To be Argued by:
PAUL SWEENEY
(Time Requested: 15 Minutes)

Supreme Court of the State of New York
Appellate Division – First Department

Case Nos.:
2022-02729
2022-05126
2022-05129

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

Plaintiffs-Appellants,

-against-

GORDON RAMSAY and G.R. US LICENSING LP,

Defendants-Respondents,

-and-

FCLA, LP and THE FAT COW, LLC,

Nominal Defendants.

BRIEF FOR PLAINTIFFS-APPELLANTS

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I. PRELIMINARY STATEMENT

This is an appeal by Plaintiff-Appellant Rowen Seibel ("Seibel" or "Plaintiff-Appellant") of the judgment and decision after a bench trial ("Trial Decision") in which the court below ("Court-Below") permitted defendants celebrity chef Gordon Ramsay ("Ramsay") and GR US Licensing, LP ("GRUS")(collectively "Ramsay-Respondents") to unilaterally close a restaurant ("Restaurant") in clear violation of the parties' unanimous consent provision in their LP and LLC Agreements based primarily on the doctrine of *in pari delicto.* The defense of *in pari delicto* was not pled by Ramsay-Respondents, nor was it argued as a defense at any time in the litigation. The Court-Below improperly *sua sponte* relied on this defense, which had clearly been waived, but also applied the wrong state's law and misinterpreted the circumstances in which the defense may be applied.

In addition, the Court-Below excused Ramsay-Respondents' clear breach of the Agreements based on the court's utter disregard for the chronology of events. The Court-Below repeatedly excused Ramsay's unilateral decision to close the Restaurant based on facts that arose *after* he made the decision to close.

The Court-Below further rejected Plaintiff-Appellant's damages as too speculative based on either (i) ignoring or misinterpreting the restaurant expert's analysis or (ii) impermissibly substituting the court's view on restaurant damages for the expert's. Worse still, the Court-Below ignored the alternative basis for damages

which Ramsay-Respondents agreed was a valid basis for damages – value based on offers to buy the venture.

The Court-Below's most significant factual findings were based on a misapplication of the legal doctrine of *in falsus uno, in falsus omnibus* against Seibel. The court's application of the *in falsus uno* doctrine was in clear error as the purported "lie" by Seibel was (1) immaterial to the case; and (2) not based on irrefutable evidence, but rather upon pure speculation by the Court-Below. As a result, numerous significant factual findings contained in the Trial Decision were based on the Court-Below's total disregard for all of Seibel's testimony, which was in clear error. In contrast, the Court-Below somehow found that Ramsay and his team repeatedly lied about the single most important issue in the case – Ramsay's alleged reasons for his unilateral decision to close the Restaurant – but minimized these lies as merely "somewhat lacking in credibility." (R. 22510) The Court-Below's fact finding also relied on unauthenticated recordings, and rank speculation. In fact, the Court-Below bent over backwards for Ramsay by making critical factual findings expressly based on "perhaps" speculation that was entirely devoid of support in the record.

This Court should not only overturn the judgment, but the clear legal errors require that this Court enter judgment in favor of Seibel on the breach of contract (and fiduciary duty) claims with damages and attorneys' fees.

II. QUESTIONS PRESENTED FOR REVIEW

1. Did the Court-Below err by applying the doctrine of *in falsus uno, in falsus omnibus* to disregard all of Plaintiff-Appellant's testimony and make findings of fact based on such disregard when the testimony in question was neither material nor demonstrably false? Yes.

2. Did the Court-Below err by permitting into evidence four (4) recorded conversations and relying on the recordings in the findings of fact when no trial witnesses were able to authenticate the recordings? Yes.

3. Did the Court-Below err by *sua sponte* applying the doctrine of *in pari delicto* as a defense to a breach of contract claim when the defense had never been raised by Ramsay-Respondents in their answer or in any other pleading or motion? Yes.

4. Did the Court-Below err by applying New York law on the doctrine of *in pari delicto* as a defense to contracts governed by Delaware and California law when Delaware and California law would not permit application of the doctrine? Yes.

5. Did the Court-Below err by excusing Ramsay's decision to close the Restaurant in clear breach of the unanimous consent provision in the applicable contracts based solely on facts that arose many months *after* Ramsay made the decision to close the Restaurant? Yes.

6. Did the Court-Below err by finding Plaintiff-Appellant had not proved damages when the court ignored or misinterpreted Plaintiff-Appellant's expert's analysis and further ignored Plaintiff-Appellant's alternative basis for damages? Yes.

7. Did the Court-Below err by rejecting Plaintiff-Appellant's breach of fiduciary duty claim when Ramsay's misconduct was due to his desire to end his partnership with Seibel, and the court previously ruled that to do so would constitute a breach of fiduciary duty? Yes.

8. Did the Court-Below err by granting Ramsay's indemnification claim when there was no evidence that Ramsay made any of the payments for which he sought indemnification? Yes.

III. STATEMENT OF NATURE OF THE CASE AND RELEVANT FACTS

A. The Parties Agree to Open the Fat Cow Restaurant

Seibel and Ramsay agreed in 2011 to partner in opening a new restaurant in Los Angeles to be named the "Fat Cow". (R. 16438; 14728, 15053-15054) Although Ramsay was an international celebrity, he could not put his name on the Restaurant until March 1, 2014 due to a pre-existing agreement with the Blackstone Group. (R. 14740-14741; 15070-15071) Both parties equally contributed capital to build out the leased premises ("Premises"), and the Restaurant opened on September 26, 2012. (R. 15059:9-11; 22524 ¶2) The parties entered into a number of agreements for the venture, namely the Fat Cow LLC Agreement ("LLC Agreement"), FCLA Agreement ("FCLA Agreement"), the License Agreement ("License"), and Lease Assignment ("Lease") in October 2012. (R. 22524 ¶¶ 3-6)[1].

Under the LLC Agreement, all decisions required unanimous consent and the Agreement did not contain any provision to deal with a deadlock. (R. 16537 §7(a)) The FCLA Agreement provided for FCLA to own and operate the Restaurant, and required its decisions to be made by its General Partner, Fat Cow LLC. (R. 16544, §8). Because Fat Cow LLC could not make decisions without unanimous consent, neither could FCLA. (R. 16537 §7(a), 16544 §8)

[1] The Lease Assignment assigned the Lease between Ramsay and GFM, LLC ("Landlord") to FCLA. (R. 22524 ¶1). Rick Caruso ("Caruso") is the principal of GFM. (R. 22526)

B. Trademark Issues

The parties learned in early 2012 that trademarking the name "The Fat Cow" would be problematic because of an existing registered trademark filed by a Florida restaurant called "Las Vacas Gordas," Spanish for "the Fat Cow." (R. 14737-38; 16603; 17425) Ramsay told Seibel he would take care of all trademark issues (R. 16603; 14738:6-14739:10; 14874:10-14875:20), but "chose not to take any action" to remedy the situation. (R. 16603:14913:2-14917:3) Thus, when FCLA and Fat Cow LLC entered into the License Agreement for use of the name Fat Cow, the License Agreement expressly provided for the re-filing of a trademark application and, if denied, for an application "for an alternative trademark." (R. 16586, Sched. A) The parties' understanding was that they would change the name of the Restaurant if the trademark issue required them to do so. (R. 1663:16-1664:8, 1672:13-23, 1674:3-6; 401:4-11; 3041:15-24).

C. Ramsay Abandons His Obligation to Operate the Restaurant

The parties intended that Ramsay and his team[2] were going to operate the Restaurant. (R. 15057; R. 14727) It is stated in the Lease. (R. 16458) It was further confirmed by Ramsay's representations to the Landlord in 2013 – that he was the sole operator. (R.16702; 15057:14-16; 4410:11-12, 4422:25-4423:11) This is because Ramsay and his team were very experienced at operating restaurants, (R.

[2] *See* Roster of Key Persons. (R. 22526)

15058), while Seibel had no operational experience. (R. 15058-15059; R. 14727-14728) Ramsay intended to operate the Restaurant with a colleague, Andi Van Willigan. (R. 14729-14730; 16700: 15191; 14865; 14753-14754) However, when Ramsay and Seibel agreed to fire Van Willigan before the opening, Ramsay refused to send a replacement, and Seibel and his inexperienced team (Craig Green and Jerri Rose Tassan)[3] were left to pick up the slack. (R. 15450-15452; 15451:3-15452:1, R.15455-15456; R.16051; R.15352; R.14752, R.15268:25-15269:14; R.15452:2-11, R.15455:22-15456:3)[4]

Not surprisingly, the Restaurant experienced numerous operational issues when it opened in September 2012,[5] including issues with service and quality, a class action litigation due to the employee software Ramsay chose[6], and disputes with vendors.[7] These issues were resolved by the middle of 2013[8], by which time Ramsay had brought Van Willigan back to run the Restaurant. (R. 15458) As a result, by the

[3] *See* Roster of Key Persons (R. 22526)
[4] In fact, Green had no experience at all in the restaurant industry. (R. 15266:6-8, R. 15346, R. 14738-14742) Tassan did not have Van Willigan's level of experience. (R.14901-14902; R.14904; R. 2355-2357, R. 2434:24-2435:23)
[5] (R. 22523 ¶2)
[6] As the Court-Below found, Ramsay's team selected LAVU "point of sale" software, which was the primary cause of the class action. (R. 22512-13; R. 17284; R. 17144; R. 16052-16053; R. 16070-71; R. 14800-14801; R. 17118; R. 16700; R. 6212:7-6214:2) LAVU was selected because Ramsay was working on "a bigger opportunity" with LAVU that was "already in motion." (R. 17118)
[7] (R. 14757-14758, R. 14925; R. 15277; R. 15283, R. 15289; R. 18345, R. 17135; R. 15287; R. 15293-15294; R. 18656)
[8] (R. 15316; R. 16063:24-16065:15; R. 17139; R. 16878, R. 16967, R. 17142; R. 14757-14758; R. 14763-64; R. 15278:4-10; R. 15314:25-15316:8; R. 16064:15-16065:15)

second half of 2013 significant improvements had been made.[9] In addition, while Seibel and Ramsay had disagreements over the menu of the Restaurant, those disagreements had no impact whatsoever on the Restaurant since (i) neither was operating the Restaurant on a day-to-day basis,[10] and (ii) Seibel deferred to Ramsay's preference on the menu.[11]

D. Ramsay Decides to Close the Restaurant in June 2013

Not only did Ramsay shirk his obligation to operate the Restaurant, when Seibel stepped up to fill the gap Ramsay blamed Seibel's team for every problem. (R. 15189; R. 17284) As a result, Ramsay decided in June 2013, just 9 months after its opening, that he would unilaterally close the Restaurant. (R. 15884:24-15885:21; R. 17284; R. 15189)[12] This is despite Ramsay's self-proclaimed skill in "fixing a hundred restaurants and going in with situations far worse than Rowen Seibel and Gordon Ramsay's, and putting them back on the road to success. I'm quite –I'm quite good at that, I enjoy and relish that chance." (R. 15051:24-15053:23) Instead of even attempting to fix the issues at the Restaurant, Ramsay decided to open a new

[9] See R. 17273 ("really improving the food quality"); R. 17276 ("tremendous job turning the restaurant around and running a first-class operation"); R. 4425:10-19, R. 4426:12-4427:10; R. 3954:7-3956:6; R. 15078:1-4; R. 6287:3-6288:12, R. 6291:6-6292:8; R. 3918:4-14; R. 3919:24-3920:1; R. 3986:4-3987:11; R. 16895; R. 16720; R. 1756; R. 17562).
[10] (R. 14753:12-14754:13; R. 476:19-477:10; R. 920:15-921:7, R. 2068:4-17; R. 6195:9-6196:25; R. 6197:23-6199:20)
[11] (R. 14776-14779; R. 14870; R. 15081)
[12] While there were brief communications about Ramsay buying out Seibel in June 2013, those discussions ended in July 2013. (R. 17049; R. 15485:17-15486:7)

restaurant without Seibel in the Premises and benefit from Seibel's capital contribution to build out the Premises. (R. 17227; R. 14792:14-22; R. 15110:3-18)

At no time during the months between June and December 2013 did Ramsay or his team inform Seibel that they were going to "close" the Restaurant. (R. 15884:2-11)

E. Ramsay's Secret Scheme To Close the Restaurant

After Ramsay made the decision to close the Restaurant in June 2013, he took numerous steps to secretly close the Restaurant and use the assets – the improvements paid for by the parties, and the trained staff - for a new restaurant.

In or about early November 2013, a designer was secretly hired by Ramsay for the new restaurant. (R. 15092:23-15094:3; R.17486; R. 6000:22-6001:1; R. 6003:3-8) The name would be "Gordon Ramsay Roast", and a trademark application was filed.[13] (R. 16739) Ramsay engaged in clandestine meetings with the Landlord to get Caruso's approval for the new restaurant. (R. 14977, R. 15096, R. 15101:5-12; R. 13233; R. 15101:23-15102:14)[14] Ramsay and his team did not tell Seibel about his plans.[15] Instead, Ramsay's team continued from September 2013 until

[13] "Chicken Shop" was the temporary name of Ramsay's new restaurant until he settled on the name "Gordon Ramsay Roast." (R. 15092:23-15094:3; R. 15096:23-15097:11; R. 17174, R. 17185, R. 17486; R. 1067:23-1068:18; R. 1135:13-18; R. 1179:10-17; R. 6305:6-6306:1)

[14] When Ramsay decided to contact the Landlord to set up the secret meeting about the new restaurant, Gillies responded "Game on." (R. 16716; R. 15099)

[15] (R. 15904-15905; R. 15889; R. 14821-14822; R. 15521. R. 16929, R. 16940, R. 17014, R. 17015, R. 17019-17022, R. 17038, R. 17041, R. 17044, R. 17085, R. 17086, R. 17087-17093, R. 17410, R. 17422, R. 8558, R. 18560)

December 13, 2013 to tell Seibel that he merely intended to change the name of the Restaurant due to the trademark dispute. (R. 14791-92; R. 16704, R. 17012, R. 17014, R. 17015)

F. Trademark Issues Come To A Head

When Ramsay finally told Seibel he was closing the Restaurant on December 13, 2013, Ramsay falsely claimed the reason was the trademark. ("The Fat Cow has to close as the name cannot be used because of Las Vacas Gordas" (R. 17227); R. 14792:14-22; R. 15110:3-18) That excuse was false and contrary to every single representation made to Seibel about the trademark from 2012 through the beginning of December 2013 merely requiring a name change at the Restaurant.[16]

The parties had agreed before the Restaurant opened that if Las Vacas Gordas ("LVG") objected to the name, they would change the name. (R. 14741-72; R. 15067; R. 15074:2-5) They had invested too much money to just close, around $800K each. (R 14793; R. 15066:14-15067:8; R. 14688) Ramsay conceded that it was his intention to change the name, as was set forth in the FCLA and License Agreements.[17] The name change, to include Ramsay's famous name, was exactly what the parties intended: (i) Ramsay had committed to Landlord in April 2013 to

[16] (R. 14793:2-14794:1; R. 14795; R. 18480; R. 14791-14792; R. 16704, R. 17012, R. 17014, R. 17015, R. 16988, R. 17002; R. 14740-42; R. 15067; R. 15069-15070; R. 15115:3-9; R. 16877; R. 15073:5-15; R. 15062, R. 15066, R. 15070; R. 16544, R. 16586; R. 15878; R. 14748)
[17] (R. 15062, R. 15066, R. 15070-15071; R. 16544, R. 16586; R. 15878; R. 14741; R. 15064:8-15065:12; R. 14739-14741; R. 14766-14767)

put his name on the Restaurant (R. 15073:5-15, R. 15880; R. 16877); (ii) Landlord wanted Ramsay's name on the Restaurant; (R. 15115:3-9, R. 17273, R. 15076:9-15077:11); and (iii) when the Blackstone agreement expired on February 28, 2014 Ramsay was legally permitted to put his name on the Restaurant. (R. 14740-14741; R. 15070-15071)

Ramsay's team led the negotiations with LVG, which they told Seibel were for getting permission to use "Fat Cow" until March 1, 2014, at which point Ramsay's name could be used on the Restaurant. (R. 17012, R. 14769-14773; R. 15879-15884; R. 16704, R. 17014) Ramsay and Seibel believed that adding Ramsay's name would have a positive impact on the Restaurant. (R. 15071; R. 14739:15-14740:20; R. 15118-15119) All the negotiations with LVG were about the Restaurant changing its name (not closing). (R. 15880-82, R. 15884:2-11; R. 16988, R. 17002; R. 2706:17-24; R. 2707:7-12)

Upon reaching an agreement with LVG, the Restaurant did not have to close. The agreement permitted the use of the Fat Cow name until the Blackstone agreement expired (R. 15115); Ramsay even filed another trademark for "The Cow by Gordon Ramsay" for use at the Grove. (R. 16073; R. 15075:9-13) There was *nothing* stopping Ramsay from simply changing the name on March 1, 2014.[18]

[18] Ramsay testified (R. 15115:3-25):

Q. Separate issue from the trademark, though. As far as the trademark was concerned you were allowed to put a new name on this restaurant, right?

G. The Restaurant Closes

Ramsay told Seibel for the first time on December 13, 2013 that he was closing the Restaurant by March 1, 2014 due to the trademark dispute, and Seibel immediately and repeatedly objected.[19]

To support Ramsay's lie, Michael Thomas, corporate counsel for Ramsay-Respondents ("Thomas"),[20] repeatedly claimed to Seibel that the Restaurant had to close on March 1, 2014 because that date was the "absolute backstop" date that LVG would permit them to use the Fat Cow name. (R. 17019; R. 15490; R. 17038, R. 15493) In fact, Thomas never even attempted to obtain more time past March 1, 2014. (R. 15491-15492; R. 2958:4-2959:22, R. 2961:2-6; R. 2722:9-17) The LVG principal, Mr. Gajer, stated that if Ramsay offered more money, Gajer would have

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A Yes, sir, with the landlord's permission.
Q Okay. And the landlord continued at this point to want the name Gordon Ramsay on the restaurant, correct?
A Yes, sir.
Q In fact you had testified earlier that if Las Vacas Gordas insisted that you couldn't use the name on the restaurant you would in fact change the name, right?
A Yes, sir.
Q Okay. And your counsel had by this time negotiated an agreement with Las Vacas Gordas to allow The Fat Cow name to be used until the time that the Blackstone agreement expired, right?
A I believe so. Yes, sir.
Q And that was done for the purpose of having the name changed after that period with the name that would include your name, correct?
A Yes, sir.
Q And that was still the situation in December of 13 of 2013, right?
A Yes, sir.

[19] (R. 15144; R. 15145; R. 15146-15147; R. 15886; R. 17091; R. 14794-14795; R. 17227; R. 17097; R. 17038; R. 15509)
[20] (R. 22526)

given a license for additional time. (R. 2958:4-2959:14) At trial, Thomas admitted he did not attempt to get more time or offer more money. (R. 15908-15910, R. 15912; R. 16993, R. 16999)

Realizing the absurdity of relying solely on the trademark ruse as the basis to close, Ramsay offered new excuses to close the Restaurant. Ramsay claimed that the Restaurant needed funds from Seibel, but Seibel would not put more money into the Restaurant without a commitment from Ramsay that he was keeping the Restaurant open, a commitment that never came. (R. 14280:24-14281:10) In fact, contrary to Ramsay's claim that he was keeping the Restaurant open with his funds at the end of December 2013, the two partners' funding was equal at that time. (R. 15105:17-24; R. 17631) Any claim by Ramsay-Respondents that Ramsay closed because he was funding the enterprise and Seibel was refusing to do so, whether in June 2013 or December 2013, is false.[21]

Seibel continued to object to the closure of the Restaurant. (R. 17105; R. 17044; R. 17091) And yet, Ramsay's secret plan to open a new restaurant without Seibel using the assets and employees of the Restaurant continued. The plan was so brazen that after the decision was made and announced, Van Willigan hired bar

[21] By April 2013, Seibel had contributed $99,097 more than Ramsay, which Ramsay made equal by an additional contribution in June. (R. 14764-14765; R. 47612; R. 22515)

consultants for the Restaurant *with Fat Cow funds* on January 11, 2014, clearly intended to train employees for Ramsay's new restaurant.[22]

The Restaurant was supposed to be featured on Hell's Kitchen Season 12, which Ramsay conceded would be a huge boon for the Restaurant. (R. 15156, R. 16611) However, in February 2014, Ramsay unilaterally and without informing Seibel negotiated a new agreement to replace the Fat Cow Restaurant with his new restaurant as the prize for season 12 of Hell's Kitchen. (R. 15157; R. 17967)

On April 2, 2014, Seibel filed the complaint in the instant litigation. (R. 28) When the Landlord learned of the litigation, lease negotiations for Ramsay's new restaurant in the Premises ended and Ramsay was forced to abandon his scheme. (R. 15180:1-15182:7; R. 17256, p. 3; R. 4452:15-4453:25; R. 1189:4-1190:1)[23]

IV. DECISIONS BELOW

A. Motion to Dismiss

On or about March 27, 2015, the Court-Below denied in part and granted in part Ramsay's motion to dismiss the action in its entirety. (R. 22205) In its decision, the Court-Below rejected Ramsay's "extraordinary contention that a party anticipatorily breaches a unanimous consent provision by opposing the closing of a

[22] (R. 16089; R. 7168:6-7169:1; R. 7174:9-7175:17; R. 7178:2-8, R. 17235, R. 17600; R. 6386:16-6387:20; R. 6394:20-24; R. 17596; R. 6377:2-20; R. 6393:19-25)

[23] As a result, the Hell's Kitchen negotiations for Ramsay's new "Roast" restaurant also fell through and Ramsay entered into an agreement for another of his restaurants to be the prize for season 12 of Hell's Kitchen. (R. 17974)

going business venture…" (R. 22225) Further, the Court-Below recognized that if Ramsay truly believed the parties' differing views caused a deadlock, an appropriate remedy was to seek judicial dissolution, which they did not do until *long after* they closed the Restaurant in breach of the Agreements. (R. 22205-6) After the Motion to Dismiss was decided, Seibel's derivative cause of action for breach of fiduciary duty and his direct and derivative causes of action for breach of the Fat Cow LLC Agreement remained. (R. 22230-1)[24]

B. <u>Summary Judgment Decision</u>

Both parties moved for summary judgment, at least in part, and the Court-Below denied both motions for the most part, dismissing only Seibel's direct claims. (R. 22279) The Court-Below held that "It is undisputed that Ramsay closed the restaurant even though Seibel objected to the closure", but also held that Ramsay raised triable issues as to whether they were excused from performance due to the doctrine of impossibility. (R. 22292, 22294) However, the Court-Below adhered to its holding in the MTD Decision that rejected Ramsay's anticipatory breach argument. (R. 22294, n. 8)

The Court-Below further held that "[i]f Ramsay closed the restaurant simply because he wanted to end his partnership with Seibel and start a new restaurant, there

[24] After discovery was complete, the Court-Below granted Seibel's motion to amend the complaint to include a direct and derivative claim for breach of the FCLA Agreement. (R. 22504)

would be a breach of fiduciary duty." (R. 22307) Although the Court-Below acknowledged it was not disputed that Ramsay worked on his new restaurant while at The Fat Cow, the court still found there were triable issues as to whether Ramsay breached his fiduciary duty.

C. Motions in Limine

Before trial, both parties made several motions in limine, which were decided by an order dated January 6, 2022.[25] In one motion, Seibel sought to preclude various audio tapes from evidence which were recorded by Ramsay's team without Seibel's knowledge or consent and were not properly authenticated. (R. 13605) The Court-Below granted the motion in part and permitted Ramsay to attempt to authenticate the remaining audio tapes that were not precluded at trial. (R. 8; R. 14829)

The Court-Below also granted Seibel's motion to preclude unrelated, prejudicial evidence of Seibel's conviction based on tax conduct that occurred ten years prior to the events at issue here. (R. 8)

D. Post-Trial Decision

In the Trial Decision, the Court-Below found that Seibel was not credible based on a finding that Seibel may have lied about a personal check for $1,200 issued to a former employee of the Restaurant – an issue of minimal relevance to the action. (R. 22508-9) This purported "lie" was never established at trial, as multiple trial

[25] After trial, the Court-Below issued individual decisions on each motion in limine, each dated May 19, 2022, each referring to the decision made in the January 6, 2022 order. (R. 6-8)

witnesses supported Seibel's testimony. However, in contrast, the Court-Below acknowledged Ramsay-Respondents' repeated lies showed a lack of credibility (R. 22510) but not enough to disregard their entire testimony, even though those lies involved the crux of this entire case: the reason for Ramsay unilaterally closing the Restaurant. (R. 22511)

The Trial Decision also contained unsupported, speculative justifications for Ramsay's many failures and improper conduct that was not established (or even argued) by Ramsay at trial: although it was Ramsay's obligation to operate the Restaurant, the Court-Below found that "perhaps" Ramsay did not send anyone with experience from his team (after Van Willigan's departure) due to "Seibel's overbearing nature..." (R. 22513) The Court-Below also found that "perhaps" Ramsay's team was distracted by other projects which prevented them from being present at the Restaurant and caused them to ignore food quality and operational problems. (R. 22516) There was no evidence in the record to support either of these two "perhaps" findings on critical factual issues. Nevertheless, as a result of the "perhaps" findings, the unauthenticated audiotapes, and the disregard for all of Seibel's testimony, the Court-Below made numerous factual findings against Seibel and thereby excused Ramsay-Respondents from liability based primarily on the unpled defense of *in pari delicto*.

E. Attorneys' Fee Award

The Court-Below awarded Ramsay $4,004,376.88 in attorneys' fees, a reduction from the original request of $5,953,232.50 due, *inter alia*, to removing fees for Ramsay's unsuccessful motions and requests for fees from a second law firm in the U.K. (R. 22540) In its decision, the Court-Below did not address the reasonableness of the rates charged by Ramsay's counsel, the duplicative nature of the billing entries, the excessive amount of partner time billed, or the equity of awarding celebrity chef Ramsay millions of dollars in fees against an individual that cannot afford to pay his own lawyers. (R. 21922-3)

V. ARGUMENT

A. Standard Of Review

It is well-settled that the Appellate Division has the same broad authority as that of the trial court when reviewing a decision after a bench trial, and the Appellate courts may render a judgment that it finds warranted by the facts. *N. Westchester Pro. Park Assocs. v. Town of Bedford*, 60 N.Y.2d 492, 499, 458 N.E.2d 809, 812–13 (1983); *see also Thoreson v. Penthouse Int'l, Ltd.*, 80 N.Y.2d 490, 495, 606 N.E.2d 1369, 1370 (1992) (fact-finding decisions of trial court may be revisited on appeal where conclusions could not be reached under a fair interpretation of the evidence); *Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278, 279, 788 N.Y.S.2d 44, 45 (1st Dep't 2004) (de novo standard of review applies to trial court's findings made as a matter of law).

B. The Court-Below's Credibility Determinations Must Be Overturned

Deference is generally given to the trial court on credibility determinations, unless the trial court afforded too much weight to contradictory and inconsistent testimony of interested witnesses. *See Cadle Co. v. Nunez*, 43 A.D.3d 653, 655, 841 N.Y.S.2d 291 (1st Dep't 2007) (reversing lower court decision based on credibility of witnesses related to defendant whose testimony was proven false on the stand). The trial court's decision based on witness credibility may be overturned where the testimony is viewed as "incredible as a matter of law" and where "credibility would

be strained beyond the breaking point" when considering the witnesses' testimony in light of the other evidence [or lack thereof] presented. *People v. Quinones*, 61 A.D.2d 765, 765, 402 N.Y.S.2d 196, 197–98 (1st Dep't 1978); *Matter of Carl W.*, 174 A.D.2d 678, 679–80, 571 N.Y.S.2d 536, 538 (2d Dep't 1991). Appellate courts have the power to grant the judgment that should have been granted by the trial court when weighing the probative value of conflicting testimony. *Hanna v. State*, 152 A.D.2d 881, 884–85, 544 N.Y.S.2d 85, 87–88 (3d Dep't 1989); *see also Lefton v. Freedman*, 163 A.D.2d 360, 559 N.Y.S.2d 330 (2d Dep't 1990).

1. The Court-Below Improperly Disregarded All of Seibel's Testimony

The Court-Below found that Seibel "lied" and "fabricated" evidence relating to an employee claim, Mr. Nguyen ("Nguyen"). (R. 22508-10) This was the "primary" basis for the Court-Below to apply *falsus in uno, falsus in omnibus* to "disregard all of Seibel's testimony." (*Id*.) This is a clear error.

The Nguyen labor issue was submitted at trial as one small part of the claim that Seibel mismanaged the Restaurant. Nguyen was a Fat Cow employee for two weeks in September 2012, and claimed he was owed payment of between $1200.00 and $1500.00. (R. 16766; R. 17403) A December 19, 2012 email informed Ramsay's and Seibel's team about the claim. (R. 19311) Andy Wenlock, part of Ramsay's team, admitted that despite receiving the email and taking employee issues

"seriously", he did nothing to follow-up after receiving notification.[26] (*Id.;* R. 15846:2-15; R. 16065:19-16067:24)

Seibel testified that he had left a check for Nyugen to pick up to resolve his claim before the hearing. (R. 15460-15461; R. 17403) The Court-Below found that Seibel lied about the check because it was "clearly backdated" (R. 22510), and yet the *only* testimony at trial supported Seibel's statements. (R. 17403; R. 15460:22-15461:24; R. 15136:16-15137:22; R. 15298:4-15299:2) Tassan testified that she remembered seeing the check, and saw the envelope left for Nguyen at the hostess stand of the Restaurant, and understood that Nguyen didn't pick up his check. (R. 2447:23-2450:25) Green reiterated that same fact in his May 2013 email. (R. 18584) Not a single Ramsay witness testified one way or the other.

For the doctrine of *falsus in uno, falsus omnibus* to apply, the testimony must be "demonstrably false." *Washingon Mut. Bank v. Holt,* 113 A.D.3d 755, 756-77 (2d Dep't 2014)("Where a witness has given testimony that is *demonstrably false*, we may, in accordance with the maxim *falsus in uno falsus in omnibus*, choose to discredit or disbelieve other testimony given by that witness.")(Emphasis added.) That was not the case here. The *only* testimony at trial supported Seibel's account.

[26] The Court-Below found that Seibel had not kept Ramsay's team informed about the claim after the December 2012 email. (R. 22509) The Court-Below ignored the testimony by Wenlock, that he did not follow up on the claim (R. 16065-16067), and Tassan's that she spoke to multiple people from Ramsay's team to keep them informed about the claim, including Ramsay and Wenlock. (R. 2515:8-2516:7) Tassan reiterated that she discussed the legal advice she received with Ramsay's team, including Wenlock and Simon Gregory. (R. 2534:10-2536:11; 2537:11)

No evidence was submitted to show his testimony regarding the check was "demonstrably false." Moreover, the purported misrepresentation did not concern a "material fact." *See East Side Mgrs. Assoc., Inc. v. Goodwin,* 26 Misc.3d 1233(A) at *8 (Civ.Ct. N.Y. Cty. 2010). The testimony about the check was immaterial, because the issue raised by Ramsay was that Seibel had mismanaged the Restaurant, failed to inform his team about the claim and mishandled the claim.[27]

The Court-Below's improper decision to disregard *all* of Seibel's testimony had substantial prejudice to Seibel and significantly impacted the court's factual findings. For example, the "most important[]" excuse for Ramsay to close the Restaurant was that "Seibel unilaterally took money out of the capital account." (R. 22511) Not only did that "fact" arise months *after* Ramsay made the decision to close, but the Court-Below expressly relied upon the *in falsus uno* finding to disregard Seibel's testimony and resolve the issue "in favor of Ramsay" despite Ramsay's complete lack of recollection of the facts.[28] (R. 22514-15)

[27] The other purported basis for applying the *in falsus uno* doctrine, namely, that certain rebates were allegedly not disclosed and Seibel's failure to recall one of those rebates at his deposition, (R. 22510), were not instances of Seibel purportedly testifying falsely to the Court-Below and should have had no bearing on the *in falsus uno* finding.

[28] Seibel testified he agreed to bring back Van Willigan on the condition she would not be paid by Fat Cow, as she was going to be working on other Ramsay matters for Ramsay's other companies. (R. 14785:3-14787:10; R. 15022; R. 14786-14787; R. 14887-14888; R. 17211; R. 6301:24-6302:8; R. 15458:19-15460:21) When Seibel learned that Ramsay had paid Van Willigan in 2013 from Fat Cow funds contrary to the parties' agreement, Seibel considered that a distribution to Ramsay and withdrew an *equal* amount. (R. 14787-88) Seibel's testimony is consistent with Green's. (R. 15308:12-15309:15) In contrast, Ramsay could not recall if it was agreed that Van Willigan would not be paid by the Fat Cow. (R. 15140:16-24) The Court-Below not only credited

2. Ramsay's Credibility Involved Lies About the Single Most Important Issue of the Case

In contrast, the Court-Below found that despite Ramsay and his team's numerous misrepresentations, they were only "somewhat lacking in credibility" and thereby accepted Ramsay's testimony on many contested issues. (R. 22510-11) However, unlike Seibel, Ramsay and his team's lies were about the single most important issue in the action – Ramsay's purported reasons for unilaterally closing the Restaurant and were demonstrably false:

- Ramsay claimed that he decided to close the Restaurant in June 2013 because he could no longer be in business with Seibel. (R. 15188:11-15190:11, R. 15724:11-15725:6) That was false, as shown by the fact that Ramsay and Seibel were negotiating potential new deals in November 2013. (R. 22511; R. 19320; R. 15703:9-15705:18; R. 15944:8-25; R. 19324; R. 18620; R. 15599-15600) In addition, the evidence showed that Ramsay opened a restaurant with Seibel in Atlantic City in February 2015. (R. 15023:8-15; R. 15734; R. 15491, R. 15492; R. 15712)
- Ramsay testified he could not be in business with Seibel because Seibel was secretly negotiating deals to open Gordon Ramsay BURGR

Ramsay's lack of recollection over Seibel and Green's clear recollection, but also appears to have relied on Ex. 680 (R. 19966), an unauthenticated recording, discussed *supra*.

restaurants (another group of restaurants they partnered in) in airports. (R. 15183:1-15; R. 15687:24-15688:10) In fact, Ramsay's team not only knew about the potential deals, but had initiated the process and handed the negotiations over to Seibel in May 2013. (R. 19354, R. 15599; R. 3954:16-18; R. 18420, R. 19353).[29]

- Ramsay testified he could not be in business with Seibel because Seibel suggested a deal for restaurants in airports and Ramsay would never have a restaurant in an airport. (R. 15183; R. 469; R. 15732:10-17) That was false. (R. 22511) The evidence showed that Ramsay had a restaurant in an airport since 2008. (R. 15943)
- Ramsay testified he could not be in business with Seibel because Seibel was improperly trying to negotiate the use of Ramsay' name without permission (R. 15725:3-6). That was false. As the Court-Below found, Seibel was acting under the clear authority of the BURGR LLC Agreement. [30]
- Ramsay testified that there were "contracts that he [Seibel] was signing unbeknownst to me", but Thomas conceded that Seibel was merely

[29] These documents show conclusively that Gillies', Ramsay's right-hand man, lied at his deposition when he claimed Ramsay and his team did not know about Seibel's discussions involving the airport deals, which the Court-Below did not consider. (R. 3928:20-3930:5)

[30] The Court-Below agreed that these activities were fully consistent with Seibel's responsibilities under GR Burgr LLC Agreement. (R. 22511; R. 17430, Sec. 7.2; Sec. 4 (a)-(d), Schedule 1, Sec. 8.2, 8.8; R. 15498:2-15952:10)

negotiating and did not ever sign such a contract. (R. 15189:5-7; R. 15952:7-10)

- Ramsay falsely testified that Seibel was "trying to sell a Gordon Ramsay restaurant in Singapore" without permission (R. 15183:2-9) Thomas agreed. (R. 15952:11-14) In fact, the evidence at trial showed numerous communications between Seibel and Ramsay and his team showing Ramsay was fully informed of the Singapore inquiries. (R. 19348; R. 19349; R. 19350)
- Ramsay lied when he claimed repeatedly that the Restaurant had to close because of the Trademark. (R. 22510-11)(see infra section III(F))

All of these lies were presented to the Court-Below to support Ramsay's defense to the breach of contract claim that he was justified to close the Restaurant.

Incredibly, the Court-Below not only minimized the impact of these critical lies, but the court disregarded the multitude of proven lies by Ramsay during his trial testimony, including, but not limited to: (i) Ramsay's statement that the landlord, Caruso, didn't like Seibel (R. 15150), yet Caruso never met Seibel (R. 15467, R. 4409); (ii) Ramsay's testimony that he funded the Restaurant in December 2013 to help pay employees at Christmas and keep the lights on (R. 15105; 15188), but the record shows that he provided no such funding in December 2013 (R. 17631); (iii)

Ramsay's testimony that his team didn't know about the Spencer Nguyen claim (R. 15185), yet the documents show that his team knew (R. 19311); (iv) Ramsay's testimony that the Landlord would not let him put his name on the Restaurant in December 2013 (R. 15114), yet Landlord stated he was always in favor of Ramsay's name being on the Restaurant (R. 4133:3-18); and (v) Ramsay's testimony that his team arranged for him to meet with Caruso at a "discreet table" was not to keep the meeting secret from Seibel (R. 15108), yet Ramsay subsequently admitted later that statement was false (R. 15166).

While credibility determinations warrant deference, here the Court-Below's decision to disregard all of Seibel's testimony, while finding Ramsay's pathological level of lies, particularly on the single most important issue of the case, to be "somewhat lacking in credibility" was contrary to the evidence presented. *Cadle*, 43 A.D.3d at 655.

3. The Court-Below Was Improperly Influenced by Evidence Excluded from Trial

The Court-Below's credibility determinations appear to have been improperly influenced by evidence excluded from the trial. Prior to trial, the Court-Below excluded evidence regarding Seibel's criminal conviction concerning "alleged conduct related to Seibel's taxes [that] occurred ten years prior" and rejected the argument that it "impacts his credibility." (R. 10). However, on the first day of trial during Seibel's testimony it was clear that Seibel's credibility had already been

negatively impacted in the court's eyes. Within the first hour of Seibel's testimony, regarding Seibel' inquiry *in 2011* about leasing the Premises for one of his other restaurants and being quoted a rent that was higher than what was subsequently offered to the Fat Cow, the Court-Below interjected that such a question might "open the door" to admission of the conviction – which occurred *in 2016* – because it could explain why Seibel was offered worse terms than Ramsay was offered for the Restaurant. (R. 14715:11-14720:6) In other words, no one had ever raised – nor reasonably could have raised – the argument that Seibel's 2016 plea could have impacted negotiations of a lease in 2011, but the Court-Below had already so clearly been impacted by knowledge of the excluded evidence that the court raised it in connection with wholly unrelated facts that occurred five years prior. Indeed, the Court-Below never let go of the unsupportable view that the Landlord did not have a favorable view of Seibel, finding that Seibel had "alienated" the landlord – despite there being absolutely no evidence to support that finding because they had never met or spoken. (R. 22516; R. 15467:4-10; R. 4409:1-10)

It appears that the Court-Below's unfounded basis to exclude all of Seibel's testimony purportedly based on Seibel's supposed "lie" about a $1200 check to an employee was impacted by evidence that the Court-Below had properly excluded.

C. The Audio Recordings Should Have Been Excluded

The Court-Below improperly permitted Ramsay to introduce certain audio recordings made in the U.K. in which Ramsay's team secretly and without Seibel's consent recorded conversations with Seibel while he was in New York (R. 10, 13605) The Court-Below appeared to rely upon the recordings in numerous factual findings.[31] The recordings should have been excluded for at least two reasons:

First, CPLR § 4506(3)(a) provides that: "An aggrieved person who is a party in any civil trial … may move to suppress the contents of any overheard or recorded communication … on the ground that ... the communication, conversation or discussion was unlawfully overheard or recorded." CPLR §4506 further "provides that any evidence obtained by illegal eavesdropping is inadmissible in every type of civil, criminal, administrative and legislative proceeding in New York." *See* CPLR §4506 (McKinney, Practice Commentaries). The recordings were made in the U.K. (R. 19356) In the U.K., consent is required by all parties before the recording of a telephone call may be shared with a third party. (R. 14189 at Parts I and II). Further,

[31] The Court-Below explicitly relied upon Ex. 680 (R. 19966) to support the finding related to Lowder's report and use of historical data. (R. 22519) The Court-Below also appeared to have relied upon other recordings. Ex 681 (R. 20051) discusses liens filed by contractors (R. 14927), which relates to the Court-Below's findings blaming Seibel for not promptly paying vendors (R. 22512-13); Ex 683 (R. 20219) discusses wage and labor issues (R. 14971;19674), which relates to the Court-Below's findings blaming Seibel for labor issues (*id.*); Ex 64 (R. 16794) relates to a disagreement on the menu (R. 14989), which relates to the Court-Below's finding on disagreements among the partners; and Ex. 680 (R. 19966, 15014) discusses the payments to Van Willigan, which the Court-Below clearly relied upon in finding against Seibel on this issue claiming he "siphoned" money from the company. (R. 22515, 22517).

businesses may not record conversations at all except for very specific and limited purposes which are not present in this case. (R. 14586, §3; R. 14281, §1(5)). Since the recordings violate the law in which they were made, they should have been excluded.

Second, the recordings were not properly authenticated at trial.[32] Mr. Gillies, Ramsay's right-hand man, who made the recordings, did not testify at trial. Wenlock did not make the recordings and had no knowledge where they were kept, or when they were provided to counsel. (R. 15989-15990; R. 16083:1-14; 16083:24-16084:2; 1238:14-20.) For two of the phone calls, Ex. 64 (R. 16794) and Ex. 681 (R. 20051), Wenlock was present when Gillies recorded the calls, but does not recall the date of the recordings. (R. 19356 ¶3; R. 16081:3-8; 16083:15-23) Wenlock was not in the room for the third call, Ex. 680 (R. 19966), and did not even participate in the fourth call, Ex. 683 (R. 20219). (R. 16084:9-13) Nevertheless, Wenlock made the wild and unsupportable claim that each recording represented the entirety of the phone calls. (R. 19356 ¶4; R. 16081:9-20; R. 16083:15-23) Wenlock's testimony lacks credibility – that 9 years later Wenlock can recall, word for word, the entire conversation, particularly when he claimed the inability to recall calls from a similar time period. (R. 16053:13-16054:1; 16063:15-22; 16071:18-24; 16082:16-16083:25)

[32] Exhibits 64, 680, 681 and 683 (R. 16794; R. 19966; R. 20051; R. 20219) are the recordings and transcripts that Gillies made without Seibel's consent. (R. 14590-91)

In *Grucci*, the Court of Appeals noted that there was no proof offered in regards to "who recorded the conversation, how it was recorded (e.g., the equipment used) or the chain of custody during the nearly nine years that elapsed between early 2000, when the conversation allegedly took place, and the trial in late 2008." *Grucci* at 897. The Court further held that "[t]he predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered," and thereby affirmed the exclusion of the tapes. *Id.* The Court-Below clearly should not have permitted the recordings.

D. The Clear Facts And Law Proved That Ramsay Breached The LP And LLC Agreements

Plaintiff-Appellant has asserted a derivative breach of contract claim for breaches of the FCLA Agreement and LLC Agreement. Despite Seibel proving a clear breach by Ramsay-Respondents, the Court-Below ruled against Seibel.

1. Applicable Standards for Breach of Contract Claims

With regard to the FCLA Agreement, the breach is asserted against both Ramsay, as manager, and GRUS as General Partner, both of whom caused a breach of the FCLA contract by their unilateral actions. (R. 16544) The FCLA Agreement is governed by Delaware law. *See Interim Healthcare, Inc. v Spherion Corp.,* 884 A2d 513, 548 (Del Super Ct 2005), *affd,* 886 A2d 1278 (Del 2005). Ramsay and GRUS violated the FCLA Agreement by unilaterally closing the Restaurant. (R. 16544, §§ 8.1, 8.2, 8.4, 8.5)

With regard to the LLC Agreement, the derivative claim is asserted against GRUS, the member of the LLC, and Ramsay, in his capacity as a manager of the LLC, for breach of the unanimous consent provision. (R. 16537, ¶¶6, 7[a]) The LLC Agreement is governed by California law.[33] *See Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821, 250 P.3d 1115, 1121 (2011); *Densmore v. Manzarek*, No. B186036, 2008 WL 2209993, at *1 (Cal. Ct. App. May 29, 2008).

2. The Agreements Were Breached Because Unanimous Consent Was Required and Was Not Obtained

The heart of Seibel's breach of contract claim is that the Ramsay-Respondents closed the Restaurant in violation of the unanimous consent provisions of the LLC Agreement and FCLA Agreement, which was proven by the uncontested evidence.[34] (R. 15144, 15145, 15146-15147; 15886, 17091, 14794-14795, 17227; 17097; 17038, 15509; 22292-94) Indeed, this was an "undisputed fact." (R. 22292)

3. The Court-Below Improperly Applied the *In Pari Delicto* Defense to Excuse Ramsay-Respondents' Clear Breach

The Court-Below found Seibel could not succeed on the breach of contract claim because "Seibel is an active wrongdoer for the harm upon which he seeks to

[33] (R. 16537, § 18)

[34] The evidence further showed that Ramsay also did not have Seibel's consent to: (i) issue the WARN notice that the Restaurant would be closing (R. 14816-17; 17096, 17038; 16609; 15502-03; R. 15517); (ii) enter into the LVG agreement (R. 15506, 15963); or (iii) negotiate a new lease with Caruso. (R. 17038, 14812-13, 15507-15509, 15707-15708)

collect and therefore cannot recover" based on the "doctrine of *in pari delicto."* (R. 22516-17) This is clearly erroneous for numerous reasons.

a. The *In Pari Delicto* Defense Was Not Pled and Therefore Was Waived by Ramsay-Respondents

The defense of *in pari delicto* was never raised by Ramsay-Respondents in their answer, or their motions to dismiss and summary judgment. (R. 66, 113, 163, 22205, 22279) In fact, Ramsay-Respondents did not raise the defense in any pre-trial proceedings, at trial or even in their post-trial brief. (R. 21473)

Pursuant to CPLR 3018(b), an affirmative defense must be pled if it would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of the pleadings, otherwise it is waived. *See Fernandez v. Hencke*, 93 A.D.3d 440, 441, 941 N.Y.S.2d 36, 37 (1st Dep't 2012) (affirming judgment after bench trial holding defendant waived affirmative defense that was raised for the first time after trial in accordance with CPLR 3018(b)); *Marks v. Macchiarola*, 204 A.D.2d 221, 221, 612 N.Y.S.2d 405, 405 (1st Dep't 1994); *DiIorio v. Gibson & Cushman of New York, Inc.*, 161 A.D.2d 532, 533, 566 N.Y.S.2d 1, 2 (1st Dep't 1990). It is only where the plaintiff is not prejudiced or surprised by a defense that a defendant is permitted to raise a defense that was not first asserted in the pleadings. *See Rogoff v. San Juan Racing Ass'n, Inc.*, 54 N.Y.2d 883, 885, 429 N.E.2d 418, 419 (1981) (defense was not waived because there was no prejudice where adverse party

fully opposed the defense in motion papers); *Spiegel v. 1065 Park Ave. Corp.*, 305 A.D.2d 204, 205, 759 N.Y.S.2d 461, 463 (1st Dep't 2003).

The doctrine of *in pari delicto* weighs the intentional wrongdoing of both parties and may operate to prevent a party from recovering from another party who is at equal or lesser fault. (*See infra* Section V(D)(3)(c)(i)) Seibel was prejudiced by Ramsay-Respondents' failure to plead *in pari delicto* because Seibel was not on notice of the need to present a case at trial detailing the intentional wrongdoing of Ramsay-Respondents, and to weigh that evidence against any on the part of Plaintiff-Appellant, as would be required to respond to an *in pari delicto* defense.

In *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 8 N.Y.S.3d 143 (1st Dep't 2015), the First Department found plaintiff was prejudiced because plaintiff was "hindered in the preparation of his [or her] case or has been prevented from taking some measure in support of his [or her] position[.]" 129 A.D.3d at 80. Here, Ramsay-Respondents' failure to plead *in pari delicto* as an affirmative defense or raise it at any point in this action, prejudiced Plaintiff-Appellant by preventing him from obtaining discovery on this issue and presenting a case at trial rebutting this defense. Under these circumstances, it was an error for the Court-Below to *sua sponte* raise the *in pari delicto* defense. *Tilbury Fabrics, Inc. v. Stillwater, Inc.*, 81 A.D.2d 532, 533, 438 N.Y.S.2d 82, 84 (1st Dep't 1981), *aff'd*, 56 N.Y.2d 624, 435

N.E.2d 1093 (1982) (defendant's failure to assert defense constituted waiver per CPLR 3018(b), and it was error for trial court to raise that defense *sua sponte*).

b. The Court-Below Incorrectly Applied New York's Law on *In Pari Delicto* to Contract Claims Governed by Delaware and California Law.

Not only did the Court-Below improperly raise the *in pari delicto* defense, it incorrectly applied New York's *in pari delicto* substantive law. (R. 22516-17) This is a clear error.

Because the LP Agreement is governed by Delaware law, Delaware law applies to the contract's substantive issues. *Portfolio Recovery Assoc., LLC v. King,* 14 N.Y.3d 410, 416, 901 N.Y.S.2d 575 (2010). The First Department has stated that *in pari delicto* is a "substantive equitable defense" governed by the applicable substantive law of the contract at issue. *FIA Leveraged Fund Ltd. v. Grant Thornton, LLP,* 150 A.D.3d 492, 496 (1st Dep't 2017). Accordingly, Delaware law should have been applied to the *in pari delicto* defense of the breach of the LP Agreement claim, and California law should have been applied to the defense of the breach of the LLC Agreement claim. (R. 16541, §18; R. 16569, §17.2)

c. *In Pari Delicto* Is Inapplicable to Facts of this Case

There are multiple reasons why the Court-Below improperly applied the *in pari delicto* defense here.

i. *Seibel's Conduct Does Not Rise to the High Level Required for the Application of the In Pari Delicto Defense*

Delaware courts define the acts that constitute *in pari delicto* as "illegal" or even "criminal." 1 Am. Jur. 2d Actions § 40. Delaware courts typically only apply the defense when two parties are "of equal fault" regarding illegal activity or extreme immoral wrongdoing. *See Korotki v. Hiller & Arban, LLC*, No. CV-15C-07-164, 2017 WL 2303522, at *12 (Del. Super. Ct. May 23, 2017), *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 237 (Del. Ch. 2014); and *In re Am. Int'l Grp., Inc., Consol. Derivative Litig.*, 976 A.2d 872, 883 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. Of Louisiana v. Gen. Re Corp.*, 11 A.3d 228 (Del. 2010).

In *Korotki,* 2017 WL 2303522, at *12, the court described *in pari delicto* as "an extreme remedy." The court held that Korotki's "violation of Delaware's fraudulent transfer laws," did not reach the "extremely high bar" set by the *in pari delicto* doctrine. *Id.* Indeed, Delaware courts have refused to apply *in pari delicto* unless the mutual fault or wrongdoing involves illegal or criminal conduct. In *In re LJM2 Co-Inv., L.P.*, 866 A.2d 762, 771 (Del. Ch. 2004), the court rejected the defense of *in pari delicto* because it did not concern activity that is per se forbidden by law. *Id. See also, In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 237 (Del. Ch. 2014).

Similarly, California courts generally apply *in pari delicto* to cases involving illegal contracts or other illegal activities or matters of serious moral turpitude. *Tri-Q, Inc. v. Sta-Hi Corp*., 63 Cal. 2d 199, 220, 404 P.2d 486 (1965)(the lower court erred in applying *in pari delicto* because there was no public interest to protect in failing to enforce the already completed illegal contract.) *See also McIntosh v. Mills*, 121 Cal. App. 4th 333, 347, 17 Cal. Rptr. 3d 66, 76 (2004) (*in pari delicto* applied to bar plaintiff from recovering under an illegal fee sharing agreement.)

Seibel's conduct cited by the Court-Below does not rise to the level of misconduct required to bar his claim under the *in pari delicto* doctrine (R. 22517), and it was clear error for the Court-Below to apply it here.

ii. *The Fiduciary Duty Exception Applies Here*

The fiduciary duty exception of *in pari delicto* states that "the doctrine has no force in a suit by a corporation against its own fiduciaries." *Stewart v. Wilmington Tr. SP Servs., Inc.*, 112 A.3d 271, 304 (Del. Ch. 2015), *aff'd,* 126 A.3d 1115 (Del. 2015). The *Stewart* court specifically referenced its application to "shareholder derivative suits" and it "will not bar the corporation from suing its faithless fiduciaries, because of the fiduciary duty exception." *Id.*

In *In re Am. Int'l Gp., Inc., Consol. Deriv. Litig.,* 976 A.2d 872, 876, 882 (Del. Ch.2009)(*AIG II*), the court found that because of the exception "the doctrine does not have force in a suit by a corporation against its own officers or employees." Thus,

the court found that the corporate officers and directors were "unable to invoke the *in pari delicto* defense." *Stewart*, 112 A.3d at 306, *citing AIG II*, 976 A.2d at 876. The result is similar under California law. *See, Sontag v. Denio,* 23 Cal. App. 2d 319, 323, 73 P.2d 248, 251 (1937) (when the parties are in a fiduciary relationship the court will not apply *in pari delicto*).

Here, GRUS and Ramsay are fiduciaries and/or owners of the entities, and *in pari delicto* is not available in this action brought by the entities against them.

iii. Seibel's Conduct Should Not be Imputed to the Entities

In addition, the Court-Below "imputed" the wrongful conduct of Seibel to the entities in order to apply the *in pari delicto* defense. (R. 22517) That was improper under the adverse interest exception.

The adverse interest exception to the *in pari delicto* doctrine is a departure from the general rule of imputation "that the knowledge and actions of the corporation's officers and directors, acting within the scope of their authority, are imputed to the corporation itself." *Stewart.* At 302-03, *citing Teachers' Ret. Sys. Of Louisiana v. Aidinoff*, 900 A.2d 654, 671 n.23 (Del. Ch. 2006). "These considerations are central to the *in pari delicto* doctrine: the practice of imputing officers' and directors' knowledge to the corporation means that, as a general rule, when those actors engage in wrongdoing, the corporation itself is a wrongdoer." *Stewart*, 112 A.3d at 303, *citing In re Am. Int'l Grp., Inc., Consol. Derivative Litig.*, 976 A.2d

872, 883-84 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. Of Louisiana v. Gen. Re Corp.*, 11 A.3d 228 (Del. 2010).

The adverse interest exception applies when "the corporate agent responsible for the wrongdoing was acting solely to advance his own personal financial interest, rather than the corporation itself." *In re Am. In'l Grp., Inc.*, 976 A.2d at 891. Under such circumstances, "corporations have not been held to the general rule of *in pari delicto*." *Stewart*, 112 A.3d at 303.

The Court-Below "imputed" certain conduct by Seibel that was clearly to the benefit of Seibel alone, and not the entities. The Court-Below imputed Seibel's conduct that he supposedly "siphoned money from the business at a time when it was cash poor." (R. 22517) That is precisely the conduct that cannot be imputed onto the entity. *Stewart*, 112 A.3d at 303. The Court-Below also relied upon its finding that Seibel "was engaged in efforts to parley to his own advantage his partner's business." (R. 22517) This too is clearly conduct that was for Seibel's benefit and not the entities.

All the other conduct referenced by the Court-Below relates to the court's (misguided) finding that Seibel mismanaged the Restaurant by failing to pay contractors, failing to timely pay an employee, and supposedly causing "extreme negative publicity" to the Restaurant. (R. 22517) While such conduct could arguably be conduct seen as beneficial to the company and therefore may be imputed onto the

company, Delaware and California law do not permit application of the defense based on mismanagement, and not illegal acts or act of serious moral turpitude. *See supra*.

For these reasons, the Court-Below should not have applied the *in pari delicto* defense.

4. Frustration of Purpose and Impossibility Do Not Apply

In the Trial Decision, the Court-Below states that "even if *in pari delicto* did not apply, Seibel still could not recover" on his breach of contract claim. (R. 22517). The Court-Below provides no legal basis for that conclusion. (*Id.)* To the extent that the Court-Below relied upon the two defenses argued by Ramsay-Respondents – frustration of purpose and impossibility – that finding is in error. The evidence showed that Ramsay-Respondents' purported excuses for closing the Restaurant: (a) did not exist at the time the Ramsay-Respondents' decision was made to close; (b) do not constitute valid grounds for nullifying the clear dictates of the Agreements; or (c) were inconsistent with the evidence.

i. *Standard for Impossibility and Frustration of Purpose*

In Delaware, "[t]here can be no invocation of the impossibility defense if the supervening events were reasonably foreseeable, and could and should have been anticipated by the parties and provision made therefor within the four corners of the agreement." *Obsidian Fin. Grp., LLC*, No. CV 2020-0485-JRS, 2021 WL 1578201,

at *6; *see also Bobcat N. Am., LLC v. Inland Waste Holdings, LLC*, No. CVN17C06170PRWCCLD, 2019 WL 1877400, at *9 (Del. Super. Ct. Apr. 26, 2019). Under California law, the doctrine of impossibility provides: "[w]here a party has agreed, without qualification, to perform an act which is not in its nature impossible of performance, he is not excused by the difficulty of performance, or by the fact that he becomes unable to perform…" *Irwindale Citrus As'n v. Semler*, 60 Cal. App. 2d 318, 324, 140 P.2d 716, 719 (1943) *citing*, Cal. Civ. Code § 1597. California takes a strict view that impossibility requires the literal, physical impossibility under a contract, short of that, "everything is deemed possible." Cal. Civ. Code § 1597. *See also, In re Toyota Motor Corp.*, 790 F. Supp. 2d 1152, 1175 (C.D. Cal. 2011)*; W. Indus. Co. v. Mason Malt Whisky Distilling Co.*, 56 Cal. App. 355, 205 P. 466 (Cal. Ct. App. 1922)

Regarding the doctrine of frustration of purpose in Delaware, "[t]he frustration of purpose defense requires the defendant to establish: (1) substantial frustration of the principal purpose of the contract; (2) that the nonoccurrence or occurrence of the frustrating event was a basic assumption upon which the contract was made; and (3) no fault on the part of the defendant." *Chase Manhattan Bank v. Iridium Afr. Corp.*, 474 F. Supp. 2d 613, 620 (D. Del. 2007). California law is similar. *Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.*, 66 Cal. App. 3d

101, 154, 135 Cal. Rptr. 802, 833–34 (Ct. App. 1977); *Johnson v. Atkins*, 53 Cal. App. 2d 430, 433-34, 127 P.2d 1027 (1942).

ii. *The Court-Below's "Facts" Underlying the Decision Occurred After Ramsay Decided to Close the Restaurant in June 2013.*

The "most important" fact relied upon by the Court-Below to excuse Ramsay's clear breach was that Seibel allegedly "raided" the business accounts." (R. 22511, 22517) Other facts cited by the Court-Below were (1) the Restaurant needed a cash infusion from Seibel; and (2) letting the mediator's proposal lapse. (R. 22517) These findings do not support an impracticability, impossibility or frustration of purpose defense.

The most blatant error is that these findings by the Court-Below to support Ramsay's defense to the breach of contract claim *did not exist in June 2013* when Ramsay decided to close the Restaurant. (R. 15189; R. 17284; R. 15884:24-15885:21; R. 18480) First, Seibel's purported "raid" of company funds was not a basis to close in June 2013 because Seibel first took money out of the Restaurant account in September 2013 (an amount equal to the amount Ramsay had improperly removed to pay Van Willigan.)[35] (R. 17649) Second, when Ramsay decided to close the Restaurant, the Restaurant did not need a cash infusion *from Seibel*, because as

[35] As set forth above, this factual finding was based on the improper total disregard for Seibel's testimony that he merely removed an amount equal to what Ramsay had removed to pay Van Willigan, contrary to their agreement that Ramsay would pay Van Willigan personally, and the unauthenticated audio recordings that should been excluded.

of June 2013 Seibel's and Ramsay's cash contributions were equal. (R. 14764-65; R. 17612), and even by December 2013, Seibel and Ramsay had contributed the same amount to the venture. (R. 17631)[36] Third, the mediator's proposal lapsed in December 2013 and therefore could not be a basis to close in June 2013.[37] (R. 17227, 17410)

The Court-Below also found that Seibel's refusal to consent to the closure of the Restaurant after December 2013 was "out of spite." (R. 22517) First, Ramsay decided to close the Restaurant in June 2013 and did not inform Seibel of that decision until December 13, 2013.[38] Thus, Seibel's refusal to consent did not happen until December 2013, months into Ramsay's secretive plotting and scheming to seize the Restaurant for himself. It is simply far beyond any evidence before the Court-Below to find that Ramsay's secret scheme to close the Restaurant and open one without Seibel that he was surreptitiously executing for months was benevolent,

[36] The Court-Below credited Ramsay for making a "99,077" cash infusion in June 2013, and yet that amount merely brought Ramsay equal to Seibel's contributions to date. (R. 22515; R. 17612) Moreover, the 12/31/13 Balance sheet shows "Partner Equity" for Seibel to be $27,790 more than Ramsay ($248,708 v. $220,918). Because the Court-Below disregarded Seibel's testimony, the court ignored Seibel's testimony that he was always willing to contribute funds to the Restaurant so long as he had assurances of a continued operation (R. 14821, 14822).

[37] The Court-Below blaming Seibel for the failure of the mediator's proposal is based on the disregard for Seibel's testimony and is contrary to the evidence presented. Thomas and the documents admit that Ramsay did *not* want to settle at the mediator's amount (R. 15925; R. 17410; R. 17041) As a result, Thomas told counsel that there was no interest in settling. (R. 15498-99; R. 17410)

[38] (R. 17227; R. 14792:14-22; 15110:3-18; 15189; 17284; 15884 24-15885:21; 18496)

while Seibel acted out of "spite" when it was revealed to him in December 2013 that Ramsay would unilaterally close the Restaurant.[39]

Moreover, Ramsay's breach of the unanimous consent provision cannot be justified by a defense of impossibility or frustration of purpose because the parties could have included a deadlock provision in their contracts as this "could and should" have been anticipated by them. There were discussions of including a deadlock provision in the LLC Agreement, but the parties chose not to do so. (R. 16752) Thus, the parties foresaw that the managers might not reach unanimous consent and assumed that risk. "There can be no invocation of the impossibility [or impracticability] defense if the supervening events were reasonably foreseeable, and *could and should* have been anticipated by the parties and provision made therefor within the four corners of the agreement." *Obsidian Fin. Grp., LLC*, No. CV 2020-0485-JRS, 2021 WL 1578201, at *6 (emphasis added); *see also Bobcat N. Am., LLC v. Inland Waste Holdings, LLC*, No. CVN17C06170PRWCCLD, 2019 WL 1877400, at *9 (Del. Super. Ct. Apr. 26, 2019). *See also, Glendale Fed. Sav. & Loan Assn.*, 66 Cal. App. 3d at 154.

[39] The Court-Below further ignored the fact that Ramsay and his team admitted to being motivated by the desire to hurt Seibel, as Gillies stated upon Ramsay announcing his decision to close the Restaurant, that "we have the comfort that Rowen has lost all his investment in the business, with nothing to show for it." (R. 17230)

The Court-Below found, without legal support, that "Seibel had no more right to insist on unanimous consent to close the restaurant than Ramsay did to keep it going." (R. 22518) The Court-Below provided no legal authority whatsoever for this unique conclusion, and Plaintiff-Appellant is not aware of any such authority, essentially that a member/partner's desire for the status quo, i.e. the entity should continue to pursue its stated purpose – operating the Restaurant – is subject to the unanimous consent provision. In fact, it is clear that Ramsay had a clear option – if he wanted to close the Restaurant, and Seibel did not consent, he could file for dissolution. (R. 22225-6; Del. LLC Act §18-802) Instead, he chose to utterly disregard the contract and act unilaterally and close the Restaurant without authority to do so.

5. Seibel Proved Damages

The Court-Below found that Seibel failed to prove damages. (R. 22518-20) This ruling is contrary to the evidence and law.

i. The Court-Below Erred In Disregarding Lowder's Expert Opinion

The Court-Below disregarded Plaintiff-Appellant's expert testimony on the issue of damages, however, this was based on a misinterpretation of the expert's analysis. (R. 22518-20)

First, the Court-Below ignored Lowder's 40 years of experience consulting and doing financial projections for restaurants, with a special focus on the restaurant

market in Los Angeles and the Grove, and her conclusions based on that experience (R. 10898 Sec. III, p. 4; 16166:10-18; 16167:11-16168:24). Despite assuming Lowder was correct in stating that the Restaurant was profitable when non-recurring expenses were excluded, the Court-Below improperly substituted its own judgment finding the projections "unrealistic". (R. 22520; R. 16129:7-14; R. 10898 Sec. (a).) *See Scalisi v. Oberlander*, 96 A.D.3d 106, 122, 943 N.Y.S.2d 23, 34 (1st Dep't 2012) (lower court improperly substituted its own medical judgment for that of the parties' experts); *Doy S. v. State*, 196 A.D.3d 1165, 1168, 149 N.Y.S.3d 745, 748 (4th Dep't 2021) (lower court erred because its decision was based on its own psychological judgment substituted for that of the parties' experts).

Most important, however, is that the Court-Below's conclusion ignored much of the basis for Lowder's conclusions:

- Lowder did not "completely ignore[] the dynamics of the two partners" (R. 22519), rather, she testified that it was irrelevant as neither was the operator of the Restaurant on day to day basis. (R. 16173:1-10) The Court-Below also ignored the fact that although the parties had a disagreement on the menu, Seibel deferred to Ramsay's wishes and the menu remained as Ramsay desired. (R. 15079, 14778-79)

- Lowder did not ignore losses (R. 22519), but found that the Restaurant was always cash positive, except for non-recurring expenses which is typical for a start-up restaurant. (R. 10898, Sec. (a), Ex. F); R. 9430:2-6; 9343:9-15)

- The Court-Below criticized Lowder for relying on Green (R. 22519), but her reliance was proven to be justified since the information provided by Green proved to be accurate and consistent with the company's data submitted at trial. (R. 15317-15325; R. 18962)

- Lowder explained why she rounded up to allow for more alcohol sales (R. 22519) – the bar consultant hired as the Restaurant was closing would have led to increased alcohol sales. (R. 9529:10-15) The Court-Below completely disregarded this legitimate reason for an increase in alcohol sales.

- Lowder explained why exposure with Ramsay's name would increase traffic (R. 22519) – while some people may know of his association due to limited media exposure, many, many more people would know it was a Ramsay restaurant if his name was on the Restaurant – and the resulting benefit was supported by the fact that both Ramsay and the Landlord wanted Ramsay's name on the Restaurant because it is good for business. (R. 14741:5-11, 15071:11-21; 4413:3-8, 4442:15-18) To claim otherwise, has absolutely no basis in the evidence before the Court-Below.

- Lowder concluded that the promotion and exposure that the Restaurant would receive by being featured in a full season of Ramsay's television show, Hell's Kitchen, and the winning chef working at the Restaurant, would increase the traffic at the Restaurant and its revenues. (R. 10898, §IV(d)(e)) Even Ramsay admitted that such "excellent publicity" would be "a great thing for the restaurant."[40] (R. 15155:25-15156:9)

- The Court-Below also found that Lowder ignored the Restaurant's bad press, which is not the case. (R. 22520) In fact, Lowder relied on positive reviews from customers, the improved food and service, and the positive press expected from the television show. (R. 10898, Sec. (h); 9482:11-9483:8; 16146:17-16148:11; 16153:10-16154:1)

- Lowder did not ignore Seibel's mismanagement of the Restaurant (R. 22520), rather, Lowder knew that Ramsay had by mid-2013 taken over the Restaurant operations, as he was contractually obligated to do, and that he was a far more experienced operator, and that would increase

[40] Contrary to the Court-Below's conclusions, Lowder did not compare Hell's Kitchen to the movie Sideways – rather, she simply testified that she had seen growth from restaurants featured in other movies and television shows, such as Sideways and Entourage. (R. 16146:25-16148:23; 16169:18-24; 16170:16-19; 16175:1-19)

profits. (R. 16168:25-16169:8; R. 9510:9-21) The Court-Below ignored this point.

The Court-Below ignored other aspects of Lowder's opinion. For example, the court ignored Lowder's testimony that although Ramsay took control in the second half of 2013, he had already decided to close the Restaurant and was not focused on having the Restaurant succeed, but rather close. (R. 9760, p. 2) Indeed, the fact that the Restaurant's performance was improving – until Ramsay's unilateral decision to embark on a scheme to close the Restaurant in June of 2013 – is entirely ignored by the Court-Below in its review of Lowder's opinion on damages.

Finally, although the Court-Below held that Lowder's numbers represented a significant increase in the profits actually seen by the Restaurant, that does not render her opinion speculative. As the First Department held in *Wathne Imports, Ltd. v. PRL USA, Inc.*, 101 A.D.3d 83, 89, 953 N.Y.S.2d 7 (1st Dep't 2012), actual sales figures of the Fat Cow will not disprove or invalidate the growth rate used by Lowder that was based on comparable data, historical data, and her experience in the restaurant industry, among other things. Importantly, the *Wathne* court held that *the actual sales figures* prior to the breach *do not disprove or invalidate* the growth rate found by the expert based on comparable handbag sales. *Id.* at 89. Indeed, contrary to the Court-Below's view that Lowder's opinion was speculative, Lowder's projections were consistent with the mid and high-end projections that the Ramsay team did prior to the Restaurant opening. (R. 19327, 19334, 19339, 19344, 19346)

Accordingly, Lowder's opinion should not have been disregarded entirely by the Court-Below.

ii. *The Court-Below Erred In Disregarding Seibel's Alternative Damages Analysis*

In addition, the Court-Below completely ignored Plaintiff-Appellant's alternative basis for damages. Ramsay-Respondent's expert testified that an appropriate measure of damages is the value as exhibited by offers to buy the venture. (R. 16200-16201; R. 16374-16375; R. 21578) The uncontradicted evidence showed that in June 2013, around the time Ramsay decided to close the Restaurant, Ramsay offered to buyout Seibel's 50% interest in the Restaurant for $796,342.00. (R. 17047) In March 2014, Ramsay offered to buyout Seibel's 50% interest for $831,482. (R. 17422; R. 18656) These undisputed facts clearly show that, even if the Court-Below found Lowder's opinions too speculative, depending on the appropriate date of valuation – the date Ramsay decided to close ($796,342.00) or the date of closure ($831,482.00), the clear value of Seibel's 50% interest of the Restaurant was established at trial and such damage should have been awarded to Seibel. [41]

[41] Even if the Court-Below properly rejected the above damages, which it clearly should not have, Plaintiff-Appellant may still recover nominal damages under breach of contract. *Garfield on behalf of ODP Corp. v. Allen*, 277 A.3d 296, 328 (Del. Ch. 2022) (court may vindicate breach of contract claim even where monetary damages not proven by awarding nominal damages); *Ivize of Milwaukee, LLC v. Compex Litig. Support, LLC*, No. CIV.A. 3158-VCL, 2009 WL 1111179, at *12 (Del. Ch. Apr. 27, 2009); *Elation Sys., Inc. v. Fenn Bridge LLC*, 71 Cal. App. 5th 958, 965–66, 286 Cal. Rptr. 3d 762, 769 (2021) (under California Code § 3360, party entitled to nominal damages

G. Plaintiff-Appellant Proved Its Breach of Fidiciary Duty Claim

The Court-Below did not directly address Seibel's breach of fiduciary duty claim in the Trial Decision. However, the Court-Below appeared to reject the claim when it found that Seibel cannot rely on the "entire fairness doctrine". (R. 22517-18) The Court-Below's ruling is incorrect.

With regard to FCLA LP, the claim is asserted against GRUS and Ramsay. (R. 22218-19)[42] Seibel's breach of fiduciary duty claim under California law was asserted against GRUS, the member of the LLC, for acts occurring after January 1, 2014.[43] The breach of fiduciary duty claim is also asserted against Ramsay as a manager of the LLC. (R. 16537, §17; R. 22205)

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in breach of contract action despite inability to show actual damage); *Sweet v. Johnson*, 169 Cal. App. 2d 630, 632–33, 337 P.2d 499, 500–01 (1959).

[42] Ramsay-Respondents breached their fiduciaries duties to FCLA and Fat Cow LLC by (1) purposefully failing to obtain rights for the name of the Restaurant (R. 16603; R. 16609, *see supra* §III(B), (F); (2) only seeking permission to use the name "The Fat Cow" for a limited time so that Ramsay would have an excuse to close the Restaurant (R. 2958:4-2959:14, 2961:2-6; R. 2722:9-17, *see supra* §III(B)(F) & (G); (3) refusing to operate the Fat Cow Restaurant under any other name (R. 17227, p. 2, *see supra* §III(F), (G)); (4) clandestinely negotiating with the Landlord for the Restaurant about a new restaurant and misappropriating the Lease (R. 16720, p. 1, *see supra* §III(E)) misappropriating the capital improvements and staff that was trained at the Restaurant for Ramsay's new restaurant (R. 16090-91; R. 16716, 16727; *see supra* §III(E), (G)); (6) secretly negotiating a new agreement to misappropriate the Restaurant's promotion on Ramsay's television show, Hell's Kitchen (R. 15157; R. 17967, 17974, *see supra* §III(G); (8) hiring and paying bar consultants for Ramsay-Respondents' new restaurant with the entities' funds after the decision was made to close the Restaurant (R. 16089; R.7168:6-7169:1; 7174:9-7175:17; 7178:2-8, 17235, 17600); (9) causing a default in the Lease; and, (10) instructing or permitting the secret recording of several conversations between Seibel and the GRUS team (R. 16794, 19966, 20051, 20219).

[43] Section 17 of the Fat Cow LLC Agreement limits GRUS' liability as a member of the LLC. (R. 16537, §17; R. 22216) California law effective January 1, 2014 limited parties' exculpation of fiduciary duties and thus post January 1, 2014 conduct of GRUS can be considered as a basis for breach of its fiduciary duty. (R. 22216, citing Cal. Corp. Code § 17701.10[c])

Once again, the sole reason the Court-Below rejected application of the entire fairness doctrine was based on facts that arose *after* Ramsay decided to close the Restaurant. (R. 22517-18) For that reason alone, the Court-Below's ruling should be overturned. In addition, on summary judgment the Court-Below found: "[i]f Ramsay closed the restaurant simply because he wanted to end his partnership with Seibel and start a new restaurant, there would be a breach of fiduciary duty." (R. 22307, *citing Cline v Grelock*, No. 4046-VCN, 2010 Del. Ch. LEXIS 43, at *2 [Del. Ch. Mar. 2, 2010]) The Court-Below found that was exactly why Ramsay closed the Restaurant and therefore judgment is warranted in favor of Seibel. (R. 22517) In addition, the facts referenced above (n. 42), show Ramsay-Respondents took many actions in furtherance of the secret scheme in clear breach of their fiduciary duties.[44]

H. The Court-Below's Award of Attorneys' Fees To Ramsay-Respondents Was Improper

Based on the incorrect ruling that Ramsay-Respondents had not breached the contracts, the Court-Below awarded Ramsay-Respondents attorneys' fees. (R. 15-16) Upon finding that Ramsay-Respondents breached the Agreements, the attorneys' fees award must also be overturned.

[44] *See Gatz Properties, LLC v Auriga Capital Corp.*, 59 A.3d 1206, 1208 (Del 2012); *Weinberger v. UOP, Inc.,* 457 A.2d 701, 710 (Del. 1983); *Cinerama, Inc. v Technicolor, Inc*., 663 A2d 1156, 1163 (Del 1995); *Coley v. Eskaton*, 51 Cal. App. 5th 943, 960, 264 Cal. Rptr. 3d 740, 754 (2020)*; Krasner v Moffett*, 826 A.2.d 277, 287 (Del 2003)

In addition, the amount of attorneys' fee awarded was in error. Ramsay-Respondents sought attorneys' fees in the total amount of $5,953,232.50 and the Court-Below ultimately awarded fees in the amount of $4,004,376.88. (R. 22540, 22544) Even if Ramsay-Respondents are entitled to attorneys' fees under the FCLA Agreement – which they clearly are not -- the Court-Below made a number of errors.

First, Ramsay-Respondents were required to, and did not, establish that their attorneys' billing rates were reasonable – and the Court-Below ignored this entirely. *515 Ave. I Corp. v. 515 Ave. I Tenants Corp.*, 29 Misc. 3d 1228(A), 920 N.Y.S.2d 240 (Sup. Ct. 2010) (it is the burden of movant to establish reasonableness of fee award requested, including the rate requested). Ramsay-Respondents failed to support counsel's statement that its fees are reasonable by anyone other than interested persons – i.e. the people charging the rates themselves. (R. 21591, 21866, 21887) *SO/Bluestar, LLC v. Canarsie Hotel Corp.*, 33 A.D.3d 986, 988, 825 N.Y.S.2d 80 (2d Dep't 2006) ("[t]here must be a sufficient affidavit of services, detailing the hours reasonably expended . . . and the prevailing hourly rate for similar legal work in the community."). *See Orser v. Wholesale Fuel Distributors-CT, LLC*, 65 Misc. 3d 449, 456, 108 N.Y.S.3d 675, 683 (N.Y. Sup. Ct. 2018), *aff'd*, 173 A.D.3d 1519, 105 N.Y.S.3d 137 (3d Dep't 2019); *515 Ave. I Corp. v. 515 Ave. I Tenants Corp.*, 29 Misc. 3d 1228(A), 920 N.Y.S.2d 240 (Sup. Ct. 2010). The Court-Below entirely disregarded this requirement when awarding attorneys' fees.

Second, the Court-Below also failed to address whether the number of hours expended was reasonable in light of the duplicative and inefficient billing demonstrated by the records provided. *See Rahmey v. Blum,* 95 A.D.2d 294, 466 N.Y.S.2d 350 (2d Dep't 1983) (the law is well-settled that billing for hours which are duplicative or represent inefficiency, "padding", or otherwise unnecessary hours should be disallowed); *Becker v. Empire of America Fed. Sav. Bank,* 177 A.D.2d 958, 577 N.Y.S.2d 1001 (4th Dep't 1991) ("Hours which reflect duplication of services, inefficiency, or padding should be disallowed..."). It is obvious given a cursory review of counsel's bills that an excessive amount of time was billed – particularly at partner rates. For example: for trial preparation and motions in limine alone, MSK billed 1398 hours of partner time (or over 150 hours in preparation for each of the 9 days of trial). (R. 21947 ¶6) For that same period, associates only billed 128 hours and paralegals billed 347 hours. (*Id*.) The same is true with summary judgment motions, where paralegals billed only 385 hours, associates only 241, and partners a total of 1224 hours. (*Id*.)

In addition, in Ramsay-Respondents' billing section for mediation and settlement efforts there are only two entries for associate billing and one for a paralegal out of approximately 90 billing entries spanning from 6/23/14 to 12/11/20 – the rest were all partner billing. (R. 22087) Emailing, scheduling, computer searches and status updates are all tasks that can be completed, at least in part, by

associates and paralegals to reduce fees. *See Small v. New York City Transit Auth.*, No. 03-CV-2139 (SLT)(MDG), 2014 WL 1236619, *13-14 (E.D.N.Y. Mar. 25, 2014).

Third, the Court-Below also ignored the ultimate amount in controversy when determining the reasonableness of the fee – which is a required consideration under applicable Delaware law. *See Bergin v. McCloskey*, No. CIV.A. 2006-02-095, 2008 WL 4662378 at *2 (Del. Com. Pl. Oct. 22, 2008)(court refused to award attorneys' fees that exceeded the amount in controversy). The judgment awarded to Ramsay-Respondents is less than $1 million, and yet the Court-Below issued an attorney fee award of over $4 million dollars.

Lastly, the Court-Below did not consider the inequity in awarding the $4 million attorney fee to a world-renowned celebrity for payment of his lavish fees from multiple law firms. Seibel's financial position in comparison to Ramsay's should have been considered and resulted in a reduction of the attorney fee award issued. *Bergin*, 2008 WL 4662378, at *4 (court reduced attorney fees sought due to party's inability to pay and limited financial resources). It was established that Seibel could not afford to pay his own counsel for this and other matters. (R. 21922 ¶¶7-8) It was inequitable for the Court-Below to award attorneys' fees of over $4 million to Ramsay-Respondents in consideration of these facts.

I. Ramsay Is Not Entitled To Indemnification

The Court-Below improperly awarded Ramsay indemnification under the Indemnification Agreement. That award was improper for numerous reasons.

1. Ramsay Made No Payments Qualifying Him for Indemnification

The Court-Below awarded Ramsay indemnification under the Indemnification Agreement, which concerns Ramsay personally as a party to the Lease. (R. 16583) Ramsay's entities paid settlement amounts and lawyer fees associated with the settlement of the Landlord's claim against Ramsay as a result of unpaid rent due from the Restaurant subsequent to its unilateral closure by Ramsay. (R. 22529) The Court-Below ignored the fact that these payments, however, *were not made by Ramsay* thus there is no indemnification claim that can be brought by Ramsay as a matter of law. The only evidence shows that "Kavalake Ltd." and/or "Gordon Ramsay Holdings" made payments to the Landlord for rent, for settlement of the Landlord's litigation, and for legal fees. (*Id*. ¶¶ 1-2, 5, 8)

The Indemnification Agreement clearly provides that "Seibel shall indemnify and save harmless *Ramsay* against one-half (1/2) of all manner of loss, damage, charge, claims, suit, action and liability, including counsel fees, which Ramsay may for any cause at any time sustain or incur by reason of having entered into the aforesaid Lease..." (R. 16583, ¶ 1, emphasis added) *None of these payments were made by Ramsay*. There was no evidence and no testimony establishing that Ramsay

reimbursed the Kavalake and GRH entities for these payments or explaining the relationship, if any, between Gordon Ramsay individually and Kavalake and GRH.

Since there has been no payment by the party that seeks indemnification, that party (i.e. Ramsay) has no claim for indemnification. *Bay Ridge Air Rts., Inc. v. State*, 44 N.Y.2d 49, 53, 375 N.E.2d 29, 30 (1978); *Fils-Aime v. Ryder TRS, Inc.*, 11 Misc. 3d 679, 683, 809 N.Y.S.2d 434, 438 (Sup. Ct. 2006), *aff'd,* 40 A.D.3d 914, 836 N.Y.S.2d 670 (2007); *Lantau Holdings Ltd. v. Orient Equal Int'l Grp. Ltd.*, 174 A.D.3d 409, 410, 107 N.Y.S.3d 274, 276 (1st Dep't 2019) (denial of indemnification claim upheld where party failed to establish "it was ever out of pocket for certain moneys advanced by nonparty").[45]

2. Ramsay May Not Seek Indemnification for his own Intentional Torts:

The Court-Below found Ramsay was entitled to indemnification because his conduct was, at worst, negligent, rejecting Seibel's argument that under well-established principles of New York law, a party may not indemnify itself against its own intentional torts. *Austro v. Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 676 (1985) ("Indemnification agreements are unenforceable as violative of public policy ... to the extent that they purport to indemnify a party for damages flowing from the intentional causation of injury."); *Public Serv. Mut. Ins. v. Goldfarb*, 53 N.Y.2d 393, 399 (1981); *Bank of New York v. Neumann*, 628 N.Y.S.2d 675, 676 (1st Dep't 1995).

[45] The Indemnification Agreement is governed by New York law. (R. 16583, ¶3)

The Court-Below's finding was contrary to the clear evidence at trial. The cause of the liability to the Landlord was Ramsay's wrongful closing of the Fat Cow Restaurant, which Ramsay did over Seibel's objections and therefore without authority to do so. Thus, Ramsay acted intentionally to cause the injury and should not be indemnified. *Facilities Dev. Corp. v. Miletta*, 180 A.D.2d 97, 102, 584 N.Y.S.2d 491, 494 (3d Dep't 1992).

J. Seibel Is Entitled To Attorneys' Fees

Because Ramsay-Respondents' defenses fail, the Trial Decision should be overturned and judgment entered in favor of Seibel on the breach of contract claim and/or fiduciary duty claims. Upon such an order, Seibel, under the applicable FCLA Agreement, is entitled to his attorneys' fees, and this matter should be remanded to determine the amount of Seibel's attorneys' fees.

VI. CONCLUSION

For the reasons set forth above, this Court should:

1. Overturn and vacate the Judgment, the damage and attorney fee award of the Court-Below; and
    a. Enter Judgment in Appellant's favor on the breach of contract claim, with damages equal to the value of the enterprise, with attorneys' fees, and remand to a new Justice of the Supreme Court for a determination of Appellant's attorney fees; or

b. Enter Judgment in Appellant's favor on liability on the breach of contract claim, with attorneys' fees, and remand to a new Justice of the Supreme Court for a determination of Appellant's damages and attorney fees; or

c. Overturn the Judgment and remand for a new trial to be heard by a new Justice of the Supreme Court.

Dated: August 28, 2023

Respectfully Submitted,

/s/ Paul Sweeney, Esq.

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PRINTING SPECIFICATIONS STATEMENT
Pursuant to 22 NYCRR 1250.8[j]

The foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

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Supreme Court State of New York
Appellate Division, First Dept.

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

Plaintiffs-Appellants,

-against-

GORDON RAMSAY and G.R. US LICENSING LP,

Defendants-Respondents,

-and-

FCLA, LP and THE FAT COW, LLC,

Nominal Defendants.

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Statement Pursuant to CPLR 5531

Case Nos.:
2022-02729
2022-05126
2022-05129

1. The Index Number in the trial court was 651046/2014.

2. The full names of the parties are set forth above. There have been no changes.

3. The action was commenced in the Supreme Court, New York County.

4. The summons and verified complaint were filed on April 2, 2014. Defendants Gordon Ramsay and G.R. US Licensing's verified answer and counterclaim was filed on April 21, 2015. Plaintiffs' reply to the counterclaim was filed on May 11, 2015. Defendants Gordon Ramsay and G.R. US Licensing's first amended verified answer and counterclaim was filed on February 24, 2016. Plaintiffs' reply to amended counterclaim was filed on April 4, 2016. The verified amended complaint was filed in September, 2018. Defendants Gordon Ramsay and G.R. US Licensing, LP's verified answer to amended verified complaint and counterclaim, was filed on March 21, 2019. Plaintiff's reply to the counterclaims was filed on March 28, 2019.

5. The object of the action is to recover damages from breach of contract in addition to breach of fiduciary duty and self dealing.

6. The appeal is from the following:
   The Decision and Order of the Supreme Court, New York County (Hon. Melissa Crane), dated and entered May 19, 2022;
   The Judgment of the Supreme Court, New York County, dated and entered October 18, 2022; and
   The Judgment of the Supreme Court, New York County, dated and entered October 25, 2022.

7. The appeal is being perfected on the record method.