

Boyce v T Squared Invs., LLC
2019 NY Slip Op 30965(U)
April 12, 2019
Supreme Court, New York County
Docket Number: 651660/2014
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

Justice

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MARK BOYCE, HULL CAPITAL MANAGEMENT, LLC, PIPE
SELECT FUND, LLC,

Plaintiff,

- v -

T SQUARED INVESTMENTS, LLC, T SQUARED PARTNERS LP,
T SQUARED CAPITAL LLC, T SQUARED INVESTMENT
COMPANY, LLC, THOMAS SUAVE, MARK JENSEN

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 010) 231, 232, 233, 234,
235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 256, 261,
262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274

were read on this motion to/for PARTIAL SUMMARY JUDGMENT .

The following e-filed documents, listed by NYSCEF document number (Motion 011) 280, 281, 282, 283,
284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 303, 304, 305,
306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325,
326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336

were read on this motion to/for PARTIAL SUMMARY JUDGMENT .

For the reasons set forth below, Hull Capital Management, LLC (Hull Capital) and Pipe Select
Fund, LLC's (PIPE Select) (Hull Capital and PIPE Select, together, the Plaintiffs) motion (Mtn.
Seq. 010) 1 for partial summary judgment pursuant to CPLR 3212 is granted to the extent the
Plaintiffs are entitled to an audit of Fund 1 (hereinafter defined) but is otherwise denied, and T
Squared Capital, LLC, T Squared Investment Company, LLC, T Squared Partners, LP, Thomas
Sauve and Mark Jensen's (collectively, the Defendants) motion (Mtn. Seq. 011) for partial
summary judgment dismissal pursuant to CPLR 3212 is granted solely to the extent that the

1Plaintiff Mark Boyce filed a stipulation discontinuing his claims against the Defendants with prejudice on the
morning of oral argument (4/5/19 Stipulation of Discontinuance, NYSCEF Doc. No. 338). Therefore, the Court will
not address Mr. Boyce's claims and related arguments insofar as they are no longer relevant to the instant decision.

cause of action for misappropriation (fourth cause of action) and unjust enrichment (sixth cause of action) are dismissed but is otherwise denied.

RELEVANT BACKGROUND

In 2007, Hull Capital invested \$10 million in T Squared Investments LLC (**Fund 1**), which was managed by Messrs. Sauve and Jensen through their control of T Squared Capital LLC (the **Managing Member**), pursuant to a certain Seed Agreement (the **Seed Agreement**), dated October 4, 2007, by and between Hull Capital, Messrs. Sauve and Jensen, Fund 1 and the Managing Member (Hull Aff., ¶ 1). Fund 1 was created to secure private investments in publicly traded companies (re: private equity, each hereinafter, a **PIPE** transaction). PIPEs are inherently illiquid (Sauve Aff., ¶ 5). As the investment manager of an entity eventually known as PIPE Select Fund, LLC (**PIPE Select**), Hull Capital made the largest investment in Fund 1 and was, therefore, its lead or “seed” investor.

Reference is also made to a certain Third Amended Limited Liability Company Operating Agreement (the **Operating Agreement**), dated August 1, 2010, by and between the Managing Member and certain persons and entities as members (each, a **Member**) (NYSCEF Doc. No. 289). In late March 2011, Hull Capital submitted a request to withdraw \$4 million of its investment. Article VII of the Operating Agreement governs the parties’ rights to withdrawals. Section 7.2(e) of the Operating Agreement, Article VII, provides:

All payments under this Article VII shall be made in cash or securities in-kind or both, as the Managing Member may in its sole and absolute discretion determine.

Per Section 7.2(a) of the Operating Agreement, a withdrawal is effective the last day of the quarter at least 60 days after receipt of the withdrawal request and, per Section 7.2(b)(i) of the Operating Agreement, payable 30 days thereafter. To wit, the March 2011 withdrawal request was due on June 30, 2011 and payable on July 31, 2011. It is undisputed that on or before July 31, 2011, Fund 1 paid only \$175,000 of Hull Capital's \$4,000,000 withdrawal request.

Section 7.3 of the Operating Agreement provides:

The company may suspend or postpone the payment of any withdrawals from Capital Accounts applicable to the Company:

(a) during the existence of any state of affairs which, in the opinion of the Managing Member, makes the determination of the price or value of the Company's investments or the disposition of the Company's investments impractical or prejudicial to the Members; or...

(c) for such other reasons or for such other periods as the Managing Member may in good faith determine.

The Defendants allege that, due to the illiquidity of Fund 1's investments, Fund 1 was unable to honor the remainder of the Plaintiffs' request without jeopardizing the company (*Sauve Aff.*, Mtn. Seq. 011, ¶¶ 20-21). In addition, according to the Defendants, after the Managing Member explained the problem to Hull Capital, Hull Capital agreed to wait for payment of its withdrawal request until Fund 1's liquidity improved (*id.*, ¶ 21). Ultimately, on October 4, 2011 (*i.e.*, some approximately 2 months after the due date per the terms of the Operating Agreement), the Managing Member formally suspended payment (*Hull Aff.*, Ex. H).

Subsequently, in 2014, Messrs. *Sauve* and *Jensen* set up T Squared Partners LP (**Fund 2**). The Managing Member gave written notice of Fund 1's liquidation on May 6, 2014 and invited all

investors other than Hull Capital to continue their investment in Fund 2. The Managing Member then caused a *pro rata* share of Fund 1's assets, commensurate with the investments of those investors who wanted to maintain their positions, to transfer to Fund 2, while Hull Capital's *pro rata* share remained in Fund 1 (Sauve Aff., ¶ 34).

The Plaintiffs brought this lawsuit in 2014 shortly after the Defendants set up Fund 2. The First Amended and Supplemental Complaint (the **Complaint**) sets forth the following twelve causes of action: (1) breach of the Operating Agreement; (2) fraud; (3) breach of fiduciary duty; (4) misappropriation; (5) conversion; (6) unjust enrichment; (7) accounting; (8) specific performance of the Operating Agreement; (9) fraudulent transfer/violation of NY Debtor Law §§ 276, 278, 279; (10) breach of the Seed Agreement; (11) specific performance of the Seed Agreement; and (12) injunctive relief. The gravamen of the Plaintiffs' Complaint is that Messrs. Sauve and Jensen set up Fund 2 as a vehicle to avoid repayment of their obligations to the Plaintiffs, invited all of Fund 1's other investors to transfer their investments to Fund 2, transferred all of their own investments from Fund 1 to Fund 2, transferred all of Fund 1's valuable assets to Fund 2, and then refused to pay Hull Capital's redemption request on the grounds that Fund 1 lacked sufficient funds. The Plaintiffs also allege that because the Defendants have failed to provide certain contractually mandated audits of Fund 1 and Fund 2, Hull Capital has no means of knowing precisely what assets are in Fund 1 or Fund 2 or what they are worth. As discussed in more detail below, the Seed Agreement requires the Defendants to, among other things, provide Hull Capital with annual audits of Fund 1. The Seed Agreement also requires that Messrs. Sauve and Jensen devote "substantially all of their business time and effort" to running Fund 1 (Seed Agreement, § 4[d][iii]; Hull Aff., Ex. A, NYSCEF Doc. No. 240). The Plaintiffs further argue

that Messrs. Sauve and Jensen breached this latter requirement by forming Fund 2, as well as by running/managing nine other companies, thus rendering their obligation, pursuant to the Seed Agreement, to devote “substantially all of the business time and effort” to running Fund 1 impossible.

According to the Defendants, whereas the Plaintiffs sought a redemption of a substantial part of their investment, the majority of Fund 1’s other investors wanted to continue their investments (Suave Aff., ¶¶ 010, 28). As a result, the Defendants claim, Fund 1’s investors now had incompatible goals – Hull Capital wanted to liquidate while others did not – and, as a result, the Managing Member determined to bifurcate Fund 1’s assets and formed Fund 2 (*id.*, ¶¶ 29-30). In their answer, the Defendants assert the following two counterclaims: (1) declaratory judgment that Hull Capital and PIPE Select’s request for withdrawal became effective on July 30, 2011 and Boyce’s request for withdrawal became effective in June of 2013 and (2) breach of contract (Operating Agreement).

DISCUSSION

Summary judgment should be granted when the movant presents evidentiary proof in admissible form that there are no triable issues of material fact and that there is either no defense to the cause of action or that the cause of action or defense has no merit (CPLR § 3212[b]). The burden is initially on the movant to make a *prima facie* showing of entitlement to judgment as a matter of law tendering sufficient evidence in admissible form to demonstrate the absence of any material fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such *prima facie* showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64

NY2d 851 [1985]). Once the showing has been made, the burden of going forward with the proof shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a material issue of fact, which requires a trial (*Alvarez*, 68 NY2d at 324, citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

I. Plaintiffs' Motion for Partial Summary Judgment is Granted Solely with Respect to the Eleventh Cause of Action

The Plaintiffs move for partial summary judgment “on four discrete claims” (Plaintiffs’ Supporting Memorandum of Law, p. 2). First, the Plaintiffs argue that pursuant to section 13.2(b) of the Fund 1 Operating Agreement and Section 18-606 of the Delaware Limited Liability Act (the **LLC Act**), after Hull Capital’s redemption became due and owing, Hull Capital became a creditor of Fund 1 with respect to that amount, with all the corresponding rights, including the right to be paid before any transfers are made to remaining equity holders or insiders.² Second, the Plaintiffs argue that once the Managing Member transferred all of its investment in Fund 1 to Fund 2 in March of 2014, by operation of law, the Managing Member no longer had any authority to manage Fund 1’s affairs and, as such, all subsequent transactions that the Managing Member effectuated on behalf of Fund 1 were unauthorized and should be rescinded. Third, the Plaintiffs argue that the Defendants have failed to provide Hull Capital with contractually mandated annual audits of Fund 1 and Fund 2. And, fourth, the Plaintiffs argue that Messrs. Sauve and Jensen and the Managing Member breached the requirement in the Seed Agreement to devote substantially all of their business time and effort to managing Fund 1.

A. Hull Capital is a Creditor of Fund 1

² For the avoidance of doubt, the Plaintiffs do not assert a specific cause of action for failing to comply with the LLC act. The cause of action is for breach of the Operating Agreement.

Section 18-606 of the LLC Act provides that:

... unless otherwise provided in a limited liability company agreement, at the time a member becomes entitled to receive a distribution, the member has the status of, and is entitled to all remedies available to, a creditor of a limited liability company with respect to the distribution.

As noted, Article VII of the Operating Agreement governs the parties' rights to redemption and specifically answers the question raised by the Plaintiffs. Section 7.2(b)(i) specifically provides that:

A Member who requests a withdrawal of less than ninety percent (90%) of the value of such Member's Capital Account shall be paid within thirty (30) days after the applicable Withdrawal Date.

Section 7.2(a) clarifies that Withdrawal Date means that, following the first 25 months of their investments, Members may make withdrawals in increments of \$25,000 "as of the last day of each calendar quarter... upon Sixty (60) days prior written notice." Here, as discussed above, the Plaintiffs made a withdrawal request on March 29, 2011. Per the Operating Agreement, the Withdrawal Date therefore was June 30, 2011 and T Square Investments, LLC had an absolute obligation to pay the Plaintiffs \$4,000,000 in cash or in kind as of July 31, 2011. It is simply beyond cavil that the Plaintiffs were a creditor. This conclusion is further supported by Fund 1's Financial Statement for the Year Ended December 31, 2012, prepared by an Independent Auditor, Marcum, which lists the Plaintiffs' withdrawal request as a "liability" (Hull Aff., Ex. J, NYSCEF Doc. No. 328).

In their opposition, the Defendants argue that the \$4,000,000 redemption request was a pending redemption which, pursuant to Section 7.3 of the Operating Agreement, the Defendants had the right to postpone or suspend. This however misses the point. Whether the Defendants had the right to suspend the redemption liability does not change the character or the status of the \$4,000,000 request as of July 31, 2011.

B. Rescission of “Unauthorized” Transfers

The Plaintiffs also seek rescission of transfers from Fund 1 to Fund 2 following the Managing Member’s transfer of its own investment in Fund 1 to Fund 2 because, they argue, once the Managing Member transferred its own investment out of Fund 1 it no longer had authority to manage Fund 1’s affairs and, therefore, all subsequent transfers were unauthorized and should be rescinded. The argument is without merit. Under Delaware law, a manager of an LLC need not be a member and a member need not be a manager (*see North Am. Steel Connection, Inc. v Watson Metal Prod. Corp.*, 515 F Appx 176, 183 [3d Cir 2013] [citing 6 Del Code 18-402]). In addition, Section 7.1 of the Operating Agreement permits the Managing Member to:

... withdraw ***all or any of the value in any of the Managing Member’s Capital Accounts at any time***, from time to time, without the consent of the Members and without notice to any of the Members [emphasis added].

Furthermore, Section 13.1 of the Operating Agreement provides:

Dissolution of the Company. The Company shall be dissolved upon the earliest to occur of:

- (a) the withdrawal, resignation or Involuntary Withdrawal of the Managing Member in its capacity with respect to the Company, or any other event that results in such entity ceasing to be a managing member for such purposes and in such capacity, unless the remaining

Members holding a majority of the then outstanding Company Interests agree, within ninety (90) days after such event, to continue the Company with a new and qualified substitute managing member pursuant to and in accordance with the terms and conditions set forth in Article IV hereof;

- (b) an election to dissolve the Company made by the Managing Member, in its discretion, upon 30 days prior written notice to the Members; or
- (c) the happening of any other event, including the entry of a decree of judicial dissolution under Section 18-802 of the Delaware Act, that under the law of the State of Delaware, mandatorily requires the dissolution of the Company.

Simply put, the Operating Agreement does not provide that any such transfer invalidates the Managing Members' authority or otherwise causes an event of dissolution under the Operating Agreement.

C. Audits

Section 4(d)(iii) of the Seed Agreement provides:

The Manager shall provide Hull with (i) direct access (including electronic access), but not trading authority, to the Fund's and Other Related Fund's accounts with their brokers; (ii) unaudited estimated monthly percentage gross and net returns within 4 days after the end of each month plus net asset value statements relating to the Hull Capital Contributions within 15 days after the end of each month prepared by a third-party administrator approved by Hull; (iii) **annual audited financial statements of each Fund prepared by independent auditors approved by Hull within 90 days after the end of each fiscal year** [emphasis added]; and (iv) a list of all custodians, broker-dealers, banks, financial intermediaries, and counterparties (which shall include any entity contracting with the Fund in a financial or investment transaction) that the Funds or the Manager contemplate engaging (collectively, the "Reporting Requirements"). Each of the Manager and the Funds agree not to engage any such entity provided in clause (iv) above without the prior written consent of Hull, which consent shall not be unreasonably withheld or delayed. Hull consents to all custodians, broker-dealers, banks, financial intermediaries and counter parties engaged by the Funds as of the date of this Agreement. (Hull Aff., Ex. A, § 4[d], NYSCEF Doc. No. 240).

The Plaintiffs argue that they are entitled to an audit of both Fund I and Fund II. In their opposition papers, the Defendants argue that the relief requested should be denied because their obligations under the Seed Agreement ended when the Operating Agreement was executed and that Section 14.9 of the Operating Agreement which contained a standard integration clause rendered the special rights afforded to the seed investor pursuant to Seed Agreement extinguished. The argument is unavailing.

A subsequent contract that does not pertain to precisely the same subject matter will not supersede an earlier contract unless the subsequent contract has clear language indicating that it is revoking, canceling or superseding the specific prior contract (*Globe Food Services Corp. v Consolidated Edison of NY, Inc.*, 184 AD2d 278 [1st Dept 1992]). The Seed Agreement and the Operating Agreement do not contemplate the same relationships. The Seed Agreement was entered into to give certain special rights to a lead/early (re: seed) investor to induce their investment. The seed investment is marketed as an inducement to encourage others to invest pursuant to the Operating Agreement. In addition, the parties to the Seed Agreement and the Operating Agreement are not the same. The parties to the Seed Agreement are Hull Capital, the Managing Member, Fund 1, T Squared Partners LLC, and Messrs. Jensen and Sauve. The parties to the Operating Agreement are the Managing Member and the members of Fund 1. For the avoidance of doubt, Mssrs Jensen and Sauve signed the Seed Agreement in their individual personal capacity but signed the Operating Agreement on behalf of the Managing Member only. To the extent that the Defendants also argue that an audit is excused by impossibility due to fact that they cannot afford the cost of an audit, this is not what is meant by the doctrine of impossibility. With respect to Fund 2, however, the Seed Agreement does not afford the Plaintiffs the right to an audit. The Plaintiffs are simply entitled to direct access of the accounts

of “Other Related Funds.” The term “Other Related Funds” is defined in Section 2 of the Seed Agreement as “any other fund or account” established by Messrs. Sauve, Jensen or the Managing Member. Therefore, the Plaintiffs are entitled to summary judgment on their eleventh cause of action for specific performance with respect to an audit of Fund 1 only.

D. Alleged Failure by Messrs. Sauve, Jensen and the Managing Member to devote substantially all of their business time and effort to management of Fund 1

Section 5(c) of the Seed Agreement states that, “[t]he Managing Member, Jensen and Sauve covenant and agree that they will devote substantially all of their business time and effort ... to the Funds’ management.” The Plaintiffs rely on certain deposition testimony by Mr. Jensen that purportedly concedes that he and Mr. Sauve “may have” spent more than 1000 hours per year working for entities other than Fund 1 (Jensen Dep., pp. 344-48), and the fact that Mr. Jensen admitted that he, Mr. Sauve and the Managing Member had established or acquired at least nine companies other than Fund 1, and that he and Mr. Sauve occupied high-level roles at each of those nine companies. In their opposition papers, the Defendants argue that the Seed Agreement does not apply – *i.e.*, the Messrs. Sauve and Jensen have no obligation at all after the Operating Agreement was executed, and that, even if they did, the Plaintiffs have failed to demonstrate that being involved in nine other companies is sufficient to demonstrate a breach of the provision. Putting aside the argument already addressed above (*i.e.*, that the obligations of Messrs. Sauve and Jensen were extinguished because the Operating Agreement superseded the Seed Agreement), this is clearly a factual issue which cannot be resolved on summary judgment.

- II. Defendant's Motion is Granted Solely to the Extent that the Causes of Action for Misappropriation (4th Cause of Action) and Unjust Enrichment (6th Cause of Action) are dismissed

The Defendants move for summary judgment dismissal of the claims for breach of the Operating Agreement (1st cause of action); breach of fiduciary duty (3rd cause of action); misappropriation (4th cause of action); conversion (5th cause of action); unjust enrichment (6th cause of action); accounting (7th cause of action); specific performance as it relates to the Operating Agreement (8th cause of action); fraudulent transfer (9th cause of action); breach of the Seed Agreement (10th cause of action); and specific performance as it relates to the Operating Agreement (11th cause of action).

A. Breach of Contract (Operating Agreement)

Delaware law governs the Operating Agreement (Operating Agreement, § 14.5). The elements of a breach of contract claim under Delaware law are the same as they are under New York law: (1) a contractual obligation, (2) a breach of that obligation, and (3) resulting damages (*H-M Wexford LLC v Encorp, Inc.*, 832 A2d 129, 140 (Del Ch 2003)). Although this claim is broadly asserted as against all the Defendants, the Managing Member is the only defendant that is a party to the Operating Agreement. Accordingly, as an initial matter, only the Managing Member may be liable for breaching the Operating Agreement. Putting that aside, the Plaintiffs allege the following eight breaches of the Operating Agreement:

- (1) failing to tender to Plaintiffs' securities and/or cash sufficient to satisfy their respective redemptions;
- (2) refusing to provide access to Plaintiffs and their representatives to the complete set of books and records of the Fund;
- (3) withdrawing excessive management fees beyond those permitted by the LLC Agreement;
- (4) receiving reimbursements for out-of-pocket expenses in substantial excess of the reimbursement amounts permitted under the LLC Agreement;

- (5) failing to manage the business and affairs of the Fund, including maintenance of the books and records of the Fund, competently and honestly;
- (6) failing to provide accurate reports and valuations of the Fund's positions throughout the Fund's operation;
- (7) improperly delaying Plaintiffs' respective redemption dates; and
- (8) forming T Squared 2 to siphon valuable assets from T Squared, leaving T Squared insolvent and incapable of satisfying its creditors, including Plaintiffs (Complaint, ¶ 134).

With respect to the first alleged breach, the Defendants argue that this aspect of the Plaintiffs' claim fails because the Managing Member suspended payment of PIPE Select's redemption request in accordance with the Operating Agreement. As set forth above, pursuant to Section 7.3 of the Operating Agreement, the Managing Member may "suspend or postpone the payment of any withdrawals." The Managing Member may suspend payment "during the existence any state of affairs which, in the opinion of the Managing Member, makes the ... disposition of [Fund 1's] investments impractical or prejudicial to the Members" (Operating Agreement, § 7.3[a]). Additionally, the Managing Member may suspend payment "for such other reasons or for such other periods as the Managing Member may in good faith determine" (*id.*, § 7.3[c]). The Managing Member suspended payment of PIPE Select's withdrawals on October 4, 2011. To date, it has not lifted that suspension. Although the Defendants do not expressly state upon which provision of section 7.3 they rely, it would appear to be subsection 7.3(c): "for such other reasons or for such other periods as the Managing Member may in good faith determine." The Plaintiffs argue that the suspension was not made in good faith because of the subsequent withdrawals of other members and transfers of assets to Fund 2. Whether the Managing Member made its decision "in good faith" is a factual question that cannot be determined on summary judgment or without the benefit of the audit discussed above.

With respect to the second alleged breach, the Plaintiffs also argue that the Managing Member has refused to provide access to the complete books and records of Fund 1 pursuant to section 3.6(b) of the Operating Agreement. That section provides that a member of Fund 1 may inspect the company's records "[u]pon reasonable advance written notice." The Managing Member argues that it cannot be in breach of this provision because it has "never rejected a written request for access to its records" from the Plaintiffs (Sauve Aff., ¶ 44). Hull Capital made its request by asking for copies of specific documents from the Managing Member. To the extent that section 3.6(b) only provides for a Member to "inspect and copy, at the Member's expense," Company records, the Defendants' are entitled to summary judgment dismissal without prejudice of this aspect of the breach of contract claim.

With respect to the third alleged breach, the Complaint alleges that the Defendants withdrew "excessive" management fees beyond those permitted by the Operating Agreement. Section 6.1 of the Operating Agreement sets forth the management fees payable to the Investment Manager. The Defendants maintain that the Managing Member never paid the Investment Manager more than the amounts permitted under this provision (Sauve Aff., ¶ 39). The Plaintiffs' do not submit any contrary evidence, but instead argue that the Defendants inflated Fund 1's assets and thereby inflated the management fees that flowed to the Investment Manager pursuant to Section 6.1 of the Operating Agreement. Without the benefit of an audit or any indication of the value of the assets under management, the Court cannot resolve this issue.

With respect to the fourth alleged breach, receiving reimbursements for out-of-pocket expenses in excess of the reimbursement amounts permitted under the Operating Agreement, Sections 6.2

and 6.3 of the Operating Agreement, respectively, provide that Fund 1 shall pay or reimburse the Managing Member for organizational or operating expenses. The Defendants maintain that this aspect of the claim should be dismissed as the Managing Member has never sought or received reimbursement for any cost or expense in excess of those permitted by Sections 6.2 and 6.3 (Sauve Aff., ¶ 40). The Plaintiffs submit evidence that the Managing Member permitted Fund 1 to pay what may be “excessive fees” of \$6,000/month to Greg Jensen, Mark Jensen’s brother, as a consultant. Greg Jensen served as Fund 1’s “head of due diligence coordination, investment monitoring, and portfolio maintenance” (Feder Aff., Ex. 6, Jensen EBT, p. 110). However, the Plaintiffs contend that Greg Jensen admitted that prior to being hired by Fund 1, he had no professional investment or finance-related experience whatsoever, and that prior to his hiring, he had never conducted due diligence on a prospective portfolio investment (*id.*, pp. 87-89, 103-105). Greg Jensen could not name a single individual in Fund 1’s purported network of 13 due diligence professionals in China – notwithstanding that he was Fund 1’s “head of due diligence coordination” (*id.*, pp. 115-118). Put another way, the Plaintiffs contend that Greg Jensen was hired as a favor to Mr. Jensen and not because he was competent to perform his duties and the payments to him were, therefore, improper and excessive. This also cannot be resolved at this stage of the proceeding.

With respect to the fifth alleged breach, failing to manage the business and affairs of Fund 1 competently and honestly, although the Plaintiffs do not allege any specific provision of the Operating Agreement that was breached, their allegations that the Managing Member inflated assets, charged excess fees based on the inflated values and “cherry picked” the best assets to transfer to Fund 2 are sufficient to sustain this claim at this stage in the proceeding. To the

extent that the Defendants argue that the Plaintiffs do not submit any evidence for the proposition that the Managing Member failed to maintain complete and accurate records, this is not something that cannot be determined without the benefit of an audit.

With respect to the sixth alleged breach, failing to provide accurate reports and valuations of the Fund 1's positions throughout the Fund's operation, the Defendants argue that nothing in the Operating Agreement requires the Managing Member to supply reports and valuations of Fund 1's positions to the Plaintiffs. At most, the Managing Member is required to provide Schedule K-1's to Fund 1's annual tax return (citing Operating Agreement, § 3.6[c]). The Plaintiffs do not allege a breach of this provision. However, the Operating Agreement clearly requires valuations of Fund 1's assets to be accurate (*e.g.*, Operating Agreement, § 9.5). To the extent that the Plaintiffs allege that the Defendants consistently inflated the value of Fund 1's assets, this aspect of the breach of contract claim cannot be dismissed on summary judgment.

With respect to the seventh alleged breach, "improperly delaying Plaintiffs' respective redemption dates," this claim cannot be dismissed on summary judgment. As noted above, Section 7.3(c) permits the Managing Member to suspend payment of withdrawals "for such other reasons or for such other periods as the Managing Member may in good faith determine," and whether the Managing Member exercised its right in "good faith" here is an issue of fact that cannot be determined in this case on summary judgment.

Finally, with respect to the eighth alleged breach, forming Fund 2 "to siphon assets from [Fund 1]," and "leaving [Fund 1] insolvent and incapable of satisfying its creditors," the Operating

Agreement does not preclude the establishment of Fund 2 or any other fund. Likewise, the Operating Agreement does not prohibit Members of Fund 1 from transferring their interests in the Fund. The Operating Agreement permits Members to withdraw from Fund 1 and permits the Managing Member to pay their withdrawal requests in-kind with fund assets (Operating Agreement, § 7.2). Whether the Defendants' conduct in transferring Fund 1's assets to Fund 2 was proper depends on whether the Defendants suspended the Plaintiffs' redemption rights in "good faith." As the latter cannot be determined on summary judgment, this aspect of the breach of contract claim cannot be dismissed. In addition, the Plaintiffs allege that the Managing Member cherry picked which assets it transferred to Fund 2 (i.e., choosing the most valuable assets to transfer and leaving the rest) and returned certain other assets after they were transferred. Specifically, the Plaintiffs take issue with the transfer from Fund 1 to Fund 2 of 52% of the stock in Dolphin Entertainment, Inc. (**Dolphin**) and the subsequent sale by the Managing Member of the remaining 48% of the Dolphin stock from Fund 1 to Fund 2. Messrs. Sauve and Jensen set the terms of that deal and signed the sales documents for both the buyer (Fund 2) and the seller (Fund 1). Although the Defendants submit that the sale was subsequently reversed and that 48% of Dolphin's stock is now owned by Fund 1 again (Sauve Aff., ¶¶ 35-36), it is not clear at this stage if there were other assets that were improperly transferred between the Funds without the benefit of an audit.

(1) Breach of Fiduciary Duty

The Defendants argue that the third cause of action for breach of fiduciary duty should be dismissed because it is duplicative of the Plaintiffs' breach of contract claim. While "a cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim

cannot stand,” the Plaintiffs’ breach of fiduciary duty claim is not duplicative (*William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept 2000] [citation omitted]). The “same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself” (*id.* [quotation and citation omitted]). Here the Plaintiffs argue that the Defendants breached their fiduciary duties by, among other things, failing to conduct due diligence on Fund 1’s investments, selling the Dolphin stock from Fund 1 to Fund 2, and through the redemption other Fund 1 investors after the Plaintiffs redemptions had already become due and owing. This is separate from the Plaintiffs’ breach of contract claim because although the Managing Member’s fiduciary obligations to the Plaintiffs arise from the parties’ contractual relationship, the specific alleged breaches of fiduciary duty are not based on specific contractual provisions, but on the Managing Member’s obligation to act for the Plaintiffs’ benefit (*Mandelblatt v Devon Stores*, 132 AD2d 162, 168 [1st Dept 1987]). Nor is the breach of fiduciary duty claim premised on the same conduct as the breach of contract claim, as the Defendants argue. In addition to the allegations of self-dealing by the Defendants, the Managing Member suspended the Plaintiffs’ redemption request in 2011 and has failed to take any action to lift that stay in the seven years since for purportedly wrongful and self-serving reasons. The foregoing is sufficient to maintain a fiduciary duty claim.

(2) Misappropriation

The Plaintiffs’ misappropriation is claim is based on, among other things, the Defendants’ taking of “exorbitant” management fees “based upon overinflated valuation of the Fund’s assets” and “transferring the Fund’s most valuable assets to a new fund [Fund 2]” (Compl., ¶¶ 171-172).

Defendants argue that this claim should be dismissed because the law does not recognize a claim for misappropriation, but only for conversion and that in any event it is duplicative of the conversion claim. The Court agrees. While the law recognizes a claim for “misappropriation,” it is generally limited to (1) misappropriation of trade secrets, (2) misappropriation of ideas, or (3) misappropriation of skills and expenditures, none of which in any way fits the Plaintiffs’ theory of the case here (*Schroeder v Pinterest Inc.*, 133 AD3d 12 [1st Dept 2015]). In any event, the Plaintiffs’ conversion claim subsumes the misappropriation claim and therefore the allegations made by the Plaintiffs with respect to misappropriation may be brought as part of their claim for conversion.

(3) Conversion

The “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” (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012] [citation omitted]). The Plaintiffs claim that the transfer of certain assets from Fund 1 to Fund 2 constitutes conversion. Whether or not the Defendants wrongfully converted assets belonging to the Plaintiffs presents a factual issue and cannot be determined in this case on summary judgment.

(4) Unjust Enrichment

“The doctrine of unjust enrichment invokes an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned” (*Pappas, supra*, 20 NY3d at 234 [quotation omitted]). However, a party may not recover in unjust enrichment where the parties’ relationship is governed by contract as here (*id.*). This claim is dismissed.

(5) Accounting

To the extent that the Defendants argue that accounting is an equitable remedy, not a cause of action, courts routinely permit claims for an accounting to go forward so long as the underlying causes of action (*e.g.*, breach of contract, breach of fiduciary duty and audit) are well pled as here. The Defendants therefore are not entitled to summary judgment dismissal of this claim.

(6) Specific Performance

Inasmuch as the Plaintiffs' eighth cause of action seeks a decree of specific performance requiring the Managing Member to honor the Plaintiffs' withdrawal requests (Complaint, ¶¶ 198-208) and the breach of contract claim is not dismissed, the Defendants are not entitled to summary judgment dismissal of the eighth cause of action.

(7) Fraudulent Transfer

A fraudulent transfer claim requires a plaintiff to establish, among other things, that the conveyance was made without fair consideration (*Fisher v Sadv Realty Corp.*, 34 AD3d 632, 633 [2d Dept 2006]); NY Debt & Cred. Law SS 273, 274; 6 Del Code 1304[a][2]). Without an audit, the Court cannot determine whether the transfer of assets from Fund 1 to Fund 2 was made with fair consideration. Summary judgment dismissal of this claim would not be appropriate at this time.

(8) Breach of Contract (Seed Agreement)

To the extent that the Defendants argue that they are entitled to summary judgment on this claim because the Operating Agreement superseded the Seed Agreement, this argument is unavailing for the reasons set forth above.

(9) Specific Performance (Audit Statements)

As set forth above, the Plaintiffs are entitled to audited financial statements for Fund 1.

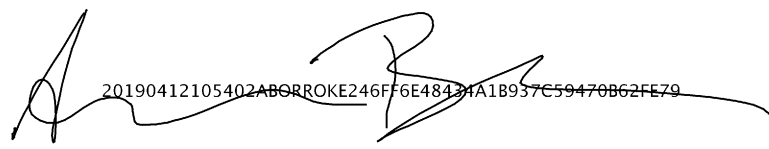
Accordingly, it is

ORDERED that Hull Capital Management LLC and Pipe Select Fund, LLC's motion for partial summary judgment (mtn. seq. no. 010) is granted only with respect to the Plaintiffs' claim for an audit of Fund 1 (the eleventh cause of action), and is otherwise denied, and it is further

ORDERED that the Defendants' motion for partial summary judgment (mtn. seq. no. 011) is granted with respect to the fourth cause of action for misappropriation and the sixth cause of action for unjust enrichment; and the complaint is dismissed with respect to those claims only, and the Defendants' motion is otherwise denied, without prejudice to renewal, to the extent such renewal would be appropriate following an audit; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the parties are directed to appear for a pretrial conference on May 20, 2019 at 2:30 pm at 60 Centre Street, Room 238.



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4/12/2019

DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: