SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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ADULT BEVERAGE COMPANY, LLC,

Plaintiff,

-against-

Index No. 153388/2012
Motion Date: 8/4/2016
Motion Seq. 021 & 022

TRACY REINHARDT, JEFFREY KUDLA, MRS 1 CORPORATION f/k/a ADULT BEVERAGE COMPANY, JOHN DOES 1-10, and MARY ROES 1-10

Defendants.

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BRANSTEN, J.

In this action, Plaintiff Adult Beverage Company, LLC ("ABCO") alleges that Defendants Tracy Reinhardt, Jeff Kudla, and MRS 1 Corporation f/k/a Adult Beverage Company ("Old ABCO") (collectively, "Defendants") breached several agreements and fiduciary duties arising from their business dealings. The dispute stems from a transaction by which non-party W.J. Deutsch & Sons Ltd. sought to invest in an alcoholic drink, "Adult Chocolate Milk," which was owned by Old ABCO. Defendants Reinhardt and Kudla were shareholders of Old ABCO, along with non-party Nicolle Halbur. To complete the investment, Old ABCO sold Adult Chocolate Milk to Plaintiff ABCO, a newly formed entity. The parties also agreed that Reinhardt would be employed by ABCO. The business then suffered several setbacks, straining the parties' relationship and resulting in this litigation.

Presently before the Court are Defendants' motion for summary judgment and Plaintiff's motion for summary judgment. Motion Sequence Numbers 021 and 022 are consolidated for disposition herein. For the reasons that follow, the Court denies Defendants' motion and grants Plaintiff's motion in part.

I. Background

According to Plaintiff's Amended Complaint (the "Complaint"), Old ABCO was engaged in the business of creating and marketing alcoholic beverages, including Adult Chocolate Milk. Compl. ¶ 8. In August 2011, W.J. Deutsch & Sons Ltd. ("Deutsch") sought to invest in Adult Chocolate Milk. NYSCEF No. 882, Plaintiff's Rule 19-A Statement of Undisputed Material Facts ("Pl. Rule 19-A") ¶¶ 1-2; NYSCEF No. 996, Defendants' Responsive Rule 19-A Statement ("Def. Opp. Rule 19-A") ¶¶ 1-2. To consummate the transaction, the parties entered into several agreements, including, without limitation: The Reorganization Agreement, the Limited Liability Company Agreement of Adult Beverage Company, LLC (the "LLC Agreement"), the Employment Agreement of Tracy Reinhardt (the "Employment Agreement"), the Employment Agreement of Nicolle Halbur, the Distribution Agreement with Deutsch., the Escrow Agreement, the Intellectual Property Assignment of Old ABCO ("Old ABCO IP Assignment"), and the Intellectual

Property Assignment of Tracy Reinhardt ("Reinhardt IP Assignment"). Pl. Rule 19-A ¶ 3; Def. Opp. Rule 19-A.[1]

Plaintiff ABCO, a new entity, was formed as part of the deal. *Id.* Defendant Reinhardt agreed to be employed by ABCO as the "Co-Founder of the Company." (Steffanci Aff. Ex. J, at 1.)

A. The ABCO Loan

Prior to the transaction, on July 26, 2011, Deutsch and Defendant Old ABCO entered into a Repayment Note memorializing their agreement with respect to a transfer of $174,746.88 from Deutsch to Old ABCO. Pl. Rule 19-A ¶ 10; Def. Opp. Rule 19-A ¶ 10. Pursuant to the Repayment Note, Old ABCO promised to pay Deutsch $174,746.88, "due and payable, in full, on August 31, 2011." Steffanci Aff. Ex. B. The Note further states that all payments due thereunder are "payable in lawful money," and contains a waiver of "demand and presentment for payment, notice of nonpayment, notice of dishonor, protest, notice of protest, bringing of suit, and diligence in taking any action to collect amounts

[1] Defendants admit this paragraph only in part, and take issue with "the statements about the Distribution Agreement." (NYSCEF. No. 996, ¶ 3). The statement to which Defendants object is factually beyond dispute: there is in existence a Distribution Agreement that was entered into by the parties with regard to the transaction. Nevertheless, Defendants contend that they requested the Distribution Agreement but "Plaintiffs refused to exchange it," raising particular alarm with the Court because the Plaintiff certified that "discovery now known to be necessary" has been completed. (NYSCEF. No. 473, Note of Issue). But Defendants themselves point the Court to Motion Sequence No. 015, which reveals that Defendants had this document in their possession all along, even as they repeatedly requested it from the Plaintiff and from non-party Deutsch—this makes sense, since *it is their own document*. But the Court digresses—the point is, Defendants' "denial" of this material fact is spurious.

owed . . ." *Id.* Upon Old ABCO's execution of the Note, Deutsch wire transferred the $174,746.88 in loan proceeds to Old ABCO's Wells Fargo bank account. Pl. Rule 19-A ¶ 12; Def. Opp. Rule 19-A ¶ 12. The next day, on July 27, 2011, Old ABCO transferred that $174,746.88 to Flow Media & Graphics. Pl. Rule 19-A ¶ 13; Def. Opp. Rule 19-A ¶ 18.

The parties dispute the reason for Deutsch's transfer of funds to Old ABCO. Plaintiff contends that Defendant Old ABCO needed a loan to pay for its purchase of bottles from the bottle vendor Flow Media, while Defendants argue that Old ABCO was merely an intermediary in the transaction between Flow Media and Deutsch. Pl. Rule 19-A ¶ 7; Def. Opp. Rule 19-A ¶ 7. Notably, Flow Media had billed Deutsch for the $174,746.88 purchase. Halbur Aff. Ex E, Invoice 1311.

In December 2011, the Note was purportedly transferred "pursuant to a true-up" from Deutsch to the new entity, Plaintiff ABCO. Pl. Rule 19-A ¶ 15; Def. Opp. Rule 19-A ¶ 15.[2] On or about April 16, 2012, ABCO sent Old ABCO an invoice for the full amount of the Repayment Note, labelled Invoice 1045. Halbur Aff. EX. K.[3] The invoice indicates a "due date" and "invoice date" of December 31, 2011. *Id.*

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[2] Defendants do not deny the existence of the "true-up" transaction; rather, Defendants' responsive statement of undisputed material facts presents a legal argument as to the insufficiency of this evidence. Def. Opp. Rule 19-A ¶ 15. As such, the Court will treat the existence of the "true-up" as undisputed for the purposes of this motion.

[3] While Plaintiff's Rule 19-A statement asserts that Invoice 1045 was sent on December 31, 2011, Plaintiff clarifies in its reply papers that December 31, 2011 was merely the "invoice date" or "due date" of the invoice, while the "ship date" of April 16, 2012 indicated on Invoice 1045 itself was the date on which it was actually sent to Plaintiff. *See* NYSCEF No. 1045, Steffanci Supplemental Aff. ¶¶ 7-8.

Plaintiff contends that, despite its demands, Old ABCO has not paid any portion of the amount due under the Repayment Note. Pl. Rule 19-A ¶ 19. Defendant disputes this statement, contending that its obligations under the Repayment Note have been satisfied. Def. Opp. Rule 19-A ¶ 19.

B. The Quality Control Issues

Shortly after closing the transaction, Plaintiff ABCO informed Old ABCO that it learned of quality control issues with certain Adult Chocolate Milk product. Steffanci Aff. ¶ 12. As a result, ABCO asked its distributors to destroy the bad product. Pl. Rule 19-A ¶ 24; Def. Opp. Rule 19-A ¶ 24. On August 24, 2011, Old ABCO's counsel emailed Nicolle Halbur to inform her that because of the quality control issues, the company could be forced to buy-back or account for cases shipped prior to the Deutsch transaction. Halbur Aff. Ex O. On October 26, 2011, Ms. Halbur emailed Defendants Kudla and Reinhardt and stated "Just wanted you both to be aware of the product recall process that Deutsch is requesting of [Defendant Old ABCO]. This process will be at our [Defendant Old ABCO's] expense." Halbur Aff. Ex. P. In December, Ms. Halbur again emailed Defendants Kudla and Reinhardt with a "Complete List of invoices/Debts as of 12/7/11." Halbur Aff. Ex. Q. The message describes the "WJD [Deutsch] Quality Issue" and states that Old ABCO needed "to be mindful that this could be owed." *Id.*

On March 26, 2012, Plaintiff ABCO sent an invoice for the recall costs to Old ABCO. Halbur Aff. Ex. R (the "Quality Control Invoice"). On August 22, 2012, ABCO

provided Kudla back-up documentation regarding the quality control problem; ABCO's letter states that the returns amounted to $134,418.11. Steffanci Aff. Ex. F. And on October 30, 2012, Kudla emailed Tom Steffanci, a principle of Plaintiff ABCO, denying Defendant Old ABCO's liability for the quality control problem and the resulting $134,418.11 charge. Steffanci Aff. Exhibit I.

Nonetheless, ABCO demanded that Old ABCO pay for the recall costs, claiming that Old ABCO was liable for those costs because the product was shipped prior to the transaction. ABCO claims that, under Section 2.4(c) of the Reorganization Agreement, Old ABCO retained liability for issues arising from this product.

The relevant section of the Reorganization Agreement is entitled "Retained Liabilities" and provides:

> The Company [ABCO] is assuming only the Assumed Liabilities and is not assuming, and will not be obligated to pay, perform, or discharge, any other liabilities or obligations of ABC [Old ABCO] or the ABC Business, whether arising out of occurrences prior to, at or after the Closing. ABC shall pay, perform, discharge and be responsible for all liabilities and obligations of ABC and the ABC Business which are not Assumed Liabilities, including, without limitation. . . . any liability or obligation relating to the operation of the ABC Business before closing.

See Halbur Aff. Ex L., § 2.4(c).

Defendants dispute their liability for the recall costs. They admit that they have not paid the invoice for the quality control issue, but argue that they are not responsible for these costs. Def. Opp. Rule 19-A ¶ 34.

C. Old ABCO's Funds

On March 21, 2012, Defendants Reinhardt and Kudla withdrew $237,722.90 and $96,672.00, respectively, from Old ABCO's bank account. Pl. Rule 19-A ¶ 35. Defendants contend that they had resolved all of Old ABCO's claims as of that date, but do not directly dispute the withdrawals from Old ABCO's bank account. Def. Opp. Rule 19-A ¶ 35.

D. Defendant Reinhardt's Employment with Plaintiff ABCO

As part of the transaction and pursuant to her Employment Agreement, Defendant Reinhardt agreed to work for Plaintiff ABCO. The Employment Agreement contained several clauses describing Reinhardt's responsibilities, and permitted ABCO to terminate her for "Cause:"

> The Company may terminate this Agreement at any time . . .(b) for Cause. For purpose of this Section 11, "Cause" shall mean and include… (ii) the commission of any act or omission involving dishonesty or fraud with respect to the Company or its business…, (iii) any conduct by you that is materially injurious to the business or reputation of the Company…, (iv) your substantial and repeated failure to perform duties as reasonably directed by the Board of Managers, (v) your gross negligence or willful misconduct with respect to the Company… violation of material Company policies or (vi) your breach of Section 6, 7 or 8 of this Agreement.

Steffanci Aff. Ex. J, Employment Agreement at ¶ 11.

Separately, the Employment Agreement included Non-Competition and Non-Solicitation clauses. *Id.* ¶ 6. Defendant Reinhardt also agreed "to devote [her] best efforts, energies and skills to the faithful discharge of the duties and responsibilities attributable to

[her] position and to this end will devote [her] full working time and attention to the business and affairs of the Company." *Id.* ¶ 1.

Reinhardt's initially assigned responsibilities and duties were set forth in a chart distributed by ABCO's Board of Managers Pl. Rule 19-A ¶ 42; Def. Opp. Rule 19-A ¶ 42. ABCO allocated only two categories of responsibilities to Reinhardt: (1) new flavor development; and (2) events, public relations, and social media. Pl. Rule 19-A ¶ 43; Def. Opp. Rule 19-A ¶ 43. Regarding the first category of responsibilities, Reinhardt was tasked with developing five flavor profiles for ABCO. However, for reasons disputed by the parties, only one new flavor went to production. Pl. Rule 19-A ¶¶ 45-48; Def. Opp. Rule 19-A ¶¶ 45-48.

On February 29, 2012, ABCO circulated an amended "roles and responsibilities" chart removing Reinhardt from website management. Steffanci Aff. Ex. W. Then on April 9, 2012, ABCO's Board called a meeting to discuss a further reduction in Reinhardt's duties and a reduction in salary. Pl. Rule 19-A ¶¶ 58-59; Def. Opp. Rule 19-A ¶¶ 58-59.[4] On April 16, 2012, a subsequent Board meeting was scheduled to discuss Reinhardt's new

[4] While Defendants' responsive Rule 19-A statement indicates that these assertions are "denied," Defendants' subsequent response to these paragraphs does not deny that the meeting occurred or that a reduction in salary and duties was discussed. Rather, Defendants assert that Defendant "was told she was losing her job or she should take a salary reduction in the amount of $180,000." Def. Opp. Rule 19-A ¶¶ 58-59. This characterization of the meeting does not wholly dispute Plaintiff's assertions in paragraphs 58 and 59. Rather, Defendants appear to dispute only the assertion that Reinhardt's "failing performance" necessitated the meeting. As such, the Court will treat paragraphs 58 and 59 of Plaintiff's Rule 19-A statement as denied only to the extent the paragraphs address Reinhardt's job performance.

role. Pl. Rule 19-A ¶ 62; Def. Opp. Rule 19-A ¶ 62.[5] Reinhardt asked for a revised employment agreement, and a separate meeting was scheduled for April 24, 2016. Pl. Rule 19-A ¶ 64; Def. Opp. Rule 19-A ¶ 64. Reinhardt did not attend this or any subsequent board meetings. Pl. Rule 19-A ¶¶ 64-50; Def. Opp. Rule 19-A ¶¶ 64-65. The Board resolved to terminate her employment as of May 2, 2012, and offered to pay her a severance of $50,000. Pl. Rule 19-A ¶ 66; Def. Opp. Rule 19-A ¶ 66. Reinhardt did not respond to the offer. Notably, Reinhardt testified that she had ceased all work for New ABCO in April, prior to her May 2, 2012 termination. *See* Kierych Aff. Ex. C, Reinhardt Dep. at 90:9-14, 192:14-24.

Defendants assert that Reinhardt was praised for her work throughout 2011 and early 2012. NYSCEF No. 869, Defendants' Rule 19-A Statement of Undisputed Material Facts ("Def. Rule 19-A") ¶ 37. Plaintiff acknowledges only "isolated incidents where Reinhardt was praised," and presents evidence in opposition showing that "her employment with ABCO was characterized by misconduct, mishaps, and malfeasance, as early as September 2011, up until she resigned in April 2012." NYSCEF No. 971, Plaintiff's Responsive Rule 19-A Statement of Undisputed Material Facts ("Pl. Opp. Rule 19-A") ¶ 37.

[5] While Defendants' response to Plaintiff's Rule 19-A statement indicates that paragraphs 62, 64, and 66 of are "denied," Defendants' subsequent responses do not directly address the validity of Plaintiff's assertions. As such, the Court deems paragraphs 62, 64, and 66 of Plaintiff's Rule 19-A statement as admitted, and treats Defendants' responsive statements as merely supplementary.

