SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA CRANE PART 60

Justice

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ROWEN SEIBEL, FCLA, LP, THE FAT COW, LLC, INDEX NO. 651046/2014

Plaintiff,

Decision after Trial

- v -

GORDON RAMSAY, G.R. US LICENSING, LP, FCLA, LP,
THE FAT COW, LLC

Defendant.

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Melissa A. Crane, JSC

The court held a two-week virtual bench trial in this matter commencing January 10, 2022. The following contains the court's credibility determinations, findings of fact and conclusions of law. The court thanks the lawyers for both sides who went above and beyond to represent their clients. The outcome is in no way a reflection on their excellent lawyering.

This case concerns a dysfunctional business relationship involving a restaurant, the Fat Cow LLC (the "Fat Cow" or "the restaurant"), that had no tie-breaking mechanism in the LLC formation documents. Plaintiff Rowan Seibel (Seibel) and defendants Gordon Ramsey (Ramsey) and GR US Licensing were (more or less) 50/50 owners of derivative plaintiff the Fat Cow LLC.[1] Plaintiff no longer contests dissolution, but seeks, derivatively on behalf of Fat Cow, damages for breach of contract and breach of fiduciary duty.

Credibility Findings:

The court finds the plaintiff, Rowen Seibel, not credible. This is primarily because it appears he fabricated evidence and then compounded that fabrication by using the same evidence to lie to this court. For a full understanding of this determination, a little background is necessary. Mr. Seibel, who at the time was in charge of running the restaurant, had a tendency not to pay employees, suppliers and contractors. On September 28, 2012, Spencer Nguyen, who

[1] Plaintiff FCLA, LP actually owned the restaurant while Fat Cow LLC, owned 2% of FCLA and GRUS and Seibel each owned 49% of FCLA.

OTHER ORDER – NON-MOTION

had briefly been a manager at the restaurant and who had not been paid, wrote requesting payment for two weeks wages at an annual salary of only $40,000 to Nick Brown and Jerry Rose Tassen (JRT). Both these individuals were involved in managing the restaurant. Nguyen noted that all prior requests had been ignored and that he would submit his claim to the California Labor Commissioner if he did not get an answer [**Ex. 59**].

No one responded to Mr. Nguyen. Instead, Seibel instructed JRT "tell him to submit—I don't do threats" [**Ex 460**]. Mr. Nguyen followed through and a hearing before the Labor Commission in California took place on April 3, 2013. Although Nick Brown, a manager at the restaurant, sent an email to Andy Wenlock (Ramsey's operation's director) and Seibel attaching the notice of claim seeking $1,538.46 [**Exs. 599 and 600**], no one from Seibel's side followed up with Ramsey and no one informed Ramsey or anyone on his team about the hearing [**Ex. 574**]. On May 8, 2013, the Labor Commissioner awarded Mr. Nguyen approximately $14,000, including penalties. When the Ramsey side confronted Seibel about the verdict, Seibel pretended that he had cut a check, but that Mr. Nguyen had failed to pick it up at the restaurant. Seibel testified similarly at trial and even presented a supposed copy of the check [*see* **Ex. 294**].

This testimony and exhibit 294 were likely fabricated. First, no original of that check has ever materialized, even though Nguyen allegedly never picked it up. In addition, the check is dated the day before the email in which Seibel states "tell him to submit—I don't do threats" [**Ex. 460**]. Why would Seibel have written "tell him to submit" if he had already paid Nguyen the day before? More important, if a check had actually been cut, why would someone from the restaurant not have mentioned it at the hearing?

Seibel compounded his lie during the trial. When asked why he did not simply remind Nguyen to pick up the check that had been cut the day before, Seibel's only explanation was Nguyen wanted a "larger amount" [TT 716:8-22]. Yet, the check is in the exact amount that Nguyen demanded after taxes [compare **Ex 599**]. It is also strange that the check is from Seibel's personal account, as opposed to a check from the business. Plaintiff points to testimony from JRT who vaguely claims she thought "there may have been something for Spencer" [JRT Depo pgs 101-102], but she did not know what "the envelope" contained. Her testimony is vague and her memory chaotic. She does not even recall what she said at the hearing that resulted in a judgment over $10,000 more than the initial claim (*id.*).

Thus, the court finds that the check was fabricated as an after-the-fact excuse to try to escape criticism from his partner, Ramsey, for allowing the Nguyen issue to go all the way to a hearing resulting in excess liability and penalties. Then, brazenly, Seibel and Craig Green tried to proffer this clearly backdated check as evidence in court. If a witness will lie to the court, it is possible he would lie about everything. Therefore, under the doctrine i*n falsus uno, in falsus omnibus*, the court disregards all of Seibel's testimony.

The reasons to distrust Seibel do not end there. Craig Green testified that Seibel had a relationship with Vera Water and Vera Water had asked Seibel to invest. Seibel apparently also received some sort of rebate for using Vera Water's product at the restaurant [*see* **Exs. 542, 548 and 549**]. However, Seibel pocketed those rebates instead of sharing them with Ramsey. Other kickbacks included a scheme with Bank of America (BOA). On March 3, 2013, Siebel signed an agreement on behalf of BR 23 Ventures, a company he solely owned, whereby BOA paid a 10% rebate on monies merchants paid for the Fat Cow's use of BOA's credit card services [*see* **Exs. 298, 528** and Craig Green testimony TT pg 577]. Seibel at deposition denied any knowledge about the BOA rebates. At trial, he changed his story. He admitted he knew about the BOA and Vera Water rebates, but concocted another far-fetched and unverifiable story that he paid Ramsey in cash when he bumped into him at a hotel in Las Vegas.

Seibel and Green's plotting to take over Gordon Ramsey Holdings via Wexford Capital reflects poorly on their credibility indeed. On June 10, 2013, Green and Seibel proposed a term sheet for Wexford Capital to invest at 40% in RAS Worldwide, a company that was Seibel's alone. This entity was to hold some rights to all Gordon Ramsey restaurants, including the Fat Cow. Previously, on June 2, 2013, Green prepared an internal email about the investment efforts and noted that the goal was to gain a controlling interest in Gordon Ramsey Holdings [Ramsey's umbrella entity] [**Ex. 291**]. This all occurred behind Mr. Ramsey's back.

Finally, Seibel's unilateral withdrawal of money from the restaurant's capital account, at a time when the business was failing and Mr. Ramsey was infusing his own funds just to keep it afloat, also reflects someone not to be trusted.

The Ramsey side was somewhat lacking in credibility too, however, but not as badly. Defendants presented a moving target of excuses for why they acted unilaterally in closing the restaurant. Some of these excuses were implausible. For example, it strains credulity that the name of the restaurant was a reason to close, because it was a trademark infringement, when the

name could simply be changed. The name "Fat Cow" anyway seems a poor choice for a city as health conscious as Los Angeles.

Defendant also claimed that he could not be in business with Seibel any longer because Seibel was trying to negotiate for additional restaurants without Ramsey's knowledge. Ramsey pointed in particular to discussions concerning Areas Airport and Singapore on behalf of GR Burgr, LLC.

However, at trial the evidence showed that, not only did the Ramsey side know about these potential transactions, but Seibel was actually carrying out his responsibilities under the GR Burgr LLC Agreement in having these discussions [**Ex. 305 § 7.2**], Moreover, the discussions were in accordance with his rights as a member of the LLC [**Ex. 305 § 8.2; 8.8**]. Ramsey tried to paint Seibel as irresponsible concerning mediation for a class action lawsuit. However, Seibel had good reason for not attending. His mother was very sick and the Ramsey side was aware of that circumstance.

Rather, what became apparent from the evidence at trial is that the Ramsey side did not want to be in business with Seibel any longer, most importantly because Seibel unilaterally took money out of the capital account. In addition, Seibel had proven himself incompetent in managing the Fat Cow, had contributed to its demise, and the Ramsey side was otherwise suspicious of Seibel—suspicions that were ultimately borne out (see discussion re: Wexford *supra*).

The court has no reason to distrust the other fact witnesses at trial. However, when compared to the contemporaneous documents, their testimony was of limited utility. This is especially true of Mr. Hendricks, the witness from Caesar's who did not work for Caesar's during the relevant time period.

Findings of Fact

1. The relevant contracts

On November 18, 2011, Ramsay entered into a retail center lease agreement ("Lease Agreement") with GFM LLC d/b/a The Grove ("GFM"), for a restaurant space located at 189 The Grove Drive, Suite 0-10, Los Angeles, California 90036 (See Lease Agreement, **Ex. 3**). The Lease required Ramsey to operate the restaurant. The Fat Cow restaurant opened on September 26, 2012. On October 12, 2012, GR and Seibel, as Members, and Seibel and Ramsay, as

Managers, executed a Limited Liability Company Agreement ("Fat Cow LLC Agreement") to form The Fat Cow LLC (*see* Fat Cow LLC Agreement, **Ex. 7**). On October 12, 2012, GR, Seibel, and The Fat Cow executed a Limited Partnership Agreement ("FCLA LP Agreement") to form FCLA, LP ("FCLA"), a Delaware limited partnership (*see* FCLA LP Agreement, **Ex. 8**). On October 12, 2012, Fat Cow LLC licensed "The Fat Cow" name and restaurant concept to FCLA through a license agreement ("License Agreement") (*see* License Agreement, **Ex. 11**).

On October 20, 2012, Ramsay assigned his rights, title and interest under the Lease Agreement to FCLA through a Lease Assignment and Assumption Agreement ("Lease Assignment and Assumption Agreement") (*see* Lease Assignment and Assumption Agreement, **Ex. 9**). In November 2012, FCLA and Upper Ground Enterprises, Inc. entered into an agreement whereby the Fat Cow Restaurant would provide the restaurant's location for use in the production of the television series titled, "Hell's Kitchen," season 12 (*see* **Ex. 15**). On November 15, 2012, Seibel executed an Indemnification Agreement ("Indemnification Agreement") (*see* Indemnification Agreement, **Ex. 10**).

2. Setting up the Restaurant and Accompanying Problems

Ramsey and Seibel essentially headed two sides they each referred to as their "team" [*see e.g.* **Ex 58**]. These teams tried, with almost no success, to work together. Until the summer of 2012, the Ramsey side led the effort to get the restaurant up and running. A protégé of Ramsey, Chef Andi Van Willigan, led this effort. In addition, Stuart Gillies, the managing director of Mr. Ramsey's restaurant group, and Mr. Andy Wenlock (mentioned earlier) were part of the Ramsey team. On April 8, 2012, Mr. Seibel directed Jerri Rose Tassen (JRT), who had worked with Seibel on other restaurant projects, to participate in the opening of the Fat Cow. Mr. Craig Green was also on the Seibel team.

There were problems with contractors during the build out phase of the restaurant. However, Seibel and his team treated them dismissively (*see e.g.* **Ex 83**) and stubbornly refused to pay them. For example, on September 14, 2012, Seibel instructed JRT to stall the contractors until certain approvals were in place in order to be in "control" (*see* **Ex. 459**). An architect even had to place a lien on the property, to which Seibel instructed "do nothing" (**Ex. 462**). The architect placed the lien because, apparently at Seibel's direction, a bad check was issued to trick the architect into handing over plans (**Ex. 491**). On January 15, 2013, another contractor filed a

mechanics lien due to non-payment (**Ex. 486**). The liens did little to improve the relationship with the landlord, who issued a lease default due to the liens on March 25, 2013 and asked for indemnity on April 19, 2013 (**Exs. 228, 232**). In addition, the failure to pay contractors resulted in bad press that fell on Ramsey only, as he was the celebrity (see **Exs. 65 and 488**).

When the Ramsey Team tried to rectify the situation with the contractors, Seibel, along with Craig Green, actively undermined those efforts. For example, Mr. Wenlock from Ramsey's organization returned to Los Angeles to sort out issues with the contractors. When Mr. Wenlock asked for contractor invoices, Green promised Wenlock he would work on it, but then secretly emailed Seibel suggesting they withhold the invoices. Seibel responded "send nothing" [**Ex. 493**].

Both Ramsey and Seibel thought that Ms. Van Willigan should resign after a particularly disastrous "tasting" in Las Vegas. (A tasting is when a restaurant tries out its menu prior to implementing it.) However, it is also clear that Seibel treated Van Willigan in a disrespectful and misogynistic fashion (*see* **Ex. 58**, pg 2 [reportedly accusing her of being "emotional" in response to her complaining about the disrespectful way he treated her]). Seibel also interfered with the Ramsey Team's work. Exhibit 58 exemplifies these problems. In this email, dated June 17, 2012, Ramsey felt compelled to write to Seibel: "you know that food is my area of expertise and you've now over interfered…every time my back's turned you seem to get really personal with Andi and its not right."

After Ms. Van Willigan left, the Seibel Team were the only people on the ground in California. Under the Lease, the Fat Cow was supposed to be "an upscale, full service restaurant and bar operated by Gordon Ramsey serving California eclectic cuisine" (**Ex. 3** pg A-1). Perhaps because of Seibel's overbearing nature, Ramsey did not send anyone from his more experienced team as he was supposed to do under the Lease.

3. <u>Continuing Problems</u>

Prior to opening and after the restaurant opened, there were significant problems with the restaurant's Point of Sale system, LAVU. These problems may have led to the input of incorrect employee work hours [**Ex. 289** May 23, 2013 email from Craig Green]. Van Willigan and the Ramsey side selected the LAVU system [**Ex. 161**].

On June 13, 2013, former employees of the restaurant filed a class action complaint in Los Angeles County Superior Court, against Fat Cow LLC and FCLA alleging violations of

California wage practices (**Ex. 661**). This class action complaint may have been the end result of problems with the LAVU system. Despite facing crippling liability from the class action, Seibel's team failed to apprize the Ramsey side in any reasonable fashion about the existence of the class action. With the advent of the class action, the restaurant faced bankruptcy [**Ex 75**].

Due to the lawsuits, the restaurant suffered negative publicity (**Exs. 488, 489**). The reviews on the food and customer service were also negative (*see* **Exs. 463, 471**). Understandably, the bottom line suffered. By the end of April 2013, The Fat Cow's current liabilities exceeded its current assets by $191,400.85 (*see* Expert Report of Anthony Bracco, dated July 27, 2017 "Bracco report," ex. 3). Its cumulative negative cash flow from operations was negative $95,340.93. Its cumulative free cash flow was negative $1,449,471.64 (*id.* ex. 4). Its revenue had decreased from $494,289.78, at its peak, to $342,594.30 (*id.*). It was experiencing continual losses. The class action was looming. In short, in the spring of 2013, the Fat Cow was not a profitable restaurant and had serious operational and legal problems.

In an effort to improve the situation, Andi Van Willigan returned to the helm in June 2013 (**Ex. 338**), essentially replacing Seibel's day to day management. Seibel did not want to pay Van Willigan. The evidence is unclear whether the Ramsey side alone or both sides were to pay her, but considering Seibel's complete lack of credibility, this issue is resolved in favor of Ramsey. An audit that Van Willigan commissioned, dated July 19, 2013, revealed extensive labor and employment compliance issues, including health and safety, but pointing out inconsistent use of the LAVU POS system (**Ex. 709**).

In addition, the Fat Cow continued to be unprofitable in late 2013 through early 2014 (Bracco report ex. 4). Current liabilities always exceeded current assets (Bracco report ¶ 20, ex. 3). The only time the net current assets improved (still negative though) was when Mr. Ramsey made a capital contribution in June 2013 (*id.*). Even worse, net current assets decreased from negative $44,880.49 as of July 31, 2013 to negative $202,438.92 by January 28, 2014 (*id.*). The Fat Cow also had overdue invoices that increased from $88,887.65 on July 31, 2013 to $177,908.52 by January 28, 2014 (*id.*). Also in 2013, the Littler firm had estimated liability for the *Becerra* class action to be $439,000, not including penalties and attorney fees. In short, this was not a restaurant that was doing well. The day the restaurant closed, its assets were negative $287,654.28 (*id.*). On February 11, 2014, Mr. France, from Ramsey's team, estimated that the restaurant needed another $400,000 in cash to survive (**Exs. 545, 505, 506, 510**).

Because of the poor financial situation at the Fat Cow, Mr. Ramsey, through one or two of his own companies having nothing to do with Seibel, made the following cash infusions:

June 2013 - $99,077 (**Ex. 505**);
1/24/2014 - $40,000 to the Littler firm for services related to the class action (Joint Stip. ¶ 3);
2/19/2014 - $52,220.50 to the landlord in rent payments after Mr. Yoo reported not having enough cash to pay the rent (**Ex. 546**).

Indifferent to the plight of the restaurant, at the height of these financial problems, Seibel withdrew cash in the following amounts:

10/07/2013 - $12,500
12/17/2013 - $37,500;
01/08/2014 - $10,000.00;
02/03/2014 - $10,000.00;
03/20/2014 - $10,000.00
= $80,000.00

(*see* NYSEF doc 665 response to rog 10).

Seibel claims he took the $37,500 because the Fat Cow was paying Andi Van Williigan and was not supposed to be but, as stated earlier, this was a pretext to withdraw money. Ramsey had not agreed to pay Van Williigan other than through the restaurant. Also, Seibel, who complains so much about unilateral action, took the money without unanimous consent. In fact, he does not appear to have even notified anyone he was taking it.

On January 28, 2014, FCLA issued a WARN Notice ("The Fat Cow WARN Notice") to notify California state agencies and officials that the restaurant intended to close its operations. (*see* The Fat Cow WARN Notice at **Ex. 346**). The Fat Cow Restaurant closed somewhere between March 28, 2014-April 1, 2014. Seibel sued on April 2, 2014.

4. Post-Closing

After the restaurant closed, Mr. Ramsey paid $230,628.83 under the Lease for the months of March-June 2014 (**Ex. 245**). He also paid $52,220.50 for the balance of February 2014 rent (Joint Stip., ¶¶ 1-2). After the landlord sued for additional rent, Mr. Ramsey paid legal fees of $173,546.19 and $800,000.00 to settle (*id.* ¶¶ 5 and 8). Seibel did not contribute. Ramsey also paid $24,337.71 in attorney's fees and $17,500 to settle in an action an unpaid vendor brought (*id.* ¶¶ 6-7). Seibel contributed nothing towards these expenses.

Consistent with his modus operandi to ignore all requests for payment, Seibel let lapse the mediator's proposal to settle the class action for $500,000 (**Ex. 139**). He allowed the lapse even in the face of the Littler law firm's memo post mediation, dated November 13, 2013, that warned liability could be much higher than $500,000 (**Ex. 78**). That the *Becerra* class action ultimately settled for less than $500,000 (it settled for $140,000) was largely due to the fact that the restaurant had closed (**Ex. 661 ¶¶ 19-21**). Therefore, by closing the restaurant, Ramsey mitigated the damages from the class action.

The court finds that both parties contributed to the demise of the Fat Cow. Seibel's management was destructive. During his tenure, he alienated everyone from Andi Van Willigan, to vendors, to employees, and even the landlord. This had the effect of costing the restaurant money in the form of penalties, legal fees, and good will. He ignored real problems, such as the class action, contractors who were owed money, and the Nguyen situation. He also failed to apprize his partner about these looming issues in any reasonable fashion. Then, he siphoned money from the restaurant when it was barely surviving, at a point when Ramsey had to infuse cash just to pay the rent.

However, the Ramsey side was not without fault either. It selected the disastrous LAVU system. It left Seibel's less experienced team holding down the fort when it was Ramsey's responsibility to run the restaurant under the Lease. This led to food quality and operational problems, simply because Ramsey was not present. There is also evidence in the record that the Ramsey side ignored non-food problems such as LAVU and legal problems like Nguyen. Perhaps other projects distracted the Ramsey side? Bottom line though, the record reflects that Seibel engaged in willful misconduct, whereas the Ramsey side was merely negligent at worst.

Conclusions of Law

Seibel, via a derivative claim, contends that Ramsey breached the unanimous consent provision of the Fat Cow LLC agreement by closing the restaurant unilaterally. The problem for Seibel is he is an active wrongdoer for the harm upon which he seeks to collect and therefore cannot recover derivatively. "The doctrine of *in pari delicto* bars a party that has been injured as a result of its own intentional wrongdoing from recovering for those injuries from another party whose equal or lesser fault contributed to the loss" (*Rosenbach v Diversified Grp., Inc.*, 85 A.D.3d 569, 570 [1st Dep't 2011]). Under the doctrine of *in pari delicto*, courts will not

intercede to resolve a dispute between two wrongdoers" (*Kirschner v. KPMG LLP*, 15 N.Y.3d 446, 464 [2010]).

The doctrine serves an important policy purpose: "no court should be required to serve as paymaster of the wages of crime, or referee between thieves. Therefore, the law will not extend its aid to either of the parties or listen to their complaints against each other, but will leave them where their own acts have placed them" (*Stone v. Freeman,* 298 N.Y. 268, 271 [1948]).

Here, the evidence at trial demonstrated extensive wrongdoing on the part of Seibel. In particular, he siphoned money from the business at a time when it was cash poor. He refused to pay contractors, ultimately costing the business more money in the long run and alienating the landlord. His conduct and cover up with respect to Mr. Nguyen was nothing short of bizarre. Under his watch, the restaurant suffered extreme negative publicity. And, he was engaged in efforts to parley to his own advantage his partner's business. This misconduct adds up and the law imputes Seibel's conduct to the entity. Therefore, he cannot recover derivatively (*see New Greenwich Litig. Tr., LLC v. Citco Fund Servs. (Eur.) B.V.*, 145 A.D.3d 16, 25, [1st Dep't 2016]; *Romanoff v. Romanoff*, 148 A.D.3d 614, 615 [1st Dep't 2017] ["Gerald's conduct, as an officer and director of GHC and New Roads, is imputed to the corporations."]).

However, even if the doctrine of *in pari delicto* did not apply, Seibel still could not recover. Seibel cannot rely on an unanimous consent provision when he created the circumstances whereby the restaurant had to close. This was not a restaurant that could survive without a large cash infusion that Seibel did not want to make. Ramsey could not reasonably be expected to stay in business with someone who had raided the business accounts and continued to do so after the WARN notice issued. Moreover, it was Ramsey who would suffer the most from continued operations as it was he who had personally guaranteed the Lease. Seibel's refusal to consent to shutting the restaurant, coupled with removing cash unilaterally, letting the mediator's proposal lapse and foot dragging with respect to buyout negotiations, reflects a refusal to consent out of spite. Conversely, the evidence shows that the motivation behind Ramsey's decision to close the Fat Cow was not an intent to harm Seibel, but rather to mitigate damages, including Lease liabilities that would have fallen on both parties.

Seibel also cannot rely on the "Entire Fairness" doctrine (*see* Pl Post Trial Brief at 81) when he is the one who took money out of a cash-strapped business without telling Ramsey. Moreover, the parties could not even agree on basic issues, such as what type of restaurant to

operate. Neither trusted the other. No one wanted to make the type of cash infusion required to keep the restaurant going and there was no guarantee that the restaurant could overcome its prior bad press and organizational problems. Therefore, it was a proper exercise of the business judgment rule to close the restaurant. Doing so also had the benefit of mitigating damages from the class action and potential liability to the landlord. Finally, Seibel had no more right to insist on unanimous consent to close the restaurant than Ramsey did to keep it going. If Ramsey is in breach, then so is Seibel.

No damages

In any event, Seibel cannot recover, through dissolution or otherwise, because there is nothing to recover. The Fat Cow LLC was worthless. It is undisputable that the restaurant never made a profit during the 18 months it was in operation. Even plaintiff's expert, Janet Lowder acknowledged in her report that the Fat Cow lost over $1 million in three months of operations in 2012, over $200,000 on a full year's operations in 2013, and over $700,000 in 2014, the year it closed.

Because the restaurant's history showed only losses, Seibel had no choice but to use hypothetical lost profits to prove damages. To establish lost profits, "damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes" (*Kenford Co. v. County of Erie*, 67 N.Y.2d 257, 261 [1986]). The law is the same in Delaware and California (*see e.g. Agilent Techs. v. Kirkland*, No. Civ. 3512-VCS, 2010 WL 610725, at *29, n.271 [Del. Ch. Feb. 18, 2010] ["[t]he general rule, followed in Delaware law and elsewhere, is that future lost profits must be established by 'substantial evidence' and not by speculation."]; *Kids' Universe v. In2Labs*, 116 Cal. Rptr. 2d 158, 167-68 [Cal. Ct. App. 2002] ["damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent."])

For businesses without a profit history, "a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty" (*Kenford*, 67 N.Y.2d at 261 [the "general rule" is that lost profits evidence "is too speculative, uncertain and remote to be considered where there is no history of prior profits"]; *Re v. Gannett Co*., 480 A.2d 662, 668 [Del. Super. Ct. 1984], *aff'd* 496 A.2d 553 [Del. 1985]; *Metro Storage International LLC, et al,*

v. James A. Harron, No. CV 2018-0937-JTL, 2022 WL 1404359, at *37 [Del. Ch. May 4, 2022] ["Delaware courts regularly refuse to award damages based on the lost profits from a new business, deeming evidence of lost profits to be too speculative, uncertain, and remote when there is no history of prior profits."]; *see also Sargon Enterprises, Inc. v. Univ. of S. California*, 288 P.3d 1237, 1235 [Ca. 2012] [expert relied on the speculative assumption that manufacturer would have developed marketing and research and development departments to permit it to compete with the market leaders]).

The analysis of plaintiff's expert, Janet Lowder, has no basis in reality. First, she completely ignored the dynamics of the two partners, who could not even agree on the type of food to serve. The only way to reach her conclusions was to ignore historical data, so she did just that. For example, she ignored the history of severe losses and instead projected earnings of $4,543,609 in profits over three years post closure (*see* Lowder ex. D). She completely ignored the poor reviews the restaurant had received. Her assumption of 700 customers per day was not derived from historical data either. Historical data showed 394 per day (**Exs. 597, 680**). Nor did Lowder use average historical ticket prices at the restaurant. Rather she relied solely on data from Mr. Green, who, as determined earlier, is of dubious credibility. Then, without verifying Green's numbers, she rounded up "to allow for more alcohol sales" (TT 1272:6-10) without independently verifying the numbers and without an explanation for why there was more room for alcohol sales in the first place. Lowder's assumed growth from association with Ramsey's name was also speculative, especially as the restaurant was already widely associated with him in the media.

Perhaps the most speculative aspect of Lowder's involved the Hell's Kitchen TV show. Lowder testified that **if** The Fat Cow had been featured on Hell's Kitchen, and **if** the winning chef had then worked at the Fat Cow, it "would contribute significantly to increased customer traffic counts resulting in increased . . . Profit" (Report of Janet Lowder dated March 9, 2018, pg 5). However, there was no support for this theory in her report. At trial, she only alluded to one of her clients whose restaurant was featured heavily in the iconic movie "Sideways" and whose profits supposedly doubled after that movie's release. There are too many "ifs" to satisfy speculation. What if the network decided not to air Hell's Kitchen? What if the winning chef, having heard of the Fat Cow's problems, did not want to work there? What if the show did not become nearly as famous as the movie "Sideways?" This is speculation on top of speculation

and taints the entirety of Lowder's testimony. It is also concerning that an expert for a party would refer to an opposing party, here Gordon Ramsey, using the derogatory term "infamous." (*see* Lowder report, pg. 16).

As a result of unreliable and speculative hypotheses, Lowder's revenue projections are unrealistic. Lowder projected 2014 revenues of $8.372 million (Lowder Report ex. D). This was 82.4% more than the $4.59 million the restaurant earned in 2013. "Although the Fat Cow actually lost over $200,000 in 2013, Lowder calculated an "adjusted" 2013 profit by backing out certain expenses that she considered "nonrecurring" and eliminating depreciation. Even assuming she was right, the resulting adjusted 2013 profits were approximately $375,000. Lowder's 2014 projected profit is still about 4.6x times higher. This is unrealistic. At bottom, Lowder's adjusted profit calculations ignored huge historical losses, failed to take into account both sides' lack of cooperation, Seibel's destructive management, and Ramsey's negligent management, and failed to explain how to make up for bad press.

Mr. Bautista relied solely on Lowder to project that the restaurant was worth $9.3 million as of March 31, 2014. However, the court discredits Bautista's entire testimony as it relies entirely on Lowder's speculative projections.

In actuality, the restaurant was not a going concern. As the historical data shows, the restaurant never made a profit, was unable to meet its debts, had lost $2 million, and faced insolvency due to a looming class action. It only survived as long as it did because Mr. Ramsey, through his other companies, infused cash. In fact, by closing the restaurant, Ramsey likely mitigated damages for the Fat Cow. Accordingly, there are no damages for Seibel to recover.

Counterclaims

Under the Indemnity Agreement **[Ex 10]**, Seibel agreed to bind himself personally to indemnify Mr. Ramsey "one-half (1/2) of all manner of loss, damage, charge, claims, suit, action and liability, including counsel fees, which Ramsey may for any cause or any time sustain or incur *by reason of having entered into aforesaid Lease.*"

According to the Joint Stipulation regarding Ramsey payments [NYSCEF doc 664], Ramsey made $282,844.33 in rent payments between February and June 2014. He spent $173,546.19 in legal fees relating to litigation with the landlord and $800,000 to settle the litigation with the landlord. These expenses fall squarely within the Indemnity Agreement. Ramsey also incurred $181,970.86 in legal fees relating to the *Becerra* litigation, $24,337.71 in

legal fees related to the *L.A. Specialty* litigation (a contractor's claim), $17,500 to settle the *L.A. Specialty* litigation, and $5,500 to Mr. Yoo's company for bookkeeping related to the Fat Cow. Seibel does not challenge the reasonableness of these amounts or that they were incurred "by reason of having entered the aforesaid Lease."

Instead, Seibel claims that Ramsey cannot recover under the Indemnification Agreement because of Ramsey's own wrongful conduct. First, the expenses Ramsey incurred were not the result of any negligence on his part, but rather either the result of Seibel's deliberate misconduct (not apprizing Ramsey about the Nguyen hearing or the class action) or no one's fault (*see e.g.* bookkeeping fees). As for the $69,000 for Andi Van Willigan's pre-opening work, the court has already found that this should have been borne by the restaurant and therefore Seibel must pay half. Accordingly, Seibel owes Ramsey ½ of $1,554,699.09, which equals $777,349.54.

Moreover, as this court has already found, Ramsey's conduct was at worst was negligent over the course of the time the Fat Cow was open. New York courts have found similarly broad language as "any and all loss" or "all claims and demands of whatsoever kind or nature" to indemnify negligent conduct (*see RoundPoint Mortg. Servicing Corp. v. Five Bros. Mortg. Co. Services and Securing, Inc.*, No. 315-CV-559, 2017 WL 2722304, at *6 [W.D.N.C. 2017] [applying New York law]; *Emerson v. KPH Healthcare Servs., Inc.*, 203 A.D.3d 1272, 164 N.Y.S.3d 296, 298 [3d Dep't 2022] [party did not have to demonstrate absence of its own negligence in enforcing agreement that required indemnification "against any and all losses, liabilities, damages, actions, demands, claims, costs and expenses, including reasonable legal fees and expenses, arising out of or in connection with any claims for injuries or death to persons . . . arising from or claimed to arise from [Parry] performing services under [the agreement's] terms."]; *Hong Leong Fin. Ltd. (Singapore) v. Morgan Stanley*, 44 Misc3d 1231 (A) at *10 (Sup. Ct. N.Y. Cty. Sept. 12, 2014), *aff'd* 131 A.D.3d 418 (1st Dep't 2015) ("Broadly-worded clauses, providing indemnification for 'all claims, suits, loss, cost and liability,' fairly include liability for active negligence of the indemnity."]; *see also Stewart Title Ins. Co. v. New York Title Rsch. Corp.,* 178 A.D.3d 618, 619 [1st Dep't 2019] ["it is irrelevant whether NY Title was negligent in fulfilling its obligations under the escrow agreement since Newburgh agreed to indemnify against 'all loss'"]).

Ramsey, not being an active wrongdoer, is also entitled to recover derivatively for the unauthorized withdrawals that Seibel took. This award is also fundamentally fair, because Seibel

essentially siphoned Ramsey's money as Ramsey was the only one infusing cash into the restaurant. These withdrawals amount to $80,000.00.

Accordingly, it is

ORDERED that the petition to dissolve FCLA, LP and Fat Cow LLC is granted without opposition; and it is further

ORDERED, ADJUDGED AND DECREED that FCLA, LP and Fat Cow LLC are dissolved; and it is further

ORDERED that Articles of Dissolution or other appropriate documentation shall be filed with the relevant Department of State within 90 days following this judicial resolution; and it is further

ORDERED that the court dismisses plaintiffs' derivative claims for breach of contract and breach of fiduciary duty; and it is further

ORDERED that the court awards judgment on defendants' counterclaim against Rowan Seibel individually in the amount of $777,349.54 with statutory interest from March 28, 2014, as calculated by the clerk of the court; and it is further

ORDERED that the court awards judgment on defendants' derivative claims for breach of contract and breach of fiduciary duty in favor of FCLA, LP against Rowan Seibel individually in the amount of $80,000.00 with statutory interest from March 10, 2014, as calculated by the clerk of the court; and it is further

ORDERED that the clerk is directed to enter judgment accordingly; and it is further

ORDERED that the court awards defendants/counterclaimants their reasonable attorney's fees as prevailing parties; and it is further

ORDERED that defendants have until June 30, 2022 to interpose a motion for those attorney's fees or the claim will be waived.

5/11/2022
DATE

MELISSA CRANE, J.S.C.

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