SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DOUGLAS HOFFMAN** **PART** **44**

Justice

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FREEDOM HOLDING, INC.,SILVIO SCAGLIA, ELITE WORLD GROUP, LLC,E1972 INC.

Plaintiff,

- v -

JULIA HAART, HAART DYNASTY LLC,

Defendant.

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INDEX NO. 650661/2022

MOTION DATE 06/01/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 34, 35

were read on this motion to/for DISMISS.

DOUGLAS E. HOFFMAN, J.S.C.

In this action, Defendants Julia Haart ("Ms. Haart") and Haart Dynasty LLC ("Haart LLC") move to dismiss certain causes of action alleged by Plaintiffs Freedom Holding, Inc. ("Freedom"), Silvio Scaglia ("Mr. Scaglia"), Elite World Group, LLC ("EWG"), and E1972 Inc (collectively, Plaintiffs). Specifically, Defendants move for an order:

> (a) pursuant to CPLR 3211(a)(7), dismissing the first and third causes of action of the amended complaint for failure to state a cause of action (the first cause is for conversion, asserted by Freedom Holding and Scaglia against defendants; the third cause is for breach of contract, asserted by Scaglia against Haart);
> (b) pursuant to CPLR 3211(a)(3), alternatively, should the first cause of action survive dismissal under CPLR 3211(a)(7), dismissing such cause of action as far as Scaglia asserts it on the ground that Scaglia lacks standing to sue on that claim;
> (c) pursuant to CPLR 3211(a)(3), should the third cause of action survive dismissal under CPLR 3211(a)(7), dismissing such cause of action as far as Scaglia asserts it on the ground that Scaglia lacks standing to sue on that claim;
> (d) pursuant to CPLR 3211(a)(5), alternatively, should the third cause of action survive dismissal under CPLR 3211(a)(7), dismissing such cause of action on the ground that it is barred by the statute of frauds (GOL § 5-701(a)(1));
> (e) pursuant to CPLR 3211(a)(7), dismissing the fourth cause of action of the amended complaint (which is for unjust enrichment, asserted by Freedom Holding and Scaglia against defendants) for failure to state a cause of action as duplicative of the second cause

of action (which is for breach of fiduciary duty, asserted by Freedom Holding against Haart) and/or the first cause of action;
(f) pursuant to CPLR 3211(a)(3), alternatively, should the fourth cause of action survive dismissal under CPLR 3211(a)(7), dismissing such cause of action as far as it is asserted by Scaglia on the ground that Scaglia lacks standing to sue on that claim;
(g) pursuant to CPLR 3211(a)(3), dismissing the fifth (and now last remaining) cause of action of the amended complaint (which is for a constructive trust, asserted by Freedom Holding and Scaglia against defendants) as far as it is asserted by Scaglia on the ground that Scaglia lacks standing to sue on that claim; and
(h) granting such other and further relief as the Court deems just and proper.
[NYSCEF doc. 26].

Plaintiffs oppose, except to concede that Mr. Scaglia lacks standing on certain of the claims, as discussed below.

Background

The following is a recitation of material alleged facts from Plaintiffs' First Amended Complaint [NYSCEF doc. 28], unless otherwise stated.

Plaintiffs allege that Mr. Scaglia owns 50% of the common shares, plus the preferred shares of Freedom, which is incorporated in Delaware. Mr. Scaglia is Freedom's director. Plaintiffs allege that in 2019, prior to the marriage of Mr. Scaglia to Ms. Haart, he gifted her 50% of the common stock of Freedom. Freedom is also alleged to have a bank account at J. P. Morgan bank, and at some point, both Ms. Haart and Mr. Scaglia had "access" to that account. It is not alleged in the complaint whether Ms. Haart was ever an officer or director of Freedom.

Plaintiffs also allege that Freedom is the sole member of EWG, a Delaware limited liability company, registered as a foreign limited liability company in New York, with a "principal place of business" in New York. Currently, Mr. Scaglia is EWG's chairman of the board. Ms. Haart had been CEO and director at EWG. Ms. Haart is a resident of New York. Personal jurisdiction is alleged under CPLR § 301 (and is not contested).

Ms. Haart and Mr. Scaglia were married in 2019. Although not included in the complaint, Mr. Scaglia filed for divorce on February 18, 2022 (Index 365088/2022 in this Court), which matrimonial action is discussed by both parties in their opposition and reply papers on this motion.[1]

Prior to this motion, Plaintiffs withdrew, without prejudice, claims Sixth through Tenth in the First Amended Complaint (regarding certain claims by EWG and E1972 Inc. against Ms. Haart), and accordingly, those claims are not addressed herein. [NYSCEF doc. 29, Notice of Voluntary Discontinuance].

The remaining claims center around an alleged $850,000 transfer of funds by Ms. Haart from Freedom to Haart LLC in February 2022. Specifically, Plaintiffs allege that on January 19, 2022, in New York, Mr. Scaglia and Ms. Haart entered into an oral contract, that in essence, allowed each of them to withdraw "only" $250,000 from Freedom's bank account at J.P. Morgan:

> On January 19, 2022, Mr. Scaglia met with Haart and Freedom Holding's accountant, Jeffrey S. Feinman of DDK & Company, to discuss Freedom Holding's finances. The meeting was held at Mr. Scaglia and Haart's home at 70 Vestry Street, New York, NY. At the meeting it was agreed that limits should be placed on withdrawals from the Freedom Holding bank account at J.P. Morgan. Haart and Mr. Scaglia agreed that the only withdrawals from the Freedom Holding account—other than to cover a mortgage, rent, and current living expenditures—would be $250,000 to Haart and $250,000 to Mr. Scaglia.
> [First Amended Complaint, NYSCEF doc. 28 at 5-6].

Plaintiffs do not allege or explain in what capacity either Mr. Scaglia or Ms. Haart made that agreement to withdraw "only" $250,000 each from Freedom, whether as spouses, as fellow shareholders, as directors, officers, or otherwise. Plaintiffs allege that "[s]hortly after the

[1] This action was referred from the Commercial Division of this Court to the undersigned because of the pending matrimonial action.

agreement was entered," Ms. Haart withdrew that (apparently allowed) $250,000 from Freedom's account.

Plaintiffs allege that soon thereafter, on February 7, 2022, Mr. Scaglia sent Ms. Haart, via email, from him and the fellow director of EWG (not a party here), a letter and an agenda for EWG's February 11, 2022 board meeting, including "Dismissal of the CEO – for discussion and approval." [First Amended Complaint, NYSCEF doc. 28 at 6].

Then, Plaintiffs allege that the following day, on February 8, 2022, Ms. Haart, "without any legal right," "retaliated by withdrawing $850,000 from the Freedom Holding bank account at J.P. Morgan and transferring it to her company Haart Dynasty LLC. [Ms.] Haart transferred the funds to enrich herself at the expense of Freedom Holding and of its co-owner Mr. Scaglia. Mr. Scaglia and Freedom Holding have informed [Ms.] Haart, through her counsel, that the withdrawal of the $850,000 was illegal, but she and Haart Dynasty LLC have not returned the funds." *Id*. at 6-7.

Although it is not explicitly stated in the complaint, it appears from the alleged timeline that Ms. Haart may have still been an officer and director of EWG on February 8, 2022, if her removal did not occur until February 11, 2022 as per the agenda sent to her.

After the Notice of Voluntary Discontinuance, the following five claims remain:

1. Conversion (Freedom/Mr. Scaglia against all Defendants)
2. Breach of Fiduciary Duty (Freedom against Ms. Haart)
3. Breach of contract (Mr. Scaglia against Ms. Haart)
4. Unjust enrichment (Freedom/Mr. Scaglia against all Defendants)
5. Constructive trust (Freedom/Mr. Scaglia against all Defendants)

The underlying facts of these five causes of action are all anchored on the $850,000 withdrawn on February 8, 2022, and Plaintiffs seek return of the $850,000 moneys, constructive trust, plus costs, disbursements, and counsel fees.

Plaintiffs, as part of their papers on this motion, concede that Mr. Scaglia does not have "direct" (as opposed to derivative, as a shareholder of Freedom) standing for claims of conversion, unjust enrichment, and constructive trust. Mr. Scaglia was never a plaintiff on the fiduciary duty claim. Plaintiffs continue to assert Mr. Scaglia as plaintiff on the contract claim, and indeed, Mr. Scaglia is the only plaintiff on that claim.

On their motion to dismiss certain claims, Defendants allege that certain of the claims cannot co-exist if based on the same underlying alleged facts. Plaintiffs answer that they may plead in the alternative at this stage of the proceedings and it is not up to Defendant to decide which claim to strike as allegedly duplicative. [Def. Memo of Law, NYSCEF doc. 30 at 3-5].

Regarding the conversion claim, Defendants also seek dismissal under Delaware law: they allege that conversion is not available for claims regarding "money" (as opposed to specific "property"). [Def. Memo of Law, NYSCEF doc. 30 at 3-4]. In opposition, Plaintiffs allege that New York law would apply to the conversion claim in this case, and that New York law would allow a claim for conversion of "money."

Regarding the breach-of-contract claim, Defendants seek dismissal on two separate grounds: (i) because Freedom is the owner of the J.P. Morgan bank account, only Freedom, and not Mr. Scaglia could have standing to sue, and (ii) because Mr. Scaglia is suing for the alleged breach of the provision of the oral contract that Ms. Haart would not withdraw any more than $250,000, that provision is indefinite in duration and therefore outside of the one-year requirement for oral contracts to not run afoul of the statute of frauds (citing GOL § 5-701(a)(1);

CPLR 3211(a)(5)). [Def. Memo of Law, NYSCEF doc. 30 at 4]. In opposition, Plaintiffs allege that the duration of the oral contract is not indefinite in that it could be performed in a year if the parties were to divorce within a year, adding that the parties' divorce was already contemplated at the time of the January 19, 2022 oral agreement. Defendants, on reply, cite numerous publicly available articles about divorce timing. Neither side, however, discusses how a final divorce decree, even if issued within a year (or at any point) would "end" the performance of the January 19, 2022 oral agreement.

At oral argument, Defendants conceded that even if they were to succeed on each branch of their motion, the action would not be dismissed in its entirety, and at least two claims (all, again, related to the $850,000 transfer) would remain. This motion, therefore, does not seek a dismissal of the action so much as a "winnowing" of the causes of action, all of which are related to the $850,000 transfer.

ANALYSIS

On a motion to dismiss pursuant to CPLR § 3211, plaintiffs' allegations are accepted as true and accorded "the benefit of every possible favorable inference" (*Leon v. Martinez*, 84 NY2d 83, 87 [1994]). The court must "determine whether a cognizable cause of action can be discerned therein, not whether one has been properly stated . . . . However, the complaint must contain allegations concerning each of the material elements necessary to sustain recovery under a viable legal theory." *MatlinPatterson ATA Holdings LLC v. Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011] (citations omitted).

The laws of Delaware or New York are potentially at issue for each cause of action: each of Freedom and EWG are incorporated in Delaware, and at least some of the alleged acts (the

oral contract, the bank transfer) potentially took place in New York. Here, both sides agree that Delaware law would apply to the claim for breach of fiduciary duty, due to the application of the internal-affairs doctrine for the Delaware-incorporated entities. Similarly, both sides agree that New York law would apply to the alleged breach of the January 19, 2022 contract, whether because the [oral] contract was entered into in New York or allegedly breached in New York. Plaintiffs argue that New York law would also apply to the claims for unjust enrichment, conversion, and constructive trust, whereas Defendants argue that Delaware law would apply to each of those three claims.

In order to decide whether the laws of Delaware or New York apply to each alleged cause of action, the court must first determine whether there is an "actual" conflict between the jurisdictions' laws for each, before engaging in a choice of law analysis: if "no conflict exists between the laws of the jurisdictions involved, there is no reason to engage in a choice of law analysis." *Elson v. Defren*, 283 AD2d 109, 114 [1st Dept 2001]. Therefore, the initial question is whether there is a difference between the laws of Delaware or New York for the claims.

If there is a difference between the laws of the two jurisdictions, New York conflict-of-laws analysis would apply, and the question would become the appropriate state's interest, as explained by the Court of Appeals in *Cooney v. Machinery Instruments*:

> The traditional approach to choice of law problems arising in tort was simply to apply *lex loci delicti*, the law of the place of the tort, to all substantive issues in the case (*see, e.g., Poplar v. Bourjois*, 298 N.Y. 62, 66, 80 N.E.2d 334; Restatement of Conflict of Laws §§ 377–390). The theoretical underpinning of that rule was the vested rights doctrine: the right to recover in tort is created by, and exists solely to the extent of, the law of the jurisdiction where the injury occurred (*Babcock v. Jackson*, 12 N.Y.2d 473, 477–478, 240 N.Y.S.2d 743, 191 N.E.2d 279).
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> Although the vested rights doctrine did have the salutary characteristics of predictability and ease of application, it failed to accord any significance to the policies underlying the conflicting laws of other jurisdictions (*see, Babcock*, 12 N.Y.2d, at 478, 240 N.Y.S.2d 743, 191 N.E.2d 279; *Miller v. Miller*, 22 N.Y.2d 12, 15, 290 N.Y.S.2d 734, 237 N.E.2d 877). Thus in *Babcock* the Court adopted a more flexible approach

> intended to give "controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." (*Babcock*, 12 N.Y.2d, at 481, 240 N.Y.S.2d 743, 191 N.E.2d 279).
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> Of the various, sometimes competing, schools of thought on choice of law, the one that emerged as most satisfactory was "interest analysis," which sought to effect the law of the jurisdiction having the greatest interest in resolving the particular issue (*see, Schultz v. Boy Scouts*, 65 N.Y.2d 189, 197, 491 N.Y.S.2d 90, 480 N.E.2d 679 *supra*; *Miller v. Miller*, 22 N.Y.2d 12, 15–16, 290 N.Y.S.2d 734, 237 N.E.2d 877 *supra*). *Cooney v. Osgood Mach., Inc*., 81 NY2d 66, 71–72 [1993]

Here, New York's interest, as alleged, concerns defendants' alleged actions (and presumably, damages stemming from those actions) – the oral contract and the transfer of funds. Delaware's interest is alleged as the internal affairs of the Delaware-incorporated plaintiff Freedom. As the Appellate Division, First Department explained in *New Greenwich Litigation Trustee v. Citco Fund Services*, the conflict-of-laws internal affairs doctrine could apply (and result in application of Delaware choice of law) *only* if the claims are regarding the internal affairs of a Delaware entity and its officers, directors, or shareholders *as such*:

> The parties contend that either Delaware law or New York law should be applied to this litigation. Plaintiff argues that under the internal affairs doctrine, Delaware law governs this matter . . . plaintiff's argument fails.
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> The internal affairs doctrine is a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its *current* officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands. Stated another way, Under the internal affairs doctrine, claims concerning the relationship between the corporation, its directors, and a shareholder are governed by the substantive law of the state or country of incorporation.
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> However, as the Delaware Chancery Court explained in *In re American Intl. Group, Inc.*, 965 A.2d 763, 817 (Del.Ch.2009), the "internal affairs doctrine, although potent, has very specific applications." In particular, the Chancery Court noted that the doctrine only "governs the choice of law determinations involving matters *peculiar* to corporations, that is, those activities concerning the relationships *inter se* of the corporation, its directors, officers and shareholders" (965 A.2d at 817 [internal quotation marks omitted]).
>
> Accordingly, since the internal affairs doctrine does not apply to those defendants who are not current officers, directors, and shareholders of the plaintiff corporation, as none of the instant defendants are with respect to the funds, the internal affairs doctrine does not apply to the claims asserted against defendants. . . . We . . . reject the application of the

> internal affairs doctrine to the instant defendants who are outside administrators and auditors, i.e. contractual agents or third parties external to the funds.
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> *New Greenwich Litig. Tr., LLC v. Citco Fund Servs. (Eur.) B.V.*, 145 AD3d 16, 21–23 [1st Dept 2016] (certain citations omitted).

Here, Ms. Haart is not alleged to be an officer or director of the only cited plaintiff for these claims – Freedom. Although she is alleged to hold 50% of the common (but not preferred) shares of Freedom, she is not alleged to be its controlling shareholder for fiduciary duty purposes (*see, e.g., Kahn v. M&F Worldwide Corp*., 88 A3d 635, 651 [Del 2014]; *Ivanhoe Partners v. Newmont Mining Corp*., 535 A2d 1334, 1344 [Del 1987]). Nor does Ms. Haart seek derivative (or any) claims against the corporation as its shareholder, which also could have implicated the internal affairs doctrine, *see, e.g., Mason-Mahon v. Flint*, 166 AD3d 754, 756 [2d Dept 2018].

Here, Plaintiff does not allege sufficient facts to implicate any "matters *peculiar* to corporations, that is, those activities concerning the relationships *inter se* of the corporation, its directors, officers and shareholders" as part of the alleged claims for conversion, unjust enrichment, or constructive trust. Nor is there any allegation that *situs* of alleged wrongful acts took place in Delaware. Accordingly, Plaintiff has not alleged sufficient facts to require application of Delaware law to these three claims. Nevertheless, where appropriate herein, the Court will address Plaintiff's claims regarding Delaware law, out of abundance of caution.

Further, as both sides agree that Mr. Scaglia lacks standing on the claims for unjust enrichment, conversion, and constructive trust, the court does not address those portions of the motion. The court now turns to each of the remaining claims on this motion.

Conversion

Under New York law, "conversion takes place 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. Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." *Colavito v. New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006] (citations omitted). "[C]onversion is concerned with [plaintiff's] superior right of possession of such property, not title ownership" *Core Dev. Grp. LLC v. Spaho*, 199 AD3d 447 [1st Dept 2021]. Where the funds are held in specific escrow and allegedly misused or misapplied, plaintiffs may advance a claim for conversion: "Money, ***if specifically identifiable***, may be the subject of a conversion action. . . [C]onversion occurs when funds designated for a particular purpose are used for an unauthorized purpose." *Petrone v. Davidoff Hutcher & Citron, LLP*, 150 AD3d 776, 777 [2d Dept 2017] (citations omitted) (emphasis added).

Under Delaware law, "Conversion is an act of dominion wrongfully exerted over the property of another, in denial of his right, or inconsistent with it." *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 678 A2d 533, 536 [Del 1996] "Generally, the necessary elements for a conversion under Delaware law are that a plaintiff had a property interest in the converted goods; that the plaintiff had a right to possession of the goods; and that the plaintiff sustained damages." *Goodrich v. E.F. Hutton Gp., Inc.*, 542 A2d 1200, 1203 [Del Ch 1988]. Phrased another way, "To make out a claim for conversion, [plaintiff] must prove that, at the time of the alleged conversion, (1) [it] had a property interest in the allegedly converted property, (2) [it] had a right to possession of such property, and (3) Defendants wrongfully possessed or disposed of such

property as if it were their own." *Israel Disc. Bank of New York v. First State Depository Co., LLC*, No. CIV.A. 7237-VCP, 2012 WL 4459802, at *13 (Del Ch Sept. 27, 2012), *aff'd*, 86 A3d 1118 (Del 2014).

Here, the allegedly converted property is money, $850,000. Conversion claims for money are generally not allowed in Delaware: "subject to one narrow exception, a conversion claim seeking the payment of money cannot be sustained. Money is subject to conversion *only* when it can be described or identified as a specific chattel, but not where an indebtedness may be discharged by the payment of money generally." *Kyle v. Apollomax, LLC*, 987 F Supp 2d 519, 525 (D Del 2013) (applying Delaware law, *citing Goodrich v. E.F. Hutton Grp.*, 542 A2d 1200, 1203 (Del Ch 1988)). In *Goodrich*, Delaware Chancery Court dismissed the Delaware-law conversion claim for monies allegedly owed, stating that an "action for conversion of money will lie only where there is an 'obligation to return the identical money' delivered by the plaintiff to the defendant. The plaintiff alleges that [defendant] converted moneys through the accrual of interest on a 'float'. There is no allegation that any specific money was delivered to the defendant and that the defendant had any obligation to return the identical money. There being no such allegation, plaintiff's claims based on conversion must be dismissed." *Goodrich v. E.F. Hutton Grp.*, 542 A2d at 1203 (*citing Lyxell v. Vautrin*, 604 F.2d 18 [5th Cir 1979]).

The tort of conversion (whether in Delaware or New York) has roots in common law, and New York would take a similar view of alleged conversion of non-specific monies: claims for conversion of monies are allowed only if the funds in question were "separate, distinct, separately identifiable" and not commingled with other monies. For example, in *Amusement Industries, Inc. v. Stern*, a claim for conversion of $13 million was allowed where those specific,

traceable funds were held in defendant's escrow account and allegedly not returned by the defendant escrow agent when due:

> The defendants argue that the $13 million was to be commingled with the rest of the funds needed to acquire the Portfolio, that it was not kept as a "separate, distinct, separately identifiable chattel and, therefore, [that it] cannot form the basis for a conversion claim." Def. Mem. at 40. The two cases they cite for this proposition, however, are not apposite. In *The High View Fund, L.P. v. Hall*, 27 F.Supp.2d 420 (S.D.N.Y.1998), the court dismissed a conversion claim brought by investors because the plaintiffs were simply seeking the return of money they had invested. *Id.* at 429. *Auguston v. Spry*, 282 A.D.2d 489, 723 N.Y.S.2d 103 (2d Dep't 2001), similarly involved an investor seeking return of moneys invested. *Id.* at 489–90, 491. *Auguston* dismissed the conversion claim because plaintiff's $200,000 investment "was to be commingled into the [defendant] corporation's capital." *Id.* at 491. Here, Amusement contends that the $13 million was to remain undisturbed in the escrow account until some later time when an agreement would be reached as to its disposition. While that disposition might have eventually included commingling once release of the funds was authorized, Amusement does not contend that the release was ever authorized. Thus, it does not seek return of money paid towards an investment. Rather, it seeks the return of the specifically identified $13 million the plaintiffs placed in escrow, which was only to be released if Amusement gave defendants the authority to do so. *Id.*
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> *Amusement Indus., Inc. v. Stern*, 786 F Supp 2d 758, 783 [SDNY 2011] (applying New York law).

Here, there is a claim that a specific sum ($850,000) was either misappropriated or inappropriately transferred, but no claim that these moneys are separate, distinct, or could not be repaid by the payment of money generally from defendants' commingled funds (if repayment is otherwise appropriate). There is no claim that Freedom funds in the J.P. Morgan account were held in escrow (unlike the funds in *Amusement Industries* or in *Petrone v. Davidoff Hutcher*), or for any specific purpose. Indeed, Plaintiffs' own allegations are that Mr. Scaglia and Ms. Haart somehow agreed to withdraw $250,000 from that account approximately two weeks before. The complaint does not allege sufficient facts necessary for each element of a conversion of "moneys" – that the funds were either in escrow or similarly, that the transferred "[m]oney [is] … specifically identifiable, [and the] funds designated for a particular purpose are used for an unauthorized purpose." *Petrone v. Davidoff Hutcher*, 150 AD3d at 777. *See also Auguston v.*

Spry, 282 AD2d 489, 491 [2d Dept 2001] ("plaintiff's cause of action alleging conversion must fail because he alleges that his money was to be commingled into the corporation's capital. As commingled money, his money was incapable of being converted") (*citing United Sys. Assocs. v. Norstar Bank Upstate N.Y.*, 171 AD2d 922 [3d Dept 1991] (dismissing a conversion claim over funds in checking account, stating that conversion requires claims of "legal ownership of specific and identifiable property. A checking account, which does no more than create a debtor-creditor relationship, does not satisfy that requirement and cannot be converted").

Here, Plaintiff's attempt to wedge these money allegations into the tort of conversion is similarly strained, and not necessary, as stated by another court on a similar motion over alleged conversion and misappropriation:

> Conversion is the "wrongful exercise of dominion over the property of another, in denial of his right, or inconsistent with it." *Drug, Inc. v. Hunt*, Del.Supr., 168 A. 87, 93 (1933). An action for conversion has traditionally applied to the wrongful exercise of dominion over tangible goods. *See* RESTATEMENT (SECOND) OF TORTS § 222A, cmt. a. Following a modern trend, Delaware courts have tentatively expanded the doctrine to encompass some intangible goods where the intangible property relations are merged into a document. *See Drug, Inc. v. Hunt*, Del.Supr., 168 A. 87, 93 (1933) (specific stock certificates); *see generally, Mastellone v. Argo Oil Corp.*, 82 A.2d 379, 382-83 (1951) (stock certificates). . . ***We do not, however, have a shortage of available legal theories of recovery should plaintiff prove the factual elements of this case. There is no need to attempt to craft new theories of recovery of this type. Therefore I conclude that conversion is not an available theory of recovery to plaintiff insofar as it complains of the payment of money*** by TLC Beatrice . . .
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> *Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc.*, No. 13950, 1995 WL 694397, at *16 (Del. Ch. Nov. 21, 1995) *appeal refused TLC Beatrice Int'l Holdings, Inc. v. Carlton Invs.*, 676 A.2d 908 (Del. 1996) (emphasis added)

The court notes further that where there is an assertion of both a tort claim of conversion and a contract claim in the same action, Delaware law holds that "in order to assert a tort claim along with a contract claim, the plaintiff must generally allege that the defendant violated an independent legal duty, apart from the duty imposed by contract . . . Where . . . the plaintiff's

claim arises solely from a breach of contract, the plaintiff generally must sue in contract, and not in tort." *Kuroda v. SPJS Hldgs., LLC*., 971 A2d 872, 889 [Del Ch 2009]. Here, although the same underlying fact – transfer of $850,000 – is alleged on both the contract claim and the tort of conversion claim, different legal rights are asserted, and plaintiffs are not stating that Freedom's alleged property right to the funds derives *only* from the alleged oral contract between Mr. Scaglia and Ms. Haart (the only alleged claimant and defendant on the contract claim). Further, at least some Delaware cases have allowed plaintiffs to plead in the alternative, at least at the motion-to-dismiss stage. *See, e.g*., *Israel Disc. Bank of New York v. First State Depository Co., LLC*, No. CIV.A. 7237-VCP, 2012 WL 4459802, at *13 [Del Ch Sept. 27, 2012], *aff'd*, 86 A3d 1118 [Del 2014] ("Defendants argue that [plaintiff] cannot plead conversion because it also has asserted a breach of contract claim against [defendant] based on the same facts. Preliminarily, I note that Plaintiff is permitted under Rule 8(e)(2) to plead claims in the alternative. Therefore, even if [plaintiff's] breach of contract and conversion claims were mutually exclusive, that would not preclude [plaintiff] from pursuing both claims in the alternative." *C.f., W.D.C. Holdings, LLC v. IPI Partners, LLC*, No. CV 2020-1026-JTL, 2022 WL 2235005, at *13 [Del Ch June 22, 2022] (dismissing a conversion tort claim where the "alleged property right derives from the Tort Plaintiffs' contract rights. . . [and although] plaintiffs have properly cited the standard for pleading a conversion claim along with a contract claim . . . they have failed to show how they met that standard" for conversion [independent of the right derived from the contract]).

Similarly, New York cases would allow pleading in the alternative at this early stage of the proceedings. *See, e.g., Allenby, LLC v. Credit Suisse, AG*, 134 AD3d 577, 581 [1st Dept 2015] ("Defendants contend that the aiding and abetting claim is duplicative of their fraud claim. However, plaintiffs may plead alternate causes of action"); *Pickering v. State*, 30 AD3d 393, 394

[2d Dept 2006] ("at this early stage of the proceedings, and in the absence of a clear concession by the defendant … the claimants were entitled to plead incompatible theories of recovery in the alternative") (*citing* CPLR § 3014). Therefore, the court grants Defendant's motion to the extent of dismissing the first cause of action (for conversion of $850,000) as currently alleged, without prejudice to Plaintiff's remaining claims or, if so advised, appropriate amended allegations if they were to sufficiently allege a conversion claim.

Breach of Fiduciary Duty

Plaintiff Freedom alleges a breach of fiduciary duty against it by defendant Julia Haart, stating that Ms. Haart was "entrusted" with access to Freedom's account. The complaint does not state the capacity in which Ms. Haart was so "entrusted," however. She is not alleged to have been an officer or director of Freedom (or even employee). She is alleged to hold 50% of the common (although not of the preferred) stock. Ms. Haart is separately alleged to have been an officer and director of EWG (with Freedom as EWG's only member). She was also Mr. Scaglia's spouse at the time of the alleged transfer, and Mr. Scaglia is alleged as Freedom's director and controlling shareholder. The complaint does not explain who "entrusted" Ms. Haart with access to Freedom's bank account, in what capacity that person acted and in what capacity Ms. Haart allegedly acted. For example, to the extent that Mr. Scaglia may have had access to the account as Freedom's officer, and he "entrusted" Ms. Haart with access "for convenience" as his spouse, that may be different than if Ms. Haart was "entrusted" with access to Freedom's accounts as somehow related to other (not alleged) agreements between Freedom and EWG, the Freedom-owned LLC of which Ms. Haart was the CEO during some of the relevant period.

Both sides agree that Delaware corporate law would apply to the claim for breach of fiduciary duty, due to the application of the internal-affairs doctrine for the Delaware-incorporated entities. As Defendant has not sought dismissal of the fiduciary-duty claim, the court will not address it. The scope of the fiduciary duty may need to be defined, however, if the action continues unsettled. *See, e.g., A.W. Fin. Servs., S.A. v. Empire Res., Inc.*, 981 A2d 1114, 1127–28 [Del 2009] (on a certified question from federal court, stating, "Although a claim for damages for breach of fiduciary duty is cognizable under Delaware law, that claim presupposes that the defendants are 'fiduciaries' that owed fiduciary duties to the plaintiff. Clearly the issuing corporation, Empire, is not a fiduciary to the plaintiff, which is its stockholder. The relationship between the issuer (Empire), on the one hand, and American Stock and ACS, on the other, would normally be commercial in character, arising out of the law of agency. Whether American Stock and ACS had any cognizable relationship to a stockholder of the issuer (here, A.W. Financial)—commercial, fiduciary, or otherwise—as a legal matter, is addressed by the plaintiff in only a conclusory manner, and by no other party at all. The record is, therefore, not adequate to enable us to opine on the question of whether a claim for breach of fiduciary duty is viable against American stock and/or ACS.")

Breach of contract

Both sides agree that New York law applies to the claim by Mr. Scaglia against Ms. Haart for breach of contract. Under New York law, the four elements of a breach of contract are: "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v. Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010].

Defendants allege that Mr. Scaglia does not have standing on this claim, and the "resulting damages" are alleged to be the funds taken from Freedom's account. Plaintiffs do not address this portion of the motion in their opposition. There is not sufficient information in the complaint for the court to understand whom the alleged oral contract was between, such that the court could then determine whether there were sufficient allegations regarding whether one party to the contract performed, whether one side breached, and whether there were damages (to the performing side). It is not sufficient to state that Mr. Scaglia agreed with Ms. Haart to withdraw "only" $250,000 from Freedom, without explaining the basis for either person to withdraw this amount (and then to bar each other from withdrawing any more). As an extreme example, two shareholders of Amazon could not make such an agreement and then sue each other when either one somehow withdraws more money from Amazon.

Also, as part of their answering papers on the motion, Plaintiffs state that the January 2022 oral agreement was possibly in contemplation of the divorce between Ms. Haart and Mr. Scaglia and perhaps, was somehow part of that process: "In contemplation of their upcoming divorce, Ms. Haart and Mr. Scaglia agreed they would both limit withdrawals from the Freedom account to $250,000 each." [Pl. Memo of Law in Opposition, NYSCEF doc. 34 at 7]. Neither side discusses whether the oral agreement, if made as between spouses, complies with DRL § 236(B)(3) acknowledgement requirements for matrimonial agreements. *See, e.g., Matisoff v Matisoff*, 90 NY2d 127 [1997]; *Jorge R. v. Janett S.*, 68 Misc 3d 1205(A), 129 NYS3d 663 [Sup Ct, NY Cnty 2020]. Similarly, there is not sufficient information at this time for the court to determine whether the alleged oral contract would be barred by the statute of frauds or other grounds.

The complaint, however, provides sufficient notice at this stage to survive a motion to dismiss by alleging the elements of a breach-of-contract claim by Mr. Scaglia against Ms. Haart: allegations of (i) a contract between Mr. Scaglia and Ms. Haart, (ii) compliance by Mr. Scaglia, (iii) non-compliance by Ms. Haart, and (iv) damages (even if indirect) to Mr. Scaglia. Whether Mr. Scaglia can ultimately succeed on this legal theory is not before the court. Therefore, the branches of Defendant's motion seeking dismissal of the contract cause of action are denied.

Unjust Enrichment

Defendants seek dismissal of the "unjust enrichment" claim as duplicative of either the fiduciary-duty claim or the breach-of-contract claim. Defendants do not otherwise seek dismissal of the "unjust enrichment" claim.

Plaintiffs argue that New York law would apply to the claims for unjust enrichment, whereas Defendants argue that Delaware law would apply. "The essential inquiry in any action for unjust enrichment ... is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. A plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [defendant] to retain what is sought to be recovered." *Mandarin Trading Ltd. v. Wildenstein*, 16 NY3d 173, 182 [2011].

In New York, where there is both a claim for unjust enrichment and a contract claim, and there is no disagreement about the existence of terms of the contract, the unjust enrichment claim can be dismissed as duplicative of the contract claim. *See, e.g., Panwest NCA2 Holdings LLC v. Rockland NCA2 Holdings, LLC*, 205 AD3d 551, 552 [1st Dept 2022] ("unjust enrichment claim should have been dismissed as duplicative of the breach of contract claim. The parties do not

dispute the existence of a valid written agreement, and the issue here is whether defendant breached the agreement") (*citing Clark-Fitzpatrick, Inc. v. Long Island R. Co*., 70 NY2d 382, 388 [1987]). In *Clark-Fitzpatrick, Inc*., the Court of Appeals explained the reason for proceeding under only a contract and not a quasi contract if there is indeed a contract: a "'quasi contract' only applies in the absence of an express agreement, and is not really a contract at all, but rather a legal obligation imposed in order to prevent a party's unjust enrichment . . . a quasi-contractual obligation is one imposed by law where there has been no agreement or expression of assent, by word or act, on the part of either party involved. The law creates it, regardless of the intention of the parties, to assure a just and equitable result. . . Here, it is undisputed that the relationship between the parties was defined by a written contract, fully detailing all applicable terms and conditions . . . Notwithstanding plaintiff's claim that defendant breached the contract, plaintiff chose not to rescind the agreement, but instead to complete performance of the contract and sue to recover damages, which of course was plaintiff's right. Having chosen this course, however, plaintiff is now limited to recovery of damages on the contract, and may not seek recovery based on an alleged quasi contract." 70 NY2d at 388–89. Here, however, it is not clear at this early stage that there is an "undisputed" contract "fully detailing all applicable terms and conditions," such that the only question would be whether there was a breach of that contract. Furthermore, the contract claim and the unjust enrichment claims are not brought by the same parties. Accordingly, cases that would dismiss an unjust enrichment claim as duplicative of a contract claim under those circumstances are not necessarily applicable here.

Similarly, to the extent that there is not sufficiently "unequivocal" agreement among all parties as to the fiduciary duty owed under the alleged circumstances, the claims for unjust enrichment and for violation of fiduciary duties are not clearly duplicative. As the Appellate

Division, First Department explained, claims for fiduciary duty, unjust enrichment, and breach of contract need not be dismissed as "duplicative" on a motion to dismiss, especially where there is not necessarily a known complete overlap between the source of the fiduciary duty or contract or other torts:

> While the [defendants] assert that the [plaintiff's] allegations are contradicted by the documentary evidence, i.e., the agreement between [defendant] MES and [plaintiff], which does not expressly impose fiduciary obligations on [either defendant], liability for breach of a fiduciary duty "is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation" (Restatement [Second] of Torts § 874, Comment *b*). "[I]t is not mandatory that a fiduciary relationship be formalized in writing.... Thus, the ongoing conduct between parties may give rise to a fiduciary relationship that will be recognized by the courts" (*Wiener*, 241 A.D.2d at 122, 672 N.Y.S.2d 8; *see also Frydman & Co. v. Credit Suisse First Boston Corp.*, 272 A.D.2d 236, 237, 708 N.Y.S.2d 77 [2000]). . . . this case does not involve an attempt to pierce the corporate veil. A corporate officer can be held personally liable for his tortious conduct (see *McPhillips, Inc. v. Ellis*, 278 A.D.2d 682, 684, 717 N.Y.S.2d 743 [2000]). That *McPhillips* did not involve a claim for breach of fiduciary duty is of no moment. Liability was predicated on the commission of a tort, and breach of fiduciary duty is a tort (*see Buchwald & Assoc. v. Rich*, 281 A.D.2d 329, 330, 723 N.Y.S.2d 8 [2001]; *Batas v. Prudential Ins. Co. of Am.*, 281 A.D.2d 260, 263, 724 N.Y.S.2d 3 [2001]). The particular tort committed is of little significance. [R]eliance on *Northeast Gen. Corp. v. Wellington Adv.*, 82 N.Y.2d 158, 604 N.Y.S.2d 1, 624 N.E.2d 129 [1993], an appeal from the grant of the defendants' motion to set aside the jury's verdict and for judgment in their favor, is misplaced, since that determination was made not on a motion to dismiss but after a full trial. Indeed, the majority opinion in *Northeast Gen. Corp.* noted that " the contract and the relationship of the parties must be plumbed" (*id.* at 162, 604 N.Y.S.2d 1, 624 N.E.2d 129) to determine whether a fiduciary relationship exists. . . The unjust enrichment claim was also improperly dismissed. "A cause of action for unjust enrichment is stated where plaintiffs have properly asserted that a benefit was bestowed ... by plaintiffs and that defendants will obtain such benefit without adequately compensating plaintiffs therefor" (*Wiener v. Lazard Freres & Co.*, supra, 241 A.D.2d at 119, 672 N.Y.S.2d 8, quoting *Tarrytown House Condominiums v. Hainje*, 161 A.D.2d 310, 313, 555 N.Y.S.2d 83 [1990]). While "the existence of a valid and enforceable written contract precludes recovery on a theory of unjust enrichment" (*Cornhusker Farms v. Hunts Point Coop. Mkt.*, 2 A.D.3d 201, 206, 769 N.Y.S.2d 228 [2003]), the unjust enrichment claim here, based on the Rencks' alleged retention of funds to which they were not entitled, is predicated on conduct not covered by the contract.

Sergeants Benev. Ass'n Annuity Fund v. Renck, 19 AD3d 107, 110–12 [1st Dept 2005].

As discussed *supra*, New York law would apply to claims for unjust enrichment and contract, whereas Delaware law would apply to the fiduciary duty claims. There does not appear to be a substantive difference, however, between the laws of New York and Delaware on the issue of whether potentially duplicative claims may be allowed at this stage of the proceeding. Under each, pleading in the alternative at this stage may be allowed.

Furthermore, as stated *supra*, to the extent that the unjust enrichment, contract, and fiduciary duty claims do not have identical plaintiffs and defendants, at this early stage of the proceedings, plaintiffs may plead in the alternative, under either New York or Delaware law, and the court will not dismiss the unjust enrichment claim as a duplicative pleading.

Constructive trust

Defendants seek dismissal of the constructive trust claim only as brought by Mr. Scaglia. They do not seek dismissal of this claim as brought by Plaintiff Freedom. Defendants concede that Mr. Scaglia does not have direct standing on this claim. Accordingly, there is no conflict on this motion regarding this claim.

Accordingly, upon the papers and proceedings in this matter, and for the reasons stated herein, it is ORDERED that motion sequence 001 is determined as follows:

Branch (a) is granted to the extent of dismissing the first cause of action (for conversion of $850,000) as currently alleged, without prejudice to Plaintiff's remaining claims or, if so advised, appropriate amended allegations if they were to sufficiently allege a conversion claim; that branch of the motion for dismissal of the third cause of action (breach of contract) is denied;

Branch (b) is denied as moot;

Branches (c), (d) and (e) are denied;

Branch (f) is granted on consent, dismissing Mr. Scaglia as one of the plaintiffs asserting the fourth cause of action (unjust enrichment) due to his lack of direct standing to assert this claim (as opposed to remaining plaintiff Freedom);

Branch (g) is granted on consent, dismissing Mr. Scaglia as one of the plaintiffs asserting the fifth cause of action (constructive trust) due to his lack of direct standing to assert this claim (as opposed to remaining plaintiff Freedom).

This constitutes the Decision and Order of the Court.

7/20/2022
DATE

7/20/2022
DOUGLAS HOFFMAN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE