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

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

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

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

Plaintiffs-Appellants,

-against-

GORDON RAMSAY and G.R. US LICENSING LP,

Defendants-Respondents,

-and-

FCLA, LP and THE FAT COW, LLC,

Nominal Defendants.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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I. PRELIMINARY STATEMENT

Ramsay-Respondents' opposition consists of repeating a laundry list of accusations and mudslinging against Seibel hoping this Court will ignore Ramsay's blatant breach of the parties' contract, his multitude of proven lies, and the clear legal errors made by the Court-Below in the Decision.

Most of the accusations against Seibel are that he mismanaged the Restaurant. (Opp. 10-21) This argument overlooks the undisputed fact that it was Ramsay alone who was legally obligated to operate the Restaurant. When he refused to replace his colleague who was supposed to operate the Restaurant, Seibel and his inexperienced associates jumped in to fill the void. Then, when operational errors occurred, Ramsay unfairly blamed Seibel and used it as a faux basis to unilaterally close the Restaurant and attempt to misappropriate the lease and abscond with Seibel's investment of over $800,000.

Ramsay-Respondents' opposition ignores the clear error by the Court-Below when it excused Ramsay's unilateral closure of the Restaurant in breach of the unanimous consent provisions. *Every single* "fact" relied upon by Ramsay-Respondents and the Court-Below to excuse Ramsay's unilateral conduct arose *after* Ramsay made the decision to close the Restaurant in June 2013. The simple chronology of events shows that the Court-Below's ruling was clearly in error.

Ramsay-Respondents offer little opposition to the legal error by the Court-Below when it denied Seibel's breach of contract claim based on the defense of *in pari delicto*, a defense that was not pled. In opposition, Ramsay-Respondents' only argument is that *in pari delicto* is similar to a defense they pled, unclean hands, and therefore the Court-Below's error is immaterial. Ramsay's argument utterly fails to overcome the fact that the defenses are not identical under Delaware law, and Seibel was clearly prejudiced by not being on notice of a *in pari delicto* defense.

Ramsay-Respondents' opposition references many purported "facts" to justify the Court-Below's improper application of *falsus in uno, falsus in omnibus* to disregard all of Seibel's testimony. However, Ramsay-Respondents' purported "facts" are not the basis for the Court-Below's improper application of that doctrine, and many do not even concern testimony by Seibel – as is required. Moreover, Ramsay-Respondents' opposition does not even try to claim that Seibel's testimony by the Court-Below was demonstrably false or material. As a result, Ramsay-Respondents' opposition fails to justify the Court-Below's incorrect decision to disregard all of Seibel's testimony, which was the basis for numerous material factual findings made against Seibel, even on issues on which there was no contrary testimony or evidence.

Conversely, to justify the Court-Below's excusing the world-famous celebrity's blatant lies about the single most critical issue of the case – Ramsay's

claimed reasons for closing the Restaurant – Ramsay-Respondents make numerous inaccurate representations and cite portions of the record that do not support their misstatements of fact. In other words, to justify Ramsay's misrepresentations to the Court-Below, Ramsay-Respondents misrepresent to this Court the evidence in the record.

This Court should correct these clear errors and enter judgment for Appellant. The Court-Below's errors that excused Ramsay's clear breach of contract resulted in awarding Ramsay-Respondents over $4 million in attorneys' fees. Ramsay-Respondents do not dispute, and cannot dispute, that once this Court overturns the Decision and finds that Ramsay-Respondents breached the contract, the attorneys' fees award must be vacated and, instead, Seibel is entitled to his attorneys' fees.

Regarding the Court-Below's $777,349.54 indemnification award to Ramsay, Ramsay does not dispute the clear fact that there was no evidence in the record that Ramsay personally paid any money which would entitle him to indemnification. Lacking any evidence that Ramsay incurred any cost or expense, there is simply no basis for Ramsay to be indemnified.

In sum, Ramsay-Respondents do not offer any valid basis why the clear errors by the Court-Below should not be overturned.

II. STATEMENT OF NATURE OF THE CASE AND RELEVANT FACTS

There are numerous facts in the Record that Ramsay-Respondents do not dispute, such as:

- The Court-Below made at least two factual findings that were not supported by the Record, but rather were based entirely on the Court-Below's speculative "perhaps" findings. (R. 22513, 22516; Seibel-Brief ["SB"] 17)

- Ramsay was obligated to operate the Restaurant and did not send a replacement when his team leader was fired. (R. 15057, 14727; 15450-15452; SB 6-7)

- The parties both knew about the trademark issue in early 2012 and agreed they would change the name if required. (R. 401:4-11; R. 1663:16-1664:8; SB 6)

- While sitting on the sidelines, Ramsay and his team criticized Seibel, whose inexperienced team made operational mistakes. (SB 7-8)

- Seibel did not pay certain vendors because Seibel's team felt they had not delivered service, but when Ramsay's team advised that the vendors should be paid, the vendors were paid. (R. 16063:24-16065:15; SB 7)

- When Ramsay decided to close the Restaurant in June 2013, he did not inform Seibel of that decision. (R. 15884:24-15885:21; SB 8)

- Instead, Ramsay secretly acted to negotiate with the Landlord to open a new restaurant; hired designers and created concepts for a new restaurant. (R. 15096; SB 9-10)

Ramsay-Respondents make other factual representations that are contrary to the evidence in the Record, such as, among others set forth below, the following:

- Ramsay-Respondents argue that Ramsay did not lie about why he had to close the Restaurant. However, he repeatedly claimed the reason was

the trademark dispute, which he admitted at trial was not a proper basis to close the Restaurant. (R. 15115:3-25; SB 10-11)

- Ramsay-Respondents argue that Ramsay did not lie when he decided to close the Restaurant in June 2013 because he could no longer be in business with Seibel. However, the evidence shows many subsequent discussions about opening new restaurants with Seibel and they opened another restaurant together in 2015. (R. 15734; R. 15599-15600; SB 23-24)

- Ramsay-Respondents argue that Thomas did not lie about being unable to negotiate more time to use the trademarked name, yet fails mention that Thomas admitted that did not even try to obtain more time, which the trademark owner said he "definitely" would have given. (R. 15491-15492; SB 12-13; Opp. 27; R. 2958:4-2959:14)

In addition, Ramsay-Respondents attempt to impugn Seibel by reciting numerous allegations that Seibel failed to adequately inform Ramsay of certain activities, said things in private emails that are unpleasant or insulting, and made errors when he stepped in to fill the void left by Ramsay's abdication of his responsibility to operate the Restaurant. However, relying on arguments about Seibel's character and good faith operational missteps is not an excuse to breach the parties' contract and attempt to steal Seibel's investment.

III. ARGUMENT

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

Ramsay-Respondents do not contest the fact that Ramsay's unilateral decision to close the Restaurant violated the governing agreements' unanimous consent provision. Instead, they make numerous misguided arguments in a futile attempt to support the Court-Below's Decision rejecting Seibel's breach of contract claim.

1. Seibel Was Prejudiced by the Court-Below's Application of the Unpled Defense of *In Pari Delicto*

Ramsay-Respondents do not dispute that the Court-Below improperly applied New York *in pari delicto* law instead of Delaware law. Ramsay-Respondents also concede that the defense of *in pari delicto* was not pled. Ramsay-Respondents further concede that it is only when a plaintiff is not prejudiced or surprised by a defense that a defendant is permitted to raise a defense that was not asserted in the pleadings. *See Rogoff v. San Juan Racing Ass'n, Inc.*, 54 N.Y.2d 883, 885, 429 N.E.2d 418, 419 (1981); *Spiegel v. 1065 Park Ave. Corp.*, 305 A.D.2d 204, 205, 759 N.Y.S.2d 461, 463 (1st Dep't 2003).

However, Ramsay-Respondents argue that since they asserted an unclean hands defense, it was proper for the Court-Below to impose the *in pari delicto* defense because the two defenses are "closely analogous." (Opp. 58, *citing Stewart*

v. Wilmington Tr. SP Servs., Inc., 112 A.3d 271, 302 (Del. Ch.), *aff'd*, 126 A.3d 1115 (Del. 2015).) That argument fails for a number of reasons.

First, the two defenses are treated differently under Delaware law. Delaware courts define *in pari delicto* using the 1 Am. Jur. 2d Actions § 40 definition: "a general rule that courts will not extend aid to either of the parties to a criminal act…under this rule, a party is barred from recovering damages if his losses are substantially caused by activities the law forbade him to engage in."[1] Unlike *in pari delicto,* Delaware courts do not define the conduct applicable to an unclean hands defense as a criminal act or conduct strictly forbidden by the law. *SmithKline Beecham Pharms. Co. v. Merck & Co.,* 766 A.2d 442, 449 (Del. 2000) (applying unclean hands to conduct that violates the conscience or good faith, not criminal conduct; further holding that it is improper for courts to apply a balancing test to both parties' conduct when applying unclean hands)

Second, *in pari delicto* is an "extreme remedy." involves the weighing of one's illegal or criminal wrongdoing against another's. *See Korotki v. Hiller & Arban, LLC*, No. CV-15C-07-164, 2017 WL 2303522, at *12 (Del. Super. Ct. May 23, 2017), *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 237 (Del. Ch.

[11] *See PVP Aston, LLC v. Fin. Structures Ltd.*, No. CVN21C09095AMLCCLD, 2022 WL 1772247 at *17 (Del. Super. Ct. May 31, 2022); *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 237 (Del. Ch. 2014); and *In re Am. Int'l Grp., Inc., Consol. Derivative Litig.*, 976 A.2d 872, 883 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. of Louisiana v. Gen. Re Corp.*, 11 A.3d 228 (Del. 2010).

2014); and *In re Am. Int'l Grp., Inc., Consol. Derivative Litig.*, 976 A.2d at 883. Ramsay-Respondents present no authority to the contrary.[2]

Despite Ramsay-Respondents' arguments in opposition, Seibel was clearly prejudiced by the *sua sponte* application of *in pari delicto*. (Opp. 58) Seibel did not present evidence, or engage in discovery, on Ramsay's illegal or improper conduct and request that the trier of fact weigh that evidence against any alleged conduct by Seibel.[3] Seibel did not present at trial any evidence that would weigh allegations of misconduct by Seibel against misconduct by Ramsay. There can be little question that Seibel was prejudiced by not being on notice that the Court-Below intended to interpose a defense that required a weighing of misconduct by Seibel against such misconduct by Ramsay.

