

Tufenkian v Tirakian
2020 NY Slip Op 30697(U)
March 3, 2020
Supreme Court, New York County
Docket Number: 652875/2015
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

-----X

JAMES TUFENKIAN

Plaintiff,

- v -

SYLVIA TIRAKIAN,

Defendant.

-----X

INDEX NO. 652875/2015

MOTION DATE 03/02/2020

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 244, 245, 246, 247, 249

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

Upon the foregoing documents and for the reasons set forth below, James Tufenkian's motion pursuant to CPLR § 3212 for partial summary judgment as to liability is denied, and Ms. Tirakian's cross-motion for summary judgment is granted solely to the extent set forth herein.

THE FACTS RELEVANT TO THE MOTION

Mr. Tufenkian and Ms. Tirakian formed Harvest Song Ventures LLC (Harvest Song) pursuant to a certain Operating Agreement, dated July 28, 2005 (the Original Agreement), as amended by the Amendment No. 1 to Operating Agreement, dated May 17, 2006 (Amendment No. 1), and as further amended by the Amendment No. 2 to Operating Agreement, dated March 20, 2014, (Amendment No. 2; the Original Agreement, Amendment No. 1, and together with Amendment No. 2, hereinafter, collectively, the Operating Agreement), each by and between Mr. Tufenkian and Ms. Tirakian.

Harvest Song was engaged in the business of manufacturing, packaging, and selling branded foods from Armenia, including artisanal fruit preserves made from the seasonal crops of small family farmers. Mr. Tufenkian and Ms. Tirakian were each 50% equity holders of Harvest Song. Ms. Tirakian was its President at all times relevant herein. The deal as reflected in the Original Agreement was that Ms. Tirakian would provide “sweat equity” and Mr. Tufenkian would provide 90% of the initial funding with Ms. Tirakian providing the other 10% (Op. Ag. § 2.7-8). Pursuant to the Operating Agreement, Mr. Tufenkian loaned \$270,000 to Harvest Song and Ms. Tirakian contributed \$30,000 in start-up expenditures, which were also treated as a loans. Thereafter, pursuant to Amendment No. 1, Mr. Tufenkian agreed to loan up to an additional \$720,000 to Harvest Moon and Ms. Tirakian agreed to provide up to an additional \$80,000 (Am. No. 1 § 2.9-10). Pursuant to Section 3.1 of the Operating Agreement, net profits, losses, credits, deductions, and any other items are to be borne equally between Mr. Tufenkian and Ms. Tirakian as 50/50 members (Op. Ag. § 3.1). Upon liquidation, the Operating Agreement provided:

[N]et cash shall be distributed and applied first to pay any and all debts and liabilities of the Company, second to establish necessary reserves for contingent or unforeseen liabilities of the Company in an amount agreed by the Members, third to the Members in accordance with and proportionate to their positive capital account balances, and fourth to the Members in proportion to their Membership Interests.

(*id.*, § 3.2). The Operating Agreement also designated Ms. Tirakian as the “President of the Company with the power to carry out the day-to-day operations of the Company” (*id.*, § 4.3.1), and stated that Mr. Tufenkian would “provide advisory services from time to time to the Company, at his discretion” (*id.*). Both members were to jointly “make decisions on certain matters, such as those related to compensation, distributions, new members and other matters as determined by Mr. Tufenkian” (*id.*). Under the Operating Agreement, Ms. Tirakian was initially

entitled to an annual salary of \$30,000 and health insurance, as well as a raise and bonus if Harvest Song met certain financial performance targets (*id.*, § 4.3.2).

In addition, the Operating Agreement contained an exculpatory clause shielding members from liability except under certain limited circumstances. Specifically, Section 4.4 of the Operating Agreement provided:

Except as otherwise provided by law, *the Members shall not be liable, responsible or accountable in any way for damages or otherwise to the Company for any act or failure to act pursuant to this Agreement or otherwise unless* there is a judicial determination that (i) he or she acted in bad faith, (ii) the conduct of the Member constituted intentional misconduct or a knowing violation of law, (iii) he or she gained a financial benefit to which he or she was not legally entitled, or (iv) such person failed to perform his or her duties in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances.

(Op. Ag. ¶ 4.4 [emphasis added]). In other words, liability arising from the Operating Agreement could only be grounded in bad faith, intentional misconduct or knowing violations of law, retention of an unlawfully-derived financial benefit, or failure to carry out the member's duties with reasonable care under the circumstances.

When the company began operating in 2005, Ms. Tirakian suggested and Mr. Tufenkian agreed that Harvest Song should retain an accountant to oversee the company's books. At the suggestion of Eric Jacobson, the Chief Financial Officer of one of Mr. Tufenkian's unrelated companies, Tufenkian Import-Export Ventures, Inc. (**Tufenkian Ventures**), they hired Oliver Nourani, another employee of Tufenkian Ventures. For the first year, Mr. Nourani came to the office on Saturdays to assist Ms. Tirakian with the company's accounting. After a year, however, Mr. Nourani resigned and they needed a new accountant. Mr. Tufenkian and Ms.

Tirakian agreed to hire Louis Anastasi, a licensed Certified Public Accountant since 1988 who had previously worked as a QuickBooks professional advisor for more than six years.

In his amended verified petition, Mr. Tufenkian alleges that he began noticing discrepancies in March 2013 in the purported value and amount of Harvest Song's inventory in the company's financial documents. Mr. Tufenkian realized that the inventory reflected on the financial statements did not match the actual inventory as reflected in the stock lists. Mr. Tufenkian requested that Mr. Anastasi conduct an initial investigation to determine what went wrong. Mr. Anastasi attributed the discrepancies to a series of data entry errors. These errors had overstated Harvest Song's inventory and its profitability. In addition, Mr. Tufenkian discovered that purchases of inventory were incorrectly recorded and were not properly tracked by the inventory tracking system. The purchase of new inventory was recorded, but once sold, the items were not removed from the inventory in the tracking system and the "cost of goods sold" (COGS) expenses were not offset properly. The effect of these errors was that the inventory and profitability were grossly overstated. The total value of the mis-recorded inventory purchases was \$553,769.

Mr. Tufenkian further alleges that in August 2010, certain expired goods totaling \$119,128 were not properly accounted for. By writing off the quantity of the expired goods but not the value, the write-off resulted in a further overstatement of Harvest Song's inventory. After making the appropriate accounting adjustments, the value of the inventory was reduced by \$865,146. Mr. Tufenkian discovered that nearly \$200,000 in additional adjustments were needed that were not attributable to the incorrectly-recorded inventory purchases or expired inventory write-offs.

There were several other inventory adjustments between 2007 and 2012 that resulted in misstating inventory. Significantly, however, Mr. Tufenkian concedes that he is uncertain of how the accounting errors actually occurred or who was responsible. In his deposition testimony, Mr. Tufenkian testified that “*I actually don’t know who would have been responsible for the entry errors,*” and further stated that it was possible that Mr. Anastasi was responsible for the errors rather than Ms. Tirakian (Tufenkian Tr., 164:11-18 [emphasis added]). In addition, Mr. Eric Jacobson believed that Mr. Anastasi caused the accounting errors by incorrectly entering data into QuickBooks (*id.*, 164:20-25).

Mr. Tufenkian commenced this proceeding by filing a verified petition on August 19, 2015, seeking dissolution of Harvest Song, appointment of a receiver, and an accounting (NYSCEF Doc. No. 1). Approximately 10 months later, on June 28, 2016, Mr. Tufenkian filed an amended verified petition asserting additional causes of action for breach of contract and breach of fiduciary duty, among other claims (NYSCEF Doc. No. 51). Ms. Tirakian filed a verified answer and counterclaims, asserting claims for breach of fiduciary duty, fraud in the inducement, and seeking an accounting. By decision and order, dated November 17, 2016, the court (Ramos, J.) granted the amended verified petition to dissolve Harvest Song and ordered that a neutral third party be appointed as receiver of Harvest Song to promptly wind up its affairs (NYSCEF Doc. No. 161).

Shortly thereafter, on December 2, 2016, Mr. Tufenkian filed a “Notice of Request to Voluntarily Discontinue Third Cause of Action,” wherein he represented to the court that, “[s]ince the Court heard oral argument, the Company has shut down its active operations, and, as

of December 1, 2016, has: (a) only \$776 in cash ..., (b) zero inventory ..., (c) only \$1980 in accounts receivable,” and stated that Harvest Song “is obviously unable to pay the costs of a Receiver,” and “a business with virtually no assets and no operations would unnecessarily cause the Company and the parties to incur significant costs and expenses with little, if any, benefit” (Glandian Aff., Ex. D; NYSCEF Doc. No. 162). Based on Mr. Tufenkian’s withdrawal of the claim for the appointment of a receiver, the court issued an order, dated March 8, 2017, severing as moot that portion of its Dissolution Order which appointed a receiver for the company (*id.*, Ex. E, NYSCEF Doc. No. 163).

Ms. Tirakian filed a second amended answer and a counterclaims on December 15, 2016, asserting a counterclaim for the appointment of a receiver and a counterclaim for accounting. Ms. Tirakian alleged that Mr. Tufenkian had not made any effort to dissolve Harvest Song and that he has continued to operate Harvest Song and to sell the company’s specialty jams and preserves through at least the end of June 2018 using Tufenkian Ventures. By decision and order, dated April 19, 2019, the court granted Ms. Tirakian’s motion and directed the appointment of a neutral third-party receiver to wind of the affairs of Harvest Song, including liquidating and marshalling its assets in an orderly and efficient manner and providing an accounting (NYSCEF Doc. No. 199).

In his moving papers in support of his motion for summary judgment, Mr. Tufenkian submits the expert report of Craig Jacobson of the financial consulting firm Glass Ratner Advisory & Capital Group, LLC (the **Expert Report**; NYSCEF Doc. No. 225). Based on his review of the documents in this matter, Mr. Jacobson concluded that the significant errors in Harvest Song’s

financial records were due to (a) improper recording of inventory, (b) failure to properly record expired goods, (c) failure to regularly perform and document physical inventories, and (d) failure to compare the physical inventory data with the inventory listed in the company's accounting records (*id.*, ¶ 70). Mr. Jacobson further concluded that “[p]roper internal controls and procedures, such as regular physical inventory counts, would have prevented or caught these errors early on” (*id.*), and “to accurately account for and make corrections to inventory, ***a complete physical count should be done at least once at the end of the year*** before the year-end financial statement is finalized” (*id.*, ¶ 63 [emphasis added]).

In her opposition papers, Ms. Tirakian argues that Mr. Tufenkian's claims are barred under the applicable statutes of limitations, and that, in any event, she is shielded from liability pursuant to the exculpatory clause set forth in Section 4.4 of the Operating Agreement. She also invokes the protection of Section 409 of the Limited Liability Company Law (the **LLC Law**), and argues that she cannot be held liable because she relied on a professional accountant. And, she argues that she did not breach her fiduciary duty because that she and others did exactly what Craig Jacobson, the petitioner's expert, indicated was necessary – at least annual inspections of the inventory.

In his reply, Mr. Tufenkian submits an affidavit from Mr. Eric Jacobson – his own CFO – introducing a new theory and “new facts” – namely that the inventory counts conducted by Ms. Tirakian and her employees were only done to determine how much additional product to order for the next season and not to test the accuracy of the inventory reflected in the financial statements.

DISCUSSION

Summary judgment will be granted only 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]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The proponent of a summary judgment motion carries the initial burden to make a *prima facie* showing of entitlement to judgment as a matter of law (*Alvarez*, 68 NY2d at 324). Failure to make such a showing requires denial of the motion (*id.*, citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once this showing is made, the burden shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of a triable issue of fact (*Alvarez*, 68 NY2d at 324).

Breach of Contract

To prevail on a cause of action for breach of contract, the plaintiff must establish: (i) the existence of a contract, (ii) the plaintiff's performance, (iii) the defendant's breach, and (iv) resulting damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Pursuant to CPLR § 213 (2), a breach of contract claim is subject to a six-year statute of limitations. As a general rule, a contract claim accrues at the time of the breach (*Ely-Cruikshank Co., Inc. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

Here, Mr. Tufenkian argues that Ms. Tirakian breached the Operating Agreement by (a) failing to contribute her required share of debt to finance Harvest Song's operations, (b) failing to carry out her duties as President in good faith and with ordinary care by, among other things, causing the creation of false financial statements, (c) receiving and failing to return increased

compensation and profit distributions to which she was not legally entitled, (d) purchasing inventory without authority, (e) blocking access to Harvest Song email accounts and other records, and (f) failing to cooperate with Mr. Tufenkian in good faith.

Application of the Relation-Back Doctrine

As an initial matter, Ms. Tirakian argues that all of the alleged breaches occurred more than six years prior to June 28, 2016, the date on which the breach of contract claim was interposed in the amended verified petition, and the claims are therefore untimely. The argument fails. To the extent that any of the alleged breaches occurred after August 15, 2009, the portion of the breach of contract claim that is based on such breaches is not time-barred as the claim is deemed to have been interposed at the time the original verified petition was filed pursuant to the relation-back doctrine, *i.e.*, on August 15, 2009 (*O'Halloran v Metropolitan Transp. Auth.*, 154 AD3d 83, 86 [1st Dept 2017]). The relation-back doctrine, as codified in CPLR § 203 (f), provides: “[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions [or] occurrences . . . to be proved pursuant to the amended pleading” (CPLR § 203 [f]). The relevant inquiry is not whether the original pleading gives notice of the claim, but whether it gives notice of the underlying transactions or occurrences forming the basis of the otherwise untimely claim asserted in the amended pleading (*Giambrone v Kings Harbor Multicare Ctr.*, 104 AD3d 546, 548 [1st Dept 2013]).

Here, the original verified petition, filed on August 15, 2009, sets forth allegations concerning the same transactions and occurrences that form the basis for the additional claims asserted in the

amended verified petition, which was filed on June 28, 2016. Therefore, any claim based on alleged breaches that occurred after August 15, 2009, which claim would therefore be time-barred when interposed in the amended verified petition, is deemed to have been interposed at the time the original verified petition was filed and is therefore not time barred. Any claim that accrued prior to August 15, 2009 is dismissed as time barred. Accordingly, the breach of contract claims are dismissed solely to that extent.

Contributions of Debt to Finance Harvest Song's Operations

First, the portion of the breach of contract cause of action based on Ms. Tirakian's alleged failure to contribute her 10% share of debt to finance Harvest Song's operations is dismissed as untimely. Paragraphs 2.9 and 2.10 of the Operating Agreement, which were added pursuant to Amendment No. 1 on May 17, 2006, stated that "[Ms. Tirakian] agrees to loan the Company up to \$80,000," and that "[s]uch loans shall be made at the same time [Mr. Tufenkian] makes the loans" that he is required to make under the Operating Agreement, and "[Mr. Tufenkian's] loans shall be made within one year after the date of the Amendment" (Op. Ag., ¶¶ 2.9, 2.10). In other words, under the Operating Agreement, the loans had to be made, if at all, on or before May 17, 2007. The verified amended verified petition was filed on August 19, 2015, more than eight years after the last possible date on which the alleged breach could have occurred. Accordingly, that portion of the claim that is based on Ms. Tirakian's failure to contribute her required share of debt is dismissed.

Failing to Carry Out Duties in Good Faith and with Ordinary Care

In addition, Mr. Tufenkian argues that Ms. Tirakian breached her obligations under the Operating Agreement by failing to carry out her duties in good faith and with the degree of care of an ordinarily prudent person under the circumstances due to her failure to properly record inventory and conduct regular physical inventory counts. Ms. Tirakian argues that the allegedly improper entries of inventory occurred between 2006 and 2007, except for a single incorrect entry in 2009, and a breach of contract claim based on such alleged breaches is therefore untimely. This misses the point. The inventory when initially recorded was accurate on the balance sheet. It was only when each sale was made that the failure to deduct the COGS occurred. Inasmuch as Ms. Tirakian does not attach a statement or other information itemizing when each sale occurred, she does not make out a *prima facie* showing under *Alvarez* that the claims are time barred. In other words, the relevant breaches for the purposes of this portion of Mr. Tufenkian's breach of contract claim occurred when each sale was made, as Ms. Tirakian failed to reflect the removal of inventory in Quickbooks, which caused Harvest Song's inventory and profitability to be substantially overstated on the financial statements. There is insufficient evidence in the record to determine when such entries occurred as the sales information is not attached to the moving papers showing when the product sales took place. Accordingly, to the extent that Ms. Tirakian seeks dismissal of the breach of contract claim as it relates to the improper recording of inventory, the motion must be denied.

However, as discussed below, there are issues of fact concerning whether such improper recording of inventory and other accounting errors were even caused by Ms. Tirakian, and whether such conduct was done in bad faith and fell below the standard of care of an ordinarily prudent manager under the circumstances. Therefore, Mr. Tufenkian's motion for summary

judgment on the breach of contract claim as it relates to Ms. Tirakian carrying out her duties as President of Harvest Song with ordinary care by, among other things, improperly recording inventory, is denied.

Compensation and Profit Distributions

To the extent that Mr. Tufenkian's breach of contract claim seeks recovery for certain compensation and profit distributions prior to August 15, 2009, such claims are time-barred as such alleged breaches occurred more than six years prior to the date on which the claim was interposed. And, to the extent that Mr. Tufenkian alleges that any increases in salary or distributions occurred after August 15, 2009, Mr. Tufenkian has failed to come forward with evidence showing that such compensation or profit distribution, if any, was unauthorized or otherwise constituted a breach of the Operating Agreement. On the contrary, Mr. Tufenkian's deposition testimony indicates that he agreed to each salary increase and distribution (Tufenkian Tr., 277:21-278:2, 302:6-14). Mr. Tufenkian simply offers no evidence to establish that Ms. Tirakian's compensation was excessive or otherwise improper in any way. Accordingly, Ms. Tirakian is entitled to summary judgment dismissal of the breach of contract claim as it relates to compensation and distributions.

Purchase of Inventory

Mr. Tufenkian argues that Ms. Tirakian breached the Operating Agreement by purchasing inventory without authority. The argument is unavailing. Mr. Tufenkian has offered no evidence to show that any purchases of inventory were unauthorized. In fact, the Operating Agreement delegated the authority to manage the day-to-day operations of Harvest Song to Ms.

Tirakian, and there is no evidence suggest that any acquisitions of inventory were outside of the scope of that authority. The portion of the breach of contract claim based on unauthorized purchases of inventory is therefore dismissed.

Access to Accounts and Records

Mr. Tufenkian argues that Ms. Tirakian breached the Operating Agreement by failing to turn over certain account information and company records. However, the evidence submitted by Ms. Tirakian establishes the opposite. Mr. Tufenkian testified during his deposition that Ms. Tirakian cooperated in good faith following her resignation by, among other things, turning over all of the company's books and records (Tufenkian Tr., 211:14-19). In addition, the allegation that Ms. Tirakian blocked Mr. Tufenkian's access to Harvest Song's email accounts and other records is contradicted by Mr. Tufenkian's own testimony. During his deposition, Mr. Tufenkian testified that Ms. Tirakian failed to cooperate by failing to turn over access to the company's website (*id.*, 211:9-13). But he subsequently conceded that on March 25, 2015, Ms. Tirakian sent an email to the company administering the website and copying Mr. Tufenkian with the subject "Website hand-over," in which she provided the username and password for the server and effectively turned over control of the website (*id.*, 214:15-217:5).

Cooperation in Good Faith

Finally, Mr. Tufenkian argues that Ms. Tirakian breached the Operating Agreement by failing to cooperate with Mr. Tufenkian in good faith. As discussed above, however, Mr. Tufenkian fails to come forward with evidence to establish that Ms. Tirakian acted in bad faith at any time. In fact, the evidence submitted by Ms. Tirakian establishes that she acted in good faith in

attempting to resolve the accounting discrepancies after they were discovered and in turning over access to the company's account information and records after she resigned.

Therefore, Mr. Tufenkian's motion for summary judgment on the Fifth Cause of Action for breach of contract is denied and the cause of action is dismissed except for that portion of the claim that is based on Ms. Tirakian's alleged breach of fiduciary duty more particularly described below.

Breach of Fiduciary Duty

To state a claim for breach of fiduciary duty, a plaintiff must allege (i) that the defendant owed the plaintiff a fiduciary duty, (ii) misconduct by the defendant, (iii) damages to the plaintiff resulting from the defendant's misconduct (*NRT New York, LLC v Morin*, 147 AD3d 589, 589 [1st Dept 2017]). Where the breach of fiduciary duty claim seeks monetary relief, the three-year limitation period applies, and where the relief sought is equitable in nature, the six-year limitation period applies (*id.*, at 180).

The Statute of Limitations

Ms. Tirakian argues that the breach of fiduciary duty claim must be dismissed as untimely because all of the alleged breaches occurred more than three years prior to June 28, 2016, the date on which the amended verified petition was filed. The court disagrees.

Because the breach of fiduciary duty claim seeks monetary relief, the claim is subject to the three-year limitation period (*id.*). However, as discussed above, the claims asserted in the

amended verified complaint are deemed to have been interposed in the original verified petition pursuant to the relation-back doctrine. Therefore, a claim based on breaches that occurred prior to August 15, 2009 would be time barred. As discussed above, to the extent that Mr. Tufenkian argues that Ms. Tirakian breached her fiduciary duty by receiving and retaining compensation and profit distributions to which she was not entitled, any such compensation or distributions would have occurred prior to August 15, 2009 and any claim based on such compensation or distributions is therefore time-barred. However, there is insufficient evidence as to when each alleged instance of improper recording of inventory, concealment of the company's financial condition, presentation of false financial statements, or misappropriation of company funds occurred. In the absence of such evidence, Ms. Tirakian has failed to meet her burden in establishing that the breach of fiduciary duty based on such alleged breaches should be dismissed as time barred.

Ms. Tirakian owed Mr. Tufenkian a Fiduciary Duty

The threshold issue is whether Ms. Tirakian owed a fiduciary duty to Mr. Tufenkian. Pursuant to Section 4.3.1. of the Operating Agreement, Ms. Tirakian was the President of Harvest Song and was responsible for managing all aspects of its operations (Op. Ag. § 4.3.1). Section 401 of the LLC Law provides:

If management of a limited liability company is vested in its members, then (i) any such member exercising such management powers or responsibilities shall be deemed to be a manager for purposes of applying the provisions of this chapter, unless the context otherwise requires, and (ii) any such member shall have and be subject to all of the duties and liabilities of a manager provided in this chapter.

(LLC Law § 401 [b]). Because Ms. Tirakian exercised management powers and responsibilities for Harvest Song, she was a manager for the purposes of the LLC Law at all relevant times. As

the managing member of Harvest Song, Ms. Tirakian owed a fiduciary duty to Mr. Tufenkian as a non-managing member (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]).

Having established that Ms. Tirakian owed Mr. Tufenkian a fiduciary duty, the next issue is whether Ms. Tirakian breached her fiduciary duty. Mr. Tufenkian argues that Ms. Tirakian breached her fiduciary duty to Mr. Tufenkian by failing to manage Harvest Song in an ordinarily prudent manner due to her failure to conduct physical inventory counts, incorrectly entering inventory data in the company's books, and receiving salary increases and distributions of profit to which she was not entitled. In her opposition papers, Ms. Tirakian argues that (i) she is shielded from liability by the exculpatory clause of the Operating Agreement, (ii) the undisputed evidence demonstrates that she performed her duties as manager diligently and in good faith, (iii) she cannot be held liable because she relied on the services of an accountant pursuant to LLC Law § 409, and (iv) her actions as manager were protected by the business judgment rule. However, neither party has met their burden is establishing their entitlement to summary judgment as a matter of law.

The Exculpatory Clause

First, to the extent that Ms. Tirakian argues that she is shielded from liability based on the exculpatory clause of the Operating Agreement, the argument fails as there are issues of fact as to whether Ms. Tirakian performed her duties in good faith and in an ordinarily prudent manner. Pursuant to Section 4.4 of the Operating Agreement, a member cannot be liable absent a judicial finding of bad faith, intentional misconduct or knowing violation of law, retention of financial benefit to which the member was not entitled, or failure to perform duties in good faith and with

the degree of care of an ordinarily prudent person under the circumstances. Here, Mr. Tufenkian has failed to come forward with any evidence of bad faith, intentional misconduct, or a knowing violation of the law on Ms. Tirakian's part. In addition, as discussed above, the evidence submitted by Ms. Tirakian establishes that her compensation and profit distributions were authorized under the Operating Agreement and agreed to by Mr. Tufenkian. Accordingly, Ms. Tirakian is protected from liability under Section 4.4 of the Operating Agreement unless Mr. Tufenkian can establish that she failed to carry out her management duties in good faith and with the requisite degree of care.

In support of his argument that Ms. Tirakian failed to exercise the degree of care of an ordinarily prudent person under the circumstances, Mr. Tufenkian submits the Expert Report of Craig Jacobson (NYSCEF Doc. No. 225). The Expert Report concludes that there were significant errors in Harvest Song's financial records due to Ms. Tirakian's failure to properly record inventory and failure to compare the physical inventory data with the inventory listed in the company's accounting records, and that proper controls and procedures would have prevented such errors or allowed the company to catch them sooner. As discussed above, the Expert Report also concluded that annual physical counts of the inventory were required in a business like this one.

In her opposition papers, Ms. Tirakian argues that the undisputed evidence demonstrates that she performed her duties as President and manager of the day-to-day operations of Harvest Song diligently and in good faith. She submits the deposition testimony of Mr. Anastasi, who testified that the company "was very important to her" and that "she was very passionate about the

product” (Anastasi Tr., 63:2-5). Mr. Anastasi further testified that during the seven years that he worked for Harvest Song, Ms. Tirakian never did anything to give him reason to question her honesty, integrity, or intentions (*id.*, at 63:6-10). In addition, Ms. Tirakian sent an email to Mr. Anastasi in 2013 in which Ms. Tirakian stated: “Lou, we need answers and direction, I need your highest priority in this. I want to have an absolute clean ledger book” (Anastasi Tr., 61:2-8). Mr. Anastasi testified that he understood this to mean that “[s]he wanted her books to be 100 percent correct” (*id.*, at 61:9-13). He also testified that throughout the time that he worked with Ms. Tirakian, it was important to her that things be done correctly and he never knew her to be irresponsible in her record keeping (*id.*, at 61:14-23).

In addition, Ms. Tirakian testified that their warehouse manager “did often [conduct a] physical inventory, of course,” and that physical counts of all inventory were conducted at Harvest Song’s various locations, including inventory in transit to the United States (Tirakian Tr., 70:155). Mr. Anastasi also testified that physical inventories were occasionally done at each of the locations (Anastasi Tr., 28:2-9). And most significantly, ***Mr. Anastasi estimated that such inventory was conducted at least once per year***, and probably more frequently than that (*id.*, at 38:18-23) which is the frequency that Mr. Tufenkian’s expert, Mr. Jacobson, indicated was necessary.

Based on the foregoing conflicting evidence, there are issues of fact concerning whether Ms. Tirakian acted in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances in carrying out her responsibilities as President of Harvest Song.

For the avoidance of doubt, the new theory and new facts that Mr. Tufenkian attempts to introduce in the Reply Affidavit of Eric Jacobson is improperly raised in the Reply for the first time and was not in any way raised in the opposition papers. Accordingly, it simply is not proper for the court to consider (*EPF Intern. Ltd. v Lacey Fashions Inc.*, 170 AD3d 575, 575 [1st Dept 2019]).

LLC Law § 409

Ms. Tirakian argues that she is entitled to summary judgment dismissal of the breach of fiduciary duty claim based on LLC Law § 409. The argument fails. LLC Law § 409 provides:

In performing his or her duties, a manager shall be entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, in each case prepared or presented by: . . . (2) counsel, public accountants or other persons as to matters that the manager believes to be within such person's professional or expert competence.

(LLC Law § 409 [b] [2]).

Here, Ms. Tirakian attempts to invoke the protection afforded by LLC Law § 409 by arguing that she relied on Mr. Anastasi, an accounting professional, and therefore cannot be held liable for the company's record-keeping errors. However, there are issues of fact concerning the degree to which Ms. Tirakian relied, if at all, on the information, opinion, reports, or statements of Mr. Anastasi in performing her duties as manager. There is simply no evidence regarding the scope of Mr. Anastasi's duties within the company. Accordingly, Ms. Tirakian has not met her burden in establishing her entitlement to dismissal of the breach of fiduciary duty claim based on LLC Law § 409.

Application of the Business Judgment Rule

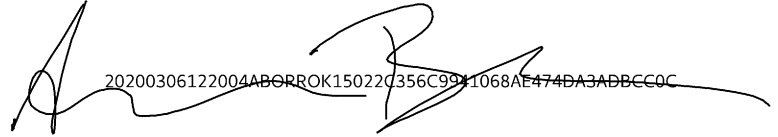
Inasmuch as Ms. Tirakian argues that she is entitled to summary judgment dismissal of the cause of action for breach of fiduciary duty based on the business judgment rule, the argument fails. The business judgment rule “bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes” (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). However, the business judgment rule “cannot shelter individuals from responsibility for breaches of [the] duty of care they owe as directors” (*Ench v Breslin*, 241 AD2d 475, 476 [2d Dept 1997]). As the Court of Appeals has observed, “wantonly negligent, even reckless conduct, can[not] . . . be justified as falling within the business judgment rule” (*Giblin v Murphy*, 73 NY2d 769, 772 [1988]). Here, as set forth above, there are issues of fact concerning whether Ms. Tirakian acted in good faith and with the requisite degree of care, or whether her conduct was so negligent or even reckless that she is not entitled to the protection of the business judgment rule.

Therefore, Mr. Tufenkian’s motion for summary judgment on the Sixth Cause of Action for breach of fiduciary duty is denied and Ms. Tirakian’s cross motion is also denied.

Accordingly, it is

ORDERED that the petitioner’s motion for partial summary judgment is denied and the respondent’s cross motion for summary judgment is granted solely to the extent that the Fifth Cause of Action is dismissed for claims that accrue prior to August 15, 2009 and that portion of

the sixth cause of action based on the respondent's improper receipt of certain compensation and profit distributions is dismissed, and is otherwise denied.


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ANDREW BORROK, J.S.C.

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APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE