

Veronis Suhler Stevenson Holdings, LLC v Cole

2015 NY Slip Op 31111(U)

June 25, 2015

Supreme Court, New York County

Docket Number: 654127/2013

Judge: O. Peter Sherwood

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**

-----X
**VERONIS SUHLER STEVENSON HOLDINGS,
LLC; et al.,**

Plaintiffs,

-against-

GEORGE L. COLE, et al.,

Defendants.

-----X
GEORGE L. COLE, et al.,

Counterclaim-Plaintiffs,

-against-

**VERONIS SUHLER STEVENSON HOLDINGS,
LLC; et al.,**

Counterclaim-Defendants,

-----X
GEORGE L. COLE, et al.,

Third-Party Plaintiffs,

-against-

JEFFREY STEVENSON, et al.,

Third-Party Defendants.

-----X
O. PETER SHERWOOD, J.:

In motion sequence number 005, defendants George L. Cole, Hal R. Greenberg, and Michael B. Kessler (collectively "defendants") move for summary judgment dismissing the complaint in its entirety. The VSS Entities¹ cross-move for summary judgment dismissing (1) defendants'

¹Plaintiffs in this action are Veronis Suhler Stevenson Holdings, LLC ("VSS"); VSS Fund Management LLC; VSS Mezzanine, LLC; VSS Structured Capital II, LLC; VS&A Equities

DECISION AND ORDER

**Index No.: 654127/2013
Mot. Seq. No. 005**

counterclaims except for the second, and (2) defendants' third-party claims against Jeffrey Stevenson, David Bainbridge, and Chris Russell (collectively, the Third Party Defendants). For the following reasons, the motion and cross-motion are granted in part.

Background

This dispute arises from the resignation/termination of defendants from plaintiff VSS to join a rival private equity firm, The Riverside Company ("Riverside"). Citing defendants' alleged breaches of contract and fiduciary duties, VSS seeks a declaration that it validly retroactively terminated defendants for cause, and that as a result it was entitled to cancel defendants' "carry units" in four VSS-sponsored funds, and may recover all compensation paid to defendants.

I. Defendants' Employment at VSS

For over 25 years, VSS has sponsored and managed private equity investment funds. Defendants Cole, Greenberg and Kessler were at-will employees at VSS and served as senior investment professionals at the firm prior to their departures in 2013.² VSS compensated defendants through a combination of annual salary and bonus, and award of "Carry Units"³ in the funds in which they were members. Collectively, defendants earned and became fully vested in (a) 3,450 Carry Units in the VSS Mezzanine, LLC Fund ("SC I"); (b) 5,658 Carry Units in the VSS Structured Capital II, LLC Fund ("SC II"); (c) 487.5 Carry Units in the VS&A Equities III, LLC Fund ("Equities III"); and (d) 850 Carry Units in the VSS Equities IV, LLC Fund ("Equities IV"). The defendants were also members of related waiver entities associated with the each of the funds, and thus were

III, LLC; VSS Equities IV, LLC; VSS Mezzanine Waiver Entity LLC; VSS SC II Waiver Entity LLC; and VSS Waiver Entity LLC (collectively, "VSS Entities" or "plaintiffs").

² Cole claims that VSS terminated his employment. VSS contends that he resigned. The proper classification of Cole's termination at VSS is a disputed issue in an action brought by Cole against VSS in the Southern District of New York. The proper classification is immaterial to this action. Greenberg and Kessler resigned on September 3, 2013.

³ Plaintiffs VSS Mezzanine LLC, VSS Structured Capital II, LLC, VS&A Equities III, LLC, and VSS Equities IV, LLC are each the "general partner" of the VSS fund with which they are affiliated (*i.e.*, VSS Mezzanine LLC is the general partner of VSS Mezzanine, LLC Fund, etc.). Under the limited liability agreement for each VSS fund (collectively, the "LLC Agreements"), the general partner is entitled to a share of profits generated by the fund, typically referred to as "carried interest". The LLC Agreements allocate "Carry Units" to VSS investment professionals working on the fund, representing their right to participate in the carried interest.

entitled to certain profits distributed by such entities (“Waiver Distributions”).

While employed by VSS, the defendants were required to follow certain confidentiality policies. In 2012, VSS adopted a Compliance Manual/Code of Ethics setting forth VSS’s confidentiality policy. Plaintiffs allege that each of the defendants had recently affirmed in writing that he had reviewed and understood the VSS Code of Ethics. The Compliance Manual & Code of Ethics contains specific definitions of “confidential information” and “proprietary information”, and limitations on information fitting those definitions (*see Ruiz aff*, Ex. 30, NYSCEF Doc. No.386, pp. 59-61).

Further, the LLC Agreements require that “Participating Members” (which include the defendants) maintain the confidentiality of certain information. The defendants executed the LLC Agreements. Each of LLC Agreements contains a “carve-out” denoting information not considered confidential. While similar, the carve out clauses are not identical. The SC II LLC Agreement carve-out (*see Ruiz aff*, Ex. 24, NYSCEF Doc. No. 380, § 13.2) permits defendants to “disclose any such information (a) that has become generally available to the public (including summary information typically provided to new investors in early stage marketing meetings)” (*id.*).⁴ The Equities III, Equities IV, and SC I LLC Agreements are more restrictive, as they do not contain the parenthical phrase “(including summary information typically provided to new investors in early stage marketing meetings)”. They simply permit defendants to “disclose information (a) that has become generally available to the public” (*see id.*, Exs. 22-23, NYSCEF Doc. Nos. 378-79, § 31.2; Ex. 25, NYSCEF Doc. No. 381, § 12.7). In this Decision and Order, the four provisions are referred to collectively as the “carve outs”.

II. Cole and Greenberg Search for New Employment Opportunities

In early 2013, VSS entered the advanced stages of launching a third structured capital fund, known as VSS SC III. In connection therewith, Stevenson, VSS’s controlling member, demanded that defendants agree to be bound by a collection of restrictive covenants contained in the limited liability agreement for the SC III fund (the “SC III Agreement”). Under its terms, signatories to the

⁴According to defendants, the terms of the SC II Agreement “governs the vast majority of the money at stake” in this case (Defendants’ Reply Memorandum at p. 3, NYSCEF Doc. No. 622).

SC III Agreement would be prevented from (i) soliciting VSS employees; (ii) soliciting existing VSS investors; and (iii) soliciting prospective VSS investors. Stevenson announced that unless everyone signed the SC III Agreement containing restrictive covenants, VSS would not attempt to launch SC III. The defendants did not execute the SC III Agreement.

During this period, defendants began to search for new employment opportunities. Defendants contend that they were concerned with Stevenson's leadership of VSS and the overall long term viability of VSS. VSS in turn suggests that defendants were greedily scheming to beat VSS to the punch by finding an outside sponsor for a competing fund following a similar investment strategy to the SC III fund.

Cole and Greenberg engaged in discussions with another private equity firm - Shamrock Capital Advisors ("Shamrock") - about transitioning a team of VSS professionals to Shamrock. To that end, on February 15, 2013, Greenberg emailed Shamrock a copy of the February 2013 LP Update Presentation Deck (the "LP Deck"⁵). The LP Deck summarized current performance and developments in the SC I and SC II funds. The parties dispute whether the LP Deck falls within the Carve Out. VSS contends that the LP Deck contained confidential information not previously given to investors and that potential investors who received this type of information signed confidentiality agreements. Defendants claim that the LP Deck could be shared pursuant to the Carve Out because it contained the type of information that VSS previously used to pre-market the SC III fund (*see* Pls. Rule 19-a[b] Counter-stmt, NYSCEF Doc. No. 471, ¶¶ 48-9 ["[T]he VSS Decks that are at issue in this litigation were shared by VSS with approximately 500 potential investors during VSS' early stage fundraising process for the merely proposed SC III fund . . . - . . . [T]he SC III Deck was provided without VSS asking any of its potential investors to sign non-disclosure agreements"]. Referring to the LP Deck, VSS states that it was distributed to large institutional investors who were all signatories to the limited partnership agreement that required them to maintain confidentiality with respect to such information. Additionally, over the weekend of March 16-17, 2013, Cole asked

⁵ VSS alternatively refers to the LP Deck as the Investor Update. The term "deck" refers to a "summary document that clearly and concisely conveys the fund's investment strategies and objectives" (Compl. ¶ 32). A deck is a "relatively short PowerPoint document" (*see* Ruiz aff, Ex. 17 [Stevenson Dep. Tr.], NYSCEF Doc. No. 373, 190:18:21) that is intended to aid in "soliciting capital commitments to a particular private capital fund" (Compl. ¶ 32).

VSS's Controller Andrew Goscinski to prepare an analysis of the material terms of all investments made by the SC I and SC II funds (the "Summary", or the "Portfolio Analysis").⁶ On March 17, 2015, Cole emailed the Summary to Shamrock. The parties dispute whether the Summary fell within the Carve Out.

By April 2013, discussions with Shamrock ended. Cole, however, continued to consider other employment opportunities. Cole met with and sent a May 2013 Deck to Advent Capital Management and its advisor Credit Suisse. Additionally, on June 22, 2013, Cole sent the Deck to M20 Partners, a placement agency. On June 21, 2013 Cole sent an email to Greenberg, Kessler, Russell, and Bainbridge forwarding personal email addresses to coordinate their job searches. On June 28, 2013, Cole learned from M20 Partners that a potential employment opportunity might exist at Riverside. The same day, Cole sent Greenberg an email indicating that Riverside was interested in exploring a structured capital strategy.

Beginning in June 2013, Kessler also started considering alternative employment opportunities. To that end, Kessler sent the May 2013 Deck to a friend at Forum Capital Partners (a private placement agent) and a friend at 3ai Investors (a private investor). On July 1, 2013, Kessler's friend at 3ai Investors introduced him to a potential employer, Alexandra Coppet of C.V. Starr. Over the next month, Kessler, Cole, Greenberg, Bainbridge, and Russell were all involved in discussions with C.V. Starr. During one such meetings, Kessler provided three profiles of VSS investments in which he was involved. In addition, in response to a subpoena, C.V. Starr produced numerous VSS documents that defendants allegedly provided to C.V. Starr, including, (1) the Summary; (2) a copy of the Limited Partnership Agreement entered by investors in VSS SC II reflecting the terms on which limited partners invested in SC II; (3) a copy of the Private Placement Memorandum prepared by VSS for VSS SC II (labeled "Private and Confidential"); (4) a copy of the GP Agreement for VSS SC II reflecting the economics of VSS's agreements with its investment professionals participating in VSS SC II ; and (5) valuation statements reflecting the financial performance of every portfolio company held by SC I and SC II and VSS's calculations of the current market value of each of those investments (the "VSS Valuation Statements").

⁶ Defendants contend that Cole created the document and asked Goscinski to simply review it.

III. Claimed Solicitation of VSS Investors

Throughout this process, Stevenson continued to demand that defendants sign the SC III Agreement with restrictive covenants. Cole asserts that this caused him to fear for his job. He arranged to speak with Tom Haubenstricker, the CEO of GoldPoint Partners, one of VSS's largest institutional investors, seeking "advice . . . regarding whether investors would look negatively on someone of Cole's age and experience if that person were terminated, and whether such a person would have viable employment prospects at a private equity firm" (Defs. Rule 19-a Stmt, NYSCEF Doc. No. 336, ¶ 143). The meeting took place on July 11, 2014, after Cole was terminated and therefore as to this meeting, he was not subject to any non-solicitation restrictions. Greenberg attended at least a part of the meeting. Plaintiffs contend that the purpose of Cole's contact with Mr. Haubenstricker was to obtain his assurance that he would "invest in Defendants' new fund" (*see* Pls. Rule 19-a[b] Counter-stmt, NYSCEF Doc. No. 471, ¶ 143)⁷. Greenberg testified that the subject of solicitation did not come up while he was present at the meeting. Apparently, VSS did not take Haubenstricker's deposition.

In late June 2013, Cole and Greenberg met with Paul Chute of Phoenix Life, another VSS investor. Defendants contend that they only "spoke generally about issues with the ongoing SC III Agreement negotiations and the timing of marketing SC III" (Defs. Rule 19-a Stmt, NYSCEF Doc. No. 336, ¶ 148). VSS disputes this and asserts that defendants discussed the prospect of their leaving VSS with Mr. Chute.

On Sunday, June 30, 2013, Stevenson sent Cole an email demanding that he sign the SC III Agreement. Cole refused. The parties dispute whether Cole therefore voluntarily resigned, or whether VSS terminated him. Regardless, July 1, 2013 was Cole's final day at VSS.

IV. The Defendants Join Riverside

After his departure from VSS, Cole met with Pam Hendrickson, the COO of Riverside. Following this meeting, Cole reached out to Greenberg, Kessler, Gordon, Reynolds, Ankeet Kansupada (a former VSS investment professional), Russell, and Bainbridge to explore a possible opportunity with Riverside. All except Russell, agreed to meet with Riverside.

⁷see also Lipman aff. Ex. HH, NYSCEF Doc. No. 505

In pursuit of employment, Cole transmitted certain VSS documents to Riverside, including the private placement memoranda for the SC II fund, the SC II limited partnership agreement, the SC II general partnership agreement, the Summary, the Valuation Statements, and other charts.⁸ Greenberg was copied on emails transmitting such VSS documents. On August 30, 2013, Riverside extended offers of employment to Cole, Greenberg, Kessler, Reynolds, Gordon, and Kansupada. On September 3, 2013, Kessler, Greenberg, Gordon, and Reynolds tendered their resignations to VSS.

VSS alleges that on September 9, Greenberg emailed a collection of Stevenson's "Call Notes" to Riverside's Director of Investor Relations, Monica Chase. The Call Notes are Stevenson's assessments of recent meeting with institutional investors regarding investing in the SC III fund. On July 24, 2014, Riverside produced pursuant to subpoena additional allegedly confidential documents, including a May 31, 2013 "Fundraising Status Prospects" report (the "VSS Prospects Report"), showing the status of VSS's marketing efforts involving over 1,000 potential investors in SC III.

Also on September 9, 2013, Kessler returned to VSS's office to return his company-issued phone, and to retrieve a backpack. With Kessler's consent, VSS inspected the contents of the backpack and in addition to personal items, found certain VSS documents. Kessler contends that he was entitled to retain the documents as a continuing investor in VSS, and in order to assist him in work he expected to conduct on VSS's behalf after his resignation. VSS contends that the documents were confidential and Kessler was not entitled to retain them.

V. VSS Terminates Defendants and Institutes the Instant Action

The LLC Agreements permit VSS to terminate employees "for-Cause" if they engage in "willful malfeasance in connection with [their] employment" (*see id.*, Exs. 22-23, NYSCEF Doc. Nos. 378-79, § 12; Ex. 24, NYSCEF Doc. No. 380, § 11). Termination for cause permits VSS to cancel defendants's Carry Units and Waiver Distribution rights (*see id.*, Exs. 22-24, NYSCEF Doc. Nos. 378-80, § 6.3; Ex. 25, NYSCEF Doc. No. 381, § 4.2[c]). On November 26, 2013, VSS notified defendants of VSS' decision to "retroactively terminate[defendants] for cause as a result of [their] malfeasance while employed by VSS" (*see Ruiz aff*, Exs. 18-20, NYSCEF Doc. No. 374-76). The cancellation caused the remaining Carry Units and Waiver Distribution rights, including those issued

⁸ These are the same documents produced by C.V. Starr in discovery, but defendants claim not to know how C.V. Starr obtained them.

to Third Party Defendants Stevenson, Bainbridge and Russell, to become more valuable.

A day later, on November 27, 2013, VSS instituted this action. The complaint alleges eight causes of action for: breach of contract (count 1); breach of fiduciary duty (count 2); aiding and abetting breach of fiduciary duty (count 3); misappropriation of trade secrets, confidential/proprietary information, and other property (count 4); tortious interference with economic relations/prospective economic relations (count 5); unfair competition (count 6); replevin (count 7); and declaratory judgment (count 8). Plaintiffs request that the court (1) declare that VSS validly terminated defendants for cause; (2) grant judgment to VSS in the amount of all compensation, benefits, and other distributions defendants received during their period of disloyalty to VSS; (3) declare that VSS validly canceled the defendants' Carry Units; (4) direct defendants to return all VSS documents and property, and enjoin them from making further copies of such documents; (5) award VSS punitive damages; and (6) award interest and costs.

In their amended answer and counterclaims, filed on January 16, 2014, defendants impleaded the Third Party Defendants, asserted counterclaims for (1) conversion, (2) breach of contract, (3) constructive trust, (4) injunctive relief, and (5) "joint and several liability," and alleged third party claims for breach of fiduciary duty, breach of contract, and constructive trust.

Discussion

I. Defendants' Motion for Summary Judgment

Counts 1 and 3 through 7 must be dismissed generally because these causes of action do not allege compensatory damages and all requested injunctive relief has already been resolved through a so-ordered stipulation of the parties. All of the relief requested in this action flows from counts 2 (breach of fiduciary duty/duty of loyalty under the faithless servant doctrine), and 8 (declaratory judgment), as discussed below. First, we address the counts that are due to be dismissed.

A. Count 1 - Breach of Contract

Plaintiffs first cause of action asserts that defendants breached the VSS Code of Ethics. To sustain a breach of contract cause of action in New York, plaintiffs must allege facts showing each of the following elements: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages sustained by plaintiff as a result of the breach (*see Kraus v Visa Intl Serv Assn*, 304 AD2d 408 [1st Dept 2003]). Plaintiffs contend that defendants breached the Code

of Ethics by *inter alia*, scheming to defect from VSS while soliciting VSS employees and investors, and distributing allegedly confidential information to potential employers.

The 71-pages long Code states that it “is designed to comply with Rule 204A-1 under the Investment Advisers Act of 1940”. It “is based upon the principle that VSS and its employees owe a fiduciary duty to VSS clients . . .”. The “purpose of the Code is to preclude activities that may lead to or give the appearance of conflicts of interest, insider trading and other forms of prohibited or unethical business conduct”. (Code of Ethics, Lipman aff., Ex. L, NYSCEF Doc. No. 483, p.53).

SH Although not part of any enumerated “design”, “principal” or “ purpose”, the Code also contains a section devoted to VSS’s “Policy on Confidentiality and Proprietary Information” the principal goal of which is protecting VSS’S proprietary and confidential information, “a valuable, special and unique asset of the Firm” (*id*, p. 59). The Confidentiality Policy the sets forth broad guidelines for the preparation, collection, use and maintenance of proprietary and confidential information (*see id*. at p. 60).

Defendants assert that the first cause of action must be dismissed because the complaint fails to allege any damages flowing from the alleged breach, instead seeking forfeiture of all compensation defendants received as employees of VSS (*see* Compl. ¶ 63). Although plaintiffs provide no citation for the novel proposition that an employee must forfeit all compensation received for breaching an employee manual and plaintiffs have in fact conceded that the complaint seeks no compensatory damages for defendants’ alleged breach of the Code of Ethics (*see* Ruiz aff, Ex. 96 [Response to Fourth Request for Production], NYSCEF Doc. No. 452, No. 3 [“Plaintiffs’ Complaint does not allege an amount of legally compensable damages”]; *see* Pls. Rule 19-a[b] Counter-stmt, NYSCEF Doc. No. 471, ¶ 253 [acknowledging same]), this ground for dismissal must be rejected because on a claim for breach of contract, nominal damages are always available (*see* 5 Corbin, Contracts §1001, at 29).

“Routinely issued employee manuals, handbooks and policy statements should not lightly be converted into binding employment agreements” (*Lobosco V. New York Tel. Co./NYNEX*, 96 NY2d 312, 317 [2001]). Although the complaint alleges that defendants “twice affirmed that he has reviewed and understood the VSS Code of Ethics and have twice agreed to comply with it”, plaintiffs provide no evidence that defendants received any further consideration for these promises

or that any plaintiff, as promisee, suffered a detriment in exchange for defendants' promise (*see Weiner v McGraw-Hill, Inc.*, 57 NY2d 458, 460-64 [1982]). In the absence of more, plaintiffs have not demonstrated that the Code of Ethics created a binding contract.

In this opposition to the motion, VSS argues that a violation of the confidentiality provision of the Code of Ethics warrants forfeiture of all Carry Units because under the terms of the LLC Agreements, "Cause" for forfeiture includes "a material breach . . . of any confidentiality policy" (Opp. Br., p. 21, n. 10, NYSCEF Doc. No. 470). However, the first cause of action in the complaint does not allege breach of the LLC Agreements. Further, as defendants note, the terms of the SC II Agreement do not contain restrictions on the use of confidential information (*see* Defs. Opp. Ex. E, ¶ 12). The first cause of action shall be dismissed.

B. Count 3 - Aiding and Abetting a Breach of Fiduciary Duty

Count 3 seeks to hold defendants liable for aiding and abetting one another's breach of fiduciary duties owed to VSS. "[A] claim for aiding and abetting breach of a fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808-09 [2d Dept 2011]). Accordingly, damages are an essential element of a claim for aiding and abetting a breach of fiduciary duty. As with the breach of contract claim, VSS seeks defendants' forfeiture of all compensation they received as employees of VSS. Plaintiffs fail to provide a legal basis for such damages arising from a claim for aiding and abetting a breach of fiduciary duty. As discussed below, the sole doctrine under New York law cited by plaintiffs in support of such relief is the faithless servant doctrine. Plaintiffs have not demonstrated that an alleged aider and abettor of a faithless servant is exposed to a forfeiture of his or her own compensation. Indeed, the faithless servant doctrine is narrowly applied (*see G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 103-04 [2d Dept 2007] *affd*, 10 NY3d 941 [2008]), and plaintiffs have provided no support for the concept that the doctrine should be extended to aiders and abettors. Lastly, plaintiffs have in fact conceded that the complaint seeks no compensatory damages for defendants' alleged aiding and abetting (*see* Ruiz *aff*, Ex. 96 [Response to Request for Production], NYSCEF Doc. No. 452, No. 3; Pls. Rule 19-a[b] Counter-stmt, NYSCEF Doc. No. 471, ¶ 253). This claim will be dismissed.

C. Count 4 - Misappropriation of Confidential Information

Count 4 asserts a claim for misappropriation of trade secrets and other proprietary information. “To establish a claim for misappropriation of trade secrets, plaintiff must show (1) that it possesses a trade secret, and (2) that defendant is using that trade secret in breach of an agreement, confidence, or duty, or as a result of discovery by improper means” (*Sylmark Holdings Ltd. v Silicone Zone Intern. Ltd.*, 5 Misc 3d 285, 297 [Sup Ct NY County Aug. 9, 2004]).

As with counts 1 and 3, VSS has conceded that no compensatory damages are sought based on this claim (*see Ruiz aff*, Ex. 96, NYSCEF Doc. No. 452, No. 3; Pls. Rule 19-a[b] Counter-stmt, NYSCEF Doc. No. 471, ¶ 253). Indeed, neither the complaint nor VSS’s motion papers point to damages VSS sustained as a result of defendants’ misappropriation of confidential information. Instead, VSS asserts that by reason of their misappropriation of the documents, defendants should be called upon to return all compensation received during their employment, and to forfeit their Carry Units and Waiver Distributions. VSS cites no case awarding such a drastic form of relief based on this count.

Separately, VSS seeks injunctive relief “(i) directing each of the Defendants immediately to return to Plaintiffs all of Plaintiff’s documents and other property . . . in his possession or under his control, and (ii) prohibiting Defendants from making copies of such documents or other property” (*see Compl.*, *ad damnum* clause ¶ [c]). While irreparable harm supporting such relief is presumed where trade secrets have been misappropriated (*see Sylmark Holdings Ltd.*, 5 Misc 3d at 299), the injunctive relief sought by plaintiffs through this claim has been resolved through a so-ordered stipulation of the parties (*see Lipman aff*, Ex. 102, NYSCEF Doc. No. 458). Accordingly, having not asserted (much less demonstrated) any damages arising from defendants’ purported misappropriations, and having already consensually resolved the injunctive relief sought, the claim for misappropriation of trade secrets shall be dismissed.

D. Count 5 - Tortious Interference with Economic Relations

Count 5 asserts a claim for tortious interference with economic relations based on defendants’ solicitation of VSS employees and investors. “The required elements of a cause of action for tortious interference with prospective business relations are as follows: (a) business relations with a third party; (b) the defendant’s interference with those business relations; (c) the defendant act[ed] with

the sole purpose of harming the plaintiff or us[ed] wrongful means; and (d) injury to the business relationship” (*Advanced Global Tech. LLC v Sirius Satellite Radio, Inc.*, 15 Misc 3d 776, 779 [Sup Ct, NY Cty Mar. 8, 2007] *affd as mod*, 44 AD3d 317 [1st Dept 2007]). “[The] plaintiff must demonstrate that the defendant’s interference with its prospective business relations was accomplished by ‘wrongful means’ or that defendant acted for the sole purpose of harming the plaintiff” (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299-300 [1st Dept 1999]). “‘Wrongful means’ includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but more than simple persuasion is required” (*id.* at 300).

As with counts 1, 3 and 4, VSS has not alleged any legally compensable damages flowing from the defendants’ alleged interference with VSS’s relations with their employees or investors, or sought any injunctive relief beyond that which has already been consensually resolved. More fundamentally, plaintiffs have not demonstrated that defendants used “wrongful means” or that defendants acted for the sole purpose of harming VSS. VSS itself contends that defendants acted out of a self-interested desire to earn more money. Additionally, VSS does not allege or demonstrate that defendants used “physical violence, fraud, misrepresentation, civil suits, criminal prosecutions [or] some degree of economic pressure” to convince VSS’s employees and investors to follow them to Riverside. Indeed, all of the evidence submitted shows nothing more than “simple persuasion”, which the First Department has held is insufficient to constitute “wrongful means” (*see Snyder*, 252 AD2d at 300). Accordingly, the motion for summary judgment dismissing the tortious interference claim must be granted.

E. Count 6 - Unfair Competition

Count 6 of the complaint asserts a cause of action for unfair competition based on defendants’ use of plaintiffs’ confidential and proprietary information, to solicit employees, and investors and thereby to “unfairly compete against Plaintiff through the creation of a similar private equity fund employing Plaintiffs [sic] employees, marketed to Plaintiffs’ investors and utilizing Plaintiffs [sic] marketing materials and fund documentation” (Compl. ¶ 79). Unfair competition is a form of unlawful business injury (*Ronson Art Metal Works, Inc. v Gibson Lighter Mfg. Co.*, 3 AD2d 227, 230 [1st Dept 1957]). “New York law has long recognized two theories of common-law

unfair competition: ‘palming off,’ which is not at issue here, and misappropriation” (*Miller v Walters*, 46 Misc 3d 417, 426 [Sup Ct, NY Cty Oct. 9, 2014]). “The basic rule of damages in a case of unfair competition is the amount which the plaintiff would have made, except for the defendant's wrong” (*Ronson Art Metal Works, Inc.*, 3 AD2d at 232). The foregoing notwithstanding, injunctive relief is available in certain cases to redress unfair competition (*id.* at 231).

Here, plaintiffs have not alleged any compensable damages “which the plaintiff would have made, except for the defendant's wrong” (*id.* at 232). Instead, VSS seeks forfeiture of all compensation paid to defendants during their employment and the cancellation of their Carry Units (*see* Compl. ¶ 80). Such damages are not available under a claim for unfair competition. Similarly, defendants’ claimed injunctive relief has been resolved by a so-ordered stipulation. Without an allegation that plaintiffs suffered some injury, the unfair competition claim must fail.

F. Count 7 - Replevin

Count 7 of the complaint asserts a claim for replevin, seeking to compel defendants “to return all misappropriated information and documents to Plaintiffs” and ordering them “not to make copies of any such information or documents” (*see* Compl. ¶ 81-83). The parties have agreed to such relief via a so-ordered stipulation (*see* Lipman aff, Ex. 102, NYSCEF Doc. No. 458). This claim is moot.

G. Counts 2 (Breach of Fiduciary Duty) and 8 (Declaratory Judgment)

1. Count 2 - Breach of Fiduciary Duty

Plaintiffs’ principal claim is alleged at Count 2 which asserts a claim for breach of fiduciary duty. Through this claim VSS seeks to recover all compensation paid to defendants during the course of their employment at VSS based on the “faithless servant doctrine”. Under that doctrine, “an employee who acts in any manner inconsistent with his agency or trust and fails to exercise the utmost good faith and loyalty in the performance of his duties is deemed a faithless servant and must account to his principal for secret profits [and forfeit] his right to compensation” (*Mosionzhnik v Chowaike*, 41 Misc 3d 822, 831 [Sup Ct, NY Cty July 29, 2013]) “during the time period of disloyalty” (*Phansalkar v Andersen Weinroth & Co., L.P.*, 344 F3d 184, 205 [2d Cir 2003]). A faithless servant must forfeit any compensation received, even when “the services were beneficial to the principal, or the principal suffered no provable damage as a result of the breach of fidelity by the agent” (*Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928, 928-29 [1977]). The forfeiture, if ordered, is

limited to compensation earned during the period of faithlessness (*see Phansalkar*, 344 F 3d at 200).

Plaintiffs contend that defendants' conspiracy to defect from VSS in order to launch a competing fund, while sharing confidential and proprietary VSS information with competitors in order to find a sponsor for that fund, and soliciting VSS' investors' support of the new fund make them faithless servants. Defendants counter that there was nothing improper about sharing the documents and information that they did with potential future employers because they reasonably believed that all such documents and information fell within the Carve Out, or were otherwise permissible for them to share (because the information was stale, widely distributed, or otherwise not confidential). Similarly, defendants contend that they did not improperly solicit either VSS employees or investors while employed by VSS, but instead simply held general conversations in hypothetical terms. According to defendants, to the extent they had any conversations with VSS employees while still employed by VSS, those conversations were nothing more than permissible efforts to coordinate job search efforts, or were had post-termination and therefore cannot substantiate a faithless servant claim (*see Gibbs v Breed Abbott & Morgan*, 271 AD2d 180, 185 [1st Dept 2000]). Defendants add that plaintiffs cannot lump all defendants together so as to hold each responsible for the acts of the others and that sharp distinctions must be made, for example, regarding solicitations made by Cole after termination at the end of June 2013 and solicitation of employees and investors purportedly had by Greenberg while still employed by VSS.

At oral argument on the motion, VSS argued that exhibits U, X, Z, P, Q, OO, KK, LL, NN, MM, PP, QQ, RR, SS, TT, UU, VV, WW, XX, BBB, DDD and YY are examples of confidential materials defendants improperly disclosed to competitors (Oral Argument Tr., p. 39). The exhibits appear to include Stevenson's "Call Notes" (Ex. YY); C.V. Starr's analysis of the SCI and SCII portfolio companies (Ex. PP); deal pricing analyses (Ex. UU); the Investment Summary (Ex. VV) and a VSS Prospects Report (Ex. BBB). Defendants contend that all of the documents and information provided to third parties were in good faith believed to be subject to the Carve Out. The Carve Out permits defendants to "disclose any such information (a) that has become generally available to the public" and in the case of the SC II fund, it includes "summary information typically provided to new investors in early stage marketing meetings" (*see Ruiz aff*, Ex. 24, NYSCEF Doc. No. 380, § 13.2; *see also id.*, Exs. 22-23, NYSCEF Doc. Nos. 378-79, § 31.2; Ex. 25, NYSCEF Doc.

No. 381, § 12.7). Whether particular documents defendants admittedly shared with VSS' competitors (for example, exhibits YY, PP, UU, VV and BBB) contain the type of information envisioned by the Carve Out and which of the defendants provided the information in question to third parties are disputed issues of fact and cannot be decided on a motion for summary judgment.

There is no evidence that defendants improperly solicited VSS employees to abandon VSS and instead to follow them to a new sponsor and fund in direct competition with VSS. It is undisputed that prior to his departure, Cole and a number of other senior professionals met and coordinated efforts to explore leaving VSS for other employment. Such efforts are lawful. Following his termination, Cole made overtures to others, including some junior VSS employees, to join him at Riverside.⁹ Those who chose to move to Riverside did so for their own personal reasons (*see* Ex16, Reynolds Tr. 38:20-57:5; Ex. 5, Gordon Tr. 93:14-15, 150:7-151:5; Ex. 6, Greenberg Tr. 10:12-17:8; Ex. 10, Kessler Tr. 155:17-158:3). Departures motivated by personal interests are not actionable (*see Headquarters Buick-Nissan v Michael Oldsmobile*, 149 AD2d 302, 304 [1st Dept 1989]).

The evidence indicates that Cole and Greenberg had communications with VSS investors some of which may have included efforts to encourage the investors to support their efforts to launch a new fund (or at least inquire as to whether they would support such efforts). Cole admittedly had a conversation with Tom Haubenstricker, the Chief Executive Officer of GoldPoint Partners which is one of VSS's largest institutional investors, on the day he was terminated and together with Greenberg, held a meeting on July 11, 2013. In late June 2013, while both were still employed by VSS, Cole and Greenberg met with Paul Chute of Phoenix Life, another VSS investor. What transpired during these meetings, including whether defendants affirmatively solicited investments in the fund they envisioned launching or merely sought their advice, remains a disputed issue of fact. The evidence indicates that some of the meetings/conversations held by Cole and all of the meetings attended by Greenberg occurred while employed at VSS, and that each defendant may have had some

⁹Plaintiffs' argument that Greenberg played an active role in soliciting Reynolds is unsupported in the record. The email on which plaintiffs rely shows that Cole, not Greenberg suggested that Reynolds meet with Riverside (*see* VSS Ex. BB and Defs Reply Ex. 111, Reynolds Tr. 58:21-61:7).

role in the alleged solicitations.

The above does not apply to Kessler. Plaintiffs have not shown that he solicited other employees or VSS investors or provided any confidential information to any competitor except as discussed below (*see* Pls. Resp. to Defs. Rule 19-a Stmt, NYSCEF Doc. No. 471, ¶¶172-74, 186). It appears that Kessler provided three single-page profiles of VSS investments in which he was involved to a competitor. Kessler testified that he believed that his actions were permitted by the Carve-Out (*see* Ruiz aff, Ex. 10 NYSCEF Doc. No. 366 [Kessler Tr.], 86:19-87:12). A comparison of the Kessler profiles with information VSS typically included in Decks shared during early stage marketing meetings shows that the same type of information was used in both documents (*e.g.*, compare Ruiz aff. Ex. 29, [Nov. 2008 Deck] at 19-21, 23, 30-31, 39-43 with Ex. 70 at 58 and Ex. 29 at 20-21, 23, 39, 43).

If Kessler invited other senior level professionals to attend one or more meetings to explore employment options outside of VSS, that action is permissible. (*see Gibbs, supra*). There is no admissible proof that Kessler spoke to any potential investors (let alone attempted to solicit their business). The testimony of Alexandra Coppet of C.V. Starr that Kessler may have engaged in discussions with investors together with her testimony that she did not know which of the defendants had spoken with investors in July 2013, after Cole's departure from VSS, does not fill the void. Kessler testified that he had no contact with investors (*see* Ruiz aff Ex. 10, [Kessler Tr.], NYSCEF Doc. No. 366, 281:13-22).

As for the backpack VSS invited Kessler to retrieve after inspecting it, there was a reasonable basis for the documents contained therein to remain in Kessler's possession after his resignation (*see* Lipman aff, Ex. DDD, NYSCEF Doc. No. 587). Further, when confronted, Kessler willingly complied with VSS's request to inspect it and readily returned the documents when he was told he could not retain them (*see Ruesch Intl. v Mac Cormack*, 222 AD2d 343 [1st Dept 1995]).

As a matter of applicable Delaware law, this evidence concerning Kessler does not amount to a demonstration of acts done with a dishonest oppressive or corrupt motive thereby showing "willful malfeasance" (*see State v Seitz*, 14 AD2d 710, 711 [Ct. General Sessions, New Castle]). Even if the court were to apply New York law, the evidence presented does not meet the test of "a corrupt intent" which is required to establish "willful malfeasance" (*see Matter of Mann*, 251 AD2d

739 [2d Dept 1977]).

The motion shall be granted as to Kessler. The motion summary judgment is denied as to the Second Cause of Action against Cole and Greenberg. Assuming that liability is proven, damages under the faithless servant doctrine is limited to recovery of compensation received during the period of defendants' disloyalty (*see In re Blumenthal*, 40 AD3d 318, 318 [1st Dept 2007]).

2. Count 8 - Declaratory Judgment

The Eighth Cause of Action of the complaint asserts a claim for declaratory judgment that (1) VSS validly retroactively terminated defendants for "cause"; (2) the defendants' Carry Units were properly cancelled; and (3) defendants are no longer entitled to any Waiver Distributions. In support of this claim, plaintiffs rely on the "after-acquired evidence doctrine" (*see* Pls. Opp. Br., NYSCEF Doc. No. 470, at 19-21). "The 'after-acquired evidence doctrine' appears to have a very short history in Delaware's jurisprudence" (*Lord v Peninsula United Methodist Homes, Inc.*, 2001 WL 392237, at *6 [Del Super Apr. 12, 2001]). Nonetheless, "Delaware courts have sanctioned the use of after-acquired evidence" (*Schiavello v Delmarva Sys. Corp.*, 61 F Supp 2d 110, 114 [D Del 1999]). Thus, "[i]f this later-discovered information evidences proper grounds for discharge, the employer may use it to justify removal of the . . . employee" (*Davenport Group MG, L.P. v Strategic Inv. Partners, Inc.*, 685 A2d 715, 723 [Del Ch 1996]). Although the after-acquired evidence doctrine is typically employed as a defense to a charge of wrongful termination, at least one case has extended the doctrine for the purpose of confirming an employer's legitimate reason for a discharge (*Weber v Tada*, 589 Fed Appx 563, 567-68 [2d Cir 2014] *cert denied*, 135 S Ct 1749 [2015]).

"Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge" (*McKennon v Nashville Banner Pub. Co.*, 513 US 352, 362-63 [1995]). Consistent with this concept, the LLC Agreements each provide for termination for "cause" where an employee commits an act of willful malfeasance (*see* Ruiz aff, Exs. 22-23, NYSCEF Doc. Nos. 378-79, § 12; Ex. 24, NYSCEF Doc. No. 380, § 11). Thus, for VSS to prevail on its declaratory judgment cause of action, it must demonstrate that defendants' wrongdoing constituted "willful malfeasance" and that VSS would have terminated defendants on that ground alone had it known of it at the time. The parties

dispute whether defendants' conduct constituted willful malfeasance, and whether VSS would have terminated defendants had it known of it. Both of these determinations are fact intensive and therefore inappropriate for summary judgment.

The concept of "willful malfeasance" has no strict definition under Delaware law (which law controls pursuant to the choice of law provisions in the LLC Agreements), but it involves at a minimum "a dishonest, oppressive or corrupt motive" (*State v Seitz*, 40 Del 572, 14 A2d 710, 711 [Del Gen Sess 1940]). Defendants contend that they had no such "corrupt intent" because they honestly believed the information they shared with other entities to be subject to the Carve Out. Moreover, defendants contend that they did not improperly solicit VSS employees or investors. However, as discussed above with respect to the second cause of action, there are triable issues of fact on these points as to Cole and Greenberg. Of course, delving into defendants' intent is inherently a fact based inquiry.

Defendants argue with substantial force that plaintiffs cannot prove that VSS would have terminated defendants had it known of defendants' actions at the time defendants left VSS. Defendants contend that VSS tolerated virtually identical behavior from Bainbridge and Russell, and indeed, VSS has never terminated anyone for cause in its history. Unsurprisingly VSS disagrees.

On a motion for summary judgment, the court is required to view the evidence in the light most favorable to the party opposing the motion and must give that party the benefit of every inference that can be drawn from the evidence (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). If the court has any doubt as to the existence of a triable issue of fact, it must deny the motion for summary judgment (*see Freese v Schwartz*, 203 AD2d 513 [2d Dept 1994]). Such is the case here as to Cole and Greenberg. The confidentiality clause of the LLC Agreements leave much room for interpretation regarding disclosure of current VSS information to third parties. Whether the conversation Cole had with Haubenstricker on June 30, 2013, was a first step in Cole's efforts to recruit investors cannot be resolved here under the standards governing a motion for summary judgment. Further, the determination of what VSS would have done cannot be determined as a matter of law based solely on evidence of VSS's determination not to terminate similarly situated employees and a prior history of not applying the sanction. Accordingly, the motion for summary judgment dismissing count 8 is granted as to Kessler and denied as to Cole and Greenberg.

II. Cross-Motion for Summary Judgment Dismissing Counterclaims and Third Party Claims

A. Counterclaims

1. Counterclaim 1 - Conversion

Defendants have voluntarily withdrawn their counterclaim for conversion (*see* Defs. Opp. Br., NYSCEF Doc. No. 621, p. 8 [“The Counterclaim-Plaintiffs withdraw their claim for conversion since the other causes of action are sufficient to protect their rights.”]).

2. Counterclaim 3 - Constructive Trust

Defendants’ third counterclaim seeks imposition of a constructive trust over the assets of each of the VSS Entities. As both parties recognize, Delaware law does not recognize a standalone cause of action for imposition of a constructive trust (*see Teachers’ Retirement Sys. of Louisiana v Aidinoff*, 900 A2d 654, 671 fn. 22 [Del Ch 2006]; Pls. Br., NYSCEF Doc. No. 468, p. 3; Defs. Opp. Br., NYSCEF Doc. No. 621, p. 7).¹⁰ A constructive trust is a remedy to be imposed only after entry of “an order of relief under a recognized cause of action” (*Teachers’ Retirement Sys. of Louisiana*, 900 A2d at 670).

Moreover, equitable relief will not be awarded where a party has an adequate remedy at law (*McMahon v New Castle Assoc.*, 532 A2d 601, 609 [Del Ch 1987]). Here, defendants contend that “equitable relief is needed to prevent the irreparable harm that would result if [Cole, Greenberg, and Kessler] were to prevail, only to discover that VSS has no money to compensate [Cole, Greenberg, and Kessler]” (*see* Defs. Opp. Br., NYSCEF Doc. No. 621, p. 7). Defendants contend that VSS has failed to establish a reserve for its potential liability in this lawsuit, and thereby is backtracking on assurances its counsel made during the December 20, 2013 hearing on a preliminary injunction motion. These contentions are unavailing for a number of reasons. First, defendants have offered no evidence that VSS will be unable to satisfy any judgment entered against it. Second, plaintiffs’ remedy through money damages “is not made inadequate because the alleged insolvency of the corporate defendant may render a subsequent judgment unenforceable” (*Robjudi Corp. v. Quality*

¹⁰ The parties agree that Delaware law applies. Defendants rights to the Carry Units and Waiver Distributions arise out of the LLC Agreements, which contain a choice of law clause providing for Delaware law to govern (*see* Ruiz aff, Exs. 22-24 [Equities IV, SC I and SC II Agreements], NYSCEF Doc. Nos. 378-380 § 13.5; Ex. 25 [Equities III Agreement], NYSCEF Doc. No. 381, § 12.6).

Controlled Products, Ltd., 111 AD 2d 156, 157 [1985] [Titone, J. dissenting]). Accordingly, defendants' fears that VSS might be unable to satisfy a judgment against it is an insufficient reason for imposing a constructive trust. This accords with the court's short form order dated December 20, 2013 denying defendants' motion for a preliminary injunction (*see* NYSCEF Doc. No. 27). The third counterclaim is dismissed.

3. Counterclaim 4 - Injunctive Relief

Counterclaim 4 seeks to enjoin the general partners of SC I & II, and Equities III & IV funds from distributing or disposing funds the defendants would be entitled to receive based on their Carry Units. This claim seeks to maintain the status quo until a determination is made on VSS's declaratory judgment claim. "To prevail on an application for preliminary injunctive relief, the moving party must demonstrate (1) a likelihood of ultimate success on the merits, (2) irreparable injury absent the granting of the preliminary injunction, and (3) that a balancing of the equities favors the movant's position" (*Zanghi v State*, 204 AD2d 313, 313-14 [2d Dept 1994]).

VSS argues that this claim should be dismissed because defendants have not demonstrated irreparable harm. Defendants oppose dismissal for the same reasons that they oppose dismissal of the constructive trust claim: namely, that "equitable relief is needed to prevent the irreparable harm that would result if [defendants] were to prevail, only to discover that VSS has no money to compensate [defendants]" (*see* Defs. Opp. Br., NYSCEF Doc. No. 621, p. 7). This claim must be dismissed for the same reasons the constructive trust claim was dismissed. Defendants' remedy at law is not made invalid simply because of the possibility that VSS may at some point in the future become insolvent.

4. Counterclaim 5 - Joint and Several Liability

Counterclaim 5 does not assert a recognized cause of action. Instead, it seeks to hold plaintiffs and counterclaim defendants jointly and severally liable for the prior-asserted counterclaims. Although the counterclaim itself pleads various bases for joint and several liability, counterclaim plaintiffs have not pursued any of them on this motion. Instead, they offer two distinct grounds in their motion papers: enterprise liability and fraudulent conveyance.

"Under the common enterprise theory, each entity within a set of interrelated companies may be held jointly and severally liable for the actions of other entities that are part of the group" (*F.T.C. v Tax Club, Inc.*, 994 F Supp 2d 461, 469 [SD NY 2014]). The court having dismissed counterclaims

1, 3, and 4, only counterclaim 2 for breach of contract remains. Defendants offer no support for extending the enterprise theory of liability into the realm of contracts. It is a theory traditionally applied to hold individual members of an enterprise responsible for the bad acts of the other members. Indeed, the very case that defendants cite, wherein the Southern District upheld a claim asserting enterprise liability on a motion to dismiss, involved claims for deceptive and fraudulent business and marketing techniques (*see F.T.C. v Tax Club, Inc.*, 994 F Supp 2d 461, 469 [SD NY 2014]). Defendants offer no support for holding an affiliate of their contract counterparty responsible for the counterparty's breach of a contract to which the affiliates are neither signatories nor guarantors. To so hold would render every affiliate of an entity liable for the entity's contractual obligations. In any event, defendants having voluntarily withdrawn their one counterclaim in tort (conversion), the Court cannot find a basis for continued pursuit of joint and several liability on an enterprise liability theory.

Defendants also pursue their theory of joint and several liability under Debtor and Creditor Law § 273-a, which provides that:

Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action without regard to the actual intent of the defendant if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment.

(NY Debt & Cred § 273-a). By the plain language of the law, defendants cannot invoke this statute unless and until a judgment is entered in this action and VSS fails to satisfy that judgment.

Because defendants have not pursued any of their pleaded bases for joint and several liability, this branch of the motion is deemed abandoned. The newly advanced theories are not viable. Accordingly, counterclaim 5 is dismissed.

B. Third Party Claims

1. Third Party Claims 1 & 2 - Breach of Fiduciary Duty

The first and second third-party claims assert breach of fiduciary duty against Stevenson (first), and Bainbridge and Russell (second). Defendants contend that Third Party Defendants' breached their fiduciary duties by voting to retroactively terminate defendants for cause in order to increase the value of their own Carry Units and Waiver Distributions. VSS attacks these claims on

two bases: (1) they are barred by the exculpatory provisions noted below; and (2) they are improperly duplicative of the breach of contract third party claim.

VSS contends that each of the third party claims should be dismissed because each of the LLC Agreements contains an exculpatory clause, binding upon defendants, which excludes “Covered Persons”, a term defined to include Stevenson, Bainbridge, and Russell (*see* Lipman *aff.*, Exs. D, E, G, NYSCEF Doc. Nos. 475-76, 478, § 8; Ex. F, NYSCEF Doc. No. 477, § 6). The exculpatory provisions at issue provide that:

To the extent not inconsistent with applicable law, no Covered Person shall be liable, responsible or accountable in damages or otherwise to the Company or to any Member for any action taken or for any failure to act on behalf of the Company in connection with the business or operations of the Company, unless the act or omission constituted gross negligence, willful misconduct or a breach of a fiduciary duty to the Company. No Covered Person shall be personally liable for any of the obligations or liabilities of the Company

(*id.*, Exs. D, E, G [SC I, SC II, Equities IV Agreements], NYSCEF Doc. Nos. 475-76, 478, § 8.1).¹¹

Thus, the provisions do not preclude liability for breaches of fiduciary duty or willful misconduct.

Defendants allege that Third Party Defendants have breached their fiduciary duties and committed willful misconduct through, *inter alia*, their manufacturing of “false claims to support their unprecedented attempt to take back the fruits of decades of work by” defendants to their own personal benefit (VSS Opp. Br., NYSCEF Doc. No. 621, p. 4). The evidence submitted raises triable issues of fact at least with regard to the Third Party Defendants’ alleged improper motivations and willful misconduct in voting to retroactively terminate defendants for cause. Accordingly, the breach of fiduciary duty third party claims cannot be dismissed as they fall within the “breach of fiduciary duty” and “willful misconduct” exceptions to the exculpatory clauses set forth above.

This case is distinguishable from *Kagan v HMC-New York, Inc.*, 94 AD3d 67 [1st Dept 2012], upon which VSS relies. *Kagan* dealt with a plaintiff’s claims for breach of contract and breach of fiduciary duty against the manager entities of his employer - an investment firm - based on their decision not to pay him amounts he believed due to him under the relevant limited liability

¹¹ The language of the exculpatory provision for the Equities III fund is substantially similar but not identical to language of the remaining three funds, quoted here.

company agreements. Those agreements contained an exculpatory clause similar to the one herein. It provided:

No Manager or Officer shall have any liability to the Company [the Manager Entities] or any Member or Holder for any loss suffered by the Company or any Member or Holder that arises out of any act or omission by the Manager or Officer, if such Manager or Officer performs its duty in compliance with the standard set forth in the immediately preceding sentence [to act in good faith, as set forth in § 7.9], except loss or damage resulting from intentional misconduct, knowing violation of law, gross negligence or a transaction from which the Manager or Officer received a personal benefit in violation or breach of the provisions of this Agreement

(*id.* at 70). The Kagan court dismissed the breach of fiduciary duty claims on the grounds that “the plaintiff simply does not make any allegations at all that fall within the exclusions of the limited liability provision”, and therefore the fiduciary duty claims were duplicative of the breach of contract cause of action (*id.* at 71).

Here, however, the plaintiff alleges that the vote of Third Party Defendants to terminate defendants retroactively for cause were improperly motivated by self-interest, which caused them to “manufacture[] false claims to support their unprecedented attempt to take back the fruits of decades of work by [defendants]” (VSS Opp. Br., NYSCEF Doc. No. 621, p. 4). There are questions of fact as to whether Third Party Defendants’ motivations and actions constitute willful misconduct and breaches of fiduciary duty. Thus, the exculpatory provisions do not bar the breach of fiduciary duty claims as a matter of law (*see Kelly v Blum*, 2010 WL 629850, at *11-12).

However, “[e]ven if plaintiff alleged facts that, if true, would be sufficient to show that defendants breached their fiduciary duties, these claims would not be sustainable if they merely duplicated a claim for breach of contractual duties that the LLC agreements place on the manager[s]” (*Kagan*, 94 AD3d at 79). Nonetheless, defendants’ allegations are sufficient to place the breach of fiduciary duty claims outside the contract. Defendants do not allege that Third Party Defendants simply breached a contract provision. Instead they allege that Third Party Defendants’ “manipulation of . . . position[s] of control to ensure that [defendants] would not receive [their] due under the contract and a scheme to benefit at [defendants’] expense” (*Kagan*, 94 AD3d at 80 [Moskowitz, J dissenting]). Accordingly, the breach of fiduciary duty claims as alleged here are not duplicative of the breach of contract claim, but rather arise out of independent duties Third Party

Defendants owed defendants by virtue of their positions of control at VSS. The motion for summary judgment dismissing the first and second third party claims is denied.

2. Third Party Claim 3 - Breach of Contract

In Count 3 of the Third Party complaint, defendants assert that each of the Third Party Defendants breached the LLC Agreements by “improperly retroactively terminating the [defendants] for their alleged malfeasance” (Third Party Compl., NYSCEF Doc. No. 37, ¶ 157) in violation of § 6.3 of the LLC Agreement for the SC I, SC II, and Equities IV funds, and § 4.2 of the Equities III fund. In addition to being barred by the exculpatory clauses, VSS contends that the breach of contract third party claim should be dismissed on the grounds that none of the Third Party Defendants is alleged to have breached any provision of the agreements at issue as VSS terminated the defendants for cause, not the individual Third Party Defendants. Defendants do not respond to these arguments in their opposition papers.

This claim must be dismissed it is barred the exculpatory clause and does not fall within any exception contained therein. Moreover, as VSS argues, the individual Third Party Defendants personally did not terminate defendants. The actions they took were taken in their capacities as members of VSS. Having alleged no breach by the Third Party Defendants individually, the claim must fail.

3. Third Party Claim 4 - Constructive Trust

Defendants’ last third party claim is asserted against Stevenson only, and seeks to impose a constructive trust over “any proceeds [defendants] may become entitled to in the future pursuant to the VSS Entities’ Agreements, to the extent necessary to satisfy the [defendants’] rightful claims to same” (*see* Third Party Compl., NYSCEF Doc. No. 37, ¶ 170). This claim is a tag-along claim to defendants’ counterclaim seeking to impose a constructive trust over VSS (*see* Third Party Compl., NYSCEF Doc. No. 37, ¶ 171). For the reasons the claim against VSS fails, so too does this claim. Specifically, defendants have failed to demonstrate that they have no adequate remedy at law.

Conclusion

At bottom, plaintiffs seek a declaratory judgment confirming their retroactive termination of defendants for cause and therefore confirming cancellation of defendants’ Carry Units, and forfeiture of all compensation received while employed by VSS. These two forms of relief are

unavailable except under counts 2 (breach of fiduciary duty) and 8 (declaratory judgment). Plaintiffs implicitly recognize this as the arguments in their opposition brief pertain only to these two claims (*see* Pls. Opp. Br., NYSCEF Doc. No. 470, pp. 16-19 [arguing that defendants owed and breached fiduciary duties to VSS - count 2], 19-23 [arguing that defendants' willful malfeasance permitted them to retroactively terminate defendants for cause under the after-acquired evidence doctrine - count 8], 23-25 [arguing that VSS may recover all compensation paid to defendants under the faithless servant doctrine - count 2]). The First (Breach of Contract), Third (Aiding and Abetting Breach of Fiduciary Duty), Fourth (Misappropriation of Trade Secrets), Fifth (Tortious Interference with Economic Relations), Sixth (Unfair Competition) and Seventh (Replevin) causes of action in plaintiffs' complaint shall be dismissed. Further, counts 2 and 8 are dismissed as against Kessler.

For the reasons outlined above, plaintiffs' cross-motion for summary judgment dismissing all of the counterclaims and cross-claims except for the breach of contract counterclaim (counterclaim 2) shall be granted except as to Third Party Claims 1 and 2 (for breach of fiduciary duty).

The First (Conversion), Third (Constructive Trust), Fourth (Injunctive Relief) and Fifth (Joint and Several Liability) counterclaims against the VSS Entities shall be dismissed. As to that branch of the cross-motion seeking dismissal of the third party complaint, the motion shall be granted in part and the Third (Breach of Contract) and Fourth (Constructive Trust) causes of action are dismissed. The cross-motion is denied as to the First and Second (Breach of Fiduciary Duty) causes of action in the third party complaint.

It is hereby

ORDERED that the motion for summary judgment of defendants, George Cole, Hal Greenberg and Michael Kessler to dismiss the complaint is **GRANTED** to the extent that the First, Third, Fourth, Fifth, Sixth and Seventh causes of action are **DISMISSED** as to all defendants, and the complaint as to Michael Kessler is dismissed in its entirety and the motion is otherwise **DENIED**; and it is further

ORDERED that the cross-motion of the plaintiffs and counter-claim defendants VSS Entities, and third party defendants Jeffrey Stevenson, David Bainbridge and Chriss Russell to dismiss the counter-claims and third party complaint is **GRANTED** to the extent that the First, Third,

Fourth and Fifth counter-claims against the VSS Entities are DISMISSED and Third and Fourth causes of action of the third party complaint are DISMISSED as against all Third Party Defendants and the cross motion is otherwise DENIED; and it is further

ORDERED that all counsel for the respective parties shall appear for a pre-trial conference on Tuesday, July 28, 2015 at 12:00 PM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: June 25, 2015.

ENTER,


O. PETER SHERWOOD
J.S.C. 6/25/15