

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

PRESENT: MARCY S. FRIEDMANPART 60*Justice*ROWEN SEIBEL, individually and on behalf of FCLA, LP
and THE FAT COW LLC,INDEX NO. 651046/2014

-against-

GORDON RAMSAY and G.R. US LICENSING, LP

MOTION DATE _____

and

MOTION SEQ. NO. 001

FCLA, LP and THE FAT COW LLC,

The following papers, numbered 1 to _____ were read on this motion to dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

No (s). _____

Answering Affidavits — Exhibits _____

No (s). _____

Replying Affidavits _____

No (s). _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that

Upon the foregoing papers, it is ORDERED that the motion to dismiss of defendants Gordon Ramsay and G.R. US Licensing, LP is decided in accordance with the attached decision/order, dated March 27, 2015.

Dated: 3-27-15

Marcy Friedman, J.S.C.
MARCY S. FRIEDMAN, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check as appropriate:.....Motion is: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

_____ x
ROWEN SEIBEL, individually and on behalf of
FCLA, LP and THE FAT COW LLC,

Index No.: 651046/2014

Plaintiffs,

Motion Seq. 001

– against –

DECISION/ORDER

GORDON RAMSAY and G.R. US LICENSING,
LP,

Defendants,

and

FCLA, LP and THE FAT COW LLC,

Nominal Defendants.

_____ x

Plaintiff Rowen Seibel brings this action individually and on behalf of FLCA, LP and The Fat Cow LLC, entities through which he and defendants Gordon Ramsay and G.R. U.S. Licensing, LP (GR) (collectively the Ramsay defendants or defendants), opened and operated a restaurant in Los Angeles called “The Fat Cow.” According to Seibel, Ramsay breached fiduciary and contractual duties and “fraudulently induced Seibel to invest over \$800,000 in Fat Cow Restaurant . . . but then intentionally forced Fat Cow Restaurant to close so that he could use Seibel’s investment to benefit another Gordon Ramsay restaurant” in the same location. (Compl. ¶ 1.) The Ramsay defendants move to dismiss all claims against them pursuant to CPLR 3211 (a) (7) and (a) (1). For the reasons stated below, the court grants defendants’ motion as to all causes of action, except the derivative cause of action for breach of fiduciary duty, and

the direct and derivative causes of action for breach of contract with respect to The Fat Cow LLC.

Facts

The material facts, as alleged in the complaint, are as follows. Defendant Ramsay is a celebrity chef and television personality, and the majority owner of defendant GR, a limited partnership organized under Delaware law. (Compl. ¶¶ 4, 5.) In late 2011, Ramsay informed Seibel, with whom he had had prior restaurant joint ventures, that he was looking for a partner for a new restaurant venture in Los Angeles. (*Id.* ¶¶ 15-16.) Seibel claims that Ramsay informed him he had “significant cash flow problems,” and sought a partner to contribute to the start up and capital expenses, and to share expenses and risks. (*Id.* ¶ 16.) Seibel agreed to partner with Ramsay (*id.* ¶ 17), and Ramsay entered into a lease for a premises to be operated on The Grove Drive in Los Angeles, under the trade name “The Fat Cow.” (*Id.* ¶¶ 19-21.) According to Seibel, Ramsay represented that he “would be responsible for obtaining the trademark ‘Fat Cow’ and would file all appropriate applications to protect the ‘Fat Cow’ trademark.” (*Id.* ¶ 18.)

As the complaint further alleges, on November 11, 2011, an entity controlled by Ramsay filed a trademark application for “Fat Cow” with the United States Patent & Trademark Office (Patent Office). (*Id.* ¶ 22.) By February 2012, Seibel informed Ramsay that he had discovered a possibly conflicting mark registered to a restaurant in Florida called “Las Vacas Gordas” (Spanish for “Fat Cow”). (*Id.* ¶ 23.) When he relayed this information and his concerns to Ramsay, Ramsay’s representatives assured him that “it is all under control,” “[d]on’t you worry, I’m the trademark queen,” and “there is nothing stopping us from opening under the name ‘Fat Cow’ as planned . . . we will have the US mark in time for the May opening.” (*Id.* ¶ 24.) In or

around March 14, 2012 the Patent Office “issued a provisional full refusal of the ‘Fat Cow’ trademark application.” (Id. ¶ 25.) The restaurant opened under the name “Fat Cow” on September 26, 2012. (Id. ¶ 57.)

It is undisputed that in October 2012, subsequent to the opening and although the trademark issue was still unresolved, the parties created two entities and entered into a series of agreements to govern the ownership and operation of the restaurant. FCLA, LP (FCLA), a Delaware limited liability partnership, was formed to “develop, own and operate a first class steakhouse restaurant under the name ‘Fat Cow’, or a variation thereof as determined by the General Partner.” (Id. ¶ 35.) Under the Limited Partnership Agreement of FCLA (FCLA Agreement), Seibel and GR are limited partners, each owing a 49% partnership interest in FCLA. (Id. ¶ 34; FCLA Agreement § 7.2 [Montclare Aff., Ex. D].) The Fat Cow LLC, a California limited liability company, is the general partner of FCLA, and owns a 2% partnership interest. (Id.) The “full and exclusive right, power and authority to manage all the affairs and business” of FCLA is vested in Fat Cow LLC, as general partner. (Compl. ¶ 37; FCLA Agreement § 8.1.) Under the Limited Liability Company Agreement of The Fat Cow LLC (Fat Cow Agreement), also entered into as of October 12, 2012, Seibel and GR each own a 50% membership interest in the LLC. (Compl. ¶ 30; Fat Cow Agreement § 5 [b] [Montclare Aff., Ex. E].) Seibel and Ramsay are each Managers of The Fat Cow LLC, Seibel having been designated as Manager by himself and Ramsay having been designated by GR. (Compl. ¶ 32; Fat Cow Agreement § 6.) The Fat Cow Agreement provides that “all decisions of the Managers shall be made upon unanimous consent of the Managers.” (Id. § 7 [a].)¹

¹ At or about the time of the formation of FCLA and The Fat Cow LLC, the parties also entered into several other agreements, including: a license agreement, by which The Fat Cow LLC licensed to FCLA the rights to use the trade name “The Fat Cow” (Compl. ¶ 40); an assignment of the lease for the restaurant premises from Ramsay to FCLA (id. ¶¶ 46-48); and an agreement by which FCLA permitted filming of Ramsay’s “Hell’s Kitchen” television

The complaint alleges that Ramsay and GR repeatedly breached their obligations to Seibel and to FCLA and The Fat Cow LLC. With respect to the trademark issue, in particular, Seibel alleges that after the trademark application was denied in March 2012, “Ramsay took no action to re-file the trademark application; took no action to file a trademark application that Fat Cow LLC could use at the Restaurant; took no action to effectuate a change of the name of the Restaurant, and took no action to secure permission from Las Vacas Gordas to use the Fat Cow name.” (Compl. ¶¶ 56, 62-64.) Seibel further alleges that Ramsay had secret negotiations with the landlord of the restaurant premises (id. ¶ 65); failed to negotiate with the Florida restaurant, Las Vacas Gordas, for anything more than a limited extension of time to use the trade name Fat Cow for the restaurant (id. ¶¶ 66-70); and instead “began taking steps to secretly shut down Fat Cow Restaurant.” (Id. ¶ 71.) These steps included secretly filing trademark applications for new names that Ramsay intended to use for a new restaurant at the same location, to be operated without the participation of Seibel, FCLA or The Fat Cow LLC. (Id. ¶¶ 73-74.) One such application was allegedly made in June 2013 for the trademark name “The Cow by Gordan Ramsay.” (Id. ¶¶ 73-74.) Ramsay announced his intention to close the restaurant in December 2013, claiming that “Ramsay was required to do so because the trademark agreement with Las Vacas Gordas expired on February 28, 2014. (Id. ¶ 85.) On January 24, 2014, Ramsay then allegedly made other applications for the marks “Gordan Ramsay at the Grove” and “GR Roast,” to be used for the new restaurant. (Id. ¶¶ 105-107.)

The complaint also alleges that Ramsay and GR breached their fiduciary obligations by taking action “to misappropriate the assets of FCLA and Fat Cow LLC, the Lease, the refurbished Premises, and other corporate opportunities,” for the benefit of Ramsay’s intended

program at the restaurant, in exchange for a mention and “beauty shot” of the restaurant at least once in every episode. (Id. ¶¶ 51-52.)

new restaurant at the premises. (Id. ¶ 78.) In support of this claim, Seibel alleges that in the summer of 2013, Ramsay hired an associate, Andi Van Willigan, and caused FCLA to compensate her in the amount of \$10,000 per month. According to Seibel, this hiring was over his objection and for the purpose of having Van Willigan effectuate Ramsay's plan to close the restaurant and open a new restaurant. (Id. ¶¶ 79-84.) Other alleged wrongful acts include misappropriating the agreement regarding filming of the Hells Kitchen television show at the restaurant (id. ¶¶ 94-101); causing FCLA and The Fat Cow LLC to train numerous employees for Ramsay's personal ventures (id. ¶ 103); and hiring bar consultants, paid for by FCLA, after Ramsay's announcement of his intent to close the restaurant and just weeks before its closing. (Id. ¶ 109.)

On January 27, 2014, Ramsay issued a notice to employees that the restaurant would close in 60 days. (Id. ¶ 92.) Seibel asserts that Ramsay unilaterally closed the restaurant (id. ¶¶ 86-93) in violation of his fiduciary and contractual obligations.

The complaint alleges a first cause of action for breach of fiduciary duty, a second for "fraud and misappropriation," a third for conversion, a fourth for breach of contract, a fifth for unjust enrichment, and a sixth for fraud in the inducement.

Discussion

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual

allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts.” (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211 (a) (1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon v Martinez, 84 NY2d at 88.)

Direct vs Derivative Claims

Seibel brings each cause of action both in his individual capacity and derivatively on behalf of FCLA and The Fat Cow LLC. As a threshold matter, defendants contend that all of the direct claims, except the fraudulent inducement claim, are maintainable only derivatively. (Ds.’ Memo. Of Law In Supp. at 6-8 [Ds.’ Memo.])

It is well settled that causes of action directed to the internal affairs of a corporation are determined pursuant to the laws of the state of incorporation. (Lerner v Prince, 119 AD3d 122, 128 [1st Dept 2014] [“New York choice-of-law rules provide that substantive issues such as issues of corporate governance . . . are governed by the law of the state in which the corporation is chartered. . .”].) The law of the state of organization also applies to limited partnerships, and governs the determination as to whether claims must be brought derivatively. (See Matter of Hakimian [Bear Stearns & Co., Inc.], 46 AD3d 294, 295 [1st Dept 2007].) Delaware and California law will therefore govern the determination for FCLA and The Fat Cow LLC, respectively.

Under Delaware law, as held in the context of an action on behalf of a corporation, in order to determine whether a claim must be brought derivatively, a court must “look to the nature

of the wrong and to whom the relief should go. The stockholder's claimed direct injury must be independent of any alleged injury to the corporation. The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." (Tooley v Donaldson, Lufkin & Jenrette, Inc., 845 A2d 1031, 1039 [Del 2004].) Similarly, under California law, "[a]n action is deemed derivative if the gravamen of the complaint is the injury to the corporation, or to the whole body of its stock and property without any severance or distribution among individual holders, or it seeks to recover assets for the corporation or to prevent the dissipation of its assets." (Grosset v Wenaas, 42 Cal 4th 1100, 1108 [2008] [internal quotations and citation omitted]; see also Nelson v Anderson, 72 Cal App 4th 111, 124 [2d Dist 1999], reh denied & mod on other grounds 1999 Cal App LEXIS 583, lv denied 1999 Cal LEXIS 6280 [Cal 1999] ["[A]n individual cause of action exists only if the damages were not incidental to an injury to the corporation"] [emphasis in original].)

Here, the complaint alleges that defendants intentionally planned to "loot" and close a restaurant owned and operated by FCLA and The Fat Cow LLC. (Compl. ¶ 77.) Defendants argue that the first through fifth causes of action (i.e., all of the pleaded causes of action except the sixth for fraudulent inducement) allege damages to the entities and are therefore solely derivative claims. As defendants correctly argue, the first cause of action for breach of fiduciary duty alleges, among other things, misappropriation of the lease, capital improvements, staff, and television agreement of The Fat Cow LLC and/or FCLA. (Compl. ¶ 116 [e], [f], [g], [i].) The second for fraud alleges misappropriation of the corporate opportunities and assets of the entities. (Id. ¶ 124.) The third for conversion and fifth for unjust enrichment allege unlawful receipt of FCLA's and The Fat Cow LLC's funds. (Id. ¶ 131, 139.) Although these causes of action also

allege misappropriation of Seibel's funds, the injuries to Seibel as investor are clearly dependent on or incidental to the harm to the entities. The causes of action are accordingly derivative.

In so holding, the court notes that Seibel does not dispute that these causes of action allege injury to the operating entities. Rather, he argues that he may have independent claims based on acts that predated the formation of FCLA and The Fat Cow LLC. (See P.'s Memo. Of Law In Opp. at 19 [P.'s Memo.], citing Solomont v Polk Dev. Co., 245 Cal App 2d 488, 495 [2d Dist 1966] [holding that a fiduciary relationship "can arise during negotiations [to form a] partnership"].) Seibel fails, however, to distinguish the allegations that could support the direct claims based on pre-formation conduct from those that support the derivative claims. The direct claims therefore are not maintainable based on such conduct. (See Yudell v Gilbert, 99 AD3d 108, 115 [1st Dept 2012] [applying Delaware standard articulated in Tooley v Donaldson, Lufkin & Jenrette, Inc. (845 A2d 1031, supra), to determine whether claims were direct or derivative, and affirming dismissal of direct claims "embedded in an otherwise derivative claim for partnership waste and mismanagement"].)

The court also rejects Seibel's argument that he can maintain a direct breach of fiduciary duty cause of action based on the allegation that Ramsay caused FCLA to pay Van Willigan's salary in violation of an agreement between Seibel and Ramsay. (P.'s Memo. at 20.) The authority on which plaintiff relies for this proposition is inapt, as it involved a breach of contract, not a fiduciary duty claim. (See Carlson v Hallinan, 925 A2d 506, 512, 526 [Del Ch 2006], clarified in part 2006 Del Ch LEXIS 95, clarified on other grounds 2006 Del Ch LEXIS 95 [holding that plaintiff/shareholder-director had direct breach of contract cause of action based on defendant directors' violation of contract not to pay executive compensation to themselves, thus rendering the sums paid in compensation unavailable for pro rata distribution to shareholders].)

The court further rejects Seibel's assertion that a direct breach of fiduciary duty cause of action is maintainable on the ground that Ramsay's closing of the restaurant "may have caused liability by Siebel under the Guaranty for the Lease." (P.'s Memo. at 20.) This speculative claim cannot support the fiduciary duty cause of action.

On the complaint as pleaded, the court accordingly holds that the first cause of action for breach of fiduciary duty, the second for fraud and misappropriation, the third for conversion, and the fifth for unjust enrichment, are not maintainable as direct claims. Although defendants also seek dismissal of the direct claim for breach of contract pleaded in the fourth cause of action, defendants do not address the injury or damages for this cause of action.² The claim is therefore dismissed only to the extent that the derivative breach of contract claim is dismissed. (See infra at 18-21.)

The court now turns to the derivative claims and remaining direct claims.

Derivative Claim for Breach of Fiduciary Duty

The parties have stipulated that California law governs the extent of defendants' fiduciary obligations to The Fat Cow LLC, and that Delaware law governs their obligations to FCLA. (Oral Argument Transcript [Tr.] at 26; see also Venturetek, L.P. v Rand Publ. Co., Inc., 39 AD3d 317, 317 [1st Dept 2007], lv denied 10 NY3d 703 [2008] [law of state in which entity is incorporated controls whether conduct breached fiduciary duties].)

The Fat Cow LLC

Defendants argue that under California Corporations Code section 17005 (d), the statute in effect at the time they executed the operating agreement for The Fat Cow LLC, they "were

² The court notes, however, that it is questionable that this claim is maintainable by Seibel in his individual capacity. As discussed further in the text (infra at 17), the breach of contract cause of action alleges, among other things, use of corporate assets for purposes to which Seibel did not consent. Thus, it would appear that any injury would be injury to the entities, rather than to Seibel.

entitled to modify fiduciary duties without limitation.” (Ds.’ Memo. at 8.) They further argue that section 17 of the Fat Cow Agreement eliminated all fiduciary duties of the Managers and Members to the company. (Id. at 9.) Section 17005 (d) provided that “[t]he fiduciary duties of a manager to the limited liability company and to the members of the limited liability company may only be modified in a written operating agreement with the informed consent of the members.”³ Section 17 of the Fat Cow Agreement provides:

“Exculpation of Members and Managers. The Members, in their capacity as both Members and Managers, as applicable, shall not be liable to the Company for any breach of duty in either such capacity, unless otherwise provided by law, and shall be entitled to indemnification by the Company to the maximum extent provided by law.”

Seibel does not contest that California Corporations Code section 17005 (d) permitted modification of members’ or managers’ fiduciary duties. Rather, he argues that section 17 of the Fat Cow Agreement modified only the duties of “Members,” a defined term, and that because GR, not Ramsay, was the Member and Ramsay was only a Manager appointed by GR, this modification does not apply to Ramsay. (P.’s Memo. at 10.) The Ramsay defendants counter that because Ramsay was appointed a Manager by GR, he is GR’s agent and is therefore exempted from fiduciary duties by section 17. (Ds.’ Reply Memo. at 2.) Defendants also argue that because Seibel and Ramsay are equal Managers of the Fat Cow, LLC, Seibel’s interpretation would produce the “absurd result” that Seibel’s, but not Ramsay’s, fiduciary duties would be limited. (Id.)

Although defendants’ argument is persuasive, they fail to cite California law on the interpretation of contracts or the standards for determining whether a contract is ambiguous, and

³ Section 17005 (d) remains applicable to “all acts or transactions” by a limited liability company, its members, or managers conducted or entered into prior to January 1, 2014, the period during which nearly all of the misconduct alleged by Seibel purportedly took place. (Cal Corp Code § 17713.04 [b].)

the court therefore declines on this record to make a final determination that Ramsay's fiduciary duties were limited by section 17005 (d). Even assuming that section 17 covers Ramsay, defendants fail to address a serious question, governed by an extensive body of law, as to whether or to what extent California law in effect at the time the Fat Cow Agreement was executed would have precluded exculpation of members or managers from acts of intentional wrongdoing or fraud, such as are alleged in the complaint. (See e.g. Neubauer v Goldfarb, 108 Cal App 4th 47, 56 [2d Dist 2003] [California "'has traditionally viewed with disfavor attempts to secure insulation from one's own negligence or willful misconduct. . . . [T]his public policy applies with added force when the exculpatory provision purports to immunize persons charged with a fiduciary duty from the consequences of betraying their trusts,'" quoting Cohen v Kite Hill Community Assn., 142 Cal App 3d 642, 654 [4th Dist 1983]].)

As to GR, Seibel appears to concede that section 17 of the Fat Cow Agreement limits its liability, as a Member of The Fat Cow LLC, for breach of fiduciary duty to the LLC. However, he argues that under California law effective on January 1, 2014, conduct occurring after that date is subject to more stringent limits on exculpation of fiduciary duties than pre-January 1, 2014 conduct. (See Cal Corp Code § 17701.10 [c].) He further argues that the complaint alleges post-January 1, 2014 breaches of fiduciary duty. (P.'s Memo. at 11-12.) The Ramsay defendants argue in response that the complaint does not plead such post-January 1 breaches with the requisite particularity. (Ds.' Reply Memo. at 1-2.)

Defendants' contention is without merit. The complaint alleges, among other acts, post-January 1, 2014 filing of trademark applications for new names for Ramsay's sole use, and steps to close the restaurant. (See supra at 4-5.) The court holds that the complaint adequately pleads

fiduciary duties on the part of both Ramsay and GR, as Manager and Member, respectively, of The Fat Cow LLC.

FCLA

FCLA Agreement section 8.10 provides that the “General Partner shall not be liable . . . for any errors in judgment or for any act or omission performed or omitted by it in good faith . . . , other than acts of fraud, bad faith or willful misconduct.” The Ramsay defendants do not dispute that as the general partner, The Fat Cow LLC, has fiduciary duties to FCLA under this section. They contend, however, that GR owed no fiduciary duties to FCLA or Seibel because it is a limited partner, without operating powers, and because The Fat Cow LLC, the general partner, had full power to manage the business of FCLA. They claim that Ramsay individually had no fiduciary duties because he was merely a manager of The Fat Cow LLC and was exempt from fiduciary duties under the Fat Cow Agreement. (Ds.’ Memo. at 9-10.) Seibel does not dispute that The Fat Cow LLC, as general partner, owes fiduciary duties to the partnership. He contends, however, that individuals or entities that “control” the general partner also owe fiduciary duties to the partnership and the limited partners. (P.’s Memo. at 12-13.)

A substantial body of Delaware law exists as to whether the manager of a corporate partner of a limited partnership or the limited partners themselves may owe fiduciary duties to the partnership. Defendants’ discussion of this authority is cursory at best, and defendants fail to submit authority that supports their contention that such duties are imposed only where the managers or limited partners have “sole” control over the partnership. (Ds.’ Reply Memo. at 3.) Rather, “[b]reach of fiduciary duty is an equitable claim, and it is a maxim of equity that equity regards substance rather than form.” (Feeley v NHAOCG, LLC, 62 A3d 649, 668 [Del Ch 2012] [internal quotation marks and citations omitted].) In accordance with that principle,

Delaware courts have held that “questions about the extent to which a partner or other person owes [fiduciary] duties will be answered by the role being played, the relationship to the entity, and the facts of the case.” (Feeley, 62 A3d at 662.) Thus, limited partners “can assume fiduciary duties if they take on an active role in the management of the entity.” (Id. at 662, 667-68 [in case involving limited liability company, surveying authority on imposition of fiduciary duties in limited partnerships upon limited partners and others]; KE Prop. Mgt., Inc. v 275 Madison Mgt. Corp., 1993 Del Ch LEXIS 147, *23-25 [Del Ch July 21, 1993] [“[T]o the extent that a partnership agreement empowers a limited partner discretion to take actions affecting the governance of the limited partnership, the limited partner may be subject to the obligations of a fiduciary. . .”]; Matter of USACafes, L.P. Litig., 600 A2d 43, 49 [Del Ch 1991] [holding that directors of general partner owed fiduciary duties to limited partners, where directors “dominated and controlled the affairs” of partnership].)⁴

The complaint effectively alleges that notwithstanding the limitations imposed by the FCLA and The Fat Cow LL Agreements on GR’s and Ramsay’s management authority, GR and Ramsay exercised actual control over the operations of FCLA through Ramsay’s unilateral actions, assumption of responsibility for the trademarks, and refusals to confer or negotiate with Seibel. Any determination as to whether GR and Ramsay breached fiduciary duties must await a record that is factually developed as to the manner and extent to which they exercised control, as well as a fuller discussion of the legal authority on the circumstances under which the exercise of control will be held to subject a manager or limited partner to fiduciary duties. At the pleading

⁴ Although the court need not determine the scope of this duty for purposes of this motion, it has been held that the duty “may well not be so broad as the duty of the director of a corporate trustee. But it surely entails the duty not to use control over the partnership’s property to advantage the corporate director at the expense of the partnership.” (Matter of USACafes L.P. Litig., 600 A2d at 49 [footnote omitted].)

stage, the complaint adequately alleges the derivative breach of fiduciary duty cause of action on behalf of FCLA, based on fiduciary duties on the part of both GR and Ramsay in his individual capacity.

Sufficiency of the Breach of Fiduciary Pleading Generally

The parties assume that New York law governs the sufficiency of the pleading of the fiduciary duty cause of action, and that CPLR 3016 (b) requires the claim to be pleaded with specificity. (See Westdeutsche Landesbank Girozentrale v Learsy, 284 AD2d 251, 252 [1st Dept 2001] [holding that pleading requirements are “a matter of procedure governed by the law of the forum,” and applying CPLR 3016 (b) on motion to dismiss claims substantively governed by foreign law].) CPLR 3016 (b) requires that “[w]here a cause of action or defense is based upon . . . breach of trust . . . , the circumstances constituting the wrong shall be stated in detail.” (See Berardi v Berardi, 108 AD3d 406, 407 [1st Dept 2013], lv denied 22 NY3d 861 [2014] [applying CPLR 3016 (b) to breach of fiduciary duty claim].)

The complaint satisfies New York pleading requirements by specifying multiple alleged breaches by defendants of their fiduciary duties. These allegations include defendants’ acts in (i) purposefully failing to secure an extended right to use the “Fat Cow” name (Compl. ¶¶ 116 [a]-[b]); (ii) refusing to operate the restaurant under any other name (id. ¶ 116 [c]); (iii) filing applications for alternative names for use at Ramsay’s intended new venture (id., ¶ 116 [d]); (iv) misappropriating the lease that Ramsay assigned to FCLA and secretly negotiating with the landlord for the space (id., ¶ 116 [e], [h]); (v) misappropriating various of the restaurant’s assets, including “the capital improvements paid for by Seibel, FCLA and Fat Cow LLC . . . for use in Ramsay’s new restaurant” (id. ¶ 116 [f]); misappropriating the restaurant’s staff (id. ¶ 116 [g]); misappropriating the Hell’s Kitchen Agreement, which provided for the restaurant to be

mentioned on Ramsay's television program (id. ¶ 116 [i], [j]); (vi) "[r]efusing to communicate or meet with Seibel on business matters and decisions that required unanimous consent (id. ¶ 116 [k]); and (vii) taking various actions on behalf of FCLA and Fat Cow LLC without Seibel's consent, including closing the restaurant, hiring and compensating Van Willigan, negotiating with the landlord, and making agreements with respect to the television program. (Id. ¶ 116 [l]); see also P.'s Memo. at 13-14.)

Contrary to defendants' contention, the fiduciary duty cause of action is not barred as a matter of law by the fact that Ramsay has not opened a new restaurant at the same location.⁵ That fact cannot demonstrate that defendants did not orchestrate a plan to open a new restaurant there, or did not cause the Fat Cow restaurant to close in furtherance of that plan. Defendants' disloyal actions, if proven, may constitute a breach of their fiduciary obligations, notwithstanding the failure or abandonment of the alleged plan.

Nor, contrary to defendants' further contention, is the fiduciary duty cause of action barred by the parties' agreement permitting the general partner (The Fat Cow LLC), the limited partner (GR), and their managers or members to engage in other ventures. (FCLA Agreement § 19.) A contractual agreement permitting competitive business activities cannot be construed as permitting FCLA's fiduciaries to deliberately cause Fat Cow to fail, as Seibel alleges they did, by refusing to exercise their management power in good faith and by usurping business opportunities, possible alternative marks, and FCLA funds for use in connection with Ramsay's alleged new venture. (See Compl. ¶¶ 71, 74, 76, 78, 96, 98, 101-110, 116.)

⁵ In their briefing of this claim, defendants rely on a letter, dated May 21, 2014, from counsel to the landlord of the premises at which the Fat Cow restaurant had operated, referring to discussions about possible re-occupancy by the Tenant of the premises, and stating that the Tenant or its affiliates had no further rights to occupancy under the existing lease or a new lease. (Montclare Aff., Ex. M.) This letter does not qualify as documentary evidence that conclusively establishes a defense as a matter of law, for purposes of a motion to dismiss. In any event, there is no dispute that Ramsay has not opened a new restaurant at the premises.

Finally, defendants argue that Seibel's fiduciary duty claim should be dismissed as duplicative of his breach of contract claim. (Ds.' Memo. at 13-14.) Plaintiff counters that the fiduciary duty claim is broader in scope than the breach of contract claim. (P.'s Memo. at 17.) The determination as to whether these claims are duplicative is governed by Delaware law for FCLA and California law for The Fat Cow LLC. (Kagan v HMC-New York, Inc., 94 AD3d 67, 72 [1st Dept 2012], appeal dismissed 19 NY3d 918 [holding that where entities' agreements were governed by foreign law – there, Delaware – the foreign law was applicable to determine whether the fiduciary duty and breach of contract claims were duplicative].)

On the limited briefing on this record, defendants fail to persuade this court that the breach of fiduciary duty claim should be dismissed as duplicative of the breach of contract claim. As defendants do not cite any legal authority on the standards under California law for determining whether a claim is duplicative, the court declines to dismiss The Fat Cow LLC fiduciary claim. On the limited Delaware legal authorities on which defendants rely, the court does not find that the FCLA fiduciary claim should be dismissed as duplicative of the breach of contract claim.

As explained by this Department, under Delaware law “when the same facts that underlie a plaintiff's contract claim also form the basis of plaintiff's fiduciary claim, the fiduciary claim is precluded.” (Kagan, 94 AD3d at 72 [internal quotation marks, citations, and brackets omitted].) The Court further held, however, that “[s]ince the fiduciary claims [were] substantially identical to the breach of contract claims, they were properly dismissed.” (Id.) A Delaware Chancery court has elaborated that fiduciary duty claims may be maintained where, “[a]lthough [they] share a common nucleus of operative facts with Plaintiffs' breach of contract claim, they depend on additional facts as well, are broader in scope, and involve different considerations in terms of

a potential remedy.” (See Schuss v Penfield Partners, L.P., 2008 Del Ch LEXIS 73, *35 [Del Ch June 13, 2008] [dismissing fiduciary duty claim based on failure to perform act that contract did not require to be performed, but upholding fiduciary claim based on allegation that defendants’ interpreted other contractual requirements “in bad faith or as a result of gross negligence or willful misconduct.” [Id. at *30-31, 34]; but see Blue Chip Capital Fund II Limited Partnership v Tubergen, 906 A2d 827, 833 [Del Ch 2006] [holding that breach of contract and fiduciary duty claims were duplicative where “the fiduciary claim that the board breached its duty of loyalty when it improperly interpreted the Makewell provision [a provision for a certain preference payment] is substantially the same as the implied contract claim that the board failed to determine the Makewell amount in good faith”].)

The breach of contract claim pleads that Ramsay breached the FCLA Agreement and The Fat Cow LLC Agreement “by, among other things, taking actions on behalf of the entities without unanimous consent.” (Compl. ¶ 136.) As pleaded elsewhere in the complaint, these actions included hiring and compensating Van Willigan (id. ¶ 83), hiring “bar consultants” (id. ¶ 109), training personnel for Ramsay’s personal ventures (id. ¶ 103), and closing the restaurant without Seibel’s consent. (Id. ¶¶ 85-93.) The breach of fiduciary duty cause of action encompasses a significantly broader range of alleged misconduct, including defendants’ questionable handling of the trademark application and their allegedly disloyal negotiations with the landlord and producers of the Hell’s Kitchen television program. (Id. ¶ 116; see supra at 14-15.)

Seibel does not plead or argue that these additional acts or failures to act constituted “decisions” requiring “unanimous consent of the Managers” under Fat Cow Agreement section 7 (a), the contractual unanimity provision, or that they otherwise violated express contractual

requirements. (See generally Nemec v Shrader, 991 A2d 1120, 1129 [Del 2010] [noting the “well-settled principle that where a dispute arises from obligations that are expressly addressed by contract, that dispute will be treated as a breach of contract claim. In that specific context, any fiduciary claims arising out of the same facts that underlie the contract obligations would be foreclosed as superfluous”].) Moreover, unlike the breach of contract claim, the fiduciary duty claim is based on acts of self-dealing on Ramsay’s part – i.e., acts in furtherance of his alleged “plan to loot and then close Fat Cow Restaurant” (id. ¶ 77) – which, if proved, would support liability even if Seibel were unable to prove lack of consent to a “decision.” On the limited authority submitted, the court does not find that the fiduciary duty claim should be dismissed at the pleading stage as duplicative of the breach of contract claim.⁶

Breach of Contract

Seibel’s core contract claim is that “Ramsay breached several provisions of the FCLA Partnership Agreement and the Fat Cow LLC Agreement by, among other things, taking actions on behalf of the entities without unanimous consent.” (Compl. ¶ 136.) The FCLA and Fat Cow Agreements both contain choice of law provisions specifying that the Agreements shall be governed by and construed in accordance with the laws of Delaware and California, respectively. (FCLA Agreement § 17.2; Fat Cow Agreement § 18.) These provisions are enforceable. (See Aon Risk Servs. v Cusack, 102 AD3d 461, 463 [1st Dept 2013].)

FCLA

Under Delaware law, “[t]he sin qua non of pleading an actionable breach is demonstrating that there was something to be breached in the first place. In other words, before

⁶ Defendants sought dismissal of the fiduciary duty claim in its entirety on the ground that it is duplicative of the breach of contract claim. The denial of the branch of the motion to dismiss on this ground will not preclude defendants from arguing, upon the final resolution of the action, that particular bases for the claims are duplicative.

the Court can start worrying about whether or not there was a breach, the Court needs to determine that there was a duty.” (Fisk Ventures, LLC v Segal, 2008 Del Ch LEXIS 158, *28 [Del Ch May 7, 2008] [emphasis omitted], affd for reasons stated below 984 A2d 124 [Del 2009].) The FCLA Agreement does not require unanimous consent but, rather, vests in The Fat Cow LLC “the full and exclusive right, power and authority to manage all of the affairs and the business” of FCLA. (See Compl. ¶ 37; FCLA Agreement § 8.1.) Moreover, Seibel does not identify any allegations which, if proven, would constitute a breach of any provision of the FCLA Agreement. The breach of contract cause of action as to FCLA will therefore be dismissed.

The Fat Cow LLC

Under California law, the elements a breach of contract claim 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 [2011].) Section 7 (a) of the Fat Cow LLC Agreement provides for “unanimous consent of the Managers” for all decisions, unless otherwise provided in the Agreement.

As discussed above (supra at 17), the breach of contract claim is based on allegations that Ramsay and GR breached the Fat Cow Agreement by unilaterally hiring and compensating Van Willigan, hiring bar consultants, training personnel for Ramsay’s personal ventures, and closing the restaurant without Seibel’s consent.

These allegations state an actionable breach of contract claim against both Ramsay and GR. The court rejects defendants’ contention that Ramsay is not a party to the Fat Cow Agreement or cannot be held liable under the Agreement. (Ds.’ Memo. at 22, n 10; Ds.’ Reply Memo. at 12.) Ramsay signed the Agreement twice – first, in his capacity as Director of GR,

and again as Manager of The Fat Cow LLC. The line immediately above these signatures states that each of the undersigned executed the Agreement “intending to be legally bound hereby.” (Fat Cow Agreement at 6.) Although the opening paragraph of the Agreement states that it is entered into between Seibel and GR, Ramsay’s signature binds him individually, at least with respect to the provisions of the Agreement governing Managers. (See Restatement [Second] of Agency § 155, Cmt a. [“No part of a document is necessarily more important than any other part for the purpose of determining the parties thereto”].) Defendants cite no California authority in support of their argument to the contrary, which they set out primarily in a footnote. (Ds.’ Memo. at 22, n 10.)

Defendants further argue that the breach of contract cause of action is not maintainable based on their acts in closing the restaurant. This argument is in turn based on the contentions that if Ramsay’s conduct in closing the restaurant was unilateral, Seibel’s conduct in demanding that the restaurant stay open was also unilateral, and that Seibel thus “anticipatorily repudiated the contractual obligation of unanimity, excusing Defendants’ performance of that obligation.” (Id. at 23.) Under California law, “if a party to a contract expressly or by implication repudiates the contract before the time for his or her performance has arrived, an anticipatory breach is said to have occurred.” (Romano v Rockwell Intl., Inc., 14 Cal. 4th 479, 489 [1996].) Defendants cite no California or other authority that supports their extraordinary contention that a party anticipatorily breaches a unanimous consent provision by opposing the closing of a going business venture, or that the anticipatory breach doctrine permits a party, as alleged here, to seize unilateral control of an entity that he has no right to manage except under the terms of the parties’ contracts.⁷ On the contrary, as defendants acknowledge, a judicial dissolution

⁷ Fisk Ventures, LLC v Segal (2008 Del Ch LEXIS 158, supra), on which defendants rely, is not to the contrary. There, a supermajority vote of two classes of shareholders was required for all essential decisions for the limited

proceeding is an appropriate mechanism for resolving managerial deadlock.⁸ (See Ds.’ Memo. at 23; P.’s Memo. at 24; Cal Corp Code § 17707.03 [b] [4] [in an action filed by any manager or member of an LLC, a court may dissolve the LLC when “[t]he management of the limited liability company is deadlocked or subject to internal dissention”].)

The court accordingly holds that the breach of contract cause of action is maintainable under the Fat Cow Agreement based on the pleaded allegations, including those regarding defendants’ unilateral closing of the restaurant.

Fraud

At oral argument, the parties stipulated to the application of New York law to Seibel’s tort claims, including his fraud claims. (Oral Argument Tr. at 26.)

The second cause of action, labeled one for “fraud and misappropriation,” alleges that Ramsay made misrepresentations “for the purpose of inducing Seibel to invest” in FCLA and The Fat Cow LLC. (Compl. ¶ 120.) It further alleges that after Seibel invested, Ramsay “continued to make misrepresentations to Seibel that he was acting in Fat Cow and FCLA’s best interests,” including informing Seibel that he would take all necessary steps to enable the restaurant to operate under the “Fat Cow” name. (Id. ¶ 122.) The cause of action is also based on the allegations that Ramsey conducted business “without Seibel’s authorization,” and “misappropriated for his personal benefit the corporate opportunities and assets of FCLA and Fat

liability company. In a proceeding to dissolve the LLC, the majority holder of one of the classes of shares interposed a breach of contract counterclaim alleging damage to the LLC as a result of the refusal of the other class of shareholders to accede to his proposals regarding research and financing. In dismissing the counterclaim, the Court held that the LLC agreement did not obligate one class to accede to the wishes of the others. The case is distinguishable, as there was no allegation that any party took contractually unauthorized action to implement its own preferred solution to the company’s financial difficulties. The Court also expressly held that the counterclaim did not “allege[] facts sufficient to support a reasonable inference that [defendants] “acted with gross negligence, willful misconduct, [or] in bad faith. . . .” (Id., at * 34.)

⁸ Here, however, GR did not file its dissolution proceeding, GR US Licensing, LP v Seibel (Sup Ct, New York County, Index No. 651618/14) until May 27, 2014.

Cow LLC, including the assignment of the Lease” and the television show agreement. (Id. ¶¶ 123-124.)

This cause of action replays the claims asserted under the breach of fiduciary duty and contract causes of action discussed above. The only new allegation – that Ramsay made fraudulent misrepresentations to induce Seibel to invest – duplicates the sixth cause of action for fraud in the inducement. This cause of action will therefore be dismissed as duplicative.

The sixth cause of action for fraud in the inducement pleads that Ramsay fraudulently induced Seibel to enter into the FCLA and Fat Cow Agreements “based on his repeated misrepresentations that (1) the Fat Cow trademark was under control; (2) that he would handle any and all trademark issues related to Restaurant; and (3) if such trademark issues could not be remedied, he would effectuate a change in the name of the Restaurant.” (Compl. ¶¶ 143-45, 55-56.) As elsewhere alleged in the complaint, Ramsay used the trademark issue “as his straw man excuse” to close the restaurant. (Id. ¶ 71.)

“The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages.” (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009].) A fraud claim must be pleaded with particularity pursuant to CPLR 3016 (b). (Id.) As the Appellate Division has explained, “the classic definition of fraud [is] the misrepresentation of a present fact.” Thus, “a promise to confer a benefit in the future . . . is only actionable when the defendant had no intention of fulfilling the promise at the time it was given.” (Braddock v Braddock, 60 AD3d 84, 89 [1st Dept 2009] [emphasis in original], appeal withdrawn 12 NY3d 780.) A present intention not to fulfill a promise should not be found solely on the basis that the promise was not fulfilled, but may be inferred from surrounding circumstances. (Id.) However,

“[g]eneral allegations that defendant entered into a contract while lacking the intent to perform it are insufficient to support the claim.” (New York Univ. v Continental Ins. Co., 87 NY2d 308, 318 [1995].) Put another way, there must be specific “factual allegations from which the misrepresentation of an inconsistent present intention can be inferred.” (Braddock, 60 AD3d at 98 [Lippman, then P.J., agreeing with majority’s statement of the standard, but dissenting on whether it was met]; Lanzi v Brooks, 43 NY2d 778, 779-780 [1977] [“Plaintiff’s complaint did not allege either a present intent not to carry out the promises of future action, or, in fact, any factual assertions from which this conclusion can be drawn, and thus failed to state a cause of action for fraud based on a misstatement of future intentions”]; see MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287, 293 [1st Dept 2011]; Healthwave Inc. v New York Socy. For The Relief Of The Ruptured And Crippled Maintaining The Hosp. For Special Surgery, 99 AD3d 494, 494 [1st Dept 2012]; Fletcher v Boies, Schiller & Flexner, LLP, 75 AD3d 469, 470 [1st Dept 2010].)¹

Here, the complaint does not plead factual allegations from which it may reasonably be inferred that, at the time Seibel entered into the FCLA and Fat Cow Agreement, the Ramsay defendants had a present intent not to perform its future obligations under those Agreements.

¹In HSH Nordbank AG v UBS AG (95 AD3d 185, 206 [2012]), this Department stated that “[a] claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract the parties executed; if the promise concerned the performance of the contract itself, the fraud claim is subject to dismissal as duplicative of the claim for breach of contract.” (Emphasis in original.) The decision does not discuss, and is not read by this court as overruling, the line of cases cited above, which hold that a fraud claim may also be based on an insincere promise when adequate factual allegations are pleaded from which it can be inferred that the promisor lacked the present intent to carry out its contractual promises in the future. (See also MBIA [Countrywide], 87 AD3d at 293 [explaining that a misrepresentation of present fact is collateral to the contract].)

The complaint alleges that defendants never took action to contest the Patent Office's provisional trademark decision, to secure an extended license from Las Vacas Gordas to use the mark, or to choose a different name for the restaurant. (Compl. ¶¶ 27-28, 55-56, 64, 70, 76.) On the above authority, however, these allegations of non-performance are insufficient to support the claim that Ramsay intended from the start not to fulfill his promises. Furthermore, the complaint acknowledges that defendants did, at least, cause an initial trademark application to be filed for the name "Fat Cow," and that Ramsay negotiated with and secured from Las Vacas Gordas a license to use the "Fat Cow" name until February 28, 2014. (Id. ¶¶ 22, 67.) Seibel therefore cannot claim that defendants failed to take any action in furtherance of their promises regarding the trademark. Perhaps the most compelling allegations regarding defendants' handling of the trademark issue involve their filing, in June 2013 and January 2014, of trademark applications for a new name, allegedly for a restaurant to be opened at the same location. (Compl. ¶¶ 73-74, 105-107). These allegations fall far short, however, of supporting an inference that Ramsay intended from as early as 2011 to cause the joint venture to fail. Nor do defendants allege any other facts from which such intent can reasonably be inferred. The fraudulent inducement claim will accordingly be dismissed.

Conversion and Unjust Enrichment

It is well settled that "[a] conversion takes places when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." (Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 49-50 [2006].) A cause of action for conversion "cannot be predicated on a mere breach of contract. . . ." (Kopel v Bandwidth Tech. Corp., 56 AD3d 320, 320 [1st Dept 2008].) The cause of action for conversion is based on the allegation that

defendants, “without authority, intentionally exercised control over [] funds and property” belonging to Seibel, FCLA and Fat Cow LLC in such a manner as to interfere with their rights of possession. (Compl. ¶ 131.) In his opposition to the motion, Seibel identifies the funds in question as the “payments to Van Willigan and the consultant” and “all the assets of the entities, which include fixtures in the refurbished Premises.” (Ps.’ Memo. at 25.)

The conversion cause of action thus duplicates the breach of contract cause of action, as well as the breach of fiduciary duty cause of action. (Kopel, 56 AD3d at 320 [conversion claim dismissed as duplicative of breach of contract claim, where “no independent facts are alleged giving rise to tort liability”].) To the extent that Seibel alleges that his \$800,000 investment in the restaurant was converted, that claim also fails because Seibel does not allege that he retained any right individually to possess those funds, or the improvements they paid for. (See Auguston v Spry, 282 AD2d 489, 491 [2d Dept 2001] [dismissing conversion claim, on the ground that money commingled with corporation’s capital was “incapable of being converted”].)


Seibel’s unjust enrichment claim must be dismissed for similar reasons. (Goldman v. Metro. Life Ins. Co., 5 NY3d 561, 572 [2005] [“The theory of unjust enrichment lies as a quasi-contract claim. It is an obligation the law creates in the absence of any agreement.”]; Clark-Fitzpatrick, Inc. v Long Is. R.R. Co., 70 NY2d 382, 388 [1987] [“The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter.”].) Seibel does not dispute that Ramsay’s authority over entity property is the subject of a written contract, and does not oppose dismissal of the unjust enrichment claim.

It is accordingly hereby ORDERED that defendants’ motion is granted to the following extent: The first cause of action for breach of fiduciary duty is dismissed with prejudice only to

the extent that it alleges a direct claim on behalf of plaintiff Seibel; the second cause of action for fraud and misappropriation, the third cause of action for conversion, the fifth cause of action for unjust enrichment, and the sixth cause of action for fraud in the inducement are dismissed with prejudice in their entirety; and the fourth cause of action for breach of contract is dismissed with prejudice to the extent it alleges direct and derivative claims for breach of the FCLA Agreement, and is otherwise denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 27, 2015


MARCY FRIEDMAN, J.S.C.