UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LOKESH MELWANI and CANTAL TRADE LTD,

Plaintiffs,

-against-

HUNTER LIPTON, EAGLE POINT FINANCIAL LLC, and MDF HOLDINGS LLC

Defendants.

Civil Action
No. 17-CV-8308 (PGG)

DEFENDANTS EAGLE POINT FINANCIAL LLC AND MDF HOLDINGS LLC's MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF THE THIRD AMENDED COMPLAINT

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Defendants EAGLE POINT FINANCIAL LLC and MDF HOLDINGS LLC ("Defendants") submit this Memorandum of Law in Support of their Motion for Summary Judgment against the Third Amended Complaint ("TAC") of Plaintiffs LOKESH MELWANI and CANTAL TRADE LTD., pursuant to Rules 56 and 17 of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Plaintiffs commenced a nondischargeability action against Hunter Lipton in the United States Bankruptcy Court, District of Nevada, for fraud and at the same time suing an innocent party solely on the basis of what the alleged fraudster told them. Moreover, Plaintiffs are not even pursuing the alleged fraudster himself – they recently withdrew their adversary proceeding against Mr. Lipton in his Nevada bankruptcy case, and have been sanctioned by the Court there for discovery abuses.

The Nevada Bankruptcy Court held: "IT IS HEREBY ORDERED that the Motion [for sanctions] is granted, in part, as follows: Plaintiffs [Melwani and Cantal] shall remit the amount of $12,847.45 to Garman Turner Gordon, as counsel for Debtor [Lipton], representing monetary sanctions" for their discovery misconduct, as well as apparently giving false testimony in answers to Requests for Admission. *Melwani and Cantal Trade LTD. v. Lipton*, Case No.: BK-S-19-13898-ABL (D.Nv.Bk.)(1/13/22)(ECF Doc. 90)[1] As Lipton argued before the Nevada Bankruptcy Court, successfully, "Mr. Melwani testified in the New York Case to certain facts regarding the part of his claim there that is identical to his claim here." (D.Nv. ECF Doc. 85) However, through his responses to the Requests for Admissions, he has done just the opposite

[1] Pursuant to FRE 201(b), Defendants request that this Court take judicial notice of the Nevada Bankruptcy Order, which is a public record. A true and correct copy of the Bankruptcy Order is attached heretoto as **Exhibit "A"**.

and contradicted his sworn testimony (in the New York Case). Here, Plaintiffs have abused the Courts to an even greater extent: Plaintiffs' testimony having contradicted their own Third Amended Complaint, and having knowingly sued MDF only because it: i) had employed Mr. Lipton, and ii) Plaintiffs speculation that MDF had deep pockets.

RELEVANT PROCEDURAL BACKGROUND

The procedural history of this case stretches back to 2017 and requires no summarization here, it is respectfully submitted, to determine Defendants' instant motion. The relevant history begins on October 5, 2018, when Plaintiffs filed their Second Amended Complaint ("SAC"). (ECF Doc. 51)[2] The SAC pled claims for (1) breach of contract against Lipton and Eagle Point; (2) unjust enrichment against MDF; (3) fraud against Lipton; and (4) a conversion claim against all Defendants. (SAC, ¶¶ 26-60) This case was reassigned to Your Honor on October 29, 2018.

On February 5, 2019, Defendants moved to dismiss the SAC. (ECF Doc. 72) On July 19, 2019, Defendants notified this Court that Defendant Lipton had filed a bankruptcy petition in the United States Bankruptcy Court for the District of Nevada. (ECF Doc. 80) Accordingly, on August 20, 2019, the Court stayed this matter as to Lipton pursuant to 11 U.S.C. § 362(a)(1), but not as to the remaining co-Defendants. (ECF Doc. 82)

On September 20, 2019, the Court granted Defendants' motion to dismiss Plaintiffs' conversion claim. The Court also granted Defendants' motion to dismiss Plaintiffs' claims against MDF to the extent that those claims were premised on a theory that MDF is a successor-in-interest to Eagle Point. (ECF Doc. 86)

[2] In this Motion, all references to "ECF No." are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court.

Plaintiffs then made a motion for leave to file a Third Amended Complaint ("TAC"). When granted, Plaintiffs added a claim for aiding and abetting breach of fiduciary duty against Defendant MDF. (ECF Doc. 98)

On August 20, 2020 Plaintiffs served their Third Amended Complaint ("TAC") (ECF Doc. 111) The TAC included one claim against Eagle Point, for Breach of Contract, and two against MDF, for Unjust Enrichment (since withdrawn) and Aiding and Abetting Breach of Fiduciary Duty. While this Court previously had issued an Order that, "by May 7, 2018, Plaintiffs shall submit to the Court the e-mails that constitute the alleged contract at issue in this case," (ECF Doc. 32), the TAC did not attach those e-mails as exhibits.

RELEVANT FACTUAL BACKGROUND

In the TAC, Plaintiffs Lokesh Melwani ("Melwani") and Cantal Trade Ltd. ("Cantal") allege that they co-own their interest Eagle Point Financial LLC, "of which Plaintiffs own a 32.5 percent interest." (Declaration of Thomas M. Mullaney, dated February 28, 2022 ("Mullaney Decl."), ¶ 2, attaching as Exhibit 1 Plaintiffs' "TAC", ¶ 1) Plaintiffs allege that they collectively paid $300,000 for that interest in Defendant Eagle Point Financial LLC ("Eagle Point"). (Id. ¶ 18) Only Cantal remitted funds to Eagle Point, however. (Mullaney Decl., ¶ 7, attaching as Ex. 5, "Debit Advices" from Union Bancaire Privee, UBP SA to Cantal Trade Ltd.; Rule 56.1(a) Statement of Undisputed Material Facts ("Rule 56.1 Stmt."), ¶ 1)

Plaintiff Melwani resides in London, England, and Plaintiff Cantal is a British Virgin Islands company allegedly "wholly owned and operated by Melwani." (Mullaney Decl., Ex. 1, TAC, ¶¶ 3-4, 13) Defendant Lipton was alleged to be citizen of New York. (Id. ¶ 14) Defendant Eagle Point is a New York limited liability company with its principal place of business formerly in New York. (Id. ¶ 15) Defendant MDF is a Nevada limited liability company. (Id. ¶ 16) The

TAC alleges, incorrectly, that "MDF was 'created or founded by' Lipton, and Lipton is the 'chief or sole manager, owner[,] or operating agent' of MDF." (Id. ¶¶ 24, 28)

It is alleged that in "mid-2010" Melwani, Cantal, Lipton, and Eagle Point "entered into an agreement whereby Plaintiffs purchased a 32.5 percent equity stake in [Eagle Point] . . . in the amount of $300,000[.]" (Id. ¶ 18) The TAC alleges that on July 27, 2011, Lipton "sold, transferred, or otherwise disposed of [Eagle Point] to a third party" for $1.2 million. (Id. ¶¶ 21-22;)) In fact, Eagle Point sold its assets to Blue Pay Processing. (Mullaney Decl., ¶ 3, attaching as Ex. 2 Plaintiffs' e-mail-string Contract, at 20-21; Rule 56.1 Stmt., ¶ 3). According to Plaintiffs, Lipton breached his fiduciary duty by misappropriating the proceeds of the sale of Eagle Point so that GLS/MDF could use those proceeds to complete the purchase of Telecomcia. (Mullaney Decl., Ex. 1, TAC, ¶¶ 23, 62)

The TAC does not include a cause of action for Breach of Fiduciary Duty against any Defendant. (See id.; Rule 56.1 Stmt., ¶ 4) The text of the claim for Aiding and Abetting Breach of Fiduciary Duty does not assert that Eagle Point had a fiduciary duty to Plaintiff(s). (Id.) Plaintiffs, on August 25, 2021, withdrew its Unjust Enrichment claim against MDF. (ECF Doc. 148)

Plaintiffs further allege that MDF knew of Mr. Lipton's alleged breach, by virtue of MDF being owned or controlled by Lipton. (Mullaney Decl., Ex. 1, TAC ¶ 63; Rule 56.1 Stmt., ¶5).

Plaintiffs have testified that they have absolutely no reason to dispute any of the October 16, 2020 Declaration of Harvey Berg ("Berg Decl."), re-submitted herewith with exhibits attached. (Mullaney Decl., ¶ 4, attaching as Exhibit 3 relevant excerpts of Transcript of the Deposition of Melwani/Cantal, Cont'd, dated April 9, 2021 ("Pls' Tr."), p. 341, li.13 – p.348, li.9; Rule 56.1 Stmt., ¶ 6). Mr. Berg had averred: "From inception, Feinberg had ultimate control

of MDF as he and Gotham owned all of MDF's member units that had voting or approval rights. Lipton's ownership was of exclusively non-voting shares." (Berg Decl., ¶ 14; Rule 56.1 Stmt., ¶ 7) Gotham Enterprises & Affiliated, LLC ("Gotham") was Mr. Feinberg's company, and he was its managing member. (Berg Decl., ¶ 25)

Mr. Berg averred to the facts and sequence of events surrounding the capitalization of MDF and its predecessor company GLS, (Id., ¶ 24-33, attaching Exs. B-E, ¶ 72; Rule 56.1 Stmt., ¶¶ 35-46), none of which Plaintiffs have disputed in their depositions, or since. Plaintiffs have declined to take the deposition of either Mr. Berg or MDF, and also have declined to depose Eagle Point, or subpoena and/or depose Mr. Feinberg, or any other third-party. (Mullaney Decl., ¶ 5, R.56 Stmt., ¶ 9)

ARGUMENT

Standard for Motion for Summary Judgment

The applicable standard for a Court's determination of a motion for summary judgment is well-established. "Summary judgment may be granted only where there is no genuine issue as to any material fact and the moving party ... is entitled to a judgment as a matter of law. Fed.R.Civ.P. 56(c); *Peter Mayer Publishers Inc. v. Shilovskaya*, No. 12 CIV. 8867 (PGG) (HBP), 2015 WL 1408830, at *5 (S.D.N.Y. Mar. 27, 2015) In ruling on a motion for summary judgment, a court must of course resolve all ambiguities and draw all factual inferences in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). To grant the motion, the court must determine that there is no genuine issue of material fact to be tried. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

A genuine factual issue derives from the "evidence [being] such that a reasonable jury could return a verdict for the nonmoving party." *Anderson,* 477 U.S. at 248, 106 S.Ct. 2505. The nonmoving party cannot defeat summary judgment by "simply show[ing] that there is some metaphysical doubt as to the material facts," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), or by a factual argument based on "conjecture or surmise," *Bryant v. Maffucci,* 923 F.2d 979, 982 (2d Cir.1991).

The Court of Appeals for the Second Circuit has further explained that: "[I]n determining whether the moving party has met [its] burden of showing the absence of a genuine issue for trial, the district court may not rely solely on the statement of undisputed facts contained in the moving party's Rule 56.1 statement. It must be satisfied that the citation to evidence in the record supports the assertion[s]." *Vt. Teddy Bear Co. v. 1–800 Beargram Co.,* 373 F.3d 241, 244 (2d Cir.2004); *see also Giannullo v. City of New York,* 322 F.3d 139, 140 (2d Cir.2003); *Holtz v. Rockefeller & Co., supra,* 258 F.3d at 74 "[] a Local Rule 56.1 statement is not itself a vehicle for making factual assertions that are otherwise unsupported in the record.").

As this Court has also held: "'[W]here the non[-]moving party will bear the burden of proof at trial, Rule 56 permits the moving party to point to an absence of evidence to support an essential element of the non[-]moving party's claim.'" *Bolling v. City of New York*, No. 18 CIV 5406(PGG)(RWL), 2021WL961758, at *4–5 (S.D.N.Y. Mar. 15, 2021)(internal citations omitted).

A. AIDING AND ABETTING BREACH OF FIDUCIARY DUTY CLAIM FAILS

1. Lipton Was Never The Sole Owner Nor Controller At MDF

As Your Honor opined on August 12, 2020 when permitting the Third Amended Complaint, the elements in New York of aiding and abetting a breach of fiduciary duty are: (1)

"a breach by a fiduciary of obligations to another," (2) "that the defendant knowingly induced or participated in the breach," and (3) "that plaintiff suffered damage as a result of the breach." *In re Platinum-Beechwood Litig.*, 400 F. Supp. 3d 2, 5 (S.D.N.Y. 2019); *citing In re Sharp Int'l Corp.*, 403 F.3d 43 (2d Cir. 2005); *see also Lerner v. Fleet Bank, N.A.,* 459 F.3d 273, 294 (2d Cir. 2006).

The TAC alleges "MDF Holdings LLC had knowledge of Hunter Lipton's breach of fiduciary duty by virtue of Hunter Lipton being the owner of MDF Holdings LLC." (Mullaney Decl., Ex. 1, TAC, ¶ 63) It has been held in this case previously that, potentially, the law may find that "Lipton's knowledge is imputed to MDF [] by virtue of his ownership of and control over MDF." (See Order of The Hon. Paul G. Gardephe, dated August 12, 2020 ("Aug. 12 Order") at 4; *citing S.E.C. v. Ballesteros Franco*, 253 F.Supp.2d 720, 728 (S.D.N.Y. 2003)(analogizing to agency law where actions of agent, within the scope of his or her agency, are imputed to corporation) For this imputation theory to succeed, however, Mr. Lipton would have to be acting within the scope of his employment at MDF, or exert control so complete over MDF that it became the "corporate embodiment" of Mr. Lipton. *S.E.C. v. Manor Nursing Centers, Inc.,* 458 F.2d 1082 (2d Cir.1972); *See also In re Parmalat Sec. Litig.*, 383 F.Supp.2d 587, 597 (S.D.N.Y. 2005)("the acts performed and the knowledge acquired by a corporate officer or agent are imputed to the corporation where the officer or agent was acting within the scope of his or her employment."); *Franco,* 253 F. Supp. 2d at 728.

The evidence that Mr. Lipton neither owned nor controlled MDF is uncontroverted. (Berg Decl., ¶¶ 14-19, ¶¶ 22-33; Exs. A-E; Rule 56.1 Stmt., ¶¶ 27-31; 34-46) In fact, the evidence given by Plaintiffs themselves demonstrates that Mr. Lipton neither owned nor

controlled MDF. For example, Plaintiffs testified unambiguously at their depositions that paragraph 28 of the TAC, which alleges that MDF was owned by Lipton, was false.

Mr. Melwani testified that "Hunter Lipton personally owned 29 percent [of MDF] is what I said." (Mullaney Decl., Ex. 3, Pls' Tr., p.142, li 20-22.) Plaintiffs had also testified that they believed that Mr. Feinberg was the majority shareholder of MDF, owning about 75% of it. (Id., p.94, li.7 – p.95, li.11) The TAC, however, reads that "MDF [] had knowledge of Hunter Lipton's breach of fiduciary duty by virtue of Hunter Lipton being the owner of MDF[.]" (Mullaney Decl., Ex. 1, TAC, ¶ 64). That is false, and willfully so.

Plaintiffs' other testimony further demonstrates the falsehood of the allegation that Mr. Lipton owned MDF. For example, Mr. Melwani plainly testified that the "Lipton family" (including Herb Feinberg) owned MDF, a telephonic marketing company:

7· Q.· · ·Mr. Melwani, what do you know ·
8· about MDF Holdings?
9· A.· · ·MDF Holdings, I believe, is a
10· company that controls 1-800 numbers and a
11· lead generation company.
12· Q.· · ·Is that all you know about it?
13· A.· · ·I know it was owned by the Lipton
14· family.·

(Mullaney Decl., Ex. 3, Pls' Tr., p.29, li.7-14; see also Berg Decl., ¶25)

Melwani's testimony, when asked specifically about paragraph 63 of the TAC, continued,

17· ·Q.· · ·"MDF Holdings LLC had knowledge
18· ·of Hunter Lipton's breach of fiduciary duty
19· ·by virtue of Hunter Lipton being the owner of
20· ·MDF Holdings LLC."
21· ·Did I read that correctly?
22· ·A.· · ·Yes.
23· ·Q.· · ·Do you want to leave that
24· ·sentence, that paragraph unchanged as you sit
25· ·here today?

(Mullaney Decl., Ex. 3, Pls' Tr., p.147, li.17-25)

MR. RAO:· Objection.· Calls for ·
3· ·speculation. ·
4· ·A.· · ·I mean, yeah, Hunter was the main ·
5· ·person at MDF. ·
6· ·Q.· · ·So this is still true, paragraph ·
7· ·63 is true? ·
8· ·A.· · ·Yes, and I know they had ·
9· ·knowledge that he owed me the money, both
10·Tara and Herb, who were the other owners

(Id., p.148, li.2-10)

Plaintiffs purported rationale maintaining this falsehood as true in the TAC is frivolous, it is respectfully submitted. Plaintiffs continue to assert that Mr. Lipton was still MDF's "sole owner," even if MDF was actually co-owned by others in the so-called "Lipton family," such as: i) Mr. Herb Feinberg, Mr. Lipton's former father-in-law and the funding source of MDF, ii) perhaps Mr. Feinberg's widow, Mrs. Feinberg (if ownership of shares passed to her upon Mr. Feinberg's demise), iii) Mr. Lipton's ex-wife, Tara Gordon Lipton, and/or iv) any trusts of the Lipton's children that may hold such shares.

Melwani explained that despite these majority, co-owners, Mr. Lipton was something called "the sole, main owner" of MDF, (Id., p.140, li.9-25), or the "main person" at MDF (Id., p.149, li.4-8) Plaintiffs have refused to correct this false allegation in their TAC, but instead pursue MDF because "someone" in the "Lipton family," as he defines it, "owes me money."

15· ·Q.· · ·Did you ask Tara to get her
16· ·father to pay you the money?
17· ·A.· · ·Anyone.· They had the means.
18· ·Q.· · ·Do you think the children's
19· ·trusts, do they owe you money?
20· ·MR. RAO:· Objection, calls for
21· ·speculation.
22· ·A.· · ·Whomever it was, the family
23· ·benefited from me putting in this money. ·
Q.· ·So, yes, the children's trusts
25· ·owe you money? ·

4· · A.· · ·I don't know, but someone owes me ·
5· · money. ·

(Id., p.136, li.13-p.137, li.13) MDF was named as a defendant only because it was owned by the wealthy Mr. Feinberg, whereas Eagle Point was broke, and according to Plaintiffs the sins of the son-in-law should be vested on the father-in-law.

Q.·Yeah.· Is it your intent to write
2· ·here in this sentence, the last sentence in ·
3· ·paragraph 7, that because it was known that ·
4· ·Eagle Point didn't have any more assets, ·
5· ·therefore, MDF owed you money? ·
6· ·MR. RAO:· Objection. ·
7· ·Mischaracterizes contents of the document.
·8· A.· · ·Yes, Hunter Lipton and MDF owed ·
9· ·me money.

(Id., p.230, li.25-p.231, li.9)

Moreover, the TAC suffers from other false allegations. For example, Plaintiffs admitted that Hunter Lipton never was, and did not "remain the chief or sole manager, [] or operating agent of defendant MDF[.]" Instead, Mr. Melwani testified that at the time he or Cantal was asked to invest in MDF he "actually thought [Lisa Broderick] was the officer of MDF." (Id., p.44, li.15-16.) He then continued that "for all I know she could be" the CEO still. (Id., p.46, li. 6-10)

There is no genuine issue of material fact that Mr. Feinberg was the managing member of Gotham Enterprises, LLC and controlled Gotham during the time of alleged conduct asserted by Plaintiffs in their TAC. (Berg Decl., ¶¶ 14, 23; Rule 56.1 Stmt., ¶¶ 7, 27) After Mr. Feinberg and Gotham provided the funds to purchase the assets, MDF was formed and commenced operations in 2011. (Berg Decl., ¶ 21; Rule 56.1 Stmt., ¶ 34) Almost from inception of the creation of MDF, Mr. Feinberg was the majority owner of MDF because Mr. Feinberg and Gotham owned all of MDF's member units that had voting or approval rights according to the MDF Amended and

Restated Operating Agreement dated September 23, 2013 as follows (Berg Decl., ¶ 14; Rule 56.1 Stmt, ¶ 27):

MEMBERS AND TYPES OF SHARES	NUMBER OF UNITS	PERCENTAGE INTEREST
Class A Members (voting shares)		
Herb Feinberg	110,000	11%
Gotham	400,000	40%
Class A Subtotal:	**510,000 Units**	**51%**
Class A-1 Members (non-voting shares)		
Hunter Lipton	250,000	25%
Class A-1 Subtotal:	**250,000 Units**	**25%**
Class B Members (non-voting shares)		
Reserved but Unissued Profits Interests	145,000	14.5%
Class B Subtotal:	**145,000 Units**	**14.5%**
Class C Members (non-voting shares)		
Harvey Berg	25,000	2.5%
David Leone	25,000	2.5%
Tanner Canyon II Trust	25,000	2.5%
Ed Hines	20,000	2.0%
Class C Subtotal	**95,000 Units**	**9.5%**
TOTAL	**1,000,000 Units**	**100%**

According to MDF's Amended and Restated Operating Agreement dated September 23, 2013, Mr. Feinberg was MDF's Manager. (Berg Decl., ¶ 34; Rule 56.1 Stmt., ¶ 47) Plaintiffs have failed to rebut the evidence and have wholly failed to demonstrate Mr. Lipton's control by way of voting rights, which were always exclusively held by Mr. Feinberg before and after the operative the events occurred as alleged in the TAC.

The TAC thus indisputably bases its aiding and abetting breach of fiduciary duty claim on knowingly false allegations. The evidence is irrefutable that Mr. Lipton neither owned a controlling share, nor had any voting rights whatsoever, nor controlled MDF – being the "main person" or the son-in-law of the 79% owner does not equal being the "sole owner." Accordingly, Mr. Lipton's knowledge should not be imputed to MDF. Instead, consequences should be visited on Plaintiffs for deliberately dragging MDF, a stranger to the conduct alleged in this case, through years of unnecessary and costly litigation.

2. MDF Provided No Substantial Assistance

Additionally, Plaintiffs' aiding and abetting claim fails on an additional ground. Plaintiffs simply fail to point to any MDF participation or aid, substantial or otherwise, given to Mr. Lipton in his alleged breach of fiduciary duty. "One participates in a fiduciary's breach if he or she affirmatively assists, helps conceal, or by virtue of failing to act when required to do so, enables it to proceed." *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 281–82 (2d Cir. 1992); *citing Newberger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1074 (2d Cir.1977), *cert. denied*, 434 U.S. 1035, 98 S.Ct. 769, 54 L.Ed.2d 782 (1978).

"MDF Holdings LLC substantially assisted Hunter Lipton in his breach of fiduciary duty by, inter alia, serving as the vehicle through which Hunter Lipton was able to breach his fiduciary duties." (Mullaney Decl., ¶ 2, Ex. 1, TAC ¶ 64) Plaintiffs fail to produce any evidence demonstrating how MDF acted as such a vehicle, except, and exclusively, that because Mr. Lipton occasionally used an MDF e-mail account to send correspondence to Mr. Melwani, liability should attach.

The last two pages of those e-mails, however, constitute settlement discussions, and so are inadmissible. (Mullaney Decl., ¶ 4, Ex. 3, Email string contract, at 20-21) Rule 408

generally prohibits the introduction of evidence regarding offers of compromise or settlement when the evidence is offered "to provide liability for, invalidity of, or amount of a claim that was disputed as to validity or amount." FED. R. EVID. 408(a); *Faulkner v. Arista Recs. LLC*, 797 F. Supp. 2d 299, 316 (S.D.N.Y. 2011)

But even presuming the admissibility of those e-mails, MDF should not be liable for Mr. Lipton's alleged personal (or Eagle Point's) misconduct only because he used MDF's e-mail account – that would be the internet version of shooting the messenger. Otherwise, Verizon or PacTel would be liable, as they "facilitated" the e-mail traffic amongst the parties.

In any event, Plaintiffs fail to show how receipt of these e-mails injured them. The TAC alleges that "MDF Holdings LLC compounded its assistance by helping to conceal Hunter Lipton's breach by falsely assuring Plaintiffs that they would be repaid for their investment, and advising Hunter Lipton as to how best forestall any need to make such repayment." (Mullaney Decl., Ex. 1, TAC ¶ 66) This allegation fails on its face, for multiple reasons. First, what is being alleged are not concealments of a breach, instead these "assurances" (if they are deemed admissible, as they comprise settlement discussions) are acknowledgements of liability of Mr. Lipton.

Next, there is no evidence whatsoever, admissible or otherwise, that unnamed persons at MDF gave advice to Mr. Lipton on forestalling, or avoiding, or minimizing such a liability. Mr. Lipton cannot aid and abet himself, if that is what Plaintiffs are arguing here. *See Volvo N. Am. Corp. v. Men's Int'l Pro. Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1988)("it is legally impossible to conspire with oneself"); *citing United States v. Gisehaltz,* 278 F.Supp. 434, 437 (S.D.N.Y.1967). Plaintiffs' speculation that Mr. Lipton took Eagle Point proceeds to invest in MDF is wholly refuted by Mr. Berg's uncontroverted declaration, and exhibits.

As far as affirmative acts, "[a] person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator." *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 294 (2d Cir. 2006) In this Circuit, the test of whether the aid rendered was "enough" to warrant the imposition of liability is essentially a proximate cause inquiry. *See Edwards & Hanly v. Wells Fargo Securities Clearance Corp.*, 602 F.2d 478, 484 (2d Cir.1979), *cert. denied,* 444 U.S. 1045, 100 S.Ct. 734, 62 L.Ed.2d 731 (1980). "Thus, though but for causation is not sufficient, liability may attach for acts or omissions that are a substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence." *Diduck*, 974 F.2d at 284, *citing Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23–24 (2d Cir.1990). Plaintiffs can point to nothing that MDF did, or failed to do, that enabled Mr. Lipton's alleged breach to proceed to any degree, or caused any injury to Plaintiffs, whatsoever.

Moreover, if Plaintiffs are proceeding on a liability-by-omission theory against MDF, that too fails. "The inaction of an aider and abettor is actionable only when the aider and abettor has an affirmative duty to act or has a fiduciary duty to the plaintiff[,]" *See In re Platinum-Beechwood Litig.*, 400 F.Supp.3d at 3. Plaintiffs do not allege any such duty was owed to them by MDF. Nor did they adduce any evidence of such a duty, as they declined to take any depositions of MDF, or anyone else, in pre-trial discovery.

By contrast, the depositions of Plaintiffs revealed ample evidence of the utter meritlessness of their claims. Another such excerpt is found below:

23 ·Q.· · ·So because Eagle Point doesn't
24 ·have any money, you're looking for other
25 ·places to get your pay out?
2· ·MR. RAO:· Objection, ·
3· mischaracterizes prior testimony. ·
4· ·A.· · ·Controlled by the same person. ·

5· ·Q.· · ·Mr. Feinberg?·
6· ·A.· · ·Or Mr. Lipton.·
7· ·Q.· · ·Or Mr. Lipton did you say?·
8· ·A.· · ·Yeah.

(Mullaney Decl., Ex. 3, Pls' Tr. p.163, li.23-p.164, li.8)

B. MELWANI'S CLAIMS FAIL FOR LACK OF RULE 17 STANDING

Rule 17(a)(1) of the Federal Rules of Civil Procedure provides that an action must be prosecuted in the name of the "real party in interest." As Courts have explained, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin,* 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) That, however, is what Mr. Melwani is attempting to do; assert Cantal's legal rights as if they were his.

Permitting that would defeat the very purpose of Rule 17, which is to "protect the defendant against a subsequent action by the party actually entitled to recover." *House of Eur. Funding I Ltd. v. Wells Fargo Bank*, No. 13-CV-519 RJS, 2015 WL 5190432, at *2 (S.D.N.Y. Sept. 4, 2015); *citing Wiwa v. Royal Dutch Petroleum Co.,* No. 96–cv–8386 (KMW), 2009 WL 464946, at *10 (S.D.N.Y. Feb. 25, 2009) (quoting FED.R.CIV.P. 17 advisory committee's note to 1966 amendment).

Plaintiff Melwani and Plaintiff Cantal should not then be treated as interchangeable. As a general matter, shareholders in New York corporations may not sue third parties directly for harms those third parties have caused to a corporation. *Salomon v. Burr Manor Ests., Inc.*, 769 F. Supp. 2d 83, 91 (E.D.N.Y. 2011); *See, e.g., Solutia Inc. v. FMC Corp.,* 385 F.Supp.2d 324, 331 (S.D.N.Y.2005) (*citing Abrams v. Donati,* 66 N.Y.2d 951, 953, 498 N.Y.S.2d 782, 489 N.E.2d 751 (1985) as stating that "[f]or a wrong against a corporation a shareholder has no individual

cause of action, though he loses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation.").

It is undisputed that Cantal invested all of the disputed funds into Eagle Point. Eagle Point has previously stipulated that it had a contract concerning this investment with Cantal. No assignments of rights or ownership of shares or membership interests has been executed by Cantal in Melwani's favor.

Cantal may well have other investors, or owners, or creditors (Melwani has never demonstrated the source of Cantal's $300,000.00 investment in the first place) who have claim to those funds, who may show up someday alleging they had the right to act for Cantal and Melwani did not. And Melwani would not be prejudiced if he were dismissed and Cantal remained as sole Plaintiff – if he really is the sole owner of Cantal and controls its bank account he could send Cantal funds to himself at will, and not be subject to any restrictions in Cantal's governing document relating to other owners.

1. Without The Cantal/Eagle Point E-Mail Contract, There Is No Enforceable Contract

As this Court has discussed previously, "the SAC and the 2010 emails do not demonstrate that Melwani did not invest in Eagle Point. Here, although both sides contend that an enforceable contract exists, it is not entirely clear to the Court that a valid contract exists. Even if a valid contract exists, it is not clear who the parties to that contract are. The 2010 emails are vague and unspecific as to a variety of points. The 2010 emails do not explicitly state that Melwani is investing in Eagle Point, and they contain no mention of Cantal - an entity that both Plaintiffs and Defendants agree was a party to the contract. Accordingly, based on the 2010 emails, the Court cannot conclude that there was a "manifestation of mutual assent" that reflected

true agreement on "all material terms." (See Opinion and Order of The Hon. Paul G. Gardephe, dated September 20, 2019 ("Sept. 20 Op.") at 14).

According to Second Circuit, Southern District and New York State precedent, if there was no meeting of the minds and agreement as to identity of the parties, then there is no contract at all, and the breach of contract claim must be dismissed.

The formation of a contract requires "an offer, acceptance, consideration, mutual assent and intent to be bound." *Prince of Peace Enterprises, Inc. v. Top Quality Food Mkt., LLC*, 760 F. Supp. 2d 384, 397 (S.D.N.Y. 2011), *adhered to on denial of reconsideration*, No. 07 CIV. 00349 (RJH)(FM) 2011 WL 650799 (S.D.N.Y. Mar. 14, 2011) Parties typically are not bound to a contract which was not fully executed, which itself indicates a lack of a meeting of the minds. *Yenom Corp. v. 155 Wooster Street, Inc.*, 23 A.D. 3d 259 (1st Dept 2005); *Trieste Grp. LLC v. Ark Fifth Ave. Corp.*, 21 Misc. 3d 1142(A), 880 N.Y.S.2d 227 (Sup. Ct. 2006)

Mutual assent, of course, requires "a meeting of the minds of the parties, and, if there is no meeting of the minds on all essential terms, there is no contract." *Id. See also Kelly Asphalt Block Co. v. Barber Asphalt Pav. Co.*, 211 N.Y. 68, 70, 105 N.E. 88, 89. Indeed, "[i]f the Court finds substantial ambiguity regarding whether both parties have mutually assented to all material terms, then the Court can neither find, nor enforce, a contract." *Schurr v. Austin Galleries of Illinois, Inc.*, 719 F.2d 571, 576 (2d Cir.1983).

This rule is strictly adhered to in New York. "When the parties understand the relevant language [in a document] differently and both understandings are reasonable, the contract will be unenforceable as no meeting of the minds has occurred." *Computer Assocs. Int'l Inc. v. U.S. Balloon Mfg. Co.*, 10 A.D.3d 699, 782 N.Y.S.2d 117, 119 (1st Dept. 2004). Moreover, "[e]ven if the parties intend to be bound by a contract, it is unenforceable if there is no meeting of the

minds, *i.e.*, if the parties understand the contract's material terms differently." *Prince of Peace*, 760 F. Supp. 2d at 398.

C. STATUTE OF LIMITATIONS BARS REMAINING CLAIM AGAINST MDF

Additionally, the TAC should be dismissed because the statute of limitations precludes the aiding and abetting claim against MDF under Nevada law, where MDF is incorporated. (Mullaney Decl., Ex. 1, TAC, ¶ 16) Nevada law should apply on the statute of limitations issue, as the Court has already held. (See Sept. 20 Order at 9, n.9)

Defendant MDF is incorporated in Nevada and its primary place of business is likewise in Nevada -- as Plaintiffs must concede, given their participation along with MDF in Mr. Lipton's bankruptcy proceeding in Nevada. Id. Plaintiffs are either in London, England, or the British Virgin Islands. (Id.; TAC ¶¶ 12, 13) Plaintiffs offer no reason to apply New York law in their Memorandum of Law in Support of the Motion to Amend.

In Nevada, with regard to the aiding and abetting the breach of fiduciary duty claim, a Court properly applies the three-year limitations period provided by Nev.Rev.Stat. Ann. § 11.190(3)(d). *USACM Liquidating Tr. v. Deloitte & Touche*, 754 F.3d 645, 648 (9th Cir. 2014)

Mr. Melwani has conceded repeatedly that he has known of Mr. Lipton's alleged misconduct since the Summer of 2011 – more than three years before Plaintiffs filed this action.

First, Mr. Melwani averred in his Declaration in Opposition to Motion for Summary Judgment, dated February 6, 2019, that: "On March 6, 2016, at 4:20 p.m,, almost five years after Hunter Lipton first told me that he had my money in escrow, he sent an email from his MDF account which referred to a completed agreement and a rough schedule for payments. [] It is a blatant lie after five years of lying." (ECF Doc.76) In that February 6, 2019 Declaration, Mr. Melwani further averred that: "Hunter Lipton has "Madoffed" me for the past seven and a half

years." (Id.) Seven-and-one-half years prior to February 6, 2019 is August 6, 2011. Plaintiffs initiated this case in New York State Supreme Court on July 26, 2017.

Second, Plaintiffs deposition testimony is also clear that by July 27, 2011 Plaintiffs were first aware of the "acts" that comprise MDF's alleged aiding and abetting the alleged breach of fiduciary duty. (Mullaney Decl., Ex. 1, TAC, ¶¶ 25, 19-21)

4· Q.· · ·This is Melwani Exhibit Q. ·
5· A.· · ·Yes. ·
6· Q.· · ·Q is, Exhibit Q is an e-mail from ·
7· you to Mr. Lipton, July 27, 2011.· The ·
8· document is Bates labeled P000111 to 12.· And ·
9· you write to Mr. Lipton, "I am fuming with
10·you.· How can you possibly think what you
11·have done is okay?"
12· ·Did I read that correctly?
13· ·A.· · ·Yes, you did.
14· ·Q.· · ·Are you not telling Mr. Lipton
15· ·here that he has breached your agreement with
16· ·him?
17· ·MR. RAO:· Objection.
18· ·A.· · ·It's taken out of context.· This
19· ·is a series of e-mails.· I didn't even want
20· ·him to sell Eagle Point.

(Mullaney Decl., ¶ 6, attaching July 27, 2011 e-mail from Lokesh Melwani to Hunter Lipton, Ex. Q to Pls' Dep., as Ex. 4)

-- what had he done that was not okay ·
6· ·with you?· Is that not a breach of the ·
7· ·agreement? ·
8· ·A.· · ·He sold the assets without me ·
9· ·wanting him to do so.
10·Q.· · ·Right.· Breaking your agreement;
11·correct?
12·MR. RAO:· Objection.· Calls for a
13·legal conclusion, misstates content of
14·document.
15·A.· · ·Yeah, I think so

(Mullaney Decl., Ex. 3, Pls' Tr. p.420, li.4-20)

Plaintiffs also testified that he first knew that Defendant Eagle Point had further breached its contract (assuming *arguendo* its formation) with Plaintiff on August 15, 2012. (Mullaney Dec., Ex. 2, at p. 21; also marked as Ex. B to Pls. Tr. ("Blue Pay Processing printout"))

16· · · · Q.· · ·Yeah.· When do you think you
17· ·realized that Eagle Point and Mr. Lipton were
18· ·going to breach the investment contract with
19· ·you and Cantal?
20· · · · A.· · ·Well, there was something later,
21· ·I don't know if it was that year or the year
22· ·after, is when we got the Blue Pay Processing
23· ·printout where he put the 139,000 as opposed
24· ·to 32 percent, 32 and a half percent, which
25· ·is about 390. ·
2· · · · Q.· · ·Okay.· That's the first time you ·
3· ·realized he was not going to honor the ·
4· ·contract? ·
5· · · · A.· · ·It's the first time I thought he ·
6· ·was screwing around, but he was still saying ·
7· ·he was going to pay me my capital back and ·
8· ·there were a series of e-mails right up until ·
9· ·2016, I believe in 2017, where he's trying to
10· say:· I want to pay your capital back, the
11· goal is that we get all your capital back,
12· et cetera, et cetera.
13· · Q.· · ·But that "we" didn't include EPF,
14· if I recall your earlier testimony; is that
15· right?
16· · A.· · ·At that stage, he had taken the
17· money from EPF.
18· · Q.· · ·And you thought EPF was gone;
19· correct?
20· · A.· · ·I did.

Thus, dismissal of the TAC is warranted because the statute of limitations expired the summer of 2014, and as a result precludes the aiding and abetting claim against MDF under Nevada law, where MDF is incorporated.

CONCLUSION

For the reasons set forth above, Defendants EAGLE POINT FINANCIAL LLC and MDF HOLDINGS LLC respectfully request that this Court grant their motion for summary judgment in its entirety.

Dated: February 28, 2022
New York, New York

Respectfully submitted,

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