SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** 39
Justice

MPROSIEMO LIMITED,

Plaintiff,

- v -

ARKADIY VAYGENSBERG, LEONID TATARCHUCK, STEFAN STEFANOV, ARKENSBERG, LLC, NIS, INC., ROMANIROV, LLC, ELMWOOD VENTURES, LLC, NICHOLAS BARTHELEMY, GEORGE V. EATERTAINMENT, S.A., JOHN DOES 1 THROUGH 10, BB NY OPERATIONS 357TH ST., LLC

Defendants.

INDEX NO. 654565/2017

MOTION DATE 9/22/2017

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 42, 43, 44, 45, 47, 48, 49, 50[1]

were read on this application to/for Dismiss.

Upon the foregoing documents, it is

In this action for, inter alia, breach of contract, defendant George V. Eatertainment, S.A. ("GVE") moves, pursuant to CPLR § 3211 (a) (1), (7) and (8), to dismiss plaintiff MProsiemo Limited's ("MProsiemo") complaint. Defendants Arkadiy Vaygensberg ("Vaygensberg"), Leonid Tatarchuk ("Tatarchuk"), Stefan Stefanov ("Stefanov"), Arkensberg LLC ("Arkensberg"), Romanirov LLC ("Romanirov"),

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[1] On March 14, 2018, MProsiemo's counsel submitted an affirmation in further opposition to the motion to dismiss (NYSCEF Doc. No. 51). I did not consider this additional affirmation because it post-dates the motion's fully submitted date of February 7, 2018.

Elmwood Ventures, LLC ("Elmwood"), Nicholas Barthelemy ("Barthelemy") and BB NY Operations 357th St., LLC ("BBNY") (collectively and together with GVE, "Defendants") also move to dismiss MProsiemo's complaint pursuant to CPLR § 3211 (a) (1) and (7).[2] Defendants' motions are consolidated for disposition.

In 2014, Vaygensberg allegedly told MProsiemo, a Cyprus company, that he had acquired the rights to develop a Buddha Bar bar and restaurant franchise in New York, and that he had identified a prime location for the restaurant in Midtown Manhattan (the "Midtown Location").[3] MProsiemo alleges that, based on Vaygensberg's representations, MProsiemo entered into a BBNY Members' Agreement (the "Member Agreement"), dated October 29, 2014. Nominal defendant BBNY was formed to establish and operate a New York Buddha Bar location.

The Member Agreement states that "NIS, MPROSIEMO, ROMANIROV and ARKENSBERG have agreed to establish and manage the Business through the Company as a joint venture company." Pursuant to the Member Agreement, MProsiemo acquired a 30% membership interest in BBNY and a call option to purchase an additional five (5%) percent interest in BBNY from Romanirov in return for a $1,040,000 investment.

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[2] Defendant NIS, Inc. ("non-moving defendant NIS") has neither answered MProsiemo's complaint nor filed a motion to dismiss. Defendants state that they previously informed MProsiemo that MProsiemo misidentified NIS as "NIS, Inc." According to Defendants, the fourth member of BBNY is NIS Management, Inc., and that company is not represented by Defendants' attorneys.

[3] Vaygensberg previously solicited and received a $5,000,000 investment from MProsiemo to open a Buddha Bar in London.

MProsiemo transferred the $1,040,000 to BBNY's TD Bank Account on December 1, 2014.

Section 3.1 of the Member Agreement provided that

> [BBNY] will carry on the business of setting up and operating a bar and restaurant facility to be called "Buddha Bar" at 357 West 57th Street, New York, New York, USA pursuant to the Licenses and any other business it is agreed should form part of the Business in accordance with clause 5.3 and paragraph 22 of schedule 1 (the Business).

"Licenses" are defined in the Member Agreement to mean:

> (1) the concept license agreement to be granted by Creative Design FZ LLC to [BBNY] after the execution of this Agreement relating to the use by [BBNY] of the unique concept for the operation of a "Buddha-Bar" restaurant and (2) the trade mark license agreement to be granted by George V Entertainment [sic] S.A. to [BBNY] after the execution of this Agreement relating to the use by [BBNY] of "Buddha-Bar" trade mark.

MProsiemo alleges that operational authority over the establishment of a New York Buddha Bar franchise was vested with defendant Vaygensberg, who served as BBNY's Manager and Chairman.

In February 2015, Vaygensberg allegedly informed MProsiemo that Westside 309, LLC, the landlord at the Midtown Location, had proposed unreasonable lease terms and that therefore BBNY would not establish a Buddha Bar at the Midtown Location but would instead look for another location. According to MProsiemo, BBNY's managing members did not provide MProsiemo with any further information on BBNY's business activities from February 2015 to September 3, 2015. MProsiemo claims that it requested status updates from Vaygensberg concerning BBNY but did not receive any "meaningful" response.

In November 2015, MProsiemo demanded a return of its capital investment in BBNY. As alleged in the complaint, for the six months following MProsiemo's demand, Vaygensberg and Tatarchuk found numerous "flaws" within documents executed by MProsiemo for the return of its capital contribution. MProsiemo alleges that, although it complied with Vaygensberg's and Tatarchuk's requests, Defendants nevertheless refused to return MProsiemo's capital contribution.

MProsiemo alleges, on information and belief, that on or about October 20, 2015, Defendants formed Elmwood to set up and operate a Buddha Bar location in Tribeca (the "Tribeca Location") and that GVE granted Elmwood a franchise license. On May 19, 2016, Elmwood filed an application with the New York State Liquor Authority for a liquor license for a Buddha Bar Tribeca location. Press reports indicated that Stefanov and Barthelemy were among the restaurant's representatives at a Tribeca Community Board meeting concerning proposed plan for a Buddha Bar.

MProsiemo alleges that "while promising to return [MProsiemo's] capital investment, Defendants (i) formed a new enterprise; (ii) usurped an opportunity vested with BBNY pursuant to law and under the Agreement; (iii) pursued a competing venture; (iv) misappropriated Plaintiff's capital contribution; (v) failed to return Plaintiff's capital contribution as agreed upon; and (vi) froze Plaintiff out of Elmwood."

MProsiemo brought this action on June 29, 2017, asserting causes of action for dissolution of BBNY, an accounting, officer and director misconduct, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, conversion, breach of the implied

covenant of good faith and fair dealing, violation of the New York Franchise Sales Act and breach of contract.

GVE, Vaygensberg, Tatarchuk, Stefanov, Arkensberg, Romanirov, Elmwood, Barthelemy and BBNY now move to dismiss the complaint based on documentary evidence that they claim disproves MProsiemo's claims as a matter of law, and for failure to state a cause of action. In addition, GVE moves to dismiss for lack of personal jurisdiction.

Discussion

GVE and Personal Jurisdiction

GVE, a French company, seeks dismissal of the complaint as against it for lack of personal jurisdiction. "'While the ultimate burden of proof rests with the party asserting jurisdiction..., the plaintiff[] in opposition to a motion to dismiss pursuant to CPLR 3211(a)(8), need only make a prima facie showing that the defendant[s] w[ere] subject to the personal jurisdiction of the Supreme Court.'" *Daniel B. Katz & Associates Corp. v. Midland Rushmore, LLC*, 90 A.D.3d 977, 978 (2d Dept. 2011) (citation omitted).

I note first that there is no basis for general jurisdiction over GVE under CPLR § 301, because GVE is neither incorporated, nor has its principal place of business, in New York. Rather, GVE has its principal place of business in Paris, France, and is registered with the Paris Corporate Registry.

MProsiemo argues that New York may exercise personal jurisdiction over GVE pursuant to CPLR § 302(a)(1) because of "its contractual agreement with Elmwood, a New York State limited liability company in the State of New York, its registration of the

domain name buddhabarnyc.com, its licensing of its franchise rights for use in the state of New York by the Buddha Bar New York that operated through 2013, and its licensing of its franchise rights for use in Buddha Bar Tribeca." GVE counters that the Court does not have personal jurisdiction over it under CPLR § 302(a)(1), because it was not doing business in New York— *i.e.*, there are no licensed Buddha Bars in New York and GVE did not grant any party the right to open a franchise in New York.

Under New York's long-arm statute, CPLR § 302(a)(1), personal jurisdiction may be exercised over a defendant which transacts business in the state, where that transaction of business is substantially related to a plaintiff's claims. There is a two-prong inquiry under CPLR § 302(a)(1): "under the first prong the defendant must have conducted sufficient activities to have transacted business in the state, and under the second prong, the claims must arise from the transactions." *Rushaid v. Pictet & Cie*, 28 N.Y.3d 316, 323 (2016); *see also D&R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro*, 29 N.Y.3d 292, 298 (2017).

The transacting business requirement may be satisfied by proof of one transaction, so long as the claim arises from that same transaction. *Rushaid v. Pictet & Cie*, 28 N.Y.3d at 323 n 4. However, "[i]t is not enough that a non-domiciliary defendant transact business in New York to confer long-arm jurisdiction." *D&R Global Selections,* 29 N.Y.3d at 298. A plaintiff's claim must have an "articulable nexus" or "substantial relationship" with the defendant's transaction of business, and although this inquiry is "relatively permissive," the claim must not be "completely unmoored" from the transaction. *Id.* at 298-299 (internal quotation marks and citations omitted).

Here, the complaint is devoid of any allegations of interactions between GVE and MProsiemo. In fact, MProsiemo only refers to GVE in the body of the complaint once, stating that, "Plaintiff believes and therefore avers that defendant GVE granted Elmwood a license to operate a Buddha-Bar franchise at the Tribeca Location." MProsiemo then asserts a single cause of action against GVE for violation of the New York Franchise Act. MProsiemo claims that GVE – along with Arkensberg, Romanirov, non-moving defendant NIS, nominal defendant BBNY and Vaygensberg—offered MProsiemo a franchise within the meaning of Section 681(3) of the Act, both orally and pursuant to the Agreement.

First, MProsiemo's assertion, upon information and belief, that GVE granted Elmwood a license, is disproved in the affidavit of Carlos Abou Matta ("Matta"), the President Directeur General of GVE. Matta attests that GVE did not grant Elmwood a license agreement for the right to open a Buddha Bar franchise in New York.[4] Second, even if MProsiemo's allegation that GVE granted a franchise license to Elmwood was true, MProsiemo's claim here does not arise from that transaction, but instead from alleged breaches of the obligation of BBNY to obtain a franchise agreement under the Member Agreement. GVE was not a party to the Member Agreement and MProsiemo

[4] Matta states that there was a memorandum of understanding (the "MOU") between GVE, Creative Design FZ LLC, and Elmwood dated January 15, 2016 and that pursuant to the MOU, Elmwood was granted a ninety (90) day "Exclusivity Period" to enter into License Agreements with the Licensor to use Licensor's trademarks and concepts in New York. Matta further avers that the "Exclusivity Period" expired on April 15, 2016 without the parties entering into any license agreements.

does not allege that it had any contact with anyone from GVE regarding a Buddha Bar franchise.

Absent any allegations that GVE took any acts to establish a Buddha Bar franchise with MProsiemo, there is simply no basis to exercise long-arm jurisdiction over GVE. *See D&R Global Selections,* 29 N.Y.3d at 299 (stating that the nexus will be deemed insufficient "where the relationship between the claim and transaction is 'too attenuated' or 'merely coincidental.'") (citation omitted). Similarly, there is no "articulable nexus" between the previous existence of a Buddha Bar in New York (which ceased operations in 2013) and the claims arising out of the Member Agreement, as the latter was signed in 2014 and GVE was not a party to it.

MProsiemo also argues that New York may exercise long-arm jurisdiction over GVE due to its domain name registration. I disagree. New York courts deem passive websites as an insufficient basis upon which to confer personal jurisdiction over a foreign corporation. *See., e.g. Paterno v. Laser Spine Institute*, 24 N.Y.3d 370, 377 (2014) ("[p]assive websites… which merely impart information without permitting a business transaction, are generally insufficient to establish personal jurisdiction."). Similarly, the passive registration of the domain name "buddhabarnyc.com," without more, cannot support a finding of personal jurisdiction. Thus, I dismiss the complaint as to defendant GVE based on lack of personal jurisdiction.[5]

[5] As I dismiss the complaint against GVE on the grounds of lack of personal jurisdiction, I do not address the other dismissal grounds raised by GVE in its motion to dismiss.

I also deny MProsiemo's request for jurisdictional discovery, under CPLR § 3211(d) because, contrary to its contention, it has not made a "sufficient start" on the issue of personal jurisdiction. *See McBride v. KPMG Intern.*, 135 A.D.3d 576, 577 (1st Dept. 2016) (finding that lower court properly denied plaintiffs' request for jurisdictional discovery where "plaintiffs failed to submit affidavits specifying facts that might exist but could not then be stated that would support the exercise of personal jurisdiction over [foreign defendant]).

Causes of Action under Business Corporation Law

MProsiemo alleges two causes of action under New York's Business Corporation Law ("BCL"): for dissolution of BBNY (BCL §1104-A); and for officer and director misconduct (BCL §720). As Defendants point out, the BCL is inapplicable here because BBNY is a New York limited liability company, thus the Limited Liability Company Law ("LLCL"), rather than the BCL, governs.

MProsiemo's mislabeling of its causes of action in and of itself does not merit dismissal. On a motion to dismiss, a court must "determine only whether the facts as alleged fit within any cognizable legal theory." *Leon,* 84 N.Y.2d at 87-88. Courts look at the substance rather than the form of the pleaded facts and even if a plaintiff incorrectly labels its claim, so long as the facts make out another cause of action, that claim can survive a motion to dismiss. *Oringer v. Rotkin*, 162 A.D.2d 113, 114 (1st Dept. 1990); *Edwards v. Codd*, 59 A.D.2d 148, 154-155 (1st Dept. 1977).

LLCL 702 states that:

> On application by or for a member, the Supreme Court in the judicial district in which the office of the limited liability company is located may decree dissolution of a limited liability company whenever it is not reasonably practicable to carry on the business in conformity with the articles of organization or operating agreement.

Dissolution under LLCL 702 is "initially a contract-based analysis" in that courts are required to first examine the LLC's operating agreement to determine whether it is "'reasonably practicable' for the limited liability company to continue to carry on its business in conformity with the operating agreement." *Ocean Ave., LLC*, 72 A.D.3d 121, 128 (2d Dept. 2010). Thus, judicial dissolution is available in situations where a plaintiff demonstrates that the LLC is not able to function as intended or is financially failing. *Id.* at 129.

Defendants argue that the cause of action for dissolution must be dismissed because MProsiemo's allegations of oppressive actions towards it by the other LLC members are insufficient for dissolution under LLC 702. However, in addition to alleging that Defendants' actions towards it were oppressive, MProsiemo's complaint alleges that: 1) BBNY was formed for the purpose of setting up and operating a "Buddha Bar" at 357 West 57th Street in New York; and 2) it is impossible for BBNY to fulfill its purpose because Defendants usurped the opportunity through defendant Elmwood. Unlike the cases cited by Defendants, the allegation here is not only that MProsiemo has been excluded by the other members of the LLC, but also that the LLC has not been able to carry on its business. At this pre-answer motion to dismiss stage, MProsiemo has sufficiently alleged a cause of action for dissolution. *See Mace v. Tunick*, 153 A.D.3d 689, 690-691 (2d Dept. 2017) (reversing lower court's dismissal of plaintiff's cause of

action for dissolution where plaintiff alleged that it was impossible for the LLC to fulfill its purpose).

MProsiemo's other BCL claim, alleging officer and director misconduct under §720 against Vaygensberg, was withdrawn by MProsiemo in footnote 3 of its Memorandum of Law in Opposition to the Motion to Dismiss. I therefore dismiss that cause of action.

Breach of Fiduciary Duty

In its breach of fiduciary duty cause of action MProsiemo alleges that Vaygensberg, Tatarchuk, Stefanov, Arkensberg, Romanirov and non-moving defendant NIS "failed to diligently, carefully and honestly administer the affairs of BBNY, engaged in corporate waste, squandered assets of BBNY, and failed to faithfully perform their fiduciary duties as majority shareholders of BBNY by, inter alia, knowingly and fraudulently self-enriching themselves by unlawfully using BBNY assets to reimburse personal expenses, wasting BBNY assets, at the expense of Plaintiff." Plaintiffs asserting a claim for breach of fiduciary duty must allege that "(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct." *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dept. 2011). Moreover, causes of action for breach of fiduciary duty must be plead with particularity. *Stang LLC v. Hudson Square Hotel, LLC*, 158 A.D.3d 446, 446 (1st Dept. 2018). With the foregoing in mind, I review MProsiemo's allegations against moving Defendants.

1. Arkensberg and Romanirov

As the managing members of BBNY, Arkensberg and Romanirov owed non-managing member MProsiemo a fiduciary duty. *Pokoik v. Pokoik*, 115 A.D.3d 428, 429 (1st Dept. 2014). MProsiemo's allegations that Arkensberg and Romanirov engaged in corporate waste and self-enrichment at MProsiemo's expense are sufficient to state a claim for breach of fiduciary duty against them.

2. Vaygensberg

MProsiemo alleges that Vaygensberg served as BBNY's Manager and Chairman and had operational authority over the establishment of a Buddha Bar franchise in New York. Defendants contend that Vaygensberg was not a member or manager of BBNY. Vaygensberg did not submit affidavit an affidavit on this motion, however, the Member Agreement directly refutes MProsiemo's allegation, as it lists only Romanirov and Arkensberg as BBNY's managing members.

Nevertheless, MProsiemo does allege a sufficient factual basis for a breach of fiduciary duty claim against Vaygensberg. MProsiemo alleges that: 1) it previously invested with Vaygensberg in a UK Buddha Bar operation; 2) Vaygensberg told MProsiemo that he had acquired the rights to develop a Buddha Bar bar and restaurant franchise in New York and had identified the Midtown Location; 3) Vaygensberg encouraged MProsiemo to immediately invest additional funds into the New York venture, citing favorable U.S. economic conditions; 4) based on the parties' relationship and Vaygensberg's representations, MProsiemo entered into the Member Agreement and invested $1,040,000 in BBNY; 5) Vaygensberg told MProsiemo that the Midtown

location would not work and that BBNY would look for a new location yet did not disclose any further information on BBNY's activities from February through September 3, 2015; 6) Vaygensberg and others formed another company, Elmwood, to pursue opening a Buddha Bar in Tribeca during the same period that no action was being taken to advance BBNY's goals; and 7) Vaygensberg stalled MProsiemo's efforts for the return of its capital investment and ultimately refused to return the money. Considering these allegations, I find that MProsiemo has sufficiently alleged a cause of action for breach of fiduciary duty against Vaygensberg.

3. Tatarchuk and Stefanov

The Member Agreement does not list Tatarchuk and Stefanov as members of, or involved in the administration of, BBNY. Therefore, a breach of fiduciary duty claim cannot be based upon their relationship to BBNY. Further, except for one email exchange between MProsiemo and Tatarchuk concerning the return of MProsiemo's capital contribution, the complaint is devoid of any allegations of interactions between the two, so there is simply no basis to find that a fiduciary relationship existed. *See Oddo Asset Management v. Barclays Bank PLC*, 19 N.Y.3d 584, 593 (2012) (stating that fiduciary relationships are based on "'a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions'") (citation omitted).

Similarly, MProsiemo's complaint lacks any allegation showing that Stefanov owed MProsiemo a fiduciary duty – it does not reference any interactions between MProsiemo and Stefanov regarding the establishment of a Buddha Bar at the Midtown

Location, and fails to detail any misconduct by Stefanov with respect to the proposed Midtown Location. Instead, MProsiemo states that it "believes" that Stefanov received an economic participation interest in Elmwood[6], and then discusses Stefanov's purported misconduct in relation to Buddha Bar UK. These allegations are insufficient to state a claim for breach of fiduciary duty against Stefanov.

Therefore, I dismiss the breach of fiduciary duty claim against Tatarchuk and Stefanov.[7]

Aiding and Abetting Breach of Fiduciary Duty

To state a cause of action for aiding and abetting the breach of fiduciary duty, a plaintiff must plead "a breach of fiduciary duty, that the defendant knowingly induced or participated in the breach, and damages resulting therefrom." *Bullmore v. Ernst & Young Cayman Islands*, 45 A.D.3d 461, 464 (1st Dept. 2007). A defendant knowingly participates in a breach of fiduciary duty only if it provides substantial assistance to the primary violator. *Id.* Furthermore, a claim for aiding and abetting breach of fiduciary duty requires actual knowledge, not merely constructive knowledge, and a plaintiff cannot simply "rely on conclusory and sparse allegations that the aider or abettor knew or should have known about the primary breach of fiduciary duty." *Id.* (citation omitted).

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[6] MProsiemo also inexplicably alleges that it "believes" that Stefanov did not invest funds in either BBNY or Elmwood.

[7] MProsiemo further contends that Tatarchuk and Stefanov acted as the "actual and/or apparent agent[s]" of Vaygensberg in "dealings" with MProsiemo. Again, however, the complaint fails to provide sufficient additional particularized information pertaining to these "dealings" (except for the above-referenced single Tatarchuk email).

1. Barthelemy and Elmwood

MProsiemo's only cause of action against Barthelemy and Elmwood is for aiding and abetting breach of fiduciary duty. Specifically, MProsiemo alleges that Elmwood and Barthelemy aided and abetted the "wrongful" transfer of the Buddha-Bar opportunity from BBNY. The complaint, however, fails to allege that Elmwood and Barthelemy were aware of any other party's breach of fiduciary duty to MProsiemo. *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dept. 2003) (noting that conclusory allegations do not show "actual knowledge" and are "an insufficient basis for aider and abettor liability"). Also absent from the complaint are allegations concerning how Elmwood and Barthelemy rendered "substantial assistance." *Art Capital Group, LLC v. Neuhaus*, 70 A.D.3d 605, 610 (1st Dept. 2010). Contrary to MProsiemo's argument, the simple allegation that Barthelemy was involved in other Buddha Bar ventures, including the proposed Buddha Bar in Tribeca, is an insufficient basis upon which to plead aider and abettor liability. Accordingly, I dismiss the aiding and abetting breach of fiduciary duty claim against Elmwood and Barthelemy.

2. Vaygensberg, Arkensberg and Romanirov

MProsiemo alleges that: 1) Vaygensberg aided and abetted Arkensberg, non-moving defendant NIS and Romanirov in oppressing and freezing-out MProsiemo from BBNY; and 2) Arkensberg, non-moving defendant NIS, and Romanirov aided and abetted Vaygensberg in transferring money and business opportunities out of BBNY and into other entities, including Elmwood. As MProsiemo has alleged that Vaygensberg, Arkensberg and Romanirov were primary violators in its cause of action for breach of

fiduciary duty, it is redundant to allege that they aided and abetted their own breaches of fiduciary duty. Consequently, the cause of action for aiding and abetting breach of fiduciary duty is dismissed as against Vaygensberg, Arkensberg and Romanirov.

3. **Tatarchuk and Stefanov**

MProsiemo alleges, without any factual support, that Tatarchuk and Stefanov aided and abetted Arkensberg, non-moving defendant NIS and Romanirov in the oppression and freeze-out of MProsiemo from BBNY. Without more, these bare allegations are insufficient to state a claim for aider and abettor liability and I dismiss this cause of action against Tatarchuk and Stefanov.

Equitable Accounting

In order to establish a right to an equitable accounting, a plaintiff must demonstrate the existence of a fiduciary or confidential relationship and a breach of the duty imposed by that relationship respecting property in which the plaintiff has an interest. *Adam v. Cutner & Rathkopf*, 238 A.D.2d 234, 242 (1st Dept. 1997). As discussed above, MProsiemo has failed sufficiently to allege the requisite fiduciary relationship with respect to Tatarchuk and Stefanov, thus the cause of action for an equitable accounting is dismissed as against them. With respect to Vaygensberg, the Member Agreement shows that he was not a managing member of BBNY. Therefore, the equitable accounting claim against him also must be dismissed, particularly because MProsiemo seeks BBNY's books and records and there is no competent allegation to show that Vaygensberg has access to them.

The complaint alleges a fiduciary relationship between MProsiemo, as a non-managing member of BBNY and Arkensberg and Romanirov, as the managing members of BBNY. Due to their alleged fiduciary relationship with MProsiemo and the allegations that MProsiemo's requests for access to BBNY's books and records were ignored, MProsiemo has sufficiently pled a claim for equitable accounting against Arkensberg and Romanirov. *See Mohinani v. Charney*, 156 A.D.3d 443, 444 (1st Dept. 2017).

Breach of Contract

Defendants argue that the breach of contract cause of action must be dismissed because there are no allegations that Arkensberg or Romanirov did anything to breach paragraphs 3.1 or 5.3 of the Member Agreement. MProsiemo does allege that Arkensberg, Romanirov and non-moving defendant NIS breached various provisions of the Member Agreement, including failing to: 1) set up and operate a Buddha Bar at the Midtown location pursuant to ¶ 3.1; 2) use "reasonable endeavors," under ¶ 3.2, to make sure that BBNY was conducted in the best interests of the Company; 3) obtain MProsiemo's written consent prior to changing the nature/scope of BBNY's business pursuant to ¶ 5.3; and 4) provide financial information under ¶ 5.2. MProsiemo also alleges that it fulfilled its contractual obligations and that it sustained damages because of Defendants' breach. Thus, the breach of contract claim was sufficiently pled. *See Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept. 2010).

Conversion

Defendants argue that MProsiemo's conversion claim must be dismissed because the money that was allegedly converted belonged to BBNY rather than MProsiemo and "[t]o the extent that [MProsiemo] contends that this alleged conversion diminished the value of its membership interest in BBNY, such a claim would have to be brought derivatively." In opposition, MProsiemo argues that it stated a cause of action for conversion by alleging that Vaygensberg, Tatarchuk, Stefanov, and Arkensberg intentionally and improperly assumed control over Plaintiff's $1,040,000, and, despite demand, have refused to return the money.

To establish a conversion claim, a plaintiff must demonstrate: (1) possessory right or interest in the property; and (2) that the defendant exercised an unauthorized dominion over that property to the exclusion of plaintiff's rights. *Komolov v. Segal*, 144 A.D.3d 487, 488 (1st Dept. 2016). A conversion claim cannot be solely predicated on a breach of contract. *See Jeffers v. American University of Antigua*, 125 A.D.3d 440, 443 (1st Dept. 2015); *Fesseha v. TD Waterhouse Inv. Servs.*, 305 A.D.2d 268, 269 (1st Dept. 2003).

Here, MProsiemo fails to allege that it maintained legal ownership or an immediate superior right of possession to the $1,040,000 after the funds were invested in BBNY. *See Schulz v. Dattero*, 104 A.D.3d 831, 833 (2d Dept. 2013). Further, MProsiemo's conversion cause of action is not supported by any facts independent of its breach of contract claim, and is thus duplicative. *Gleyzerman v. Law Offices of Arthur Gershfeld & Associates, PLLC*, 154 A.D.2d 512, 513 (1st Dept. 2017).

Accordingly, I grant Defendants' motion to dismiss the cause of action for conversion.

Breach of the Implied Covenant of Good Faith and Fair Dealing

Defendants contend that MProsiemo failed to identify a wrong, distinct from a breach of contract, that would support a breach of the implied covenant of good faith and fair dealing cause of action and therefore the latter claim should be dismissed. MProsiemo states that its breach of the implied covenant of good faith and fair dealing claim and breach of contract claim are not duplicative, reasoning that "if the Court finds that Defendants did not breach the Member Agreement, [MProsiemo] should have the ability to rely upon its claim that Defendants breached of the duty of good faith and fair dealing, in order to provide [MProsiemo] with an equitable remedy for Defendants' misconduct."

MProsiemo's breach of the implied covenant of good faith and fair dealing claim and its breach of contract claim arise from the same facts, thus the former must be dismissed as duplicative. *Logan Advisors, LLC v. Patriarch Partners, LLC*, 63 A.D.3d 440, 466-467 (1st Dept. 2009).

Violation of the New York State Franchise Sales Act

The complaint contains a cause of action under the New York State Franchise Sales Act ("Franchise Sales Act").[8] Section 687 of the Franchise Sales Act states:

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[8] The Franchise Sales Act, in Section 681, provides the following definition:

> 3. "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:
>
> (a) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor, and the franchisee is required to pay, directly or indirectly, a franchise fee, or

> 2. It is unlawful for a person, in connection with the offer, sale or purchase of any franchise, to directly or indirectly:
>
> (a) Employ any device, scheme, or artifice to defraud.
>
> (b) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. It is an affirmative defense to one accused of omitting to state such a material fact that said omission was not an intentional act.
>
> (c) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Section 691(1) of the Franchise Sales Act states that

> A person who offers or sells a franchise in violation of section six hundred eighty-three, six hundred eighty-four or six hundred eighty-seven of this article is liable to the person purchasing the franchise for damages and, if such violation as willful and material, for rescission…

MProsiemo alleges that GVE, Arkensberg, Romanirov, non-moving defendant NIS, nominal defendant BBNY and Vaygensberg offered it a franchise within the meaning of Section 681(3) of the Franchise Sales Act and that the "Defendants engaged in fraudulent and unlawful practices under Section 687 of the Franchise Act by offering for sale and ultimately selling this franchise to BBNY and/or Elmwood."

As previously noted by a New York court, there is "a paucity of reported cases dealing with the Franchise Sales Act." *Fantastic Enterprises, Inc. v. S.M.R. Enterprises,*

> (b) A franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate, and the franchisee is required to pay, directly or indirectly, a franchise fee.

Inc., 143 Misc.2d 124, 127 (Sup. Ct. NY 1988). Despite the scarce case law in this area, Defendants correctly assert that MProsiemo's allegations fail to state a claim under the Franchise Act.

The Franchise Sales Act claim must be dismissed as against Arkensberg, Romanirov, non-moving defendant NIS, and nominal defendant BBNY because the Member Agreement is an operating agreement for the limited liability company, not a franchise agreement, and therefore the Franchise Sales Act is inapplicable. And, while MProsiemo alleges that Vaygensberg induced it to enter into the Member Agreement to pursue a franchise opportunity with Buddha Bar, MProsiemo does not allege that Vaygensberg offered MProsiemo a franchise agreement, and therefore the claim fails against him as well. Consequently, I dismiss the Franchise Sales Act claim in its entirety.

In accordance with the foregoing, it is

ORDERED that the motion by defendant George V. Eatertainment, S.A. to dismiss the MProsiemo's complaint is granted based on lack of personal jurisdiction and the complaint is dismissed in its entirety as against this defendant and the Clerk is directed to sever and enter judgment accordingly.; and it is further

ORDERED that the motion by defendants Arkadiy Vaygensberg, Leonid Tatarchuk, Stefan Stefanov, Arkensberg LLC, Romanirov LLC, Elmwood Ventures, LLC, Nicholas Barthelemy and BB NY Operations 357th St., LLC to dismiss MProsiemo's cause of action for breach of fiduciary duty is granted as to Tatarchuk and Stefanov, and denied as to Vaygensberg, Arkensberg, and Romanirov; and it is further

ORDERED that the motion by defendants Arkadiy Vaygensberg, Leonid Tatarchuk, Stefan Stefanov, Arkensberg LLC, Romanirov LLC, Elmwood Ventures, LLC, Nicholas Barthelemy and BB NY Operations 357th St., LLC to dismiss MProsiemo's cause of action for an equitable accounting is granted as to Vaygensberg, Tatarchuk and Stefanov and denied as to Arkensberg, and Romanirov; and it is further

ORDERED that the motion by defendants Arkadiy Vaygensberg, Leonid Tatarchuk, Stefan Stefanov, Arkensberg LLC, Romanirov LLC, Elmwood Ventures, LLC, Nicholas Barthelemy and BB NY Operations 357th St., LLC to dismiss MProsiemo's complaint is granted as to the causes of action for officer and director misconduct, aiding and abetting breach of fiduciary duty, conversion, breach of implied covenant of good faith and fair dealing and violation of the Franchise Sales Act and denied as to the causes of action for dissolution and breach of contract; and it is further

ORDERED that having dismissed each of the causes of action against them, the complaint is dismissed in its entirety as against defendants Leonid Tatarchuk, Stefan Stefanov, Elmwood Ventures, LLC, and Nicholas Barthelemy and the Clerk is directed to sever and enter judgment accordingly; and it is further

ORDERED that the remaining Defendants are directed to answer the complaint within thirty (30) days and the parties are directed to appear for a preliminary conference at 60 Centre Street, Room 208 on July 18, 2018 at 2:15pm.

This constitutes the decision and order of the Court.

5/22/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		DO NOT POST				FIDUCIARY APPOINTMENT	REFERENCE