

Goureau v NBCUniversal Media LLC

2023 NY Slip Op 30381(U)

February 7, 2023

Supreme Court, New York County

Docket Number: Index No. 160490/2021

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

INDEX NO. 160490/2021
MOTION DATE 05/17/2022, 05/17/2022, 05/17/2022
MOTION SEQ. NO. 006 009 010

NICOLAS GOUREAU, STEPHANIE MENKIN, GOOBERRY CORPORATION,

Plaintiff,

- v -

NBCUNIVERSAL MEDIA LLC, A DELAWARE LIMITED LIABILITY COMPANY, MACHETE CORPORATION, A CALIFORNIA CORPORATION, MARCUS LEMONIS, ML RETAIL, LLC, A DELAWARE LIMITED LIABILITY COMPANY, MARCUS LEMONIS, LLC, A DELAWARE LIMITED LIABILITY COMPANY, ROBERTA RAFFEL, MLG RETAIL, LLC A DELAWARE LIMITED LIABILITY COMPANY, ML FASHION, LLC, A DELAWARE LIMITED LIABILITY COMPANY,

Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 006) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 127, 130, 143, 145, 146, 147, 148, 160, 170

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 009) 61, 62, 63, 64, 65, 66, 67, 68, 69, 129, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 159, 171

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 010) 91, 92, 93, 94, 95, 96, 97, 144, 161, 168, 169, 172

were read on this motion to/for DISMISS

The court consolidates motion sequences numbered 006, 009, and 010 for disposition.

This action involves a dispute between the owners of a chain of women's luxury retail clothing stores and the people and entities that produce and present The Profit, a business-

themed reality television series that appears on CNBC.¹ Defendant Marcus Lemonis (Lemonis) is the host (amended complaint, ¶4).

Plaintiff Nicholas Goureau (Goureau) is a cofounder and majority shareholder of plaintiff Gooberry Corporation (Gooberry) (*id.* ¶17). Plaintiff Stephanie Menkin (Menkin) is a cofounder and minority shareholder of Gooberry (*id.* ¶8). Gooberry is a privately held New York corporation that maintains its principal place of business in Manhattan (*id.* ¶19). Plaintiffs allege that nominal defendant ML Fashion, LLC (ML Fashion) is a privately held Delaware limited liability company that maintains its principal place of business in Manhattan (*id.* ¶20).

Plaintiffs allege that Lemonis is a domiciliary of Illinois, an investor, the owner of defendants Marcus Lemonis, LLC (ML, LLC) and ML Retail, LLC (ML Retail), and the “featured business fiduciary advisor of CNBC’s reality show, *The Profit*” (*id.* ¶21). Lemonis is the manager, chairman, and chief executive officer of ML Fashion and owns a 33.34% interest in ML Fashion through his wholly owned entity, ML Retail (*id.*).² Defendant Roberta Raffel, also known as Bobbi Lemonis (Raffel), is a resident of Illinois (*id.* ¶24) (Raffel, with Lemonis, ML Retail, ML, LLC, and MLG Retail, are collectively referred to as ML Defendants).

Machete Corp. (Machete) is a California corporation that maintains its principal place of business in California (*id.* ¶26). Plaintiffs identify Machete as the company CNBC hired to produce *The Profit*. Plaintiffs allege that Machete, as NBCU’s coconspirator, was engaged “to

¹ CNBC is allegedly a wholly owned subsidiary of defendant NBCUniversal Media, LLC (NBCU), a Delaware corporation which maintains its principal place of business in Manhattan, but “does business throughout New York and across the United States” (amended complaint, dated December 22, 2021 [NYSCEF Doc No. 39] [amended complaint], ¶27).

² Plaintiffs allege that MLG Retail, LLC (MLG Retail) is a Delaware limited liability company that maintains its principal place of business in Manhattan (*id.* ¶25), and that its sole member is ML Fashion (*id.*).

create a show wherein they direct their employee, Marcus Lemonis, to run roughshod over unsuspecting business owners” (*id.* ¶33).

Background

Underlying Allegations

Goureau and Menkin opened their first women’s clothing store, named Courage.B, in 2008 (*id.* ¶1).³ By 2014, plaintiffs had grown their business, opening six more stores in affluent, competitive markets (*id.* ¶2), and had begun looking for outside investors to help them “take the next step as a company” (*id.* ¶¶3-4).

During their search for investors, plaintiffs learned about *The Profit*, a show that claimed to put “small, struggling businesses in touch with a business guru who could change their lives,” and applied to appear on the program (*id.* ¶¶4-5). Plaintiffs deny that they were “small and struggling,” but they were in need of capital. They insist that, rather than being a source of assistance, *The Profit* turned out to be a “complex scam [*sic*]” intended to boost CNBC’s ratings “at the cost of destroying the participating businesses” through “fraudulent lies” and “inducements” (*id.* ¶5).

Plaintiffs further allege that NBCU “created a mob-style scam that approached small companies like Courage.B,” made promises to act in the companies’ best interests, but instead used them “as fodder for ratings” and “destroyed the reputation of the business’ owners” (*id.* ¶6). They allege that NBCU’s producer allowed Lemonis “to use a mob-style debt bust out, product theft, insane giveaways, commingling of assets, and self-dealing” to “drown the companies in massive amounts of debt, . . . and compromise the companies’ stability” (*id.* ¶7).

³ Gooberry is Courage.B’s operating company. Goureau and Menkin, who are siblings, jointly own 56% of Gooberry’s shares (*id.* ¶¶11, 18-19). Their mother, Noemi Goureau (Noemi), is also a Gooberry shareholder (*see id.* ¶273).

In this case, plaintiffs allege Lemonis made a “false investment offer” to Courage.B to put himself “100% in control” of it. They allege that Lemonis then caused Courage.B to take on millions of dollars in debt, “all payable to Lemonis or Lemonis controlled companies,” and left plaintiffs with the choice of paying him back in full or ceding control of the company to him (*id.* ¶10). Plaintiffs assert they could not pay Courage.B’s debt, so they agreed to allow him to purchase a stake in Courage.B’s operating company, Gooberry, that purportedly gave him control of plaintiffs’ business (*id.* ¶11). Plaintiffs allege that, once he gained control of Gooberry, Lemonis diverted businesses that appeared on *The Profit* to Gooberry, placed those businesses “under the Gooberry umbrella” and put their employees on Gooberry’s payroll, mismanaged their businesses, and stole assets to which he had been entrusted (*id.* ¶12).

Plaintiffs allege that, when Gooberry was almost destroyed, Lemonis offered to help plaintiffs recoup their losses by joining his investments in other businesses. To further this proposal, Lemonis formed ML Fashion as a vehicle for those investments. Goureau, Menkin, and Lemonis each took a third of ML Fashion’s equity, but Lemonis assumed absolute authority as the company’s sole manager. Plaintiffs assert that Lemonis used this authority to benefit himself at their expense and the expense of his other investors (*id.* ¶13).

Prior Litigation

This action is not the first that plaintiffs have brought relating to this dispute. They first sued Lemonis and other defendants in Delaware Chancery Court in June 2020 (*see* decision in *Goureau v Lemonis*, 2021 WL 1197531, *6, 2021 Del Ch LEXIS 59, *16 [Del Ch, Mar 30, 2021, C.A. No. 2020-0486-MTZ] [annexed as ex A [NYSCEF Doc No 83] to the affirmation of Owen R. Wolfe, Esq. [NYSCEF Doc No. 82]). That action was stayed pending resolution of another lawsuit that plaintiffs had commenced around the same time in the United States District Court

for the Southern District of New York (*id.*, 2021 WL 1197531, *7, 2021 Del Ch LEXIS 59, *19, citing first amended complaint in *Goureau v Lemonis*, 1:20-cv-04691-MKV [SDNY, June 6, 2020] [SDNY FAC]).

Plaintiffs asserted 13 causes of action in the SDNY FAC, dated August 17, 2020 (ex A [NYSCEF Doc No. 63] to the affirmation of Saul B. Shapiro, Esq., executed January 13, 2022 [NYSCEF Doc No. 62]). Of those, defendants contend that eight have analogues in this action: (i) fraudulent inducement; (ii) fraud; (iii) breach of fiduciary duty; (iv) breach of the implied covenant of good faith and fair dealing; (v) unjust enrichment; (vi) misappropriation; (vii) corporate mismanagement and waste; and (viii) conversion. This is correct, for the most part.

A cause of action for the dissolution of Gooberry under Business Corporation Law (BCL) Section 1104-a was also asserted in both actions. Moreover, Plaintiffs asserted causes of action for fraud, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, unjust enrichment, misappropriation of corporate assets, and corporate mismanagement and waste in this case numerous times, by or against different parties. Plaintiffs' only causes of action here that were not previously pleaded in the SDNY FAC are fraudulent concealment (third cause of action), breach of the ML Fashion LLC Agreement (eleventh), breach of contract (twelfth), defamation (twentieth), negligent misrepresentation (twenty-first), and conspiracy (twenty-second).

On August 27, 2021, plaintiffs filed a proposed second amended complaint (SDNY PSAC) in the SDNY Action (annexed as ex B [NYSCEF Doc No. 64 to the Shapiro affirmation, *supra*).

Following several motions to dismiss, District Judge Mary Kay Vyskocil granted dismissal "with respect to [plaintiffs'] fraud-based and RICO claims alleged" in the SDNY FAC

and declined to exercise supplemental jurisdiction over plaintiffs' remaining state law claims (see *Goureau v Lemonis*, 2021 US Dist LEXIS 167079, *19 [SDNY, Sept 2, 2021, 1:20-cv-04691-MKV], annexed as ex B [NYSCEF Doc No 84] to Wolfe affirmation).

Plaintiffs then moved the District Court for reconsideration. In her order of October 15, 2021, Judge Vyskocil held that reconsideration was warranted because plaintiffs' later factual assertions would have supported a finding of diversity jurisdiction. Despite reconsideration, the Court found that plaintiffs' **"state law claims [still] fail to state a claim upon which can be granted," and held that the SDNY "Amended Complaint must be dismissed in its entirety"** (*Goureau v Lemonis*, 2021 WL 4847073, *7, 2021 US Dist LEXIS 199321, *2 [SDNY, Oct 15, 2021, 1:20-cv-04691-MKV], annexed as ex C [NYSCEF Doc No. 85] to Wolfe affirmation, emphasis added).

Judge Vyskocil entered an order closing the case on November 22, 2021 (ex D [NYSCEF Doc No. 86] to Wolfe affirmation). The November 22, 2021 order corrected one facet of the October 15 order. In the November 22 order, at 1, the court specifically noted that it was "abstaining" from consideration of "Plaintiffs' request in Count 13 for dissolution of the Nominal Defendant [Gooberry] in this case." This abstention was reiterated in the SDNY's order of December 14, 2021, determining plaintiffs' motion for clarification, that clarified the prior dismissal orders (annexed as ex H [NYSCEF Doc No. 90] to Wolfe affirmation). Among other things, Judge Vyskocil ordered that, "except with respect to Count 13 in the [SDNY FAC] seeking dissolution of the Nominal Defendant Gooberry Corporation, the claims asserted by Plaintiffs. . . were **dismissed with prejudice. . . and on the merits**" (December 14, 2021 Order, at 2 emphasis added). Plaintiffs never appealed any of the SDNY decisions. Instead, they discontinued the action in SDNY and tried their luck here.

Discussion

Each of the defendants in this action move to dismiss plaintiffs' amended complaint pursuant to CPLR 3211. "In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [citation omitted]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*id.*).

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994] [citation omitted]).

Dismissal may also be sought on the grounds of collateral estoppel or res judicata under subparagraph (a)(5). "Under res judicata, or claim preclusion, a valid final judgment bars future actions between the same parties, or those in privity with them, on any 'claims arising out of the same transaction or series of transactions, even if based upon different theories or if seeking a different remedy'" (*East Hampton Capital LLC v Fergusson*, 183 AD3d 409, 409-10 [1st Dept 2020], quoting *Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 12 [2008] and citing *Green v Santa Fe Indus.*, 70 NY2d 244, 253 [1987] [alterations omitted]). "Once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*O'Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 [1981]). "A claim will be barred by the prior adjudication of a different claim arising out of the same "factual grouping" even if the claims 'involve material different elements of proof'" (*Fifty CPW Tenants Corp v Epstein*, 16 AD3d 292, 293 [1st Dep't 2005]).

“New York courts must give full faith and credit to a federal court judgment” (*Matter of Frontier Ins. Co.*, 27 AD3d 274, 275 [1st Dept], *lv denied*, 7 NY3d 713 [2006]; *see also Lane v Birnbaum*, 258 AD2d 389, 389 [1st Dept 1999] [“dismissal with prejudice ‘so ordered’ by the Federal court in the prior action between the parties constituted a final determination on the merits, with res judicata effect not only as to the matters litigated therein, but also as to all relevant issues that could have been but were not litigated therein”] [citations omitted]; *Yang v. Korea First Bank*, 247 A.D.2d 237, 668 N.Y.S.2d 363, 364 (1st Dep’t 1998) (finding that plaintiff’s present claims of fraud and malfeasance were barred by *res judicata* because they could have been, but were not, raised as a defense in the prior foreclosure action).

“The doctrine of collateral estoppel precludes a party from relitigating an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point” (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455 [1985] [internal quotation marks and citations omitted]). “The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action” (*id.* at 456 [citations omitted]). “Any doubts regarding the preclusive effect of [a prior] ruling” should be resolved in favor of the party against whom the estoppel would operate (*Wal-Mart Stores, Inc. v United States Fid. & Guar. Co.*, 11 AD3d 300, 301 [1st Dept 2004]).

Under CPLR 3211(a)(7), the court addresses the face of the pleading, to decide whether the pleader’s allegations fit any cognizable legal theory (*Martinez, supra*, 84 NY2d at 87-88).

“When considering these pre-answer motions to dismiss the complaint for failure to state a cause of action, we must give the pleadings a liberal construction, accept the allegations as true and

accord the plaintiffs every possible favorable inference” *Chanko v American Broadcasting Cos.*, 27 NY3d 46, 52 [2016] [citation omitted]). Nevertheless, “allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration” (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995] [citations omitted]; see also *Lewis v Riklis*, 82 AD2d 789, 789 [1st Dept 1981] [“allegations ... in conclusory form, based upon information and belief, do not establish a sufficient factual showing, evidentiary in nature” to support claim]). Moreover, “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense” (CPLR 3013).

Initially, the court notes, to avoid res judicata, plaintiffs have reconstituted certain derivative claims that the SDNY dismissed as direct claims. Indeed, plaintiff stated on the record at oral argument at page 18 “we are not married to the derivative claims, we would like to proceed with direct claims.” However, plaintiff admitted that the harm was to the corporate entity (Tr., pg. 19). As explained on the record at pages 19-20, pleading a claim as direct does not turn a derivative claim into a direct claim and the federal court has already dismissed the derivative claims with prejudice.

Motion Sequence No. 006 - ML Defendants

ML Defendants move to dismiss plaintiffs’ amended complaint, in its entirety and with prejudice, pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7). They focus first on res judicata. This ground for dismissal resolves most of plaintiffs’ claims against them, as plaintiffs have alleged the same or similar facts, about the same transactions and occurrences, spread across three pleadings, two of which the SDNY already dismissed on the merits and with prejudice.

Plaintiffs assert 23 causes of action in the amended complaint, that spans over 160 pages. One or more of the ML Defendants are named in eighteen of the 23 causes of action.

In the fourth and fifth causes of action, Menkin and Goureau allege that Lemonis, ML Retail and ML, LLC committed fraudulent inducement and fraud (amended complaint, ¶¶459-66 [NYSCEF Doc No. 39]). Plaintiffs in this action have made substantially the same allegations against the same defendant parties with respect to these causes of action as they did in the dismissed SDNY FAC (NYSCEF Doc No. 63). The SDNY FAC's first cause of action for fraudulent inducement differed slightly because it also named Machete as defendant (SDNY FAC, ¶133 *et seq.*). Similarly, the SDNY PSAC's first cause of action was also for fraudulent inducement and was also asserted against Lemonis, ML Retail and ML, LLC, as well as Machete and NBCU (SDNY PSAC ¶421 *et seq.* [NYSCEF Doc No. 64]).

Here, the amended complaint's fifth cause of action for fraud is directed against Lemonis, ML Retail and ML, LLC. So is the second cause of action for fraud in the dismissed SDNY FAC. Plaintiffs allege in both claims that Lemonis, through his alter egos, made material misrepresentations of fact or failed to disclose to plaintiffs material information regarding the risks and benefits they would face if they allowed Lemonis to direct their business. Accordingly, plaintiffs fourth and fifth causes of action must be dismissed, based on *res judicata*, because the federal court has already adjudicated and dismissed these claims (*East Hampton Capital LLC, supra*, 183 AD3d at 409-410).

In their sixth and seventh causes of action, plaintiffs allege breach of fiduciary duty. In the sixth cause of action, Menkin and Goureau, individually and on behalf of Gooberry, allege that defendants NBCU, Machete, and Lemonis, owed them fiduciary duties, based on their agreement that Lemonis—as an employee of NBCU and Machete, and as a director of Gooberry

under the Gooberry Shareholder Agreement, and as manager and agent for ML Retail and ML, LLC—would act on plaintiffs’ behalf and in their best interests, but breached these duties by purposely acting to plaintiffs’ detriment (amended complaint, ¶¶478-79, 481-82). Specifically, plaintiffs described the actions of NBCU, Machete and Lemonis as a mob-style “bust out,” where they used a business’s debt to take control over it and waste its assets for their own benefit (*id.* ¶¶44-45).

Plaintiffs previously asserted the sixth cause of action here as the third cause of action for breach of fiduciary duty in the SDNY FAC, as they both involve allegations about Lemonis’s breach of fiduciary duty as part owner of Gooberry. The claim in the SDNY FAC, however, was solely against Lemonis and did not also name NBCU, Machete, ML Retail or ML, LLC as defendants, as the amended complaint here does. The amended complaint, however, expressly states that ML Retail and ML, LLC are Lemonis’s “alter egos” only (amended complaint ¶¶22 and 23). Consequently, their addition does not change the substance of these allegations from one pleading to the next. Thus, the sixth cause of action must be dismissed against Lemonis, ML Retail and ML, LLC. The sixth cause of action as asserted against NBCU and Machete is addressed *infra*.

In their seventh cause of action, Menkin and Goureau allege (individually as well as derivatively on behalf of ML Fashion) that Lemonis breached fiduciary duties he owed to them as ML Fashion’s sole manager by, among other things, self-dealing, converting assets, burdening ML Fashion with additional debts payable to Lemonis and his entities, and taking actions that unfairly favored ML Retail to the detriment of ML Fashion. Plaintiffs allege that Lemonis caused them to sustain damages in excess of \$4.1 million (*id.* ¶¶493-494).

Specifically, plaintiffs allege that, upon obtaining control, Lemonis saddled Courage.B and its operating company, Gooberry, with nearly \$2 million debt for “falsely inflated and unsubstantiated” liabilities (*id.* ¶10). Plaintiffs contend that, when they learned of this and complained, Lemonis told them they must either pay the debt immediately or allow him to take over the company [Gooberry] (*id.*). Plaintiffs capitulated and allowed Lemonis to buy a stake in Gooberry through ML Retail (*id.* ¶11). Plaintiffs further allege that, as Gooberry’s prospects dimmed, Lemonis suggested that they join him in other investments to recoup their losses. To this end, Lemonis created ML Fashion as an “umbrella entity,” gave himself, Goureau and Menkin equal one-third shares, but arrogated to himself the role of Manager and took full control over ML Fashion (*id.* ¶13). Plaintiff made substantially the same breach allegations in connection with Gooberry in the sixth cause of action and reiterated them with respect to ML Fashion in the seventh. Plaintiffs consider ML Fashion to be just “another vehicle,” like ML Retail and ML, LLC, that Lemonis used to cheat “unsuspecting victim businesses appearing on *The Profit*” (*id.*). Therefore, they merely reiterate the third cause of action in the SDNY FAC that the federal court dismissed on the merits and with prejudice. Thus, the seventh cause of action must also be dismissed based on *res judicata*.

In their eighth and ninth causes of action, Menkin and Goureau allege aiding and abetting breach of fiduciary duty. In their eighth cause of action, they assert that Raffel⁴ knowingly aided and abetted Lemonis’s breaches by working with Lemonis and intentionally mismanaging the

⁴ Plaintiffs describe Raffel, also known as Bobbi Lemonis, as Lemonis’s “Partner in Crime” (*id.* ¶¶358-59). Raffel was the owner of Runway, a retail boutique in Deerfield, Illinois, when she and Lemonis first met in early 2016 (*id.* ¶355). Lemonis arranged for Gooberry to buy Runway’s store in March 2016 (*id.* ¶356). Plaintiffs believe Lemonis bought the Runway store because he was romantically interested in Raffel, not because he believed the deal would benefit Gooberry or ML Fashion in any way (*id.* ¶357). Plaintiffs allege that, in May 2016, Lemonis had Gooberry and ML Fashion renovate and restock Runway’s store, pushing them further into debt (*id.* ¶358).

day-to-day affairs of ML Fashion so that it was unable to cover operating costs and was indebted to ML Retail and ML, LLC (*id.* ¶499).

In their ninth cause, Menkin and Goureau allege that NBCU and Machete aided and abetted Lemonis's breach of fiduciary duty by, among other things, airing episodes of *The Profit*, portraying the program as "real" and as an opportunity for businesses to improve themselves, portraying Lemonis as acting in good faith with the intent to help plaintiffs, showing other companies getting capital infusions, and "recruiting contestants" for Lemonis to place in positions at Gooberry, thereby increasing Gooberry's debts (*id.* ¶502). Plaintiffs also allege that NBCU and Machete further aided and abetted Lemonis's breach by "design[ing] a show that would denigrate and destroy the participating businesses and benefit Lemonis" and by drafting the Participant Agreement, that Menkin and Goureau signed, that enabled Lemonis to take over Gooberry (*id.* ¶503).

Plaintiff did not assert these aiding and abetting breach of fiduciary duty causes of action in the SDNY FAC, but they are premised on allegations of misconduct on the part of Lemonis and others with respect to Gooberry and ML Fashion that plaintiff could have raised in the SDNY FAC. Accordingly, they are subject to dismissal (*see Lane, supra*, 258 AD2d at 389). Indeed, plaintiffs asserted claims for aiding and abetting breach of fiduciary duty against Raffel and NBCU in the ninth and tenth causes of action to the SDNY PSAC, respectively (*see Shapiro affirmation, ex B, ¶¶484-87, 488-91* [NYSCEF Doc No. 64]). In any event, because the underlying breach of fiduciary duty causes of action must be dismissed, these claims alleging aiding and abetting that breach must also be dismissed (*see WIT Holding Corp. v Klein*, 282 AD2d 527, 529 [2d Dept 2001]).

In their tenth cause of action, Menkin, Goureau, and Gooberry, derivatively on behalf of ML Fashion, assert a claim for breach of the implied covenant of good faith and fair dealing with respect to the ML Fashion LLC Agreement (LLC Agreement) (amended complaint ¶300) against Lemonis and his entities, ML Retail and ML, LLC, based on their “abusing . . . the managerial power over ML Fashion provided to them in the LLC Agreement” (*id.* ¶510). Lemonis, ML Retail, and ML, LLC are alleged to have committed these breaches by diverting ML Fashion’s capital and other assets for their own use (*id.*). In the SDNY Action, plaintiffs asserted this cause of action directly, as Gooberry shareholders, against Lemonis, ML Retail, ML, LLC, for alleged ML Fashion losses. These claims were raised in the SDNY Action involving the same parties and the same occurrences, but ascribed plaintiffs’ claimed losses to their interest in Gooberry in that case. Plaintiffs now ascribe the same losses in the amended complaint to their interest in ML Fashion. This is a distinction without a difference and so the tenth cause of action must also be dismissed on the ground of res judicata.

In the eleventh cause of action, Menkin and Goureau, individually and derivatively on behalf of ML Fashion, assert a claim for breach of the ML Fashion LLC Agreement against Lemonis, ML Retail and ML, LLC (*id.* ¶513). Plaintiffs allege that Lemonis, after promising to use company assets to benefit only the company, breached the LLC Agreement by diverting assets, including cash deposits and store inventory, from ML Fashion to his own entities for his own benefit and to promote his own personal brand, MARCUS. Plaintiff’s allege the diversions harmed plaintiffs and ML Fashion, and that Lemonis violated his duties as the Manager under the LLC Agreement (*id.* ¶¶516-17).

Plaintiffs asserted this same cause of action as its twelfth cause of action its SDNY PSAC (¶¶ 497 *et seq.* [NYSCEF Doc No. 64]), so this is a potential claim that plaintiffs identified but

chose not to litigate in the SDNY Action (*Lane, supra*, 258 AD2d at 389). The eleventh cause of action must therefore also be dismissed based on res judicata.

In the twelfth cause of action, Menkin asserts a claim for breach of contract against ML Fashion and MLG Retail. Menkin alleges that she served as President of both ML Fashion and MLG Retail since they were formed, and those entities agreed to compensate her for her services on a bi-monthly basis (amended complaint ¶¶529-30). Beginning on April 1, 2020, however, ML Fashion and MLG Retail breached their agreements when they ceased paying Menkin her compensation (*id.* ¶531). This cause of action was also asserted as plaintiffs' thirteenth cause of action in the SDNY PSAC (¶¶ 513 *et seq.*), and so must be dismissed here on the ground of res judicata.

In their thirteenth and fourteenth causes of action, plaintiffs assert claims for unjust enrichment, contending that Lemonis used his position as a director of Gooberry and Manager of ML Fashion to enrich himself. In the thirteenth cause of action, Menkin, Goureau, and Gooberry assert that they brought this claim against Lemonis, ML Retail, and ML, LLC as an alternative to their claim for breach of the Shareholder and Stock Purchase Agreements,⁵ that they contend are both subject to rescission under their cause of action for fraudulent inducement. Similarly, Menkin and Goureau directly, and derivatively on behalf of ML Fashion, assert that they brought the fourteenth cause of action against Lemonis, ML Retail and ML, LLC as an alternative to their claim for breach of the LLC Agreement, that they contend is subject to rescission by virtue of their fraudulent inducement claims (amended complaint ¶544). The unjust enrichment cause of

⁵ Under the Stock Purchase Agreement, Gooberry and Goureau agreed to permit Lemonis to purchase of 32 shares of Gooberry, a 32% ownership interest, for \$800,000, through his entity ML Retail (amended complaint ¶273). At the same time that the Stock Purchase Agreement was entered, Gooberry shareholders Goureau, Menkin, Noemi, and ML Retail entered the Shareholder Agreement, naming Lemonis, Goureau, Menkin, and Noemi as Gooberry's board of directors (*id.* ¶274).

action on behalf of Gooberry appeared as plaintiffs' fifth cause in the proposed second amended complaint in the District Court (*see* SDNY PSAC ¶¶163 *et seq.*). Plaintiffs could have asserted their claims for these same injuries derivatively through Gooberry and ML Fashion in the SDNY Action, so *res judicata* requires dismissal.

Plaintiffs assert corporate mismanagement and waste as their fifteenth and sixteenth causes of action. In their fifteenth cause of action, Menkin, Goureau, and Gooberry allege that Lemonis engaged in bad faith and self-dealing (on his own behalf and on behalf of ML Retail and ML, LLC, as their manager and agent) to the detriment of Gooberry (amended complaint, ¶¶552-553). In their sixteenth cause of action, Menkin and Goureau individually, and derivatively on behalf of ML Fashion, allege that Lemonis, as Manager of ML Fashion, engaged in bad faith and self-dealing, to benefit himself, ML Retail and ML, LLC, to ML Fashion's detriment (*id.* ¶¶558-559). The fifteenth cause of action here is reiteration of the seventh cause of action asserted in the District Court (SDNY FAC, ¶¶177 *et seq.*) that addresses Lemonis's mismanagement and waste of Gooberry assets. Plaintiffs' sixteenth cause of action in the amended complaint is analogous, asserting that the same wrongdoing by Lemonis caused the same losses. The only difference is that plaintiffs allege here that the losses were suffered by ML Fashion rather than Gooberry. Thus, this claim must be dismissed based on *res judicata*.

Plaintiffs repeat this pattern in their seventeenth and eighteenth causes of action asserting misappropriation of corporate assets. In their seventeenth cause of action, Menkin, Goureau, and Gooberry contend that Lemonis, individually and through ML Retail and ML, LLC, used his position as director of Gooberry to mismanage and waste Gooberry's corporate assets, and to increase his control of Gooberry in violation of the common law and Section 720 of New York's Business Corporation Law (amended complaint ¶¶565-568). In their eighteenth cause of action,

Menkin and Goureau, individually and derivatively, on behalf of ML Fashion, allege that Lemonis, individually and through ML Retail and ML, LLC, used his position to take cash and other assets wrongfully to ML Fashion's detriment (*id.* ¶¶573-76). The seventeenth cause of action is a reiteration of the SDNY FAC sixth cause of action (¶173 *et seq.* [NYSCEF Doc No. 63]), that addresses Lemonis's alleged misappropriation of Gooberry assets. The eighteenth cause of action is a parallel claim asserted against Lemonis and his entities for his misappropriation of ML Fashion assets. Again, *res judicata* applies and these claims must be dismissed.

Menkin and Goureau, derivatively on behalf of ML Fashion, assert their nineteenth cause of action for conversion against Lemonis, ML Retail and ML, LLC, alleging that they wrongfully removed inventory, fixtures, furniture, and equipment from ML Fashion stores (amended complaint ¶¶582-86). The SDNY FAC includes conversion as its eighth cause of action, but asserted the alleged theft of Gooberry assets, rather than ML Fashion assets (*see* SDNY FAC, 185 *et seq.*). Again, this is a distinction without a difference, as plaintiffs allege that Gooberry and ML Fashion were the means Lemonis used to divert plaintiffs' assets to himself, so dismissal on the ground of *res judicata* is required.

In their twentieth cause of action, Menkin and Goureau allege that NBCU, Machete, and Lemonis published certain defamatory statements and content by airing an episode of *The Profit* and a later Progress Report, relating to Courage.B, multiple times since their initial release, and by making them publicly accessible for viewing through NBCU's streaming service (amended complaint ¶590).

There is no analogous claim in the SDNY FAC. Still, the allegations are based on information known and available to plaintiffs before they filed the SDNY FAC on Aug 17, 2020,

and so these are claims that could have been asserted in the SDNY Action. Therefore, they are subject to dismissal on the grounds of res judicata. Even if this were not so, plaintiffs' defamation claim still fails to state a cause of action.

“Defamation is ‘the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society’” (*Stepanov v Dow Jones & Co.*, 120 AD3d 28, 34 [1st Dept 2014], quoting *Foster v Churchill*, 87 NY2d 744, 751 [1996]). “To prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm” (*id.* [citations omitted]). “Because the falsity of the statement is an element of the defamation claim, the statement's truth or substantial truth is an absolute defense” (*id.*, citing *Konrad v Brown*, 91 AD3d 545, 546 [1st Dept], *lv denied* 19 NY3d 804 [2012]). “On a motion to dismiss a defamation claim, the court must decide whether the statements, considered in the context of the entire publication, are ‘reasonably susceptible of a defamatory connotation,’ such that the issue is worthy of submission to a jury” (*id.*, quoting *Silsdorf v Levine*, 59 NY2d 8, 12, *cert denied*, 464 US 831 [1983]).

Plaintiffs fail to state a claim for defamation in numerous ways. Most notably, the few statements plaintiffs have identified to support their claim could not reasonably be construed as defamatory.

In opposition to these motions, plaintiffs argue that they have established defamation per se and have asserted special damages “by alleging that their ‘personal and professional reputations have forever been destroyed’” (*citing* amended complaint ¶592). For defendants’

statements to be found defamatory per se, they must be sufficiently defamatory so that they would “tend to injure a party in his business or profession” (*Chiavarelli v Williams*, 256 AD2d 111, 113 [1st Dept 1998] [citation omitted]). “The challenged statements, however, must be more than a general reflection upon the plaintiff’s character or qualities, and must amount to an attack on the plaintiff’s professional abilities or suggest improper performance or unprofessional conduct” (*School of Visual Arts v Kuprewicz*, 3 Misc 3d 278, 283 [Sup Ct, NY County 2003], citing, *inter alia*, *Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076 [1997] and *Chiavarelli, supra*).

The three partial statements plaintiffs cite in support of their claim are that Lemonis said: (i) “‘‘Courage.B is losing \$500,000 per year’’ as if this happened in multiple years”; (ii) “‘‘forcing managers to lie about sales per day being ‘\$1,500’’”; and (iii) “‘‘that Courage.B ‘‘basically just knocked off everyone else’s bags’’” (amended complaint, ¶592).

As to the first, a statement that plaintiffs’ company was losing money is not defamatory, in and of itself (*Marks v Elephant Walk*, 156 AD2d 432, 433 [2d Dept 1989] [noting company is “‘‘financially troubled business entity does not render statement defamatory, [where] there is no suggestion that plaintiff’s work was unsatisfactory or causally related to the [business’s] alleged fiscal difficulties’’]). The second statement, out of context as it is, appears to fault Courage.B’s managers for engaging in puffery about the company’s performance at plaintiffs’ request. The third statement is an assertion of opinion, as it does not denigrate the quality or value of Courage.B’s retail goods, though it may be read as questioning plaintiffs’ originality. Neither puffery nor opinion are actionable as defamation (*Hassig v FitzRandolph*, 8 AD3d 930, 932 [3d Dept 2004], citing *Millus v Newsday, Inc.*, 89 NY2d 840, 842 [1996], *cert denied* 520 US 1144 [1997] and *Dancer v Bergman*, 246 AD2d 573 [2d Dept 1998], app dismissed 92 NY2d 876

[1998]). Accordingly, plaintiffs' defamation cause of action must be dismissed against Lemonis, NBCU and Machete.

In their twenty-first cause of action, Menkin and Goureau allege that NBCU, Machete and Lemonis made representations and omissions of fact to them which were not true, that NBCU, Machete, and Lemonis had no reasonable grounds to believe were true when made, and that they intended for Menkin and Goureau to rely on those negligent misrepresentations to their detriment (amended complaint ¶597). There is no analogous claim in the SDNY FAC. Still, the allegations are based on actions that occurred before plaintiffs filed the SDNY FAC on August 17, 2020. And therefore plaintiff should have brought this claim in the federal action.

In their twenty-second cause of action, Menkin and Goureau allege that NBCU and Machete conspired with Lemonis in his scheme to defraud plaintiffs, and to commit other tortious acts against them, through their participation in *The Profit*. Plaintiffs also allege that they misled plaintiffs into trusting Lemonis and made other conscious efforts to assist Lemonis in his fraudulent scheme to harm plaintiffs (*id.* ¶¶608-09).

“In order ‘to establish a claim of civil conspiracy, the plaintiff must demonstrate the primary tort plus the following four elements: (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties’ intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury”

(*Norex Petroleum Ltd. v Blavatnik*, 48 Misc 3d 1226[A], 2015 NY Slip Op 51280 [U], *9-10 [Sup Ct, NY County 2015] [Bransten, JSC], *affd.*, *appeal dismissed*, 151 AD3d 647 [1st Dept], *lv denied* 30 NY3d 906 [2017], quoting *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010]).

A “conspiracy to commit a fraud or tort is not, of itself, a cause of action” in the State of New York (*Hoeffner v Orrick, Herrington & Sutcliffe LLP*, 85 AD3d 457, 458 [1st Dept 2011])

[citations omitted]). The District Court in the SDNY Action expressly dismissed all of plaintiffs' fraud-based causes of action (September 2, 2021 order in *Goureau v Lemonis*, 2021 US Dist LEXIS 167079, *19 [1:20-cv-04691-MKV] [ex B [NYSCEF Doc No. 84] to Wolfe affirmation [NYSCEF Doc No. 82]). None of the tort-based claims plaintiffs assert survive the dismissal motions before this court either. Therefore, the motion of defendants Lemonis, NBCU and Machete to dismiss plaintiffs' cause of action for conspiracy is granted.

In their twenty-third cause of action, Menkin and Goureau allege that, as shareholders of Gooberry, and based on defendants' illegal, oppressive, and fraudulent conduct, they are entitled to dissolution and liquidation of Gooberry, based upon New York Business Corporation Law Section 1104-a (amended complaint ¶¶612-16). This is the only cause of action from the SDNY FAC that the District Court preserved. While the ML Defendants moved to dismiss plaintiffs' entire complaint, they do not assert in their papers that the dissolution claim must be dismissed or offer any basis to dismiss that claim. Thus, plaintiffs' cause of action for dissolution of Gooberry under New York Business Law Section 1104-a survives the defendants' motions.

Motion Seq. No. 009 - NBCUniversal

In the amended complaint's first three causes of action, Menkin and Goureau allege that NBCU, as CNBC's owner (*id.* ¶27), committed fraud in the inducement, fraud, and fraudulent concealment by making false representations of material fact and intentionally failing to disclose material information. Plaintiffs assert that NBCU did so to induce them to participate in *The Profit* and by misleading them about the possible benefits and harm that could result from their participation (*id.* ¶¶429-58). Plaintiffs did not assert these causes of action against NBCU in the SDNY FAC, as NBCU was not named as a defendant therein.

Plaintiffs, however, did name NBCU as a defendant in its 26-count SDNY PSAC (NYSCEF Doc No 64) and asserted causes of action against NBCU for fraudulent inducement; aiding and abetting fraudulent inducement; fraud; aiding and abetting fraud; fraudulent concealment; and aiding and abetting fraudulent concealment (SDNY PSAC ¶¶421-466). This shows that plaintiffs posited, and could have asserted, claims against NBCU for fraudulent inducement, fraud and fraudulent concealment during the pendency of the SDNY Action but chose not to, requiring dismissal of the amended complaint's first, second and third causes of action.

NBCU is also named as defendant in the sixth cause of action for breach of fiduciary duty, the ninth cause of action for aiding and abetting breach of fiduciary duty, the twentieth cause of action for defamation, the twenty-first cause of action for negligent misrepresentation, and the twenty-second cause of action for civil conspiracy. These causes of action are also dismissed with respect to NBCU for the reasons stated above.

Motion Sequence No. 010 – Machete

Machete is named in the amended complaint's sixth cause of action for breach of fiduciary duty, ninth cause of action for aiding and abetting breach of fiduciary duty, twentieth cause of action for defamation, twenty-first cause of action for negligent misrepresentation, and twenty-second causes of action for conspiracy. These causes of action are also dismissed with respect to Machete for the reasons stated above.

CONCLUSION

The court has considered the parties' remaining contentions and finds them unavailing.

Accordingly, it is

ORDERED, that the motion of defendants Marcus Lemonis, ML Retail, LLC, Marcus Lemonis, LLC, Roberta Raffel, and MLG Retail, LLC, is granted to the extent that the fourth, fifth, sixth, seventh, eighth, tenth, eleventh, twelfth, thirteenth, fourteen, fifteen, sixteenth, seventeen, eighteen, nineteenth, twentieth, and twenty-first causes of action in the Amended Complaint are dismissed as against these defendants; and it is further ordered

ORDERED, that the motion of defendant NBCUniversal Media LLC dba NBC Universal to dismiss the first, second, third, sixth, ninth, twentieth, twenty-first and twenty-second causes of action in the Amended Complaint is granted; and it is further

ORDERED, that the motion of defendant Machete Corporation to dismiss the sixth, ninth, twentieth, twenty-first, and twenty-second causes of action in the amended complaint is granted; and it is further


ORDERED, that the action is continued against defendants Marcus Lemonis, ML Retail, LLC, Marcus Lemonis LLC, and MLG Retail, LLC on the twenty-third cause of action [dissolution] only, and the action is severed and dismissed as to the other defendants; and it is further

ORDERED, that defendants Marcus Lemonis, ML Retail, LLC, Marcus Lemonis LLC, and MLG Retail, LLC must serve an answer to the complaint within 20 days of the date of this decision and order; and it is further

ORDERED, that counsel for plaintiffs and for defendants Marcus Lemonis, ML Retail, LLC, Marcus Lemonis LLC, and MLG Retail, LLC, appear before this Court virtually by Microsoft Teams on March 7, 2023, at 11:30 a.m., for a preliminary conference; and it is further

ORDERED THAT there shall be no further motion practice without prior conference with the court; and it is further

ORDERED THAT plaintiff shall not file any amended pleading without prior conference with the court.

<u>2/7/2023</u> DATE	 MELISSA A. CRANE, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	REFERENCE
			<input checked="" type="checkbox"/>	SUBMIT ORDER
			<input checked="" type="checkbox"/>	FIDUCIARY APPOINTMENT