To be Argued by:
JACOB D. ALBERTSON
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

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.

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

BRIEF FOR DEFENDANTS-RESPONDENTS

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I. INTRODUCTION

This case concerns the failure of The Fat Cow restaurant co-owned by Plaintiff-Appellant Rowen Seibel ("Seibel") and Defendants-Respondents Gordon Ramsay and GR US Licensing LP ("GRUS") (together, "Ramsay"). The applicable agreements required the partners to agree on all decisions. Seibel sued in 2014, alleging that Ramsay breached the contracts and fiduciary duties by closing the restaurant without agreement. Ramsay denied these allegations, and sued for indemnity.

The next eight years' vigorous litigation included multiple pre-trial motions, 27 depositions, tens of thousands of pages of document production, and 7 expert reports. It culminated in a two-week bench trial featuring a dozen live witnesses, lengthy deposition transcripts, over 500 trial exhibits, hundreds of pages of post-trial briefs, and 22,548 pages of appellate record. Each party had ample opportunity to present the evidence as they saw fit.

After these extensive proceedings, the court-below denied Seibel's claims and granted Ramsay indemnity and attorneys' fees. The court-below found restaurant closure to be the only realistic course and that Seibel, not

Ramsay, "created the circumstances" necessitating closure. R-22517.[1] Those circumstances included: financial failure ($2 million lost over 18-months (R-22518)); poor food quality; adverse publicity; employee and vendor lawsuits (including, the court-below found, a massive class action); lease defaults; and operational dysfunction. Furthermore, Ramsay and Seibel disagreed about core issues, including the fundamental restaurant concept (burger joint or "farm-to-table" restaurant). Moreover, Ramsay lost all trust in Seibel due to his dishonest conduct (including "taking money out of [the] cash-strapped business without telling Rams[a]y" (R-22517), "pocket[ing] ... rebates instead of sharing them with Rams[ay]" (R-22510), issuing "a bad check ... to trick the architect" (R-22513), and "plotting to take over" Ramsay's business (R-22510)).

The problems were so severe that the court-below correctly concluded that restaurant closure benefitted both partners, mitigating further losses. The court-below in sum rejected Seibel's claim that he could force Ramsay to continue operating the restaurant for 15 years (as Seibel's damage experts assumed) with a dishonest partner in a disastrous enterprise.

[1] "R" cites are to the page and line of the appellate record. "AB" cites are to the page of Seibel's appellate brief.

On appeal, Seibel spins the evidence from cherry-picked facts in the 22,000-page record. But the court-below saw the evidence entirely differently, and had discretion to determine the facts and witness credibility. Seibel can prevail only by showing the court-below's factual findings were "obvious[ly]" wrong and "could not be reached under any fair interpretation of the evidence." *Thoreson v. Penthouse Int'l, Ltd.*, 80 N.Y.2d 490, 495 (1992). Seibel's selective evidence does not come close to meeting this burden.

II. COUNTER-QUESTION PRESENTED

Should this Court affirm where the court-below determined the key disputed fact and credibility issues in Ramsay's favor based on substantial evidence in the 22,000-page record? Yes.

III. ARGUMENT SUMMARY

Each of Seibel's appellate arguments fails.

- Seibel argues that the court-below improperly assessed his and Ramsay's credibility. This argument ignores overwhelming evidence of Seibel's dishonesty, and the court-below's discretion. Here, the evidence, as properly interpreted by the court-below, proved that Seibel: (i) took, then lied about, kickbacks; (ii) lied about and fabricated an employee paycheck; (iii) secretly schemed to takeover

Ramsay's restaurants and exploit The Fat Cow name for an Egyptian restaurant; (iv) committed vendor check fraud; (v) concealed invoices needed to pay contractors; and (vi) withdrew cash when the restaurant was failing and Ramsay was contributing money. The evidence also disproves Seibel's claims that Ramsay lied. *Infra* §VII.A.

- Seibel argues that the court-below was biased by Seibel's felony tax conviction. On the contrary, the court-below favored Seibel by excluding his conviction and other admissible evidence of his dishonesty. Seibel relies solely on one off-hand court-below comment that does not show bias. In any event, Seibel did not, as required for bias reversal, move for recusal or prove bias based on an extrajudicial source that unjustly affected the result. *Infra* §VII.A.2.
- Seibel argues that the court-below improperly admitted conversation audiotapes. But applicable New York law permits one participant to record conversations, and Ramsay properly authenticated the tapes through participant testimony. Regardless, other evidence amply supported every issue covered by the tapes. *Infra* §VII.B.
- Seibel argues that Ramsay breached the unanimity provision by closing the restaurant without Seibel's permission, but:

- Seibel's own breaches bar that claim. He breached his obligation to act with unanimity and to "operate a first class restaurant" (R-16545; R-16538) by, among other things, refusing to pay and mistreating contractors and employees, with resulting adverse publicity; unilaterally withdrawing funds; taking kickbacks; committing check fraud; and attempting to secretly exploit The Fat Cow name. Also, as the court-below properly found, Seibel "had no more right to insist on unanimous consent to close the restaurant than Ramsay did to keep it going." R. 22518. Seibel could not force Ramsay to keep operating a failed restaurant with a dishonest partner. *Infra* §VII.C.1.
- Frustration/impossibility excuses compliance with the unanimity provision because the parties assumed that they could agree (and made no deadlock provision) and operate a first class restaurant. The assumptions were flat wrong. The restaurant utterly failed and the partners disagreed about its operations and fundamental concept. Seibel argues that frustration/impossibility are inapplicable because the parties could have foreseen these events. But the parties had operated other restaurants successfully, and

Ramsay could not have foreseen Seibel's dishonesty, the myriad problems, or the stark disagreements. Seibel also argues that the conditions creating impossibility/frustration did not exist when Ramsay allegedly decided in June 2013 to close the restaurant. But the alleged breach was closing the restaurant, not an earlier inchoate decision to close, and in any event, the conditions did exist before June 2013. *Infra* §VII.C.2.

- Ramsay was entitled to the dissolution he sought because of deadlock and financial failure. Seibel ultimately stipulated to dissolution, but dissolution even if disputed would have ended restaurant operations and precluded Seibel's damage claims for 15-years further operations. *Infra* §VII.C.3.
- As the court-below found, Seibel's dishonest conduct barred his claims under *in pari delicto*. Seibel argues that the doctrine was not pleaded, but unclean hands was. The two doctrines encompass the same misconduct and moreover may be raised *sua sponte*. Seibel also argues that his misconduct was not serious or material. However, his conduct was fundamentally dishonest and goes to the core reasons why Ramsay could not be forced to continue

operations with him. Seibel also argues that exceptions apply to *in pari delicto*. But the exceptions protect only innocent shareholders. Seibel is not innocent. And in any event, unclean hands would bar Seibel's claims even if *in pari delicto* did not. *Infra* §VII.C.4.

- Seibel argues that he proved damages. But The Fat Cow lost millions. Proving future lost profits for such an unprofitable enterprise requires stringent reliance on objective historical data. Seibel's expert instead relied on speculation. Seibel alternatively and improperly relies on buy-out "offers" that were mere negotiations, never firm, and included indemnities that could have reduced the offer prices to zero. *Infra* §VII.E.
- Seibel argues that in awarding Ramsay fees the court-below failed to consider counsel's rates or the reasonableness of their hours. On the contrary, the court-below considered rate evidence and reduced the requested fees by over $2 million. *Infra* §VII.F.
- Seibel argues that Ramsay was not entitled to indemnity because he acted intentionally to harm Seibel. But considerable evidence supported the court-below's contrary conclusion. Moreover, despite

Seibel's argument, nothing barred indemnity just because Ramsay-owned entities paid the debts. *Infra* §VII.G.

IV. FACTS AND PROCEEDINGS

A. Pre-Opening

Seibel is a restaurant entrepreneur who has licensed the New York Serendipity restaurant name and concept. R-14709:2-25. Ramsay is a world-famous chef, restauranteur, and television celebrity. R-14710:23-14711:24.

In late 2011, Seibel and Ramsay agreed to invest in a restaurant at the Grove, an upscale Los Angeles shopping mall. (Seibel had previously been involved in Ramsay-named restaurants, including GR Burgr, in Las Vegas. R-14711:25-14712:5; R-15720:4-15722:3.) In November, 2011, Ramsay personally signed the Grove lease, with a ten-year term and annual occupancy costs exceeding $600,000. *See* R-16446-44; R-10912. Seibel agreed to indemnify Ramsay for 50% of any resulting losses. R-16583-85. Andi Van Willigan ("AVW"), a chef who had worked with Ramsay, would manage the restaurant. R-299:20-300:25; R-329:9-332:20; R-14865:5-15; R-14881:2-18.

As the court-below properly found, "Seibel treated [AVW] in a disrespectful and misogynistic fashion." R-22513. Among other things, Seibel called her a "fucking fag"(R-16763-64; R-6273:14-6274:1; R-14889:21-

14895:11; R-14900:11-14901:7), and she was asked to resign as of July 2012 (R-17190). Seibel then "directed" Jerri Rose Tassan ("JRT"), who worked with Seibel in Las Vegas, to be the non-chef manager on the ground.[2]

The parties learned in February 2012 that the "The Fat Cow" name could not be trademarked because another restaurant had registered "Las Vacas Gordas" ("LVG"), Spanish for The Fat Cows. R-17425-29. The USPTO then rejected the trademark. R-18146-99. The parties agreed to proceed anyway and address the issue later if needed. R-14739:24-14740:1; R-16600-01 (License Agreement signed by Seibel; noting "provisional[] [trademark] refus[al].")

In September, 2012, Seibel signed an agreement to have The Fat Cow depicted in *Hell's Kitchen*, a Ramsay television show. R-18033-39.

B. Fall 2012: Opening

The Fat Cow opened in September 2012. In October 2012, the parties signed the agreement for the Fat Cow, a California LLC to be managed by the "unanimous consent" of its two managers, Seibel and Ramsay. R-16538, ¶¶6,

[2] R-22512-13; R-16048:22-16049:9; R-3879:4-24. Seibel argues that Ramsay left the Seibel team to "pick-up the slack." AB 7. Hardly. Seibel suggested JRT without request; contributed to AVW's departure; and had his team take control without demanding that the Ramsay team do so. R-22512-13; R-16048:22-16049:9; R-3879:4-24; R-18200; R-14901:8-14904:12.

7(a). The Fat Cow LLC in turn managed FCLA, LP, a Delaware LP that would own and "operate" the "first class" restaurant. R-16549, ¶7.2. The agreements included no mechanism for breaking deadlocks if the parties failed to reach "unanimous consent." *See* R-22512.

C. Post-Opening: Fall 2012 to Summer 2013

1. Seibel Refuses to Pay Contractors

Seibel and his associates (Craig Green and JRT) had responsibility for paying the build-out contractors. *See, e.g.*, R-1014:22-1019:8; R-15979:6-15. As the court-below found, they "treated [the contractors] dismissively and stubbornly refused to pay them." R-22512. It was, as the court-below found, Seibel's "modus operandi to ignore all requests for payment." R-22516. For example:

- When the architect (Mr. Jacek of Gold Grenade) requested payment, Seibel responded "WHO CARES!" R-18245-47; R-14909:18-14911:11. When the architect liened the property, Seibel said do "nothing." R-18248.
- When another contractor requested payment, Seibel instructed pay "[n]othing." R-18250-53; R-14908:15-14909:17.

- Seibel's team told the kitchen designer they "d[id]n't plan on paying," and refused to communicate with her. R-18262-75; R-14912:3-14914:16.
- Seibel's team issued the architect a check, asked him to hand over the drawings, and then cancelled the check. R-18402-03. Green admitted this was a "small piece of check fraud." R-17366-67. Later, the architect filed a mechanics lien. *See* R-17248-49 (mentioning Gold Grenade lien). Ramsay, who knew nothing about this, was publicly and embarrassingly confronted by the architect about the cancelled check while dining at The Fat Cow with his family. R-15184:18-15185:4; R-1016:2-1018:6.
- In January, 2013, Restaurant Design International ("RDI") inquired about an "extremely over[]due" invoice. R-16962-63. In response, Green called RDI "schmucks." *Id.* *See also* R-14914:2-14916:3. RDI then filed a non-payment lawsuit against Ramsay. R-18361-76.
- Seibel refused to pay and mistreated other vendors. *See* R-18241-42, R-14905:2-14908:14 (Seibel: "Stall" contractor payments until all the approvals were "signed off," because then "we[']re in control. And that's how we like it."); R-17365 (stonewalling laundry vendor); R-

18349-52 (short paying another vendor); R-17355-64 (in response to complaints about a vendor, Seibel writes "I'll take pleasure plundering their biz"); R-18285-86 (Seibel urges Green to "go[] to battle" for rent rebates, notwithstanding a lease specifying all charges. The email referenced the "La Frieda" method, Seibel's name for his kickback scheme (*see infra* §VII.A.2)).

Seibel's conduct led to problems with the landlord, Mr. Caruso. In February and March 2013, the Grove sent letters declaring lease defaults based on the liens and other conduct. R-17238-40; R-17241-49.

Seibel's conduct also resulted in bad publicity for Ramsay (though Ramsay had no responsibility for it). On April 16, 2013, Grub Street, a restaurant publication, ran an article entitled: "Gordon Ramsay Sued over Unpaid Construction at Fat Cow." R-18389-94. The same day TMZ published an article with Ramsay's picture entitled "Gordon Ramsay: Fat Cow Sued for Being Dairy Dairy Cheap." R-18395-400. The articles do not mention Seibel.

Ramsay's team, including Stuart Gillies from Ramsay's restaurant group, was extremely upset about Seibel's conduct. *See* R-1014:22-1021:19; R-15184:3-15185:21; R-15984:4-15986:16; R-20058:25-20068:25; R-20079:3-

20084:19; R-20085:3-20089:7. Many of the conversations are on audiotape, transcribed at R-20051-218 (*see* preceding cites).

In response to the Ramsay concerns, Seibel was recalcitrant. He called the contractors "crooked," "terrorists," "blood suckers" and "parasites," and boasted "I don't negotiate with terrorists." R-3887:14-17; R-20059:25; R-20068:19-22. Gillies expressed the Ramsay team's contrary approach: "You can't treat people like that… you can't just say they are terrorists ... because they are demanding payment for services delivered.… [In] every project we do there is often problems … but ultimately you work through it… you can't just not pay them." R-3887:14-3892:13; R-20084:13-16.

Andy Wenlock, on Ramsay's team with construction expertise, came to Los Angeles from London, investigated, and resolved the issues. He found that the restaurant should pay most of the overdue amounts while securing limited fixes. R-15979:6-15984:3; R-16878-91; R-17139-41; R-17142; and R-20971-73 (recommendation emails). But as the court-below properly found, Seibel and Green "actively undermined [the] efforts" to "rectify the situation with the contractors." R-22513; R-18407-8 (Wenlock asks for contractor invoices, Green promises them, but then secretly suggests to Seibel withholding them. Seibel responds "[s]end nothing.") In May, 2013, Mr. France, a Ramsay

finance officer, attempted to confirm contractor payments. Green told Seibel that they should not approve. Seibel said "[l]et em get pregnant"; i.e., say nothing, let Ramsay pay, and then complain after-the-fact (a consistent Seibel practice). R-18411. In June, 2013, France noted he could pay the contractors only "by side-lining [Seibel] as … it would all grind to a halt if we tried to get him on board." R-17143.

2. Employee Problems

Seibel's team also created employee issues.

a. Spencer Nguyen and Dishonest Testimony

As the court-below found, on September 28, 2012, former restaurant manager Mr. Nguyen requested JRT and Seibel pay $1,205.48 in unpaid wages. R-16766. As the court-below found, Nguyen was "ignored." R-22509; R-18243; R-14950:10-13. Instead, Seibel told JRT "[t]ell him to submit [a claim to the Labor Commissioner]—I don't do threats." JRT responded "we do not negotiate with terrorist[s]," a repeated Seibel catch-phrase. *See* R-18243. The Ramsay team received none of these emails. R-14943:9-14944:6; R-14947:2-12; R-22508-09.

On December 14, 2012, The Fat Cow received Nguyen's claim. R-18334-36. JRT and Green attempted to handle it, and JRT testified at the

hearing. *See* R-15992:3-15994:1; R-16967-78 (noting JRT appearance at R-16971). On May 8, 2013, Nguyen received an award of about $14,000. R-16967-78. As the court-below found, no one "informed Ramsay or … his team about the hearing," and they learned the outcome only after the fact. R-22509; R-15992:3-15994:18; R-15186:17-23.[3]

Later, Seibel told the restaurant's lawyers that he had cut a personal check for Nguyen's salary that Nguyen had just failed to retrieve. R-16896. At trial, Seibel repeated that statement. R-14947:13-24. But as the court-below found, the check and Seibel's testimony were "fabricated." R-22509-10. *See infra* §VII.A.1.a.

b. Other Labor Issues

The Fat Cow had other employee issues, and Seibel repeatedly displayed contempt for his employees. *See* R-18284 (Seibel labels an employee a "moron" and instructs: "Get rid of that dumb trashcan."); R-18412-13 (Seibel demands "to replace this loser," referring to a chef); R-17193 (three worker's compensation claims in 20 days); R-18347-48 & R-16944-49 (other employees notice Labor Commissioner claims).

[3] *See also* R-14946:11-16; R-2056:11-20; R-40296:19-40298:15.

Seibel focused on slashing costs, employee morale be damned. For example, Seibel wanted to treat workers as consultants, not employees, and limit their hours to avoid providing medical coverage. R-16893. And when asked about employee sick days and vacation, Seibel responded "[f]orget this shit … I believe in work and dedication. Not laziness and sloth." R-18287. The Ramsay team "fundamentally d[id] not agree" with treating employees as consultants to avoid medical coverage (R-16892), or in general with how Seibel dealt with employees. R-15185:23-15186:16; R-15846:2-15847:17.

c. The Class Action and Adverse TV Publicity

On May 9, 2013, the day after the Nguyen ruling, restaurant employees were asked to join a wage and hour class action. R-18610. The next day, they filed a complaint with the California labor agency. R-18641-46. On June 13, 2013, the employees filed in court the *Becerra* wage and hour class action. R-17379-402.

On June 14, 2013, the celebrity website Radar ran an article: "Gordon Ramsay's Own Kitchen Nightmare! Class Action Lawsuit Filed Against Him by Restaurant Employees." R-18430-31. *See also* R-16919-21. On June 18, 2013, the *Becerra* plaintiffs appeared on the nationwide television show "Good Morning America" ("GMA"). *See* R-16922; R-18463 (tape of GMA program

entitled "Gordon Ramsay's Real-Life Kitchen Nightmare"). The publicity focused on the irony of these problems for Ramsay, who specialized in fixing others' restaurants. None of the bad publicity mentioned Seibel.

Again, the Ramsay team was very unhappy with the publicity and events leading to it. R-15185:23-15186:16 (GMA "was a big dent"). They believed that Seibel's failure to address the Nguyen complaint and other employment practices led to the class action. R-15124:7-23; R-15130:12-19; R-15846:2-15847:5; R. 6844: 21-6845:15; R. 6876:13-6877:9.

As the court-below summarized these events, Seibel's "management was destructive," he "alienated everyone" and "ignored real problems," with the effect of "costing the restaurant money in the form of penalties, legal fees, and good will." R-22516.

3. Negative Reviews

The Fat Cow also faced negative reviews. *See* R-18249 (negative Yelp reviews); R-18276-79 (November 20, 2012 article entitled "Fat Cow? Fat Chance. Gordon Ramsay's New Grove Restaurant Disappoints"; the menu was "glop," and had "Ramsay's name on it but no trace of the skill he's famous for."). Caruso was "very, very unhappy with the restaurant and our operation as a whole." R-18339. Seibel agreed that "the place isn't good … period!"

R-18338. *See also* R-16769; R-17196 (noting Caruso's "dissatisfaction"). The Grove default notices included claims about poor food. *See* R-17238-40; R-16771-93; R-17241-49. Caruso met with Ramsay, who agreed to improve food quality. R-16877.

4. Trademark Infringement

On April 22, 2013, LVG demanded that The Fat Cow cease using that name. *See* R-16874-76. Ramsay's lawyer Michael Thomas asked for nine months to change the name, but LVG wanted only three. R-17002. The matter remained unresolved.

5. Awful Financial Results

Unsurprisingly, in light of the turmoil, the restaurant's financial results were terrible. By the end of April, 2013, The Fat Cow had net current assets approaching negative $200,000, its cumulative cash flow was approximately negative $1.5 million, and it had over $1 million in cumulative losses. *See* R-11005; R-11010. As the court-below summarized, by the "[S]pring of 2013, [T]he Fat Cow was not a profitable restaurant," was "experiencing continual losses," faced the "looming" class action, and had "serious operational and legal problems." R-22514.

6. Partner Disagreement and Buy-Out Discussions

By March, 2013, the parties recognized the restaurant was failing, but strenuously disagreed about how to fix it. Much of this disagreement is captured in a transcribed March 2013 telephone call. R-16794-871; R-15988:5-15. Seibel emphatically wanted a "pizza, burger, and ice cream" joint (R-16823:24-16825:24) because he cared only about a "direct, massive bottom line, and huge returns on investment" (R-16861:13-16863:23) and did not think anything else would succeed. R-16842:16-16847:19. Ramsay wanted a more sophisticated "farm-to-table" concept, definitely did not want a "burger joint," was worried about his reputation, and was willing to invest more for his concept (while Seibel was not). *See* cites above and R-16853:1-16864:15. The parties were never "going to be on the same page" (R-16842:16-16843:1; R-16847:4-19) and agreed in principle to resolve the disputes by having Ramsay buy out Seibel. R-16863:24-16864:15.

Other documents confirm partner disintegration. *See* R-18342 (Seibel: "they [the Ramsay group] know nothing about the market or how to make $$$$"); R-16879 (Ramsay team: Green's "[n]egativity around spends is clear and obsessed with money and spend which is cascading down to [the] team."); R-6217:1-6218:12; R-6365:25-6366:7 (Seibel's attitude was always "let's see if

we can squeeze this out of them … [H]e always wanted to go around the cheap way of everything."); R-3900:10-24 (Seibel and Ramsay had a "very different" approach: Seibel was "all about the numbers, over-managing, numbers, numbers, numbers…."); R-6872:17-6873:10 (Ramsay focused on quality, Seibel on profits, which led to disagreement); R-18426 (Seibel: "clearly [partner] disagreement"); R-15079:23-15080:10 (Ramsay: "Rowen was turning left and I was turning right.…").

D. Later 2013 Events

1. *Becerra*; Buy-Out; LVG

By summer 2013, the Ramsay team took a more direct operational role in anticipation of the buy-out and brought back AVW. R-17557-58; R-3953:13-3954:14. Though he later denied it, Seibel agreed that The Fat Cow should pay her salary just as it had paid JRT's.[4] The court-below resolved that disputed issue "in favor of Rams[a]y." R-22514.

On June 21, 2013, Seibel emailed an offer to sell to Ramsay. *See* R-18480.

[4] *See* R-19978:7-19979:9 (Seibel: "I was fine to pick up part of that cost [for AVW], meaning we're fine as a business to pick up part of that cost."); R-19981:4-19982-11 ("Someone has to be there—a business has to have expenses"); R-3953:13-3954:14; R-3955:12-24; R-4034:18-4035:2.

The parties reached agreement with LVG permitting use of The Fat Cow name until March 31, 2014. R-7005-8, ¶1.2.

The parties agreed to mediate the *Becerra* action, and in September, 2013, the Littler defense law firm projected a $1.7 million high-end exposure, not including attorneys' fees, interest or penalties. R-17060. At the October mediation, plaintiffs demanded $500,000 minimum, without knowing about other "worrying" wage and hour issues discovered through an internal audit. R-17162. The mediator later proposed a $500,000 settlement; Littler concluded that "liability could be three to four times that amount." R-16943. The parties had unpaid and mounting Littler fees. R-16942-43; R-17095*;* R-15796:12-15797:1; R-15826:12-15828:11.

As the court-below noted, Seibel "let lapse" the mediator's proposal and refused to settle, calling the lawsuit "blackmail." R-22516; R-15881:15992:2; R-15787:18-15788:17; R-15790:18-15838:14.

2. More Awful Financial Results

The Ramsay team's increased involvement improved the restaurant only marginally. R-11148-49, ¶¶33-34; R-4435:1-6 (Caruso: food was "okay, not great"); R-6344:12-6345:6 (AVW: reviews improved but "w[ere] still really bad" and "not enough to get us out of the hole"); R-3986:4-3987:3 (Gillies:

despite late 2013 improvements, "there were a number of huge issues that that business was facing"); R-15114:19-25.[5]

Financial results remained horrendous:

- The restaurant lost almost $2 million during its 18-month run. R-10920.
- Current liabilities exceeded current assets every month. R-10977, ¶20; R-11005-06.
- Through January 28, 2014, unadjusted net cash flow was negative $1,267,000, cash flow from operations was negative $81,000, and free cash flow was approximately negative $1,429,000. R-10978, ¶¶22, 23; R-11008-13.
- Past due invoices rose from $88,887.65 in July 2013 to $177,908.52 in January. R-10976-97, ¶19; R-11005-06.
- Expenses were "extremely high." R-16128:6-21; R-16127:8-16128:5 (occupancy costs higher than "safe").

[5] Contrary to Seibel's argument, a bar consultant hired at The Fat Cow's expense was for the existing not a new restaurant. *See* R-18593-94; R-17600-03; R-6390:22-6391:17; R-16099:8-16100:6. And Seibel's expert expected the consultant to help the existing restaurant's profits. R-9529:3-15.

And these results did not account for the *Becerra* liability or legal fees. R-10975-76, ¶16; R-11002-03. The parties seriously contemplated bankruptcy. R-16940-43; R-18546; R-20970. Ramsay's expert confirmed the restaurant's insolvency by early 2014. *See* R-10970-11026.

Contemporaneous sources confirmed the dismal finances and need for at least $400,000 in cash infusions.[6] Seibel was among the naysayers. Despite his argument now that late 2013 events portended massive success, Seibel's contemporaneous comments prove he believed otherwise. *See* R-17409 ("[T]hese [are] the [revenue] #'s we expected and are garbage—this will be the norm in a lot of cases—suggest they prepare accordingly"); R-18550-51 ("This [manager] is semi-moronic—they're down [year] over [year] some crazy

[6] *See, e.g.*, R-18435-47 (France: the restaurant "does not have enough cash to settle its liabilities"); R-16942-43 (Littler: "the restaurant has been and will continue to be operating in the red"); R-17017-18 (Ramsay to Seibel: "we need to cut our losses."); R-6851:18-6852:5 (bookkeeper testimony); R-18584-85 (France: another $400,000 needed to meet debts); R-18464-71; R-18586. Seibel argues that the restaurant did not need more from Seibel (and that Ramsay did not benefit the restaurant by his payments) because Seibel had invested more than Ramsay. AB 13, 41. In fact, by year-end 2013, bookkeeper's records show Ramsay had invested more than Seibel (even before accounting for later Seibel's withdrawals and Ramsay payments). R-17632. Moreover, Ramsay contended that his contributions and capital were undercounted. R-17109. In any event, the restaurant needed more than either partner had invested. *See* previous cites.

number. But he's cheerleading the 1 night they're up $2k."); R-18501-03 ("Excuses and stupidity [for bad service]—morons.").

Ramsay testified that only millions invested in a new concept had any hope of solvency and success. R-15166:5-15167:17; R-15188:11-15192:3.

3. Ramsay Contributes; Seibel Siphons Money

Even to survive the short term, the restaurant needed cash. Ramsay made a $99,077 capital infusion in June 2013; paid the Becerra lawyers $40,000 on January 24, 2014; and paid $52,220 in rent on February 14, 2014. R-17631-32; R-18435-47; R-22529-30, ¶¶1, 3.

As the court-below found, while Ramsay paid, Seibel "siphoned money from the restaurant when it was barely surviving." R-22516. Without Ramsay's consent, Seibel withdrew $12,500 on October 7, 2013; $37,500 on December 17, 2013; and $30,000 in equal withdrawals on January 8, February 3, and March 20, 2014. *See* R-22515; R-22537; R-15422:3-15424:7. The court-below found Seibel was "indifferent to the plight of the restaurant, at the height of [the] financial problems" and made his withdrawals on a "pretext." R-22515.

The restaurant's bookkeeper reported Seibel's withdrawals led to "a dire situation which will lead to possibly missing payroll, vendor obligations, taxes

and other liabilities to run the business." R-17651. In response, Seibel wrote "[a]in't my prob[lem]." *Id.*; R-15422:14-17. In response to Seibel's last withdrawal, the bookkeeper wrote: "I was depending on that cash….[W]e have no funds to cover all of the vendor bills." R-19537.

Seibel said his withdrawals were meant to "even out" payments to AVW because he did not agree that The Fat Cow could pay her. *See* R-18556. The court-below correctly found otherwise. *See supra* §IV.D.1.

E. Late 2013 and Early 2014: Plans for Closure and a New Restaurant

1. Closure Reasons

By late 2013, Ramsay had begun plans for closing The Fat Cow and opening a new restaurant under Ramsay's sole control. Ramsay testified that closure and rebranding was necessary for a variety of reasons:

- The restaurant was failing financially. *See supra* §§IV.D.2; R-15188:18-19 ("We were losing money hand over fist."); R-15167:2-3.
- The restaurant was indelibly marred by past problems. *See supra* §IV.D.2; R-15188:17-21 (This "was not about a Band-Aid where we could come in and change the menu and lick paint on the walls. This thing needed to be done with and started again[.]").

- The partners disagreed, and Ramsay distrusted Seibel.[7] *See supra* §IV.C.6; R-15188:22-25 (Ramsay: "[Seibel] and myself were going down two opposite streets and there is no worse business ... tha[n] where two partners can't meet as one.").
- The *Becerra* liability. R-15189:19-22 (the class action "was the final nail in the coffin.").
- The restaurant would need to close for at least some time to change its name and avoid trademark liability. R-15759:23-15760:7.[8]

2. The Name Change Was Not the Only Closure Reason

Seibel incorrectly argues that Ramsay said he would change the name, while later dishonestly asserting the name change as the sole closure reason. But Ramsay was always willing to change the name once that was legally permitted, and indeed promised Caruso to do so. *See* R-16702. And without all the other problems, he would have changed the name. R-15194:12-15. But Ramsay could not just change the name on a failed restaurant. *See* R-15112:13-

[7] Seibel argues he ended discord by agreeing to Ramsay's "farm-to-table" menu. Not so. He expected to be bought out, and if not, always believed Ramsay's concept was unworkable. *See supra* §IV.C.6. And disagreements were not limited to the menu. *Id*.

[8] *See also* R-17041-43 (summarizing multiple closure reasons).

17 ("[Y]ou cannot just label stuff and stick the name Gordon Ramsay above The Fat Cow with the unbelievable amount of negativity inside that restaurant."); R-15113:11-18; R-15194:18-15195:2; R-15145:3-10. Seibel knew all the restaurant's problems, no matter its name.[9] *See supra* §§IV.C & D.

Seibel also argues that Thomas lied about being unable to extend the name-change deadline. But Thomas confirmed that he had negotiated the "absolute backstop date" with the LVG lawyer, Mr. Isicoff. R-17019; R-15907:12-15908:1; R-3947:7-3949:3. Thomas's understanding was based exclusively on what Isicoff told him. R-15909:13-16. And Isicoff unequivocally testified that his "client wanted the name changed as quickly as possible," and did not inform Thomas of anything different. R-2701:18-2702:1; R-2733:12-2734:2. The LVG owner later testified that he might have given more time, but Thomas never spoke to him. R-15909:13-16. In any event, new name or no, the existing restaurant could not continue operating.

[9] Seibel cites a Ramsay email stating: "The Fat Cow has to close as the name cannot be used…." R-17228-29. But the email lists other closure reasons, including the "employee issues." *Id.*; R-15111:20-22. The email was not intended to list every closure reason, and Seibel knew all the other reasons. R-15195:3-R-15196:2.

3. Mitigating Lease Liability

The Ramsay team preferred to stop operations entirely, but the lease made that impossible. The partners were facing more than $6 million dollars in lease liability. *See* R-4059:13-18 (Gillies: "The desire and ambition to open another restaurant … we actually didn't have.... We only did it because we were forced into… mitigating the issues with the lease."); R-15166:11-17 (Ramsay: "I signed a lease with huge responsibilities of ten years. And we had ... eight and a half years left on that lease. So we would have to renegotiate some form of salvage, conceptualize [a] new space, new restaurant.").

4. Buy Out Expected So Seibel Not Involved In New Restaurant

From late November through early 2014, Ramsay's team discussed a new restaurant with contractors and the landlord. Seibel was not involved because Ramsay always expected the buy-out to occur. *See* R-4002:6-9 ("we were buying [Seibel] out."); R-4004:11-4005:6; R-17966 ("GR will be buying Rowen out of the partnership"); R-15177:24-15179:4. Indeed, Ramsay could not otherwise open a new restaurant. Caruso would not approve a successor restaurant without resolution of the Seibel/Ramsay issues. R-4445:7-13; R-17233; R-15180:22-15181:4. Moreover, any successful new restaurant required

"one [Ramsay] concept" not diluted by "another [Seibel] concept." R-15201:18-15202:1; R-15888:17-24.

Seibel was also anxious for the buy-out. *See* R-4005:7-22 ("Rowen was quite keen to get out ….. Rowen wanted his money back."); R-15085:14-15086:17. Seibel admitted never losing his desire for a buy-out. R-15012:18-21.

Buy-out discussions continued until the restaurant closed. On January 20, 2014, Seibel's lawyer Ziegler acknowledged in a buy-out email the intended "opening of a new restaurant" at which Ramsay would "make all decisions" concerning any restaurant. *See* R-18565-66. *See also* R-17109-10; R-18587; R-17422-24; R-18592 (buy-out discussions). On March 12, 2014, Ziegler noted he had been "trying to reach a [buy-out] resolution (which I still believe we can do)." *See* R-18597. Discussions ended only because Seibel filed this lawsuit. *See infra* §IV.F.

While Seibel was properly not involved in the details, he knew from the first buy-out discussions that Ramsay would likely change the restaurant name and concept. *See* R-18480 (Ramsay might open something like "gordon ramsay grill"). Ramsay confirmed: "in that beginning discussion about the settlement and buying him out, I explained I have to mitigate the losses by turning on a

new concept." R-15085:18-20. *See also* R-15085:8-9 ("[W]e told Rowen that after buying him out we would set up a new restaurant."); R-15098:14-16; R-15100:21-25; R-15150:6-10. In any event, contrary to Seibel's argument, the new concept could never be "secret." Celebrity chef Ramsay could not conceal any new restaurant in the public Grove mall.

F. April 1, 2014: Closure and Post-Closure

Although Seibel objected to closure, he presented no viable alternative. R-15850:19-23. As the court-below noted, the restaurant "could [not] survive without a large cash infusion that Seibel did not want to make." R-22517. Significant evidence supported that Seibel opposed closure for improper reasons such as trying to leverage Ramsay's consent to other restaurant deals. R-18565-57; R-4020:21-4024:1; 4037:14-4040:7. On April 1, 2014, only two weeks after the last buy-out email, the restaurant closed. Seibel sued the next day, ending all discussions about a buy-out or new restaurant. R-15181:10-15182:7; R-17250-55; R-17256-69.

Liabilities remained. On June 12, 2014, Ramsay paid $230,623.83 in rent. R-19546; R-22529-30. The Grove sued him for $6 million and Ramsay paid legal fees of $173,546.19 to defend, and $800,000 to settle. Ramsay was also personally sued by vendor LA Specialty and paid more fees to defend the

ongoing *Becerra* lawsuit. R-19547-50; R-22530-31; R-20291-303. Seibel paid nothing to Littler or anyone else and repeatedly rejected Ramsay's indemnity requests. *See* R-17256-69; R-19542-43; R-19544; R-19545; R-19546. The "Hell's Kitchen" program could no longer feature "The Fat Cow" (R-15157:16-15158:2; R-2736:6-13) and Ramsay provided the Las Vegas "GR Pub" (in which Seibel also had an interest) as a substitute. R-15193:15-25; R-15000:21-15001:5.

While closure was expensive, as the court-below found, it "mitigate[ed] damages from the class action" and "[l]ease liabilities that would have fallen on both parties." R-22516-17; *see also infra* §VII.G.

V. DECISION BELOW

After trial and post-trial briefing, the court-below rejected Seibel's claims for breach of contract and fiduciary duty, awarded Ramsay indemnity for amounts expended on The Fat Cow, and awarded Ramsay his fees. R-22508-22; R-22540-44.

On the issue of credibility, the court-below found:

- Seibel was "not credible" because he: "fabricated evidence" and "lie[d] to this court" regarding the Nguyen situation; took secret rebates and then offered "concocted" rebate testimony; secretly

"plot[ed] to take over" Ramsay's company; and "unilateral[ly] withdr[ew] ... money from the restaurant's capital account, at a time when the business was failing and Mr. Rams[a]y was infusing his own funds just to keep it afloat." R-22508-10.

On other facts in dispute, the court-below found:

- Seibel "stubbornly refused to pay" contractors and "treated them dismissively," resulting in liens, default notices, and bad press, and Seibel "actively undermined [Ramsay's] efforts" to rectify the situation. R-22512-13.
- The employee class action resulted in "negative publicity" and potential bankruptcy. R-22513-14.
- Reviews for "food and customers service were also negative." R-22514.
- By the spring of 2013, The Fat Cow "was not a profitable restaurant and had serious operational and legal problems." It "continued to be unprofitable in late 2013 through early 2014." R-22514.
- After closure, Ramsay paid over $1 million in rent, defense and settlement of the landlord's lawsuit, and defense and settlement of a

vendor lawsuit. "Seibel contributed nothing toward these expenses." R-22515.

On Seibel's claims for breach of contract and fiduciary duty, the court-below found:

- Seibel was an "active wrongdoer for the harm upon which he seeks to collect," so was barred from recovery. R-22516-17. Furthermore, "Seibel cannot rely on a unanimous consent provision when he created the circumstances whereby the restaurant had to close." R-22517.
- "Ramsay could not reasonably be expected to stay in business with someone who had raided the business accounts." R-22517.
- "Ramsay's decision to close the Fat Cow was not [intended] to harm Seibel, but rather to mitigate damages ... that would have fallen on both parties." R-22517. This "was a proper exercise of the business judgment rule." R-22517-18.
- "Seibel had no more right to insist on unanimous consent to close the restaurant than Rams[a]y did to keep it going." R-22518.

- In any event, Seibel could not recover "because there is nothing to recover. The Fat Cow LLC was worthless." R-22518. Seibel's expert's lost profit opinion "has no basis in reality." R-22519.

On Ramsay's counterclaims, the court-below found:

- Ramsay was entitled to indemnity for what he paid. His payments were "either the result of Seibel's deliberate misconduct ... or no one's fault." R-22520-21. Ramsay "is also entitled to recover derivatively for the unauthorized withdrawals that Seibel took." R-22521-22.

The court-below ordered Seibel to pay Ramsay $777,249.54 plus interest, and $80,000 plus interest to FCLA, LP. R-22522.

The court-below found Ramsay was the prevailing party under the FCLA, LP agreement, and ordered Seibel to pay Ramsay $4,004,376.88 in reasonable attorneys' fees. R-22541-44.

VI. STANDARD OF REVIEW

"[T]he decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses." *Thoreson*, 80 N.Y.2d at 495 (citing *Claridge Gardens, Inc. v.*

Menotti, 160 A.D.2d 544, 544-45 (1st Dep't 1990)). *See also Wong v. Hsia Chao Yu*, 160 A.D.3d 549, 549-50 (1st Dep't 2018) ("Because the trial court was in the best position to evaluate the credibility of the witnesses, its determination is entitled to great deference.").

The trial court's factual findings must be "viewed in a light most favorable to sustain the judgment." *1970 University LLC v. Estate of Garcia*, 58 N.Y.S.3d 897, 897 (1st Dep't 2017). And this Court should consider whether "the totality of the circumstances, as perceived by the Trial Justice from the testimony, permits [the court-below's] conclusion." *Thoreson*, 80 N.Y.2d at 495.

Seibel argues for "de novo" review, citing *Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278 (1st Dep't 2004). But there, the lower court-below "interpreted a contract provision ... as a matter of law." *Id.* at 279. The case did not involve any disputed questions of fact. Likewise, Seibel's other case, *Northern Westchester Professional Park Associates v. Town of Bedford*, 60 N.Y.2d 492, 499 (1983), involved no credibility questions and pre-dates *Thoreson*. Here, where the court-below weighed hotly disputed facts and made credibility findings, substantial deference is required.

VII. ARGUMENT

A. The Court-Below Properly Assessed Credibility

1. The Court-Below Properly Assessed Seibel's Credibility

Contrary to Seibel's claim, the court-below properly assessed Seibel's lack of credibility based on strong evidence of his repeated dishonesty.

a. Nguyen Incident

The court-below properly found that Seibel's check and testimony related to Nguyen was "fabricated." R-22510. First, Seibel presented no original of the check. Second, Seibel did not mention the check when he emailed "tell [Nguyen] to submit" because Seibel does not "negotiate with terrorist[s]." R-18243-44. The check was purportedly dated the day before (R-17406), and it is inconceivable that Seibel would have cut the check, and then failed to have mentioned it to either JRT or Nguyen in the next day's email. R-14951:25-14952:8; R-22509. Third, the check was never mentioned as a defense during the Nguyen hearing. R-16967-78; R-22509. Seibel had no explanation for that. R-14952:9-16. Fourth, when asked why he did not simply remind Nguyen to pick up the check supposedly cut the day before, Seibel's only explanation was Nguyen wanted a "larger amount." R-15471:8-22. As the court-below found, that "compounded his lie" because the purported check was in the exact amount that Nguyen demanded. R-22509; *cf.* R-17406 (check for $1,205.48) and R-

16766-68 (Nguyen sought two weeks wages at an annual salary of $40,000, and 2/52 times that amount equals $1,205.48).[10]

Ignoring this evidence, Seibel argues that the "only testimony" supported his version of events, citing testimony that JRT (an obviously biased witness) had seen an envelope left for Nguyen. But as the court-below noted, JRT "did not know what 'the envelope' contained" and her testimony was "vague and her memory chaotic." R-22509. Moreover, JRT had no explanation why she never mentioned the check at the hearing. R-2449:11-17. The court-below was plainly within its rights to find against Seibel; indeed, any other finding would defy the evidence.[11]

Seibel also claims that the court-below ignored JRT's testimony that she kept Ramsay's team informed about the Nguyen proceedings. That was belied by other evidence which the court-below was entitled to credit.[12] Regardless,

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[10] Green also admitted that the check could have been backdated. R-15299:21-15300:14.

[11] Seibel's other cites do not support his argument. *See* AB 21, citing: R-15460:22-15461:24 (Seibel: does not know why JRT failed to mention the check at the hearing); R-15136:16-15137:22 (Ramsay testimony about kickbacks); R-15298:4-15299:2 (Green testifying that his check information was hearsay); R-18584-85 (email about restaurant debts).

[12] Wenlock received a copy of the claim, then asked JRT and Green what it was, but got no response, and it was thereafter handled only by JRT and Green. *See* R-20977; R-15992:3-15994:2. The Ramsay team did not know about the

whether the Ramsay team knew about the proceedings in no way rebuts that Seibel lied about the check.

b. Kickbacks

The court-below also properly found that, through his entity BR23 Ventures, Seibel received secret kickbacks from restaurant vendors. R-22510. These included a 10% rebate for The Fat Cow's use of Bank of America credit card services, paid under a March 2013 contract signed by Seibel. They also included kickbacks on the restaurant's purchases from its water vendor, Vero Water. *See* R-18353-60; R-14773:5-14776:3; R-15433:2-15434:20; R-15309:19-15313:22; R-17415-19; R-18254-56 (confirming The Fat Cow "rebates"); R-15329:4-15331:17; R-18570-75; R-18576-77; R-18589; R-18590-91. Seibel and Green also attempted to get kickbacks from other actual or potential vendors, including brewers Innis & Gunn, Moa Beer, and Newcastle. In each case, Green and Seibel tried exploiting Ramsay's name to obtain the kickback. *See, e.g.,* R-15364:13-15366:3; R-15435:7-19; R-18428-9; R-18552-3; R-18540.

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hearing until after the fact. *Id*.; R-18462; R-15186:17-23; R-14945:18-14946:16; R-2056:4-20; R-4026:16-4028:16.

As the court-below found, Seibel gave dishonest testimony about these kickbacks. R-22510. When asked at deposition, Seibel denied knowing about any Bank of America or Vero Water kickbacks. *See* R-2158:1-13; R-15424:13-15425:3; R-2150:7-24; R-15425:18-15426:22. But at trial, Seibel admitted knowing about the kickbacks that he had concealed at deposition. R-14773:5-14775:4. Indeed, he admitted to signing the Bank of America agreement and having an in-person meeting with Vero Water about the kickbacks. R-15425:18-15426:4; R-15311:19-15313:10; R-15433:2-15434:20.

To avoid admitting breach of his acknowledged obligations to share these amounts with Ramsay, Seibel testified that he disclosed the kickbacks and paid Ramsay his share in cash. R-15430:11-14; R-14774:19-14776:3. The story was concocted. Not a single kickback email copies the Ramsay team. Neither Green nor Seibel could remember any details about the alleged cash transfers. R-15427:3-15432:6; R-15313:3-15315:2; R-15332:7-15334:6.

When pressed, Seibel said he handed Ramsay cash at the time of the 2013 Super Bowl. R-15427:10-15430:10. But when told that the Super Bowl occurred before he received any kickbacks, Seibel backtracked and said he "didn't remember the date." R-15434:21-15435:4. Indeed, Seibel admitted

that, by Fall 2013 when Seibel first received kickbacks, Ramsay was refusing to meet with Seibel in person. R-14788:3-14789:17.

Seibel also made the unbelievable claim that Ramsay just took the cash and never asked what it was for or how it was calculated. R-15427:3-15429:12. Ramsay credibly denied ever knowing about or receiving any share of the off-the-books kickbacks. R-15137:21-15138:16; R-15206:4-15209:5. The court-below concluded that Seibel had "concocted another far-fetched and unverifiable story that he paid Rams[a]y in cash when he bumped into him at a hotel in Las Vegas." R-22510.

Seibel's brief says only that Seibel "failed to recall" the kickbacks and was not "testifying falsely." AB 22, n.27. The evidence proves otherwise.

c. Attempted Takeover

As the court-below found, Seibel and Green also secretly plotted to gain a "controlling interest" in Gordon Ramsay Holdings (a Ramsay-owned umbrella entity (*see* R-15075:11-15)) by "kick[ing] out" Gilles and Wenlock; forming RAS Worldwide, to be owned only by the Seibel team and to hold all Ramsay restaurants including The Fat Cow; and to sell an investment in RAS to investment group Wexford Capital. *See* R-15370:3-15371:24; R-15373:13-15383:3; R-15378:3-5; R-17373; R-20559-61; R-15467:12-15469:3. As the

court-below properly concluded, "[t]his all occurred behind Mr. Ramsay's back" and "plotting to take over Gordon Rams[a]y Holdings via Wexford Capital reflects poorly on their credibility indeed." R-22510. Seibel's brief never addresses this incident.

d. Unilateral Money Withdrawal

The court-below properly found that "Seibel's unilateral withdrawal of money … at a time when the business was failing and Mr. Rams[a]y was infusing his own funds just to keep it afloat, also reflects someone not to be trusted." R-22510; *supra* §IV.D.3.

e. Other Dishonest Conduct

The court-below did not directly cite other dishonest Seibel conduct. For example, Green and Seibel tried secretly to open The Fat Cow restaurants in the Middle East. Numerous emails, spanning May to October 2013, document the efforts, confirm in-person meetings between Green and Middle East investors, and confirm an intent to exploit Ramsay's name while expressly excluding Ramsay. *See* the following emails, none copied to the Ramsay team: R-17314-51; R-18414-15; R-18493; R-18505-7 (R-18507 expressly noting Ramsay will be excluded: "we will not be able to proceed with a Gordon affiliation," but negotiations continue for Seibel alone); R-18508-9; R-18510-11; R-18537-9; R-

20557; R-15388:18-24; R-15392:6-15396:9. Ramsay knew nothing of this and was "shocked" when he learned of it. R-15209:6-25; *see also* R-3933:8-3935:9.

Seibel also secretly attempted to steal royalties belonging to Ramsay in connection with an Atlantic City restaurant. R-21533-34; R-20114:1-16; R-20120:7-20121:6; R-20125:3-20126:13; 15734:8-15735:17; 3924:4-3925:2.

Other dishonest Seibel testimony or conduct is cited in Section IV. *See, e.g.*, §IV.D.2 (Seibel lying about restaurant financial prospects); §IV.C.1 (Seibel lying about contractor invoices); §IV.D.1 (Seibel lying about agreeing to pay AVW); §IV.C.1 (contractor check fraud).

f. Seibel Misstates the Credibility Law

All this evidence more than justified the court-below's credibility determination, to which deference is due. *See Thoreson*, 80 N.Y.2d at 495 and cases cited *supra* §VI. In his appeal, Seibel argues that the Court improperly applied the doctrine of *falsus in uno, falsus in omnibus*. But he cites no First Department or Court of Appeals decisions to support his argument. *See* AB 20-22 (citing only *East Side Managers Assocs., Inc. v. Goodwin*, 26 Misc. 3d 1233(A) (Civ. Ct. N.Y. Cty. 2010), and *Washington Mutual Bank v. Holt*, 113 A.D.3d 755 (2d Dept. 2014)).

Moreover, as Seibel's citations confirm, the court-below had discretion to disbelieve all Seibel's testimony. *See East Side Managers Assocs.*, 26 Misc. 3d 1233(A) at *3 ("it is for this court to determine how much, if anything, to believe from a witness"; "[i]f a witness has testified falsely as to any material fact, [his] entire testimony … may be disregarded") (citing *United States v. Gilkeson*, 431 F. Supp. 2d 270, 277 (N.D.N.Y. 2006)). The court-below properly found, based on substantial evidence, that Seibel's misconduct and dishonest testimony were both "demonstrably false" and "material." Such misconduct and dishonesty related to the critical issue whether Ramsay was obligated to stay in business with a partner who fabricated checks; took secret kickbacks; schemed to take over Ramsay's business; tried to covertly exclude Ramsay from a Middle East restaurant; and imperiled the restaurant by extracting money while Ramsay contributed it.

Indeed, as Seibel's own citations confirm, it would have been reversible error not to apply the doctrine under such circumstances. *See Washington Mutual*, 113 A.D.3d at 756-57 (reversing trial court for failing to apply "*falsus in uno falsus in omnibus*").

2. The Court-Below Was Not Biased by Seibel's Felony Tax Conviction

Seibel argues that the court-below was biased by Seibel's conviction for felony tax evasion. R-13287:12-15; R-13288:11-13289:25; R-13298-99. Seibel pleaded to tax evasion while working with Ramsay on Las Vegas casino restaurants where "suitability" rules bar felons. A Nevada court ruled that Seibel fraudulently concealed the conviction in order to dishonestly maintain the casino relationships, and a Delaware court ruled that the conviction justified dissolving the Ramsay/Seibel entity operating a GR Burgr restaurant in Las Vegas. R-13336-50; R-13356-88.

Far from being biased against Seibel, the court-below bent over backwards to exclude evidence of his misconduct. For example, the court-below excluded:

- Seibel's tax conviction despite its admissibility for his credibility. R-10. *See, e.g., Fahey v. Pub. Health Council, Dep't of Health*, 89 A.D.2d 702, 703 (3d Dep't 1982) ("convictions for income tax evasion are deemed to involve moral turpitude" admissible on credibility); *Young v. Lacy*, 120 A.D.3d 1561, 1562 (4th Dep't 2014) (same); R-13542-43; *see generally People v. Cooper*, 78 A.D.3d 593, 593 (1st Dep't 2010).

- Evidence that Seibel took secret kickbacks not only from The Fat Cow but from the very same vendors, at the same time, using the same scheme and terminology at Ramsay/Seibel Las Vegas restaurants. *See* R-12052; R-14702:18-14704:24 (rejecting evidence). Seibel called the common kickback scheme the "La Frieda method," referring to one of the vendors. R-12052. Such evidence was admissible to prove "a common scheme or plan" of kickbacks and unclean hands. S*ee, e.g.* Guide to N.Y. Evid. § 4.21; R-12049.
- Certain evidence that Seibel tried to steal Ramsay's royalties on an Atlantic City restaurant, which was additional evidence why Ramsay could not do business with Seibel. R-21533, n.33; R-22527, ¶1; R-16421:1-16426:18.

Moreover, the court-below made several credibility determinations in Seibel's favor. R-22510-11. All this shows the opposite of bias.

Seibel asserts bias based on a single court-below comment that testimony about Caruso's 2011 state of mind could open the door to Seibel's tax conviction. R-14718-20. Seibel argued at trial (and now argues again) that it would not open the door because the conviction was years later. R-14719:3-7.

In response, the court-below said she was then unsure about the facts, keeping an open mind, and merely warning counsel. R-14719:10-14. Undeterred, Seibel continued his testimony on the same issue and the conviction remained excluded. R-14720:7-14. This hardly shows bias.

In any event, Seibel does not prove the prerequisites to bias reversal. First, a party must object and move for recusal. *People v. Chen*, 256 A.D.2d 75, 76 (1st Dep't 1998); *Biancoviso v. Barona*, 150 A.D.3d 990, 991 (2d Dep't 2017). Seibel did neither. Second, bias must "stem from an extrajudicial source … other than what the judge learned from his [or her] participation in the case." *McDonald v. Terry*, 100 A.D.3d 1531, 1531 (4th Dep't 2012); *Seborovski v. Kirschtein*, 117 A.D.3d 627, 627-28 (1st Dep't 2014). Here, the alleged bias is only from what the court-below learned during the case. Finally, bias must "unjustly affect the result." *Alevy v. Herz*, 214 A.D.3d 582, 584 (1st Dep't 2023); *Biancoviso*, 150 A.D.3d at 991. Seibel makes no such showing.

3. The Court-Below Properly Assessed Ramsay's Credibility

Seibel argues that Ramsay lied when he said he no longer wanted to be in business with Seibel at The Fat Cow because Ramsay: (a) talked about opening other GR Burgr restaurants with Seibel; and (b) opened an Atlantic City restaurant with Seibel. However, Ramsay in fact refused to do further GR

Burgr restaurants with Seibel (R-15736:1-4) and did not open an Atlantic City restaurant with Seibel.[13] In any event, as the court-below properly found, Ramsay indisputably "did not want to be in business with Seibel any longer" at The Fat Cow, because of Seibel's conduct. R-22511.

Ramsay also did not lie when he said he did not want to do a chain of GR Burgr airport restaurants, where it was difficult to control quality. R-15732:10-15733:11. This contrasted with Ramsay's sit-down, non-chain, single upscale Heathrow restaurant, where he could control food quality. R-15966:6-15967:8.

Ramsay believed that Seibel tried to negotiate additional GR Burgr restaurants in airports and Singapore without his knowledge and authorization. Seibel argues that Ramsay lied about that because Ramsay's team knew about initial negotiations with Areas for airports; Ramsay's team knew Seibel was going to Singapore; and the court-below found that the GR Burgr documents authorized Seibel to explore GR Burgr deals. However, while Gillies knew about the initial airport approach, Seibel continued to push airports without

[13] Despite his reluctance, and solely as an accommodation to Caesars, Ramsay let Seibel make a separate agreement with Caesars (not with Ramsay) to participate in Atlantic City. *See* R-15734:3-15735:25; R-15962:1-21; R-21280-323 and R-21324-71 (separate agreements for Ramsay and Seibel entities for Atlantic City). Because of his The Fat Cow experiences, Ramsay refused to do any other restaurants with Seibel. R-15734:4-15738:24.

adequate authority or communication. R-3928:20-3931:5; R-18621; 15725:13-15726:13. And while Ramsay knew about Seibel's trip to Singapore, nothing in the Singapore emails mention GR Burgr. R-19348-51. Gilles and Ramsay denied knowing that the Singapore trip had any GR Burgr purpose. R-3928:20-3929:18; R-15182:8-15184:2. Finally, Ramsay and his counsel did not believe the GR Burgr agreement authorized Seibel's unilateral negotiations. *See* R-17442, § 8.1 (GR Burgr unanimity provision); R-15724:11-15725:6; R-15734:3-6. But the court-below of course could draw its own conclusions, and found only that the "Ramsay side" (and not Ramsay specifically) was "somewhat lacking in credibility" on certain such issues. R-22510.

Seibel's other "lie" arguments are also misguided and subject to the court-below's discretion:

- Seibel says that Ramsay testified that he was not trying to keep a meeting with Caruso secret, but then "admitted" that was "false." But the cited testimony only confirms that Ramsay did not have a "concern about anything about Mr. Seibel getting back to Caruso." R-15165:25-15166:3.
- Seibel argues that Ramsay lied when he said Caruso did not want Ramsay's name on the restaurant. But Ramsay merely testified that

Caruso would not want Ramsay's name on the "existing toxic restaurant." R-15114:7-18. No one disputes that Caruso would have welcomed the Ramsay name on a properly operating restaurant.

- Seibel argues that Ramsay lied when he said his team did not know about the Nguyen claim. But the evidence fully supported Ramsay's statement. *See supra* §VII.A.1.a.
- Seibel argues that Ramsay lied by claiming to have paid employees at Christmas because he made no restaurant contributions in December 2013. But Ramsay testified only that he "never closed a restaurant down a week before Christmas." R-15188:1-10. And Ramsay did contribute funds necessary to keep The Fat Cow open in December 2013 and beyond. *See supra* §IV.D.3.
- Seibel argues that Ramsay lied when he said that Caruso did not like Seibel because Caruso never met Seibel. But Caruso knew the reputation and dealings of Seibel and his "Vegas crew" and did not like them or Seibel's Serendipity restaurant. R-15150:11-15151:8; R-4464:8-19; R-4466:7-9; R-3916:13-3917-12.

B. The Court-Below Properly Admitted The Recordings

The court-below did not err in admitting certain audio recordings and transcripts. Seibel cites CPLR 4506, but that statute establishes that "a conversation that is taped by one of the parties to the conversation" is *not* prohibited by the statute. *Iannazzo v. Stanson*, 2003 WL 26556586, at *8–9 (Sup. Ct., N.Y. Cty. Nov. 24, 2003) (Gammerman, J.); *accord People v. Lasher*, 58 N.Y.2d 962, 963 (1983) ("It is not unlawful to eavesdrop on telephone conversations with the consent of one of the parties to the conversation"); *Locke v. Aston*, 31 A.D.3d 33, 38 (1st Dep't 2006) (recording a conversation with the consent of one party "is not illegal")[14]. All the recordings were made by parties to the conversation and therefore not barred.

Also, one "well-recognized" method of authenticating recordings is through "[t]estimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered." *People v. Ely*, 68 N.Y.2d 520, 527–28 (1986) (citations omitted); *see also Muhlhahn v. Goldman*, 93 A.D.3d 418, 419 (1st Dep't 2012) (same). Wenlock

[14] Seibel's contention that the recordings were illegal in the UK is irrelevant (even if true); "[w]hether or not the tapes are admissible in evidence is determined by New York law." *Iannazzo*, 2003 WL 26556586, at *7; *Locke*, 31 A.D.3d at 38 (same).

participated in the phone calls recorded in Exhibits 64 (R-16794-871), 680 (R-19966-20050), and 681 (R-20051-159), and testified that these were complete, accurate, and unaltered. R-15989:12-15990:10 (Ex. 680); R-15986:17-15987:15 (Ex. 681); R-15988:2-15989:11 (Ex. 64). Seibel authenticated the same recordings (R-15014:14-15017:7 (Ex. 680); R-14927:2-14934:7 (Ex. 681); R-14989:18-14994:18 (Ex. 64)) as well as Exhibit 683 (R-20219-57, *see* R-14971:22-14973:7).

In any event, the court-below cited just one transcript in its Decision—Exhibit 680—to support that Seibel's expert improperly assumed 700 daily restaurant customers. However, the court-below's conclusion was primarily supported by Exhibit 597, "Manager Shift Summaries." R-22519; R-18962-19309 (Ex. 597); R-21569 (summarizing Ex. 597). The transcript cite was merely corroborative. R-16114:19-16115:8; *see also infra* § VII.E.2. Seibel speculates that the court-below "appeared to have relied upon other recordings" (AB 28, n.31), but the court-below did not otherwise cite the transcripts and each finding was amply supported by other cited evidence.[15] Thus, any alleged

[15] Specifically, the court-below did not cite Exhibit 681 to support blaming Seibel for not paying vendors, but did cite Exhibits 83 (R-16962-63), 459 (R-18241-42), 462 (R-18248), 491 (R-18402-06), 486 (R-18361-76), 228 (R-17238-40), 232 (R-17248-49), 65 (R-16872-73), 488 (R-18389-94), and 493 (R-18407-10). The court-below did not cite Exhibit 683 to support blaming

error was harmless. *See, e.g., People v. Sealy*, 34 A.D.3d 259, 259 (1st Dep't 2006) (harmless to improperly admit evidence where other evidence supports the finding).

C. Seibel Did Not Prove Breach of Contract

For several reasons, as the court-below properly found, Seibel failed to prove his breach of contract claims.[16]

1. Seibel Breach

A party claiming breach of contract must show that it performed. *See, e.g.*, *Intermec IP Corp. v. TransCore, LP*, 2023 WL 5661585, at *5 (Del. Super. Ct. Aug. 23, 2023); *Burley v. Benson-Seeney*, 2021 WL 5755308, at *3 (Del. Super. Ct. Dec. 3, 2021). Seibel failed to so prove. Indeed, the evidence shows that, in multiple ways, Seibel breached his obligations as Fat Cow LLC

Seibel for labor issues, but did cite Exhibits 59 (R-16766-68), 460 (R-18243-44), 559 (R-18610), 600 (R-19312-14), 294 (R-17403-06), 58 (R-16763-65), and 661 (R-19584-734). The court-below did not cite Exhibit 64 about menu disagreements or reference such disagreements at all. Finally, the court-below did not cite Exhibit 680 to conclude that Seibel siphoned money, but cited Seibel's own interrogatory admissions (R-22532-39). *See* R-22508-21.

[16] Ramsay focuses on Delaware law because the alleged damages are profits from the restaurant owned by the Delaware LP. The California LLC would not have damages as a mere holder of LP interests. *See, e.g.*, *Sole Energy Co. v. Petrominerals Corp*., 26 Cal. Rptr. 3d 798, 813 (Cal. Ct. App. 2005) (corporate lost profits must be sought by the corporation derivatively not by the shareholder).

Manager to "operate a first class restaurant" and to act only with mutual consent. R-16545, ¶4(a); R-16538, ¶7(a). These breaches included mistreating and failing to pay contractors and employees; check fraud; withdrawing monies; actively impeding resolution of the contractor issues; taking kickbacks; and trying to take over the restaurant group and exploit the partnership name in Egypt. Seibel engaged in all these activities without Ramsay's knowledge or consent and they impeded "first class" operations.

Also, a party breaches where he "prevent[s] or hinder[s]" the other party's performance. *Snow Phipps Group, LLC v. KCake Acquisition, Inc.*, 2021 WL 1714202, at *52-53 & n.576 (Del. Ch. Apr. 30, 2021); Restatement (Second) of Contracts § 245. Here, all Seibel's disruptive conduct hindered Ramsay from operating a first class restaurant and from reaching agreement with Seibel.

Finally, as the court-below properly found, "Seibel had no more right to insist on unanimous consent to close the restaurant than Ramsay did to keep it going." R-22518. Seibel had no contractual right to force Ramsay to continue operating a failed restaurant with a dishonest partner for 15 years (as the damage claims presume) in violation of the unanimity provision. Seibel calls that a "unique conclusion" supported by "no legal authority." AB 44. On the

contrary, it is hardly a novel proposition that party breaches a contract where he "demands of the other a performance to which he has no right under the contract" and conditions his own performance on that demand. 4 A. Corbin, Corbin on Contracts § 973, p. 910 (1951); *see also PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998, 1014 & n.75 (Del. Ch. 2004) (citing the same Corbin section). Here, Seibel did just that—insisting that the restaurant had to stay open despite Ramsay's disagreement and in violation of the unanimity provision.

Seibel also argues that absent agreement the "status quo" had to remain. But nothing in the agreements so provides. In any event, there is no "status quo." Restaurant operations require daily decisions about employees, menus, pricing, and others about which the parties did not agree. And continued operations required a cash infusion that the parties would or could not make. Seibel could not force Ramsay to agree with him on those issues.

2. Impossibility/Frustration

Contractual obligations are discharged where a "party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." *J & G Associates v. Ritz Camera Centers, Inc.*, 1989 WL 115216, at *3 (Del.

Ch. Oct. 3, 1989) (quoting Restatement 2d of Contracts § 261). Obligations are also discharged when the contract's "principal purpose is substantially frustrated without [the party's] fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at *57 (Del. Ch. Oct. 1, 2018), *aff'd*, 198 A.3d 724 (Del. 2018); Restatement (Second) of Contracts § 265.

Here, the parties assumed they could agree on all issues (and made no deadlock provision) and that they could operate a "first class" successful restaurant. R-16545, ¶4(a). The assumptions did not hold. Seibel and Ramsay disagreed on virtually all decisions, including on whether to close the restaurant to mitigate losses. And the restaurant was an utter failure. These events constitute frustration and impossibility.

Seibel argues that impossibility/frustration is inapplicable because the parties could have foreseen these events. But neither Ramsay nor Seibel anticipated the extensive dissension, Seibel's fraudulent conduct, or the myriad other restaurant problems. They had previously been involved in other restaurants successfully. R-14712:1-5. Seibel also argues that the conditions creating impossibility/frustration did not exist in June 2013 when Ramsay

supposedly decided to close. However, the alleged breach was closure without consent, not any June 2013 inchoate intention to do so. In any event, the pertinent factors all existed by June 2013. *See supra* §IV.C.

3. Dissolution

Under Section 17-802 of the Delaware Revised Uniform Limited Partnership Act), dissolution is appropriate "whenever it is not reasonably practicable to carry on the business in conformity with the partnership agreement." *See also*, *e.g.*, *In re: GR Burgr LLC*, 2017 WL 3669511, *5 (Del. Ch., Aug. 25, 2017) (dissolution ordered of Seibel/Ramsay GR Burgr entity due to deadlock and unanimity term that provided "no means of navigating around the deadlock")[17]; *PC Tower Ctr., Inc. v. Tower Ctr. Dev. Assocs. Ltd. P'ship*, 1989 WL 63901, at *5 (Del. Ch. June 8, 1989) (partnership dissolved where "business can only be operated at a loss[,]" and partners were in "irreconcilable conflict[,]" and "at a deadlock"); *Fisk Ventures, LLC v. Segal*, 2009 WL 73957, at *4 (Del. Ch. Jan. 13, 2009), *aff'd*, 984 A.2d 124 (Del. 2009) (dissolution

[17] The GR Burgr and The Fat Cow agreements have the same unanimity provisions, and all the same deadlock factors support dissolution here as in that case, which should be binding under collateral estoppel. *See* R-13522-48.

order because of "deadlock[]; "no means of navigating around the deadlock"; and company finances that left "effectively no business to operate").[18]

The court-below noted that Ramsay "could not reasonably be expected" to stay in business with Seibel under all the circumstances. R-22517, 18, 20. Under this law, similar to impossibility/frustration, Ramsay was entitled to the dissolution he sought (R-22522) (citing to Ramsay's petition for dissolution) and to which Seibel ultimately stipulated (R-21471). Dissolution would end restaurant operations, and bar Seibel's claims for 15-years of damages. Seibel never claimed any shorter-period damages.[19]

4. *In Pari Delicto*/Unclean Hands

The court-below found Seibel's claims barred by *in pari delicto* (R-22516-17), but held that "even if *in pari delicto* did not apply, Seibel still could not recover." R-22517. That is correct for all the reasons stated above.

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[18] California Corporations Code section 17707.03(b) similarly authorizes LLC dissolution where "[i]t is not reasonably practicable to carry on the business" or management is "deadlocked."

[19] Also, after dissolution, the parties receive no "going concern" value but only distribution of any remaining entity assets. *Active Asset Recovery, Inc. v. Real Est. Asset Recovery Servs., Inc.*, 1999 WL 743479, at *20 n.18 (Del. Ch. Sept. 10, 1999).

a. Seibel's Claim of Prejudice Is Baseless

But Seibel's conduct also bars his claims. Seibel argues that *in pari delicto* was not pleaded. However, Ramsay pleaded unclean hands (*see* R-131, ¶151) which is "closely analogous" to *in pari delicto. Stewart v. Wilmington Trust*, 112 A.3d. 271, 302 (Del. Ch. 2015), *aff'd*, 126 A.3d 1115 (Del. 2015). Such defenses may be raised *sua sponte* as "a matter of public policy." *Simmons v. Benn*, 96 A.D.2d 507, 508 (2d Dep't 1983). *Accord Janke v. Janke*, 47 A.D.2d 445, 449-50 (4th Dep't 1975), *aff'd*, 39 N.Y.2d 786 (1976).

In any event, Seibel concedes that a defense may be raised at or even after trial where the plaintiff "is not prejudiced or surprised." AB 32. *See* CPLR 3025(b). The prejudice must be "more than 'the mere exposure … to greater liability'"; the party must be "hindered in the preparation of his case." *Kimso Apartments, LLC v. Gandhi*, 24 N.Y.3d 403, 411 (2014) (citation omitted).

There was no hindrance here. All the same evidence supports unclean hands and *in pari delicto*. More broadly, the Complaint and Counterclaim both alleged intentional, wrongful misconduct by the other party, which was the very conduct that also supported *in pari delicto* and unclean hands. R-131-32, ¶151-

54; R-134-49. All that conduct was the subject of vigorous discovery and heavily contested at trial.[20]

b. The Exceptions to *In Pari Delicto* Do Not Apply

Seibel argues that *in pari delicto* does not apply because his conduct was not illegal. He is wrong. "[A] party is barred [under *in pari delicto*] from recovering damages if his losses are substantially caused by activities the law forbade him to engage in." *Stewart*, 112 A.3d at 301-02; *see also 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). That describes Seibel's conduct perfectly. He engaged in a variety of forbidden activities, including check fraud relating to Mr. Nguyen and the architect; conversion through unilaterally withdrawing restaurant funds; fraudulent attempts to exploit Ramsay's name (e.g. in Egypt) and take over his restaurant business (e.g. in Wexler Capital); secret kickbacks; and breach of duties to cooperate in (e.g.) paying contractors.

[20] For that reason, Seibel's citations to *Scholastic Inc. v. Pace Plumbing Corp.*, 129 A.D.3d 75, 80 (1st Dep't 2015) and *Tilbury Fabrics, Inc. v. Stillwater, Inc.*, 81 A.D.2d 532 (1st Dep't 1981), *aff'd,* 56 N.Y.2d 624 (1982), are entirely misplaced. In those cases, plaintiff had taken no discovery on the newly added statute of limitations defense.

Seibel also argues the fiduciary duty exception to *in pari delicto*. But that exception holds that, where a plaintiff brings a derivative suit on behalf of a corporation, a corporate insider defendant cannot rely on his own wrongful conduct (through the corporation) to bar the claim. In other words, the exception prevents "fiduciaries [from] immuniz[ing] themselves [from liability] through their own wrongful, disloyal acts, a transparently silly result." *Stewart*, 112 A.3d at 304. Here, the court-below found that Seibel's acts (not Ramsay's acts through the corporate entity) were wrongful. The exception and its rationale do not apply under such circumstances.

Seibel also argues the related "adverse interest exception" to *in pari delicto*. This argument fails for the same reasons. That exception is intended to protect "innocent stockholders" who sue on behalf of a corporate entity and whose claims might otherwise be barred by the misconduct of a corporate insider. *Stewart. 112 A. 3d* at 302-308. A corporate wrongdoer may not invoke the exception to benefit himself rather than an "innocent stockholder." *Id.* at 303 (corporate thief could not invoke the exception). For just such reasons, the exception does not apply to "sole actors," i.e. where the corporation is owed or dominated by the wrongdoer. *Id.* at 311. In such cases, the exception would unfairly insulate the wrongdoer and his corporation from the consequences of

his own misconduct. *Id*. That is exactly what Seibel improperly attempts here—to invoke his own wrongdoing to protect a corporate recovery that would benefit only him and not Ramsay.

Finally, even if *in pari delicto* did not apply, unclean hands would. All Seibel's claims are derivative, and all derivative actions are equitable and subject to the unclean hands defense. *In re Shawe & Elting LLC*, 2015 WL 4874733, at *36 (Del. Ch. Aug. 13, 2015), *aff'd sub nom*. *Shawe v. Elting*, 157 A.3d 152 (Del. 2017). Under unclean hands, "a litigant [like Seibel] who engages in reprehensible conduct in relation to the matter in controversy ... forfeits his right to have the court hear his claim, regardless of its merit." *Id*.

D. Seibel Did Not Prove Breach of Fiduciary Duty

Seibel's breach of fiduciary duty claim failed because based on the same conduct as his contract claims. "[A] plaintiff may not 'bootstrap' a breach of fiduciary duty claim into a breach of contract claim merely by restating the breach of contract claim as a breach of fiduciary duty." *Grunstein v. Silva*, 2009 WL 4698541, at *6 (Del. Ch. Dec. 8, 2009).

Moreover, even if Ramsay's decisions were subject to the heightened "entire fairness review" that applies to interested transactions, he did not breach any duties. "A fiduciary can satisfy the entire fairness standard … [if] there

was no future for the business and no better alternative for the [interest] holders." *Cancan Dev., LLC v. Manno*, 2015 WL 3400789, at *26-27 (Del. Ch. May 27, 2015), *aff'd*, 132 A.3d 750 (Del. 2016); *see also Berg & Berg Enterprises, LLC v. Boyle*, 100 Cal. Rptr. 3d 875, 899 (2009) (no fiduciary breach where there were no "viable alternate sources of financing …").

Here, as the court-below properly found, there was no viable alternative for The Fat Cow. It "was a proper exercise of the business judgment rule to close the restaurant," as doing so "had the benefit of mitigating damages from the class action and potential liability to the landlord." R-22518.

E. Seibel Did Not Prove Damages

Seibel's experts opined that a restaurant which lost $2 million in 18 months, faced unsatisfied debts and insolvency, and was a failure by every other metric would have operated for over 15 years (despite an only 10-year lease) and earned almost $10 million in future profits. The court-below properly found these conclusions "had no basis in reality," "ignored huge historical losses," and piled "speculation on top of speculation." R-22519-20.

1. Standard for Lost Profit Damages

As the court-below properly held, lost profits must be proven with reasonable certainty based upon reliable evidence. R-22518. And, as the court-

below also properly held, for businesses like The Fat Cow without 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 Co. v. Erie Cty.*, 67 N.Y.2d 257, 261 (1986); *see also* R-22518-19; R-11984-9 and R-21565-7 (additional applicable authority).[21]

2. Lowder's Projections Were Speculative

Despite its $2 million in historical losses, Seibel's expert, Janet Lowder, projected that The Fat Cow would have earned $4,546,609 in profits during the first three years of hypothetical (post-closure) operations. R-10918. Lowder assumed 700 patrons per day and average meal prices of $33. R-10910. But, as the court-below correctly found (R-22519), these figures had no relation to any historic data of The Fat Cow or any comparable restaurants. R-16110:25-16113:10; R-16113:23-16114:17; R-16115:6-8; R-16116:5-16118:10;

[21] *Wathne Imports, Ltd. v. PRL USA, Inc.*, 101 A.D.3d 83 (1st Dep't 2012), which Seibel cites, does not change this standard. There, the court declined to exclude an expert's lost profit report before trial, but held the report "may be challenged at trial," as Ramsay did here. *Id.* at 89. Moreover, the *Wathne* expert tethered his analysis to "actual gross sales." *Id.* at 86. Seibel's experts relied on no such actual figures. R-22519-20.

R-16119:13-21; R-18962-19309.[22] For example, historic daily patrons, as the court-below properly found, were less than 400 per day. R-18962-19309 (Ex. 597); R-21569 (summarizing Ex. 597); R-22519.

As the court-below also correctly found, these improper calculations resulted in hypothetical 2014 revenue 82% higher than actual 2013 results (R-10942), compared with the 0.6% growth rate of comparable restaurants. R-11050-51, ¶23; R-22520. Lowder then projected that 2014 revenue would increase by another 10% in 2015 and 2016. R-10918; R-10942. But the 10% growth rate had no basis in data, quantitative analysis, or specific numbers from The Fat Cow or any other allegedly comparable restaurant. R-11141-42, ¶20.

Lowder's cost projections were also speculative. She relied on no historical cost data but instead modeled the expenses she thought a "new and improved" The Fat Cow should incur. But she had no basis to believe the partners would agree to that and no objective expense corroboration. *See* R-

[22] Seibel argues Lowder relied on Green for an average meal price that "proved to be accurate." AB 5. In fact, Green gave Lowder lower numbers (R-15319:6-9) which she "rounded up" for alcohol sales "without an explanation." R-22519; R-16118:6-10; R-21569-70. Lowder's argues that the bar consultant would have increased alcohol sales, but can only speculate by how much. In any event, the court-below found Green of "dubious credibility" (R-22519) and even if the meal price had been right, the patron assumptions and resulting profit numbers were not.

16125:9-23; R-16126:2-6; R-16128:6-16130:3. She did not use historical cost numbers because they "were pretty bad and had issues." R-16124:22-16125:5.

In short, as the court-below summarized, Lowder's conclusions "ignore[d the] historical data." R-22519.

As the court-below also properly found, Lowder failed to account for known problems such as the class action liability (R-16140:9-18; R-16164:14-24) and the admitted need for a capital influx for which she identified no credible source. (R-16156:8-16157:1; R-16157:7-16). She also assumed, without evidence, that partner discord "would resolve by 2014" (R-16144:15-24). She thus, as the court-below properly found, "completely ignored the dynamics of the two partners" and their "lack of cooperation," and "Seibel's destructive management." R-22519-20.

Moreover, although the restaurant lost over $200,000 in 2013, Lowder calculated an "adjusted" 2013 profit of $375,000. Her "adjustments" backed out allegedly "nonrecurring" expenses and depreciation. But depreciation is a real expense and even non-recurring expenses may significantly affect profitability. R-16131:2-12; R-16132:8-13; R-16215:21-16216:2; R-6833:8-18; R-6834:3-6. In any event, Lowder improperly classified as "nonrecurring" expenses that were plainly recurring, such as bookkeeping and salaries. *See*

R-16131:23-16132:7; R-16133:4-18; R-16137:3-24; R-11048-49, ¶19(d); R-11074-75. Finally, as the court-below properly found, even if Lowder's "adjustments" were right, she assumed 2014 profits of about 4.6 times her "adjusted" $375,000 profit in 2013. *See* R-16142:3-16143:5. "This is unrealistic." R-22520.

Ramsay's experts rightfully pointed out these flaws, and the court-below was of course entitled to credit their testimony. R-11043-50; R-11139-52.

Lowder identified a handful of factors that she thought might increase profits. But she had no objective basis to estimate the alleged increases; and her "calculations" were mere "guesstimates." R-16154:2-16155:2. For example, Lowder opined that:

- The restaurant's location would increase sales. But she had no reason to believe that the location would be better in 2014 than in the previous unprofitable years. R-16144:25-16145:25.
- Restaurant profits would increase from appearing on "Hell's Kitchen." But she conceded that would depend on unknown factors outside restaurant control. R-16146:17-16149:1; R-16151:22-16153:9. She argued the effect could be the same as for the restaurant featured in the movie "Sideways" (R-16169:18-22; R-16174:23-

16177:4), but as the court-below found, that was completely speculative. R-22519.

- Adding Ramsay's name would lead to unspecified growth. R-16149:12-16150:20. But as she admitted and the court-below found, The Fat Cow was "already widely associated" with Ramsay. R-16149:2-8; R-22519.
- A new "gastropub" concept would increase sales, but she provided no data to support that conclusion and had no basis to believe the partners would accept her hypothesized menu and concept changes. R-16150:21-16151:21.
- Despite Lowder's claims that operations got better after Ramsay's management role increased, losses continued. *Supra* §IV.D.2.

The court-below also properly disregarded Seibel's other expert, Bautista, who projected Lowder's calculations over 15 years assumed future operations (R-16189:5-24), because he "relie[d] entirely on Lowder's speculative projections." R-22520; R-16187:4-18; R-16197:17-23; R-16204:11-18; R-16187:25-16189:4; R-11043-47.

As shown above, contrary to Seibel's argument (AB 45-47), the court-below did not ignore Lowder's conclusions but merely found, based on

overwhelming evidence, that Lowder's testimony was speculative and unrealistic.[23]

3. Seibel Did Not Prove Alternative Damages

Seibel argues in the alternative that his damages were the amounts for which he offered to sell his restaurant interests. But there was never any agreed offer; Seibel cites mere negotiations and the parties never agreed, for example, how to reconcile capital accounts as part of a buy-out formula. *See* R-17109-10; R-18587; R-17422-24. More critically, Ramsay insisted that any sale include indemnity for *Becerra* (and other liabilities), and indemnity could have resulted in nothing to Seibel.[24] R-17423; R-17048, ¶5 (indemnity included in offer); R-16943 (potential liability 3 to 4 times the $500,000 mediator's proposal). But indemnity was unacceptable to Seibel. R-18597-99. As Ramsay's lawyer testified, indemnity was a "major, major issue" and would have left Seibel "with little upside." R-15480:16-15481:8.

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[23] The damage calculation has a variety of other flaws. *See* R-21565-79.

[24] As the court-below properly found, the class action settled for less than projected only because the restaurant had then closed and plaintiffs were thus concerned they could not collect. R-19588-9, ¶¶19-21; R-18578 (closure notice resulted in a "very substantial move" on settlement); R-22516.

Moreover, no evidence supports that these offers could represent damages. Ramsay's experts never testified that they could; and Seibel's citations do not support the contrary. In fact, Seibel's own expert testified that unclosed offers like those upon which Seibel relies "ha[ve] not much credence." *See* R-16200-01.[25]

F. The Court-Below Properly Awarded Attorney's Fees

The court-below properly found that Ramsay was entitled to "reasonable attorney's fees as prevailing parties." R-22522; *see also Comrie v. Enterasys Networks, Inc.*, 2004 WL 936505, at *2 (Del. Ch. Apr. 27, 2004) (party that "predominated in litigation" is the "prevailing party"). But Seibel argues the court-below failed to consider: (1) the reasonableness of counsel's rates and hours; (2) the amount in controversy; and (3) alleged inequity.

"[T]he determination of reasonable counsel fees is a matter within the sound discretion of the trial court and, in the absence of an abuse of discretion, will be upheld." *Thomas B. v. Lydia D.*, 120 A.D.3d 446, 446 (1st Dep't 2014). With that discretion in mind, Seibel's arguments fail:

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[25] Seibel claims at minimum nominal damages. For the reasons discussed herein, Ramsay did not breach, so no damages of any kind are warranted. But even if nominal damages were warranted, Ramsay would be entitled to indemnity and the prevailing party attorneys' fees. *See infra* §§VII.F & G.

- Ramsay submitted two affidavits confirming the reasonableness of his counsel's rates. *See* R-21600, ¶14; R-21887-92. Seibel contested those rates. *See* R-21935-21938. The court-below noted that it had to set a "reasonable hourly rate" and awarded "a reasonable amount of attorneys' fees" with "all of the relevant factors" in mind. R-22541; R-22543. Accordingly, the court-below considered rates.
- The court-below also considered the reasonableness of hours, and in fact reduced fees to reflect the same by $1.5 million, before making a *further* reduction of 10%. *See* R-22543. [26]
- Ramsay faced claims of $10 million plus punitive damages. Seibel accused Ramsay of fraud, affecting Ramsay's livelihood and mandating a vigorous defense. For these reasons, and because of Seibel's aggressive litigation tactics, this was no run-of-the-mill dispute. The court-below expressly noted that it would need to consider the "amount involved and results" obtained. R-22541-43.

[26] Seibel claimed too many partner hours on summary judgment motions, trial preparation, and mediation and settlement. AB 52. But the court-below eliminated most summary judgment fees and all fees for mediation and settlement negotiations. R-22543. The court-below had discretion to decide whether partner time for trial preparation was excessive.

- The court-below properly rejected Seibel's claim of inequity because he could "not afford to pay his own counsel." AB 53. Seibel submitted no affidavit so proving. In any event, "[e]conomic hardship…, even to the extent of bankruptcy or insolvency, does not excuse performance of a contract," such as the contractual obligation to pay fees. *Bersin Properties*, LLC v. *Nomura Credit & Cap., Inc*., 74 Misc. 3d 1209(A), 159 N.Y.S.3d 828 (Sup. Ct., N.Y. Cty. 2022), *aff'd*, 213 A.D.3d 431 (1st Dep't 2023).

G. The Court-Below Properly Awarded Indemnity

Seibel argues that Ramsay is not entitled to indemnity because he paid the amounts incurred through his entities.[27] But the Indemnity Agreement "inures to the benefit" not only of Ramsay but his "legal representatives, successors, and assigns" and must be interpreted "in a reasonable manner to give effect to the intent of the parties." R-16583-84, ¶¶2, 3. Depriving Ramsay of the intended benefit merely because he paid through his entities would be completely inconsistent with the Agreement's purposes. Moreover, the

[27] R-22529-31 lists the payments and payors. Ramsay and his wife own payor Kavalake; he is its director and manager; and Kavalake controls GRUS. R-233:9-234:6; R-748; R-15870:2-15. Payor Gordon Ramsay Holdings is a Ramsay-owned umbrella entity for his restaurants. R-15075:11-15; 3845:4-13; 3852:19-21; R-15870: 2-5; R-15370:3-15371:24; R-17373; R-22510.

Agreement requires only that Ramsay "incur" (not pay) a "liability." R-16583, ¶1. There is no dispute that Ramsay personally incurred the liabilities for which he paid through his entities.[28]

Seibel also argues that Ramsay cannot be indemnified because he acted intentionally. But the intentional conduct exception is "narrow," requiring not only that the indemnitee "acted intentionally" but that he had "the intent to harm or injure others." *J.P. Morgan Sec. Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 335 (2013); *accord Pub. Serv. Mut. Ins. Co. v. Goldfarb,* 53 N.Y.2d 392, 399 (1981) No evidence supports that Ramsay incurred liability with the intent to harm Seibel. As the court-below correctly found, "the expenses Rams[a]y incurred were ... either the result of Seibel's deliberate misconduct ... or no one's fault." R-22521. Ramsay closed The Fat Cow to mitigate lease liabilities for himself and Seibel. *Supra* §IV.E.3; R-22520.

The court-below found that Ramsay's conduct was "at worst …negligent." R-22521. And, as the court-below also properly found, "[b]roadly-worded [indemnity] clauses …[like the one at issue here] include

[28] *See* R-19547-50 (lease lawsuit against Ramsay personally); R-20291-303 (settlement of lease lawsuit); R-20280-90 (personal settlement of lawsuit by LA Specialty); R-16438-527 (lease with Ramsay personally).

liability for active negligence." *Hong Leong Fin. Ltd. (Singapore) v. Morgan Stanley*, 44 Misc. 3d 1231(A), *10 (Sup. Ct., N.Y. Cnty. 2014), *aff'd*, 131 A.D.3d 418 (1st Dep't 2015); R-22521.

VIII. CONCLUSION

This Court should affirm in all respects.

Dated: New York, New York
October 26, 2023

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