Defendants contend that, despite Plaintiff's assertions, none of the company's setbacks were caused by Reinhardt. Def. Rule 19-A ¶¶ 46-49. Moreover, Defendants assert that Reinhardt was actually issued an ultimatum by ABCO: accept a salary reduction from $250,000 to $70,000 or be terminated. Def. Opp. Rule 19-A ¶ 59.

E. Reinhardt's Side Project "Shotpops"

In February 2012, while working for ABCO, Reinhardt corresponded with her brother, Ernie Reinhardt, and Alberto Flores of Flow Media regarding model designs for "Shotpops"—and alcoholic product designed to look like a popsicle. Steffanci Aff. Ex. DD. Lee Reedy, an ABCO employee tasked with label designs, also worked on Shotpops creating marketing materials for investors at Reinhardt's direction. Pl. Rule 19-A ¶ 77; Def. Opp. Rule 19-A ¶ 77. Although the Shotpops product was never launched, a Shotpops presentation for investors referred to Ms. Reinhardt's employment history and to ABCO. Pl. Rule 19-A ¶ 77; Def. Opp. Rule 19-A ¶ 78.

Significantly, the parties' Intellectual Property Assignment agreement, contained in Reinhardt's Employment Agreement, stated as follows:

> In consideration for the execution of the Reorganization Agreement, the payment of the purchase price for the [Old ABCO] Transferred Assets and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, [Old ABCO] hereby irrevocably conveys, transfers and assigns to [ABCO], and [ABCO] hereby accepts, all of Seller's rights, title and interest in and to the Intellectual Property, including the but not limited to the following . . . (b) trademark and trademark applications listed in Exhibit B.

Steffanci Aff. Ex. CC.

Exhibit B, in turn, lists the trademark for "Adult Shot Pop," Serial No. 85112307, filed on August 20, 2010. *Id.* Additionally, Reinhardt's Employment Agreement contained a non-solicitation clause, stating:

> Non-Solicitation. You agree that at any time during the time periods referred to in Section 6(a) above, you shall not, directly or indirectly, cause or encourage any employees of the Company, or any sales representatives, customers, prospective customers, distillers, wholesalers, suppliers, vendors, purchasing agents or referral sources with which the Company or its predecessor does or has done business, to discontinue their relationship with the Company or to engage in a relationship with any business which is directly competitive with any aspect of the business of the Company, and its subsidiaries and affiliates or which is the same or similar to the business of the Company or such subsidiaries or affiliates, as applicable, as currently conducted, and as said business may evolve in the ordinary course, whether said business is conducted by the Company or any one or more of its subsidiaries, or any successor or assign thereof.

Steffanci Aff. Ex. J.

II. Legal Standard

It is well-understood that summary judgment is a drastic remedy and should only be granted if the moving party has sufficiently established the absence of any material issues of fact, requiring judgment as a matter of law. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012) (citing *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986)). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *Zuckerman v. City of New York*, 49 N.Y.2d 557,

562 (1980). When deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-movant. *Branham v. Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 (2007). However, mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman*, 49 N.Y.2d at 562; *see also Ellen v. Lauer*, 210 A.D.2d 87, 90 (1st Dep't 1994) ("[it] is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . .") (citations omitted).

III. Discussion

Plaintiff moves for summary judgment in its favor with respect to three separate categories of issues raised in the Complaint: (1) the Repayment Note issues, (2) the quality control issues, and (3) Defendants Renhardt and Kudla's theft of monies from Old ABCO's coffers. Plaintiff further moves for summary judgment on Defendants' Counterclaim for breach of her employment agreement with Plaintiff.

Defendants oppose, and independently move for summary judgment in their favor on each issue. Defendants' motion also raises numerous additional arguments in favor of dismissal of certain claims. The Court will address these arguments individually below.

A. The "Repayment Note" Causes of Action[6]

Defendants move for summary judgment on the causes of action arising from the Repayment Note on two independent grounds. First, Defendants argue that Plaintiff lacks standing to sue on the Repayment Note because rights to the Note were not properly assigned from non-party Deutsch to Plaintiff ABCO. Def. Mov. Br. at 13-15. Defendants argue in the alternative that, even if the note was properly assigned, it was nevertheless satisfied by Defendant Old ABCO through purchase of bottles from Flow Media on behalf of Deutsch. *Id.* at 12. The Court will address each argument in turn below.

1. Whether Plaintiff has standing to sue on the Repayment Note

Defendants argue that Plaintiff lacks standing to sue for collection of monies owed under the Repayment Note. Def. Mov. Br. at 15.

New York law does not require specific boilerplate language to assign one's right to sue on a contract. *Miller v. Wells Fargo Bank Int'l Corp.*, 540 F.2d 548, 557 (2d Cir. 1976) (applying New York law). Rather, "any act or words are sufficient which 'show an intention of transferring the [cause of action] to the assignee, when the assignor is divested of all control and right to cause of action and the assignee is entitled to control it and receive its fruits.'" *Id.* (quoting *Advance Trading Corp. v. Nydegger & Co.*, 127 N.Y.S.2d 800,

[6] The Repayment Note causes of action include allegations related to the Repayment Note contained in Counts Five and Six (breach of contract), Counts Seven and Eight (account stated), Count Nine (conversion), and Counts Ten and Eleven (unjust enrichment). See Def. Mov. Br. at 2 n.2

801 (Sup. Ct. Bronx Cty. 1953). Thus, "the substance, not the form, prevails in determining whether a particular transaction constitutes an assignment." *Aini v. Sun Taiyang Co.*, 964 F. Supp. 762, 778 (S.D.N.Y. 1997), *aff'd sub nom. Topiclear Beauty v. Sun Taiyang Co.*, 159 F.3d 1348 (2d Cir. 1998) (applying New York law).

Here, Defendant argues that the Repayment Note, originally produced by non-party Deutsch, "is devoid of assignment, endorsement or any other indicia of standing conferred on Plaintiff." Def. Mov. Br. at 15 (citing Dembia Aff. Ex. 14 at 14). In support, Defendants cites to the Repayment Note itself, arguing that the face of the Note contains no language indicating an intent to transfer rights in the Note to a third party. *Id.*

In opposition, Plaintiff presents three items of evidence purportedly showing that Deutsch intended to transfer—and in fact did transfer—its rights in the Repayment Note to Plaintiff ABCO through a "true-up" transaction between Deutsch and ABCO in December 2011. Pl. Opp. Br. at 8; Pl. Rule 19-A ¶ 15. First, Plaintiff presents the deposition testimony of Nicole Halbur, in which she states that Deutsch was collecting and holding money on behalf of Plaintiff ABCO until ABCO could obtain the necessary paperwork to sell alcoholic products. Halbur Dep. 185:11-20. According to Halbur's testimony, once ABCO completed the paperwork, ABCO "did a true-up with Deutsch for the monies they collected and then what was owed to Deutsch. They deducted the 174 [i.e., the $174,746.88] from the amount that was paid to [Plaintiff] new ABCO, LLC." Halbur Dep. 185:17-20.

Halbur attaches a document to her affidavit described as the "true-up calculation," showing the $174,746.88 Repayment Note as an accounting entry on Plaintiff's books. NYSCEF No. 929, Halbur Aff. ¶ 18, Ex. J. Halbur also attaches a copy of Invoice 1045, purported to be an invoice sent by Plaintiff to Defendant Old ABCO for the $174,746.88 Old ABCO owed pursuant to the Repayment Note on December 31, 2011. Halbur Aff. ¶ 19, Ex. K.

Defendants argue that Invoice 1045 should not be considered in support of Plaintiff's motion for summary judgment because Plaintiff cannot show that Defendants actually received the Invoice or were aware of its contents at times relevant to the Complaint. Defendants argue that neither Old ABCO nor its principal received Invoice 1045 on the "invoice date" listed on the face of the Invoice—December 31, 2011. *See* Dembia Aff. ¶¶ 1-7; Kudla Aff. ¶ 2. Notably, Kudla states that both Invoice 1045 and Invoice 1038 were sent to an address in Arizona at which neither Defendant accepted mail during the times relevant to the Complaint. Kudla Aff. ¶ 4.

In response, Plaintiff submits a supplemental affidavit by Tom Staffanci, a principal of Plaintiff ABCO, clarifying that, while Invoice 1045 was properly assigned an "invoice date" and "due date" of December 31, 2011, it was in fact sent to Defendant Old ABCO on the "shipping date" set forth on the face of Invoice 1045—April 16, 2012—to remind Old ABCO of its outstanding obligation under the Repayment Note. Steffanci Supplemental Aff. ¶¶ 7-8.

Despite the apparent dispute of fact as to when Invoice 1045 was first seen or received by Defendants, the Court concludes that this dispute is insufficient to defeat Plaintiff's showing of standing on the Repayment Note claims. Regardless of when it was sent, the parties do not dispute that it was sent from Plaintiff ABCO to Defendant Old ABCO demanding satisfaction of the Repayment Note. The Court concludes that this fact, combined with the true-up calculation and Halbur's deposition testimony, are sufficient to show an intent by Deutsch to "divest all control" of the Repayment Note—and thus, the relevant causes of action—to Plaintiff ABCO. *See Miller*, 540 F.2d at 557. *See Aini v. Sun Taiyang Co.*, 964 F. Supp. 762 at 778.

Accordingly, Plaintiff has sufficiently shown that it has standing to sue for collection of the Repayment Note. *See id.*

2. Whether Defendant Old ABCO met its obligations under the Repayment Note

Plaintiff argues that it has shown undisputed evidence of Defendants' non-payment of the Repayment Note, and is thus entitled to summary judgment on its claims for payment on the Note. Defendants respond that the initial $174,746.88 payment by Deutsch to Old ABCO pursuant to the Note was not a loan, but an "advance payment" by Deutsch for the purchase of bottles on Deutsch's behalf. Def. Mov. Br. at 12. In other words, Defendants contend that Old ABCO merely acted as an intermediary for Deutsch's purchase from Flow Media, and Old ABCO's role in the transaction was as an intermediary or go-between. Defendants argue that Old ABCO's obligations under the Repayment Note were thus

satisfied upon the purchase of those bottles from Flow Media on July 27, 2011. Def. Mov. Br. at 11-12; Def. Opp Br. at 11.

In an action for non-payment under a promissory note, a *prima facie* case is established where the plaintiff shows "proof of the note[] and the failure to make payment in accordance with [its] terms." *Kornfeld v. NRX Techs., Inc.*, 93 A.D.2d 772, 773 (1st Dep't 1983), *aff'd,* 62 N.Y.2d 686 (1984). The defendant may defeat summary judgment by showing "evidentiary proof sufficient to raise an issue as to the defenses to the instrument. *Interman Indus. Prod., Ltd. v. R.S.M. Electron Power, Inc.*, 37 N.Y.2d 151, 155 (1975).

Here, neither side denies that the Repayment Note required Defendant Old ABCO to satisfy its obligation "in lawful money of the United States of America," without resort to any "offset, defense, counterclaim, or adjustment." *See* NYSCFEF No. 882, Repayment Note at 2. Thus, to defeat summary judgment, Defendant Old ABCO must present evidence that, in accordance with the terms of the Repayment Note, it paid the holder of the Note $174,746.88 in "lawful money" without offset, defense or adjustment. *See Kornfeld v. NRX Techs., Inc.*, 93 A.D.2d at 773.

In support of Defendants' argument that Old ABCO satisfied its obligations under the Note, Defendants attach two e-mails between Defendants, Deutsch, and Flow Media discussing who will pay Flow Media for the bottle purchase and indicating Flow Media's demand for advance payment of $174,746.88 prior to delivery of the 88,707 bottles. *See* NYSCEF Nos. 812-813, Kudla Aff. Exs. 2 and 3. Defendants contend that these e-mails,

dated June 5, 2011, and July 22, 2011, show the parties' understanding that the Repayment Note was to be satisfied by paying Flow Media for the 88,707 bottles, rather than by repaying a "loan" to Deutsch. Def. Mov. Br. at 6.

The Court notes that, at the time the e-mails were sent, the parties were in the process of transitioning into a new corporate structure, and, as of July 22, 2011, had not yet determined how the parties' mid-transition operations would be funded. *See* Pl. Rule 19-A ¶ 5; Def. Opp. Rule 19-A ¶ 5. During this period of admitted uncertainty, non-party Flow Media sent Invoice 1311, billing Deutsch directly for the $174,746.88 bottle purchase on July 11, 2011. *See* Pl. Rule 19-A ¶ 6; Def. Opp. Rule 19-A ¶ 6. It was not until July 26, 2011 that Deutsch and Old ABCO resolved the transition-funding question by signing the Repayment Note. *See* Repayment Note at 2.

In the context of these undisputed facts, it does not appear that the above-referenced emails contradict the plain terms of the Repayment Note in any way—namely, that Defendant Old ABCO agreed to tender $174,746.88 in "lawful money" to Deutsch by August 31, 2011. *See* Repayment Note at 2. And while the Note's "lawful money" requirement could conceivably be met in more than one way, the Court rejects Defendants' expansive interpretation of the phrase to include the purchase of bottles on Deutsch's behalf—such an interpretation would render meaningless the Repayment Note's express prohibition of any "offset, defense, counterclaim or adjustment." *See Lobacz v. Lobacz*, 72 A.D.3d 653, 654–55 (2010) ("a court's reading of a contract should not render any

provision meaningless but, rather, the court should construe a contract so as to give full meaning and effect to its material provisions").

Based on the foregoing analysis, the Court concludes that Plaintiff has made a *prima facie* case for account stated on the Repayment Note, and that Defendants present insufficient evidence to rebut Plaintiff's case. As such, the Court grants summary judgment in favor of Plaintiff on Defendant ABCO's liability under the Repayment Note. *See Kornfeld v. NRX Techs., Inc.*, 93 A.D.2d 772, 773 (1st Dep't 1983), *aff'd,* 62 N.Y.2d 686 (1984) (granting summary judgment for plaintiff on claim for account stated where plaintiff presented unrebutted proof of promissory notes and defendant's failure to make payment in accordance with their terms).

B. The Quality Control Causes of Action[7]

Plaintiff argues that it has shown *prima facie* entitlement to summary judgment on the "quality control" issues. In its papers, Plaintiff contends that it is entitled to payment of $134,418.11 on the March 26, 2012 "Quality Control Invoice" because Defendant Old ABCO received it, failed to timely object, and failed to make the required payment. Pl. Mov. Br. at 8-9.

[7] The "quality control causes" of action include allegations related to the Quality Control Invoice contained in Counts Five and Six (breach of contract), Counts Seven and Eight (account stated), Count Nine (conversion), and Counts Ten and Eleven (unjust enrichment). See Def. Mov. Br. at 2 n.2

Defendant Old ABCO responds that its obligation to "timely object" was met when it opposed the underlying liability for the recall of $134,418.11 worth of bad product through e-mails sent in December 2011, months before the Quality Control Invoice was even issued. *See* Def. Reply Br. at 8.

A plaintiff may establish *prima facie* entitlement to summary judgment on an invoice seeking payment for goods or services rendered "upon proof that the defendants received and retained, without objection, the invoices that the plaintiff sent them." *Thaler & Gertler, LLP v. Weitzman*, 282 A.D.2d 522, 523 (2nd Dep't 2001). If the defendant fails to object within a reasonable time, "he will be deemed by his silence to have acquiesced, and will be bound by it as an account stated, unless fraud, mistake or other equitable considerations are shown. *Peterson v. IBJ Schroder Bank & Trust Co.*, 172 A.D.2d 165, 166 (1st Dep't 1991).

Plaintiff argues that an October 30, 2012 email from Defendant Kudla purporting to object to the Quality Control Invoice does not constitute a "timely objection" as a matter of law because it was sent more than seven months after the Invoice was received. Pl. Mov. Br. at 9 n.7 (citing NYSCEF No 893, Steffanci Aff. Ex. I). Defendant does not directly address the October 30, 2012 e-mail in her briefing, pointing instead to a series of e-mails sent dated December 5 and 21, 2011 between Old ABCO principals Tracy Reinhardt and Nikki Halbur (among others) discussing Old ABCO's position on the company's payment of numerous outstanding invoices. *See* NYSCEF No. 886, Reinhardt Aff. Ex. 20.

In the December e-mail, Defendant Reinhardt inquires as to Deutsch's position on liability for the quality control issues, and notes that "[b]esides crediting [Old ABCO] for the recalled product, there still is a balance to be reimbursed to [Plaintiff] ABCO Inc. We need to get on that!" *Id.* at 2. In a follow-up email, Halbur responds "[c]ompletely agree on aligning with Evis [a principal of non-party Deutsch] for the inventory and the quality issues." *Id.* at 2.

These e-mails followed a similar message from Halbur to Kudla on December 5, 2011, stating that Halbur had "discussed the shortage of AB Co funds to the shareholders here as well as the quality recall issue that should be considered. He understood the situation . . . and set up a meeting to discuss this with Tom Steffanci later in the week." Kudla Aff. ¶ 22.

The Court concludes that, as a matter of law, the December 2011 e-mails do not constitute an objection to the March 26, 2012 Quality Control Invoice. While the e-mails show Defendant Old ABCO's knowledge of Plaintiff's intent to hold it liable for the product recall costs—albeit *prior* to receipt of the invoice—the e-mails do not establish Old ABCO's objection to this liability. On the contrary, the e-mails show that Old ABCO had in fact *not* staked out a position on the liability issue, and instead sought further discussions with Deutsch in an attempt to resolve the matter amicably.

In contrast to the December 2011 e-mails, the October 30, 2012 e-mail argues that Old ABCO was not responsible for the quality control issue and explicitly states that Old ABCO "denies the backcharge in its entirety." *See* NYSCEF No 893, Steffanci Aff. Ex. I.

However, the e-mail was sent to Plaintiff more than seven months after the original Quality Control Invoice was sent. *See id.* Furthermore, Defendant Old ABCO submitted this objection an additional two months after Plaintiff sent it back-up documentation for the charge and again requested payment of the Quality Control Invoice. *See* NYSCEF No. 890, Steffanci Aff. Ex. F. Defendants present no explanation as to why this objection was not established sooner. Thus, the Court concludes that the October 2012 e-mail fails to defeat Plaintiff's *prima facie* case for account stated because the e-mail was untimely.

Defendants also argue that "Plaintiff's motion is devoid of an evidentiary proof in admissible form" that Old ABCO was directly responsible for the recall of $134,418.11 worth of defective product in the first place. Def. Opp. Br. at 10-11. Defendants present an alternative theory of liability, suggesting that Plaintiff ABCO was in fact liable for the product recall due to bad warehousing practices occurring after ownership of product inventory was transferred from Defendant Old ABCO to Plaintiff ABCO on August 10, 2011.

The Court finds that this argument is unsustainable. If Defendant Old ABCO believed the warehousing issues precluded its liability for the $134,418.11 in recalled product, then Defendant's recourse was to timely object to the March 26, 2012 Quality Control Invoice on those grounds or be deemed "acquiescent" to the Invoice's charges. *See Peterson v. IBJ Schroder Bank & Trust Co.*, 172 A.D.2d 165, 166 (1st Dep't 1991).

Here, while Defendants present evidence of these bad warehousing practices, (*see* NYSCEF Nos. 818-819), the record is devoid of evidence of a timely objection to the

Quality Control Invoice on those grounds. As discussed above, the December 2011 and October 2012 e-mails regarding Old ABCO's liability for the quality control issues do not constitute "timely objections" to the Invoice, and no other evidence of an objection is presented. Because of this, Defendants' evidence of the warehousing issues is insufficient to defeat Plaintiff's *prima facie* case of account stated on the Quality Control Invoice. *See Thaler & Gertler, LLP v. Weitzman*, 282 A.D.2d 522, 523 (2nd Dep't 2001).

Based on the foregoing, the Court concludes that Plaintiff has made a *prima facie* case of account stated on the Quality Control Invoice. *See id.* Summary judgment on this issue is therefore granted in favor of Plaintiff.

C. The "Theft of Monies" Causes of Action[8]

Plaintiff argues that it is entitled to summary judgment on its claim that individual Defendants Reinhardt and Kudla tortuously interfered with Defendant Old ABCO's contractual obligations on the Repayment Note and Quality Control Invoice by draining Old ABCO's bank account prior to satisfaction of those debts. Pl. Mov. Br. at 10-14.[9] Specifically, Plaintiff seeks the return of $237,722.90 withdrawn by Reinhardt and

[8] The "theft of monies" causes of action include allegations of theft against Reinhardt and Kudla contained in Count Four (gross negligence), Count Twelve (fraudulent conveyance), and Counts Thirteen and Fourteen (tortious interference with contract). *See* Pl. Mov. Br. at 3 n.3

[9] While Plaintiff's moving brief initially seeks summary judgment with respect to a wider array of claims on the "theft of monies" issues, *see* Pl. Mov. Br. at 3 n.3, the brief only presents substantive argument with respect to Counts Thirteen and Fourteen alleging tortious interference, *see* Pl. Mov. Br. at 10-14 (arguing exclusively that "Kudla and Reinhardt intentionally interfered with ABCO's contracts"). As such, on the "theft of monies issues," the Court will only consider arguments with respect to Counts Thirteen and Fourteen.

$96,672.00 withdrawn by Kudla from Old ABCO's bank account on March 21, 2012. Defendants respond that Reinhardt and Kudla were justified in withdrawing the funds because they reasonably believed that, at the time of their withdrawals, all of Defendant Old ABCO's debt obligations had been satisfied. Def. Opp. Br. at 13.

To sustain a cause of action for tortious interference with contract, a plaintiff must show "(1) the existence of a valid contract between the plaintiff and a third party, (2) defendant's knowledge of that contract, (3) defendant's intentional [and improper] inducement of the third party to breach that contract, and (4) damages." *Rosario-Suarez v. Wormuth Bros. Foundry*, 233 A.D.2d 575, 577 (3rd Dep't 1996).

In support of Plaintiff's argument that Defendants Reinhardt and Kudla were aware of Old ABCO's unpaid debts on the Repayment Note and Quality Control Invoice, Plaintiff points to evidence that Reinhardt and Kudla knew of the Repayment Note and Quality Control Invoice prior to withdrawals, and were familiar with Old ABCO finances generally. *See, e.g.*, Halbur Aff. Ex. G; Nolan Aff. Ex. C; Steffanci Aff ¶ 14. Plaintiff also presents an affidavit by ABCO's principal Tom Steffanci, in which Steffanci states that Reinhardt admitted to ABCO's liability for the quality control issues. Steffanci Aff ¶ 15.

However, Defendants present competing evidence, in the form of Reinhardt and Kudla's own affidavits, attesting to the individual Defendants' belief that those debts were either satisfied or no longer owed at the time they withdrew ABCO's funds on March 22, 2012. *See* Kudla Aff. ¶¶ 21-29; Reinhardt Aff. ¶ 7-8.

Accordingly, the Court concludes that an issue of fact remains as to whether Defendants Reinhardt and Kudla *intentionally* induced Old ABCO to breach its obligations on the Repayment Note and Quality Control Invoice. *See Rosario-Suarez v. Wormuth Bros. Foundry*, 233 A.D.2d 575, 577 (3rd Dep't 1996). Summary Judgment on Plaintiff's fraudulent inducement claims is therefore denied.

D. Alleged Breaches of the Employment Agreement Between Plaintiff ABCO and Defendant Reinhardt

Defendant Reinhardt moves for summary judgment on Plaintiff's claims for breach of the Reorganization Agreement and Reinhardt's Employment Agreement, as well as on her Counterclaim for Plaintiff ABCO's alleged breach of contract.

In the Complaint, ABCO claims that Reinhardt breached Section 1 (the "Best Efforts" provision), the non-compete provision, and the non-solicitation provisions of Reinhardt's employment agreement by developing the "ShotPops" product against ABCO's express wishes. Compl. ¶¶ 62-67. ABCO also claims that Reinhardt breached the confidentiality provision of the Reorganization Agreement in filing a complaint based on the same occurrences in federal court in California. *Id.* In her Counterclaim, Reinhardt alleges that ABCO breached the employment agreement by firing her without cause in violation of the contract's "for-cause" provision.

ABCO opposes summary judgment on each claim, and separately moves for summary judgment on Reinhardt's Counterclaim for breach of the employment agreement. The Court will address arguments with respect to each claim individually below.

1. *Defendant's Alleged Breach of the Employment Contract*

ABCO argues that Reinhardt's development and marketing of the ShotPops product violated the Best Efforts, non-compete, and non-solicitation provisions of the employment contract. Pl. Mov. Br. at 16-19. Among other things, Defendant argues that Plaintiff failed to show damages caused by her actions. Def. Mov. Br. at 20.

To make a breach of contract claim, a plaintiff must show four elements: (1) the formation of a contract; (2) performance by the Plaintiff; (3) breach; and (4) resulting damage. *McCormick v. Favreau*, 82 A.D.3d 1537, 1541 (3rd Dep't 2011). Thus, a plaintiff is not entitled to summary judgment on her breach of contract claim unless she can show undisputed evidence that the defendant's alleged breach actually resulted in damages. *See Scalisi v. N.Y. Univ. Med. Ctr.*, 24 A.D.3d 145, 146 (1st Dep't 2005) (affirming grant of summary judgment where "plaintiffs had failed to demonstrate any compensable damages as required in a breach of contract action".

In support of ABCO's argument that Reinhardt breached these contract provisions, ABCO presents evidence that its principal Tom Steffanci warned Reinhardt about the damage ShotPops could cause to ABCO's brand and image. *See* Reinhardt Aff. ¶ 51-52. Uncontroverted evidence shows that Reinhardt nonetheless persisted, pitching the product

on her own behalf while travelling on ABCO business. *See* Steffanci Aff., Ex. EE; Nolan Aff. Ex. H. Reinhardt dedicated a portion of this sales pitch to ABCO itself, referencing ABCO products and her work at the company. *See* Steffanci Aff. ¶ 61, Ex. FF. Plaintiff further presents uncontroverted evidence that Reinhardt solicited the ShotPop idea to three prohibited entities as set forth in the non-solicitation provision—Lee Reedy, Plaintiff's label designer; TDC, Plaintiff's distiller; and Flow Media, Plaintiff's bottle supplier. *See* Steffanci Aff. Exs. DD-FF.

Defendant Reinhardt does not deny that she pitched ShotPops to these entites after being told that ABCO "wanted nothing to do with" the product. *See* Reinhardt Aff. ¶ 43. Rather, Reinhardt contends that her development of the ShotPops product cause no material damage to Plaintiff, its image, or its brand. Reinhardt argues that her efforts to develop ShotPops were so negligible—less than a single day worth of work—that the efforts had no practical effect on ABCO's business. *Id.* ¶ 40. Indeed, Reinhardt contends that the ShotPops concept "never got off the ground," and soon became a "dead issue." *Id.* She further contends that, in any event, the ShotPop concept differed from any products offered by ABCO and would thus not have competed in ABCO's market. *Id.* ¶ 41.

Notably, while Plaintiff argues in its papers that Reinhardt's behavior was "materially injurious to ABCO's business and reputation," (Pl. Mov. Br. at 18), and that Reinhardt "knew ABCO did not want to damage its brand by developing ShotPops," (Pl. Mov. Br. at 19), the record is devoid of evidence showing damage actually caused by ShotPops' development—or that ShotPops was anything other than a "dead issue" soon

after Reinhardt began pursuing the concept in the first place. *See* Reinhardt Aff. ¶¶ 40-43. Upon review, the record thus shows undisputed evidence that Plaintiff suffered no material damages from Reinhardt's development of ShotPops.

Accordingly, the Court grants summary judgment in favor of Defendant on this issue. *See Scalisi v. N.Y. Univ. Med. Ctr.*, 24 A.D.3d at 146. Count Two is therefore dismissed to the extent it alleges Defendant's breach of the Employment Agreement.

2. *The Defendant's Alleged Breach of the Confidantiality Provision of the Reorganization Agreement*

Defendant similarly argues that Plaintiff failed to present any evidence of damages resulting from the alleged breach of the Reorganization Agreement's confidentiality provision. Def. Mov. Br. at 20-21.

In opposition, Plaintiff presents evidence of the breach itself by attaching Defendant's complaint in the California action, and states that the complaint in fact disclosed details of the reorganization protected by the parties Reorganization Agreement. *See* Kierych Aff. Ex. G. However, as Defendant argues, Plaintiff presents no evidence of damages suffered as a result of the California filing.

Accordingly, summary judgment on this issue is granted in favor of Defendant. *See Scalisi v. N.Y. Univ. Med. Ctr.*, 24 A.D.3d at 146. Count Two is therefore dismissed to the extent it alleges Defendant's breach of the Reorganization Agreement.

3. *Defendant Reinhardt's Counterclaim for Plaintiff's breach of the employment agreement*

Defendant Reinhardt argues that she is entitled to summary judgment on her counterclaim for breach of contract because Plaintiff ABCO's actions leading up to Reinhardt's April 2012 cessation of work constituted "constructive termination" in violation of the "for cause" provision of the employment contract. Def. Mov. Br. at 17-19. Specifically, Defendant alleges that ABCO presented her with "two non-negotiable options: (1) to execute the Amended Agreement [cutting her pay from $250,000 per year to $70,000 per year]; or (2) she would be terminated." Counterclaim ¶ 10. Defendant argues that ABCO unfairly sought to cut her pay while simultaneously increasing her job responsibilities as a pretext to force her out without showing the necessary "cause" for termination.

Plaintiff responds that, because Defendant stopped working voluntarily before she could be fired, the doctrine of constructive discharge does not apply. In the alternative, Plaintiff argues that the "ultimatum" was not a pretext for subsequent discharge—both the "ultimatum" and the subsequent discharge were justified by Plaintiff's own poor performance and independent violations of the employment agreement. According to Plaintiff, these breaches absolve it of liability for constructive discharge.

An employee may make a *prima facie* showing of constructive discharge by presenting evidence that the employer made working conditions "so intolerable, difficult, or unpleasant that a reasonable person would have felt compelled to resign." *Gold Coast*

Rest. Corp. v. Gibson, 67 A.D.3d 798, 799 (2nd Dep't 2009). On the other hand, an individual who resigns *without* showing "intolerable, difficult, or unpleasant" working conditions, even in the face of inevitable termination, has not been constructively terminated. *See People ex rel. Spitzer v. Grasso*, 54 A.D.3d 180, 234 (1st Dep't 2008). Thus, an employee's resignation after refusing to perform a reasonable assignment has been held to constitute a voluntary leaving of employment without good cause. *Claim of Valentino*, 244 A.D.2d 642, 642 (3rd Dep't 1997).

Furthermore, it is well settled that if facts existed at the time of termination which would justify a termination "for cause," such termination is justified regardless of whether the justifying facts were discovered after the discharge, or some other cause was assigned. *Metchick v. Bidermann Indus. Corp.*, No. 91 CIV. 2329, 1993 WL 106139, at *2 (S.D.N.Y. 1993) (applying New York law); *see also Rockland Exposition, Inc. v. All. of Auto. Serv. Providers of New Jersey*, 894 F. Supp. 2d 288, 342 n.49 (S.D.N.Y. 2012), *as amended* (Sept. 19, 2012) (applying New York law) ("When a party terminates a contract with an express "for cause" termination provision, evidence discovered after the alleged breach can be used by the breaching party to justify its termination.").

In support of Defendant's argument that the salary-decrease was a pretext for improper discharge, Defendant points to (a) the substantial size of the pay decrease, an increase in job responsibilities, (Reinhardt Aff. Ex. 2); (b) Plaintiff's contemporaneous removal of Defendant's workplace; (c) Defendant's initial positive performance reviews;

and (d) the suspicious timing between the degrading performance reviews and decrease in Plaintiff's payroll capacity, (Reinhardt Aff. Exs. 11-15). *See* Def. Mov. Br. at 17-19.

Defendant argues that these changes in her pay, responsibilities, and workplace support her claim for breach under the First Department case *Hondares v. TSS-Seedman's Stores, Inc.*, which held that "if an employee is under contract to fill a particular position, any material change in his duties or significant reduction in rank may be treated by the employee as a breach of the contract." 151 A.D.2d 411, 413 (1st Dep't 1989). However, *Hondares* is distinguishable from the case at bar because here, Defendant was not under contract to fulfil a "particular position." Rather, Defendant's employment contract provided Defendant with "such responsibilities and duties with respect to the business of the Company as may be determined and assigned to you from time to time by or upon the authority of the Board of Managers." Steffanci Aff., Ex. J. As Plaintiff argues, this provision on its face provides Plaintiff with discretion to set and change Defendant's responsibilities, and does not explicitly prohibit unilateral "material changes" to Defendant's duties or responsibilities.

Defendant presents no evidence or argument that the "material changes" addressed above altered any duties, responsibilities, or rights expressly provided by the Employment Agreement, as the plaintiff showed in *Hondares*. Accordingly, the Court concludes that Plaintiff's factual allegations regarding change in pay, responsibilities, and workplace fail to establish a breach of the "for cause" discharge provision of the employment contract.

Similarly, the Court concludes that the allegedly suspicious timing of Plaintiff's poor performance reviews fails to raise an issue of material fact as to whether Reinhardt was "constructively discharged" prior to her April 2012 cessation of work, or whether Plaintiff had good cause to actually discharge her. This is because Plaintiff does not rely on the poor performance reviews to justify Reinhardt's discharge in the first place. Rather, Plaintiff points to evidence of Reinhardt's violation of other contractual provisions—including the non-solicitation provision, as discussed above. *See* Def. Mov. Br. at 19-21.

Notably, Reinhardt does not dispute that she actually solicited the business of certain entities in the course of her work on ShotPops, knowing Plaintiff's aversion to the product. *See* Reinhardt Aff. ¶ 44.

While the Court dismissed Plaintiff's claim for breach of the non-solicitation provision for lack of "damages" evidence, such damages evidence is not a prerequisite to show "good cause" for a discharge premised on breach of that same provision. *See* Steffanci Aff. Ex. J at ¶ 11 (providing that Reinhardt may be terminated for "cause" and defining "cause" as, *inter alia*, violation of the non-solicitation agreement). Thus, Plaintiff's uncontroverted evidence that Reinhardt independently solicited the business of the three prohibited entities—Lee Reedy, TDC, and Flow Media—sufficiently shows "good cause" for Defendant's discharge.

Based on the foregoing analysis, the Court concludes that Defendant's cessation of work in April of 2012 was not justified by any prior actions of Plaintiff. *See People ex rel. Spitzer*, 54 A.D.3d at 234. The Court further concludes that, in any event, Plaintiff would

have been justified in discharging Defendant "for cause" in May due to her subsequently discovered violation of the Employment Agreement's non-solicitation provision. *See Rockland Exposition, Inc. v. All. of Auto. Serv. Providers of New Jersey*, 894 F. Supp. 2d 288, 342 n.49 (S.D.N.Y. 2012), *as amended* (Sept. 19, 2012) (applying New York law) ("When a party terminates a contract with an express "for cause" termination provision, evidence discovered after the alleged breach can be used by the breaching party to justify its termination.").

Accordingly, the Court grants summary judgment in favor of Plaintiff on this issue. Defendant's First Counterclaim for Plaintiff's breach of the Employment Agreement is therefore dismissed.

E. Defendant's Motion to Dismiss Remaining Claims

1. *Declaratory Judgment*

Defendant Reinhardt argues that she is entitled to summary judgment on Plaintiff's claim seeking a declaratory judgment precluding Defendant from making certain arguments in this case and the related action in California federal court. In support, Defendant argues that the claim should be dismissed on the ground of forum non-conveniens because Plaintiff ABCO "did not sign the Reorganization Agreement." Def. Mov. Br. at 21. Defendant cites no legal support for its argument, and the Court's own review is able to discern no such support. Indeed, Plaintiff ABCO cites evidence that it is, in fact, a party to the Reorganization Agreement. *See* Kudla Aff. ¶ 24 (attesting that ABCO

"was previously known as Quik LLC"); Dembia Aff. Ex. 11, Term Sheet (showing that Quick LLC signed the Reorganization Agreement).[10] Summary Judgment on Plaintiff's declaratory judgment claim is therefore denied.

2. *Attorneys' Fees*

Defendants seek summary judgment on the Complaint's claim for attorney's fees on several grounds. First, Defendants argue that Plaintiff is not a party to the Reorganization Agreement under which attorney's fees are sought. And second, Defendants argue that Plaintiff has failed to provides the particulars of its attorneys' fees claim. Upon review, the Court concludes that neither argument has merit.

Defendants' first argument fails because, as discussed above, evidence shows that ABCO was in fact a party to the reorganization agreement. Defendants' second argument fails because Plaintiff need not establish a specific amount of attorneys' fees for its claim to survive summary judgment. *Gorgone v. Regency Agency, Inc.*, 238 A.D.2d 265, 267 (1st Dep't 1997). Indeed, on Defendant's prior motion to compel production of documents regarding Plaintiff's claim for attorneys' fees, the Court ruled that "those documents can be provided at the conclusion of trial and only if plaintiff ultimately prevails on its claim

[10] Notably, Defendant presents an affidavit signed by Robert Dembia, Defendant's attorney, attesting to the fact that ABCO was *not* a party to the Reorganization Agreement. *See* Dembia Aff. ¶ 40. However, this "attorney affirmation" does not purport to be based on personal knowledge, and is thus of no evidentiary significance on the instant motion. *See Warrington v. Ryder Truck Rental, Inc.*, 35 A.D.3d 455, 456 (2nd Dep't 2006).

for attorneys' fees." Kierych Aff., Ex. F at 24:23-25:2. Accordingly, summary judgment on Plaintiff's claim for attorneys' fees is denied.

3. *Breach of the Implied Covenant of Good Faith and Fair Dealing and Gross Negligence*

Defendants argue that Plaintiff's claim for breach of the implied covenant of good faith and fair dealing must be dismissed as duplicative of Plaintiff's breach of contract claims. Def. Mov. Br. at 21. Plaintiff responds that its claim for breach of the implied covenant of good faith and fair dealing is properly pled because, while it is derived from the parties' contract, it is premised on actions separate from those underlying the breach of contract claims. Pl. Opp. Br. at 18.

It is well settled that all contracts imply a covenant of good faith and fair dealing in the course of performance. *Forman v. Guardian Life Ins. Co. of Am.*, 76 A.D.3d 886, 888 (1st Dep't 2010). "This covenant embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* Where a plaintiff alleges breach of contract, breach of the implied covenant of good faith and fair dealing is properly pled "only if it is based on allegations different than those underlying the accompanying breach of contract claim." *ARI & Co. v. Regent Int'l Corp.*, 273 F. Supp. 2d 518, 522 (S.D.N.Y. 2003) (applying New York law). Similarly, a claim for breach of contract will not preclude recovery in tort

where losses are the result of gross negligence. *Gold Connection Disc. Jewelers, Inc. v. Am. Dist. Tel. Co.*, 212 A.D.2d 577, 578 (2nd Dep't 1995).

As discussed above, Plaintiff's claims for breach of contract are premised on Old ABCO's failure to repay monies owed on the Repayment Note and Quality Control Invoice, as well as Reinhardt's breach of several provisions of her employment agreement. *See* Compl. at Counts Two, Five, and Six. On the other hand, Plaintiff's claims for gross negligence and breach of the implied covenant of good faith and fair dealing are premised on Reinhardt and Kudla's alleged attempts to frustrate Old ABCO's ability to repay the monies owed on the Repayment Note and Quality Control invoice by withdrawing money from Old ABCO's bank accounts prior satisfaction of those debts. *See* Compl. at Counts Three and Four.

Based on this review, the Court concludes that Plaintiff's claims for gross negligence and breach of the implied covenant of good faith and fair dealing are properly pled because they are premised on facts independent of Plaintiff's claims for breach of contract. *See ARI & Co.*, 273 F. Supp. 2d at 522.

4. *Unjust Enrichment*

Defendants move for summary judgment on Plaintiff's two unjust enrichment claims (Counts Ten and Eleven) on the grounds that the evidence shows that the Defendants did not benefit from the $174,746.88 received pursuant to the Repayment Note, or the recall of $134,418.11 due to the quality control issues. Def. Mov. Br. at 23.

However, this argument lacks merit because, as the Court found above, those amounts remain due and owing from Defendant Old ABCO to Plaintiff ABCO on the Repayment Note and Quality Control Invoice. *See* Sections III.A and III.B, *supra*. Regarding the Repayment Note, Old ABCO owes $174,746.88 to repay a wire transfer in that amount received from Deutsch on July 26, 2011. *See* Section III.A, *supra*. Regarding the Quality Control Invoice, Old ABCO owes $134,418.11 for expenses incurred by Plaintiff ABCO in recalling bad product. *See* Section III.B, *supra*. Defendants' retention of the money owed on these debt instruments constitutes a "benefit" for the purposes of unjust enrichment. *See Elec. Ins. Co. v. Travelers Ins. Co.*, 124 A.D.2d 431, 432 (3rd Dep't 1986) ("For the purposes of unjust enrichment, a person receives a benefit where . . . he is saved an expense or loss."). Accordingly, Defendant's motion for summary judgment on Counts Ten and Eleven is denied.

F. The Parties' Cross-Motions for Sanctions

Defendants move for sanctions under 22 NYCRR 130-1.1 based on "material factual statements that are false" allegedly made by Plaintiff in support of its summary judgment motion. Def. Mov. Br. at 16-17. Specifically, Defendants argue that Plaintiff improperly backdated Invoice 1045 to create an inference that it was received by Defendants in December 2011, rather than April 2012, thereby increasing its evidentiary significance. Def. Opp. Br. at 4-5.

Plaintiff separately moves for sanctions against Defendants, arguing that Defendants' motion for summary judgment, as well as their request for sanctions, were themselves frivolous. Pl. Reply Br. at 13-14. Plaintiff also argues that Defendants' papers contain numerous "material factual statements that are false." *Id.*

Uniform Rule 130-1.1 states in relevant part: "the court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." 22 NYCRR § 130-1.1(a). According to the rule, conduct is frivolous if it is "completely without merit in law," "undertaken primarily to delay or prolong the resolution of the litigation," or "asserts material factual statements that are false." *Id.* at § 130-1.1(c).

Where a party seeks sanctions for acts undertaken to delay or prolong the litigation, such sanctions will only be granted on a showing of the "wanton and willful nature of counsel's actions." *Ortiz v. Weaver*, 191 A.D.2d 158, 159 (1st Dep't 1993).

Regarding Defendants' argument that Invoice 1045 was backdated to appear that it was issued in December 2011, the Court notes that Plaintiff addressed this issue in its reply, indicating that any such assertion was unintended and that the face of the Invoice shows that it was in fact sent on April 16, 2012. The Court concludes any error made by Plaintiff regarding the timing of Invoice 1045 was made in good faith and eventually corrected, allowing the Court to consider the Invoice's evidentiary significance in the proper context. *See Tso-Horiuchi v. Horiuchi*, 122 A.D.3d 918, 918 (2nd Dep't 2014) ("To avoid sanctions,

at the least, the conduct must have a good faith basis."). Because of this, the Court declines to use its discretion to sanction Plaintiff on these grounds.

The Court similarly declines to issue sanctions on Defendants. Defendants had a good faith basis in taking issue with Plaintiff's position that Invoice 1045 was delivered to Defendants in December 2011—despite the fact that Plaintiff clarified in its reply papers that Invoice 1045 was not sent until April 2011, at the earliest. And furthermore, while the breadth of Defendants' motion for summary judgment undoubtedly led Plaintiff to incur additional costs to defend, the Court concludes that decision to file such a broad motion was a strategic decision premised on sufficiently non-frivolous evidentiary support. *See* 22 NYCRR § 130-1.1(a).

Accordingly, the parties' cross-motions for sanctions are denied.

G. Defendants' Motion to Amend the Answer

Defendants move to amend the answer to assert the affirmative defenses of setoff and standing. Def. Mov. Br. at 16.

"A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." CPLR 3025(b). In considering a motion to amend under CPLR 3025(b), "leave shall be freely given upon such terms as may be just including the granting of costs and continuances." *Id.*; *see also Healthcare I.Q., LLC v. Chao*, 2011 WL 10961725 at *3 (Sup. Ct. N.Y. Cty. 2011). However, Courts will deny a motion to amend where such

amendments are "palpably insufficient" or "futile." *Healthcare I.Q.*, 2011 WL 10961725 at *3; *Taormina Sales Co., Inc. v. Gannon*, 2011 WL 2669322 at *1 (N.Y.Sup.).

Here, the Court concludes that the assertion of both affirmative defenses would be futile. Defendants are precluded from asserting a setoff defense by the plain language of the Repayment Note, which required satisfaction "in lawful money of the United States of America," *without resort to any "offset, defense, counterclaim, or adjustment."* *See* NYSCFEF No. 886, Repayment Note (emphasis added); *The Bank of New York Mellon v. Cobblestone Estates, Inc.*, 2009 WL 2626454 (barring defendant from asserting defenses and counterclaims in answer where specifically prohibited in the parties' agreement). And furthermore, Defendants' assertion of a standing defense would be futile, as the Court concluded above that Plaintiff did indeed have standing to sue on the Repayment Note. See Section III.A, *supra*. Accordingly, Defendants' motion to amend the Answer is denied.

IV. CONCLUSION

For the foregoing reasons, the parties' motions for summary judgment are granted in part and denied in part. The parties' cross-motions for sanctions are denied, and Defendant's motion to amend the Answer is denied.

Accordingly, it is

ORDERED that summary judgment is granted in favor of Plaintiff on the Repayment Note causes of action and the Quality Control Issue causes of action; and it is further

ORDERED that Defendants' First Counterclaim for breach of the Employment Agreement is dismissed; and it is further

ORDERED that Count Two of the Amended Complaint is dismissed; and it is further

ORDERED that the parties' cross-motions for sanctions are denied; and it is further

ORDERED that Defendant's motion to amend the answer is denied.

Dated: ~~March~~ April 12, 2017
New York, New York

ENTER

Eileen Bransten

Hon. Eileen Bransten, J.S.C.