

<b>Mutual Benefits Offshore Fund v Zeltser</b>
2018 NY Slip Op 30097(U)
January 16, 2018
Supreme Court, New York County
Docket Number: 650438/2009
Judge: Marcy Friedman
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK - PART 60

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MUTUAL BENEFITS OFFSHORE FUND,

Plaintiff,

Index No. 650438/2009

Against

EMANUEL ZELTSEER, MARK ZELTSEER, STERNIK &  
ZELTSEER, M.E. SELTSEER P.C., ALEXANDER FISHKIN,  
INTEREL CORPORATION, and JOSEPH KAY,

DECISION/ORDER

Defendants.

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FRIEDMAN, J.

Plaintiff Mutual Benefits Offshore Fund (MBOF or plaintiff) brought this action to recover approximately \$4.3 million allegedly wrongfully retained by defendants Emanuel Zeltser, Esq. (Emanuel), Sternik & Zeltser (S&Z), Alexander Fishkin, Esq. (Fishkin), M.E. Seltser P.C. (M.E. Seltser), Mark Zeltser (Mark), Interel Corporation (Interel), and Joseph Kay (Kay).<sup>1</sup>

MBOF moves (motion sequence 16), pursuant to CPLR 3212, for summary judgment against the Zeltser Parties, the Interel Parties, and Fishkin on its third cause of action (for conversion); against the Zeltser Parties and Fishkin on its sixth cause of action (for breach of fiduciary duty); and against Emanuel Zeltser, Fishkin, and Interel on its seventh cause of action (for unjust enrichment). (See Pl.'s Notice of Motion; Pl.'s Memo. In Supp., at 10, 15.)

All defendants move (motion sequence 17),<sup>2</sup> also pursuant to CPLR 3212, for summary

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<sup>1</sup> Emanuel Zeltser and S&Z will be referred to collectively as the Zeltser Parties. Mark Zeltser and Interel will be referred to collectively as the Interel Parties. Emanuel Zeltser and Mark Zeltser are periodically referred to in this decision by their first names, not out of disrespect but in the interest of clarity.

<sup>2</sup> Defendants' original notice of motion (NYSCEF No. 483) indicated that the S&Z law firm was appearing on behalf of itself, Emanuel Zeltser and M.E. Seltser, and that Bruce D. Katz & Associates was representing Mark Zeltser, Joseph Kay, Fishkin and Interel. At oral argument, however, it was resolved that S&Z was representing itself, Emanuel Zeltser, M.E. Seltser and Kay, that Morrison Cohen LLP was representing Mark Zeltser and Interel,

judgment dismissing all of the causes of action remaining in the complaint—i.e., the second cause of action (for common law fraud), the third cause of action (for conversion), the sixth cause of action (for breach of fiduciary duty), the seventh cause of action (for unjust enrichment), and the eighth cause of action (for a permanent injunction).<sup>3</sup>

MBOF also moves (motion sequence 19) to vacate a so-ordered stipulation, dated April 20, 2010 (the Escrow Stipulation), which required the parties to maintain a joint escrow account for the purposes of holding the proceeds of certain matured insurance policies and paying premiums on other policies. (See Escrow Stip., ¶ 6 [NYSCEF No. 138].)

### BACKGROUND

This action is a part of a global dispute over the assets and affairs of Arkadi Patarkatsishvili (Badri), a deceased businessman and politician from the Republic of Georgia. In addition to the instant action, two other actions related to the global dispute are or have been pending before this Court: Little Rest Twelve, Inc. v Visan (Sup Ct, NY County, Index No. 600676/2007) (the Visan Action), and Little Rest Twelve, Inc. v Zajic (Sup Ct, NY County, Index No. 650209/2010) (the Little Rest Action) (together with the instant action and the Visan Action, the Related Actions). By decision and order of this same date, this court has determined summary judgment motions in the Little Rest Action (the Little Rest Decision). The Visan Action was discontinued in 2015.

As the court finds that defendants' arguments regarding a critical issue in this action—the

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that Fishkin was appearing pro se, and that Heller Horowitz & Feit was representing non-party Kayley Investments N.V. (Oral Arg. Tr., 9-13.)

<sup>3</sup> As detailed later in this decision, the first cause of action (for common law fraud), fourth cause of action (for breach of a legal services agreement), and fifth cause of action (for breach of an escrow agreement) were dismissed by decision and order of this Court (Fried, J.) dated September 7, 2011. (infra, at 9-11.) The September 7 decision and order was subsequently amended on other grounds. (Order, dated Sept. 22, 2011 [NYSCEF No. 265].)

ownership and control of plaintiff MBOF and its assets—are foreclosed by collateral estoppel, a review of the broader litigation history is required. Where possible, reference will be made to the Little Rest Decision on issues common to the two actions. In addition, reference will be made to the following decisions arising from related bankruptcy proceedings in the Southern District of Florida (the Bankruptcy Proceedings): Matter of Mutual Benefit Offshore Fund, Ltd., 2012 WL 3764032 (SD Fla Bankr Ct, Aug. 29, 2012, No. 11-17051) (MBOF Bankr. I); Findings Of Fact & Conclusions Of Law On Ownership, dated Apr. 25, 2013 (SD Fla Bankr Ct, No. 11-17051) (NYSCEF No. 509) (MBOF Bankr. II); and Matter of Mutual Benefit Offshore Fund, Ltd., 508 BR 762 (SD Fla, Mar. 19, 2014) (MBOF Bankr. III), affd Matter of Fisher Island Investments, Inc., 778 F3d 1172 (11th Cir 2015) (Bankr. App.).

A. THE PLEADINGS/PROCEDURAL HISTORY

1. The Complaint

Plaintiff commenced this action by filing a summons and complaint on July 21, 2009. (NYSCEF No. 2.) The complaint alleges that MBOF is a fund regulated by the Financial Services Commission in the British Virgin Islands, formed “to invest in the death benefits of United States based life insurance policies.” (Compl., ¶ 2.) MBOF raised approximately \$23 million from investors upon its formation. “Plaintiff’s largest investor was Test Trust, through its wholly owned investment company Kayley Investments NV (‘Kayley’). Kayley invested \$15 million in Plaintiff.” (Id., ¶ 15.) MBOF’s second largest investor was Swiss investment management company, Investarit, which invested \$5.5 million. Approximately twenty smaller investors contributed the remaining \$2.5 million. (Id.)

MBOF invested all of its approximately \$23 million in funds in U.S. death benefit

policies purchased from non-party Mutual Benefits Corporation (MBC). (Id., ¶ 16.) In or about May 2004, MBC was placed into receivership by the SEC for allegedly manipulating life expectancy data on death benefit policies. (Id., ¶ 17.) At the time, approximately \$3.5 billion in client funds were invested in MBC. (Id.)

In 2006, MBOF retained the law firm Tannenbaum Helpert Syracuse & Hirschtritt LLP (Tannenbaum) to represent it in connection with the MBC receivership. Tannenbaum was not successful in securing payment from MBC's receiver (the Receiver). (Id., ¶ 18.) On or about November 12, 2006, defendant Joseph Kay, one of two trustees of the Test Trust, suggested to MBOF that it replace Tannenbaum with Emanuel Zeltser and his law firm, S&Z. (Id., ¶ 19.) MBOF pleads that Kay "had a longstanding and close relationship" with the Zeltser Parties, who had represented Kay in the past (id.), and that Kay lobbied for their retention because "he knew he could control them to act for his personal benefit rather than that of Plaintiff." (Id.) On or about December 6, 2006, MBOF passed a corporate resolution appointing S&Z as its counsel in the MBC receivership matter. (Id., ¶ 20.)

The Zeltser Parties successfully recovered \$1.1 million from the MBC Receiver. According to the complaint, they represented to MBOF that the Receiver had agreed to place the funds into a special escrow account controlled by Emanuel Zeltser. (Id., ¶ 22.) They explained to MBOF "that there were certain withholding tax issues that made it necessary to put the money into a special escrow account rather than distribute it directly to Plaintiff," and represented that "the money would be distributed to Plaintiff once these withholding tax issues were resolved." (Id., ¶ 23.) Based on these representations, MBOF did not demand that the Zeltser Parties turn over the funds, but rather allowed them "to continue to collect additional funds from the [MBC]

receiver” and deposit them into the account. (Id.) However, MBOF allegedly subsequently learned that there were no withholding tax issues. (Id.)

In or about March 2008, Emanuel Zeltser was arrested in Belarus and imprisoned until June 2009. (Id., ¶ 26.) Defendant Fishkin, who had previously been affiliated with Emanuel Zeltser’s law practice, took over representation of MBOF in connection with the MBC receivership. (Id., ¶ 27.) Upon learning of Emanuel’s arrest, MBOF immediately demanded payment of the funds in the lawyer’s escrow account. (Id., ¶ 28.) In November 2008, MBOF sought information regarding the funds. Fishkin first informed MBOF “that the only person authorized as a signatory on the special escrow account was [Emanuel] Zeltser” (id., ¶ 29), but later informed MBOF that defendant Mark Zeltser, Emanuel’s brother, had sole signatory authority over Emanuel’s various accounts, including the account holding MBOF’s funds. (Id., ¶ 30.)

Plaintiff requested a meeting with Mark Zeltser and Fishkin. Mark insisted that the meeting be delayed until January 2009, claiming that he was busy securing his brother’s release from prison. (Id., ¶ 31.) Around the same time, Fishkin informed MBOF that Mark Zeltser “had an understanding with [defendant Joseph] Kay on the special escrow account.” (Id., ¶ 32.) Plaintiff responded that “Kay had no authority with respect to Plaintiff’s special escrow account since the funds therein were the sole property of Plaintiff.” (Id.) On January 29, 2009, MBOF finally met with Fishkin and Mark. The complaint pleads that Mark refused to reveal details about the account, and “represented that only Kay was authorized to instruct him with respect to the . . . account[.]” (Id., ¶ 33.) He also allegedly denied that he had withdrawn any money from the account. (Id.) MBOF disputed Kay’s authority, showing Mark Zeltser, among other things,

a copy of the corporate resolution appointing S&Z as MBOF's representative in the MBC receivership matter. Mark nevertheless stated that he would give MBOF information about the account only upon Kay's authorization. (Id., ¶¶ 39-40.)

Following discussions with attorneys for Kay and the MBC Receiver, MBOF allegedly learned that the funds were not being maintained in the escrow account. The Receiver's attorney, Curtis Miner, Esq., provided documentation that the Receiver had transferred a total of \$4.3 million in funds by wire or bank check into accounts at JP Morgan Chase in the name of M.E. Seltser rather than in the name of S&Z. Neither Emanuel Zeltser nor S&Z had ever disclosed the name M.E. Seltser to MBOF, and M.E. Seltser had never been authorized by MBOF to hold the funds. (Id., ¶¶ 34-38, 42.) MBOF commenced an investigation and allegedly discovered that Mark Zeltser had withdrawn all of the funds from the M.E. Seltser accounts on or about June 28, 2008, and deposited them into an account or accounts in the name of defendant Interel. (Id., ¶¶ 44-45.) According to the complaint, Fishkin received \$100,000 of the funds deposited into the Interel account(s), and only \$10,000 of the original \$4.3 million remains in the account(s). (Id., ¶¶ 45-46.)

## 2. The Counterclaims / Order Dismissing the Counterclaims

On August 21, 2009, defendant S&Z—purportedly “as Trustee for the assets of Kayley Investments, Ltd,” MBOF's largest investor (see supra, at 3)—and defendant Joseph Kay filed Verified Counterclaims against MBOF and a number of “counterclaim-defendants” not parties to the original lawsuit. (NYSCEF No. 27.) The Counterclaims alleged that Kayley “was” (at some unspecified time) owned by Georgian investor Badri Patarkatsishvili, an alleged long-time client of S&Z and Emanuel Zeltser, and a cousin and business partner of Joseph Kay. (Countercls., ¶¶

2, 12-13.)

According to S&Z and Kay, MBOF was a mere “offshore appendage” of MBC, “acted as its offshore hand-puppet and alter ego, and participated in MBC’s and its principals’ frauds upon investors, including Kayley.” (Id., ¶ 30.) The Counterclaims pleaded that representatives of MBOF and MBC, including Christopher Samuelson and MBOF President W. Shaun Davis, made false representations to Kay and Badri to induce them to invest Kayley’s \$15 million in MBOF, which Samuelson and Davis then “re-invested” in their “related” company, MBC. (Id., ¶¶ 3, 36-39.) After MBC was placed into receivership, Kayley’s counsel threatened MBOF’s principals with litigation. Fearing that such action might trigger their criminal prosecution, MBOF’s principals allegedly “agreed to relinquish control over MBOF to Kayley and Badri and their attorneys, until Kayley’s and Badri’s investment [] fully recovered, and further agreed to cooperate with Kayley, Badri, and Joseph Kay and their attorneys in every respect in order to recover Kayley’s and Badri’s investment.” (Id., ¶¶ 43-45.) Badri then allegedly transferred “all Kayley’s assets pertaining to its investment in MBOF . . . in trust to [S&Z] as the Trustee.” (Id., ¶ 2.)

However, on February 12, 2009, while Emanuel Zeltser was imprisoned in Belarus, Samuelson and Davis allegedly “purported to revoke [S&Z’s] authority as escrow agent for the funds recovered by [S&Z],” and appointed Samuelson and his partner Kurt Gubler as “escrow agents.” (Id., ¶ 47.) The counterclaims pleaded that this underlying action was commenced by Samuelson to “re-embezzle” the funds rightfully belonging to Kayley. (Id., ¶ 45.) Based on these allegations, the counterclaims pleaded causes of action for fraud, conversion, unjust enrichment, constructive trust, and a permanent injunction.

By decision and order dated November 1, 2010 (the Counterclaim Decision) (NYSCEF No. 188), this Court (Fried, J., whose docket the undersigned subsequently assumed) granted a motion by MBOF to dismiss the counterclaims. The court rejected S&Z's assertion that it had pleaded valid counterclaims "as trustee of an investment in MBOF that belonged or belongs to Badri." (Counterclaim Decision, at 3.) The Court noted that Badri was not a party to the case and was deceased, and S&Z had not represented that it was counsel to Badri's estate. The Court also dismissed S&Z's counterclaims "insofar as they [were] brought by S&Z as a trustee or representative of Kayley." (*Id.*) The Court reasoned that Kayley, like Badri, was not a party, and held that S&Z could not assert a counterclaim as a trustee of a "beneficially interested non-party" as it had been sued by MBOF in its own right. (*Id.*) The Court dismissed Joseph Kay's counterclaims based on Kay's failure to allege that he was authorized to bring a claim on behalf of Kayley or had a legal or equitable interest in the company. Moreover, Kayley was not a party and had never sought permission to intervene. (*Id.*)

The First Department affirmed the Counterclaim Decision on March 15, 2012. (Mutual Benefits Offshore Fund v Zeltser, 93 AD3d 504 [1st Dept 2012].) The Court held that S&Z "lacks standing to assert a counterclaim in its separate capacity as a purported trustee or representative of an entity that is not a party to the action" and that "Kay lacks standing to assert a counterclaim because the record does not support his allegation that he has an ownership interest in plaintiff's investment or that he otherwise has a stake in the outcome of the dispute over the funds at issue." (*Id.*, at 505.)

### 3. The Motion to Disqualify the Zeltser Parties

By separate decision and order, also dated November 1, 2010 (the Disqualification

Decision) (NYSCEF No. 188), the Court (Fried, J.) granted MBOF's motion to disqualify the Zeltser Parties as counsel for the counterclaim plaintiffs—i.e., Joseph Kay and S&Z in its purported capacity as Trustee for the assets of Kayley. The Court found that a conflict of interest existed based on the fact that S&Z, through Emanuel Zeltser, had on December 22, 2006 filed a notice of appearance on behalf of plaintiff MBOF in the SEC proceeding, and had received funds payable to “Mutual Benefits Offshore Fund, Emanuel E. Zeltser” from the Receiver as escrow agent. (Disqualification Decision, at 2-3.) In so holding, the Court rejected the Zeltser Parties' argument that they had not acted as counsel for MBOF in the SEC proceeding, but had merely engaged in “a ‘nominal’ representation ‘incidental’ to their true objective: to recover Kay and Badri's investment in MBOF.” (*Id.*, at 3.) The Court stated that its decision did not address whether the Zeltser Parties might interpose counterclaims on their own behalf. (*Id.*, at 4.)

#### 4. The Motion to Dismiss the Complaint

By decision and order dated September 7, 2011 (Mutual Benefits Offshore Fund v Zeltser, 2011 WL 4031516 [Sup Ct, NY County 2011]) (the Dismissal Decision), the Court (Fried, J.) granted, in part, a motion by Fishkin and the Zeltser Parties to dismiss the complaint, and dismissed the first cause of action (for common law fraud) and the fourth and fifth causes of action (each for breach of contract).

In the Dismissal Decision, the Court rejected the movants' argument that the action should be dismissed in its entirety based on their allegation that “MBOF's principals agreed in late 2006 to relinquish administrative control over MBOF to Kay and . . . Badri . . . , and not to take any corporate action without their approval, in exchange for a promise by ‘S&Z and its clients’ not to sue MBOF's principals or MBOF.” (2011 WL 4031516, at \* 3.) The Court held

that, “[e]ven if movants had articulated the parties to and the material terms of this alleged agreement, and assuming that the agreement as alleged would be enforceable, its existence [w]as a question of fact . . . .” (*Id.*) Factual issues also precluded dismissal based on movants’ assertion that Christopher Samuelson, who commenced this action on behalf of MBOF as its alleged escrow agent, “was not duly appointed as an escrow agent of MBOF or has conflicts of interest that disqualify him from serving as MBOF’s escrow agent.” (*Id.*, at \* 4.)

The Court also held that MBOF was entitled to pursue damages notwithstanding movants’ allegation that MBOF’s investors, and not MBOF itself, were the rightful owners of the \$4.3 million in recovered funds. The court agreed with MBOF’s argument that the company was a legal entity independent of the investors and had a right to recover the funds disbursed by the Receiver for its benefit, even if by contract the funds ultimately would be distributed to MBOF’s investors. (*Id.*, at \* 4-5.)

The Court sustained the conversion claim, holding that movants’ assertion that MBOF was not a “bona fide functioning business” merely raised another issue of fact. (*Id.*, at \* 5.) With respect to the two causes of action for fraud, although the Court dismissed the first as conclusory, the Court held that the second cause of action sufficiently alleged a misrepresentation by the Zeltser Parties that the recovered funds were being held in escrow for tax withholding purposes, and was not duplicative of the breach of contract claims. (*Id.*, at \* 6.) The Court also held that the complaint adequately pleaded the element of justifiable reliance, despite movants’ allegation that MBOF knew that its attorneys were acting on behalf of Badri and Kay. The Court reasoned that, even if MBOF had consented to a conflict of interest on the part of the Zeltser Parties, movants failed to cite authority that a client involved in a dual

representation cannot justifiably rely on statements and assurances given by its attorney of record. (*Id.*, at \* 6-7.)

The Court held that the fourth and fifth causes of action, which pleaded breaches of alleged agreements by the Zeltser Parties to serve as MBOF's attorneys and escrow agents, failed to plead consideration from or performance by MBOF. The Court accordingly dismissed those causes of action. (*See id.*, at \* 7-8.)

The Court rejected movants' argument that MBOF was required to "implead" Kayley because the complaint "'implied'" that Kayley was the "'actual equitable owner'" of the recovered funds, making Kayley a necessary party. The Court reasoned that no implication of ownership could be drawn from the pleading. (*Id.*, at \* 8.)

With respect to the unjust enrichment claim, the Court held that the complaint sufficiently pleaded that defendants were enriched by their receipt and retention of the recovered funds, again notwithstanding movants' claim that the funds belonged to investors. (*Id.*) The Court also held that movants' argument that the funds were no longer in their possession, having been disbursed "pursuant to the authority of S&Z's clients Kayley, Badri, and Kay," raised questions of fact that could not be resolved on a motion to dismiss. (*Id.*)

Finally, the court upheld the permanent injunction cause of action. (*Id.*, at \* 9.)

##### 5. The Motion to Intervene

On November 7, 2011—more than two years after the commencement of this action, and ten days before the Note of Issue was due to be filed— Kayley and the "Imedinvest Trust" (Imedinvest) moved to intervene. According to the proposed intervenors, Kayley was the holding company of MBOF, and Imedinvest owned both MBOF and Kayley. Their proposed

complaint sought a declaration that “Kayley and Imedinvest are the rightful owners of MBOF, and any and all of its assets previously or presently held by the MBC receiver, and all proceeds which may come into the possession of the MBC receiver in the name of MBOF should be paid over to Kayley and Imedinvest . . . .” ([Proposed] Verified Intervention Compl., Wherefore Clause [Gennady Sinski Aff., dated Nov. 7, 2011, Exh. D] [NYSCEF No. 298].) By memorandum decision dated March 30, 2012 (the Intervention Decision [NYSCEF No. 350]), the Court (Fried, J.) denied the motion, holding that the proposed intervenors had an identity of interest with the defendants and were adequately represented in this action by Emanuel Zeltser and Joseph Kay. (Intervention Decision, at 14.) The Court also denied the motion as untimely. (Id., at 14-15.)

#### 6. The Bankruptcy Proceedings

The extensive procedural history of the instant action tells only a portion of the story. On March 17, 2011, while this action and the Related Actions were pending before this Court, six creditors filed three separate involuntary Chapter 11 bankruptcy petitions against the plaintiffs in the three Related Actions—MBOF and Little Rest—and against a third entity, Fisher Island Investments, Inc. (Fisher Island), which was a plaintiff in litigation then pending in Florida state court. The petitions were filed in the United States Bankruptcy Court for the Southern District of Florida (the Bankruptcy Court).

As discussed further below, the Bankruptcy Court coordinated litigation of the three petitions. The ownership and control of MBOF, Little Rest, and Fisher Island (collectively, the Alleged Debtors) was the critical threshold issue in each case, although the identity of the alleged owners of the three entities differed. The Little Rest Decision addresses the Bankruptcy Court’s

findings, as affirmed by the Eleventh Circuit, as to the ownership of Little Rest. That decision does not address the Bankruptcy Court's findings as to the ownership and control of MBOF, which are detailed below.

The following summary of the history of the Bankruptcy Proceedings is largely drawn from the Eleventh Circuit's decision of the appeals in those proceedings. (Bankr. App., 778 F3d 1172, supra.) As stated by the Eleventh Circuit at the outset of its decision, the Bankruptcy Proceedings arose out of a dispute between two competing groups "over the ownership of, and control over" the three Alleged Debtors. The Court referred to this dispute as the "ownership issue" (id., at 1176-1177), and this court will do so here.

"The involuntary petitions asserted claims against the Alleged Debtors for approximately \$32.4 million, \$28.5 million of which was based on a promissory note (the 'Note') . . . ." (Id., at 1178.) Joseph Kay and his family were involved in the making of the Note. (Little Rest Decision, at 10.) On March 21, 2011, a mere four days after the involuntary petitions were filed, a faction "led by Joseph Kay" and represented by the Zeltser Parties filed answers on behalf of all three Alleged Debtors, "immediately admitting to the allegations in the involuntary petitions against the Alleged Debtors and consenting to the relief requested by the Petitioning Creditors." (Bankr. App., 778 F3d at 1178.) Joseph Kay's faction was referred to in the Bankruptcy Proceedings as the Zeltser Group. (Id., at 1177.) The next day, a faction "consisting of Badri's immediate family and led by Badri's widow, Inna Gudavadze," under the representation of attorneys including Martin Russo of Gusrae Kaplan & Nusbaum PPC—MBOF's counsel in the instant action—filed an emergency motion to strike the answers. (Id., at 1178.) This second faction was referred to in the Bankruptcy Proceedings as the Redmond Group, but has been

referred to by this court as the Russo Group. (Id., at 1177; Little Rest Decision, at 1.) The Russo Group contested the Zeltser Group's authority to represent MBOF, Little Rest, and Fisher Island, and claimed that the involuntary petitions had been "improperly filed in an attempt to stay the state court litigation" involving MBOF and Little Rest, which was then pending in New York, as well as the Florida state court litigation involving Fisher Island. (See Bankr. App., 778 F3d at 1178.)

In response to the Russo Group's motion, "the Zeltser Group asked the bankruptcy court to deny the relief sought therein until resolving the question of who had the authority to act on behalf of the Alleged Debtors." (Id., at 1178-1179.) "Notably, the Zeltser Group stated in its response that 'the issues of proper ownership and control over the Alleged Debtor[s] should be litigated in due course before this [the Bankruptcy] Court.'" (Id., at 1179 [brackets in original].)

The Bankruptcy Court held a hearing on March 25, 2011. The Zeltser Group "contended that Imedinvest, a 'loose investment partnership' owned all three of the Alleged Debtors. According to [Emanuel] Zeltser, Badri had been a partner of Imedinvest, and it was on behalf of Imedinvest and other entities that the Note debt had been incurred." (Id., at 1179.) The Russo Group "denied that Imedinvest had any ownership interest in the Alleged Debtors" and "asserted that Mutual Benefits [MBOF] was comprised of several large investors, the largest of which was Kayley Investments, N.V. . . . In turn, Kayley was legally owned by the Test Trust." (Id.)

At the hearing, the Zeltser Group again "specifically requested that the bankruptcy court decide the ownership issue." (Id.) As recounted by the Eleventh Circuit, "[a]ttorney [Emanuel] Zeltser claimed that the New York and Florida state courts could not determine ownership, and informed the bankruptcy court that it, as the 'ultimate Court of equity,' was the 'only court' that

could resolve the issue. Furthermore, the bankruptcy court's decision on the issue, presumably after a short 'ownership hearing,' would be 'dispositive.'"<sup>4</sup> (Id., quoting from Mr. Zeltser's argument at the hearing.)

The Bankruptcy Court questioned, among other things, whether "'something smell[ed] about a case being filed and instantly consented to . . . immediately followed by someone saying [the consenting counsel] didn't have the authority to do it in the first place.'" (Little Rest Twelve, Inc. v Visan, 458 BR 44, 52 [SD NY, July 20, 2011, Koeltl, D.J.] [Removal Decision] [brackets and ellipses in original] [decision on subsequent removal of the Related Actions to federal court, also summarizing the procedural history of the Bankruptcy Proceedings, quoting from the hearing transcript].)<sup>5</sup>

On March 31, 2011, the Court granted, in part, a motion by the petitioning creditors to jointly administer the three cases "'for the sole purpose of conducting one trial regarding the validity of the . . . Note, the assignment of the Note and determination of who are the legitimate representatives and attorneys for the three alleged involuntary debtors.'" (Bankr. App., 778 F3d at 1179, quoting the Bankruptcy Court decision.) The Bankruptcy Court also appointed an

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<sup>4</sup> Mr. Zeltser's precise argument at the hearing was as follows:

"[T]he issue of ownership is not squarely before any judge. It's indirectly there, but the issue of who is the correct owner, in control person, or persons, is not directly before any judge—any court. It should be here before Your Honor. It can be done in—in one proceeding as to all of these . . . This Court can determine ownership, but respectfully, Your Honor, this is the only Court that may because this is the ultimate Court of equity . . . Your Honor's decision will be dispositive . . . We can have an ownership hearing, a couple of days, three days, four days, you know, it doesn't have to go for a year okay. They will put on their evidence, we'll put on our evidence, and in three days the issue of ownership will be resolved . . ."

(Bankr. III, 508 BR at 766 [ellipses in original] [District Court decision on appeal of the Bankruptcy Court's subsequent ownership determination as to MBOF, quoting Emanuel Zeltser's request on March 25, 2011 to have the Bankruptcy Court decide the ownership of all three of the Alleged Debtors].)

<sup>5</sup> The removal of this action and the other Related Actions to federal court by the Zeltser Parties as attorneys is discussed in the Little Rest Decision, at 23.

Examiner to investigate the ownership issue. (Id.)

On November 18, 2011, following “extensive discovery,” the Examiner issued a 96-page report. (Id., at 1179-1180.) The Examiner “explained that the ownership dispute with respect to Mutual Benefits was different from Fisher Island and Little Rest in that Mutual Benefits was never held within the Valmore Trust.” (Id., at 1180.) With respect to MBOF, “the Examiner found that Kayley was ultimately owned by the Test Trust” and that “the attorneys for the Redmond [i.e., Russo] Group (not the Zeltser Group) were authorized to represent the Alleged Debtors.” (Id. [brackets supplied, parentheses in original].) “The Examiner’s review indicated that W. Shaun Davis, through his management company, Triangle International Management Limited (‘Triangle’), owned 100% of Mutual Benefits’ voting shares. All of Mutual Benefits’ other shareholders, including Kayley, held non-voting shares. Mutual Benefits was therefore controlled by its voting shareholder, Triangle.” (Id.) “The Examiner generally found the Zeltser Group’s story with respect to ownership to be inconsistent and irreconcilable with, or unsupported by, the record. For instance, the Zeltser Group provided little extrinsic evidence to prove the existence of Imedinvest. In fact, Joseph Kay . . . testified in connection with [a] Gibraltar proceeding in 2009 that [he was] unfamiliar with Imedinvest.” (Id.) “The Examiner also determined that the Zeltser Group had submitted certain documentation in ‘an intentional effort to mislead or misrepresent material facts to a court.’” (Id., quoting from the Examiner’s report.)

On February 13, 2012, the Russo Group moved for summary judgment on the ownership issue in the MBOF bankruptcy case. They “sought a determination that Mutual Benefits was owned by 24 investors, and that the Test Trust was the ultimate owner of Kayley, the largest

investor of Mutual Benefits.” (Id., at 1183.) Contrary to its prior representations to the Bankruptcy Court, the Zeltser Group “responded, inter alia, that the bankruptcy court lacked authority to make a final determination as to ownership, and could not make any such determination without joinder of all the alleged owners of Mutual Benefits (i.e., the investors).” (Id.) On the merits, the Zeltser Group argued that MBOF had been created in 2003 to obtain Badri and Joseph Kay’s \$15 million investment through their company, Kayley, and that in December 2006, all of the assets and stock of Kayley had been conveyed to Kay’s company Imedinvest. Mark Zeltser gave testimony based on this theory that “MBOF belonged to Badri and Kay,” and that Badri and Kay always “could replace people to manage their investment at any time.” (Bankr. I, 2012 WL 3764032, at \* 2.) The Bankruptcy Court denied the Russo Group’s motion on August 28, 2012, finding that genuine issues of material fact raised by the Zeltser Group’s response precluded summary judgment. (Bankr App., 778 F3d at 1183.)

Trial began in the MBOF bankruptcy case on April 11, 2013. Davis testified on behalf of the Russo Group that he was the owner of Meridian Asset Management, Ltd., which owned 99% of Triangle, and that Triangle owned all of the voting shares of MBOF. He further testified that he had been appointed the president and sole director of MBOF in 2002 and remained in those positions. According to Davis, “Kayley and 22 other investors held non-voting shares in Mutual Benefits, which only entitled them to an economic interest in the profits and did not confer any voting power.” (Id., at 1183-1184.) Emanuel Zeltser cross-examined Davis for four hours, attempting to establish that MBOF had “defrauded its investors and that Davis was merely a ‘nominee’ without any decision making power.” (Id., at 1184.) “Despite having submitted exhaustive lists of witnesses and exhibits, the Zeltser Group did not call any witnesses or offer

any exhibits at trial.”<sup>6</sup> (Id.) Consequently, “[t]he trial record was closed without any evidence proffered by the Zeltser Group.” (Id.)

On April 25, 2013, the Bankruptcy Court entered findings of fact and conclusions of law in favor of the Russo Group. (Id.; see generally Bankr. II, supra [the Court’s Findings Of Fact & Conclusions Of Law On Ownership].) In particular, the Court found that Triangle owned all of the voting shares of MBOF, and had held those shares continuously since 2002. (Bankr. II, at 10.) Davis was the president and sole director of both Triangle and MBOF, and had held those positions since 2002. (Id.) In 2002 and 2003, Kayley had invested \$15 million in Class B shares of MBOF, which were not entitled to vote. (Id., at 11.) “Persons other than Kayley invested approximately \$8,000,000 into Class A and Class B shares,” which were not entitled to vote. (Id.) The Court accordingly concluded that the Russo Group, and not the Zeltser Group, was authorized to represent MBOF in the Bankruptcy Proceedings. (Id.)

On March 19, 2014, the District Court affirmed the Bankruptcy Court. (See generally Bankr. III, 508 BR 762, supra [the District Court decision].) The Eleventh Circuit affirmed on February 20, 2015. On appeal, the Zeltser Group made a number of procedural objections to the Bankruptcy Court’s determination of ownership. They argued, among other things, that the Bankruptcy Court “erred by allowing the ownership issue to proceed as a contested matter rather than as an adversary proceeding,” and by not joining a number of parties alleged to be the owners of MBOF and its assets. (Bankr. App., 778 F3d at 1197.) They also argued that the Bankruptcy Court had abused its discretion in denying a continuance to allow certain of the

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<sup>6</sup> Two witnesses were barred from testifying on behalf of the Zeltser Group at trial due to their failure to appear for depositions on April 18, 2013, as required by the Bankruptcy Court. (Id., at 1184.)

Zeltser Group's witnesses to testify at the trial. (*Id.*) They further claimed that the Bankruptcy Court lacked authority to decide the ownership issue under the United States Supreme Court's then recent decision in *Stern v Marshall* (564 US 462 [2011]). (*Bankr. App.*, 778 F3d at 1189.)

The Eleventh Circuit expressly rejected the Zeltser Group's "adversary proceeding" and "mandatory joinder" arguments, relying on its own more extensive treatment of similar arguments made by the Zeltser Group with respect to the Bankruptcy Court's determination of the ownership of Little Rest and Fisher Island in favor of the Russo Group. (*Id.*, at 1197; *see also id.*, at 1194; Little Rest Decision, at 16-17, 19-20 [discussing these arguments].) The Eleventh Circuit also held that the Supreme Court's decision in *Stern* was not a bar to the Bankruptcy Court's determination of the ownership of MBOF, as "[r]esolution of the threshold ownership issue was critical to the administration of the Alleged Debtors' estates and directly affected the debtor-creditor relationship. The bankruptcy court necessarily had to determine who actually owned the Alleged Debtors in order to adjudicate the validity of the alleged \$32 million debt, because the answer determined whether the Petitioning Creditors' claims would be admitted or contested." (*Bankr. App.*, 778 F3d at 1191 [internal citation omitted].) The Eleventh Circuit further reasoned that "the Zeltser Group expressly consented to the bankruptcy court's final adjudication of the ownership issue and waived any argument to the contrary." (*Id.*) The Eleventh Circuit affirmed the Bankruptcy Court's denial of a continuance (*id.*, at 1197), as well as its findings of fact and conclusions of law, holding that "the Zeltser Group failed [to] put on any case whatsoever at trial as to any alternative ownership theory as to Mutual Benefits." (*Id.*, at 1198.)

B. MBOF'S SHOWING ON THESE MOTIONS AS TO RECOVERY AND TRANSFERS OF THE FUNDS

In support of its motion for summary judgment, MBOF submits documentation regarding its retention of the defendant attorneys to recover funds for MBOF, and the disposition of the \$4.3 million paid by the Receiver for the benefit of MBOF. Specifically, MBOF cites its corporate resolution, dated December 15, 2006 (the Corporate Resolution) (Davis Aff. In Supp., Exh. A), by which MBOF appointed its “counsel,” S&Z, as its escrow agent “for all purposes,” and authorized the firm to “take any and all appropriate and necessary legal action . . . in order to recover and receive any and all property belonging to the Fund [MBOF] . . . from whatsoever source,” including funds held by the MBC Receiver. (*Id.*, §§ 1-2.) The Corporate Resolution further directed S&Z to “hold such property and funds in escrow pending their distribution to the Fund’s investors-shareholders.” (*Id.*, § 3.) On December 29, 2006, S&Z, by Emanuel Zeltser, filed a notice of appearance as “counsel for non-party Mutual Benefits Offshore Fund, Ltd. (‘MBOF’)” in the receivership proceeding pending in the United States District Court for the Southern District of Florida. (Davis Aff. In Supp., Exh. B.)

The record further reflects that, between February 2007 and October 2007, S&Z received a total of \$4,259,886.17 million from the Receiver in the form of a wire transfer (Russo Aff. In Supp., Exh. C) and three checks. (*Id.*, Exhs. H-J.)<sup>7</sup> The funds were first placed into either of two escrow accounts entitled, respectively, “Mutual Benefits Offshore Fund Ltd. by M.E. Seltser Agt For” and “M.E. Seltser PC Escrow Account.” (*Id.*, Exhs. C, K, L, N [bank records reflecting deposits].) A few days after each of these deposits was made, the funds were

<sup>7</sup> The checks directed payment to the order of “Mutual Benefits Offshore Fund, Ltd.,” and two of the checks listed Emanuel Zeltser’s name under MBOF’s. (*Id.*)

transferred into the operating account of defendant M.E. Seltser, before being used to purchase certificates of deposit (CDs) in M.E. Seltser's name. (Russo Aff. In Supp., Exhs. F, G, L, M, N, O [bank records reflecting CD purchases].) Emanuel Zeltser testified that M.E. Seltser is a professional corporation through which he practices law. (Emanuel Zeltser Dep., at 38-39 [Russo Aff. In Supp., Ex. V].)

Emanuel Zeltser confirms that he purchased the CDs with the recovered funds, but asserts that he did so "pursuant to the instructions of Kayley, my client and the owner of these funds." (Emanuel Zeltser Aff. In Opp., ¶ 49.) He also contends that an amount equal to the recovered funds was paid to Kayley on March 31, 2008 through a Russian affiliate of S&Z.<sup>8</sup> (See S&Z's Reply Memo., at 8-9.)

Mark Zeltser liquidated the CDs on June 27, 2008. (Russo Aff. In Supp., Exh. R [bank records reflecting transfers from CDs].) To do so, he produced a power of attorney provided to him by Emanuel Zeltser, and he executed bank signature cards indicating that he was vice president and secretary of M.E. Seltser. (Mark Zeltser Dep., at 38-40, 51-52 [Aff. of Terrence K. McLaughlin (counsel for the Interel Parties) In Opp., Exh. A]; Russo Aff. In Supp., Exh. Q [Dkt. 465] [signature cards].) He transferred the proceeds from the CDs to defendant Interel to pay Emanuel Zeltser's legal fees, obligations, and expenses while he was incarcerated in Belarus.

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<sup>8</sup> According to Oxana Adler, a purported attorney for Kayley, "[a]t Kayley's request, Sternik Moscow, a Moscow-based affiliate of Sternik & Zeltser made arrangements with Allied Partners Ltd., Kayley's affiliate, to advance to Kayley funds in the amount recovered and held for the benefit of Kayley by Sternik & Zeltser. In exchange, Kayley assigned to Sternik Moscow and Allied rights, title and interest in Kayley's funds held in trust by Mr. Zeltser and his law firm, and confirmed that Kayley is in receipt of 100% of the funds recovered for Kayley by the law firm of Sternik & Zeltser in connection with Kayley's 2003 investment in Mutual Benefits Corporation and Mutual Benefits Offshore Fund, and has 'no further interest in or claim to any funds recovered by Sternik & Zeltser' and initially held for Kayley's benefit." (Adler Aff. In Opp., ¶ 34; see also *id.*, Appx., p. 6 ["Confirmation" from Kayley to Sternik Moscow that Kayley accepted £2,000,000 in full satisfaction of any funds recovered by S&Z on Kayley's behalf through December 31, 2007].)

(Mark Zeltser Dep., at 36, 44-46.) He also claims that he transferred approximately \$1 million of the funds to defendant Fishkin, at Fishkin's request, to pay for "legal expenses and expenses related to Emanuel and his business." (*Id.*, at 45.)

As previously noted, Mark Zeltser is Emanuel Zeltser's brother. Although Mark held himself out as an officer of Emanuel Zeltser's law firm when he liquidated the CDs, he admits that he is not an attorney, and claims that he "never had anything to do with my brother's law practice." (Mark Zeltser Aff. In Supp., ¶ 8.)

According to Mark, defendant Interel is a classical music artists management company he formed around 1990, but which became inactive shortly thereafter. (Mark Zeltser Dep., at 10-11.) Pursuant to a stipulation of the parties dated October 29, 2009 (NYSCEF No. 72), Interel deposited with the court \$632,000. (See also TRO, dated July 30, 2009 [NYSCEF No. 178] [prior order restraining such funds].) Mark Zeltser, as president of Interel, submitted an affidavit representing that "Interel presently holds no other 'Funds in Issue' as this term is defined in the [Oct. 30, 2009] Stipulation." (Russo Aff. In Supp., Exh. T.) The stipulation defines the Funds in Issue as "funds on [sic] any of its [Interel's] accounts, which have its origins in the \$4.3 million in issue in the MBOF complaint." (Oct. 29, 2009 Stip., ¶ 3.)

#### DISCUSSION

For the following reasons, MBOF is granted summary judgment as to liability on the sixth cause of action for breach of fiduciary duty against the Zeltser Parties, but not against Fishkin. The branch of MBOF's motion for summary judgment on the third cause of action for conversion is granted as to liability against the Zeltser Parties, but not against the Interel Parties or Fishkin.<sup>9</sup> The branch of MBOF's motion for summary judgment on the seventh cause of

<sup>9</sup> MBOF did not seek relief on the conversion claim against M.E. Seltser, and did not plead a conversion claim

action for unjust enrichment is granted as to liability against Emanuel Zeltser and Interel, but not against Fishkin.<sup>10</sup> MBOF's motion to vacate the April 20, 2010 Escrow Stipulation is also granted. Defendants' motion for summary judgment is granted solely to the extent of dismissing MBOF's causes of action for fraud and a permanent injunction.

A. MBOF'S MOTION FOR SUMMARY JUDGMENT

1. Emanuel Zeltser and S&Z---Breach of Fiduciary Duty

Summary judgment will be granted as to liability against S&Z and Emanuel Zeltser on the sixth cause of action for breach of fiduciary duty. "Breach of fiduciary duty requires (1) the existence of a fiduciary duty owed by the defendant; (2) a breach of that duty; and (3) resulting damages." (Jones v Voskresenskaya, 125 AD3d 532, 533 [1st Dept 2015].) Attorneys owe fiduciary duties to their clients, and "[f]ew, if any, of an attorney's professional obligations are as crystal clear as the duty to safeguard client funds." (Matter of Galasso, 19 NY3d 688, 694 [2012].) Similarly, "[a]n escrow agent owes the parties to the transaction a fiduciary duty, and therefore the agent, as a fiduciary, has a strict obligation to protect the rights of [the] parties for whom he or she acts as escrowee." (Greenapple v. Capital One, N.A., 92 AD3d 548, 549 [1st Dept 2012] [brackets in original, internal quotation marks and citations omitted]). "Moreover, an escrow agent has a duty not to deliver the monies in escrow except upon strict compliance with the conditions imposed by the controlling agreement." (Id.)

The Zeltser Parties do not dispute that they received \$4.3 million from the Receiver in the SEC proceeding, in which they filed a notice of appearance as counsel for MBOF. Nor do they

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against Fishkin.

<sup>10</sup> MBOF did not seek relief on the unjust enrichment claim against S&Z, Mark Zeltser, or M.E. Seltser, and did not plead an unjust enrichment claim against Fishkin.

challenge MBOF's chronicle of the transfer of those funds into and out of the MBOF attorney escrow accounts. Instead, they deny that they represented MBOF, and they raise a number of other claims and defenses relating to the ownership and control of MBOF and its assets, all of which are fundamentally inconsistent with the Bankruptcy Court's determination of ownership or are otherwise without merit. Specifically, they contend that the funds belong to Kayley, not MBOF, and that plaintiff therefore lacks standing to recover them. In support of this contention, the Zeltser Parties argue that MBOF conspired with MBC to embezzle funds from Kayley through a massive Ponzi scheme. When Kayley learned of that fraud, it threatened to sue MBOF and its officers. MBOF allegedly agreed, in response, not only to rescind Kayley's investment, but also to relinquish control over MBOF to Kayley so that Kayley could recover its investment. The Zeltser Parties further contend that they did not appear on behalf of MBOF in the SEC Proceeding until after Kayley had assumed full control of MBOF, that Kayley retained them to represent MBOF solely for the purpose of recovering Kayley's funds and returning them to Kayley, and that Kayley and its principals were the Zeltser Parties' "true clients." (Emanuel Zeltser Aff. In Opp., ¶ 43; see also id., ¶¶ 4-6, 41-46, 49.) Finally, the Zeltser Parties contend that they were the trustees of Kayley's assets and thereby the legal owners of the funds, and that the funds were properly returned to Kayley, with MBOF's permission, pursuant to the terms of MBOF's Corporate Resolution. (See id., ¶ 49.)

It is well settled that "[c]ollateral estoppel bars relitigation of an issue which has necessarily been decided in a prior action and is decisive of the present action if there has been a full and fair opportunity to contest the decision now said to be controlling." (Tydings v Greenfield, Stein & Senior, LLP, 11 NY3d 195, 199 [2008] [internal brackets, quotation marks,

and citation omitted]; see also Matter of Juan C. v Cortines, 89 NY2d 659, 667-668 [1997] [holding that privity is an “amorphous concept” but covers “those whose interests are represented by a party to the action” and those whose rights “are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation”]; Buechel v Bain, 97 NY2d 295, 303 [2001], cert denied 535 US 1096 [2002] [holding that the “fundamental inquiry” in applying the collateral estoppel doctrine “is whether relitigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results”]; Little Rest Decision, at 18-20 [citing additional authorities.] Applying the rules governing application of this doctrine to the undisputed facts of this case, the court holds that the Bankruptcy Court’s determination of ownership bars all of the Zeltser Parties’ arguments or renders them without any basis in the law.

The core issue in this action is whether the Russo Group (here, led by W. Shaun Davis and Christopher Samuelson as officers or agents of MBOF) or the Zeltser Group (here, including Joseph Kay and non-parties Kayley and Imedinvest), owned and controlled MBOF between approximately 2006 and 2008, when the funds at issue were recovered from the MBC Receiver. That issue is encompassed within the ownership issue resolved against the Zeltser Group in the Bankruptcy Proceedings. As previously discussed (supra, at 18), the Bankruptcy Court held that Triangle owned all of the voting shares of MBOF, and had held those shares continuously since 2002, and that Davis had been the president and sole director of both Triangle and MBOF continuously since 2002. (Bankr. II, at 10.) The Bankruptcy Court also held that Kayley had invested in and held non-voting shares of MBOF since 2002 and 2003. (Id., at 11.) These findings cover the period in which the Zeltser Parties’ claim that Kayley owned and controlled

MBOF.

As the Eleventh Circuit held, “[t]he bankruptcy court necessarily had to determine who actually owned the Alleged Debtors in order to adjudicate the validity of the alleged \$32 million debt.” (Bankr. App., 778 F3d at 1191 [internal citation omitted].) That issue, in turn, determined whether the petitioning creditors’ claims would be admitted, as the Zeltser Group sought to do, or contested, as the Russo Group sought to do. (Id.)

Although the Zeltser Parties acted in the Bankruptcy Proceedings as counsel for the eponymous “Zeltser Group,” and were not parties themselves, they had a clear and significant personal interest in the success of that group’s ownership theory, and thus were united in interest with their principals. (See also Little Rest Decision, at 17-25 [noting that Joseph Kay and Imedinvest were found to be the “disclosed principals” of Emanuel Zeltser in the Bankruptcy Proceedings, and applying collateral estoppel against Joseph Kay and members of his family in the related Little Rest Action]; Intervention Decision, at 14-15 [denying Kayley and Imedinvest leave to intervene in this action on the ground, among others, that their interests were adequately represented by the Zeltser Parties].) Indeed, it is entirely from the Zeltser Group’s alleged interest in the assets of MBOF that their attorneys’ claimed authority over the recovered funds derives.

As discussed further in the Little Rest Decision (at 22-25), Emanuel Zeltser and S&Z understood and intended that the Bankruptcy Court’s determination of the ownership issue would be dispositive of that issue in the Related Actions (among them the instant action), which preceded the filing of the bankruptcy petitions by almost two years. They urged the Bankruptcy Court to decide the issue, expressly stating that it was the “only Court” that could do so, and that

its determination would be “dispositive.” (Supra, at 15 n 4.) When the Bankruptcy Court declined to stay proceedings in the Related Actions, the Zeltser Parties advised this Court that “in light of the forthcoming evidentiary hearing directed by Judge Cristol [the Bankruptcy Judge], it might be prudent to await the Bankruptcy Court’s determination of ownership and control of the debtor-companies,” as “[t]his determination will dispose with [sic] both the controversy over the counsel issue and the issue of MBOF’s ownership . . . .” (Ltr., dated Mar. 29, 2011, at 2, Visan Action [NYSCEF No. 315].) They “voluntarily participated in discovery, and appeared at hearing before the bankruptcy court—all indicating [their] willingness, in fact desire, for the bankruptcy court to decide the ownership issue.” (See Bankr. App., 778 F3d at 1191-1192.) The record of the Bankruptcy Proceedings, set forth above and discussed in additional detail in the Little Rest Decision, clearly demonstrates that the Zeltser Parties had a full and fair opportunity to litigate the ownership issue there.

The Zeltser Parties come forward on these motions with evidence which purportedly shows that, in December 2006, Kayley rescinded its investment in MBOF and was assigned “full administrative control over” MBOF and ownership of its assets. (See Confidential Memo. of Understanding, dated Dec. 21, 2016 [Appx. to Adler Aff. In Opp., at 56-57] [allegedly signed by Steven K. Steiner as Vice President and Director of MBOF and Director and Principal Owner of Triangle, but not signed by anyone on behalf of Kayley]; see also Dec. 16, 2006 Ltr. from Fishkin to Davis [Fishkin Aff. In Opp., Exh. 3] [recounting an “understanding” with similar terms].)

Assuming the genuineness of this evidence, which is vehemently disputed by MBOF, the time to have presented it was during the Bankruptcy Court trial. Emanuel Zeltser and S&Z

argued to the Bankruptcy Court, on behalf of the Zeltser Group, that Kayley and its principals (namely, Imedinvest, Joseph Kay, and Badri) owned and controlled MBOF. For four hours at the trial, Emanuel Zeltser cross-examined Davis, an officer of MBOF who, Emanuel alleges here, agreed to assign control over MBOF to Kayley after the Zeltser Parties accused Davis of fraud. (Dec. 16, 2006 Ltr. [Fishkin Aff. In Opp., Exh. 3].) As recounted by the Bankruptcy Court, Emanuel “attempted to establish that MBOF defrauded its investors and that Mr. Davis was a nominee for any number of persons.” (Bankr. II, at 8.) The Bankruptcy Court held that “Mr. Davis steadfastly denied both propositions, and, in this Court’s opinion, was credible in doing so.” (Id.; see also Bankr. III, 508 BR at 775–776 [affirming that conclusion upon appeal of the Bankruptcy Court’s judgment].) The Bankruptcy Court further held that “[t]he Zeltser Group offered no explanation . . . as to how either of these showings would prove the authority of the Zeltser Group to represent MBOF in these proceedings.” (Bankr. II, at 6.) In other words, the Zeltser Group does not appear even to have contended at the trial, as they do here, that Kayley threatened to sue Davis, and Davis agreed to give Kayley control over MBOF. The Bankruptcy Court ultimately concluded, and the Eleventh Circuit explicitly affirmed the conclusion, that “the Zeltser Group failed [to] put on any case whatsoever at trial as to any alternative ownership theory as to Mutual Benefits.” (Bankr. App., 778 F3d at 1198; Bankr. II, at 10.)

The Zeltser Parties’ failure to present to the Bankruptcy Court their evidence of the assignment of control over MBOF to Kayley may have been a strategic decision. It is noteworthy that the Zeltser Group’s theory of Kayley’s ownership and control over MBOF in the Bankruptcy Proceedings differed in some respects from Emanuel Zeltser and S&Z’s theory of

Kayley's ownership on these motions. As noted above, in the Bankruptcy Proceedings, the Zeltser Parties contended that MBOF was created in 2003 to obtain Badri's and Joseph Kay's \$15 million investment through Kayley, and that Badri and Kay always "could replace people to manage their investment at any time." (Bankr. I, 2012 WL 3764032, at \* 2 [decision on MBOF's summary judgment motion, summarizing the testimony of Mark Zeltser].) The Zeltser Parties' current theory is inconsistent, because it posits that Kayley was not assigned control over MBOF until it threatened the company's officers with litigation. It appears that, having lost in Bankruptcy Court on the theory that Kayley and its principals always controlled MBOF, the Zeltser Parties now advance a new theory (and new evidence) to support their defenses. This attempt to relitigate the ownership issue cannot be countenanced.

The Bankruptcy Court's determination that Kayley did not control MBOF also defeats the Zeltser Parties' claims that Kayley owned or otherwise had a direct right to the recovered funds. It is well settled that a corporation is an entity distinct from its shareholders, with an independent legal existence and a separate personality that ordinarily cannot be disregarded. (Port Chester Elec. v Atlas, 40 NY2d 652, 656-657 [1976].) Thus, the mere ownership of corporate stock is not equivalent to the ownership of corporate property (Matter of Fontana D'Oro Foods, Inc., 65 NY2d 886, 888 [1985]), and the right to seek recovery of corporate property belongs to the corporation. (See Serino v Lipper, 123 AD3d 34, 39-40 [1st Dept 2014].) The fact that some payment from the recovered funds might ultimately have been due to Kayley did not give Kayley any present right to the funds, and certainly gave that entity no right to exclude other shareholders from recovery.

As noted, the Zeltser Parties also contend that they cannot have breached fiduciary duties

to MBOF because they never served as attorneys or escrow agents for MBOF. They contend in opposition that they acted “as counsel for Kayley and its principals” when they recovered the funds, and that their appearance on behalf of MBOF in the MBC receivership matter was merely “incidental” to that representation. (Emanuel Zeltser Aff. In Opp., ¶¶ 32-47.) This issue was previously resolved against the Zeltser Parties by this Court. Based on the Zeltser Parties’ notice of appearance in the SEC proceeding, receipt of funds from the Receiver in MBOF’s name, and other evidence, Justice Fried held in his Disqualification Decision that Emanuel Zeltser and S&Z were estopped from arguing that they did not act as legal counsel for MBOF in the SEC proceeding. (Disqualification Decision, at 3.) The Court also explicitly found that “[Emanuel] Zeltser acted as escrow agent for MBOF in the SEC proceeding and, as such, received funds from the Receiver payable to MBOF, c/o Zeltser at his law firm’s offices.” (*Id.*) To the extent that either of these holdings was provisional, this court holds similarly, based on the record on these motions and the applicable law, that the Zeltser Parties are estopped from arguing that they were not legal counsel or escrow agents for MBOF.

Finally, the Zeltser Parties argue that they were free to give the funds to Kayley because the Corporate Resolution appointing S&Z as MBOF’s escrow agent provided that recovered funds would be held in escrow “pending their distribution to the Fund’s investors-shareholders.” (See Corporate Resolution, ¶ 4 [Davis Aff. In Supp., Exh. A].) This argument is also without merit. The sole power accorded to the Zeltser Parties under the Corporate Resolution was to receive, recover and hold property belonging to MBOF. No reasonable reading of the language of the resolution supports the contention that MBOF delegated to the Zeltser Parties its right to determine the distribution of the property. Furthermore, in view of the Bankruptcy Court’s

finding that there were 23 investors in MBOF, even if the Zeltser Parties had authority to distribute the funds, there would be a serious question as to whether distribution to a single shareholder was proper.

For all of the above reasons, the court grants MBOF summary judgment as to liability against the Zeltser Parties on the breach of fiduciary duty cause of action.

2. Emanuel Zeltser and S&Z—Conversion and Unjust Enrichment

Summary judgment as to liability is also warranted against the Zeltser Parties on MBOF's third cause of action for conversion, and against Emanuel Zeltser on the seventh cause of action for unjust enrichment. "A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession." (Colavito v New York Organ Donor Network, Inc., 8 NY3d 43, 49-50 [2006].) "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights." (Id. [internal citations omitted]; accord Komolov v Segal, 144 AD3d 487, 488 [1st Dept 2016].) Where, as here, the conversion claim pertains to money, "the funds must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner." (Clark v Beth Israel Med. Ctr., 146 AD3d 495, 496 [1st Dept 2017], ly denied 29 NY3d 907.) In such cases, a conversion may occur when the funds are used for an unauthorized purpose. (Lemle v Lemle, 92 AD3d 494, 497 [1st Dept 2012] [conversion claim adequately pleaded based on allegation, among others, that defendants used corporate funds to pay for personal expenses].) A prima facie case for summary judgment on a conversion claim can be made by the submission of financial records, deposition

testimony, and correspondence demonstrating that the plaintiff's funds were transferred without permission out of an escrow account to a third party and never recovered. (Grasshoff v Etra, 135 AD3d 574, 574–575 [1st Dept 2016].)

The elements of and standards applicable to unjust enrichment claims are set forth in the Little Rest Decision and will not be repeated here. (Little Rest Decision, at 35-36.) MBOF makes a prima facie showing as to liability against the Zeltser Parties on its conversion claim, and against Emanuel Zeltser on its unjust enrichment claim, by submitting documentary evidence that the recovered funds were transferred from MBOF's escrow accounts within days of their receipt in 2007 to the operating account of M.E. Seltser, Emanuel's separate law practice. From there, they were used to purchase CDs at the direction of, or for the benefit of, third parties adverse to MBOF (e.g., Kayley or the Zeltser Parties themselves), and ultimately expended or disposed of by Emanuel or his agents for the Zeltser Parties' and Kayley's benefit. The Zeltser Parties do not raise any defenses to the conversion and unjust enrichment claims other than those discussed in the previous (fiduciary duty) section, which are barred by the Bankruptcy Court's determination of ownership or lack legal merit.<sup>11</sup>

### 3. Mark Zeltser and Interel—Conversion

The branch of MBOF's motion for summary judgment against Mark Zeltser and Interel on the third cause of action for conversion is denied. The court finds that these defendants were in privity with the Zeltser Group in the Bankruptcy Proceedings and are collaterally estopped by the findings of the Bankruptcy Court on the ownership issue. They also fail to establish a

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<sup>11</sup> For example, the Zeltser Parties do not argue that Emanuel Zeltser's acts in connection with these claims should be distinguished from those of S&Z. The court holds that the evidence submitted by MBOF provides a sufficient basis on which to disregard the formal distinction between Emanuel and his "one man law firm," S&Z (Disqualification Decision, at 3), and to hold S&Z liable for Emanuel's acts with respect to the firm's client, MBOF.

defense to the conversion claim based on the fact that the Zeltser Parties, not the Interel Parties, made the initial transfer of funds from the MBOF attorney escrow accounts to the M.E. Seltser operating account. The court finds, however, that legal and factual issues exist as to whether the Interel Parties' transfer of the funds out of the M.E. Seltser operating account constituted a conversion.

As to collateral estoppel, Mark participated in the Bankruptcy Proceedings, submitting testimony in favor of the Zeltser Group on the summary judgment motion. (See Bankr. I, 2012 WL 3764032, at \* 2.) His interests, and those of his company, were adequately represented in those proceedings by the principals of the Zeltser Group, who were themselves represented by Mark's brother Emanuel and S&Z, and on whose claim of ownership all of defendants' defenses depend. Under these circumstances, and on the legal authority cited above, the Interel Parties were in privity with the Zeltser Group in the Bankruptcy Proceedings and are collaterally estopped from arguing here that the Zeltser Group owned the funds.

The Interel Parties are not insulated from liability for conversion on the ground that they did not participate in the initial transfers of the recovered funds. (See Interel Parties' Memo. In Opp., at 2, 8-9.) It is undisputed that the Interel Parties took control and disposed of the funds in the operating account. Moreover, the court finds that these funds were directly traceable to the funds converted by the Zeltser Parties and remained the rightful property of MBOF. (See Republic of Haiti v Duvalier, 211 AD2d 379, 384-386 [1st Dept 1995]; Simpson & Simpson, PLLC v Lippes Mathias Wexler Friedman LLP, 130 AD3d 1543, 1544-1545 [4th Dept 2015].) As the converted funds were identifiable, it is immaterial that they may have been commingled with other funds in the operating account. (Simpson, 130 AD3d at 1544-1545.) The lack of any

personal benefit to the Interel Parties also does not establish a defense to the conversion claim.

(23 NY Jur 2d Conversion, § 18.)

On this record, however, the court cannot resolve Mark Zeltser's claims that he acted in good faith and without knowledge that the funds he transferred had previously been converted and were the property of MBOF. He testified at his deposition in this action that he transferred funds from M.E. Seltser's law firm operating account, and that he believed that those funds belonged to Emanuel. (Mark Zeltser Dep., at 36-37 [McLaughlin Aff. In Supp., Exh. A].) MBOF fails to make a factual showing that Mark knew the true source of the funds or acted in bad faith when he transferred them from the M.E. Seltser account. Conversely, Mark's claim that he lacked such knowledge or acted in good faith requires credibility determinations which are not properly made on a summary judgment motion.

More important, there are differing lines of authority that have not been adequately addressed or reconciled on this record. In one such line, the Courts have held that "a cause of action for conversion need not allege or prove a tortious taking or even that defendants acted in bad faith." (Pokoik v Gittens, 171 AD2d 470, 471 [1st Dept 1991] [holding that defendants' "total, or at least partial, lack of knowledge of the source of the funds" was no defense to summary judgment on conversion claim, where plaintiff produced evidence showing that plaintiff's bookkeeper—the defendants' relative—had previously embezzled the funds from plaintiff, and the defendants had then used or transferred the funds for their own purposes]; Suzuki v Small, 214 AD 541, 557 [1st Dept 1925], affd without opinion, 243 NY 590 [1926] ["It has been held without exception that wrongful intent is not a necessary element of a conversion"]; Passaic Falls Throwing Co. v Villeneuve-Pohl Corp., 169 AD 727, 729 [1st Dept

1915] [holding that a defendant's honest but mistaken belief that his principal was the true owner of converted property is not a defense to conversion claim].)

Another longstanding line of authority recognizes that "one who comes lawfully into possession of property cannot be charged with conversion thereof until after a demand and refusal. . . ." <sup>12</sup> (MacDonnell v Buffalo Loan Trust and Safe Deposit Co., 193 NY 92, 101 [1908].) This line of authority also recognizes, however, that the demand requirement "has no application in a case where the lawful custodian of property commits an overt and positive act of conversion by an unlawful sale or disposition of the same." (Id.) The Southern District of New York, in surveying New York law on the issue, concluded that

"taken together, [the cases] stand for the principle that one who comes into possession of property lawfully and then disposes of it will not be liable for conversion unless that disposal was in some way wrongful. See, e.g., MacDonnell, 193 N.Y. at 101, 85 N.E. 801. Plaintiff has not cited any case, and we are not aware of one, in which a court applying New York law has held otherwise. Although wrongful intent or knowledge of another person's superior property right are not prima facie elements of a conversion claim, cases affirming liability based on the defendant's transfer of property have involved conduct by the defendant that was wrongful, unlawful, selfishly motivated, or known by the defendant to be in violation of another's rights."

(Regions Bank v Wieder & Mastroianni, P.C., 526 F Supp 2d 411, 416 [SD NY 2007].)<sup>13</sup> This case was affirmed by the Second Circuit for the reasons stated by the District Court. (268 Fed Appx 17 [2d Cir, Feb. 29, 2008]; see also 23 NY Jur 2d Conversion, Etc. § 47 [stating that "no demand and refusal are necessary in order to prove conversion where the lawful custodian of

<sup>12</sup> MBOF fails to make a prima facie showing that it made a demand upon the Interel Parties for return of the funds before the Interel Parties transferred the funds. (See Davis Aff. In Supp., ¶ 14; Samuelson Reply Aff., ¶ 3; Gubler Reply Aff., ¶ 6.)

<sup>13</sup> The Regions Court noted, however, that there are cases which have "implied in dicta that a person could be liable for conversion based on any transfer, not just a wrongful one." (526 F Supp 2d at 414 n 4.)

property commits an overt and positive act of conversion, or wrongfully exercises ownership and dominion over the property”].)

Comprehensive briefing on these authorities is required. The parties must also comprehensively address whether the Interel Parties’ transfer qualifies as a “wrongful” transfer for purposes of conversion.<sup>14</sup>

4. Interel—Unjust Enrichment

MBOF also seeks summary judgment against Interel on the seventh cause of action for unjust enrichment. Interel opposes this branch of the motion on the grounds that it has not benefited from any of the funds that were recovered by the Zeltser Parties from the SEC Receiver; that it deposited \$632,000 of such funds in court in 2009; and that it is not currently holding any recovered funds. (See Interel Parties’ Memo. in Opp., at 17.) MBOF contends that Mark Zeltser admitted, at his deposition, that an additional \$300,000 traceable to the recovered funds remained in Interel’s account even after the \$632,000 was paid into court. (See MBOF’s Reply Memo., at 14.) The record is at best equivocal on this issue. Counsel for MBOF himself remarked during the pertinent questioning that Mark Zeltser did not appear to understand the question, and tabled the discussion. (See Mark Zeltser Dep., at 140-142.) After a break, Mark asserted that the \$300,000 that remained in Interel’s account was his own money, not funds transferred from M.E. Seltser. (*Id.*, at 146-148.)

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<sup>14</sup> Mark Zeltser also contends on these motions that he acted as an agent for Emanuel Zeltser when he transferred the funds from the M.E. Seltser operating account. (Interel Parties’ Memo. In Opp., at 16.) Accepting this contention, a legal issue also exists, but has not been adequately addressed by the parties, as to whether Mark may be liable for conversion based on agency law. (See e.g. Passaic Falls, 169 AD at 729 [holding that “[a]n agent or servant who converts the property of a third person is liable for such conversion, and it is no defense if his acts were committed in pursuance of his employment or for the benefit of his principal or master, though the servant or agent acted under a bona fide belief that his master or principal was the owner of the property and in ignorance of the true owner’s rights, since one who interferes with personal property must at his peril see that he is protected by authority of the true owner”].)

As held above (supra, at 33-34), the funds over which Interel took control were directly traceable to the funds converted by the Zeltser Parties and belonged to MBOF. These funds included the \$632,000 that Interel deposited into court. An issue of fact exists, however, as to whether Interel is currently in possession of or was enriched by any additional recovered funds. Moreover, MBOF does not contend that it will not be obligated to make distributions of the recovered funds to its investors. Defendants have represented that the Zeltser Parties, through their affiliate, have already transferred to Kayley its full interest in the recovered funds. (Supra, at 21 n 8.) Neither MBOF nor Kayley should receive a windfall. Under these circumstances, the court will grant summary judgment as to liability against Interel, but the amount of MBOF's damages must remain for trial. The damages issues will include the amount of distributions that MBOF would have been required to make from the recovered funds to Kayley and other investors, and the amount of recovered funds that have already been paid to Kayley. The \$632,000 will remain on deposit until the amount to which MBOF is entitled is determined.

5. Fishkin—Breach of Fiduciary Duty

MBOF also seeks summary judgment against Fishkin on the sixth cause of action for breach of fiduciary duty. MBOF claims that Fishkin acted as Emanuel Zeltser's co-counsel during the period in which the recovered funds were misappropriated. (See Davis Aff. In Supp., ¶ 15.) As evidence for this claim, MBOF submits an alleged invoice from Fishkin for legal services rendered by him for MBOF between November 2008 and March 2009 (id., Exh. H), a record listing legal fees paid by MBOF to Fishkin in 2009 (id., Ex. I), and three financial summary reports prepared by Fishkin's firm between July 2007 and September 2008, reflecting premiums paid and funds recovered from the Receiver for MBOF. (Id., Exhs. E, F, G.) Each of

the financial summary reports contained a statement that “Funds recovered and to be recovered are on deposit in the special trust account for the benefit of MBOF shareholders and creditors . . . and shall remain escrowed pending Resolution of the General Meeting of actual investors-shareholders of MBOF and/or appropriate Order of the US District Court for the Southern District of Florida, pursuant to a motion upon notice to all known and potential claimants.”

Fishkin denies that he ever served as counsel or escrow agent for MBOF. He, like the Zeltser Parties, contends that he acted throughout the pertinent period as an attorney for Kayley and its principals, including Badri and Kay. (Fishkin Aff. In Opp., ¶ 4.) He submits, among other things, a December 16, 2006 letter addressed to W. Shaun Davis, the president of MBOF, in which Fishkin expressly referred to Kayley and Badri as his clients. (Id., Exh. 3.) This is one of the same documents relied upon by the Zeltser Parties to show that, in December 2006, MBOF assigned control over MBOF and its assets to Kayley. (See supra, at 27.)

Fishkin denies that he ever held or had access to MBOF’s funds, or that he ever requested payment or was paid by MBOF for legal services. (Id., ¶¶ 5-6.) He disputes the authenticity of the documents submitted by MBOF, including the invoice and the financial reports, claiming that they are altered versions of similar reports and invoices that he tendered to Kayley, which he believes may have been shared with MBOF. (Fishkin Aff. In Opp., ¶ 7.) At least one of the reports submitted by MBOF expressly refers to Fishkin’s law firm as “Kayley’s attorneys.” (Davis Aff. In Supp., Exh. E; compare id., Exh. H [alleged invoice from Fishkin’s firm which bears the subject line “CLIENT: MBOF/INVESTARIT/KAYLEY INVESTMENTS”].)

In reply to Fishkin’s denials and his challenge to the authenticity of its evidence, MBOF submits an affidavit from Davis. Davis challenges the authenticity and/or accuracy of evidence

submitted by Fishkin, including the December 16, 2006 letter, which he contends he never received and is “fictional.” (Davis Reply Aff., ¶ 3.) MBOF also submits a number of emails from Fishkin to representatives of MBOF in late 2008 and early 2009. (See MBOF’s Reply Memo., at 6-8 [quoting and discussing the emails].) Fishkin referred to himself in these emails as “working for the Fund’s benefit” (Samuelson Reply Aff., Exh. A.), “protect[ing] the interests of” MBOF (Gubler Reply Aff., Exh. D), and even as “an attorney for MBOF” (Samuelson Reply Aff., Exh. E). In one of the emails, Fishkin also confirmed his receipt of an “authorization” from MBOF regarding payment of his legal fees. (Gubler Reply Aff., Exh. D.) Fishkin did not address this evidence at the oral argument, although he had an opportunity to do so.

The branch of MBOF’s motion seeking summary judgment against Fishkin on the breach of fiduciary duty cause of action is denied. The grounds on which the Zeltser Parties are estopped from denying that they served as MBOF’s fiduciaries do not apply to Fishkin. There is no corporate resolution naming Fishkin as MBOF’s counsel or escrow agent in connection with the receivership proceeding. He did not file a notice of appearance on behalf of MBOF in that proceeding. Nor is there any evidence that he received any funds from the Receiver on behalf of MBOF in the course of that proceeding.

In addition, the evidence in the record is seemingly inconsistent as to whether Fishkin ever represented MBOF, and there are questions as to the authenticity of at least some of the evidence which cannot be resolved without credibility determinations. Moreover, even if Fishkin represented MBOF, questions of fact exist as to his role, if any, in the diversion of MBOF’s funds, and the amount, if any, he received from the Interel Parties. A trial is required to resolve these issues.

6. Fishkin—Conversion and Unjust Enrichment

Although MBOF also seeks summary judgment against Fishkin on theories of conversion and unjust enrichment, the complaint does not plead these causes of action against Fishkin. The court accordingly need not address these claims. (See Silber v New York Life Ins. Co., 92 AD3d 436, 440–441 [1st Dept 2012].) The claims also appear to have been abandoned by MBOF on reply.

7. MBOF's Damages Against The Zeltser Parties

The court has found liability against one or both of the Zeltser Parties on the breach of fiduciary duty, conversion, and unjust enrichment claims. The court further finds that MBOF's damages on each claim are at most \$4,259,886.17—the amount of the funds recovered by the Zeltser Parties from the SEC Receiver. MBOF can only recover this total amount once. Moreover, as noted above (supra, at 37), a question exists as to whether MBOF's damages must be reduced by amounts already paid to its largest investor, Kayley. Any judgment in MBOF's favor may also have to be reduced by some or all of the \$632,000 deposited by Interel into court.

B. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

On their own motion for summary judgment, defendants rely on arguments and claims rejected by the Bankruptcy Court, or assert defenses that this court has rejected above in connection with MBOF's motion. In particular, defendants contend that MBOF consented in the Corporate Resolution to distribution of the recovered funds to Kayley (Defs.' Memo. In Supp., at 12-13); that MBOF failed to demand the return of the funds (id., at 15); that Kayley rescinded the subscription agreement (id., at 16-20); and that MBOF suffered no damages and lacks standing because the funds belong to Kayley. (id., at 21-24.) Defendants also contend that

MBOF is barred from recovering the escrowed funds because a federal court in 2004 enjoined non-party MBC and its “agents” from obtaining money derived from misrepresentation or fraud. (See *id.*, at 6-8, 13-14.) This last defense depends on defendants’ assertion that principals of MBOF participated in MBC’s fraud. As previously noted, that argument was expressly rejected in the Bankruptcy Proceedings. (MBOF II, at 8; supra, at 28.)

In light of this court’s determination of MBOF’s summary judgment motion, defendants’ motion must be denied except to the following extent: The court will grant, without opposition, the branches of defendants’ motion for dismissal of the second cause of action for fraud and the eighth cause of action for a permanent injunction.

C. MBOF’S MOTION TO VACATE THE APRIL 20, 2010 ESCROW STIPULATION

MBOF’s motion to vacate the Escrow Stipulation is granted. “The power of a trial court to exercise supervisory control over all phases of an action or proceeding has long been recognized, including the discretionary authority to relieve a party from the consequences of a stipulation effected during litigation.” (Charlton v A.O. Smith Water Prods., 64 AD3d 486, 486 [1st Dept 2009], citing Teitelbaum Holdings v Gold, 48 NY2d 51, 54 [1979].) Although a showing of good cause for vacatur has generally required proof of fraud, collusion or mutual mistake (Hallock v State, 64 NY2d 224, 230 [1st Dept 1984]), “under almost any given state of facts, where to enforce a stipulation would be unjust or inequitable or permit the other party to gain an unconscionable advantage, courts will afford relief.” (Bank of N.Y. v Forlini, 220 AD2d 377, 378 [2d Dept 1995] [internal quotation marks, brackets, and citations omitted].)

The plain language of the Escrow Stipulation makes clear that it was entered at a time when MBOF was in possession of insurance policies that were “the subject of conflicting claims

as to ownership.” (Escrow Stip., ¶ 1 [NYSCEF No. 138].) The Stipulation was entered to ensure that premiums were paid on the policies, and thus “to prevent the Policies from lapsing during the resolution of the Dispute.” (*Id.*, ¶ 4.) The Stipulation further recited that it was “neutral as to any Party’s rights to file any motions any Party may deem necessary.” (*Id.*, ¶ 12.) The Stipulation thus clearly was an interim measure intended to preserve the status quo only until the ownership issue was determined.

Defendants’ opposition to vacatur is again founded upon the theory that Kayley is the true owner of MBOF’s assets. Having determined that defendants are collaterally estopped from raising that argument, no grounds exist for the Stipulation to continue in force. It should therefore be vacated.

It is accordingly hereby

1. ORDERED that the motion of plaintiff Mutual Benefits Offshore Fund, Ltd. (MBOF) for summary judgment is granted solely to the following extent:

- A. It is ORDERED that MBOF is granted summary judgment as to liability as against defendants Emanuel Zeltser and Sternik & Zeltser on the third cause of action for conversion; and it is further
- B. ORDERED that MBOF is granted summary judgment as to liability as against defendants Emanuel Zeltser and Sternik & Zeltser on the sixth cause of action for breach of fiduciary duty; and it is further
- C. ORDERED that MBOF is granted summary judgment as to liability as against Emanuel Zeltser on its the seventh cause of action for unjust enrichment, and it is further

- D. ORDERED that MBOF is granted summary judgment as to liability as against Interel Corporation on the seventh cause of action for unjust enrichment; and it is further
2. ORDERED that the motion of defendants Emanuel Zeltser, Mark Zeltser, Sternik & Zeltser, M.E. Seltser P.C., Alexander Fishkin, Interel Corporation, and Joseph Kay (collectively, defendants) for summary judgment is granted solely to the following extent:
- A. It is ORDERED that defendants are granted summary judgment dismissing the second cause of action for fraud and the eighth cause of action for a permanent injunction; and it is further
3. ORDERED that MBOF's motion to vacate the April 10, 2010 so-ordered stipulation (NYSCEF No. 138) is granted; and it is further
4. ORDERED that MBOF is directed to settle order within 30 days of the date of this order providing for the closing of the escrow account established under the terms of the April 10, 2010 so-ordered stipulation; and it is further
5. ORDERED that the remaining causes of action, or branches thereof, and the damages issues, are severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, NY  
January 16, 2018

  
MARCY FRIEDMAN, J.S.C.