SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

----------X

KM PRODUCTIONS NY, INC.,

Plaintiff,

- v -

CIPRIANI USA, INC.,CIPRIANI GROUP, INC.,CIPRIANI 42ND STREET, LLC,CIPRIANI 55 WALL, LLC,STAR GROUP PRODUCTION, LLC,LANDMARKS BY CIPRIANI, LLC,EXQUISITE STAFFING, LLC,

Defendant.

----------X

INDEX NO. 650475/2019

MOTION DATE 9/24/2020

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 53, 60, 61, 69, 73

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

ORDERED that the motion to dismiss the amended third-party complaint is granted to the limited extent that the second, third and fourth causes of action are dismissed, and is denied in all other respects; and it is further

ORDERED that the remainder of the third-party action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Third-Party Defendants shall serve a copy of this Order along with Notice of Entry on all parties within twenty (20) days of entry.

MEMORANDUM DECISION

In this action, first-party plaintiff KM Productions NY, Inc. (KM) brings suit against first-party defendants Cipriani USA, Inc., Cipriani Group, Inc., Cipriani 42nd Street, LLC, Cipriani 55Wall, Star Group Production, LLC, Landmarks by Cipriani, LLC and Exquisite Staffing LLC (collectively, Cipriani), seeking certain legal and equitable relief related to the use and detention of certain audio equipment located in a Cipriani location, including breach of contract and replevin (*see* complaint [NYSCEF Doc No. 1]).

On March 18, 2019, Cipriani responded by interposing an answer with affirmative defenses and counterclaims, and simultaneously commenced a third-party action against third-party defendants Clifton Steurer (Steurer), Thomas Leinbach (Leinbach) and Harley Hendrix (Hendrix) (NYSCEF Doc No. 10). In its counterclaims and third-party complaint, Cipriani alleges that KM engaged in a conspiracy with Leinbach, Hendrix, and Steurer to defraud Cipriani, pay kickbacks in exchange for a continuing per event rental fee for the audio equipment, create unfair competition, and injure Cipriani and its business interests by means of a criminal enterprise engaged in racketeering activity in violation of 18 USC § 1962. On April 13, 2019, Cipriani amended the counterclaims and third-party complaint (NYSCEF Doc No. 14).

Third-party defendants Leinbach and Hendrix now move, pursuant to CPLR 3211 (a), for an order dismissing the amended third-party action as against them (NYSCEF Doc No. 32). Thereafter, Steurer joined in the motion to dismiss (NYSCEF Doc No. 58).

As set forth below, the motion to dismiss is granted in part, and denied in part.

BACKGROUND FACTS

Accepting the allegations set forth in the amended third-party complaint as true (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), the following facts emerge:

Cipriani operates three banquet venues in Manhattan: 25 Broadway, 110 East 42nd Street and 55 Wall Street. Cipriani generates revenue by renting out these venues to event sponsors, or clients, together with equipment from various vendors at pre-negotiated rates, and then invoices clients for the rental costs of the equipment, plus a markup (amended third-party complaint, ¶ 104).

In certain cases, Cipriani owns the equipment requested by a client, and directly rents out such equipment to the client (*id*., ¶ 105). When certain events have extraordinary equipment needs (which is not the norm), Cipriani allows the clients to negotiate directly with equipment vendors to transact the pricing and payments among themselves (*id*., ¶ 106).

KM provided event production services and equipment to Cipriani beginning in 2014, including rentals for lighting, audio, video, staging and special effects. KM had certain audio/visual equipment installed in Cipriani's 25 Broadway, 110 East 42nd Street and 55 Wall Street locations (affidavit of John Higgins, Cipriani's chief executive officer [NYSCEF Doc No. 63], ¶¶ 5-6).

Cipriani alleges that KM, together with third-party defendants Steurer, Hendrix and Leinbach, engaged in a massive, multi-year fraud, bribery and kickback scheme, in the course of which KM and the third-party defendants entered into a series of transactions, circumventing Cipriani, in order to financially enrich themselves at Cipriani's expense (amended third-party complaint, ¶ 107).

Cipriani alleges that, in exchange for their assistance in ensuring that KM would be retained as Cipriani's sole vendor for audio and video equipment, KM paid the third-party

defendants more than half a million dollars in "kickbacks and bribes" from early 2015, through the date of their respective terminations in 2018 (*id.*, ¶ 108). As a result, during this period, the third-party defendants procured and guaranteed contract terms favorable to KM, and to the detriment of Cipriani, including, but not limited to: (1) higher rental and lease prices from Cipriani than those charged by other vendors; (2) unnecessary rental contracts being secured; (3) avoidance of implementing the rent-to-own contracts with Cipriani; and (4) payments received directly from Cipriani's clients which benefitted KM and harmed Cipriani because the third-party defendants "bypassed the typical invoicing process" established by Cipriani (*id.*, ¶ 109).

Specifically, Cipriani alleges that it has discovered, through reviewing KM's records, that KM made payments to the third-party defendants totaling at least $546,301 (*see* Higgins aff, exhibit A [check, ACH and wire transfer records provided by KM evidencing these payments]). At a minimum, KM paid Leinbach, Hendrix and Steurer $316,880, $15,500 and $213,921, respectively, without Cipriani's knowledge or consent (*id.*, ¶ 16; *see* exhibit A). Cipriani alleges that neither KM nor the third-party defendants have offered any plausible explanation for these payments (*id.*, ¶ 17).

According to Cipriani, Hendrix was hired by an unnamed Cipriani entity in 2007, and spent 11 years leading an event production team at the 55 Wall Street venue, and also supervised event production at the 25 Broadway location (amended third-party complaint, ¶ 110). Hendrix engaged in client contact regarding "event settings and stage designs," and compiled proposed event package solutions for the client, including utilization of KM's equipment and services, as well as that of third-party vendors (*id.*). By the time of her termination in 2018, Hendrix's title was Director of Operations. Cipriani alleges that, accordingly, she exercised significant authority in deciding which vendors to use for clients, and which equipment to rent or to purchase on behalf

of Cipriani based on the frequency of use and clients' orders. Most importantly, by virtue of her position of trust with Cipriani, Hendrix had the ability to arrange for clients to contract with and pay vendors directly for supplemental services, rather than contracting with and paying Cipriani, as was protocol (*id.*, ¶ 110).

Leinbach, who is Hendrix's husband, worked for Cipriani on a contract basis as an audio engineer from 2009 until the termination of his employment in 2018. Leinbach was responsible for "adjusting, testing and operating audio equipment for clients' events." He worked closely with vendors in setting up equipment, and also worked closely with clients to implement their stage designs or desired special effects. Cipriani alleges that it relied on Leinbach's professional expertise in evaluating and recommending audio and video equipment when selecting vendors for events (*id.*, ¶ 112).

Cipriani alleges that Hendrix and Leinbach "repeatedly recommended" KM's equipment and services to it (*id.*, ¶ 114).

Steurer was hired in 2006 as President of Star Group Production, LLC, and was supervising all three venues in New York City at the time of his termination in 2018. During his employment, Steurer supervised Hendrix and Leinbach. As supervisor of those three locations, Steurer was able to review and approve vendor contract terms and prices, and had discretion to permit clients to pay the vendors directly, rather than paying Cipriani and its associated markup fees. He would also decide whether rent-to-own agreements would be recommended to or be executed by Cipriani (*id.*, ¶ 111). Steurer recommended and executed contracts on behalf of Cipriani, which included contracts involving KM (*id.*, ¶ 114).

Cipriani alleges that, by paying them at least half a million dollars in payments as referenced above, KM induced Leinbach, Hendrix, and Steurer to collectively defraud Cipriani in order to maximize the benefits of this kickback scheme (*id.*, ¶ 113).

Cipriani further alleges that the direct billing option procured by Leinbach and Hendrix, and approved by Steurer, permitted KM to help the client bypass Cipriani's 40% markup and deprived Cipriani of "direct labor" revenue associated with the set-up and take down of events, thereby freeing KM to directly bill the client for additional labor and incidental equipment rentals which "fell beyond what had been agreed with [Cipriani]" (*id.*, ¶¶ 115-116).

In 2017, KM offered Cipriani rent-to-own agreements for certain equipment. Although Cipriani and KM executed the rent-to-own agreements for 25 Broadway and 55 Wall Street in April 2017, Cipriani asserts that KM and the third-party defendants deliberately did not implement the rent-to-own contracts signed with KM (*id.* at ¶¶ 117-18; *see* Higgins affidavit, exhibit B). Cipriani alleges that Hendrix, Leinbach and Steurer misled it by advising it about the purported infeasibility of the rent-to-own contracts, and omitting "crucial information about the rent-to-own contracts" (amended third-party complaint, ¶¶ 117-18).

Cipriani further alleges that it would have earned greater revenues by implementing those contracts, because they (1) would have earned higher profits by paying the installments on the equipment, instead of paying rental fees charged on a per-occasion basis; and (2) would have owned the equipment outright once installment payments were complete, i.e., within 34 months at 25 Broadway, and 36 months at 55 Wall Street (*id.*, ¶ 117).

KM allegedly earned millions of dollars by direct billing Cipriani clients and charging for additional direct labor services without the inclusion of Cipriani's 40% markup (*id.*, ¶ 119).

Cipriani alleges that KM and the third-party defendants caused damages to Cipriani that included, but were not limited to: (a) payment for significantly above-market equipment rental prices; (b) compensation paid to the third-party defendants, and the bribes taken by them during their employment with Cipriani; (c) loss of mark-up profits where KM improperly rented equipment directly to Cipriani' clients; (d) increased costs to Cipriani, who was prevented from implementing the rent-to-own contracts; (e) lost mark-up revenue on incidental equipment and direct labor revenue for setting up and taking down rental equipment; (f) costs of investigating this scheme; and (g) damages to Cipriani's client relationships (*id*., ¶ 120).

The amended third-party complaint sets forth six causes of action: breach of fiduciary duty (first cause of action); violations of §§ 1962 (c) and (d) of the Racketeer Influenced and Corrupt Organizations Act (RICO) (second and third causes of action); violation of the Robinson-Patman Act, 5 USC § 13 (c) (fourth cause of action); fraud (fifth cause of action); and unjust enrichment (sixth cause of action).

On November 26, 2019, the first party action was settled between KM and Cipriani by a stipulation of discontinuance with prejudice, and dismissal of all pending motions in the first party action (NYSCEF Doc No. 83).

DISCUSSION

It is firmly established that, on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 5-6 [2013]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon*, 84 NY2d at 87). The sole inquiry is whether a cognizable legal theory is contained in the pleading, not whether

there is evidentiary support or whether the claimant can ultimately succeed on the merits (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013]; *Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008]). If the four corners of the complaint provide potentially meritorious claims, the motion to dismiss should be denied (*see Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 10 [1st Dept 2012]). "'However imperfectly, informally, or even illogically the facts may be stated, a complaint, attacked for insufficiency, must be deemed to allege whatever can be implied from its statements by fair and reasonable intendment'" (*Feinberg v Bache Halsey Stuart, Inc.*, 61 AD2d 135, 138 [1st Dept 1978] [citation omitted]).

However, while affording all favorable implications to the plaintiff and the pleading, the court must also focus on the allegations in the complaint, and avoid reading into the complaint assertions or theories that are contrary to those that were expressly pleaded by the plaintiff (*see Nomura Home Equity Loan, Inc., Series 2006-FM2 v Nomura Credit & Capital, Inc.*, 30 NY3d 572, 582 [2017]; *see also Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 144 [2017] ["We may not read into [the plaintiff's] allegations a claim for cognizable damages, which he did not actually incur, under the guise of liberally construing the complaint"]).

Construing the third-party amended complaint in the generous matter to which it is entitled, this court nevertheless concludes that with respect to the second, third and fourth causes of action (the RICO and Robinson-Patman Act claims), the facts alleged in that pleading are insufficient, and compel the dismissal of these causes of action. This court finds that the remaining causes of action (breach of fiduciary duty, fraud and unjust enrichment) contain sufficient allegations to withstand dismissal.

Breach of Fiduciary Duty (First Cause of Action)

In the first cause of action of the amended third-party complaint, Cipriani alleges that the third-party defendants "were faithless and disloyal employees" who breached their fiduciary duty to Cipriani "by accepting bribes and kickbacks from" KM "without the knowledge of "Cipriani," and taking actions in KM's interest, rather than that of Cipriani (amended third-party complaint, ¶ 164).

"To establish a breach of fiduciary duty, the plaintiff must show the existence of a fiduciary relationship, misconduct that induced the plaintiff to engage in the transaction in question, and damages directly caused by that misconduct" (*Barrett v Freifeld*, 64 AD3d 736, 739 [2d Dept 2009]). "'A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*AG Capital Funding Partners, LP v State St. Bank & Trust Co.*, 11 NY3d 146, 158 [2008]; quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Under the faithless servant doctrine, "an employee who 'act[s] in any manner inconsistent with his agency or trust' and fails 'to exercise the utmost good faith and loyalty in the performance of his duties' is deemed a 'faithless servant' and must . . . account to his principal for secret profits [and] forfeit[] his right to compensation'" (*Mosionzhnik v Chowaiki*, 41 Misc 3d 822, 831 [Sup Ct, NY County 2013] [citation omitted]; *see also Feiger v Iral Jewelry, Ltd.*, 41 NY2d 928, 928 [1977] ["One who owes a duty of fidelity to a principal and who is faithless in the performance of his services is generally disentitled to recover his compensation, whether commissions or salary"]; *Visual Arts Found., Inc. v Egnasko*, 91 AD3d 578, 579 [1st Dept 2012]).

Further, an employee is under a duty of loyalty to an employer and is forbidden from acting with anything less than the utmost good faith during the performance duties (*see e.g. City of Binghamton v Whalen*, 141 AD3d 145, 146–47 [3d Dept 2016]; *see also Sokoloff v Harriman*

Estates Dev. Corp., 96 NY2d 409, 416 [2001]). Where the employee is an agent of a corporation alleged to have taken actions against it, an "adverse interest exception" applies, but only where the agent has "'*totally abandoned* his principal's interests and [is] acting entirely for his own or another's purposes. It cannot be invoked merely because he has a conflict of interest or because he is not acting primarily for his principal'" (*Kirschner v KPMG LLP*, 15 NY3d 446, 465 [2016] [citation omitted, emphasis in original]).

Faithless servant violations have been found where the agent or employee was engaged in the sale of a competitor's goods (*Elco Shoe Mfgrs., Inc. v Sisk*, 260 NY 100, 105 [1932]). The employee must have competed against his employer and profited from one or more opportunities properly belonging to his employer in order to be found a faithless servant (*see Maritime Fish Prods. v World-Wide Fish Prods.*, 100 AD2d 81, 88 [1st Dept 1984] [duty of loyalty breached where employee "surreptitiously organized a competing corporation, corrupted a fellow employee, and secretly pursued and profited from one or more opportunities properly belonging to his employer"]; *Murray v Beard*, 102 NY 505, 508-509 [1886] [finding faithlessness where a timber broker had undertaken competing obligations to different dealers]). "New York's strict application of the faithless servant doctrine 'mandates the forfeiture of all compensation . . . where . . . one who owes a duty of fidelity to a principal is faithless in the performance of his services'" (*Art Capital Group, LLC v Rose*, 149 AD3d 447, 449 [1st Dept 2017], quoting *Soam Corp. v Trane Co.*, 202 AD2d 162, 163–164 [1st Dept 1994]).

The third-party defendants contend that the breach of fiduciary duty cause of action must be dismissed because "it does not distinguish between compensation and benefits that it paid to Mr. Leinbach or Ms. Hendrix as salary, and that which was obtained under purported criminal or false pretenses that are traceable to faithless servant activities," and, as such, the third-party

defendants "are without adequate notice as to what transactions or events give rise to the faithless servant claims and what salary or benefits flowed to them during the course of the alleged faithless period" (third-party defendants' memorandum of law at 13 [NYSCEF Doc No. 35]).

To the contrary, this court finds that, in the amended third-party complaint, Cipriani has identified at least $546,988 that KM admits paying to Steurer, Hendrix and Leinbach that could be viewed as commercial bribes rather than salary. "Nothing could be more corrupting, nor have a greater tendency to lead to disloyalty and dishonesty on the part of servants, agents, and employees and to a betrayal of the confidence and trust reposed in them" (*Sirkin v Fourteenth St. Store*, 124 App Div 384, 389 [1st Dept 1908]). Where a vendor bribes a customer's employees to act against the customer's interest, a breach of fiduciary duty claim will lie against those employees (*see 37 East 50th Street Corp. v Restaurant Group Mgt. Servs., L.L.C.*, 156 AD3d 569, 570-71 [1st Dept 2017] [permitting breach of fiduciary duty claim to proceed where "plaintiff relied on defendant to ably manage its business and to exercise business judgment in good faith and without personal bias or conflict of interest"]).

At this early stage of the litigation, it does not matter that Cipriani cannot specifically establish all of the transactions that may have been affected by KM's alleged bribery of the third-party defendants. The mere fact that KM made these payments, and that the third-party defendants accepted them, is sufficient to create a conflict of interest, and to support a claim of breach of fiduciary duty (*see Consolidated Edison Co. v Zebler*, 40 Misc 3d 1230[A], 2013 NY Slip Op 51354[U], *5 [Sup Ct, NY County 2013] [defendant constituted a faithless servant by virtue of scheme of receiving bribes and kickbacks]; *see e.g. Sardanis v Sumitomo Corp.*, 279 AD2d 225, 230 [1st Dept 2001] [finding that breach of fiduciary duty cause of action "was pleaded with sufficient particularity to withstand a motion to dismiss at this stage, pending discovery," given

allegations "certain named and unnamed faithless employees formed a competitive company . . . which then conspired with a former customer [Sumitomo] . . . to drive plaintiff out of business" and "take over the company by allegedly bribing RST employees to obtain sensitive and confidential data for Sumitomo"]; *see also Black v MTV Networks, Inc.*, 172 AD2d 8, 11 [1st Dept 1991] ["regardless of intent, motive, illicit purpose, or pecuniary loss, such secret payments improperly create interests for agents that are 'adverse to their principal' and the principal's complete knowledge and approval is required of 'any substantial advantage received by an agent' from third persons"' [citation omitted]; *American Assur. Underwriters Group, Inc. v MetLife Gen. Ins. Agency, Inc.*, 154 AD2d 206, 208 [1st Dept 1990] ["In making secret stock payments to MetLife's employees, AAUG eroded their duty of undivided loyalty to their employer . . . and improperly created interests for these agents which were adverse to that of their principal"]).

The third-party defendants further argue that the breach of fiduciary cause of action fails with respect to Leinbach because he was "only an independent contractor who could not bind Cipriani related entities" (third-party defendants' memorandum of law at 14).

However, it is irrelevant that Cipriani retained Leinbach on a contract basis, rather than as a regular employee. It is well-settled that "[a] fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (Restatement Second, Torts, § 874, comment a). As such, the First Department has permitted breach of fiduciary duty claims to proceed where the duty is one of "fidelity" from a consultant to a principal (*see TPL Assoc. v Helmsley-Spear, Inc.*, 146 AD2d 468, 470 [1st Dept 1989] [reinstating claim of breach of fiduciary duty against brokers who failed to disclose a conflict of interest; "[a]n agent is charged with a duty of loyalty and may not have interests in the subject transaction which are adverse to those of his principal"]; *Mandelblatt v*

Devon Stores, Inc., 132 AD2d 162, 168 [1st Dept 1987] ["the charge that respondent . . . injured appellants' business opportunity was under a duty, as a highly paid consultant, to give advice and act for appellants' benefit, is sufficient to state a claim for this tort"]).

It is clear that, as employees of Cipriani, the third-party defendants owed a fiduciary duty to Cipriani. The third-party complaint contains specific allegations that KM paid the third-party defendants more than half a million dollars over a three-year period, and that these individuals failed to disclose these payments to Cipriani at any time during their employment. Accepting these allegations as true, this court finds them sufficient, at this early stage of the litigation, to state a claim for breach of fiduciary duty.

RICO Claim (Second Cause of Action)

In its second cause of action claiming a substantive RICO violation under 18 USC § 1962, Cipriani alleges that Steurer, Leinbach, and Hendrix "formed an enterprise and association" with KM to sell and rent KM's equipment to Cipriani and its clients with such activities affecting interstate commerce, and that "Third-Party Defendants are key members of the enterprise" (amended third-party complaint, ¶ 169). Cipriani further alleges that the third-party defendants "agreed to and did conduct and participate in the enterprise's affairs through a pattern of racketeering activities . . . for the unlawful[] purpose of intentionally defrauding [Cipriani]" (*id.*, ¶ 170). According to Cipriani, the racketeering activities were comprised of "multiple related acts of bribes and fraud" committed by the third-party defendants (*id.*, ¶ 171). Cipriani claims to have been injured in its business and property as a result of such conduct, resulting in damages (*id.*, ¶ 174).

In support of their motion to dismiss this claim, the third-party defendants contend that this cause of action "is nothing more than sweeping assertions [of criminal conduct] and a conclusory string of unsupported blanket statements which are legally insufficient" (third-party defendants' memorandum of law at 16).

While a claim of an 18 USC § 1962 civil racketeering violation is federal in nature, the New York State Court of Appeals has determined that the state courts have concurrent jurisdiction, and may adjudicate such claims (*Simpson Elec. Corp. v Leucadia, Inc.*, 72 NY2d 450, 455 [1988]). However, under New York law, civil RICO cases are subject to a heightened pleading standard (*Besicorp Ltd. v Kahn*, 290 AD2d 147, 151 [3d Dept 2002]; *Wells Fargo Bank, N.A. v Wine*, 45 Misc 3d 1209[A], 2010 NY Slip Op 52474[U], *3 [Sup Ct, Ulster County 2010], *affd* 90 AD3d 1216 [3d Dept 2011]), given the fact that the assertion of a RICO claim often has "'an almost

inevitable stigmatizing effect on those named as defendants'" (*World Wrestling Entertainment, Inc. v Jakks Pac., Inc.*, 530 F Supp 2d 486, 495-496 [SD NY 2007] [citation omitted], *affd* 328 Fed Appx 695 [2d Cir 2009] [internal quotation marks and citation omitted]; *see also Nichols v Mahoney*, 608 F Supp 2d 526, 536 [SD NY 2009] ["A civil RICO lawsuit has vast implications for the defendants because of the specter of treble damages and the possibility of permanent reputational injury to defendants from the allegation that they are 'racketeers'"]).

"Because of this likely powerful effect on potentially innocent defendants who face the threat of treble damages, and the concomitant potential for abuse of RICO's potent provisions, the court is aware of a particular imperative in cases such as the one at bar, 'to flush out frivolous [civil] RICO allegations at an early stage of the litigation'" (*Curtis & Assoc., P.C. v Law Offices of David M. Bushman, Esq.*, 758 F Supp 2d 153, 167 [ED NY 2010] [citation omitted], *affd sub nom. Curtis v Law Offices of David M. Bushman, Esq.*, 443 Fed Appx 582 [2d Cir 2011]). Thus, courts must closely scrutinize complaints "to ensure that 'RICO's severe penalties are limited to enterprises consisting of more than simple conspiracies to perpetrate the acts of racketeering . . . courts must always be on the lookout for the putative RICO case that is really nothing more than an ordinary fraud case clothed in the Emperor's trendy garb'" (*Spiteri v Russo*, 2013 WL 4806960, * 46 [ED NY 2013], *affd sub nom. Spiteri v Camacho*, 622 Fed Appx 9 [2d Cir 2015], quoting *U.S. Fire Ins. Co. v United Limousine Serv., Inc.*, 303 F Supp 2d 432, 443 [SD NY 2004]; *see also Goldfine v Sichenza*, 118 F Supp 2d 392, 394 [SD NY 2000] [such frivolous RICO allegations are often manifested in the form of "garden variety fraud or breach of contract cases that some Plaintiff has attempted to transform into a vehicle for treble damages by resort to what [...] [has been] referred to as 'the litigation equivalent of a thermonuclear device'—a civil RICO suit"] [citations omitted]). Indeed, "'the civil provisions of [RICO] are the most misused statutes in the federal

corpus of law'" (see *West 79th St. Corp. v Congregation Kahl Minchas Chinuch*, 2004 WL 2187069, *5 [SD NY 2004] [citation omitted]).

Under the civil RICO statute, "any person injured in his business or property by reason of a violation of section 1962 . . . may sue therefore . . . and shall recover threefold the damages he sustains and the cost of the suit, including reasonable attorneys' fees" (18 USC § 1964 [c]). In order to assert a valid civil RICO claim for a violation of section 1962 (c), "'a plaintiff must show that he was injured by defendants' (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity'" *World Wrestling Entertainment, Inc.*, 530 F Supp 2d at 495 [citation omitted]; *accord Board of Mgrs. of 120 E. 86th St. Condominium v Park Ave. Physicians Realty, LLC*, 61 Misc 3d 1214[A], 2018 NY Slip Op 51518[U], *10 [Sup Ct, NY County 2018]; *House of Spices (India), Inc. v SMJ Servs., Inc.*, 2011 NY Slip Op 31072[U] [Sup Ct, Queens County 2011], *affd as modified*, 103 AD3d 848 [2d Dept 2013]; *Penn Warranty Corp. v DiGiovanni*, 10 Misc 3d 998, 1007 [Sup Ct, NY County 2005]). "Because the core of a RICO civil conspiracy is an agreement to commit predicate acts, a RICO civil conspiracy complaint, at the very least, must allege specifically such an agreement" (*Hecht v Commerce Clearing House, Inc.*, 897 F2d 21, 25 [2d Cir 1990]).

Here, the allegations in the third-party complaint fail to satisfy the heightened pleading requirements for a RICO claim. As such, this claim must be dismissed (*Belair Care Ctr., Inc. v Cool Insuring Agency, Inc.*, 168 AD3d 1162, 1164 [3d Dept 2019] [finding that "dismissal of the RICO cause of action was proper given that the allegations in the amended complaint failed to satisfy the heightened pleading requirement for such claims"]; *see also Daskal v Tyrnauer*, 123 AD3d 652, 652 [2014]). Indeed, Cipriani attempts to "transmogrify" state law torts of fraud and breach of fiduciary duty by merely labeling them as "RICO" (*see Helio Intl. S.A.R.L. v Cantamessa*

USA, Inc., 2013 WL 3943267, *9 [SD NY 2013] ["the allegations in the Complaint that purport to plead predicate criminal acts sufficient to establish a cause of action under RICO 'amount merely to a breach of contract claim [and common business torts], which cannot be transmogrified into a RICO claim by the facile device of charging that the breach was fraudulent, indeed criminal'"] [citation omitted]).

More specifically, this court finds that Cipriani's pleading lacks the required specificity showing that KM and the three third-party defendants are all connected to an "enterprise," that engaged in a "pattern of racketeering activity."

18 USC § 1961 (4) provides that an "enterprise" includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity," and a "pattern of racketeering activity" requires at least two acts of racketeering activity committed within ten years of each other (18 USC § 1961 [5]). An enterprise can be established by showing the existence of an "ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit" (*United States v Turkette*, 452 US 576, 583 [1981]).

The court must first decide whether the third-party defendants had managerial ability over KM, such that the court may find that they conducted or participated, directly or indirectly, in the conduct of the enterprise's affairs (18 USC § 1962 [c]). "'[T]o conduct or participate, directly or indirectly, in the conduct'" of an enterprise's affairs "one must participate in the operation or management of the enterprise itself" (*Reves v Ernst & Young*, 507 US 170, 185 [1993], quoting 18 USC § 1962 [c]).

Here, there are no factual assertions that Leinbach managed or otherwise conducted the affairs of KM, such that the RICO claim is valid as against him. To the contrary, Cipriani alleges

that Leinbach worked for Cipriani as an audio engineer, and relied upon him for technical and design advice, and that it was KM that solicited him to accept commercial bribes which would inure to the benefit of KM (third-party complaint, ¶¶ 112-113). Clearly, if, as alleged, KM solicited Leinbach, an employee of Cipriani, then Leinbach is not managing the affairs of KM, which is a requisite for the RICO claim. The RICO claim fails also against Hendrix as she was hired as a Director of Operations for Cipriani venues, and remained in that role until she was terminated in 2018 (*see* third-party amended complaint, ¶ 110). With respect to Steurer, Cipriani likewise makes no factual allegations that he participated in the affairs and management of KM.

In addition, based on Reves' "operation and management" test, courts have found various actions insufficient to trigger RICO liability. "[S]imply aiding and abetting a violation is not sufficient to trigger liability" (*United States v Viola*, 35 F3d 37, 40 [2d Cir 1994]), abrogated on other grounds by *Salinas v United States*, 522 US 52 [1997]; *see also Goldfine v Sichenzia*, 118 F Supp 2d at 403 ["the mere fact that a defendant may have *aided* in the alleged scheme to defraud, *even if that aid was intentional*, does not give rise to liability under § 1962 [c]" [emphasis in original]).

Moreover, "[a] defendant does not 'direct' an enterprise's affairs under § 1962 (c) merely by engaging in wrongful conduct that assists the enterprise" (*New York v United Parcel Serv.*, 2016 WL 4203547, *4 [SD NY 2016], quoting *Redtail Leasing, Inc. v Bellezza*, 1997 WL 603496, *5 [SD NY 1997]; *see also Abbott Labs. v Adelphia Supply USA*, 2017 WL 57802, *6 [ED NY 2017]). "Nor is it enough to simply provide 'goods and services that ultimately benefit the enterprise'" (*U.S. Fire Ins. Co.*, 303 F Supp 2d at 451-52 [citation omitted]).

Rather, a legally sufficient civil RICO complaint must show that the participants are engaged in such racketeering for a greater purpose of the enterprise and not mere self-interest (*see*

e.g. Matter of General Motors LLC Ignition Switch Litig., 2016 WL 3920353, *13 [SD NY 2016] [RICO plaintiff "'failed to distinguish this association of entities from the typical and ordinary participants who act separately for the purpose of distributing any product'"] [citation omitted]; *Matter of Toyota Motor Corp. Unintended Acceleration Mktg., Sales Practices, & Products Liability Litig.*, 826 F Supp 2d 1180, 1202-03 [CD Cal 2011] [RICO allegations insufficient where "Plaintiffs merely allege that the Defendants are associated in a manner directly related to their own primary business activities" even though plaintiffs alleged that this "primary business activity . . . was conducted fraudulently"]; *Kaczmarek v International Bus. Machs. Corp.*, 30 F Supp 2d 626, 630 [SD NY 1998] ["Plaintiffs do not describe the role, if any, of IBM in the operation or management of this Enterprise. IBM was simply conducting its own 'affairs' in distributing its product," and thus, "have failed to state a claim for violation of § 1962 [c]").

Here, Cipriani fails to identify the alleged enterprise, or show how the third-party defendants engaged in racketeering for the greater good of the enterprise, and not merely for their self-interest. In addition, Cipriani fails to delineate each participant's individual racketeering acts in furtherance of the enterprise, or identify how KM was doing anything other than conducting its own affairs, which is fatal to its claims.

Even accepting Cipriani's allegations as true, the RICO cause of action outlines merely a self-interested scheme where the third-party defendants received kickbacks so long as they could continue to keep KM's equipment rented for events by the direct client billing scheme. Clearly, the enterprise element fails: the success of KM in the scheme is entirely dependent upon the abuse of power engaged in by Hendrix who used her position and to offer direct billing to the client. That direct billing in turn translated to proceeds for KM, and a commission was then kick-backed to Leinbach and/or Hendrix for having arranged the deal. Under that scenario, which is the heart

of all of Cipriani's claims, KM and the third-party defendants are all acting in a simple conspiracy of self-enrichment at the expense of Cipriani. There is no enterprise over which they are acting for a greater purpose, or in which they are exercising control.

Accordingly, the RICO claim fails for want of an enterprise.

A legally sufficient RICO cause of action must also demonstrate a pattern of racketeering activity. According to RICO's definitional section, a "'pattern of racketeering activity' requires at least two acts of racketeering activity, . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity" (18 USC §1961 [5]). The acts of racketeering activity that constitute the pattern must be among the various criminal offenses listed in § 1961 (1), and they must be "'related, *and* [either] amount to or pose a threat of continuing criminal activity'" (*Cofacredit, S.A. v Windsor Plumbing Supply Co.*, 187 F3d 229, 242 [2d Cir 1999] [citation omitted; emphasis in original]). The "continuity" requirement "can be satisfied either by showing a 'closed-ended' pattern—a series of related predicate acts extending over a substantial period of time—or by demonstrating an 'open-ended' pattern of racketeering activity that poses a threat of continuing criminal conduct beyond the period during which the predicate acts were performed" (*Spool v World Child Intl. Adoption Agency*, 520 F3d 178, 183 [2d Cir 2008]). "This threat is generally presumed when the enterprise's business is primarily or inherently unlawful" (*id*. at 185). "When 'the enterprise primarily conducts a legitimate business,' however, no presumption of a continued threat arises" (*id*. [citation omitted]). "In such cases, 'there must be some evidence from which it may be inferred that the predicate acts were the regular way of operating that business, or that the nature of the predicate acts themselves implies a threat of continued criminal activity'" (*id*. [citation omitted]).

"The law is clear that 'the duration of a pattern of racketeering activity is measured by the RICO predicate acts' that the defendants are alleged to have committed" (*id.* at 184 [citation omitted]). To sufficiently allege a RICO predicate act based upon violation of a criminal violation of New York Penal Law 180.03, Commercial Bribery in the First Degree, an E Felony, Cipriani is required to demonstrate that any of the third-party defendants:

> "confers, or offers or agrees to confer, any benefit upon any employee, agent or fiduciary without the consent of the latter's employer or principal, with intent to influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit conferred or offered or agreed to be conferred exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars."

Likewise, in order to sufficiently allege a violation of New York Penal Law 180.08, Commercial Bribe Receiving in the First Degree, and E Felony, Cipriani is required to show that:

> "An employee, agent or fiduciary . . . without the consent of his employer or principal, solicits, accepts, or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs, and when the value of the benefit solicited, accepted or agreed to be accepted exceeds one thousand dollars and causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars."

"The essence of bribery, as defined in this article, is in the 'intent' to influence improperly the conduct of another by bestowing a benefit, and the essence of bribe receiving is in the 'agreement or understanding' that the recipient's conduct will be influenced by the benefit" (William C. Donnino, Practice Commentary, appended to New York. Penal L. § 180.00 [McKinney's 1998]).

With respect to commercial bribery, the complaint alleges that KM "paid kickbacks and bribes to the Disloyal Employees totaling at least $546,301" (third-party complaint, ¶ 108). This bare allegation, without any supporting factual details with respect to the circumstances of the alleged bribe, or with respect to the causal relationship between the payment of the alleged bribe

and the corresponding actions taken by the third-party defendants, fails to satisfy the heightened pleading requirements needed for a civil RICO cause of action. Moreover, given this bare allegation, it is impossible to determine whether Cipriani has put forth the requisite showing of either a closed or open-ended pattern of racketeering, because there are not enough details for the court to evaluate the factual background of the underlying predicate acts.

Accordingly, because the third-party amended complaint fails to allege sufficient facts demonstrating an agreement between KM and the third-party defendants to engage in a pattern of racketeering activity, it fails to state a civil RICO cause of action (*see Board of Mgrs. of Beacon Tower* Condominium, 136 AD3d 680, 686 [2d Dept 2016]; *see also Crawford v Franklin Credit Mgt. Corp.,* 758 F3d 473, 487 [2d Cir 2014]; *Wells Fargo Bank, N.A.*, 45 Misc. 3d 1209[A], 2010 NY Slip Op 52474 at *3).

Hence, the second cause of action must be dismissed.

RICO Conspiracy (Third Cause of Action)

Cipriani has agreed to withdraw its third cause of action of the third-party amended complaint pertaining to a RICO civil conspiracy (*see* Cipriani's opposition memorandum of law [NYSCEF Doc No. 69] at 1, n 1).

The Robinson-Patman Act Claim (Fourth Cause of Action)

Cipriani's fourth cause of action is brought pursuant to the Robinson-Patman Act, 15 USC § 13 (c). In support of this cause of action, Cipriani alleges that the third-party defendants engaged in commerce with KM, and that in the course of such commerce, they "accepted kickbacks" from KM in connection with the lease and sale of KM to Cipriani without Cipriani's knowledge of such payments (amended third-party complaint, ¶¶ 181-182).

Although Cipriani has not specifically withdrawn this cause of action, it makes no mention of this cause of action in its opposition to KM's motion to dismiss. Accordingly, this court deems these claims abandoned, and they are dismissed (*see Burgos v Premiere Props., Inc.*, 145 AD3d 506, 508 [1st Dept 2016] *see also Scekic v SL Green Realty Corp.*, 132 AD3d 563, 565 [1st Dept 2015]).

This court also finds that, in any event, the allegations set forth in the amended third-party complaint are insufficient to satisfy the requirements of this statute.

The Robinson-Patman Act is one of many federal anti-trust statutes passed to protect retailers and manufacturers from price discrimination. It was meant to amend the 1936 Clayton Act, which itself was an amendment to the Sherman Act (*Jack's Cookie Co. Inc. v Du-Bros Foods Inc.*, 145 Misc 2d 699, 700 [Civil Ct, Queens County, Special Term 1989]). The statute provides:

> "Payment or acceptance of commission, brokerage, or other compensation
>
> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid"

(15 USC §13 [c]).

Thus, under this statute:

"It is unlawful for any person to

(1) pay (or receive)-

a. anything of value as a commission, brokerage, or other compensation, or

b. any allowance or discount in lieu of brokerage,

except for services rendered in connection with a sale or purchase of goods,

(2) when the payment is made to (or by)

a. the other party to the transaction, or

b. an agent, representative or other intermediary where the intermediary is

(i) acting for or in behalf of, or

(ii) subject to the direct or indirect control of

any party to the transaction other than the person by whom the compensation is paid"

(*Blue Tree Hotels Inv. (Canada), Ltd. v Starwood Hotels & Resorts Worldwide, Inc.*, 369 F3d 212, 218 [2d Cir 2004]).

The explicit reach of the statute "'extends only to persons and activities that are themselves 'in commerce,' the term 'commerce' being defined in [Section 1] of the Clayton Act . . . as 'trade or commerce among the several States and with foreign nations'" (*Diaz Aviation Corp. v Airport Aviation Servs., Inc.*, 762 F Supp 2d 388, 396 (D PR 2011), quoting *Gulf Oil Corp. v Copp Paving Co.*, 419 US 186, 194 [1974]).

In the case of the sale of goods like audio equipment, as alleged in paragraph 182 of Cipriani's amended third-party complaint, case law holds that "[t]o satisfy the 'in commerce' requirement, one of the discriminatory sales must cross a state line" (*Able Sales Co. v Compania de Azucar de Puerto Rico*, 406 F3d 56, 61 [1st Cir 2005], citing *Gulf Oil Corp.*, 419 US at 198–201). This means that the sale or rental of KM equipment had to "physically cross a state boundary in either the sale to the favored buyer or the sale to the buyer allegedly discriminated against" (*Coastal Fuels of Puerto Rico, Inc. v Caribbean Petroleum Corp.*, 79 F3d 182, 189 [1st Cir 1996]).

"'[I]t is necessary to allege . . . that the transactions complained of are actually in interstate commerce'" *Diaz Aviation Corp.*, 762 F Supp 2d at 396 [citation omitted].

Here, Cipriani fails to assert any allegations of fact that will satisfy the pleading burden it has to demonstrate that (1) Leinbach and Hendrix, in activities separate and distinct from their services provided to Cipriani, are engaged in interstate commerce; (2) that there was a specific sale of any good; and (3) that such good crossed a state line to invoke interstate commerce. As such, this cause of action fails on its face. In fact, once Cipriani received the audio equipment from KM years ago, and continues to be in possession of it today, the equipment is not in the stream of commerce, and therefore is not subject to a Robinson-Patman claim (*see Diaz Aviation Corp.*, 762 F Supp 2d at 396).

This cause of action is also insufficient because: (1) it specifically alleges that Leinbach and Hendrix were direct employees of Cipriani, and makes no reference to them engaging in employment or other commercial activity at the direction of a competitor; (2) it fails to identify any good sold or rented to Cipriani at any time by KM; and (3) it fails to identify specific instances of monies tendered to Leinbach and Hendrix that were not excepted under the statute for services rendered in connection with the sale or purchase of goods involving the other party to such transaction, and they were acting on behalf of their principal. Indeed, under the Robinson-Patman Act, the Second Circuit has never reached the question of whether—and under what circumstances—commercial bribery can form the basis of a claim under § 2 (c) (*see Blue Tree Hotels Inv. (Canada), Ltd.*, 369 F3d at 221).

Moreover, while this court may have concurrent jurisdiction to preside over the Robinson-Patman Act claim, courts have repeatedly declined to do so to avoid causing disparate results between state and federal courts on matters involving the Clayton and Sherman anti-trust acts,

which the Robinson-Patman Act was created to amend (*see Jack's Cookie Co., Inc.*, 145 Misc 2d at 701 ("the courts have uniformly construed the legislation as conferring exclusive jurisdiction on the Federal courts in any action to recover damages under the Sherman and Clayton Acts"]).

Accordingly, the fourth cause of action is also dismissed.

Fraud (Fifth Cause of Action)

In its fifth cause of action for fraud, Cipriani alleges that the third-party defendants "made misrepresentations and omissions of facts to [Cipriani], including but not limited to the kickback scheme, the fair market prices of rental audio equipment and the rent to own contracts with" KM (amended third-party complaint, ¶ 189). Cipriani further alleges that "the third-party defendants knew that all of the above statements made to [Cipriani] were false," and that they "intentionally defrauded [Cipriani] for personal gain" (*id.*, ¶ 190-191). Cipriani also alleges that it "relied on their representations (*id.*, ¶ 191).

To plead common law fraud, a plaintiff must prove "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on misrepresentation or material omission and injury" (*see Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]). Each of these elements must be supported by factual allegations sufficient to satisfy the particularity requirement of CPLR 3016(b) *Monaco v. New York Univ. Med. Ctr.*, 213 A.D.2d 167, 169 [1st Dept 1995].)

The third-party defendants argue that the fraud cause of action must be dismissed because "Cipriani fails to articulate any discernible specific fact or occasion which otherwise satisfies the 'detail' requirement of CPLR 3016 [b]" (third-party defendants' memorandum of law at 32).

However, CPLR 3016 (b) "'merely requires that a claim of fraud be pleaded in sufficient detail to give adequate notice'" (*Knight Secs., L.P. v Fiduciary Trust Co.*, 5 AD3d 172, 173 [1st Dept 2004] [citation omitted]). The pleading requirements of CPLR 3016 (b) may be met when "the material facts alleged in the complaint, in light of the surrounding circumstances, are sufficient to permit a reasonable inference of the alleged conduct, including the adverse party's knowledge of, or participation in, the fraudulent scheme" (*JP Morgan Chase Bank, N.A. v Hall*, 122 AD3d 576, 580 [2d Dept 2014] [internal quotation marks and citations omitted]). This rule "is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting a fraud'" (*Lanzi v Brooks*, 43 NY2d 778, 780 [1977] [citation omitted]), because "sometimes the surrounding circumstances 'are peculiarly within the knowledge of the party against whom the [claim] is being asserted'" (*Houbigant, Inc. v Deloitte & Touche, LLP*, 303 AD2d 92, 98 [1st Dept 2003] [citation omitted]).

This factor deserves even more consideration where commercial bribery is alleged to have occurred, and the defendant is likely to have taken steps to conceal its activities (*see Niagara Mohawk Power Corp. v Freed*, 265 AD2d 938, 939 [4th Dept 1999] [permitting plaintiff to pursue fraud claim where defendants were alleged to have committed commercial bribery of plaintiff's employees; "[a]t this stage of the action, plaintiff is unable to state the circumstances of the fraudulent scheme in more detail because that information is exclusively in defendants' possession"]; *see also Grumman Aerospace Corp. v Rice*, 196 AD2d 572, 573 [2d Dept 1993] [permitting fraud claim to proceed; "[g]iven the nature of the allegations here, it would be impossible for the plaintiff to state the circumstances in more detail because, if the allegations are true, only the defendants would have knowledge of the details"]). The element of scienter, i.e., that the defendant knew of the falsity of representations being made to the plaintiff, is most likely

to be within the sole knowledge of the defendant, and least amenable to direct proof (*Houbigant*, 303 AD2d at 98). A plaintiff must only allege facts from which it may be inferred that the defendant was aware that its misrepresentations would be reasonably relied upon by the plaintiff, not that the defendant intended to induce the particular acts of detrimental reliance ultimately undertaken by the plaintiff (*id*. at 100).

The facts in this case are similar to those considered by the First Department in *Pramer S.C.A. v Abaplus Intl. Corp.* (76 AD3d 89 [1st Dept 2010), as well as by the Fourth Department in *Niagara Mohawk Power Corp.* (265 AD2d at 938-39). In each case, the Appellate Division held that a plaintiff could pursue fraud and unjust enrichment claims against disloyal employees who had been bribed by other entities.

For example, in *Pramer*, the plaintiff alleged that its own CEO received improper payments from a second company, in exchange for which the disloyal CEO committed the plaintiff to pay grossly inflated prices for the second company's services. The First Department held that the plaintiff "sufficiently pleaded the elements of the fraudulent scheme, i.e., that Abaplus conferred a benefit on plaintiff's unfaithful employee to influence his conduct to the detriment of plaintiff," and noted that "the fraud cause of action based on plaintiff's bribery-related allegations arise from the common law of torts" (*Pramer*, 76 AD3d at 99; *see also Niagara Mohawk Power Corp.* (265 AD2d at 938-39 [sustaining a fraud cause of action based on alleged bribery by the plaintiff's employee]).

Likewise, here, Cipriani has alleged that KM and the third-party defendants formed a fraudulent kickback scheme, as evidenced by KM's payments of over half a million dollars in bribes to the third-party defendants, in order to deceive Cipriani regarding the revenue generated from the equipment rentals, direct labor services, direct payments and the rent-to-own contracts,

and to bypass Cipriani's contract and payment protocols, enriching themselves at Cipriani's expense (*see* amended third-party complaint, ¶¶ 143-144). The specific reasons for KM's bribes, and the details of KM's and the third-party defendants' falsehoods and representations, are peculiarly within the knowledge of KM and the third-party defendants at this time.

These interrelated and unexplained transactions strongly suggest a deceptive and fraudulent scheme as to which Cipriani should be entitled to further discovery. The facts as pled create a reasonable inference of the alleged fraudulent conduct, which is sufficient to meet the pleading standard of CPLR 3016 (b) (*see Pramer*, 76 AD3d at 100).

Accordingly, the motion to dismiss the fraud cause of action is denied.

Unjust Enrichment (Sixth Cause of Action)

In its sixth cause of action for unjust enrichment, Cipriani alleges that, from at least 2015 through 2018, the third-party defendants "accepted bribes and kickbacks from" KM, and that, had they known the third-party defendants were "accepting bribes and defrauding" it, it "would not have been obligated to pay Third-Party Defendants' salary, and would have terminated their services at the time Third-Party Defendants began taking bribes" (amended third-party complaint, ¶¶ 195-196). Cipriani further alleges that these bribes and kickbacks, or other items of value, rightfully belong to it, and have unjustly enriched the third-party-plaintiffs (*id.*, ¶ 197).

To successfully plead a cause of action for unjust enrichment, "[a] plaintiff must show that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered" *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011] [quotation marks and citation omitted]).

The third-party defendants argue that the allegations set forth in the amended third-party complaint are legally insufficient to sustain an unjust enrichment cause of action, because Cipriani

has not identified "specific payments [that] are traceable to a bribe or kickback such that third-party defendants were unjustly enriched" (third-party defendants' memorandum of law at 32-33).

To the contrary, this court finds that KM itself has provided documentation of over $500,000 in wire transfers made to the third-party defendants at the time they worked for Cipriani. Cipriani asserts that this excess compensation to the third-party defendants forms the basis of its unjust enrichment claim. Accordingly, these allegations are sufficient to state a cause of action for unjust enrichment, and defeat the third-party defendants' motion to dismiss (*see Pramer*, 76 AD3d at 99 [permitting unjust enrichment claim to proceed against disloyal employee who had been bribed by another entity]; *Niagara Mohawk Power Corp.*, 265 AD2d at 939 [same]; *see also Western Elec. Co. v Brenner*, 41 NY2d 291, 295 [1977] ["Moreover, any compensation secretly or improperly received from others beyond the compensation to which the employee is entitled is deemed to be held by him on a constructive trust for his employer"]).

The court has considered the remaining arguments, and finds them to be either moot, or without merit.

CONCLUSION

Accordingly, it is

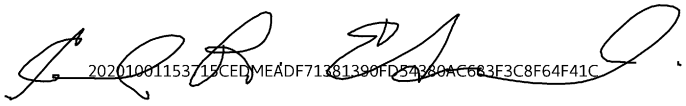
ORDERED that the motion to dismiss the amended third-party complaint is granted to the limited extent that the second, third and fourth causes of action are dismissed, and is denied in all

other respects; and it is further

ORDERED that the remainder of the third-party action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for Third-Party Defendants shall serve a copy of this Order along with Notice of Entry on all parties within twenty (20) days of entry.



10/1/2020
DATE

CAROL R. EDMEAD, 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