[2] In addition, under Delaware law unclean hands is strictly limited to claims involving equitable relief, while *in pari delicto* is permitted where both legal and equitable claims are made. *Korotki v. Hiller & Arban, LLC*, No. CVN15C07164CCLDWCC, 2017 WL 2303522, at *2 (Del. Super. Ct. May 23, 2017); *Am. Healthcare Admin. Servs., Inc. v. Aizen*, 285 A.3d 461, 474 (Del. Ch. 2022).

[3] In fact, the Court-Below granted a motion by Ramsay-Respondents to preclude evidence of Ramsay's wrongdoing based on relevance. (R. 12035-12084; R. 10) The precluded evidence included multiple litigations detailing allegations of legally forbidden conduct by Ramsay, and several newspaper articles detailing allegations of criminal, illegal and immoral conduct by Ramsay (such as his arrest for being caught nude in public, illegal avoidance of tickets, infidelity, and several accusations of racism, cultural appropriation, and sexism). (*Id*.) In opposition to the motion to preclude, Seibel did not argue that this evidence is necessary to respond to an *in pari delicto* defense to weigh Ramsay's wrongdoing against that alleged of Seibel – precisely because Seibel was not on notice of the need to present such evidence. (*Id*.)

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

Ramsay-Respondents also argue that, although the Court-Below erroneously applied New York law, under Delaware law the *in pari delicto* defense is applicable to the facts presented in this action. That argument fails for multiple reasons.

a. *In Pari Delicto only Applies to Illegal Conduct*

Ramsay-Respondents dispute Seibel's assertion that under Delaware law *in pari delicto* only applies to illegal conduct, and argues instead that the defense only applies to "activities the law forbade him to engage in." (Opp. 59) There is simply no basis to distinguish between "activities the law forbids" and "illegal" conduct, nor do Ramsay-Respondents cite any authority to support their baseless mincing of words. (Opp. 59) In fact, the definition of "illegal" contradicts the argument. Black Law's definition of "illegal" is "forbidden by law; unlawful." *Illegal*, Black's Law Dictionary (11th ed. 2019). Oxford dictionary defines "illegal" as "contrary to or forbidden by law." *Illegal*, Oxford English Dictionary (2nd ed. 2023). Ramsay-Respondents simply have no support for their argument that under Delaware law *in pari delicto* is limited to illegal conduct.

Ramsay-Respondents do not even attempt to claim that Seibel's conduct was illegal. Instead, they attempt to imply illegality by improperly using the term "kickback" to describe the rebates Seibel's company received. However, the Court-Below correctly referred to the transactions as "rebates" (R. 22510), as there was no

evidence submitted at trial that the rebates were improper or illegal and the trial testimony revealed that such rebates are standard in the industry. (R. 15309:19-15312:10)[4] Ramsay-Respondents simply fail to provide any basis to support the application of *in pari delicto* under Delaware law to Seibel.

b. The Fiduciary Duty Exception Applies Here

Ramsay-Respondents argue that even if *in pari delicto* could be applied here, the fiduciary duty exception to the doctrine does not apply. (Opp. 60) In fact, the case cited by Ramsay-Respondents, *Stewart v. Wilmington Tr. SP Servs., Inc.*, 112 A.3d 271, 304 (Del. Ch. 2015), *aff'd,* 126 A.3d 1115 (Del. 2015), states that the exception applies to this precise situation: ‼

> Under [the fiduciary duty] exception, perhaps the most expansive, the doctrine has no force in a suit by a corporation against its own fiduciaries…. [T]he underlying justification is that parties like receivers, trustees, and stockholder derivative plaintiffs must be able to act on the corporation's behalf to hold faithless directors and officers accountable. (Citations omitted)[5]

Ramsay-Respondents fail to cite any case that would apply *in pari delicto* to prohibit a derivative suit brought against a corporate fiduciary, as the Court-Below did here.

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[4] The other conduct referenced by Ramsay-Respondents is clearly not illegal conduct. (*See* Opp. 59, referencing answering an initial inquiry about interest in a restaurant in Egypt (R. 15391:13-19); drafting an internal memo about hypothetical cost of the majority interest in Ramsay Holdings (R. 15366:9-17; 15468:21-15469:4); disputing a contractor's invoice because of faulty work (R. 14756:7-14757:5; 15287:20-24); and distributing to Seibel the exact amount that Ramsay improperly withdrew from the Company in breach of the parties' agreement. (R. 14785:3-14787:10)

[5] *See also, In re Am. Int'l Gp., Inc., Consol. Deriv. Litig.,* 976 A.2d 872, 876, 882 (Del. Ch.2009)(*AIG II*)(finding that corporate officers and directors were "unable to invoke the *in pari delicto* defense.")

The fiduciary duty exception applies here and *in pari delicto* is not an available defense.

c. *Seibel's Conduct May Not be Imputed to the Entities*

Regarding another exception to *in pari delicto,* the adverse interest exception, Ramsay-Respondents' arguments (Opp. 60-61) ignore Seibel's showing that the Court-Below's improperly imputed Seibel's conduct to the entities. (R. 22517) The adverse interest exception to the application of *in pari delicto* arises when "the corporate agent responsible for the wrongdoing was acting solely to advance his own personal financial interest, rather than the corporation itself." *In re Am. In'l Grp., Inc.*, 976 A.2d at 891. As Seibel showed in the opening brief, the conduct imputed by Court-Below to the entities was conduct that benefitted Seibel, and not the entities. (SB 38) Accordingly, the Court-Below's imputation was in error and the adverse interest exception should have barred application of *in pari delicto.*

3. Seibel Did Not Breach the Contract

In opposition, Ramsay-Respondents argue that Seibel's breach of contract claim fails because Seibel breached the parties' agreements. (Opp. 52-53) This argument is based on the Court-Below's statement, without legal support, that "Seibel had no more right to insist on unanimous consent to close the restaurant than Ramsay did to keep it going." (R. 22518) To support this baseless position, Ramsay-Respondents cite to *PAMI-LEMB I Inc. v. EMB-NHC, L.L.C.*, 857 A.2d 998 (Del.

Ch. 2004) and 4 A. Corbin, Corbin on Contracts, §973, p. 910 (1951) (cited in *PAMI-LEMB*). However, *PAMI-LEMB* merely holds that a party repudiates a contract by refusing to perform and therefore cannot seek to enforce the contract. 857 A.2d at 1014. Repudiation was not pled and is not at issue here. (R. 131-133) Here, Seibel merely seeks compliance with the unanimous consent provision of the contract. Seibel's desire to maintain the status quo, *i.e.,* the entity should continue to pursue its stated purpose – operating the Restaurant – is not a breach; but closing the Restaurant in contravention of the unanimous consent provision clearly is.

In fact, Ramsay had a clear option – if he wanted to close the Restaurant, and Seibel did not consent, he could file for dissolution. (R. 22225-6; Del. LLC Act §18-802) Ramsay-Respondents cite Delaware law that concerns when it is appropriate to seek judicial dissolution. (Opp. 56) However, the cases cited by Ramsay-Respondents all involve situations in which one party first sought court dissolution because of a deadlock.[6] These cases do not hold that a party is entitled to self-help by forcing a business to close without his partner's consent instead of seeking judicial dissolution. If Ramsay genuinely believed a deadlock existed, he should

[6] See Opp p. 56; *PC Tower Ctr., Inc. v. Tower Ctr. Dev. Assocs. Ltd. P'ship*, No. CIV. A. 10788, 1989 WL 63901, at *5 (Del. Ch. June 8, 1989) (dissolution sought because of deadlock – no self-help as Ramsay did here); *Fisk Ventures, LLC v. Segal*, No. CIV.A. 3017-CC, 2009 WL 73957, at *4 (Del. Ch. Jan. 13, 2009), aff'd, 984 A.2d 124 (Del. 2009) (same); *In re: GR BURGR, LLC*, No. CV 12825-VCS, 2017 WL 3669511, at *1 (Del. Ch. Aug. 25, 2017) (same).

have filed a dissolution action. He didn't, until long after he chose to breach the contract and act unilaterally to close the Restaurant.

4. Frustration of Purpose and Impossibility Do Not Apply

In opposition, Ramsay-Respondents argue that the doctrines of frustration of purpose and impossibility apply to excuse Ramsay-Respondents' clear breach of the contract because "the parties' assumed they could agree on all issues (and made no deadlock provision) and that they could operate a 'first class' successful restaurant." (Opp. 55)

Contrary to Ramsay-Respondents' conclusory argument, the Court-Below permitted a defense to the breach of contract claim based entirely on facts that *did not exist in June 2013* when Ramsay decided to close the Restaurant. (R. 15189; R. 17284; SB 41-44) As such, there is simply no basis to permit the application of either the impossibility or frustration of purpose defenses when Ramsay decided to close the Restaurant long before the purported factual underpinnings of the alleged defenses existed.

Second, Ramsay-Respondents' argument fails to distinguish the case law cited by Seibel showing the defenses are not applicable here, namely that (i) Delaware law prohibits the impossibility defense, "if the supervening events were reasonably foreseeable"; (ii) California law's strict view of impossibility provides that "a party is not excused by the difficulty of performance" and (iii) Delaware and California

law on frustration of purpose requires a showing, *inter alia,* that the nonoccurrence of the frustrating event was a basic assumption of the contract and there was no fault on the part of the defendant. (SB 39-40)

Regarding foreseeability, the fact that the parties considered but chose not to include a deadlock provision in their contracts (R. 16752) shows that the parties foresaw that the managers might not reach unanimous consent and assumed that risk. *Obsidian Fin. Grp., LLC*, No. CV 2020-0485-JRS, 2021 WL 1578201, at *6 (improper to invoke impossibility if the supervening events were reasonably foreseeable); *see also* SB 43. The argument that the Restaurant was not a "first class" operation falls squarely at Ramsay's feet – he refused to fulfill his clear obligation to operate the Restaurant.

B. <u>Plaintiff-Appellant Proved Its Breach of Fiduciary Duty Claim</u>

In opposition, Ramsay-Respondents first argue that Seibel has no fiduciary duty claim because it merely restates the breach of contract claim. (Opp. 61) That is false. Tellingly, Ramsay-Respondents do not specifically address *any* of the conduct cited by Seibel in which Ramsay-Respondents breached their fiduciary duty separate and apart from the breach of contract claim. (SB 49, n. 42)

In addition, Ramsay-Respondents ignore the fact that the Court-Below rejected application of the entire fairness doctrine based on facts that arose *after* Ramsay decided to close the Restaurant. (R. 22517-18) Ramsay-Respondents further

ignore the prior ruling of the Court-Below that: "[i]f Ramsay closed the restaurant simply because he wanted to end his partnership with Seibel and start a new restaurant, there would be a breach of fiduciary duty." (R. 22307, *citing Cline v Grelock*, No. 4046-VCN, 2010 Del. Ch. LEXIS 43, at *2 [Del. Ch. Mar. 2, 2010]) In the Decision, that was exactly why Ramsay closed the Restaurant and therefore judgment is warranted in favor of Seibel. (R. 22517)

C. Seibel Proved Damages

1. The Court-Below Erred In Disregarding Seibel's Proof of Damages

In opposition to Seibel's argument that damages were proved at trial, Ramsay-Respondents either ignore the same evidence at trial that the Court-Below improperly ignored or misrepresent the evidence in the record.

First, Ramsay-Respondents attempt to distinguish *Wathne Imports, Ltd. v. PRL USA, Inc.*, 101 A.D.3d 83, 89, 953 N.Y.S.2d 7 (1st Dep't 2012), by arguing that the expert in *Wathne* used "actual gross sales" in his analysis and that Lowder did not. (Opp. 63 n. 21) That is not correct. As the court found in *Wathne, the actual sales figures* prior to the breach *do not disprove or invalidate* the growth rate found by the expert based on comparable handbag sales. *Id.* at 89. Lowder's analysis considered the Restaurant's actual performance (R. 22519), but also took into account the many factors that would have resulted in improved performance if

Ramsay had not unilaterally closed the Restaurant, such as (1) having the Restaurant operated by someone who had not determined in June 2013 to close the Restaurant and therefore had little incentive for improving performance (R. 9760, p. 2; SB 46-47); (2) the undisputed benefit of being featured in a national television program (R. 10898, §IV(d)(e); 15155:25-15156:9); (3) the undisputed benefit of having Ramsay's name on the Restaurant (R. 22519; SB 46); and (4) Lowder's unquestioned expertise in the restaurant market in Los Angeles and, specifically, the Grove, where the Restaurant was located, and how the aforementioned changes would impact a restaurant in that market. (R. 10898, Sec. III, p. 4; SB 44-45) Indeed, Lowder was the *only* expert who testified at trial with expertise in restaurant performance and projections, as well as expertise in the Restaurant's specific market.

Moreover, Ramsay-Respondents completely ignore, just as the Court-Below ignored, the uncontested fact that Lowder's projections were consistent with the mid and high-end projections that the Ramsay's team did prior to the Restaurant opening. (R. 19327; SB 47)

Ramsay-Respondents' other arguments are equally off-base. To contradict Lowder's finding that the Restaurant was cash-positive, Ramsay-Respondents claim certain non-recurring expenses were incorrectly categorized. (Opp. 65) However, those minor discrepancies would not have changed Lowder's conclusion that the Restaurant was cash-positive, excluding non-recurring expenses, which is typical for

a start-up restaurant, nor would those discrepancies impact her projections because the same expenses were included in the projections. (R. 16171:19-16172:20; SB 45) Ramsay-Respondents claim that Lowder testified that the Restaurant's location would "increase sales." (Opp. 66) In fact, Lowder testified that the Restaurant's location at the Grove and next to a movie theatre and fountain would "draw a lot of people to that area", a factor that she "considered" in her projections. (R. 16173:11:24) Ramsay-Respondents further argue that Lowder improperly relied upon the average meal prices provided to her by Green. (Opp. 64) But the evidence at trial showed that the numbers provided by Green were correct and supported by the company data. (R. 15323:24-15325:6; 16117:20-16118:10) Lowder did not "round up" the average numbers "without explanation," as Ramsay-Respondents argue, but rather testified exactly why she anticipated increased alcohol sales. (R.16117:20-16118:10; 9529:3-23)

In sum, the Court-Below misinterpreted Lowder's conclusions and improperly substituted its judgment for Lowder's conclusions that were based on her unquestioned expertise in the restaurant industry and relevant market. Accordingly, Lowder's opinion should not have been disregarded entirely by the Court-Below.

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

Ramsay-Respondents' argument in opposition to Seibel's alternative damages analysis for $831,482 is directly contrary to Ramsay-Respondents' expert's

testimony. In opposition, Ramsay-Respondents claim that the damages fail because "there was never any agreed upon offer." (Opp. 68) But that argument is contradicted by their own expert, who testified that the relevant consideration is whether there had been "recent *offers to purchase* the company or its equity." (R. 16200:12-20) Moreover, even if Ramsay-Respondents are correct that indemnity for the *Beccera* litigation was part of the offer, the amount of that indemnity was a proven amount – one-half of the $140,000 paid to settle that litigation – and could be applied to the offer.[7] (R. 22516)

In sum, Ramsay-Respondents have not provided any basis for the Court-Below to reject the alternative damages that are based on Ramsay-Respondents' own expert's valuation of the enterprise.

3. Seibel's Nominal Damages Satisfy Breach of Contract Standards and Entitle Seibel to Attorneys' Fees and to Vacate Ramsay's Attorneys' Fees Award

Ramsay-Respondents do not dispute that even if this Court affirmed the Court-Below's rejection of the above damages in (i) and (ii), Plaintiff-Appellant may still recover nominal damages under breach of contract. (SB 48, n. 41) Ramsay-Respondents argue that even with such a finding, Ramsay is still entitled to attorneys' fees. (Opp. 69, n. 25) That is clearly incorrect. The attorneys' fee award was based

[7] Ramsay-Respondents cannot argue that this amount is inapplicable because the *Beccera* litigation was settled after the Restaurant had closed, as his buyout offer of Seibel was part of his plan to close the Restaurant and therefore would have resulted in a similar settlement. (R. 17047)

on the contractual provision entitling the prevailing party to attorneys' fees. (R. 22540) Upon showing that Ramsay breached the parties' agreements, Ramsay-Respondents are no longer entitled to attorneys' fees. Instead, Seibel is entitled to his attorneys' fees, regardless of the amount of damages Seibel proved at trial.

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

Many of the Court-Below's factual findings on which the Decision hinged were based on the ruling that all of Seibel's testimony must be disregarded. As discussed below, Ramsay's opposition does not provide a valid basis for the Court's application of *falsus in uno, falsus in omnibus.*

1. The Court-Below Improperly Applied the Doctrine of *Falsus in Uno, Falsus in Omnibus*

As Ramsay-Respondents concede, the application of the doctrine *falsus in uno, falsus in omnibus* requires testimony that is both "demonstrably false" and "material." (Opp. 43) Regarding the Court-Below's ruling, Ramsay-Respondents conclusory argument that the Court-Below found that Seibel's testimony at trial was "demonstrably false" and "material" (Opp. 43) is not supported by the Decision. (R. 22510)[8]

[8] Ramsay Respondents provide a long laundry list of other accusations leveled at Seibel (all of which were contradicted at trial) that do not involve alleged false testimony at trial by Seibel, and therefore are irrelevant to the Court-Below's improper application of *falsus in uno*. (Opp. 36-42).

Regarding the check for Mr. Nguyen ("Nguyen"), Ramsay does not dispute that the *only other testimony* at trial supported Seibel's testimony—that of Mr. Green and Ms. Tassan. (R. 17403; SB 21) Ramsay-Respondents' only argument is that Tassan was "an obviously biased witness." (Opp. 37) That does not change the fact that the *only* testimony at trial supported Seibel's testimony and as such Seibel's testimony was in no way "demonstrably false."

Regarding the rebates (which Ramsay incorrectly calls "kickbacks"), at his deposition in 2015, Seibel said he was not aware of any rebates from Bank of America ("BOA") – an issue that had not yet been raised in the litigation and was not raised until almost a year later. (R. 2158:2-13; R. 5104-05) By the 2022 trial, Seibel had refreshed his recollection and testified about the BOA rebates, which totaled less than $3000. (R. 14775:3-5) The fact that Seibel did not recall certain insignificant rebates at his 2015 deposition hardly constitutes "demonstrably false" testimony at trial.

In addition, contrary to Ramsay-Respondents' conclusory statement that the referenced testimony by Seibel was "material," they make no other argument that would support a finding of materiality of the testimony that was relied upon by the Court-Below. As is shown in Seibel's opening brief, the subject testimony clearly was not material. (SB 21-21, n. 27)

As a result, the Court-Below's decision to use such testimony to disregard all of Seibel's testimony is clearly contrary to the standards applicable to *falsus in uno, falsus in omnibus. Washington Mut. Bank v. Holt,* 113 A.D.3d 755, 756-77 (2d Dep't 2014)(finding that the doctrine applies when the testimony is "demonstrably false") (SB 21-22)[9]. Ramsay-Respondents offer no argument in opposition to Seibel's showing that this incorrect ruling caused prejudice to Seibel and significantly impacted the Court's factual findings. (SB 22)

In fact, *all* of Seibel's alleged wrongdoing was disputed at trial and Seibel (and Green) testified in direct contravention of the allegations of wrongdoing. The fact that the Court-Below disregarded all this testimony was clearly a substantial basis for many of the Court's factual findings upon which the Decision is based.

2. The Court-Below Was Improperly Influenced by Certain Evidence

In opposition to Seibel's argument that the Court-Below appeared to have been influenced by excluded evidence, namely his tax-related guilty plea, Ramsay-Respondents argue that the Court-Below "bent over backwards" to exclude that evidence. (Opp. 44) Seibel is not, however, disputing that ruling by Court-Below.[10]

[9] Ramsay-Respondents' claim the *Washington Mutual* confirms that it would have been "reversible error" if the Court-Below did not apply the doctrine is wrong, (Opp. 43), because the Second Department applied to doctrine because the testimony of the process server was both relevant and demonstrably false, which is clearly not the case here. 113 A.D.3d at 757.

[10] The Court-Below's decision concerned a plea entered long after the Restaurant closed and concerned facts which pre-date the Restaurant and have absolutely nothing to do with the Restaurant or Ramsay.

Rather, the Court-Below's comments at trial and conclusions in the Decision reveal that the properly excluded evidence appears to have improperly influenced the Court's credibility determinations. (SB 26-27)[11]

Regarding the evidence that was improperly admitted, the tape recordings, Ramsay-Respondents argue that the Court-Below properly admitted in evidence the recordings of certain phone calls made by Ramsay's team without Seibel's knowledge.

First, regarding authenticity, Ramsay-Respondents simply claim that Wenlock's conclusory statements that the recordings were "complete, accurate and unaltered" should be accepted. Ramsay-Respondents' argument completely ignores Wenlock's admissions that clearly show he could not authenticate the recordings. (SB 29) It is clear that the recordings were not properly authenticated and should have been excluded. *See,* Grucci v. Grucci, 20 N.Y.3d 893, 897, 981 N.E.2d 248, 251 (2012).

[11] Ramsay-Respondents argue that Seibel should have first objected and moved for recusal during the trial. (Opp. 46) Not only may a judgment be reversed based on prejudicial improprieties even without preservation of an objection for appellate review, *see People v. Livingston*, 128 A.D.2d 645, 646, 512 N.Y.S.2d 889, 890 (2d Dep't 1987), Seibel is not arguing that the Court-Below should have been recused for bias, but that the Court-Below's credibility determinations were improperly influenced by excluded evidence. *See People v. Haines*, 139 A.D.2d 591, 591, 527 N.Y.S.2d 85, 86 (2d Dep't 1988)(trial court's improper inquiry into a highly prejudicial topic warranted a reversal of the judgment against defendant); *Echeverria v. City of New York*, 166 A.D.2d 409, 410, 560 N.Y.S.2d 473 (2d Dep't 1990) (judgment reversed because there was no way to know whether and to what extent improperly admitted evidence influenced the trier of fact's decision).

Second, Ramsay-Respondents argue that although the recordings were illegal where they were made – United Kingdom – CPLR §4506(3) does not prohibit their admissibility. (Opp. 50) That argument undercuts the intention of CPLR 4506[12] and New York public policy by permitting into evidence recordings that were illegal where they were made in contravention of local privacy laws. Ramsay cites to two cases: Iannazzo v. Stanson, 2003 WL 26556586 (Sup. Ct., N.Y. Cty., Nov. 24, 2003) and Locke v. Aston, 31 A.D.3d 33, 38, 814 N.Y.S.2d 38 (1st Dept. 2006). While *Ianazzo* addresses the issue at hand, Appellant is not aware of any instance in which any other court, appellate or trial level, has cited to this case on this issue. *Locke* is not on point as the question before the court was whether to permit plaintiff to assert a tort claim in New York based on a violation of California's statute requiring two-party consent to recordings. 31 A.D.3d at 38. The evidentiary question here requires adherence to the text of CPLR §4506(3)(a), and New York's public policy require that the recordings are inadmissible.

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

The improper application of *falsus in uno* to disregard all of Seibel's testimony is further shown by the clear and undisputed evidence of a multitude of lies by the

[12] CPLR §4506(3) enables an "aggrieved person" to move to suppress unlawful recordings. If Ramsay's argument is correct, this subsection would be meaningless and duplicative of CPLR §4506(1), which already provides for the suppression of recordings which violates Penal Law § 250.05.

celebrity chef Ramsay about the most material and critical issue of the case – his claimed reasons for closing the Restaurant without Seibel's consent – which the Court-Below improperly ignored.

Ramsay argues in opposition that he did not lie at trial and does so by inaccurately citing to the Record below. For example, Ramsay argues that his testimony that he closed the Fat Cow because in June 2013 he decided he could not be in business with Seibel any longer was not false, even though he subsequently opened a restaurant in Atlantic City with Seibel in February 2015. (Opp. 47) Ramsay's argument is based on his unique definition of "with" – he didn't open a restaurant "with" Seibel in 2015 because they both had separate contracts with Caesars for the same restaurant that provided payment to both parties from that same restaurant. (Opp. 47, n. 11) Apparently, Ramsay's claim is that if he and Seibel had one contract with Caesars then he opened the restaurant "with" Seibel; but two contracts for the same restaurant means he did not open the restaurant "with" Seibel. That tortured distinction is simply absurd.

In addition, the clear evidence showed that 5 months after Ramsay decided to close the Restaurant, he was aware that Seibel was negotiating additional deals for GR BURGR, which they owned together, and did not object. (R. 22511; SB 23) Accordingly, Ramsay's testimony that he decided in June 2013 that he could no longer be in business with Seibel is demonstrably false.

Ramsay claims he did not lie when he claimed he decided that he had to close the Fat Cow in June 2013 because Seibel was "secretly" negotiating potential new deals without his knowledge. (R. 15183:1-15; R. 15687:24-15688:10) Ramsay's explanation is that while his team knew about the Areas deals for airports, "Seibel continued to push airports without adequate authorization or communication." (Opp. 47-48) In fact, Ramsay testified at trial that "we got approached by Craig Green about doing restaurants in airports." (R. 15183:10-11) That is false. Gillies, on behalf of Ramsay, initiated the communication with Areas regarding airports in May 2013 and asked Seibel to take over the negotiations. (R. 19354-55, 18420-421; SB 24) Then, at the same time Ramsay decided to close the Restaurant in June 2013, on June 10, 2013, Gillies wrote to Seibel regarding the Areas inquiry: "Any comments back on the below points please as we need to make some decisions." (R. 18420) On July 1, 2013, Gillies wrote to Seibel: "Shall we talk prior to the areas call tomorrow." (R. 19353)[13] As these emails and testimony show, it is demonstrably false that Ramsay decided in June 2013 that he could no longer be in business with Seibel because of Seibel's allegedly clandestine negotiations with Areas about restaurants in airports because (i) the negotiations were not secret, and (ii) at that

[13] In opposition, Ramsay doesn't even attempt to dispute that Gillies, Ramsay's right-hand man, falsely testified at his deposition when he claimed Ramsay and his team did not know about Seibel's discussions involving the airport deals. (R. 3928:20-3930:5)

exact time Ramsay's team was enthusiastically discussing the negotiations with Seibel and without objection.

Ramsay argues in opposition that he did not lie about having to pay employees at Christmas because (1) he "only testified that he 'never closed a restaurant down a week before Christmas.' R-15188:1-10" and (2) he "did contribute funds necessary to keep The Fat Cow open in December 2013" citing §IV.D.3." (Opp. 49) Neither assertion is supported by the cited Record pages or anywhere else in the Record.

At trial Ramsay testified "it was just a very severe, severe blow to see staff the week before Christmas not getting their salary…. I have never closed a restaurant down a week before Christmas and make sure their staff didn't get paid. So, while I was pumping money in …." (R. 15187:21-15188:10) It is simply false that Ramsay did not claim he "pumped money in" to make sure the employees were paid. The only citation in the Opposition at §IV.D.3 about Ramsay "pumping money in" around Christmas 2013 is that Ramsay paid Fat Cow's lawyers "$40,000 on January 24, 2014." (Opp. 24) Paying lawyers in January most certainly is not "pumping money in" to the Restaurant so that the staff received their salary at Christmas. In fact, Ramsay does not dispute that the company records show *he provided no such funding in December 2013.* (R. 17631) Just as Ramsay's trial testimony was demonstrably false, so too is his argument to this Court in opposition.

Ramsay argues in opposition that he did not lie when he testified that the Landlord, Caruso, did not like Seibel because Caruso did not like Seibel's "Vegas crew" or the Serendipity restaurant. (Opp. 49; R. 15150:11-15151:8) Caruso did not testify about Seibel's "Vegas crew" or that he did not like them and, in fact, testified that he did not know Seibel. (R. 4409)[14] Regarding Serendipity, Caruso only testified that he did not think Serendipity was a suitable restaurant for the Grove. (R. 4464:8-19)

In sum, Ramsay's opposition does not offer any basis to support the Court-Below's decision to disregard all of Seibel's testimony, while finding Ramsay's pathological level of lies, particularly on the single most critical issue of the case, to be "somewhat lacking in credibility", and was, in fact, contrary to the evidence presented. *Cadle*, 43 A.D.3d 653, 655 (1st Dep't 2007).

E. The Court-Below's $4 Million Attorney Fee Award was Improper

Ramsay-Respondents summarily state that the Court-Below found its total attorneys' fees and hourly rates reasonable when it awarded $4,004,376.88 attorney fee award and cites to two affidavits purportedly confirming their reasonableness. (Opp. 70) Ramsay-Respondents' opposition (i) fails to address the evidence of reasonableness must be from *uninterested* parties (SB 51); (ii) incorrectly claims that

[14] In fact, it was Gillies who gave hearsay testimony at his deposition about Seibel's "Vegas crew" – not Caruso. (R. 3917)

the Court-Below considered rates, unnecessary and duplicative time entries, and inefficient billing, when there is no evidence fees were reduced on such grounds. (*See* SB 52) The Court-Below failed to consider all the relevant factors in determining whether the $4 million in attorneys' fees was reasonable, particularly because Ramsay-Respondents' attorneys' fees dwarfed their monetary recovery. (SB 52-53)

F. Ramsay Is Not Entitled to Indemnification

Ramsay does not dispute that the indemnification obligation ran to him personally, and he made no payments that would have entitled him to indemnification. Ramsay makes no attempt at distinguishing the caselaw cited by Seibel. (SB 55)

Instead, Ramsay argues that he is entitled to indemnification because the Indemnification Agreement is for the benefit of his "legal representatives, successors and assigns." (Opp. 71) There is no evidence in the record to support that argument. The two entities that made the payments for which indemnification was awarded are Kavalake Ltd. and Gordon Ramsay Holdings. (R. 22529-31) Ramsay argues that he individually owns these companies (Opp. 71), however, the record not only fails to support this claim but contradicts it. When asked at his deposition if he is the 100% owner of Kavalake, Ramsay's counsel objected, and he refused to answer the

question. (R. 232:4-233:8)[15] As for Gordon Ramsay Holdings, Ramsay testified in his 2015 deposition that he has about 45 different companies, he doesn't know the structure of any of them. (R. 236:21-237:25) At trial, Ramsay merely testified that Gordon Ramsay Holdings is "one of [his] companies" but did not provide any specifics on the ownership structure of the entity. (R. 15075:9-15) Wenlock testified at trial that Gordon Ramsay Holdings *was* previously a subsidiary of GRUS, but at the time of trial it *was not* – yet he couldn't "talk to the specific structure."(R. 16044:6-14)

Thus, there is no evidence in the Record to support the current claim by Ramsay that Kavalake and Gordon Ramsay Holdings are his personal "legal representatives, successors and assigns." Indeed, Ramsay does not contend that these entities are his alter egos and piercing the corporate veil would be appropriate with regard to all his entities. In sum, there is simply no basis for the Court-Below to order Seibel to indemnify Ramsay personally for payments that he did not make, and the indemnification award was entirely improper.

[15] Notably, at his deposition Ramsay testified that "we" are the largest shareholder of Kavalake but did not clarify who "we" consists of, nor did he specify the amount of the ownership interest. (R. 233:9-20). However, "largest" implies that there is at least one other shareholder, if not more.

IV. CONCLUSION

For the reasons set forth above, this Court should overturn the Judgment and grant the relief requested in Appellants' Brief.

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Respectfully Submitted,

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