NSUPREME 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, Plaintiff, -against- GORDON RAMSAY and G.R. US LICENSING, LP, Defendants, and FCLA, LP and THE FAT COW, LLC, Nominal Defendants.	**Index No.: 651046/2014**
GR US LICENSING, LP, a Delaware limited partnership, for itself and derivatively on behalf of THE FAT COW, LLC, a California limited liability company, Plaintiff, -against- ROWEN SEIBEL, Defendant, and THE FAT COW, LLC, Nominal Defendant.	**Index No. 651618/2014**

PLAINTIFF'S POST TRIAL BRIEF

CERTILMAN BALIN ADLER & HYMAN, LLP
Attorneys for Plaintiff
90 Merrick Avenue, 9th Floor
East Meadow, New York 11554
(516) 296-7159

OF COUNSEL:
Paul B. Sweeney, Esq.
Nicole L. Milone, Esq.

7673898.1

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. SUMMARY OF EVIDENCE PRESENTED AT TRIAL 3

A. Summary of Witnesses 3
B. Summary of Documentary Evidence 4

III. SUMMARY OF PLAINTIFF'S CLAIMS 6

IV. PLAINTIFF PROVED ITS BREACH OF CONTRACT CLAIM....6

A. Applicable Standards for Breach of Contract Claims 6
B. The Agreements Were Breached Because Unanimous Consent Was Required and Was Not Obtained 9

1. Ramsay Defendants Did Not Obtain Seibel's Consent....9
2. The Buyout Discussions Do Not Excuse Ramsay Defendants' Breach of the Agreements 10
3. Ramsay Defendants' Failure to Disclose Their Plans Reveals They Were Knowingly Violating the Agreements 14
4. Ramsay Defendants Misrepresented Seibel's Position on Bankruptcy to Justify Their Conduct that Breached the Agreements 17
5. Ramsay Defendants Actively Concealed Their Conduct....19

C. Ramsay Defendants Impossibility, Impracticability and Frustration Defenses Fail 21

1. Legal Standards for Impossibility, Impracticability and Frustration 21
2. Failure of Managers to Agree Unanimously Does Not Excuse Performance 25
3. Ramsay Decided to Close the Restaurant in Approximately June 2013 27
4. The Trademark Was Not a Valid Reason to Close the Restaurant 27
5. The Claim that LVG Imposed an Absolute Backstop date of March 1, 2014 Was a Lie 31
6. Ramsay's Claim that He Could No Longer Be In Business with Seibel Was Proven to be False....33

a. Areas Airport Discussions on Behalf of GR Burgr, LLC 34
b. Singapore Discussions on Behalf of GR Burgr, LLC....36
c. Ramsay Knew About the Inquiry in Egypt....37

d. Ramsay Opened a New Restaurant that Involved Seibel in Atlantic City in 2015 38
e. Ramsay Defendants' Claim that They Could No Longer be in Business with Seibel Does Not Satisfy the High Bar for the Impossibility, Impracticability and Frustration of Purpose Doctrines 41

7. The Other "Fundamental Disagreements" Between Ramsay and Seibel Were Contrived and Do Not Support Impossibility, Impracticability or Frustration 42

a. The Alleged Failure to Notify Ramsay of the Class Action Was Not a Valid Basis to Close 42
b. Ramsay Improperly Blamed Seibel for the Class Action and Other Restaurant Operational Problems 43

i. Ramsay Was Supposed to be Operating the Restaurant 43
ii. Ramsay's Team Was Intended to Lead the Pre-Opening Management Team 44
iii. Ramsay Failed to Replace Van Willigan 44
iv. LAVU Was the Primary Cause of the Class Action and Was Selected by Van Willigan 45

c. The Class Action Liability and Failure to Settle Were Not Reasons to Close 46
d. Vendor Issues Were Improperly Blamed on Seibel 51
e. The Nguyen Labor Claim Did Not Cause a Fundamental Disagreement 53
f. Any Disagreement Over the Menu Was Resolved in Ramsay's Favor 54
g. The Evidence Supports Seibel's Position Regarding Van Willigan's Compensation 55
h. The Performance of the Restaurant Did Not Warrant Closure 56

i. Food Quality Issues Had Been Resolved 56
ii. The Restaurant Was Cash Positive 57

D. Seibel Proved Damages 60

1. Seibel Proved the Fact of Damages 62
2. Seibel Proved the Amount of Damages of $9.3M 63

a. Janet Lowder's Projections for the Restaurant 63
b. John Bautista's Valuation of the Restaurant 66
c. Rebuttal of Lowder by Ramsay Defendants' Rebuttal Expert Gordon Lacks Credibility 67

d. Rebuttal to Bautista by Ramsay Defendants' Rebuttal Expert Dragon is Without Basis....71
e. Ramsay Defendants' Expert Bracco's Opinion Should Not Be Afforded Any Weight....73

3. Plaintiff's Damages Are Not Unduly Speculative....75

V. PLAINTIFF PROVED ITS BREACH OF FIDUCIARY DUTY CLAIM....78

A. Defendants Wanted to Exclude Seibel; Entire Fairness Applies....80
B. There Was No Delegation of Managerial Authority....83
C. Seibel Did Not Breach His Fiduciary Duties....84

VI. PLAINTIFF IS ENTITLED TO ATTORNEY'S FEES....86

VII. RAMSAY'S INDEMNIFICATION CLAIM FAILS....86

A. Ramsay Made No Payments Qualifying Him for Indemnification....86
B. Ramsay May Not Seek Indemnification for his own Intentional Torts....88

VIII. SEIBEL DOES NOT CONTEST THE DISSOLUTION....91

IX. CONCLUSION....91

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Bank Brussels Lambert v. Chase Manhattan Bank, N.A.,
No. 93 CIV. 5298 (LMM), 1999 WL 710778 (S.D.N.Y. Sept. 10, 1999)....88

Chase Manhattan Bank v. Iridium Afr. Corp.,
474 F. Supp. 2d 613 (D. Del. 2007)....24, 59

Niehoff v. Maynard,
299 F.3d 41 (1st Cir. 2002)....77

In re Toyota Motor Corp.,
790 F. Supp. 2d 1152 (C.D. Cal. 2011)....22

True North Composites, LLC v. Trinity Indus., Inc.,
D.Del., 1919 F. Supp.2d 484 (2002)....60

State Cases

Applied Equip. Corp. v. Litton Saudi Arabia Ltd.,
7 Cal. 4th 503, 869 P.2d 454 (1994)....62

Asahi Kasei Pharma Corp. v. Actelion Ltd.,
222 Cal. App. 4th 945, 169 Cal. Rptr. 3d 689 (2013), *as modified on denial of reh'g* (Jan. 16, 2014)....61, 63

ASDI, Inc. v Beard Research, Inc.,
11 A3d 749 (Del 2010)....78

Ashland Mgmt. Inc. v. Janien,
82 N.Y.2d 395, 624 N.E.2d 1007 (1993)....62, 63

Austro v. Niagara Mohawk Power Corp.,
66 N.Y.2d 674 (1985)....87

Bank of New York v. Neumann,
628 N.Y.S.2d 675 (1st Dep't 1995)....87

Banner Ent., Inc. v. Superior Ct. (Alchemy Filmworks, Inc.),
62 Cal. App. 4th 348, 72 Cal. Rptr. 2d 598 (1998)....13

Bay Ridge Air Rts., Inc. v. State,
44 N.Y.2d 49, 375 N.E.2d 29 (1978)....86

Bd. of Managers of Trump Palace Condo. v. Feld Kaminetzky & Cohen, P.C.,
24 Misc. 3d 1203(A), 889 N.Y.S.2d 881 (Sup. Ct. NY Cty. 2009)..8

Beard Research Inc. v. Kates,
8 A.3d 573 (Del Ch. 2010), aff'd 11 A.3d 749 (Del. 2010) 61, 62, 74

Beard Research, Inc. v Kates,
8 A3d 573 (Del Ch 2010)..78

Berg & Berg Enters., LLC v. Boyle,
178 Cal. App. 4th 1020 (Ct. App. 6th Dist. 2009)..78

Bobcat N. Am., LLC v. Inland Waste Holdings, LLC,
No. CVN17C06170PRWCCLD, 2019 WL 1877400 (Del. Super. Ct. Apr. 26, 2019) 24, 26

Callahan v. Rafail,
No. CIV.A. 99C-02-024, 2001 WL 283012 (Del. Super. Ct. Mar. 16, 2001) 75

Caspary v. Moore,
21 Cal. App. 2d 694, 70 P.2d 224 (Ct. App. 1934)...62

Chrysler Corp. v. Quimby,
144 A.2d 133 (Sup. Ct. Del. 1958) 62

Cinerama, Inc. v Technicolor, Inc.,
663 A2d 1156 (Del 1995) 82

Feeley v NHAOCG, LLC,
62 A.3.d 649, 662 (Del Ch 2012)...7, 21, 78, 79

City of Vernon v. City of Los Angeles,
45 Cal. 2d 710, 290 P.2d 841 (1955) 23, 33, 53, 55

CMMF, LLC v. J.P. Morgan Inv. Mngt., Inc.,
9992 N.Y.S.2d 158, 2013 WL 8480424. (N.Y. Sup. Ct. Aug. 21, 2013) 74

Coley v. Eskaton,
51 Cal. App. 5th 943, 264 Cal. Rptr. 3d 740 (2020)..82

Densmore v. Manzarek,
No. B186036, 2008 WL 2209993, at *1 (Cal. Ct. App. May 29, 2008)............................7, 88

Distribu-Dor, Inc. v. Karadanis,
11 Cal. App. 3d 463, 90 Cal. Rptr. 231 (Ct. App. 1970) 62

Duncan v. Theratx, Inc.,
775 A.2d 1019 (Del. 2001) 60

Elyaoudayan v. Hoffman,
104 Cal. App. 4th 1421, 129 Cal. Rptr. 2d 41 (2003)....13

Everest Invs. 8 v. McNeil Partners,
114 Cal. App. 4th 411, 8 Cal. Rptr. 3d 31 (2003)....81

Facilities Dev. Corp. v. Miletta,
180 A.D.2d 97, 584 N.Y.S.2d 491 (3d Dep't 1992)....89, 90

Fils-Aime v. Ryder TRS, Inc.,
11 Misc. 3d 679, 809 N.Y.S.2d 434 (Sup. Ct. 2006), *aff'd,* 40 A.D.3d 914, 836 N.Y.S.2d 670 (2007)....86

First Sec. Co., Ltd v. Storey,
9 Cal.App.2d 270 (1935)....77

Gatz Properties, LLC v. Auriga Capital Corp.,
59 A.3d 1206 (Del. 2012)....60, 81

Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.,
66 Cal. App. 3d 101, 135 Cal. Rptr. 802 (Ct. App. 1977).... *passim*

Graham v Maple Tree Holdings, LP
No. 8949-UCL, 2014 WL 4928755 (Del Ch 2014)....78

Greenwich S.F., LLC v. Wong,
190 Cal. App. 4th 739, 118 Cal. Rptr. 3d 531 (2010)....75

Gross v. Sweet,
49 N.Y.2d 102, 400 N.E.2d 306 (1979)....88

Grucci v. Grucci,
20 N.Y.3d 893, 981 N.E.2d 248 (2012)....4, 5

Interim Healthcare, Inc. v. Spherion Corp.,
884 A.2d 513 (Del. Super. Ct.), aff'd, 886 A.2d 1278 (Del. 2005)....60

Interim Healthcare, Inc. v Spherion Corp.,
884 A2d 513 (Del Super Ct 2005), *affd,* 886 A2d 1278 (Del 2005)....8

Irwindale Citrus Ass'n v. Semler,
60 Cal. App. 2d 318, 140 P.2d 716 (1943)....21

Johnson v. Atkins,
53 Cal. App. 2d 430, 127 P.2d 1027 (1942)....25

K & K Capital Investments v. IPC (USA), Inc.,
No. 2D CIVIL B222427, 2012 WL 2525644 (Cal. Ct. App. July 2, 2012)....62

Kashmiri v. Regents of Univ. of California,
156 Cal. App. 4th 809, 67 Cal. Rptr. 3d 635 (2007), *as modified* (Nov. 15, 2007), *as modified* (Nov. 28, 2007) 49, 59

Kids' Universe v. In2Labs,
95 Cal. App. 4th 870, 116 Cal. Rptr. 2d 158 (2002)....................75

Krasner v Moffett,
826 A.2.d 277, 287 (Del 2003) 81

Lantau Holdings Ltd. v. Orient Equal Int'l Grp. Ltd.,
174 A.D.3d 409, 107 N.Y.S.3d 274 (1st Dep't 2019) 87

Maudlin v. Pac. Decision Scis. Corp.,
137 Cal. App. 4th 1001, 40 Cal. Rptr. 3d 724 (2006)....................22

Meister v. Mensinger,
230 Cal. App. 4th 381, 178 Cal. Rptr. 3d 604 (2014)....................61

Mesa Holding Ltd. P'ship v. Bicoastal Corp.,
No. CIV. A. 11210, 1991 WL 17172 (Del. Ch. Feb. 11, 1991)....................50, 59

Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.,
854 A.2d 121 (Del. Ch. 2004)....................60

Min. Park Land Co. v. Howard,
172 Cal. 289, 156 P. 458 (1916) 24, 33, 53

Murrieta Car Wash, Inc. v. N. Cty. Bank,
No. G034260, 2005 WL 2100012 (Cal. Ct. App. Aug. 31, 2005), *as modified on denial of reh'g* (Sept. 28, 2005) 61

Naughton v. City of New York,
94 A.D.3d 1, 940 N.Y.S.2d 21 (2012) 87

Neubauer v. Goldfarb,
108 Cal App 4th 47 (2d Dist. 2003)....................77

Oasis W. Realty, LLC v. Goldman,
51 Cal. 4th 811, 250 P.3d 1115 (2011) 7, 8, 78

Obsidian Fin. Grp., LLC v. Identity Theft Guard Sols., Inc.,
No. CV 2020-0485-JRS, 2021 WL 1578201 (Del. Ch. Apr. 22, 2021) 22, 24, 26, 33

Paul v. Deloitte & Touche, LLP,
974 A.2d 140 (Del. 2009) 60

Pfizer Inc. v. Advanced Monobloc Corp.,
No. 97C-04-037-WTQ, 1999 WL 743927, at *5 (Del. Super. Ct. Sept. 2, 1999), *opinion corrected on denial of reconsideration*, No. 97C-04-037-WTQ, 1999 WL 1240864 (Del. Super. Ct. Sept. 24, 1999)....75, 76

Public Serv. Mut. Ins. v. Goldfarb,
53 N.Y.2d 393 (1981)....87

Ridley Inv. Co. v. Croll,
56 Del. 209, 192 A.2d 925 (1963)....50, 59

Safe Harbor Fishing Club v. Safe Harbor Realty Co.,
34 Del. Ch. 28, 107 A.2d 635 (1953)....41, 50, 56, 59

Sargon Enterprises, Inc. v. Univ. of S. California,
55 Cal. 4th 747, 288 P.3d 1237 (2012)....74

SB Liberty, LLC v. Isla Verde Assn., Inc.,
217 Cal.App.4th 272 (2013)....82

Siga Techs., Inc. v. PharmAthene, Inc.,
132 A.3d 1108 (Del. 2015)....61, 62, 74

Sweeney v. Hertz Corp.,
292 A.D.2d 286, 740 N.Y.S.2d 19 (1st Dep't 2002)....88, 90

Tecot Elec. Supply Co. v. Skipper's Elec., Inc.,
No. CIV.A.2007-03-269, 2009 WL 51551 (Del. Com. Pl. Jan. 9, 2009)....13

Travelers Casualty and Surety Co. v. Honeywell International,
26 Misc.3d 1202(A), 906 N.Y.S.2d 784, 2006 WL 6454437 (Sup. Ct. N.Y. Co. 2006) (Tolub, J.), *aff'd*, 48 A.D.3d 225, 851 N.Y.S.2d 426 (1st Dept. 2008)....7

Re v. Gannett Co.,
480 A.2d 662 (Del. Super. Ct. 1984), *aff'd*, 496 A.2d 553 (Del. 1985)....74, 75

W. Indus. Co. v. Mason Malt Whisky Distilling Co.,
56 Cal. App. 355, 205 P. 466 (Cal. Ct. App. 1922)....22, 49, 55, 59

Wathne Imports, Ltd. v. PRL USA, Inc.,
101 A.D.3d 83, 953 N.Y.S.2d 7 (1st Dep't 2012)....74

Weinberger v. UOP, Inc.,
457 A.2d 701 (Del. 1983)....82

State Statutes

Cal. Civ. Code, § 1597 .... 21, 22

Cal Corp. Code § 17005(d) 77

Cal Corp. Code § 17153 77

Other Authorities

Rest.2d of Contracts, § 261 (1981) 22, 23

Rest.2d of Contracts, § 262 .... 23, 41

Rest.2d of Contracts, § 263 .... 23, 41

Rest.2d of Contracts, § 264 (1981) 23, 41

Plaintiff Rowen Seibel ("Seibel") respectfully submits this post-trial brief requesting judgment against defendants Gordon Ramsay ("Ramsay") and his wholly owned entity G.R. US Licensing LP ("GRUS") (collectively "Ramsay Defendants" or "Defendants").

I. PRELIMINARY STATEMENT

All the critical aspects of Plaintiff's case were confirmed by witnesses and exhibits, namely that none of Ramsay Defendants' alleged reasons for unilaterally closing the Fat Cow Restaurant ("Restaurant" or "Fat Cow") come close to overcoming the high bar for applying the doctrines of impossibility or impracticability to excuse compliance with the parties' agreements. In addition, as Seibel stated during the opening arguments, the chronology of events is essential because it clearly shows that Ramsay Defendants' excuses at trial for closing the Restaurant were not true and certainly did not exist at the time their decision was made to close the Restaurant and open a new restaurant without Seibel.

In sum, the clear evidence showed that (1) Ramsay Defendants made the unilateral decision to close the Restaurant and open a new Restaurant that Seibel would have no part of in or around June 2013; (2) Seibel was not informed of this plan until December 13, 2013; (3) for months, Ramsay Defendants took numerous steps to effectuate this secret plan and purposefully kept those plans secret from Seibel; (4) instead of telling Seibel of their plan, Ramsay Defendants misled Seibel into believing that the name would be changed on the Restaurant and operated under the same or similar ownership structure; (5) when the plan to close the Restaurant was revealed to Seibel in December 2013, Ramsay and his team falsely stated that the reason to close the Restaurant was the trademark issue; and (6) Ramsay Defendants disclosed the intention to open a new restaurant in the same space that the Fat Cow had leased.

The evidence at trial further showed that Defendants' alleged reasons for closing the Restaurant were false and certainly did not exist at the time Ramsay made his decision to close in June 2013 (or in December 2013 either). Ramsay testified that Seibel's mismanagement led to the class action lawsuit which was the "final straw" that caused Ramsay to decide he had to disassociate from Seibel, but the evidence showed that the class action was not caused by Seibel or his "team." Ramsay testified that Seibel was "milking" his relationship with Ramsay and taking advantage of Ramsay's name by soliciting new restaurants for the partners without Ramsay's knowledge. The evidence showed that Ramsay and his team were fully aware that Seibel was having these discussions, and at least in one case, the opportunity came to Ramsay's right-hand man, Stuart Gillies ("Gillies"), who then referred it to Seibel. Ramsay testified that Seibel was such a bad business partner Ramsay could no longer be in business with him as of June 2013. However, the evidence clearly showed that to be false as not only did Ramsay and his team continue to discuss new opportunities with Seibel after June 2013, but Ramsay opened a new restaurant in Atlantic City with Seibel's participation in 2015. Ramsay testified that he closed the Restaurant because his funds alone were keeping the doors of the Restaurant open. However, the clear evidence shows that in June 2013 Seibel had put in more money than Ramsay, and that by the end of December 2013, the two partners' funding was equal. To justify their unilateral conduct, Ramsay Defendants exaggerate the financial condition of the Restaurant – which was cash positive when non-recurring expenses were excluded, a fairly common circumstance for a start-up restaurant. Ramsay Defendants further ignore the undisputed evidence of improved quality at the Restaurant and the positive impact the television exposure and putting Ramsay's name on the Restaurant would bring in 2014. Certainly, someone like Ramsay, who is world-renowned for saving failing restaurants, had options available to make the Fat Cow a success.

The indisputable evidence showed that Ramsay and his team's alleged excuses for not complying with the parties' agreements were complete fabrications. These fabricated excuses lead to the inevitable question – if Ramsay had valid reasons to disassociate himself and his business from Seibel, why go to such lengths to deceive not only Seibel, but the Court as well. The reason is clear – he was engaged in deception of Seibel from the beginning and sought to fabricate excuses in order to engage in conduct that he knew was prohibited by the agreements, namely, to close the Restaurant over Seibel's objections, and take over the prime location for his own restaurant and benefit from Seibel's investment in that space. Ramsay misled Seibel in order to gain leverage over Seibel and force him to sell out to Ramsay on Ramsay's terms. When Seibel did not buckle to Ramsay's demands, Ramsay closed the Restaurant any way based on the fabricated excuses. Upon announcing Ramsay's decision to close the Restaurant, Gillies rejoiced stating that "we have the comfort that rowen has lost all his investment in the business, with nothing to show for it." (Ex. 219)

II. <u>SUMMARY OF EVIDENCE PRESENTED AT TRIAL</u>

A. <u>Summary of Witnesses</u>

The Court heard three (3) fact witnesses from Plaintiff: Rowen Seibel, Brian Ziegler ("Ziegler") and Craig Green ("Green"). The Court heard from four (4) fact witnesses on behalf of Defendants: Gordon Ramsay, Michael Thomas ("Thomas"), Andy Wenlock ("Wenlock") and Jeffrey Hendricks (from Caesars). The Court also heard from Plaintiff's restaurant industry expert, Janet Lowder, and John Bautista on Plaintiff's damages based on the valuation of the business. Defendants' experts were Anthony Bracco on damages, and rebuttal experts John Gordon, rebutting Lowder's testimony, and Raymond Dragon, rebutting John Bautista.

Witnesses who only appeared by transcript (and/or video recording) include Rick Caruso ("Caruso"), Jerri Rose Tassan ("Tassan"), Andi Van Willigan ("Van Willigan"), Stuart Gillies and the witnesses from Las Vacas Gordas, Luis Gajer and Eric Isicoff.

B. Summary Of Documentary Evidence

The parties submitted over 500 documents into evidence. All but five have been stipulated to for admissibility purposes. The objections to those documents are preserved in the Joint Stipulation entered into by the parties, dated March 14, 2022. (NYSCEF Doc. No. 663)

Certain evidence, Exhibits 64, 680, 681 and 683, are recordings and transcripts of the certain recordings of telephone calls that Gillies made without Seibel's consent. While the Court denied Seibel's motion in limine to exclude certain recordings (and granted the motion with regard to two of the recordings), the ruling was subject to the Defendants' ability to authenticate the recordings at trial. (1/6/22 Transcript, p. 17, ln. 23-25) Defendants were not able to properly authenticate the recordings at trial. While Seibel and Wenlock testified that they recognized the voices on the recordings, testimony identifying the parties to a taped conversation is not sufficient. *See Grucci v. Grucci,* 20 N.Y.3d 893, 897, 981 N.E.2d 248 (2012) (noting that "identity and authenticity are separate facets of the required foundation, both of which must be established") *quoting People v. Ely,* 68 N.Y.2d 520, 528 (1986).

Wenlock testified that for two of the phone calls, Exs. 64 and 681, he was in the room when Gillies recorded the calls on his Dictaphone and recalls the month, but not the exact date of the recordings. (Ex. 617 ¶3; Tr. 1235:3-8; 1237:15-23) Wenlock claims that the recording represented the entire phone call. (Ex. 617 ¶4, Tr. 1235:9-20; 1237:15-23) Wenlock's testimony lacks credibility -- that 9 years later Wenlock can recall, word for word, the entire conversation, particularly when he claimed the inability to recall calls from a similar time period. (Tr. 1207:13-1208:1; 1217:15-22; 1225:18-24; 1236:16-1237:25) In addition, Wenlock had no knowledge or information revealing what Gillies did with the recordings after the call concluded, where they were kept or when he provided them to counsel. (Tr. 1237:1-14; 24-1238:2) With regard to Exhibit 680, Wenlock also claimed to recall that the recording contained the entire conversation (Tr. 1238:9-13) However, for this conversation Wenlock was not even in the room with Gillies to see how the call was recorded and had no idea what was done with the recording when the call concluded. (Tr. 1186-1187; 1238:14-20) There was no further testimony with regard to the authenticity of the recordings or the chain of custody. For Exhibit 683, Ramsay Defendants did not produce any witness to authenticate the recording, other than Seibel's testimony that he recognized the voices.

In *Grucci*, the Court of Appeals noted that there was no proof offered in regards to "who recorded the conversation, how it was recorded (e.g., the equipment used) or the chain of custody during the nearly nine years that elapsed between early 2000, when the conversation allegedly took place, and the trial in late 2008." *Grucci* at 897. The Court further held that "[t]he predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered," and thereby affirmed the exclusion of the tapes. *Id.*

The testimony at trial failed to establish the "predicate for admission" as required by the Court of Appeals. *Grucci,* 20 N.Y.3d at 897 ("[t]he predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered”).

The parties also disagree about the Court’s ruling with respect to the admissibility of Exhibit 676, the Amended Judgment in a Criminal Case reflecting the criminal conviction of Seibel. This Court clearly granted Plaintiff’s motion in limine seeking the preclusion of this exhibit as it was entirely prejudicial. (Motion in Limine Decision, dated January 6, 2022, “Pl MIL 2 is granted as to the conviction itself…”) In clarifying this ruling at trial, the Court admitted into evidence a letter referencing the conviction (Ex. 666), to the extent the conviction was relevant to Caesar’s determination of Seibel as unsuitable, however, the Court clearly stated: “I don’t need to hear about the conviction. I don’t need to hear about what it was.” (Tr. 1477:25-1478:4; 1479:16-21) Exhibit 676 (which was not admitted nor introduced at trial) has nothing to do with Caesars and only contains information directly relating to Seibel’s conviction, which this Court has explicitly excluded. It is clear the Court precluded this exhibit in granting Plaintiff’s motion in limine and further reinforced that ruling at trial.

III. SUMMARY OF PLAINTIFF’S CLAIMS

Plaintiff has two (2) causes of action, each asserted derivatively: (1) breach of contract; and, (2) breach of fiduciary duty. As set forth below, Plaintiff proved liability and damages with regard to both claims.

IV. PLAINTIFF PROVED ITS BREACH OF CONTRACT CLAIM

A. Applicable Standards for Breach of Contract Claims

Plaintiff has asserted a derivative breach of contract claim for breaches of the Fat Cow LLC Agreement and the FCLA LP Agreement. With regard to the Fat Cow LLC Agreement, the derivative claim is asserted against Ramsay, who signed the contract as a director of defendant-member GRUS, and in his capacity as a manager of the LLC.[1] As set forth in the LLC Agreement, Seibel and Ramsay were the managers of the LLC and all managerial decisions required unanimous consent.[2] (Ex. 7, ¶¶6, 7[a]) The claim is also asserted against GRUS, the member of the LLC.[3]

Under California law,[4] the elements of a cause of action for breach of contract are: (1) the existence of the contract; (2) plaintiff's performance or excuse for nonperformance; (3) defendant's breach; and (4) the resulting damages to the plaintiff. *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821, 250 P.3d 1115, 1121 (2011).[5] Both Ramsay, as manager, and GRUS as member violated the unanimous consent provision of the Fat Cow LLC Agreement. *See Densmore v. Manzarek*, No. B186036, 2008 WL 2209993, at *1 (Cal. Ct. App. May 29, 2008) (Appellate Court upheld trial court's verdict for plaintiff on breach of contract claim, *inter alia*, wherein partnership agreement mandated unanimous consent of all partners in the management

---

[1] The Fat Cow LLC Agreement provides that Ramsay controls GRUS (Ex. 7 ¶21) The FCLA LP Agreement also provides that Ramsay controls GRUS. (Ex. 8 ¶ 25). See also Motion to Dismiss Order, dated March 27, 2015, pp. 19-20, NYSCEF Dkt. No. 39 ("MTD Order").
[2] This Court previously ruled that a breach of contract claim could be asserted against Ramsay individually for breach of the Fat Cow LLC in his capacity as a manager. (MTD Order, NYSCEF Doc. No. 39, pp. 19-20, *citing Restatement (Second) of Agency, § 155, Cmt a.)* This Decision should be given preclusive effect pursuant to the doctrine of law of the case in this regard. *Travelers Casualty and Surety Co. v. Honeywell International*, 26 Misc.3d 1202(A), 906 N.Y.S.2d 784, 2006 WL 6454437 at *8 (Sup. Ct. N.Y. Co. 2006) (Tolub, J.), *aff'd*, 48 A.D.3d 225, 851 N.Y.S.2d 426 (1st Dept. 2008).
[3] This Court previously rejected on summary judgment Ramsay Defendants' argument that Seibel lacked standing to assert derivative claims for breach of contract on behalf of both Fat Cow LLC and FCLA LP. (Summary Judgment Decision & Order, dated October 2, 2020, NYSCEF Docket No. 536 ["SJ Order"], pp. 12-13 "Ramsay's decision to close The Fat Cow and open a new restaurant in its place asserts damages to FCLA and Fat Cow LLC.")
[4] The Fat Cow LLC Agreement contains a choice of law provision specifying that the agreement shall be governed by and construed in accordance with the laws of California. (Ex. 7, § 18) This Court has already determined that this choice of law provision is enforceable in its MTD Order. (NYSCEF Doc. No. 39, p. 18)
[5] Ramsay Defendants also have asserted a breach of contract claim against Seibel for an alleged breach of the LLC Agreement. Defendants cannot establish a breach because they cannot meet the first requirement of this claim: their own performance under the contract. As set forth below, Defendants breached the contract and there is no defense or excuse to their failure to perform. Thus, their breach of contract claim fails as a result.

and control of partnership, but defendants made a management decision without unanimous consent).

With regard to the FCLA LP Agreement, the breach is also asserted against both Ramsay and GRUS, both of whom caused GRUS to breach the contract by their unilateral actions.[6] Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages. *Interim Healthcare, Inc. v Spherion Corp.,* 884 A2d 513, 548 (Del Super Ct 2005), *affd,* 886 A2d 1278 (Del 2005). The General Partner of FCLA is Fat Cow LLC, of which Ramsay is one of the managers. (Ex. 8) Ramsay signed the FCLA Agreement in his capacity as a manager of Fat Cow LLC. (Ex. 8, p. 32) The Ramsay Defendants, Ramsay and GRUS, took actions on behalf of FCLA that was solely entrusted to the General Partner, Fat Cow LLC, under the FCLA Agreement by, *inter alia,* closing the Restaurant.

Ramsay and GRUS violated the following provisions of the FCLA Agreement: (1) Section 8.1, vesting the exclusive power to manage all affairs of the Company with the General Partner; (2) Section 8.2, appointing Fat Cow LLC as General Partner; (3) Section 8.4, providing that the General Partner may authorize Officers to act on behalf of the Company, which was not done here; and (4) Section 8.5, providing that the General Partner has the sole authority to approve the sale, lease or transfer of Company assets and to approve a dissolution. (Ex. 8, pp. 9-13)[7] Sections 8.1 and 8.2 of the FCLA Agreement provide that "the full and exclusive right, power and authority to

---

[6] The Court previously ruled the breach of the FCLA contract claim could be asserted against both Ramsay and GRUS. (SJ Order, NYSCEF Dkt. No. 536, p. 25; NYSCEF Dkt. No. 530, p. 2, "Ramsay" defined as both Gordon Ramsay and GRUS in NYSCEF Dkt. No. 483, p. 1)

[7] Notably, Delaware law does not require plaintiff to demonstrate his or her performance of the contract in order to establish a claim for breach of that contract, contrary to New York and California law. *Bd. of Managers of Trump Palace Condo. v. Feld Kaminetzky & Cohen, P.C.*, 24 Misc. 3d 1203(A), 889 N.Y.S.2d 881 (Sup. Ct. NY Cty. 2009); *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821, 250 P.3d 1115, 1121 (2011).

manage all of the affairs and the business of the Company, with all the rights and power generally conferred by law, or necessary, advisable or consistent in connection therewith shall be vested in the General Partner." (Ex. 8)

B. The Agreements Were Breached Because Unanimous Consent Was Required and Was Not Obtained

1. Ramsay Defendants Did Not Obtain Seibel's Consent

The heart of Seibel's contract claim -- that Ramsay and GRUS, which Ramsay controlled, closed the Restaurant in violation of the unanimous consent provision of the Fat Cow LLC Agreement and the FCLA LP Operating Agreement -- was proven by the evidence. (*See also,* SJ Order, NYSCEF Dkt. No. 536, pp. 14-15) In sum,

1. Decisions of the Fat Cow LLC were to be made by unanimous consent of the managers. (Tr. 1114; Tr. 723-24; Ex. 7 ¶7(a))
2. Seibel and Ramsay were the managers of Fat Cow LLC. (Ex. 7 ¶6)
3. Decisions of FCLA LP were made by the General Partner, Fat Cow LLC. (Ex. 8 ¶8.2);
4. Decisions of FCLA were made by the managers of Fat Cow, LLC, Ramsay and Seibel. (Ex. 7 ¶¶6, 7(a); Ex. 8 ¶8.2)
5. As a result, the Fat Cow LLC Agreement and the FCLA LP Operating Agreement (collectively, the "Agreements") clearly required unanimous consent of the managers for decisions. (Tr. 340, 341; 76-77; Exs. 7 and 8)
6. Ramsay did not have Seibel's consent to close the Restaurant (Tr. 424, 425, 426-427; 1083, Ex. 145, Tr. 127-128, Ex. 218; Ex. 149; Ex. 127, Tr. 754)[8]

[8] The evidence further showed that Ramsay also did not have Seibel's consent to: (i) issue the WARN notice that the Restaurant would be closing (Tr. 149-50; Ex 148, Ex. 127; Ex. 14; Tr. 747-48; Tr. 762); (ii) enter into the Las Vacas Gordas ("LVG") agreement (Tr. 751, 913); or (iii) negotiate a new lease with Caruso, the landlord. (Ex. 127, Tr. 145-146, 752-754, 927-928)

As a result, because Ramsay Defendants could not contest that they did not violate the unanimous consent requirement in the Agreements, the bulk of the evidence submitted by Defendants did not concern whether their conduct violated the LLC Agreement and the FCLA LP Agreement – it is without dispute that it did. Rather, Defendants' evidence was focused on whether they had a legally valid basis to nullify the clear unanimous consent provisions of the Agreements. The evidence showed, however, that Ramsay Defendants' purported excuses for closing the Restaurant: (a) do not constitute valid grounds for nullifying the clear dictates of the Agreements; (b) were inconsistent with the evidence; or (c) did not exist at the time the Ramsay Defendants' decision was made to close.

2. The Buyout Discussions Do Not Excuse Ramsay Defendants' Breach of the Agreements

Ramsay Defendants' position appears to be that because Seibel "agreed" in principal to a buyout, his later objections to the closure of the Restaurant were meaningless because he forfeited his ability to withhold his consent to any action under the Agreements. (Ramsay Defendants' Demonstrative Exhibit 1, Opening Slide 9; Tr. 365) Thomas testified in response to a question whether a buyout agreement was reached, "Not binding, but an agreement." (Tr. 1084:13-16) As shown below, despite the undisputed fact that the buyout was never finalized, Defendants continue to argue these discussions excuse the failure to seek and/or obtain Seibel's consent. In other words, Ramsay Defendants want all the benefit of a buyout – not having to involve his partner in any decisions – without having to actually pay anything to Seibel to buy him out. The evidence at trial revealed the numerous fallacies in Ramsay Defendants' position.

First, there was no binding agreement to a buyout, as Ramsay concedes. (Tr. 364:15-16; 454:2-4) After a single discussion between Seibel and Ramsay in June 2013 (Ex. 513), there were two emails exchanged between their respective counsel, Ziegler and Thomas. (Exs. 133, 134) The first, from Thomas to Ziegler on July 5, 2013, outlined a proposal for a buyout. (Ex. 133) When Zeigler responded over three (3) weeks later simply to request a discussion, Thomas told him that the discussions has been "parked" due to the class action. (Ex. 134) There were no other communications during this time period between Thomas and Zeigler other than these two emails. (Tr. 729:18-730:11) Ramsay concedes he did not have discussions with Seibel about a buyout after the discussion represented by the June 2013 email. (Tr. 372:15-19) These emails, which concluded with Ramsay's team ceasing any further discussions, clearly did not represent an agreement between the parties on a buyout, and there is no dispute a final agreement was never reached. (Tr. 364; Tr. 114; Tr. 715-715) Indeed, Ziegler testified that the indemnity provision of the proposal which continued Seibel's liability for the class action and any other liabilities after the buyout, was a significant issue that Seibel would not have agreed to. (Ex. 133; Tr. 725-726; 730-731; Tr. 812-814) As a result, there was no buyout "agreement" and, as Ramsay conceded, there is no dispute that Seibel and Ramsay remained partners throughout 2013 and 2014. (Tr. 364:15-24)

While Ramsay and Thomas testified that buyout discussions continued after July 2013 and throughout 2013, there is simply no evidence to support that claim.[9] (Tr. 1006:24-10072; 1048:6-

[9] Based on the numerous contradictions and misstatements by Ramsay, this Court should not find any of his testimony credible, including, but not limited to his testimony that (i) he would not consider a restaurant in an airport (Tr. 463, 470), but he has a restaurant in an airport since 2008 (Tr. 1140); (ii) claimed lack of knowledge regarding Areas, Singapore, (Tr. 463:2-9), yet the documents show he and his team knew (Ex. 611, 612, 613, 615, 616); (iii) claimed that Caruso didn't like Seibel (Tr. 430), yet Caruso never met Seibel (Tr. 712, Caruso Tr. 10); (iv) claims he funded the Restaurant in December 2013 to help pay employees at Christmas and keep the lights on (Tr. 385; 468), the records show that to be false (Ex. 369); (v) claims his team didn't know about Spencer Nguyen (Tr. 466), yet his team knew (Ex. 599); (vi) claimed Caruso would not let him put his name on the Restaurant in December 2013 (Tr. 394), yet Caruso stated he was always in favor of Ramsay's name being on the Restaurant (Caruso Tr. 14:3-18); (vii) claims the "discreet table email" was not to keep the meeting secret from Seibel (Tr. 388), yet subsequently admitted later that was not the case (Tr. 446); (viii) claimed that Seibel was signing contracts without Ramsay's knowledge (Tr. 469), yet there is no evidence that ever happened; and (ix) claimed he could no longer be in business with Seibel in 2013 (Tr. 463, 470) and yet opened a restaurant with Seibel in Atlantic City in 2015.

9; 1085:5-24; Tr. 370:16-19) Ziegler and Seibel testified that there was not a single communication about the buyout after it was "parked" by Thomas in July 2013 until January 2014. (Tr. 116-17; 306; 731; 760; 821-822) Thomas conceded that there were no written proposals, or even references to a buyout, between July 2013 and January 16, 2014. (Tr. 1084:21-24; 1086:19-23; 1058:22-24; Ex. 540) Ramsay conceded that any discussions he had with Seibel regarding a buyout were prior to the June 2013 email. (Tr. 372:15-19) With all of the voluminous correspondence between the parties in the period of time from July 2013-January 16, 2014, it is simply unfathomable and lacking in credibility that there were continuing discussions of a buyout and yet not one mention of the buyout in a single email or letter between July 2013 and January 16, 2014.

When buyout talks commenced again on January 16, 2014 – a month after Ramsay informed Seibel for the first time that he was closing the Restaurant over Seibel's objection – the talks did not come close to reaching an agreement. (Tr. 1058:22-24; Ex. 540) Ziegler testified that no specific terms of a potential buyout were discussed at the January 2014 meeting. (Tr. 767-768) The Ziegler memo on January 20, 2014, that followed the meeting, made two proposals that contained specific terms, none of which were previously discussed. (Ex. 540) While there were a few additional emails about a potential buyout until March 1, 2014, there is no dispute that no agreement for a buyout was reached. (Ex. 152; Tr. 153; Tr. 773-774) Indeed, the indemnification issue, which had caused the alleged "parking" in July 2013, was never agreed to -- the Zeigler January 2014 proposal required indemnification of Seibel, which Ramsay never agreed to. (Ex 540; Tr. 1136-37; Tr. 725-726; 770) Ramsay Defendants knew that no buyout had been agreed to because all the while Ziegler continued to tell Thomas that Seibel's consent was required if no buyout was reached (*See e.g.* Exs. 149, 152, 130, 553; Tr. 773:22-774:5, 21-25)

There was no valid agreement for a buyout based on these facts under applicable law. Under both California and Delaware law, failure to agree on all material points prevents formation of a contract, even if the parties orally agreed upon some terms. *Elyaoudayan v. Hoffman*, 104 Cal. App. 4th 1421, 1430, 129 Cal. Rptr. 2d 41, 47 (2003) ("California law is clear that there is no contract until there has been a meeting of the minds on all material points"); *Banner Ent., Inc. v. Superior Ct. (Alchemy Filmworks, Inc.)*, 62 Cal. App. 4th 348, 359, 72 Cal. Rptr. 2d 598, 604 (1998), as modified (Mar. 30, 1998) ("the failure to reach a meeting of the minds on all material points prevents the formation of a contract even though the parties have orally agreed upon some of the terms, or have taken some action related to the contract"); *Tecot Elec. Supply Co. v. Skipper's Elec., Inc.*, No. CIV.A.2007-03-269, 2009 WL 51551, at *3 (Del. Com. Pl. Jan. 9, 2009) ("Where there is no meeting of the minds, there is no enforceable contract in Delaware. In addition, a contract must contain all material terms in order to be enforceable"). As established, the parties disagreed on several material terms, significant ones being the amount of the buyout and indemnification/liabilities of the former partner going forward. There was no buyout agreement.

In sum, Ramsay's contention that a buyout was "agreed" to was proven false at trial, and is legally unenforceable. Ramsay's position that a buyout proposal negated Seibel's unanimous consent rights is simply untenable: he wants the result of a buyout – to make all the decisions without Seibel's knowledge or consent – but never have to pay Seibel to buy him out. He simply cannot have it both ways.

3. Ramsay Defendants' Failure to Disclose Their Plans Reveals They Were Knowingly Violating the Agreements

Ramsay Defendants' contend Seibel knew of Ramsay's plan to close the Restaurant and open a new restaurant without Seibel because all parties assumed a buyout would occur. (Tr. 365;

Defendants' Demonstrative Ex. 1, Opening Slide 12) Ramsay testified that Seibel knew that he planned to close the Restaurant and open a new restaurant without Seibel. (Tr. 365:5-366-5; 400:1-11) However, there is simply no evidence to support Ramsay's claim, and, in fact, the evidence showed that Ramsay Defendants purposefully hid from Seibel the plan to close and reopen a new restaurant that would exclude Seibel. The fact that Ramsay failed to disclose his plans to Seibel shows that Ramsay Defendants knew they were acting improperly and contrary to the clear requirements of the Agreements.

First, the June 21, 2013 email from Seibel to Ramsay expressly states that if Seibel is bought out, "the name fat cow remains on the door until it has to be changed into the cow." (Ex. 513)[10] The reference to "the cow" is clearly the trademark that Ramsay had filed 10 days prior for "The Cow by Gordon Ramsay." (Ex. 26) Thus, the document clearly reveals that a mere name change would occur, not a new restaurant or new concept, as Ramsay falsely testified. The proposal drafted by Ramsay's counsel, Thomas, on July 5, 2013, provided for a buyout of Seibel's entire interest in Fat Cow LLC and FCLA, and also provided for a 5% ongoing "profit participation" in FCLA LP – clearly referencing the Fat Cow Restaurant, and not a new concept or new restaurant. (Ex. 133) As such, these emails reveal an intention to keep the Fat Cow Restaurant open.

This is consistent with the testimony of both Seibel and Ziegler that they were never informed that Ramsay was going to open a new restaurant without Seibel. (Tr. 154-55; Tr. 767) In fact, Wenlock conceded that Seibel was not told about the planning for the new restaurant. (Tr.

[10] The email further prohibits the use of the name. Seibel wrote: "Gordon Ramsay grill, or a variation of that/a similar name to that of our vegas stores (and our planned rollout of the vegas stores) shall not be used/happen – the project is the cow, and its important to me as we discussed and agreed that I do not want to give up my ownership in a project that's a similar name or bears a likeness to our creations in LV." (Ex. 513; Tr. 3029-19)

1196) However, starting in September 2013 any information about the new "Chicken Shop" or "Gordon Ramsay Roast" restaurant could not have come from Ramsay since Ramsay conceded that by that time Ramsay had stopped communicating with Seibel. (Tr. 377) In fact, Ramsay claims that he was instructed not to talk to Seibel at that time. (Tr. 469) While Seibel continued to reach out to Ramsay, Ramsay did not respond to Seibel and did not tell Seibel why he was no longer communicating with him. (Tr. 377:17-379:2; 493-494; 122-123, Ex. 556-558; Ex. 218)

The documentary evidence is consistent with Seibel's and Ziegler's testimony that neither Ramsay nor Thomas ever said that Defendants were opening a new restaurant or new concept. Ramsay's team had many emails discussing the new concept or new restaurant in October and November of 2013, and not one was sent to Seibel. (Tr. 372-74; Exs. 188, 194, 195, 199, 312-316, 319, 320, 324, 328, 329) With all the emails between Thomas and Gillies with Seibel and Ziegler in the second half of 2013, not a single email mentions the new restaurant. (Tr. 1086; *See e.g.* Exs. 76, 78, 120, 121, 123-125, 127, 128, 130, 139, 141, 144-146, 297, 300, 537, 538) Those communications repeatedly discuss related issues, such as bankruptcy possibilities, the class action liability, and, after December 13, 2013, the alleged need to "close" the Restaurant; but not a single email mentions the intention to open a new restaurant that would not involve Seibel.

Ramsay claims that disclosure of his plans is revealed by the January 20, 2014 buyout proposal, drafted by Ziegler over a month after Ramsay declared his intention to close, because it mentions the possibility of a "new" restaurant. (Ex. 540) While the terms of one proposal drafted by Ziegler mentions a "new restaurant", Ziegler testified that was not something that Thomas informed Ziegler that Ramsay had been planning – which is undisputed he had been planning for months. (Tr. 902-03; Tr. 767) Rather, that possibility was referenced because it was one of the options available to Ramsay if a buyout was completed, because upon a buyout Ramsay wanted to have full control of the Restaurant (Tr. 768-769) Thomas' testimony is consistent with that – Thomas doesn't recall if he told Ziegler that his client had been planning a new restaurant, but rather thought it "a given." (Tr. 1136:1-12) But it was clear that any such "new" restaurant was contingent on finalizing the buyout. (Tr. 904) Lacking any documentary evidence, and in light of their various other false statements at trial by Ramsay and Thomas, there is simply no credible basis to believe that Seibel was informed of Ramsay's secret plan.

Moreover, Ramsay's claim that he had already disclosed to Seibel that he was planning a new restaurant or new concept that would not involve Siebel is directly contradicted by all of the communications in which Ramsay or Thomas state throughout 2013 that the Restaurant was going to "change" its name. A new restaurant, a new concept, like the one Ramsay was planning as the Chicken Shop, and later Gordon Ramsay Roast, is not a name "change" but a brand-new concept completely separate from the Fat Cow. A name change means the restaurant is still the Fat Cow concept, but with a change like the trademark application filed by Ramsay in June 12, 2013, The Cow by Gordon Ramsay. (Ex. 26; Tr. 355:9-13; Ex. 513) As a result, Ramsay's team continued from September 2013 until December 13, 2013 to state to Seibel that a name "change" would occur, as provided for in the potential agreement with Las Vacas Gordas (or "LVG"). (Tr. 124-25; Exs. 27, 119, 120, 121, 102)[11] There would simply be no reason to discuss a name "change" with Seibel if Ramsay truly believed the parties had agreed to a buyout and Ramsay was going to close the Fat Cow and open a new restaurant with a new concept without Seibel. Ramsay and his

[11] The License Agreement and FLCA Agreement also anticipated a name change. (Ex. 8, ¶4(a); Ex. 11, Schedule A) The communications with Las Vacas Gordas also called for a name change. (Ex. 119, 115, 102)

team were intentionally misleading Seibel by claiming to be working on a name "change" from September 2013 until December 13, 2013 for the very reason that he had not disclosed to Seibel his secret plan to close the Fat Cow and open a new restaurant without Seibel.[12]

4. Ramsay Defendants Misrepresented Seibel's Position on Bankruptcy to Justify Their Conduct that Breached the Agreements

Defendants attempted to argue that the suggestion of bankruptcy in late October 2013 supports Ramsay's position that the Restaurant had to close and that Seibel essentially consented to closing the Restaurant by raising the bankruptcy possibility. The evidence clearly contradicted that argument.

There is no dispute that Seibel and Gillies discussed the potential of the Restaurant filing for bankruptcy as a possible way to limit the liability of the class action litigation. The discussion was in the context of reopening the Restaurant with same or similar ownership (Ex. 124; Tr. 141-144, 147-48; Ex. 78, Tr. 1094-95; Tr. 711-712; Ex. 139, 297; Ex. 125) Nevertheless, despite receiving an email from Seibel on October 29, 2013 the idea of bankruptcy was "insolvency and a fresh start to the business", meaning the "business" including Ramsay and Seibel (Ex. 139; Tr. 142), Thomas repeatedly attempted to create an inaccurate record of Seibel's position regarding bankruptcy by leaving out the critical part of reopening with the same or similar ownership structure. (Ex. 76) Even after Seibel corrected Thomas' misstatement on Dec. 9, 2013 (Ex. 297), Thomas simply ignored Seibel and continued making a false record of Seibel's position. (Ex. 124) Indeed, Thomas knew that the bankruptcy idea was limited to reopening with the same ownership

[12] After closing the Restaurant, Ramsay suggested using his intended new restaurant, GR Roast, as the prize for the Hell's Kitchen season instead of the Fat Cow. (Tr. 437)

structure because that is what he told counsel, the Littler firm on Nov. 8, 2013. (Exs. 78, Ramsay 009387-001), and again on Dec. 24, 2103 (Ex. 125, Ramsay 011577-0002) The reason is clear – Ramsay had already secretly made the decision to close and now wanted to use Seibel's suggestion of bankruptcy to justify the secret decision.

That plan is consistent with Thomas' behavior. While Thomas knew that advice on bankruptcy was critical to determining the class action liability, he did nothing to get bankruptcy advice until early December. (Tr. 1118-1119) Thomas claimed he was waiting for Seibel's response on class action liability in November, when he knew it was contingent on the bankruptcy option. (Tr. 1119) But, by the time they finally obtained advice from a bankruptcy specialist, Mr. Usdin, that the bankruptcy option could possibly work with the same owners, but they still needed further advice, (Tr. 926; Ex. 125; Ex. 127, Tr. 755-756), Ramsay had already informed Seibel that he was closing the Restaurant.

Moreover, Thomas conceded that when discussing bankruptcy with Ziegler he did not mention Ramsay's plan to reopen the Restaurant without Seibel. (Tr. 1101-1102) He further conceded it would be important in the discussions with Ziegler about bankruptcy (and the class action) to tell Ziegler that Ramsay intended to close the Restaurant and reopen a new restaurant without Seibel, but that he never told Ziegler of Ramsay's plan. (Tr. 1086-87) In fact, if Ramsay had told Seibel he was closing and reopening without Seibel, there would have been no point to discuss bankruptcy with Seibel – the Restaurant was closing down anyway based on Ramsay's decision. The entire bankruptcy discussion reveals that Ramsay did not inform Seibel of his true intentions – to close and reopen without him – but rather attempted to misuse Seibel's position on bankruptcy to create an inaccurate record that provides an after-the-fact justification for Ramsay's deceitful closure.

5. Ramsay Defendants Actively Concealed Their Conduct

The fact that Defendants were hiding their plans from Seibel even *after* Ramsay stated he was closing the Restaurant on December 13, 2013, is further supported by the evidence that revealed it was their intention to keep Seibel in the dark.

Ramsay admitted that when he met with Caruso in December 2013, Seibel was not invited to the meeting nor was he informed of the meeting. (Tr. 381:5-12) Ramsay admitted that the purpose of the meeting with Caruso was to present the idea for a new restaurant that would take over the lease from the Fat Cow (Tr. 376, 280), but Seibel was not aware that any such conversation was taking place. (Tr. 381:7-12) In fact, Ramsay's team was instructed to "discreetly arrange a table" so that it would not "get back to Rowen." (Ex. 31; Tr. 381:23-382:14)[13] Ramsay conceded this was an attempt to keep the meeting from Seibel.[14] (Tr. 445:25-446:4) Ramsay attempted to claim that Mr. Caruso was "not a fan" of Seibel. (Tr. 430: 11-17) That testimony is clearly false. Both Seibel and Caruso testified that they had never met before. (Tr. 712: 4-10; Caruso Tr. 1:1-10)[15] Tellingly, when Defendants deposed Caruso, they did not even ask whether he had any negative view of Seibel or would not want Seibel to know about meetings between Caruso and

---

[13] When Ramsay decided to contact Caruso to set up the secret meeting about the new restaurant, Gillies responded "Game on" (Ex. 30, Tr. 379), not exactly the response from a group that claimed they were being transparent with Seibel.

[14] Initially, Ramsay claimed he wanted a discrete location, not because he wanted to keep the meeting secret from Seibel, but because Caruso was "not a fan" of Siebel's. (Tr. 430:11-17). However, upon further cross he admitted that he wanted to keep the meeting secret from Seibel. (Tr. 445:25-446:4)

[15] In fact, Ramsay subsequently testified that he was aware that Caruso did not know Seibel, but later changed his testimony again. (Tr. 432:19-433:11, 444:10-445:1)

Seibel, as Ramsay baselessly claimed at trial.[16] The day after the meeting, Ramsay and Seibel had a chance meeting in an elevator bank during which Ramsay did not tell Seibel about the meeting with Caruso.[17] (Tr. 384; Tr. 148) If Ramsay had already informed Seibel of his plan to close the Restaurant and re-open a new restaurant that did not involve Seibel, there would be no reason to affirmatively conceal the meeting with Caruso from Seibel.[18]

This was not the only time that Ramsay actively tried to conceal plans from Seibel. After Seibel was informed about Ramsay's plan to issue a WARN notice of closure in late December 2013, Ramsay claimed the "creep" Bill Yoo, the company bookkeeper, was who Ramsay suspected had "tipped off Rowen!" (Ex. 38; Tr. 385-386) When news of the new restaurant was leaked to the press, Ramsay's team said it was "the worst thing in the world" when they thought Rowen would find out about their plans in January 2014. (Tr. 389) While Ramsay attempted to claim his concern was the public announcement was premature, the fact remains that this leak is precisely how Seibel learned of their secret plan to open a new restaurant. (Tr. [redacted]

---

[16] While Ramsay attempted to claim that Caruso had a negative view of Seibel based on the Serendipity negotiations for space at the Grove, the *only* evidence in the record was that Caruso did not want a Serendipity restaurant at the Grove (Caruso Tr. 65:8-19; 66:18-23), and that is why the proposed lease terms offered to Ramsay for the Fat Cow were significantly better than those offered Seibel for his Serendipity restaurant. (Tr. 48:11-50:1; Ex. 49)

[17] Ramsay Defendants also did not ask Caruso whether he insisted that any issue with Seibel be resolved before agreeing to a new restaurant, as they now claim. Indeed, far from demanding that Ramsay resolve his issues with Seibel before proceeding with the new restaurant, Caruso testified he was excited about it. (Caruso Tr. 32:25-33:6) Caruso testified that, three months later in March 2014, the issue of a partnership dispute with Seibel was raised by Ramsay's team but he did not know the nature of the dispute between Ramsay and Seibel (Ex 222; Caruso Tr. 44:11-22; 63:21-13) Caruso testified that he only said "I just don't want to get involved in other people's disputes." (Ex. 222; Caruso Tr. 45:25-47:2) In fact, Caruso said that he had no issue with Ramsay continuing his partnership with Seibel at the Grove restaurant, and never told Ramsay that he wanted Seibel out of the partnership. (Caruso Tr. 61:24-62:9)

[18] Even after the Restaurant had closed and after Seibel filed a complaint alleging, among other things, that Ramsay had filed a trademark application for "Gordon Ramsay Roast", Van Willigan did not know how Seibel had found out about it and conducted an investigation, concluding that it was simply a public record search. (Ex. 225; Van Willigan Tr. 208:17-210:17)

C. Ramsay Defendants Impossibility, Impracticability and Frustration Defenses Fail

The crux of the evidence submitted at trial by Defendants was to show that Ramsay did not want to be in business with Seibel, and therefore Defendants were justified in the actions they took. However, in order to avoid the clear requirements of the Agreements and the unanimous consent provision, Ramsay had to show that he was excused from complying with the unanimous consent requirement for making decisions, such as closing the Restaurant, based on the doctrines of impossibility, impracticability or frustration.

1. Legal Standards for Impossibility, Impracticability and Frustration

As set forth above, the Fat Cow LLC Agreement is governed by California law and the FCLA LP Agreement is governed by Delaware law. While the standards for impossibility, impracticability and frustration are largely similar in both states, California's standards for impossibility are even stricter than in Delaware.

Under California law, the doctrine of impossibility provides: "[w]here a party has agreed, without qualification, to perform an act which is not in its nature impossible of performance, he is not excused by the difficulty of performance, or by the fact that he becomes unable to perform…The impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it…The Civil Code, § 1597, provides that 'Everything is deemed possible except that which is impossible in the nature of things.'" *Irwindale Citrus Ass'n v. Semler*, 60 Cal. App. 2d 318, 324, 140 P.2d 716, 719 (1943) *citing*, Cal. Civ. Code § 1597. California takes a strict view in application of the doctrine such that impossibility requires the literal, physical impossibility of an act to be accomplished in order to excuse one's performance under a contract. If it is impossible in the nature of the act (e.g. it is impossible to repair a totaled car as totaled means beyond repair),[19] then it will excuse performance, short of that, "everything is deemed possible." Cal. Civ. Code § 1597. For example, in *W. Indus. Co. v. Mason Malt Whisky Distilling Co.*, 56 Cal. App. 355, 205 P. 466 (Cal. Ct. App. 1922), the doctrine of impossibility did not excuse defendant's failure to deliver goods by barge as called for in the contract where, after the contract was signed, defendant was prohibited by criminal charges filed against it from delivering by barge. The California Court of Appeals held there was sufficient evidence that delivery of the goods was possible by other means and, as a result, performance was not impossible. *W. Indus. Co. v. Mason Malt Whisky Distilling Co.*, 56 Cal. App. at 355.

The standards for impracticability in California and those in Delaware for both impossibility and impracticability, mirror the Restatement (Second) of Contracts, which does not permit a party to cause the impracticability of performance. The Restatement provides: "Where, after a contract is made, a 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, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." Rest.2d of Contracts, § 261 (1981); *Maudlin v. Pac. Decision Scis. Corp.*, 137 Cal. App. 4th 1001, 1017, 40 Cal. Rptr. 3d 724, 735 (2006); *Obsidian Fin. Grp., LLC v. Identity Theft Guard Sols., Inc.*, No. CV 2020-0485-JRS, 2021 WL 1578201, at *6 (Del. Ch. Apr. 22, 2021) (for impossibility and impracticability defense, defendant must demonstrate: "(1) the occurrence of an event, the nonoccurrence of which was a basic assumption of the contract; (2) the continued performance is not commercially practicable; and (3) the party claiming

[19] *See In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1175 (C.D. Cal. 2011) (excusing defendant's performance under contract where contract called for defendant to repair or adjust vehicle, but vehicle was totaled rendering repair or adjustment, by definition, impossible).

impracticability did not expressly or impliedly agree to performance in spite of impracticability that would otherwise justify nonperformance"). There are three categories of different types of "event[s]" that traditionally have warranted the application of this principle: (1) supervening death or incapacity of a person necessary for performance; (2) supervening destruction of a specific thing necessary for performance; and (3) supervening prohibition or prevention by law. Rest.2d of Contracts, §§262, 263, 264 (1981). While this list is not exhaustive, it is indicative of the importance of the types of "events' the occurrence of which can render one's performance under a contract impracticable and thus, discharge one's obligations.

"Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved. A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like…" Rest.2d of Contracts, § 261. However, a party will not be excused from performance due to increased difficulty or expenses beyond the normal range. *Id.* An example of extreme expense as opposed to an expense beyond the normal range can be found in *City of Vernon v. City of Los Angeles*, 45 Cal. 2d 710, 290 P.2d 841 (1955). There, the city of Vernon contracted with the city of Los Angeles for the disposal of its waste through L.A.'s sewage facilities beginning in 1909 (and several additional contracts throughout the 1920-30s). 45 Cal. 2d at 710. Due to industrialization in and around Vernon and new health laws regarding sewage facilities that occurred over time, to complete its performance obligations under the contracts L.A. would have been required to build an entirely new sewage facility for the disposal of Vernon's waste at a cost of $41,000,000.00. 45 Cal. 2d at 719. The court held that L.A.'s performance was excused due to the unreasonably excessive cost of doing so. *Id.*

The Supreme Court of California (their highest court) has held on impracticability: "where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be nonexistent." *Min. Park Land Co. v. Howard*, 172 Cal. 289, 292, 156 P. 458 (1916). There, the parties to the contract agreed that one would take gravel from the other's land, but when it was discovered that the gravel was below water-level and could not be removed by "ordinary means" (i.e. without engaging a steam-dredger causing excessive expense and great delay), performance was excused because the gravel was not "available" in a practical and reasonable way: "the situation is not different from that of a total absence of earth and gravel." *Id*. at 292; 293.

In Delaware, "[t]here can be no invocation of the impossibility [or impracticability] defense if the supervening events were reasonably foreseeable, and could and should have been anticipated by the parties and provision made therefor within the four corners of the agreement." *Obsidian Fin. Grp., LLC*, No. CV 2020-0485-JRS, 2021 WL 1578201, at *6; *see also Bobcat N. Am., LLC v. Inland Waste Holdings, LLC*, No. CVN17C06170PRWCCLD, 2019 WL 1877400, at *9 (Del. Super. Ct. Apr. 26, 2019).

Regarding the doctrine of frustration of purpose in Delaware, "[t]he frustration of purpose defense requires the defendant to establish: (1) substantial frustration of the principal purpose of the contract; (2) that the nonoccurrence or occurrence of the frustrating event was a basic assumption upon which the contract was made; and (3) no fault on the part of the defendant." *Chase Manhattan Bank v. Iridium Afr. Corp.*, 474 F. Supp. 2d 613, 620 (D. Del. 2007). In California, that doctrine states similar to Delaware: "Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration, and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears." *Johnson v. Atkins*, 53 Cal. App. 2d 430, 433-34, 127 P.2d 1027 (1942) *quoting*, Rest. of Contracts §288. The *Johnson* court detailed the history of the application of this doctrine, which demonstrated its close ties with war times where "contracts for the sale of specific materials, and for the shipment on named vessels, or to specific ports, were made impossible of performance by war restrictions, embargoes, or seizure of the vessel…" 53 Cal. App. 2d at 432. More succinctly put, the doctrine applies "when performance is possible but a supervening, fortuitous event has virtually destroyed the value of the consideration to be rendered." *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, 66 Cal. App. 3d 101, 154, 135 Cal. Rptr. 802, 833–34 (Ct. App. 1977).

None of the evidence submitted at trial supported Ramsay Defendants' purported defense that performance was impossible, impractical, or frustrated under either Delaware or California law such that they were permitted to unilaterally declare a deadlock and essentially nullify the unambiguous contract terms.

2. Failure of Managers to Agree Unanimously Does Not Excuse Performance

It is undisputed that decisions by either FCLA or Fat Cow LLC required unanimous consent of the managers of the LLC. Ramsay Defendants have previously argued that the parties agreed to the unanimity provision in the Fat Cow LLC Agreement (and for the LLC to be the general partner of FCLA) on the assumption that the managers would be capable of reaching decisions unanimously – and that assumption turned out to be false. Without a deadlock provision, the managers could not come to a decision by unanimous consent and Defendants believe that meets the standard for impracticability, impossibility or frustration of purpose. However, "[t]here can be no invocation of the impossibility [or impracticability] defense if the supervening events were reasonably foreseeable, and could and should have been anticipated by the parties and provision made therefor within the four corners of the agreement." *Obsidian Fin. Grp., LLC*, No. CV 2020-0485-JRS, 2021 WL 1578201, at *6; *see also Bobcat N. Am., LLC v. Inland Waste Holdings, LLC*, No. CVN17C06170PRWCCLD, 2019 WL 1877400, at *9 (Del. Super. Ct. Apr. 26, 2019). It was reasonably foreseeable that there would come a time when the managers (Seibel and Ramsay) would not reach unanimous consent on a decision. The parties could have included a deadlock provision in their contracts as this "could and should" have been anticipated by them. *Id*. In fact, there were discussions of including a deadlock provision in the LLC Agreement, but somehow it was never finalized with that provision. (Ex. 53) The acknowledgement by both parties that a deadlock provision should be included in the LLC Agreement upon its drafting means the parties foresaw a time in which the managers may not reach unanimous consent – thus Defendants cannot argue they're excused from performance when this possibility was known to them at the outset. Where the party has assumed the risk that the "impracticable/impossible" event might occur, the defense does not apply. Moreover, the failure of the managers to agree unanimously did not "virtually destroy" the value of the Restaurant and thus there has been no frustration of purpose. *Glendale Fed. Sav. & Loan Assn.*, 66 Cal. App. 3d at 154.

Accepting Defendants' argument would excuse a party from performance under a contract with a unanimous consent provision that lacks a deadlock clause any time the contracting parties cannot agree. Plaintiff is not aware of any California or Delaware legal authority that supports the proposition that a lack of a deadlock provision in a contract where the parties cannot agree unanimously renders performance impracticable, impossible or frustrated. The law is clear about the types of circumstances that support impracticability, impossibility and frustration, and those circumstances are not present here.

3. Ramsay Decided to Close the Restaurant in Approximately June 2013.

The facts that allegedly caused the impossibility, impracticability or frustration had to have existed when the decision to close was made. The evidence at trial showed that such purported grounds supporting these defenses did not exist in June 2013 (or even by December 13, 2013).

Both parties agree that the first time Ramsay informed Seibel of his intention to close the Fat Cow Restaurant was on December 13, 2013 in an email. (Ex. 218; Tr. 125:14-22; 390:3-18) However, as Plaintiff stated in the opening, the decision to close was made long before December 13, 2013. At trial, both Ramsay and his counsel, Thomas, conceded that the decision to close the Restaurant and open a new restaurant that would not involve Seibel was made by June 2013. Specifically, Ramsay testified that the class action, which was filed in June 2013, "was the final straw" in his relationship with Seibel. (Tr. 469; Ex. 260) Thomas testified that the decision to close was made when Seibel and Ramsay discussed a buyout in June 2013. (Tr. 1081 24-1082:21; Ex. 513) As a result, Ramsay Defendants must show that their grounds for impossibility, impracticability or frustration of purpose existed when the decision to close was made.

4. The Trademark Was Not a Valid Reason to Close the Restaurant

When Ramsay first informed Seibel that he intended to close, the sole basis that he stated in his December 13, 2013 email was the trademark. Exhibit 218 states "The Fat Cow has to close as the name cannot be used because of Las Vacas Gordas." While Ramsay raises a number of additional issues in that email, it is the trademark alone that he states requires the Restaurant "to close." (See also, Tr. 128:8-11)

The clear evidence at trial showed that statement to be false. (Tr. 126:2-127:1;128) Ramsay admitted (i) he had committed to Caruso in April 2013 to put his name on the Restaurant (Tr. 353, 1077; Ex. 67); (ii) Caruso wanted Ramsay's name on the Restaurant and would consent to it; (Tr. 395)[20]; (iii) when the Blackstone agreement expired on February 28, 2014 Ramsay was legally permitted to put his name on the Restaurant (Tr. 73-74; Tr. 350-351); (iv) Ramsay always intended to put his name on the Restaurant when the Blackstone agreement expired (Tr. 351); (v) the Las Vacas Gordas agreement permitted the use of the Fat Cow name until the Blackstone agreement expired (Tr. 395); (vi) Seibel was in favor of changing the name (Tr. 398-99); (vii) Ramsay had filed a trademark for "The Cow by Gordon Ramsay" for use at the Grove (Ex. 26; Tr. 355:9-13).[21] There was NOTHING stopping Ramsay from simply changing the name to "The Cow by Gordon Ramsay" on March 1, 2014.

[20] Initially, Ramsay claimed that the Caruso would not "allow me to stick the word Gordon Ramsay up while there were issues inside that building and continue trading." (Tr. 394:7-18). He subsequently admitted that not only did Caruso want his name on the Restaurant, but that Ramsay had committed to putting his name on it. (Tr. 395:3-9; Ex. 67; Tr. 353:5-15.) Moreover, the only evidence in the record, including Ramsay's own testimony is that by December 2013, Caruso was happy with the Restaurant and did not believe there were "issues inside the building" that would cause him to object to Ramsay's name being put on the Fat Cow Restaurant. (Ex. 247, Tr. 356:9-357:11) Ramsay further testified that he agreed that the food quality had improved as early as June 2013. (Tr. 358:1-4)

[21] Ramsay testified (Tr. 395:3-25):

Q. Separate issue from the trademark, though. As far as the trademark was concerned you were allowed to put a new name on this restaurant, right?

A Yes, sir, with the landlord's permission.

Q Okay. And the landlord continued at this point to want the name Gordon Ramsay on the restaurant, correct?

A Yes, sir.

Q In fact you had testified earlier that if Las Vacas Gordas insisted that you couldn't use the name on the restaurant you would in fact change the name, right?

A Yes, sir.

Q Okay. And your counsel had by this time negotiated an agreement with Las Vacas Gordas to allow The Fat Cow name to be used until the time that the Blackstone agreement expired, right?

A I believe so. Yes, sir.

Indeed, as Ramsay testified it was the intention of the parties since before the Restaurant opened that if Las Vacas Gordas objected to the name, they would change the name – not permanently close the Restaurant. (Tr. 74-75; Tr. 347) They had invested too much money to just close (Tr. 126; Tr. 346:14-347:8) All parties were aware of the issue prior to opening (Tr. 70-71; Ex. 12; Ex. 303) Ramsay conceded that the clear intention from the beginning was to change the name, as that was set forth in the FCLA and License Agreements (Tr. 342, 346, 350; Exs. 8, 11; Tr. 1075; 81) Ramsay testified that the possible necessity to change the name was discussed at length between Ramsay and Seibel. (Ramsay Tr. 344:8-345:12; Tr. 72-74; 99-100) Ramsay conceded it was always his intention that if Las Vacas Gordas insisted on a name change, Ramsay would change the name. (Tr. 354:2-5)

Thomas conceded that all of the negotiations with Las Vacas Gordas were for the express intention of getting permission to use "Fat Cow" until the Blackstone agreement prohibition expired and then to "change" the name of the Restaurant – not close it. (Ex. 119, Tr. 102-106; Tr. 1076-1077) Defendants further conceded that the entire purpose of the LVG negotiations were based on the intention to change the name of the Restaurant. (Tr. 395; 355; 1076) Ramsay and Seibel believed that adding Ramsay's name would have a positive impact on the Restaurant. (Tr. 351; 74) Thomas told Las Vacas Gordas' counsel, Mr. Isicoff, that they would change the name (Ex. 115; Tr. 1077-78) All the drafts of the Las Vacas Gordas agreements and the final agreement

---

Q And that was done for the purpose of having the name changed after that period with the name that would include your name, correct?
A Yes, sir.
Q And that was still the situation in December of 13 of 2013, right?
A Yes, sir.

expressly provided for a "change" of the name (Tr. 1078-79, Exs. 102, 115) When the initial agreement was made with LVG in September 2013, Thomas told Gillies, who forwarded the email to Seibel – the name would change. (Tr. 1079-80; Ex. 27) The documents sent to Ziegler provided for the change of name. (Tr. 1080-81; Ex. 120) Even Mr. Isicoff testified that it was not represented to him at the start of the negotiations and for some time thereafter that the Restaurant was closing. (Isicoff Tr. 21:17-24; 22:7-12) The evidence clearly showed, and Thomas conceded, that with all the communications between the parties after Las Vacas Gordas issued its cease and desist letter (Ex. 100), there was not a single communication about closing the Restaurant because of the trademark until Ramsay and Thomas's December 13, 2013 communications to Seibel. (Tr. 1081:2-11)

Suddenly, on December 13, 2013 and thereafter, Ramsay and his team talked about the Restaurant being permanently closed due to the trademark. At the time, and at trial, Ramsay Defendants attempted to blur the distinction between (i) changing the name, or "rebranding" the Restaurant, which could result in a temporary closure while the name is changed, and (ii) the permanent closure of the Fat Cow Restaurant enterprise between Ramsay and Seibel. It was, and is, completely duplicitous to tell Seibel that the name was changing due to the trademark – leading Seibel to believe the joint venture partnership would continue under a new name, and then switch gears and claim the same trademark issue required a permanent closure of the joint venture partnership.

Simply put, the Restaurant did not have to close permanently due to the trademark. As Ziegler testified, the claim that the Restaurant had to "close" because of the trademark was obviously false, as other options were available, such as staying open and using another name, or getting an extension of time from Las Vacas Gordas. (Tr. 759-760) In fact, Ziegler repeatedly suggested that Thomas attempt to get more time from LVG. (Tr. 734-35; Exs. 124, 127)

The fallacy of Ramsay's position is further revealed by the fact that he admitted to making the decision to close the Restaurant and reopen a new restaurant without Seibel in June 2013! At no time during the months between June and December 2013 did Ramsay or his team claim they were going to "close" the Restaurant. (Tr. 1081:2-11) If Ramsay had disclosed his plans to Seibel in June 2013, as he and Thomas claimed, and everyone was simply working towards finalizing a buyout, as Ramsay and Thomas also claimed, that would mean the decision to close was made before Thomas even reached a tentative deal with LVG in September 2013.[22] In other words, the trademark could not have been the reason behind the decision to close in June 2013 when there is no evidence that anyone knew how much additional time LVG would give the Restaurant to continue using the name.

5. The Claim that LVG Imposed an Absolute Backstop date of March 1, 2014 Was a Lie

Because Ramsay knew the claim that the Restaurant must close because of the LVG agreement and the trademark issue was contrived, Thomas fabricated the excuse that March 1, 2014 was the "absolute backstop" date that he was able to obtain from Las Vacas Gordas to continue to use the Fat Cow name. Thomas made the claim of the absolute backstop date on multiple occasions. (Ex. 123; Tr. 735; Ex. 127, Tr. 738)

However, as revealed by the LVG witnesses, in fact, Thomas never even attempted to obtain more time past the March 1 date, and never offered to pay more than the $5,000 agreed

[22] The myth of this position is revealed by Mr. Isicoff's testimony that at the start of the negotiations and for a time thereafter, Thomas did not mention anything about the Restaurant closing. (Isicoff Tr. 21:17-24; 22:7-12)

upon payment. (Tr. 736-737; Gajer Tr. 21:4-22:14, 24:2-6; Isicoff Tr. 37:9-17) In fact, Mr. Gajer of LVG stated that had Ramsay offered more money, Gajer would have given a license for additional time. (Gajer Tr. 21:4-22:14) Thomas admitted he did not attempt to get more time. (Tr. 1105, 1107, 1109) He admitted he did not ever offer more money to LVG to get more time. (Tr. 1105-1106) He did not offer more money despite knowing that LVG "happily" had extended the end date on two separate occasions without requesting more money. (Tr. 1105:5-23; Exs. 103, 108) Ramsay also admitted that he did not attempt to extend the agreement (Tr. 506)

Thomas' excuse at trial was that he did not want to go back to LVG and ask for additional time. (Tr. 991) Despite the fact that Thomas admitted that he was acting on behalf of the entity in these negotiations, (Tr. 1103) he admitted that he did not tell Ziegler (counsel for 50% owner of Thomas' client in the negotiations) of his alleged reason for not going back to LVG for more time. (Tr. 1103-1104) In addition, Thomas did not ask for Seibel's view or agree that he should ask for more time.[23] (Tr. 1103-04) So, in his capacity as representing the entity, Thomas followed only Ramsay's instructions and misled Seibel about his purported inability to get additional time. (Tr. 991) Instead, he finalized the LVG Agreement despite admitting that he did not get authority from Ziegler or Seibel to sign the final agreement (Tr. 1110-1111) He never even asked Ziegler if his client consented. (Tr. 1112-13) Thomas did not have authority to bind the entity without Seibel's consent, which Ziegler told Thomas. (Tr. 732, 815) Nevertheless, Thomas based his purported authority to sign the LVG Agreement on an alleged conversation between Gillies and Seibel back

[23] Thomas claimed that Seibel would not have paid any more money because of his initial position stated in April 2013 at a time when no one was discussing closing the Restaurant, but never once asked either Seibel or Ziegler in late 2013, particularly when faced with Defendants' new (and false) claim that they must close the Restaurant by March 1, 2014 because of LVG, whether Seibel was willing to pay any more money. (Tr. 1106:17-1107:2)

in September, although Thomas admitted that he did not know when Gillies and Seibel had last spoken – but it clearly occurred when Seibel was told the Restaurant would be "changing" its name, not closing as a result of the LVG agreement. (Tr. 1111-12)

In the context of Defendants' impracticability, impossibility and frustration defenses, this trademark excuse fails. Negotiating a payment for permission to use the name or extended use of the name is not the type of extreme, unreasonable expense that would be incurred sufficient to warrant the defense of impracticability, as demonstrated *City of Vernon*, 45 Cal. 2d at 719. Nor is there any "supervening, fortuitous event" that has "virtually destroyed" the value of what the parties contracted for. *Glendale Fed. Sav. & Loan Assn*, 66 Cal. App. 3d at 154. There is nothing that the parties thought existed at the time the Agreements were entered into that "turn[ed] out to be nonexistent" as in *Min. Park Land Co.* 172 Cal. at 292. In fact, the parties were acutely aware of the trademark issue prior to signing the Agreements and naming the Restaurant, as they explicitly provided for a name change in the Agreements. (Exs. 8, 11) "There can be no invocation of the impossibility [or impracticability] defense if the supervening events were reasonably foreseeable…" *Obsidian Fin. Grp., LLC*, No. CV 2020-0485-JRS, 2021 WL 1578201, at *6. This trademark dispute was not only reasonably foreseeable, it was expected by both parties. It cannot form the basis for an impracticability, impossibility or frustration defense.

6. Ramsay's Claim that He Could No Longer Be In Business with Seibel Was Proven to be False

Ramsay claimed one of his reasons for closing the Restaurant was that he could no longer be in business with Seibel because Seibel was trying to "take advantage of my success" and "milking it" by trying to negotiate for additional restaurants without Ramsay's knowledge. (Tr. 468:11-470:11, 944:11-945:6) As this Court noted, "Here's the problems with the defense's credibility, okay, is that your reasons for getting rid of Mr. Seibel are all – they're like a moving target, you know. What is it? Will the real reason please stand up." (Tr. 1481:1-7) Not only was it shown at trial that testimony was false, but such a claim is not sufficient to support an impossibility, impracticability, or frustration defense.

a. Areas Airport Discussions on Behalf of GR Burgr, LLC

Ramsay claimed at trial that unbeknownst to him, Seibel was negotiating deals to open Gordon Ramsay BURGR restaurants in airports.[24] (Tr. 463:10-15; 907:24-908:10) Ramsay said he did not want to do restaurants in airports, (Tr. 463, 470; Tr. 952:952:10-17) and claimed that when Craig Green brought up airports it was "all too much too soon" and led to his alleged need to cease doing business with Seibel. (Ramsay Tr. 463) Thomas claimed that "we discovered Mr. Seibel had been out having various discussions with parties to use Ramsay's name and his IP and goodwill, so without permission and without informing us at the stage when they started in those negotiations." (Tr. 945:3-6) That testimony was false.

First, Ramsay's statement that the idea of him having a restaurant in an airport was objectionable on its face was admitted to being false, because Thomas admitted that Ramsay had a restaurant in an airport since 2008.[25] (Tr. 1140)

More importantly, the evidence at trial showed that Ramsay knew about the potential airport deals with an entity known as "Areas" from the start. Ramsay's "MD" – managing director and right-hand man – not only knew about the Area's potential deals, but had initiated the process and handed the negotiations over to Seibel. It was Gillies who had the initial meeting with the

[24] Thomas also testified that he didn't know about the Areas negotiations before October 2013. (Tr. 961)
[25] Gillies testified that he worked for Ramsay's airport restaurant ("Plane Food" at Heathrow) since 2008 and was still in operation at the time of the depo. (Gillies Tr. 9:20-10:19)

Areas people in May 2013, a meeting that was also attended by Gillies' personal assistant, Alexis Sarris. (Ex. 616) Clearly, Ramsay knew about the meeting.[26] The meeting was not attended by Seibel, but the minutes of the meeting were sent by Sarris to Seibel. (Ex. 616) Thus, Gillies and Ramsay brought the opportunity to Seibel. (Ex. 616, Tr. 844) Seibel and Gillies continued to discuss Areas in June 2013. (Ex. 499) In July 2013, Gillies contacted Seibel to discuss "strategy, options, etc." before their call with Areas. (Ex. 615) Ramsay's claim that Seibel was acting without his team's knowledge was shown to be utterly false. These documents directly contradict Gillies' claim at his deposition that they did not know about Seibel's discussions involving the airport deals. (Gillies Tr. 95:20-97:5)

The Areas discussions further reveal that Defendants' claim - that he decided in June 2013 that Ramsay could no longer be in business with Seibel - was also false. When Seibel emailed Ramsay about his discussions with Areas and a potential RFP or request for proposal in November 2013 that would be submitted by the GR Burgr LLC, the LLC that was 50% owned by Seibel, Gillies did not respond by saying that Ramsay would not do any further BURGR restaurants with Seibel, or claim they could not move forward on any deals together. Rather, he sought more information. Gillies said that they "[c]annot move any further on areas though until we have a lot more detail on the proposal & assurances." (Ex. 604; Tr. 923:9-925:18) Similarly, when Ziegler contacted Thomas about Areas, Thomas did not respond – we won't do business with Siebel -- but rather sought additional information. (Tr. 1141:8-25; Exs. 605, 563. Tr. 844-845)

[26] Gillies claimed that he met with Seibel in April 2013 and that Seibel wanted to talk about "airport opportunities" but that Gillies didn't want to talk about it (contrary to Ramsay's claim that Seibel did not disclose the airport potential deals with Ramsay's team.) (Gillies Tr. 121:16-18; 122:7-11)

Not only was Seibel acting with Ramsay's teams' full knowledge, as Seibel accurately testified, but his activities were also clearly consistent with the GR Burgr LLC Agreement. (Ex. 305, Sec. 7.2) The Burgr LLC Agreement not only expressly anticipated additional restaurants, but it was the licensee of the trademark that included Ramsay's name – "BURGR Gordon Ramsay". (Ex. 305, p, 1; Sec. 4 (a)-(d); Schedule 1) In addition, as a Manager of the BURGR LLC, Seibel clearly had the authority to negotiate on behalf of the LLC. (Ex. 305, Sec. 8.2; 8.8; Tr. 1145:2-1149:10) Contrary to Ramsay's claim that Seibel was taking advantage of his name, and Thomas' claim that Seibel was improperly trying to negotiate the use of Ramsay' name without permission (Tr. 945:3-6), Seibel was acting under the clear authority of the BURGR LLC Agreement. Moreover, despite Ramsay's unsupported claim that there were "contracts that he [Seibel] was signing unbeknownst to me", Thomas conceded that Seibel was merely negotiating and did not ever sign a contract on behalf BURGR. (Tr. 469:5-7; 1149:7-10)

b. <u>Singapore Discussions on behalf of GR Burgr, LLC</u>

During trial, Ramsay claimed one of the reasons he could no longer be in business with Seibel was the "bizarre moment" when he learned that "Mr. Seibel was trying to sell a Gordon Ramsay restaurant in Singapore", which he claimed "he had no permission to do it, so all of these underhanded negotiations outside of your working relationship was taking place." (Tr. 463:2-9) Thomas reiterated that Seibel had negotiations in Singapore that Ramsay "was not aware of." (Tr. 1149:11-14)

In fact, on May 15, 2013, Gillies wrote to Seibel, "[r]egarding the trip to Singapore and Macau, I am afraid that I cannot attend after all unfortunately as I have other commitments already. I'm sure we can talk through the details after the trip." (Ex. 611) June 26, 2013, Seibel wrote to

Ramsay's assistant, J.C. Babas, "whats the sched looking like – is Singapore trip happening? Want to talk with him re:cow, Singapore, ac and lv? (Ex. 612) Then on July 24, 2013, Seibel wrote to Gillies and Ramsay "Let me know when is a good time to recap Singapore (my visit and yours), macau and hk (observations, dining concepts –Sandeep restaurants, hk market." (Ex. 613) Clearly, Ramsay and Gillies had been discussing potential business in Singapore with Seibel. Thomas testified that the business proposal in Singapore raised by Seibel was for GR Burgr (Tr. 1149-51; *see also* Tr. 907:24-908:10) – revealing that Seibel's discussions were fully authorized under the BURGR LLC Agreement. There was nothing improper occurring with regard to the mere fact that Seibel had discussions – disclosed in advance of his trip – about a potential Gordon Ramsay BURGR restaurant in Singapore. Once again, Ramsay Defendants' claims of ignorance of Seibel's activities were contradicted by the documents.

c. <u>Ramsay Knew About the Inquiry in Egypt</u>

At trial, it was shown that Ryan Stock, the manager of the Fat Cow Restaurant, informed Green that a person from Egypt had inquired about a potential Fat Cow restaurant in Egypt. (Ex. 497; Tr. 631:14-632:16) Green testified that he informed Ramsay's team about the inquiry and his follow up that did not advance sufficiently to bring to directly to Ramsay's attention. (Tr. 635:3-636:8, 637:13-19; 642:3-16; 643:9-644:18) As he falsely claimed with Areas and Singapore, Ramsay claimed he never knew about the inquiry from Egypt.[27] (Tr. 489:6-19) In light of his false testimony regarding other projects he claimed he and his team did not know about, Ramsay has no credibility on this issue and his claimed ignorance should be rejected.

[27] Gillies also claimed he did not know about Egypt. (Gillies Tr. 92:5-10; 100:8-13; 102:4-9) Gillies went so far as to falsely claim a Fat Cow restaurant had actually been opened in Egypt, a statement so absurd and demonstrably false that Ramsay Defendants ceased promoting that false narrative. (Gillies Tr. 101:1-103:25)

Equally important for the case is the fact that Ramsay said he did not learn of the Egypt inquiry until after this action was filed. (Tr. 489:6-19) As such, it could not be a basis for his decision to close the Restaurant and is irrelevant to the issues at hand.

d. Ramsay Opened a New Restaurant that Involved Seibel in Atlantic City in 2015

Ramsay's claim that he could no longer be in business with Seibel (Tr. 463, 470) is further contradicted by the undisputed fact that Ramsay opened a restaurant in Atlantic City in February 2015 that both he and Seibel had an interest in. (Tr. 326:8-15; Tr. 954; Ex. 736, 737; Tr. 932) While Thomas testified that the Atlantic City restaurant proceeded with Seibel "as a favor" to Caesars (Tr. 955), the fact remains that Defendants' position that they had to close the Fat Cow because Ramsay could not be in business with Seibel is simply false.

Ramsay's and Thomas' attempts to claim that Seibel acted improperly by even discussing the Atlantic City restaurant with Caesars was further shown to be false. (Tr. 463, Tr. 951:15-19) The Atlantic City restaurant was a Gordon Ramsay Pub & Grill. (Ex. 736, 737) The first Gordon Ramsay Pub was established in Las Vegas. (Tr. 951) Seibel and Ramsay had separate contracts with Caesars. (Ex. 451, 457; Tr. 951) Caesars and an entity controlled by Seibel, LLTQ Enterprises, LLC ("LLTQ"), entered into a development and operation agreement ("Seibel LV Pub Agreement") relating to a Gordon Ramsay Pub & Grill ("Pub Restaurant") at Caesars Palace in Las Vegas. (Ex. 457) Seibel contributed capital in exchange for its capital payback and 50% of the profits from this Restaurant after certain recoupment payments to Caesars. (Ex. 457) Caesars entered into a separate agreement with Ramsay providing for a license fee to be paid to Ramsay ("Ramsay LV Pub Agreement.") (Ex. 451)

Thomas' testimony that Ramsay and Seibel's respective "relationship with Caesars" with regard to the Las Vegas Pub Restaurant are "independent" of each other, is misleading at best, as revealed by the Pub Agreements. (Tr. 951:15-19, Exs. 451, 457) The two Agreements expressly reference each other and expressly concern the same restaurant. (*See e.g.* Ex. 451, p. 7 (defining "LLTQ Agreement"); Ex. 457, p. 3 (defining "GR Agreement.")) Caesars is party to both agreements and has the same obligations to manage and operate the subject restaurant; the agreements involve the exact same subject matter and require LLTQ and Ramsay to provide recommendations as one voice.[28] If Ramsay's contract is terminated, so must Seibel's LV Pub Agreement. (Ex 457, §4.2.3)

Thomas attempted to claim that Seibel and Ramsay are not in business together in Atlantic City. (Tr. 954) However, both Seibel and Ramsay signed their agreements with Caesars for the Atlantic City Gordon Ramsay Pub on the same day, May 14, 2014. (Ex. 736, 737) While Seibel's agreement is a "consulting" agreement, and Ramsay's is a license and services agreement, neither party is an owner of the restaurant and both parties are compensated by a percentage of revenues. (Ex. 736, Sec. 8; Ex.737, Sec. 8, 14.1) While Thomas claimed that he didn't know why Seibel was involved in the Atlantic City restaurant (Tr. 955), the Seibel LV Pub Agreement for the LV Pub Restaurant provides, and Ramsay knew, that any additional Pub & Grill restaurant with Caesars

[28] For example, the Seibel LV Pub Agreement and Ramsay LV Pub Agreement contain many identical and nearly identical provisions (Ex. 457 Recital B, Ex. 451, Recital C; Ex. 457 Recital C, Ex. 451 Recital D; Ex. 457 §3.4, Ex. 451 § 3.3; §§ 5.1, 5.2, 5.4, and 5.6 of both agreements; Ex. 457, § 8.1 and Ex. 451 § 9.1.) These agreements also directly impact each other in many ways, including the requirement under, among others, §14.11 of the Ex. 451 for a jointly-submitted recommendation among Ramsay and Seibel under §§ 5.1 and 5.2 of both agreements (recommendations regarding hiring certain employees); §5.4 of both agreements (recommendations for pre-opening training and refresher training); § 5.5 of both agreements (recommendations regarding employee evaluation); § 9.1 of the Ex, 451 and § 8.1 of Ex, 457 (recommendations regarding marketing and publicity for the restaurant); and § 9.2 of Ex. 451 and § 8.2 of the Ex. 457 (recommendations for operational efficiencies, including the Las Vegas Pub's food and beverage menus, quality standards, operations, efficiency and profitability).

had to include Seibel. The Seibel LV Pub Agreement, at Section 13.22, provides that if Caesars chose to pursue any venture similar to the Gordon Ramsay Pub, the parties must enter into a new agreement that follows the same terms and conditions as contained in the Seibel LV Pub Agreement subject only to changes necessary to reflect the changes in location, a baseline amount, expenses and costs.[29] (Ex. 457, §13.22)

Ramsay and Thomas' claim that Seibel was engaged in negotiations that Ramsay was not aware of was is contradicted by the emails introduced at trial, such as a May 2013 email between Seibel and Gillies. (Ex. 618) When confronted with that email, Thomas claimed that while he became aware of the Seibel negotiation with Caesars about a Gordon Ramsay Pub restaurant in Atlantic City, he didn't know about them prior to January 2013. (Tr. 1158-59) Once again, the time-line contradicts Defendants' position. Ramsay claims he decided in June 2013 that he could no longer be in business with Seibel, but if in fact he was upset about alleged negotiations that Seibel had in 2012 regarding the Atlantic City Pub, Thomas conceded that by January 2013 Ramsay's team was fully aware of the negotiations and that by 2014 Ramsay agreed to open a new Pub Restaurant in Atlantic City that Seibel had an interest in.[30] (Tr. 1159)

[29] Section 13.22 provides: "Additional Restaurant Projects. If Caesars elects under this Agreement to pursue any venture similar to (i) the Restaurant (i.e., any venture generally in the nature of a pub, bar, café or tavern) or (ii) the "Restaurant" as defined in the development and operation agreement entered into December 5, 2011 between TPOV Enterprises, LLC (an affiliate of LLTQ), on the one hand, and Paris Las Vegas Operating Company, LLC, on the other hand (i.e., any venture generally in the nature of a steak restaurant, fine dining steakhouse or chop house), Caesars and LLTQ shall, or shall cause an Affiliate to, execute a development and operation agreement on the same terms and conditions as this Agreement, subject only to revisions proposed by Caesars or its Affiliate as are necessary to reflect the difference in location between the Restaurant and such other venture (including, for the avoidance of doubt, the Baseline Amount, permitted Operating Expenses and necessary Project Costs)."

[30] Ramsay's position is further contradicted by the renewed buyout discussions that Thomas had with Ziegler in January 2014. When Ziegler introduced a proposal involving other restaurants that Seibel and Ramsay were jointly involved in, Thomas did not say Ramsay would not do business with Siebel. (Tr. 929:18-932:12)

e. Ramsay Defendants' Claim that They Could No Longer be in Business with Seibel Does Not Satisfy the High Bar for the Impossibility, Impracticability and Frustration of Purpose Doctrines.

Not only are Ramsay Defendants' claimed need to cease doing business with Seibel demonstrable false, but even if true – which they are not – they would not be sufficient for the application of the defense of impossibility, impracticability or frustration of purpose.

The actions of Seibel negotiating for other business opportunities is far beyond the scope and types of events that courts consider sufficient to excuse a party's performance under a contract. Traditionally, the application has been applied to the death or incapacitation of a necessary person, destruction of the thing necessary for performance or some legal prohibition. Rest.2d of Contracts, §§262, 263, 264 (1981). Nothing about Seibel's negotiations "destroyed the value of the consideration to be rendered." *Glendale Fed. Sav. & Loan Assn.*, 66 Cal. App. 3d at 154. Ramsay may have considered it annoying or inappropriate for Seibel to engage in these negotiations, but such minor inconveniences will not discharge a party from their binding agreements. *Safe Harbor Fishing Club v. Safe Harbor Realty Co.*, 34 Del. Ch. 28, 33, 107 A.2d 635, 638 (1953). Simply put, Seibel's actions in negotiating potential deals for the future of both Seibel and Ramsay and their business ventures together, even if hidden from Ramsay - which they were not - do not rise to the level of warranting application of the impossibility, impracticability or frustration defenses.

7. The Other "Fundamental Disagreements" Between Ramsay and Seibel Were Contrived and Do Not Support Impossibility, Impracticability or Frustration

At trial, Defendants attempted to claim that he was justified in closing the Restaurant because Ramsay and Seibel had numerous "fundamental" disagreements. Ramsay attempted to improperly place the blame for a number of operational issues that allegedly caused the class action, vendor liens, and other issues, on Seibel and then use these issues as a basis to justify his closure of Restaurant. Not only was the significance of these disagreements contrived, but even had they truly existed they do not support Defendants' impossibility, impracticability or frustration of purpose defense.

a. <u>The Alleged Failure to Notify Ramsay of the Class Action Was Not a Valid Basis to Close</u>

In Exhibit 218, Ramsay writes that the "employee issues should have been drawn to our attention and dealt with properly as soon as they became apparent." (Ex. 218) The statement was shown to be false. First, Ramsay conceded that he was referring to the class action (Tr. 405) Despite complaining in Exhibit 218 that the class action should have been brought to his attention earlier, Ramsay conceded at trial that he learned about the class action at the same time as Seibel. (Tr. 407:25-408:3; Ex. 559, Ex. 260)[31] That is exactly what Seibel testified to at trial. (Tr. 129:9-131:25).[32] At trial, Ramsay attempted to claim that "maybe I was referring to the magnitude" of the class action in Exhibit 218. (Tr. 409:6-12) However, he quickly admitted that he learned of the magnitude of the class action from counsel that had been retained to represent the Fat Cow at the same time as Seibel. (Tr. 410:20-24)

[31] Gillies admitted that he was aware of the potential class action in May 2013 and reached out to counsel. (Gillies Tr. 128:22-130:5; 130:25-131:2, "I had immediately done what I would always do, I reached out to our legal counsel and said: Just FYI, there is something here that might be nothing but let's start to investigate.")

[32] Despite Ramsay's admission, Wenlock continued to repeat the debunked claim that they did not know about the class action when Seibel did. In support of his claim, Wenlock said he could not find the email notice of the class action that Green sent him. (Tr. 1226; Exhibit 183) Wenlock appeared to claim that Green manufactured the email, and claimed that because there was no time-stamp on the original email it must be a fake – ignoring the fact that another email about the class action sent by Ramsay's team member, Simon Gregory, also lacked a time-stamp. (Tr. 1250, Exhibit 504; 1254-55) Wenlock's unfounded accusation was not only directly refuted by Craig Green's testimony (Tr. 546-552), and the documents, (Exhibit 183; Exhibit 289), but by Wenlock's own testimony. The Green email was sent on May 16, 2013 and Wenlock admitted that he spoke to Green and Tassan while in Los Angeles about the class action in May 2013. (Tr. 1228) Wenlock's admission shows that he knew about the class action in May 2013, exactly when Green's email was sent.

It is telling that Ramsay claimed the class action was "the straw that broke the camel's back" and caused him to decide in June 2103 that he could not be in business with Seibel (Tr. 469) when it was not until December 13, 2013 that he told Seibel he was closing the Fat Cow. (Ex. 218) He had 6 months to tell Seibel about the "straw that broke the camel's back" – the class action – that required closure, but he didn't. Just as the words he chose in Exhibit 218 discussing the class action are demonstrably false, so was the entire excuse that the class action required closure.

b. Ramsay Improperly Blamed Seibel for the Class Action and Other Restaurant Operational Problems

When the class action was filed and both partners were simultaneously advised of the situation, Ramsay's teams immediately removed Seibel from the email chain and began to blame him for the lawsuit. (Ex. 260, Tr. 132-33) After removing Seibel from the email chain, Ramsay's publicist wrote that the class action was "due to poor management on the other side." That statement is false in multiple ways.

i. Ramsay Was Supposed to be Operating the Restaurant

First, the evidence conclusively showed that it was always intended that Ramsay and his team were going to operate the Restaurant. (Tr. 337; Ex. 3; Tr. 60) Ramsay and his team were experienced and very good at operating restaurants. (Tr. 338) Seibel had no operational experience (Tr. 338-339; Tr. 60-61) That is consistent with Ramsay's original intention that he and Andi Van Willigan would own and operate the restaurant in the Grove. (Tr. 471:6-10) All the documents reveal that Ramsay was to be the sole operator of the Restaurant. It is stated in the Lease. (Ex. 3) It was further confirmed by Ramsay's representations to the Landlord in 2013 – that he was the sole operator. (Ex. 24; Tr. 337:14-16; Caruso Dep. 11:11-12, 23:25-24:11) *ii. Ramsay's Team Was Intended to Lead the Pre-Opening Management Team*

As Ramsay conceded and the documents revealed, Van Willigan was the project leader in the pre-opening stage of the Fat Cow Restaurant. (Tr. 62-63; Ex 18) In fact, the pre-opening team was primarily Ramsay's people (Ex. 18, Tr. 63-64) While neither Seibel nor Ramsay were expected to be present to manage the Restaurant, consistent with Ramsay's commitment to be the sole operator of the Restaurant, Van Willigan was going to run the Restaurant once it opened. (Tr. 168; Tr. 86-87; 515)

iii. Ramsay Failed to Replace Van Willigan

However, prior to the opening Van Willigan was let go because of issues at the tasting. (Tr. 695-697) While Ramsay attempted to deny his involvement and blame the situation on Seibel, the contemporaneous documents reveal that he was in favor of terminating her from the Fat Cow. (Ex. 201, Tr. 498:4-499:4) Although she was supposed to run the Restaurant (and even become an equity owner), Ramsay did not send anyone else from his experienced team to manage the Restaurant. (Tr. 1205; 696:3-697:1, 700-701) While Seibel did his best to fill the gaps, neither Seibel nor the people he brought in, Jeri Rose Tassan and Craig Green, had Ramsay's teams' experience as restaurant operators. (Ex. 598, Tr. 85, 514:25-515:14, 697:2-11, 700:22-701:3) In fact, Green had no experience at all in the restaurant industry. (Tr. 512:6-8, 592:71-5) Tassan did not have Van Willigan's experience and was not a replacement for her; rather she helped out the best she could. (Tr. 204-205; 207; Tassan Tr. 6-7, 86:24-87:23)

While the Restaurant had hired a general manager, Nick Brown, to manage the day to day of the Restaurant (Tr. 64, 84; 514), and an executive chef to manage the kitchen (the "back of the house"), Ramsay failed to fulfill his obligation to operate the Restaurant. While the people on the ground at the Fat Cow were in constant communications by phone and email with Ramsay's team, (Tr. 86-87; 519), as Ramsay stated, the Restaurant lost its direction. (Tr. 462, 702) In sum, Ramsay didn't send an experienced operator to replace Van Williligan and fulfill his obligation to operate the Restaurant, but when Seibel and his unexperienced group attempted to fill the gaps, Ramsay blamed Seibel whenever there were problems at the Restaurant.

It was not until Van Williligan returned in July 2013, that Ramsay fulfilled his obligation to operate the Restaurant. (Tr. 703)[33]

iv. <u>LAVU Was the Primary Cause of the Class Action and Was Selected by Van Willigan</u>

In the very same email that Seibel is taken off so that he can be unfairly blamed for the class action, Wenlock concedes that the primary cause of the class action was the LAVU system. (Ex. 260, p. 1). There was little dispute that LAVU caused issues related to the class action (Ex. 182; Tr. 1224-25; Ex. 260; Tr. 133-134) But the evidence also showed that Ramsay's team selected LAVU. (Tr 1206-07; Ex. 161; Ex. 13)[34] Part of the reason for the selection was that Gordon was working on "a bigger opportunity" with LAVU that was "already in motion" when Van Williligan recommended using LAVU. (Ex. 161)[35] LAVU was problematic from the beginning and all parties knew it. (Tr. 1208-09; Ex. 601; Tr. 88-89; Tr. 521-523; Tassan Tr. 215:15-216:10) Wenlock's attempt to claim that it was a wifi problem that caused the LAVU issues is beside the point – he

---

[33] Ramsay Defendants argue that taking over the operations of the Restaurant was evidence that the buyout had been agreed to in principal. (Def. Demonstrative Ex. 1, Opening Slide 9) In fact, it merely reflected his team taking on the role that was intended from Day 1. In fact, Gillies wrote on June 3, 2013, before the Ramsay/Seibel buyout discussion, that the Ramsay team had "to take complete control of the situation" and that they had made "great progress there in the last 4 weeks." (Ex. 499)
[34] Van Williligan recommended using the LAVU point of sale system, as she had worked with it on Ramsay's shows, and Ramsay and Seibel agreed to use LAVU. (Ex. 18; Van Williligan Tr. 41:7-43:2)
[35] Wenlock distanced himself from that statement, claiming he did not know what he was referring to. (Tr. 1207)

simply confirmed that there were problems with LAVU, as he stated in his email and as he was advised by Bill Yoo. (Tr. 1209-1210; Ex. 260; Ex. 182) Wenlock was informed about the LAVU problem as early as December 12, 2012, but did nothing about it. (Ex. 602; Tr. 1213) Instead, Wenlock and the rest of Ramsay's team attempted to incorrectly blame the lawsuit on Seibel, despite clear evidence that LAVU caused the problems and Ramsay and his "bigger opportunity" with LAVU was the reason for selecting LAVU.[36]

c. <u>The Class Action Liability and Failure to Settle Were Not Reasons to Close</u>

There is no dispute that the potential liability associated with the class action was significant and had to be addressed by the partners. However, Ramsay's attempt to claim there the class action failed to settle because of Seibel was shown to be false at trial, and the liability itself was not a valid reason to close.

First, Ramsay attempted to distance himself from his complaint in Ex. 218 about Rowen not being able to attend the mediation because Rowen's mother was gravely ill. (Tr. 411:190-412:10) In fact, although Ramsay claimed he couldn't recall how much notice Seibel had of his mother's illness, the record plainly shows that Seibel notified Ramsay's team promptly.[37] (Tr. 411; Tr. 137) It is also clear from the testimony that Seibel's attendance had no impact on whether or not the class action would settle at the mediation. The entity had counsel at the mediation. (Tr. 412:13-14) Ramsay further conceded that "the settlement position that was taken at the mediation was something that had been agreed upon by the partners before going to mediation." (Tr. 413:15-

[36] Unlike Ramsay and his team's refusal to accept blame for any problem, and insistence on pointing the fingers at Seibel, Seibel accepted that decisions, like the one to use LAVU, are partnership problems that have to be worked through and should be form the basis to foist blame on his partner. (Tr. 134)

[37] Gillies did not believe Seibel's reason for not attending the mediation. (Gillies Tr. 142:22-143:1; 145:1-14)

23; Tr. 709:4-711:5) And the class action plaintiffs made a demand that the partners were not agreeable to. (Tr 1239:9-11; Ex. 186) As a result, it was not Seibel that caused the mediation to fail, but rather the fact that the plaintiffs demanded more than the partners – both Ramsay and Seibel were willing to pay. (Tr. 414; Tr. 138-39)[38]

In addition, Ramsay's team continued to attempt to fault Seibel for the failure to settle upon receiving a mediator's proposal. (Ex. 218) Once again, the blame on Seibel is misplaced. Not only did Thomas not recall if he ever told Ziegler that Ramsay wanted to accept the mediator's proposal (Tr. 1120), Thomas admitted that Ramsay did NOT want to settle at the mediator's amount (Tr. 1121; Ex. 297) That is exactly what Thomas wrote on December 6, 2013, and again on January 6, 2014. (Ex. 297, Ex. 128 p. 3, "the partners in the business did not wish to settle at the level proposed or close to the level proposed by the mediator.") Thomas did not discuss the settlement position with Seibel or Ziegler before telling Fat Cow's counsel that there was no interest in settling. (Tr. 743-744; Ex. 297) Thomas took his instructions on settlement from Gillies, but Gillies admitted that he was not speaking with Seibel at this time. (Tr. 1122; Gillies Tr. 148:8-14, 149:5-6. 165:15-25)

Second, the other factor that limited the partners' ability to reach a settlement was that they were looking for advice from bankruptcy counsel to see if liability could be limited by declaring bankruptcy. (Tr. 926; Ex. 125; Ex. 127, Tr. 755-756) Both Ramsay and Thomas knew that Gillies

[38] Andy Wenlock, who attended the mediation and authored Ex. 186, attempted to claim that Seibel had not agreed to pay any money to settle the class action. However, in his memo Wenlock claimed that the partners' "position was not disclosed." (Tr. 1239-41; Ex. 186) When confronted with the contradiction of mentioning "partners' position" with his claim that the partners supposedly had no position due to Seibel, Wenlock admits that the partners position was a settlement in the range of $250,000-$300,000 (Tr. 1240:4-1242:22) That is consistent with Seibel's testimony. (Tr. 710:3-711:2)

and Seibel had discussed exploring bankruptcy as a means to limit liability if they could re-open the Restaurant together. (Exs. 139, 297) Ziegler understood that Thomas was leading discussions in attempting to get bankruptcy counsel and dealing with class action counsel. (Tr. 741; 745-46) Ziegler not involved in communications with Littler until December 2013. (Tr. 808-809; Tr. 819-820) Knowing that bankruptcy advice was delaying the ability to settle the class action, Thomas admittedly did nothing to get bankruptcy advice. (Tr. 1118:5-1119:22)

Third, regardless of why the class action did not settle, the liability was not the reason for closing the Restaurant. Ramsay made his decision in June 2013, at which time the parties did not even know the extent of the potential liability. In fact, the premise that the potential settlement – even if it cost as much as the mediator's proposal of $500,000 -- is the reason the Restaurant could not possibly continue is false.[39] Seibel was willing to contribute so long as he had assurances of a continued operation (Tr. 154, 155), and Ramsay testified that he was willing to pour $1.5M to $2.0M into a new restaurant that would be located in the same space and would be operated by his team– exactly what was supposed to happen in Fat Cow. (Tr. 447)

Funding was not the cause for closure, nor did it make it impossible for the Restaurant to continue, rather it was an after the fact excuse by Ramsay.[40] Contrary to Ramsay's witnesses' statements, Seibel never refused to contribute money to the venture. (Tr. 154) In fact, through December 31, 2013, Seibel and Ramsay had contributed the same amount to the venture. (Ex. 369) Ramsay's testimony that he put money in around Christmas time to pay employees is false – he

[39] The range of potential liability was estimated by counsel to be between $1.7M, and $175,000, and the action eventually settled for $140,000. (Ex. 137, Tr. 140, 1421:23-1422:3)
[40] Exhibit 218 does not any of the other alleged reasons for closure. (Tr. 415-417)

was not supporting the restaurant at that time and the documentary evidence shows that he had NOT contributed more money than Seibel through December 31, 2013. (Ramsay Tr. 467, Ex. 369) Moreover, to the extent additional funding was called for, as industry expert, Lowder, stated there were numerous ways of obtaining financing that would not have required a capital infusion from the partners and would have enabled the continued operations of the Restaurant. (Tr. 1311:2:12; Lowder Rebuttal Rpt. P. 2, 5)

Financial difficulties, no matter how great, will not render performance under a contract impossible under California law. "If the language of the contract is clear and unambiguous, the fact that compliance with its terms incurs greater expense than was anticipated does not excuse performance." *W. Indus. Co.*, 56 Cal. App. at 360; *see also Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, 66 Cal. App. 3d 101, 153–54, 135 Cal. Rptr. 802, 833–34 (Ct. App. 1977) ("[f]acts which may make performance more difficult or costly than contemplated when the agreement was executed do not constitute impossibility"); *Kashmiri v. Regents of Univ. of California*, 156 Cal. App. 4th 809, 839, 67 Cal. Rptr. 3d 635, 658 (2007), *as modified* (Nov. 15, 2007), *as modified* (Nov. 28, 2007) ("economic crises do not excuse performance on a contract"). Delaware courts have similarly held that financial difficulty, no matter how substantial, is not sufficient to render performance impossible or impracticable. "Mere inconvenience or substantial increase in the cost of compliance with a contract, though they might make compliance a hardship, cannot excuse a party from the performance of an absolute and unqualified undertaking to do a thing that is possible and lawful. Courts cannot alter contracts merely because they work a hardship. A contract is not invalid, nor is the obligor therein in any manner discharged from its binding effect, because it turns out to be difficult or burdensome to perform…Mere inability to perform a contract will not alone relieve the defaulting party." *Safe Harbor Fishing Club v. Safe Harbor Realty Co.*, 34 Del. Ch. 28, 33, 107 A.2d 635, 638 (1953) (internal citations omitted); *see also Ridley Inv. Co. v. Croll*, 56 Del. 209, 211, 192 A.2d 925, 926 (1963), *quoting Safe Harbor*, 34 Del. Ch. 28; *Mesa Holding Ltd. P'ship v. Bicoastal Corp.*, No. CIV. A. 11210, 1991 WL 17172, at *2 (Del. Ch. Feb. 11, 1991) (lack of financial means to perform obligations under contract insufficient reason for upholding defense of impossibility).

In *Safe Harbor*, where the parties contracted for the construction of a club house on a site with no road leading to it, the plaintiff was not excused from performance by impossibility even though the materials physically could not be transported to the site without a road leading there. 34 Del. Ch. at 31–32. The *Safe Harbor* court held that, although it would cause an increase in difficulty and expense, it was not impossible to construct a dirt road to enable the plaintiff to construct the club house as required by the contract. *Id*. Thus, any increased difficulty and expense in dealing with the class action, no matter how insurmountable they may have seemed, are not sufficient reasons for Defendants to be excused from the unanimous consent requirements of the LLC Agreement and their unilateral seizing control of the general partner of the LP.

In sum, it is not sufficient for impossibility, impracticability or frustration of purpose for Ramsay to claim that he had to close and could no longer be in business with Seibel because Seibel's mismanagement caused the class action, when it was convincingly shown that (i) Ramsay was supposed to be managing the Restaurant and Seibel's unexperienced team stepped in only when Ramsay failed to replace Van Willigan; (ii) Seibel's alleged mismanagement did not cause the class action, but rather Ramsay's selection of the LAVU system did; (iii) neither party wanted to settle at the amounts suggested and explored alternatives, such as bankruptcy to limit the liability; (iv) the liability was small compared to the money already invested and the amounts needed to replace the Restaurant; and (v) the partners had alternatives to finance any such liability available to them.

d. Vendor issues Were Improperly Blamed on Seibel

Similar to the class action, Ramsay attempted to use the liens filed by certain vendors as a basis to close the Restaurant by improperly blaming Seibel for the issues. There was testimony from both sides that issues with vendors were discussed. (Tr. 90-91, Tr. 228; 523; 529, 535) When vendor payment issues were identified by Tassan in a December 2012 email (Ex. 172), Wenlock and Tassan discussed payment decisions. (Tr. 530) Wenlock had also been very involved in pre-opening and in regular communication with Tassan.[41] (Tr. 1200, Tr. 1202, Ex. 164) In January 2013, there were further discussions/emails about potential liens with Wenlock's continued involvement. (Exs. 481, 173; Tr. 533; 539-540; Ex. 575) Seibel testified that both sides agreed to the strategy (Tr. 90-91), and in addition to following that strategy he put up the escrowed money to take care of the lien. (Tr. 96-98, Tr. 536-537; Ex. 207; 575)[42]

Wenlock testified that he became involved in January 2013. (Tr. 1175-76; Ex. 173) He further testified that he was very experienced in the build out of restaurants and dealing with vendors. (Tr. 1198-1200; Ex. 156) Green, on the other hand, had little to no experience in dealing with vendors during a build out and whether the problems they identified were significant. Green had no restaurant experience. (Tr. 512-513; 592; Tr. 1216) Tassan further testified that Ramsay's

[41] (Tassan Tr. 103:2-24, 104:25-105:20, 106:7-19, 153:3-154:9; 159:25-160:15; Van Willigan Tr. 76:6-78:1; Gillies Tr. 46:22-47:1)
[42] By that time in early 2013, Seibel had contributed $99,097.56 <u>more</u> than Ramsay. (Tr. 97-98; Ex. 360)

team was supposed to send her to London to be trained in how Ramsay's team operates, but that never happened. (Tassan Tr. 230:6-231:2) When Wenlock investigated and concluded that the issues were not significant enough to warrant withholding pay, his recommendations were followed by Seibel. (Tr. 1215-19; Ex. 179) All the vendor issues were resolved by May 2013. (Tr. 562)

In sum, Ramsay refused to replace Van Willigan with an experienced operator and refused to fulfill his responsibility to operate the Restaurant, leaving Seibel to plug the hole with inexperienced people. When their inexperience led to problems, such as the liens and the publicity they caused, Seibel's team deferred to Ramsay and Wenlock's more experienced view on how to resolve the issues. There was no "fundamental" disagreement between the parties. Once Ramsay and his experienced operators expressed a view, Seibel conceded and deferred to Ramsay's position. Ramsay should not be able to escape his contractual obligations to obtain Seibel's consent because he refused to operate the Restaurant as he had agreed to and then got upset when Seibel's less experienced people, who were never supposed to be operating the Restaurant, made an error. Moreover, this "fundamental" disagreement was fully resolved by May 2013. (Tr. 1217:24-1219:15; Ex. 179)

e. <u>The Nguyen Labor Claim Did Not Cause a Fundamental Disagreement</u>

The assertion by Ramsay with regard to the Nguyen labor claim appears to be twofold: it showed a fundamental disagreement because Seibel did not tell Ramsay's team about it, and it revealed a difference in how to treat employees.

Ramsay claims he did not know about Spencer Nguyen. (Tr. 466) Seibel testified that Ramsay's team was made aware of Nguyen's claim and its was discussed. (Tr. 246:21-247:1) Wenlock claimed that he was not informed of the claim, and yet documents show that Wenlock was informed of the claim in December 2012. (Ex. 599) Wenlock testified that he did not communicate with anyone about Nguyen's claim after receiving notice in December 2012 and before the hearing in May 2013. (Exs. 599, 719; Tr. 1190) Despite claiming how seriously Ramsay takes employee issues, Wenlock did nothing to follow up on the Nguyen notice of claim letter. (Tr. 1220)

Ramsay and Wenlock's claim was contradicted by Tassan. While Ramsay's team claimed they were not informed about the Labor board hearing regarding Nguyen, Tassan testified that she spoke to the owners and others before testifying, specifically: Rowen, Gordon & Jennifer, Matt Simon, Wenlock, Yoo, Owen, Nick, Griffin, Rebecca, and Kim. (Tassan Tr.167:8-168:7) She stated: "I spoke to every single person." (Tassan Tr. 167:18) She reiterated that she spoke to a "professional" prior to testifying,[43] she discussed the advice she received with Wenlock and Simon Gregory. (Tassan Tr. 186:10-188:11; 189:11)[44]

In any event, this labor dispute did not cause a significant financial impact and was resolved by mid-2013 could not possibly be a basis for an impossibility, impracticability or frustration defense. There is nothing about the Nguyen claim that the parties thought existed at the time the agreements were entered into that "turn[ed] out to be nonexistent" as in *Min. Park Land Co.*, 172 Cal. at 292, nor is there the type of extreme, unreasonable expense that would be incurred as demonstrated *City of Vernon*, 45 Cal. 2d at 719. This is not a defense.

[43] Tassan stated, "I don't know if he was an attorney or if he was a labor officer or something to that effect, but I did speak with a professional" (Tassan Tr. 186:13-16)

[44] Ramsay raised the Nguyen matter regarding Seibel's credibility with regard to his claim he left a check for Nguyen. The only people who testified with knowledge of the situation, Seibel, Green and Tassan, all supported Seibel's statements. (Ex. 294; Tr. 705:22-706:24; 716:16-717:22 Tr. [redacted] Tassan testified that she understood that Nguyen didn't pick up his check. (Tassan Tr. 99:23-101:5) Tassan confirmed that she remembered seeing the check, and saw the envelope left for Nguyen at the hostess stand of the Restaurant. (Tassan Tr. 101:6-102:25)

f. Any Disagreement Over the Menu Was Resolved in Ramsay's Favor

Ramsay overstates the import of the disagreement over the menu between Seibel and Ramsay. As Seibel testified, he thought they could be more profitable by adding more burger and pizza options to the menu. (Tr. 109) Seibel's position was not a violation of the lease; they already served burgers and pizza. (Tr. 110, 111; 173) Even though this disagreement was a catalyst for the buyout talks, Seibel deferred to Ramsay's wishes and the menu remained the same. (Tr. 361, Tr. 111-112) The claim by Ramsay that this "fundamental" difference was a basis for closing the Restaurant is contradicted by the undisputed fact that the Restaurant continued to operate with the same menu Ramsay wanted and without evidence of a single further complaint about the menu from Seibel.

g. The Evidence Supports Seibel's Position Regarding Van Willigan's Compensation

Ramsay claims that Seibel's withdrawal of funds in late 2013 were grounds for Ramsay's decision to close. However, Seibel's position that he only agreed to bring back Van Willigan on the condition she would not be paid by Fat Cow is supported by the record, as she was going to be working on other Ramsay matters for Ramsay's other companies. (Tr. 118:3-120:19; Tr. 325) Part of Seibel's reasoning is the parties were disputing Van Willigan's 2012 compensation, another period of time that she was admittedly not working full time for the Fat Cow. (Tr. 119-120; Tr. 190-91; Ex. 210; Van Willigan Tr. 130:24-131:8) Ramsay had agreed to pay her 2012 compensation, which would go towards her earning a 10% ownership in the Restaurant, but then wanted credit for the compensation when she left the project. (Tr. 184-187; Ex. 456, 458) The fact that certain people were paid directly by the partners was not unusual, as Seibel paid the entirety of Green's compensation while he was working at the Fat Cow. (Tr. 513) Seibel testified that he would not have agreed to pay Van Willigan from Fat Cow funds while the parties still had not resolved the dispute over her 2012 compensation. (Tr. 703:19-705:21) As a result, when he learned that Ramsay had paid Van Willigan in 2013 from Fat Cow funds, contrary to the parties' agreement, Seibel considered that a distribution to Ramsay and withdrew an equal amount.[45] (Tr. 120-21) Seibel's testimony is consistent with Green's. (Tr. 554:12-555:15) Contrary to Seibel's specific recollection, Ramsay could not recall if it was agreed that Van Willigan would not be paid by the Fat Cow. (Tr. 420:16-24)[46] Unfortunately, Ramsay was not speaking to Seibel at the time and neither party discussed them both putting the money back in the company. (Tr. 500)[47] While this disagreement, unlike the others, was an actual dispute between the parties, it hardly rises to the level that would permit Ramsay to close the Restaurant without Seibel's consent on the grounds of impossibility, impracticability or frustration. First, the amount of money at issue does not rise to the level of an extreme, unreasonable expense that would warrant a defense to one's performance under contract. *W. Indus. Co.*, 56 Cal. App. at 360 (greater expense than anticipated does not excuse performance); *cf. City of Vernon*, 45 Cal. 2d at 719 ($41M unreasonable expense that excuses performance). Further, an inconvenience such as this minor disagreement regarding who agreed to pay for Van Willigan's salary, though it may cause a hardship, does not excuse a

---

[45] Ramsay cannot argue that by withdrawing the money for the Van Willigan compensation Seibel violated the unanimous consent provision of the Agreements, any more than Seibel can argue that by paying Van Willigan with Fat Cow funds Ramsay unilaterally took action without Seibel's consent. (Tr. 669-60) Since the evidence weighs in favor of Seibel's testimony that he and Ramsay agreed that Van Willigan would not be paid with Fat Cow funds, if there is a breach Ramsay breached first.

[46] Plaintiff's seek to exclude all the recordings from evidence. To the extent that the Court permits them into evidence, in Exhibit 680, pp. 11:13-21, Gillies states that Ramsay had no problem paying Van Willigan's salary if she returned. (Tr. 704:6-16)

[47] Seibel's AmEx card that he permitted the Fat Cow to use to pay expenses was also paid off at year-end in accordance with normal practices. (Tr. 664-666; 708:15-709:2; Ex. 376)

party from their undertaking. *Safe Harbor Fishing Club*, 34 Del. Ch. at 33. Moreover, this dispute arose long after June 2013 when Ramsay made his decision to close.[48]

h. The Performance of the Restaurant Did Not Warrant Closure

Ramsay's position is that the Restaurant had failed and therefore had to close. That position was contrary to the evidence.

i. Food Quality Issues Had Been Resolved

There is no dispute that there were food quality and service issues when the Restaurant opened. (Tr. 88, 94; 523; Ex. 228) After hearing from Caruso, Ramsay committed to him that the food and service would improve (Tr.356-57) In fact, on June 4, 2013 Caruso told Ramsay it had in fact improved, and Ramsay agreed with him. (Tr. 356:13-358:4) This improvement was due also to the fact that a new general manager, Ryan Stock, had been hired earlier in the year. (Tr. 96, 122) In fact, great progress had already been made in May 2013 (Ex. 499, June 3, 2013 email referencing the "great progress" in the past 4 weeks; Tr. 702:15-703:18) Ramsay's more experienced team of operators was now operating the Restaurant as was originally agreed to. (Tr. 316, 322, 358:5-359:12, 438-440)[49] There was simply no reason that the Restaurant food quality would not have continued to be of high quality.

---

[48] With regard to the rebates, Defendants claims regarding the rebates that Seibel received have no bearing on their alleged reasons for closing the Restaurant as they admit they learned about the rebates long after the Restaurant closed. (Tr. 484:15-19)

[49] This was further confirmed by Van Willigan and Gillies. Van Willigan testified that performance of Restaurant improved when she came back in 2013, stating that everything was brought up to code, they added an HR consultant, reworked the menu, and boosted employee morale; in fact, "every single thing was different." (Van Willigan Tr. 116:3-117:12) She further testified that after she came back Caruso was happy with the Restaurant. (Van Willigan Tr. 122:5-10) Gillies agreed that the Restaurant improved after the April 2013 letter from Caruso. (Ex. 24; Gillies Tr. 84:13-85:14) After that, Ramsay's team became more involved in the operations, in particular after Van Willigan returned. (Gillies Tr. 85:19-87:1; 121:16-122:11; 122:19-21; 122:7-11) Gillies testified that Caruso was happy to have Van Willigan back and was generally happier with the product and how the place was run. (Gillies Tr. 154:4-11)

ii. The Restaurant Was Cash Positive

While there was no dispute that the Restaurant's liabilities exceeded its assets, it was equally clear that the Restaurant was cash positive on a month-to-month basis once the non-recurring liabilities were excluded. (Lowder Rpt. Sec. IV(a)) As Lowder showed, the Restaurant was not only cash positive, but had additional reasons for it to become profitable quickly: (1) the performance of the Restaurant would continue to improve as it had during 2013 (Lowder Rpt. Sec. IV(b)(c));[50] (2) it was about to get enormous exposure in 2014 by being featured in the Hell's Kitchen television program (Lowder Rpt. Sec. IV(d)(e)[51]; and (3) Ramsay was going to put his name on the Restaurant, which everyone, Ramsay and Caruso included, believed would be beneficial to the Restaurant. (Lowder Rpt Sec. IV(g); Tr. 1328; Tr. 74:5-11, 351:11-21; Caruso Tr. 14:3-8, 43:15-18)

Further evidence of the Restaurant's improvement is the average check price. Ramsay complained that when the Restaurant opened the Restaurant's average check was $20 as evidence that the Restaurant was "losing money hand over fist." (Tr. 468:18) That fact shows precisely how much the Restaurant's performance improved by the end of 2013. Green testified that when he reviewed the average check amounts for late 2013 through early 2014 they were approximately $28 during lunchtime and $33 during dinner. (Tr. 563:25-565:11) He further testified that he reviewed the Avero reports, based on Micros data, from October 2013 through March 2014, and

[50] The undisputed evidence showed the Restaurant's food quality had improved. (See above IV(C)(7)(h)(i)). The undisputed evidence further revealed that the Grove was an excellent location for the Restaurant. Ramsay agreed (Tr. 334-335); as did Seibel; Ramsay' expert, John Gordon (Tr. 1435-36); and Lowder (Tr. 1327).
[51] Ramsay and Seibel agreed that being featured on the show was excellent publicity and a positive for the Restaurant. (Tr. 436)

the combined average check was $30.07. (Tr. 568: 6-571:6; Ex. 597) This uncontradicted testimony shows the significant improvement at the Restaurant, with the average check rising from $20, per Ramsay, to $30.07 by the time the Restaurant closed.

Indeed, in light of these facts it could hardly be impossible or impracticable for the Restaurant to continue. Ramsay was world renowned for turning around failing restaurants and testified that he had personally "saved situations far worse than he faced with Seibel" at the Fat Cow. (Ramsay Tr. 332-333)[52]

In addition, Ramsay's claim that he was supporting the Restaurant alone in 2013 is false. Ramsay claimed he closed because his funding was keeping the doors of the Restaurant open, while Seibel was not funding the enterprise, and he was not willing to do so anymore. (Tr. 385:17-24; Tr. 467:20-468:10) He stated that in December 2013, "I was the only one individually, sir, that was actually putting the money in to keep the lights on. If I wasn't putting those monies in this restaurant would have gone into bankruptcy months prior to this." (Tr. 395) That statement was false. In fact, by the end of December 2013, contrary to Ramsay's claim that he put in money to make sure the employees got paid during the holidays, the two partners' funding was equal. (Tr. 385:17-24; Ex. 369, p. 2)[53] Ramsay did not submit any evidence to show he made contributions before year-end 2013 to "keep the lights on", to save the company from bankruptcy, or to pay employees, because it did not happen. Moreover, there was no evidence that prior to that date

---

[52] Defendants cherry-picked the daily reports for a select few days in 2013 in an attempt to show the Restaurant's purported poor performance. (Exs. 519, 520, 296, 532) Seibel's reaction to these certain days of poor performance was simply was him being conservative "so that we have good surprises. (Tr. 658:4-6)

[53] The 12/31/13 Balance sheet shows "Partner Equity" for Seibel to be $27,790 <u>more</u> than Ramsay ($248,708 v. $220,918), and Ramsay's "Partner Contributions" to be nearly an equal amount, $27,769.65, more than Seibel ($99,077.56 v. 71,307.91). While it shows a $50,000 distribution to Seibel, that is the amount that was paid to Seibel to equal the $50,000 payments that Ramsay caused the Fat Cow to make to Van Willigan in contravention of the parties agreement. *See supra* IV(C)(7)(g).

Seibel ever refused to contribute money to the venture. In fact, Seibel testified to the contrary. (Tr. 154) The facts showed that through December 31, 2013, Seibel and Ramsay had contributed the same amount to the venture.[54] (Ex. 369) Any claim by Defendants that Ramsay closed because he was funding the enterprise and Seibel was refusing to do so, whether in June 2013 or December 2013, is false.

In any event, financial difficulties are not sufficient to excuse performance under the doctrines of impossibility or impracticability. *W. Indus. Co.*, 56 Cal. App. at 360 (greater expense than anticipated does not excuse performance); *Glendale Fed. Sav. & Loan Assn*, 66 Cal. App. 3d at 153–54 (more difficult or costly performance will not support the defense of impossibility); *Kashmiri*, 156 Cal. App. 4th at 839 ("economic crises do not excuse performance on a contract"); *Safe Harbor Fishing Club*, 34 Del. Ch. at 33 (substantial increase in cost of compliance with contract will not excuse performance); *Ridley Inv. Co.*, 56 Del. at 211; *Mesa Holding Ltd. P'ship*, 1991 WL 17172, at *2 (lack of financial means to perform obligations under contract insufficient reason for upholding defense of impossibility). Frustration of purpose is also reserved for something more significant than mere financial woes. Settling a class action lawsuit will not "virtually destroy" the principal purpose of what the parties contracted for – i.e. the Restaurant itself. *Glendale Fed. Sav. & Loan Assn*, 66 Cal. App. 3d at 154; *Chase Manhattan Bank*, 474 F. Supp. 2d at 620. The law does not support Ramsay Defendants' position.

D. Seibel Proved Damages

[54] Although Ramsay Defendants raised the claim that Ramsay paid certain legal fees to the Littler firm, Thomas conceded that the legal fees for the class action had nothing to do with the decision to close the Restaurant. (Tr. 1138:1-7) Moreover, the evidence submitted showed that Seibel was willing to pay his share of legal fees. (Tr. 776:18-777:3; Ex. 149)

The final element of a breach of contract claim is damages to the plaintiff resulting from the breach. *See Interim Healthcare, Inc. v. Spherion Corp.*, 884 A.2d 513, 548 (Del. Super. Ct.), aff'd, 886 A.2d 1278 (Del. 2005). In Delaware, "the standard remedy for breach of contract is based upon the reasonable expectations of the parties *ex ante*." *Duncan v. Theratx, Inc.*, 775 A.2d 1019, 1022 (Del. 2001) (applying expectation damages to breach of contract claim which requires breaching party to compensate plaintiff for reasonable expectation of value of the breached contract and what the plaintiff lost); *see also Paul v. Deloitte & Touche, LLP*, 974 A.2d 140, 146–47 (Del. 2009) (contract damages are those that "arise naturally from the breach or that were reasonably foreseeable at the time the contract was made").

Damages for loss of the value of the business are permissible under both breach of contract (and breach of fiduciary duty) claims under Delaware and California law.[55] *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 168 (Del. Ch. 2004) (permitting claim for damages that company would have been worth certain value had fiduciary duty not been breached); *Gatz Properties, LLC v. Auriga Capital Corp.*, 59 A.3d 1206, 1220–21 (Del. 2012) (affirming trial court's damage award based upon value of company for breach of contracted-for fiduciary duty claim); *True North Composites, LLC v. Trinity Indus., Inc.,* D.Del., 1919 F. Supp.2d 484, 524-525 (2002)(the "proper measure of damage for destruction of a business is not lost profits, but the difference between the value of the business before and after the defendant's wrongful acts"); *quoting Zaleski v. Mart. Assoc.*, Del. Super. Ct., 1988 WL 77779, *1 (July 25 1988);

[55] Ramsay previously argued that Seibel is seeking "lost profits." That is not correct. Bautista's Report sets forth the lost value of the business (finding it to be in excess of $9 million). (Bautista Rpt. p. 5) Bautista's Report relies upon the financial projections and future profits contained in the Lowder report, based on her finding that the Restaurant was cash positive when Ramsay decided to close and halt its continued success. (Bautista Tr. 63:16-20)

Meister v. Mensinger, 230 Cal. App. 4th 381, 400, 178 Cal. Rptr. 3d 604, 619 (2014) (remanding to trial court for determination of value of company on breach of fiduciary duty claim); *Murrieta Car Wash, Inc. v. N. Cty. Bank*, No. G034260, 2005 WL 2100012 (Cal. Ct. App. Aug. 31, 2005), *as modified on denial of reh'g* (Sept. 28, 2005) (permitting damages for value of company in breach of contract case).

The standard for proving damages in Delaware was set forth in *Beard Research Inc. v. Kates*, 8 A.3d 573, 614 (Del Ch. 2010), aff'd 11 A.3d 749 (Del. 2010):

> Plaintiffs must prove their damages by a preponderance of the evidence. Delaware does not "require certainty in the award of damages where a wrong has been proven and injury established." Indeed, "[t]he quantum of proof required to establish the amount of damage is not as great as that required to establish the fact of damage.". Responsible estimates of damages that lack mathematical certainty are permissible so long as the court has a basis to make such a responsible estimate. Public policy has led Delaware courts to show a general willingness to make a wrongdoer "bear the risk of uncertainty of a damages calculation where the calculation cannot be mathematically proven." Nevertheless, when acting as the fact finder, this Court may not set damages based on mere "speculation or conjecture" where a plaintiff fails to adequately prove damages. [Citations omitted.]

See also, Siga Techs., Inc. v. PharmAthene, Inc., 132 A.3d 1108, 1130–31 (Del. 2015), *as corrected* (Dec. 28, 2015)(finding that the Court of Chancery properly applied the established presumption that doubts about the extent of damages are generally resolved against the breaching party.) Consistent with Delaware law, Seibel has shown the fact of injury and has satisfactorily shown the amount of damages, and any presumption that doubts about the extent of damages should be held against the wrongdoers, the Ramsay Defendants. The law in California and New York is the same as Delaware on this point.[56]

[56] *Asahi Kasei Pharma Corp. v. Actelion Ltd.*, 222 Cal. App. 4th 945, 972–73, 169 Cal. Rptr. 3d 689, 711 (2013), *as modified on denial of reh'g* (Jan. 16, 2014) ("Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be

1. Seibel Proved the Fact of Damages

There can be no question that Seibel has suffered damages as the result of Ramsay Defendants' conduct in wrongfully closing the Restaurant. (Lowder Rpt., Section IV) The breaching conduct at issue here, the wrongful closing of the Restaurant, undoubtedly caused the damages alleged by Seibel, which is the value of the enterprise that Ramsay Defendants' conduct destroyed. As set forth above, Seibel has substantial evidence of harm, including the fact that he not only lost his share of the value of the business (over $9 million), but also that he lost his invested $831,482, and was deprived of the ability to obtain a return of his investment.[57] (Bautista Rpt. at p. 5; Ex. 300). The fact of these damages were proven by Lowder, as set forth above, and the evidence that the Restaurant was cash positive and was poised to become profitable with the improvements that had been undertaken at the Restaurant and the beneficial events coming in 2014 with the television exposure and change in name. The fact of these damages is sufficient to prove the breach of contract (and fiduciary duty) claim. *Beard*, 8 A.3d at 614; *Siga Techs.,* 132 A.3d at

---

used, and the damages may be computed even if the result reached is an approximation."); *Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 403, 624 N.E.2d 1007, 1010 (1993) ("Damages resulting from the loss of future profits are often an approximation. The law does not require that they be determined with mathematical precision. It requires only that damages be capable of measurement based upon known reliable factors without undue speculation.").

[57] *Chrysler Corp. v. Quimby,* 144 A.2d 133, 136 (Sup. Ct. Del. 1958)(awarding breach of contract damages in the amount of plaintiff's lost investment). In California, "[c]ontract damages seek to approximate the agreed-upon performance…the measure of damages is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 515, 869 P.2d 454, 460 (1994) *quoting*, Cal. Civ. Code §3300. California law recognizes loss of one's investment as a form of breach of contract damages. *K & K Capital Investments v. IPC (USA), Inc.*, No. 2D CIVIL B222427, 2012 WL 2525644, at *4 (Cal. Ct. App. July 2, 2012) (holding it is an "erroneous principle of law" that damages for breach of contract may not include loss of investment); *Distribu-Dor, Inc. v. Karadanis*, 11 Cal. App. 3d 463, 471, 90 Cal. Rptr. 231, 236 (Ct. App. 1970). California law further permits recovery of lost value of a business in a breach of contract action. *Caspary v. Moore,* 21 Cal. App. 2d 694, 699, 70 P.2d 224 (Ct. App. 1934).

1130–31; *Asahi Kasei Pharma Corp.*, 222 Cal. App. 4th at 972–73; *Ashland Mgmt. Inc.*, 82 N.Y.2d at 403.

2. Seibel Proved the Amount of Damages of $9.3M

Seibel proved damages suffered due to the lost value of the Restaurant through the testimony of experts Janet Lowder and John Bautista.

a. Janet Lowder's Projections for the Restaurant

Lowder is an expert with approximately 40 years of experience in the restaurant consulting industry, and her practice specifically focuses on the restaurant market in Los Angeles. (Lowder Rpt. Sec. III, p. 4; pp. 11-12; Tr. 1320:10-18) She had experience specifically with the Grove. (Tr. 1321:11-1322:7) Lowder has been retained in hundreds of cases as an expert evaluating restaurants for financial projections, profitability improvements, market impact, business plans and sales audits. (Lowder Tr. 5:1-14) She has taught multiple classes at U.C.L.A. since 1990 all focused on the restaurant industry. (Lowder Rpt. p. 11; Tr. 1320:19-1321:10) In connection with her work in this case, she reviewed and relied not only on the financial records of the Restaurant, but also the deposition testimony and corresponding exhibits taken in this action, and certain industry publications and reports, for example, the Restaurant Operations Report for 2013-2014 and Top 100 Independent Restaurants for the years 2014-2016. (Lowder Rpt. Sec. III, pp. 3-4)

Lowder testified, via her report and through examination at trial:

- The Restaurant was "a successful and viable operation despite some issues that affected the concept in the initial eighteen months of opening. If left open, the restaurant would have been a highly profitable and successful venture. (Lowder Rpt. Section IV; *see also* Lowder Rebuttal, Sec. IV)

- Through the end of 2013, the Restaurant had positive cash flow and was profitable when excluding non-recurring expenses (Lowder Rpt. Sec. IV(a), Schedule F; Lowder Rebuttal Rpt. Sec. III(a)); and

- There were numerous factors that contributed to expected future profitability of the Restaurant, including:
  - The location of the Restaurant was "prestigious and desirable" as part of the Grove, and within the Grove it was near the movie theater and fountain which draws significant foot traffic (Lowder Rpt, pp. 2-3, Sec. IV(b); Tr. 1327:11-24);
  - The concept of the Restaurant was a good one for that market (Lowder Rpt. Sec. IV(c)[58];
  - The food quality and service issues had improved and were expected to continue to improve (Lowder Rpt. Sec IV(h);
  - The promotion and exposure that the Restaurant would receive by being featured in a full season of Ramsay's television show, Hell's Kitchen, and the winning chef working at the Restaurant would increase the traffic at the Restaurant and its revenues (Lowder Rpt. Sec IV(d)(e); and
  - The addition of Ramsay's name to the Restaurant would positively impact the Restaurant's profits (Lowder Rpt. Sec IV(g).

The improvements that Lowder saw in the Restaurant were fully supported by the factual record that she reviewed, as well as the evidence at trial. The benefit of Ramsay's name to the Restaurant was undisputed, as Ramsay, Seibel and Caruso testified. (Tr. 74:5-11, 351:11-21; Caruso Tr. 14:3-8, 43:15-18) The positive exposure from being featured for a full season on a national television show was also conceded by the Defendants. (Tr. 435:25-436:9) In sum, the changes that Lowder relied upon in her projections are facts that Ramsay Defendants conceded. In addition, Lowder's projections were consistent with the mid and high-end projections that the Ramsay Defendants did prior to the Restaurant opening. (Exs. 606, 607, 608, 609, 610) As shown by Exhibit 606, 609, and 610, when compared with Lowder's projections in Exhibit D of her Report, Ramsay's second "mid-range projection'; and "high end projection" projected higher revenues and profits for years 2013-2015.

[58] See also, Lowder Tr. 98:3-10; 163:21-164:8; 183:11-184:13.

Upon reviewing the historical performance of the Restaurant, and based on the improvements, and her experience in the market and in restaurant projections, Lowder projected the Restaurant's financial performance for three years. (Lowder Rpt. Exs. A-E) After projecting year one revenue, she projected revenue increases of 10% for the next two years[59], and projected profits for the most likely scenario of $1.176M (Year 1); $1.503M (Year 2), and $1.863M (Year 3). (Lowder Rpt. Ex. D)

b. John Bautista's Valuation of the Restaurant

John Bautista, Plaintiff's valuation expert, determined the fair market value of the total equity in the Restaurant when it closed to be $9.3 million. Bautista expressly relied upon the analysis of the industry expert, Janet Lowder. He had numerous conversations with her as part of his "due diligence" regarding her projections, reviewed the back-up documentation, and tested the reasonableness to verify her projections. (Bautista Tr. 125:16-25; 126:19-24.) Bautista's opinion relies upon the financial projections and future profits contained in the Lowder report, based on her finding that the Restaurant was cash positive when Ramsay decided to close and halt its continued success. (Bautista Tr. 63:16-20) The financial projections and future profits provided by Lowder is the type of information that is reasonably relied upon by restaurant business valuation experts. Furthermore, Lowder's report is a source of information that business valuation experts regularly utilize and properly rely upon to calculate economic loss. (Tr. 1341:4-7; 1384:2-6; 1384:17-24; 1395:25, 1396:1; 1396:10-12; and 1396:13-18) Bautista's reliance upon Lowder's

[59] Lowder's projected increases were based on increased prices, inflation, her years of experience doing projections, and industry data such as National Restaurant Association information and Operations report, in addition to the specific positive impact of the other previously mentioned improvements at the Restaurant. (Tr. 1276:13-20; Lowder Tr. 183:11-187:18)

report is in accordance with the American Institute of Certified Public Accountants ("AICPA") guidelines. (Tr. 1396:23-25 and 1397:1-2.)

Bautista considered multiple valuation approaches, but determined that the discounted cash flow method and guideline company approaches were most appropriate. (Bautista Rpt. 4-5; Tr. 1351:17-1353:23) For the discounted cash flow, Bautista based his valuation on projected 10% revenue growth until 2017, and a 5% revenue growth until 2024 and a 3% growth after that until 2027. (Bautista Rpt. Ex. 9; Tr. 1384:7:4) Bautista applied an 18% discount rate to arrive at a valuation of $9.1M (Bautista Rpt. Exs. 9, 10) For the guideline company method, based upon the revenue projection and EBITDA from Lowder for 2014, and applying the multiples chosen from comparable companies, Bautista projected the enterprise value of $9.4 million. (Bautista Rpt. Ex. 13, Tr. 1391:3-1392:8). To determine that his analysis was reasonable, Bautista relied upon publicly traded restaurant company data, as that was the only data available, analyzed risk factors, transaction data from private restaurants, and historical data from the Restaurant (Tr. 1392:9-1395:4), all of which was performed pursuant to AICPA guidelines.

c. <u>Rebuttal of Lowder by Ramsay Defendants' Rebuttal Expert Gordon Lacks Credibility</u>

Defendant's industry expert John Gordon's rebuttal to Janet Lowder's expert opinion was without basis and lacking in credibility.

First, Gordon did not conduct a financial projection, as Lowder did. (Tr. 1432) He also did not review the extensive record in this action, including all the deposition transcripts, exhibits and financial records from the Fat Cow. (Tr. 1433; Gordon Rpt. Ex. 2) Unlike Lowder, who has extensive experience with restaurants in the Los Angeles market, the vast majority of his work involves chain restaurants. (Tr. 1433) In sum, Gordon did not review sufficient materials to have a basis to rebut Lowder, nor is his expertise focused on single store restaurants in the Los Angeles market.

Despite not reviewing the record for the Fat Cow, Gordon opined that he did not believe Lowder gave enough weight to the historical data. (Tr. 1434) However, as Lowder explained, for instance with regard to historical data on turns, while she reviewed and considered the historical data, based on improvements at the Restaurant, her experience and industry standards, her opinion on future turns did not correspond to the historical data.[60] (Tr. 1267-68) Gordon simply has no basis for his opinion regarding the appropriate weight that should be given to historical data that he did not review, nor does he have a basis to opine on whether Lowder's opinions with regard to weight given to the improvements at the Restaurant was appropriate or not.[61]

Gordon disagreed with Lowder's opinion that the Restaurant would continue to operate and become profitable based on a report, the "Parsa Report", that found the majority of restaurants fail in their first three years. (Gordon Rpt. ¶10) However, as Gordon conceded, the Parsa Report, concerned 1996-1999 data from the Columbus Ohio market, that included quick service restaurants. (Tr. 1436-38) Such data has little bearing on a full-service restaurant located at the

---

[60] Further, Lowder testified that she was concerned that the Fat Cow data is not entirely reliable as a sole point of comparison because the point of sales system, LAVU, was faulty – a point that was confirmed at trial. (Lowder Tr. 237:5-7; 238:1-19)

[61] Regarding the turns, the Fat Cow had 200 customer seats total as stated in Lowder's report; 140 of them are inside the restaurant and 60 are on the outdoor patio area. (Lowder Report, Ex. A) Lowder calculated the most likely scenario/average of 3.5 turns based on the number of seats at the Fat Cow, the historical turns at the Restaurant, the average check amount, the location, i.e. the destination lifestyle center of the Grove, and the Restaurant Operations Report for the years 2013-2014, in addition to her knowledge and experience in the industry as well as the other items mentioned in her report. (Lowder Tr. at 227:5-13; 232:9-13) While weather or outdoor events at the Grove could impact the outdoor seating, Lowder assumed that such factors would only increase the usage indoors. (Tr. 1264:25-1265:10) Despite criticizing Lowder on this point in his report, Gordon conceded at trial that Lowder could be correct that losing seats outdoors on certain days could increase the usage of the indoor seats. (Tr. 1449:8-1450:11)

Grove in Los Angeles in 2013, the market in which Lowder has significant experience.[62] To make matters worse, Gordon opined that the Restaurant had a number of Parsa's "indicators of failure," but Gordon's opinion was based on Ramsay Defendants' counsel telling him which indicators were present – he did not conduct an independent inquiry on the factors. (Tr. 1440-1441; Gordon Tr. 84:22-85:17, 100:7-102:15) In addition, Gordon did not even attempt to determine which, if any, of Parsa's "indicators of success" were present at the Restaurant. (Tr.1440-1441) As such, Gordon's opinion lacks credibility when he relied entirely upon counsel for his indicators of failure, but did not even attempt to consider indicators of success that might support Lowder's opinion.

While Gordon criticized Lowder's projected revenue increase as higher than the median in the National Restaurant Assocation/Deloitte 2016 Operations Report, he conceded that many restaurants are above the median, and that the projected revenues were therefore achievable. (Gordon Rpt. ¶17; Tr. 1442-1443)[63] Indeed, while Gordon claimed that the growth projected by Lowder "are not easy to achieve," he conceded that they were not unachievable. (Gordon Rpt. ¶17; Tr. 1442-1443) When Gordon compared Lowder's projected revenues to existing restaurants at the Grove, Gordon incorrectly opined that Lowder's projected revenues were higher than those two restaurants. In fact, as he conceded at trial they were lower than one of them (Cheesecake Factory) and higher than the other (Maggiano's).[64] (Gordon Rpt. ¶23; Tr. 1452-1454:24)

---

[62] Gordon conceded that the Grove is a prestigious, destination location, with a significant amount of foot traffic, located near a movie theater, which are all positive attributes. (Tr. 1435-1436). The Parsa Report did not consider restaurants solely with those attributes.

[63] Gordon conceded that his Table 4 in para. 17 of his report incorrectly used the number "1652" instead of "4652." (Gordon Rpt. ¶17; Tr. 1442:1-6)

[64] Lowder's projection of 2014 revenues increasing significantly over the 2013 actual numbers was based on the extensive evidence that: (1) the Restaurant was still experiencing growth issues in early 2013, as some restaurants do in the early stages of operations; (2) the performance was greatly improved for a number of months in 2013; and, (3)

Gordon made another error when he incorrectly criticized Lowder's labor as a percentage of revenues being too low, when in fact her projections were higher than the median set forth in the NRA/Deloitte Report that he relied upon. (Gordon Rpt. ¶27; Tr. 1457-63) With regard to Lowder's projected expenses, Schedules 3 and 4 of the Lowder Report represent the historical expenses of the Fat Cow based on actual data contained in Fat Cow's financial statements, and Schedules 1 and 2 represent her projections for future expenses. Despite Ramsay Defendants' criticism of those Schedules, Lowder stated that she adjusted the historical expenses to account for the early start-up costs that were inordinately high (which can be typical when restaurants first open) but started to stabilize in 2013 and would have continued to do so if the Fat Cow remained open. (Lowder Report, Schedules 1-4; Tr. 1282:15-1283:14; Lowder Tr. 272:8-273:17)[65]

Gordon's other criticisms of Lowder were equally unsupported. He criticized Lowder for finding that the Restaurant would have increased foot traffic from the national exposure of being featured on the Hell's Kitchen television show. However, he conceded that his opinion was based on a report on the television show, Kitchen Nightmares, a show about failing restaurants that does not portray the subject restaurants in a positive light. (Tr. 1444-1446). In addition, those restaurants have the benefit of Gordon Ramsay, world-renowned for saving failing restaurants, for one week;

---

improvement was cut short when Ramsay began his plans to close the Restaurant in the fall of 2013. (Lowder Rebuttal Report, p. 2; Lowder Report, Section IV). Moreover, her view that management's decision to close would have a negative impact on the Restaurant's performance was confirmed by Ramsay Defendants' expert Bracco, who testified that the date of closing would "potentially" impact how management acts. (Tr. 1409:14-18)

[65] At trial, Lowder was asked numerous questions as to whether every expense she categorized as nonrecurring was, in fact, nonrecurring. (Tr. 1286-1291) While the categories of expenses that Lowder found to be non-recurring expenses are clearly accurate, even if certain single entries within those categories was improperly deemed "non-recurring" that had no impact on her projections as all items were properly categorized in her projections. (Tr. 1325:9-1326:20)

whereas the Restaurant has Ramsay as an owner with a continued vested interest in the success of the Restaurant. (Tr. 1444-46)

Gordon also criticized Lowder's projected average check because "NPD Group estimates that only 20% of all restaurant transactions in the United States are over $10." (Gordon Rpt. ¶23). However, he conceded that data includes quick service restaurants which have vastly different average checks from full-service restaurants. (Tr. 1456:3-1457:1) Moreover, he conceded that he did not review average check numbers from the Restaurant. (Id.) The evidence at trial showed that according to Ramsay, when the Restaurant opened the Restaurant's average check was $20. (Tr. 468:18). This is consistent with Lowder's testimony that she saw an average check amount of $24 in 2012 at the Restaurant. (Tr. 1272:6-1273:2 ; NYSCEF Dkt. No. 265) In her report, Lowder relied upon Green for the average check amounts.[66] Green testified that when he reviewed the average check amounts for late 2013 through early 2014 they were approximately $28 during lunchtime and $33 during dinner. (Tr. 563:25-565:11) Lowder rounded up the numbers from Green in her projections to $33 for lunch and $35 for dinner, to take into account increased alcohol sales, which reflected the continued upward trend from 2012 average check amounts of between $20 and $24. (Lowder Tr. 239:25-241:7; 263:22-264:16)[67] This evidence clearly supports Lowder's opinion and is completely at odds with Gordon's rebuttal opinion on the average check amounts.[68]

In sum, Gordon's rebuttal to Lowder's opinion are not credible.

d. Rebuttal to Bautista by Ramsay Defendants' Rebuttal Expert Dragon is Without Basis

[66] There is nothing improper about Lowder's reliance on representations from management, as counsel appeared to questions to Lowder at trial. (Tr. 1273:3-21; *see also,* Lowder Tr. 239:25-241:7; 263:22-264:16)
[67] *See also,* Tr. 568: 6-571:6; Exhibit 597.
[68] Lowder did not include the class action in her projections because in her experience and understanding 98% of cases settled and therefore she made the reasonable assumption it would settle. (Tr. 1292:6-1294:21)

The primary rebuttal opinion by Ramsay Defendants' expert Raymond Dragon is that Bautista should not have relied up Lowder because he did not adequately verify or confirm Lowder's opinion. Significantly, Dragon is not a restaurant industry expert and has no expertise to rebut Lowder's opinions with regard to the factors that contributed to her opinions concerning the projected success of the Restaurant. In fact, Dragon has never performed a forward-looking revenue projection for a restaurant or restaurant group. (Tr. 1492:17-20). Dragon, without the requisite restaurant industry expertise, improperly criticizes Bautista for reliance on Lowder. Yet Dragon admittedly considered the report of John Gordon dated September 15, 2017, wherein Mr. Gordon, similar to Bautista, relied on an analysis of chain restaurants. (Tr. 1509:13-15). Dragon's criticism of Bautista for reliance upon Lowder while he considered the report of John Gordon challenges Dragon's credibility.

While Dragon criticizes Bautista's reliance on publicly traded restaurants, Bautista considered data from chain restaurants and made the appropriate size and other risk adjustments to this data to take into account the fact that the Fat Cow was a single store (considered in the valuation industry an appropriate use of market data on an adjusted basis). (Bautista Tr. 218:14-221:11; 235:18-236:7; 240:8-24) Furthermore, the smaller company transaction data Bautista included in his report support the same pricing multiples that are evidenced by the chain restaurant data. (Bautista Report, Appx. 1, Ex. 16) Regarding Dragon's criticism that he failed to adjust the data for "same store" growth (Dragon ¶¶22-26), Bautista he considered same store sales (Bautista Tr. 223:15-18) but found it was not applicable because same store sales encompass average growth of many restaurants, some poor performers (with low or even negative growth) and some high performers (with conceivably double-digit growth rates such as those in prime locations). (Bautista Tr. 225:14-226:22) The Fat Cow was a single restaurant in a prime location.

Bautista appropriately utilized the discounted cash flow method and guideline company approaches to value the Fat Cow. These methods are undoubtedly acceptable under industry standards and AICPA. Dragon must concede that these methods are appropriate to determine the value of the Fat Cow or a similar company with no earnings or sales because he asserts the appropriateness of these methods in his article titled How Do You Value A Company With No Earnings (Or Sales), dated April 20, 2021. Furthermore, at trial Dragon agreed that the Discounted Cash Flow Method and the Comparable Companies Method may be utilized to value a company with no sales or earnings. (Tr. 1498:13-15 and 23-25) In short, Dragon only provides criticism of Bautista and no alternative valuation as Dragon expressly did not opine as to the value of the Fat Cow. (Tr.1492:11-13)

e. Ramsay Defendants' Expert Bracco's Opinion Should Not Be Afforded Any Weight

Ramsay Defendant's expert Anthony Bracco offered the opinion that the Restaurant had to close because it was insolvent as of January 31, 2014. (Bracco Rpt. ¶29) Bracco's opinion should not be afforded any weight whatsoever for the simple reason he did not express any opinion as to the solvency of the Restaurant on the date when Ramsay made the decision to close – June 2013.[69] (Tr. 1408) Bracco's own testimony reveals the importance of the date that the decision was made to close the Restaurant, as he also admitted an earlier date of closing would "potentially" impact how management acts. (Tr. 1409:14-18) Ramsay was in charge of the Restaurant as of June 2013

[69] In addition, Ramsay informed Seibel of his decision to close on Dec. 13, 2013 and Bracco did not conduct a solvency test as of that date either.

and their own expert admits that because they had already decided to close it could impact how they manage the Restaurant. According to Bracco's report, the Restaurant's liabilities only exceeded assets by the end of June 2013 by $33,813 – hardly an indication of an insolvent restaurant that had to be closed. (Bracco Ex. 3)

Bracco based his opinion that the Restaurant was insolvent by application of the ability to pay solvency test, however, Bracco conceded that the restaurant industry often sees a less than 1:1 ratio in assets to current liabilities. (Tr. 1410-1412) As the industry expert Lowder opined, the ability to pay solvency test is not appropriate for restaurants because they typically have less than a 1:1 ratio of assets to liabilities. (Lowder Rebuttal Rpt. p. 4) Indeed, as Bautista showed, every guideline restaurant company has negative working capital. (Bautista Rebuttal Rpt. p. 3)

Nevertheless, even with regard to the ability to pay solvency test that Bracco claimed to apply, as both Lowder and Bautista stated in their rebuttal opinions, access to capital is critical when determining a restaurant's solvency because the analysis depends on the entities' ability to pay its expenses. (Lowder Rebuttal Rpt. Sec.II, Sec. III, p. 5; Bautista Rebuttal Rpt. pp. 1-3). Lowder listed numerous ways the Restaurant could have access to capital even if the partners decided not to put up additional capital. (Lowder Rebuttal Rpt. Sec.II, Sec. III, p. 5) By not considering the financing options that the Restaurant would have, and simply stating that there was no requirement that the partners contribute more capital, Bracco ignored a critical aspect of the solvency test. (Tr. 1403-1405)

Bracco did not consider which expenses of the Restaurant's were non-recurring expenses and the positive cash flow from operations. (Tr. 1413) This is despite admitting that restaurants often experience significant start-up costs (Tr. 1413-1414) This combined with the fact that

Bracco did not consider the reasons that performance would improve in 2014 and thereby increase revenues reveal that Bracco could not properly consider whether the Restaurant could pay its liabilities. (Lowder Rebuttal Rpt. p. 3, 5) In addition, Bracco assumed a $500K liability from the class action in contravention of the standards. (Tr. 1421-1424) He based his estimate of the liability from a lawyer's memo that did not estimate the liability, but rather offered three options for the parties to consider in proceeding. (Tr. 1421-1422)

In sum, Bracco's opinion that the Restaurant was insolvent is not credible and should not be provided any weight by the Court.

3. Plaintiff's Damages Are Not Unduly Speculative

Seibel's damage analyses are too not speculative as a matter of law. While under Delaware law the Court may not set damages based on mere "speculation or conjecture," mathematical certainty is not required.[70] *Beard*, 8 A.3d at 614; *see also, Re v. Gannett Co.*, 480 A.2d 662, 668 (Del. Super. Ct. 1984), *aff'd*, 496 A.2d 553 (Del. 1985) ("The standard applied in proving future events or future losses is reasonable probability, namely, whether something is more likely to happen than not"); *Siga Techs.,* 132 A.3d at 1130–31 (applying the established presumption that doubts about the extent of damages against the breaching party.) Here, Lowder reviewed and

[70] The law is similar under California and New York law. *Sargon Enterprises, Inc. v. Univ. of S. California*, 55 Cal. 4th 747, 775, 288 P.3d 1237, 1254 (2012)("Courts must not eviscerate the possibility of recovering lost profits by too broadly defining what is too speculative"); *Wathne Imports, Ltd. v. PRL USA, Inc.*, 101 A.D.3d 83, 88-897, 953 N.Y.S.2d 7 (1st Dep't 2012)("A degree of uncertainty is to be expected in assessing lost profits. When the existence of damage is certain, and the only uncertainty is as to its amount, the plaintiff will not be denied recovery of substantial damages, although, of course, the plaintiff must show a stable foundation for a reasonable estimate of damages. An estimate of lost profits incurred through a breach of contract necessarily requires some improvisation, and the party who has caused the loss may not insist on theoretical perfection. It is always the breaching party who must shoulder the burden of the uncertainty regarding the amount of damages." *See also, CMMF, LLC v. J.P. Morgan Inv. Mngt., Inc.*, 9992 N.Y.S.2d 158, 2013 WL 8480424. *30 (N.Y. Sup. Ct. Aug. 21, 2013)(after bench trial finding plaintiff's damages were not unduly speculative as the law does not require that damages be determined with mathematical precision.)

considered the historical data of the Restaurant, but in her projections she relied upon her knowledge of the market, and data from similarly situated restaurants, and applied both the improvements that were made at the Restaurant as well as the events that would occur in 2014 and forward, such as the television exposure and name change, other contributing factors specific to the Restaurant, and data between similarly situated restaurants, to conclude that revenues and profits would grow. (Ex. 48; Lowder Aff. at ¶¶11, 13)[71]

The Delaware and California authority previously relied upon by Defendants are entirely distinguishable as well.[72] For instance, in *Pfizer Inc. v. Advanced Monobloc Corp.*, No. 97C-04-037-WTQ, 1999 WL 743927, at *5 (Del. Super. Ct. Sept. 2, 1999), *opinion corrected on denial of reconsideration*, No. 97C-04-037-WTQ, 1999 WL 1240864 (Del. Super. Ct. Sept. 24, 1999), the expert's opinion on lost profits of *women's premium brand* shaving cream was held too speculative because it was based on a comparison with *men's value brand* shaving cream. *Pfizer Inc. supra*, at *5. That is not the case here as the Lowder Report compares other restaurants based on proper

[71] Unlike the cases previously relied upon by Ramsay Defendants, the Fat Cow Restaurant had eighteen months of operations under its belt, and was steadily improving just before it was prematurely closed. (Lowder Rpt. Section III). In *Re v. Gannett Co.*, 480 A.2d 662, 668 (Del. Super. Ct. 1984), *aff'd*, 496 A.2d 553 (Del. 1985), the future losses of sales were held to be too speculative where the product never made it to market and no expert testimony was offered on the venture's probable economic success. In *Greenwich S.F., LLC v. Wong*, 190 Cal. App. 4th 739, 118 Cal. Rptr. 3d 531 (2010), lost profits were not awarded to buyer after trial where the development was not built and the entire venture's existence was speculative.

[72] In *Callahan v. Rafail*, No. CIV.A. 99C-02-024, 2001 WL 283012, at *2 (Del. Super. Ct. Mar. 16, 2001), the court rejected plaintiff's lost profits analysis on summary judgment because the analysis assumed that a race horse would continue to win at the same level for six years in competitive racing; there were simply too many variables due to the specific competitive nature of horse racing, which is not at all similar to an established restaurant's profit projections like the Fat Cow. In *Kids' Universe v. In2Labs*, 95 Cal. App. 4th 870, 116 Cal. Rptr. 2d 158 (2002), plaintiffs failed to present any historical data, market survey, or analysis of data of similar enterprises that the expert relied upon in establishing lost profits. 95 Cal. App. 4th at 888. There was no evidence presented that "gains from [] sales would have exceeded the costs of operat[ions]." *Id.* Unlike the expert in *Kids' Universe*, Lowder relied upon historical data and reviewed and compared data from other comparable restaurants in rendering her opinion. (Lowder Rpt. Section III) The Lowder Report also contains a detailed analysis of the prospective profits of the Restaurant had it not closed prematurely, which accounts for cost of operations in a thoroughly detailed manner. (Ex. 48, at Ex. D)

comparable data. (Ex. 48, Section III; Lowder Aff. at ¶11, 13) More importantly, the *Pfizer* expert report was excluded because the expert had never made a projection for the calculation of lost sales before, and he was not qualified to make such a projection. *Id.* at *6. That is not the case here. In addition, as stated above, Bautista testified that he had applied well-established methods to his valuation of the Restaurant.

On cross-examination, Ramsay Defendants questioned Bautista whether he was aware of any offers to buy the company, which Bautista was not. (Tr. 1354-1355) In addition, Ramsay Defendants' expert, Dragon, testified that Bautista should have considered whether there were any willing buyers to purchase the Restaurant. (Tr. 1500-1501) Ramsay Defendants apparently take the position that the negotiations in which Ramsay would purchase back Seibel's interest in the Restaurant in July 2013 by paying him back his $832K investment in the Restaurant for his 50% ownership interest, plus an additional 5% of ongoing profits are the appropriate basis for determining the value of the Restaurant in accordance with the market-based method. (Ex 133) The January 2014 buyout negotiations, as well as Seibel's March 2, 2014 offer to sell are for similar amounts that Ziegler calculated to be $831K. (Exs. 540, 300).

If the Court finds that the offers are an alternative and adequate grounds to establish the value of the business, this Court could award the entity double the $832K, of which Seibel would be entitled to 50% based on the offers made.[73]

[73] Ramsay Defendants witness from Caesars, Mr. Jeffrey Hendricks, ostensibly testified with regard to Seibel's damages on the grounds that Ramsay would have been required to cease doing business with Seibel in Sept. 2016, when Caesars terminated the contracts for certain other restaurants in Las Vegas that Seibel had previously been a party to. As this Court indicated at the time, the testimony was irrelevant and likely only admissible for purposes of dissolution. (Tr. 1481:23-1482:3) If the Court permits this testimony for any other reason, such as damages, Hendricks' testimony could not possibly support the claim that Ramsay would have had to terminate all business with Seibel in September 2016, including the Fat Cow business, because: (i) Hendricks was not at Caesars during the

V. PLAINTIFF PROVED ITS BREACH OF FIDUCIARY DUTY CLAIM

Plaintiff has also asserted breach of fiduciary duty claims.[74] With regard to the Fat Cow LLC, the claim is asserted against GRUS, the member of the LLC, for acts occurring after January 1, 2014. As this Court has already held, Section 17 of the Fat Cow LLC Agreement limits GRUS' liability as a member of the LLC. (Ex. 7, §17; MTD Order, NYSCEF Doc. No. 39, p. 11) However, California law effective January 1, 2014 limited parties' exculpation of fiduciary duties and thus post January 1, 2014 conduct of GRUS can be considered as a basis for breach of its fiduciary duty. (*Id*., citing Cal. Corp. Code § 17701.10[c]) The breach of fiduciary duty claim is also asserted against Ramsay as a manager of the LLC. (Ex. 7, para. 6) Ramsay the manager is not exempt from fiduciary duty claims by §17 of the Fat Cow LLC Agreement – which by its terms only limits fiduciary duties of members not managers. (Ex. 7, §17; MTD Order, NYSCEF Doc. No. 39)[75] With regard to FCLA LP, the claim is asserted against GRUS and Ramsay. This Court has already

---

relevant time period (1479:3-6; 1480:3-15); (ii) he has no direct knowledge if Caesars was requiring GR to divest all business with Seibel (Tr. 1483:3-20; Ex. 666); and (iii) the face of the letter sent to Ramsay by Caesars does not require Ramsay to cease doing business with Seibel, only the BURGR entity. (Ex. 666, Tr. 1483:3-20)

[74] Plaintiff's claim includes a request for punitive damages, which is available under Delaware law upon a showing that the defendant acted with malice and with intent to injure the plaintiff. *Niehoff v. Maynard*, 299 F.3d 41, 53 (1st Cir. 2002). The evidence at trial revealed that Defendants bore ill will toward Seibel and that they intended to open a new restaurant without him, using assets from the Fat Cow Restaurant. Gillies, Ramsay's right hand man, even happily noted that they took "comfort" in the fact that Seibel would lose all of his investment. (Ex 219)

[75] Although the heading of this section is: "exculpation of members and managers" the text only refers to members in their capacity as both members and managers. (Ex. 7, §17) Ramsay is only a manager not a member, thus this section does not apply to him. California law provides that "the legal effect of the terms of [a] signed document is not enlarged by the heading of the latter." *First Sec. Co., Ltd v. Storey,* 9 Cal.App.2d 270, 273 (1935). Moreover, there is a vast body of California law cited by this Court in the MTD Order which provide that managers or members of limited liability companies cannot exculpate themselves from acts of intentional wrongdoing or fraud. MTD Order, p. 11; *Neubauer v. Goldfarb*, 108 Cal App 4th 47, 56 (2d Dist. 2003). Section 17 says that Members "shall not be liable to the Company for any breach of duty in either such capacity, *unless otherwise provided by law* ..." California law provides otherwise, such as Section 17153 of Cal Corp. Code, which provides that "The fiduciary duties a manager owes to the limited liability company and to its members are those of a partner to a partnership and to the partners of the partnership." While Section 17005(d) of Cal Corp. Code says a manager's fiduciary duties may be "modified" by written agreement, it does not say they may be eliminated.

held that the Ramsay and GRUS can be held liable for breach of fiduciary duty under the FCLA LP Agreement if it is found that they controlled the general partner of the LP (i.e. Fat Cow LLC). (MTD Order, NYSCEF Doc. No. 39, pp. 13-14)[76]

The elements of a claim for breach of fiduciary duty under Delaware law are: (1) that a fiduciary duty existed and (2) that the defendant breached that duty. *Beard Research, Inc. v Kates*, 8 A3d 573, 601 (Del Ch 2010), affd sub nom. *ASDI, Inc. v Beard Research, Inc*., 11 A3d 749 (Del 2010). California law is substantially the same. *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 820, 250 P.3d 1115, 1121 (2011). This Court has previously recognized that, under both Delaware and California law, the business judgment rule creates a rebuttable presumption that general partners are acting in the company's best interests. (SJ Order, NYSCEF Doc. No. 536, pp. 26-34, *citing Zoren v Genesis Energy, L.P.*, 836 A2d 521, 528 (Del. Ch. 2003); *Berg & Berg Enters., LLC v. Boyle*, 178 Cal. App. 4th 1020, 1045 (Ct. App. 6th Dist. 2009)). This Court continued:

> However, an exception to the business judgment rule exists in both States. 'Delaware law imposes an entire fairness burden when the fiduciary charged with protecting the minority in a sale of the company does not have an undivided interest to extract the highest value for the shareholders'(*Matter of LNR Prop. Corp. Shareholders Litigation*, 896 A2d 169, 177 [Del Ch 2005].) The FCLA incorporates this limitation, stating that liability applies to 'acts of fraud, bad faith or willful misconduct' (FCLA Agreement ¶ 8.10.) Similarly, in California, which governs Fat Cow LLC, 'the rule establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest' (*Berg*, 100 Cal App at 1045.) Thus, 'the rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest' (*Id*.

[76] *Citing Feeley v NHAOCG, LLC*, 62 A.3.d 649, 662 (Del Ch 2012)(limited partners "can assume fiduciary duties if they take on an active role in the management of the entity"); *see also*, *Graham v Maple Tree Holdings, LP* No. 8949-UCL, 2014 WL 4928755 (Del Ch 2014)("A breach of fiduciary duty claim can be asserted not only against the general partner but also against those in control of the general partner.")

> [internal quotation marks and citation omitted].) In such circumstances, the 'entire fairness' doctrine is applicable. Under this standard, the burden shifts to the defendant or the counterclaim-defendant to show that the challenged conduct was fair to the other party (*See In re Walt Disney Co. Derivative Litigation*, 906 A2d 27, 52 [Del 2006].)

(SJ Order, NYSCEF Doc. No. 536, p. 27) This Court went on to state that: "[i]f Ramsay closed the restaurant simply because he wanted to end his partnership with Seibel and start a new restaurant, there would be a breach of fiduciary duty." (*Id.* at 29; *citing Cline v Grelock*, No. 4046-VCN, 2010 Del. Ch. LEXIS 43, at *2 [Del. Ch. Mar. 2, 2010]) As the evidence at trial revealed, that is exactly what occurred.

A. <u>Defendants Wanted to Exclude Seibel; Entire Fairness Applies</u>

There is overwhelming evidence that Defendants' actions were self-interested, and that Ramsay and GRUS took those actions with the intent of starting a new venture using Fat Cow assets to the exclusion of Seibel. Defendants breached their fiduciaries duties to FCLA and Fat Cow LLC by (1) purposefully failing to obtain rights for the name of the Restaurant (Exs. 12, 14, *see supra* IV(C)((4) & (5)); (2) only seeking permission to use the name "The Fat Cow" for a limited time so that Ramsay would have an excuse to close the Restaurant (Gajer Tr. 21:4-22:14, 24:2-6; Isicoff Tr. 37:9-17, *see supra* IV(C)((4) & (5)); (3) refusing to operate the Fat Cow Restaurant under any other name or to effectuate a name change (Ex. 218, p. 2, *see supra* IV(C)((4) & (5)); (4) clandestinely negotiating with the Landlord for the Restaurant about a new restaurant and misappropriating the Lease (Ex. 31, p. 1, *see supra* IV(B)(3) & (5))[77]; (5) misappropriating

[77] One of the Restaurant's most valuable assets was its Lease, which still had 8 years remaining. (*Supra* IV(B)) Ramsay's unilateral conduct closing the Restaurant created a significant liability for the business, which Ramsay claims to have attempted to remedy by having the Lease assigned to his new restaurant for nothing. Willfully creating an enormous liability and transferring an asset to himself for nothing is clear self-dealing and a breach of duty.

the capital improvements and staff that was trained at the Restaurant for Ramsay's new restaurant (Tr. 1244-45; Ex. 30, 35; *see supra* IV(B); (6) secretly negotiating a new agreement without authority and against the interests of the Restaurant so that Defendants could misappropriate the agreement promoting the Restaurant on Ramsay's television show, Hell's Kitchen (Tr. 437; Exs. 387, 390); (8) refusing to communicate or meet with Seibel on business matters and decisions (Exs. 218, 124, 127 *see infra* V(B));[78] (9) compensating Van Willigan from the Entities' revenues despite an agreement she would be compensated by Defendants (Ex. 210, p. 1; Yoo Tr., 78:6-79:3; *see supra* IV(C)(7)(g)); (10) hiring and paying bar consultants for Defendants' new restaurant with the Entities' funds after the decision was made to close the Restaurant (Tr. 1243; Couch Tr., 33:6-34:1;39:9-40:17;43:2-8, Exs. 224, 353)[79]; (11) causing a default in the Lease and attempting to take this asset without compensation to the Entities (*see supra* IV(B)); and, (12) instructing or permitting the secret recording of several conversations between Seibel and the GRUS team (Exs. 64, 680-685).[80]

All of these acts were to benefit Defendants and/or the new restaurant, that Defendants admitted at trial would not include Seibel. (Tr. 365:5-366:5, 400:1-11) Although Defendants claim

---

[78] Ramsay did not respond to Seibel's Dec. 13 email to meet and attempt to have a productive discussion (Tr. 423); neither the managers or their delegates, if permitted, ever discussed the issues facing the Restaurant; Ramsay's team didn't respond to Ziegler's requests for meetings (Ex. 127).

[79] After the decision to close had been made and after the original WARN notice was supposed to be issued, Van Willigan hired bar consultants for the Restaurant on January 11, 2014. (Van Willigan Tr. 215:16-216:20; 223:20-24) Van Willigan knew at the time that employees of the Fat Cow may be working at the new restaurant. (Ex.352; Van Willigan Tr. 206:2-20; 222:19-25) Wenlock admits this decision was wrong. (Tr. 1246)

[80] Seibel was not informed he was being recorded. (Tr. 112) Ramsay could not recall if he instructed Gillies to record (Tr. 442, 443) and he did not know if it was their normal business practice to record business meetings (Tr. 444; Tr. 1233-34). None of the GRUS testimony established how many recordings there were of Seibel without his knowledge. (Tr. 442; Tr. 1233-34) In fact, the recordings were never properly authenticated and should not be admitted by this Court. The person who recorded them (Gillies) did not authenticate them or testify at trial, and Wenlock could not establish chain of custody (Tr. 1237) nor is his testimony that he recalls the entire conversation from several years prior credible for purposes of authentication (Tr. 1235-36). *See supra* II(B).

that they were operating under the assumption that Seibel *would* be bought out and they *would* be permitted to take these actions, the buyout never happened and that is not in dispute. (Tr. 364:15-16, 454:2-4) The Defendants cannot be permitted to violate their fiduciary duties by engaging in acts that are clear conflicts of interest and self-dealing based on limited discussions about a buyout that were put on hold in July 2013 and never finalized by the time these acts were committed. Defendants do not dispute that the parties never agreed upon an *amount* for which the buyout would occur as of the date they took the above-described actions (on or before December 2013). (Tr. 364:15-16, 454:2-4) As set forth above, under both California and Delaware law there was no oral agreement for a buyout as there was no meeting of the minds on all material terms. Thus, Defendants' excuse that the buyout was verbally agreed to and that should excuse their self-interested transactions fails as a matter of law.

The proper standard for evaluating Defendants' action in light of their profound self-dealing is the entire fairness standard. *Krasner v Moffett*, 826 A.2.d 277, 287 (Del 2003)(when the ultimate decision maker is interested in the transaction, the entire fairness rule applies and defendants bear the burden of proof); *Everest Invs. 8 v. McNeil Partners*, 114 Cal. App. 4th 411, 430, 8 Cal. Rptr. 3d 31, 45 (2003) ("business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest.") Under that standard, Defendants' secret scheme to close the Fat Cow, negotiate with the Landlord and re-open a new restaurant is enough to fail the entire fairness doctrine. *Gatz Properties, LLC v Auriga Capital Corp.*, 59 A.3d 1206, 1208 (Del 2012)(holding that manager of limited liability company violated fiduciary duty by, *inter alia*, causing company to be sold to himself and that manager was not protected by exculpatory language of limited liability company agreement due to manager acting in bad faith and making willful misrepresentations); *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) (finding the transaction did not satisfy the entire fairness doctrine when the benefits of the transaction to the parent were not fully disclosed to the minority shareholders because the entire fairness requires compliance with the duty of disclosure.") *See also Cinerama, Inc. v Technicolor, Inc*., 663 A2d 1156, 1163 (Del 1995); *Coley v. Eskaton*, 51 Cal. App. 5th 943, 960, 264 Cal. Rptr. 3d 740, 754 (2020) (transactions where directors personally involved were inherent conflict of interest and outside scope of business judgment rule, even where directors did not personally benefit from the breach).

B. There Was No Delegation of Managerial Authority

Ramsay has claimed at trial that he failed to speak with Seibel directly about the issues facing the Restaurant toward the end of 2013 because his lawyer Thomas and his "delegate" Gillies were speaking to Seibel on his behalf. (Tr. 1022:11-19, 1033:10-14, 1035:7-14, 1039:2-6) First, the LLC Agreement does not explicitly provide for the delegation of *all* managerial authority (nor does it provide that managerial decision-making authority can be delegated), but it does provide for the designation of officers that may from time to time be delegated certain managerial duties. (Ex. 7, at §7(b); Tr. 748-750, 849) However, there was never a designation of any officers made by both managers under this section. (Tr. 772-773) Lacking any designation of officers or proper delegation of managerial duties in compliance with the terms of the LLC Agreement, California law does not permit parties to delegate their managerial authority to individuals or entities outside the LLC. *SB Liberty, LLC v. Isla Verde Assn., Inc.*, 217 Cal.App.4th 272, 283 (2013). Thus, there was no delegation of managerial decision-making authority or any other delegation or designation of authority under the LLC Agreement and applicable California law.

Even assuming that Gillies was properly delegated any authority, Gillies testified repeatedly and in no uncertain terms at his deposition that his last conversation with Seibel occurred in November 2013 after the two had a disagreement at a restaurant in Vegas and Gillies left. (Gillies Tr. 148:8-14, 149:5-16, 165:15-25) Even when Gillies and Seibel were speaking prior to that last conversation, they were not discussing the broad range of issues that had to be dealt with, and these issues were interconnected. (Tr. 1129; 152-53)

As for the communications between Seibel and Ramsay's respective counsel, Thomas testified that he was communicating with Seibel and/or Ziegler on behalf of GRUS, not on behalf of Ramsay. (Tr. 1116-17) Ramsay's claims that Seibel only wanted to discuss matters *other* than the Fat Cow is belied by the written evidence at the time which demonstrated Seibel and his counsel Ziegler were expressly requesting discussions on the Fat Cow issues. (Ex. 127; Tr. 1129-30; Tr. 892-894) In fact, Seibel, through counsel, called for an urgent meeting to discuss these many issues before the Defendants issued the WARN notice on December 28, 2013 as indicated at the time. (Ex. 127, Tr. 757-58; Tr. 759, Ex. 125)[81] Defendants never responded to this request for a meeting; they did not offer to have the alleged "delegate" Gillies or counsel Thomas or anyone else attend, they just did nothing. (Tr. 1132-33; Ex. 554; Tr. 761)

C. <u>Seibel Did Not Breach His Fiduciary Duties</u>

GRUS brought a derivative counterclaim against Seibel for breach of fiduciary duty on behalf of FCLA LP and Fat Cow LLC. Based on the legal standards of fiduciary duty in Delaware

[81] The day-to-day decisions referenced by Thomas in his January 6, 2014 letter (Ex. 128) that could be delegated were not the ones Ziegler wanted the parties to meet over. (Tr. 1133-34; Exhibit 128; Tr. 763)

and California set forth above, Seibel's actions cannot be considered self-dealing, self-interested or a conflict of interest.

First, GRUS alleges that Seibel converted funds belonging to FCLA when those funds were actually taken by Seibel in response to the improper removal of funds by Defendants to pay Van Willigan salary. Van Willigan worked for GRUS in many other capacities aside from the Restaurant and, as a result of the negative history between Seibel and Van Willigan, GRUS agreed to pay her salary entirely (i.e., not using FCLA funds). (Tr. 118:3-120:19, 325:2-6; Ex. 210)[82] When GRUS removed funds, Seibel did the same. Second, GRUS alleges that Seibel received "kickbacks" by saving the Restaurant money in a well-known marketing rebate program, where Seibel testified he shared the rebates with his partner Ramsay. (Tr. 108:6-1090:3, 560:15-20)[83] Third, Seibel pursued opportunities for future Fat Cow restaurants in other locations such as Egypt, consistent with the intent of the parties in entering into this venture of opening more restaurants, and Green testified that any deal would necessarily have included Ramsay. (Tr. 642:9-24) Finally, Seibel did not fail to fund the companies in or around December 2013 as the company records show that the partner funding was equal at that time. (Ex. 369) Further, Seibel wanted to discuss the future of the Restaurant with his partner who refused to meet with him, and he was understandably hesitant to put money into a venture that Defendants had seized complete control over while indicating they were closing the Restaurant. (Tr. 777-778, Ex. 553)

[82] When asked about this agreement at trial, Ramsay could not recall one way or the other. (Tr. 420:16-24) To the extent this Court admits into evidence the secretly recorded conversations of Seibel and GRUS over Plaintiff's objections, one of the recordings reveals that GRUS agreed to pay for Van Willigan's salary. (Ex. 680, pp. 11-12)

[83] Should the Court find this rebate program constituted a breach of Seibel's fiduciary duty, the evidence reveals a total of rebates received of approximately $3,000.00. (Tr. 108:3-5) Thus, any damages claim should be limited to that amount.

None of the actions described above, or any other action taken by Seibel for that matter, fall into the category of self-interested transactions that would bring the action out of the realm of the business judgment rule. Moreover, this Court should not impose on Seibel a fiduciary duty during a time in which Defendants had seized control over both the FCLA LP and the Fat Cow LLC. For the reasons set forth above that permit a fiduciary duty to be found against GRUS as limited partner that took control over the entity, Seibel cannot be held liable for breaching a fiduciary duty to FCLA as a mere limited partner that indisputably did not have control over the entity – or the Restaurant would not have closed.

VI. PLAINTIFF IS ENTITLED TO ATTORNEY'S FEES

If this Court finds that Seibel has met the standards for upholding his breach of contract and/or breach of fiduciary duty claims, and finds that FCLA was in fact damaged by these breaches (regardless of the Court's finding with regard to the extent of the damages set forth in Plaintiff's expert reports), this Court can and should still find in favor of Plaintiff and award him attorneys' fees as expressly provided for in the LP Agreement. (Ex. 8, §24)

VII. RAMSAY'S INDEMNIFICATION CLAIM FAILS

A. Ramsay Made No Payments Qualifying Him for Indemnification:

Ramsay individually seeks indemnification from Seibel individually as a result of the Indemnification Agreement the parties entered into associated with Ramsay's signature on the Lease for the Restaurant space at the Grove. (Ex. 10)[84] Ramsay claims that he paid settlement

[84] There is an indemnification obligation contained in the Lease Assignment between Ramsay and FCLA. (Ex. 9, ¶3). However, Ramsay did not bring his claim under this Agreement (NYSCEF Dkt. No. 499, ¶¶54-62) and, even if he had, it would fail for the same reasons set forth herein.

amounts and lawyer fees associated with the settlement of the landlord's claim against him as a result of unpaid rent due from the Restaurant subsequent to its closure. (*See* NYSCEF Doc. No. 664, Joint Stipulation dated January 24, 2022) These payments, however, were not made by Ramsay thus there is no indemnification claim that can be brought by Ramsay as a matter of law.

The stipulation provides that Kavalake Ltd. and Gordon Ramsay Holdings both made payments to GFM LLC (the landlord at the Grove) in February 2014 and June 2014 for rent for the Restaurant. (*Id*. ¶¶ 1-2) Gordon Ramsay Holdings made payments for legal services related to the landlord's litigation regarding the Restaurant. (*Id*. ¶ 5) Finally, Gordon Ramsay Holdings paid the landlord to settle the litigation in November 2015. (*Id*. ¶ 8) None of these payments were made by Gordon Ramsay individually. No evidence was admitted or even introduced by Defendants establishing that Gordon Ramsay reimbursed the Kavalake and GRH entities for these payments. There was no testimony or evidence explaining the relationship, if any, between Gordon Ramsay individually and Kavalake and GRH. The Indemnification Agreement clearly provides that "Seibel shall indemnify and save harmless Ramsay against one-half (1/2) 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..." (Ex. 10, ¶ 1) There is no evidence before the Court that ***Ramsay*** has incurred any losses whatsoever in association with the Lease, or otherwise. Since there has been no payment by the party that seeks indemnification, that party (i.e. Ramsay) has no claim for indemnification. *Bay Ridge Air Rts., Inc. v. State*, 44 N.Y.2d 49, 53, 375 N.E.2d 29, 30 (1978); *Fils-Aime v. Ryder TRS, Inc.*, 11 Misc. 3d 679, 683, 809 N.Y.S.2d 434, 438 (Sup. Ct. 2006), *aff'd,* 40 A.D.3d 914, 836 N.Y.S.2d 670 (2007).

Seibel did not agree to indemnify Kavalake or Gordon Ramsay Holdings. Seibel has no relationship to these entities and is not in privity with them. There can be no claim for indemnification under the admissible facts before the Court. *Naughton v. City of New York,* 94 A.D.3d 1, 12, 940 N.Y.S.2d 21, 30 (2012) (no contractual indemnification claim where parties not in contractual privity with one another).

Simply put, where there is no evidence linking the payments made by GRH and Kavalake to the amounts claimed by Gordon Ramsay individually for indemnification from Seibel, there can be no claim for indemnification. *Lantau Holdings Ltd. v. Orient Equal Int'l Grp. Ltd.*, 174 A.D.3d 409, 410, 107 N.Y.S.3d 274, 276 (1st Dep't 2019) (denial of indemnification claim upheld where party failed to establish "it was ever out of pocket for certain moneys advanced by nonparty").

B. <u>Ramsay May Not Seek Indemnification for his own Intentional Torts:</u>

The Indemnification Agreement provides that it shall be construed in accordance with the laws of the state of New York. (Ex. 10, ¶3) Under well-established principles of New York law, a party may not indemnify itself against its own intentional torts. *Austro v. Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 676 (1985) ("Indemnification agreements are unenforceable as violative of public policy ... to the extent that they purport to indemnify a party for damages flowing from the intentional causation of injury."); *Public Serv. Mut. Ins. v. Goldfarb*, 53 N.Y.2d 393, 399 (1981) ("One who intentionally injures another may not be indemnified for any civil liability thus incurred.) However, one whose intentional act causes an unintended injury may be so indemnified....This is so because to allow such indemnity would be to violate the 'fundamental principle that no one shall be permitted to take advantage of his own wrong"); *Bank of New York v. Neumann*, 628 N.Y.S.2d 675, 676 (1st Dep't 1995) ("public policy does not permit indemnification for damages flowing from the intentional causation of injury."). Thus, Ramsay cannot obtain contractual indemnification for his own wrongdoing (i.e. breach of contract and/or breach of fiduciary duty/intentional tort) which caused the harm of which he now complains.[85]

That is exactly what Ramsay is attempting to accomplish here by his indemnification claim — exculpate himself from the consequences of his own wrongdoing. As explained above, it is without dispute that the cause of the liability to the landlord was Ramsay's wrongful closing of the Fat Cow Restaurant. There is no dispute that the Defendants closed the Restaurant over Seibel's objections and therefore without authority to do so, and that such unauthorized conduct by one of the two managers of the Fat Cow LLC is not only a breach of the Fat Cow LLC Agreement, but also undoubtedly represents a breach of fiduciary duty. *See Densmore v. Manzarek*, No. B186036, 2008 WL 2209993, at *1 (Cal. Ct. App. May 29, 2008) (Appellate Court upheld trial court's verdict for plaintiff on breach of fiduciary duty claim, inter alia, herein partnership agreement mandated unanimous consent of all partners in the management and control of partnership, but defendants made a management decision without unanimous consent). A breach of fiduciary duty is considered an intentional tort. *See Bank Brussels Lambert v. Chase Manhattan Bank, N.A.*, No. 93 CIV. 5298 (LMM), 1999 WL 710778, at *1 (S.D.N.Y. Sept. 10, 1999) (describing plaintiff's claim of breach of fiduciary duty as that of an intentional tort). The Defendants may not contract away their liability for their intentional wrongful conduct.

---

[85] Moreover, one may not contract away their liability for their own negligence or intentional tortious conduct, unless they have expressly done so in unequivocal terms. *Gross v. Sweet*, 49 N.Y.2d 102, 110, 400 N.E.2d 306, 311 (1979); *see also Sweeney v. Hertz Corp.*, 292 A.D.2d 286, 288, 740 N.Y.S.2d 19, 21 (1st Dep't 2002) ("It is settled that the law frowns upon contracts intended to exculpate a party from the consequences of his own negligence and ...such agreements are subject to close judicial scrutiny.") (internal citations and quotes removed). Even if Ramsay's wrongful conduct were considered to be negligent, which it clearly is not, he would not be entitled to indemnification unless the Indemnification Agreement clearly so provides, which, as explained below, it does not.

Moreover, the plain language of the Indemnification Agreement reveals it was not intended to encompass the wrongful and intentional conduct by Ramsay that caused the breach of the Lease. It is the general rule that an indemnification agreement between sophisticated business entities will be construed as intending to indemnify either party for its own wrongdoing only when the language in the agreement clearly connotes an intent to provide for such indemnification." *Facilities Dev. Corp. v. Miletta*, 180 A.D.2d 97, 102, 584 N.Y.S.2d 491, 494 (3d Dep't 1992) (emphasis added). In *Facilities Dev. Corp. v. Miletta*, the indemnification clause provided defendant will indemnify plaintiff, "from suits, actions, damages and costs of every nature and description resulting from the work under this [c]ontract". 180 A.D.2d at 101. However, the court found that language "does not clearly connote an intent to provide for the indemnification of plaintiffs representative for damages caused by the representative's own tortious conduct and/or breach of contract." Id. at 102. There is no doubt that both Ramsay and Seibel are sophisticated businessmen, thus the Indemnification Agreement could only possibly be construed as indemnifying Ramsay for his own breach if the language clearly evidences an intent for such indemnification. 180 A.D.2d at 102. The Indemnification Agreement provides that "Seibel shall indemnify and save harmless Ramsay against one-half (1/2) 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..." (Ex. 10, ¶ 1) The broad, vague language that provides for indemnity for damages Ramsay may "for any cause at any time sustain or incur" under the Lease clearly mirrors that in *Facilities Dev. Corp. v. Miletta*, which provided for indemnification for damages "of every nature and description" under the contract. 180 A.D.2d at 101. In *Facilities Dev. Corp. v. Miletta*, this broad language was not sufficient to demonstrate an intent to provide for indemnification of damages for a party's own tortious conduct or breach of contract. Id at 102; *see also Sweeney v. Hertz Corp.*, 292 A.D.2d at 288 ("[U]nless the intention of the parties is expressed in unmistakable language, an exculpatory clause will not be deemed to insulate a party from liability for his own negligent acts.") The same result should occur here.

VIII. SEIBEL DOES NOT CONTEST THE DISSOLUTION

Based on the evidence submitted at trial, upon the distribution of the derivative damages sought by Plaintiff and established herein, Plaintiff is no longer contesting dissolution of the Entities.

IX. CONCLUSION

Accordingly, based on the foregoing, Plaintiff has demonstrated his entitlement to the following judgment that should issue forthwith:

(i) Plaintiff, derivatively on behalf of Fat Cow, LLC, and derivatively on behalf of FCLA LP, should be awarded judgment against Defendants Gordon Ramsay and GR US Licensing LP, in the amount of $9.3 million, plus any additional pre-judgment interest compounded annually at 9% through the date of entry of judgment, plus post-judgment interest in the amount of 9% from the date of entry of judgment until such judgment is paid, on Plaintiff's first cause of action, plus punitive damages of which Plaintiff is individually entitled to 50% of such judgment;

(ii) Plaintiff, derivatively on behalf of Fat Cow, LLC, and derivatively on behalf of FCLA LP, should be awarded judgment against Defendants Gordon Ramsay and GR US Licensing LP, in the amount of $9.3 million, plus any additional pre-judgment interest compounded annually at 9% from March 31, 2014 through the date of entry of judgment, plus post-judgment interest in the amount of 9% from the date of entry of judgment until such judgment is paid, on Plaintiff's second cause of action, of which Plaintiff is individually entitled to 50% of such judgment;

(iii) Awarding Plaintiff his reasonable attorneys' fees;

(iv) Defendants' counterclaims be dismissed in their entirety;

(iv) For such other and further relief as this Court deems just and proper.

Further, judgment of dissolution of Fat Cow, LLC and FCLA LP, and the winding up of its affairs, but denying any other further relief requested by GR US Licensing.

Dated: East Meadow, New York
March 15, 2022

CERTILMAN BALIN ADLER & HYMAN, LLP

By: s/ Paul B. Sweeney

Paul B. Sweeney
Nicole L. Milone
Attorneys for Plaintiff
90 Merrick Avenue – 9th Floor
East Meadow, New York 11554
(516) 296-7000