

Union Apparel Group, Ltd. v Lam
2022 NY Slip Op 33509(U)
October 14, 2022
Supreme Court, New York County
Docket Number: Index No. 653867/2016
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MELISSA A. CRANE PART 60M

Justice

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UNION APPAREL GROUP, LTD.,

INDEX NO. 653867/2016

Plaintiff,

- v -

THOMAS LAM, SUSANNA LAM, GLOBAL DIRECT
CONSULTING, LLC, AND JOHN DOES 1 THROUGH 10,

Defendant.

**AMENDED
DECISION AFTER
BENCH TRIAL**

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INTRODUCTION

This case arises from the failed business relationship between plaintiff Union Apparel Group, LTD. (“Union Apparel”) and defendants and third-party plaintiffs, Thomas Lam, a/k/a/ Tommy Lam and/or Thomas Shu Kwong Lam (“Mr. Lam”), Global Direct Consulting, LLC (“GDC”) and Mr. Lam’s wife, Susanna Lam, a/k/a Sue Lam (“Ms. Lam”) (collectively, “Defendants”). Plaintiff Union Apparel manufactures clothes. Individual Defendant Mr. Lam and his various entities design and solicit orders for clothing retailers.

The parties’ relationship began in 2011, when Mr. Lam and his entities partnered with Union Apparel to finance and fulfill purchase orders that Mr. Lam could not finance himself. The parties continued to work together until about June 2016. Mr. Lam would design products and solicit purchase orders, while Union Apparel would produce the garments for those orders. From 2011 through May 2016, the parties agreed to split all net profits 50-50, whereby Mr. Lam and his entities received advances against their net-profit split in the form of bi-weekly payments, among other advances.

Plaintiff commenced this case on July 22, 2016 alleging that Mr. Lam and his entities overdrew advances against their share of net profits, and that defendants improperly interfered with Union Apparel’s business in various ways (Complaint, ¶ 8; [NYSCEF Doc. No. 1]). Before trial, plaintiff withdrew its claims for unfair competition (fourth cause of action) and tortious interference (first and second causes of action) (Amended Complaint, ¶¶ 67-74 [NYSCEF Doc.

No. 143]). Defendants asserted counterclaims, *inter alia*, for breach of contract (failure to pay commissions) and violations of the Stored Communications Act in their July 12, 2021 dated amended answer (Amended Answer with Counterclaims, ¶¶ 155-167, 203-208 [NYSCEF Doc. No. 146]). By the time of trial defendants abandoned the other counterclaims in the amended answer.

Accordingly, the main issues for trial were: (1) whether Mr. Lam was a commissioned salesperson under the New York Labor Law (“NYLL”) or whether, instead, the parties were joint venturers; (2) whether Mr. Lam is liable to Union Apparel for the excess advances he received; and (3) whether Mr. Lam is entitled to relief under the Stored Communications Act. This decision contains the court’s credibility determinations, findings of fact and conclusions of law following a three-day bench trial that took place in February 2022.

FINDINGS OF FACT AND CREDIBILITY DETERMINATIONS

The court first heard testimony from Union Apparel’s principal, Aiping Jenny Chen (“Ms. Chen”), and its expert witness, JoAnn Fleming (“Ms. Fleming”). There was no reason to doubt their credibility. On the other hand, as discussed below, the court did not find defendants’ witnesses to be credible.

I. Factual Background

Union Apparel designs, manufactures, and produces women’s apparel for retailers throughout the United States. Ms. Chen, Union Apparel’s principal, founded the company after first working in a garment factory and later operating a different business for a few years. Mr. Lam has worked in the women’s apparel industry for more than three decades (February 2, 2022 Trial Transcript, pg. 238, lines 4-6 [NYSCEF Doc. No. 162]). During that time, Mr. Lam has owned and operated entities Retail Direct Manufacturing, LLC (“RDM”), Global Direct Consulting, LLC (“GDC”) and several others (*id.*, pg. 239, lines 22-25). Mr. Lam and his entities “merchandize,” “style,” and “design” women’s apparel and solicit orders from retailers, but do not manufacture the products themselves (*id.*, pg. 238, lines 20-22).

In 2011, Mr. Lam and RDM had secured purchase orders for defendants’ products from retailers but lacked the financing to fulfill them. Those retailers included nonparties Ashley Stewart, Ingenious Design, and Avenue. Because he lacked the credit to obtain his own financing

from a bank for these orders, Mr. Lam approached Ms. Chen and Union Apparel for financing and manufacturing assistance.

II. The Parties' Relationship Through May 31, 2016

After several meetings, the parties reached an agreement and memorialized its terms in an October 21, 2011 email (the "Initial Agreement") (Plaintiff's Exhibit 2A, [NYSCEF Doc. No. 155]). Trial testimony made clear that, under the Initial Agreement, Union Apparel would finance and produce the apparel to fulfil RDM's existing purchase orders. Mr. Lam would solicit sales for the new "RDM Division" of Union Apparel. In referring to "RDM," the parties meant Mr. Lam and his business entities, including GDC.

During this time, Union Apparel maintained other manufacturing endeavors that were separate from the "RDM Division" work. Specifically, Mr. Lam testified that he did not sell Union Apparel's general products to his clients. Instead, he solicited orders from his own RDM customers, that Union Apparel would then produce and fulfill for defendants.

In the Initial Agreement, the parties agreed that all net profits from defendants' business would be split 50-50 between Union Apparel, and Mr. Lam and his entities, that net profits would be calculated on a quarterly basis, and that Mr. Lam would receive a \$1,200 weekly advance against his 50% share of the net profits (*id.*). Throughout the entire time that the Initial Agreement was in place, Mr. Lam and his entities did receive the \$1,200 weekly (or \$2,400 bi-weekly) advances against their 50% share of the net profits. Mr. Lam also received a 1099 for himself and GDC, and filed a K-1, but did not receive a W-2. The parties' initially forecast net profits based on the orders defendants solicited and estimates of costs and expenses. At each quarter's end, the parties would determine the actual net profits, and reconcile the advances with the finalized net profits.

At some point, Mr. Lam pressured Ms. Chen to increase his advances, allegedly because his finances were strained¹. As a result, Union Apparel started advancing Mr. Lam 4% of the forecasted net "sales" in addition to the \$1,200 weekly advances he was already receiving under the Initial Agreement. Ms. Chen credibly explained at trial that the extra 4% advance "was against

¹ Indeed, the exhibits reflect continual pressure from Mr. Lam for more and more money (see, e.g., Ex 2C in which Ms. Chen acknowledges that defendant needed money "very urgently" and that defendant had demanded money on some sort of "sheet;" Ex 2D where Mr. Lam wrote: "I need that \$20,000," despite owing plaintiff over \$100,000) Throughout his testimony, Mr. Lam justified this pressure stating repeatedly "I have to live."

his sales at the end of the year,” meaning that “[h]e gets 4 percent out of the estimated profit” to be returned from his 50% net profit share at the end of each quarter (February 2, 2022 Trial Transcript, pgs. 71, 89, 90 [NYSCEF Doc. No. 162]). Mr. Lam and his entities were still required to settle their advances against their actual 50% share of the net profits at the end of each quarter. The parties often mischaracterized the payments Mr. Lam and his entities received as “commissions,” though the credible evidence at trial established that they were clearly advances that defendants agreed to repay once the true net profits were finalized. For instance, Mr. Lam clarified his testimony regarding his income from the venture with Union Apparel as follows:

“THE COURT: Okay. But, I guess what I am trying to -- the real issue for me is whether that all comes out of the 50 percent at the end, or if it is in addition to.

THE WITNESS: It is not in addition to. I used the wrong terminology.

THE COURT: It is not in addition to. Is that your testimony?

THE WITNESS: It is ultimately the 50/50, okay, net profit is my source of income”

(February 3, 2022 Trial Transcript, pgs. 276-277, lines 10-12 [NYSCEF Doc. No. 163]).

III. The Defendants’ Overdrawn Advances and the Ashley Stewart Bankruptcy

Plaintiff first became aware that Mr. Lam and his entities were seriously overdrawn against actual net profits after nonparty retailer Ashley Stewart filed for bankruptcy in 2014. Ashley Stewart, a GDC/RDM customer, submitted orders that Union Apparel later fulfilled for defendants. Due to Ashley Stewart’s bankruptcy, Union Apparel was unable to collect a \$203,000 payment for Ashley Stewart’s purchase orders. Accordingly, Mr. Lam and his entities were not entitled to the advances against the estimated net profits for those purchase orders.

In an email dated February 13, 2015 (Plaintiff’s Exhibit 2C [NYSCEF Doc. No. 155]), Ms. Chen informed Mr. Lam that he and his entities had overdrawn advances for the quarter ending November 30, 2014. As of February 16, 2015, Mr. Lam and his entities owed Union Apparel \$183,169.10. Mr. Lam contemporaneously acknowledged that his advances exceeded his actual share of net profits for that period (*id.* Email from Mr. Lam dated 2/16/2015 at 2:43 PM). While Union Apparel later recovered \$183,544.00 from Ashley Stewart in September 2016, defendants’ advances continued to exceed defendants’ share of actual net profits.

Acknowledging that he owed Union Apparel for his overdrawn advances, Mr. Lam initially agreed in February 2016 to reduce his advances from \$1,200 per week plus 4% of defendants' "sales" to \$1,200 per week plus 2% of those "sales." Mr. Lam also acknowledged at trial that defendants had overdrawn advances from 2014 and 2015 (February 3, 2022 Trial Transcript, pg. 309, lines 4-21 [NYSCEF Doc. No. 163]).

IV. The Parties' Second Agreement and the Termination of the Parties' Business Relationship

In May 2016, the parties agreed to restructure the Initial Agreement to enable defendants to repay the overdrawn amounts and continue their business relationship. After negotiations, Mr. Lam and Ms. Chen entered into a new agreement (the "Second Agreement") memorialized in an email thread starting in May 2016 (Plaintiff's Exhibit 2H [NYSCEF Doc. No. 155]). The Second Agreement provided that the parties' existing business arrangement would end on May 31, 2016, that Mr. Lam (through RDM) and Mrs. Lam would perform work for Union Apparel starting June 1, 2016 in exchange for combined "base" salaries of \$120,000, and that Mr. Lam would be entitled to scaled commissions if his solicited sales that exceeded certain monetary thresholds (*id.* [6/2/2016 at 4:22 PM from Ms. Chen to Mr. Lam]).

In Plaintiff's Exhibit 2H,² Mr. Lam again acknowledged that he owed Union Apparel for defendants' overdrawn advances and agreed to repay that balance using 1% of his future commissions from purchase orders (*id.* 5/23/2016 email 4:02 PM Lam inserted text: "The balance of what RDM owes Union Apparel shall be pay from my future commissions on 1% base."). Union Apparel also agreed to reduce the total balance defendants owed by \$50,000 in consideration for the new Second Agreement, and to make a one-time \$20,000 payment to Mr. Lam to "cover until the end of May [2016]" (*id.*). The parties were clear that defendants would owe the total remaining overdrawn amount owed if Mr. Lam left Union Apparel (*see* Ex 2D 5/23/2016 email from Chen to Lam: "if you leaving the company, you need to pay back everything you owe Union Apparel").

The parties agreed to complete a final accounting of the amounts defendants owed to Union Apparel by June 10, 2016 (*id.*, pg. 1). Mr. Lam confirmed that he understood and requested the \$20,000 payment for May 2016 immediately. Undermining his credibility, however, Mr. Lam

² Ex. 2H is quite difficult to parse, because Mr. Lam inserted responses to Ms. Chen directly into what she had already written. In the original version, Mr. Lam's comments were apparently in red, but the trial version is monochromatic.

contemporaneously, on 6/2/2016 at 4:49 PM, forwarded that entire email chain to his wife with a note telling her to “play it cool please...” (Plaintiff’s Exhibit 2H, [NYSCEF Doc. No. 155]). Right before forwarding the email chain to his wife, at 4:42 PM, Ms. Chen had emailed Mr. Lam and asked him to confirm that he agreed to the Second Agreement’s terms before issuing the \$20,000 check (Plaintiff’s Exhibit 2D). Mr. Lam acknowledged his assent to those terms the next day (Ex 2D 6/3/2016 at 4:22 PM [“Yes, confirm correct.”]). It is undisputed that Union Apparel paid Mr. Lam the \$20,000 in June 2016.

The final numbers for the amount defendants owed Union Apparel were ready for review around July 27, 2016 (*id.*). Around July 18, 2016, Mr. Lam met with Ms. Chen and Union Apparel’s bookkeeper to review the figures (NYSCEF Doc. No. 34, ¶ 51). Mr. Lam was provided with a final profit and loss spreadsheet detailing and listing his overdraw as approximately \$299,000.

Around this same time in July 2016, despite receiving a salary from plaintiff, Mr. Lam traveled to China without informing Ms. Chen or Union Apparel. Despite agreeing to the Second Agreement’s terms, Mr. Lam admitted he made the trip for his own sake, not on Union Apparel’s, to improve his own consulting business. Specifically, he described the trip as being for “sourcing...styling, and...[making himself], [and his] business a lot better” (February 3, 2022 Trial Transcript, pg. 316, lines 6-8 [NYSCEF Doc. No. 163]). By July 15, 2016, despite having received the \$20,000, Mr. Lam stopped showing up to work or communicating with Ms. Chen. (*see* Ex 2E 7/15/2016 email at 4:35 pm). In this email [Ex 2E] (to which there has been no objection), Ms. Chen alludes to Mr. Lam stealing her business, and later, on July 18, 2016, after Mr. Lam had returned from China, of stealing “samples and patterns” that he took on his trip to China. Thus, Ex 2E raises the concern that Mr. Lam was attempting to set up a competing business to that of Union Apparel, on Union Apparel’s dime and using Union Apparel’s resources.

On July 20, 2016, a few days after meeting with Ms. Chen and Union Apparel’s bookkeeper to review the final amounts owed for defendants’ overdrawn advances, Mr. Lam resigned. Despite agreeing that if he left, the total remaining overdraw amount would become immediately due and payable, defendants have not repaid the overdrawn amounts to Union Apparel.

V. The Nuance Lawsuit

After the parties' business relationship ended, Union Apparel paid \$50,000 to nonparty Nuance Industries, Inc. ("Nuance"), an RDM client, to settle a copyright infringement lawsuit (*Nuance Indus., Inc. v Union Apparel Group, LTD.*, Index No. 655882/2017) (the "Nuance Lawsuit"). That case arose from the settlement of claims in a related federal action, *Nuance Indus., Inc. v Ashley Stuart, Inc. et al.*, 1:15-cv-08513 (KMW). Mr. Lam personally guaranteed a \$50,000 settlement payment and agreed to pay half that amount, which was \$25,000 (February 3, 2022 Trial Transcript, pg. 323, lines 8-23 [NYSCEF Doc. No. 163]). Union Apparel paid the \$50,000 to Nuance, but Mr. Lam never repaid Union Apparel his 50% share.

VI. The Parties' Overdraw Calculations and Experts

Preliminarily, the court finds defendants' expert Philip Kline ("Mr. Kline") lacking in credibility. In his report, Mr. Kline attempted to mislead the court by including contrived calculations that incorporated enhanced damages related to defendants' purported Labor Law claim. When the court asked about these inflated figures and why they were included in his report, Mr. Kline's only answer was that "[he] was asked by counsel to calculate that," that "[his] report makes very clear that this was calculated at the request of counsel," and that "[he] was informed by counsel that there might be a doubling of [damages], and [he] provided that" (February 2, 2022 Trial Transcript, pg. 210, lines 8-9, 19-20; pg. 212, lines 4-6 [NYSCEF Doc. No. 162]). This inclusion of figures at counsel's request to contrive falsely inflated calculations undercuts the credibility of his report, making it impossible to afford any significant weight to his opinion or analysis.

Mr. Kline's lack of credibility was also of concern when he was asked if it "[was] normal for a contractor receiving a 1099 to split payments between himself personally and his LLC." Mr. Kline responded that "[he does not] have enough experience in that specific space to feel comfortable saying what is or is not normal," which was troubling, as he had testified minutes earlier about the same topic (February 2, 2022 Trial Transcript, pg. 193, lines 18-25 [NYSCEF Doc. No. 162]).

Mr. Lam also lacked credibility. Mr. Lam distanced himself about payments he received and evaded questions about how they were computed. He also provided a moving target of excuses

when answering questions about his compensation terms and why he forwarded an email containing those terms to his wife, with a note telling her to “play it cool,” moments after he had agreed to them. Mr. Lam’s credibility was also damaged after he changed his testimony overnight so that he could “set the record straight” (February 3, 2022 Trial Transcript, pg. 275, lines 16-18; pg. 276, lines 6-17 [NYSCEF Doc. No. 163]). Moreover, the record contains evidence that directly after squeezing another \$20,000 out of plaintiff, Mr. Lam traveled to China, with Union Apparel’s intellectual property, in an attempt to set up a competing business.

The documentary evidence at trial also belied Mr. Lam’s testimony, especially with regard to the \$20,000 check he accepted from Union Apparel in June 2016. While Mr. Lam took the position in his testimony that there was no agreement for him to repay his overdraw to Union Apparel, the relevant email chains clearly indicate that he acknowledged the debt owed, and accepted the \$20,000 check with the understanding that he would repay his overdraw (*see* Ex 2D). These instances negatively impacted Mr. Lam’s credibility to a severe degree.

The court finds plaintiff’s expert, Ms. Fleming, to be qualified and credible. Ms. Fleming reviewed the parties’ relevant bookkeeping records, met with Union Apparel’s bookkeeper and principal, and reviewed other relevant documentation and deposition transcripts. She concluded that, despite the parties’ poor bookkeeping and accounting practices, “the accountant did review the numbers...the bank accounts were reconciled which means the expenses and deposits were captured. The accountant used the books and records to prepare the annual corporation tax returns” (Plaintiff’s Expert Report, pg. 10 [NYSCEF Doc. No. 155]).

Based on her review of the deposition transcripts, accounting records, and various communications and other documents, Ms. Fleming opined that defendants were overpaid advances in the amount of \$203,119, broken down as follows:

“2013- 2016 Profits before 50/50 split	\$1,927,828 @ 50%	\$963,914
June - July 2016 Salary		15,000
Health Insurance adjustment		(47,930)
Travel/Office and Entertainment Expense adjustment		(53,082)
Rent Expense adjustment		(32,873)
Nuance Payment adjustment		(25,000)
Ashley Stewart Recovery		<u>91,772</u>
Total Payments due to Thomas Lam		\$911,801
Union Apparel Group payments to Thomas Lam		<u>(1,114,920)</u>
Overpayment due to Union Apparel Group from Lam		\$203,119”

(*id.*).

Through her testimony, Ms. Fleming clarified Mr. Lam's compensation arrangement, explaining that it was a draw or an advance that the parties conclusively finalized after an accounting at the end of each quarter (February 2, 2022 Trial Transcript, pg. 116, lines 7-23 [NYSCEF Doc. No. 162]). Ms. Fleming's calculations were more accurate than Mr. Kline's calculations, as she made various necessary adjustments, such as those for the Rent Expense Allocation, Payroll Expense, Payroll Tax Expense and, most notably, the \$50,000 payment Union Apparel paid to settle the Nuance Lawsuit (*id.*, pg. 190, lines 8-11).

Ms. Fleming, however, incorrectly includes defendants' regular salary for the June 1, 2016 - July 15, 2016 in her calculations concerning the parties' joint venture (Plaintiff's Expert Report, pg. 8 [NYSCEF Doc. No. 155]). The credible evidence at trial established that the parties agreed, in the Second Agreement, to conclude their joint venture relationship as of May 31, 2016. Ms. Fleming should not have included the \$15,000 salary that plaintiff owed to defendants for June 1, 2016 through July 2016 when calculating the total amount owed to defendants in connection with the joint venture. She also should not have included plaintiff's \$8,307.68 salary payment to defendants for June to July 2016 in her calculation for the total amount that plaintiff paid to defendants in connection with the joint venture.

In addition, the documentary evidence also established that Union Apparel agreed to reduce defendants' overdraw debt by \$50,000 in consideration for the Second Agreement (*see* Ex 2D). Ms. Fleming did not account for that deduction in her calculations.

Accordingly, the court modifies Ms. Fleming's calculations as follows:

1. For the period spanning 2011 to May 31, 2016: the amount Union Apparel owed defendants should have been reflected as \$896,801 (\$911,801 - \$15,000 [regular salary owed to defendants for June to July 2016]); the amount paid by Union Apparel to defendants should have been reflected as \$1,106,612.32 (\$1,114,920 - \$8,307.68 [regular salary paid by plaintiff for June to July 2016]); and a deduction of \$50,000 should have been subtracted from the amount defendants owed plaintiff pursuant to the Second Agreement. Accordingly, defendants owe plaintiff \$159,811.32 for unreturned overdrawn advances (\$1,106,612.32 - \$896,801 - \$50,000).
2. For the period spanning June 1, 2016 until the parties' terminated their business relationship in July 2016, defendant did not receive \$6,692.32 for unpaid salary (\$15,000 [total salary owed] - \$8,307.32 [total salary paid]).

CONCLUSIONS OF LAW

I. Joint Venture Versus Commissioned Salesperson

Initially, the court must determine whether the parties were joint venturers or if Union Apparel employed Mr. Lam and his entities as commissioned sales representatives. While the parties loosely referred to defendants' advances as "commissions" on occasion prior to June 1, 2016, the court finds that the parties were joint venturers from the beginning of their business relationship until May 31, 2016, the period that the Initial Agreement was operative. Moreover, defendant did not establish at trial that he earned any commissions in the approximately month and a half period (June 1, 2016 to July 20, 2016) that the Second Agreement was operative.

"A joint venture is an association of two or more persons to carry out a single business enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge" (*Kaufman v Torkan*, 51 AD3d 977, 979 [2008] [internal quotation marks and citation omitted]; see *Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 565 [1988]). A joint venture exists "when there are acts manifesting the intent of the parties to be associated as joint venturers, mutual contribution to the joint undertaking through a combination of property, financial resources, effort, skill or knowledge, a measure of joint proprietorship and control over the enterprise, and a provision for the sharing of profits and losses" (*Slabakis v Schik*, 164 AD3d 454, 455 [1st Dept 2018]). An agreement to enter into a joint venture may be oral or written and may be inferred from the totality of the parties' conduct in performance of the joint venture (see *Schultz v Sayada*, 133 AD3d 1015, 1016 [3d Dept 2015]). The intent of the parties may be express or implied (*Mendelson v Feinman*, 143 AD2d 76 [2d Dept 1988]).

As "[a] joint venture ... is in a sense a partnership for a limited purpose, and it has long been recognized that the legal consequences of a joint venture are equivalent to those of a partnership," the court looks to the Partnership Law to resolve disputes involving joint ventures (*Gramercy Equities Corp. v Dumont*, 72 NY2d 560, 565 [1988]). Thus, "[a]n indispensable [element] of a contract of . . . joint venture, both under common law and statutory law, is a mutual promise or undertaking of the parties to share in the profits of the business *and submit to the burden of making good the losses*" (*Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317 [1958], *appeal dismissed* 358 US 39 [1958] [emphasis in original]).

Here, the credible evidence establishes that the parties were joint venturers from the beginning of their business relationship until May 31, 2016. The parties agreed to combine

defendants' knowledge, skill, and effort in designing and soliciting orders for women's apparel with plaintiff's financial and manufacturing resources. Further, they plainly agreed to share all profits and losses evenly, 50-50. While defendants were paid advances on their projected share of the net profits, the parties agreed to account for the actual net profits at the end of each quarter. Defendants agreed, and repeatedly acknowledged, that they owed Union Apparel their 50% share of the losses when the advances surpassed their actual share of the net profits.

Moreover, the credible evidence at trial established that Mr. Lam's involvement in Union Apparel's joint business affairs with RDM went far beyond mere sales-related tasks. Mr. Lam was involved with almost all aspects of Union Apparel's RDM-related operations, and he regularly performed tasks relating to sourcing materials, development, and production. Mr. Lam testified that he had no involvement in Union Apparel's own products, and that he was involved only with his own orders that Union Apparel produced and fulfilled. The products defendants sold to RDM clients were different from Union Apparel's regular products and these products belonged to a separate product line under Mr. Lam's "RDM Division." Mr. Lam testified that he designed the garment styles himself and claimed ownership over these products and their concepts.

Further, the numerous email communications between Ms. Chen and Mr. Lam introduced at trial established that they intended to run the business as partners in a joint venture. Ms. Chen referred to Mr. Lam her "brother" (Ex 2C, [2/16/2015 email at 3:48 PM]) and "partner" (*id.* [2/13/2015 email at 4:28 PM]). Additionally, the many email exchanges showed that Ms. Chen regularly referred to Union Apparel as "their" company. Clearly, the parties and their entities intended to work together, rather than for one another, until June-July 2016.

Accordingly, defendants' second counterclaim under the Labor Law fails. Defendants allege in the amended complaint that plaintiff violated the NYLL by failing to pay commissions for defendants' Consulting Services (NYSCEF Doc. No. 146, ¶ 178-179). Defendants contend that under the NYLL, this non-payment imposes "[liability]...for all commissions owed, together with double damages, reasonable attorney's fees, court costs, and disbursements" (NYSCEF Doc. No. 146, ¶ 178-179). However, as stated above, the facts and evidence at trial do not establish that Mr. Lam was a commissioned salesperson or a consultant at any relevant time prior to June 1, 2016. Rather, the evidence supports that Mr. Lam and his entities were Union Apparel's partners in a joint venture from 2011 until May 31, 2016.

Moreover, defendants failed to sustain their burden that they were entitled to commissions for any sales made on or after June 1, 2016. To the extent that the parties restructured their business relationship in the Second Agreement, making Mr. and Mrs. Lam Union Apparel's salaried employees effective June 1, 2016, the record is lacking evidence demonstrating that Union Apparel violated the NYLL. In any event, the evidence at trial suggests that Mr. Lam never intended to solicit sales on behalf of Union Apparel in June and July 2016, but rather intended to steal everything for himself. There is simply no evidence warranting an award to defendants for failure to pay commissions.

Further, as defendants were joint venturers/partners with Union Apparel, they are liable to Union Apparel for their excess advances through May 31, 2016. Plaintiff proved by a preponderance of the evidence that defendants received advances that exceeded their 50% share of actual net profits, and that defendants never repaid those amounts, in violation of the parties' joint venture agreement (the Initial Agreement). Mr. Lam repeatedly acknowledged defendants' debts to Union Apparel, and expressly agreed in writing to repay the excess advances (*see e.g.* Plaintiff's Exhibit 2D, pg. 1 [NYSCEF Doc. No. 155]). Moreover, while Mr. Lam was not a credible witness generally, he conceded at trial that his income from the venture was a 50% net profit share (*see e.g.* February 3, 2022 Trial Transcript, pgs. 277-278 [NYSCEF Doc. No. 163]).

Further, the parties agreed to restructure their joint venture/partnership, and to carry over defendants' overdraw debt, when they entered the Second Agreement. Pursuant to the Second Agreement, Mr. Lam acknowledged the overdraw debt and agreed to pay back the balance, less the \$50,000 deduction, if he ever left Union Apparel's employ (Plaintiff's Exhibit 2H). It is undisputed that defendants resigned in July 2016 and did not pay back the overdraw debt. Thus, plaintiff has established that defendants breached the Second Agreement by failing to repay the overdraw debt when they left plaintiff's employment.

Although neither party addresses alter ego in their post-trial briefs, the complaint asserts its claims against Mr. Lam individually. There is ample evidence in the record to support, *prima facie*, that Mr. Lam, RDM and GDC, were one and the same. For starters, Mr. Lam completely controlled both entities, which appear to have no other employees. There were a complete lack of corporate formalities. For example, sometimes he would receive money directly rather than having it run through his company (Ex 2C 2/16/2015 at 3:48 PM ["Okay ,Please ask Thalia to write check as below. Make 2 checks = \$24885.77 per check [payable] to Thomas S. [Lam] / [Global Direct

Consulting.”)). He also took all the money for himself, failed to leave enough in the corporate accounts to avoid the overdraft and then refused to pay the plaintiff back. Defendants have done nothing to refute this showing.

However, plaintiff has not established that Susanna Lam was a party to any of the agreements. Specifically, plaintiff has not proven by a preponderance of the evidence that Mrs. Lam was a joint venturer under the Initial Agreement, or that she agreed to repay the overdraft debt pursuant to the Second Agreement. Rather, the evidence established only that Mr. Lam negotiated a salary for his wife, Mrs. Lam, when the parties restructured their business relationship in May – June 2016. Accordingly, Mrs. Lam cannot be held liable for the overdraft debt.

As discussed, plaintiff presented the only credible witnesses on the issue of defendants’ excess advances, and plaintiff’s expert’s calculations are adopted as modified per the discussion, *supra*. As previously stated, plaintiff failed to make out a *prima facie* case of entitlement to the \$50,000 that it agreed to forgo in consideration for the Second Agreement or the \$6,692.32 that it failed to pay defendants in salary for June to July 2016. In reaching this conclusion, the court notes that plaintiff at no point made an argument under the faithless servant doctrine or any similar legal theory. Plaintiff’s expert, Ms. Fleming, even acknowledged in her report that plaintiff owed defendants \$15,000 for regular salary for the period from June to July 2016, but only paid defendants \$8,307.68 for that period. Thus, plaintiff’s own evidence establishes that it owed defendants \$6,692.32 in regular salary for June to July 2016 (\$15,000 - \$6,692.32).

Accordingly, the court finds that defendants owe Union Apparel \$153,119.00 (the adjusted overdraft amount, \$159,811.32, less the amount of unpaid salary for June to July 2016, \$6,692.32), with prejudgment interest at the statutory rate from July 20, 2016 (the date that defendants resigned and all amounts defendants owed to plaintiff became due) for its cause of action asserting breach of the parties’ agreements.

II. Mr. Lam Is Not Entitled to Relief Under the Stored Communications Act

Defendants’ seventh counterclaim asserts that plaintiff violated the federal Stored Communications Act, 18 U.S.C. § 2701 (“SCA”) by illegally accessing and hacking into defendants’ personal email accounts, and subsequently downloading, reading, and printing out various emails on those accounts without receiving defendants’ permission or authorization (NYSCEF Doc. No. 146, ¶¶ 204-205). Defendants further allege that plaintiff “read some of the

stolen emails and/or provided [them] to friends, [c]lients and attorneys without [Defendants'] permission or authorization," that "each email accessed...from Defendants' personal email accounts constitutes a separate [SCA] violation," and that, as a result, they are "entitled to compensatory damages of \$1,000 for each of the emails stolen," punitive damages, as well as an award of attorneys' fees (NYSCEF Doc. No. 146, ¶¶ 206-208). At trial, however, Mr. Lam failed to establish by a preponderance of the evidence, that he is entitled to any relief under the SCA.

The SCA prohibits unlawfully accessing stored communications (18 U.S.C. § 2701). A cause of action under the SCA must allege that a person "(1) intentionally accesses without authorization a facility through which an electronic communication service is provided; or (2) intentionally exceeds an authorization to access that facility; and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system" (18 U.S.C. § 2701[a]).

Further, a civil cause of action for violations and subsequent enforcement of the SCA is provided for under 18 U.S.C. § 2707(a), which provides, in pertinent part, that the appropriate relief in civil actions seeking to enforce the SCA include damages under subsection C (18 U.S.C. § 2707[b](2)). 18 U.S.C. § 2707[c] states the following:

"A court may assess as damages in a civil action under this section the sum of the **actual damages suffered by the plaintiff and any profits made by the violator** as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of \$1,000. If the violation is willful or intentional, the court may assess punitive damages. In the case of a successful action to enforce liability under this section, the court may assess the costs of the action, together with reasonable attorney fees determined by the court"

(18 U.S.C. § 2707[c] [emphasis added]).

Here, Mr. Lam failed to establish that the purported unauthorized access resulted in any actual damages. While he argues that the alleged unauthorized access resulted in a leak of his bank records and personal communications with his stepsister to others (February 3, 2022 Trial Transcript, pg. 376 [NYSCEF Doc. No. 163]), Mr. Lam simply fails to provide proof of any actual damages sufficient to sustain a claim under 18 U.S.C. § 2707 and the SCA. In any event, Mr. Lam totally undermined his own credibility at trial, and the proof presented at trial to support his counterclaim was vague and speculative.

Further, defendants' reliance on *Pure Power Boot Camp v Warrior Fitness Boot Camp* (587 F.Supp 2d 548 [SDNY 2008]) is misplaced, as that case involved an employer directly accessing its former employees' personal email accounts by using the usernames and passwords that were stored on their work computers and allegedly shared with another former co-worker. Here, it is neither clear where these emails were stored, nor how they were even accessed to begin with, and defendants have not provided adequate proof to warrant an award of damages under the SCA. As such, the court denies Defendants' seventh counterclaim in its entirety.

III. Defendants' Oral Application for Relief Under CPLR 3217

The court denies defendants' counsel's oral application, made during the trial, for "an award of attorneys' fees incurred in defending the Abandoned Claims commencing at May 31, 2018" in its entirety (*see* Defendants' Post Trial Brief [NYSCEF Doc. No. 159, ¶¶ 95-96]). Plaintiff's counsel abandoned or withdrew various claims, such as plaintiff's tortious interference and unfair competition causes of action, on the eve of trial. On the first day of trial, defendants' counsel informed the court that he intended on submitting a fee application, pursuant to CPLR 3217 (February 1, 2022 Trial Transcript, pg. 11, lines 10-25; *see also id.* at pgs. 12-15 [NYSCEF Doc. No. 161]). The court invited counsel to brief the issue in their post-trial memoranda.

Defendants now assert that they are entitled to attorneys' fees under CPLR 3217, but they have failed to explain how plaintiff's decision not to pursue the abandoned claims prejudiced them (*see* Defendants' Post-Trial Brief at 28, ¶¶ 95-96 [NYSCEF Doc. No. 158]). For example, defendants do not explain how their trial preparation involved anything further than what they had to undertake anyway. Nor do defendants provide any proof of allegedly wasted attorneys' fees. In any event, both parties are equally responsible for the numerous delays in this case, that started with 13 claims and more than 6 counterclaims, but ultimately boiled down to a few documents. Both parties over-litigated this case, charted their own course, and ultimately exacerbated their own costs. Accordingly, the court denies defendants' request for attorneys' fees under CPLR 3217.

CONCLUSION

In reaching its determination, the court has considered the testimonial and documentary evidence admitted at trial and the post-trial briefs. Any other materials or exhibits that were not admitted into evidence at trial were not considered. The court has considered the parties' remaining contentions in their post-trial memoranda and finds them unavailing.

Accordingly, it is

ORDERED that the court renders a verdict in favor of plaintiff on its cause of action for breach of the parties' agreements (ninth cause of action); and it is further

ORDERED that the clerk is directed to enter a judgment in favor of plaintiff Union Apparel, and as against defendants Thomas Lam, a/k/a Tommy Lam and/or Thomas Shu Kwong Lam, and Global Direct Consulting, LLC, in the amount of \$153,119.00 with prejudgment interest from July 20, 2016 (the date that defendants resigned) at the statutory rate, as calculated by the clerk of the court; and it is further

ORDERED that the court dismisses all claims against Susanna Lam; and it is further

ORDERED that the remainder of plaintiff's amended complaint is dismissed; and it is further

ORDERED that the defendants' amended answer with counterclaims is dismissed; and it is further

ORDERED that there shall be no motion practice without prior notice to the court; and it is further

ORDERED that within 14 days from the court's entry of this decision after trial on NYSCEF, the parties must e-file all their trial exhibits on NYSCEF in a manner that will allow them to be accessed without using a separate website or file hosting service; and it is further

ORDERED that the clerk is directed to record the verdict in plaintiff's favor, to enter the judgment accordingly, and to mark this case as disposed.

DATE: 10/14/2022


MELISSA A. CRANE, JSC

Check One: Case Disposed Non-Final Disposition
Check if Appropriate: Other (Specify AMENDED DECISION AFTER BENCH TRIAL)