reviews about customer service and its menu. For example, on October 3, 2012, Simon Gregory (an executive chef with the Ramsay group in London) noted negative Yelp reviews in an email copied to Seibel and others. *See* Ex. 463; *see also* Ex. 469 (customer complaint). On November 20, 2012, LA Weekly ran an article entitled "Fat Cow? Fat Chance. Gordon Ramsay's New

Grove Restaurant Disappoints." Ex. 471. The article was scathing, noting the "mall" restaurant was disappointing even compared to "other mall food." The article suggested people will come because "they know Ramsay's name," but the menu items were "glop" and the lunch was "ruins … with Ramsay's name on it but no trace of the skill he's famous for." *Id*.

On January 18, 2013, JRT reported that Mr. Caruso was "very, very unhappy with the restaurant and our operation as a whole." Seibel agreed that "the place isn't good …period." Ex. 479. *See also* Ex. 60 (Seibel, on Jan. 18, 2013: "the [Fat Cow] experience must improve all around. Been saying that forever guys."). *See als*o Ex. 205. On February 27, 2013, the Grove sent a formal notice of default due to the poor food, Mr. Ramsay's limited involvement, and the mechanic's liens. *See* Ex. 228. *See also* Exs. 61, 85 (reflecting landlord dissatisfaction). Seibel recognized that, consistent with the Lease obligations and Seibel's own previous rejection at the Grove, Mr. Ramsay was the key party to maintain relations with the landlord. He noted: "It[']s [Ramsay's] relationship [with the Grove] to maintain." *See* Ex. 86.

Eventually, as reported in his letter of April 25, 2013 (Exs. 24, 67), Mr. Caruso met with Mr. Ramsay, who agreed at some point in the future to put his name on the restaurant and to improve food quality. Demonstrating the depth of his dissatisfaction, Mr. Caruso also invited Mr. Ramsay to offer a payment that would allow Mr. Ramsay to buy-out his lease obligations. *Id.* Seibel has contended that Mr. Caruso was offering to pay Mr. Ramsay to buy-out an allegedly under-market lease. But Mr. Caruso was plain that the opposite was the case: He was inviting Mr. Ramsay to pay Mr. Caruso in exchange for relieving Mr. Ramsay from his lease obligations. RC Depo., 62:25-63:15 ("Q. Is what you were proposing that Mr. Ramsay pay you something to terminate the lease, or were you going to pay him? A. He would pay me.").

4. "Las Vacas Gordas" Trademark Infringement.

On April 22, 2013, through lawyer Eric Isicoff, Las Vacas Gordas sent the not-unexpected letter demanding that The Fat Cow cease and desist from using that name. *See* Ex. 66. Mr. Thomas was assigned responsibility for addressing the issue. *See* Exs. 114, 119, 209. On May 20, 2013, following a phone call with Mr. Isicoff, Mr. Thomas sent to Mr. Gillies, and Mr. Gillies forwarded to Seibel, Mr. Thomas's analysis of the trademark issues. *See* Ex. 119. The analysis confirmed that Las Vacas Gordas wanted The Fat Cow to change the name or enter into a "limited license at the Grove but not for any further use," i.e., a license for the Los Angeles location only. Mr. Thomas thus noted that if the parties ever intended "to do more of these [The Fat Cow restaurants] that license is of no value." Mr. Thomas noted that one option offered by Mr. Isicoff was to "negotiate time to rebrand." *Id.*

Following a discussion between Mr. Gillies and Seibel, Mr. Thomas was directed to see if he could obtain a several month period after which The Fat Cow would stop using the name. He then had a telephone call with Eric Isicoff and asked for a nine-month license which would give adequate time for The Fat Cow to adopt a new name. On June 10, 2013, following that call, Mr. Isicoff emailed Mr. Thomas and noted that the client was "happy with the decision to change the name" but wanted only three months not nine months for that to occur. *See* Ex. 115. Mr. Thomas had another discussion with Mr. Isicoff in June, during which he asked again for a longer period, and Mr. Isicoff said he would send a proposed agreement. TT, 979:9-980:7. The matter remain unresolved entering the second half of 2013.

5. Discouraging Financial Results.

Given the level of turmoil, the financial results from restaurant operations for the first seven months were hardly encouraging. By the end of April 2013, The Fat Cow's ***current***

liabilities exceeded its current assets by $191,400.85. Bracco Rpt., Ex. 3. Its cash flow was also negative: its cumulative net cash flow from operations was ***negative*** $95,340.93, and its cumulative free cash flow was ***negative*** $1,449,471.64. *Id.,* Ex. 4. Its ***revenue had decreased*** from its December 2012 peak of $494,289.78 to just $342,594.30, and its cumulative net income (profits) was still substantially negative (owing primarily to ***losses*** of $236,724.59 pre-opening, $236,607.06 in September, and $586,096.16 in December). *Id.*; *see also* attached Appendix B (showing month-by-month financial information).

H. <u>Partner Disagreements and Buy-Out In Principle of Seibel</u>.

These various issues and others frayed the parties' relationship.

1. Disagreements on Fat Cow Concept and Investment and Resulting Buy-Out.

One of the central disagreements was captured on a March, 2013, recorded telephone conversation between Mr. Gillies, Mr. Wenlock, Seibel, and Green, Exhibit 64. The tape includes acknowledgement that the restaurant had a still-undefined concept and was not doing well; and that there was a fundamental disagreement about that concept and whether to invest money to improve the kitchen so that it could deliver a quality farm-to table-product (the Ramsay team wanted the investment; Seibel did not). The tape ends with an agreement in principle to resolve the disputes by having Mr. Ramsay buy-out Mr. Seibel. *See* Ex. 64, 27:18-24, 30:24-31:16, 33:6-15, 33:25-35:19, 49:23-51:17, 53:9-54:14, 57: 10-58:8, 61:12-62:15, 65:11-66:18, 69:8-70:12, and 70:24-71:15. Pertinent quotations are below:

> SEIBEL: I know this market. This is a pizza, burger, and ice cream market… [but Ramsay] wants to do a gastro pub type restaurant…. No matter how many times we put [gastro pub items] on the menu… [the customers are] not buying it. They're buying a burger, fries, fish and chips, mac and cheese.... [31:24-31:16]

GILLIES: I just don't think we're ever going to be on the same page with this concept of this restaurant, I'm afraid. [49:23-50:1]

GILLIES: [Y]ou and Craig put some ideas down … menu-wise… [and] Gordon said I don't want that menu. I don't want a burger joint in there. Okay? I have a burger joint in Vegas…. I want this to be farm to table.... So we need … a structure in place that will deliver that menu successfully with the redesign work that we need, there's an agreement from whoever is in there putting money in that that money goes in … and we turn this place into the restaurant that it's supposed to be because it's the end of March now ... nothing has [m]oved, we're still talking about menu style and we're just going nowhere. [50:8-51:11]

SEIBEL: Look, I -- I completely agree the place is under performing... [but] I'm saying we're not going to make money like that [with the farm-to-table concept Mr. Ramsay wants].

GILLIES: Well, we believe it will.

SEIBEL: I'm convinced we're not going to make money. [53:9-54:14]

SEIBEL: All I care about is how much money is at the bottom line. If I thought that the farm-to-table vision was going to be an enormously profitable one, I wouldn't even, you know, make a statement about it, let's go with it. But we had this farm-to-table vision… [and] the customers just don't want it. They're outright rejecting it…

GILLIES: No, I disagree to a large extent because the resources aren't there to produce the quality... It's never ever been geared up to produce that level. [57:10-58:8]

GILLIES: Now, to make the Fat Cow [a] destination, you start with your identity. You get the right resources to deliver the quality, consistency, and volume… So in order for us to move forward and all be happy, we need to invest in modifications there. If we don't do it, then we're not going to be happy from our side … [61:16-62:11]

GILLIES: [W]e're getting negative reviews because it's not delivering to the level they expect from the guy who is on TV [Ramsay]. … They see how demanding he is, and they expect it to be great.... [W]hy did we ever get involved with Gordon to go into a site like that if we weren't going to do that food. You can't go in there and do mid-range.... You go in there, and you raise the bar... [The way] to do that … is to make the modifications that we needed.

> If we agree that we don't want to make those modifications because we don't think the business has generated enough, there's a problem there, then there's a conflict straight away because we want to invest the money. [65:17-66:18]
>
> SEIBEL: There is some sort of diversion of concepts, and if you guys want to buy it out, I have no problem with that, because I don't believe that there's as much as any potential there compared to with a different vision of what the people want there. I think it's a flawed mistake.... Burger concepts is what makes money these days. So I'm not interested in having a glory type restaurant…. I just want the checks to hit the bank. So, you know, all we care about is direct, massive bottom line, and huge returns on investment. So if you guys don't have that vision, then -- and I'm telling you I don't have that vision for a farm-to-table menu there at the Grove. [69:8-70:12]
>
> GILLIES: Yeah. Well, where do you want to go from this because we want farm-to-table.
>
> SEIBEL: Why don't we put together some numbers and some projections, and if you guys want to take it forward, then you know I'd be happy to sell. …We just need dollars out of it. You know, I don't think that you're getting the best return on investment doing that. I'm constant in that, so much so that I'll bet against it by saying, you know, I would get out of that.
>
> GILLIES: Yeah, okay. Well, that's -- at least we got some clarity. So we need to move that conversation forward. Let's all think about some numbers here then. [70:24-71:15]

See also TT, 359:23-360:23 (Mr. Ramsay: "Rowen was turning left and I was turning right. So we weren't agreeing on the menu… [W]e were not aligned.")

2. Other Disagreements.

Other documents confirm the obvious disintegration of the relationship. For example, on January 22, 2013, Seibel wrote to Green complaining that "they [the Ramsay group] know nothing about [making money]." *See* Ex. 480. The Ramsay team by contrast thought Seibel and Green had a short term and unproductively cheap approach. *See, e.g.,* Ex. 69 (Wenlock emailed complaining about the Seibel and Green attitude about expenses, explaining that Green's "negativity around spends is clear and obsessed with money and spend which is cascading down to the team."). *See also* AVW Depo., 46:1-47:19, 194:25-195:7 (Seibel's attitude was always "let's see if we can squeeze that out of them. … [H]e always wanted to go around the cheap way of everything."); SG Depo., 67:10-24 (Seibel and Ramsay had a "very different" approach: Seibel was "all about the numbers, over-managing, numbers, numbers, numbers, which is important, but you've got to let a business grow."); BY Depo., 125:17-126:10 (Ramsay team focused on quality, Seibel team focused on costs and profits, which led to ongoing disagreements); Ex. 501 (Seibel noting there was "clearly disagreement" between the parties).

I. Summer of 2013 to Early 2014: Van Willigan Returns; *Becerra* Mediation; Bankruptcy Discussion; Trademark Resolved; Continuing Buy-Out Discussions.

As explained above, by summer of 2013, the restaurant was performing poorly, financially and otherwise; the parties faced the looming *Becerra* lawsuit and possible trademark infringement claims; and a buy-out in principle had been discussed. The Ramsay team also had begun taking a more direct operations role in part in the expectation of a buy-out.[15] This led to improvements—but not enough. Financial problems, partner disagreement, and turmoil continued throughout 2013 and into early 2014.

1. June 2013: Andi Van Willigan Returns.

The Ramsay team proposed to bring back Ms. Van Willigan. The recording of a May 22, 2013 phone call captures discussion about who would pay her for providing The Fat Cow services. While Mr. Ramsay's team indicated some willingness to pay that salary themselves, Seibel stated that The Fat Cow should pay, although he wanted to interview Ms. Van Willigan

[15] *See, e.g.*, Ex. 499 (June 7, 2013 email, Gillies to Seibel stating: "As a partner we of course would like your approval for all matters but the state of the business [and] poor direction it has received once investigated by us recently, has led us to take complete control of the situation there in order to protect our reputation [and] investment for both parties."). *See also* Ex. 515 (July 5, 2013 email; Green noting the Ramsay "team is now highly involved in the operations").

before she was rehired.[16] Ms. Van Willigan returned On June 29, 2013. Ex. 338. Before then, on June 7, 2013, Mr. Gillies reminded Seibel that "the discussion we have had about your talking to Andi van prior to starting at fat cow is still valid, but it needs happen ASAP please as we are planning to introduce her to the team at fat cow late June." Ex. 499. But Seibel never had that discussion and never expressly objected to her return. And despite his recorded willingness to have The Fat Cow pay her, Seibel later (as explained below) used such payments as a pretext to unilaterally withdraw money from The Fat Cow at a period of great financial stress.

2. *Becerra*, the Trademark Issues, Bankruptcy, and Buy-Out Progress.

In the meantime, the parties addressed the buy-out, *Becerra*, and the trademark issues.

a. June 2013 Buy-Out Communication.

On June 21, 2013, Seibel emailed Mr. Ramsay confirming a discussion about the terms of the buy-out, as discussed in the earlier audiotape. *See* Ex. 513. In essence, Mr. Ramsay would repay Seibel's then capital investment to date, estimated to be $796,000 (after accounting for fund placed in escrow with Mr. Caruso for the mechanic's liens). Seibel would also receive a 5% share of profits in the ongoing restaurant operations, but would have a purely "passive position….[where] I will have no managerial responsibility nor liability towards the operation." *See* Ex. 513. Seibel also acknowledged that the name—and concept—of the restaurant could change in the exercise of Mr. Ramsay's managerial prerogative. It could for example be the "gordon ramsay grill." As a limitation, however, Seibel and Mr. Ramsay both testified that Seibel did not want the ongoing restaurant to have a "similar name or … likeness" to the Las

[16] *See* Ex. 680, 9:10-15:23, and in particular 11:7-12:9 (Seibel: "I was fine to pick up part of that cost [for Ms. Van Willigan], meaning we're fine as a business to pick up part of that cost."); 14:4-11 ("Someone has to be there -- a business has to have expenses."); and 15:4-5 ("I'm happy to sit down and talk with her," before she is hired.).

Vegas concepts. *Id*. As Mr. Ramsay testified, Seibel wanted these provisions to "save face" that he had not been excluded by Mr. Ramsay. TT, 472:17-473:2.

b. June 2013 *Becerra* Analyses and Labor Audit.

On June 28, 2013, only two weeks after the *Becerra* lawsuit was filed, Mr. Thomas asked the Littler firm, who specialized in wage and hour class actions, to provide an initial exposure analysis. *See* Ex. 75. The analysis projected liability of about $439,000 ***not including*** wage statement penalties (then estimated to be $400,000), attorneys' fees, interest, or the exposure from certain other wage claims Littler had not yet analyzed. *See* Ex. 75, pp. 5-6. On July 6, 2013, Mr. Gillies forwarded Exhibit 75 to Seibel and Mr. Ramsay, and noted that the Fat Cow was "looking at a big pay out" and facing "huge exposure." Ex. 77. *See also* Ex. 136.

c. July 2013 Buy-Out Communications.

On July 5, 2013, Mr. Thomas sent Mr. Ziegler an outline of a proposal to consummate the buy-out. *See* Ex. 133. The proposal largely mirrored Seibel's earlier email (Ex. 513), but added indemnification provisions. The email also noted and acknowledged the contemplated "name change and rebrand exercise" for The Fat Cow. *Id*. Mr. Ziegler testified at trial that the indemnity provisions were unacceptable, but they of course were not final terms.

On July 30, 2013, Mr. Thomas and Ziegler exchanged emails about the outline proposal. In the emails, Exhibit 134, Mr. Ziegler asked to schedule a call. Mr. Thomas noted in response that the buy-out proposal "was parked due to the liability on the Fat Cow employee claims. I believe my clients will wish to proceed in due course but with that factored in now that the exposure is becoming clearer. Shall we endeavor to speak during the course of next week?"

Seibel has made much of this email supposedly ending the buy-out discussions. But it did nothing of the sort. The email is plain that the proposal is "parked," meaning (as Mr.

Thomas testified) that he intended to return to it. TT, 1006:5-1007:8. The return was not contemplated to be long delayed, since Mr. Thomas suggested in his email talking only a week later. And it made sense for the parties to get more information from Littler, particularly since its early memo noted the need for more analysis. As it turned out, the delays and difficulties in resolving the *Becerra* case deferred the buy-out conversations longer then intended. But (as explained below) they continued. And as Seibel admitted at trial, he never had nor expressed any desire not to be bought out or to end the buy-out conversations. TT, 315:14-21. Mr. Ramsay also always intended the buy-out to occur. TT, 458:24-461:4.

d. September 2013: Las Vacas Gordas Communications.

On September 3, 2013, Mr. Thomas finally heard back from Mr. Isicoff about Las Vacas Gordas. *See* Ex. 27; TT, 980:15-984:2. He had not heard from Mr. Isicoff since the June 10, 2013 email (Ex. 115) and the following phone call. In Exhibit 27, Mr. Thomas emailed Mr. Gillies advising him that Isicoff had agreed to let The Fat Cow use the name until February 1, 2014, without charge except $5,000 to reimburse Las Vacas Gordas attorneys' fees. Mr. Gillies forwarded Mr. Thomas email to Seibel, while noting that was a "good result." *Id.* Mr. Seibel did not record any disagreement. That same day, Mr. Isicoff sent a draft agreement permitting The Fat Cow to continue using the name through February 1, 2014. *See* Ex. 102.

e. September to November 2013: *Becerra* Mediation and Bankruptcy Discussion.

In the meantime, Mr. Thomas pressed hard for and arranged an early mediation to resolve *Becerra*. TT, 1007:9-17. On September 30, 2013, Littler sent a pre-mediation analysis, projecting a $1.7 million high-end exposure, not including attorneys' fees, interest or penalties. *See* Ex. 137, p. 3. On October 1, 2013, Mr. Thomas forwarded the analysis to Seibel and Mr. Wenlock, who were expected to attend the mediation on behalf of the partners. *See* Ex. 525.

(i) Seibel Refuses to Pay Anything to Settle *Becerra*.

On October 1, 2013, following his receipt of the Littler mediation analysis, Seibel met in person with Mr. Wenlock and Mr. Thomas in London. Both Mr. Wenlock and Mr. Thomas had strong and fully consistent recollections of the meeting, because of Seibel's extreme position. In his characteristic hardline fashion, and despite earlier acknowledging the legitimate concerns raised by time shaving, Seibel called the lawsuit "blackmail," and stated his unwillingness to pay ***anything*** in settlement. TT, 1188:5-1189:22, 1007:22-1008:17.

(ii) October 13, 2013 *Becerra* Mediation Is Unsuccessful.

Mr. Wenlock attended the mediation alone, after Seibel was unable to attend at the last minute. Mr. Wenlock prepared a sobering mediation recap. *See* Ex. 186. Plaintiffs were demanding a minimum of $500,000. Mr. Wenlock was concerned that even that offer was without the plaintiffs "know[ing] the full picture as we have not disclosed certain pieces of information, we had to stop the current HR audit[17] as it was finding more worrying issues and non-compliance." He noted that: "We do not have a strong case and the further we get into the issues the deeper the exposure is for us." He suggested that the realistic options were to "settle now or pay more money in settlement costs and further lawyers' fees."[18] *Id.* The mediator then

[17] Ms. Van Willigan commissioned the audit which revealed extensive labor and employment compliance issues, even though only partially completed. *See* Ex. 709.

[18] Seibel argues that Ex. 186 reflects an agreement, inconsistent with his stark refusal to settle, to settle in the range of $250,000 to $300,000. Not so. Rather, as Mr. Wenlock testified, he and Littler tried obtaining an offer in that range, which could then be presented to Seibel and Mr. Ramsay to see if they would agree. TT, 1241:10-1243:4. *See also* SG Depo., 134:21-137:25 (Ramsay team asked for Seibel's authority for settling; Seibel refused). While Mr. Ramsay testified through a leading question on cross that the mediation involved "a jointly agreed" position, there was no evidence that he knew about the London meeting or was directly involved in the mediation or settlement talks.

made a proposal to settle for $500,000. Ex. 78. Seibel, consistent with the meeting vividly recalled by Mr. Thomas and Mr. Wenlock, never agreed.

(iii) Bankruptcy Seriously Considered and *Becerra* Remains Unresolved.

Matters were so serious at this point that the parties seriously considered bankruptcy. Mr. Thomas consistently pushed Seibel and Ziegler, in vain, for resolution of *Becerra* and/or for bankruptcy. For example, on November 18, 2013, Mr. Thomas emailed Ziegler to follow up on the bankruptcy or the mediator's proposal, and attached a Littler post-mediation memo of November 14, 2013. That memo concluded that "liability could ultimately be three to four times that [proposed $500,000 settlement] amount." *See* Ex. 78. Mr. Thomas also expressed urgency about the impending need to begin actively defending the case and spending attorneys' fees. *Id.* And Littler was already owed unpaid fees. *See* Ex. 147. Other emails and testimony confirm Mr. Thomas's active approach and his frustration with Seibel and Ziegler lack of constructive engagement on bankruptcy or resolving *Becerra.*[19] TT, 1012:12-1017:1, 1020:6-1025:11.

On December 6, 2013, Littler advised Ziegler and Mr. Thomas that despite expiration of the mediator's proposal, Plaintiff's counsel might still have some interest in settling. *See* Ex. 297. Based on the previous statements by Seibel that he would not settle, and Seibel's

[19] *See, e.g.*, Ex. 139 (Oct. 29, 2013; Mr. Thomas to Ziegler: "We really need to make a decision on this [mediator's proposal] before the weekend." Seibel never responded about settlement, but noted only that "insolvency" was under consideration.); Ex. 563 (Nov. 7, 2013; Mr. Thomas to Ziegler noting that the mediator's proposal had expired; litigation expense would soon resume; and bankruptcy should be pursued. In response, Ziegler changed topics to the Areas airport deal (discussed below)); Ex. 530 (Nov. 29, 2013; Mr. Thomas to Ziegler, pushing a bankruptcy decision); Ex. 714 (Nov. 29, 2013; Mr. Thomas to Ziegler documenting "our telephone discussions this week and when you confirmed to me on behalf of Rowen that it was his desire to proceed with a bankruptcy of FCLA."); Ex. 141 (Thomas scheduling a call with bankruptcy counsel a week later); Ex. 531 (Littler advice on the partners' personal *Becerra* exposure and whether bankruptcy would stay any such personal claims).

unwillingness to accept the mediator's proposal, Mr. Thomas responded no. In response, Ziegler suggested in Exhibit 297—and testified at trial—that Mr. Thomas should have considered a joint counter offer. But as Mr. Thomas testified at trial and replied in Exhibit 297, there had been no previous suggestion of settlement interest by Seibel and Ziegler; they had let the mediator's proposal expire; and they could certainly have intervened earlier if they had wanted to make a different settlement offer. TT, 1029:16-1033:14. Mr. Thomas also noted in Exhibit 297 that Ziegler and Seibel had agreed to bankruptcy, in response to which Seibel said "[b]ankruptcy if that's what makes the most financial sense" after considering "[a]ll factors." But Siebel proposed no counter offer which could still then have been made.

f. November 2013: Further Buy-Out Discussions.

Mr. Gillies and Seibel met in Las Vegas in November and continued to discuss the buy-out. SG Depo., 165:15-25. Mr. Gillies testified that the discussions proceeded in the "normal" fashion of Seibel deals: A "top-line" oral agreement, refined as time went along. And the parties continued to gather information about the *Becerra* case that would inform the buy-out discussions, which remained "in motion." SG Depo., 133:12-134:17, 162:10-164:13.

g. Late 2013: Final Resolution of Trademark Issues.

On December 13, 2013, Ziegler and Mr. Thomas exchanged emails about the trademark issues, and Ziegler asked whether the deadline for stopping use of the name could be extended. *See* Ex. 121. Mr. Thomas responded that he had negotiated the "absolute backstop date," i.e. the longest date possible. *See* Ex. 123. Mr. Thomas at trial reiterated why that was the case based on his discussions and negotiations with Mr. Isicoff. TT, 1104:12-1105:1. *See also* SG Depo., 114:7-116:3, 172:23-173:13. Seibel has suggested that was untruthful, citing testimony by Mr. Gajer, the principal in Las Vacas Gordas, that he would have considered a longer license. But the cited testimony proves nothing. Mr. Thomas never spoke to Mr. Gajer. His understanding was based exclusively on what he was told by Mr. Isicoff, Mr. Gajer's lawyer. TT, 1106:13-16. And Mr. Isicoff unequivocally testified that his "client wanted the name changed as quickly as possible," and did not inform Mr. Thomas of anything different. Eric Isicoff ("EI") Depo., 16:18-17:1; 48:12-49:2.

On December 19, 2013, Mr. Thomas sent copies of the Las Vacas Gordas settlement agreement (with a handwritten correction of the owning entity's name, as request by Mr. Ziegler) back to Mr. Isicoff. He sent copies signed by Mr. Ramsay on behalf of The Fat Cow. *See* Ex. 80. He also forwarded the signed agreement to Zeigler and Mr. Gillies. *Id*. There was no further comment from Ziegler. With some additional changes, the agreement was later consummated providing until March 31, 2014 to use The Fat Cow name.[20]

J. <u>Poor Financial Performance in Late 2013 and Early 2014.</u>

1. Negative Profits and Disappointing Revenue.

The Fat Cow continued to be unprofitable in late 2013 and through early 2014. Net income (profits) were negative every month from August 2013 to closure, and tens of thousands of dollars negative for each of those months except August and December (which was almost $140,000 negative). Expert Report of Anthony Bracco ("Bracco Rpt."), Ex. 4. Revenue increased somewhat in the busy July and August months, totaling $447,697.23 and $440,445.14, respectively. *Id.* But dipped again in September and October, to $322,275.98 and $329,577.92,

[20] On February 10, 2014, Ziegler suggested extending the deadline because the restaurant's closure date had been delayed due to Seibel's objection to the WARN notice. *See* Ex. 130. Mr. Thomas called Mr. Isicoff, who later advised that as "chef to chef" courtesy, Mr. Gajer would extend the date to March 31, 2014 but also required a personal side letter from Mr. Ramsay agreeing he would not use the "Fat Cow" name going forward. TT, 994:15-22, 995:5-14;, Ex. 131. On February 24, 2014, Mr. Isicoff sent Mr. Thomas the executed settlement agreement, with the March 31, 2014 date interlineated, as well the executed side letter. *See* Ex. 116.

respectively. *Id.* It increased again in November and December, but both of these months were worse than the results from the same months in 2012. *See* attached Appendix B.

2. Negative Net Current Assets

The Fat Cow's current liabilities exceeded current assets ***every month*** that the restaurant was open. *See* Bracco Rpt., ¶ 20; Ex. 3 "Net Current Assets (Liabilities)." And while the net current assets improved to ***negative*** $33,812.84 in June of 2013 (resulting from Mr. Ramsay's capital contribution that month of $99,077), the situation worsened every month thereafter. Net current assets decreased from ***negative*** $44,880.49 as of July 31, 2013 to ***negative*** $202,438.92 as of January 28, 2014.[21] And these results do not account for the *Becerra* lawsuit, which posed significant additional liability and ongoing legal fees. Using the mediator's $500,000 proposed settlement, the net current assets (or working capital) would be reduced to a ***negative*** $759,000 as of January 28, 2014. *See* Bracco Rpt., ¶¶ 16, 20, Ex. 2-A & 2-B.

3. Overdue Invoices, Negative Cash Flow, and High Expenses

The Fat Cow also had substantial past due invoices throughout its existence, and that condition worsened over time. As of July 31, 2013, past due invoices were $88,887.65. By January 28, 2014, that amount had increased to $177,908.52, even without considering the obvious *Becerra* liabilities. Bracco Rpt., Ex. 3; App'x. D attached hereto. And The Fat Cow had consistent cash flow problems. Through January 28, 2014, its unadjusted net cash flow was ***negative*** $1,267,000, its cash flow from operations was ***negative*** $81,000, and its free cash flow was approximately ***negative*** $1,429,000. Bracco Rpt., Ex. 4.

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[21] By the time the restaurant closed on March 31, 2014, net current assets were ***negative*** $287,654.28. Bracco Rpt., Ex. 3; *see also* App'x C attached hereto.

The Fat Cow also had high expenses. TT, 1282:6-21 (Lowder: direct and operating expenses were "extremely high"); TT, 1281:8-1282:5 (Lowder: occupancy costs for 2013 were 13% of sales, a percentage materially higher than Lowder considered "safe.").

4. The Financial Results Were Poor Despite Operational Improvements; The Earlier Problems Were Too Much to Overcome.

The Ramsay team's increased involvement improved restaurant operations during the second half of 2013 and into 2014. For example, Mr. Caruso praised the food and operations, and Yelp reviews improved marginally. *See, e.g.*, Ex. 247. But the past problems were too much to overcome, as the hard financial results proved. Both Mr. Ramsay and Defendants' restaurant operations expert John Gordon confirmed that the restaurant simply could not dig out of its deep hole. Expert Report of John Gordon ("Gordon Rpt."), ¶¶ 19-21. Mr. Ramsay testified that only a complete reconceptualization with millions in additional investments had any hope of financial solvency. TT, 446:5-447:17, 468:11-472:3. *See also* AVW Depo., 173:12-174:10 (after she returned in 2013, The Fat Cow reviews improved but "w[ere] still really bad" and "not enough to get us out of the hole" that included "financial[]" issues, "bad press," and "people not coming"); SG Depo, 153:4-154:3 (Despite late 2013 improvements, "there were a number of huge issues that that business was facing, and I think a very mixed period of trading inconsistency…." Upon her return, Ms. Van Willigan was "always up against it."); TT, 394:21-25 (late 2013 compliments by Mr. Caruso "wasn't the confirmation that the place... was a royal success"); TT, 471:18-472:3 (any improvements did not create "sufficient oxygen to keep [the restaurant] open"); RC Depo. 28:13-18, 36:1-6 (food was "okay, not great").

5. Seibel Admits in Late 2013 That the Fat Cow Is Failing.

By contrast, Seibel testified at trial that The Fat Cow had solved all its previous problems by late 2013 and was then on an "upward trajectory." TT, 121:3-4. Even setting aside the company's books and records, which flatly contradict this position, Seibel's own contemporaneous comments prove he knew otherwise. For example, on August 10, 2013, Seibel responded to the daily Manager Shift Summary, which showed revenue and other daily The Fat Cow results for that Friday. *See* Ex. 519. Seibel complained in particular about the number of meals that had been "comped" that day, noting: "Look at these comps -- and this idiot [manager Ryan Stock] said it was a smooth day." Green then added: "Wow. 14.8k [in revenue] on a fri[day] when the Grove was 'very crowded,'" thus expressing dissatisfaction with the day's revenues. Green also noted a recurring problem—Caruso closing the patio so that The Fat Cow seating was limited. *Id.* ("patio was closed again (Caruso is the worst)"). But Green also opined that was not the complete cause of the revenue shortfall, and that the kitchen was underperforming and "couldn't get the food out on a slow night." *Id.*

The Manager Shift Summary for August 16, 2013 showed $16,000 in revenue on a "nice" Friday. In response, Green responded "the weather is nice in California, [but] the day was a bust all around for them." Seibel then expressed his extreme dissatisfaction with the results: "Excuses and stupidity -- morons." *See* Ex. 520.

On September 4, 2013, Seibel responded to the prior day's reported daily receipts of $6,000 as follows: "[T]hese are the #'s we expected and are garbage -- ***this will be the norm in a lot of cases -- suggest they plan accordingly.***" Ex. 296 (emphasis added). In other words, Seibel was predicting continued poor results. When asked how he could reconcile this dim prognostication with his trial testimony that the restaurant was excelling in late 2013, Seibel gave inherently implausible and dishonest testimony, stating only that he was trying to be "conservative" and "lower expectations." TT, 657:19-658:6. The emails suggest no such thing.

On December 7, 2013, Seibel responded to a positive report from the manager of $13,000 in revenue from December 1, 2013 as follows: "This guy is semi-moronic -- they're down [year] over [year] some crazy number. But he's cheerleading the 1 night they're up $2k." *See* Ex. 532.

And, as explained above, the parties seriously considered bankruptcy in late 2013.

In light of the above, it is no wonder that Seibel remained willing to consummate a buy-out. He saw no prospect of any continuing profits, and had not changed his opinions from those reflected in the March 2013 recorded telephone conversation, Ex. 681. And he was not alone, as others contemporaneously confirmed The Fat Cow's dismal financial situation.[22]

6. Mr. Ramsay Makes Contributions to Meet Cash Flow Problems.

As its financial results demonstrated, the restaurant obviously needed cash infusions. To meet the cash needs, Mr. Ramsay made an additional $99,077 cash investment in the Fat Cow in June 2013. *See* Exs. 369, 505. On January 24, 2014, Ramsay (through Kavalake Ltd.[23]) paid $40,000 to Littler on behalf of the Fat Cow, for services relating to the employee class action. *See* NYSCEF Doc. No. 664 ("Joint Stip."), ¶ 3. Seibel paid Littler nothing. On February 14, 2014, Mr. Yoo reported that he did not have sufficient cash to meet rent payments. Ex. 546. On February 11, 2014, Mr. France estimated that the restaurant needed another $400,000 in cash to

[22] *See, e.g.,* Ex. 288 (Yoo: "we will have $11,875.01 in payroll tax money that we cannot use for operations because of the lack of working capital."); Ex. 505 (France: The Fat Cow "does not have enough cash to settle its liabilities according to terms and conditions."); Ex. 78 (Littler: "the restaurant has been and will continue to be operating in the red (at least in the appreciable future)"); Ex. 122 (Ramsay to Seibel: "we need to cut our losses."). *See also* BY Depo, 104:18-105:5 ("Q: [W]ere there instances where you didn't have sufficient cash to pay the bills on time? A: Oh, yes."). By June 2013, Mr. France had performed sophisticated financial analyses and concluded (not surprisingly) that The Fat Cow needed cash infusions. *See* Exs. 505, 506, 510. In a private email with Seibel, Green disagreed, calling France's analysis "absurd." Ex. 506.

[23] Kavalake was the majority shareholder of GRUS, and Ramsay was the majority shareholder in Kavalake. TT, 1067:2-10; *see also, e.g.*, Ex. 7, p. 7 (showing Kavalake as GP of GRUS).

meet anticipated debts. Ex. 545. On February 19, 2014, Ramsay (again through Kavalake) paid $52,220.50 to GFM LLC (the Grove) in rent payments on behalf of the Fat Cow. Joint Stip. ¶ 1

7. On a Pretext, Seibel Makes Unauthorized Withdrawals at a Time of Severe Need Leading to a "Dire" Financial Situation.

At the height of these financial problems, while Ramsay was making investments in The Fat Cow, Seibel was withdrawing monies on a pretext. On December 17, 2013, Mr. Yoo reported that $37,500 and other monies had just been extracted by Seibel from The Fat Cow. Ex. 299. He wrote that as a result: "I have very little in operating cash to run the business. We are in a dire situation which will lead to possibly missing payroll, vendor obligations, taxes, and other liabilities to run the business." *Id.* Even Seibel's expert, Lowder, admitted the (obvious) fact that Seibel's taking such a distribution negatively impacted the Fat Cow's solvency. TT, 1319:3-12.

In an email with Green discussing Mr. Yoo's report of a "dire financial situation," Seibel wrote "[a]in't my prob[lem]." Ex. 376; TT, 668:14-17. In a December 18, 2013 email, Mr. France asked Seibel why he extracted the amounts (Green still had check writing authority), and Seibel admits that was to "even out" the amounts paid to Ms. Van Willigan. He claimed that was because "we have discussed with all that the Cow would not be responsible for Andi's salary." *See* Exs. 536, 555.[24] Of course, that was inaccurate. Months earlier, Seibel said he was willing to have The Fat Cow pay Ms. Van Willigan (as it had paid JRT). *Supra* § II.D.1. And Mr. Gillies confirmed that he spoke many times with Seibel who had always agreed that Ms. Van Willigan "would be paid from the business." SG Depo., 120:13-121:14; *see also id.*, 122:12-24 (Seibel never said otherwise because they "had [so] agreed."), 201:18-202:2.

[24] Mr. Yoo criticized Green's claim that Seibel could take money for this reason. Exs. 375, 377.

Seibel also admitted that he did not tell the Ramsay team before taking the pretextual withdrawals. TT, 668:3-6; 669:25-670:2. That Seibel surreptitiously and unilaterally inquired about[25] and extracted funds makes his claim that he had never consented even less credible. And Seibel continued to make unauthorized withdrawals—totaling $80,000—despite the ongoing cash issues.[26] In response to Seibel's last withdrawal, on March 31, 2014, Mr. Yoo wrote: "I was depending on that cash. I've got tax payments that have to get paid and we have no funds to cover all of the vendor bills." Ex. 651.

8. Mr. Gillies Reacts to the Unauthorized Seibel Withdrawals.

On December 18, 2013, Mr. Yoo emailed Mr. France explaining Seibel's misguided rationale for unilaterally extracting the funds. *See* Ex. 219. Mr. France then emailed Mr. Gillies, suggesting opening a new The Fat Cow account from which Seibel would not be able to make unauthorized unilateral withdrawals. *Id*. In response, Mr. Gillies noted that "there is no solution to this unless rowen agrees, which he will not out of spite" and suggested that they try to find other ways to "legally restrict any further withdraw[al]s by him." Mr. Gillies plainly was frustrated, and then noted: "Whichever is the final solution, we have the comfort that rowen has lost all his investment in the business, with nothing to show for it." Ex. 219.

Seibel argues repeatedly that this shows malicious intent. On the contrary, it shows understandable frustration over the situation and Seibel's conduct, where ***both*** parties would be losing their The Fat Cow investment. *See* Ex. 377; SG Depo., 201:7-202:18, 202:25-203:9 ("We

[25] In preparation for the unauthorized withdrawals, Seibel began secretly inquiring to Mr. Yoo about payments made to Ms. Van Willigan in September. *See* Ex. 375, 529, 560, 561. None of the emails were copied to the Ramsay team.
[26] He withdrew $12,750 on October 7, 2013; $37,500 on December 16, 2013; and $30,000 in equal withdrawals on January 10, February 3, and March 20, 2014. *See* NYSCEF Doc. No. 665, Seibel's Response to Defs.' Interrog., Resp. No. 10.

were all frustrated… I don't wish him to lose money but we were all losing money and we certainly held Rowen responsible for a large part of that."). And as explained more fully below and as he testified, Mr. Gillies had many other good causes to be upset with Seibel.

9. Bracco's Conclusion: The Fat Cow Was Insolvent.

Mr. Ramsay's financial expert, Anthony Bracco, analyzed The Fat Cow's financial position using the "Ability To Pay" solvency test. He considered The Fat Cow's actual performance across various financial metrics— including revenue, net income, cash flow, and assets vs. liabilities—and concluded that, as of the January 28, 2014 WARN notice date, The Fat Cow was insolvent and incapable of continuing operations without additional cash infusions. *See generally* Bracco Rpt. and §§ II.J.1-7, *supra*.

10. Seibel's Experts Do Not Undermine the Insolvency Conclusion.

Despite conceding the perilous cash flow situation, *see infra* §§ IV.E.3.j & IV.E.4.c, Seibel's experts complained that Bracco failed to consider the possibility of additional cash infusions. But as Lowder conceded, the owners had no obligation to contribute additional funds or seek outside funding, and doing either would have required unanimous consent. TT, 1316:2-8; Ex. 7, ¶¶ 8-9; Ex. 8, ¶¶ 6.2-6.5. There is no evidence both owners would have agreed to borrow or invest additional funds, *cf.* BY Depo., p. 104:24-105:5 (partners "refuse[d] to provide ... capital"), or that The Fat Cow could obtain outside funding, how much, or on what terms.

Seibel's experts also complained that Bracco was wrong to point to The Fat Cow's negative working capital because restaurants commonly have negative working capital. But that reflects that restaurants are risky and often close; indeed, about 60% of restaurants fail within 3 years. TT, 1410:18-1411:5; Gordon Rpt., ¶¶ 10-11; Expert Report of Raymond Dragon ("Dragon Rpt."), ¶ 31. Seibel's expert Bautista agreed restaurants are risky and often close. TT, 1368:4-9. Thus, even having industry average working capital would be consistent with likely failure. But The Fat Cow's working capital was ***much worse than average***: approximately negative 16% of revenues—compared to the 3.2% industry average cited by Bautista. TT, 1368:19-1369:20.

Seibel's experts also attempted to minimize The Fat Cow's overdue invoices, by noting that restaurants commonly have invoices aged 30 or 60 days. But regardless of what other credit terms other restaurants may have had, The Fat Cow was obligated to pay its invoices on the due dates set forth on their invoices—in many cases, that meant on delivery. TT, 1317:12-23. Seibel's experts concede that The Fat Cow was bound by its invoice terms. TT, 1370:15-18.

Seibel's experts also criticized Bracco for choosing a January 28, 2014 analysis date. But the WARN notice date was a logical one. TT, 1408:21-1409:1. In any event, Bracco confirmed that choosing an earlier date would not have changed his conclusion because the negative financial trends were consistently bad even in earlier periods (and got worse after January 28). *See* Bracco Rpt., Exs. 3 & 4; ¶ 28; TT, 1408:12-17, 1428:20-1430:12.[27]

In addition, Seibel's experts claimed Bracco should have considered that Lowder deemed certain expenses "nonrecurring." But even non-recurring expenses must be paid, may last a long time, and may significantly affect profitability. TT, 1285:2-12; 1286:8-13; 1369:21-1370:2; BY Depo., 86:8-18, 87:3-6. In any event, Lowder's "nonrecurring" conclusions were wrong. She looked at the labels on expense categories, but not at the particular expenses within the category.

[27] Lowder claimed Bracco lacked restaurant experience. She was wrong. *See* TT, 1409:25-1410:8. In any event, Bracco opined as a financial accounting expert; any lack of restaurant experience would not undermine his opinion. Lowder also complained, without basis, that Bracco's analysis reflected Seibel's cash withdrawals. The withdrawals were unjustified, but Lowder admitted that, justified or not, they affected the Fat Cow's solvency. TT, 1319:3-12.

See TT, 1285:23-1286:7; 1287:9-18; 1291:3-16; 1291:21-24. Many of the particular expenses were in fact recurring, for items like bookkeeping and chef salaries, and so properly treated as such by Bracco. *See* Dragon Rpt., ¶ 19 & Ex. 1-h & 1-i.[28]

Seibel's experts finally object that Bracco's analysis used $500,000 for *Becerra* liability. But doing so was supported by GAAP. Bracco Rpt. ¶¶ 16-17 & n. 6&7; TT, 1422:8-1423:2. And both Seibel's experts concede the obvious—*Becerra* would cause settlement and defense costs. But neither Seibel expert considered ***any*** such expense in their valuations. TT, 1294:9-18; 1318:5-17; 1350:4-19; 1371:3-12. That was plainly wrong. In any event, as explained above (*infra*. §§ II.J.1-3), even without considering the *Becerra* expense, The Fat Cow had negative working capital, overdue bills, and negative cash flow, and would still have been insolvent.

K. Late 2013: Further Disintegration of Relationship Due to Seibel's Secret Efforts to Exploit Ramsay's Name Without Consent.

Seibel's unauthorized 2013 efforts to trade off Mr. Ramsay's name and restaurant rights contributed to ongoing disagreements between the parties.

a. Singapore Marina Bay Sands and GR Burgr.

Mr. Ramsay testified about traveling to Singapore and meeting with Marina Bay Sands about promoting one of his restaurant chains, Bread Street Kitchen, in which Seibel was not involved. TT, 462:8-463:9. He was confronted by his hosts with an embarrassing surprise that Seibel had already—without Mr. Ramsay's permission or knowledge—been pitching a GR Burgr restaurant there. Mr. Ramsay had no interest in that. *Id.*; *see also* SG Depo., 95:20-98:5, 148:24-149:4, 166:15-21, 188:9-189:9; TT, 953:12-954:7. And Seibel had no right to pitch it.

[28] Lowder claimed Mr. Yoo's deposition supported her "nonrecurring" conclusion. Lowder Rpt., Ex. F. It didn't. Mr. Yoo testified that he did not know whether the specified expenses were nonrecurring. BY Depo., p. 74:11-17; TT, 1289:1-25.

The GR Burgr LLC agreement, like the Fat Cow LLC agreement, required unanimous approval of Seibel and GRUS for any actions. *See* Ex. 305, §8.1.[29] Mr. Ramsay was rightly displeased.

b. Areas Airport Deal and Cruise Lines.

Seibel also tried, without the Ramsay team's permission, to negotiate for placing GR Burgr restaurants in airports, with a company called Areas, and on cruise lines. Again, Mr. Ramsay and his team did not approve of or know about those efforts, which also included blatant misrepresentations about the scope of Seibel's rights.[30] Mr. Ramsay was unwilling to have a chain of casual airport restaurants[31], where it was difficult to control quality, and had a similar reluctance for cruise ships. TT, 463:1-15; 470:7-11; 952:10-953:3; *see* SG Depo., 95:20-98:5.

[29] Seibel introduced emails showing that the parties discussed his trips to Singapore, and suggested those prove consent for the Sands pitch. But the emails reflect only discussion about the Singapore trip, not any knowledge or authorization for pitching GR Burgr to Sands. *See* Exs. 611-614. Any such authority or knowledge was flatly denied by the Ramsay team. *See* above.

[30] *See, e.g.*, Ex. 499 (June 7, 2013 email from Gillies to Seibel: the Areas "proposal is a long way off the mark"). On October 30, 2013, Zeigler sought approval for "a letter of authorization" ("LOA") permitting Areas to bid with airports for installing Gordon Ramsay restaurants. *See* Exs. 605 & 718. The Ex. 718 attachment, draft redlined by Ziegler, represents that Seibel and GR Burgr LLC had the rights to license the name "Gordon Ramsay Pub & Grill." That was absolutely untrue. Only Mr. Ramsay or his entities had rights in the "Gordon Ramsay" name, which had been licensed to GR Burgr LLC only for mutually approved "Gordon Ramsay Burgr" restaurants. *See* Ex. 722, §1.1 (GRUS reserving all rights in "Gordon Ramsay" name, and licensing GR Burgr LLC to use "Gordon Ramsay" solely for GR Burgr restaurants). Mr. Ramsay and his entities assigned certain limited rights in "GR Pub" to Caesars, but never to Seibel or GR Burgr LLC. *See* Ex. 451, §§6.1, 6.3 (limited license to Caesars). Moreover, no one on the Ramsay team had authorized the Areas negotiations. TT, 945:13-22. *See also* Ex. 563 (Thomas complaining about Areas and telling Zeigler "we …need to have a clear approach with respect to any activity involving ... Gordon's name. It is imperative that we are involved at the earliest stage" of any such ventures). Arguing that his Areas discussions were authorized, Seibel cites emails that Gillies first introduced the Areas discussions. *See* Exs. 615-616. That is correct, but Seibel then unilaterally continued and progressed the discussions without permission, after the Ramsay team had been unwilling to do so.

[31] This contrasted this with Ramsay's sit-down, non-chain, upscale Heathrow restaurant, where he could control food quality and experience in a single premium restaurant. TT, 1163:6-1164:8.

c. Atlantic City Restaurant.

Also deeply concerning was Seibel's conduct concerning an Atlantic City Caesars hotel for GR Pub & Grill or GR Steak. Caesars (mistakenly believing Ziegler represented the Ramsay interests, which was never the case[32]) sent Ziegler alone a draft Atlantic City agreement that included both Mr. Ramsay and Mr. Seibel. Ziegler then, without the Ramsay team's knowledge, split that contract into one that was for Seibel and one that was for Ramsay. But in making that split, Ziegler took the fees that Caesars was otherwise going to pay Mr. Ramsay's as a license fee for his name— name rights that belonged only to Mr. Ramsay and his entities—and spit that fee between Seibel and Mr. Ramsay.[33] TT, 954:9-955:25. In the March 2013 audiotape, Exhibit 681, Mr. Gillies is very upset with Mr. Seibel over this issue after he learns of it. *See* Ex. 681, pp. 64:11-16 ("So when the contracts were sent from Caesars to Brian [Ziegler] with the outline of 6 percent for Rams[a]y … why did Brian split the deal and sent it back to Caesars"?); 70: 9-17 ("Caesars made a proposal that was at 6 percent minimum at $6 million and then increasing…

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[32] Certilman never represented Ramsay or GRUS, and was never instructed to act on their behalf.

[33] The Court declined to admit certain documents providing the details. Mr. Ramsay renews his request for their admission, and provides this summary as an offer of proof. On January 3, 2013, Amy Sabo, in-house counsel at Caesars, sent Ziegler a single proposed agreement for a Gordon Ramsay Pub & Grill at Caesars Atlantic City. *See* Ex. 723. The Agreement proposed to pay a Ramsay entity, GR LP, a fee of 6% of restaurant sales up to $6 million and higher percentages for sales above. *See* Ex. 723, pp. 1 and 22, §8.1. This was in exchange for a "License" by Mr. Ramsay and his entities of their exclusive rights to the "GR LP Marks." *Id.*, *see also id.*, p. 3 (defining "GR Marks"); p. 18, § 6.1 (defining the "License"). On January 26, 2013, Mr. Ziegler in response (and without knowledge of the Ramsay team) sent Ms. Sabo ***two*** drafts, one for Mr. Ramsay and one for Seibel's entity. *See* Exs. 727 & 724. But in these agreements, the License that in Ms. Sabo's draft would be paid to Mr. Ramsay's entity alone, is equally split between Seibel and Mr. Ramsay. *See* Ex. 727, bates p. GRH 11612-13 (splitting License fee to Mr. Ramsay in half) and bates p. GRH 11652-53 (paying the other half to Seibel). The Ramsay team was not included in these emails and did not even know about the communications. On March 16, 2013, Mr. Gillies expresses great concern about all of this. *See* Ex. 730. Mr. Thomas immediately became involved, obtained the previously unknown details, and requested to be included in all future negotiations. *See* Exs. 732, 733, 734. Mr. Ramsay then complained about this directly to Caesars. *See* Ex. 735. *See also* TT, 942:19-944:10.

Then Brian splits that and goes back to them with saying, no… 3 percent for [Seibel and] 3 percent for GRH"); 75:18 ("why are you cutting our fee in half"?). Seibel tried to justify the duplicitous split by claiming that he was the one who brought value and he could use anyone, not just Mr. Ramsay's name, to do a deal. *See* Ex. 681; 91:10-12 ("I run the deal. I am the deal. The deals happen because of me and because of the brew that we keep together.… [W]e can put anyone's name on the door."). *See also* SG Depo., 91:4-95:10, 99:2-100:5.

After this concerning incident, Mr. Gillies reminded Seibel that he could do no negotiations involving Mr. Ramsay without his consent. *See* Ex. 711. And Seibel's Atlantic City scheming remained a very sore point. *See, e.g*., Ex. 191 (Dec. 26, 2013 email from Mr. Ramsay to Gillies, upset that Caesars says they are threatening to cancel Atlantic City unless there is an agreement involving Seibel). *See also* TT, 463:20-464:2 (Ramsay talking about his "shock" over Seibel actions in Atlantic City). Mr. Thomas testified that, as an accommodation to Caesars, and despite his upset, Mr. Ramsay eventually agreed to allow Mr. Seibel to participate in one more Atlantic City restaurant. But that was not an agreement ***with*** Mr. Seibel; Mr. Ramsay agreed only to acquiesce to permit Seibel to have a separate agreement with Caesars. *See* Exs. 736 and 737 (separate Seibel and Ramsay agreements, respectively, for GR Pub & Grill in Atlantic City). The Ramsay team refused thereafter to permit Mr. Seibel to have any involvement with any Ramsay restaurant, and have completely and properly refused to do any other business with him. TT, 956:1-959:14.

d. Seibel Efforts to Tie Together The Fat Cow and Caesar's Restaurants; Mr. Gillies Upset with Seibel.

Mr. Gillies also testified at length about his anger at Seibel over these various incidents. And he also noted how Mr. Seibel repeatedly tried to leverage other restaurant deals as a condition of agreeing to do anything on The Fat Cow, making agreement on The Fat Cow issues impossible. Mr. Gillies testified in particular about his meeting in Las Vegas in late 2013, at which Mr. Gillies tried discussing The Fat Cow issues and Seibel instead insisted on addressing other issues, including the Singapore Sands deal that the Ramsay team did want to do. And Seibel made an explicit threat to interfere in Mr. Ramsay's business if the Ramsay team did not agree to that deal. Mr. Gillies eventually walked out the meeting in frustration and anger. *See* SG Depo., 148:7-150:6, 187:21-191:1. *See also id.*, 204:14-207: 7 ("All Rowen would do is talk and want to get in a room and talk about Singapore, airports, Vegas, New Orleans. We didn't want to do it. Our problems was facing us at the Grove in LA and that is all we wanted to do was come to a solution and resolution.... There was no solution coming from Rowen and his team to actually mitigate the problems that we were facing… the trademark issue, the class action, etc. So there was continuous buildup of frustration.").[34]

This attempt to improperly to leverage The Fat Cow issues to gain concessions on other restaurants is also illustrated by Ex. 540. On January 20, 2014, after two days of in-person meetings between Mr. Thomas and Ziegler, Mr. Ziegler sent an updated outline of the buy-out proposal that had been "parked" (but never dropped) as the *Becerra* class action liability was assessed. *See* Ex. 540. Ziegler's cover email expressly admits that Mr. Thomas had "strongly" discouraged that any The Fat Cow proposal include any "requirement that the parties memorialize" understandings about other restaurants. *Id.* Mr. Thomas's testimony was more blunt. He said he had directly told Mr. Ziegler not to link the issues because of the distrust

[34] *See also id.*, 166:1:-167:1 ("For [Seibel] the Fat Cow was merely one element in a much broader play of opportunities that he felt he should be involved with us, but we didn't want to be involved in those opportunities but Rowen would not restrict his conversation"), 187:21-188:8, 188:19-191:1 ("Rowen wouldn't ever discuss the main issue [The Fat Cow]… He only wanted to discuss other projects, other deals, other operations, which we didn't want to discuss.").

created over past events. TT, 1058:22-1060:14. But Ziegler ignored the request and insisted on linking. He noted that his client could not "comfortably leave" an agreement about the other restaurants out of any final deal. Ziegler's' attached proposals then require that the parties agree to together "pursue Atlantic City GR Steak and GR Pub transactions" and agree to pursue GR Burgr at Sands Singapore—even though Mr. Ramsay wanted to do neither. *See* Ex. 540. On January 24, 2014, Mr. Thomas again objected to the linking of The Fat Cow and other restaurant issues: "[A]s explained when we met, my clients cannot link any of these matters together and they all need to be looked at properly and in isolation." Ex. 150.

Based on all his interactions with Seibel, Mr. Gillies developed strong views about Seibel's dishonesty, ethics, and value to The Fat Cow. *See, e.g.,* SG Depo., 104:13-105:23, 142:22-148:6 ("Rowen had lied to us many times"); 155: 20-159:13 (Seibel was "quite destructive"). Seibel has pointed to various emails where Mr. Gillies speaks disparagingly of Seibel, laments Seibel's ongoing participation in the restaurant, or expresses an intent to watch him carefully. These are all borne of Mr. Gillies' hard experiences and reflect his honest (albeit sometimes colorfully expressed) views. These also confirm the parties' fundamental inability to work together.

L. <u>Late 2013 and Early 2014: Plans for The Fat Cow Closure and a New Restaurant</u>.

1. Reasons for Closure and New Restaurant Plans.

By late 2013, Mr. Ramsay had begun plans for closing The Fat Cow and opening a new restaurant concept under the sole control of Mr. Ramsay and his team. As Mr. Ramsay testified, the closure and rebranding was obviously necessary for a variety of reasons:

- The Fat Cow was failing financially. It was losing money, was insolvent, and had survived as long as it had only because Mr. Ramsay had contributed monies while Seibel withdrew monies. Seibel himself repeatedly discussed his dissatisfaction with its financial performance. *See supra* §§ II.J.5; TT, 468: 18-19 ("We were losing money hand over fist."); TT, 447:2-3 ("The restaurant was failing and it had to close.").

- The Fat Cow was also failing as a concept and operationally. Despite improvements, the restaurant was marred indelibly by past problems, and could not succeed without a fresh start. *See supra* § II.J.4; TT, 468:17-21 ("Standards were slipping. The service was not attentive. … And that was not about a bandaid where would could come in and change the menu and lick paint on the walls. The thing needed to be done with and started again.")
- The partners continued to disagree, and Mr. Ramsay distrusted and did not wish to continue in business with Seibel.[35] *See supra* §§ II.H &II.K; TT, 468:22-25 ("The biggest issue for me was the direction that Rowen and myself were going down two opposition streets and there is no worse business anywhere in the planet than where two partners can't meet as one.").
- The restaurant faced significant liability from *Becerra*. TT, 469: 19-22 ("The class action lawsuit ... was the final nail in the coffin."); SG Depo, 168:13-169:5 ("I was involved in trying to come up with a concept … which would not then be liable to the class action"). Continuing operations with the same ownership, even after bankruptcy, would not mitigate the exposure. *See* Ex. 128 (Mr. Thomas: "risk of a successor business is substantial" even "if

[35] Seibel claimed that the disagreements were in the past. For example, he claims that he agreed to maintain the "farm-to-table" menu desired by Mr. Ramsay. But it is obvious that, if he did so, that was because he intended to bought out. He made plain in the audio-recording (Ex. 64) that he only wanted to make money, and that he did not believe the Ramsay farm-to-table concept would ever do that. *See supra* § II.H.1. His continued harping in late 2013 about financial results shows that he never changed his mind. *See supra* § II.J.5. Plainly, the disagreements would have continued if the partners had remained in business. And the disagreements were not limited to the menu. The parties had fundamentally different ways of doing business and an irreconcilable breakdown in trust over all the previous issues. *See supra* §§ II.H &II.K.

there is a change of name but the same business and structure is in place whether bought out of bankruptcy or not. You [Ziegler] rightly raised those concerns and the advice has been quite clear. My clients do not wish to run the risk of further claims and litigation arising out of successor business arguments.").

- The restaurant was going to have to close for a time period to change its name and avoid the trademark liability.[36] TT, 979:23-980:7.

2. The New Restaurant Was Intended to Mitigate Lease Liability.

The Ramsay team would have preferred simply to stop The Fat Cow operations, without opening a new restaurant in its place, but the ongoing lease liability made that impossible. Mr. Ramsay needed a new restaurant to mitigate that liability. SG Depo., 226:13-18 ("The desire and ambition to open another restaurant … we actually didn't have.... We only did it because we were forced into… mitigating the issues with the lease."); TT, 446:11-17 ("I signed a lease with huge responsibilities of ten years. And we had ... eight and a half years left on that lease. So we would have to renegotiate some form of salvage, conceptualize [a] new space, new restaurant.")

3. The New Restaurant Plans Did Not Include Seibel Because He Would Be Bought Out. No New Restaurant Could Open Otherwise.

By late November and through early 2014, Mr. Ramsay's team was having discussions and email communications with kitchen planners, graphic designers, and others, including PR consultants and the Landlord, about plans to develop a brand new concept for The Fat Cow space—a chicken-focused "Ramsay Roast" restaurant. Seibel was not involved in these discussions because Mr. Ramsay believed the buy-out would occur. *See* SG Depo., 169:6-9 (Rowen was not involved because "we were buying [him] out.") & 171:11-172:6; TT, 481:18-

[36] *See also* Ex. 128 (Mr. Thomas summarizing the multiple reasons closure was necessary).

482:4. Mr. Ramsay was consistent and unwavering in intending to complete the buy-out. *See, e.g.*, Ex. 386 (Feb. 7, 2014 email, Ramsay told Ivan Garel-Jones of ITV Studios (involved in Hell's Kitchen) that "GR will be buying Rowen out of the partnership"); TT, 459:2-4.

Indeed, Mr. Ramsay knew that he could not open a new restaurant unless Seibel was bought out. Mr. Ramsay needed Mr. Caruso's approval for any new restaurant, and Mr. Caruso would not approve a new deal for a successor restaurant without a Ramsay/Seibel agreement. TT, 460:22-461:4. Mr. Caruso made plain that he did not want to be in the middle of a partnership dispute. *Id.*; *see also* RC Depo., 46:7-13; Ex. 222, p.2 (Caruso concerned about "his liabilities" for taking sides in a partnership dispute).

Seibel was also anxious for the buy-out. He wanted to recoup the investment (which he would otherwise have lost) and welcomed a small continuing passive interest in any ongoing restaurant at The Fat Cow space. *See* SG Depo., 172:7-22 ("Rowen was quite keen to get out as well. Rowen wanted his money back."); TT, 366:1-5, 6-17 (Seibel asked for "retention of the five percent to keep a professional interest" in ""whatever that identity [of the new restaurant] became"); TT, 370:13 ("he was excited to have a five percent"). And Seibel admitted at trial never losing his desire to close a buy-out deal. *See supra* § II.I.2.c.

4. A New Concept Was No Surprise to Seibel.

Seibel of course also knew the restaurant would have to close in order to change its name. And it was no surprise that, after closure, the restaurant would be rebranded and re-conceptualized. As early as the March 2013 conversation caught in the Ex. 64 audiotape, the parties knew, in Seibel's words, that there "is tremendous confusion as to what the concept is" Ex. 64, 27:22-23. There was also then discussion (and disagreement) about additional investments and changes to confirm a concept. *See supra* § II.H.1. And Seibel recognized from the first buy-out communication that Mr. Ramsay could do what he wanted and that the concept could change to something like the "gordon ramsay grill." *See* Ex. 513.

Mr. Ramsay confirmed: "in that beginning discussion about the settlement and buying him out, I explained I have to mitigate the losses by turning on a new concept." TT, 365:18-20. *See also*, TT, 365: 9-10. ("[W]e told Rowen that after buying him out, we would set up a new restaurant."); 378:14-16 (at a meeting in Vegas, "I told [Seibel] there we have to stick to the plan .. and moving on ... establishing new restaurants"); TT, 380:21-25; TT, 430:6-10 ("Mr. Seibel was fully aware of my strong relationship with Mr. Caruso and he knew that I had spoken to him on several occasions about reconceptualizing the space and trying, trying so hard to think of a new idea to come back strong.").

In any event, the new concept could never be secret. There was no way celebrity chef Mr. Ramsay could conceal any new restaurant in the very public Grove mall.

5. There Was No Reason For Seibel to Be Involved in the Details of Planning the New Restaurant.

While there was no secret about the new restaurant, Seibel argues that various emails show an intent to hide the plan details. Seibel misconstrues the emails.[37] But there was no reason he should have been involved in the details. First, he would not have any say in the new restaurant (Ex. 513); and second, his participation would have imperiled the enterprise. Again,

[37] For example, in Ex. 31, Ms. Aves-Elliott asked to "discreetly arrange a table" for a meeting between Mr. Caruso and Mr. Ramsay because she "[did] not want it to get back to Rowen." *See* Ex. 31. But ***that very same day*** Mr. Ramsay emailed Seibel that he would be meeting with Caruso. *See* Ex. 122. On January 30, 2014, the press learned (due to a leak by the Grove) that Mr. Ramsay might be planning a new restaurant for The Fat Cow space. *See* Ex. 268. The Ramsay team noted that the leak was "terrible." Contrary to Seibel's argument, the leak was not "terrible" because Seibel would learn about the new restaurant. Seibel already knew about a planned "new restaurant," as confirmed by Ziegler's email 10 days earlier. *See* Ex. 540. The leak was bad only because publicizing new restaurants prematurely often results in harmful consumer pre-judging. *See* AVW Depo., 172:10-173:11; TT, 389:17-21. *See also* Exs. 264, 266.

the landlord did not like Seibel's team. *See supra* note 2. Also, the parties could not get along, and exposing that to the landlord or others would have made a new restaurant even harder. Success in mitigating the lease liability and obtaining landlord approval depended upon having "one concept that is executed properly from the Gordon Ramsay brand," and not diluted by "another [likely contradictory] concept with Mr. Seibel." TT, 481:18-482:1, 1085:17-24.

6. Mr. Ramsay Had Good Reason Not to Meet Directly With Seibel.

Seibel also complains that in late 2013 Mr. Ramsay did not want to meet with him directly. But both Mr. Ramsay and Mr. Gillies explained why. Mr. Ramsay and his team by then distrusted Mr. Seibel. TT, 378:17-19 (the partners no longer had any mutual "respect" and had "departed and went our ways"); TT, 476: 22-23 (Mr. Ramsay felt that he "had been taken advantage of"). They also believed that Seibel used every The Fat Cow meeting as an excuse to leverage other unwanted deals. *See supra* § II.K.d. And they thought (and Mr. Thomas advised) that given all the history and problems, any partner discussions should be on the record and include lawyers and other team members. *Id.*; *see also* TT, 476:17-477:23 ("I was warned, severely warned from …my legal team, you got to stop seeing this individual in person"); TT 1056:21-1057:8. Mr. Ramsay expressly told Seibel in person that he wanted any discussions to be between the teams (TT, 379:3-19), but Seibel ignored that and continued to demand direct meetings. And there was no need or requirement for direct meetings. The parties' lawyers and other representatives could address any issues and were communicating regularly. TT, 477:9-23, 1053:6-9. *See also* SG Depo.,180:15-181:18,188:9-191:1, 205:20-207:7.

7. Seibel Knew the Name Change Was Not the Only Reason for Closure.

Seibel complains that Mr. Ramsay dishonestly said he was always willing to change the restaurant's name, while later asserting the name change as the reason for closure. But this is an empty argument. Mr. Ramsay ***had*** always been willing to change the name. Indeed, he had promised Mr. Caruso that he would change the name. *See* Ex. 24. And Mr. Ramsay testified that, but for all the other problems, he would have changed the name. TT, 474:12-15. But with all the other problems, Mr. Ramsay could not just change the name and continue operating. *See* TT, 392:13-17 ("[Y]ou cannot just label stuff and stick the name Gordon Ramsay above The Fat Cow with the unbelievable amount of negativity inside that restaurant. That wouldn't have made the restaurant any more successful by naming [it] The Fat Cow by Gordon Ramsay. Those issue[s] would not go away."); TT, 393:11-18 ("[T]here was no way I could say Gordon Ramsay Fat Cow with all those issues in there and expect to continue trading. We were reconceptualizing, shutting down this restaurant and starting all over again and paying Rowen Seibel's money back."); TT, 474:19-475:2; 425:7-10.

The need to change the name by April 1, 2014 was in fact driven by the terms of the Las Vacas Gordas agreement, which provided a timing deadline for closing. But the name issue was far from the only reason the restaurant had to close, and Seibel knew it. He was well aware of all the financial issues and other problems that continued to plague the restaurant, no matter its name. *See supra* §§ II.I.e & II.J.5. Seibel nevertheless disingenuously argues that various emails assert that the name change was the only reason for closure. They do nothing of the kind.[38] Moreover, even if emails had so asserted, that would not change the ***fact*** that other circumstances justified closure and that Seibel knew those circumstances.

[38]For example, Ramsay's public relations team agreed that the best approach to publically explaining closure was the simplest one—the need to stop using "The Fat Cow." *See* Ex. 264, 265, 347, 266. As Mr. Ramsay noted, the simple public explanation was to avoid "washing our dirty linen in public" and "offload[ing] all this negativity" to the public and the Grove. TT, 403:18-21. But contrary to what Seibel argues, the use of a simple public explanation does not mean changing the name was the only reason for closure. In fact, Ms. Wolfe, Mr. Ramsay's

8. Seibel Mischaracterizes Exhibits 122/218.

Seibel incorrectly argued that Mr. Ramsay's December 13, 2013 email (Exs. 122 & 218) misrepresented the reasons for closure because, in that email, Mr. Ramsay noted "The Fat Cow has to close as the name cannot be used because of Las Vacas Gordas." But that was not the only reason stated in the email, which lists other reasons for closure, including the "employee issues" and need for "mitigation." As Mr. Ramsay wrote, the "employee issues should have been drawn to our attention and dealt with properly as soon as they became apparent." Seibel argued this was a misrepresentation because the Ramsay team learned about the *Becerra* suit about as soon as the Seibel team. But the quoted reference was not to the *Becerra* suit,[39] but other labor matters—such as Spencer Nguyen—that were handled by Green, Seibel, and JRT and not promptly brought to the Ramsay team's attention or addressed properly. *See supra* § II.G.2. As stated in Ex. 122, ***those*** initially undisclosed matters "led to the escalation of the problem," i.e. the much more serious *Becerra* lawsuit. *See also supra* § II.G.2.c. And Mr. Ramsay accurately reported in Exhibit 122 that they had been unable to settle the *Becerra* lawsuit because "[y]ou have always been clear that you would not settle for anywhere close to the sums of money the mediator said would be required to deal with these claims." *See supra* § II.I.2.e.i.

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public relations person, wanted to have ready an answer in case anyone asked "the logical question" why not "just change the name?" *See* Ex. 265. She confirmed that, if pressed, she could offer other reasons; for example that the "class action … was an issue." Ex. 264. *See also* Ex. 347 (if asked by the press, "why don't you just change the name," the answer can be "[u]nfortunately its not as simple as just changing the name. It is more complicated (leases, concepts, quality of brand so name important, brand development").

[39] Although, even the *Becerra* issues may not have been timely disclosed. While the Ramsay team learned of the lawsuit at roughly the same time as Seibel, they were not timely informed about the precedent Private Attorney General Act letter. *See* Ex. 504 (Mr. Wenlcok stating that he was unable to find any evidence of the initial May 16 email purportedly from Green (and later forwarded by Green); Green's May 16 email has a different date format than subsequent emails, no time stamp, and internal differences in font style and size); TT, 1251:11-1252:19 (Mr. Wenlock testimony that he never received Green's purported May 16 email).

Moreover, as Mr. Ramsay testified, the email made multiple "points" about closure; not just a single point. TT, 391:20-22. Mr. Ramsay did not intend that email to list every reason for closure, and he knew that Seibel was already aware of the other reasons, such as the partner discord and financial ones. TT, [redacted] Given the parties' long history. Mr. Ramsay did not have to spell out every reason for closure.

M. Buy-Out Discussions Continued Until Ended by This Lawsuit.

The buy-out discussions continued until this lawsuit was filed. On January 20, 2014, Ziegler emailed revised proposed terms to Mr. Thomas. The proposal acknowledged the intended "opening of a new restaurant. . . by GR at the location of the Fat Cow at The Grove," and acknowledged that after the buy-out Mr. Ramsay would "make all decisions" concerning any restaurant. *See* Ex. 540. And on February 7, 16, and 18, and March 1, 2, and 6 of 2014, Ziegler and Mr. Thomas continued to exchange emails about details of the buy-out terms. *See* Ex. 154, 547, 300, and 550. Mr. Thomas notes in the March 1 email that "[t]ime is running short" and the parties need to close their agreement so that they can "follow up with the landlord early next week and resolve with him as the restaurant closure is fast approaching." *See* Ex. 300. On March 12, 2014, Ziegler responded that he had been "trying to reach a resolution ***which I still believe we can do***." *See* Ex. 553 (emphasis added). Buy-out discussions ended two weeks later only because Seibel filed this lawsuit.

N. April 1, 2014 Closure and Post-Closure Payments by Ramsay.

Although Seibel and Ziegler objected to closure, they presented no viable alternatives—no coherent plan, financial or otherwise, as to how The Fat Cow could continue operating. TT, 1047:19-23.[40] And on April 1, 2014, only two weeks later after the last buy-out email, The Fat Cow closed. Seibel sued the next day. That not only ended the buy-out discussions, it also ended any discussions with the landlord about a new restaurant. TT, 461:10-462:7; Ex. 239, 243; Benjamin Howell ("BH," counsel for the Grove) Depo., 53:17-55:17.

The lease liabilities remained. Ex. 245. On June 12, 2014, Mr. Ramsay paid $230,628.83 in rent under Lease, covering the months March through June of 2014 (in addition to the $52,220.50 he had paid for February rent). *See* Ex. 657; Joint Stip. ¶¶ 1, 2 On August 7, 2014, the Grove sued for additional rent, demanding damages "in excess of $6,000,000.00." Ex. 658, ¶ 16. Mr. Ramsay paid legal fees of $173,546.19 to defend, and $800,000 to settle, that litigation. *See* Joint Stip. ¶¶ 5, 8; Ex. 687. Mr. Ramsay, through counsel, repeatedly sought reimbursement from Seibel for these expenses under the indemnity agreement. Seibel repeatedly rejected the requests. *See* Exs. 243, 654, 655, 656, 657, 663 (indemnity requests and rejections).

The Ramsay team sold all remaining assets, and paid what bills they could. *See* AVW Depo., 189:10-190:5. But that left unpaid vendors. Ramsay was also personally sued by vendor LA Specialty for food products delivered to The Fat Cow. He paid $24,337.71 in attorneys' fees and $17,500 to settle that action. *See* Ex. 686; Joint Stip. ¶¶ 6, 7.

[40] Seibel argued that, before closing the restaurant, the Ramsay team hired a bar consultant at The Fat Cow's expense for the planned new restaurant. Not so. The consultant contract was for "The Fat Cow," not a new restaurant. *See* Ex. 551. Seibel makes much of an email sent by Mr. Gillies inquiring about the hiring because it was alleged in this lawsuit to be improper. However, when Mr. Gillies asked about the "bar consultant," Ms. Van Willigan explained that she was charged with continuing to run The Fat Cow restaurant as profitably as possible through its final close date, and hired the consultant for only that purpose. *See* Ex. 353; AVW Depo., 219:22-220:17; 222:12-18. After investigating, the only concerns of Mr. Gillies and Mr. Wenlock were that she had hired a consultant without approval and when the Ramsay group had internal experts who could instead have served that function. TT, 1253:8-1255:3; SG Depo., 222:21-223:20.

Mr. Ramsay also paid to defend the ongoing Becerra lawsuit, incurring $141,970.86 in fees to do so (not including the $40,000 he had previously advanced to Littler). *See* Joint Stip. ¶¶ 3-4. Mr. Seibel paid no fees and did not defend. Ultimately, Mr. Ramsay negotiated a settlement and release for $140,000. Ex. 661, pp. 17 et. seq. (Becerra settlement agreement). Mr. Ramsay's counsel was able to negotiate this reduced amount only because The Fat Cow had no money and was no longer operating.[41] Seibel and Mr. Ramsay each paid half that amount.

Mr. Ramsay also paid fees to Mr. Yoo's company, SB Suite: $5,500 for bookkeeping services on September 11, 2015, and $8,500 on September 3, 2014. Joint Stip. ¶ 9, Ex. 692.

The "Hell's Kitchen" program could no longer feature "The Fat Cow" because of the needed name change, as it could have led to a further claim from Las Vacas Gordas. TT, 437:16-438:2; EI Depo., 51:6-13. There was also concern that the television show could not feature a restaurant which was the subject of a widely publicized wage and hour class action. Accordingly, Mr. Ramsay negotiated that the winning chef would be offered a position in another restaurant, GR Pub in Las Vegas (in which Seibel also had an interest). TT, 473:15-24, 303:21-304:5. Mr. Ramsay had to personally re-record, on his own time and at his own expense, portions of the show mentioning "The Fat Cow." *See* Exs. 387; 389.

[41] *See* Ex. 661, ¶¶ 19-21 (class counsel declaration explaining that the closure was a key factor in a low settlement amount: "Defendants produced documents showing the Fat Cow restaurant had suffered steady financial losses in 2012, 2013, and the first quarter of 2014…. [T]he restaurant was no longer operating as of March 27, 2014, and … was carrying substantial debts and did not have the resources to satisfy all of its liabilities… [T]he risk that Defendants would be unable to pay a verdict outweighed the substantial reduction in the settlement value of the dispute. In the end… I decided it was [better] to get some tangible recovery rather than a pyrrhic victory months or years down the road."). *See also* Ex. 544 (Littler noting that the WARN notice of closure "has clearly given [Plaintiff's counsel] enough pause" and had resulted in a "very substantial move" in reducing the settlement offer).

O. Post-Lawsuit Discovery of Secret Kickbacks, Fat Cow Egypt, the Wexford Capital Transaction, and Seibel's Unsuitability.

Mr. Ramsay learned about other Seibel misconduct only after closure.

1. Seibel's Secret Kickbacks and Dishonest Testimony.

Green's internal October 15, 2012 memo of "Fat Cow Must's" announced the intent to extract a "Minimum Rebate" from all the Fat Cow suppliers, in part using the leverage of Mr. Ramsay's Las Vegas restaurants to do so. *See* Ex. 465. As explained below, Seibel had no intent to disclose those kickbacks to or share them with Mr. Ramsay.

a. Bank of America and Vero Water Kickbacks.

The kickbacks included amounts paid by Bank of America for using its merchant credit card services for The Fat Cow. On March 3, 2013, Seibel signed an agreement with Bank of America. *See* Ex. 485, Schedule A; TT, 106:5-108:5, 679:2-680:19, 555:19-557:18. The other contracting party was BR 23 Ventures, an entity owned by Seibel. *Id.* Bank of America promised to pay (and did pay) BR 23 a 10% rebate of monies paid by merchants to Bank of America for The Fat Cow's use of its credit card services. *Id.* *See also* Exs. 298; 528 (deposits or invoices about BR 23 rebates); TT, 577:7-17 (Green testimony regarding this arrangement).

Seibel also obtained kickbacks on amounts paid by Fat Cow on purchases from Vero Water, a company that supplied bottled water used at The Fat Cow. TT,106:5-108:5; *see also* Exs. 542, 543, 548, 549 (documents reflecting Vero Water rebates); TT, 557:19-559:22.

b. Other Attempted Kickbacks.

Seibel and Green also attempted to also get kickbacks from other vendors for The Fat Cow sales, including brewers Innis & Gunn, Moa Beer, and Newcastle. In each case, Green intended to exploit the Ramsay name in order to obtain the kickback. *See, e.g.*, Ex. 492; TT, 611:20-612:3 (May 12, 2013 email from Green to Seibel discussing a "[L]a [F]rieda style [rebate] deal" in exchange for offering Innes & Gunn "at the Cow"); Ex. 498 (May 21, 2012 Green email chain with Innes & Gunn and requesting an incentive equal to "% of sales monthly of Innis & Gunn at our locations" and noting it is "Mr. Ramsay's favorite beer"); Ex. 502 (Green introducing Innes & Gunn to The Fat Cow manager Ryan Stock to arrange sales of Innes & Gunn there); Ex. 533 (Dec. 13, 2013 Green email to Danielle Abraham of BR23 providing draft email to send to Newcastle requesting 15% rebates on sales at the Fat Cow among other restaurants, and instructing to "play up the UK connection between GR and Newcastle," noting "[s]hould the vendor try and play hardball the threat is to pull their product from our stores altogether."); Ex. 527 (Oct. 25, 2013 email from Green to Moa Beer requesting 15% rebate to BR23 on sales at The Fat Cow).

c. Dishonest Kickback Testimony

Seibel and Green gave dishonest testimony about these kickbacks. When asked at deposition, Seibel absolutely denied knowing about any Bank of America rebates. *See* Seibel Depo: 683:10-13; TT, 670:13-671:3. At deposition, Seibel also denied knowing anything about any Vero Water rebates. *See* Seibel Depo. 675:8-24; TT, 671:18-672:13, 677:2-5. But at trial, Seibel utterly contradicted his deposition testimony. He admitted that he knew about the Bank of America and Vero Water rebates that he had concealed at deposition. TT, 106:5-108:5. Indeed, at trial, he admitting ***signing*** the Bank of American agreement and having an ***in-person meeting*** with Vero Water about the kickbacks. TT, 557:19-559:8.

At trial, Seibel then double-downed on his untruthful testimony. Seibel admitted that he was obligated to remit any of these kickbacks to the Fat Cow. TT, 676, 11-14. He would be breaching his fiduciary duties and the applicable contracts if he did not. Attempting to avoid that conclusion, Seibel claimed that he had disclosed the kickbacks to Mr. Ramsay and shared their proceeds with Mr. Ramsay in cash. TT, 107:19-109:3. The story is incredible to say the least. Not a single kickback email is copied to Mr. Ramsay or his team. There is no written evidence of their disclosure of any kind. And the story about paying Mr. Ramsay in cash falls apart. Neither Green nor Seibel could remember any significant or consistent details about the alleged cash transfers—not the numbers of transfers, their dates, any witnesses to them, or their amounts. TT, 673:3-678:6, 560:15-561:2. 578:7-580:6.

When pressed, Seibel finally offered that he handed Ramsay cash during the 2013 Superbowl. TT, 673:10-676:10. But when confronted with the fact that the February Superbowl occurred ***before*** he received any kickbacks, Seibel backtracked and said "I didn't remember the date." TT, 681:2-4. Indeed, Seibel admitted that, by Fall of 2013 when Seibel first received kickbacks, Mr. Ramsay was by then refusing to meet with Seibel in person. This completely undermined Seibel's claim that he gave Ramsay cash in person. TT, 121:3-122:10.

Seibel also claimed that Mr. Ramsay just took the money and never asked what it was for or how it was calculated, a claim unbelievable on its face. TT, 673:3-675: 12. Moreover, the payments are recorded nowhere in the Fat Cow books. Mr. Ramsay vehemently—and credibly—denies ever knowing about the kickbacks or ever receiving any share of them, and states the obvious: He would not engage in such off-the-books cash transactions. TT, 417:21-418:16, 486:4-489:5. Plainly, Seibel again testified dishonestly.

2. The Secret Fat Cow Egypt Efforts and More Dishonest Testimony.

Green and Seibel tried secretly to open The Fat Cow restaurants in the Middle East while excluding Mr. Ramsay. Numerous emails, spanning May to October 2013, document the efforts, confirm in-person New York City meetings between Green and the Middle East investors, and show an intent to exploit Mr. Ramsay's name. *See* Exs. 278, 496, 497, 516 (investors noting:

"Gordon Ramsay is very famous among our target market, so associating Fat Cow's name with him will reflect tremendously on sales"); 522, 523, 524, 526, and 710. Seibel made significant progress on deal terms. *See* Ex. 526 (proposing a $100,000 location fee, plus a 6 to 8% royalty on gross restaurant receipts; investor responds: "We agree to your proposed fees … and would like to proceed right away" to prepare legal documents).

No one told Mr. Ramsay's team about any of this. The emails are exclusively between Green, Seibel, and the Middle East investors. Green claims they orally informed the Ramsay team about the opportunities, but offered no details of time, place, or witnesses to the alleged oral disclosures. TT, 634:18-636:11; 637:13-638:4. The testimony was not credible. Mr. Ramsay vehemently denied any knowledge of (or interest in) the Middle East proposals, and was "shocked" when he learned of them through discovery in this case. TT, 489:6-25. Mr. Gillies also did not know about them. *See* SG Depo., 100:8-102:9. Moreover, the Middle East discussions followed months after Gillies' March 28, 2013 email, Ex. 711, reminding Seibel to immediately tell the Ramsay team in writing about any proposed deals. Seibel and Green ignored the directive. TT, 642:3-9 (Green admitting he failed to comply with Gillies' request).

In fact, Seibel not only concealed the Middle East proposals, but exhorted Green to quickly close a Middle East deal (*see, e.g.,* Ex. 497 ("sell …intl rights"); Ex. 523 ("extract a deal")) ***while expressly admitting an intent to exclude Mr. Ramsay.*** *See* Ex. 522 (Green to investor: "It does not appear we will be able to proceed with a Gordon affiliation with the Fat Cow" in the Middle East; but negotiations continued thereafter).

3. Wexford Capital: The Attempt to Take Over Gordon Ramsay Holdings.

As perhaps the ultimate effort to improperly exploit Mr. Ramsay and his restaurants, Seibel and Green secretly plotted to take over Gordon Ramsay Holdings (a Ramsay-owned umbrella entity (*see* TT, 355:11-15)) and to oust Mr. Gilles and Mr. Wenlock. On June 10, 2013, Green and Seibel proposed a term sheet for Wexford Capital, a private equity company involving Joe Jacobs, to invest in RAS Worldwide, a company that would be run by Seibel, Green, JRT, and Ziegler, and which would hold all rights in the Gordon Ramsay restaurants including The Fat Cow. *See* Ex. 712. Green prepared an internal email about the investment efforts and noted that the goals included as a "1st action majority controlling ownership of GRH [Gordon Ramsay Holdings] -- kick out Gillies, Wenlock." *See* Ex. 291; TT, 616:14-617:24, 624:3-5. This shows not only the depth of Seibel's dishonest plans but the scope of the parties' distrust and disagreement.

4. Seibel's Unsuitability and the Risk to Ramsay.

Nevada and other states have "suitability" rules barring felons or dishonest persons from doing casino business. TT, 1469:1-1470:17. Caesars adopts particular provisions in its contracts to enforce those rules. TT, 1470:18-25. The contracts between Ramsay and Caesars contain such provisions, which restrict Ramsay's associations with felons, even in businesses unrelated to Caesars or a casino. *See, e.g.*, Ex. 476, ¶ 11.2.[42] Of course, Seibel was convicted of felony tax

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[42] In particular, for example, under the terms of the GR Burgr/Caesars agreement, Seibel as a member and manager of GR Burgr LLC, and as a member and manager of the Fat Cow entities, is a "GR Associate." *See* Ex. 476 ¶ 2.2. Fat Cow LLC, FCLA, LP and Seibel through such entities are also "GR Associates" because: (a) the entities are "Affiliates" of Ramsay; and (b) "GR Associates" include such "Affiliates" and their "agents [and] representatives," like Seibel. *See* Ex. 476, pp 1-2 & ¶ 4.2. The GR Burgr Agreement states that if Caesars determines, in its "sole and exclusive judgment, that ***any GR Associate*** is an Unsuitable Person, then … Ramsay … shall terminate ***any relationship*** with the Person [i.e. Seibel] who is the source of such issue," and failing such termination, Caesars "shall have the right to terminate this Agreement ***and its relationship with Gordon Ramsay*** and GRB." Ex. 476, ¶ 11.2 (emphasis added). On September 2, 2016, Caesars confirmed that Seibel is a "GR Associate" and an "Unsuitable Person," triggering the quoted provisions. *See* Ex. 666. Seibel argued that Ex. 666 merely demanded disassociation from GR Burgr, but that was because GR Burgr was the ***only*** association between Mr. Ramsay and Seibel at the time. The other restaurants were not operated by them together, but rather through separate contracts, and The Fat Cow was no longer operating.

evasion on November 22, 2016. *See* Ex. 676.[43] That conviction occurred after The Fat Cow had already shut, so Caesars had no occasion to demand that Ramsay disassociate from Seibel in The Fat Cow. However, Caesars' in-house counsel testified that Caesars would have looked very carefully at the issue, and (as explained in the preceding footnote) the language of the contract would have restricted Ramsay from further affiliation with Seibel even at The Fat Cow if then still operating. *See* TT, 1472:15-22, 1476:17-21, 1479:3-6, 1480:3-6, 1482:14-21.

III. REMAINING CLAIMS

The following claims remain: (1) claims by Mr. Ramsay and GRUS to dissolve FCLA, LP and The Fat Cow; (2) derivative claims on behalf of FCLA, LP and Fat Cow LLC, brought by Seibel and against Mr. Ramsay and GRUS, for alleged breach of contract and fiduciary duty in closing The Fat Cow; and (3) derivative claims on behalf of FCLA, LP, brought by Mr. Ramsay and GRUS, against Seibel for breach of contract and fiduciary duty in taking kickbacks, improperly converting funds, and the other misconduct specified above; and (4) Mr. Ramsay's claim for indemnification against Seibel.

IV. LEGAL ARGUMENT

A. <u>Dissolution Must Be Ordered</u>.

1. Standards for Judicial Dissolution.

Under Section 17-802 of the Delaware Revised Uniform Limited Partnership Act ("DRULPA"), dissolution may be ordered "whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement." The test in determining whether to dissolve a partnership pursuant to § 17-802 is "whether it is reasonably practicable to carry on

[43] Seibel contends that Exhibit 676, Seibel's judgment of conviction, should be excluded. But the Court agreed to admit the fact of the conviction, at the very least, in relation to the issue of Seibel's suitability. TT, 1477:25-1478:4; *see also* TT, 784:23-786:7.

the business of a limited partnership, and not whether it is impossible." *In re Silver Leaf, L.L.C.*, No. Civ. 20611, 2005 WL 2045641, at *10 n.3 (Del. Ch. Aug. 18, 2005). Once the partnership's "business purpose" cannot reasonably be carried on, dissolution is warranted. *See*, *e.g.*, *In Re: GR Burgr LLC*, No. Civ. 12825–VCS, 2017 WL 3669511, *5 (Del. Ch., Aug. 25, 2017) (dissolution warranted where owners were deadlocked and the agreement required unanimous consent but provided "no means of navigating around the deadlock")[44]; *PC Tower Ctr., Inc. v. Tower Ctr. Dev. Assocs. Ltd. P'ship*, No. Civ. 10788, 1989 WL 63901, at *5 (Del. Ch. June 8, 1989) (partnership dissolved where "business can only be operated at a loss[,]" and the limited partners were "in a position of irreconcilable conflict[,]" and "at a deadlock"); *Fisk Ventures, LLC v. Segal*, No. Civ. A. 3017-CC, 2009 WL 73957, at *4 (Del. Ch. Jan. 13, 2009), aff'd, 984 A.2d 124 (Del. 2009) (ordering dissolution because "(1) the members' vote is deadlocked ...; (2) the operating agreement gives no means of navigating around the deadlock; and (3) due to the financial condition of the company, there is effectively no business to operate"); *Huff Energy Fund, L.P. v. Gershen*, No. Civ. 11116-VCS, 2016 WL 5462958, *8 (Del. Ch. Sep. 26, 2016) (unanimity requirement does not preclude dissolution).

California Corporations Code section 17707.03(b) similarly permits a court to decree the dissolution of a California LLC, like Fat Cow LLC, whenever any of the following events occur:

- "It is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement."
- "Dissolution is reasonably necessary for the protection of the rights or interests of the complaining members."

[44] As the Court knows, *In Re: GR Burgr* was between Mr. Ramsay and Seibel and resulted in an order dissolving GR Burgr LLC. All the grounds specified for dissolution there establish, under doctrines of collateral estoppel and res judicata, the entitlement to dissolution here. *See* NYSCEF Doc. No. 648.

- "The business of the limited liability company has been abandoned."
- "The management of the limited liability company is deadlocked or subject to internal dissension."
- "Those in control of the limited liability company have been guilty of, or have knowingly countenanced, persistent and pervasive fraud, mismanagement, or abuse of authority."

2. The Fat Cow Entities Should Be Dissolved.

Judicial dissolution is clearly warranted under applicable legal standards, on several grounds. That is because, as discussed above:

- The restaurant was insolvent, with large liabilities (class action and rebranding) certain to accrue. The business could not continue to operate without cash infusions that the parties were unwilling to provide. *See supra* § II.J.
- The owners were at a deadlock, and the operating agreements gave no means of navigating around that deadlock. *See supra* §§ II.F, II.H, II.K & II.L;
- Seibel's bad acts had caused negative publicity for Mr. Ramsay, threatened to severely affect his rights (including his ownership in the Las Vegas restaurants and the ability to exploit his name as he sought fit), and dissolution was necessary to protect his rights. *See supra* §§ II.G.1, II.G.2, II.G.3 & II.K; and
- Seibel had engaged in persistent mismanagement, abuse of authority, and fraudulent and dishonest conduct. Mr. Ramsay could not be forced to continue in business with such a person, and was entitled to protection. *See supra* § II.G.1, II.G.2, II.K & II.O.

3. Process for Winding Up.

Upon dissolution, DRULPA § 17–804(a) provides that the "assets" of a limited partnership shall be distributed: (1) to creditors; (2) to partners and former partners in satisfaction of liabilities for distributions; and finally (3) "to partners first for the return of their contributions and second respecting their partnership interests." In addition to paying all claims and obligations (including contingent and conditional claims), the partnership must make provisions sufficient to compensate for any pending claim or claims unknown to the partnership. "In the event there are insufficient assets to pay or make reasonable provision to pay a limited partnership's obligations at the time of dissolution, § 17–804(b) requires compliance with the priority scheme detailed in § 17–804(a)." *Techmer Accel Holdings, LLC v. Amer*, No. Civ. 4905-VCN, 2010 WL 5564043, at *7 (Del. Ch. Dec. 29, 2010).[45]

Critically, the winding up procedure in DRULPA "precludes" consideration of a "going concern" valuation, such as the one Seibel offers here.[46] *Active Asset Recovery, Inc. v. Real Est. Asset Recovery Servs., Inc.*, No. Civ. 15478, 1999 WL 743479, at *20 n.18 (Del. Ch. Sept. 10, 1999). "Under the DRULPA, the court must determine the value of the limited partnership's assets and distribute them to the partners, not provide the limited partners with the value of their proportionate ownership interests ... as a going concern." *Id.*[47]

4. There Are No Remaining Assets to Wind Up, and Seibel Is Not Entitled to Any Payout.

As discussed *supra*, at the time the restaurant closed (and indeed long before), the liabilities of The Fat Cow exceeded its assets by a substantial margin. *Supra* § II.J.2. The assets were sold off and used to pay liabilities, and the Ramsay parties were forced to cover approximately $1.6 million in additional liabilities on behalf of The Fat Cow. *Supra* § II.N.

[45] As the Fat Cow LLC had no assets other than a 2% interest in the FCLA LP, California standards for winding up are irrelevant. Regardless, like Delaware, California law requires "that all the known debts and liabilities of a limited liability company" be "paid or adequately provided for" before any distributions are made to members. Cal. Corp. Code § 17707.05.
[46] *See* Bautista Rep., p. 1 ("Our estimate of value is based on a going concern premise.").
[47] As the court noted in *Active Asset Recovery*, the Delaware legislature chose not to make DRULPA § 17–804 an appraisal statute. *Id.*

Because the company's assets were fully exhausted in paying creditors, no assets remained to distribute to partners, and no payments are owed to Seibel upon winding up.[48]

Of course, dissolution and winding up could have been avoided if there had been a buy-out of one partner's interests. This is exactly what Ramsay was attempting, and intended, to do. Those efforts, like his other mitigation efforts, were thwarted by Seibel's lawsuit.

B. Defendants Are Not Liable For Breach of Contract.

Seibel failed to prove his derivative claims alleging breach of the FLCA, LP Agreement and Fat Cow LLC Agreement for closing the restaurant without unanimous consent.[49]

1. The Doctrine of Impossibility/Impracticability Excused Performance Because the Parties Could Not Agree or Be Forced to Agree on Continued Operations.

Both Delaware and California apply the Restatement doctrine of impossibility/ impracticability. Under that doctrine, a party's contractual obligation will be discharged: "Where, after a contract is made, [the] party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." *J & G Associates v. Ritz Camera Centers, Inc.*, No. Civ. No. 9811, 1989 WL 115216, at *3 (Del. Ch. Oct. 3, 1989) (quoting Restatement 2d of Contracts § 261); *see also Maudlin v. Pac. Decision Sciences Corp.*, 40 Cal. Rptr. 3d 724, 735 (Cal. Ct. App. 2006)) (quoting and adopting the same Restatement provision). Like the standard for dissolution, "[i]mpracticability does not require literal impossibility but applies when performance would require excessive and unreasonable expense." *Habitat Trust for Wildlife, Inc. v. City of Rancho Cucamonga,*, 96 Cal. Rptr. 3d 813, 843 (2009); *see Superior Ct. of*

[48] However, as discussed *infra* § IV.F, Mr. Ramsay is entitled to indemnification from Seibel for having paid $1.6 million out of pocket to satisfy the liabilities of The Fat Cow.
[49] His direct claim for breach of contract was dismissed. NYSCEF Doc. No. 540, pp. 34-35.

Alameda Cty. v. Cty. of Alameda, 65 Cal. App. 5th 838, 856 (2021) (same); *Vernon v. Los Angeles*, 290 P.2d 841, 847 (Cal. 1955) (performance excused where unreasonably expensive); *J & G Associates*, 1989 WL 115216, at *3 (Delaware courts have abandoned the more restrictive defense of "impossibility" in favor of the doctrine of "commercial impracticability").

As discussed *supra* Section IV.A dissolution was warranted because continuing operations would have been impracticable. For the same reasons, it was legally impracticable to require the Ramsay parties to consent to keep the restaurant open under the circumstances, and the decision to close was not a breach of the unanimity provision.

More specifically, the agreements' unanimous consent requirement, without a deadlock-breaking provision, ***assumed that Seibel and Mr. Ramsay would agree on all decisions***. Indeed the parties considered adopting, and then failed to adopt, any deadlock-breaking provisions. *See supra* § II.F. The parties thus went into the agreements ***knowing*** that, if they did not agree, there was no way forward. But the express assumption of unanimous agreement did not hold. Seibel and Mr. Ramsay disagreed on virtually all decisions—menus and concept, personnel, expenses, treatment of vendors, litigation strategies, and whether to pay bills on time. Ultimately and most fundamentally, the parties could not agree on the most basic and important decision: Whether to close the restaurant to mitigate FCLA's losses or continue operating.

Because the LLC Agreement had no provision for breaking deadlocks, and neither party could force the other to change its mind, Mr. Ramsay and Seibel were unable to comply with the unanimity provision. This irreconcilable stalemate rendered the unanimous consent provision impracticable to perform and thus unenforceable. *See Advanced 23, LLC v Chambers House Partners, LLC*, No. 650025/2016, 2017 WL 6539282, at *4 (Sup. Ct. N.Y. Cty. Dec. 21, 2017) (it was "no longer reasonably practicable for [LLC] to continue functioning in accordance with its Operating Agreement" where the Agreement "requires the unanimous consent or the majority vote of either its Members or Co-Managers," but "the relationship between the parties has degraded to such an extent that they are no longer on speaking terms . . . and they have been unable to cooperate to make business decisions").

At minimum, the decision to close The Fat Cow could no more be a breach than Seibel's decision to the contrary—i.e., to insist on remaining open. Given the mutuality of the "unanimous consent" provision, the failure to agree on closure was no more Mr. Ramsay's fault than Seibel's. Seibel had no contractual right to force Mr. Ramsay to continue operating against his will, particularly not with a partner who eschewed Ramsay's operational values, causing Ramsay reputational harm, substantial business losses, and personal financial risk. That is particularly true because continued operations depended, as both a practical matter and by virtue of the Lease provision, on Mr. Ramsay's creative and operational efforts. Seibel could not make Mr. Ramsay exercise those efforts for his alleged benefit. And he certainly could not make Mr. Ramsay do so for 15 continuous years, as Seibel's damage claims assume.

Seibel has argued that the "status quo" required continuing restaurant operations. But nothing in the agreements provides that if the parties do not agree, the "status quo" continues. Seibel cannot now rewrite the contracts to adopt a deadlock provision that the parties declined to incorporate. *Murfey v. WHC Ventures, LLC*, 236 A.3d 337, 355 (Del. 2020) ("courts cannot rewrite contracts or supply omitted provisions").

In any event, even if the agreements required that the parties maintain the "status quo," such a provision would be undefined and unenforceable. Operating a restaurant is no simple task; it is complex and difficult, and comes with a very high failure rate. Gordon Rpt., ¶ 10; Dragon Rpt., ¶ 31. Green aptly noted that a restaurant is like a symphony: "all of the pieces in the orchestra have to kind of be working together and if one piece of the orchestra is not working correctly, then the symphony -- the music is not as melodious." TT, 512:9-17. Continuing operations require a variety of daily decisions: about employees, menus, pricing, and dozens of others. Above all, a restaurant needs funds. And there is simply no dispute here that to continue operating, The Fat Cow needed a substantial cash infusion, and that neither partner could be compelled to contribute capital or agree to seek outside funding. *Supra* §§ II.F, II.J.2 & II.J.10; *infra* §§ IV.E.3.j & IV.E.4.c. Thus, even if the "status quo" meant the continuing operations of the restaurant, nothing in the agreements or the law could compel the Ramsay parties to fund and continue operating the restaurant (let alone for 15 more years) in light of its financial position and the deadlock among the partners.

2. The Doctrine of Frustration Excused Performance Because the Parties Could Not Operate a First Class Restaurant.

Even if the agreements had not expressly assumed a condition that did not occur—the ability to reach unanimous decisions—the financial and operating impediments alone would excuse continuing operations. The doctrine of discharge by supervening frustration, closely allied to impracticability/impossibility, is set forth in the Restatement (Second) of Contracts. It discharges a contracting party's obligations when his "principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." *Akorn, Inc. v. Fresenius Kabi AG*, No. 2018 Civ. 2018-0300-JTL, 2018 WL 4719347, at *57 (Del. Ch. Oct. 1, 2018), aff'd, 198 A.3d 724 (Del. 2018); Restatement (Second) of Contracts § 265; *Habitat Trust*, 96 Cal. Rptr. 3d at 843.

Here, the purpose of the agreements was to operate a "first class" and "upscale" successful restaurant. *See supra* §§ II.C & II.F. The parties expected and hoped to meet that purpose, using the capital initially invested. They declined to provide for any obligation to

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contribute additional capital. But that purpose became unexpectedly frustrated, and was excused, by the variety of serious operational and financial impediments that the restaurant encountered as recounted above.

3. Seibel Failed to Perform.

Under Delaware and California law, a party pursuing a breach of contract claim must show that it performed pursuant to the contract. *Oasis West Realty, LLC v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011); *VLIW Technology, LLC v. Hewlett-Packard Co.*, 840 A2d 606, 612 (Del 2003). On summary judgment, Justice Edmead found that Defendants had raised a triable issue of fact as to whether Seibel's conduct precluded his claim for breach. NYSCEF Doc. No. 540, pp. 15-16. At trial, Seibel failed to prove that he performed, and indeed the evidence shows that, in multiple ways, Seibel breached or otherwise failed to perform his obligations under the Agreements before any alleged breach by Ramsay. Specifically:

- Seibel unilaterally took an unreasonably hard line with contractors and vendors, including by delaying and/or refusing to pay for work performed, leading to liens, lawsuits, problems with the landlord, and bad press for The Fat Cow and Ramsay. *Supra* § II.G.1.
- Seibel unilaterally took an unreasonably hard line with employees, including by refusing to pay employees for their work, resulting in lawsuits and bad press for The Fat Cow and Ramsay. *Supra* § II.G.2.
- Seibel unilaterally withdrew $80,000 from The Fat Cow, without consent or knowledge of the Ramsay parties, and when the restaurant was in dire need of cash. *Supra* § II.J.7.
- Seibel unilaterally took secret kickbacks from Fat Cow vendors, and failed to account for or distribute the cash to The Fat Cow or Ramsay. *Supra* § II.O.1.

- Seibel unilaterally engaged in detailed discussions with investors about establishing The Fat Cow franchise in the Middle East, without the authorization or consent of the Ramsay Parties and otherwise attempted to exploit The Fat Cow concept impermissibly. *Supra* § II.O.2.

In addition, Seibel's conduct described above interfered with the ability of The Fat Cow to operate a first class" and "upscale" restaurant, as required by contract. Seibel's breaches, on their own, preclude his contract claims.

4. Mr. Ramsay Could Not Be Individually Liable.

Even if there had been any breaches (and there are not), Ramsay could not be individually liable for breaching the FCLA, LP Agreement because he is not a party to it. "[O]nly parties to a contract may be liable for breach of that contract." *Wenske v. Blue Bell Creameries, Inc.*, No. 2018 Civ. 0699-JRS, 2018 WL 5994971, at *3 (Del. Ch. Nov. 13, 2018); *accord Wallace ex rel. Cencom Cable Income Partners II, Inc., L.P. v. Wood*, 752 A.2d 1175, 1180 (Del. Ch. 1999). GRUS is the only Ramsay-related party to the FCLA, LP contract and so alone could be liable under it. *See supra* § II.F.

Seibel has argued that, because Mr. Ramsay signed the Fat Cow LLC agreement as a manager, he was a party to it. Mr. Ramsay disagrees, but it does not matter because there are no recoverable damages for breach of that agreement. Seibel seeks to recover profits allegedly lost by FCLA, LP, The Fat Cow's owner. The Fat Cow LLC, which is merely one owner of FCLA LP, has no standing to sue for FCLA LP's alleged lost profits. Only FCLA, LP may recover those profits. *See Sole Energy Co. v. Petrominerals Corp.*, 26 Cal. Rptr. 3d 798, 813 (Cal. Ct. App. 2005) ("When corporate lost profits are sought as damages, the gravamen of the complaint is injury to the corporation, not injury to an individual shareholder"; a claim is must be asserted on behalf of the corporation which lost profits, not by the entity's shareholder or owner).[50]

5. GRUS and Ramsay Are "Prevailing Parties" and Entitled to Fees.

Because they are the "prevailing part[ies]" on Seibel's claim, GRUS and Ramsay are "entitled ... to recover all costs of [this] judicial action, including reasonable attorneys' fees ... from [Seibel]." Ex. 8, ¶ 24; *see also Comrie v. Enterasys Networks, Inc.*, No. Civ. 19254, 2004 WL 936505, at *2 (Del. Ch. Apr. 27, 2004) (party that "predominated in litigation" is the "prevailing party" under Delaware law).

C. <u>Defendants Are Not Liable for Breach of Fiduciary Duty</u>.

Seibel also failed to prove his derivative claim for breach of fiduciary duty.

1. The Claim Is Barred as Duplicative of the Contract Claim.

"[W]hen the same facts that underlie a plaintiff's contract claim also form the basis of plaintiff's fiduciary claim, the fiduciary claim is precluded." *Kagan v. HMC-New York, Inc.*, 94 A.D.3d 67, 72 (1st Dep't 2012); *Grunstein v. Silva*, No. Civ. 3932-VCN, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009) (cleaned up) ("a plaintiff may not 'bootstrap' a breach of fiduciary duty claim into a breach of contract claim merely by restating the breach of contract claim as a breach of fiduciary duty"). Since Seibel's claim for breach of fiduciary duty in support of his claim for damages is based on the same alleged conduct as the breach of contract claim—closure of the restaurant—it fails.

[50] The reason is obvious. Lost profits must first be returned to the entity entitled to them, in this case FCLA, LP. The profits might then eventually be distributed by that entity to its owners, but only ***after*** satisfying creditors and others with superior rights. *See, e.g.*, *Sole Energy*, 26 Cal. Rptr. 3d at 810 ("Shareholders do not own and have no right to receive corporate profits.")

2. The Decision to Close and Efforts to Open a New Restaurant Did Not Breach any Duty.

Under Delaware law applicable to FCLA:

> The business judgment rule generally protects the actions of general partners, affording them a presumption that they acted on an informed basis and in the honest belief that they acted in the best interests of the partnership and the limited partners.

Zoren v. Genesis Energy, L.P., 836 A.2d 521, 528 (Del. Ch. 2003) (citation omitted). The plaintiff bears "the burden of rebutting this presumption." *Id.* If the plaintiff fails to rebut the presumption, the business judgment rule protects the challenged decisions, "so long as they can be attributed to any rational business purpose." *Huff*, 2016 WL 5462958, at *11 (citations omitted). California law is the same. *See Berg & Berg Enters., LLC v. Boyle*, 100 Cal. Rptr. 3d 875, 899 (Cal. Ct. App. 2009).

Seibel cannot rebut the business judgment presumption. First, the Ramsay parties did not benefit from the closure of the restaurant, or their attempt to open a new restaurant. To the contrary, they paid approximately $1.6 million to settle the affairs of The Fat Cow, with no contribution from Seibel, after closure. The evidence also showed that Ramsay's efforts were for the purpose of mitigating losses to both partners.

Second, in light of the many issues plaguing The Fat Cow, the decision to close can certainly "be attributed to [a] rational business purpose." *Huff*, 2016 WL 5462958, at *11. Even if these decisions were subject to the more heightened "entire fairness review" that applies to interested transactions, there would still be no liability. "A fiduciary can satisfy the entire fairness standard in a transaction where an interest holder receives nothing if the fiduciary proves that there was no future for the business and no better alternative for the [interest] holders." *Cancan Dev., LLC v. Manno*, No. Civ. 6429-VCL, 2015 WL 3400789, at *26-27 (Del. Ch. May

27, 2015), *aff'd*, 132 A.3d 750 (Del. 2016) (citation omitted) (no fiduciary breach in selling company assets to defendant's own entity where the company "had no funding sources and no alternatives" and "[i]ts equity had no value"); *see also Berg & Berg*, 100 Cal. Rptr. 3d at 899 (no fiduciary breach where there were no "viable alternate sources of financing or facts that made the [the challenged decision] irrational, unsound, or unreasonable"). Here, too, there was no viable alternative for The Fat Cow.

D. Both Claims Are Barred by Unclean Hands Doctrine.

Seibel's claims would be barred in any event because of Seibel's unclean hands. That equitable doctrine applies, even to Seibel's breach of contract claim, because all his claims are derivative, and "derivative actions have long been recognized in New York as equitable proceedings." *Horizon Asset Mgmt., LLC v. Duffy*, 106 A.D.3d 594, 595 (1st Dep't 2013); *Tigani v. Director*, No. Civ. N19C-10-014-MMJ-CCLD, 2020 WL 5237278, at *3 (Del. Super. Ct. Sept. 2, 2020), aff'd, 253 A.3d 1049 (Del. 2021) (same under Delaware law); *Rosenfeld v. Zimmer*, 254 P.2d 137 (Cal. Dist. Ct. App. 1953) (same under California law). And "[u]nclean hands is a defense to equitable derivative claims." *Forefront Partners LLC v. Omanoff*, No. 650973/2017, 2020 WL 863982, at *2 n.7 (Sup. Ct., N.Y. Cty. Feb. 21, 2020) (citing *In re Shawe & Elting LLC*, No. Civ. 10449-CB, 2015 WL 4874733, at *36 (Del Ch Aug. 13, 2015)).

Under unclean hands doctrine, "a litigant who engages in reprehensible conduct in relation to the matter in controversy ... forfeits his right to have the court hear his claim, regardless of its merit." *In re Shawe & Elting LLC*, 2015 WL 4874733, at *36; *see also Camp v. Jeffer, Mangels, Butler & Marmaro*, 35 Cal. App. 4th 620, 638 (Cal. Ct. App. 1995); *Gutman v. Gutman*, 819 N.Y.S.2d 771, 772 (2d Dep't 2006). As discussed *supra*, Seibel's conduct with respect to vendors and employees, taking of kickbacks and unauthorized distributions, efforts to secretly and unilaterally exploit The Fat Cow in Egypt, take over GR Holdings, and many other efforts to usurp and undermine Mr. Ramsay's opportunities and exploit his name were reprehensible, and by this conduct he has forfeited any right to prevail on his claims.

E. There Would Be No Damages for Seibel's Claims in Any Event.

Even if Seibel could establish any breaches (he cannot), his claims would fail because he did not prove damages.

1. The Fat Cow Was Not Profitable.

It is undisputed—and confirmed by Lowder's own report—that The Fat Cow lost almost $2 million during its 18-month run. *See* Lowder Rpt., Ex. F. More specifically, The Fat Cow lost over $1 million in three months of operations in 2012, over $200,000 on a full year's operations in 2013, and over $700,000 in 2014, the year it closed. *See id.*; *see also supra* § II.J.1; Bracco Rpt., Ex. 4 (monthly net income). And it faced the daunting prospect of *Becerra* liability. Seibel himself acknowledged its perilous status. *See supra* § II.J.5.

2. Legal Standard for Lost Profit Damages.

Since the restaurant was not profitable, Seibel premises his damages claim on hypothetical lost profits. But under New York law, "damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes." *Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261 (1986). The law is the same in all relevant jurisdictions.[51] *See, e.g.*, *Agilent Techs. v. Kirkland*, No. Civ. 3512-VCS, 2010 WL 610725, at *29, n.271 (Del. Ch. Feb. 18, 2010) ("The general rule, followed in Delaware law and elsewhere, is that future lost profits must be

[51] Because the laws in New York, California, and Delaware are the same, pertinent cases from each jurisdiction are cited herein.

established by 'substantial evidence' and not by speculation."); *Kids' Universe v. In2Labs*, 116 Cal. Rptr. 2d 158, 167-68 (Cal. Ct. App. 2002) ("damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent").

a. Established Businesses Must Prove Lost Profits Based Upon Historical Data of the Business or Comparable Businesses.

Where a business has actually operated, lost profits must be proven with reasonable certainty based upon historical performance data. In *Awards.com, LLC v. Kinko's, Inc.*, the First Department held that where the plaintiff-company had "never made any profits, and could not keep up with its monthly fee payments, there [wa]s no profit record to serve as a basis for projecting millions of dollars in future profits." 42 A.D.3d 178, 185 (1st Dep't 2007), *aff'd*, 14 N.Y.3d 791 (2010) (citing cases). Nor, the Court noted, had the plaintiff "identified any benchmark in the form of comparable businesses to permit a factfinder to determine that the claimed lost profits are reliable or demonstrated with reasonable certainty." *Id.* And, significantly, the Court rejected plaintiff's expert damage analysis because it was "based on nothing but unverified assumptions about future profitability given to [the expert] by plaintiffs themselves." *Id.*; *see also Kids' Universe*, 116 Cal. Rptr. 2d at 167-68 (for an "established business," damages are recoverable if "their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales"); *Zaleski v. Mart Assocs.*, No. Civ. 82C-NO-11, 1988 WL 77779, at *1 (Del. Super. Ct. July 25, 1988) (same).

Courts require a substantial record of historical data to satisfy the "reasonable certainty" standard. Thus, courts have held that "a months-long history of sales is patently insufficient to support a claim for future lost profits." *Anchor Glass Container Corp. v. Pabst Brewing Co., LLC*, 131 N.Y.S.3d 538 (Sup. Ct., N.Y. Cty. 2020).

b. Businesses Without Profit History Must Satisfy an Even Stricter Standard, and Lost Profits Are Generally Not Recoverable.

For businesses that are new or otherwise without profit history, "a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty." *Kenford*, 67 N.Y.2d at 261. The "general rule" is that lost profits evidence "is too speculative, uncertain and remote to be considered where there is no history of prior profits." *Re v. Gannett Co.*, 480 A.2d 662, 668 (Del. Super. Ct. 1984), *aff'd*, 496 A.2d 553 (Del. 1985); *see also Kids' Universe*, 116 Cal. Rptr. 2d at 168 (for an "unestablished business," prospective lost profits "are not recoverable for the reason that their occurrence is uncertain, contingent and speculative" unless "their nature and occurrence can be shown by evidence of reasonable reliability").[52]

3. Lowder's Projections Are Speculative and Contrary to Historical Evidence.

Despite its historical losses, Lowder projects that The Fat Cow would have earned $4,546,609 in profits during the first three years of post-closure operations. Lowder Rpt., Ex. D. Lowder reaches these results by assuming:

(a) The Fat Cow has 200 customer seats (140 inside, and 60 outside), and each seat will average 3.5 daily "turns" (*i.e.*, the number of times a restaurant seat is used by a paying customer), totaling 700 patrons per day, *see id.*, Ex. A; and

(b) The average meal price would be $30.00 for lunch and $35.00 for dinner. *Id.* (Lowder also assumed a breakfast price equal to the lunch price.) Lowder then calculated The

[52] Numerous other cases, discussed in detail in Motion in Limine No. 1, hold similarly. *See* NYSCEF Doc. No. 620.

Fat Cow's average future revenues as turns per day, times seats, times meal prices, times 365 days a year (assuming The Fat Cow operated every day). *Id*.

But these calculations have no relation whatsoever to any historic turns or average meal prices at The Fat Cow (or any other particular comparable restaurants). More specifically:

a. The Seat Assumption Ignored That Not All Seats Were Available.

Lowder admitted that the 60 seats on the outdoor patio were not always available. TT, 1264:25-1265:3. But she did not do any analysis of how often that was the case. TT, 1265:4-10. She admitted that if her assumption were incorrect, that could affect her forecast. TT, 1265:16-21. In fact, the outside seats were regularly unavailable. *See, e.g.*, Ex. 490 (Green: Fat Cow was "forced to close the fountain patio" 13 days "during peak holiday shopping season," and the Grove shot snow out of cannons, disturbing The Fat Cow's patio guests for a five-week period).

b. The Turn Assumption Was Without Evidentiary Basis.

Lowder was aware that The Fat Cow had historical turn data, but she did not use it. TT, 1265:22-1267:5.[53] That is because she was "assuming a new and improved Fat Cow that would have had better results than what the restaurant actually experienced." TT, 1267:6-10. Lowder attempted to blame her failure to consider the data on supposed problems with the Lavu system. But those problems went away after The Fat Cow switched to Micros, and she didn't analyze Micros data either. TT, 1267:12-22. Ultimately, the reason she did not use the historical data was clear: it simply did not jibe with her speculative projections. TT, 1267:23-1268:1.

[53] Nor did she attempt to support her turns with data from any other restaurant. 1268:2-17.

c. The Assumed Number of Patrons Was Far Higher than Reality.

Lowder also admitted that her assumed 700 patrons per day was not derived from The Fat Cow's historical data; it was substantially higher than what the Fat Cow ever experienced. TT, 1269:6-8. Exhibit 597, a compilation of "Manager Shift Summaries" from the time period when Seibel, Green, and Lowder believed that the Fat Cow was performing better, shows that the average number of patrons was approximately 394 per day. At trial, Green relied on this same exhibit to calculate an alleged average ticket price. As set forth below, the total covers never remotely approached Lowder's assumed average, even in the busiest December holiday month.

Average Covers (Summary of Ex. 597)	
Time Period	Average of Covers
October 2013	399.89
November 2013	447.38
December 2013	548.57
January 2014	368.32
February 2014	303.04
March 2014	281.67
Total	**394.38**

Indeed, the Manager Shift Summaries reveal that it was an extraordinarily rare occurrence that the Fat Cow received 700 or more patrons, even on a busy Friday or Saturday. This is corroborated by Seibel's comment, during a recorded conversation, that The Fat Cow was a "very difficult ship to – to be produced, you know, past six to 700 covers," and "the wheels come off the bus at 600 or 700 people." Ex. 680, p. 62:9-63:16.

d. The Assumed Meal Price Was Higher than Reality.

Lowder never looked at average historical ticket prices at the Fat Cow. TT, 1273:13-21. She relied solely on Mr. Green, who gave her an average lunch price of $28.82, and an average dinner price of approximately $33, and she did not independently analyze those numbers. TT, 1270:5-1272:10, 1273:13-21. But even if Green were correct,[54] Lowder "rounded" Green's numbers up to $30 and $35, respectively, to "allow for more alcohol sales" (TT, 1272:6-10), and offered no evidentiary basis or data justifying those increases.

e. The Assumed 2014 Revenue Was 82% Higher than Actual 2013 Results, Dwarfing the 0.6% Growth Rate of "Comparable" Restaurants.

Lowder's speculative revenue projections not surprisingly resulted in staggeringly unrealistic increases. Lowder projected 2014 revenue of $8.37 million[55]—82.4% more than the $4.59 million The Fat Cow earned in 2013. Lowder's $8.37 million annual projection also amounts to $697,666.67 per month. The Fat Cow never came within $200,000 of this projected monthly average, even in its best months. Lowder Rpt., Exs. C & F; Report of John Bautista ("Bautista Rpt."), Ex. 9. This type of massive revenue increase is unheard of in the restaurant industry. *See* Gordon Rpt., ¶ 19 (restaurant expert Gordon explaining that, based on his decades of experience and industry data, "an 82% increase in year over year revenues is neither seen nor reasonable"). Also, using the same-store revenue growth data for the restaurants Bautista considered "comparable," Ramsay's expert Dragon noted that the average growth rate of individual restaurants in these chains was 0.6%. Dragon Rpt., ¶ 23 & Ex. 4-a.[56]

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[54] Green had never previously offered any basis for these numbers, but at trial claimed that all meals averaged $30.07, based on his analysis of the Manager Shift Summaries, Ex. 597.

[55] Lowder projected high, low and "most likely" profits. *See* Lowder Rep., Ex. A. The quoted number is her "most likely" calculation. Lowder could not estimate the likelihood that this number would occur rather than her high or low calculations. TT, 1263:18-1264:3.

[56] At trial, Seibel's counsel attempted to discredit Mr. Dragon with questions about prior engagements and professional writings in which he stated that, in some cases, companies with negative book value or no earnings can have positive valuations. But those cases are easily distinguished. They include: "fintech" companies, which have proprietary technology that give them a competitive edge in the marketplace, and invest heavily in research and development; companies with positive cash flow and existing contracts that are known to produce large revenue in the near future; or companies that possess hard data regarding the relationship between advertising spends and future revenue. The Fat Cow had no such advantages. TT,

f. Lowder's Continued Double-Digit Growth Is Unsupported.

After the 82.4% increase in 2014 revenue, Lowder projected that 2014 revenue would in turn increase by 10% in each of 2015 and 2016. Lowder Rpt., Ex. D. That 10% annual revenue growth is equally speculative—it has no basis in data, quantitative analysis, or specific numbers from The Fat Cow or any other allegedly comparable restaurant. Indeed, as Gordon points out, only two of the "comparable" companies Bautista identified have shown consistently positive sales growth since 2013, and those brands were positive by 3% or less. Gordon Rpt., ¶ 20.

g. Lowder's Conclusions Are Highly Sensitive to Her Unjustified Assumptions.

Lowder's revenue (and resulting profit) calculations are highly sensitive to her unjustified assumptions. All her projected profits go away if there are even slight changes to the factors she used. For example Green testified that the average check during the timeframe when the restaurant was performing well was $30.07. TT, 570:6-571:2. Multiplying that average by the actual average number of daily patrons during that same period (*see supra* § IV.E.3.c) results in a daily average revenue of $11,859.01 ($30.07 x 394.38), or $4,328,537.41 for a full year ($11,859.01 x 365), or approximately **$4 million less than Lowder's projected 2014 revenue**. Even multiplying Green's average check by the **highest** monthly average patron total (548.57, *see id.*), and assuming that peak number could be sustained for the full year, results in a total annual revenue of $6,020,857.46 ($30.07 x 548.57 x 365), or approximately **$2.3 million less revenue than Lowder projected for 2014**. Either adjustment would entirely wipe out Lowder's projected profit. *See* Lowder Rpt., Ex. D (total projected expenses of $7,195,230 for 2014).

1503:16-1507:4. By contrast, Mr. Dragon shows that Seibel's experts' improperly applied their methodologies and reached plainly erroneous conclusions, for all the reasons noted in the discussion herein. *See generally* Dragon Rpt.; *see also* TT, 1499:12-1503:15.

h. Lowder's Cost Assumptions Are Speculative and Inconsistent with Historical Data.

Of course, future profits are the difference between future revenues and future expenses. But Lowder's expense projections are as speculative as her revenue projections. Again, Lowder did not rely upon actual The Fat Cow data; instead, she modeled from scratch the expenses she thought a restaurant like The Fat Cow ***should*** incur if operated as ***she*** proposed. *See* Lowder Rpt., Ex. B (modeling payroll). Specifically, for example, Lowder projected 12 servers, but that number of servers was not based on the historical number of servers at The Fat Cow. TT, 1278:10-23. It was an improvement on the historical numbers. TT, 1279:6-8. She used invented numbers, and not historical numbers, because the "historical numbers[] were pretty bad and had issues." TT, 1278:25-1279:5. Lowder made no attempt to corroborate whether her numbers were feasible for the Fat Cow. TT, 1279:9-23. As she admitted, she was "assuming the numbers without reference to the historical data because [her] projection reflects what [she] view[ed] as the new and improved Fat Cow in 2014." TT, 1280:2-6.

The same is true of other expenses. Lowder considered the 2013 direct and operating expenses to be "extremely high," so she lowered the number in her projection because she was "trying to make it profitable." TT, 1282:6-1284:3.

Lowder also failed to account, in any way, for the liability from the class action that was pending at the end of 2013, despite admitting that legal fees and settlement relating to that action would have affected profits. TT. 1294:9-18. In her projection, she simply washed it away, and assumed that "[i]t would have been settled by [2014] based on my projections." TT, 1318:14-24.

On top of this, her cost projections failed to properly account for inflation. While she built in inflation to increase projected revenue every year, she did not assume any inflationary increases for her projected fixed costs. TT, 1277:3-1278:1. The result was that revenue grew significantly faster than costs in her model.

i. Lowder's Claims of 2013 "Adjusted" Profits Is Inaccurate and in Any Event Not Used in Her Report.

Although The Fat Cow actually lost over $200,000 in 2013, Lowder calculated an "adjusted" 2013 profit by backing out certain expenses that she considered "nonrecurring" and eliminating depreciation. As discussed *supra* § II.J.10, her adjustments are baseless. But even assuming she were right, the resulting adjusted 2013 profits were approximately $375,000. Lowder's 2014 projected profit is still approximately **4.6 times higher** than even this (artificially) adjusted 2013 result and was not in any manner based on that result. *See* TT, 1296:3-25; 1297:1-5. Moreover, Lowder's improperly "adjusted" profit calculation for 2013 simply ignored The Fat Cow's huge losses in 2012 and 2014.

j. Lowder Ignored the Capital Deficit

Lowder conceded that "the restaurant would have benefited from an influx of working capital." TT, 1310:8-11. Bautista calculated The Fat Cow's working capital at **negative** $329,125 at the end of 2013 (Bautista Rpt., Ex. 8), and Lowder opined that the appropriate amount would have been **positive** $837,000 (TT, 1310:15-1311:1)**—a deficit of $1.15 million**. She casually suggested, without evidentiary support, that it could have gotten a loan, but she admitted that the owners needed to agree before seeking outside funding, and she could not opine about the terms of any loan that might be offered to the troubled restaurant. TT, 1311:7-16.

k. Lowder Ignored Discord Among the Owners

Lowder knew of the discord between Seibel and Mr. Ramsay (TT, 1298:15-21), but "assumed that any such discord would resolve by 2014." TT, 1298:22-24. The evidence shows that was an unreasonable assumption. This is significant, as Lowder also assumed that "whatever happened in the future, The Fat Cow would adjust appropriately, whatever that required." 1297:7-18; 1313:9-1314:10. And Lowder assumed not only partnership agreement, but that both partners would agree to ***her*** opinions about how the restaurant could be run to pare expenses. Such agreement was highly unlikely. The record proves the Ramsay team's quality concerns and their inconsistency with Seibel's (and apparently Lowder's) cost-cutting predilections. *See supra* § II.H.

l. Lowder's Purported Justifications for Improved Performance Are Speculative.

Lowder's only justifications for her huge profit and revenue increases are speculative assumptions the following factors ***might*** benefit The Fat Cow. But Lowder had no basis to estimate that these factors would result in her gargantuan projected revenue and profit increases (or any increases at all). Her "calculations" based on these factors lack evidentiary foundation and are mere "guesstimates" based on her unspecified experience. TT, 1308:2-1309:2.

(i) The Location Would Not Increase Sales.

Lowder opines that The Fat Cow's location at the Grove would increase sales. But she had no reason to believe that the location would somehow be better in 2014 than it was in the previous years. TT, 1298:25-1299:25. She also conceded that other restaurants have failed at the Grove. TT, 1300:1-16. The Grove was certainly no guarantee of success.

(ii) Assumed Growth from Appearing on *Hell's Kitchen* Was Speculative.

Lowder opines that if The Fat Cow had appeared on *Hell's Kitchen*, and if the winning chef had agreed to work at The Fat Cow, that would have improved profits. She assumed, though, that The Fat Cow would appear on the show in 2015 and 2016 (TT, 1302:6-11), even though it never had any contract relating to those years. And she conceded that whether and how much these events could affect growth would depend on unknown factors outside of The Fat Cow's control. TT, 1301:3-1302:5, 1305:22-1306:22. Those factors included when whether the winning chef agreed to work at the restaurant (which he or she was not obligated to do, and in fact did not always happen, TT, 474:1-11) and when the show aired (which was in the network's discretion). And she did not analyze, and could not quantify, how much growth, if any, could be attributed to a show appearance or winning chef. TT, 1302:12-1303:1, 1306:23-1307:9.

Her only support that these factors might increase profits was vague testimony regarding "a couple of clients" whose restaurants have appeared on shows or movies. TT, 1302:21-23. On redirect, she testified about one of her client's sales supposedly doubling after appearing in the 2004 movie, *Sideways*, and another client's sales increasing by some unspecified amount after appearing on the show, Entourage. TT, 1323:18-22, 1328:23-1331:4. Defendants renew their objection to this testimony, which was not part of her report, not identified in her expert deposition, lacks documentary evidence, and cannot be tested. In any event, the testimony does support her conclusion, as there is no evidence that those situations are comparable to The Fat Cow appearing on Hell's Kitchen.

(iii) Assumed Growth from Ramsay's Name Was Speculative.

Lowder opined that adding Ramsay's name to the restaurant would lead to some unspecified growth. But she admits that Ramsay's association with The Fat Cow was already widely known. TT, 1303:2-8. And she did not analyze or quantify how much growth this would lead to, if any. TT, 1303:12-17. Critically, she testified that her growth rate assumptions ***would not have changed even if Ramsay's name had not been added*** (TT, 1304:2-9), meaning that this factor had no effect. Also, Seibel disagreed with Lowder. He opined that Ramsay's "name is not going to change the clientele of what Caruso is bringing to the Grove." Ex. 64, 38:9-19 ("I don't think that the operation makes money as an extension of someone's personality.").

(iv) The "Concept" Would Not Lead to Increased Sales

Lowder opined that the supposed "gastropub" concept would have increased sales. But she admits that such a concept would not guarantee success, and that the success or failure gastropubs, like all restaurants, depends on a number of factors. TT, 1304:21-1305:15. She provided no data to support her conclusion that the "gastropub" concept would lead to success. TT, 1305:16-21. Also, she does not explain how ***her*** gastropub concept differs from what The Fat Cow was already doing, or if it did differ, that Mr. Ramsay would agree to it. And if her concept was the same as what Mr. Ramsay preferred, Seibel certainly disagreed that the concept would thrive at the Grove. *See supra* § II.H.1.

(v) Lowder's Hopes About Improving Despite Poor Reviews Are Irrelevant and Baseless

Finally, Lowder opines that, despite its past poor reviews and low ratings, The Fat Cow would thrive. She offers no supporting data. Indeed, her position is belied by her admission that the restaurant had already "improved and reached a stabilized level of performance in the mid 2013 time frame." TT, 1307:17-1308:1. Any such improvement would already be reflected in the data. But the financial data show no substantial or consistent growth. *See supra* § II.J.

4. Bautista's Valuation Wholly Relies on Lowder's Speculative Projections and Other Erroneous Assumptions

Bautista applied Lowder's speculative numbers to conclude that, as of March 31, 2014, The Fat Cow was worth $9.3 million.[57]

[57] Bautista used two methods in coming to his conclusion: (a) the so-called "Discounted Cash Flow" method, by which he reduced to present value and then aggregated all Lowder's future projected profits through 2028; and (b) the so-called "Guideline Company" method, in which he

a. Improper Assumption of 15 Years Continuous Operation

Most fundamentally, Bautista's valuation erroneously assumes 15 years of continuous The Fat Cow operation. Mr. Ramsay had no obligation to continue operating The Fat Cow at all, and was instead entitled to dissolution. ***And as explained above, in dissolution, there is no right to a valuation based on ongoing operations and dissolution would end ongoing operations***. In any event, even if Mr. Ramsay had been required to continue operating, there is no basis to assume he was required to operate for 15 years. Such a duration is flatly inconsistent with the high rates of restaurant failure. *See* Gordon Rpt. ¶¶ 10-11. Moreover, the Lease was only for a 10 years. TT, 1348:11-25. Bautista did not even consider the risk that Lease might not be renewed. T 1349:1-14. His assumption that the Lease would renew, and on comparable terms, is entirely speculative. The flawed 15-year assumption alone invalidates the Bautista report. He offers no valuation based on any shorter period.

b. Improper Reliance on Lowder

Bautista conceded the grim results for The Fat Cow based on its **actual** performance. Bautista Rpt., Ex. 8. But he altogether ignores that historical data and relies exclusively on Lowder's speculative projections of how The Fat Cow might perform if it "were run optimally." TT, 1358:11-18, 1351:21-23. And Bautista relied on Lowder's speculative projections without independent analysis despite significant evidence of their unreliability. TT, 1341:25-1343:4. For example, Bautista admitted that Lowder's growth projections were far higher than industry trends. TT, 1344:5-17; *see also* TT, 1358:11-18. Bautista also admitted that if Lower's projections were inaccurate, so is his valuation. TT, 1341:4-17. Thus, because Lowder's

took Lowder's profit projections and multiplied them by a factor derived from his study of other companies and their ratios between earnings and stock values.

projections are impermissibly speculative, Bautista's report also fails on that ground alone. *See* Dragon Rpt., ¶¶ 12-18.

c. Failure to Account for *Becerra* or the Capital Needs

Bautista failed to make any allowance for the expenses to be incurred because of *Beccera*, despite conceding they were likely to be incurred. TT, 1349:25-1350:13, 1351:13-16. Bautista also acknowledged the capital deficit, but did not consider the risk that it might not obtain it, TT, 1349:15-24, even though he admitted if the owners had no obligation to contribute or borrow funds, that could change his conclusions, TT, 1366:1-10. *See* Dragon Rpt., ¶¶ 19-20.

d. Failure to Consider Buy-Out Offer

Bautista assumed that: "There have been no recent offers to purchase the company or its equity." Bautista Rpt., p. 3; TT, 1355:7-9. He admitted that, if there had been offers at the time, they would provide an indication of value. TT, 1354:21-25. Yet, as of March 2, 2014 (just weeks before Bautista's valuation date), Seibel offered to sell his 50% interest in The Fat Cow for $831,482. Ex. 300. (And that offer substantially over-valued The Fat Cow, as it failed to account for the substantial liabilities, lack of cash flow, and substantially discounted the risk of the *Becerra* case.) Bautista failed to reconcile his $9.3 million valuation with Seibel's dramatically lower valuation.

e. Improper Growth Rate Assumptions.

Bautista assumed that, after the 84.2% growth in 2014, The Fat Cow's revenue would increase 10% in 2015 and 2016, 5% in 2017 through 2024, and 3% in 2025 through 2027. But Bautista admitted that the chain stores he considered "comparable" had substantially lower growth rates on a store-by-store average.[58] Indeed, the available data shows that the same-store growth rate of these companies was 0.6%; nowhere near the growth rates that Bautista assumed. TT, 1363:9-1364:2; Dragon Rpt., ¶ 23 & Ex. 3.[59] Bautista's only justification for ignoring same-store growth was that: "if you just take out [the chain companies'] good restaurants in the good locations, you'll probably see double digit growth rates." TT, 1363:17-22. This is pure speculation, based on no analysis whatsoever.

5. Seibel Has No Claim to Lost Investment, as He Failed to Show Causation.

Seibel may argue that he is entitled to recover his lost approximately $800,000 investment as contract damages. This is wrong. First, Seibel, individually, has no claim. The only remaining claims are derivative on behalf of the entities. Seibel cannot recover ***his*** lost investment pursuant to his derivative claims on behalf of the entities. Second, even if they were legally recoverable, lost investment damages may only be awarded ***if plaintiff establishes causation***. Closing the restaurant caused Seibel loss of his investment only if continuing operations would have generated sufficient profits to overcome the millions in operational losses and to then permit partner distributions equal to his original investment. However, as explained above, Seibel has failed to prove any future profits were reasonably certain to occur.

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[58] Notably, Bautista did not even reference "same-store" growth rates in his report, instead citing chain-wide growth rates of his "comparable" companies, which includes growth from opening new restaurants. TT, 1362:6-1363:11.

[59] Dragon recreated Bautista's analysis, utilizing a 1.0% growth rate more in line with industry data, and determined that if Bautista had used this growth rate and made certain other adjustments to align with the facts, he would have concluded that The Fat Cow had a substantially ***negative*** valuation. *Id.* ¶ 26.

F. Seibel Is Liable Under the Indemnity Agreement.

1. The Indemnity Agreement Applies.

Ramsay is entitled, under the Indemnity Agreement, to reimbursement by Seibel for half the costs Mr. Ramsay incurred "by reason of having entered into the" Lease. These include:

- $282,844.33 in rent payments between February and June of 2014 (Joint Stip. ¶¶ 1-2)
- $173,546.19 in legal fees relating to the Grove litigation (*id.*, ¶ 5)
- $800,000 to settle the Grove litigation (*id.*, ¶ 8)[60]
- $181,970.86 in legal fees relating to the *Becerra* litigation (*id.*, ¶¶ 3-4)
- $24,337.71 in legal fees relating to the LA Specialty litigation (*id.*, ¶ 6)
- $17,500 to settle the LA Specialty litigation (*id.*, ¶ 7)
- $14,000 paid to Mr. Yoo's company for The Fat Cow bookkeeping (*id.*, ¶ 9; Ex. 692)
- $69,000 paid to Ms. Van Willigan for her pre-opening work for The Fat Cow (*supra* § II.D.1)

The payments above total $1,563,199.09. Seibel made no contribution thereto. Because Ramsay repeatedly requested and Seibel repeatedly denied indemnity against liability and paid and for defense fees and costs in the Grove lawsuit (*supra* § II.N), Seibel, as the indemnitee, is "conclusively bound by any reasonable good faith settlement" and fees incurred by Ramsay. *Feuer v. Menkes Feuer, Inc.*, 8 A.D.2d 294, 298–99 (1st Dep't 1959). Settlements are considered reasonable "when the recovery at trial could have been greater." *Koch Indus., Inc. v. Aktiengesellschaft*, 727 F. Supp. 2d 199, 225 (S.D.N.Y. 2010) (collecting cases).

[60] The Grove had sought "damages in an amount in excess of $6,000,000.00." Ex. 658, ¶ 16.

2. Seibel's Legal Arguments Against Indemnification Fail.

Seibel has argued that he is discharged under the Indemnity Agreement because a party may not be indemnified against its own intentional torts. This argument fails.

The Court of Appeals has repeatedly clarified that "the public policy exception for intentionally harmful conduct is a narrow one, under which it must be established not only that the insured acted intentionally but, further, ***that it acted with the intent to harm or injure others***." *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 335 (2013) (emphasis added). *Accord, e.g., Austro v. Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 676 (1985); *Pub. Serv. Mut. Ins. Co. v. Goldfarb,* 53 N.Y.2d 392, 399 (1981) ("One who intentionally injures another may not be indemnified" but "***one whose intentional act causes an unintended injury may be so indemnified***.") (emphasis added).

The evidence shows that the Ramsay parties' decision to close The Fat Cow was not motivated by an intent to harm Seibel; rather, they were attempting to mitigate Lease liabilities that would have fallen on both Seibel and he Ramsay parties. Those efforts were forestalled by Seibel's conduct in filing this suit.

Even if Defendants were liable for breach of contract or fiduciary duty (which they are not), such conduct would not discharge Seibel of his indemnity obligation because Defendants had no intention to harm. *See Live Invest, Inc. v. Morgan*, 57 Misc. 3d 762, 768 (Sup. Ct. Suffolk Cty. Sept. 7, 2017) ("Since a contract is simply a set of alternative promises either to perform or to pay damages for nonperformance, a breach of contract is not necessarily a 'wrongdoing.'") (internal citations omitted); *see also ITT Corp. v. Lee*, No. 15Civ. 2730 KBF, 2016 WL 447848, at *3 (S.D.N.Y. Feb. 4, 2016), *aff'd*, 663 F. App'x 80 (2d Cir. 2016) ("Casting the claim as an 'intentional' breach of contract does not help" when "no facts separate and distinct from the breach of contract . . . can transform the claim into an intentional tort.").[61]

3. The Indemnity Provision in the Lease Assignment Applies.

For the same reasons, Mr. Ramsay is also entitled to indemnity from FCLA, LP under the Lease Assignment. Thus, if Seibel prevails in obtaining damages on behalf of FCLA, LP pursuant to his derivative claims, any such funds must first be returned to FCLA LP as the owner of those profits, and then used to reimburse Mr. Ramsay for the liabilities he incurred on behalf of The Fat Cow. Ex. 8, ¶ 7.3 & 7.4.

G. <u>Seibel Is Liable for Breach of Contract and Fiduciary Duty.</u>

Finally, for the reasons discussed *supra* § IV.B.3, Seibel breached the FCLA, LP and Fat Cow LLC Agreements and his fiduciary duties by taking unilateral actions that caused harm to those entities. Seibel should be required, at minimum, to return the funds that he unlawfully took from The Fat Cow through his unauthorized distributions and kickbacks. Also, because Seibel breached the FCLA LP Agreement, GRUS is "entitled ... to recover all costs of [this] judicial action, including reasonable attorneys' fees ... from [Seibel]." Ex. 8, ¶ 24.

V. CONCLUSION

For the foregoing reasons, the Court should enter judgment as follows:

- Granting the petition to dissolve FCLA, LP and Fat Cow LLC;

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[61] Seibel may also argue that he is not liable for indemnity incurred as a result of Mr. Ramsay's negligence. Even if negligence were established (and there is no evidence thereof), New York courts have found similarly broad language such as "any and all loss" or "all claims and demands of whatsoever kind or nature" to indemnify negligent conduct. *RoundPoint Mortg. Servicing Corp. v. Five Bros. Mortg. Co. Services and Securing, Inc.*, No. 315-CV-559, 2017 WL 2722304, at *6 (W.D.N.C. 2017) (applying New York law); *Hong Leong Fin. Ltd. (Singapore) v. Morgan Stanley*, 998 N.Y.S.2d 306 (Sup. Ct. N.Y. Cty. Sept. 12, 2014), *aff'd*, 131 A.D.3d 418 (1st Dep't 2015) ("Broadly-worded clauses, providing indemnification for 'all claims, suits, loss, cost and liability,' fairly include liability for active negligence of the indemnity.").

- Ruling against Seibel on his derivative claims for breach of contract and fiduciary duty;
- Ruling in favor of Mr. Ramsay's indemnification claim, and ordering Seibel to reimburse Mr. Ramsay for 50% of all expenses paid by reason of having entered into the Lease;
- Ruling in favor the derivative claims by Mr. Ramsay and GRUS for breach of contract and fiduciary duty, and ordering Seibel to pay damages to FCLA, LP; and
- Awarding attorneys' fees to Defendants as the prevailing parties.

DATED: New York, New York
March 15, 2022

Respectfully submitted,

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APPENDIX A

WITNESS NAME	IDENTITY
Nick Brown	Initial The Fat Cow general manager.
Rick Caruso	Owner of the Grove outdoor mall.
Jennifer Aves-Elliott	Assistant to Mr. Ramsay based in London.
Malcolm France	Finance person in the Ramsay restaurant group in London.
Gardiner & Theobald ("G&T")	Construction managers for The Fat Cow build-out.
Stuart Gillies	Managing Director of the Ramsay restaurant group in London.
Gold Grenade	Architectural firm for The Fat Cow buildout.
Craig Green	Seibel business partner involved in The Fat Cow.
Simon Gregory	An executive chef with the Ramsay group in London.
Gavin Grusd	An attorney at Certilman Balin for Seibel.
Eric Isicoff	Lawyer for Las Vacas Gordas.
Trevor James	Finance person at Ramsay organization involved early in The Fat Cow documentation.
Jacek Ostoya	Architect and principal in Gold Grenade.
Amy Kim and Amy Kim Design	Kitchen Designer for The Fat Cow buildout.
Littler law firm	Independent lawyers representing The Fat Cow in *Becerra* lawsuit.
Restaurant Design International ("RDI")	Kitchen equipment supplier on The Fat Cow buildout.
Ryan Stock	Manager for The Fat Cow later in its operations.
Jerri Rose Tassan	Worked with Seibel and at his request became involved in The Fat Cow.
Michael Thomas	An attorney at Sheridan's for Mr. Ramsay and his organization.
Andi Van Willigan	Chef who worked with Mr. Ramsay, and was involved in pre-opening at The Fat Cow, but was asked to resign in July 2011 and returned in June 2012.
Andy Wenlock	Operations manager for Ramsay restaurant group in London.
Stacy Wolfe	Public relations representative for Mr. Ramsay.

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Matt Woolf	The Fat Cow head chef.
Bill Yoo	Independent accountant and bookkeeper for The Fat Cow.
Brian Zeigler	An attorney at Certilman Balin for Seibel.

APPENDIX B: Monthly Revenue, Net Income, and Cash Flow from Operations

Month	Revenue	Net Income (Loss)	Cash Flow from Operations
Inception-Aug. 2012	0.00	(236,724.59)	305,378.40
Sep. 2012	34,265.94	(236,607.06)	(343,183.67)
Oct. 2012	435,186.23	(2,627.20)	(63,695.57)
Nov. 2012	459,877.94	18,247.84	(76,112.02)
Dec. 2012	494,289.78	(586,096.16)	29,719.40
Jan. 2013	341,876.57	(15,468.34)	39,200.51
Feb. 2013	308,829.52	4,109.58	18,764.63
Mar. 2013	388,552.34	19,442.50	12,406.16
Apr. 2013	342,594.30	(7,502.61)	(17,818.77)
May 2013	383,355.33	5,347.69	66,380.07
June 2013	391,607.74	61,460.27	(40,439.99)
July 2013	447,697.23	(8,456.25)	97,086.56
Aug. 2013	440,445.14	(9,512.17)	(91,972.08)
Sept. 2013	322,275.98	(69,702.03)	(6,331.09)
Oct. 2013	329,577.92	(16,710.28)	(46,917.01)
Nov. 2013	400,871.56	(27,014.05)	2,839.89
Dec. 2013	492,460.69	(139,972.58)	63,018.51
Jan. 1-28, 2014	304,762.52	(19,324.96)	(29,431.00)

Source: Bracco Report, Ex. 4.

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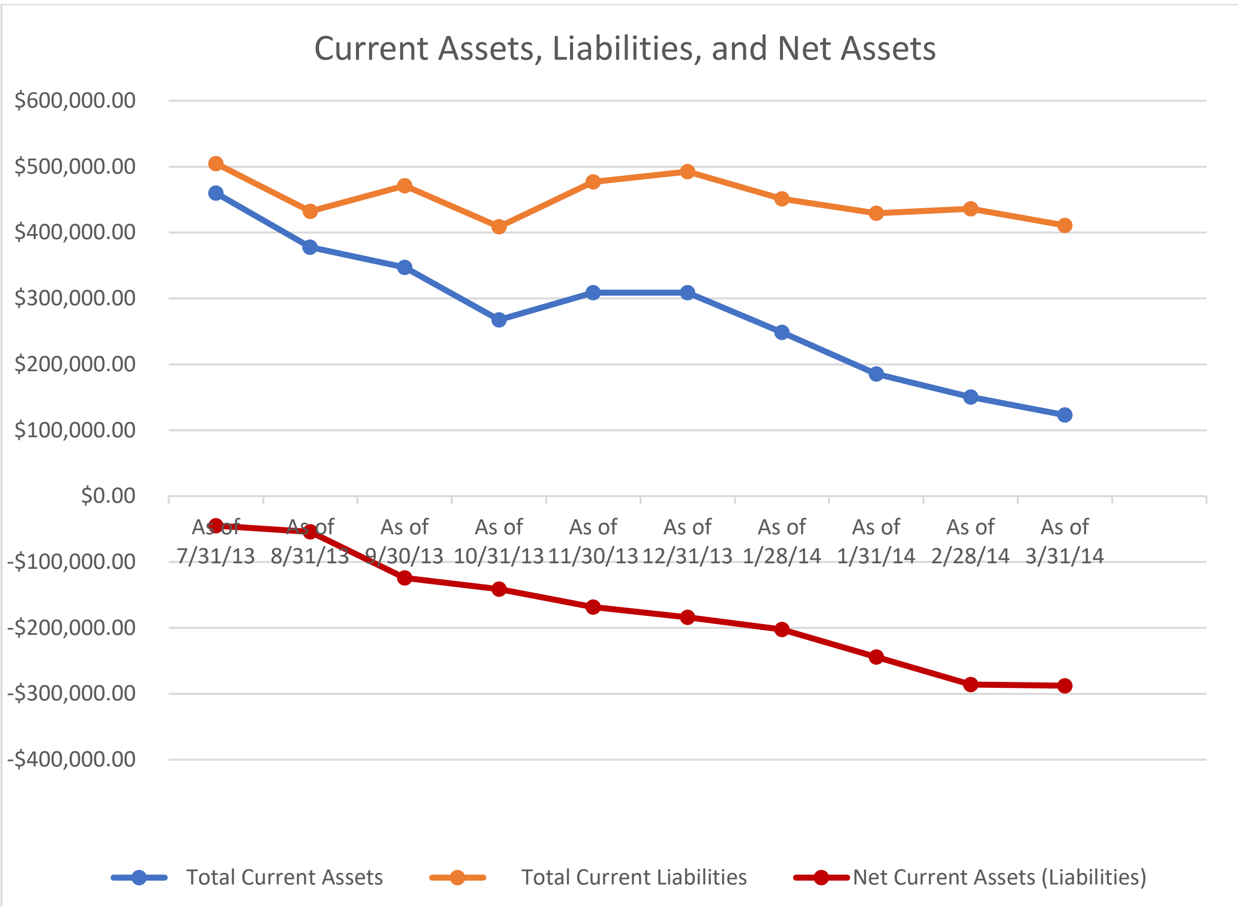
APPENDIX C:
Unadjusted Net Current Assets Over Time



Source: Bracco Report, Ex. 3.

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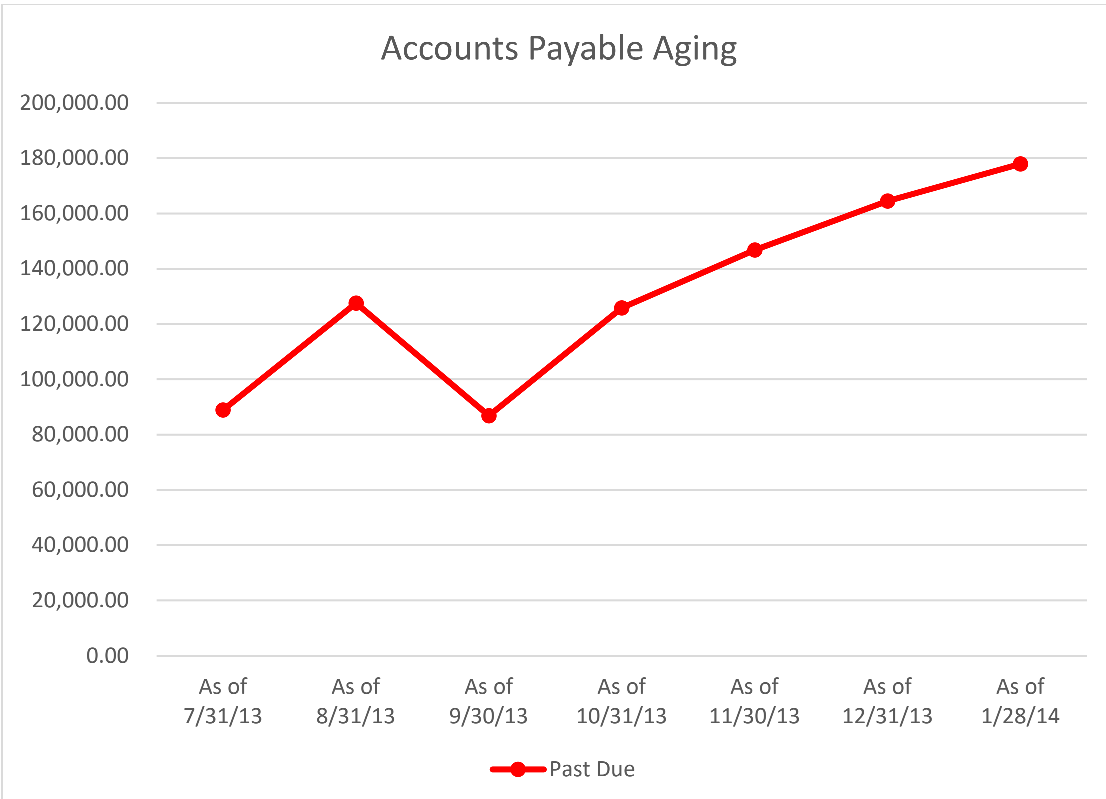
APPENDIX D:
Accounts Payable Aging, July '13-Jan '14



Source: Bracco Report, Ex. 3.

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