

Otsuka v Shimura

2022 NY Slip Op 34255(U)

December 15, 2022

Supreme Court, New York County

Docket Number: Index No. 159202/2020

Judge: Mary V. Rosado

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO

PART 33M

Justice

-----X
CHIKAKO OTSUKA, Individually and in the Right and on
Behalf of GREEN APOLLO LLC and CIMBA KING LLC,

INDEX NO. 159202/2020

MOTION DATE 04/30/2021

Plaintiffs,

MOTION SEQ. NO. 002

- v -

TOMOHIKO SHIMURA and AMERICA CO., LTD.

**DECISION + ORDER ON
MOTION**

Defendants.
-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62

were read on this motion to/for

DISMISS

Upon the foregoing documents, Defendants Tomohiko Shimura (“Shimura”) and ICS America Co., Ltd. (“ICS”) (collectively “Defendants”) motion to dismiss Plaintiffs Chikako Otsuka (“Otsuka”), Green Apollo LLC (“Green Apollo”), and Cimba King LLC’s (“Cimba”) (collectively “Plaintiffs”) amended complaint pursuant to CPLR §§ 3211(a)(1), (a)(5), and (a)(7) is granted in part and Plaintiffs’ cross-motion seeking leave to serve a second amended complaint is granted.

I. Procedural History

Plaintiff Otsuka filed her Complaint on December 1, 2020, alleging that Otsuka’s business partner, Defendant Shimura, had diverted, misappropriated, and diminished certain assets that were meant for Green Apollo and Cimba (NYSCEF Doc. 2 at ¶¶ 9-30). Otsuka alleged (1) fraud; (2) breach of fiduciary duty; (3) breach of the implied covenant of good faith and fair dealing; (4) breach of contract; (5) waste; (6) unjust enrichment; (7) conversion; and sought declaratory and

injunctive relief, the appointment of a temporary receiver, and an accounting of sums collected and expended by Defendant Shimura (*id.* at ¶¶ 31- 81).

In response, on January 29, 2021, Defendant Shimura filed a motion to dismiss pursuant to CPLR §§ 3211(a)(1), (a)(5), and (a)(7) (NYSCEF Doc. 25). On February 8, 2021, a stipulation was entered adjourning the motion to dismiss until April 2, 2021 (NYSCEF Doc. 31). On March 10, 2021, a stipulation was entered withdrawing the motion to dismiss and providing that Otsuka shall e-file an amended complaint on or before April 9, 2021 (NYSCEF Doc. 32). Otsuka filed an amended complaint pursuant to stipulation on April 23, 2021 naming Green Apollo and Cimba as additional plaintiffs. (NYSCEF Doc. 33). Shortly thereafter, Defendant Shimura renewed his motion to dismiss (NYSCEF Doc. 34). Plaintiffs in response cross-moved seeking leave to amend the complaint a second time pursuant to CPLR § 3025(b) (NYSCEF Doc. 41). Plaintiffs also opposed Defendant Shimura's motion to dismiss (NYSCEF Docs. 42-61).

II. Pertinent Facts

Both Plaintiff Otsuka and Defendant Shimura submitted affidavits of fact in support and in opposition of the respective motions and cross-motions (NYSCEF Docs. 35 and 43). Plaintiff Otsuka and Defendant Shimura are business partners in two real estate investments (NYSCEF Doc. 35 at ¶ 4). Plaintiff Otsuka and Defendant Shimura invested in a building located at 170 W. 123rd Street, New York, New York (the "170 Property") which is owned by Green Apollo, and a building located at 518 W. 136th Street (the "518 Property") which is owned by Cimba (*id.* at ¶ 5). Plaintiff Otsuka and Defendant Shimura each own 50% of Green Apollo and Cimba (collectively "the LLCs") (*id.* at ¶ 14). According to Shimura, the buildings lost several tenants which caused the monthly mortgage payments to outstrip the revenue from rent (*id.* at ¶ 8). Shimura, who manages both LLCs, decided it was in the best interest of the LLCs to refinance the

mortgages (*id.* at ¶ 9). Shimura claims he made a capital call to reduce the principal of each mortgage, but Plaintiff Otsuka refused to make any capital contributions (*id.* at ¶ 10-11).

Otsuka, on the other hand, alleges several instances where Shimura acted with malfeasance. First, Plaintiff alleges that although Otsuka and Shimura were partners, Shimura impermissibly charged Otsuka a 5% real estate broker fee in addition to a 5% loan broker fee in August of 2012 when purchasing the 170 building (NYSCEF Doc. 43 at ¶¶ 3-4). Otsuka also alleges that Shimura instructed her to make multiple six-figure deposits into an account managed by ICS America Co., a management company owned by Shimura (*id.* at ¶ 5). Otsuka alleges this resulted in improperly commingling funds between Shimura's brokerage account and the shared corporation accounts (*id.*). Otsuka further alleges that Shimura filed a false tax returns in 2012 stating that Otsuka had a 0% equity share, and in 2013-2015 stating Otsuka had a minority 48% equity share (*id.* at ¶ 7).

Otsuka also claims that Shimura illegally rented multiple units in the 518 Property resulting in liability for Cimba (*id.* at ¶¶ 11-12). Otsuka alleges that Shimura has imposed costs on Plaintiffs through a variety of other lawsuits as well, including a nuisance lawsuit, an action commenced by the City of New York to close an illegal drinking and gambling establishment, and an action by Shimura against an individual named "Bromberg" (NYSCEF Doc. 2 at ¶ 24). Moreover, Otsuka alleges that Shimura is unilaterally attempting to refinance the 518 Property in breach of the operating agreement. Otsuka also alleges that Shimura will not allow her to inspect the books and records of the LLC (NYSCEF Doc. 43 at ¶¶ 14-18).

III. Discussion

A. Defendants' Motion to Dismiss

i. Standard

Defendants move to dismiss pursuant to CPLR §§ 3211(a)(1), (a)(5)¹ and (a)(7). A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

When reviewing a pre-answer motion to dismiss for failure to state a claim pursuant to CPLR § 3211(a)(7), the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow

¹ Although Defendants seek relief pursuant to CPLR § 3211(a)(5), there are no arguments for dismissal related to this rule in Defendants' moving papers, nor is CPLR § 3211(a)(5) cited even once in Defendants' memorandum of law in support of their motion to dismiss.

for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

ii. Contentions

Defendants argue that the Amended Complaint fails as a matter of law pursuant to CPLR § 3013 because it fails to provide Defendants with proper notice of Plaintiffs' claims. Defendants argue that Plaintiffs' CPLR § 3013 problems are highlighted by the fact that Plaintiffs impermissibly intermingle their direct and derivative claims. Moreover, Defendants assert that to the extent Plaintiffs have pled derivative claims, Plaintiffs have failed to comply with the requirement of a pre-suit demand on the LLCs to commence an action and otherwise failed to plead as to why such demand would be futile. Defendants further argue that Plaintiffs fail to plead fraud and other causes of action based on allegations of misrepresentation with the requisite particularity imposed by CPLR § 3016(b). Defendants also claim that Plaintiffs' claims for fraud, conversion, unjust enrichment, and breach of the implied covenant of good faith are duplicative of the breach of contract claim and must therefore be dismissed. Finally, Defendants argue that Plaintiffs' breach of fiduciary duty claim is barred by the operating agreements.

In response, Plaintiffs argue that under the liberal pleading standards of the CPLR, Plaintiffs have put Defendants on fair notice of their claims. Plaintiff asserts that there is no impermissible intermingling of direct and derivative claims, and that some courts have allowed hybrid derivative and personal claims to be maintained. Plaintiffs further assert that they have met the heightened burden of CPLR § 3016(b) by detailing numerous instances of misrepresentation by Defendant Shimura. Plaintiffs claim that their fraud, conversion, unjust enrichment, and breach of the implied covenant of good faith are not duplicative as these claims are premised on misrepresentations and breaches of duties separate from the breach of contract claim and are

alternative theories of recovery. Plaintiffs assert that their breach of fiduciary duty claim should survive because the operating agreements allow for such a claim where there was bad faith, intentional misconduct, a knowing violation of law, or a retention of an unlawfully-derived financial benefit. Finally, Plaintiffs request leave to replead any cause of action the Court may find should be dismissed.

iii. Direct and Derivative Claims

As a threshold matter, the Court will address the contentions surrounding whether or not direct and derivative claims may be permissibly pled in “hybrid” fashion. Although Plaintiffs rely on a case from the Second Department decided in the 1980s, as well as two trial court decisions from over a decade ago, the First Department has recently held, on numerous occasions, that direct and derivative claims may not be intermingled in a single cause of action (*Hettinga v Nahoum*, 193 AD3d 499, 499 [1st Dept 2021] [“no persuasive basis to disturb the motion court’s dismissal of [plaintiff’s] claims without prejudice where the complaint intermingled plaintiffs’ direct and derivative claims into single causes of action”]; *Billig v Schwartz*, 190 AD3d 547, 548 [1st Dept 2021] [“The intermingling of direct and derivative claims into single causes of action warrants dismissal of the complaint without prejudice”]; *Barbour v Knecht*, 296 AD3d 218, 228 [1st Dept 2002]). Therefore, any cause of action which intermingles direct and derivative claims shall be dismissed without prejudice.

The First Department has recognized the difficulty in determining whether a claim is direct or derivative (*Yudell v Gilbert*, 99 AD3d 108 [1st Dept 2012]). Thus, the First Department has adopted a test outlined by the Supreme Court of Delaware in *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1039 [Del. 2004] (*see also Serino v Lipper*, 123 AD3d 34, 40 [1st Dept 2014]). In order to distinguish derivative claims from direct claims a court must consider

(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the suing stockholders, individually)” (*Serino*, 123 AD3d at 40 quoting *Yudell*, 99 AD3d at 114, quoting *Tooley*, 845 AD2d at 1033). In other words, if harm is caused to an individual rather than a corporation, an individual states a direct action (*Gjuraj v Uplift Elev. Corp.*, 110 AD3d 540 [1st Dept 2013]). However, if an individual harm is claimed, but is embedded in an alleged harm to the corporation, it cannot survive (*Serino*, 123 AD3d at 40 citing *Abrams v Donati*, 66 NY2d 951, 953-954 [1985]; see also *Hahn v Stewart*, 5 AD3d 285 [1st Dept 2004] [claims that the corporation’s damaged reputation diminished the value of former corporate shareholder’s shares dismissed on the grounds that such allegations pled a wrong to the corporation only, for which a shareholder can only sue derivatively]).

iv. Fraud

Plaintiffs’ fraud claim is dismissed without prejudice for impermissibly intermingling direct and derivative claims. Harm is alleged to both Plaintiff and the LLCS, and thus direct and derivative claims have been impermissibly pled within one cause of action (*see* NYSCEF Doc. 33 at ¶ 34 [“The misstatements, concealments and/or omissions as to the pirating of the assets of funds belonging to the plaintiff [sic], GREEN APOLLO and CIMBA KING, were all to the plaintiffs’ detriment.”]). Plaintiffs may replead their fraud claim, with the requisite specificity and separately for both the direct and derivative claims.

v. Injunctive Relief

Plaintiffs’ cause of action seeking injunctive relief is also dismissed without prejudice. Plaintiffs again impermissibly intermingle direct and derivative claims. An analysis of Plaintiffs’ allegations under this cause of action highlights this fatal issue. Specifically, Plaintiffs allege that

an injunction is needed because Shimura's acts are "detrimental to the interests of the plaintiff [sic], GREEN APOLLO and CIMBA KING." (NYSCEF Doc. 33 at ¶ 38). Plaintiffs further allege that "[p]ursuant to the respective Operating Agreements, the parties agreed, as additional relief, to all the elements of a preliminary injunction to prevent the further breach of the Agreement. As such, plaintiffs seek an immediate injunction to enjoin defendants forthwith from the conduct outlined above which illustrates numerous breaches of the subject Agreement." (*id.* at ¶ 39). Notably, Plaintiffs do not specify which acts give rise to the need for injunctive relief.

As Plaintiffs are explicitly seeking injunctive relief to protect both Otsuka's interests (which are ostensibly direct claims) as well as the interests of Green Apollo and Cimba King (which are ostensibly derivative claims), this cause of action impermissibly intermingles direct and derivative claims. Thus, the cause of action for injunctive relief is dismissed without prejudice.

vi. Breach of Fiduciary Duty

Contrary to Defendants' assertions, the Court does not find that the operating agreements bar Plaintiffs' breach of fiduciary duty claims. Both operating agreements contain a section titled "Liability and Indemnification" which provides that "no manager or member shall be liable or accountable in any way for damages to the Company or to any of the Members for any failure to act pursuant to this agreement, unless there was bad faith or intentional misconduct." (NYSCEF Docs. 28 at §5.5(a) and NYSCEF Doc. 29 at §5.5(a)).

On a pre-answer motion to dismiss the Court must give a plaintiff the benefit of all favorable inferences which may be drawn from the pleadings (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]) Therefore, the Court finds that if not explicitly pled, there exists a sufficient inference of bad faith or intentional misconduct based on the allegations to avoid application of the exculpatory clause found within both LLC's operating agreements.

However, as with the preceding claims, the Court finds that this cause of action also impermissibly intermingles direct and derivative claims. Again, this cause of action explicitly alleges that “Plaintiff(s) trusted that defendant would not engage in conduct that was adverse to its own business interests or that would result in the improper and unlawful misappropriation of plaintiffs’ own assets (NYSCEF Doc. 33 at ¶ 42). Plaintiffs further allege that “[a]s such, said defendant had a fiduciary duty to Plaintiff(s) to not misappropriate or convert any GREEN APOLLO assets (*id.* at ¶ 43). Members of an LLC owe fiduciary duties to each other as well as the LLC (*Jones v Voskrenskaya*, 125 AD3d 532, 533 [1st Dept 2015]).

The Court finds that Plaintiffs failed to specify to whom Defendant Shimura breached a fiduciary duty. Plaintiff simply states that “Defendant SHIMURA’s actions and misappropriation of GREEN APOLLO funds and his inexcusable refusal to return same is a clear breach of fiduciary duty” (NYSCEF Doc. 33 at ¶ 44). This leaves the Court speculating as to whether the alleged breach of a fiduciary duty is to Green Apollo and Otsuka, or only Green Apollo, or all named Plaintiffs. As the allegations in this cause of action refer Shimura’s position of trust with “Plaintiff(s)” which indicates a breach of a fiduciary duty owed to the LLCs (a derivative claim) and Otsuka (a direct claim), the Court finds that this cause of action again intermingles direct and derivative claims and should be dismissed without prejudice. Moreover, the vague pleadings also contravene CPLR § 3013 (*Nationstar Mortgage, LLC v Ocwen Loan Servicing, LLC*, 194 AD3d 490 [1st Dept 2021]).

vii. Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiffs cause of action for breach of implied covenant of good faith and fair dealing is also dismissed without prejudice. First, this cause of action alleges in conclusory fashion that “Defendants were under an obligation to deal fairly with Plaintiff(s) and in good faith at all times

relevant herein and before their transaction with Plaintiff.” (NYSCEF Doc. 33 at ¶ 46). This cause of action goes on to allege that “Defendants willfully or negligently breached covenants to Plaintiff(s) in so acting.” (*id.* at ¶ 47). While paragraph 46 refers to “transaction” in the singular, it does not specify to which transaction Plaintiffs are referring. Multiple transactions are referenced in the “facts” section of the Amended Complaint. As some transactions happened in 2012, a decade ago, and may be barred by the statute of limitations, this cause of action fails to provide Defendants with the notice required by CPLR § 3013 so that they may properly defend this action.

Moreover, it has been held that a separate cause of action for breach of the covenant of good faith and fair dealing cannot be maintained where it is premised on the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract (*Parlux Fragrances, LLC v S. Carter Enterprises, LLC*, 204 AD3d 72, 91-92 [1st Dept 2022]). Therefore, to the extent Plaintiffs are alleging damages as a result of Defendant Shimura’s bad faith breach of the operating agreements, this cause of action is duplicative. This cause of action is dismissed without prejudice and Plaintiffs may replead.

viii. Declaratory Relief

As Plaintiffs allege that Defendant Shimura has misrepresented Plaintiff Otsuka’s membership interest in the LLCs on several tax documents, and Defendant Shimura himself provides in his affidavit that a 2% interest belonging to Plaintiff Otsuka was transferred to an unnamed third-party in 2016, the Court finds there exists a justiciable controversy regarding Plaintiff Otsuka’s membership interest (*see* NYSCEF Doc. 35 at ¶ 15; *see also* NYSCEF Doc. 33 at ¶¶ 13 and 20). Therefore, Plaintiffs’ declaratory relief claim survives.

ix. Breach of Contract – LLC Operating Agreements

Plaintiffs allege that “defendant Shimura’s conduct herein complained of was in derogation of his contractual obligations pursuant to the LLC Operating Agreements governing the parties relations with respect to GREEN APOLLO and CIMBA KING.” (NYSCEF Doc. 33 at ¶ 56). Plaintiffs go on to allege that Shimura’s conduct was a breach of covenant of good faith and fair dealing and “the self-dealing, waste, co-mingling of funds and deliberate dishonesty has caused Plaintiff(s) to suffer substantial injury and damage” (*id.* at ¶ 57). Self-dealing, waste, and co-mingling of funds are derivative in nature (*Homapour v Harounian*, 182 AD3d 426, 426 [1st Dept 2020]; *Higgins v New York Stock Exchange, Inc.*, 10 Misc.3d 257, 267 [Sup. Ct., NY County 2005]). However, “deliberate dishonesty” may represent a breach of a fiduciary duty or fraud claim which may be owed directly to Plaintiff Otsuka as co-member of the LLC, or a breach of a fiduciary duty owed to the LLCs themselves (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014] [managing member of LLCs owed plaintiff, a non-managing member, a fiduciary duty]; *Bischoff v Boar’s Head Provisions Co., Inc.*, 38 AD3d 440, 440 [1st Dept 2007] [member of LLC brought derivative claim on behalf of LLC against certain individuals for violation of LLC’s operating agreement]). Therefore, Plaintiffs, who again assert their allegations on behalf of “Plaintiff(s)”, have failed to specify whether the breach of contract claim is derivative or direct, and if both, they have impermissibly intermingled the two.

Also, Plaintiffs’ inclusion of an allegation in this cause of action alleging breach of the implied duty of good faith and fair dealing, and waste, implies that the stand alone causes of action for waste and implied breach of good faith and fair dealing are duplicative of the breach of contract cause of action. Plaintiffs again fail to lay out specifically which transactions constituted the breach. Moreover, Plaintiffs have fatally failed to even identify the essential terms of the parties’

contract, or the specific provisions of the contract upon which the alleged liability is predicated (*Martin Associates, Inc. v Illinois National Insurance Company*, 188 AD3d 572 [1st Dept 2020]; *Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1999]). As these various procedural infirmities may be remedied, this cause of action is dismissed without prejudice.

x. Waste

Although not expressly stated, Plaintiffs allege in their cause of action for waste that the “defendant [*sic*] LLCs suffered losses in an amount to be determined at trial” (NYSCEF Doc. 33 at ¶ 64). As the damage is alleged to have been suffered by the LLCs, this is expressly a derivative claim, and Plaintiffs do not appear to be alleging any direct claims. Therefore, this cause of action does not suffer the same infirmity as the other claims wherein direct and derivative claims were impermissibly intermingled.

However, before bringing a derivative action, a party must attempt to make the corporation initiate an action on its own behalf. The complaint in a derivative action must allege with particularity that the plaintiff made a pre-suit demand on the corporation or must otherwise allege demand-futility (*Marx v Akers*, 88 NY2d 189, 193 [1996]; *Najjar Group LLC v West 56th Hotel LLC*, 110 AD3d 638, 639 [1st Dept 2013]).

Although there is neither an allegation of a pre-suit demand, nor is there any mention of demand-futility there are certain situations where failure to abide by this technicality has been excused. For example, when at the time of the commencement of an action, the company is under control of the person accused of wrongdoing, a demand to bring an action would be futile and is therefore unnecessary (*Tong v Hang Seng Bank, Ltd.*, 210 AD2d 99, 100 [1st Dept 1994] [demand unnecessary where plaintiff alleged that he was one of two directors/officers, and that the other director/officer raided the company bank account]; *see also Barr v Wackman*, 43 AD2d 689, 689

[1st Dept 1973], *affd* 36 NY2d 371 [1975] [demand excused where the board itself was accused of breach of fiduciary duty and its members were named as defendants in the derivative action]). As it is alleged that there are only two members of the LLCS, Shimura and Otsuka, and Shimura is alleged to have committed a multitude of wrongdoings, Plaintiff Otsuka's has in essence pled the futility of a pre-suit demand. Therefore, Plaintiffs' cause of action alleging waste survives. However, as multiple other causes of action have been dismissed without prejudice, Plaintiffs may explicitly plead demand-futility to strengthen other potential derivative claims should they wish.

xi. Unjust Enrichment

Plaintiffs explicitly plead "this claim is asserted by Plaintiff(s) individually and derivatively on behalf of the defendant LLCs [*sic*] against Defendant manager." (NYSCEF Doc. 33 at ¶ 66). Because Plaintiffs impermissibly combined direct and derivative claims for unjust enrichment, this cause of action is dismissed without prejudice (*Billig v Schwartz*, 190 AD3d 547, 548 [1st Dept 2021]).

xii. Appointment of a Temporary Receiver

As Plaintiffs' waste claim survives, and Plaintiffs have alleged certain acts which may, upon a proper motion with supporting papers, support the appointment of a temporary receiver, the Court finds there is no reason to dismiss this portion of Plaintiffs' Amended Complaint.

xiii. Conversion

This cause of action is also dismissed without prejudice. First, the allegations do not contain the transactions or dates of the alleged conversion and therefore may be barred by the statute of limitations (*see Swain v Brown*, 135 AD3d 629 [1st Dept 2016]). To that end, pursuant to CPLR § 3013, Defendants are entitled to notice of the specific dates and transactions that Plaintiffs are alleging the conversion(s) occurred. Secondly, Plaintiffs specifically allege that "[b]y

wrongfully retaining, misusing, wasting and refusing to return plaintiffs', funds, [sic] defendant Shimura wrongfully exercised the right of ownership over those sums to the exclusion of plaintiffs' rights to same." (NYSCEF Doc. 33 at ¶ 77). Plaintiffs further assert "Plaintiffs' funds are a specifically identifiable sum of money wrongly withheld by defendants." (*id.* at ¶ 78). Construing the allegations as they appear in the Complaint, Plaintiffs use of "Plaintiffs' funds" in their allegations indicate the conversion claim is for funds belonging to both the LLCs and Plaintiff Otsuka. This once again impermissibly intertwines direct and derivative claims. Therefore, the conversion cause of action is dismissed without prejudice.

xiv. Accounting

Since Plaintiffs' waste claim survives, and Plaintiffs' have alleged the wrongful use of LLC funds and assets, the Court sees no reason to dismiss Plaintiffs' cause of action seeking an accounting of funds Shimura expended as managing member of the LLCs.

xv. Leave to Amend

Leave to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinsky v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or the amendments are patently devoid of merit (*Greenburgh Eleven Union Free School Dist. V National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]). Delay alone is not sufficient to deny leave to amend (*Johnson v Montefiore Medical Center*, 203 AD3d 462 [1st Dept 2022]).

Defendants concede in their pleading papers that Plaintiffs should be able to replead certain causes of action (*see* NYSCEF Doc. 38 at page 22 ["Defendant respectfully request that this Court issue an order dismissing Plaintiff's entire amended Complaint, with leave to replead only the fifth

(declaratory relief), sixth (breach of contract), and ninth (receiver) causes of action”]. Further, Defendants have failed to show how they might be prejudiced by any amended pleading, especially since Defendants have not even yet filed an Answer. Moreover, as the majority of Plaintiffs’ claims have been dismissed on technicalities, the Court finds there exists good cause to allow Plaintiffs to file a second amended complaint.

While Plaintiffs have submitted a proposed amended complaint in support of its cross-motion, the causes of action in the proposed amended complaint suffer the same procedural infirmities as the current amended complaint. Therefore, the Court, being bound by precedent, cannot accept the proposed second amended complaint. Rather, Plaintiffs are granted leave to file and serve another amended complaint correcting the procedural deficiencies laid out in this order and decision. Failure to do so may result in waiver of Plaintiffs’ claims.

Accordingly, it is hereby,

ORDERED that Plaintiffs’ causes of action for fraud (first cause of action), injunctive relief (second cause of action), breach of fiduciary duty (third cause of action), breach of the implied covenant of good faith and fair dealing (fourth cause of action), breach of contract (sixth cause of action), unjust enrichment (eighth cause of action), and conversion (tenth cause of action), are all dismissed without prejudice, and it is further

ORDERED that Defendants’ motion to dismiss is denied as to Plaintiffs’ causes of action for declaratory relief (fourth cause of action), waste (seventh cause of action), appointment of a temporary receiver (ninth cause of action), and accounting (eleventh cause of action); and it is further

ORDERED that Plaintiffs' cross motion seeking leave to serve a second amended complaint is granted, and Plaintiffs are directed to file and serve upon all Defendants a second amended complaint within thirty (30) days of entry of this decision and order; and it is further

ORDERED that within twenty (20) days of service of Plaintiff's second amended Complaint, Defendants are directed to file and serve a responsive pleading; and it is further

ORDERED that the Clerk of the Court shall amend the caption to reflect the stipulation to amend the caption and complaint filed on Friday, April 23, 2021 (NYSCEF Doc. 32):

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CHIKAKO OTSUKA, Individually and in the Right and on Behalf of GREEN APOLLO LLC and CIMBA KING LLC,

Plaintiffs

- v -

TOMOHIKO SHIMURA and AMERICA CO., LTD

Defendants.

-----X

And it is further

ORDERED that within fourteen (14) days of entry, counsel for Plaintiffs shall serve a copy of this decision and order with notice of entry upon all parties and the Clerk of the Court; and the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

12/15/2022

DATE

Mary V Rosado

HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: