Supply Co., LLC v Hardy Way, LLC
2020 NY Slip Op 32632(U)
August 10, 2020
Supreme Court, New York County
Docket Number: 652855/2016
Judge: Marcy Friedman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 60

PRESENT: Hon. Marcy Friedman, J.S.C.

SUPPLY COMPANY, LLC,

Plaintiff,

– against –

HARDY WAY, LLC, and ICONIX BRAND GROUP, INC.,

Defendants.

Index No.: 652855/2016
Motion Seq. No. 001

HARDY WAY, LLC,

Plaintiff,

– against –

KEVIN YAP,

Defendant.

Index No.: 653101/2017
Motion Seq. No. 001

DECISION AND ORDER

These two actions involve claims for payments under a License Agreement and Guarantee. Under the License Agreement, Hardy Way, LLC (Hardy Way) granted Supply Company, LLC (Supply Co.) a non-exclusive license to use the Ed Hardy Licensed Mark in exchange for a minimum royalty payment of $1.5 million. Under the Guarantee, Kevin Yap, a member of Supply Co., guaranteed Supply Co.'s obligations. It is undisputed that the minimum royalty has not been paid. Supply Co. entered into a separate agreement with non-party Rainbow Apparel Distribution Center Corp. (Rainbow) under which Supply Co. guaranteed a minimum maintained markup percentage of 50% on sales of Ed Hardy merchandise received by Rainbow from Supply Co. during the initial term or renewal of the agreement. It is undisputed that Supply Co. received a reimbursement request from Rainbow under that agreement for a minimum

maintained markup payment in the amount of approximately $3.3 million. (Action No. 1, Compl., ¶ 47 [NYSCEF Doc. No. 2].) Liability for the minimum royalty payment and the reimbursement request is at issue in these actions.

In Action No. 1, brought by Supply Co. against Hardy Way and its parent, Iconix Brand Group, Inc. (Iconix) (collectively, defendants or Hardy Way), Supply Co. claims that Hardy Way breached the License Agreement by failing to bear the cost of the reimbursement request from Rainbow (Rainbow Reimbursement Request). Supply Co. also asserts that Hardy Way and/or Iconix fraudulently induced it to enter into the License Agreement. In Action No. 2, brought by Hardy Way alone against Kevin Yap, Hardy Way claims that Yap breached the Guarantee by failing to pay the minimum royalty due, but unpaid by Supply Co., under the License Agreement. Yap asserts counterclaims for damages due to the Rainbow Reimbursement Request and for rescission of the License Agreement and Guarantee based on fraudulent inducement.

Background

The License Agreement between Hardy Way and Supply Co., made as of November 10, 2014 and effective as of November 9, 2014, provides, in section 1, that Hardy Way, as Licensor, grants a non-exclusive license to Supply Co., as Licensee, to use the Ed Hardy Licensed Mark "in connection with the manufacturing, warehousing and distribution of, and billing and collections in respect of" approved Products, defined as "Articles." (License Agreement, § 1.1 [a], [b] [Action No.1, Aff. Of Andrew Hambelton (Defs.' Atty.) In Supp., Ex. B] [Hambelton Aff.] [NYSCEF Doc. Nos. 13, 15].) Section 1.2 (c) provides that "[t]he rights granted to Licensee hereunder do not include the right to sell Articles." Section 1.4 provides, in contrast, that "Licensor shall design, merchandise, offer for sale and sell Products to retailers and any other accounts . . . of its choosing."

Section 1.5 provides:

> "Promptly following any sale of Products by Licensor to an Approved Account . . . , Licensee shall document and accept orders for such Products ('Orders'), accurately reflecting the terms of the applicable sale (including, without limitation, the quantity and price of each Style Number in such Order), as agreed to by Licensor; provided, however, that Licensor shall not agree to a price for any Style Number (as defined below) that is less than thirty-five percent (35%) of the LDP (as defined below)[1] for such Style Number, unless otherwise mutually agreed in writing between Licensee and Licensor. Licensee may reject any Order . . . for an Approved Account that Licensee has a bona fide reason to believe is not a Creditworthy Account. . . ."

Section 7.1 provides: "Licensee shall pay to Licensor a minimum royalty for each Annual Period (each a 'Minimum Royalty') as set forth on Schedule C. . . ." Schedule C provides for a Minimum Royalty of $1.5 million based on Minimum Gross Wholesale Sales of $7.5 million.

Section 8 of the License Agreement provides for an additional sales royalty to be paid based on Gross Wholesale Sales, and specifies the deductions that Supply Co. as Licensee may take against Gross Wholesale Sales. Section 8.1 provides:

> "During each Annual Period, Licensee shall pay to Licensor a 'Sales Royalty' equal to twenty percent (20%) of 'Gross Wholesale Sales'. 'Gross Wholesale Sales' means the aggregate invoiced price of all Articles ordered from Licensee or any of its affiliates, which invoiced price shall be established by Licensor in its sole discretion, before applying any Deductions (as defined below). Licensee may apply any markdowns, chargebacks or returns (collectively, 'Deductions') actually taken by Licensee in respect of the Articles against Gross Sales in respect of such Articles for any Annual Period as a credit against the Minimum Royalty payable for such Annual Period in respect of such Articles. No deduction shall be made for other discounts, allowances, uncollectible accounts or costs incurred by Licensee. Total Deductions for any Annual Period shall not exceed 18% of Gross Wholesale Sales for such fiscal quarter."

Supply Co.'s separate agreement with Rainbow, written on the letterhead of Rainbow, is dated November 5, 2014, and was "Agreed & Accepted" by Supply Co. on November 7, 2014.

[1] LDP is not defined in the License Agreement. The meaning of this term is not relevant to this decision.

The agreement does not bear a title, but is referred to in Supply Co.'s complaint in Action No. 1 as the Markdown Agreement (Compl., ¶ 39), the title that will be used in this decision. The Markdown Agreement states in pertinent part:

> "During the period beginning November 1, 2014, or the date you [Supply Co.] first ship goods to us [Rainbow] in 2014 (whichever is later), through and including January 30, 2016 (the 'initial term'), you agree to guarantee to us a Minimum Maintained Markup percentage of 50%, on sales of merchandise received from you during that period (even if ordered prior thereto), all as hereinafter more fully provided. . . .
>
> We will start with at least a 50% initial markup percentage, but shall have the right in our sole discretion of marking down goods at any time, without any prior approval from you. Sales of your merchandise, during the period as provided above in the preceding paragraph, must achieve a Minimum Maintained Markup percentage of 50%. Failure to achieve this Minimum Maintained Markup percentage target, will require that you reimburse us the difference of what we would have needed in order to achieve the Minimum Maintained Markup percentage target. . . ."

(Action No. 1, Markdown Agreement, at 1 [Hambelton Aff., Ex. C] [NYSCEF Doc. Nos. 13, 16].)

It is undisputed that on January 1, 2015, Supply Co. shipped the initial order of $84,247.00 of Ed Hardy Product to Rainbow. (Action No. 1, Compl., ¶¶ 37, 44.) Between January and March 2015, it shipped an additional $4.5 million of such Product to Rainbow. (Id., ¶ 46.) In May 2015, Supply Co. received the Rainbow Reimbursement Request for $3.3 million. (Id., ¶ 47.)

In Action No. 1, Supply Co.'s complaint pleads a first cause of action against defendants for breach of the License Agreement "by failing [to] bear the losses, costs and expenses of the Markdown Agreement." (Id., ¶¶ 61, 54-63.) The complaint pleads a second cause of action for fraud in the inducement (id., ¶¶ 64-74) on two independent grounds: First, that Hardy Way misrepresented to Supply Co. that it "should not expect to pay any Markdown Reimbursement"

(id., ¶ 67); and, second, that Hardy Way concealed the serious damage to the Ed Hardy Mark and its declining viability, as well as "the true state of its financials by making deceptive and misleading public statements and filings with the SEC. . . ." (Id., ¶¶ 65, 20.) In addition, based on the facts underlying the first and second causes of action, the complaint alleges a third cause of action for breach of the covenant of good faith and fair dealing (id., ¶¶ 75-79) and a fourth cause of action for unjust enrichment. (Id., ¶¶ 80–84.)

In Action No. 2, Hardy Way's complaint pleads a sole cause of action against Yap for breach of the Guarantee "by fail[ing] to pay the $1.5 million guaranteed Minimum Royalty" due under the License Agreement. (Action No. 2, Compl., ¶¶ 28-29 [NYSCEF Doc. No. 1].) Yap asserts a first counterclaim for a declaratory judgment that Hardy Way and/or Iconix is obligated "to reimburse Supply Co. and Yap for all losses suffered as a result of the Markdown Reimbursement from Rainbow." (Action No. 2, Ans. ¶ 52, ¶¶ 50-53 [NYSCEF Doc. No. 4].) Yap asserts a second counterclaim for a declaratory judgment that rescinds the License Agreement and Guarantee and awards Yap compensatory and consequential damages, based on Hardy Way's or Iconix's "conceal[ment] [of] the true state of its financials by making deceptive and misleading public statements and filings with the SEC. . . ." (Id., ¶¶ 54-56.)

In Action No. 1, Hardy Way and Iconix move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint. In its opposition to the motion, Supply Co. seeks leave, in the event the court "determine[s] that further specification or clarification is necessary," to replead to add allegations in support of the previously pleaded causes of action. (See Action No. 1, Pl.'s Memo. In Opp., at 26 [NYSCEF Doc. No. 21]; Proposed Am. Compl. [Aff. Of Harlan Lazarus (Pl.'s Atty.) In Opp. (Lazarus Aff.), Ex. 1] [NYSCEF Doc. Nos. 22, 23].)

In Action No. 2, Hardy Way moves for summary judgment on its complaint, pursuant to CPLR 3212, and for dismissal of Yap's counterclaims, pursuant to 3211 (a) (1) and (7). Yap cross-moves for leave to amend his answer to assert counterclaims for declaratory judgments determining that the License and Guarantee Agreements are void because they lack consideration and are unconscionable. (Proposed Am. Ans., ¶¶ 61-64, ¶¶ 65-68 [Aff. Of Harlan Lazarus (Def.'s Atty.) In Supp. Of Cross-Motion (Lazarus Aff.), Ex. 1] [NYSCEF Doc. Nos. 26, 27].)

Action No. 1 and Action No. 2 are consolidated for disposition of these motions.[2]

Action No. 1

First Cause of Action for Breach of Contract

It is well settled that on a motion to dismiss pursuant to CPLR 3211 (a) (7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 [2002].) The court, however, "is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003]; see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183, 185 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211 (a) (1) is considered, "a dismissal is warranted only if the

[2] This decision has two sections, one for Action No. 1 and one for Action No. 2. References in the section for each Action are to pleadings, exhibits, and memoranda of law filed in that action, unless otherwise specifically stated.

documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon, 84 NY2d at 88.)

Supply Co.'s first cause of action for breach of contract pleads that "[b]y directing Supply Co., its agent, to execute the Markdown Agreement, Defendants implicitly and by operation under the law, agreed to bear the losses, costs and expenses of the Markdown Agreement. [¶] Defendants violated the License Agreement by failing [to] bear the losses, costs, and expenses of the Markdown Agreement." (Compl., ¶¶ 60, 61.) In claiming that defendants are liable for the sums that Supply Co. was obligated to reimburse Rainbow under the Markdown Agreement, Supply Co. argues that the Markdown Agreement is an enforceable "collateral agreement" and is not inconsistent with the License Agreement. (Pl.'s Memo. In Opp., at 9.) More particularly, Supply Co. argues that it was obligated, by the terms of the License Agreement, to accept orders with the "'terms' solicited by [d]efendants"; that defendants solicited and obtained the orders from Rainbow; and that Supply Co. entered the Markdown Agreement as defendants' agent. (Id., at 2-4, 9, 11-14.)

The court holds that Supply Co.'s claim for reimbursement of sums due under the Markdown Agreement is barred by the terms of the License Agreement. It is not disputed that Supply Co. and Hardy Way were the parties to the License Agreement, while Supply Co. and Rainbow were the parties to the Markdown Agreement. The contention that Supply Co. signed the Markdown Agreement as Hardy Way's agent is contradicted by the terms of License Agreement.

It is noted that the License Agreement contains an express disclaimer of agency: "Nothing herein shall be construed to constitute the parties hereto as partners or as joint venturers, or either as agent of the other, and Licensee may not obligate or bind Licensor in any

manner whatsoever." (License Agreement, § 25.6.) The authorities are, however, unclear as to whether a contractual disclaimer of agency is effective where the interests of third-parties are not at issue – that is, in disputes between the parties to the contract. (See Rubenstein v Small, 273 AD 102,104 [1st Dept 1947] [holding, in an intra-party dispute, that '[t]he court is not bound by the [contractual] disclaimer of . . . agency" in determining the parties' "true relationship," and must judge the transaction "by its real character" rather than by the parties' characterization]; but see Spinelli v National Football League, 96 F Supp 3d 81, 133 [SD NY 2015] [holding, under New York law, that "[i]n disputes between a purported principal and purported agent, where the interests of third parties or government agencies are not in issue, the parties are bound by a contractual agreement that their relationship is not one of agency"]; see also Gulf Ins. Co v Transatlantic Reins. Co., 69 AD3d 71, 96-97 [1st Dept 2009] [citing Rubenstein v Small in support of the holding that a disclaimer of agency is not effective against a non-party to the contract in which the disclaimer of agency is made].)

The court need not finally determine whether the disclaimer of agency in the License Agreement is conclusive, as the terms of the License Agreement are otherwise plainly inconsistent with an agency relationship. As noted above, Supply Co. premises its claim that it entered into the Markdown Agreement as Hardy Way's agent on the allegations that it was obligated to "document and accept the order[s]" for the sales made by Hardy Way to Rainbow, and that it was required to execute the Markdown Agreement "prepared between the [d]efendants and Rainbow." (Compl., ¶¶ 38-39.) Supply Co.'s contention that these circumstances gave rise to an agency relationship ignores that Supply Co. entered into the License Agreement, after consultation with counsel (License Agreement, § 21.3), and that the Agreement specified the circumstances in which it could reject orders. In particular, the License

Agreement specified, as the sole ground on which Supply Co. could reject an order at a contractually allowable price to an approved account, that Supply Co. had a bona fide reason to believe the account was not "Creditworthy." (Id., § 1.5.)[3] At the time of entry into the License Agreement, Supply Co. agreed that Rainbow was an "Approved Account." (Id., Schedule D.) Supply Co. thus could have, but did not, bargain for contractual provisions that would have permitted it to reject orders with other conditions that it found unacceptable.

Significantly also, Supply Co.'s claim of agency ignores that it obligated itself to accept orders in exchange for provision to it of the opportunity to fill these orders upon compensation to Hardy Way for this opportunity. Specifically, Supply Co. agreed to pay Hardy Way as Licensor "a minimum royalty for each Annual Period" in the amount of $1.5 million based on minimum Gross Wholesale Sales of $7.5 million. (Id., § 7.1, Schedule C.) The License Agreement also provided for payment by Supply Co. to Hardy Way, during each Annual Period, of a Sales Royalty, against which the Minimum Royalty could be credited. (Id., §§ 7.3, 8.1.) For purposes of calculating the Minimum Royalty, "any markdowns, chargebacks or returns (collectively, 'Deductions') actually taken by Licensee" could be deducted from Gross Wholesale Sales, up to a contractual cap of 18% of Gross Wholesale Sales for any fiscal quarter. (Id., § 8.1 [quoted in full, supra].) Supply Co. accepted and agreed to the Markdown Agreement on November 7, 2014, prior to the November 10 date as of which the License Agreement was made. Had Supply Co. sought to impose liability for the full guaranteed markup percentage upon Hardy Way, it could have negotiated for a better term than the 18 percent cap on deductions in the License Agreement.

[3] Supply Co. does not claim that it believed the Rainbow account not to be Creditworthy. Nor does Supply Co. claim that the price for which Hardy Way sold the goods to Rainbow did not comply with the contractual requirements or that Rainbow was not an Approved Account. (See License Agreement, § 1.5.)

The terms of the License Agreement thus conclusively contradict Supply Co.'s claim that it was Hardy Way's agent because it was obligated to accept orders on Hardy Way's terms. To the extent that Supply Co. advances the alternative claim that Hardy Way is liable for the sums due under the Markdown Agreement based on an oral agreement, such an agreement is unenforceable. The complaint alleges that before Supply Co. signed the Markdown Agreement, "the [d]efendants assured Supply Co. to not worry about any potential Markdown Reimbursements associated with the Markdown Agreement and that they would see that Supply Co. would not suffer any loss, irrespective of anything in the Licensing Agreement to the contrary." (Compl., ¶ 42.)[4] An oral agreement that Hardy Way would ensure that Supply Co. would not bear the losses under the Markdown Agreement, or that Hardy Way would bear those losses, is plainly inconsistent with section 8.1 of the License Agreement. That section (quoted in full, supra) unambiguously limits – that is, places a cap on – the "Deductions," which are defined as "any markdowns, chargebacks or returns" that may be taken by Supply Co. as a credit against the Minimum Royalty payment, in respect of products ("Articles") distributed by Supply Co. as Licensee. Supply Co.'s claim in this action that Hardy Way is liable for all markdowns that are the subject of the Rainbow Reimbursement Request is therefore barred by the express terms of the License Agreement.

Moreover, such an oral agreement is barred by the general merger clause of the License Agreement, which provides: "This Agreement contains the entire understanding and agreement

[4] The complaint refers to this oral assurance or agreement in the context of the cause of action for fraudulent inducement (Compl., Second Cause of Action, ¶¶ 66-67), but does not specifically refer to the oral assurance in the cause of action for breach of contract, which is based on the claim that Supply Co. entered into the Markdown Agreement as Hardy Way's agent. (Compl., First Cause of Action, ¶¶ 54-63.) The proposed amended complaint expressly pleads the breach of contract cause of action based not only on the allegation that Supply Co. signed the Markdown Agreement as defendants' agent, but also based on the oral assurance. (Proposed Am. Compl., ¶ 73.) The oral assurance is also alleged as a basis for the fraudulent inducement cause of action in the proposed amended complaint. (Id., ¶¶ 81, 82.)

between the parties hereto with respect to the subject matter hereof, supersedes all prior oral or written understandings and agreements relating thereto and may not be modified, discharged or terminated, nor may any of the provisions hereof be waived, orally." (License Agreement, § 25.5.) The merger clause "establish[es] the parties' intent that the Agreement is to be considered a completely integrated writing" and "precludes extrinsic proof to add to or vary its terms." (See Matter of Primex Intl. Corp. [v Wal-Mart Stores, Inc.], 89 NY2d 594, 599-600 [1997]; General Obligations Law § 15-301 [1].)

The court accordingly holds that Supply Co.'s first cause of action for breach of contract must be dismissed based on the terms of the License Agreement. In so holding, the court finds that the changes in Supply Co.'s proposed amended complaint would not preserve the breach of contract cause of action. It is well settled that leave to amend a pleading "should be freely granted (CPLR 3025 [b]), absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit." (MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 499 [1st Dept 2010]; accord Miller v Cohen, 93 AD3d 424, 425 [1st Dept 2012]; Kocourek v Booz Allen Hamilton Inc., 85 AD3d 502, 505 [1st Dept 2011].) As discussed in this court's prior decisions, the authorities in this Department have been in conflict as to whether or to what extent an evidentiary showing must be made as to the merit of a proposed amendment, although recent authorities have increasingly held that the party seeking leave to amend is not required to submit an affidavit of merit or to make an evidentiary showing of the merit of the proposed amendment. (See Cortlandt St. Recovery v Bonderman, 2019 NY Slip Op 31222 [U], 2019 WL 1789852, * 1-2 [Sup Ct, NY County 2019] [reviewing cases]; Ambac Assur. Corp. v Nomura Credit & Capital, Inc., 2016 NY Slip Op 32868 [U], 2016 WL 7475831, * 3 n 4 [Sup Ct, NY County 2016] [same].)

Here, Supply Co.'s request for leave to amend is made in its memorandum of law in opposition to Hardy Way's motion to dismiss (see Pl.'s Memo. In Opp., at 26), and is unsupported by an affidavit of merit. Assuming that the proposed amendments may be considered absent an evidentiary showing, the breach of contract cause of action remains palpably insufficient. As noted above, the proposed amended complaint continues to plead, albeit more explicitly than did the original complaint, that Hardy Way gave an oral assurance or promise to Supply Co. that Supply Co. would not bear the losses under the Markdown Agreement.[5] The original complaint did not identify the individuals by and to whom the oral promise was allegedly made. The proposed amended complaint seeks to supply these details, naming Horowitz at Hardy Way and Yap at Supply Co. (Proposed Am. Compl., ¶ 49.) These changes do not affect the court's holding that the oral promise is unenforceable. Supply Co. also seeks to amend the complaint to add detail to its original pleading that the Markdown Agreement was "prepared between the Defendants and Rainbow," and to identify Horowitz, Iconix's then Chief Operating Officer, as the individual who prepared the Markdown Agreement. (Compl., ¶ 39; Proposed Am. Compl., ¶¶ 43-44.) As held above, under the License Agreement, Hardy Way had the right to solicit the orders and direct the terms of sale. (License Agreement, § 1.5.) These changes in the proposed amended complaint therefore do not affect the court's above holding

[5] As discussed below, in Action No. 2, Yap's original answer, like the complaint and proposed amended complaint in Action No.1, alleged that Hardy Way assured Supply Co. and Yap that they would not be liable for any losses as a result of the Markdown Agreement, and that Hardy Way and/or Iconix are liable to Supply Co. for such losses. (Action No. 2, Ans., ¶¶ 50-53.) Yap's proposed amended answer asserts a new theory, which Supply Co.'s proposed amended complaint does not seek to assert in Action No. 1—namely, that the agreement between Supply Co. and Rainbow, which provides for the guaranteed Markup Reimbursement, does not involve deductions subject to the cap in the License Agreement. The proposed amended answer re-names the Markdown Agreement the "Markup Agreement" (Action No. 2, Proposed Am. Ans., ¶ 34), and pleads: "The Markup Agreement is not with respect to a markdown or chargeback. In fact, the Markup Agreement specifically excludes these items from the markup calculation." (Id., ¶ 38.) The proposed amended answer alleges that Hardy Way and/or Iconix are liable to reimburse Supply Co. and Yap for all losses suffered as a result of the Markup Reimbursement from Rainbow. (Id., ¶ 56.) For the reasons discussed in connection with Action No. 2, this amendment, even if it had been sought in Action No. 1, would not preserve the breach of contract claim.

rejecting Supply Co.'s agency claim. Supply Co.'s request for leave to amend the complaint to replead the breach of contract cause of action is accordingly also denied.

Second Cause of Action for Fraud in the Inducement

This cause of action is based on two separate claims: First, the complaint alleges that "[p]rior to [Supply Co.'s] signing the Markdown Agreement, the Defendants assured Supply Co. to not worry about any potential Markdown Reimbursements associated with the Markdown Agreement and that they would see that Supply Co. would not suffer any loss, irrespective of anything in the Licensing Agreement to the contrary." (Id., ¶ 42.) The complaint further alleges that "as an inducement to enter into the License Agreement and Markdown Agreement, the Defendants knowingly, intentionally and falsely represented to Supply Co. that they would make all efforts to make sure they [Supply Co.] were not harmed by the Rainbow Markdown Agreement" (id., ¶ 66), and that "Supply Co. should not expect to pay any Markdown Reimbursement." (Id., ¶ 67.) Second, the complaint alleges that "[d]efendants knew the Hardy Mark had been seriously damaged and would continue to decline in viability to the point of being essentially worthless. Defendants had superior, unique, material, nonpublic knowledge, which it [sic] had a duty to disclose to Supply Co., but intentionally withheld." (Id., ¶ 65.) In connection with this allegation, the complaint alleges that prior to Supply Co.'s execution of the License Agreement and while the parties were negotiating, Iconix "sought to conceal the true state of its financials by making deceptive and misleading public statements and filings with the SEC, which Supply Co. referenced and relied upon and which artificially inflated Supply Co.'s confidence in Hardy Way's parent company." (Id., ¶ 20.) The complaint also alleges that since the execution of the License Agreement, Iconix "has acknowledged certain securities violations and, upon information and belief, has recently conceded that its earnings must be restated." (Id.,

¶ 21.) As further alleged, "Supply Co. relied on these misrepresentations when it entered into the License Agreement and Markdown Agreement and again when it promptly accepted the January – March 2015 Rainbow Sales"—i.e., the large order following the initial order. (Id., ¶ 69.)

The elements of fraud are "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." (Eurycleia Partners, LP v Seward & Kissel, LLP, 12 NY3d 553, 559 [2009].) "General allegations that [a] defendant entered into a contract while lacking the intent to perform it are insufficient to support" a fraudulent inducement claim. (New York Univ. v Continental Ins. Co., 87 NY2d 308, 318 [1995]; accord MBIA Ins. Corp. v Countrywide Home Loans, Inc., 87 AD3d 287, 293 [1st Dept 2011].) "[A] fraud claim is not stated by allegations that simply duplicate, in the facts alleged and damages sought, a claim for breach of contract, enhanced only by conclusory allegations that the pleader's adversary made a promise while harboring the concealed intent not to perform it." (Cronos Group Ltd. v XComIP, LLC, 156 AD3d 54, 62 [1st Dept 2017] [collecting cases]; see also e.g. Financial Structures Ltd. v UBS AG, 77 AD3d 417, 419 [1st Dept 2010] [a fraud cause of action is duplicative of a breach of contract claim where it is "based on the same facts that underlie the contract cause of action, is not collateral to the contract, and does not seek damages that would not be recoverable under a contract measure of damages"]; Forty Cent. Park S., Inc. v Anza, 117 AD3d 523, 524 [1st Dept 2014] [a complaint fails to state a cause of action for fraudulent inducement where "it essentially alleges that defendant did not intend to perform under the contract when he made the promissory statements, which gives rise only to a breach of contract claim"]; HSH Nordbank AG v UBS AG, 95 AD3d 185, 206 [1st Dept 2012] ["A claim for fraudulent inducement of contract can be predicated upon an insincere promise of future performance only where the alleged false promise is collateral to the contract

the parties executed; if the promise concerned the performance of the contract itself the fraud claim is subject to dismissal as duplicative of the claim for breach of contract." [emphasis in the original]; Manas v VMS Assocs., LLC, 53 AD3d 451, 453 [1st Dept 2008] ["A fraud-based cause of action is duplicative of a breach of contract claim when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract."] [internal quotation marks omitted].)

Here, the claim for fraudulent inducement must be dismissed insofar as based on the allegation that, at the time Supply Co. entered into the License Agreement and the Markdown Agreement, it relied on defendants' alleged oral assurance or promise that Supply Co. should not expect to pay, or that defendants would bear, any Markdown Reimbursement. As discussed above, Supply Co. bases its breach of contract cause of action on Hardy Way's failure to comply with the identical oral assurance or promise. Moreover, the damages sought for the breach of contract and fraudulent inducement claims are the same—"damages arising out of and relating to the damage and destruction of Supply Co., in an amount to be determined in this action, but not less than $50,000,000." (Compl., ¶ 63 [breach of contract damages pleading]; ¶ 74 [fraud in the inducement damages pleading].) The claim for fraudulent inducement, to the extent based on this oral promise, is accordingly duplicative of the breach of contract cause of action.[6]

The court further holds that the proposed amended complaint fails to plead any allegations that correct the deficiencies in the fraudulent inducement cause of action to the extent based on defendants' oral assurance or promise that Supply Co. should not expect to pay, or that

[6] Supply Co. also pleads that it would not have shipped the bulk of the orders to Rainbow between January and March 2015 if Hardy Way had not misrepresented that the initial order was "selling well and that [Supply Co.] should not expect to pay any Markdown Reimbursements." (See Compl., ¶¶ 45-46, 72.) This claim fails for the reasons stated in connection with the dismissal of the fraudulent inducement claim to the extent based on the related allegation that Supply Co. would not have entered into the License Agreement absent Hardy Way's misrepresentation regarding the Rainbow Reimbursement Request.

defendants would bear, any Markdown Reimbursement. As discussed in connection with the breach of contract cause of action based on this promise, the proposed amended complaint seeks to add additional details as to the persons by and to whom the promise was made. These amendments do not change the fact that the promise is not collateral to the contract. The proposed amended complaint also seeks to add an allegation to the cause of action that Supply Co. relied on the oral promise "as well as the Iconix' [sic] public statements and filings with the SEC and therefore unblemished public face when it entered into the License Agreement and Markdown Agreement. . . ." (Proposed Am. Compl., ¶ 84.) While the original complaint did not specifically allege in the fraudulent inducement cause of action that Supply Co. relied on Iconix's public statements and SEC filings (Compl., ¶¶ 64-74), Supply Co. alleged in paragraph 20 of the complaint, which was incorporated by reference in that cause of action, that it relied on those deceptive public statements and filings. (Id., ¶¶ 64, 20.) More important, the additional allegations regarding Iconix's public statements and SEC filings do not change the fact that the oral promise is not collateral to the contract and that the fraudulent inducement claim, to the extent based on the promise regarding the Markdown Reimbursement, is not maintainable because duplicative of the breach of contract cause of action.

The court reaches a different result as to Supply Co.'s separate claim that it was fraudulently induced to enter into the License Agreement by defendants' failure to disclose their "nonpublic knowledge" that "(a) the Hardy Mark had been seriously damaged and was on the verge of having no viability or a lower than expected value and (b) in the months leading up to the parties' execution of the License Agreement, while the parties were negotiating, Iconix, sought to conceal the true state of its financials by making deceptive and misleading public statements and filings with the SEC, which Supply Co. referenced and relied upon and which

artificially inflated Supply Co.'s confidence in Hardy Way's parent company." (Compl., ¶¶ 20, 21, 65.)

In support of this claim for fraudulent inducement, Supply Co. relies on the "special facts" doctrine. (See Pl.'s Memo. In Opp., at 21-22.) Under the special facts doctrine, "a duty to disclose arises where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." (P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V., 301 AD2d 373, 378 [1st Dept 2003] [internal quotation marks & citations omitted].) "[T]he doctrine requires satisfaction of a two-prong test: that the material fact was information 'peculiarly within [the] knowledge' of [defendant], and that the information was not such that could have been discovered by [plaintiff] through the 'exercise of ordinary intelligence.'" (Jana L. v West 129th St. Realty Corp., 22 AD3d 274, 278 [1st Dept 2005], quoting Black v Chittenden, 69 NY2d 665, 669 [1986] [other internal citation omitted].)

Accepting the allegations as true, the court holds that Supply Co. has sufficiently pleaded a claim for fraudulent inducement under the special facts doctrine. The court cannot and does not find that the declining viability of the Ed Hardy mark or "true state of [Iconix's] financials" – if ultimately proved to have been concealed, for example, by Iconix's making of "deceptive and misleading public statements and filings with the SEC" (Compl., ¶ 20) – may not constitute material information, or information uniquely within defendants' knowledge, that could not have been discovered through ordinary intelligence by Supply Co.

In so holding, the court rejects defendants' contention that Supply Co. cannot rely on the special facts doctrine because Supply Co. "fails to allege that it made even the slightest inquiry into the brand it was investing in. . . ." (Defs.' Memo. In Supp., at 21; see Solomon Capital, LLC v Lion Biotech., Inc., 171 AD3d 467, 469 [1st Dept 2019] [holding that defendant stated a

counterclaim for fraudulent concealment, under the special facts doctrine, where plaintiffs failed to disclose the initiation of a FINRA investigation, which "was not a matter of public record and could not be discovered by defendant"]; compare Northern Group Inc. v Merrill Lynch, Pierce, Fenner & Smith, Inc., 135 AD3d 414, 414 [1st Dept 2016] [holding, in a decision in which there was no indication that there were intentional inaccuracies in SEC filings, that plaintiffs could not rely on the special facts doctrine because there were publicly available SEC filings "from which plaintiffs could have ascertained the specific risks that they claim were not disclosed to them"].)

The court also rejects defendants' argument that the value or viability of the Hardy Way brand is "purely a matter of opinion—not fact. . . ." (Defs.' Memo. In Supp., at 20.) If, as Supply Co. alleges, defendants made deceptive public statements and filings with the SEC, those inaccurate statements and filings, to the extent they pertained to the value or viability of the Hardy Way brand, would amount to more than mere opinion.

The court is unpersuaded by defendants' further argument that the merger clause in the License Agreement bars this fraudulent inducement claim. (Defs.' Memo. In Supp., at 17-18.) The merger clause here is a general merger clause which states merely that the agreement "contains the entire understanding and agreement between the parties" and may not be modified orally. (License Agreement, § 25.5 [quoted in full, supra].) As explained by the Court of Appeals, a general merger clause containing an "omnibus statement that the written instrument embodies the whole agreement, or that no representations have been made" does not bar a fraudulent inducement claim. (Danann Realty Corp. v Harris, 5 NY2d 317, 320 [1959].) In contrast, such a claim will be barred by a "specific disclaimer" that the plaintiff "is not relying on any representations as to the very matter as to which it now claims it was defrauded." (Id., at 320-21.)

Contrary to defendants' further contention (Defs.' Memo. In Supp., at 18), the fraudulent inducement claim is not barred by Supply Co.'s acknowledgement in the License Agreement that Licensor has not made "any representation or warranty of any kind with respect to . . . the prospects of the business to be conducted by Licensee hereunder." (License Agreement, § 21.1.) This disclaimer does not specifically address the viability of the Ed Hardy mark or the state of Hardy Way's or Iconix's financials or revenues. Even if it did, it would not bar the fraudulent inducement cause of action, as this cause of action is based on the claim, under the special facts doctrine, that Supply Co. could not have discovered this material information through the exercise of ordinary intelligence. As the Appellate Division has held:

> "The law is abundantly clear in this state that a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions unless (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge."

(Loreley Fin. (Jersey) No. 3 Ltd. v Citigroup Global Mkts Inc., 119 AD3d 136, 143 [1st Dept 2014], quoting Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 137 [1st Dept 2014] [internal citations omitted].)

Finally, the fraudulent inducement claim will stand against both Hardy Way and Iconix. Supply Co. seeks relief against Iconix under an alter ego or veil-piercing theory. It is well settled that "a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." (Cortlandt St. Recovery Corp. v Bonderman, 31 NY3d 30, 47 [2018] [internal quotation marks and citation omitted].) This standard is met here. The complaint alleges that Hardy Way was created as a single-purpose entity to hold legal title to certain trademarks and that "Iconix

exercised complete dominion and control over the finances, policies, business practices and activities of Hardy Way." (Compl., ¶¶ 9, 12.) As to the abuse of the corporate form to commit a fraud, the complaint also alleges Iconix's concealment of "the true state of its financials by making deceptive and misleading public statements and filings with the SEC," and its fraudulent inflation of its sales revenues to induce Supply Co. to enter into the License and Markdown Agreements. (Id., ¶¶ 20-21, 72-73.) The particular details as to Iconix's domination of Hardy Way are within defendants' exclusive knowledge. At this juncture, on a pre-discovery motion to dismiss, the pleading is adequate. (See generally Cortlandt St. Recovery Corp., 31 NY3d at 47.)

In sum, the branch of Hardy Way's motion to dismiss the fraudulent inducement cause of action, to the extent based on allegations about the viability of the Ed Hardy mark and Iconix's concealment of the true state of its financials by making deceptive and misleading public statements and filings with the SEC, will be denied. Supply Co.'s request to amend the fraudulent inducement cause of action will also be denied as moot.

Third Cause of Action for Breach of the Implied Covenant

Supply Co.'s third cause of action for breach of the implied covenant of good faith and fair dealing must be dismissed. A cause of action for breach of the implied covenant will be dismissed as duplicative of a breach of contract cause of action where both claims arise from the same facts and seek identical damages. (Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce, 70 AD3d 423, 426 [1st Dept 2010], lv denied 15 NY3d 704; see MBIA Ins. Corp. v Merrill Lynch, 81 AD3d 419, 419-420 [1st Dept 2011].) In this action, Supply Co. expressly alleges that "[d]efendants breached the covenant of good faith and fair dealing by all of their aforementioned actions taken." (Compl., ¶ 77.) Moreover, the causes of action for breach of contract and for breach of the implied covenant seek identical damages, with the exception that

the complaint also seeks punitive damages on the implied covenant claim. (Compl., ¶¶ 63, 78, 79.) Supply Co. does not contend that the implied covenant claim may be maintained as an independent claim based merely on the assertion of a claim for punitive damages. Supply Co. also does not argue that the elements of a claim for punitive damages arising from a breach of contract have been sufficiently pleaded. Nor could it do so as such a claim must be directed at the public generally. (See New York Univ., 87 NY2d at 316 [holding that the pleading elements required to state a claim for punitive damages when the claim arises from a breach of contract are: "(1) defendant's conduct must be actionable as an independent tort; (2) the tortious conduct must be of [an] egregious nature . . . ; (3) the egregious conduct must be directed to plaintiff; and (4) it must be part of a pattern directed at the public generally" [internal citation omitted]; accord Deutsche Bank Natl. Trust Co. v Morgan Stanley Mtge. Capital Holdings LLC, 169 AD3d 217, 225 [1st Dept 2019].) The third cause of action for breach of the implied covenant of good faith and fair dealing will accordingly be dismissed in its entirety.

Fourth Cause of Action for Unjust Enrichment

The claim for unjust enrichment is barred by the existence of the contract covering the subject matter of the dispute. (See Clark-Fitzpatrick, Inc. v Long Is. R. R. Co., 70 NY2d 382, 388 [1987].)

The deficiencies in the third and fourth causes of action for breach of the implied covenant and unjust enrichment are not corrected by the proposed amended complaint, which is identical to the original complaint with respect to these causes of action.

Action No. 2

In the action brought by Hardy Way against Yap, Hardy Way moves for summary judgment, pursuant to CPLR 3212, on its sole cause of action for breach of the Guarantee.

(Notice of Motion [NYSCEF Doc. No. 8].) Hardy Way also moves, pursuant to CPLR 3211(a)(1) and 3211(a)(7), to dismiss Yap's counterclaims for declaratory judgments. (Id.) Yap cross-moves for leave to file a Proposed Amended Answer with Counterclaims. (Notice of Cross-Motion [NYSCEF Doc. No. 24]; Proposed Am. Ans. [Lazarus Aff., Ex. 1] [NYSCEF Doc. Nos. 26, 27].)

In moving for summary judgment on a guaranty, a plaintiff must prove "'the existence of the guaranty, the underlying debt and the guarantor's failure to perform under the guaranty.'" (Cooperatieve Centrale Raiffeisen-Boerenleenbank, B.A., "Rabobank International" v Navarro, 25 NY3d 485, 492 [2015] [Rabobank], quoting Davimos v Halle, 35 AD3d 270, 272 [1st Dept 2006].) Once that burden is met, "the burden shifts to the defendant to establish, by admissible evidence, the existence of a triable issue [of fact] with respect to a bona fide defense." (Rabobank, 25 NY3d at 492 [internal quotation marks and citation omitted]; Gard Entertainment, Inc. v Country in N.Y., LLC, 96 AD3d 683, 683-684 [1st Dept 2012]; Griffon V, LLC v 11 E. 36th, LLC, 90 AD3d 705, 706-07 [2d Dept 2011].)

Hardy Way's cause of action for breach of the Guarantee alleges that Yap "unconditionally and irrevocably guaranteed" any amount owed by Supply Co. under the License Agreement, and "failed to pay the $1.5 million guaranteed Minimum Royalty due and owing to Hardy Way" under that Agreement. (Compl., ¶¶ 23, 28.) Hardy Way makes a prima facie showing of Yap's liability under the Guarantee by submitting proof of the License Agreement, Yap's personal Guarantee of Supply Co.'s obligation under the License Agreement to pay the Minimum Royalty, and the failure of either Supply Co. or Yap to pay the Minimum Royalty. (See Pl.'s Rule 19-a Statement of Undisputed Facts in Support of Its Motion for

Summary Judgment, ¶¶ 1-19, and affidavit and exhibits cited therein [NYSCEF Doc. No. 20].)[7] The burden thus shifts to Yap to establish the existence of a triable issue of fact with respect to a bona fide defense to non-payment of the Minimum Royalty.

In opposition to Hardy Way's motion for summary judgment, Yap contends that the License Agreement and the Guarantee Agreement are void because these Agreements lack consideration and are unconscionable. Yap seeks leave to amend his answer to assert affirmative defenses and counterclaims based on these claims. (Def.'s Memo. In Supp. Of Cross-Motion and In Opp. To Pl.'s Motion, at 7-9, 13-14 [Def.'s Memo. In Opp.] [NYSCEF Doc. No. 25].)[8] In the alternative, Yap argues that summary judgment "is premature because discovery has not been completed and deposition testimony is needed to further support" these claims. (Id., at 10.)

As a threshold matter, the court rejects Hardy Way's contention that, by its terms, Yap's Guarantee precludes, or waives, his right to assert defenses and counterclaims. There is long-standing authority that a guarantor may not "raise as counterclaims or defenses those claims belonging to the principal obligor." (Rabobank, 25 NY3d at 493, citing Walcutt v Clevite Corp., 13 NY2d 48, 56 [1963], amending remittitur 13 NY2d 903, 13 NY2d 930; Royal Equities

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[7] In his Response to Hardy Way's Rule 19-a Statement of Undisputed Facts (Response [NYSCEF Doc. No. 29]), Yap admits that he has not paid Hardy Way any portion of the $1.5 million Minimum Royalty provided for by the License Agreement. He, however, denies Hardy Way's allegation that the Minimum Royalty was "due and owing," based on his claim that the License Agreement and Guarantee are void for lack of consideration and are unconscionable. (Response, ¶¶ 7, 19.) He also admits that he signed the License Agreement and Guarantee. He, however, denies Hardy Way's allegation that he agreed to remain liable for and to fully guarantee all of Supply Co.'s obligations, based on the fact that the Guarantee refers to the Guarantee as an inducement to enter into a license agreement with a different entity, New Rise Brand Holdings, LLC. (Id., ¶¶ 9, 11].) As discussed below, these claims are without merit.

[8] Yap's Answer with Counterclaims pleads ten affirmative defenses and two related counterclaims for declaratory judgment. (See Ans., Affirmative Defenses, ¶¶ 1-10, at 4-6; Counterclaims, ¶¶ 50-53, 54-56 [NYSCEF Doc. No. 4].) As set forth in his Proposed Amended Answer with Counterclaims, Yap seeks to add the affirmative defenses of lack of consideration and unconscionability as well as two counterclaims for declaratory judgment based upon these defenses. (Proposed Am. Ans., Eleventh and Twelfth Affirmative Defenses, ¶¶ 11-12; Third and Fourth Counterclaims, ¶¶ 61-64, 65-68.) In opposing Hardy Way's motion for summary judgment, Yap relies upon the proposed defenses of lack of consideration and unconscionability, and does not appear to rely upon the other affirmative defenses pleaded in his answer. (Def.'s Memo. In Opp., at 1-2, 7-9.)

Operating, LLC v Rubin, 154 AD3d 516, 517 [1st Dept 2017]; I Bldg, Inc v Hong Mei Cheung, 137 AD3d 478, 478 [1st Dept 2016]; Hotel 71 Mezz Lender LLC v Mitchell, 63 AD3d 447, 448 [1st Dept 2009].) The rationale for precluding a guarantor from asserting the principal's defenses or counterclaims – e.g., based on fraud – is that "a guarantor may not take upon himself the election of remedies which rightfully belongs solely to his principal. Thus, a guarantor may not interpose his principal's defense of fraud since by so doing he would deprive the principal of his independent right to affirm or disaffirm" the contract. (Walcutt, 13 NY2d at 55; 63 NY Jur2d, Guaranty & Suretyship § 161 [2d ed].)

This rule that a guarantor may not assert its principal's defenses or counterclaims is subject to the exception that the guarantor "may always assert" a total or partial failure of consideration. (Walcutt, 13 NY2d at 56; accord I Bldg, Inc., 137 AD3d at 478.)

There is also long-standing authority that a guaranty will preclude the guarantor's assertion of defenses or counterclaims, where the guaranty contains a sufficiently specific waiver of such claims. As the Court of Appeals explained in Rabobank: "Guaranties that contain language obligating the guarantor to payment without recourse to any defenses or counterclaims, i.e., guaranties that are 'absolute and unconditional,' have been consistently upheld by New York courts," and have "been found to preclude guarantors from asserting a broad range of defenses." (25 NY3d at 493, citing Citibank v Plapinger, 66 NY2d 90 [1985] [Plapinger], rearg denied 67 NY2d 647 [1986].)

In Rabobank, the Court held that an absolute and unconditional guaranty precluded the guarantor from raising the defense that the default judgment for which the guarantor was sought to be held liable was obtained by collusion. The guaranty there provided not merely that it was "absolute and unconditional" but that "liability . . . under this Guaranty shall be absolute and

unconditional irrespective of: (i) any lack of validity or enforceability of [the] agreement. . . ; . . . or (iv) any other circumstance which might otherwise constitute a defense available to, or a discharge of, the Seller . . . or a guarantor." (Id., at 494 [brackets and ellipses in original].) The Court noted that this "broad, sweeping and unequivocal language . . . forecloses any challenge to the enforceability and validity of the documents which establish defendant's liability for payments arising under the [underlying] agreement. . . ," and that "this is the same language which foreclosed the defendants' fraud in the inducement defense in Plapinger." (Id., at 494 [internal citation omitted].) In Plapinger, the Court held that a guaranty that included this language precluded the guarantor from raising the defense of fraudulent inducement of the guaranty. (66 NY2d at 95.) The Court explained that to permit defendants to assert that they were fraudulently induced to sign the guaranty by an unfulfilled oral promise of the defendants "would in effect condone defendants' own fraud in 'deliberately misrepresenting [their] true intention' when putting their signatures to their 'absolute and unconditional' guarantee." (Id., at 95 [internal citation omitted].)

There is authority which, without referring to more specific language in the guaranty, has held that a guarantor waived the right to assert defenses and counterclaims relating to payment, where the guaranty stated that it was absolute and unconditional. (See e.g. W. & M. Operating L.L.C. v Bakhshi, 159 AD3d 520, 521-522 [1st Dept 2018] [the defendant's fraudulent inducement defense was "not viable, because the guaranty [was] unconditional. . ."].) Since Plapinger, however, courts have overwhelmingly reasoned that a guaranty precluded the guarantor's assertion of defenses or counterclaims where the guaranty not only stated that it was absolute and unconditional but also broadly stated that defenses were waived or identified the particular defenses that were waived as, for example, where the guaranty stated that it was

absolute and unconditional irrespective of any lack of validity or enforceability of the underlying agreement or any other circumstance which otherwise constitutes a defense to the guaranty. (See e.g. Grand Pac. Fin. Corp. v 97-111 HALE, LLC, 90 AD3d 534, 535 [1st Dept 2011] [defendants' counterclaims were prohibited where the notes and guarantees "absolutely and unconditionally guaranteed payment of the debt irrespective of any lack of validity or enforceability of any loan document"]; Fortress Credit Corp. v Hudson Yards, LLC, 78 AD3d 577, 577 [1st Dept 2010] [defendant's affirmative defenses were precluded where the guaranty "waived all defenses and counterclaims except actual payment and performance in full, which defendant has not alleged"]; Hotel 71 Mezz Lender LLC, 63 AD3d at 448 [the express waiver of "any and all defenses to enforcement of the guaranty" was "sufficiently specific to bar" the guarantor's defense, among others, of fraudulent inducement]; Hyman v Golio, 134 AD3d 992, 992 [2d Dept 2015] [the guaranty "effectively provide[d] that, even if the principal is able to escape liability, the guaranty is still enforceable" where, "[b]y the plain language of the guaranty, the defendant was precluded from raising any defenses or counterclaims relating to the underlying debt"]; ICBC (London) PLC v Blacksands Pacific Group, Inc., 662 Fed Appx 19, 21 [2d Cir 2016] [the guarantor's fraudulent inducement defense was precluded under New York law by a provision stating that the guaranteed obligation was "absolute and unconditional, irrespective of the value, validity or enforceability of the obligations of the Borrower . . . and irrespective of any other circumstance which might otherwise constitute a legal or equitable discharge or defense in favor of the Guarantor or the Borrower (other than payment in full of the Obligations). . ."].)

Here, the Guarantee that Yap executed states that it is absolute and unconditional but does not contain the specific waiver language that has been cited in support of a finding that a

guaranty precludes the guarantor's assertion of defenses and counterclaims related to payment. The Guarantee provides: Guarantor "unconditionally and irrevocably guarantees . . . (ii) the due and punctual payment of all sums of whatever character which may become payable by Licensee pursuant to the [License] Agreement will be paid by the Licensee. . . ." (Guarantee, License Agreement, Ex. B [NYSCEF Doc. No. 10].) The Guarantee further provides that the duties of the Guarantor "shall in no way be affected or impaired" by reason of enumerated circumstances, including "the modification or amendment (whether material or otherwise) of any of the obligations of Licensee under the Agreement" or "any discharge of Licensee from any of the Guaranteed Obligations in a bankruptcy or similar proceeding." (Id.) This language falls far short of the unequivocal waiver, relied upon in Rabobank, Plapinger, and progeny, that the guaranty is absolute and unconditional "irrespective" of "any lack of validity" of the underlying agreement or of "any other circumstance which might otherwise constitute a defense" available to the principal or guarantor.

On the above authority, the court holds that Yap is not precluded from asserting the defense and counterclaim, which are the subject of his motion for leave to amend, that the underlying License Agreement and Guarantee are void for lack of consideration. The court further holds, however, that this defense and counterclaim are devoid of merit. The claim of lack of consideration is based on the allegation that Hardy Way alone had the right to sell the goods subject to the License Agreement, but that Hardy Way had no obligation to do so, while Supply Co. was nevertheless required to pay Hardy Way, and Yap was required to guarantee, a Minimum Royalty of $1.5 million. (Def.'s Memo. In Opp., at 2, 7-8.) In fact, the License Agreement expressly required Hardy Way to sell the goods, and thus provided: "Licensor shall design, merchandise, offer for sale and sell Products to retailers and any other accounts

('Accounts') of its choosing." (License Agreement, § 1.4 [emphasis supplied].) Moreover, the covenant of good faith and fair dealing is implied in the contract. The defense that the License Agreement is unenforceable because it lacks consideration is therefore without merit as a matter of law.

Yap's proposed defense and counterclaim that the License Agreement and Guarantee are unconscionable are based on the same allegations as the claim of lack of consideration—namely, that Hardy Way alone had the right, but not the obligation, to sell the goods, while Supply Co. had the obligation to pay, and Yap had the obligation to guarantee, the Minimum Royalty of $1.5 million. (Def.'s Memo. In Opp., at 8-9.) Even if this court were to make the questionable assumption that this claim is not personal to Supply Co. as principal insofar as it relates to the License Agreement, the claim is without merit. A claim of unconscionability "generally requires a showing that the contract was both procedurally and substantively unconscionable when made – i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." (Gillman v Chase Manhattan Bank, N.A., 73 NY2d 1, 10 [1988] [internal quotation marks and citations omitted].) Here, the claim of substantive unconscionability as to the License Agreement is without merit for the reasons stated in connection with the claim of lack of consideration. The claim of procedural unconscionability as to the License Agreement is without merit given Supply Co.'s representation in the License Agreement that it had the opportunity to consult with its own legal counsel prior to execution of the License Agreement regarding the terms and conditions of the Agreement and its rights and obligations under the Agreement. (License Agreement, § 21.3.)

The court accordingly holds that Yap's motion for leave to amend the answer to assert defenses and counterclaims based on lack of consideration and unconscionability of the License

Agreement and Guarantee must be denied as these claims are "palpably insufficient or clearly devoid of merit." (See generally MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, supra, and other authorities cited above on the standards for leave to amend.)

Although Yap argues that Hardy Way's summary judgment motion should be denied based on the defenses and counterclaims that he seeks to plead alleging lack of consideration and unconscionability of the License Agreement and Guarantee, he argues, in the alternative, that the motion should be denied because discovery is needed to oppose the motion. (Def.'s Memo In Opp., at 7-9, 10-11.) Yap broadly asserts that depositions of Hardy Way and Iconix, including a deposition of Iconix's Seth Horowitz, "who made promises to Yap and Supply Co.," are needed concerning the negotiations of the License Agreement and Guarantee and "whether pressure tactics were used to secure Yap's signature." (Id., at 10.) Yap also asserts that "Mr. Horowitz' testimony would further evidence the unenforceability of those contracts." (Id.) As discussed above, the defenses and counterclaims alleging lack and consideration and unconscionability are based on the claim that Supply Co. and Yap had the obligation to guarantee a Minimum Royalty payment although Hardy Way had no obligation to sell Hardy Way Product. The requested discovery regarding misrepresentations or "pressure tactics" is irrelevant to these claims, which the court has held are without merit as a matter of law. Even if Yap could maintain these defenses or counterclaims, he has not submitted an affidavit showing that "facts essential to justify opposition may exist" and that the requested discovery is necessary to oppose the summary judgment motion. (See CPLR 3212 [f].) In sum, Yap has not demonstrated a need for discovery or raised a triable issue of fact in opposition to Hardy Way's summary judgment motion on any defense or counterclaim that he has specifically addressed on this motion and that he is authorized to maintain.

To the extent that Yap seeks to avoid summary judgment based on a request for discovery on a possible defense that he is not a guarantor of the License Agreement, this request is denied. In his brief in opposition to Hardy Way's motion and in support of his cross-motion, Yap does not identify a need for discovery on whether he in fact executed a guaranty for Supply Co. In his Response to Hardy Way's Rule 19-a Statement of Undisputed Facts, however, he asserts such a claim. Yap relies on an error in the Guarantee, which states that it is made "[i]n order to induce Hardy Way LLC ('Licensor') to enter into the license agreement dated as of the date hereof (the 'Agreement') with New Rise Brand Holdings, LLC ('Licensee') which is being executed simultaneously herewith . . . ." Yap states that "[a]bsent discovery, [he] cannot admit or deny whether the Guarantee was meant for New Rise or Supply Co. given that the Guarantee refers to New Rise, is undated, and New Rise was simultaneously doing business with an affiliate of Hardy Way." (Response, ¶ 13.)

Yap does not raise a bona fide dispute as to whether he agreed to serve as guarantor for the License Agreement. The License Agreement specifically recites that Yap shall serve as guarantor and attaches the Guarantee that mistakenly names New Rise as Licensee. It states:

> "Kevin Yap shall serve as guarantor and obligor for, remain liable for, and shall fully guarantee, all acts, payment obligations, minimums, and performance of Licensee and any and all of its subsidiaries and affiliates hereunder. In this connection, as a condition precedent to the effectiveness of this Agreement, Kevin Yap as guarantor hereunder, shall execute and return to Licensor a guarantee of Licensee's obligations in the form and as [sic] the terms specifically set forth in the Guarantee attached as Exhibit B."

(License Agreement, § 13.2 [underlining in original].) Moreover, Yap signed the License Agreement not only on behalf of Supply Co. but also "as Guarantor." (Id., at 18.) In the face of this documentary evidence, Yap fails to provide an affidavit denying that he executed the Guarantee for the License Agreement.

The court holds that the naming of New Rise as the Licensee in the Guarantee was a mutual mistake or scrivener's error, which may be corrected. (See Nash v Kornblum, 12 NY2d 42, 47 [1962] ["Where there is no mistake about the agreement and the only mistake alleged is in the reduction of the agreement to writing, such mistake of the scrivener, or of either party, no matter how it occurred, may be corrected"] [internal quotation marks omitted]; accord 82-90 Broadway Realty Corp. v New York Supermarket, Inc., 154 AD3d 797, 799 [2d Dept 2017] ["Contrary to the defendants' contention, the typographical error in the guaranty relating to the year of the lease did not render the guaranty unenforceable"].)

The court turns to the issue of whether Yap's existing counterclaims, which are the subject of Hardy Way's motion to dismiss, are maintainable and raise issues sufficient to avoid summary judgment. For the reasons discussed more fully below, the court holds that the first counterclaim, which alleges that Hardy Way is obligated to pay the Rainbow Reimbursement Request, is not maintainable by Yap. The second counterclaim is maintainable and states a cognizable claim to the extent that it alleges that Hardy Way fraudulently induced Yap to execute the Guarantee based on misrepresentations regarding the viability of the Ed Hardy mark and the financial condition of Iconix. Summary judgment would also be premature, given Supply Co.'s maintenance in Action No. 1 of a claim, based on allegations substantially similar to Yap's, that Supply Co. was fraudulently induced to enter into the License Agreement.

Yap's first counterclaim seeks a declaratory judgment "obligating Plaintiff and/or Iconix to reimburse Supply Co. and Yap for all losses suffered as a result of the Reimbursement from Rainbow." (Ans., First Cause of Action [Declaratory Judgment], ¶ 52.) On the authority discussed at length above, the court holds that the first counterclaim is not maintainable because it is personal to Supply Co., as Supply Co., not Yap, was obligated by the Markdown Agreement

to pay the Rainbow Reimbursement Request. In any event, as held in connection with Supply Co.'s assertion of this claim in Action No. 1, the claim is without merit, as it is contradicted by the express terms of the License Agreement. Moreover, Yap fails to allege that he personally, rather than Supply Co., incurred or paid any portion of the Markdown Reimbursement. (See Ans., ¶ 47-49.)

While Yap does not specifically request discovery in connection with this counterclaim, he does request discovery on promises made by Iconix's Horowitz to Supply Co. and Yap during the negotiations, concerning obligations under the License Agreement and Guarantee. (See Def.'s Memo. In Opp., at 10.) In view of the above holding that the first counterclaim is not maintainable by Yap, he is not entitled to such discovery in order to oppose dismissal of the counterclaim.

In holding that the first counterclaim is not maintainable, the court notes that Yap's proposed amended answer pleads additional allegations in support of this counterclaim.[9] Yap in effect asserts a new theory as to why Hardy Way is liable to Supply Co. for the Markdown Reimbursement. As noted above (n 5, supra), the agreement with Rainbow was referred to in Supply Co.'s complaint in Action No. 1 and in Yap's original answer in Action No. 2 as the Markdown Agreement. The proposed amended answer re-names this agreement the "Markup Agreement" (Proposed Am. Ans., ¶ 34), and asserts for the first time: "The Markup Agreement is not with respect to a markdown or chargeback. In fact, the Markup Agreement specifically excludes these items from the markup calculation." (Id., ¶ 38.) The proposed amended answer

[9] In the branch of his motion for leave to amend the answer, Yap seeks leave only to add the defenses and counterclaims, discussed above, which allege that the License Agreement and Guarantee lack consideration and are unconscionable. (Def.'s Memo. In Opp., at 13-14.) Yap does not expressly seek leave to plead additional factual allegations in support of the existing defenses and counterclaims. (Id.) Nevertheless, in the proposed amended answer, Yap does plead additional allegations in support of his existing counterclaims.

also adds detail as to the name of the representative of plaintiff who allegedly prepared the agreement with Rainbow for the minimum markup percentage and allegedly represented to Yap that Supply Co. would not "suffer any loss" under that agreement. (Id., ¶¶ 35, 39.) This amendment is apparently advanced in support of the new argument that the claim that Hardy Way is liable for the full Rainbow Reimbursement Request is not inconsistent with the cap imposed by section 8.1 of the License Agreement-- i.e., that the cap is inapplicable because the Minimum Maintained Markup percentage, which was the basis for the Rainbow Reimbursement Request, was not a "markdown" and therefore not a "deduction" within the meaning of section 8.1. (See Def.'s Memo. In Opp., at 12.)

Yap fails to make a colorable legal argument in support of this new interpretation of the term "markdown." Yap also does not offer any support for his conclusory alternative contention that the License Agreement is ambiguous and that "[a]t the very least, a question of fact remains with respect [] to whether the Markup Agreement is accounted for by the Deductions provision of the License Agreement. . . ." (Id., at 13.) More important, this amendment is irrelevant to the finding that the first counterclaim belongs to Supply Co.

Yap's second counterclaim alleges that "Iconix and/or [Hardy Way] sought to conceal the true state of its financials by making deceptive and misleading public statements and filings with the SEC, which artificially inflated Supply Co. and Yap's confidence in Plaintiff's parent company, and that Supply Co. and Yap referenced and relied upon [such statements and filings] when entering into the License Agreement and Guarantee." (Ans., Second Cause of Action [Declaratory Judgment], ¶ 55.) It also incorporates an allegation that Hardy Way made misrepresentations and/or omissions "regarding the strength/financial condition of the Ed Hardy mark. . . ." (Id., ¶ 49.) Although this counterclaim is not denominated one for fraud in the

inducement, it is based on allegations parallel to those in Supply Co.'s second cause of action for fraud in the inducement in Action No. 1.[10]

On the authority discussed above, the court holds that the claim that Hardy Way fraudulently induced Supply Co. to enter into the License Agreement is personal to Supply Co. and that Yap is therefore barred from asserting the fraudulent inducement claim as to License Agreement. On separate authority discussed above, the court also holds that the waiver in the Guarantee is not sufficiently specific to preclude Yap from asserting the counterclaim to the extent that it alleges that he himself was fraudulently induced to execute the Guarantee.

The court further holds that Yap's second counterclaim with respect to the Guarantee pleads a cognizable cause of action, which withstands dismissal and renders summary judgment in Hardy Way's favor premature. In moving to dismiss this counterclaim, Hardy Way seeks to rely on its arguments in Action No. 1 in support of its motion to dismiss Supply Co.'s materially similar claim based on the allegations as to the viability of the Ed Hardy mark and Iconix's concealment of the true state of its financials. (Action No. 1, Compl., Second Cause of Action; Action No. 2, Aff. Of Andrew Hambelton (Pl.'s Atty.) In Supp., ¶ 17 [NYSCEF Doc. No. 14].) These arguments are without merit for the reasons stated by the court in denying Hardy Way's motion to dismiss Supply Co.'s fraudulent inducement claim in Action No. 1.

Given the pendency of Supply Co.'s fraudulent inducement claim, the grant of summary judgment to Hardy Way in Action No. 2 would also be premature. Hardy Way correctly argues that the Guarantee is "separate and distinct from the underlying agreement being guaranteed . . . ." (Pl.'s Reply Memo., at 3 [NYSCEF Doc. No. 32].) Here, however, Yap's fraudulent inducement claim is inextricably intertwined with Supply Co.'s fraudulent inducement claim.

[10] The court will refer to Yap's second counterclaim (Second Cause of Action [Declaratory Judgment]) as a counterclaim for fraudulent inducement.

So far as appears from the papers filed in Action Nos. 1 and 2, Supply Co. acted through Yap in executing the License Agreement. Yap signed the License Agreement for Supply Co. and also signed the License Agreement as Guarantor. (License Agreement, Signature Page.) An issue therefore exists as to whether, if Hardy Way committed a fraud on Supply Co. to induce it to enter into the License Agreement, it also committed the fraud upon Yap to induce him to execute the Guarantee. (See Walcutt, 13 NY2d at 56.)

Moreover, there is persuasive authority that where the underlying contract and guaranty are "sufficiently intertwined," and separate actions to enforce the contract and the guaranty are pending, denial of summary judgment to enforce the guaranty is proper. (See Oseff v Scotti, 130 AD3d 797, 800-801 [2d Dept 2015], citing Lorber v Morovati, 83 AD3d 799, 800 [2d Dept 2011] [same in the analogous context of a promissory note]; River Bank Am. v Daniel Equities Corp., 205 AD2d 476, 476 [1st Dept 1994] [same with respect to a promissory note].) Contrary to Hardy Way's contention (see Pl.'s Reply Memo., at 1), Supply Co.'s pleading in Action No. 1 of a cause of action for breach of contract does not preclude Yap from relying on Supply Co.'s alternative claim for rescission based on fraudulent inducement. While Supply Co. will ultimately have to elect its remedy, and while its election will affect Yap's available defenses, the election is premature at this juncture. (See Unisys Corp. v Hercules Inc., 224 AD2d 365, [1st Dept 1996], lv granted 88 NY2d 815, appeal withdrawn 89 NY2d 1031 [1997] ["Even where a plaintiff may seek recovery on alternative theories, he must make an election of remedies at trial or upon submission of a motion for summary judgment, the grant of which is the procedural equivalent of a trial"] [internal quotation marks and citations omitted].) The court accordingly holds that Hardy Way's motion for summary judgment must be denied.

ORDER

Action No. 1

It is accordingly hereby ORDERED that in the action brought by Supply Company, LLC (Supply Co.) against Hardy Way, LLC (Hardy Way) and Iconix Brand Group, Inc. (Iconix) (Action No. 1), the motion of defendants to dismiss the complaint is granted to the following extent: Supply Co.'s first cause of action for breach of contract, third cause of action for breach of the covenant of good faith and fair dealing, and fourth cause of action for unjust enrichment are dismissed; and Supply Co.'s second cause of action for fraud in the inducement is dismissed except to the extent based on allegations regarding Hardy Way and/or Iconix's concealment of information about the viability of the Ed Hardy Mark and the true state of Iconix's financials, including by making deceptive and misleading public statements and filings with the SEC; and it is further

ORDERED that in Action No. 1, Supply Co.'s application for leave to amend the complaint is denied.

Action No. 2

It is hereby ORDERED that in the action brought by Hardy Way against Kevin Yap (Action No. 2), the branch of Hardy Way's motion for summary judgment on the complaint is denied; and it is further

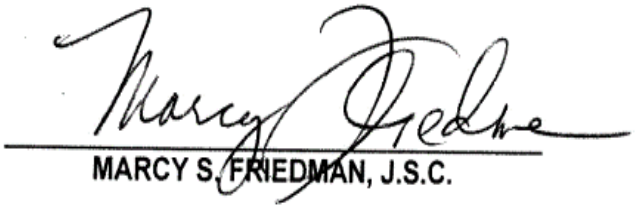
ORDERED that the branch of Hardy Way's motion to dismiss Yap's counterclaims in Action No. 2 is granted to the extent of (i) dismissing Yap's first counterclaim, denominated First Cause of Action (Declaratory Judgment), in its entirety; and (ii) dismissing Yap's second counterclaim, denominated Second Cause of Action (Declaratory Judgment), except to the extent based on defendant Yap's reliance, in entering into the Guarantee, on allegations regarding

Hardy Way and/or Iconix's concealment of information about the viability of the Ed Hardy Mark and the true state of Iconix's financials, including by making deceptive and misleading public statements and filings with the SEC; and it is further

ORDERED that in Action No. 2, Yap's cross-motion for leave to amend the answer is denied.

This constitutes the decision and order of the court.

Dated: August 10, 2020



MARCY S. FRIEDMAN, 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:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE