Evemeta, LLC v Siemens Convergence Creators Corp.
2020 NY Slip Op 33827(U)
November 17, 2020
Supreme Court, New York County
Docket Number: 651484/2016
Judge: Joel M. Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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EVEMETA, LLC,

Plaintiff,

- v -

SIEMENS CONVERGENCE CREATORS CORPORATION, SYNACOR, INC., JOHN DOES 1-10,

Defendants.

INDEX NO. 651484/2016

MOTION DATE 01/15/2020, 01/15/2020, 01/15/2020, 06/12/2020

MOTION SEQ. NO. 020 021 022 023

DECISION + ORDER ON MOTION

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SIEMENS CONVERGENCE CREATORS CORPORATION

Plaintiff,

-against-

MARTHA CHANG, ANTHONY RENNERT, SCOTT SASSA

Defendants.

Third-Party
Index No. 595821/2018

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 020) 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 869, 870, 871

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 021) 716, 717, 867, 868, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942

were read on this motion to EXCLUDE EXPERT TESTIMONY.

The following e-filed documents, listed by NYSCEF document number (Motion 022) 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781,

782, 783, 784, 785, 786, 787, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 023) 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964

were read on this motion to STRIKE NEW PROPOSED EXPERT OPINION.

Plaintiff EVEMeta, LLC (plaintiff or EVEMeta) and defendants Siemens Convergence Creator Corporation (Siemens) and Synacor, Inc. (Synacor) agreed to participate in a venture to develop, integrate, and sell a product for streaming videos over the Internet into the U.S. market. EVEMeta claims that Siemens (with whom it has settled) and Synacor secretly conspired with one another to cut it out of the parties' contractual arrangements. EVEMeta seeks to recover the alleged profits it purportedly would have made had defendants not terminated the contracts and the product had been successfully developed and marketed. Notably, Synacor and Siemens ultimately abandoned the effort to sell the product, which generated no meaningful sales or profits.

At the conclusion of discovery, the parties filed dueling summary judgment motions. Synacor seeks dismissal of EVEMeta's remaining claims for tortious interference with contract, unfair competition, breach of contract, breach of implied covenant of good faith and fair dealing, lost profits damages, and punitive damages. In the alternative, Synacor seeks to preclude certain expert testimony offered by EVEMeta in support of its claims for "lost profits" damages.[1]

[1] In motion sequence no. 021, Synacor seeks an order excluding from trial and deeming inadmissible the testimony and opinions of EVEMeta's retained experts Lauren Cole (Cole) and James Malackowski (Malackowski). In motion sequence no. 023, Synacor moves for an order precluding Malackowski from offering additional opinions not disclosed in his September 16, 2019 expert report.

EVEMeta and counterclaim defendants Martha Chang (Chang), Anthony Rennert (Rennert), and Scott Sassa (Sassa) move for summary judgment: (1) in favor of EVEMeta on its breach of contract claim against Synacor; (2) in favor of EVEMeta and the counterclaim defendants dismissing Synacor's unjust enrichment counterclaim; and (3) in favor of counterclaim defendants Chang and Rennert on Synacor's corporate veil-piercing counterclaim to hold them liable for EVEMeta's alleged breach of contract and unjust enrichment.

For the reasons set forth below, Synacor's motion for summary judgment is granted in full and EVEMeta's claims against Synacor are dismissed. The motion by EVEMeta and the counterclaim defendants is granted solely to the extent that Synacor's counterclaims for unjust enrichment and veil-piercing are dismissed. The remainder of EVEMeta's motion – for judgment in its favor on its claims against Synacor – is denied. Synacor's motions to preclude expert testimony are denied as moot. With all claims for relief now resolved or dismissed, the case is disposed.

BACKGROUND

The following factual background is taken from Synacor's Statement of Material Facts (DSMF [NYSCEF Doc. No. 714]), EVEMeta's Statement of Undisputed Material Facts (PSUMF [NYSCEF Doc No. 711], and EVEMeta's response to Synacor's Statement of Material Facts (Pl Resp DSMF [NYSCEF Doc No. 790]).

The Parties

Non-party Siemens Convergence Creators GmbH (Siemens Europe) developed and owned proprietary over-the-top (OTT) software (the Siemens OTT Software). OTT technology is used to deliver video content over the internet separate from traditional cable television set-top boxes and subscriptions (DSMF, ¶ 1).

EVEMeta was a company that provided encoding/transcoding compression technology (the EVEMeta Encoder) and services. In this context, encoding/transcoding is technology to process and convert video source files into various formats and renditions that could be viewed on mobile devices. EVEMeta consisted of two partners, Rennert and Chang, and a business consultant, Sassa. Rennert developed the EVEMeta Encoder, and handled the technical aspects of EVEMeta's business (*id*., ¶¶ 2-7; PSUMF, ¶¶ 1-2).

In early 2014, Siemens Europe sought to sell its Siemens OTT Software in the U.S. for the first time, and established a U.S. subsidiary for that purpose—defendant Siemens Convergence Creators Corporation (Siemens) (DSMF, ¶¶ 8-11).

Synacor is a company that provides internet products and services to MVPDs (multichannel video programming distributor), which generally are cable and satellite television companies. In late 2014, Siemens and EVEMeta pitched the Siemens OTT Software and EVEMeta Encoder to Synacor (*id*., ¶¶ 13-14; PSUMF, ¶¶ 3-4). The parties ultimately decided to develop and integrate an OTT product that combined the Siemens OTT Software, the EVEMeta Encoder, and existing Synacor technology and systems for the attempted sale to Synacor's MVPD clients (the Joint OTT Solution) (DSMF, ¶¶ 15-17; PSUMF, ¶ 5).

The Contracts

Siemens and EVEMeta entered into a Software Distribution Agreement, dated May 21, 2015 (the Siemens Agreement [NYSCEF Doc No. 611]), under which Siemens granted EVEMeta the right to sell/license the Siemens OTT Software to Synacor for resale to the "Synacor Clients" specifically listed in the agreement (Siemens Agreement, §§ 2.1, 2.2.5, 2.4.1, 2.4.2, Annex 2).

In turn, EVEMeta and Synacor entered into a Master Services Agreement, dated June 1, 2015 (the Synacor Agreement [NYSCEF Doc No. 612]), under which EVEMeta granted Synacor the right to resell the Siemens OTT Software to the Synacor Clients. The Synacor Agreement prohibited Synacor from selling the Siemens OTT Software to anyone other than the Synacor Clients (Synacor Agreement, §§ 4.1, 4.4 [a] and [b], Annex 7).

Pursuant to the Synacor Agreement, EVEMeta was also required to provide defined "Services," that included the integration of the EVEMeta Encoder and encoding workflow into and in support of the Joint OTT Solution (*id.*, §§ 1.37, 1.38, 2.1, 2.9, Annex 3).

The Siemens and Synacor Agreements (collectively, the Back-to-Back Agreements) included various similar provisions. Both agreements had a five-year term and included a "proof of concept" phase called the "Beta Phase" during which the parties would (1) technically develop and integrate the components of the Joint OTT Solution to make a working, commercially viable product and (2) solicit customers in an attempt to test the market (Siemens Agreement, §§ 1, 4.1; Synacor Agreement, §1.6, Annex 3, § 2).

The Beta Phase under both agreements was set to expire on September 30, 2015 (PSUMF, ¶ 11). After the expiration of the Beta Phase, the agreements would move into the Commercial Phase, which would continue for an initial term of five years, and then automatically renew for successive one-year terms (*id.*, ¶¶ 12-13).

Synacor had the right to terminate the Synacor Agreement for any reason prior to the expiration of the Beta Phase in exchange for a one-time termination payment of $180,000 to EVEMeta (Synacor Agreement, § 7.3). Synacor also had the right to terminate the Synacor Agreement for cause at any time if EVEMeta materially breached that agreement, and failed to

cure such breach within 30 days after receiving written notice of such breach from Synacor (*id.*, § 7.2).

Both the Synacor Agreement and the Siemens Agreement provided for a minimum guaranteed license fee of $3.6 million that had to be paid from Synacor to EVEMeta (under the Synacor Agreement), and then from EVEMeta to Siemens (under the Siemens Agreement), over the initial five-year term of the contracts (Siemens Agreement, Annex 4, ¶ 3.2; Synacor Agreement, Annex 2, ¶ 6). Thus, EVEMeta was required to pass through every dollar it received under the Synacor Agreement directly to Siemens until it met the $3.6 million guarantee (Pl Response DSMF, ¶ 45). EVEMeta would earn no compensation until the Joint OTT Solution was successfully sold to enough customers to exceed the $3.6 million guarantee (Siemens Agreement, § 12.1, Annex 4; Ex. 1; Pl Response DSMF, ¶ 46). Once the guarantee was met, EVEMeta would earn its margin on reselling the Siemens OTT Software to Synacor and fees from the encoding services it provided, minus its expenses. (Synacor Agreement, Annex 2).

Finally, with the knowledge and consent of EVEMeta, Siemens and Synacor entered a Side Letter Agreement, dated June 1, 20 (the Side Agreement [NYSCEF Doc No. 613]), under which Siemens agreed to license Synacor the Siemens OTT Solution directly if, inter alia, the Siemens Agreement was terminated or EVEMeta was "unable to meet its material obligations when due; including any material obligations owed to Synacor" (Side Letter Agreement, §§ 1-2.)

Failed Sales Efforts

Following the execution of the Back-to-Back Agreements, EVEMeta, Siemens and Synacor worked together to prepare the Joint OTT Solution for commercial launch. Neither the Siemens OTT Software nor the Joint OTT Solution was ever successfully sold and implemented in the U.S., despite three years of continuous and significant sales efforts.

In 2014, prior to Synacor's involvement, Siemens and EVEMeta attempted to sell the Siemens OTT Software and the EVEMeta Encoder in the U.S. They met with and pitched at least seventeen U.S. companies throughout 2014 without securing a single sale (DSMF, ¶¶ 52-54; Pl Response DSMF, ¶¶ 52-54).

The parties began marketing and attempting to sell the Joint OTT Solution in January 2015. Synacor met with and attempted to sell the Joint OTT Solution to at least 30 different customers for more than a year without success (DSMF, ¶¶ 55-62).

Synacor was only successful in making an agreement with one small MVPD customer for the Joint OTT Solution, but that customer (Consolidated Communications) never implemented the product (*id.*, ¶¶ 58-59; Pl Response DSMF, ¶¶ 58-59). Consolidated testified that it did not and could not implement the Joint OTT Solution because the cost for Consolidated to secure the OTT programming needed to use the OTT solution was too expensive (DSMF, ¶ 60; Pl Response DSMF, ¶ 60).

After the parties' relationship ended in March 2016, Siemens continued its efforts to sell the Siemens OTT Software in the U.S. until the end of 2017, without making a single sale. Siemens also entered an agreement with another reseller in August 2016 that was also unsuccessful in its attempts to resell the Siemens OTT Software (DSMF, ¶¶ 63-69).

Thus, despite approximately three years of sales efforts, neither the Joint OTT Solution nor its key component—the Siemens OTT Software—was ever successfully sold in the U.S. Synacor earned no profit from the failed venture; rather, it lost a significant amount to money attempting to develop, integrate, and sell the Joint OTT Solution (*id.*, ¶¶ 55-57, 71-113).

Contract Renegotiations and End of The Relationship with EVEMeta

During the Beta Phase, as a result of learning that Siemens may be selling its division that owned the Siemens OTT Software, Synacor requested a contractual change of control provision to protect it in the event that Siemens sold the Siemens OTT Software to a competitor. Synacor advised that it would exercise its right to terminate the Synacor Agreement for convenience during the Beta Phase if it did not receive sufficient change-of-control protection (*id.*, ¶¶ 115-117).

Because the Joint OTT Solution was not selling and (according to Synacor) there were technical issues with EVEMeta's encoding, EVEMeta agreed to extend the Beta Phase on ten different occasions, from its initial target date of September 30, 2015, through March 4, 2016, while the parties continued to address the various outstanding issues (*id.*, ¶¶ 118-148).

Beginning in November 2015, and continuing through January 2016, the parties discussed renegotiating the pricing in the Synacor Agreement in an attempt to make the Joint OTT Solution more competitive in the market (*id.*, ¶¶ 149-152).

On January 14, 2016, during a teleconference with Siemens, EVEMeta proposed three options for moving forward, including restructured pricing or a buy-out of EVEMeta and a direct relationship between Siemens and Synacor. Thereafter, EVEMeta advised that a buy-out was its preferred option and actively negotiated new pricing and the terms of a buy-out (*id.*, ¶¶ 153-182).

On March 4, 2016, Synacor emailed EVEMeta requesting another extension of the Beta Phase and its early termination rights. EVEMeta did not respond as it had with the ten prior extension requests. Rather, EVEMeta emailed Synacor on March 7, 2016, the next business day, declared that the parties were in the Commercial Phase, and demanded that Synacor pay it the $250,000 contract payment due when the project met that milestone (*id.*, ¶¶ 183-184).

On March 15, 2016, the parties had a teleconference, during which Synacor and Siemens made a buy-out proposal under which Synacor would pay EVEMeta $180,000, less $50,000 it already paid EVEMeta, for a total of $130,000 in new money, and Siemens would forgive the $300,000 Beta Phase fee in the Siemens Agreement. EVEMeta never responded to the offer (*id.*, ¶¶ 190-199).

Procedural History

EVEMeta initiated this lawsuit on March 21, 2016, and subsequently filed a complaint and amended complaints culminating in the current operative third amended complaint, filed on May 31, 2017 (the complaint [NYSCEF Doc No. 287]).

This Court (Bransten, J.) granted defendants' motions to dismiss EVEMeta's claims for fraudulent misrepresentation, fraudulent concealment, and civil conspiracy to commit fraud (NYSCEF Doc. Nos. 430-431). The Appellate Division affirmed dismissal of those claims, and also dismissed EVEMeta's claims for tortious interference with prospective economic advantage and attorney's fees (*EVEMeta, LLC v Siemens Convergence Creators Corp.*, 173 AD3d 551 [1st Dept 2019]; *EVEMeta, LLC Siemens v Siemens Convergence Creators Corp.*, 176 AD3d 612 [1st Dept 2019]).

Accordingly, the following claims remain against Synacor: (1) breach of the Synacor Agreement (fourth cause of action); (2) breach of the implied covenant of good faith and fair dealing (fourth cause of action); (3) breach of the Synacor Agreement's audit provision (fifth cause of action); (4) tortious interference with the Siemens Agreement (sixth cause of action); (5) punitive damages in connection with the tortious interference claim (sixth cause of action) and (6) unfair competition (seventeenth cause of action). EVEMeta seeks the purported lost profits it would have earned if the parties continued with the business venture.

Synacor filed an answer (NYSCEF Doc No. 440) and asserts counterclaims against EVEMeta for breach of the Synacor Agreement (counterclaim count 1, ¶¶ 63-74) and unjust enrichment (counterclaim count 2, ¶¶ 75-82). In addition, Synacor asserts that EVEMeta's principals—Rennert and Chang—are personally liable for the claims against EVEMeta (*id.*). Finally, Synacor asserts an unjust enrichment claim against Sassa, EVEMeta's authorized representative (*id.*).

By stipulation dated September 10, 2020 (NYSCEF Doc No. 967), EVEMeta's claims against Siemens, Siemens' counterclaims against EVEMeta, and Siemens' third-party claims against Chang, Rennert and Sassa were discontinued with prejudice.

Expert Discovery

Discovery is complete. EVEMeta identified Cole and Malackowski as its expert witnesses, and represented that all their expert opinions were encompassed in their expert reports (NYSCEF Doc No. 713). Cole submitted an expert report dated September 16, 2019 (NYSCEF Doc No. 706), a rebuttal expert report dated October 15, 2019 (NYSCEF Doc No. 707), and a reply expert report dated November 1, 2019 (NYSCEF Doc No. 708). Cole was deposed and provided testimony on November 13, 2019 (NYSCEF Doc No. 709).

Malackowski submitted an expert report dated September 16, 2019 (NYSCEF Doc No. 703), and a reply expert report dated November 1, 2019 (NYSCEF Doc No. 704). Malackowski was deposed and provided testimony on December 6, 2019 (NYSCEF Doc No. 705).

In her expert reports, Cole assumed that certain numbers of customers would have purchased the OTT software if the product had been available between 2016 and 2020 (*see* Cole Report, ¶¶ 30, 36, 41, 47). Relying on Cole's assumptions, Malackowski then performed

calculations to estimate that EVEMeta suffered $44 million in lost profits (*see* Malackowski Report at §§ 3, 13).

Synacor and Siemens submitted expert reports and rebuttals to EVEMetas' expert's reports. (*see* NYSCEF Doc Nos. 599, 710, 711, 782). A Note of Issue and Certificate of Trial Readiness was filed on December 13, 2019 (NYSCEF Doc Nos. 487, 488).

In addition to Siemens' experts, Synacor's industry expert, Brian Mahony, and Synacor's damages expert, Jaime C. d'Almeida, submitted expert rebuttal reports (*see* NYSCEF Doc Nos. 104 [Mahony] and 105 [d'Almeida]), and were deposed and provided testimony (*see* NYSCEF Doc No. 106 [d'Almeida]).

In opposition to Synacor's motions for summary judgment and to exclude expert testimony, EVEMeta submitted a new affidavit from Cole dated February 14, 2020—two months after the Note of Issue and Certificate of Trial Readiness was filed—with six new "Slides" attached (NYSCEF Doc Nos. 791, 792, 913).

The California Action

Separately, EVEMeta filed a lawsuit against Siemens Europe and certain of its executives in California state court arising from the same failed business venture, agreements, and facts at issue in this case (*EVEMeta, LLC v Siemens Convergence Creators Holding GmbH* [Superior Court of CA, LA County, Index No. BC 668452] [the "California Action"]). EVEMeta retained the same experts in both this action and the California Action. EVEMeta's experts submitted the same expert reports and opinions, and provided joint deposition testimony applicable to both actions.

Siemens Europe filed a motion seeking to exclude EVEMeta's experts. After full briefing and oral argument, the California court ordered an evidentiary hearing. Thereafter,

EVEMeta submitted Cole's six new slides (CA hearing transcript, at 3, 145 [NYSCEF Doc No. 875]). On February 10, 2020, the California court held an evidentiary hearing at which Cole testified regarding her expert reports, her six new slides, and her proffered opinions (*id*. at 145, 7-25).

After post-hearing briefing, on March 6, 2020, the California court entered a written decision (NYSCEF Doc No. 941) granting Siemens Europe's motion to preclude EVEMeta from offering the opinions of Cole and Malackowski on the ground that they were unduly speculative and unreliable:

> "Ms. Cole's opinions are not based upon matters upon which a reasonable expert would rely, and do not show the nature and occurrence of lost profits with evidence of reasonable reliability, because her opinions are not based on any historical data from Plaintiff or a comparison to similar businesses. The court also finds the general common categories Ms. Cole relied upon were insignificant for comparison purposes because Ms. Cole failed to give any qualitative analysis of plaintiff's features compared to the features of the purported comparable companies. Additionally, her opinion rested on speculation and self-generated assumptions. While it is apparent to this Court that plaintiff attempted to downsize the overreaching analysis deployed in the Sargon case, the analysis still suffers from the requisite factual foundation to pass evidentiary muster.
>
> Because the court finds that Ms. Cole should be excluded from testifying, the court further concludes that plaintiff's valuation expert, James Malackowski, will not be allowed to testify as well. Mr. Malackowski's opinions, to the extent that he relies upon the conjecture of Ms. Cole, would be another layer of speculation"

(California decision at 3).

Malackowski's New Opinion

On May 26, 2020, EVEMeta informed defendants that it now intends to have Malackowski offer a new expert opinion that provides an alternative calculation for EVEMeta's lost profit damages in this case (*see* EVEMeta's opposition to motion to exclude [NYSCEF Doc No. 906], at 18-23). According to EVEMeta, Malackowski's new opinion replaces Cole's estimates with: (1) an estimate about the number of future customers which he obtained from a

December 2014 email written by Sassa, EVEMeta's former consultant; and (2) an estimate about the amount of future revenue which he obtained from a March 2015 slide deck prepared by an employee of Siemens Europe (*id*. at 19-21). Notably, the estimates from Sassa and Siemens Europe were created before EVEMeta had entered into the contracts regarding the development of the software (*id*.). To formulate his new opinion, Malackowski assumes the estimates from Sassa and Siemens Europe would have come to fruition and then, based on that assumption, performs calculations purporting to show that EVEMeta suffered between $1.8 and $45.1 million in lost profit damages (*id*. at 20-21, citing Malackowski model using Sassa email [NYSCEF Doc No. 934], at exhibit 1.0; Malackowski model using Siemens slide [NYSCEF Doc No. 937], at Ex. 1.0).

DISCUSSION

I. Synacor's Motion for Summary Judgment (Motion Sequence No. 20)

"'[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion

(*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment should not be granted if there are genuine material issues of disputed fact (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-529 [1st Dept 2002], *affd* 99 NY2d 647 [2003]).

Synacor moves for dismissal of EVEMeta's claims for tortious interference with contract, unfair competition, breach of contract, breach of implied covenant of good faith and fair dealing, lost profits damages, and punitive damages. EVEMeta does not oppose Synacor's motion to dismiss its claims for breach of the contractual audit provision and unfair competition (*see* EVEMeta's opposition at 1 [NYSCEF Doc No. 788]).

EVEMeta must prove damages as a necessary element of each of its remaining substantive claims (*see Kelly v Bensen*, 151 AD3d 1312, 1314 [3d Dept 2017] [internal quotation marks and citation omitted] [failure to provide proof of damages "is fatal to a cause of action for breach of contract"]; *accord Acranom Masonry, Inc. v Wenger Constr. Co.*, 2019 WL 3798047, *15, 2019 US Dist LEXIS 136429 [ED NY 2019]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [the elements of breach of contract claim "include . . . resulting damages"]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] ["Tortious interference with contract requires . . . damages resulting therefrom"]; *Able Energy, Inc. v Marcum & Kliegman LLP*, 69 AD3d 443, 444 [1st Dept 2010] [implied covenant of good faith requires proof of damages]).

EVEMeta's damages claims can be divided into two categories. The primary claim seeks to recover "lost profits" that EVEMeta purportedly would have enjoyed if the parties' venture had continued and led to the successful development and sale of the product. EVEMeta also

seeks to recover the $3.6 million "guarantee" payment to which it allegedly was entitled to receive from Synacor.

A. EVEMeta's Claim for Lost Profits is Impermissibly Speculative

EVEMeta's principal claim is to recover purported lost profits that it asserts would have come its way if Siemens and Synacor had not breached the parties' agreement. It is undisputed that neither the Siemens OTT Solution nor the Joint OTT Solution was ever successfully sold and implemented in the US, and that Synacor and Siemens never made any profit from the Joint OTT Solution. The central question on this motion is whether EVEMeta's claim to recover lost profits is sustainable, based on the evidence in the summary judgment record, as a matter of law. The Court holds that it is not.

New York has a "relatively demanding standard for an award of lost profits" (*Kidder, Peabody & Co., Inc. v IAG Intl. Acceptance Group N.V.*, 28 F Supp 2d 126, 131 [SD NY 1998], *affd* 205 F3d 1323 [2d Cir 1999]). As the Court of Appeals has observed: "Loss of future profits as damages for breach of contract have been permitted in New York under long-established and precise rules of law. First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes" (*Kenford Co., Inc. v County of Erie*, 67 NY2d 257, 261 [1986] [emphasis added] [affirming vacatur of award of lost profits as damages for failure to construct stadium]; *accord Ashland Mgt. v Janien*, 82 NY2d 395, 403 [1993] [it is well settled that a "party may not recover damages for lost profits unless they … are capable of measurement with reasonable

certainty" and to make this showing, a plaintiff is required to demonstrate that its damages are measurable "based upon known reliable factors without undue speculation"]).

Judicial skepticism is particularly acute with respect to claims for lost profits arising from a business venture or product with no prior track record to support claims of future success. "If it is a new business seeking to recover for loss of future profits, a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty" (*Kenford*, 67 NY2d at 261; *accord Zink v Mark Goodson Prods.*, 261 AD2d 105, 106 [1st Dept 1999]). Thus, it is not surprising that "[m]ost of the leading cases which have decided on claims of future lost profits have ruled that they are not recoverable" (*Great Earth Intl. Franchising Corp. v Milks Dev.*, 311 F Supp 2d 419, 432 [SD NY 2004] [granting summary judgment against claim for lost profits]).

In *Kenford*, the parties entered into agreements with respect to the construction and operation of a domed sports stadium. Under a management contract between the parties, the plaintiff was to operate the stadium for 20 years. Construction of the stadium never began, and the plaintiff filed a lawsuit against the defendant for breach of contract, seeking compensation for the profits plaintiff claimed it would have received if the stadium had been built and it had been able to operate the stadium during the term of the contract. Although the plaintiff submitted the "business and industry's most advanced and sophisticated method for predicting the probable results of contemplated projects," including "historical data, obtained from the operation of" similar businesses (*id.*), the Court of Appeals reversed a multi-million dollar lost profits judgment and dismissed the plaintiff's inherently speculative claim, noting:

> "We of course recognize that any projection cannot be absolute, nor is there any such requirement, but it is axiomatic that the degree of certainty is dependent upon known or unknown factors which form the basis of the ultimate conclusion. Here, the foundations upon which the economic model was created undermine the

> certainty of the projections. [Plaintiff] assumed that the facility was completed, available for use and successfully operated by it for 20 years . . . . Quite simply, the multitude of assumptions required to establish projections of profitability over the life of this contract require speculation and conjecture, making it beyond the capability of even the most sophisticated procedures to satisfy the legal requirements of proof with reasonable certainty. The economic facts of life, the whim of the general public and the fickle nature of popular support for professional athletic endeavors must be given great weight in attempting to scertain damages 20 years in the future. New York has long recognized the inherent uncertainties of predicting profits in the entertainment field in general and, in this case, we are dealing, in large part, with a new facility furnishing entertainment for the public."

(67 NY2d at 261-63 [internal citations omitted; emphasis added]).

Since *Kenford*, New York courts routinely have rejected lost profits claims asserted with respect to unproven businesses or products when such profits cannot be predicted with reasonable certainty. (*See, e.g.*, *Olsenhaus Pure Vegan, LLC v Electric Wonderland, Inc.* 116 AD3d 449, 450 [1st Dept 2014]; *Digital Broadcast Corp. v Ladenburg, Thalmann & Co., Inc.* 63 AD3d 647, 647-48 [1st Dept 2009]; *Awards.com, LLC v Kinko's, Inc.* 42 AD3d 178, 185 [1st Dept 2007], *affd* 14 NY3d 791 [2010]); *Calip Dairies, Inc. v Penn Sta. News Corp.* 262 AD2d 193, 194 [1st Dept 1999]); *Zink,* 261 AD2d at 106; *Nineteen N.Y. Props. Ltd. Partnership v 535 5th Operating,* 211 AD2d 411, 412 [1st Dept 1995]); *Matter of Mehta v New York City Dept. of Consumer Affairs*, 162 AD2d 236, 237 [1st Dept 1990]).

The undisputed facts in this case bring it squarely within the ambit of *Kenford* and its progeny. To summarize: Siemens, EVEMeta, and Synacor undertook a new business venture, to develop, integrate, and sell a new product, the Joint OTT Solution, into a new market (the U.S.) (DSMF, ¶¶ 8-17; Pl Resp DSMF, ¶¶ 8-14, 16- 17). Neither the Joint OTT Solution nor the Siemens OTT Software were successfully sold in the U.S. despite sales efforts spanning from 2014 to 2017 put forth by Siemens, Synacor, EVEMeta, and Siemens' subsequent reseller, Imagine Communication Corp. (DSMF, ¶¶ 52-69; Pl Resp DSMF, ¶¶ 52-69). The Joint OTT

Solution was never placed in operation with or implemented by a customer (DSMF, ¶¶ 52-69, 204-213; Pl Resp DSMF, ¶¶ 56-62, 204, 209-213). The Joint OTT Solution never generated any profit (EVEMeta's opposition at 28; DSMF, ¶¶ 52-69, 204-213; Pl Resp DSMF, ¶¶ 52- 69, 204, 209-213). The Joint OTT Solution never generated any revenue, and Siemens earned a total of "$143,000 in revenue from sales of the Siemens OTT Software from January 2014 through December 2017" (Pl Resp Siemens SMF [NYSCEF Doc No. 789], ¶ 61).

As in *Kenford*, the efforts of EVEMeta's expert witnesses cannot save EVEMeta's claims from dismissal. Cole opines that, but for the breakup of the trilateral arrangement, the Joint OTT Solution would have achieved substantial commercial sales success during the term of the Back-to-Back Agreements (Cole Report, ¶¶ 2, 30, 36, 41, 47).[2] In particular, she identifies the following four groups of potential customers for the Joint OTT Solution: Group 1: Synacor's existing MVPD customers; Group 2: Additional MVPDs that were not existing Synacor customers; Group 3: Cable TV channels (e.g., CNN and HBO); and Group 4: OTT Providers (e.g., Netflix).

For each group, Cole "assumes" that a certain number of customers within each group would have purchased the Joint OTT Software during the contract's five-year term (the adoption rate) (*see* Cole Report, ¶¶ 23, 31, 37, 45). She then estimated the percent of subscribers/users who would actually utilize the Joint OTT Solution during that five-year term (penetration rate) (*id.*, ¶¶ 2, 26, 30, 35-36, 41, 44, 47-48). For example, with respect to Group 1 (Synacor's existing customers), Cole first estimated the adoption rate, opining that "it is reasonable to

[2] Malackowski's lost damages calculations are based on Cole's estimates and opinions concerning the number of customers and subscribers who would have purchased and used the Joint OTT Solution. As such, if Cole's projections are wrong, then Malackowski's calculations are also wrong. EVEMeta's experts' reports make that clear, and Malackowski acknowledges that point (Malackowski Dep., at 228- 230).

assume" that by the end of 2016, Synacor "could have" captured 15% of the total 5,479,770 subscribers belonging to this group, rising to 30% by the end of 2017, 45% by the end of 2018, 60% by the end of 2019, and 75% by the end of 2020 (*id.*, ¶ 30). Thus, Cole opined that, ultimately, 75% of Group 1 "could have" purchased the Joint OTT Solution. The assumptions and estimates, however, did not end with the adoption rate. Because payment under the Synacor Agreement depended on the number of "active subscribers" per month (Synacor Agreement, § 1.2, Annex 2), EVEMeta's experts estimated the penetration rate, i.e., the number of cable customers/subscribers "who would actually [be] utilizing the Siemens OTT Platform" (Malackowski Report at 6-7, Figure 2; Cole Report at 10-11, ¶ 26). Cole opined that it was "reasonable . . . to assume" penetration rates of "18% of MVPD subscribers in 2016 . . . 40% of MVPD subscribers by the end of 2017, 55% by the end of 2018, and that it will reach 60% by the end of 2019 and 65% by the end of 2020" (Cole Report, ¶ 26). The "calculation" of lost profits is even more speculative with respect to customer Groups 2, 3, and 4, which were not even existing "Synacor Clients."

Furthermore, EVEMeta's experts did not analyze any purported comparable companies' profit history in opining that, but for the breakup of the parties' trilateral partnership, EVEMeta would have earned $44,091,477 in profit under the payment terms of the parties' agreements (Cole Report, ¶¶ 2, 30, 36, 41, 47; Malackowski Report at 3, 7, 9-13, 18, 23). Without any relevant or reliable data points in this regard, EVEMeta's market share and lost profit projections are built on nothing more than unverified and speculative assumptions. (*Holland Loader Co., LLC v FLSmidth A/S*, 313 F Supp 3d 447, 481 [SD NY 2018], *affd*, 769 Fed Appx 40 [2d Cir 2019] ["A company without past sales can prove lost profits by identifying a comparable company and analyzing that company's actual profit history]" [citing *Kenford*, 67 NY2d at 261];

Awards.com, 42 AD3d at 185 [rejecting lost profits claim because the plaintiffs "have not even identified any benchmark in the form of comparable businesses to permit a factfinder to determine that the claimed lost profits are reliable or demonstrated with reasonable certainty"]).

EVEMeta's reliance upon *Wathne Imports, Ltd. v PRL USA, Inc.* (101 AD3d 83 [1st Dept 2012]), is misplaced. In that case, the defendants filed a motion in limine seeking to exclude the testimony of the plaintiff's expert relating to lost profits arising from the discontinuance of trademarked Polo Sport brand handbags. As part of his analysis, the plaintiff's expert "determined the average of the actual gross sales from Polo Sport handbags during the period 1998 to 2000," and then used data from other companies selling handbags after Polo Sport handbags were discontinued to estimate growth. Under the circumstances of that case, the court ruled that plaintiff's expert's analysis should not be excluded, but should be "be challenged through cross-examination." However, unlike here, *Wathne* did not concern a new business venture with no track record of operations, profits, or experience akin to the governing line of cases cited above. In fact, *Wathne* explicitly recognized New York legal authority that requires dismissal of plaintiff's lost profits claim:

> "While both *Ashland* and *Kenford* were determinations made after trial, claims for lost profits have been dismissed by this Court upon a motion for summary judgment where the plaintiff's lost profits were said to arise from a "new business endeavor" with no track record (*see Zink v Mark Goodson Prods.*, 261 AD2d 105, 106 [1st Dept 1999], *lv dismissed* 94 NY2d 858 [1999]), or a business in the "development stage" that "had never generated any revenue" (*see Digital Broadcast Corp. v Ladenburg, Thalmann & Co., Inc.*, 63 AD3d 647, 647-648 [1st Dept 2009], *lv dismissed* 14 NY3d 737 [2010])"

(*Wathne*, 101 AD3d at 88).

Nor does the fact that two potential customers —Consolidated and GVTC—purportedly signed on to purchase the Joint OTT Solution (EVEMeta's opposition at 28-29) save EVEMeta's claim from dismissal. The corporate representative for Consolidated testified that it ultimately

did not and could not purchase or implement the Joint OTT Solution, or any OTT product, because the necessary OTT programming content was cost-prohibitive (deposition of Jaime Montes, Consolidated's director of product management [NYSCEF Doc No. 697], at 53-56). Consolidated further explained that, because it determined that it could not implement on OTT product, it never paid any fees related to the Joint OTT Solution (*id.*, at 62- 63). Nevertheless, EVEMeta's experts include Consolidated on the list of 31 potential Group 1 customers without addressing Consolidated's unrefuted testimony. GVTC averred (in response to a subpoena) that "we did not purchase or use the Siemens product in question. We are aware they offered the service, but chose not to purchase it" (NYSCEF Doc No. 692). EVEMeta's expert, Malackowski, specifically excluded GVTC from his calculations. (Malackowski Report, Appendix B, at 26).

Nor is it sufficient that EVEMeta claims that the Joint OTT Solution was unsuccessful "precisely because of Defendants'" purported conduct (EVEMeta's opposition at 28). In virtually every case cited above in which the court dismissed the lost profits claim arising from a new business venture, the plaintiff argued that the defendant's conduct prevented it from earning future profits. Nonetheless, the court still dismissed the plaintiffs' lost profit claims because, notwithstanding claims of liability or wrongdoing, the plaintiff must still establish lost profits with the requisite degree of reasonable certainty.

Finally, even if Malackowski's May 26, 2020 proposed post-Note expert report is considered to be timely – which it is not – it would not change the result. Rather than relying on Cole's speculative estimates, Malackowski now purports to rely upon someone else's speculative estimates – namely, those contained in Sassa's December 2014 email and a March 2015 slide deck prepared by an employee of Siemens Europe (*see id.*). Again, Malackowski simply

assumes the accuracy of those estimates, performs various calculations based on those estimates, and then concludes that EVEMeta suffered between $1.8 million and $45.1 million in lost profit damages. While there may be circumstances in which reliance on lay witness estimates would be sufficient to support a claim for lost profits, this is not one of them. The Sassa and Siemens estimates are, if anything, far less analytically rigorous than Cole's analysis, which (as noted above) itself is insufficient to support an award of lost profits.

In sum, EVEMeta's claim for lost profits is impermissibly speculative and cannot sustain its claims for relief.

B. EVEMeta's Claim for Lost Profits is Barred by the Terms of the Synacor Agreement

Even if EVEMeta were able to prove its lost profits claim with sufficient certainty, that claim is barred by contract. The parties contractually agreed that, except for "acts of gross negligence or intentional misconduct . . . neither party shall be liable . . . for any lost profits or indirect, incidental, collateral, special, punitive, unforeseen, exemplary, consequential or similar damages" (Synacor Agreement, § 10). Thus, EVEMeta is contractually barred from recovering lost profits damages absent Synacor's "acts of gross negligence or intentional misconduct" (*id.*).

Under New York law, "if contracting parties agree to a limitation-of-liability provision, it will be enforced unless unconscionable, even if it leaves a non-breaching party without a remedy" (*Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 822 [2014]). "New York courts have routinely enforced liability-limitation provisions when contracted by sophisticated parties, recognizing such clauses as a means of allocating economic risk in the event that a contract is not fully performed" (*Process Am., Inc. v Cynergy Holdings, LLC*, 839 F3d 125, 138 [2d Cir 2016]). Therefore, the limitation of liability clause in the Synacor Agreement is fully enforceable.

"Gross negligence, when invoked to pierce an agreed-upon limitation of liability in a commercial contract, must smack of intentional wrongdoing. It is conduct that evinces a reckless indifference to the rights of others" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992] [internal citations and quotation marks omitted]). "New York courts 'set the bar quite high' in determining whether a party's conduct 'smacks of intentional wrongdoing'" (*Tradex Europe SPRL v Conair Corp.*, 2008 WL 1990464, *3, 2008 US Dist LEXIS *9 [SD NY 2008]), "demanding nothing short of in a compelling demonstration of egregious intentional misbehavior evincing extreme culpability: malice, recklessness, deliberate or callous indifference to the rights of others, or an extensive pattern of wanton acts" (*Net2Globe Intl., Inc. v Time Warner Telecom of N.Y.*, 273 F Supp 2d 436, 454 [SDNY 2003]).

EVEMeta fails to set forth any evidence demonstrating Synacor engaged in the egregious conduct necessary to pierce the parties' contractually-agreed limitation of liability provision (*see Net2Globe Intl., Inc.*, 273 F Supp 2d at 454 [as the party attempting to pierce an agreed-upon limitation of liability clause, it is plaintiff's burden to establish acts of gross negligence or intentional misconduct]). Therefore, Synacor is entitled to summary judgment dismissing EVEMeta's lost profits damages claim pursuant to that provision (*see e.g. Metropolitan Life Ins. Co. v Noble Lowndes Intl.*, 84 NY2d 430, 439 [1994] [applying limit of liability clause and rejecting contract exception for "willful acts or gross negligence" because "defendant's repudiation of the Agreement was motivated exclusively by its own economic self-interest in divesting itself of a highly unprofitable business undertaking"]; *David Gutter Furs v Jewelers Protection Serv., Ltd.*, 79 NY2d 1027, 1029 [1992] [granting the defendant summary judgment because the plaintiff did "not raise an issue of fact whether defendant performed its duties with reckless indifference to plaintiff's rights, and thus the contractual exculpatory and limitation of

liability clauses are enforceable"]; *Retty Fin., Inc. v Morgan Stanley Dean Witter & Co.*, 293 AD2d 341, 341 [1st Dept 2002] [dismissing claim under similar limitation of liability provision because allegations failed "to set forth actions by defendant evincing a reckless disregard for the rights of [plaintiff] or 'smack[ing]' of intentional wrongdoing"] [citation and quotation marks omitted]; *Net2Globe Intl., Inc.*, 273 F Supp 2d at 456 [granting summary judgment because plaintiff failed to show "the malice or intentional wrongdoing necessary to invalidate . . . the parties' contractual limitation of liability provision"]; *EV Scarsdale Corp. v Engel & Voelkers N. E. LLC*, 2017 NY Slip Op 32380[U], * 19 [Sup Ct, NY County 2017] [granting summary judgment pursuant to limit of liability provision because "there is no evidence of gross negligence in the record"]).

C. Guaranteed Payment

In addition to lost profits, EVEMeta contends that, as damages for Synacor's wrongful termination of the Synacor Agreement, EVEMeta is entitled to receive the "minimum Guarantee of $3.6 million" provided for in the agreement.

This argument fails. It is undisputed that, in order to secure and maintain its right to license/sell the Siemens OTT Software to Synacor, EVEMeta was required to pass through every dollar it received under the Synacor Agreement directly to Siemens until it met a $3.6 million guarantee in the Siemens Agreement (Siemens Agreement, section 12.1, Annex 4). That is fundamental to the "back to back" nature of the entire arrangement. Thus, even if EVEMeta could prove that Synacor wrongfully terminated the Synacor Agreement, and that EVEMeta could perform its obligations under the agreement, EVEMeta would not be entitled to the $3.6 million because, in order to maintain its right to license the Siemens OTT Software to Synacor

during the contract term, i.e., perform under the Synacor Agreement, EVEMeta had to pay the entire $3.6 million to Siemens (*see* Siemens Agreement, § 12.1, Annex 4).

Indeed, EVEMeta acknowledges that it "would only net out any money on these deals" after it "brought in sufficient revenue on a per user basis so as to exceed the fixed minimum guaranteed license fee" (complaint, ¶ 43 ["In short, EVEMeta agreed to shoulder most of the significant commercial risk with this project and to defer all of its compensation until the point at which the project exceeded the parties' expectations as to an appropriate minimum license fee"]). Moreover, EVEMeta's own damages expert subtracted out the $3.6M expense owed to Siemens in determining Synacor's purported damages to EVEMeta (*see* Malackowski Report, at §§ 5, 7, 10).

To allow EVEMeta to recover and keep the $3.6 million pass-through payment would be a windfall. "Under New York law . . . 'breach of contract damages are intended to place a party in the same position as he or she would have been in if the contract had not been breached'" (*Tullett Prebon Fin. Servs. v BGC Fin., L.P.*, 111 AD3d 480, 481 [1st Dept 2013] [citation omitted]). "[W]hen one party . . . breaches a contract . . . the other party . . . is entitled to be placed in the same—not a better—position than it would have been had no breach occurred" (*Cohen Bros. Realty Corp. v RLI Ins. Co.*, 151 AD3d 512, 516 [1st Dept 2017]). It is "fundamental that the injured party should not recover more from the breach than he would have gained had the contract been fully performed" (*Freund v Washington Sq. Press, Inc.*, 34 NY2d 379, 382 [1974]).

* * * *

Accordingly, in the absence of any viable claim for damages, Synacor's motion for summary judgment is granted (*see Frat Star Movie, LLC v Tebele*, 174 AD3d 411, 411 [1st Dept

2019] [granting motion for summary on breach of contract claim, finding that "even if defendants had breached the agreement, plaintiff could not demonstrate lost profits resulting from the breach"]; *FranPearl Equities Corp. v 124 W. 23rd St., LLC*, 164 AD3d 1190, 1190 [1st Dept 2018] [granting summary judgment on breach of contract claim, and finding that "[t]o the extent plaintiff tried to show lost profits during the 13 ½ month delay, its expert submissions were 'merely speculative, possible or imaginary,' rather than 'reasonably certain and directly traceable to the breach'"]; *Able Energy, Inc.*, 69 AD3d at 444 [claim for breach of the covenant of good faith and fair dealing was "properly dismissed for failure to allege actual ascertainable damages arising in connection with such" claim]; *see also Awards.com*, 42 AD3d at 185 [dismissing claim for lost profits on summary judgment]).[3]

II. EVEMeta's Motion for Summary Judgment (Motion Sequence No. 022).

EVEMeta's motion for summary judgment on its breach of contract claim is denied for the reasons set forth above in granting Synacor's motion for summary judgment on those claims.

However, EVEMeta's motion to dismiss Synacor's counterclaims for unjust enrichment and piercing the corporate veil is granted, for the following reasons.

A. Unjust Enrichment

It is well-settled under New York law that "a party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter" (*Cox v NAP Constr. Co.*, 10 NY3d 592, 607 [2008]). Unjust enrichment is available only "'*in the absence of an actual agreement*'" (*Pappas v Tzolis*, 20 NY3d 228, 234 [2012] [emphasis in original; citation omitted]).

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[3] EVEMeta's only remaining claim seeking punitive damages is tortious interference with contract (complaint, ¶ 117). Because EVEMeta's tortious interference with contract claim is being dismissed, EVEMeta's demand for punitive damages must also be dismissed.

Here, there is no dispute that Synacor's unjust enrichment claim relates to "EVEMeta's supposed work performed under the Synacor Agreement" and EVEMeta's alleged "total[ ] fail[ure] to deliver the Services pursuant to the terms of the Synacor Agreement" (Synacor Counterclaim, ¶¶ 77, 79). Accordingly, this claim fails as a matter of law as against EVEMeta and Rennert and Chang, its principals.

Although Sassa is not a principal of EVEMeta or a party to the agreement, the unjust enrichment claim fails as well as against him because there is no evidence that he received any compensation, enrichment, or benefit from Synacor. An unjust enrichment claim requires proof that a party "was enriched . . . at the expense of" the party seeking recovery (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182-183 [2011]). It is undisputed that only EVEMeta received any compensation from Synacor under the Synacor Agreement, and that counterclaim defendants, including Sassa, did not receive any compensation (Synacor Counterclaim, ¶¶ 76-78 ["Synacor paid EVEMeta $50,000 as a 'Set-Up Fee' pursuant to the terms of the Synacor Agreement. Synacor also paid EVEMeta an additional $35,275.16 in expenses and other disbursements relating to EVEMeta's supposed work performed under the Synacor Agreement"]).

While Synacor asserts, "[u]pon information and belief," that Sassa "received half of the Set-Up Fee" pursuant to an alleged agreement with EVEMeta, Chang, and Rennert (*id.* ¶ 81), it fails to submit any evidence as to this effect. Indeed, Sassa testified that he did not receive any compensation from EVEMeta, Rennert, or Chang (Sassa dep at 48, 56 [NYSCEF Doc No. 764]). Synacor provides no evidence to refute Sassa's sworn testimony that he did not receive any payments from EVEMeta on which an unjust enrichment claim could be based, including, for

example, any entry in EVEMeta's bank account statements, reflecting any payment from EVEMeta to Scott Sassa.

Accordingly, the unjust enrichment counterclaim is dismissed.

B. Piercing the Corporate Veil

As part of its breach of contract and unjust enrichment counterclaims, Synacor alleges that Chang and Rennert, as principals of EVEMeta, are personally liable for EVEMeta's debts and obligations on the theory of piercing the corporate veil (Synacor Counterclaim, ¶¶ 68-74, 80). To succeed on their veil-piercing claims, Synacor must be able to show that Chang and Rennert "exercised complete domination" over EVEMeta with respect to EVEMeta's transactions with Synacor, and that "such domination was used to commit a fraud or wrong against [Synacor], resulting in [Synacor's] injury" (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]).

Synacor cannot make such a showing because there is no evidence in the record that Chang's or Rennert's domination over EVEMeta "was used to commit a fraud or wrong" against Synacor. The only wrong that Synacor identifies in its veil-piercing claims is EVEMeta's alleged breach of the Back-to-Back contracts (Synacor Counterclaim, ¶ 72 ["Chang and Rennert knew EVEMeta did not have the capital, staff, or capabilities to provide the Services it agreed to provide under the Synacor Agreement . . . . This additionally constitutes a fraud or wrong that makes Chang and Rennert personally liable, as EVEMeta's principals, for EVEMeta's total material breaches of the Synacor Agreement"]).

Under New York law, "a simple breach of contract, without more, does not constitute a fraud or wrong warranting the piercing of the corporate veil" (*Bonacasa Realty Co., LLC v Salvatore*, 109 AD3d 946, 947 [2d Dept 2013]; *see also Chiomenti Studio Legale L.L.C. v*

Prodos Capital Mgt. LLC, 140 AD3d 635, 636 [1st Dept 2016] [finding that a defendant's alleged failure to pay fees due under the parties' contract "does not constitute a fraud or wrong sufficient to pierce the corporate veil]").

Although Synacor argues that undercapitalization or personal use of corporate funds is sufficient on its own to satisfy a finding of fraud or wrongdoing that resulted in injury to it, that is not the law. Rather, undercapitalization and personal use of corporate funds only constitutes a "fraud or wrong" where the plaintiff took those actions for the purpose of rendering the company unable to pay a judgment to defendants (*see e.g.*, *Edward Tyler Nahem Fine Art, L.L.C. v Barral*, 136 AD3d 477, 478 [1st Dept 2016] [affirming denial of veil-piercing claim where evidence failed to show that defendant undercapitalized the company "for the purpose of leaving the corporation judgment proof"]; *Bonacasa Realty Co.*, 109 AD3d at 947 [granting summary judgment to defendant on veil-piercing claim because "plaintiff failed to raise a triable issue of fact as to whether [defendant's] use of the corporate form was intended for the commission of a fraud or wrong upon plaintiff"]; *James v Loran Realty V Corp.*, 85 AD3d 619, 619-620 [1st Dept 2011] [dismissing veil-piercing claims because, "while plaintiffs may have demonstrated that defendant Palazzolo exercised complete domination and control over Loran V, they have failed to show that Palazzolo's actions were for the purpose of leaving the corporation judgment proof"], *affd* 20 NY3d 918, 919 [2012] ["Plaintiffs did not meet th[eir] burden [on veil-piercing claim], inasmuch as they failed to produce evidence that the individual defendants took steps to render the corporate defendant insolvent in order to avoid plaintiffs' claim for damages or otherwise defraud plaintiffs"]).

Accordingly, Synacor's veil-piercing counterclaims are dismissed.

III. Synacor's Motions to Exclude the Testimony of EVEMeta's Experts and Malackowski's New Expert Opinion (Motion Sequence Nos. 021 and 023)

Given that all of EVEMeta's claims are being dismissed, Synacor's motions to exclude EVEMeta's experts' testimony in support of such claims are denied as moot.

* * * *

Accordingly, it is

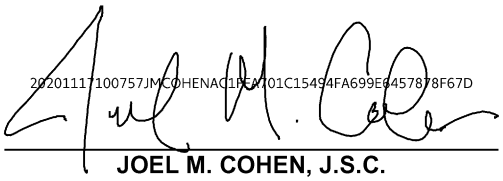
ORDERED that Synacor's motion for summary judgment (motion sequence no. 020) is **granted**, and EVEMeta's claims against Synacor for tortious interference with contract, unfair competition, breach of contract, breach of the implied covenant of good faith and fair dealing, lost profits damages, and punitive damages are hereby dismissed with prejudice; it is further.

ORDERED that Synacor's motion for an order excluding from trial and deeming inadmissible the testimony and opinions of EVEMeta's retained experts Lauren Cole and James Malackowski (motion sequence no. 021), is **denied as moot**; and it is further

ORDERED the motion of EVEMeta and counterclaim defendants Martha Chang, Anthony Rennert and Scott Sassa for partial summary judgment (motion sequence no. 022) is **granted in part.** Synacor, Inc.'s counterclaims for unjust enrichment and piercing the corporate veil are dismissed. The remainder of the motion is denied; and it is further

ORDERED that Synacor's motion for an order preluding James Malackowski from offering: (1) his new opinion that EVEMeta suffered lost profit damages between $1.8 million and $45.1 million; or (2) any other opinion that was not disclosed in his September 16, 2019 expert report (motion sequence no. 023), is **denied as moot**.

This constitutes the decision and order of the Court. The parties are directed to settle a judgment consistent with the foregoing.



11/17/2020
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE