SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

WHITE MANAGEMENT CORP., M & W FOODS, INC., LOG JAM OF GLENS FALLS, INC., BOUNTIFUL BREAD, INC., PLATTSBURGH TACO INC., KODIAK CREAMERY, INC., NORPCO RESTAURANT, INC., ALBANY-PLATTSBURGH UNITED CORP., CCB REALTY LLC and DAVID R. WHITE,

Plaintiffs,

-against-

RAY E. ALEY, III,

Defendant.

Index No. 904783-20

RJI No. 01-20-136144

Hon. Richard Platkin, A.J.S.C.

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This is a spite suit involving no redressable injury. David R. White ("David"), is suing his son-in-law, Ray Aley ("Ray"), personally and on behalf of nine companies (the "White Companies," together with David, "Plaintiffs"). Plaintiffs allege that Ray is liable for breach of fiduciary duty, breach of a purported oral agreement, promissory estoppel, and an accounting. Although Plaintiffs admit they suffered no losses, they seek damages of $2 million, perpetuating what is nothing more than a recreational form of litigation, and making good on David's threat to financially burden not only Ray, but David's own daughter, Cheryl Aley ("Cheryl"). Ray now moves for summary judgment dismissing all of Plaintiffs' claims against him because they have no basis in fact or law.

The White Companies own restaurants throughout New York State. After marrying Cheryl, Ray became an employee and minority shareholder of two of the White Companies: M&W Foods, Inc. and Plattsburgh Taco, Inc. ("M&W" and "Plattsburgh Taco"), which own and operate, among other things, Dunkin Donuts restaurants. Separately, Ray and Cheryl were the sole ownesr of Aley Restaurant Management, LLC ("ARM"), which operated its own Dunkin Donut restaurants. Eventually, Ray sought to exit M&W and move on to other opportunities. In 2018, Ray, David and Cheryl engaged a third party, Ever Santana ("Santana"), in negotiations for the purchase of the assets of 18 Dunkin Donuts restaurants, seven of which were owned by ARM, and eleven of which were owned by M&W.

After Santana offered $17 Million for the Dunkin Donuts restaurants, David hijacked the deal for his own benefit. Although Ray (3 percent) and Cheryl (48.55 percent) collectively owned a majority of M&W's shares, David, by way of a purported irrevocable proxy, enjoyed the controlling majority vote in M&W. Wielding the power of the irrevocable proxy, David quashed the Santana asset sale and demanded that Ray and Cheryl sell their M&W shares to him.

In June of 2019, family hostilities increased. Uncertain that any deal with David would be consummated, Ray contacted Santana to determine whether Santana had any interest in purchasing the seven Dunkin Donuts restaurants wholly owned by ARM (in which David had no ownership or other financial interest). Ray shared financial information with Santana concerning ARM, including its debt information, its expense information, and its restaurant sales information. Between June 18, 2019 and July 22, 2019, Ray sent five emails to Santana, each containing ARM data. In the process of sending Santana this information, Ray also transmitted information pertaining to the White Companies. The White Companies and ARM regularly commingled financial data, such that the White Companies' data was often displayed alongside ARM's data in their spreadsheets. Ray transmitted the White Companies' data both inadvertently and without intent to harm the companies.

From there, the story plateaus but never reaches a climax. Santana does not recall reviewing, or even opening, the information Ray sent him in June and July of 2019. Neither Santana nor Ray used, disclosed or benefited from any of the information in the emails. Nor did they consummate a transaction. After a few perfunctory discussions concerning ARM's Dunkin restaurants, Ray and Santana went their separate ways. Ray and Cheryl continued negotiations with David. As Plaintiffs readily admit, they incurred no loss as a result of the emails.

In June or July 2019, Brian White ("Brian"), David's son and Cheryl's brother, fished through Ray's corporate email, contacts and calendar, and located Ray's June 18, 2019 email to Santana. The email attached a spreadsheet that included ARM's debt information, but also included commingled information relating to the White Companies. Brian apprised his father, David, of the email, and David in turn apprised Cheryl of the email. When she demanded to see it, David led her to believe that it was "water over the dam." David, however, terminated Ray from M&W and locked him out of the companies' computer system.

In September 2019, David got what he wanted. David, Ray, Cheryl and M&W executed a stock purchase agreement, whereby David purchased Ray and Cheryl's M&W shares and ARM's seven Dunkin restaurants were transferred to M&W. M&W and Ray separately executed a deferred compensation agreement, whereby M&W agreed to pay Ray deferred compensation in annual installments of $125,000. This compensation was <u>not</u> for his prior services as a former M&W employee, but rather for certain consulting services to be provided by Ray during the transition of ownership provided for in the stock purchase agreement.

Only after the deal was done did David blindside Ray and Cheryl by commencing this lawsuit alleging that: (1) Ray breached a purported fiduciary duty by sending allegedly confidential information pertaining to the White Companies to Santana; (2) Ray breached an oral agreement to maintain the confidentiality of information on the "White Network," a computer data storage drive, (3) David and White Management Corp. are entitled to recover under the doctrine of promissory estoppel because they relied to their detriment on Ray's purported oral promise, and (4) Plaintiffs are entitled to an equitable accounting.

Ray owed only a fiduciary duty to <u>two</u> of the ten Plaintiffs: M&W and Plattsburgh Taco, as an employee, director and shareholder of both entities. Neither M&W nor Plattsburgh Taco can establish that Ray breached his fiduciary duty by sending emails to Santana. While Plaintiffs believe that Ray schemed to profit off the White Companies' information, there is not a scintilla of evidence supporting that theory. There is nothing to suggest that Ray intended to send the White Companies' information to Santana for any illegitimate purpose, to usurp a corporate opportunity, to inflict harm on the White Companies or David, or to personally benefit at the White Companies' expense. Even if Ray's emails to Santana were improper (they were not), Plaintiffs breach of fiduciary duty claims would still fail because they suffered no damages. Plaintiffs have repeatedly conceded that no loss resulted to any of the White Companies or David because of the emails.

To the extent Plaintiffs rely on the faithless servant doctrine to allege that Ray forfeited the pay he received from M&W under the Deferred Compensation Agreement executed long after the emails were sent, their claim fails for at least three reasons. First, Ray's actions do not rise to the level of substantial misconduct required to forfeit compensation. He did not steal, funnel business away, misappropriate information to establish a competitive advantage, or otherwise injure M&W or Plattsburgh Taco. The faithless servant doctrine is intended to deter bad faith conduct; this case simply does not fit that mold. Second, Plaintiffs cannot recast a contract claim into one for breach of fiduciary duty. The Deferred Compensation Agreement is a voluntary, arm's length agreement that David executed with full knowledge of the Santana communications. It provides that Ray can only be terminated, and lose a right to deferred compensation payments, if he is *convicted of a felony for a financial crime*. Plaintiffs cannot circumvent this contractual language to recover the deferred compensation under the guise of a tort claim. Third, Plaintiffs cannot establish proximate cause, i.e., that but for Ray's emails, M&W would not have entered into the deferred compensation agreement and remitted the deferred compensation payments. Plaintiffs were well aware of the emails months before they entered into the Deferred Compensation Agreement, but executed it anyway.

Plaintiffs' recent amendment to their complaint, which included the allegation that Ray breached his fiduciary duty by violating certain provisions in letters of intent for the stock purchase agreement, does not salvage their case. Again, Plaintiffs cannot pursue a tort claim arising from the terms of the letters of intent. Even if they could, the letters of intent only restricted the shop, assignment, transfer or encumbrance *of shares in M&W*. They did not prohibit Ray from pursuing a transaction with respect to the sale of *ARM's assets.*

For all of these reasons, and those set forth in further detail below, Ray respectfully requests that this Court him grant summary judgment dismissing this action in its entirety, with prejudice.[1]

ARGUMENT

I. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE BREACH OF FIDUCIARY DUTY CLAIMS.

"To prevail on a breach of fiduciary duty claim, the cause of action must allege the existence of a fiduciary relationship, misconduct by the [defendant] and damages directly caused by [the defendant's] misconduct" (*Loch Sheldrake Beach and Tennis Inc. v Akulich*, 141 AD3d 809, 811 [3d Dept 2016]; *see also Country Club Partners, LLC v Goldman*, 36 Misc 3d 1205(A) [Sup Ct, Albany County 2009] [Platkin, J.], *judgment entered*, [N.Y. Sup Ct 2009], *aff'd*, 79 AD3d 1389 [3d Dept 2010], and *aff'd*, 79 AD3d 1389 [3d Dept 2010]). On a motion for summary judgment, the defendant will prevail if plaintiff cannot meet at least one essential element of the claim (*Country Club Partners, LLC*, 36 Misc 3d 1205(A); *see also Park Place at Malta, LLC v Berkshire Bank*, 148 AD3d 1414, 1416 [3d Dept 2017]).

Defendant is entitled to summary judgment dismissing Plaintiffs' breach of fiduciary duty claims – Plaintiffs' first, third and fourth causes of action – because: (1) Ray did not engage in any acts of misconduct in breach of a fiduciary duty owed to the White Companies or White, (2) even if Defendant engaged in acts of misconduct, Plaintiffs have failed to demonstrate any ascertainable damages proximately caused by such acts, and (3) Plaintiffs are not entitled to recover under the

[1] The facts set forth herein are taken from the Statement of Material Facts and affidavits submitted herewith. Citations to "____ Dep. p. ___" reference deposition testimony affixed to the Nolan Affirmation.

faithless servant doctrine.

A. Plaintiffs have failed to Establish the Existence of a Fiduciary Relationship with Most of the White Companies or with David White.

"[A] fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit another upon matters within the scope of the relation" (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 592-93 [2012] [internal citation and punctuation omitted]). Where, as here, "[the parties] do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them" (*Id.*). A fiduciary relationship does not exist absent three essential elements: reliance, de facto control and dominance (*AG Capital Funding Partners, L.P. v State St. Bank and Tr. Co.*, 11 NY3d 146, 158 [2008]).

i. *The White Companies*

Ray did not owe a fiduciary duty to any of the White Companies except for M&W and Plattsburgh Taco, which are the only entities he was employed by (*see* Ray Aley Aff., Ex. J; David White Dep., pp. 18-20, p. 23, pp. 57-58). Ray had no role in White Management Corp., Log Jam of Glens Falls, Inc., Bountiful Bread, Inc., Kodiak Creamery, Inc., Norpco Restaurant, Inc., Albany-Plattsburgh United Corp.[2] or CCB Realty LLC (Ray Aley Aff., ¶ 9, Ex. J; David White Dep., pp. 18-20; Nolan Aff., Ex. R). Plaintiffs have similarly failed to establish that Ray "undertook a duty for or to give advice for the benefit" of any of the aforementioned White Companies (*see AG Capital Funding Partners, L.P.*, 11 NY3d at 158).

ii. *David White*

Ray also owed no fiduciary duty to David. In 2019, Ray was a minority shareholder of

[2] Ray worked as a restaurant manager for Albany Plattsburgh-United Corp. between 1997-1998.

M&W and Plattsburgh Taco (Ray Aley Aff., Ex. O [reciting M&W shares], Ex. R; David White Dep., p. 154). David, by contrast, was a majority shareholder in Plattsburgh Taco, and had the controlling, majority voting rights in M&W by way of the irrevocable proxy (*Id.*). Thus, *David,* as a majority shareholder in Plattsburgh Taco with majority voting rights in M&W*, owed a fiduciary duty to Ray* as a minority shareholder (*see*, *e.g.*, *O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 282 [1st Dept 2007]). It is the majority shareholders in a company who owe a fiduciary duty not to engage in bad faith or oppressive conduct toward minority shareholders (*Id.*). The only party who exhibited de facto control and dominance in this case was David, when he wielded his irrevocable proxy to quash the Santana transaction and back Ray and Cheryl into a corner, until they agreed to sell their M&W shares to him (Ray Aley Aff., ¶ 24, Ex. T; Santana Dep., pp. 76-78; Nolan Aff., Ex. T ["this is the deal, period and I am not changing anything as I have voting rights on the corporation!"]).

B. Ray Did Not Breach His Fiduciary Duty to M&W or Plattsburgh Taco.

While the officers and directors of a corporations "stand in a fiduciary relationship to the corporation and owe their undivided and unqualified loyalty to the corporation" (*Busino v Meachem*, 270 AD2d 606, 609 [3d Dept 2000]; Business Corporation Law § 717), the party asserting a breach of fiduciary duty "must do more than make allegations of unscrupulous acts," and must instead demonstrate misconduct in breach of the duty owed (*Robert I. Gluck, M.D., LLC v Kenneth M. Kamler, M.D., LLC*, 74 AD3d 1167, 1167 [2d Dept 2010]).

Plaintiffs M&W and Plattsburgh Taco cannot establish that Ray committed any acts of misconduct in breach of any duty he owed as a director of either corporation. The evidence shows that Ray transmitted ARM's financial information to Santana for the purpose of inquiring whether Santana had any interest in purchasing the seven Dunkin restaurants *wholly owned by ARM* (and not any of the restaurants owned by Plattsburgh Taco or M&W) (Ray Aley Dep., pp. 101-107; Santana Dep., pp. 24-25, pp. 83-85, p. 104; Ray Aley Aff., ¶¶ 28-51). Ray did not breach his fiduciary duties to M&W or Plattsburgh Taco by engaging in business dealings with respect to ARM, a company he wholly owned and had the right to manage (*see*, *e.g.*, *Licensing Dev. Group, Inc. v Freedman*, 184 AD2d 682, 683 [2d Dept 1992] [holding that a corporate fiduciary is permitted to engage in other business dealings that do not interfere with business of corporation, and doing so does not give rise to a breach of fiduciary duty]).

Plaintiffs have attempted to fashion their breach of fiduciary duty claim as one sounding in improper misappropriation of M&W and Plattsburgh Taco's financial information, arguing that Ray sent Santana the emails for no "legitimate business purpose," but rather to "advance his own personal interests and/or injure plaintiffs, particularly White" (Nolan Aff., Ex. E, ¶ 31). But the typical case of breach of fiduciary duty based on misappropriation occurs where the information was both *misappropriated and used illegitimately* (*contra. Fredric M. Reed & Co., Inc. v Irvine Realty Group, Inc.*, 281 AD2d 352, 352 [1st Dept 2001]; *Tsutsui v Barasch*, 67 AD3d 896, 898 [2d Dept 2009] ["[a] corporate officer breaches his or her fiduciary duty when he or she profits by trading on the basis of material inside information"]; *Miami Firefighters' Relief & Pension Fund v Icahn*, 199 AD3d 524 [1st Dept 2021] [breach of fiduciary duty claim exists where defendants use confidential information of corporation to extract personal profit and benefit]). That is not what occurred here.

Plaintiffs offer nothing more than speculation that Ray breached his fiduciary duty because he had "devious" purposes for transmitting M&W and Plattsburgh Taco's financial information to Santana (David White Dep., pp. 88-90). Such unsupported speculation cannot establish a breach of fiduciary duty (*Matter of In re Kenneth Cole Productions, Inc.*, 27 NY3d 268, 278 [2016] ["[m]ere speculation cannot support a cause of action for breach of fiduciary duty"]; *see also Silverstein v Westminster House Owners, Inc.*, 50 AD3d 257, 258 [1st Dept 2008] [shareholders' speculation that defendants engaged in acts of misconduct or self-dealing lacked an evidentiary basis and were insufficient to support claim for breach of fiduciary duty]).

There is no proof suggesting that Ray disclosed the information in the emails to injure the corporations or White or to usurp a corporate opportunity. Rather, the evidence shows that Ray *inadvertently* transmitted M&W and Plattsburgh Taco's debt information to Santana when he aimed to share ARM's information for a potential transaction with respect to ARM only (Ray Aley Dep., pp. 101-107; Ray Aley Aff., ¶¶ 36-41, ¶ 56). Ray perceived no threat, and intended none, to M&W and Plattsburgh Taco when he sent Santana weekly sales and expense information for his ARM Dunkin restaurants, which also contained information relating to M&W and Plattsburgh Taco. The weekly sales information was previously disclosed to third parties, including restaurant competitors (Ray Aley Aff., ¶¶ 42-50). Santana had also already received the expense information as the parties were discussing the potential deal for the 18 Dunkin Donuts restaurants (Santana Dep., pp. 94-99). Ray did not seek any illegitimate profit or benefit from the disclosure of Plattsburgh Taco and M&W's information, and none was ever derived by Ray or Santana. Plaintiffs admit this (Brian White Dep., pp. 100-102; David White Dep. pp. 89-91; Santana Dep. pp. 44-48, pp. 94-101).

Accordingly, Plaintiffs have failed to establish that Ray committed acts of misconduct in breach of a duty owed to M&W or Plattsburgh Taco.

C. Plaintiffs Have Failed to Establish That Ray's Actions Proximately Caused Any Damages.

Plaintiffs also cannot establish that Ray's emails to Santana proximately caused any damages. To prevail on a claim for breach of fiduciary duty, Plaintiffs are "required to establish that [they] suffered an actual, nonspeculative injury that would not have occurred but for [Ray's] conduct and that [Ray] proximately caused such injury" (*Park Place at Malta, LLC v Berkshire Bank*, 148 AD3d 1414, 1416 [3d Dept 2017]; *see also Miazga v Assaf*, 136 AD3d 1131, 1134 (3d Dept 2016); *Celauro v 4C Foods Corp.*, 187 AD3d 836 [2d Dept 2020]). Causation and actual damages are essential elements of a breach of fiduciary duty claim, the absence of which are fatal (*see Country Club Partners, LLC v Goldman*, 79 AD3d 1389, 1392 [3d Dept 2010]; *R.M. Newell Co., Inc. v Rice*, 236 AD2d 843, 844 [4th Dept 1997]). Where the plaintiff's damages are non-existent or entirely speculative, any breach of fiduciary duty claim will fail (*see Country Club Partners*, 79 AD3d at 1390-92 [affirming this Court's dismissal on summary judgment of a breach of fiduciary duty claim where the plaintiff could not establish damages arising from the defendant's use of its confidential information; the plaintiff's claimed damages in the amount of $400,000 were "entirely speculative"]).

Here, Plaintiffs claim that they have been damaged in the amount of <u>$2 million</u>, but have "provided no evidence" in support (*Id.*). Ray's emails to Santana did not result in Ray walking away from the Stock Purchase Agreement or Ray or Santana profiting off of M&W or Plattsburgh Taco's information. To the contrary, Ray executed the Stock Purchase Agreement <u>with David</u>. The White Companies also did not lose out on any transaction with Santana as a result of the emails, because David hijacked the only potential transaction that was ever pursued before the emails were sent (David White Dep., p. 114). Plaintiffs have thus conceded that they are unaware of even a penny of pecuniary loss that has resulted to White or the White Companies from the emails. As David admitted in his testimony, "there are no numbers" depicting any loss to the White Companies, he is not in possession of any evidence demonstrating such a loss, and he has not "specifically" been damaged in any way (David White Dep., pp. 118-121; Statement of Material Facts, ¶¶ 166-184 [citing portions of deposition testimony]).

Brian White, who now primarily runs the White Companies, also confirmed that no damages have been suffered, but claimed that this action is viable because "[i]t's unclear as to the extent of the damages at this point because we still don't know what exactly Aley was up to," it's "hard to say what the impact of that is going to be," and "it's premature even to kind of put a number on it" (Brian White Dep., pp. 36-44). Notwithstanding the lack of any loss that has occurred in the four years since the emails were sent, Plaintiffs believe that some impact might occur one day (Brian White Dep., pp. 36-44). Plaintiffs' rampant speculation that the White Companies or White *could* be harmed does not mean that they *have* been harmed (*see*, *e.g.*, *Matter of In re Kenneth Cole Productions, Inc.*, 27 NY3d at 279).

Thus, Plaintiffs' breach of fiduciary duty claim should be dismissed (*Celauro*, 187 AD3d at 838 ["Assuming, arguendo, that the defendants engaged in misconduct . . . plaintiffs sustained no damages"]).

D. Plaintiffs Are Not Entitled to Recover Under the Faithless Servant Doctrine.

Plaintiffs argue that they should be entitled to recover under the faithless servant doctrine by recouping Ray's compensation from M&W and Plattsburgh Taco and all of the deferred compensation paid under the Deferred Compensation Agreement (Nolan Aff., Ex. E, ¶¶ 37-45). Plaintiffs are incorrect.

"[T]he faithless servant doctrine states that an employee or agent who is faithless in the performance of his or her duties is not entitled to recover either salary or commission" (*Two Rivers Entities, LLC v Sandoval*, 192 AD3d 528, 529 [1st Dept 2021]). The doctrine is applied narrowly by New York courts, such that an employee is only liable where the defendant's conduct is "substantial, material and strikes at the very essence" of the employment relationship (*Turner v Konwenhoven*, 100 NY 115, 119 [1885]; *see also Yukos Capital S.A.R.L. v Feldman*, 977 F3d 216, 238 [2d Cir 2020] [noting that New York courts have relied on the *Turner v Konwenhoven* standard of substantiality in determining claims under the faithless servant doctrine and upholding instruction to jury that legal entities were entitled to disgorge director's compensation only if the director breached his duty of loyalty in "substantial respects"]).

New York courts have recognized that forfeiture of compensation may be appropriate under the faithless servant doctrine where "the employee has usurped a corporate opportunity or actively stolen f[rom] the employee" (*Linder v Innovative Commercial Sys. LLC*, 41 Misc 3d 1214(A) [NY Sup 2013], *aff'd,* 127 AD3d 670 [1st Dept 2015]), "funneled business away to a competitor or engaged in theft" (*Two Rivers Entities, LLC*, 192 AD3d at 529) or used misappropriated information to gain an advantage in establishing a competing business (*MidAmerica Productions, Inc. v Derke*, 33 Misc 3d 1209(A) [Sup Ct, Nassau County 2010]).

Even if an employee is found to be a faithless servant, forfeiture of compensation is limited "to compensation paid *during the time period* of disloyalty" (*Design Strategy, Inc. v Davis*, 469 F3d 284, 301 [2d Cir 2006] [emphasis in original] [applying New York law]; *Herman v Branch Motor Exp. Co.*, 67 Misc 2d 444, 446 [Civ Ct, New York County 1971] ["the law of New York does deprive a faithless servant of his right to compensation, but only for the period of his faithlessness"]).

This is not a case in which the faithless servant doctrine applies. As established above, Ray's actions did not constitute "substantial, material" misconduct necessary to justify forfeiture of any compensation. His actions simply do not comport with the type of misconduct New York courts have recognized as cutting to the essence of an employment relationship and justifying forfeiture of salary.

In any event, the sums Plaintiffs seek to have Ray forfeit are not recoverable for several reasons. First, under settled New York law, Plaintiffs cannot recast a contract-based claim into one for breach of fiduciary duty (*see Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 390 [1987]; *see also Curacao Oil N.V. v Trafigura Pte. Ltd.*, 67 Misc 3d 1235(A) [Sup Ct 2020], *affd*, 189 AD3d 404 [1st Dept 2020], *lv to appeal dismissed*, 37 NY3d 925 [2021], and *lv to appeal denied*, 37 NY3d 914 [2021]). M&W and Ray were "in the best position to allocate risk" at the time they entered into the Deferred Compensation Agreement, which was notably proposed <u>by David</u> in the June and July letters of intent (*Bocre Leasing Corp. v Gen. Motors Corp. (Allison Gas Turbine Div.)*, 84 NY2d 685, 688 [1995]). Under the Deferred Compensation Agreement, the parties agreed that Ray could be terminated only for "Cause," defined as "conviction of a felony for a financial crime such as theft or embezzlement" (*Id.*). Ray has not been convicted of a felony here for sending a handful of emails. Plaintiffs cannot circumvent the clear terms of the Deferred Compensation Agreement to create a tort claim.

Second, Plaintiffs are also not entitled to recover any payments under the Deferred Compensation Agreement because they cannot prove that "but for" Rays alleged acts of misconduct in June or July of 2019, M&W would not have agreed to pay Ray the deferred compensation under the agreement (*see Country Club Partners, LLC*, 36 Misc 3d at *7, *aff'd* 79 AD3d 1389). Plaintiffs seek to have Ray forfeit the first three deferred compensation payments he received in the amount of $375,000, plus Medicare tax in the amount of $18,545.34 accrued on the deferred compensation payments, for the total amount of $393,545.34 (Nolan Aff., Ex. L). But the sums payable under the Deferred Compensation Agreement are not susceptible to forfeiture, because they are <u>not</u> sums paid to Ray <u>as an employee</u> of M&W or Plattsburgh Taco for services rendered in June or July of 2019, when the alleged misconduct occurred. The agreement, on its face, provided that M&W would pay Ray $625,000 in exchange for Ray's provision of "consulting services to M&W Food to support the transition of the ownership as set forth in the [Stock Purchase Agreement] at the reasonable request of M&W" after his employment with M&W was terminated (Ray Aley Aff., Ex. O [emphasis added]). The first payment under the agreement became due in September 2019 upon the closing of the Stock Purchase Agreement, well after Ray sent Santana the emails (*Id.*).

Put simply, the deferred compensation was paid as a result of a voluntary, arms-length agreement that Ray entered into with M&W well after he sent the emails. There is no proof to suggest that M&W was unjustly coerced into entering into the Deferred Compensation Agreement because of the emails. And, most importantly, Plaintiffs were well aware of Ray's communications with Santana when the Stock Purchase Agreement and Deferred Compensation Agreement were executed, but never raised any issues with respect to the emails at any point prior to the closing date on either agreement (Cheryl Aley Aff., Ex. A; David White Dep., pp. 131-135). Instead, David voluntarily purchased Ray and Cheryl's shares for fair market value – including any harm that might have been incurred as a result of the emails – and became its sole shareholder.

Third, Plaintiffs also improperly seek to recover Ray's compensation as an employee of M&W that was not earned by Ray "during the time period of" the alleged "disloyalty" (*Design Strategy, Inc.*, 469 F3d at 301). Plaintiffs claim that they are entitled to forfeiture of Ray's $21,690.88 in wages "paid June 18, 2019 to August 17, 2019," comprising $3,250 in pay for the pay period ending June 22, $3,250.00 in pay for the pay period ending June 29 and $15,190.88 in bonus pay for the period January 1 through March 31, 2019 (Nolan Aff., Ex. L Interrogatories). But as Plaintiffs do not dispute, the majority of that compensation ($15,190.88) was remitted as a bonus for the first quarter of 2019, which concluded in or around March of 2019, well before the emails were even sent (Ray Aley Aff., ¶ 58, Ex. K). Plaintiffs are not permitted to recover on bonus payments earned "before any alleged unethical conduct occurred" (*Wittels v Sanford*, 137 AD3d 657, 658-59 [1st Dept 2016]). Similarly, Plaintiffs seek to recover health insurance premiums for the months of August, September and October (Nolan Aff., Ex. L). Those payments, assuming they are even recoverable under the faithless servant doctrine, are similarly outside the period of misconduct alleged by Plaintiffs and thus unrecoverable here.

E. Plaintiffs Cannot Rely on Alleged Breaches of the Letters of Intent to Support a Breach of Fiduciary Duty Claim.

Plaintiffs allege that Ray breached his fiduciary duty because his emails were "in violation of certain Letters of Intent dated June 5, 2019 and July 29, 2019 entered into by David R. White, M & W Foods, and defendant, including provisions of confidentiality, no material changes and no shop of his interest" (Nolan Aff., Ex. E Amended Complaint, ¶ 29). Plaintiffs' argument is contrary to New York law and belied by the language of the June and July letters of intent.

Like the Deferred Compensation Agreement, Plaintiffs cannot rely upon the June and July letters of intent to create a breach of fiduciary duty claim pursuant to the "well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Clark-Fitzpatrick, Inc.*, 70 NY2d at 389). "This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract" (*Fourth Branch Associates Mechanicville v Niagara Mohawk Power Corp.*, 235 Ad2d 92, 963 [3d Dept 1997]). Plaintiffs do not identify any legal duty independent of the letters of intent that was violated; instead, they merely claim that the terms of the letters of intent themselves were violated.

In any event, the plain terms of June and July letters of intent contradict Plaintiffs' assertion that they have been violated. First, Plaintiffs claim that the "No Shop" provisions in the letters were violated when Ray preliminarily discussed a potential partnership in ARM or sale of ARM's Dunkin restaurants with Santana. But the "No Shop" provisions only prohibited the shop of the "*shares*" in M&W. ARM, as a limited liability company, had no "shares" capable of being shopped (Nolan Aff., Ex. M, N Letters of Intent). Ray never discussed a sale of M&W shares with Santana when he sent the emails in June and July of 2019 (Statement of Material Facts, ¶¶ 86-127; Santana Dep., pp. 84-85; Ray Aley Dep., pp. 105-106; Ray Aley Aff., ¶¶ 30-33; Hirshon Dep., pp. 40-41).

Second, the "Lock-Up" provisions provided that Ray could not issue, sell, transfer, assign, pledge as security or otherwise encumber his M&W *shares* until the Stock Purchase Agreement was executed. It is again beyond dispute that Ray never even discussed his M&W shares with Santana (*Id.*). Third, the "Confidentiality" provisions were not violated, because Ray never made a "public statement or issue[d] a[] press release" regarding the letters of intent, nor have Plaintiffs claimed that he ever did so. In fact, Ray never even discussed the letters of intent with Santana (Santana Dep., pp. 54-55).

Finally, the "No Material Changes" provisions were not violated, because Ray's transmission of the emails did not substantially and materially alter M&W's business operations. To the extent those operations were altered, that resulted from David's freezing Ray out of the company (*see* Nolan Aff., Ex. V) and the Stock Purchase Agreement, which David voluntarily agreed to (Ray Aley Aff., Ex. O).

II. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE BREACH OF CONTRACT AND PROMISSORY ESTOPPEL CLAIMS.

"[A] cause of action for breach of contract requires that [the] plaintiff show the existence of a contract, the performance of its obligations under the contract, the failure of [the] defendant to perform its obligations and damages resulting from [the] defendant's breach" (*Daire v Sterling Ins. Co.*, 204 AD3d 1189, 1190 [3d Dept 2022] [internal citation omitted]; *see also McCormick v Favreau*, 82 AD3d 1537, 1541 [3d Dept 2011]).

In their fifth cause of action, Plaintiffs White Management Corp. and David claim that Ray breached his alleged oral agreement with them to maintain information on the White Network confidentially (Nolan Aff., Ex. E Amended Complaint, ¶ 56). Ray is entitled to summary judgment dismissing the breach of contract claim because (1) the oral agreement is barred by the statute of frauds, (2) the promissory estoppel exception does not apply, and (3) Plaintiffs cannot establish the elements of a breach of contract claim in any event.

A. The Purported Oral Agreement Is Barred by the Statute of Frauds.

"The statute of frauds was intended to prevent 'fraud in the proving of certain legal transactions particularly susceptible to deception, mistake and perjury'" (*Sheehy v Clifford Chance Rogers & Wells LLP*, 3 NY3d 554, 560 [2004]). Under General Obligations Law § 5-701(a)(1), "[e]very agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking . . . [b]y its terms is not to be performed within one year from the making thereof." Where, as here, the purported contractual obligation "continues past a one-year period," an oral promise "must be in writing to be enforceable" (*Birnbaum v Goldenberg Consulting Group, Inc.*, 201 AD3d 432, 432 [1st Dept 2022]).

In this case, Plaintiffs theory is that the purported agreement was an oral one, and that no writing ever memorialized any of the alleged terms (David White Dep., p. 25).[3] Plaintiffs claim that this agreement was "in place over the years," existed in or around 2012 or 2013 and continued through 2019 (David White Dep., pp. 24-27, pp. 42-43; Statement of Material Facts, ¶¶ 156-158 [relevant portions of deposition testimony]). Because Plaintiff's own theory is that the alleged agreement was oral and continued over the years, it is barred by the statute of frauds.

B. The Promissory Estoppel Exception Does Not Apply.

Plaintiffs White Management Corp. and David attempt to circumvent the statute of frauds by relying on the promissory estoppel exception, which provides that "[a] promise inducing reasonable reliance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise" (*In re Estate of Hennel*, 29 NY3d 487, 493 [2017] [quoting Restatement [Second] of Contracts § 139]). The promissory estoppel exception may remove a contract from the statute of frauds only where the party seeking to enforce an oral agreement would "suffer unconscionable injury if the statute of frauds were enforced" *and* the elements of promissory estoppel are satisfied (*Id.*; *see also Kaloyeros v Fort Schuyler Mgt. Corp.*, 55 Misc 3d 1082, 1089 [NY Sup 2017] [Platkin, J.], *aff'd*, 157 AD3d 1152 [3d Dept 2018]).

The standard for unconscionability entails "inequality being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense" (*Id.*; *see also Bent v St. John's Univ., New York*, 189 AD3d 973 [2d Dept 2020], *lv to appeal denied*, 38 NY3d 904 [2022]). If a party can establish unconscionable injury, the elements of promissory estoppel must also be satisfied. "The elements of promissory estoppel are a clear and unambiguous

[3] Plaintiffs admit that the only binding, written agreement of confidentiality used by White Management Corp. existed in its employee handbook, but was *never signed or executed* by Ray (David White Dep., pp. 66-69; Nolan Aff., Ex. Q; Ray Aley Dep., p. 151).

promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise" (*Odonata Ltd. v Baja 137 LLC*, 2022 NY Slip Op 04128 [1st Dept June 28, 2022]).

Plaintiffs cannot establish an unconscionable injury, because *no injury* was suffered by David or White Management Corp. as a result of the emails. David has admitted that he has not sustained a penny of loss, and no information unique to White Management Corp. – a *payroll* company that *never employed* Ray at any point – was contained in any of the emails (David White Dep., pp. 18-20; pp. 57-58; Ray Aley Aff., ¶ 12; Nolan Aff., Ex. R).

David and White Management Corp. also cannot establish the elements of promissory estoppel. Plaintiffs have no evidentiary basis to suggest a clear and unambiguous promise was ever made (*see*, *e.g.*, *Bajan Group, Inc. v Consumers Interstate Corp.*, 28 Misc 3d 1227(A) [Sup Ct, Albany County 2010] [Platkin, J.] [holding that claim for promissory estoppel was not established where there was "no proof of a clear and unambiguous promise"]). Ray unequivocally testified that he made no such promise, and Plaintiffs have no countervailing proof to establish he did (Ray Aley Dep., p. 189). David conceded that he could not recall *any* specific words communicated by Ray with respect to the alleged "promise" (David White Dep., pp. 47-48). Nor could David recall the terms of the promise, when it was made, where it was made, who was present when it was made, what David himself said at the time, and, more importantly, what Ray said at the time (David White Dep. pp. 24-31). David's equivocation on this point is patently insufficient and precisely why the statute of frauds exists – to prevent a party from claiming, without any evidentiary basis, that a binding promise was made (*Comm. to Save St. Brigid v Egan*, 30 AD3d 356, 357 [1st Dept 2006] [lack of specific promise fatal to promissory estoppel claim]). For the same reasons, Plaintiffs cannot demonstrate detrimental reliance, which requires a party to "detail the circumstances surrounding the alleged promises to a sufficient degree to establish the reasonableness of plaintiff's alleged detrimental reliance" (*Kaloyeros*, 55 Misc 3d at 1089).

Based on the foregoing, Ray is entitled to summary judgment dismissing the fifth and sixth causes of action in their entirety.

C. Plaintiffs Cannot Establish a Breach of Contract Claim.

Alternatively, Plaintiffs' breach of contract claim fails because Plaintiffs lack any evidentiary basis for an enforceable oral agreement.

i. *The Alleged Oral Agreement Is Indefinite and Unclear.*

"It is well settled that a contract must be definite in its material terms in order to be enforceable" (*Clifford R. Gray, Inc. v LeChase Const. Services, LLC*, 31 AD3d 983, 985 [3d Dept 2006]). To form an enforceable agreement, there must be a manifestation of mutual assent to definite, essential terms (*Matter of Express Indus. and Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). Indeed, this Court "cannot enforce a contract unless it is able to determine what in fact the parties have agreed to" (*Vizel v Vitale*, 184 AD3d 602, 604 [2d Dept 2020]).

This Court has no evidentiary facts sufficient to demonstrate *any* material terms of the purported oral agreement. Indeed, David is unable to substantiate any specifics of the alleged oral agreement, including:

- Where the oral agreement took place, or when it was made (beyond the fact that it continued over the years) (David White Dep., p. 28; Statement of Material Facts, ¶¶ 159-165 [relevant portions of deposition testimony]);

- The specific terms of the alleged oral agreement that were discussed, what he said during the conversation that gave rise to the oral promise, or, most importantly, what Ray said (*Id.*; *see also* David White Dep., pp. 27-29, pp. 47-48); or

- Any facts suggesting that Ray understood the terms of the agreement, or who it was even between (Statement of Material Facts, ¶¶ 159-165 [relevant portions of deposition testimony]; David White Dep., pp. 34-35).

David's vague allegations simply do not give rise to an enforceable agreement (*Hart v Windjammer Barefoot Cruises Ltd.*, 220 AD2d 252, 252-53 [1st Dept 1995] ["[i]n any event, even assuming the Statute of Frauds did not apply, the alleged agreement . . . is too vague to be capable of enforcement"]; *see also Carione v Hickey*, 133 AD3d 811, 811 [2d Dept 2015]).

ii. *The Alleged Oral Agreement Was Not Breached by Ray.*

According to David, the alleged oral agreement generally consisted of a promise to maintain the confidentiality of the White Network (David White Dep., pp. 27-29). That promise, even assuming it was made, was never breached. Ray did not improperly access or remove any information from the White Network to send it to Santana (Ray Aley Dep., pp. 117-118; Ray Aley Aff., ¶¶ 36, 42, 47). Thus, the breach, as alleged by Plaintiffs, simply did not occur.

iii. *Plaintiffs David White and White Management Corp. Have Sustained No Damages.*

Finally, David and White Management Corp. – the only Plaintiffs that allege a breach of contract claim – cannot prove that they have suffered any damages, which is fatal to their claim (*Marbax Assoc. Ltd. Partnership v Resources Prop. Imp. Corp.*, 196 AD2d 727, 728 [1st Dept 1993] [dismissing limited partnership's breach of contract claim where "no damages were sustained" as a result of alleged breach]; *Ryan Ready Mixed Concrete Corp. v Coons*, 25 AD2d 530, 530 [2d Dept 1966]; *Bear, Stearns Funding, Inc. v Interface Group-Nevada, Inc.*, 2007 WL 1988150, at *21 [SDNY July 10, 2007]). Plaintiffs' alleged damages in this case consist of Ray's compensation *paid by M&W* during June and July of 2019 and deferred compensation *paid by*

M&W. That compensation was not paid by David or White Management Corp. (*Natl. Mkt. Share, Inc. v Sterling Nat. Bank*, 392 F3d 520, 525 [2d Cir 2004] ["a plaintiff must prove that a defendant's breach *directly and proximately caused* his or her damages"] [applying New York law] [emphasis in original]).

Thus, summary judgment should be granted dismissing Plaintiffs' breach of contract claim.

III. DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT DISMISSING THE CLAIMS FOR AN ACCOUNTING.

The equitable remedy of an accounting "is designed to require a person in possession of financial records to produce them, demonstrate how money was expended and return pilfered funds in his or her possession" (*Roslyn Union Free School Dist. v Barkan*, 16 NY3d 643, 653 [2011]). The elements of such a claim include "a fiduciary or confidential relationship" and "money entrusted to the defendant imposing the burden of an accounting" (*Metro. Bank & Tr. Co. v Lopez*, 189 AD3d 443, 446 [1st Dept 2020]).

Here, Plaintiffs have not alleged that they entrusted money to Ray that was pilfered, such that he may be ordered to turn over financial records for purposes of conducting an accounting. And, in any event, their claim for an accounting should be rejected for lack of a fiduciary relationship for the reasons more fully outlined in Point I *supra.*

CONCLUSION

Defendant Ray Aley respectfully requests that this Court grant his motion for summary judgment in its entirety.

Dated: July 21, 2022
Albany, New York

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CERTIFICATION OF COMPLIANCE WITH UNIFORM CIVIL RULE 202.8-b

I hereby certify the foregoing Memorandum of Law in Support of Summary Judgment, exclusive of caption and signature block, comprises 6,984 words, and thus complies with Uniform Civil Rule 202.8-b.

Dated: July 21, 2022

WILLIAM S. NOLAN